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Abraham Drassinower

Version Publisher's Version

Citation (published version) Abraham Drassinower, "A Note on Incentives, Rights and the Public Domain in Copyright Law" (2011) 86:5 Notre Dame Law Review.

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A NOTE ON INCENTIVES, RIGHTS, AND THE PUBLIC DOMAIN IN COPYRIGHT LAW

*Abraham Drassinower**

I. A GAP IN MINIMALIST COPYRIGHT DISCOURSE

The idea that the purpose of copyright law is to provide incentives for creativity is among the most fundamental and most established ideas in North American copyright discourse.¹ There can be no doubt, of course, that copyright discourse in North America is highly contested. Some regard it as nothing less than the site of so-called “copyright wars,” of intense struggles—intellectual as much as practical, political as much as theoretical—between copyright maximalists and copyright minimalists, advocates of high copyright protection and advocates of low copyright protection.² This manifest presence of vibrant, vigorous, and vivid controversy, however, obscures the depth of the latent agreement that frames it. Few, if any at all, would contest the bedrock idea that copyright law is about pro-

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* Associate Professor, Chair in the Legal, Ethical and Cultural Implications of Technological Innovation, University of Toronto Faculty of Law. E-mail: abraham.drassinower@utoronto.ca. Earlier versions of this Article were presented at the UC Berkeley School of Law Copyright@300 Symposium, the Notre Dame School of Law Creativity and the Law Symposium, and the University of Bocconi Department of Law Intellectual Property and Competition Seminar Series, Milan, Italy. I want to thank Pina D’Agostino, Maurizio Borghi, Paul Geller, Megha Jandhyala, Stavroula Karapapa, Ariel Katz, Mark Mackenna, Lilla Montagnani, Margaret Radin, Mark Rose, Rebecca Tushnet, and Arnold Weinrib for comments on presentations and/or earlier drafts. I also want to thank the Centre for Innovation Law and Policy at the University of Toronto Faculty of Law for ongoing support.

1 See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169–73 (Stephen R. Munzer ed., 2001).

2 See, e.g., WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 1–41 (2009). For discussion of copyright maximalism and copyright minimalism, see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 285–88 (1996). For discussion of copyright politics, see JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

viding incentives for creativity.³ The pervasiveness of the hold that instrumentalism has over the North American copyright imagination is paralleled only by the ease with which that imagination summarily rejects or dismisses rights-based accounts of copyright law—accounts rooted in a vision of the inherent dignity of authorship.

One of the nodal points of the copyright wars is the ongoing discussion about the expansion of copyright scope and copyright subject matter since the enactment of the Statute of Anne,⁴ the world's first copyright statute, in eighteenth century England. Predictably, whereas copyright minimalists object strenuously to this expansion, copyright maximalists support it. Equally unsurprisingly, both maximalists and minimalists formulate their position from the shared standpoint of instrumentalist copyright theory.

My purpose here is to offer minimalists some words of both caution and comfort. The cautionary aspect is that minimalism ought to be far more suspicious than it actually is about the instrumentalist hegemony in copyright discourse. Instrumentalist discourse is, in my view, part and parcel of the very expansion that minimalism seeks to counter. Copyright protection has consistently expanded since *Donaldson v. Beckett*⁵ affirmed (a) the supremacy of the Statute of Anne over common law copyright, and (b) the still prevailing view that copyright law is not a juridical recognition of rights inherent in the act of authorship but rather a policy instrument designed to promote the public interest in creativity. Thus, historically speaking, copyright expansion has taken place and continues to take place under the supremacy of instrumentalism. To be sure, this historical correlation is not by itself sufficient to persuade us that instrumentalism is necessarily complicit in the constriction of the public domain. It does strike

3 For examples of such contestation, see ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY* 23, 53 (2010); Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-mark*, 2008 MICH. ST. L. REV. 199; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1548 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 303–04 (1988); and Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 518 (1990). See also Maurizio Borghi & Stavroula Karapapa, *Non-Display Uses of Copyrighted Works: Google Books and Beyond*, 1 QUEEN MARY J. INTELL. PROP. 21 (2011) (arguing for protection of non-display uses of digital works through data protection law in order to account for authorship rights more adequately than traditional copyright law); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059 (2008) (calling for a recognition of the tradition of authors' rights extant in the Anglo-American copyright regime).

