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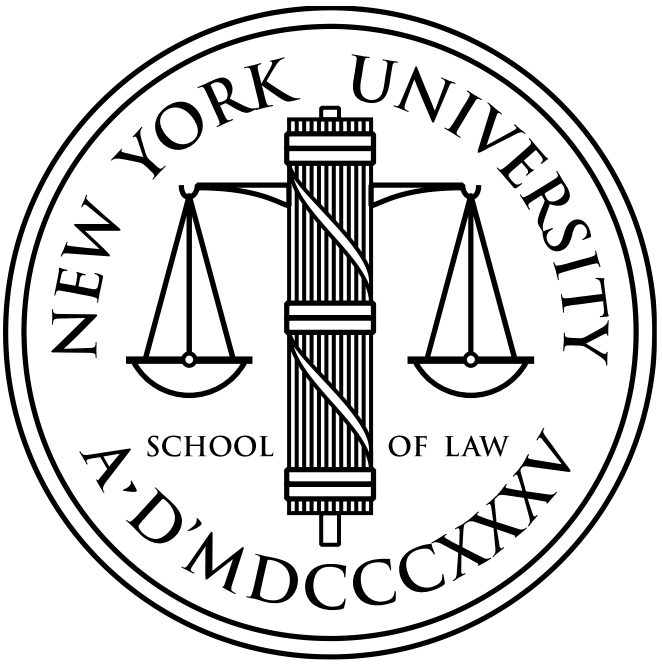

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LITERARY LANDLORDS IN PLAGUETIME

BRIAN L. FRYE*

Landlord, landlord, these steps is broken down.
When you come up yourself, it's a wonder you don't fall down.[1]

The coronavirus pandemic has affected our lives in countless ways. One of its unfortunate effects was the unavoidable closure of public libraries. Many people rely on public libraries for many different things, including free access to books. When public libraries closed, many people lost access to books, especially new books.

In response, the Internet Archive created the National Emergency Library to make digital copies of books more accessible.[2] The Internet Archive's Open Library

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[1] LANGSTON HUGHES, *Ballad of the Landlord*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 402, 402 (1995).

[2] *See* Chris Freeland, *Announcing a National Emergency Library to Provide Digitized Books to Students and the Public*, INTERNET ARCHIVE: BLOGS (Mar. 24, 2020), http://blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-

is a free digital lending library founded in 2006 that provides digital access to the books in its collection.[3] Currently, the Open Library holds about 4 million books, about 1.4 million of which are protected by copyright and subject to lending restrictions. The Open Library only lends digital copies of copyrighted books to one person at a time, as if it were lending the physical copy of the book.[4] The National Emergency Library suspended the waitlist for borrowing digital copies of certain copyrighted books in order to provide access to more people.

The National Emergency Library wasn't a perfect solution to the closure of many public libraries. The Open Library collection is already relatively modest in size when compared to many research libraries, and the National Emergency Library is only a small subset of the entire collection. In order to avoid competing with publishers, the National Emergency Library only included books that were more than 5 years old, which rarely have substantial commercial value. In addition, the formats provided by Open Library are less convenient and accessible than commercial ebooks.

Still, something is better than nothing. More than 100 libraries and archives signed a public statement supporting the National Emergency Library.[5] You would think everyone would applaud the Internet Archive's heroic effort to provide underserved populations with access to information during a national emergency, as an example of a charitable organization doing what charities do best: stepping up to meet a pressing need. You would be so wrong.

When the Internet Archive announced the National Emergency Library, publishers and authors went apoplectic. Publishers immediately denounced it as willful copyright infringement. Many authors followed suit, whining that the Internet Archive was a "piracy website" intent on depriving them of their rights.[6] Oh, and their rightful profits, of course.

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digitized-books-to-students-and-the-public/; *National Emergency Library*, INTERNET ARCHIVE, http://blog.archive.org/national-emergency-library/ (last visited Feb. 28, 2021).

[3] *See Open Library*, INTERNET ARCHIVE, https://openlibrary.org/ (last visited Feb. 28, 2021).

[4] *See id.* (indicating that users can borrow digital copies of copyrighted books from the Open Library by creating a free Internet Archive account).

[5] *See Public Statement: Supporting Waitlist Suspension for Books Loaned by the Internet Archive During the US National Emergency*, INTERNET ARCHIVE, (Mar. 24, 2020), https://docs.google.com/document/u/1/d/e/2PACX-1vQeYK7dKWH7Qqw9wLVnmEo1ZktykuULBq15j7L2gPCXSL3zem4WZO4JFyj-dS9yVK6BTnu7T1UAluOl/pub.

[6] *See, e.g.*, National Public Radio (@NPR), TWITTER (Mar. 26, 2020, 2:22 PM), https://twitter.com/NPR/status/1243241827475562497 (comments).

But there's no evidence showing that the National Emergency Library meaningfully impacted anyone's profits. After all, most of the books it made open-access had no meaningful commercial value, and many were out of print. Moreover, if publishers or authors wanted their books removed from the National Emergency Library, all they had to do was ask. In any case, the overwhelming majority of the Open Library's patrons use books only briefly, presumably browsing them or using them for research.[7] In other words, when Open Library users actually want to read a book, they tend to buy a copy. Ironically, ebook sales have increased substantially during the pandemic.[8]

In reality, publishers and authors object to the National Emergency Library and Open Library on "principle." The "principle" in question: Whenever someone uses a digital book, someone should pay for it. As far as they are concerned, "lost profits" means someone used a book and no one paid for it, even if the person who used the book wouldn't or couldn't have paid the retail price. Now, they don't care who pays. Indeed, they are fine with libraries paying for licenses to distribute ebooks. But they expect someone to pay.

