

COPYRIGHT AS A PLATFORM FOR ARTISTIC AND CREATIVE FREEDOM

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INTRODUCTION

What is the relationship between copyright and artistic freedom? At first glance, it is easy to focus on copyright's restrictions. After all, copyright makes it harder for artists to copy other people's work. By imposing restrictions on what artists and creators can incorporate into their art without permission, copyright places some limits on artists' freedom to do exactly what they want with their art.¹ In recent years there has been much discussion about these restrictions, and the common implicit conclusion is that, for the sake of artists, copyright law should be relaxed to make it easier to copy the creative expressions of others.² The resulting conventional wisdom views cop-

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¹ Copyright owners enjoy exclusive rights to reproduce, publicly distribute, publicly perform, publicly display, and prepare derivative works based upon their copyrighted works. The applicable exclusive rights can vary slightly depending on the art form. 17 U.S.C. § 106 (2012).

² See, e.g., Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 352-58 (2014) (discussing how "[r]emixed music does not fit comfortably within copyright law's 'exclusive rights' regime" and proposing a remix compulsory license); Martin Skladany, *Alienation by Copyright: Abolishing Copyright to Spur Individual Creativity*, 55 J. COPYRIGHT SOC'Y U.S.A. 361, 367-68 (2008) ("Reducing the strength of copyright . . . could substantially expand the scope of creative and political freedom by opening up artists' access to our culture's language and symbols."); Emily Meyers, Comment, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 219 (2007) ("Because many artists and scholars of art history lack the specialized legal knowledge required to understand fully their rights under the existing copyright system, they fear legal prosecution for their use of existing works or images. These artists' and scholars' expression is therefore unnecessarily chilled."); Michael Allyn Pote, Comment, *Mashed-Up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 650-51 (2010) ("[S]ects of the public, and many mashup remixers, have opposed the greater control of content owners, pushing for increased access to and free use of copyrighted works. Many proponents of mashups argue that the current copyright laws of the United States are antiquated and stifle creativity, and thus the progress of the arts, by not allowing mashup remixers to essentially use any sample that they want when making mashups, whether they are authorized to use them or not." (footnotes omitted)); Mike Masnick, *Another Appropriation Artist Loses Copyright Lawsuit; Are We Nearing the End of Appropriation Art?*, TECHDIRT

right as an inhibiting force on artists' ability to fulfill their creative potential and to express themselves freely in their art.

This conventional wisdom misunderstands the role that copyright plays in fostering and enabling artistic and creative freedom. In particular, the conventional wisdom relies on an overly narrow view of artistic freedom that fails to account for the realities of life as an artist and that ignores many of the variables that factor into whether artists are truly empowered to create. It also takes an unnecessarily broad view of freedom, assuming incorrectly that any restriction on the creative process will only serve to thwart creativity.

Artists don't create their works in a vacuum. Like everyone else, they have myriad needs and responsibilities in their lives that affect their freedom to create artistic works. They need to put their kids through college, pay the mortgage, save for retirement, and pay for healthcare expenses. Just like everyone else, they worry about how they'll support themselves and their families. As popular as the "starving artist" cliché may be, real artists need food. Meeting artists' basic needs goes a long way towards empowering them to create their art. Copyright's role in giving artists the economic freedom to meet their basic needs—by generating income from their art—is an important part of the relationship between copyright and creative freedom.³

Another oft-overlooked aspect of creative production is the time and investment that artists spend mastering their craft. In order to achieve their creative vision, artists can spend countless hours developing the skills of their trade. Whether it's a guitar player practicing four hours a day to keep her skills fresh or a painter sketching the same face hundreds of times to get it just right for the canvas, this "behind the scenes" work gives artists the foundation necessary to produce the music, movies, books, and other creative works that everyone enjoys. When one examines how copyright affects artistic freedom, it is important not to lose sight of the role that copyright plays in giving artists the time and resources—effectively the freedom—to truly master their craft.

Even for artists who can meet their basic needs and who have the requisite skills to produce their art, many creative works are still not cheap or easy

(June 10, 2011), <https://www.techdirt.com/articles/20110607/22123814604/another-appropriation-artist-loses-copyright-lawsuit-are-we-nearing-end-appropriation-art.shtml> (“[Y]ou have to wonder if the popularity of ‘appropriation art’ is about to take a nosedive, as there’s just too much liability involved. So, there we go: judges killing another art form. That should trouble anyone who cares about culture.”). Or for a very direct take on what should happen to copyright, see Rick Falkvinge, *The Copyright Monopoly Should Be Dead and Buried Already*, TORRENTFREAK (Aug. 3, 2014), <https://torrentfreak.com/copyright-monopoly-dead-buried-already-140803/> (“Kill copyright, already. Get rid of it. It hurts innovation, creativity, our next-generation industries, and our hard-won civil liberties.”).

³ See TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 16 (1998) (“Economic circumstances influence the ability of artists to express their aesthetic aspirations. Specifically, artistic independence requires financial independence and a strong commercial market.”); Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 119-22 (2008) (discussing how copyright is the best institutional arrangement for fostering successful commercial creative industries).

to produce. While it's fashionable to point out that technology has lowered the costs of artistic production, creating art can nonetheless require significant investment of time and money. As an example, at the cheaper end of the spectrum of music recording, the costs for the computers, software, microphones, and instruments that musicians use to home-produce songs still aren't negligible,⁴ and the price tag rises quickly when musicians shift to studio albums. For a high-quality, professional album, costs for the studio, recording engineer, producer, studio musicians, back-up singers, mixing, and mastering can push the price tag into the hundreds of thousands of dollars.⁵ In film, independent film budgets can run into the millions of dollars,⁶ and the biggest blockbusters can reach into the hundreds of millions of dollars.⁷ Without copyright to secure creators' property interests in their work, it is hard to fathom how artists would be empowered to undertake movie projects like *Star Wars* or *Guardians of the Galaxy*; one can only imagine how quickly potential investors would run away.⁸ Copyright's role in allowing artists to secure financing for their work is another important aspect of the relationship between copyright and creative freedom.