4 1710, 8 Ann., c. 19 (Eng.).

5 1774) 1 Eng. Rep. 837 (H.L.).

me as sufficient, however, to generate significant unease about any uncritical adoption of the instrumentalist paradigm in the name of the expansion of the public domain.⁶

The comfort I seek to offer is that there are, of course, alternative accounts of copyright law. These accounts are none other than the rights-based accounts that, in its habitual endorsement of instrumentalism, minimalism dismisses far too summarily. One of the major complaints that minimalism levels against rights-based discourse is that, once enshrined as a matter of inherent dignity, the rights of authors under copyright law cannot be easily constrained. With this complaint in mind, I want to emphasize that, on the contrary, rights-based discourse envisions not only the claims of authorship but also, and therefore, those of the public domain as a matter of inherent dignity. The rights-based account of authorship is also a rights-based account of the public domain. My purpose is, in short, to generate minimalist unease about instrumentalism and to evoke the as yet largely unexplored potential of a rights-based minimalism.⁷ At the very least, I seek to undo the widespread apprehension that rights-based accounts are necessarily maximalist accounts.

Following a sketch of the shared terrain on which the copyright wars take place (Part II), I make some observations about minimalism as a critical stance seeking to oppose a particular normative conception of copyright law to the realities of copyright expansion (Part III). I then briefly describe the historical correlation between instrumentalism and copyright expansion (Part IV). I conclude with some remarks

6 For varying formulations of that unease, see Anne Barron, *Copyright Infringement, 'Free-Riding' and the Lifeworld*, in *COPYRIGHT AND PIRACY* 93 (Lionel Bently et al. eds., 2010); Maurizio Borghi, *Copyright and Truth*, 12 *THEORETICAL INQUIRIES L. no. 1*, art. 2 (2011), <http://www.bepress.com/til/default/vol12/iss1/art2>; Maurizio Borghi, *Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment*, in 5 *NEW DIRECTIONS IN COPYRIGHT LAW* 197 (Fiona Macmillan ed., 2007); Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 *J. CORP. L.* 991 (2009) [hereinafter Drassinower, *From Distribution to Dialogue*]; Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 *CANADIAN J.L. & JURIS.* 3 (2003) [hereinafter Drassinower, *A Rights-Based View*]. See also Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *HARV. L. REV.* 281, 350–51 (1970) (arguing that instrumentalist account provides a weak general case for copyright protection); Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 *THEORETICAL INQUIRIES L. no. 1*, art. 3, at 29, 54–58 (2011), <http://www.bepress.com/til/default/vol12/iss1/art3> (juxtaposing instrumentalist account of copyright law with issues concerning the nature of the creative process).

7 See Hugh Breakey, *Natural Intellectual Property Rights and the Public Domain*, 73 *MOD. L. REV.* 208 (2010); Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST* 462 (Michael Geist ed., 2005).

about the absence in instrumentalist discourse of an account of the necessary role of the public domain in copyright law, and about the presence of such an account in rights-based discourse (Part V).

II. A SHARED TERRAIN

Because they unfold under the unifying aegis of instrumentalism, the so-called copyright wars are far less disruptive than they first appear. They are not foundational struggles about the very purpose and meaning of copyright. Rather, they resemble civil wars in which the combatants are equally faithful to the absent nation each feels the other betrays. By creating the appearance of controversy, the struggle between maximalists and minimalists sustains the underlying hegemony of the instrumentalist paradigm. As much as maximalists, minimalists deploy the concept of copyright as a way of providing incentives for creativity. The debate is not about the appropriateness of that concept but about the way in which it should be operationalized.

Generally speaking, the minimalist view is not that copyright is about something other than incentives but that, while central, incentives to produce works of authorship are not the whole of the copyright story. The role of incentives must be grasped within the larger context of a view of copyright law as a balance between incentives and dissemination, creator-interests and user-interests.⁸ An overemphasis of the incentive-function of copyright protection can sabotage the equally constitutive dissemination-function of copyright law. In a word, to use Jessica Litman's felicitous formulation, copyright is as much about reading and listening as it is about writing and composing works of authorship.⁹

Of course, maximalism is by no means indifferent to the dissemination-function of copyright law. The maximalist point is that, as distinct from production, dissemination of works of authorship itself requires incentives, and that therefore the dissemination-function of copyright law is best supported not by limiting copyright protection but, on the contrary, by strengthening it further so as to render it serviceable from the standpoint not only of production but also of

8 See JAMES BOYLE, *THE PUBLIC DOMAIN* 3–9 (2008); Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515, 527 (2010); Ariel Katz, *What Antitrust Law Can (and Cannot) Teach About the First Sale Doctrine* (May 18, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1845842>.