These "principled" objections to the National Emergency Library and the Open Library are actually objections to the very idea of a library. After all, the primary purpose of a library is to provide free access to books. The horror! Every library patron is a potential paying customer, forever lost. The National Emergency Library and Open Library just make it even easier and more convenient for people to use books for free.

Unfortunately for them, people love libraries. Many who love books spent their childhood in them. So publishers and authors can't criticize libraries, as much as they wish they could. Instead, they tie themselves into knots trying to explain why libraries are good, but digital lending is bad, unless libraries pay exorbitant fees to lend digital copies of books, even though they lend physical copies for free. It makes no sense, until you realize it's just dissembling. Publishers and authors know their audience, and play to its prejudices.

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[7] Brewster Kahle, *The National Emergency Library – Who Needs It? Who Reads It? Lessons from the First Two Weeks*, INTERNET ARCHIVE: BLOGS (Apr. 7, 2020), http://blog.archive.org/2020/04/07/the-national-emergency-library-who-needs-it-who-reads-it-lessons-from-the-first-two-weeks/.

[8] Book sales increased by about 8% in 2021, and ebook and audiobook sales increased by even more. Elizabeth A. Harris, *Surprise Ending for Publishers: In 2020, Business Was Good*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/books/book-publishing-2020.html.

Until now. Publishers and authors have lost their patience. They are sick and tired of libraries letting consumers get the goods for free. In a recent op-ed, a Canadian publisher finally said the quiet part out loud: "For their funding, libraries rely on the traffic generated by pimping free entertainment to people who can afford it."[9] In other words, libraries lend popular books to consumers, who might otherwise have purchased them. True! What a travesty. God forbid libraries provide books people actually want to read. But libraries also lend popular books to people who can't afford them and collect books that are out of print. Anything to undercut the market for books, I guess.

At least publishers and authors have become refreshingly transparent about their demands. They want someone to pay whenever someone reads a book. They don't care who pays, so long as someone does. Consumers, libraries, charities, government, whoever. Publishers and authors have come to believe they are entitled to profit from every consumer, no matter what.

So, no more libraries. I mean, the terrible injustice of allowing people to borrow books without paying for them is obvious. Of course, it's ok if the government pays the fare, so long as it pays market rates. After all, justice means property owners collecting every penny of potential profit.

None of this should come as any surprise. As Mike Masnick memorably observed, "If they were invented today, copyright maximalist authors and publishers would *absolutely* scream about libraries and probably sue them out of existence."[10] The time is now. The National Emergency Library is just another library. The only difference is ease of access. Unlicensed digital lending is already in the crosshairs. Are regular lending libraries next?

In any case, on June 1, 2020, a group of publishers sued the Internet Archive for copyright infringement.[11] They allege that the National Emergency Library infringed the copyright in their works by lending them to more than one person at a time. Further, they allege that digital lending itself is infringing.

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[9] Kenneth Whyte, *Overdue: Throwing the Book at Libraries*, GLOBE AND MAIL (July 25, 2020), https://www.theglobeandmail.com/opinion/article-thanks-to-government-funding-libraries-are-poised-to-win-market-share/.

[10] Mike Masnick, *Publisher Decries Damn Libraries Entertaining the Masses Stuck at Home for Free*, TECHDIRT (July 28, 2020 9:33 AM), https://www.techdirt.com/articles/20200727/16343744985/publisher-decries-damn-libraries-entertaining-masses-stuck-home-free.shtml.

[11] *See* Harris, *supra* note 8.

For better or worse, the first sale doctrine provides that a copyright owner's control of a particular copy of work ends when that copy is sold.[12] Anyone who buys a copy of a book can sell, rent, or lend it, without the copyright owner's permission. That's why libraries can lend books. Copyright owners hate it, but them's the breaks.

But copyright owners argue that digital copies are actually illicit reproductions such that lending digital copies is infringement even if the lender owns a physical copy of the book.[13] On their reading, the first sale doctrine only applies to physical copies. That would mean libraries can't create a digital copy of a book without infringing, and certainly can't lend digital copies without permission. In other words, copyright owners hope and believe the transition to ebooks will put paid to libraries.

They may very well fish their wish. The pandemic has certainly hastened the trend toward ebooks, and copyright owners seem to have the courts on their side. While no court has held that digital lending without a license is infringing, it seems inevitable. If and when it happens, it will mean the transformation of libraries from public archives to knowledge pantries. It's already hard to defend libraries from the apostles of efficiency. Forcing them to pay whenever their patrons use a work will only make matters worse.

But libraries can push back. If copyright is a property right, then copyright owners are just landlords, charging people rent in order to use the works they own. Landlords are entitled to charge rent. Yet no one thinks collecting rent is an absolute moral entitlement. Render unto Caesar and all, but sometimes, something's gotta give. Why not rent? And why not copyright as well? After all, copyright infringement is all about claiming and allocating profits, nothing more. Copyright owners are just landlords, and copyright profits are just rent. The law says they're entitled to collect it. But it doesn't oblige anyone to praise or respect them for claiming their pound of flesh.

