

# Introduction

## I. Regulating creativity

Copyright law regulates creativity. It affects the way people create works of authorship *ex-ante* and has significant implications on the status of works of authorship *ex-post*. But does copyright law really understand creativity? Should legal theories alone regulate creativity? This book aims to examine the relationship between the law and creativity, and asks whether copyright law should be adjusted to better accommodate non-legal understandings of the creative process.

A derivative work is one based on a preexisting work. Today, the owner of a work of authorship has the exclusive right to make derivative works based upon the original or to allow others to do so. This means that the owner may prevent other authors from using the original to make their own new works. Thus, in contrast to other copyright doctrines, which are often viewed in light of the tension between users and authors, the derivative works right raises a tension between authors and other authors. This makes the right to make derivative works a good lens through which to examine the relationship between the law and creativity.

This book examines such tension in light of cognitive psychology and genre theories' understanding of creativity and the creative process, in order to review the relationship between copyright law and creativity. It suggests a new way of thinking about the right to make derivative works that could both relieve this tension and harmonize the normative basis for the right with non-legal understandings of the creative process.

## II. The role of the derivative work right in regulating creativity

Copyright law is in constant tension with two competing purposes – promoting creativity by incentivizing authors, and granting maximum access to users. Often, users are themselves authors, which creates a more complex tension between first and second authors. This tension is most prominently evident in the right to make derivative works.

Authors' rights to their works are divided into two main types: the material right to economically exploit the work, and the moral right, which protects the personal relationship between the author and her work. Most countries in the world grant authors the material-financial protection of copyright. This grant

## 2 *Introduction*

usually comes in the form of a bundle of specific rights which protect an author's ability to economically exploit their work. In the United States, for example, the Copyright Act grants an author five different rights – the reproduction right, the distribution right, the public performance right, the public display right, and the right to make derivative works.<sup>1</sup> Similar rights exist in many other countries, thanks mainly to the broad application of international treaties.<sup>2</sup>

The right to make derivative works, in its modern sense, grants the owner of an original work the exclusive right to make works based on the original, and thus the right to prevent others from making derivative works.<sup>3</sup> The first work's owner also gains all of the other rights copyright guarantees with respect to the second work.<sup>4</sup> Derivative works can be created in the same medium or a different medium. For example, an adaptation of the book "Harry Potter and the Chamber of Secrets" into a motion picture would constitute a derivative work. J.K. Rowling, the owner of the novel, owns the exclusive right to make such an adaptation, and only she is allowed to make such use or allow others to do so. This, despite the fact that the second work, the film adaptation, is in a different medium to the first work, a novel. Similarly, writing a new book using themes, characters, and locations detailed in the Harry Potter book series but a different plot may also constitute a derivative work.<sup>5</sup> A derivative work can be created within the same medium of the first work (creating a sequel to a book series) but also across different media (as in a motion picture adaptation of a literary work). In both instances, second authors cannot create and use the second works unless they obtain proper consent from the first author or unless specific legal defenses apply. Who owns a derivative work created without the first author's consent remains unclear.<sup>6</sup>

There are two problems with the derivative works right's current formulation. First, it is too narrow in the sense that it is often overshadowed by the reproduction right, and it gets applied and discussed in too few cases. Second, it offers the first author full control over derivative second works, making it much too strong.

The derivative works right applies to a crucial aspect of the creative process and the creative world as a whole. The common saying "standing on the shoulders of giants" refers to the "obvious" notion that no work of authorship is created from nothing. In order to create and innovate one has to rely on previous knowledge and creations.<sup>7</sup> This notion is so obvious that it has become cliché.<sup>8</sup> Moreover, literature on the cognitive process of creation informs us that, as far as the creative process is concerned, using preexisting knowledge relevant to the creative domain is a central and crucial component.

Sociological study of the creative world has also revealed that preexisting expressions form common creative building blocks for authors and audience members alike. Authors use these building blocks as tools to enable their own creativity. In turn, audience members use them as meaning making tools, to help understand and attribute value to creative works. Preexisting expressions thus play a central part in all creative fields, including cultural creativity. Together with technological innovations, they enable the development of new creative patterns and new types of culture. Consider, for example, appropriation art, like musical mash-ups and remixes, the cultures they enrich, and the subcultures they have created.<sup>9</sup>

Using preexisting expressions to make new works also ensures cheap and available creative raw materials. This enables the creative world to grow in an economically efficient way. Additionally, the use of preexisting expressions has a distributive effect, because the wide availability of cheap building blocks ensures that those who could not otherwise afford to participate in the creative world have access to creative raw materials.

The right to make derivative works is essential, and protecting it, at least to a certain extent, is important. However, protection raises its own challenges. The modern right significantly extends the quasi-monopoly that copyright grants the first author. This is true not only with respect to the exploitation of a first work, but also and perhaps mainly with respect to any and all additional works of authorship that flow from a first work. Because every original work potentially serves as the basis for another work, this extensive grant raises a constant tension between first authors' rights to make and control derivative works and second authors' rights to create new works. In this sense, the right to make derivative works is very different from other domains of copyright law, which focus on the tension between authors and users. In fact, it crystallizes the theoretical and practical difficulties of the copyright regime as a whole. These tensions and the optimal ways to deal with them are at the heart of this book.