9 Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1882 (2007).

dissemination.¹⁰ Not only authors but also publishers and distributors need incentives to fulfill their role in the copyright system. It is short sighted to believe that liberating use (or aspects thereof) from protection would be in and of itself sufficient to catalyze modes of dissemination consistent with the incentive-function of copyright protection.

The minimalist challenge to the maximalist construal arises from a different assessment of the effects that certain levels of copyright protection (and hence certain corresponding levels of user rights or privileges within the copyright system) do or do not have, would or would not have, on the public interest in the production and dissemination of works of authorship that copyright is intended to serve. In this vein, the minimalist complaint against copyright expansion is not a complaint against that expansion *per se*. It is rather about the *effects* of that expansion. If copyright expansion were shown to be conducive to the public interest in production and dissemination, then there would be nothing wrong with it, at least from a copyright perspective. The dispute between maximalists and minimalists is in this respect largely empirical. It seems that the extent to which one feels uncomfortable with copyright in general, or with copyright expansion in particular, is related to the degree to which one believes that copyright does in fact promote the production and dissemination of works of authorship. But the bedrock proposition that copyright is an instrument designed to foster and disseminate creativity is common to maximalists and minimalists alike. It is the deeply common terrain that the copyright wars leave uncontested.

III. EMPIRICAL AND NORMATIVE

To the extent that this common terrain remains uncontested, minimalist opposition to copyright expansion is likely to remain not only largely ineffective but also self-defeating. This is because the affirmation of the public domain requires challenging not merely the maximalist construal of the instrumental copyright calculus but also, and more fundamentally, the very premise that copyright is an instrumental calculus to begin with.

In instrumentalist terms, the minimalist stance towards copyright expansion is that expansive copyright is at odds with copyright's own purpose of promoting creativity. Formulated in that way, the stance is particularly interesting because, faced with evidence it accepts that copyright has as a matter of fact expanded to such an extent that, systemically speaking, it stifles rather than promotes creativity, the

10 See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 167 (2003).

minimalist stance nonetheless insists on the view that copyright is about promoting creativity. This ambiguity is, of course, easily resolvable. When faced with the empirical reality of copyright expansion, the minimalist stance distinguishes copyright as an empirical reality from copyright as a juridical order. The view is that the idea that copyright is about promoting creativity is after all a normative, not empirical, proposition. The absence of empirical evidence to substantiate it is therefore not immediately relevant to its validity. It is perfectly possible to say (a) existing copyright law does not promote creativity; (b) copyright law ought to promote creativity; (c) we should therefore alter existing copyright law so as to make it live up to its own creativity-promoting purpose.

In this way, the idea that copyright is, normatively speaking, about promoting creativity may be sustained even if copyright is not in fact promoting creativity, empirically speaking. Copyright both is (normatively) and is not (empirically) about promoting creativity. This seems plausible enough. But we can hardly fail to notice that it carries with it the implication that the proposition that copyright is about promoting creativity is, at least in one of its determinations, what we might call, for lack of a better phrase, an autonomously normative proposition. It is a proposition about what copyright ought to be rather than about what copyright is. Thus, whether that proposition is correct or not is not a question that can be answered empirically. The basic thrust of the proposition is to insist that, regardless of the empirical reality of copyright expansion, copyright ought to be different. From this point of view, to seek to evaluate or validate the proposition empirically is to have misunderstood its very nature. There is nothing surprising about that. The critical bent that the minimalist stance adopts is but an admission that, if it were determinative, the empirical evidence would disprove the proposition that copyright is about promoting creativity. The minimalist point is actually that copyright has failed to become what it truly is.