COPYRIGHT & ITS DISCONTENTS

Since time immemorial, authors and publishers have insisted that copyright is and should be a kind of property, entitled to protection and respect, just like any other kind of property.[14] In the 16th century, the Stationers Company created the idea

[12] 17 U.S.C. § 109 (2018).
[13] *See, e.g.*, Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 652-54 (2d Cir. 2018).
[14] *See, e.g.*, Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 32 (2005).

of an exclusive right to reproduce a work of authorship.[15] By the 19th century, authors like Balzac and Mark Twain argued that copyright is a natural right that should exist in perpetuity.[16] The 20th century saw the triumph of the Berne Convention and its profoundly moralistic concept of copyright.[17] And who could forget the Motion Picture Association of America's infamous 2004 anti-piracy PSA, which bluntly insisted that "downloading pirated films is stealing."[18] Stealing what? Well, potential profits, obviously. Which are an odd kind of "property," indeed. But don't fight the metaphor. If we call it property, it must be justified, and trespassers must be punished, even if no one was actually harmed.

There are many good reasons to question the property metaphor when it comes to copyright. After all, the primary purpose of property is to allocate scarce goods more efficiently. Property rights enable private parties to bargain for ownership and thereby promote the efficient use of scarce goods. However, because consumption doesn't reduce supply, works of authorship aren't scarce, and so the property metaphor makes little sense. The reason for providing exclusive rights in works of authorship is to encourage people to create them in the first place, not to ensure their efficient allocation. If anything, copyright makes allocation less efficient, by imposing transaction costs. Most public domain works are widely available, but many copyrighted works are almost impossible to find.[19]

So, do we treat copyright like a property right? Most definitely. Should we? Probably not. We conceptualize copyright as a property right not because it promotes copyright policy goals, but because property is a familiar heuristic, and because we are conditioned to believe authors are entitled to own the works they produce. If the purpose of copyright is to encourage the production of works of authorship, then it makes more sense to conceptualize it as a form of competition policy. We should be asking when and why exclusive rights actually encourage authors to produce works of authorship, and structure copyright policy accordingly.

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[15] Chris Dent, *Registers of Artefacts of Creation – From the Late Medieval Period to the 19th Century*, 3 Laws 239, 243-46 (2014).

[16] *See Copyright Act: Hearing on S. 6330 and H.R. 19853 Before the J. Comms. on Patents*, 59th Cong. 116-121 (1906) (statement of Samuel L. Clemens); Honoré de Balzac, *Lettre Adressé Aux Écrivains Français du XIXe Siècle [Letter Addressed to French Writers of the 19th Century]*, 11 REVUE DE PARIS, 1834, at 62.

[17] WORLD INTELLECTUAL PROP. ORG., GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41-44 (1978).

[18] *See* PIRACY. IT'S A CRIME. (Motion Picture Association of America 2004).

[19] *See, e.g.*, Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 829-66 (2014).

But that's water under the bridge. We do think of copyright as property, and we aren't going to stop. So we might as well ask what it means. If copyright is property, then how should we think about copyright owners and the justification of their claims? Well, copyright owners let other people use their property in exchange for a fee. In other words, if copyright is property, then copyright owners are landlords, and their profits are rent.

There's nothing wrong with landlords. We need people to invest in the creation and maintenance of property, including intellectual property. If building owners are entitled to rent out housing, then copyright owners are entitled to rent out works of authorship. But there's nothing morally special about landlords, either. No one thinks that building owners are doing their tenants a favor by renting them an apartment. And no one should think that copyright owners are doing the public a favor by renting them works of authorship. The law gives property owners the right to charge rent, but that's it. So when copyright owners claim copyright infringement violates their moral right to get paid maybe we should say, "Ok, landlord," and take their claims with a grain of salt.

COPYRIGHT THEORY

There are as many theories of copyright as there are copyright scholars, and then some. If you ask two copyright scholars to explain the justification for copyright, you'll get at least three opinions. Every copyright scholar has at least one theory of copyright they accept, and a congeries of alternatives they can't abide.

Among many other things, copyright scholars disagree about whether copyright is a property right or a regulatory right. Typically, scholars who like copyright think it is a property right, and scholars who dislike copyright think it is a regulatory right. But their disagreement is metaphorical. Or rather, it is a disagreement about which metaphor should govern copyright doctrine: property or regulation.

THE ECONOMIC THEORY OF COPYRIGHT

The prevailing theory of copyright is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship caused by free riding. In the absence of copyright, works of authorship are pure public goods, because they are perfectly non-rival and non-excludable. Works of authorship are perfectly non-rival because consuming a work doesn't reduce the supply of the work. Particular tangible copies of a work are rivalrous, but the intangible work of authorship itself is not. And in the absence of copyright, works of authorship are

non-excludable, because no one can stop anyone else from using the work once it is published.

Neoclassical economics predicts market failures in public goods caused by free riding. Essentially, no one will produce public goods, because no one will pay for them. Producers typically only make things that they can sell, but consumers won't buy public goods that they can consume for free. Accordingly, we should expect a shortage of public goods, because consumers won't pay the marginal cost of production.

In theory, copyright can solve that market failure by making works of authorship excludable. Copyright gives authors certain exclusive rights in the works of authorship they create, and enables them to transfer those rights to others. Or rather, copyright means that consumers have to pay to use works of authorship. So, by hook or by crook, authors also get paid, and produce more works of authorship.

The economic theory of copyright is plausible, and surely has at least some explanatory value. After all, no one would invest millions of dollars into producing a motion picture unless they expected to profit by selling it.[20] But it also has many weaknesses.

