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# Copyright as Myth

Jessica D. Litman
*University of Michigan Law School*, jdlitman@umich.edu



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# ESSAY

## COPYRIGHT AS MYTH

*Jessica Litman**

It has become fashionable to seek to formulate, or reformulate, copyright law as an expression of overarching grand theory. Perhaps the most prominent manifestation of this trend has been the recasting of copyright law in the mold of economic incentives;[1] a more recent upstart competitor seeks to reclaim the debate by invoking the philosophical precepts of Hohfeld, Hegel and Locke.[2] Occasionally, the literature gives us polite debates about which of the competing theoretical models is more misguided.[3] Meanwhile, another voice in the copyright

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* Professor of Law, Wayne State University. B.A., 1974, Reed College; M.F.A., 1976, Southern Methodist University; J.D., 1983, Columbia Law School. This essay is based on a paper delivered at the Society for Critical Exchange Conference on Intellectual Property and the Construction of Authorship, at Case Western Reserve University on April 21, 1990. I am grateful to Jonathan Weinberg, Avery Katz, Pamela Samuelson and Wendy Gordon for their helpful comments.

1. *See, e.g.*, 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 4-11 (1989); Richard Adelstein & Steven Perez, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L REV. OF L. & ECON. 209 (1985); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); John Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other than Profit or Sale Constitute Fair Use? An Economic Analysis of the* Sony Betamax *and* Williams & Wilkins *Cases*, 28 ST. LOUIS U. L.J. 647 (1984); William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1698-1744 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989).

2. *E.g.*, Fisher, *supra* note 1, at 1744-83; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532; Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); *Symposium On Law and Philosophy*, 13 HARV. J.L. & PUB. POL'Y 757 (1990).

3. *E.g.*, GOLDSTEIN, *supra* note 1, at 8-9; Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB.

literature has been complaining that the law is remarkably unaccommodating of the actual process of creating works of authorship.[4] The resort to grand theory does little to illuminate the reason why that should be so.

The merits of the various competing theoretical models, and whether those models' disregard for experiential data is a weakness or a strength, could occupy many scholars for many months. This essay seeks to focus on a very thin slice of that inquiry: Neither copyright law, nor the models that seek to interpret it, seem to pay great attention to the process of authorship. Perhaps because the universe appreciates the aesthetics of symmetry, authors appear to return the favor by paying little attention to the copyright law.[5] One would think that the two realms scarcely overlapped for all the attention each receives from the other. One might posit that copyright law is written by lawmakers unfamiliar with the process of authorship and that authorship is committed by innocents unversed in the details of copyright. The hypothesis seems compelling if one has but slight acquaintance with both domains. Indeed, it is a hypothesis that remains persuasive notwithstanding that the copyright law was written not by lawmakers or bureaucrats, but by authors and publishers and the people who represent them.[6] Although the community of industries that copyright affects paid close attention to the provisions of the copyright law during the long copyright revision process, individual authors and publishers appear to have internalized the substance of those provisions not at all.[7]

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POL'Y 817 (1990); Yen, *supra* note 2, at 539-46.

4. *E.g.*, Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Pamela Samuelson, *Is Copyright Law Steering the Right Course?*, IEEE SOFTWARE, Sept. 1988, at 78; Pamela Samuelson & Robert J. Glushko, *Comparing the Views of Lawyers and User Interface Designers on the Copyright "Look and Feel" Lawsuits*, 30 JURIMETRICS J. 121 (1989); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1028-32 (1990) (reviewing PAUL GOLDSTEIN, COPYRIGHT, PRINCIPLES, LAW AND PRACTICE (1989)); Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421 (1988); *see also* Janet E. Mosher, *20th Century Music: The Impoverishment in Copyright Law of a Strategy of Forms*, 5 INTELL. PROP. J. 51 (1989) (Canadian law).

5. Throughout this essay, I use the word "author" in the copyright sense of anyone who creates copyrightable works, whether they be books, songs, sculptures, buildings, computer programs, paintings or films.

6. *See* Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987).

7. *See infra* note 15; *see also infra* note 27. Readers who are familiar with the intricacies of the current copyright statute might consider, here, the behavior of the institutions that publish their work.