The obvious advantage of the distinction between empirical and normative from the standpoint of the minimalist stance is that the stance need not be abandoned in the wake of copyright expansion. The expansion of copyright protection as an empirical matter of fact need not invalidate the normative claim that copyright is about promoting creativity. On the contrary, the divergence between fact and norm, between history and juridical order, has the ironic yet welcome effect of strengthening the stance, casting it not as a merely descriptive account, but rather as a critical theory seeking to push the actual beyond its limits.

At the same time, however, the distinction between empirical and normative also entails that if by some magic we were to find ourselves in an alternate universe in which copyright protection would have contracted and, correlatively, the public domain would have expanded, this contraction and this expansion would still not validate the normative claim that copyright is about promoting creativity. That is, we could not in such a universe happily say to ourselves: “Oh, well, isn’t that wonderful! Copyright truly is about promoting creativity.” The reason we could not do that is straightforward: just as the divergence between copyright theory and copyright practice cannot normatively *disprove* the theory, so the convergence of theory and practice cannot *prove* the theory. The minimalist stance cannot very well refuse to find itself invalidated by the empirical expansion of copyright, yet seek to see itself validated in an empirical contraction of copyright. It cannot just pick whatever facts it wants in order to feel self-satisfied. All that could be said in an alternate universe where copyright protection has contracted is that the minimalist stance has moved from being descriptively inaccurate to being descriptively accurate. But its normative validation would still remain an open question. Just as the actual success of the maximalist expansionist project is no reason to accept it, so would the implementation of the minimalist project not amount to proof of the normative validity of the minimalist theory. In short, the very structure of the minimalist stance as a stance critical of existing reality entails that it cannot seek to find its normative aspirations empirically validated.

Of course, especially in the United States, the proposition that copyright is about promoting creativity is, quite obviously, a constitutional imperative about the “progress of the Arts,” not some sort of empirical hypothesis to be validated in practice. But that is precisely the point. If that observation were taken seriously, one would expect that the copyright wars would look less like a largely empirical debate about the requirements of progress, and more like a deeply juridical debate about, *inter alia*, the meaning of authorship, the meaning of progress, the nature of their interrelationship, and the sense in which legal protection of authorship can be meaningfully understood as a mere means to progress. Questions about the nature of authorship are plainly prior to questions about how to promote it. One would need to know what progress is in order to provide incentives for its production.

These observations are simple. Yet they are worth making explicit because they reveal that, to the extent that the copyright wars are largely empirical debates about how to provide incentives for authorship, the copyright wars either (a) treat the constitutional

imperative as a “mere” empirical hypothesis to be validated in practice, or (b) assume that the meaning of authorship in particular or of the constitutional imperative in general is so plain and self-evident that it does not require elaborate discussion. In neither case does the bare invocation of the constitutional imperative as such resolve the predicament in which the minimalist stance must find itself for so long as it persists on framing the problem of copyright as a merely or largely empirical matter. The problem is not so much that we do not have enough social science evidence to assess the effects of copyright protection. Nor is it that social science evidence about such effects is hard to collect. That may well be true. But the problem is deeper. It is that copyright justification, precisely as such, is not an empirical matter to be resolved through social science evidence collection. More to the point, to the extent that justificatory problems are drowned in oceans of social science evidence, it becomes more and more difficult to raise the question whether instrumentalism itself, rather than its specifically maximalist construal, directs the relentless march of copyright expansion. It is as if, by virtue of some kind of ironic reversal, minimalism would become a participant in the very expansion it seeks to counter.

IV. A STRIKING REVERSAL

Matters are not helped by the persistent prejudice, widespread in North America, that non-instrumentalist accounts of copyright law are irremediably unfriendly to the public domain. Indeed, it is by no mean difficult to detect the presence of that view as early as the foundational “literary property debate,”¹¹ the great “battle between booksellers,”¹² that took place in eighteenth century England in the wake of the enactment of the Statute of Anne.¹³ This is not the place to rehearse a more or less well known story. Suffice it to recall that the great battle of the booksellers opposed statutory copyright to common law copyright, giving rise thereby to the still prevailing sense that whereas instrumentalist accounts construe copyright as a statutory scheme designed to provide incentives for innovation in the name of the public interest, rights-based accounts of copyright protection favour authorial interest at the expense of the public interest.