For one thing, copyright ownership simply isn't a salient incentive for many of the authors who receive it. After all, copyright automatically protects every "original work of authorship" the moment it is "fixed in a tangible medium," with a comically low bar for originality. As many commentators have ruefully observed, according to the Supreme Court, copyright appears to protect everything but telephone books and snow shovels.[21] But stay tuned for additional exceptions the next time the Supreme Court bothers weighing in on copyright.

In other words, copyright automatically protects every letter you write, every to-do list you make, every doodle you draw, every snapshot you take, every email you draft, every status update you post, every tweet you send, and every Instagram photo you share. But no one does any of those things because they want to own a copyright. They do them for the sake of themselves. The copyright is merely incidental. Indeed, most people don't even realize that they are creating a torrent of copyrighted works every day. I call this the "dark matter" of copyright, the 99.99+%

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[20] *But see, e.g.*, Collis Clark, *The Crazy Cult of The Room*, ENT. WEEKLY, Dec. 19, 2008, at 32, 33-34 (stating that the author of The Room spent $6 million to create a movie, yet everyone involved was aware of the poor quality).

[21] *See*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363-64 (1991); Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1013, 1038 (2017).

of copyrighted works of authorship that no one cares about, not even their own author.[22] If the purpose of copyright is to encourage the production of works of authorship by providing an economic incentive, surely it shouldn't protect works that don't require an incentive in the first place.

For another thing, even when copyright is a salient incentive, the scope and duration of copyright protection is unrelated to the incentive required. Copyright gives all copyright owners essentially the same exclusive rights and the same term, irrespective of the incentive they needed to create the work. Copyright does protect different categories of works in slightly different ways. But if the purpose of copyright is to give authors salient incentives to create works of authorship, one would expect at least some tailoring of the exclusive rights and term, depending on the nature of the work, in the interest of efficiency. Ideally, individual authors would only receive the rights and term they actually needed in order to produce each work. While such fine-grained tailoring of copyright protection is obviously impractical, in practice we see no tailoring at all, which is peculiar, because at least some tailoring is possible. For example, there is no reason to believe that all works need the same copyright term. The current term of the life of the author plus 70 years is excessive for all works.[23] But it is comically excessive for works that will be obsolete within a matter of years, like computer programs.

Finally, it is increasingly clear that copyright isn't a salient incentive to many authors,[24] even though other things are.[25] Artists typically sell unique objects and rely on scarcity, rather than copyright. They respond to economic incentives, but not the ones provided by copyright. As in many discursive communities, the salient incentive is attribution, not exclusive rights. For example, in the "academic gift economy," scholars are delighted when someone reproduces their work or uses their idea, but only if they receive credit. In academia, citations are the coin of the realm, and academics expect to get paid.

On reflection, one begins to suspect that the economic theory of copyright shares a feature common to many theories propounded by neoclassical economics:

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[22] *See, e.g.*, Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 489-90 (2004).

[23] *See, e.g.*, Kristelia A. García & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351, 373-74 (2019) (finding that empirical studies show that most creative works earn most of their lifetime revenue in the first decade after publication).

[24] *See* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 322-24 (2018).

[25] *See generally* JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY, 9-10, 15-16 (2015).

It works perfectly in theory, but utterly fails in practice. Or rather, the economic theory of copyright beautifully explains how to create an efficient copyright policy, assuming economically rational authors and no transaction costs. But the economically rational author is a rare bird indeed, and transaction costs are omnipresent, especially because no one can confidently predict what consumers will like, let alone what they will love. Moreover, nothing suggests that the economic theory had any impact whatsoever on our actual copyright policy. On the contrary, Congress just pretended to deliberate, and then copied the Berne Convention.[26]

The dirty secret is that copyright reflects economic policy, even if it doesn't reflect the economic theory. It's just that the policy in question is driven by rent seeking, not efficiency. Copyright exists for the benefit of copyright owners – nominally authors, but actually publishers – who use it to extract rents from consumers. They always want more copyright, because you never know where a rent will materialize. And they are horrified by the very premise of the economic theory. After all, they don't want copyright to be efficient, that means less rent. They want copyright to be as inefficient as possible, because a consumer's inefficiency is a publisher's profit.

MORAL THEORIES OF COPYRIGHT

But there's more to the story. While the economic theory is prevailing among academics, judges don't take it seriously, lawyers ignore it, and the public has never heard of it. Mind you, judges are always careful to pretend that copyright reflects the economic theory. You know the drill: Congress in its infinite wisdom carefully evaluated its policy choices and made these decisions, which we are duty-bound to accept as legislative facts.[27] Similarly, lawyers deploy the economic theory, if they think it will help their case, but it's always a supplemental argument, unless they don't have anything better.

Realistically, copyright policy is justified primarily by moral intuitions about authorial ownership, based on social norms that developed in relation to economic interests.[28] The concept of authorship has existed since time immemorial. But it has meant many very different things at different points in time. Before the invention of

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[26] See H.R. REP. NO. 94-1476, 2d Sess., at 133-136 (1976) (explaining that the Copyright Act of 1976 adopted many key features of the Berne Convention, including relaxing formalities and extending duration to the author's life plus 50 years. In doing so, it copied the language of the Convention nearly verbatim).

[27] *See* Eldred v. Ashcroft, 537 U.S. 186, 205, 208, 212, 222 (2003).

[28] *See generally* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1753-1759 (2012).

the printing press, authorship only mattered if it generated patronage or prestige, because reproducing works was almost as costly as creating them. Accordingly, authorial ownership was limited to attribution. The printing press increased the value of authorship by decreasing the cost of reproduction. Suddenly, authorial ownership expanded to include reproduction. And as the economic significance of works of authorship has increased, the scope of copyright protection has increased as well.