Parts I and II of this essay describe the prevailing public myth of copyright, and contrast it with the legal regime set out in the statute and case law. Part III points out that the theoretical literature about copyright commonly assumes that authors are in fact aware of the law's provisions and questions why authors cling to their own version of the copyright law rather than the actual one. Parts IV and V suggest that authors believe in the popular copyright myth, rather than the copyright law, because the actual copyright law is less hospitable than the myth to the authorship process. Authors necessarily incorporate others' work into their own in the creative process, in ways that they are not and cannot be aware of at the time. The copyright law, which accords protection from the moment a work is fixed in tangible form and forbids infringement from the infringing work's inception, might stifle that process. The copyright myth, in contrast, presents no such obstacle. Part VI, finally, suggests that theories of copyright divorced from the reality of what authors believe have only limited value. Copyright scholars have been exploring theoretical models that seek to justify copyright in the abstract, but have not yet examined the affinity of those models for the authors they seek to describe.

## I.

Copyright law turns out to be tremendously counterintuitive; that is why it is fun to teach it, and why it can be such a good substitute for smalltalk and other species of cocktail party conversation. Part of the reason that laypeople (by which I mean lawyers and non-lawyers and authors and non-authors; indeed, everyone but the copyright specialist)[8] find copyright law hard to grasp could be its mind-numbing collection of inconsistent, indeed incoherent, complexities.[9] But there seems to be

8. If one expected either people who made their living as authors or people trained in the law to have an informed idea of the basics of copyright law, then one would expect professors of law to be better informed on the topic than most. After years of conversations with many of my former colleagues at the University of Michigan Law School, however, I concluded that the popular myth of how copyright law works, *see* text accompanying *infra* notes 12-13, is so firmly ingrained in the psyche that people who make their livings authoring copyrighted works, and possess the legal training to investigate the myth, nonetheless seem unable to muster a vision of copyright law that contradicts it. *See also* Landes & Posner, *supra* note 1, at 353-55 (asserting, despite statutory language and settled case law to the contrary, that copyright in a derivative work vests in the author of the underlying work rather than the author of the derivative work).

9. For example, § 110(5) of the statute privileges the public playing of radio and television broadcasts, but not of recorded music, in commercial establishments no larger than the Pittsburgh delicatessen involved in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701.

nothing inherent in the subject of law about copyright that should violate people's intuitions. Although writers have suggested that members of the public find the idea of property rights in intangibles difficult to accept,[10] there seems to be little evidence that members of the public find the idea of a copyright counterintuitive.[11] Rather, the lay public seems to have a startlingly concrete idea of what copyright law is and how it works. This popular idea, however, has little to do with actual copyright law.

What is this public picture? My impression, distilled from some years of teaching and conversations with lawyers and non-lawyers, is that the general public's picture of the copyright system looks like this: A creative person creates something—a book, or a song, or a painting. If that person is especially protective of his rights, he can acquire a copyright. To do this, he sends his creation to the Copyright Office in Washington, which examines it to ascertain whether it is good enough. If the people in the Copyright Office decide that it is sufficiently imaginative, and not duplicative of works that have been copyrighted in the past, they will send him back a copyright.[12] He will then have "copyrighted" his work and will own a copyright in it. If, however, he doesn't feel like going to the bother of copyrighting his work, he can instead offer it, as yet uncopyrighted, to a publisher. The publisher will decide whether it is good enough to publish, and if so, the publisher will take care of sending it off to the Copyright Office to get it copyrighted.[13] In

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Section 110(4) permits certain nonprofit performances of music and literature (but not drama) under circumstances that seem designed to penalize the person who performs the work if she should seek the copyright owner's permission. Other statutory privileges are even less straightforward. *See generally* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

10. Gordon, *supra* note 2, at 1345-48; *see, e.g.*, Boudewijn Bouckaert, *What is Property?*, 13 HARV. J.L. & PUB. POL'Y, 775, 801-06 (1990); Dale A. Nance, *Forward: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 758, 761-67, 770-73 (1990).

11. *See, e.g.*, U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 121-23, 208-09 (1986); THE POLICY PLANNING GROUP, YANKELOVICH, SKELLY & WHITE, INC., PUBLIC PERCEPTIONS OF THE "INTELLECTUAL PROPERTY RIGHTS" ISSUE (1985) (final report prepared for the Office of Technology Assessment); THE POLICY PLANNING GROUP, YANKELOVICH, SKELLY & WHITE, INC., THE "INTELLECTUAL PROPERTY RIGHTS ISSUE": THE SMALL BUSINESSMAN'S PERSPECTIVE (1985) (prepared for the Office of Technology Assessment); *see also* Samuelson & Glushko, *supra* note 4, at 129 (software designers).

12. *See* SPIDER ROBINSON, *Melancholy Elephants*, *in* MELANCHOLY ELEPHANTS 1 (1985) (short story about copyright law). Over the years a number of resumes have crossed my desk that point out with some pride that an unpublished manuscript has been copyrighted by the federal government.

