
COMMENTARY

Copyright and the Human Condition

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INTRODUCTION

Professor Julie Cohen’s *Creativity and Culture in Copyright Theory*, and Professor Siva Vaidhyanathan’s *The Googlization of Everything and the Future of Copyright* do not focus on the life and death issues being dealt with by other panels.¹ Their papers may be more tenuously related to this Symposium’s topic of Intellectual Property and Social Justice, but they are relevant.² Creativity has social significance. Libraries, championed in Vaidhyanathan’s article, have social significance.³ Human capability and the quality of life include “being able to use the senses; being able to imagine, to think, and to reason — and to do these things in a truly human way, a way informed and

* Professor of Law, UC Davis School of Law. I would like to thank Professors Madhavi Sunder and Anupam Chander, and the UC Davis Law Review and its editors for organizing this Symposium and inviting me to speak.

¹ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151 (2007); Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 UC DAVIS L. REV. 1207 (2007).

² Symposium, *Intellectual Property and Social Justice*, 40 UC DAVIS L. REV. 559 (2007).

³ See Vaidhyanathan, *supra* note 1, at 1207.

cultivated by an adequate education.”⁴ The ability to create, to find information, and to experience creativity are matters of some importance. Social justice requires more than bread, shelter, and medicine. It requires an opportunity for a truly human life. A good life requires a positive goal, and creativity “provides one of the most exciting models for living.”⁵ One aspect of social justice is the existence of a general ability to access and creatively use that which surrounds us and to participate in making culture.⁶ Most obviously, access to information is a social justice issue. But so is effective access to culture and the opportunity to create it.

It is not possible, in this short piece, to do justice to the depth and richness of Cohen’s and Vaidhyanathan’s works. Instead, I have chosen to discuss some aspects of their articles.

I. JULIE COHEN, *CREATIVITY AND CULTURE IN COPYRIGHT THEORY*

Julie Cohen begins by noting that we all agree that creativity is a good thing and copyright law should seek to promote it, but that we do not agree on the meaning of creativity or how it is to be measured.⁷ Encouraging creativity is not copyright’s sole goal; the dissemination of works of authorship is another objective.⁸ But creativity is central to copyright theory, and too often we talk about creativity without a real understanding of what it is and how it can be encouraged.⁹ It is easy to assume that copyright incentives increase creativity and, therefore, if some incentives are good, more must be better. The quantity of copyrightable works that are created is often used as a marker for creativity, but there is no reason to believe that maximizing the number of copyrightable works is equivalent to maximizing

⁴ Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 UC DAVIS L. REV. 803, 818 (2007) (quoting Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 287 (1997)).

⁵ MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* 11 (1996); see R. KEITH SAWYER, *EXPLAINING CREATIVITY* 3 (2006) (“Creativity is part of what makes us human.”).

⁶ See Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 332 (2006) (stating that law should “ensure that all individuals — not just the most powerful — would have access to the channels of making cultural meaning”).

⁷ Cohen, *supra* note 1, at 1151.

⁸ Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 13 n.45 (2004).

⁹ See Cohen, *supra* note 1, at 1151-52; Molly Shaffer Van Houweling, *Commentary, Bumping Around in Culture: Creativity, Spontaneity, and Physicality in Copyright Policy*, 40 UC DAVIS L. REV. 1253, 1253-54 (2007).

creativity.¹⁰ If we can understand the nature and significance of creativity, it will be possible to make informed decisions on how copyright law can promote creativity, or at least not interfere with the creative process. Cohen suggests that neither rights theorists nor economic theorists deal successfully with this issue. We need a more encompassing view of creativity than that currently provided by copyright theorists, one that benefits from a wide range of work in social and cultural theory.¹¹ Scholars from other fields have much to tell us about creativity, systems of knowledge, and different ways of knowing.¹²

Authors researching the nature and social psychology of creativity, cited by Cohen, such as Teresa Amabile and Mihaly Csikszentmihalyi, discuss the conditions that will best encourage creativity, and not merely quantitatively. Both these authors express some ambiguity about the value of rewards for creativity. For example, Amabile finds that intrinsic, rather than extrinsic, motivation is conducive to creativity: “[W]hen people are primarily motivated to do some creative activity by their own interest in and enjoyment of that activity, they may be more creative than they are when primarily motivated by some goal imposed on them by others.”¹³ Freedom from extrinsic constraints, including rewards, outside control, and external pressure, can enhance creative thinking.¹⁴ However, certain forms of extrinsic motivation may also increase creativity, such as rewards that tell people they are competent,¹⁵ enable people to do the work they want to do,¹⁶ or enhance the enjoyment of a task.¹⁷ Csikszentmihalyi conveys a similar ambiguity. He says that creative people love what they do: “It is not the hope of achieving fame or making money that drives them; rather it is the opportunity to do the work that they enjoy doing.”¹⁸ But he also finds that extrinsic, as well as intrinsic, rewards

¹⁰ Cohen, *supra* note 1, at 1152.

¹¹ *Id.* at 1155-56.

¹² *Id.*

¹³ TERESA M. AMABILE, CREATIVITY IN CONTEXT 15 (1996); *see also* SAWYER, *supra* note 5, at 53 (“The most creative people are those who are intrinsically motivated.”).