The real problem is the public. Everyone knows the public is ignorant of and indifferent to the economic theory. Hell, the public is ignorant of and indifferent to copyright. Most people think authors are and should be entitled to control the use of the works they create, because they created them. That's it. They don't care about whether copyright provides a salient incentive to create new works. They don't care about whether copyright is efficient. They only care about what is right and what is wrong. Or rather, they only care about what they understand to be right and wrong, based on the social norms defining authorial ownership they learned and accepted.

Anyway, the public doesn't know or care what copyright says or does. It only cares about what is right. Or rather, people care about what they think is right, based on the social norms about authorial ownership and control they have internalized. Those norms have nothing to do with what the law actually says, and everything to do with social expectations. To put it another way, most people have no idea what copyright protects or prohibits. But they know a norm violation when they see one, and are always eager to punish them.

Copyright owners are plenty smart enough to recognize a good thing and take full advantage of it. And social norms about authorial ownership are about as good as it could get for them. As a general rule, the public loves authors of every stripe, and sympathizes with their interests. Whether it's novelists, musicians, or painters, fans almost reflexively condemn any perceived norm violation and are prepared to punish it. What's more, fans effectively let professionals define the ownership norms governing themselves. In other words, discursive communities are typically self-regulating, and enlist fans to enforce their rules.[29] Among other things, fans often create their own norms governing fan culture, which may themselves permit certain kinds of copyright infringement. But this is generally seen as acceptable, so long as the uses in question are non-commercial, irrespective of whether they are technically infringing.[30]

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[29] *See, e.g.*, Adler, *supra* note 24, at 342 (2018).

[30] For a Coasean justification of fan works as fair use, see F.E. Guerra-Pujol, *Of Coase and Copyrights: The Law and Economics of Literary Fan Art*, 9 N.Y.U. J. INTELL. PROP. & ENT. L. 91 (2019).

Copyright owners rely on these social norms to enforce the shadow law of copyright, which is rooted in moral intuitions, not consequentialist predictions. Despite the nominal dominance of the economic theory, copyright as actually practiced is controlled by social norms based on beliefs about the moral justification of authorial ownership and control. Members of a discursive community avoid violating those norms, for fear of censure. Violators typically repent when confronted. Infringement actions typically settle, irrespective of their merits, in part because norm violators know that juries are likely to find liability, even in the absence of actual infringement. And even judges are inclined to weigh the "good faith" of an alleged infringer when evaluating an action. Infringement actions are a sucker's game, because the dice are loaded.

COPYRIGHT AS PROPERTY

The common law loves metaphors, and copyright is no exception. For better or worse, copyright rhetoric is steeped in metaphor.[31] And the most important metaphor for copyright owners is "property." Copyright owners want copyright to be property, or at least to be conceptualized by the public as a form of property, because people not only understand how property works, but also have strong intuitions about why infringing property rights is bad.

If copyright is property, then copyright owners are entitled to determine how their works are used. As Blackstone famously observed, property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[32] Of course, what is given can always be taken away. Just as Blackstone went on to describe the countless limits on property rights, so too does the Copyright Act grant exclusive rights, only to list a congeries of exceptions.

Many scholars have resisted the property metaphor, as applied to works of authorship. They argue that exclusive rights in intangible goods have no relevant similarities to physical ownership of tangible goods. After all, people typically conceptualize property as land and things: rivalrous, tangible, and excludable. By contrast, a work of authorship has none of those qualities. It is perfectly non-rival, intangible, and partially excludable only because the law makes it so. Why should we use the property metaphor for works of authorship, if it isn't a helpful analogy for the actual, relevant qualities we want to describe? Perhaps a better analogy is to

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[31] *See, e.g.*, Brian L. Frye, *IP as Metaphor*, 18 CHAP. L. REV. 735 (2015); David A. Simon, *Analogies in IP: Moral Rights*, 21 YALE J. L. & TECH. 337 (2019).

[32] 2 WILLIAM BLACKSTONE, COMMENTARIES *329.

regulatory rights, which manage competition by determining who can participate in a market and how they can compete.

And yet, the concept of property is readily abstracted to include the exclusive rights in works of authorship provided by copyright. After all, if property is really just the nexus of contract and tort, then it can readily accommodate copyright, which is also just contract and tort, sprinkled with the pixie dust we call "creativity." The "new property" is large; it contains multitudes of rights. But is such abstraction conceptually helpful, especially if the property metaphor encourages the public to accept other metaphors that are actively misleading?

For example, copyright owners often characterize copyright infringement – or really, any unauthorized use, whether or not actually infringing – as "theft." As a rhetorical move, it makes perfect sense. People understand the concept of theft and believe it is wrong. If copyright infringement is theft, then by extension, it must be wrong as well.

But the theft metaphor neither describes what happens when the copyright in a work of authorship is infringed, nor accurately characterizes the nature of the alleged harm. When physical property is stolen, the original owner is harmed by losing possession of it. If someone steals your wallet, they have your wallet and you don't. But when someone infringes the copyright in a work of authorship, they don't deprive the copyright owner of the work or the ability to use the work. On the contrary, they are depriving the copyright owner of a potential sale of a copy of the work, or at worst, unfairly competing with the copyright owner, by selling or otherwise distributing copies of the work without permission.