13. *See* RICHARD CURTIS, HOW TO BE YOUR OWN LITERARY AGENT 171-72 (1984).

that event, of course, the publisher will own the copyright. Once one has been granted a copyright by the federal government, one is entitled to put a copyright notice on one's work, and to invoke the law's protection against plagiarism.[14]

The popular picture I've sketched out has some elements that may have derived from past copyright statutes, or from patent statutes, or from the conflation of patent, copyright and trademark doctrine that so pervades the popular press.[15] It may be a particularly American view of how copyright works. It matches the current U.S. copyright system very poorly. But there is no sense in going into the streets and announcing to the public that "copyright" is not a verb, that one cannot "copyright" something, that the federal government does not examine works of authorship for merit or duplication; the public is unlikely to listen.[16]

## II.

The copyright law reflected in the current copyright statute[17] goes about things very differently from the model I sketched out above. Copyright vests automatically in eligible works of authorship the moment they are fixed in tangible form.[18] Its existence and ownership are utterly independent of any office in Washington, D.C. that might regis-

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14. I have not done the empirical research necessary to support this sketch in any systematic way, although, since the topic for this essay occurred to me, I have taken to collaring both students and non-students and soliciting their views. In addition, I have paid careful attention to the assumptions that seem to underlie the steady stream of copyright questions that my colleagues supply.

15. *See* William Safire, *On Language: The Bloopsie Awards*, N.Y. TIMES, Apr. 22, 1990, § 6 (Magazine), at 18; William Safire, *On Language: Drop the Gun Louie*, N.Y. TIMES, July 8, 1990, § 6 (Magazine), at 6; Lawrence Minard, *Real Estate*, FORBES, Sept. 4, 1978, at 41; Jack Valenti, *Does the Letter Still Rate?: X Means Protecting Children, That's All*, N.Y. TIMES, Aug. 5, 1990, § 2, at 9. Mr. Valenti, for example, has repeatedly, and incorrectly, referred to the MPAA ratings as copyrighted by the MPAA. *Id.* at 14. Valenti, in particular, should know better. He not only designed the current ratings system, *see id.* at 19, but was also (simultaneously) intimately involved in the drafting of the current copyright statute. *See, e.g., Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 278-80 (1973); *see generally* Litman, *supra* note 6.

16. *See* Andrew Blum, *Drug Maker Copyrights Documents*, NAT'L L.J., Feb. 11, 1991, at 3 (reporting that drug manufacturer has "copyrighted 8,200 pages" of discovery documents); Jack Mathews, *Change In Film Ratings Favored: Parents Want More Details; Producers Want Status Quo*, L.A. TIMES, Dec. 23, 1987, § 6, at 1 ("When the ratings were established, the MPAA copyrighted the symbols G . . . , PG . . . , and R").

17. 17 U.S.C. § 101-810 (1988 & Supp. 1989).

18. *Id.* § 201. The familiar C-in-a-circle copyright notice has not been a prerequisite to securing copyright for more than 13 years, and is now wholly optional. *See id.* §§ 401, 402.

ter authors' claims;[19] that office in Washington has, in any event, never been in the business of screening works for imagination, merit or similarity to works of earlier registration. Nor are imagination, merit or dissimilarity from prior works required. The statutory standard of originality[20] demands only that a copyrightable work evince a scintilla of creativity and be independently created, that is, not even subconsciously copied from the copyrighted work of someone else.[21] If a work of authorship is copied, even subconsciously, from other protected works, it infringes the prior copyrights from the moment it is created, and to that extent will be uncopyrightable.[22] If, by contrast, it has pervasive similarities to earlier works but none of them result from even unconscious copying, the work's expression is automatically protected in its entirety.[23]

The metaphysical question of differentiating independently created expression from subconsciously copied expression deserves a literature of its own; for present purposes, let me simply assert that the system is not up to the task. We cannot tell the difference, but the copyright law asks us all to behave as if we could.[24] An author who proposes to use a copyrighted work as a building block for the work she intends to create, or expects to rely on fragments of copyrighted expression mined from her subconscious memory, must seek the permission of the copyright owner or owners before she begins her work[25]—or so the law would have it. As I have argued elsewhere, it can't be done.[26]

## III.

I expect that people who know and write about the copyright law are well aware that the popular public conception of copyright differs greatly from the law set forth in the statute. To the extent they practice copyright law, or offer advice to their colleagues, they know, as

19. Registration of a copyright is optional and may occur at any time during the copyright term. *See id.* § 408.

20. *Id.* §§ 102, 103.

21. *See* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991); Litman, *supra* note 4, at 974-75, 1002; Gordon, *supra* note 4, at 1029-30.