11 BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 40 (1999).

12 MARK ROSE, *AUTHORS AND OWNERS* 4–6 (1993).

13 See RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY* 44–46 (2004); see also Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. (forthcoming 2012).

Mark Rose frames his classic account of the period as a chronicle of the overturning of *Millar v. Taylor*¹⁴ in *Donaldson v. Beckett*.¹⁵ If *Millar* affirmed copyright in published works as a perpetual common law right,¹⁶ *Donaldson* held, to the contrary, that the Statute of Anne occupied the field of published works, such that copyright duration was to be limited as provided by the Statute.¹⁷ This is, of course, a familiar story. The London booksellers (who had argued for perpetual copyright) lost the great literary property debate. The Statute of Anne, a statute ostensibly premised on the public interest in the “encouragement of learning,”¹⁸ prevailed victorious over their common law claims to perpetual copyright.

Less familiar but equally true is that the story Mark Rose tells us is actually less about the victory of *Donaldson* over *Millar* than it is about the very opposite—about the victory of *Millar* over *Donaldson*. The story of the literary property debate is not the story of the triumph of statutory copyright over common law copyright. In Rose’s hands, it is rather the story of the emergence of the author as “proprietor,” of the work subject to copyright as an instance of commodified value, and of copyright law itself as a mechanism designed to distribute or to balance the products of authorial labour between authors and users, creators and public.¹⁹ “Let us note a striking reversal,” Rose writes.²⁰ “*Donaldson v. Becket* is conventionally regarded as having established the statutory basis of copyright, and of course it did. But given the way *Donaldson* came to be understood, perhaps it should be simultaneously regarded as confirming the notion of the author’s common-law right put forward by Mansfield and Blackstone.”²¹ While the London

14 (1769) 98 Eng. Rep. 201 (K.B.).

15 (1774) 1 Eng. Rep. 837 (H.L.); see ROSE, *supra* note 12, at 4–5, 67–69.

16 See *Millar*, 98 Eng. Rep. at 225–90.

17 See *Donaldson*, 1 Eng. Rep. at 843–47.

18 1710, 8 Ann., c. 19 (Eng.).

19 See ROSE, *supra* note 12, at 78–112.

20 *Id.* at 111.

21 *Id.* at 13, 111–12. Elsewhere, Rose writes:

The London booksellers failed to secure perpetual copyright, but their arguments did develop the representation of the author as a proprietor, and this representation was very widely disseminated. Moreover, the Lords’ decisions did not touch the basic contention that the author had a property in the product of his labor. Neither the representation of the author as a proprietor nor the representation of the literary work as an object of property was discredited. Nor, I suspect, *could* these contentions have been discredited at this point in history: too many and too powerful economic and social and ideological forces were at work. So long as society was and is organized around the principles of possessive individualism, the notion that the author

booksellers failed to secure perpetual copyright, their representations of the author as a proprietor and of the literary work as an object of property were widely and successfully disseminated. These representations are, of course, still with us today in one form or another. They continue to provide rhetorical and juridical tools that enable and facilitate the propertization of the “learning” that the Statute of Anne was ostensibly intended to encourage. The *manifest* story about the triumph of public interest concerns turns out to be a *latent* story about the commodification of knowledge.

The structure of this “striking reversal” is by no means some merely historical curiosity. One example will suffice. Consider the more or less recent transition in North American copyright law from a “sweat of the brow” standard of originality to a “creativity”²² or—as we now put it in Canada—a “skill and judgment” standard of originality.²³ There is here once again a manifest story and a latent story. Manifestly, the move away from the sweat of the brow standard appears as a heightening of the copyright threshold and therefore as a victory of the public domain. The classic case of *Feist Publications Inc. v. Rural Telephone Service Co.*²⁴ puts this eloquently. The Court notes that the move toward a creativity standard entails that “much of the fruit of the compiler’s labor may be used by others without compensation.”²⁵ But “[t]his result,” the Court adds, “is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”²⁶ The Canadian version of the public’s victory over the sweat of the author’s brow is similar.²⁷

The latent story of this movement from sweat of the brow to creativity is of course far less cheerful. Permit me to put it as follows. We are accustomed to thinking of the sweat of the brow standard as a standard providing that an author is entitled to the products of her labour—to the value she originates through her labour. Under sweat of the brow jurisprudence, curing misappropriations of that value is

has the same kind of property right in his work as any other laborer must and will recur.

Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 69–70 (1988) (emphasis in original).

22 See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 352–63 (1991).

23 See *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, 2004 SCC 13, para. 25, [2004] 1 S.C.R. 339 (Can.).

24 499 U.S. 340 (1991).

25 *Id.* at 349.

26 *Id.* at 350.

27 See *CCH Canadian Ltd.*, 2004 SCC 13, paras. 22–24.

perhaps the very purpose of copyright law.²⁸ But the sweat of the brow standard is in fact composed of two related, yet separable aspects. One is that the author is entitled—or at least *prima facie* entitled—to the value she originates. The other, implicit in the first, is that the author is an originator of value. Now the shift from the sweat of the brow standard to the creativity standard dislodges the first aspect (that the author is entitled to the value she originates) but retains the second (that the author is an originator of value). Thus, while the victory of the creativity standard affirms and sets the stage for what we might call a redistribution of value from author to public, it falls short of presenting a challenge to the very concept of the author as value-originator. The image of the author as an originator of commodified value emerges triumphant, even as the distribution of that value is no longer *prima facie* weighted in her favour.²⁹

I would not be one to scoff at this redistribution. But nor do I wish to take it at face value. Celebrating it uncritically is as misguided as taking for granted the so-called victory of *Donaldson* over *Millar*. The difficulty is that the distributive image of copyright law, the image of copyright law as a balance, carries with it an understanding of the work as an instance of commodified value, and, no less importantly, of the expansion of the public domain as a decrease in the price that the public must pay for the production of works of authorship. Even when deployed in support of a vigorous public domain, that is, the image of copyright law as a balance cannot help but generate an impoverished vision of the public domain as nothing other than a lower or lowered price.³⁰

Unsurprisingly, it is at best difficult to insist upon the stakes of the public domain in a language that reduces those stakes to some sort of entitlement to values for which payment is minimized. The juridical significance of publicity is very hard to establish in a discursive context that would construe publicity as bargain prices for otherwise valuable commodities.³¹ The public domain as “freebie”

28 *Walter v. Lane*, [1900] A.C. 539 (H.L.) 545 (“I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another. . . . In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice. The law which I think restrains it is to be found in the Copyright Act . . .”).

29 For an analysis of this dynamic cast as a comment on *CCH v. Law Society of Upper Canada*, see Abraham Drassinower, *Canadian Originality: Remarks on a Judgment in Search of an Author*, in *AN EMERGING INTELLECTUAL PROPERTY PARADIGM* 139 (Ysolde Gendreau ed., 2008).

30 See Drassinower, *From Distribution to Dialogue*, *supra* note 6, at 1001.

31 On commodification, see MARGARET J. RADIN, *CONTESTED COMMODITIES* (1996).

obtained at the author's expense is far from providing an image capable of anchoring a critical theory of existing copyright. The upshot is that the public domain contracts through the operation of the very framework that was ostensibly designed to further it. Thus, for example, the claim to perpetual copyright that *Donaldson* did indeed debunk is no longer as implausible today as it appeared to be then, unless of course one cares to distinguish ever so subtly between life plus seventy, on the one hand, and perpetuity, on the other.³² Similarly, the author's *prima facie* entitlement to the full value of her labour, as provided in sweat of the brow jurisprudence, is not all that distant from current and ongoing, pervasive and successful, claims that technological protection measures can and should lock up that value to make sure it is not unfairly misappropriated.

In both instances, albeit in different senses, the failure to develop the integral role of the public domain is inseparable from a failure to formulate radically non-proprietary conceptions of the author-work relation. Even efforts to formulate the fundamentals of copyright law as a distributive balance are in the end insufficient. They share and perhaps are part and parcel of the same problem. So long as copyright balancing is conceived as a balancing or distribution of commodified values, even if these values are regarded as so-called temporary monopolies rather than as objects of property, chances are that we will encounter ever-recurrent repetitions of the striking reversal whereby *Millar* asserts its claims not against but precisely *through Donaldson*. Copyright expansion has in large part taken place and continues to take place under the dominance of the vision of copyright law as a statutory instrument of learning or progress.