Now, copyright infringement may very well be wrongful and socially harmful. But it isn't theft in any meaningful sense. And calling it theft is unhelpful and confusing. Consumers are inclined to think theft is bad, so if copyright infringement is theft, it must also be bad. Yet, when you tell consumers what copyright infringement actually entails, they find it puzzling, because it includes activities they engage in all the time, without realizing they are unwitting infringers. Making a mixtape for your friend? Copyright infringement. Playing a radio in a coffee shop? Copyright infringement. Making photocopies of an article? Copyright infringement. Posting a photograph from the internet to social media? Copyright infringement. Suddenly, people are confused. How is this theft?

COPYRIGHT OWNERS AS LANDLORDS

Nevertheless, for the purpose of this essay, I will accept the property metaphor. If copyright owners want to use it so badly, then let them own it. Let us

assume that copyright owners are indeed property owners. What kind of property do they own? If we are going to use property metaphors for copyright owners, what kind of property owners are their analogues?

The obvious answer is: landlords.[33] Landlords own real estate in order to generate a profit by renting it to others who need a place to live. Landlords don't want to use their property themselves. On the contrary, unless someone else is using their property, landlords aren't generating any revenue. Landlords don't benefit by using the property they own, they benefit from the revenue that property generates in the form of rents.

Likewise, copyright owners own copyrights in order to generate a profit by renting works of authorship to consumers. You don't need to own the copyright in a work of authorship in order to consume it, you just need the permission of the copyright owner. Copyright has economic value only because it enables copyright owners to generate revenue by renting works of authorship to people who want to consume them. If no one rents a work of authorship, then it isn't generating any revenue. Copyright owners are analogous to landlords because they own a (potentially) valuable capital asset and generate revenue by collecting rents from its consumption. Indeed, the analogy is delightfully apt because the congruence is so obvious, once observed.

There are certain differences, but they are insubstantial. Quibblers will surely object that landlords rent housing to tenants, but copyright owners sell copies of works of authorship to consumers. But as an economic matter, these are identical. When copyright owners sell a copy of a work of authorship, they are really just renting the work for the life of the copy. That may well be a long time, but if copyright has taught us anything, it's the malleability of the concept of "limited times."[34]

Moreover, in our digital era, it is increasingly the case that copyright owners do not sell copies of works at all, but rather license the right to use them. By their own insistence, when copyright owners license a digital work to consumers, it is emphatically not a sale, and we know it isn't a sale because the first sale doctrine doesn't apply.[35] Copyright owners often generate much of their revenue from

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[33] *See, e.g.*, Brian L. Frye, *Ok, Landlord: Copyright Profits Are Just Rent*, JURIST (Apr. 8, 2020), https://www.jurist.org/commentary/2020/04/brian-frye-copyright-profits/.

[34] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186 (2003) (implying that any fixed term of years is a "limited time").

[35] *See* Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 659 (2d Cir. 2018).

licenses, which are just rents collected from people who want to use a particular work.

Indeed, conceptualizing copyright owners as landlords collecting rent on a capital asset is entirely consistent with the economic theory of copyright. Recall, under the economic theory, copyright is justified because it encourages authors to invest in the production of works of authorship by giving them certain exclusive rights to use those works of authorship. In other words, copyright provides an incentive to create works by giving authors the right to collect rents on the works they create, or transfer them to others who will. This is directly analogous to the housing market.

After all, how does the housing market work? In a nutshell, some people can build housing, some people have capital to invest, and some people need someplace to live. The people with capital pay the people who can build housing, and either rent the housing or sell it to those who will. Likewise, authors can make works of authorship, publishers have capital, and consumers want to consume works of authorship. The publishers pay authors to create works of authorship, and rent those works to consumers. It is exactly the same model, just adapted for a different product.

Landlords and copyright owners confront different risks. But not as different as you might think. Everyone needs housing. But no one necessarily wants to rent the housing you have on offer, or wants to pay a price that will be profitable. Likewise, everyone wants to consume works of authorship. But no one necessarily wants to consume the work of authorship you happen to own, or wants to pay the price you are asking for it.

The one great advantage of copyright ownership is that intangible works of authorship don't require maintenance in the traditional sense. Landlords must continually invest in the upkeep of their property, or it will deteriorate and lose value. A work of authorship is like a diamond, impervious to the passage of time. A copyright owner who owns a valuable work of authorship need do nothing but sit idly by and watch the rents roll in. Just as jewelry may become unfashionable and lose value, so too may a work of authorship fall out of favor and stop generating rents. But a copyright owner can always just wait for the last trickle of rents to peter out, and then ignore a work, letting it sit idle on the off-chance it someday comes back into style. Sure, copyright owners may voluntarily invest in the promotion of a work, in the hope that their investment will pay off in additional revenue. But there is no obligation to do so, and copyright owners can cut bait at any time. Indeed,

publishers are notoriously indifferent to sunk costs. If a work isn't producing, forget it, they are a dime a dozen.

Yes, copyright owners face considerable risk in predicting whether a particular work will be popular and profitable. But if that is a concern, they can always invest in works that have already proven themselves. Sure, they will be more expensive, but any sure thing always is. And yet, publishers continue to invest in speculative works. Why? Presumably, because they can purchase them on favorable terms. Authors are plentiful, but capital is not. Buy low, sell high has always been a winning strategy, in publishing as elsewhere.

THE LANDLORD METAPHOR

So, what's the problem? The landlord metaphor for copyright owners seems like a strong analogy with considerable explanatory punch. It's perfectly consistent with the economic theory of copyright, and seems to explain quite nicely how copyright owners actually use their property. Who would object to it, and why?