¹⁴ AMABILE, *supra* note 13, at 93.

¹⁵ *Id.* at 177.

¹⁶ *Id.* at 175.

¹⁷ *Id.* at 155.

¹⁸ CSIKSZENTMIHALYI, *supra* note 5, at 107. Csikszentmihalyi says that this sentiment was expressed in all the interviews that he and his students conducted with 91 exceptional individuals who had made major contributions to the sciences, the arts, business, government, or human well-being in general. For example, novelist Naguib Mahfouz said: “I love my work more than I love what it produces. I am

help the flowering of creativity.¹⁹ “Probably very few creative persons are motivated by money. On the other hand, few can be indifferent to it entirely. Money gives relief from worries, from drudgery, and makes more time available for one’s real work.”²⁰

What this research conveys is not that extrinsic rewards are irrelevant, but that there is no direct relationship between the extent of such rewards and creativity, and that intrinsic rewards may be more important. One practical example is the Internet, where people do things, try things, find things, and share things without expecting a financial reward.²¹ “The explosive creativity shared among millions on the Internet, from musical and video mash-ups to fan fiction and machinima, puts obvious strain on the incentive theory of intellectual property.”²²

Cohen notes that research in the psychology of creativity suggests that creative play and an unstructured freedom to see what happens is important to creative success.²³ A number of theorists have found that creativity results from intellectual playfulness and a deep level of involvement in the task at hand.²⁴ Play, playful exploration, and the social conditions that facilitate play can enhance flexibility and have a beneficial effect on creativity. A generous level of freedom can encourage people to combine ideas in new ways that might not be seen as immediately useful.²⁵ Cohen says that creative play, which is a deliberately chosen activity, is not the only sort of play that matters.²⁶ She speaks of “working through culture,” negotiating through the resources, values, and absences within one’s own culture.²⁷ Serendipity and things outside an author’s control can open up new

dedicated to the work regardless of its consequences.” *Id.* Csikszentmihalyi describes an experience called “flow,” which exists when things are going well, “as an almost automatic, effortless, yet highly focused state of consciousness.” *Id.* at 110; *see also* Robert J. Sternberg, *Stalking the Elusive Creativity Quark*, in *NEW DIRECTIONS IN AESTHETICS, CREATIVITY AND THE ARTS* 79, 83 (Paul Locher et al. eds., 2006) (“[P]eople rarely do creative work in an area unless they really love what they are doing and focus on the work rather than the potential rewards.”).

¹⁹ CSIKSZENTMIHALYI, *supra* note 5, at 334.

²⁰ *Id.*

²¹ *See* Litman, *supra* note 8, at 8.

²² Sunder, *supra* note 6, at 303.

²³ Cohen, *supra* note 1, at 1190.

²⁴ AMABILE, *supra* note 13, at 101, 225.

²⁵ *Id.* at 256.

²⁶ Cohen, *supra* note 1, at 1190.

²⁷ *Id.* at 1179.

pathways of artistic exploration.²⁸

Indeed, creativity has an ineffable quality, characterized by not knowing in advance.²⁹ Works do not spring fully grown from the minds of their creators, but are experimental and unpredictable.³⁰ Creators often do not know what they are doing until they have done it. Creativity does not happen all in the head, but involves improvisation in the midst of the creative process.³¹ “[A]rt, nourished by intellectual insight and skilled craftsmanship, involves an arduous process in which physical manipulations do not *follow* the conceptions of the intellect, but *are* the intellect conceiving something by making it.”³² Painters and writers respond to their work as they create it. “A painter constantly responds to his canvas and oils as he’s painting. Each step of the painting changes the artist’s conception of what he’s doing.”³³ Sawyer says: “Fiction writers constantly interact with the story as they write. A character or a plot line frequently emerges from the pen unexpectedly,” and the writer may follow “in an essentially improvisational fashion.”³⁴ Freeman Dyson describes what happens to him during the creative process, saying, “I always find that when I am writing, it is really the fingers that are doing it and not the brain. Somehow the writing takes charge.”³⁵ We have all experienced the unexpected connection or juxtaposition. Conception and making, thinking and doing, can interact.

Cohen also focuses on spatiality and the real world distribution of artistic and cultural resources. Our ability to access and manipulate that which exists around us, including preexisting expression and techniques, is central to experiencing and participating in culture. The availability of culture is not an abstract issue, but depends upon experience and availability. It is determined “by the ways in which artistic and intellectual goods are accessible to individuals in the spaces where they live, and by the forms of interaction with

²⁸ *Id.* at 1190.

²⁹ *Id.* at 1178.

³⁰ *Id.* at 1182; see also Jack Glickman, *Creativity in the Arts*, in *PHILOSOPHY LOOKS AT THE ARTS* 168, 179 (Joseph Margolis ed., 3d ed. 1987) (“[I]n creative activity the artist does not envisage the final result of his work.”).

³¹ SAWYER, *supra* note 5, at 255.

³² UMBERTO ECO, *ART AND BEAUTY IN THE MIDDLE AGES* 111 (Hugh Bredin trans., Yale Univ. Press 1986) (1959).

³³ SAWYER, *supra* note 5, at 255.