V. THE INHERENT DIGNITY OF THE PUBLIC DOMAIN

The problem is that instrumentalism can offer no concept of the necessary role of the public domain in copyright law. To understand this, it suffices to note that instrumentalism posits not only the author's right but also the public domain as an instrument of the public interest in the production and dissemination of works of authorship. The entirety of copyright law, and thus the public domain as an aspect of copyright law, is conceived instrumentally. Thus, for example, both originality and fair use are doctrinal means whereby the public interest is served. Precisely as an instrument of the public interest, the public domain has a role in copyright law only to the

³² In the United States the duration of copyright protection is life plus seventy years, *see* 17 U.S.C. § 302 (2010). The Statute of Anne, by contrast, allowed for a maximum term of 28 years.

extent that it is deemed necessary to the implementation of the public interest. The public domain's role in the structure of copyright law is contingent upon the performance of a function. Where this function can be more efficiently performed by other means, the public domain can and ought to be minimized or eliminated in the name of the public interest. The point to grasp is that the instrumentalist commitment to the *public interest* is not a commitment to the *public domain*.

Consider, for example, the view that a public domain is necessary to the extent that transaction costs involved in licensing the use of works of authorship would operate contrary to the public interest in the efficient use of those works. By eliminating the need for a licence, the public domain inserts itself, as it were, where the market fails to produce the efficient outcome. The role of the public domain is thus contingent on more or less empirically driven assessments of the degree to which certain transactions would or would not take place in the absence of the free availability of the works in question. Once the public domain is instrumentalized in this way, as a kind of safety net designed to protect us from market failure, then its role in copyright law is negotiable, derivative of more or less empirical assessments of the likelihood or lack thereof of particular behavioural patterns. Thus, where technological developments make it possible to overcome transaction costs in the way of licensing, it becomes more and more difficult to postulate the need for a public domain. One-click licensing can liberate us from the public domain. If fair use is market failure,³³ the degree to which technology can help the market cure itself, so to speak, is the degree to which the public domain is but the obsolete manifestation of a now-overcome failure. Once we have agreed that the public domain is what it is too expensive to charge for,³⁴ we can just get rid of the public domain as soon as we come up with more and more frictionless ways of charging for it.

The basic problem is that instrumentalist theory is not a theory of the necessary role of the public domain in copyright law. It is a theory of the public interest in the production and dissemination of information commodities known as works of authorship. Thus, within instru-

33 The phrase is Wendy Gordon's. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982). For a deployment of the concept of fair use as market failure in the direction of a minimization of the public domain, see Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998). For Gordon's own rejection of that view, see Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the 'Fared Use' Fallacy*, 2007 UTAH L. REV. 619.

34 With thanks to Arthur Ripstein for this way of phrasing it.

mentalist discourse, the question of the public domain, like that of the author's right, is a question about the requirements of the public interest. To be sure, nothing about the concept of the public interest requires a constricted public domain. But nor does anything in that concept necessitate a vigorous public domain. The important point is that, even under the rubric of minimalist aspirations, the dominance of instrumentalist discourse means that it is the public interest, and not the public domain, that is of primary and fundamental importance.

Of course, minimalism does and will insist that the public interest requires a vigorous rather than a constricted public domain. To the extent that it takes shape in instrumentalist terms, however, this very insistence arises from and responds to a context in which the contingency, and hence negotiability, of the role of the public domain in copyright law is both presupposed and unchallenged. The recurrent upshot is that the role of the public domain is not nearly as secure as that of the author, whose role as producer of the very subject matter to be disseminated is more difficult to question from the standpoint of the instrumentalist paradigm. Minimalist aspirations would be well served by a theory of the public domain as irreducible rather than as contingent upon something other than itself and of which it is a mere instrument—a theory of the public domain as constitutive rather than derivative.

One of the largely unexplored possibilities that a rights-based account of copyright law can provide is precisely that of a formulation of the public domain constitutively. This possibility—which I want to sketch ever so briefly by way of conclusion—requires a twofold move. The first is to define the work of authorship as an act of communication. The second is to formulate the limits of authorial entitlement to the work along two related axes, one having to do with the scope of the entitlement, and the other with the subject matter of the entitlement—i.e. with the definition of the work as an act of communication.