This Essay looks beyond the conventional wisdom to explore the broader relationship between copyright and artistic freedom. Artistic freedom isn't just about artists' freedom to do *exactly* what they want with their art, even if that means copying directly from other artists; it's much broader than that. Artistic

⁴ See Dan Wilson, *The Best Recording Equipment for Home Studios*, RICHEST (Dec. 30, 2013), <http://www.therichest.com/business/technology/the-best-recording-equipment-for-home-studios/?view=all> (recommending several thousand dollars' worth of recording equipment for musicians seeking to record from home).

⁵ The International Federation of the Phonographic Industry estimates that recording costs for emerging pop acts in major markets average between \$150,000 - \$500,000. INT'L FED'N OF THE PHONOGRAPHIC INDUS., *INVESTING IN MUSIC 13* (2014), http://www.ifpi.org/content/library/Investing_In_Music.pdf.

⁶ See Gregg Goldstein, *Facetime: Trio Behind Green Light Talks Indie Film*, VARIETY (Dec. 10, 2015), <http://variety.com/2015/film/festivals/facetime-trio-behind-green-light-talks-indie-film-1201658971/> (discussing "\$10 million and under" as the sweet spot for indie film budgets); Adam Leipzig, *Sundance Infographic 2015: Dollars and Distribution*, CULTURAL WEEKLY (Jan. 28, 2015), <http://www.culturalweekly.com/sundance-infographic-2015-dollars-and-distribution/> (estimating average budget for dramatic features submitted to the Sundance Film Festival in 2015 at \$1.7 million).

⁷ For some examples of blockbuster film production costs, see Brooks Barnes & Michael Cieply, *Hollywood Is Producing Higher Highs, Lower Lows*, N.Y. TIMES (Nov. 8, 2015), http://www.nytimes.com/2015/11/09/business/media/hollywood-is-producing-higher-highs-lower-lows.html?_r=0 (noting that the James Bond movie *Spectre* cost approximately \$400 million to produce); Ben Fritz, *A Comedown for Big-Budget Movies*, WALL ST. J. (June 30, 2013), <http://www.wsj.com/articles/SB10001424127887323689204578574140194257044> (listing several movies that cost in excess of \$100 million to produce, including *The Lone Ranger* (\$250 million), *White House Down* (\$150 million), *Pacific Rim* (\$200 million), *Turbo* (\$135 million), and *R.I.P.D.* (\$130 million)).

⁸ See Sean M. O'Connor, *Creators, Innovators, and Appropriation Mechanisms*, 22 GEO. MASON L. REV. 973, 982-83 (2015) (noting that apart from charitable contributions for creative works, "it should be clear that no one would invest without some appropriation mechanism that would provide them with a favorable return on their investment through the monetization of the commercialized goods or services. If they cannot see a way to get such a return, they will not make the investment.").

freedom is about artists being able to flourish, making a good enough living through their art to support themselves, their families, and their artistic endeavors. It's about artists being able to devote themselves to their art and to perfect themselves into the best artist they can be. It's about being free to dream big and to pursue ambitious artistic projects. And it's about being free to create works that are relevant to one's experiences, passions, and culture. Copyright is a great platform for enabling artists to do all of these things. And, as an added bonus, it encourages a diverse, rich, commercial culture in the process. While some lament the inability of creators to copy whatever they choose, the fact is that copyright enables creators to do what they do best: create new works that benefit us all.

Part I of this Essay examines how copyright gives artists the economic freedom to capture the value of their art. Part II discusses how copyright's economic freedom fosters artistic freedom by supporting a professional class of artists and creators. Part III explores how copyright's economic freedom enables artists to pursue ambitious projects and to focus on their art.

I. COPYRIGHT'S ECONOMIC FREEDOM

One of the more perplexing aspects of the interplay between copyright and creative freedom is the relationship between creativity and money. Artists and creators might say that their work is "not about the money," and it's undeniable that non-monetary factors inspire artists to create.⁹ Listening to Bob Dylan's melancholy in *If You See Her, Say Hello* or Bruce Springsteen's confrontational anger in *Badlands*, it's easy to imagine that these artists might have expressed those emotions through their art even without an expectation of profit. The same holds true for countless other works of art. Whether one is laughing along to the comedic genius in *The Big Lebowski* or being moved to tears by the tragic tale in *The Kite Runner*, it's not hard to understand what artists mean when they say that they don't create their art "for the money."

But the story doesn't end there. As we examine the relationship between copyright and creative freedom, it is important to understand that even if many artists don't "do it for the money" per se, money still plays a key role in determining what kind of art they are able to create and how much time they can spend creating it.¹⁰ Instead of asking whether artists are creating art "for the

⁹ See Mark Schultz & Devlin Hartline, *Copyright's Republic: Promoting an Independent and Professional Class of Creators and Creative Businesses*, CTR. PROTECTION INTELL. PROP. (June 5, 2015), <http://cpip.gmu.edu/2015/06/05/copyrights-republic-promoting-an-independent-and-professional-class-of-creators-and-creative-businesses/> ("We can take creators at their word: There are many nonmonetary factors that influence and incentivize creativity, such as love, independence, curiosity, and passion. In fact, thinking about the money can hurt the creative process.").