³⁴ *Id.* at 255-56; see also CSIKSZENTMIHALYI, *supra* note 5, at 119 (Barry Commoner speaks of merging of action and awareness through image of flowing ink and flowing ideas; the “ability to think and write at the same time depends on the flow of ink”).

³⁵ CSIKSZENTMIHALYI, *supra* note 5, at 118.

preexisting expression that are possible and permitted.”³⁶ The real world distribution of artistic and cultural resources makes them more or less available to different individuals.³⁷ The existence of these resources is of little significance to creation if they cannot be accessed and used by real people living in a real world.

Cohen’s deep, rich analysis of the nature of creativity is important and useful, as it illuminates what is needed to provide opportunities for the human experience of accessing and making culture.³⁸ Cohen points out that the likelihood that someone will see, hear, or think the world differently in the first place is determined by the play permitted by the cultural context, the extent to which it permits creative experimentation.³⁹ This likelihood is affected by the availability of serendipitous access to cultural resources, and the real world ability to make use of them.⁴⁰ This prevents established ways of seeing, hearing, or thinking about the world from becoming calcified.⁴¹

In working through issues of creativity, Cohen addresses what she identifies as three methodological anxieties experienced by intellectual property scholars, each characterized by false binaries.⁴² The first is whether individual creators or broader societal patterns should be the primary focus for analysis.⁴³ Does creation come from within or without, and is it the result of individual inspiration or social and cultural patterns?⁴⁴ Quite rightly, she finds that the answer is both: “[P]articular outputs represent valuable additions to collective culture and . . . their value is determined by underlying knowledge systems that are historically and culturally situated.”⁴⁵ We cannot step out of or around the resources, values, and absences within our own

³⁶ Cohen, *supra* note 1, at 1180.

³⁷ *Id.*

³⁸ *Id.* at 1177.

³⁹ *Id.* at 1190.

⁴⁰ *Id.* at 1190, 1198.

⁴¹ *Id.* at 1192.

⁴² *Id.* at 1152-53. Binaries are “either/or” ways of addressing a problem. Indeed, binaries tend to be false. Both sides of such a binary are more useful as tools for analysis than as all encompassing world views, and the two sides seldom exhaust all the possibilities.

⁴³ *See id.* at 1155.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1153-54; *see also* SAWYER, *supra* note 5, at 4 (“Scientists have discovered that explaining creativity requires understanding not only individual inspiration but also social factors like collaboration, networks of support, education and cultural background.”).

cultures.⁴⁶ “[T]here is no innocent eye. The eye comes always ancient to its work, obsessed by its own past and by old and new insinuations of the ear, nose, tongue, fingers, heart, and brain. . . . It does not so much mirror as take and make”⁴⁷ Even our idea of “realism” in painting is relative, determined by the system of representation that is standard for a given culture or person at a given time.⁴⁸

Indeed, the process of creation shapes and is shaped by what already exists in the world. We live and work within our culture and the language and symbols that inhabit it. Authors create from what they know — from what they have seen, heard, read, felt, and experienced within the context of their culture. Existing materials and knowledge can serve as the basis for new creations. Nelson Goodman says that “worldmaking as we know it always starts from worlds already on hand; the making is a remaking.”⁴⁹

The culture around us provides not only materials for creation, but the web of support that is needed to sustain creation. Cohen notes that we cannot “step out of or around the resources, values, and absences within our culture, but must negotiate our way through them.”⁵⁰ Immanuel Kant wrote: “The light dove cleaving in free flight the thin air, whose resistance it feels, might imagine that her movements would be far more free and rapid in empty space.”⁵¹ Sawyer says that just as Kant’s dove cannot fly without the support of air molecules, creativity cannot exist without the support of a shared culture.⁵² It is an illusion to believe we can fly or create more freely in empty space without support.

Cohen finds a second anxiety in the issue of merit or relativism, which she also calls the “progress problem.” This anxiety involves a commitment either to “a linear, modernist vision of creative and cultural progress or to an oppositional stance that rejects notions of

⁴⁶ Cohen, *supra* note 1, at 1179; *see also* SAWYER, *supra* note 5, at 134 (“In exploring creativity, the interesting things to explain are not all inside a person’s head; social groups, affiliations, the complex structure of creative institutions, audiences, and the social system are also important.”).

⁴⁷ NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 7-8 (1968).

⁴⁸ Nelson Goodman, *Reality Remade*, in *PHILOSOPHY LOOKS AT THE ARTS*, *supra* note 30, at 283, 299.

⁴⁹ NELSON GOODMAN, *WAYS OF WORLDMAKING* 6 (1978).

⁵⁰ Cohen, *supra* note 1, at 1179.

⁵¹ This statement is quoted in SAWYER, *supra* note 5, at 137.