22. 17 U.S.C. §§ 103b, 501. *See, e.g.*, Gordon, *supra* note 4, at 1018-19. Copyright infringement need not be intentional to be actionable. *E.g.*, 2 GOLDSTEIN, *supra* note 1, at 161.

23. *See* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 35-36 (1989). *But see* Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988) (permitting jury to infer infringement from pervasive similarities alone).

24. *See* Litman, *supra* note 4, at 1001-12.

25. *See, e.g.*, 2 GOLDSTEIN, *supra* note 1, at 161-62.

26. Litman, *supra* note 4, at 1001-02.

well, that the authors the statute affects are scarcely more expert than the general population[27] and are typically bemused to hear what the law actually provides. When academics write about copyright, however, it is standard to write as if the authors to whom the statute speaks knew its provisions and modulated their authorship accordingly.[28] Much of the literature repackaging copyright in theoretical terms proceeds from the assumption that authors' creation of works is influenced by their awareness of the intricacies of the system.[29] For those theorists who model the copyright law in economic or utilitarian terms, the assumption inheres in their approach: It is difficult to speak of the incentives supplied by a legal regime without relying on the convention that those whom the law seeks to prod are aware of the goodies that it offers as a bribe.[30] Lockean and Hegelian theorists have less need for an assumption that authors understand copyright law,[31] but have perhaps

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27. *See, e.g.*, CURTIS, *supra* note 13, at 94; 1992 SONGWRITER'S MARKET 25-26 (Brian C. Rushing ed., 1991); Robinson, *supra* note 12; ERIC SHERMAN, SELLING YOUR FILM 11-12 (1990); Safire, *supra* note 15. One of the most enduring myths of all, ratified by industry custom and widespread belief but never reflected in the law, is the notion that there is some magic number of words that may be quoted without risk of liability. *See, e.g.*, Roger Cohen, *Writers Mobilizing Against Restrictions On Using Quotations*, N.Y. TIMES, Feb. 20, 1991, § C at 11 (200 words); Jonathan Yardley, *The Catcher in the Right*, WASH. POST, Feb. 9, 1987, § D at 2 (400 words).

28. *See* Richard A. Bernstein, *Parody and Fair Use in Copyright Law*, 31 COPYRIGHT L. SYMP. (ASCAP) 1, 38 (1984); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 216 (1983); Robert Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560 (1982); Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715, 807 (1981); Beryl R. Jones, *Copyright: Commentary—Factual Compilations and the Second Circuit*, 52 BROOKLYN L. REV. 679 (1986); *see also* sources cited *infra* note 29.

29. *See, e.g.*, 1 GOLDSTEIN, *supra* note 1, at 15-21; Rochelle C. Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 605-26 (1987); Fisher, *supra* note 1, at 1712-17, 1768-79; Landes & Posner, *supra* note 1, at 332.

30. Paul Goldstein's recent work, however, offers a more sophisticated version of this assumption. Professor Goldstein suggests that the copyright scheme is designed to attract *investment* to the production of works of authorship. *See* 1 GOLDSTEIN, *supra* note 1, at 19-20. In Goldstein's model, diminution of the scope of copyright rights might indirectly reduce the profitability of particular classes of works, which might discourage investment in production of works of that class. Such an effect would not be dependent on whether authors or publishers were aware that the copyright bundle had shrunk. Professor Goldstein nonetheless appears to rely on the assumption that authors and publishers are aware of the copyright law and can be expected to behave accordingly. *See id.* at 9-10.

31. Much of this literature has focused on the supposed perception of non-authors that rights in intangibles are prima facie illegitimate, *see* sources cited *supra* note 10, but nonetheless has tended to assume that the authors claiming to be entitled to intellectual property rights are aware of the content of the rights that they assert. I question whether the public in fact distrusts the idea of intellectual property to the extent these writers suggest. *See* sources cited *supra* note 11. Instead, I would argue that the perception of illegitimacy to which these and other authors are responding may be a result of the divergence between the actual law and the popular myth of

grown accustomed to it in conceiving of copyright in terms of incentives. Indeed, a nod to economic incentives is obligatory in contemporary copyright scholarship, and the assumptions that underlie an incentive-based model have become part of the common language in which copyright scholars speak.