¹⁰ See *id.* ("[W]hile creators may not 'do it for the money,' the money is what makes it possible for them to spend their time honing skills and creating high-quality works. The money endows a professional class of creators and the various creative industries and channel partners that support them."); see also

money,” perhaps the more important question is, “What does the money make possible?” And this is where copyright comes into play.

Copyright functions as a private property right that enables artists to live and make money as entrepreneurs in a free market.¹¹ Private property rights come in many different forms, and the contours of specific property rights vary depending on the form they take.¹² As an example, property rights in land are different from property rights in water, which in turn are different from property rights in wild game and fish.¹³ While copyright—like all intellectual property rights—has different limitations and characteristics than tangible property rights, it is important to understand that these distinctions merely frame copyright as a different *type* of property right, not as something other than property.¹⁴

Private property rights are a key component of free markets and economic freedom. Among other things, they serve the important function of securing to people the value that they create through their productive labors.¹⁵ When

Schultz & van Gelder, *supra* note 3, at 92 (“People in every nation, poor or rich, are just as creative and innovative as anywhere else. Their opportunity to utilize their ability to make a living, however, depends largely on the legal and business environments of the countries in which they live.”).

¹¹ It is worth noting that some critics have referred to copyright as a “monopoly” instead of a property right. But as Stan Liebowitz deftly explains, copyright only produces a “monopoly” in the same sense that all property rights, “by the definition of ownership . . . provide a literal monopoly over the property covered by the right.” Critics of copyright “erroneously treat the definitional monopoly of a property right as being the same as an economic monopoly in a market.” Unless we intend to use the terms “property” and “monopoly” synonymously, copyright is correctly understood as a property right, not a monopoly. Stan J. Liebowitz, *A Critique of Copyright Criticisms*, 22 *GEO. MASON L. REV.* 943, 947, 949 (2015); accord Adam Mossoff, *Is Copyright Property?*, 42 *SAN DIEGO L. REV.* 29, 34 (2005) [hereinafter, Mossoff, *Is Copyright Property?*] (“When Internet exceptionalists thus maintain that ‘[c]opyright is not about ‘property,’ . . . [i]t is a specific state-granted monopoly issued for particular policy reasons,’ then they must also maintain that no legal rights in any tangible things are *property*. Everything that everyone owns—tangible or otherwise—represents only state-granted legal monopolies issued to individuals for particular policy reasons.” (alteration in original) (footnote omitted)); Tom Sydnor, *Can Economic and Historical Analyses End Copyright Law’s Property/Monopoly Disputes?* (Am. Enterprise Inst., Wash. D.C.), Oct. 2015, at 1, <https://www.aei.org/wp-content/uploads/2015/10/Can-economic-and-historical-analyses-end-copyright-laws-property-monopoly-disputes.pdf> (“Copyrights are best classified as private property rights for three reasons: (1) they do not grant trade monopolies; (2) all private property rights can be called legal monopolies; and (3) copyrights are no more prone to generate antitrust monopolies or monopolistic competition than exclusive rights in other forms of real, personal, and intellectual property.”).

¹² See Mossoff, *Is Copyright Property?*, *supra* note 11, at 39-40; see also Adam Mossoff, *Why Intellectual Property Rights? A Lockean Justification*, *LIBR. L. & LIBERTY* (May 4, 2015), <http://www.libertylawsite.org/liberty-forum/why-intellectual-property-rights-a-lockean-justification/> [hereinafter Mossoff, *Why Intellectual Property?*].

¹³ Mossoff, *Why Intellectual Property?*, *supra* note 12.

¹⁴ See *id.*

¹⁵ Mossoff, *Is Copyright Property?*, *supra* note 11, at 41 (“A person’s right to control the disposition of his creation, and thereby enjoy the fruits—the profit—of his labors, is central to the legal definition and protection of property entitlements.”).

coupled with freedom of contract,¹⁶ they give people the freedom and flexibility to decide how best to capture that value. Some people choose to capture the value of their creations by contracting out their time and skill as employees, while others choose to capture value by selling their creations directly to consumers. Others choose a combination of the above or different models altogether. Regardless of how someone chooses to capture the value of her work, the important point is that private property rights like copyright enable a wide variety of business models that allow value-creators—as property owners—to determine the best way to support themselves so that they can continue to engage in productive labor.¹⁷

Copyright is the primary private property right that allows artists to secure the value of the artistic works they create.¹⁸ Absent a contractual arrangement to the contrary, copyright enables artists to exercise ownership over their art. In the United States, copyright gives artists ownership of their works through, among other things, exclusive rights to (1) reproduce their works, (2) prepare derivative works based on their works, (3) distribute copies of their works to the public, and, with respect to certain art forms, to (4) perform their works publicly, and (5) display their works publicly.¹⁹ It makes sense that an artist should own the works that she creates. After all, these are works that would not exist but for the artist's effort in creating them in the first place. An artist's works are intimately intertwined with the artist's personal creativity—they are an expression of the artist's vision and skill—and from a moral standpoint it is difficult to argue that anyone else should have a higher claim to them than the artist.²⁰

¹⁶ In fact, a robust system of private property rights acts as a pre-condition to much of the value gained by freedom of contract, as property rights are often the underlying assets that contracts address.

