Distributive Values in Copyright

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Molly Shaffer Van Houweling*

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I. Introduction

Tarnation was a surprise hit at the 2004 Cannes and Sundance film festivals.\(^1\) Film critic Roger Ebert declared the film “powerful and heartbreaking.” Other critics called it “a masterpiece” and “a whirlwind journey.”\(^2\) Jonathan Caouette, an unemployed New York actor and doorman,\(^3\) made Tarnation on a borrowed Apple Macintosh computer by editing and combining his own home movies with other video clips and music.\(^4\) Caouette estimates that he spent $218 making the film and observes that “[m]aking a movie is not as difficult as it is made out to be” and “[h]opefully this will be a catalyst for people who didn’t have a voice before to go out and make a movie.”\(^5\)

The Mashin’ of the Christ is a short video made by a group of artists called Negativland. The video combines scenes from the blockbuster film The Passion of the Christ with depictions of Jesus from other films, including Ben-Hur, The Greatest Story Ever Told, and A Clockwork Orange.\(^6\) Negativland describes the film as the group’s “own vision of the last moments of Christ’s life.”\(^7\) The Mashin’ of the Christ has not made it to Cannes, but it is available for free on the internet using video file-sharing software.\(^8\)

Thanks to digital copying and editing technology, and the dissemination power of the internet, making and sharing a video collage like Tarnation or The Mashin’ of the Christ can be easy and relatively inexpensive.

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4. Id.


8. Id.
Documentary producer Jim Gilliam predicts that "[i]t won't be long before people will be shooting and editing short documentaries that they'll stream from their blogs."9

Perhaps. But when some entry barriers are lifted, others can loom larger in comparison. Jonathan Caouette estimates that the total cost for making Tarnation will rise to $400,000 once rights to use copyrighted music and video clips have been cleared.10 Meanwhile, the Digital Millennium Copyright Act (DMCA) has been interpreted to prohibit distribution of software that makes it cheap and easy to copy video clips from DVDs the way Negativland did.11 And the Supreme Court may decide in the pending Grokster case that the type of software Negativland used to distribute the video is illegal too.12

These examples illustrate the complicated relationship between copyright, creative expression, and money. Copyright is designed to facilitate the funding of creativity. But copyright can also make one input into the creative process—other artists' copyrighted works—expensive. The expense of building on the works of others is justified in copyright theory by the hope that the burden copyright imposes on creativity is outweighed by its benefits.13 Copyright law generally addresses the relationship between creative expression and money in terms of maximizing total creativity.

But of course a regime that couples creativity and money also affects the distribution of creative opportunities. Some creators want the monetary incentive that copyright provides; others do not. Some creators can bear the expenses that copyright imposes; others cannot.14

I am particularly interested in the ways in which creators who do not have much money are benefited and burdened by copyright.15 Should we

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13. As William Landes and Richard Posner put it, "[a] fundamental task of copyright law [is]... to strike the optimal balance between the effect of copyright protection in encouraging the creation of new works by reducing copying and its effect in discouraging the creation of new works by raising the cost of creating them." WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 69 (2003).
15. Although the topic has received little sustained attention elsewhere, several other authors have raised the possibility of bringing distributive concerns to bear on copyright. See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 208 (rev. ed. 2003); Jack M. Balkin, Digital speech and Democratic Culture: A Theory of Freedom of
understand the copyright regime as a subsidy that makes their creativity possible? Or as a tax that makes it unaffordable? How should we think about these possibilities in light of enduring values about the distribution of expressive opportunities?

I start my exploration of these questions in Part II by examining aspects of copyright policy that seem to broaden the distribution of expressive opportunities. For example, by protecting a copyright holder’s market and thus enhancing the prospect of financial rewards to creativity, copyright helps some otherwise poorly financed creators attract investment; it thus indirectly subsidizes their creativity and the distribution of their works to the public. On the other side of the copyright balance, the burdens that copyright imposes on poorly financed creators have been limited by exceptions in the Copyright Act, including the fair use doctrine, and by the economics of copyright enforcement: people without independent wealth or financial backing traditionally have had little capacity to implicate the Copyright Act in ways that would justify enforcement actions against them. Thus copyright seems, historically at least, to have benefited poorly financed creators more than it has burdened them.

By thus broadening distribution of creative opportunities, copyright is consistent with an important strain of communications policy and First Amendment jurisprudence that aims to ensure that even poorly financed speakers have some communicative power. I explore this connection in Part III in order to develop a normative account of the importance of broad distribution of expressive opportunities.