To understand the essence of the right to make derivative works and the tensions it raises, we must first understand its legislative development and its positive scope. Initially, first authors were only granted the right to prohibit literal or verbatim reproductions of their works. However, this right was gradually extended. During the nineteenth century, it grew to include a right against non-consensual translations and dramatic adaptations. The United States Copyright Act of 1909 further extended first authors' rights to protect their works from other types of non-consensual uses. The right to make derivative works was first introduced as an independently legislated right in the United States in 1976 as part of the new Copyright Act. The act defined derivative works as "work[s] based upon one or more preexisting works."<sup>10</sup>

American courts also gradually expanded the reproduction right to include protections against "partial reproduction" and even material substantially similar to a first work. This judicially effected expansion constituted a *de facto* acknowledgement of the right to make derivative works even before it was even legislated.<sup>11</sup> However, as the right to make derivative works developed, it expanded in comparison to the reproduction right.<sup>12</sup>

The right to make derivative works now exists in various forms in other jurisdictions as well. The English Copyright, Designs and Patents Act from 1988 does not include a broad right to make derivative works. Instead, it grants the author of a first work the right of adaptation, which includes the right to specific uses of works based on the first work. These uses are quite extensive, and are in addition to the author's general exclusive right to make copies or partial copies of the first work. This scheme also functions as a *de facto* grant of an exclusive right to make derivative works.<sup>13</sup> The derivative works right exists in continental Europe as well. For example, in France, authors have the exclusive right to

#### 4 *Introduction*

translate, adapt, or transform their first works. Likewise, in Germany, authors have the exclusive right to exploit or publish adaptations or transformations of their works.<sup>14</sup>

In contrast to the reproduction right, which grants the owner of the first work the exclusive right to reproduce the work itself, the modern day derivative works right grants first authors control over any secondary markets that second authors create by changing or adding expression to first works.<sup>15</sup> Consequently, an argument has developed in the literature that, in its modern definition, the right is overbroad and unsupported by the theoretical justifications of copyright law.<sup>16</sup>

By granting first authors rights in second works, the derivative works right also raises questions about the originality requirement. Second authors can enjoy some copyright protection in their derivative works. However, copyright only affords them protection of the specific creative elements which they add to the first works they change.<sup>17</sup> Moreover, before a work can be considered derivative and not a reproduction, a second author must affect a change in the first work. Moreover, not every change necessarily qualifies. For example, Patrick Ogilvy has argued that using a first work in its entirety, changing only its “method of presentation,” should be differentiated from embedding a first work in another, new work in a manner that changes the first work substantively.<sup>18</sup>

Scholars such as Nimmer and Goldstein, have in fact argued that a derivative work requires a higher standard of originality in comparison to the lower “modicum of creativity” required from the author of the first work.<sup>19</sup> And indeed, in various circumstances, a derivative work can also constitute an original work of authorship under modern copyright law. Yet, the making of a derivative work itself may infringe on the first author’s derivative works right.

This book examines whether the broad right to make derivative works, as described above, is justified both in its scope and in the strength of the remedies it affords the first author. It uses not only legal theory and tools, but also non-legal fields which look at the behavioral and sociological-philosophical aspects of creativity. After extracting the relevant notions to derivative works from the fields of creativity studies (Chapters 1 and 2), reevaluating the normative theoretical aspects the derivative works right (Chapter 3), and examining the relevant case law, it argues that the right to make derivative works is too narrow in scope and too broad with respect to the strength of the remedies it affords the first owner (Chapter 4). It then challenges modern copyright law to fully separate the right to make derivative works and the reproduction right, and to offer a new remedy model which restricts the first author’s control over the making of new derivative works (Chapter 5).

Beyond its independent importance to the rights it addresses directly, this discussion also emphasizes the need to reexamine basic doctrines from time to time and ask if and to what extent they fulfill their intended purposes. It may also serve as a case study for the potential contribution of interdisciplinary analysis to copyright and intellectual property law in general.

### III. The existing legal debate on the derivative work right

Relatively little existing literature specifically addresses the derivative work right, especially in comparison to other copyright law doctrines. Those discussions focus on the right's theoretical justifications, concerns about its scope in modern legislation, and its hypothetical implications on the creative world. But the definition of the derivative works right's scope is inconsistent in the case law and the literature, perhaps because it is so new and broad.<sup>20</sup> To the extent it has been addressed, scholars agree that, in its modern form, the derivative works right is broader than its theoretical justifications merit, and that it may have a restraining effect on creativity.<sup>21</sup> There are, however, different approaches as to the theoretical and practical grounds of this conclusion.

One of the criticisms levelled focuses on the constant tension between the derivative works right and freedom of speech. The argument is that granting the first owner an exclusive right to control the development of the discourse with respect to the first work unjustifiably and perhaps unconstitutionally restricts freedom of speech.<sup>22</sup> This approach is based on the democratic justification to copyright law, casting it as inseparable from the democratic mechanism. Under this theory, the ultimate goal of copyright protection is to facilitate and enable free public discourse independent of the state, thereby safeguarding available access to information and enabling individuals to participate in the public discourse and create meaning.<sup>23</sup>

Another common criticism is that the broad scope of the derivative work right outstrips copyright law's economic justifications. Under this theory, copyright protection is justified because it incentivizes private investment in the production of original expressions by granting authors the exclusive right to exploit their works. This enables authors to recoup their original investments and potentially make gains.<sup>24</sup> However, it has been argued that granting first authors exclusive control over derivative works provides only marginal additional incentive, and that this limited value is outweighed by the costs associated with prohibiting second authors from making unauthorized derivative works. In essence, these critics are arguing that the exclusive right to exploit the first work is already sufficient incentive and that the inefficient transaction costs imposed by an exclusive right to make derivative works therefore unnecessarily limit the scope of future creativity.<sup>25</sup>

In fact, after reviewing the literature, only two commentators hold the opinion that the broad definition of the derivative work right is justifiable. According to Michael Abramowicz's approach, the broad right to make derivative works is economically justified. While he agrees that a broad derivative work right may lead to a deadweight loss in some circumstances, he argues that granting first authors exclusive rights over the derivative markets of their first works is the only way to prevent rent dissipation in these secondary markets.<sup>26</sup> Pamela Samuelson's approach is to limit interpretation of the derivative work right under American copyright law to the nine examples detailed in the Copyright Act, or their close analogies. According to Samuelson, these are the only cases in which the American case law has afforded protection of the derivative works right, and she argues that under this interpretation, the right's scope cannot be considered as overbroad.<sup>27</sup>