¹⁷ Using the music industry as an example, Schultz and van Gelder explain how copyright “allows for greater experimentation among business models and creative visions. Those in the music business are free to take both creative and business risks. They can experiment with new genres, new production methods, and new business models. Some of these experiments will work well. Some will not. But the distributive nature of copyright allows many things to be tried, thus creating a greater chance one will find out what does work.” Schultz & van Gelder, *supra* note 3, at 120.

¹⁸ This is especially true in the digital age, where control of physical property—such as hard copies of DVDs, CDs, or books—is woefully insufficient for controlling the dissemination of the underlying works.

¹⁹ 17 U.S.C. § 106 (2012).

²⁰ In a 1783 letter to the Continental Congress, author and politician Joel Barlow captures this point perfectly:

There is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination: And when he has spent great part of his life in study, wasted his time, his fortune & perhaps his health in improving his knowledge & correcting his taste, it is a principle of natural justice that he should be entitled to the profits arising from the sale of his works as a compensation for his labor in producing them, & his risque of reputation in offering them to the Public.

Letter from Joel Barlow to the Continental Congress (Jan. 10, 1783), *Primary Sources on Copyright (1450-1900)*, COPYRIGHTHISTORY,

http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1783b&show=all (last visited May 22, 2016) (publishing a photocopy of the original document residing at the National

Furthermore, giving artists property rights to the works that they create has important implications for their economic freedom. Ownership comes with options and opens up doors that are generally not available in the absence of property rights. Artists who own their art can deploy their property in the marketplace through various business models including selling it, licensing it, performing it, or some combination of the above. And, of course, they're still allowed to give it away for free, perhaps making money from related products, if that's what they prefer.

Without property rights in their art, creators would be limited in the business models they could pursue to generate income from their work. Instead of being able to capture the real value of their art in a free market, they would be forced to rely on alternative revenue streams—such as patronage, sales of ancillary products, live performance revenue, or advertising revenue—to support their work.²¹ Unfortunately, these revenue streams come with serious limitations. Government or philanthropic patronage, for example, leaves artists at the mercy of the government officials or donors who control the purse strings. Compared to free markets, these individuals do a far worse job of processing information and allocating resources.²² Furthermore, relying on patronage threatens artistic independence by forcing artists to satisfy the preferences of a very small number of decisionmakers in order to secure support, rather than appealing to a broad variety of potential consumers.²³ In the case of government patronage, there is the additional risk that the decisionmakers will be influenced by special interest groups, and both government and philanthropic patronage run the risk that everyday bureaucratic hassles will dampen artistic freedom.²⁴

Being forced to give art away for free in the hopes of generating revenue from live performances, sales of ancillary products, or sales of advertising presents similar difficulties for artists' economic freedom. For one thing, not all art lends itself to these revenue streams.²⁵ Even for art that does, to the extent consumers place value in the art itself (and not just in accompanying performances or products), why should artists be limited to capturing value from

Archives, Center for Legislative Archives: Papers of the Continental Congress, RG 360, 4: 369-373 (No. 78)). For a brief discussion of Joel Barlow's role in the development of American copyright law, see Terry Hart, *Letter from Joel Barlow to the Continental Congress (1783)*, COPYHYPE (Jan. 28, 2013), <http://www.copyhype.com/2013/01/letter-from-joel-barlow-to-the-continental-congress-1783/>.

²¹ See Schultz & van Gelder, *supra* note 3, at 109.

²² *Id.* at 110-11 ("Market institutions, like property rights (the most relevant here being copyright), are far more effective [at developing creative industries], in part because they push decision-making down to the broadest, most distributed level.").

²³ *Id.* at 112-13 ("The more centralized funding is, the more it threatens to dampen creativity and interfere with creative freedom.").

²⁴ See *id.*

²⁵ See Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 721 (2009) ("Alternative business models based on exploiting the positive effects of widespread copying seem theoretically possible. But reality often proves far more difficult.").

these tangential revenue streams, particularly if these revenue streams are less lucrative than the potential market for the underlying art?

These alternative models paint a much bleaker economic proposition than deploying property rights in a free market, and they prove particularly difficult for those seeking to live careers as professional artists. In giving artists a marketable property right to the fruits of their creative labors, copyright gives artists the economic freedom to determine for themselves the best way to capture the value of the art they have created. In effect, it puts artists in the same position as other entrepreneurs. In order to be successful, artists need to find a market for their work, but like other entrepreneurs, they have the freedom to decide the best way to do this.²⁶

One of the beauties of copyright's market-based approach is that it allows for creative markets of many shapes and sizes. Copyright empowers a wide variety of artists to thrive not only in the mainstream, but also in diverse and smaller markets.²⁷ Equipped with a marketable right to the fruits of their labor, artists can sustain careers in lesser-known markets with niche fans. And sometimes these niche artists (or even entire genres) find themselves propelled into the mainstream by shifts in audiences' commercial preferences.²⁸

This market-based approach increases the likelihood that artists will speak to the experiences, passions, and creative sensitivities that they share with their audiences, because artists market their works to those very audiences.²⁹ Furthermore, commercial markets for creative works play an instrumental role in giving artists from minority or otherwise marginalized backgrounds the chance to contribute their diverse voices to our creative culture.³⁰ Far from stifling creative freedom, copyright's economic freedom empowers the production of a broad range of powerful, culturally significant works that speak to the many different constituencies in our society.

This economic freedom has several other important benefits for creative freedom. Part II addresses copyright's role in allowing creators to dedicate their lives to their art.

²⁶ See Schultz & van Gelder, *supra* note 3, at 119-20; Schultz & Hartline, *supra* note 9.

²⁷ See COWEN, *supra* note 3, at 8, 22-24.