Simplifying assumptions can be useful, even where, as here, they are counterfactual.[32] When we get too accustomed to invoking such assumptions, however, we can forget to ask the interesting questions that they assume away. Here are two: Why are authors oblivious of the details of the copyright system? What do scholars who insist on predicating their theoretical models on the assumption that authors know the way the copyright law operates miss about the way the law is working? It may be tempting to explain authors' ignorance of copyright with the observation that the law is too complicated for mere mortals to hold in their heads, but the shape of the overall copyright scheme is surely comprehensible. I suggest that authors may cling to their version of what copyright looks like because they like it better than ours; they find it easier to live with. The popular myth of copyright does not intrude on the authorship process the way that statutory copyright law does.

## IV.

A composer of popular music writes a new arrangement of a popular song and then seeks to sell it to a popular performer. A jazz musician improvises a theme and variations on an old favorite. An art student completing a class assignment goes to an art museum and meticulously copies a Picasso painting. A high school band records its garage-practice rendition of a top 40 hit. These things happen every day, and are all prima facie infringing.

A novelist begins a new novel; his protagonist is a professor of literature who forges a manuscript that purports to be a lost Hemingway story.[33] A motion picture director begins shooting a new movie; in several scenes he juxtaposes the action with images that recall the 1939

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copyright, and the confused mixture of mythical and real copyright law to which people, authors among them, are exposed.

32. *See, e.g.*, MILTON FRIEDMAN, *The Methodology of Positive Economics in* ESSAYS IN POSITIVE ECONOMICS (1953), *reprinted in* FRANK HAHN & MARTIN HOLLIS, PHILOSOPHY AND ECONOMIC THEORY 18 (1979); *see also supra* text accompanying note 6.

33. *See* JOE HALDEMAN, THE HEMINGWAY HOAX (1990).

MGM classic, *The Wizard of Oz*.[34] A historian writes a biography of L. Ron Hubbard, relying heavily on Hubbard's unpublished papers.[35] A Pulitzer prize-winning cartoonist draws a comic strip in which his characters speak with Mickey Mouse about the Disney Company.[36] None of these authors seeks permission before beginning work. All are in danger of seeing their works enjoined.[37]

A popular songwriter creates a new song; it incorporates portions of a prior melody that he heard but doesn't consciously recall.[38] A novelist writes a new book; it is similar in a variety of expressive details to a book that he read a long time ago and then forgot.[39] Both become defendants in copyright infringement suits.

The problem of unintentional or inadvertent infringement is more pervasive, however, than these examples suggest.[40] All authorship is fertilized by the work of prior authors, and the echoes of old work in

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34. *See* GREMLINS 2: THE NEW BATCH (Warner Brothers 1990); WILD AT HEART (Samuel Goldwyn Co. 1990).

35. *See* RUSSELL MILLER, THE BARE FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD (1987); New Era Publications Int'l, ApS. v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989) (suit against Russell Miller for copyright infringement).

36. *See* Berkeley Breathed, *Outland*, ANN ARBOR NEWS, Oct. 8, and 15, 1989.

37. Did I hear someone ask, "But what about fair use?" Of the four works described in text, only the biography, as of this writing, has been the subject of a copyright infringement suit. Defendant's assertion of a fair use defense in that case was unsuccessful. *See New Era Publications Int'l*, 873 F.2d at 583-84. The scope of the fair use privilege is a hotly contested issue. *See* Adelstein & Perez, *supra* note 1; Fisher, *supra* note 1; Piere N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990); *see also* Litman, *supra* note 4, at 1006 n.252 (noting decreased availability of fair use defense during the 1980s). Because authors who make use of copyrighted works for commercial purposes must overcome a presumption that their use is unfair, *see id.*, the availability of a fair use defense for the conduct described in the text is far from assured.

38. *See* ABKCO Music, Inc. v. Harrisongs Music Ltd., 722 F.2d 988 (2d Cir. 1983); Fred Fisher, Inc. v. Dillingham, 298 F.2d 145 (S.D.N.Y. 1924). *Compare, e.g.*, GORDON LIGHTFOOT, *If You Could Read My Mind, on* IF YOU COULD READ MY MIND (Reprise 1970) *with* WHITNEY HOUSTON, *The Greatest Love of All, on* WHITNEY HOUSTON (Arista 1985).

39. *See* Christopher Dickey, *"Roots" Author Facing Accusations: Novelist's Suit Charges Haley's Book is "Largely Copied"*, WASH. POST, Apr. 28, 1977, at A1; Sven Birkerts, *High Culture Hustler*, NEW REPUBLIC, May 12, 1986, at 35 (reviewing JAMES ATLAS, THE GREAT PRETENDER (1986)).