Mashin' of the Christ to the public. At the same time, the burdens that copyright imposes on creativity weigh more heavily on poorly financed creators than they have in the past. The new tools of digital distribution give even amateur artists—without much money, without investors, and without plans to use copyright to make a profit from their work—enough communicative potential that they need worry about copyright's costs when they build upon copyrighted works. Their activities are suddenly on copyright's radar screen. What's more, the cultural importance and ubiquity of copyrighted texts, images, and sounds may make multimedia collage and other forms of creativity that incorporate existing copyrighted works even more vital forms of cultural commentary than they have been in the past.

Unfortunately, just as the distributive impacts of copyright are being distorted by these technological and cultural changes, copyright law and scholarship have developed a focus on correcting market failure that marginalizes distributive concerns. In Part V, I consider reforms that could restore some of copyright's egalitarian cast. I also survey alternative solutions and potential objections before concluding in Part VI with an agenda for further research.

II. A Distributive View of Copyright

A. Copyright's Primary Purpose: Enlarging the Creative Pie

The primary justification for U.S. copyright law is encouraging the creation of expressive works that benefit the public. The constitutional provision that authorizes copyright (and patent) law explains its purpose as "promot[ing] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\(^{16}\) The Supreme Court has elaborated by explaining that the "immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."\(^{17}\)

The crude logic of copyright is thus that creativity is good for society, that creativity needs encouragement, and that copyright provides this encouragement by securing "a fair return" for creators. Limitations on copyright, such as fair use, are in turn justified in part by the concern that draconian copyright protection could stunt creativity by stifling those authors who would build upon the works of others. Copyright and its limitations are thus primarily concerned with the size of the creative pie: bigger is better.\(^{18}\)

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17. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
18. But see Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 VAND. L. REV. 483, 487-89 (1996) (arguing that strong copyright protection may lead to excessive investment in authorship in lieu of other productive activities); see also LANDES & POSNER, supra.
But copyright has distributive aspects as well. I highlight three here. First, the rights granted by copyright indirectly subsidize some would-be creators by facilitating financing of their work. Copyright thus ensures that creative opportunities are not available solely to the independently wealthy. Second, copyright's limits, including the fair use doctrine, serve the needs of some poorly financed creators by letting them build upon existing copyrighted works without paying for permission. Third, copyright has not, until recently, been enforced frequently against those infringers who are unlikely to be able to pay for their uses of copyrighted works.

B. Copyright as a Subsidy for Poorly Financed Creators

Copyright creates a mechanism that can finance creativity and dissemination even by those who are not independently wealthy. For example, a would-be filmmaker who cannot afford to make her movie might attract investors by promising to assign to them the exclusive rights (granted to her by copyright law) to display the film publicly and to reproduce and distribute copies of it. Those exclusive rights are potentially valuable to the investors because they eliminate competition from mere copiers. The investors hope to sell tickets and DVDs; this hope justifies their investment in the film. By enhancing the prospect of monetary returns for creativity, copyright thus makes creativity and dissemination possible for some authors who could not otherwise afford to create and share their works.

Of course, copyright subsidizes rich authors (and publishers and record companies) too; some argue that copyright primarily benefits those who least need the help. But important provisions of copyright law serve to ensure

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note 13, at 56 (“[I]t is difficult, indeed probably impossible, to say whether copyright is necessarily a good thing or a bad thing from the standpoint of optimizing the production of expressive works.”).

19. Neil Weinstock Netanel makes this point in Copyright and a Democratic Civil Society, 106 YALE L.J. 283, 358 (1996); see also Tushnet, supra note 14, at 40, 47 (“Copying makes original authors less attractive to publishers because there is not much point in paying for what others will then take for free.... Without copyright, coordination difficulties and free riding problems would make it difficult for the less wealthy to aggregate their resources and fund creativity....”).

20. This seems to be the story of Jonathan Caouette: Only after he sold the distribution rights to Tarnation was he able to transfer his video to film and acquire rights to use copyrighted music and video clips. Mary Glucksman, Executive Shuffle, FILMMAKER MAGAZINE, Winter 2005, available at http://www.filmmakermagazine.com/winter2005/line_items/executive.php.


22. Copyright has in fact been described as a subsidy for authors: most famously by Lord Macaulay, who called it a “tax on readers for the purpose of giving a bounty to writers.” Thomas B. Macaulay, 36 PARL. DEB. (3d ser.) (1841) 341, 350 (speech delivered in the House of Commons on Feb. 5, 1841). Tom W. Bell explores the idea in Authors’ Welfare: Copyright as a Statutory Mechanism for Redistributing Rights, 69 BROOK. L. REV. 229 (2003).

that poorly financed and unsophisticated creators are at least among those who can realize copyright’s benefits.