## 6 *Introduction*

Despite relative homogeneity in the criticism of the derivative works right's broad scope, there is disagreement as to how that scope should be narrowed. Proposed limitations can be divided into two categories, internal and external. Commentators in favor of internal limitations suggest narrowly interpreting the right based on its current statutory definitions,<sup>28</sup> or redefining the right through legislation.<sup>29</sup> Those who propose external limitations suggest narrowing the right's scope by adjusting its remedy component. They have suggested denying injunctive relief for infringement of the derivative works right in favor of monetary reliefs that take into consideration both the first owner's financial interest and second author's contributions.<sup>30</sup> They have further suggested using other legal doctrines, including the fair use doctrine and freedom of speech, to limit the derivative works right's scope.<sup>31</sup> They have also suggested binding the derivative works right to the infringement of another right included in copyright's bundle of rights<sup>32</sup> by granting property rights to second authors in the unauthorized derivative works they create. The idea being that this might mitigate the high transaction costs involved in attempting to obtain the first owner's approval.<sup>33</sup> A compulsory license mechanism could then enable authors other than the first author to make derivative works.<sup>34</sup>

It is noteworthy that the derivative works right's scope has almost never been examined, at least in Anglo-American literature, under the two main theoretical justifications for copyright – the Lockean labor-desert theory and personality theory. This is not necessarily surprising due to the fact that most of the literature on the derivative works right is American, whereas these two theories are dominant and accepted mostly in England and continental Europe. However, as already noted, the derivative work right exists in these jurisdictions as well. Thus discussing these theories is equally important.

Other concerns raised in the literature include the level of originality and creativity required for a derivative work to be considered an original work on its own,<sup>35</sup> the affect that the development of new technologies has on the right,<sup>36</sup> and the relationship between the derivative works right and particular fields of creativity.<sup>37</sup>

Chapter 3 focuses on the steady stream of literature criticizing the broad right to make derivative works under the economic and democratic approaches to copyright law. While it agrees with most of the extant criticisms, it also challenges some of the arguments presented. With respect to the argument that the scope of the derivative work is too broad, it suggests that the scope of the right's application is not the only component which may conflict with its underlying normative justifications. Rather the scope and strength of the right's remedies also present significant conflict. It also argues that a narrowly interpreted derivative works right does not solve the tension between the right and its normative basis. Such normative justifications actually require a broader scope of application for the right, specifically in comparison to the reproduction right. Such understanding also fits better with non-legal understandings of creativity.

In addition, Chapter 3 suggests a broader normative discussion on the derivative works right, including an analysis of right-based theories such as the Lockean and personality approaches to copyright law. With respect to the doctrinal aspects

of the right, Chapters 4 and 5 present a revised definition for the scope of application, which focuses on the additional creativity of the second author and its relation to the preexisting expressions. Second, they propose a new remedies regime for the right to make derivative works that substantially reshapes the right in comparison to existing law and literature.

#### IV. Non-legal aspects of creativity

Chapters 1 and 2 examine the right to make derivative works in light of notions and research from other fields of knowledge which relate to creativity. Most of the literature examined in this regard does not deal directly with derivative works, although there is some that focuses on creative patterns which may relate directly.<sup>38</sup> However, at least two fields offer insights into the derivative works right. The first is cognitive psychology, which focuses, among other things, on the study of the cognitive aspects of the author during the *creative process*. The second is genre theories, which focuses on the analysis and characterization of *creative products* that belong to the same creative domain.

Cognitive psychology understands the creative process as a versatile and complex field. It views the creative process as a sub-category of the cognitive process of problem-solving. Yet, in contrast to classical problem-solving, its purpose is known but the steps towards a solution are not. Indeed, cognitive psychology has offered various characterizations of the creative process based on empirical studies and theoretical approaches. These characterizations and other notions from the field of cognitive psychology help explain why the scope of the right to make derivative works should be expanded, and why its strength and remedies should be narrowed, as will be elaborated in Chapter 1.

Genre theories can be traced back to classical Greek philosophy and to European literature from the seventeenth to nineteenth centuries. Its basic principles have been applied to other fields such as cinematography, music and the visual arts, and today the modern discourse on genre focuses on these fields too. Classical literature understood genre as a set of explicit formal rules with universal applicability through which discourse could be classified. As of the twentieth century, however, significant changes in the field led to a questioning of the pre-modern approach and even to doubting the validity of the theory itself. Despite several post-romantic era scholars announcing the dissolution of genre, in the last few decades its use has returned to the academic arena and many commentators presently use genre as a theoretical tool.

The modern approach still sees classification as an inseparable part of understanding genres. However it expands the scope of examination beyond the mere classification by looking to understand the social meaning of discourse and the way in which it affects its participants, its products, and the development of new discourse. Modern genre theories use tools from the field of semiotics, including semantics and syntax, to examine the building blocks of the specific discourse and the form and structure of the discourse's product.

## 8 *Introduction*

Chapter 2 uses the genre theories literature to show that classifying the products of creative discourse is a significant and central feature of the mere existence of such discourse because the discourse itself is based, to a certain extent, on the comparison of mutual building blocks to the new and existing works of authorship. In addition, it shows that other players in the discourse rely on common building blocks to understand new works as well as to interact with them. In other words, the use of common building blocks is inseparable not only from the creative process, but also from the meaning-making process. The term “common building blocks” refers not only to the abstract ideas which underlie a specific genre, but also to the concrete expressions which participants in the genre are aware of, acknowledge, and use. This notion is relevant to the derivative works right as a legal norm because it explains that the understanding of any work requires treating it, at least to a certain extent, as a derivative work. In this sense a derivative work is not qualitatively different from an original non-derivative work.

## V. **Research questions**

This book seeks to better understand the right to make derivative works. It focuses on two main aspects of this phenomenon – the non-legal aspects of creativity and the right to make derivative works as a legal norm. The main question with respect to creativity’s non-legal aspects is the place and significance of reliance on previous knowledge, including previous concrete expressions, in the creative world. Chapter 1 examines the internal creative process of the author, using literature from the field of cognitive psychology. Chapter 2 uses genre theories to examine how participants in the creative discourse, both the authors and the audience, create and understand the creative products. With respect to legal norms, Chapter 3 considers the extent to which the theoretical justifications for the derivative works right are persuasive and whether its broad definition and strong remedies should remain intact. Chapter 4 examines the scope of the derivative works right under current law and asks whether a stable definition exists for such a right. Lastly, Chapter 5 discusses what the scope of the derivative works right ought to be, both with respect to its applicability and its accompanying remedies, in light of the non-legal conclusions and the legal theoretical justifications previously addressed.