²⁸ See Julianne Escobedo Shepherd, 2011: *The Year Dubstep Broke*, MTVHIVE (Dec. 27, 2011), <http://www.mtvhive.com/2011/12/27/2011-the-year-dubstep-broke/> (discussing dubstep's move from niche to mainstream).

²⁹ See COWEN, *supra* note 3, at 24 ("Art consists of a continual dialogue between producer and consumer; this dialogue helps both parties decide what they want. The market incentive to conclude a profitable sale simultaneously provides an incentive to engage consumers and producers in a process of want refinement."); Schultz & van Gelder, *supra* note 3, at 108 (using Nashville as an example and noting how embracing the entrepreneurial value of copyright led to more "relevant" compositions).

³⁰ See COWEN, *supra* note 3, at 29-30 (noting that "[o]utsiders and marginalized minorities often drive artistic innovation" and that "[c]apitalism has allowed minority groups to achieve market access, despite systematic discrimination and persecution").

II. SUPPORTING A PROFESSIONAL CLASS OF ARTISTS AND CREATORS

Copyright creates opportunities for artists to live their lives as *professional* artists by giving them the economic freedom to capture the value of the art they create.³¹ When discussing the relationship between copyright and artistic freedom, it is easy to forget the difference between being free to make art and being free to *make a living* making art. This difference has serious implications for artistic and creative freedom because it plays an important role in determining how much time an artist can spend mastering her craft and making her art. Professional artists have much more time to dedicate to their art and thus are free to develop their art and their skills in a way that is not possible for most amateurs. As a result, professional artists are more likely to be able to create the kind of art that actually satisfies their artistic vision.³²

In many ways, the issue boils down to simple math. There are twenty-four hours in a day, and every hour that an artist has to spend not working on her art is an hour that she won't dedicate to fulfilling her artistic vision. Artists aren't machines churning out hit songs and screenplays 24/7 in a creative works factory. Just like everyone else, they likely need to generate income to support themselves and their families.³³ Like people in other professions, when push comes to shove, they tend to recognize that basic needs trump other goals and aspirations. After all, it's hard for artists to follow their dreams if they don't know where their next meal will come from or whether they will find somewhere to spend the night indoors. Ultimately, most artists will find a different day job to pay their bills if they can't make ends meet through their art, thus relegating their art to a hobby.

This isn't to say that hobbyists and amateurs don't enjoy any artistic freedom. Hobbyists still enjoy artistic freedom in the sense that they can create the art they want to *within the boundaries of the limited time and resources they have available to do so*. This also isn't to say that hobbyists don't ever enjoy artistic success. For example, a hobbyist could find success and cultivate a

³¹ See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 196-98 (2011) (arguing that copyright should support a professional class of creators); see also O'Connor, *supra* note 8, at 989-91.

³² It is important to understand that this does not mean that any artists who wishes to pursue a career as a professional will be successful in doing so, nor does it mean that hobbyists and amateurs are *never* free to develop their art to their creative satisfaction. Like any other profession, success still requires a combination of hard work and luck. Copyright simply *puts creators in a much better position* to pursue careers as professional artists and to fulfill their artistic vision. See O'Connor, *supra* note 8, at 990-91.

³³ Like in any other profession, some percentage of artists will be independently wealthy individuals who can afford to dedicate their lives to their art without concern for earning a living. But would we want to live in a world where only the independently wealthy can afford to pursue careers as full-time artists? One of the beautiful things about copyright (and property rights in general) is that it has a democratizing effect. By securing to artists the value of their creations, copyright empowers artists from all segments of the economic spectrum to finance their careers and support themselves by commercializing their artistic works.

large fan base by posting amateur videos of his work on YouTube.³⁴ But because they have so much less time to work on their art, hobbyists generally have far less freedom than professional artists to develop their art to fulfill their creative vision.³⁵

For one thing, hobbyists and amateurs are far less likely to have enough time to develop the underlying skills necessary to produce the kind of art that satisfies their creative vision. Much like other crafts, artistic work often requires significant underlying skills that take time and effort to develop.³⁶ Some examples of this are obvious. A professional violinist or pianist might spend hours every day practicing her instrument in order to keep her skills at a high-enough level to smoothly play her repertoire. Guitar players and bassists talk about needing to keep their “chops” fresh.³⁷ And scores of other musicians spend years developing the instrumental or vocal skills they need in order to achieve their musical goals.³⁸

Musicians aren’t the only artists developing technical skills. Sculptors may spend countless hours mastering the art of carving marble, soapstone, or alabaster with elegant precision and finesse. Painters, cartoonists, and sketch artists might similarly spend years developing the skills to get their characters and scenes just right. Likewise, many photographers and cinematographers may need to master a wide variety of equipment and techniques in order to capture the images that comprise their art. Across art forms, it takes creators time—often lots and lots of time—to develop and maintain their technical skills to the point where they are free to turn their creative visions into reality.³⁹

And the technical skills are just half the story. Creativity itself is a skill that takes time and practice to develop. Artists can spend years developing the

³⁴ It is worth noting that even hobbyists that are able to achieve success in this way don’t necessarily see it as fulfilling their creative vision. Using the example of Justin Bieber—arguably “the most famous case of the [YouTube success] phenomenon”—Sean O’Connor explains that “Bieber followed up his YouTube fame by signing with a label and a manager that put him into a professional studio with professional producers, and recorded highly produced pop music.” O’Connor, *supra* note 8, at 989.

³⁵ *See id.* at 989-90 (“The issue is not whether people will create new songs and other content without appropriation mechanisms such as copyright, but whether they can *produce* them to the degree we (and they) would like.”).