First, the Copyright Act assigns initial rights to authors, not publishers. The Act thus follows the model of its English predecessor, the Statute of Anne, and rejects the more publisher-centric model of the discarded Stationers’ Company regime. Even poor and unsophisticated authors can claim their rights, because it does not cost anything or require any paperwork to trigger copyright protection. And authors who sign away their rights for a pittance eventually have an opportunity to revisit those deals through the current Act’s termination of transfer provisions, which aim to


25. Note, however, that the controversial work-for-hire doctrine can create the legal fiction that employers or commissioning parties are authors. 17 U.S.C. § 101 (2000).

26. After a series of amendments to the Act starting in 1976, federal copyright protection is now triggered simply by fixation of an original work in a tangible medium of expression—e.g., by scribbling words on a napkin or typing them onto a computer. Registration, notice, deposit, and publication are not required to secure protection (and no renewal registration is required to take advantage of the longest possible copyright term). So even the poorest author, totally ignorant of the law and without funds to pay registration fees, can preserve his exclusive rights. The elimination of copyright formalities was required for U.S. membership in the Berne Convention. But apart from Berne, the formalities of U.S. copyright law had long been criticized as hypertechnical traps for unsophisticated authors. See, e.g., Hearings before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 89th Cong. (1965) (statement of Abraham L. Kaminstein) (“The present law contains a number of highly technical requirements concerning copyright notice, registration, and deposit, and the recording of assignments which are not only burdensome and difficult to understand but which, in too many cases, result in complete loss of copyright protection.”), reprinted in 8 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 62, 68 (George S. Grossman ed., 2001). See generally Lydia Pallas Loren, Untangling the Web of Music Copyrights, 53 CASE W. RES. L. REV. 673 (2003); Christopher Sprigman, Reform(alizing Copyright, 57 STAN. L. REV. 485 (2004). Those barriers have been removed and copyright protection is now automatic. While making the benefits of copyright protection easier to acquire even for the poor and unsophisticated, this change also increased the burdens imposed by copyright by vastly multiplying the number of works to which copyright’s restrictions apply.

27. 17 U.S.C. §§ 203, 304 (2000). The early copyright acts dealt with this possibility through the mechanism of the original and renewal terms. If an author assigned away his original term, he would have a second chance to exploit his copyright because the renewal term would revert to him or his statutory heirs. The legislative history of the 1909 Act explains the rationale for maintaining the renewal mechanism:

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the [first] term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.

H.R. REP. No. 60-2222, at 14 (1909). The 1976 Act abandoned the renewal mechanism for new works and instead adopted a single unified term. But the Act retained the idea of providing authors with a second negotiating opportunity in new “termination of transfers” provisions. The new provisions allow authors to rescind transfers of their copyrights at specified times and thereby to reclaim the final years of the copyright term. 17 U.S.C. §§ 203, 304 (2000). In contrast to the old renewal scheme, the new termination-of-transfer provisions explicitly bar assignment or waiver of the author’s termination right. As Melville Nimmer explained:
preserve for authors some of the value of their copyrighted works even if they assign them away in "unremunerative transfers," as the House Report put it. Together, these features all contribute to a copyright scheme that makes creativity possible for some authors who could not otherwise afford it.

C. Exceptions for Certain Users of Copyrighted Works

Copyright can help to fund creativity. But it can also add to the expense involved in using and building upon the work of others. Copyright attracts investors to Tarnation, but it also adds $400,000 to the cost of producing the film.

Copyright's burdens are limited, however, by various exceptions for specified classes of users who might not otherwise be able to bear copyright-created expenses. For example, the Act includes a provision that permits live performance of musical works and nondramatic literary works so long as the performance does not have a commercial purpose, the performers are not paid, and no admission fee is charged. The legislative history suggests that this provision was designed to benefit users who could not otherwise afford to perform copyrighted works. A neighboring provision permits public...
performance of broadcasts on standard household radios and televisions.\textsuperscript{31} When this provision was challenged before a World Trade Organization dispute settlement panel, the U.S. justified it as a protection of "mom and pop" businesses which "play an important role in the American social fabric" because they "offer economic opportunities for women, minorities, immigrants and welfare recipients for entering the economic and social mainstream."\textsuperscript{32}

There are other exceptions: for limited reproduction by libraries and archives,\textsuperscript{33} for some public performances and displays in the course of classroom teaching\textsuperscript{34} or distance education,\textsuperscript{35} for specified public performances by "governmental bod[ies],"\textsuperscript{36} "nonprofit agricultural or horticultural organization[s],"\textsuperscript{37} "nonprofit veterans’ organization[s],"\textsuperscript{38} or "nonprofit fraternal organization[s]."\textsuperscript{39} These exceptions arguably serve people and groups who might not otherwise be able to afford their use of copyrighted works.\textsuperscript{40}

\textbf{D. Fair Use}

Apart from these narrow statutory exceptions, the more open-ended fair use doctrine has sometimes served to facilitate use of copyrighted works by poorly financed creators, and sometimes by poor consumers who benefit from the recasting of expensive works. These distributive aspects of fair use trace their origins to the English antecedents of the current doctrine.