### *1) Non-legal aspects of creativity – what is the significance of using prior knowledge?*

In order to critically assess the desirable scope of the derivative works right, the significance of the use of prior knowledge in the creative process must first be examined. This does not mean undertaking a quantitative examination of the number or types of derivative works in the world. The feasibility of that task is questionable. It means assessing the significance of the reliance on prior knowledge, including reliance on protected expressions, to both the creative process generally and to the development of the world of creativity as a whole. This in turn requires examining two aspects of the creative world: the creative process and creative products.

Examining the creative process requires asking how and to what extent authors rely on preexisting works, knowingly or unknowingly, and to what extent parts of such works may influence new works. Chapter 1 reviews cognitive psychology literature that analyses and examines the different stages and sub-processes of the creative process both theoretically and empirically.

Examining creative products requires assessing the extent to which society needs to use prior knowledge in order to understand new works of authorship and how significant to this purpose the inclusion of previous expressions in new works is. Chapter 2 uses genre theories to attempt to explain society's needs in this respect. Society, as it is exposed to various works of authorship, defines creative domains on the basis of substantial similarity between works in those domains. This reinforces the notion that understanding is, at least in part, based on identifying common building blocks and the use of preexisting works.

Addressing these questions is important on various levels. First, it facilitates understanding how significant the reliance on prior knowledge is to the creative world, both to the process of creation and to the meaning-making process. Second, dealing with these questions concretizes and analyzes the previously mentioned cliché, according to which every work is based on the works that came before it. This is important because although the idea of progress does appear in copyright literature, current law does not fully implement it.<sup>39</sup> Third, it clarifies whether the right to make derivative works as a legal norm matches the non-legal understanding of creativity. Although the model presented for redesigning the right is not based on these non-legal notions, they do assist in portraying and explaining it.

## *2) The legal world – what is the scope of the derivative works right and is it justifiable?*

This book's second part examines the extent to which the right to make derivative works matches its underlying normative justifications. For this purpose, it reviews the theoretical justifications for the right's existence, both on their own and in light of the notions from the first part of the book. As part of this examination, it is important to ask whether the main justifications to copyright law – the utilitarian approach, which includes economic analysis; the Lockean approach; the corrective justice approach; and the personality approach – also justify the derivative works right. As previously noted, the existing literature on derivative works focuses mainly on the economic and democratic justifications for its existence. Therefore, this part only offers one new criticism of the one economic analysis that justifies the current derivative works right in its entirety. However, with respect to the personality, corrective justice, and Lockean approaches, it offers full and extensive examinations of the derivative work right that do not exist in current literature, it revisits these questions, and offers new analysis.

After reviewing the normative justification for the derivative works right and its positive expression in case law, this part examines how the right could and should be adapted in order to remain within its normative grounds. One aspect addressed is the desired scope of the rights applicability to various uses of first works. The

## 10 *Introduction*

focus here is mainly on the interrelation between the right to make derivative works and the reproduction right. This part proposes a distinction between the legal phenomenon of derivative works and that of reproductions based, *inter alia*, on the notions from the non-legal discussion on the significance of the use of prior knowledge for creativity. It also addresses the derivative works right's desired characteristics, specifically the strength of its accompanying remedies. The examination of this aspect will also rely, in part, on the non-legal conclusions as well as on the previous normative legal discussion and includes a new proposed model for the derivative works right, which will be justified and based on the right's normative justifications. Although the notions from the non-legal discussion cannot function as independent justification for the proposed model, the suggested model is also in line with their understanding of creativity.

The reexamination of the scope of the right to make derivative works as part of the bundle of rights offered to the copyright owner is also important on various levels. First, due to the lack of unity in the existing literature and case law with respect to the right's current scope, its desired scope, and its justifications, it is important to offer an extensive model for the right that could lead to better predictability and unity in the field. Second, to the extent that the right could be adjusted to fit both its underlying normative justifications and non-legal understandings of the creative world, the results of an effective reexamination could improve the legal norm. Third, a model for the right to make derivative works based both on knowledge and theories from non-legal fields of creativity and on legal normative theories is important because the legal theories alone lack sufficient tools to afford a granular and stable analysis. Additionally, such a reexamination highlights the benefits that may be gained through review of basic doctrines in copyright law and intellectual property in light of interdisciplinary research and notions from non-legal fields.

## **VI. An overview of the main arguments**

The course of the book is as follows: Chapter 1 presents the discussion on the creative process according to cognitive psychology and extracts notions which may be used in the legal context. Chapter 2 discusses the development of genre theories and shows how modern approaches to genre understand the use of prior knowledge as enabling creativity and facilitating the meaning-making process. It also explains how such notions affect the legal discussion. Chapter 3 reexamines the legal-theoretical justifications of the right to make derivative works while focusing on the Lockean approach, corrective justice, and the personality approach. The conclusion of this examination is later used as a basis for the doctrinal discussion. Chapter 4 reviews the development of the right to make derivative works and the expansion of the reproduction right. It also examines the positive overlap between the two. In this light, it explains why the theoretical conclusions from the previous chapter justify the separation of the derivative works right from the reproduction right and mandate limiting the strength of its accompanying remedies. Chapter 5 portrays the most efficient and fair way to adjust the right to make derivative works to fit its underlying justifications. It suggests redesigning the right's scope and proposes a new remedies model which better fits its normative basis.

***1) The cognitive process of creation includes the use of preexisting expressions***

Given the versatility and number of different creative styles and methods, a quantitative-empirical study of the subjective process the author undergoes while creating a work seems almost impossible to conduct. Instead, cognitive psychology examines typical creative patterns and the scope of use of prior knowledge, including previous expressions, in the creative process.

As previously noted, cognitive psychology characterizes the creative process. However, despite the lack of uniformity and consensus in the field, at least with respect to a stable and precise definition of what creativity is and what the creative process consists of, an extensive review of the differing views yields several stable notions about the cognitive process of creation. These have serious repercussions on the debate about the significance of using prior expressions in the creative process.