⁵² *Id.* at 138 (“Culture . . . is that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.” (quoting Edward Tylor)).

progress, artistic merit, and authorial will entirely.”⁵³ She says that theorists have struggled to find models of progress that manage simultaneously to avoid “enshrining particular criteria of artistic and intellectual merit and to ensure that the ‘best’ artistic and intellectual outputs will succeed.”⁵⁴ Certainly, scholars and courts have struggled to avoid enshrining particular criteria. Cohen cites Justice Holmes’ warning that “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”⁵⁵ It would be no less dangerous to set up expert art boards. However, it is not clear that theorists believe they can ensure that the “best” outputs will succeed. Cohen points out that economic theorists expect the market to cause the most economically viable outputs to succeed, and rights theorists seek to enhance intellectual and expressive freedom.⁵⁶ But this does not necessarily mean that theorists believe that “the truest and most beautiful works will be the ones that appeal most strongly to the citizen’s deliberative faculty, or to the consumer’s enlightened self-interest.”⁵⁷

Cohen also takes an informative and interesting look at the meaning of progress and how it is promoted. She critiques rights theorists and economic theorists for a commitment to a rationalist philosophy that sees knowledge as “transcendent and absolute.” Instead, they should be seen as “contingent and evolving.”⁵⁸ Copyright theorists should be concerned with works from a wide variety of disciplines, which look at cultural change and the process of cultural production from a variety of angles, both empirical and theoretical.⁵⁹ Progress should be seen as “that which causes knowledge systems to come under challenge and sometimes to shift.”⁶⁰

The third anxiety identified by Cohen involves the relative value of the abstract and concrete components of artistic and intellectual culture.⁶¹ Cohen suggests that both rights theorists and economic theorists articulate a vision of copyright and of cultural progress

⁵³ Cohen, *supra* note 1, at 1153, 1162.

⁵⁴ *Id.* at 1162.

⁵⁵ *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

⁵⁶ *Id.* at 1165.

⁵⁷ *Id.* She also notes that it is far from obvious that the real world actually works like this. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1170.

within which abstraction is highly prized.⁶² Copyright does not protect ideas because they are seen as the shared raw materials of progress, the basic units of cultural transmission.⁶³ The concrete forms of cultural artifacts and practices are seen as less significant.⁶⁴

If the abstraction is all that matters, little harm is done if copyright forbids the transposition of expression into different forms.⁶⁵ But, says Cohen, “expression itself is inextricably bound up with the knowledge transmitted.”⁶⁶ It is not only the ideas within a work that matter. Changing the words used in a literary work may well change the significance of what is said. A slight alteration in color or shape may significantly affect a painting’s aesthetics and message. Synonymy is suspect, and no two terms are likely to have exactly the same meaning.⁶⁷ Keats wrote:

O, for a draught of vintage! that hath been
Cool’d a long age in the deep-delved earth,⁶⁸

William Alston offers a paraphrase of those lines:

Oh, for a drink of wine that has been reduced in temperature
over a long period in ground with deep furrows in it.⁶⁹

Although the words are different, at first glance their meanings seem very similar. But the two pieces of writing do not mean the same thing. Keats’s words are evocative: “draught,” “vintage,” “cooled,” and “earth” have connotations that go beyond the explicit meaning of the words. They convey the excellence of the wine, the care and time that went into its production, and the delight that drinking it is expected to give.⁷⁰ We should not accept too readily the notion that meaning has been taken when form is very different. Judge Richard Posner quotes T.S. Eliot’s *The Wasteland*:

⁶² *Id.*

⁶³ 17 U.S.C. § 102(b) (2006); Cohen, *supra* note 1, at 1170, 1171, 1173.

⁶⁴ Cohen, *supra* note 1, at 1175.

⁶⁵ *Id.* at 1173-74.

⁶⁶ *Id.* at 1176.

⁶⁷ WILLIAM P. ALSTON, *PHILOSOPHY OF LANGUAGE* 44-45 (1964). “Perfectly synonymous words would be . . . intersubstitutable in every sentence.” *Id.* at 44.

⁶⁸ JOHN KEATS, *Ode to a Nightingale*, in *COMPLETE POEMS AND SELECTED LETTERS* 349, 349 (Clarence D. Thorpe ed., 1935).

⁶⁹ ALSTON, *supra* note 67, at 45.

⁷⁰ See Monroe C. Beardsley, *The Testability of an Interpretation*, in *PHILOSOPHY LOOKS AT THE ARTS*, *supra* note 30, at 466, 477-78.

Highbury bore me. Richmond and Kew
Undid me. By Richmond I raised my knees
Supine on the floor of a narrow canoe.
My feet are at Moorgate, and my heart
Under my feet. After the event
He wept. He promised "a new start."
I made no comment. What should I resent?⁷¹

Posner says that the idea that might be extracted from the passage is that sex is sordid and disgusting:

It is the expression that gives the idea impact The idea in itself is nothing — banal, undeveloped, mostly false These are just the materials from which the great writer or popular entertainer makes . . . art or popular entertainment.⁷²

If the idea is the central mode of communication that all must be free to use, expression may be overprotected. It may be seen as belonging too completely to an author. Forbidding the manipulation and alteration of a work's form may be seen as of little significance. Nonliteral copyists may too readily be found to be infringers.

Nevertheless, ideas are left unprotected by copyright law for a reason. Ideas are often too general to be assigned to a single author. Any bird on any tree encompasses more than a specific bird on a specific tree. And that encompasses more than a cardinal facing a blue jay on a fallen branch of a blossoming pear tree. The more the detail is omitted, the more protection would remove from the public domain. And these general ideas are far less significantly the creation of the author than the expression that gives them life and form.