³⁶ *See id.* at 990 (“There is, however, a direct and pragmatic argument for the value of a full-time creative class: maintaining and being at the top of one’s craft requires daily practice.”); Ruth Blatt, *Why Eminem Calls Himself a Savant, and Why We Want to Believe Him*, FORBES (Dec. 5, 2013), <http://www.forbes.com/sites/ruthblatt/2013/12/05/why-eminem-calls-himself-a-savant-and-why-we-want-to-believe-him/> (discussing how artists work hard developing their talents and noting that “any musician you’ve heard of has honed his or her craft through thousands of hours of hard deliberate training”).

³⁷ For a brief dive into the “chops” phenomenon, see O’Connor, *supra* note 8, at 990.

³⁸ For an interesting discussion about the nature and amount of practice undertaken by expert musicians, see K. Anders Ericsson, *The Influence of Experience and Deliberate Practice on the Development of Superior Expert Performance*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 683, 693-94 (K. Anders Ericsson et al. eds., 2006).

³⁹ *See* O’Connor, *supra* note 8, at 990-91.

“creative muscles” they use to produce their works, even after they develop the necessary technical skills to produce their art. A musician might write thousands of songs that she simply discards as “rough drafts” or “practice” for the handful of songs that achieve what she seeks to communicate or capture. And even once a painter or sketch artist has the technical skills to capture the characters and scenes of her choosing, she still needs the creative skills to *choose* the right characters and scenes to communicate her artistic message. Photographers and cinematographers likewise spend their lives developing the “vision” they use to identify the right images and scenes for their work.

Perhaps no artists understand this more than writers. Unlike many other art forms, writing generally doesn’t involve mastering a physical instrument or physical technique. Nonetheless, great writers still possess creative skills that can take years to develop. Anyone who has even just written an essay for school understands the inherent difficulty in turning thoughts and ideas into compelling prose. The ability to write clearly, vividly, or generally in a way that is enjoyable to read is a skill that authors spend the bulk of their lives nurturing. And just like the musicians that may produce thousands of discarded songs to the handful of finished products, writers likewise produce countless discarded drafts in developing the skills that lead to their published books or articles.

Simply put, art takes time. Between the time required to develop the necessary foundational skills and the time required to produce artistic works themselves, professional artists enjoy far more freedom than hobbyists to dedicate the necessary time to achieve their artistic goals. And by securing to artists the value of their creative works—by giving them a property right in their works—copyright gives artists a marketable asset that empowers them to pursue careers as professional creators.⁴⁰

This freedom does not come without limitations. Artists are still constrained by market demands. Just like other entrepreneurs, in order to be successful artists need to find customers or employers interested in the works or skills they are selling.⁴¹ Hobbyists who expect and require no profit from their

⁴⁰ See *id.* (“Enabling a mechanism so that creators and inventors can get paid for engaging in creation/invention means that they can do it more frequently—without the distractions of having to make money doing something else—which in turn increases the chances they will produce their best work. To be clear, this is not about ‘high art’ versus ‘low art.’ It is about the artist having the time and tools to perfect whatever kind of creative expression she envisions.”).

⁴¹ This framework redounds not only to artists’ benefit, but also to the public’s benefit. Terry Hart explains:

Like any free market, enabling a free market in creative works tends toward the public good. Copyright is the economic building block of this market, allowing voluntary transactions to occur and private ordering to emerge. It encourages investment in creating and distributing the types of works that advance society and enrich our lives, the types of works that shouldn’t be considered an afterthought.

Terry Hart, “*The Profit Motive Is the Engine that Ensures the Progress of Science*”, COPYHYPE (Mar. 24, 2014), <http://www.copyhype.com/2014/03/the-profit-motive-is-the-engine-that-ensures-the-progress-of-science/>.

art are more “free” in the sense that they can create any art they desire without concern for quality or customer demand. Because of copyright, artists are also constrained by the property rights of other artists. In a world without copyright, artists could freely copy other people’s art without regard for ownership.

However, it is important to remember that freedom does not mean the absence of all limitations. In fact, limitations on some activity are important to secure freedom.⁴² More importantly, freedom also includes empowerment to succeed. In a world without copyright, the freedom artists would gain by being able to freely copy could quickly be outweighed by the freedom they would lose in no longer having a property right in their work that empowers them to pursue careers as professionals. Moreover, there is little reason to believe that the constraints imposed by copyright actually harm creativity. While it is true that creativity is to some degree cumulative, building upon what came before, restrictions encourage downstream users to actually create something new.⁴³

Without a marketable property right in their art, most full-time artists would be forced to rely on patronage or ancillary income to support themselves, or would have to make serious sacrifices for the sake of their art. These sacrifices could include things like not having children, not having adequate healthcare, skipping meals, or relying on friends or parents to provide housing. While there are many romantic notions about the sacrifices that artists make for their art, it certainly isn’t fair to expect artists to make these kinds of sacrifices simply to avoid securing as property the works that they create—works that would not exist but for their labors. We don’t expect these kinds of sacrifices from value-creators in other professions, and we shouldn’t expect them from artists either.

By empowering artists to make a living through their art, copyright gives them the freedom to devote the necessary time to produce art that satisfies their creative vision. But copyright’s contribution to artistic freedom doesn’t end there. Part III discusses how copyright supports artists’ more ambitious projects.