In brief, the process of creation is consistently divided into two main phases, which are themselves sometimes further subdivided. In the first stage, the author uses unfocussed and associative cognition – which could also be described as imagination, epiphany or as the conscious or unconscious – to search for the beginning of a possible “solution.” This phase resembles, to a certain extent, the romantic approach to creativity and authorship, which sees the creative process as an almost meta-physical activity. In contrast, in the second stage, authors are required to crystalize their unfocussed lines of thought into concrete products. This phase is almost unanimously described as imposing constraints on the unfocussed thought of the author. These constraints are driven by preexisting professional knowledge and the author’s skill in the relevant creative domain. The fact that authors must rely on available preexisting knowledge to crystalize their abstract thoughts also requires an inevitable reliance on significant components from prior works of authorship in the relevant creative domain. Consequently, these function as basic building blocks for their creative process. To the extent that this phenomenon is inseparable from the cognitive process of creation, it is understandable that prior expression use, which leads, to a certain extent, to the making of derivative works, is a necessary and inevitable part of almost every creative process, or to say the least, of many creative undertakings.

***2) The creative products – genre theories identify common building blocks in shared creative domains***

Examining and characterizing the creative product demonstrates that substantial similarities exist between works that share the same creative domain, in a way that proves that the use of preexisting expressions is also identifiable objectively. This argument follows from genre theories principles which examine the discourse classification rules in a specific creative community. While research development in the field of genre theories originally focussed only on classification of discourse products, it has, as previously noted, progressed. It now addresses a more complex structure of interrelations between the various participants in the discourse and the way in which new classifications develop. Yet this development in no way alters the

## 12 *Introduction*

basic, underlying principles of genre theories. Genre analysis still requires the identification of similarity between different discourse products, a concurrent examination of the common building blocks which were used, and analysis of the way they were used to make a creative product. In fact, to the extent that there is a close link between the characterization of a discourse in one genre, the pedagogy of new participants in it, the actions of existing participants, and the development of new discourse and the creative products; there must be a close link between the way in which creative products are perceived by the “consumers” and the cognitive process of the author. Moreover, classifying the different features of discourse is necessary and has social value in itself. This follows, because the act of classification enables community social interactions around a specific discourse.

### *3) Reexamination of the justifications for the derivative works right*

The conclusion thus far is that there is a mismatch between non-legal understandings of creativity and the legal right to make derivative works. In this light, Chapter 3 reexamines the legal-theoretical justifications to the existence of the right, specifically copyright law’s four main justifications: the utilitarian approach, the Lockean approach, corrective justice and the personality approach.

The current literature on derivative works has already reviewed and criticized this right on economic and democratic grounds. Therefore, Chapter 3 presents a shorter discussion of these approaches, including only additions to or comments upon the existing literature. With respect to the economic approach, it reaffirms many of the criticisms of the economic approach and its ability to justify the existing broad derivative works right and relies primarily on non-legal discussion to do so. In addition, it attempts to contest Abramowicz’s approach, which justified the right using the principle of rent dissipation in secondary markets. Derivative works do not necessarily create secondary markets for the original works. Their purpose is to develop and make the primary market more efficient. As far as the democratic criticisms are concerned, Chapter 3 considers the limitations cast on the derivative works right by the fair use doctrine. It emphasizes the differences between the two doctrines, specifically with respect to transformative use.<sup>40</sup> It also explains that the fair use doctrine complements the book’s proposed derivative works model.

With respect to the Lockean approach, Chapter 3 reviews the right’s current broad scope, at least as far as it is based on Locke’s justifications for granting right in the fruits of one’s labor. It focusses on Locke’s two provisos and interprets them based on the non-legal understanding of creativity.<sup>41</sup> The derivative works right may violate Locke’s second proviso, also known as the non-waste proviso. It practically guarantees waste by granting first authors a quasi-monopoly with respect to the development of their works and secondary markets but placing no obligation on them to further develop their works. The derivative works right may also violate Locke’s first “sufficiency” proviso, which restricts the individual’s right to use common property to those that leave enough and qualitatively equivalent resources in common for others. By depriving society of the ability to further develop the primary market of a work or to create secondary markets for it, the

derivative works right potentially leaves others with fewer and less valuable resources than existed prior to the first work's creation. This is true even when considering the resources in the public domain which are not considered "reproductions" of the first work. Thus, the Lockean theory cannot justify the current scope of the derivative works right.

With respect to corrective justice, which is based on Kant's doctrine of right, Abraham Drassinower has asserted that there is no justification for a derivative works right at all.<sup>42</sup> However, Chapter 3 suggests a different interpretation of corrective justice, according to which the right could be justified so long as it does not empower first authors to enjoin subsequent authors from producing derivative works. These interpretations are based on Kant's principle of universal right, according to which every person's freedom is subject to the ability of all other persons to enjoy the same degree of freedom. With respect to the derivative works right, then, second authors must be afforded the same freedom to act in the world that first authors enjoy. This must include the ability to use expressions from previous works, including other authors' first works. Chapter 3 proposes and explains a model which allows second authors the right to use expressions from first works, but also imposes on them the obligation to share any revenues from such use with first authors.

In contrast to the external criticisms of the personality approach raised in the literature, Chapter 3 presents an internal criticism which employs a philosophical understanding of the autonomy of expression, together with hermeneutic approaches, to illustrate the personality justification's limitations.<sup>43</sup> It uses Hans Georg Gadamer's hermeneutic model for the act of interpretation, which he divided into three stages – understanding, interpretation and application,<sup>44</sup> to demonstrate that the application of the interpretive result changes the perception of the interpreter and her behavior. To this model, it then adds Roberta Kwall's distinction between the first author's meaning, i.e. the work's subjective meaning to its author, and the work's message, i.e. the way in which the author wishes her work to be perceived by society.<sup>45</sup> These subjective elements should be protected in order to enable first authors to achieve autonomy. When a person is subjected to a message that an author wishes to share with society, this person undergoes an interpretive process which results in changes of the expressions in that message, creating a different meaning than that intended by the first author. Subordinating the second person's interpretation to the first person's message, and to it alone, ignores the second person's right and ability to act and express herself according to her free will.