An author's most individualized contributions are ordinarily found in what is termed "expression." It is the detail and circumstances, stripped from the work by the process of abstraction, that are the most individual. The more a work is abstracted, the more detail left out, the more it is part of the culture as a whole, dependent on the way society has structured language and on the accumulation of human experience within a culture. Further, the ideas denied copyright protection are not, precisely, the author's ideas. Those ideas, which exist within an author's head, are not perceptible and cannot be appropriated. But once the author's ideas have been expressed in tangible, perceptible form, that expression can be abstracted. It is that

⁷¹ *Miller v. City of South Bend*, 904 F.2d 1081, 1095 (7th Cir. 1990) (en banc) (Posner, J., concurring).

⁷² *Id.*

abstraction that becomes, at some point, an unprotected idea. The ideas left unprotected by copyright are not the invisible ideas of the author given visible expression in a work. Rather, they are the ideas found in the work by its multiple perceivers. They are reductions from the work, a lessening of its complexity, not its essence. This does not justify protecting expression against all forms of transposition, but it does justify leaving ideas unprotected.

Cohen argues for a decentered account of creativity, one that incorporates many contributing factors, takes account of the material realities that shape and constrain it, and fosters play.⁷³ This account involves working through culture,⁷⁴ and recognizing the importance of the real world distribution of artistic and cultural resources.⁷⁵ It suggests that copyright plays a more modest role in stimulating creativity than often is assumed by copyright lawyers and scholars, who devalue the role of context in shaping culture.⁷⁶ Thus, “copyright entitlements should be narrow and clearly incomplete, and that the scope for individual experimentation should be generous.”⁷⁷

Having suggested a rethinking of the relationship between copyright and creativity, Cohen provides an example of how her decentered account of creativity could work in practice. Cohen focuses on retellings of copyrighted fictional works, especially noncommercial Internet fan fiction and commercially distributed retellings. Broad, all-encompassing statutory provisions and judicially created tests for infringement would be replaced with narrower, more limited formulations covering different kinds of derivative works.⁷⁸ Abandoning traditional views of fair use, and using a decentered model of creativity, Cohen says that copyright treatment should depend on the context in which a retelling takes place and the cultural functions that it serves.⁷⁹ Under this model, fan fiction would be categorically exempt from a finding of infringement.⁸⁰ Writing and sharing fan fiction engages the collective culture and enables collective dialogues. “Fan fiction communities thus serve as important nodes for the ongoing interchange between mass and popular culture,” and fan

⁷³ Cohen, *supra* note 1, at 1177.

⁷⁴ See *supra* note 27 and accompanying text.

⁷⁵ See *supra* note 37 and accompanying text.

⁷⁶ Cohen, *supra* note 1, at 1192.

⁷⁷ *Id.* at 1197.

⁷⁸ *Id.* at 1198.

⁷⁹ *Id.* at 1202.

⁸⁰ *Id.* As Cohen explains, fans of popular television shows, movies, and books share their own retellings of those works on thousands of Internet sites every day. *Id.*

fiction does not threaten the economic value of copyrighted works.⁸¹ For commercially distributed retellings, copyright should protect the right to issue authorized sequels, but this right should be limited. "Retellings are an indispensable mechanism of cultural progress. Some critically acclaimed authors have retold their own stories, but many more have retold the stories of others."⁸² Protected sequels would encompass only those works continuing the narrative voice established by the original. For example, "if Harry Potter survives his final year at Hogwarts, only J.K. Rowling gets to sell an eighth *Harry Potter* novel, but anyone can write and sell any other character's story."⁸³

I am not sure how this would work in practice, as it seems to require a new set of rules for every new situation. Such a system fails to provide even an illusion of certainty, and requires the exercise of value judgments that courts are reluctant to make overtly. Nevertheless, Cohen makes a powerful argument for a less expansive view of copyright and raises an important set of issues that should be considered in making informed decisions on how copyright should function. Creativity thrives on intrinsic rewards, creative play, serendipity, cross-fertilization, and the unstructured freedom to see what happens without knowing in advance. It depends upon physicality and the real world distribution of cultural raw materials. It involves improvisation that takes place in the midst of the creative process. It requires the ability to manipulate and play with the concrete forms of cultural artifacts as well as with their abstractions. If copyright is to promote creativity, it will not be well served by rigid control over the ability to access and use cultural goods.

II. SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING AND THE FUTURE OF COPYRIGHT*

Siva Vaidhyathan's article includes an effective and moving defense of the role that libraries and librarians play in our society, and an attack on Google's plan to digitize millions of books from six major English-language libraries and provide an enormous searchable online index.⁸⁴ He does not attack this project from the point of view of a

⁸¹ *Id.*

⁸² *Id.* at 1203.

⁸³ *Id.* at 1204. I wonder, however, how a decentered model of creativity would deal with a retelling of the first five *Harry Potter* books from the point of view of Hermione or Ron.