III. ENABLING ARTISTS TO DREAM BIG AND FOCUS ON THEIR WORK

Copyright’s economic freedom gives creators important artistic freedom by allowing them to undertake large-scale projects that would be difficult to organize and finance absent a property right in the finished product.⁴⁴ Even for

⁴² There are many examples that emphasize this point. In this context, the most obvious is that restricting people’s freedom to *steal* is an important component of securing people’s freedom to *own* the fruits of their labor.

⁴³ See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1337 (2015) (“[T]he creative process . . . thrives best not under complete freedom, but rather under a moderate amount of restriction.”).

⁴⁴ See O’Connor, *supra* note 8, at 982 (noting that investors rely on appropriation mechanisms—like intellectual property rights—to justify their investments).

artists who make a living from their art—and who have the necessary *time* to dedicate to their artistic vision—works of art themselves can be very expensive and complicated to create.⁴⁵ By securing a property right in the finished product, copyright gives artists an asset they can use to secure financing for “big dream” projects that are too expensive and ambitious for most artists to finance themselves. Through the exclusive right to prepare derivative works,⁴⁶ copyright also enables artists to dream big by sustaining and nurturing interrelated works over a long period of time.

Furthermore, by facilitating the division of labor, copyright gives artists the freedom to focus on their art—spending their time doing what they do best and love most—while working with channel partners to fulfill marketing, distribution, and other commercialization roles for their work.⁴⁷ Unlike alternative models for fostering creativity, copyright’s economic freedom encourages efficient allocation of resources, increasing the likelihood of successful industries and markets to sustain creative projects and careers.⁴⁸

Even if an artist has all the free time in the world to dedicate to her art, many projects are simply too expensive to undertake without significant financing and coordination that go well beyond the means of most artists. Movies are a good example of this. To begin with, filmmakers have to secure a screenplay and hire the actors, the director, the cinematographer, and the other people that appear in the opening credits. But as anyone that has watched the end credits for a movie knows, there are hundreds, if not thousands, of people that contribute to great movies. These jobs range from somewhat familiar roles—lighting technicians, art department assistants, sound mixers, hairdressers, make-up artists, carpenters, caterers, costume designers, etc.—to more exotic roles like aerial camera pilots, greensmen, prosthetic artists, specialist researchers, armorers, and marine camera crews.⁴⁹

Furthermore, filmmakers have to purchase or rent all of the hardware and equipment used in production. This includes everything from the audio-visual equipment itself—cameras, microphones, tripods, boom stands, etc.—that capture the images and sounds of the movie, to the wood, metal, glass, plastic, and construction equipment used to build the sets. It also includes food, costumes, props, vehicles, and myriad other supplies and equipment. And it is not enough just to hire people and buy supplies; coordinating everything is in and

⁴⁵ See Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 391 (2013) (“Funding creative expression and then packaging and distributing it on a mass basis for commercial purposes are difficult tasks fraught with high cost and risk.”).

⁴⁶ See 17 U.S.C. § 106(2) (2012) (granting “the owner of copyright” the exclusive rights “to prepare derivative works based upon the copyrighted work”).

⁴⁷ See Barnett, *supra* note 45, at 391-92 (discussing how copyright and the resulting successful mass-cultural market for creative works “provides an efficient production and distribution infrastructure for the artists who supply creative inputs” to their channel partners).

⁴⁸ See Schultz & van Gelder, *supra* note 3, at 109-22.

⁴⁹ For an interesting list of job roles in the film industry, see *Job Roles*, CREATIVE SKILLSET, http://creativeskillset.org/creative_industries/film/job_roles (last visited May 22, 2016).

of itself a big task. Additionally, the items above don't include the time-consuming and expensive work that goes into marketing and commercializing a movie so that audiences around the world actually get to see it. All of this costs far more money than all but a very few artists can afford.⁵⁰

Movies aren't the only projects that lie beyond the financial reach of the vast majority of artists. Another example is high-quality recorded music. While advances in recording technology have made it easier for artists to record some types of music on the cheap, there is a big difference between recording a solo performance for YouTube and recording a high-quality studio album.⁵¹ Most musicians don't have the money to pay for the recording studio, recording engineer, producer, studio musicians, back-up singers, mixing costs, and mastering costs that can go into a high-quality studio project. And like with movies, these costs don't even include the expense of marketing, promoting, and distributing the finished product.⁵²

When it comes to large-scale "big dream" projects like these, copyright's economic freedom is paramount in giving creators the artistic freedom to pursue their creative vision. Because of copyright, large artistic projects culminate in a property right that allows the owner to capture the value of the art by commercializing it through a wide variety of mechanisms and business models. Copyright gives the owner the freedom to decide the means, timing, terms, and price point at which to offer her property (the film, album, etc.) to consumers.⁵³

Like any other entrepreneur, property rights allow artists to experiment with business models to find the most effective way to commercialize their product.⁵⁴ It is the promise of these property rights and the resulting potential revenue that attracts investors to these projects in the first place.⁵⁵ After all, investors generally prefer to invest their money in assets that will generate positive returns. Since the vast majority of artists cannot pursue these projects without first securing the necessary financing, copyright plays a fundamental role in giving artists the freedom to pursue "big dream" projects.

Copyright also gives artists the creative freedom to dream big in a different way: by nurturing clusters or groups of related works over long periods of

⁵⁰ See Barnett, *supra* note 45, at 395-97 (outlining the "non-creative tasks required to deliver a creative product to a mass market," including screening and packaging, financing, production, marketing, distribution, and exhibition).

⁵¹ See O'Connor, *supra* note 8, at 989-90 ("Quality production takes a lot more than a laptop and the free software that comes loaded on it.").

⁵² See Barnett, *supra* note 45, at 397.