According to each of the approaches, the independent existence of a derivative works right, in contrast to the reproduction right, is justified but the strength of its remedies should be diminished. This conclusion will be later used to adjust the right to make derivative works to align with its underlying justifications.

#### *4) The existing overlap between the derivative works and reproduction rights*

Due to the fact that the right to make derivative works developed side by side with the systematic expansion of the reproduction right, the relationship between the rights has always been unclear. Whether the derivative works right is fully included

## 14 *Introduction*

in the reproduction right remains an open question. Thus, for example, David Nimmer has argued that the right to make derivative works is superfluous because for a work to be “derivative” it must be significantly based on a previous work. According to him, to the extent that the derivative work includes expressions which are substantially similar to the first work, it inevitably infringes the reproduction right and no further claim with respect to the derivative works right is necessary.<sup>46</sup> Other commentators have asserted that this overlap is not complete, since there are cases in positive law in which a derivative work is created without reproduction.<sup>47</sup> However, Chapter 4 argues that in American and English laws, the overlap is almost complete. In English law, it exists due to the explicit statutory language according to which the existence of an adaptation does not preclude the existence of copying.<sup>48</sup> In American law, it exists due to the infringement tests established by the courts with respect to the reproduction and derivative works rights. They create a *de facto* overlap despite the fact that the rights have separate legislative sources.

### *5) Criticizing the current right to make derivative works*

In light of the overlap between the derivative works right and the reproduction right, and due to the mismatch between the derivative works right’s strength and its underlying justifications, Chapter 4 criticizes the current right’s definition and application. The derivative works right’s separate legislative definition and its distinct underlying justifications should lead not only to a separate legal analysis, but also to a complete separation from the reproduction right and a change to its attendant remedies. The crux of the argument is that, following the classification of a certain action as the making of a derivative work, the reproduction right should no longer be invocable and the remedies to which the first author is entitled should thus be limited in comparison to those offered by the reproduction right.

To make this point Chapter 4 first presents existing criticism of the derivative works right and different suggestions for to resolve the difficulties raised. It also points out the deficiencies in such literature. As previously noted, a common criticism is that the derivative works right is overbroad.<sup>49</sup> Some commentators have argued that the derivative works right limits the second author’s freedom of speech in an unacceptable manner and therefore should be narrowed. Other commentators have argued that the right to make derivative works is economically inefficient because it hinders creativity more than it promotes it. Although the existing literature has theoretically reviewed the difficulties which the derivative works right raises, it does not offer a sufficient solution to resolve such difficulties. Specifically, it does not deal with both the positive overlap between this derivative works right and the reproduction right, and the independent normative justifications for the derivative works right.

Chapter 4 argues that the right to make derivative works should be completely separated from the reproduction right, and that the strength of its accompanying remedies should be limited. It also asserts that only by reviewing justifications and remedies together can the problems with the current derivative works right be resolved. These aspects are necessarily interrelated for two main reasons. First,

much like any other legal right, the strength of the derivative works right is dependent both on its scope of applicability and the scope of its remedies. Second, while the derivative works right's normative justifications do establish it as an independent right, they render its limitations on subsequent authors unjustified at the same time. Therefore, focussing only on one of these two aspects – scope of applicability or the scope of remedies – cannot suffice.

Additionally, although the non-legal conceptions of creativity do not function as an independent normative justification for redesigning the current derivative works right, they do mesh better with a revised model of the right. I argue that this is more than just a happy coincidence. It is an indication that copyright law doctrines better align with deeper, non-legal understandings of the creative process and creativity when they conform to their own underlying normative justifications and fulfill their overarching goal of nurturing the creative world.

### *6) Redesigning the derivative works right*

Having established that two main features of the derivative works right should be adjusted, Chapter 5 explores a way to redesign the right that seeks to match it to its underlying justifications.

First, it proposes a new definition and scope of applicability for the derivative works right that fully separates it from the reproduction right. When second authors combine substantial parts of preexisting works with their own substantial, qualitatively creative additions that are both inseparable from the existing expression and cannot be substituted with existing non-protected expressions – the activity they are engaging in should be considered derivative works making, not reproduction. Thus, the derivative works right's definition should be redesigned to ensure that it applies to such cases, even if they are presently governed by the reproduction right under current case law. To illustrate the suggested definition, several examples of typical actions that ought to be encompassed by the new definition are discussed.

In addition, Chapter 5 establishes a separate and independent discourse on the right to make derivative works that focusses on analyzing its boundaries and underlying justifications, which includes many cases which were previously analyzed and reviewed under the reproduction right. It also explains how the suggested definition, which separates the two rights, allows for a different discussion of remedies, resolving many of the difficulties which have previously arisen when duplicate damages have been awarded for the infringement of both rights simultaneously. It also considers the changes the new definition effects between first and second authors, third parties, and potential infringers.

The normative justifications for the derivative works right require limitation of the strength of remedies it offers today. In fact, they require a transition from the current protection of property rule to a liability rule.<sup>50</sup> To explain the most efficient and fair model to achieve such goal, Chapter 5 also reviews various suggestions for alternative remedies models and explains their deficiencies. The model settled upon proposes establishing a compulsory license for the making of derivative works,

16 *Introduction*

which is subject to the payment of fair royalties. Transition to a compulsory license model may raise some difficulties, both theoretical and practical. However, these can be overcome. In addition, practical questions will be addressed – like how royalties should be determined, whether different types of royalties should apply to different types of works, whether first authors should ever have exclusive rights to make subsequent works. The ability to supervise such a model and its potential costs are also examined.

The proposed remedies model enables second authors to use expressions from preexisting works to make derivative works without the first author's consent. However, this right to engage in derivative works creation would be subject to the payment of fair royalties, derived from future revenues of the derivative work. If the parties do not reach an independent agreement as to these royalties, the proposed model provides that the second author may turn to a judicial tribunal to set the rate, subject to a payment of a preliminary fee for the costs of the procedure and the potential goodwill benefits from using expressions from the first work. Lastly, the entire mechanism would be subject to a blocking period during which the first author would maintain the exclusive right to make derivative works herself, or license others to do so.