⁸⁴ See Vaidhyathan, *supra* note 1, at 1207.

copyright maximalist. He values free, open, playful, and creative thought⁸⁵ and advocates an open and flexible copyright system.⁸⁶ Vaidhyanathan says that copyright has become too strong in recent years, protecting more content and outlawing more acts than ever before.⁸⁷ Copyright today “stifles individual creativity and hampers the discovery of and sharing of culture and knowledge.”⁸⁸ He does not sympathize with publishers who are offended by the prospect of a wealthy corporation profiting from “their” content without providing them with any control or compensation.⁸⁹ Nor does Vaidhyanathan dislike Google. He is a fan and customer: “I think it is one of the coolest companies to come along in my lifetime. I just think libraries are much cooler.”⁹⁰

Vaidhyanathan concludes that a legal attack on Google’s plans is likely to succeed, thereby hampering other, more potentially valuable public indexes and creating bad law in the process.⁹¹ The Google project, says Vaidhyanathan, hopes to rest “a huge, ambitious, potentially revolutionary project on the most rickety, least understood, most provincial, most contested perch among the few remaining public-interest provisions of American copyright: fair use.”⁹² This is a fascinating and valuable article, but it is also a bit apocalyptic. Vaidhyanathan says that “Google’s Library Project threatens to unravel everything that is good and stable about the copyright system. It injects more uncertainty and panic into the system that is already in disequilibrium.”⁹³ Later he states that if “all goes as Google plans, we might not have a copyright system we recognize in ten years.”⁹⁴

⁸⁵ *Id.* at 1219.

⁸⁶ *Id.* at 1230.

⁸⁷ *Id.* at 1210.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1217, 1230.

⁹⁰ *Id.* at 1213.

⁹¹ *Id.* at 1207, 1230.

⁹² *Id.* at 1210.

⁹³ *Id.* at 1207-08.

⁹⁴ *Id.* at 1221.

Google intends to scan public domain books from six libraries,⁹⁵ as well as some works that are still under copyright.⁹⁶ For works published before 1923, and safely in the public domain in the United States, users will have access to the entire text.⁹⁷ For works published since 1923, which may be protected by copyright, users will see bibliographic information and a few text snippets around the search term.⁹⁸ Users will not be able to print, save, cut, or copy the information.⁹⁹ Google will provide links, enabling users to buy the book from a variety of sources, and advertisements targeted to the searcher's presumed interests.¹⁰⁰

Vaidhyanathan is concerned that a legal attack on Google for its use of copyrighted works in the University of Michigan collection will succeed, causing harmful changes in the law, and particularly in the fair use doctrine.¹⁰¹ A healthy fair use doctrine can be very useful in allowing us to access and creatively use that which surrounds us and to participate in making culture. He notes that a variety of scholars and litigators have expressed enthusiasm for the Google project and, in discussing fair use, focus on the snippets of text that Google users would encounter when clicking on a link to a copyrighted work.¹⁰²

⁹⁵ These libraries are the New York Public Library and the libraries at Harvard University, Stanford University, the University of California, the University of Oxford, and the University of Michigan at Ann Arbor. *Id.* at 1215-16. The University of Madrid was recently added to the project. Jeffrey Goldfarb, *University of Madrid Joins Google Book Scan Plan*, TOPIX.NET, Sept. 26, 2006, available at <http://www.topix.net/content/reuters/322116389728246061180301791170091759496> 2. Only the University of Michigan and the University of California appear to be proceeding with a scan of works protected by copyright. Vaidhyanathan, *supra* note 1, at 1215; Cooperative Agreement Between University of California and Google, California Digital Library (Aug. 3, 2006), available at http://www.cdlib.org/news/ucgoogle_cooperative_agreement.pdf.

⁹⁶ Vaidhyanathan, *supra* note 1, at 1215.

⁹⁷ *Id.* at 1216.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 17 U.S.C. § 107 (2006) (“[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”).

¹⁰² Vaidhyanathan, *supra* note 1, at 1222-23.

Vaidhyanathan says this minimizes the importance of Google's original scanning of the books, which will be more difficult to justify as fair use.¹⁰³

It is not at all certain what will happen if the original scanning or copying of the copyrighted books in the Michigan collection is defended as fair use. The fair use doctrine has rightly been termed "so flexible as virtually to defy definition."¹⁰⁴ Vaidhyanathan quotes Professor Lawrence Lessig for the proposition that "fair use is the right to hire a lawyer," and worries that the Google Library Project will destabilize an already uncertain copyright system.¹⁰⁵ When a use confers a public benefit, that tends to favor a finding of fair use,¹⁰⁶ and he finds Google is not the most convincing upholder of the public interest.¹⁰⁷

Vaidhyanathan focuses on *Kelly v. Arriba Soft Corp.*, which involved a search engine that displayed its results in the form of small "thumbnail" images.¹⁰⁸ In that case, the Ninth Circuit found that this use of the plaintiff's photographic images was fair use, in large part because the thumbnails were seen as transformative and the defendant's use of the plaintiff's images in its thumbnails was not likely to harm the market for or value of the plaintiff's images.¹⁰⁹ Vaidhyanathan sees the *Kelly* case as injecting "flexibility and realism into the copyright system, making it fit the realities of both creative and economic practices."¹¹⁰ But he worries that its reasoning may be undermined in litigation against the Library Project.¹¹¹ Indeed, a recent district court decision, rather unconvincingly distinguishing *Kelly*, rejected a fair use defense in a case involving Google's image search engine, which displayed its results in the form of small thumbnail images.¹¹²

¹⁰³ *Id.*

¹⁰⁴ *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

¹⁰⁵ Vaidhyanathan, *supra* note 1, at 1207-08, 1210, 1226.