40. *Cf. An Attribution and an Apology*, N.Y. TIMES, Dec. 16, 1990, § 7 (Book Review), at 34:

> Mr. Gillis is certainly owed an attribution and an apology. I feel this doubly so because I have never read his book. In view of the pronounced echoes of his words in the first three sentences of my review, it would be difficult to believe that I have not read them—or some version of them—quoted somewhere else. Clearly they have lodged all too vividly in my subconscious memory.

new work extend beyond ideas and concepts to a wealth of expressive details. Indeed, authorship *is* the transformation and recombination of expression into new molds, the recasting and revision of details into different shapes. What others have expressed, and the ways they have expressed it, are the essential building blocks of any creative medium. If an author is successful at what she does, then something she creates will alter the landscape a little. We may not know who she is, or how what she created has varied, if only slightly, the way things seem to look, but those who follow her will necessarily tread on a ground distorted by her vision. The use of the work of other authors in one's own work inheres in the authorship process.[41]

Even more inconvenient is the fact that the creative process itself often requires the author to forget both where she believes she has been and where she might plan to go next.[42] There may be authors who plan every detail of a new work in advance before sitting down to call it into being.[43] For others, however, the authorship process consists of discovering expression than cannot be determined in advance.[44] Authors and

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41. *See* Litman, *supra* note 4, at 1007-12. Copyright law attempts to manage this problem by relying on the idea/expression distinction. In essence, a work's expression is protected by copyright, while its ideas are not. An author is, therefore, free to appropriate an earlier author's ideas, so long as she does not reproduce that author's expression. *See, e.g.*, 1 GOLDSTEIN, *supra* note 1, at 74-82; Landes & Posner, *supra* note 1, at 347-53; Litman, *supra* note 9, at 334-36. Unfortunately, the determination of which portion of a work represents its ideas and which represents its expression is "inevitably *ad hoc*." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

42. *Cf.* CLAUDE BONNEFOY, CONVERSATIONS WITH EUGENE IONESCO 68, 72 (1966); HALDEMAN, *supra* note 33, at 18 (fiction):

> He used his life that way. A good writer remembered everything and then forgot it when he sat down to write, and reinvented it so the writing would be more real than the memory. Experience was important, but imagination was more important.
>
> Maybe I would be a better writer, John thought, if I could learn how to forget.

43. *See* Dreyfuss, *supra* note 29, at 606-14; *see also* Virginia Woolf, *A Writer's Diary*, *in* THE WRITER'S CRAFT 374, 378-79 (John Hersey ed., 1974); *cf.* John Fowles, *Notes on an Unfinished Novel*, *in* THE WRITER'S CRAFT, *supra*, at 411, 412:

> I suppose the orthodox method is to work out what one wants to say and what one has experience at and then to correlate the two. I have tried that method and started out with an analytically arrived-at theme and a set of characters all neatly standing for something; but the manuscripts have all petered out miserably.

44. *See* BONNEFOY, *supra* note 42, at 68; EMI WADA, MY COSTUMES 147 (1989); Elizabeth Bowen, *Notes on Writing a Novel*, in THE WRITER'S CRAFT, *supra* note 43, at 81, 82-83; Harold Pinter, *Writing for the Theatre*, *in* NEW BRITISH DRAMA 574, 575-76 (Henry Popkin ed., 1964); Eric Lax, *Woody and Mia: A New York Story*, N.Y. TIMES, Feb. 24, 1991, § 6 (Magazine), at 30, 75; August Wilson, *How to Write a Play Like August Wilson*, N.Y. TIMES, Mar. 10, 1991, § 2 (Arts & Leisure), at 5.

artists insist that a work must find its own form;[45] to construct a detailed edifice for a nascent work while it is still inchoate is frustrating and futile.[46] Authors perceive that the words speak themselves, that the characters dictate their own behavior, that shapes define themselves and musical phrases play themselves as a work takes form.[47]

The experience of authorship can make it seem as if expressive details come out of the ether.[48] That impression is largely illusion, albeit one that many authors find crucial to their craft. The words, characters, shapes and notes seem new, but that does not mean that they come from nowhere. They have antecedents both in life and in art.[49]

All authors' works echo the works of prior authors. Most of those echoes are neither intended nor planned.[50] That does not, however,

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45. *See* Lawrence M. Bensky, *Harold Pinter: An Interview*, *in* PINTER: A COLLECTION OF CRITICAL ESSAYS 19, 25 (Arthur Ganz ed., 1972) ("I don't know what kind of characters my plays will have until they . . . well, until they *are*. Until they indicate to me what they are. I don't conceptualize in any way. Once I've got the clues, I follow them—that's my job really, to follow the clues."); WADA, *supra* note 44, at 147; Peter Tauber, *Monument Maker*, N.Y. TIMES, Feb. 24, 1991, § 6 (Magazine), at 48, 52 (Architect and sculptor Maya Lin explains: "Before I touch pencil to paper I think its very important to *not* find a form."); Fowles, *supra* note 43, at 412 ("This accidentality of inspiration has to be allowed for in writing; both in work one is on (unplanned development of character, unintended incidents, and so on) and in one's works as a whole. Follow the accident, fear the fixed plan—that is the rule.").