Well, as you'll recall, the shadow theory of copyright is a moral theory. We say the economic theory is the prevailing theory, but we don't really mean it. The real reason people believe in the legitimacy of copyright is because of their moral intuitions. Or rather, different people have different moral intuitions, depending on their role in the copyright market, but all of those intuitions converge to legitimate copyright ownership as a moral value.

Authors believe that copyright ownership is justified, because they ought to be able to control and profit from the use of the works they created. As I have observed, everyone believes in the legitimacy of the kind of property they hope to own, even if they don't believe in any other kind. After all, even Karl Marx believed in literary ownership, and self-professed Marxists are happy to righteously assert copyright ownership, even as they decry every other kind of property.[36]

Why? Most authors seem to have internalized a version of the Kantian idea that a work of authorship is an expression of the author's identity and autonomy, so authors are entitled to control the use of the works they create, in order to preserve the integrity of their personhood. In practice, authorial intuitions about the legitimacy of ownership claims and expectations about the scope of control authors are entitled to exercise over the use of the works they create tends to track the social norms of the discursive community in which an author typically participates. When

[36] *See, e.g.*, Ben Mauk, *Steal This E-Book?*, NEW YORKER (May 5, 2014), https://www.newyorker.com/business/currency/steal-this-e-book.

an artist copies an advertisement, it's celebrated as witty appropriation, but when an artist copies another artist, it's decried as plagiarism. What a coincidence.

Some more cynical authors also seem to have internalized a more Lockean theory of copyright ownership, under which their right to control the use of the works of authorship they created is based on the fact they created the work in the first place. "If I made it, it's mine," as it were. The circularity of this proposition is largely ignored. After all, once a work of authorship exists, it could just as well belong to everyone. The only thing authors are really claiming is a share of the positive externalities associated with the work, not the work itself.

Copyright owners, typically publishers, have an even more cynical take on copyright ownership. From their perspective, a work of authorship is simply a capital asset, which produces revenue. They invested in the work for the purpose of claiming the revenue it generates, and that's justification enough. Copyright secures their investment, by ensuring they can compel consumers to pay and can prevent unfair competition. One need not have any particularly exalted perspective on the moral legitimacy of copyright to hold this view. Dollars and cents are enough.

The weak link is consumers, who ultimately bear all of the costs, hopefully in exchange for some of the reward. The economic theory says consumers benefit from copyright protection, because copyright encourages marginal authors to produce the works of authorship that consumers want to consume, and in the absence of copyright, cultural production would be impoverished. But the economic theory bears little relation to reality. While it tells a neat and tidy economic story, imagines the facts necessary to make that story work. In practice, the scope and duration of copyright protection, and the actual function of the markets for copyrighted works of authorship, has no relationship to marginal incentives. Nor has there ever been any effort, or even intention, of structuring copyright to reflect marginal incentives. In practice, the economic theory is pure make-believe, with no meaningful relationship to how any of this actually works.[37]

The reality is that consumers accept the legitimacy of copyright ownership because they too believe the moral stories that authors tell about the justification of copyright. Authors insist that they should be able to control how the works they create are used, and object to uses they dislike. Consumers admire authors, and despise anyone who displeases the authors they idolize. So consumers are inclined to accept the legitimacy of the justifications authors offer for copyright ownership, just as they are inclined to accept the legitimacy of anything else their idols say.

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[37] *See generally* SILBEY, *supra* note 25.

When Taylor Swift complains about people doing her wrong by using her songs in ways she disapproves, the Swifties have her back. And the same is true of any other author. After all, plagiarism norms are just the most vigorous expression of the norm that authors have a moral right to control how people use the works they create.

But no one likes landlords. At best they are tolerated, and at worst, they are despised. For better or worse, among working people, "landlord" has always been a term of opprobrium, used to identify those who profit from capital, rather than from labor. Workers get wages for their labor, which landlords extract as rent.

No one wants to be called a landlord, in part because it is perceived as a sotto voce insult, and in part because it makes it harder to argue for the legitimacy of your claims to compensation. Or at least harder to make claims that people are inclined to take seriously and give moral force. As a consequence, people consciously avoid the term "landlord" and seek more anodyne alternatives. For example, the Small Property Owners Association created its delightfully cynical name explicitly in order to avoid the term "landlord."[38]

Why does this matter? Well, if consumers come to see copyright owners as landlords, they might well be inclined to take their moral claims less seriously. After all, everyone knows they have to pay rent to the landlord. But few consider it a moral obligation. You pay the rent because you need a place to live, not because you are grateful to the landlord for providing it to you. On the contrary, you expect to get what you pay for, and if the landlord starts getting grabby or fails to hold up their end of the bargain, no one is reluctant to complain or cuss them out.

I am not casting aspersions on landlords, although others might.[39] For better or worse, landlords play an important role in our economic order. We need them in order to maintain the liquidity of the housing market, and they use capital to take risks and generate profits just like any other investor.

But landlords aren't special. And if consumers come to see copyright owners as landlords, they might come to see copyright as not being special either. Or rather, works of authorship are special and valuable, in the same way that having a place to live is special and valuable. But rent is not special and valuable, and neither is the kind of control that accompanies landlordism.

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[38] *About SPOA*, SMALL PROP. OWNERS ASS'N, https://spoa.com/about-spoa/.

[39] *See, e.g.*, Mike Overby, *Copyright Holders Are Landlords and it's Not OK*, (June 26, 2020), https://ssrn.com/abstract=3637125.

If authors and copyright owners want to continue to rely on the shadow theory of copyright based on moral rights, they have to make sure that consumers continue to take those moral rights seriously. They better keep up the façade. The more people start to see copyright owners as landlords, the harder it will be.