¹⁰⁶ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (9th Cir. 1993); *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1379 (N.D. Cal. 1995).

¹⁰⁷ Vaidhyanathan, *supra* note 1, at 1222.

¹⁰⁸ See *Kelly*, 336 F.3d at 815.

¹⁰⁹ *Id.* at 817-22.

¹¹⁰ Vaidhyanathan, *supra* note 1, at 1225.

¹¹¹ *Id.* at 1230.

¹¹² *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 845 (C.D. Cal. 2006). The court found Google's use to be more commercial than Arriba Soft's because the thumbnails included those from websites carrying infringing images and with which Google had advertising arrangements. *Id.* at 846. It found that Google's thumbnails

Vaidhyanathan looks at two other cases where courts decided against the defendants.¹¹³ In *UMG Recordings Inc v. MP3.com Inc.*, the defendants sought to offer a service that allowed subscribers to listen to recordings contained on their own CDs from any place where they had an Internet connection.¹¹⁴ To do this, the defendant purchased numerous CDs and copied them onto its computer servers.¹¹⁵ Subscribers could then access these recordings, but only after proving that they already owned a CD of the recording.¹¹⁶ Despite the argument that no harm was done to the plaintiffs' market, the court found that this was not fair use.¹¹⁷ The other case, *New York Times Co. v. Tasini*, involved newspaper and magazine publishers who did not obtain digital rights to articles written by freelance writers, but nevertheless included them in digital databases.¹¹⁸ *Tasini*, which sided with the writers, was not a fair use case.¹¹⁹ Vaidhyanathan discusses the *Tasini* case because the Court dismissed market failure and public good arguments in reaching its decision.¹²⁰

Interestingly, Vaidhyanathan does not discuss the question of intermediate copying or the case of *Sega Enterprises v. Accolade, Inc.*¹²¹ Google's copying of entire copyrighted works is for the apparent purpose of providing users with a searchable index, rather than with free access to the works themselves. This intermediate copying may be infringing, even if the final product presented to the public is not.¹²²

likely would harm the plaintiff's market for the downloading of reduced-size images onto cell phones. *Id.* at 849.

¹¹³ Vaidhyanathan, *supra* note 1, at 1225-26.

¹¹⁴ *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 352.

¹¹⁸ *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 483-84 (2001).

¹¹⁹ The *Tasini* Court was interpreting 17 U.S.C. § 201(c), which authorizes the copyright owner of a collective work to reproduce and distribute a contribution to that work as part of that particular collective work, any revision of that collective work, and any later collective work in the same series. The basic question at issue was whether the publishers' inclusion of the freelancers' contribution in its databases amounted to the reproduction or distribution of the articles as part of either the original edition or a revision of that edition. *Id.* at 484; *see also* Vaidhyanathan, *supra* note 1, at 1226.

¹²⁰ Vaidhyanathan, *supra* note 1, at 1226.

¹²¹ *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1518-19 (9th Cir. 1993).

¹²² *See* 2-8 DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02[C] (2006) ("One who makes infringing copies or phonorecords of a work infringes the copyright owner's reproduction right under Section 106(1), even if he does not also infringe the Section

However, although intermediate copying is still copying, it could be considered fair use. In *Sega*, Accolade copied Sega's entire videogame program into human readable form.¹²³ The court found that Accolade's copying was for the purpose of gaining access to the Sega program's unprotected aspects,¹²⁴ and was an intermediate step in discovering how to create an unfringing game that could be played on the plaintiff's game console.¹²⁵ The court concluded that this was fair use, finding that the defendant's copying was for a legitimate reason, conferred a public benefit, and did not interfere with any market to which Sega was entitled.¹²⁶

Google may have a strong fair use defense, based on the reasoning in *Sega* and the fact that the project does not appear to harm any of the publishers' markets. But given the uncertainty of the doctrine, it is certainly possible that Google will lose a fair use argument. But many courts have decided many fair use cases in many contexts, and it is unlikely that one more decision will radically change the fair use doctrine as a whole or have the apocalyptic consequences Vaidhyanathan envisions.¹²⁷

106(3) distribution right Therefore, subject to the privilege of fair use, and subject to certain other exemptions, copyright infringement occurs whenever an unauthorized copy or phonorecord is made, even if it is used solely for the private purposes of the reproducer, or even if the other uses are licensed."'). For a discussion of intermediate copying, see Leslie A. Kurtz, *Digital Actors and Copyright — From The Polar Express to Simone*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 783, 795-801 (2005).

¹²³ *Sega*, 977 F.2d at 1514.

¹²⁴ *Sega* developed and sold Genesis console and video game cartridges that are used in it. *Id.* Accolade wanted to sell independently created, unfringing video game cartridges for use in the Sega game console. *Id.* Accolade's games could not be played on the Genesis console unless its games were compatible. *Id.* In order to accomplish this, it reverse engineered Sega's video game programs to discover what was required to make its game compatible with Sega's console. *Id.* In the process, Accolade transformed the machine-readable object code contained in Sega's game cartridges into human readable source code, using a process called "disassembly" or "decompilation." *Id.*

¹²⁵ *Id.* at 1520. *But cf.* *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1120-21 (D. Nev. 1999) (finding defendant's intermediate copying not to be fair use). The plaintiff's copyrighted work was an artistic depiction of the Las Vegas Strip and its surrounding environs, created by enhancing photographs of the Strip using the computer program Photoshop. *Id.* at 1115-16. The defendant scanned much of the image into its computer, and then manipulated and changed it. *Id.* at 1119, 1121-22. The court found that the creation of this intermediate copy was infringing and not fair use, although it also appeared to conclude that infringing material was contained in the final product. *Id.* at 1120-21.