The advantage of such a model over alternative models lies in its quasi-insurance effect. It is safe to presume that second authors who elect to use compulsory licenses will be able to protect themselves from reproduction claims. First authors will have less incentive to sue than they do now, due to the revenues to which they will automatically be entitled in works characterized as derivative. This is especially true with respect to works that it may be difficult to prove constitute mere reproductions. In addition, first authors will function as gatekeepers to ensure that derivative works are sufficiently creative and original. Open and shut cases of reproduction will still be litigated under the reproduction right, but borderline cases that contain at least some creative and original expression will likely be allowed to exist unchallenged, but subject to royalties. Thus the chances that the model would be exploited for the purpose of making infringing reproductions will actually be lower. The proposed model also resolves many of the derivative works right's theoretical difficulties by removing the restraints it currently places on subsequent authors to use preexisting expression to engage in creativity. In addition, it fits better with the non-legal understanding of creativity in that it does not prefer first authors a priori and equalizes, or at least substantially improves, the position of second authors who explicitly use previous expressions in comparison to second authors whose use of such expressions is more latent.

Chapter 5 concludes with a discussion of the proposed model's relationship with other copyright and intellectual property doctrines, specifically the fair use doctrine, moral right doctrine, and trademark law. Thus, for example, this last section will argue that, to the extent that a specific use is allowed under the fair use doctrine or any other permitted use doctrine, there will be no need for a compulsory license, nor will a user have to wait for the end of the blocking period. In contrast, when a derivative work would infringe the moral right of the first author, the compulsory license is not a cure for such infringement.

## Notes

- 1 17 U.S.C. § 106.
- 2 Articles 8–15 to the Berne Convention on the Protection of Literary and Artistic Works; WIPO Copyright Treaty art. 6–8, Dec. 20, 1996. For elaboration on the relevant aspects of the TRIPs agreement *see* Daniel Gervais, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 242–56, 265–72, 292–310 (4th edn 2012).
- 3 Hereinafter, a wholly original work of authorship will be referred to as a “first work.” Likewise, the owner of a first work will be referred to as “the first author.” In the same vein, a derivative work based on a first work will be referred to as a “second work,” and the derivative work’s author will be referred to as a “second author.”
- 4 17 U.S.C. § 101, 106; Copyright, Designs and Patents Act, 1988 s. 21.
- 5 The question if this would constitute a derivative work is dependent, among other considerations, on the what was exactly taken from the first work. To the extent that the second work uses protected expressions from the first work (such as characters, specific scene and protected plot lines), it would constitute a derivative work, *see, e.g.*, *Salinger v. Colting*, 607 F.3d 68, 71–72 (2d Cir. 2010). (A sequel to the book “The Catcher in the Rye” was found infringing upon the copyright of J.D. Salinger due to the use of characters from the first work.) However, to the extent that only the general idea underlying the first work was taken, or even if the second work uses only the names of characters from the first work but not their characteristics, the second work would be considered an original work. This point demonstrates the interface between the right to make derivative works, the reproduction right and the fair use doctrine, since the reproduction right protects the owner of the first work from partial reproductions of the works including the reproduction of characters from a full plot, and on the other side, satirical use of the first work or a use that significantly transforms its expression may grant the user or the second author a defense under the fair use doctrine. I will elaborate on these interfaces in parts IV.4 and IV.5.
- 6 Although the legislative language is unclear under the law in the United States, courts have ruled that a derivative work created without the first author’s consent will not be eligible for copyright protection with respect to the second author. *See Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 25, 1989); *Pickett v. Prince*, 52 F. Supp. 2d 893, 906–07 (N.D. Ill. 1999).
- 7 Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 218 (1983). This notion is so common that Google has chosen it as the slogan for its academic search engine Google Scholar. *See* <http://scholar.google.com>.
- 8 Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990).
- 9 For a discussion on these types of creativity and the influence legal rules have on them *see* Peter Dicola, *An Economic View of Legal Restrictions on Musical Borrowing and Appropriation*, in *MAKING AND UNMAKING INTELLECTUAL PROPERTY* 235 (Mario Biagioli, Peter Jaszi and Martha Woodmansee eds, 2011); Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PENN. L. REV. 441 (2016).
- 10 17 U.S.C. § 101.
- 11 For an elaboration on the historical development of the right to make derivative works *see*: Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 224–33 (2008); Goldstein, *supra* note 7, at 211–15.
- 12 For elaboration on the parallel development of both rights *see infra* Chapter 4.
- 13 Copyright, Designs and Patents Act, 1988 s. 21.
- 14 *See, respectively*, Code de la Propriété Intellectuelle (C. Prop. Intel.), art. L122–4; Urheberrechtsgesetz [Copyright Act] Sept. 9, 1965, BGBl. I at 1273, § 23, as amended, Oct. 1, 2013, BGBl. I at 3728. *See also* 1 André Lucas & Pascal Kamina, *France*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 2[3][a] (Paul Edward Geller ed., 2014); 2 Adolf Dietz, *Germany*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 2[3][a] (Paul Edward Geller ed., 2014).