46. *See* Bowen, *supra* note 44, at 84; Ralph Ellison, *A Completion of Personality*, in THE WRITER'S CRAFT, *supra* note 43, at 267, 272; Wilson, *supra* note 44.

47. *See* Ellison, *supra* note 46, at 272:

> Once logic is set up for a character, once he begins to move, then that which is implicit within him tends to realize itself, and for you to discover the *form* of the fiction, you have to go where he takes you, you have to follow him. In the process, you change your ideas. . . . I find that happens with me. I get to the point where something has to be done and discover that it isn't logical for the character who started out to do it, to do it; and suddenly another character pops up.

48. *See* URSULA K. LE GUIN, *Where Do You Get Your Ideas From?*, *in* DANCING AT THE EDGE OF THE WORLD 192, 198 (1989).

49. *See* Litman, *supra* note 4, at 1010-1011; *see also* URSULA K. LE GUIN, *Talking About Writing*, *in* LANGUAGE OF THE NIGHT 195, 197 (1979) ("And of course fiction is made out of the writer's experience, his whole life from infancy on, everything he's thought and done and seen and read and dreamed."); Bowen, *supra* note 44, at 83; Wilson, *supra* note 44; Thomas Wolfe, *The Story of a Novel*, *in* THE WRITER'S CRAFT, *supra* note 43, at 400, 403.

50. *See* LE GUIN, *supra* note 48, at 193-94:

> Writers do say things like "That gives me an idea" or "I got the idea for that story when I had food poisoning in a motel in New Jersey." I think this is a kind of shorthand use of "idea" to stand for the complicated, obscure, un-understood process of the conception and formation of what is going to be a story when it gets written down. The process may not involve ideas in the sense of intelligible thoughts; it may well not even involve words. It may be a matter of moods, resonances, mental glimpses, voices, emotions, visions, dreams, anything. It is different in every writer, and in many of us it is different every time. It is extremely difficult to talk about, because we have very little terminology for such processes.

mean that they reflect merely coincidental similarity. Instead, the echoes may derive from influence of works of other authors in ways that often can be difficult to pinpoint and impossible to predict in advance. But, as the copyright law would have it, expressive similarities between works may follow from plagiarism or coincidence, but not from something in between.[51]

## V.

The models of authorship reflected in the copyright law, and in much of the recent literature interpreting it, place the author in an intolerable dilemma. At one extreme is the romantic model of the author, which paints each act of authorship as the conception of something new and even unique; authors create, invent, conceive.[52] Diametrically opposed to the romantic model is the rational author, who knows the address of his muse, and cannot only identify the antecedents of his work, but can plan his own authorship process with sufficient precision to acquire the necessary permissions before commencing work.[53] The first sort of author needs nobody's permission; the second sort will know whom to ask. Authors resembling neither ideal type, however, must undertake the responsibility of securing permission from the owners of rights in the antecedents to their works before they can know what those antecedents are. Fortunately, there is an alternative to so impossible a task. Authors can forget the provisions of the copyright law, or fail to learn them, and rely instead on an imaginary version of copyright that better accommodates the realities of their work.

From that perspective, the popular myth of copyright that I sketched out earlier has marked advantages over the real thing. The salient characteristic of the popular myth of copyright is that copyright law does not become relevant until the point in time, prior to commercial exploitation, when a work of authorship is presented to the Copyright Office in Washington for a determination of copyrightability.

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> I would say that as a general rule . . . this inceptive state or story-beginning phase . . . arises in the mind, from psychic contents that have become unavailable to the conscious mind, inner or outer experience that has been, in Gary Snyder's lovely phrase, "composted." I don't believe that a writer "gets" (takes into the head) an "idea" (some sort of mental object) . . . and then turns it into words and writes them on paper. At least in my experience, it doesn't work that way. The stuff has to be transformed into oneself; it has to be composted, before it can grow a story.

51. *See* 2 GOLDSTEIN, *supra* note 1, at 7-21.

52. *See* Dreyfuss, *supra* note 29, at 607-09.

53. *See* 2 GOLDSTEIN, *supra* note 1, at 162.