⁵³ It is worth noting that this freedom exists only to the extent that artists' property rights are actually enforced and aren't watered down through compulsory licenses or exceptions to copyright that restrict artists' ability to deploy their property in a free market. The debates surrounding piracy and compulsory licenses for music in the United States provide a good example of the harm that artists and creative industries can suffer when property rights and free markets take a back seat to infringement and price regulation.

⁵⁴ See Schultz & Van Gelder, *supra* note 3, at 119-22.

⁵⁵ See Barnett, *supra* note 45, at 391-92.

time. By giving artists the exclusive right to prepare derivative works based on their works, copyright allows artists to release components of larger stories without fear that the characters or plot lines will be copied and distorted by others, potentially diluting the value of their work. Some artists use this opportunity to curate entire worlds of related works over many years, and the results can be quite impressive. The tremendous success of the *Harry Potter* and *Game of Thrones* series are great examples of what this important artistic freedom makes possible.

Not only does copyright enable artists to secure the necessary resources to undertake ambitious projects in the first place, it also allows them to focus on their art while partnering with others to help commercialize their work. One of the advantages of securing the value of art in a marketable property right is that property rights, when combined with freedom of contract, allow for the efficient division of labor—several parties can perform different roles in an industry, and they can all ultimately be compensated by the revenues generated from the products in that industry.⁵⁶ Instead of artists having to do everything themselves, they can work with channel partners to perform tasks that are better suited for their expertise. This not only increases artists' freedom to focus on their art, it also increases the likelihood that their art will be commercially successful because the various commercialization tasks can be performed by experts *in those tasks*.

These channel partners perform important marketing functions that are key to making consumers aware of art.⁵⁷ With the advent of the digital age, marketing channels have expanded, and there are myriad means by which artistic works are advertised to customers. In the film industry, we see movies marketed in both traditional formats—television and theatrical trailers, posters and billboards, mainstream journalism interviews and reviews—and creative new digital formats including social media campaigns, interactive websites, and a vast network of blogs and other digital outlets. The music industry similarly takes advantage of a wide range of marketing platforms to drive listeners to new artists, songs, and albums. Even in creative industries less known for their marketing, reaching customers is still essential to commercializing the art. In a digital world with seemingly innumerable outlets where potential customers can learn about new art, marketing expertise becomes all the more important to push an artist's work through the noise and into the hands (or more often the phones and tablets) of consumers.

Channel partners also play a key role in delivering art to consumers.⁵⁸ The digital age has brought a wealth of new formats and platforms that consumers can use to access artistic works. In addition to traditional formats, customers can stream movies and music on a wide range of devices through dozens of services, choosing the format and license model that best suits their budget and

⁵⁶ See *id.* at 390-95.

⁵⁷ See *id.* at 395-98.

⁵⁸ See *id.*

listening or viewing habits.⁵⁹ For example, for movies and television shows, consumers can choose between subscription streaming services and a variety of on-demand rental and purchase license options as well as ad-supported streaming options. For music, consumers can choose between digital radio and digital interactive ad-supported or subscription services as well as several purchase license options. Similarly, consumers can download millions of books and photographs under a variety of licenses with just the click of the mouse or the touch of a phone or tablet.

Even when working with pre-existing marketing and distribution platforms, successfully marketing and distributing creative works takes time and expertise that many artists are ill-suited to offer. While some artists spend considerable effort developing this expertise, that effort likely detracts from their freedom to dedicate time to their art itself. Furthermore, why should artists have to additionally become experts in marketing and distribution? Wouldn't it be preferable if they could dedicate their time to developing their art, leaving the marketing and distribution to people that already have expertise in those areas? Copyright empowers artists to do just that, capturing the efficiencies of the division of labor so that they can dedicate their time to their art.

CONCLUSION

To understand the relationship between copyright and artistic freedom, it helps to consider the broader context in which copyright enables artists and creators to thrive. While copyright restricts artistic freedom in the narrow sense that it places limitations on artists' ability to incorporate *anything* they want into their art without permission, this restriction is only one side of the equation; on the other side, copyright plays a critical role in fostering artistic and creative independence. By securing to artists a property right in the fruits of their productive labors, copyright gives artists the same economic freedom as other entrepreneurs. Copyright empowers artists to pursue success in whichever markets and through whichever business models work best for their creative visions. As a result, artists of all shapes and sizes—both mainstream and niche, and with a wide variety of social and cultural viewpoints—are free to develop and market their art in a rich, diverse, commercial marketplace.

Additionally, copyright's economic freedom supports a professional class of creators. These creators don't just make art, they *make a living* making art,

⁵⁹ For an interesting analysis of the availability of critically acclaimed and popular TV and film titles on legal streaming services in the United States, see KPMG LLP, *FILM AND TV TITLE AVAILABILITY IN THE DIGITAL AGE* (2014), <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/film-tv-report.pdf>. Among other things, the KPMG report concludes that as of December 2013, 94 percent of the most popular and critically acclaimed films were available on at least one of the 34 online video-on-demand services KPMG studied, and 81 percent were available on at least ten of the 34 services studied. *Id.* at 3.

enjoying the freedom to dedicate their time to their craft in ways that are impossible for most hobbyists. Copyright's economic freedom also gives creators the artistic freedom to dream big. By giving artists property rights in their creative works, copyright allows artists to secure financing for their more ambitious projects, to develop and sustain related projects over time, and to capture the efficiencies of the division of labor. Because of copyright, artists can focus on their art while working with channel partners to commercialize their work. By supporting artists and their work, copyright serves as a powerful platform for artistic and creative freedom.