18 *Introduction*

- 15 Goldstein, *supra* note 7, at 217, 227.
- 16 *See infra* part III.
- 17 Goldstein, *supra* note 7, at 240–1.
- 18 Patrick W. Ogilvy, *Frozen in Time? New Technologies, Fixation, and the Derivative Work Right*, 8 VAND. J. ENT. & TECH. L. 687, 694–95 (2006). Returning to the Harry Potter example, changing the method of presentation of the first work may happen if the character of Harry Potter will be displayed in the Tate gallery to criticize modern fictional literature, while incorporating the character of Harry Potter in a new book titled “Harry Potter in Space” will bring a change to the original work. This type of distinction may be significant in the context of the interface between the right to make derivative works and the fair use doctrine. *See* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2007).
- 19 Goldstein, *supra* note 7, at 241–2; Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 3.03 (2016) (hereinafter: NIMMER ON COPYRIGHT).
- 20 As William Patry has put it, “regrettably the understanding of derivative works is fast approaching incomprehensibility.” *See* William F. Patry, PATRY ON COPYRIGHT § 3.46 (2012).
- 21 The main theories discussed in the literature with respect to the derivative work right are economic analysis, Lockean labor-desert theory, personality theory and the democratic justification to copyright law.
- 22 For elaboration, *see infra* Chapter 3. This tension is “external” to the derivative work right. For a distinction between “external” and “internal” tensions in the context of copyright law *see* Michael Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1292–1305 (2003).
- 23 For a discussion on the democratic approach to copyright law *see* Neil Weinstock Netanel, COPYRIGHT’S PARADOX 3 (2008); Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347–64 (1996); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354 (1999); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 277–83 (1996).
- 24 William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328–29 (1989); William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 108–15 (2003); Goldstein, *supra* note 7, at 216. Absent such a right, it is argued, an author of a work will not have any incentive to create it to begin with due to the fact that intellectual creations are public goods and due to other “hitchhiking” problems. This tension is internal to the derivative work right. *See* Birnhack, *supra* note 22.
- 25 For elaboration, *see infra* Chapter 3.
- 26 Michael Abramowicz, *A Theory of Copyright’s Derivative Work Right*, 90 MINN. L. REV. 317, 357–8 (2005).
- 27 Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1513–15 (2013). The nine examples under the Copyright Act are translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation. *See* 17 U.S.C. § 101.
- 28 *See* Daniel Gervais, *The Derivative Right: Or Why Copyright Law Protects Foxes Better Than Hedgehogs*, 15 VAN. J. ENT. & TECH. L. 785 (2013); Chris Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 258 (2011); Tim Wu, *Tolerated Uses*, 31 COLUM. J.L. & ARTS 617, 631–2 (2008). Samuelson’s support of the derivative work right in its current definition is also based on this approach.
- 29 Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1267 (1997).
- 30 Paul Edward Geller, *Copyright in Crisis: Principles for Change*, 56 J. COPYRIGHT SOC’Y U.S.A. 165 (2008); Paul Edward Geller, *Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remedying Infringement*, 46 J. COPYRIGHT SOC’Y U.S.A. 39, 61 (1998);

- Orit Fishman-Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1 (2010); Jed Rubinfeld, *Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 57–58 (2002); Goldstein, *supra* note 7, at 238 n. 94; Ralph S. Brown, *The Widening Gyre: Are Derivative Works Getting Out of Hand*, 3 CARDOZO ARTS & ENT. L.J. 1, 21 (1984).
- 31 Christina Bohannan, *Taming the Derivative Work Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 696–7 (2010); Voegtli, *supra* note 29, at 1265–6; Netanel, *supra* note 23.
  - 32 Tyler Ochoa, *Copyright, Derivative Works, and Fixation: Is Galoob a Mirage or Does the Form(Gen) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMP. & HIGH TECH. L. J. 991, 1020 (2004).
  - 33 Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1047 (1997).
  - 34 The possibility to use a compulsory license mechanism for derivative works was suggested by a small number of commentators, most of which immediately ruled out such mechanism for unjustified reasons to my concern. See Voegtli, *supra* note 29, at 1264–5.
  - 35 Steven S. Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed To Attain Copyright Protection in a Derivative Work*, 40 SANTA CLARA L. REV. 325, 350–77 (2000); NIMMER ON COPYRIGHT, *supra* note 19, at 3.03.
  - 36 Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technologies*, 4 J. SMALL & EMERGING BUS. L. 57, 77–8 (2000).
  - 37 The main discussion in the American literature and case law focussed on post-modern art, which aims at, by definition, using preexisting works, and specifically to environmental sculptures and sampling, remix and mash-up techniques in the musical world. See Voegtli, *supra* note 29, at 1221–6; Dicola, *supra* note 9; Landes & Posner, *supra* note 24, at 254–69.
  - 38 Most of the literature in this field focuses on post-modern or appropriation art. See, e.g., Philip A. Gunderson, *Danger Mouse's Grey Album, Mash-Ups, and the Age of Composition*, 15(1) POSTMODERN CULTURE 4 (2004); John Shiga, *Copy-and-Persist: The Logic of Mash-Up Culture*, 24 CRITICAL STUD. MEDIA COMM. 93 (2007); Nicholas Diakopoulos, Kurt Luther, Yevgeniy “Eugene” Medynskiy, Irfan Essa, *The Evolution of Authorship in a Remix Society*, PROCEEDINGS OF THE EIGHTEENTH CONFERENCE ON HYPERTEXT AND HYPERMEDIA 133–34 (Simon Harper et al. eds, 2007).
  - 39 For elaboration on the idea of progress in copyright law see Michael Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. IP L.J. 3 (2001).
  - 40 Transformative use is a term suggested by Judge Pierre N. Leval in his article Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). The term was later adopted by the Supreme Court of the United States in *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 576 (1994). Transformative use was defined as a use that adds something new of different purpose or character and changes the first expression. For elaboration see Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 724, 746 (2011).
  - 41 For elaboration on the Lockean provisos see Robert P. Merges, JUSTIFYING INTELLECTUAL PROPERTY 48–66 (2011).
  - 42 Abraham Drassinower, *Taking User Rights Seriously, in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462, 471 (2005); Abraham Drassinower, WHAT'S WRONG WITH COPYING? 222–4 (2015).
  - 43 For the argument that the individual's autonomy is at the heart of the personality approach to copyright see Neil Netanel, *Copyright Alienability Restrictions*, 24 RUTGERS L.J. 374, 374–6 (1993).
  - 44 Hans-Georg Gadamer, TRUTH AND METHOD 306 (2nd edn, Joel Weinsheimer & Donald G. Marshall trans. & revs., 2004).
  - 45 Roberta Rosenthal Kwall, THE SOUL OF CREATIVITY 2–3 (2010).
  - 46 NIMMER ON COPYRIGHT, *supra* note 19, at § 8.09[A][1].

20 *Introduction*

47 *See, e.g.*, Gervais, *supra* note 28, at 844.

48 Copyright, Designs and Patents Act, 1988 s. 21(5).

49 This notion was suggested by Samuelson. *See* Samuelson, *supra* note 27, at 1510 and the literature described in note 24 *id.*

50 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 86 HARV. L. REV. 1089 (1972).