Copyright does not vest in a work while it remains uncompleted and unexploited. Until the author stamps her work "finished" and either sends it off to the elves in Washington or exposes it to the public, it is not itself copyrighted and, thus, cannot infringe the copyrights in other works.[54] Thus, while the author is actually engaged in the commission of authorship, she need not worry about copyright at all.

## VI.

What implications flow from the observation that the law that authors believe in is very different from the law on the books? At a practical level, there are few real consequences. Authors produce works of authorship armed with faith that copyright law is as they believe it to be, while lawyers stick around to paper over transactions that do not fit the legal regime.[55] A work that is pervasively infringing, and thus uncopyrightable, when first fixed in tangible form can be reworked before the public sees it. The statute might prescribe withholding protection from much of the work because of its antecedents; a cause of action for infringement might have already accrued, but nobody will ever know.

On a more academic level, however, the divergence between the actual law and the popular impression of it may hold a lesson for us, especially insofar as we are drawn to grand theory. When copyright scholars rely on the assumption that authors know the law under discussion, their models threaten to describe a fantasy kingdom peopled with authors who behave as no authors behave. Those models will, of course, generate improved models and counter-models, each coherent and a thing of beauty. Authors, unaffected by the improvements in the theories, will continue muddling through. There is some danger, however, that the literature will describe ever more hypothetical versions of the world. When we interpret a law that authors do not believe in through the lens of theoretical models peopled with unreal authors who know the law's provisions and adjust their creative output accordingly,

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54. I don't pretend to defend the logic underlying this corollary, but I have heard it expressed sufficiently frequently by my colleagues, students and casual acquaintances to have concluded that its symmetry lends it substantial intuitive appeal.

55. If the substantive law were different, a satisfactory approach might be to drill authors in the notion that they needn't worry about copyright unless they had a copyright problem, and that they should at that point run, not walk, to a copyright lawyer. Copyright lawyers will confirm, however, that their clients often fail to perceive that they have a copyright problem until they have already acted in ways that prejudice their options. Much of the copyright lawyer's practice, thus, involves devising stratagems to conform predicaments that have already arisen to the copyright statute's requirements.

we run a risk: We may remove ourselves even further from the concrete reality in which people who create works of authorship ply their trades. As the literature discusses copyright as a means of encouraging authorship, the authors it invokes may become increasingly alien from real ones.

This is not to say that the theoretical models currently in fashion in copyright scholarship have no value. They have both grace and elegance. Indeed, the best of them are aesthetically gratifying works of art, worthy of appreciation as sculptures in their own right. The realities they describe may be alternative realities, and they may for that reason serve as less than useful descriptive or predictive tools for the more mundane concrete reality, but the aesthetic beauty of Ptolemy's geocentric theory is not significantly diminished by the subsequent discoveries of astronomy. Because the models are adroit, however, it is tempting to ask them to deliver more than intellectual stimulation and aesthetic satisfaction. In particular, it is easy to rely on the models generated by theoretical inquiry for implicit or explicit persuasion for normative points as well.[56] And this is the point at which we should become concerned that we may only be talking with one another about the way the law works, and should work, in a fanciful universe we have grown inside our heads, while the law that we are discussing is working and not working in another place entirely.

In omitting to consider whether authors fathom the substance of the copyright law, we forget to explore the reasons that might underlie their failure to do so. Theorists who have been mining economic, political and philosophical theory for justifications of copyright appear to have been responding to a sense that copyright is perceived as illegitimate, somehow, and that justifications for the system need shoring up.[57] That sense of illegitimacy may be more complicated than the literature credits, and may be shared by authors as well as the consumers of their work.

Laws that people don't believe in suffer from an absence of legitimacy.[58] The public's perception that the copyright system is out of whack may be more subtle and complex than a naive distrust of property rights in intangibles. The failure to believe in the copyright law (as

56. *See* Fisher, *supra* note 1, at 1766-83; Hughes, *supra* note 2, at 348-63; Lacey, *supra* note 2, at 1584-95; Landes & Posner, *supra* note 1, at 341-44; Yen, *supra* note 2, at 554-57.

57. *See supra* note 31.

58. *See, e.g.*, PETRA T. SHATTUCK, PUBLIC ATTITUDES AND THE ENFORCEABILITY OF LAW (1985) (prepared for the Office of Technology Assessment).

distinguished from the copyright myth) may reflect something more involved than a need to be persuaded of the justice, efficiency or wisdom of the concept of copyright. A resolution may, thus, require more than an exhortation to moral desert, market failure, or the embodiment of personality. The concept of copyright may not be the problem; the problem may be instead that the particulars of our copyright system fail to pay enough attention to the people the system seeks to affect.