The definition of the work as a communicative act can be formulated in several ways, but one fairly direct way is to be found in the classic account of the distinction between copyright subject matter and patent subject matter in *Baker v. Selden*.³⁵ In *Baker*, the Court dealt with the copyrightability of accounting forms included in a book explaining the operation of an accounting system.³⁶ The peculiarity of the forms from a copyright perspective was that they performed a

35 101 U.S. 99, 107 (1879).

36 See *id.* at 101.

twofold function.³⁷ As part of the plaintiff's book, they were part of the explanation of how the accounting system operates. That is, the forms were part of the plaintiff's communication, as an author, of the substance of his contribution to the art and science of accounting.³⁸ But in addition to being an aspect of the plaintiff's explanation of the accounting system, they were also integral to the very operation of that system itself.³⁹ The forms were thus part and parcel of both book and system, of both communication and substance communicated.⁴⁰

Juridically, the twofold significance of the forms amounted to the finding that the forms were copyrightable as aspects of the book but not as aspects of the system.⁴¹ The defendant in *Baker* was free from liability because the use of which the plaintiff complained was a use of the accounting system, to which copyright law could not grant exclusivity.⁴² Yet the Court pointed out that the communicative uses of the forms (i.e. uses of the forms to explain rather than operate the accounting system) would nonetheless give rise to liability.⁴³ In short, while the defendant could operate the plaintiff's system free from liability, he could not have reproduced the forms in another book explaining the plaintiff's system.⁴⁴

At the level of subject matter, then, the construal of the work as a communicative act would liberate any noncommunicative uses of a work from liability. Recent case law dealing with copyright law and digital technology, for example, finds that unauthorized reproductive uses of copyright subject matter in non-communicative ways fails to give rise to liability.⁴⁵

37 See *id.* at 104.

38 See *id.*

39 See *id.*

40 See *id.*

41 See *id.* at 104–05.

42 See *id.* at 107.

43 See *id.* at 104.

44 See *id.* (“[T]he teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. *The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art, would undoubtedly be an infringement of the copyright.*” (emphasis added)).

45 See, e.g., *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003); *Soc’y of Composers, Authors and Music Publishers of Can. v. Can. Ass’n. of Internet Providers*, 2004 SCC 45, para. 46, [2004] 2 S.C.R. 427 (Can.).

At the level of scope, what we generally call “transformative” uses, or rather uses of an author’s work in the work of another, would be legitimate to the extent that such uses are reasonably necessary for the second author’s work. On this view, fair use or fair dealing for the purpose of criticism is fair because the defendant is responding to the plaintiff’s work in her own work. She is not merely repeating the work parasitically. To the extent that she is herself an author, the plaintiff cannot consistently deny the legitimacy of the use because his own claim is, after all, an authorship claim. The defense makes the plaintiff’s work freely available to the defendant, yet only where such use is reasonably necessary for the defendant’s own authorship. It affirms the defendant’s user right while sustaining the plaintiff’s authorial right. The defense thus operates as a bilateral recognition of the parties’ equal claims as authors. It affirms and sustains a principle of authorship to which both parties appeal and to which both must be subject. Not market failure, but the equality as authors of the parties to a copyright action grounds the legitimacy of fair use or fair dealing for the purpose of criticism.⁴⁶

While other deployments of both subject matter and scope limitations conceived from the standpoint of the work as a communicative act are certainly possible, the crucial point to note here is that neither kind of limitation is imposed on the author, as it were externally, but rather each and both flow from the very nature of copyright subject matter as communicative. Because they do, the limitations involved are not negotiable pieces of the instruments required to achieve some would-be public interest. They are necessary, constitutive and irreducible dimensions of a copyright law conceived as a juridical recognition of the dignity of authorship.

Minimalism would be well advised to heed the observation that the market failure theory of the author’s right carries in its wake a market failure theory of the public domain. The rights-based account, by contrast, is not merely an account of the author but also of the public domain as a matter of inherent dignity. It is an account of the radical non-negotiability of the constitutive role of the public domain in copyright law. I think that it is as such worthy of far more attention than we have managed to give it.

46 On equality and copyright, see Drassinower, *supra* note 3, at 211–14, Drassinower, *A Rights-Based View*, *supra* note 6, at 9, and Gordon, *supra* note 3, at 1540–81.