LITERARY LANDLORDS IN PLAGUETIME

Let us return to the copyright infringement action against the Internet Archive and the National Emergency Library. The pandemic created a need for access to books, and the National Emergency Library stepped in to fill it. There is an ongoing need for access to books, and the Internet Archive helps satisfy it. Both solve real and pressing problems.

Does it matter? Who knows. The awkward question is whether the publishers have viable copyright claims. As much as it pains me to say it, the answer is probably yes. The Internet Archive at least has a variety of defenses, including fair use, which seems like it ought to enable libraries to continue lending books digitally, when they can't do it physically. But the National Emergency Library is at least arguably liable for copyright infringement, based on the letter of the law.

But what about the optics? Do the publishers really want to pursue an action against a library for doing what a library does? Do they really want to insist on asserting vast statutory damages when they know perfectly well that they didn't actually suffer any real economic damages? Do they really want to make a stand on the principle that libraries are bad, because they prevent copyright owners from extracting every last cent of profit from consumers?

If publishers really want to punish the Internet Archive for creating the National Emergency Library and stop the Open Library from lending ebooks without a license, they may very well succeed. It's unlikely the public would even notice. After all, the purpose of the Internet Archive is to preserve things most people don't care about.

And yet, copyright owners have been singing their siren song of moral justification for so long, they've enraptured themselves. They've become oblivious to their own venality and hypocrisy, unselfconsciously justifying their right to claim every last crumb of potential profit as not only their legal right, but a kind of moral duty. It doesn't matter how much the public benefits, unless the copyright owner gets paid.

That kind of hubris is always a little risky. For the moment, the public is team copyright. But that could change if copyright owners push their luck. So far, the

public has more or less bought the copyright story. It's an attractive one, protecting beleaguered authors from rapacious pirates. But the public can be fickle, especially when it's inconvenienced.

People seem to love the idea of copyright, even if they don't really understand how it works. But they also love the idea of libraries, even if they don't really use them. Copyright owners seem to be gearing up to go after libraries in general, looking to squeeze every cent they can from their literary property. I wonder if they are getting a little too close to the sun. Before they throw libraries into the briar patch, they better reflect on whether it'll cause the public to get its eyes scratched in again.

CONCLUSION

If you live by the metaphor, you die by the metaphor. The landlord metaphor is dangerous for copyright owners, because it's so cutting. When you respond to a wounded copyright owner's infringement complaint by saying, "Ok, landlord," they are offended and appalled. Why? Maybe because you're telling the truth, and they dislike how they look in the mirror.

Ultimately, copyright policy is a story about politics and ideology. Copyright owners have convinced themselves that they are in the right and morally pure. But maybe they are victims of their own myopia? After all, landlords also see themselves as in the right and morally pure. The only problem is that most of the public disagrees. No one loves a landlord. At best, they are a necessary evil.

By contrast, the public loves copyright owners. Or at least it loves authors, and copyright owners are close enough. But the public is fickle and easily disappointed. There's no guarantee it will love you tomorrow. And no one is more despised than a disgraced hero.

Copyright owners have claimed the moral high ground for so long, they think it's the shore, and always want more. Often, they still succeed. But the public is finally getting skeptical, especially when copyright owners object to people using works in familiar ways. It's easy to convince people that *others* are doing something wrong. It's hard to convince them that they themselves are doing something wrong. As copyright owners increasingly find themselves at odds with the public, the tide may eventually turn.

Nothing will destroy copyright's goodwill faster and more decisively than copyright owners going after libraries. Everyone loves libraries, even if they never use them. And the people who love authors the most are also the people who love

libraries the most. Up until now, the public has been convinced that loving authors means loving copyright. But they could be dissuaded, especially if they realize that copyright owners see libraries as nothing more than a source of revenue.

Apparently, copyright owners don't care. The National Emergency Library was the first casualty in a war they seem determined to fight. The Open Library is next. After that, why not every other library? After all, they're in the same business, giving the public free access to copyrighted works of authorship. Copyright owners think that's just plain wrong. Sure, they want people to have access to their works, but more importantly, they also want everyone who consumes a work to pay for it. As far as they are concerned, every time someone uses a library copy of a work, they lose a sale, and that's a terrible shame.

Copyright skeptics should welcome this fight, because copyright owners are leading with their chin. They've relied on public goodwill for so long that they've come to take it for granted. That's a mistake. The public doesn't love copyright, it loves authors. It won't take long for people to realize that objections to libraries have nothing to do with protecting authorship, and everything to do with making sure the public pays as much as possible for the works they crave. And when they do, it'll be game over for copyright owners.

The public has long embraced copyright landlords, transfixed by their siren song of authorship and morality. But copyright's sweet melody is hitting some sour notes, and people are noticing. Going after libraries will produce a dissonance no one can ignore. And yet, copyright owners don't seem to care, or even realize their peril.

I think it's all for the best. It's high time for rethinking copyright policy, in light of technological change. For better or worse, people need to use metaphors in order to talk about policy. Most copyright metaphors flatter copyright owners. The landlord metaphor is important, because it's both accurate and unflattering. Maybe it's time copyright owners got a taste of their own metaphorical medicine. Copyright policy would be better for it.

They defied the landlords. They defied the laws.
They were the dispossessed, reclaiming what was theirs.[40]

[40] LEON ROSSELSON, *The World Turned Upside Down, on* THAT'S NOT THE WAY IT'S GOT TO BE (Acorn Records, 1975).