¹²⁶ *Sega*, 977 F.2d at 1522-28.

¹²⁷ See *supra* notes 92-94 and accompanying text.

Nevertheless, the social value of the Google project is likely, as Vaidhyanathan suggests, to factor into a fair use analysis.¹²⁸ And this social value is of independent significance. Will it be an important contribution to the spread of knowledge and will it deliver a substantially valuable research tool? Vaidhyanathan says that Google is, legally, politically, and practically the wrong agent for the job. This job would be better performed by libraries, pooling their efforts and resources.¹²⁹

Google, says Vaidhyanathan, cannot be trusted to preserve its patrons' privacy.¹³⁰ It serves its own stockholders and partners, and, as a private company, may fail, while libraries and universities last.¹³¹ Furthermore, he suggests that Google will not do as good a job as libraries, presenting only an illusion of objectivity, precision, and comprehensiveness.¹³² Google has not revealed the principles on which its search engine will operate, while librarians and libraries operate with open and public standards.¹³³ There is no reason to believe that Google will use good or open metadata standards,¹³⁴ its search algorithms are not appropriate for stable texts like books,¹³⁵ and biases are built into the search software.¹³⁶ It would be better for libraries to pool their efforts and resources in creating a library project.¹³⁷

But the Google Library Project is very useful. It will provide a valuable research tool, even if it is not the best tool. It will help people to find what they need or want. Public domain works will be accessible at any location with an Internet connection, and it will be possible to search, more or less successfully, for copyrighted works and obtain information about them. Shutting off any source of information is a cause for concern. The Google project may make it

¹²⁸ Vaidhyanathan, *supra* note 1, at 1222.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1220.

¹³¹ *Id.* at 1220-21.

¹³² *Id.* at 1221.

¹³³ *Id.*

¹³⁴ *Id.* Vaidhyanathan says full text searching is not a useful method of seeking information. *Id.* Effective searches require metadata, data about data, which must be embedded in files to guide search engines by means of subject headings, keywords, and quality indicators. *Id.*

¹³⁵ *Id.* at 1228. He gives an example. A search of terms like "It was the best of times" or "copyright" will yield very bad results. *Id.*

¹³⁶ *Id.* An example is the prevalence of computer manuals in Google Book Search. *Id.*

¹³⁷ *Id.* at 1222.

possible for those who are not in major information centers to participate in the digital information ecosystem. It will allow people in developing countries, who have some Internet access, to engage with all sorts of materials. The advantages of the Google project may well outweigh any dangers.

Vaidhyathan argues that the Google project hampers other, potentially more valuable public indexes, those that may be put in place by librarians and libraries.¹³⁸ He suggests that a slower process of digital indexing governed by the values of librarians would be preferable,¹³⁹ and that library efforts have been put on hold until the legal status of the Google project is determined.¹⁴⁰ If Google succeeds, there is less reason for others to create an index. If Google fails, that failure will stand in the way of such a creation. But lacking a time machine, we cannot know what library consortiums would produce in the absence of the Google project, or when they would actually produce it. Nor is it clear that library and Google indexes cannot coexist, even if Google's deep pockets make it possible to create the earliest version.

In comparing the potential role of Google and libraries, Vaidhyathan says that the "celebration of Google's Library Project reveals a dangerous assumption: that the role of the librarian in the global digital information ecosystem is superfluous."¹⁴¹ Indeed, the continuing viability of libraries is of great importance. As more and more information is digitized, the gulf between the rich and the poor can widen, unless the poor have some means of accessing that information. Libraries provide important opportunities for public access.

CONCLUSION

Vaidhyathan's defense of libraries and the principles, values, and ethical codes that animate them is a convincing one.¹⁴² Libraries provide free access to information and a portal to the Internet, particularly for those who lack financial resources. They can enhance the ability of those without funds to engage with all sorts of materials and access and participate in culture, and are essential instruments in

¹³⁸ *Id.* at 1208.

¹³⁹ *Id.* at 1221, 1229.

¹⁴⁰ *Id.* at 1229.

¹⁴¹ *Id.* at 1221.

¹⁴² *Id.* at 1218.

any attempt to achieve social justice. Whether their functioning is threatened by the Google project remains to be seen. Focusing on issues of social justice, Cohen says that copyright can make the problem of unequal access to cultural resources worse by placing additional obstacles in the path to “cultural participation.”¹⁴³ If these obstacles are removed by a narrower approach to copyright, greater access to and use of cultural resources will promote equality and enhance the possibilities for the progress of a vibrant collective culture.¹⁴⁴ Access to, and the ability to make use of, cultural resources help provide the opportunity for a truly human life and enhance the human condition.

¹⁴³ Cohen, *supra* note 1, at 1198.

¹⁴⁴ *Id.*