The Copyright Act explains that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."\textsuperscript{41} It directs judges to consider several

\begin{itemize}
\item 32. World Trade Organization, United States—Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000), available at http://www.wto.org/english/news_e/news00_e/1234da.pdf. Thanks to Margaret Chon for pointing this out to me.
\item 34. Id. § 110(1).
\item 35. Id. § 110(2).
\item 36. Id. § 110(6).
\item 37. Id.
\item 38. Id. § 110(10).
\item 39. Id.
\item 40. The Copyright Act’s apparent solicitude for poorly financed speakers may be accidental. Jessica Litman, who has studied the relevant legislative history extensively, concludes that the exceptions simply reflect the bargaining power of easily identifiable special interest groups, not an overarching concern for poorly financed speakers. Jessica Litman, Reforming Information Law in Copyright’s Image, 22 U. DAYTON L. REV. 587, 619 (1997). She ultimately concludes that copyright is “equity-blind[.]” Id.
\end{itemize}
nonexclusive factors to determine "whether the use made of a work in any particular case is a fair use."  

This statutory fair use doctrine developed out of early English cases under the Statute of Anne. The Statute of Anne gave copyright holders (that is, authors or their assignees) exclusive rights to "[p]rinting and [r]eprinting" of books.  

In the early cases, these exclusive rights were generally held not to extend to translations, abridgements, or other variations on the copyrighted original that included independent creative contributions. The narrow scope of copyright's exclusive rights gave second-generation authors leeway to build upon existing works without charge. It seems to have been especially useful to authors who recast existing works into a less expensive form. For example, Zachariah Chafee summarized one such case in which "Lord Apsley, backed by Blackstone, gave immunity to an abridgement of Hawksworth's Voyages, calling it 'a new and [a] meritorious work,' less expensive and more convenient to handle than the original."  

Justice Story was interpreting U.S. copyright law in light of these English precedents when he decided Folsom v. Marsh, the case that is credited with articulating the fair use doctrine under U.S. copyright law. Folsom gives less leeway to abridgements and other adaptations than did the early English cases. Indeed, Justice Story held that the biography of George Washington at issue in Folsom was not a "fair and bona fide abridgement," but rather an infringement of the plaintiff's longer work. He acknowledged the difficulty his holding posed for the defendants, and for those consumers who might have benefited from their work: "it may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries.

42. The factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." Id.

43. Act for the Encouragement of Learning, 8 Ann. c.19 (1710) (Eng.), available at http://www.copyrighthistory.com/anne.html ("[T]he Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of fourteen Years, to Commence from the Day of the First Publishing the same, and no longer.").

44. See, e.g., Burnett v. Chetwood, 2 Mer. 441, 35 Eng. Rep. 1008-09 (Ch. 1720), quoted in BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 10 (1967) ("[A] translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it—which suggested that if the accused book was a work of authorship, it could not at the same time infringe.").


46. 9 F. Cas. 342 (D. Mass. 1841).

47. Id. at 349.

48. Id.
Despite Justice Story’s narrow articulation of fair use under U.S. copyright law, the doctrine developed in ways that arguably addressed distributive concerns. For one thing, several of the classes of uses that are now singled out in the statute and case law as potentially fair (e.g., teaching, scholarship, research, and noncommercial uses) are often not particularly lucrative, although they can serve important social purposes. Favoring these uses through fair use helps to limit the burden that copyright imposes on classes of users who might not otherwise be able to afford their uses of copyrighted works.

Fair use also sometimes favors users who serve needy consumers, just as the early English cases did. For example, in Webb v. Powers, the court concluded that the defendants’ book (a collection of information and poetry about flowers) did not infringe the plaintiffs’ similar book, in part because the defendants’ book was designed not to supercede the plaintiffs’ market, but rather to serve a different market of poorer readers. The court noted that the defendants’ book sold for twenty-five cents—a dollar less than the plaintiffs’. The court continued, “Considering then its form and substance, its design and use, my mind strongly inclines to the conclusion, that the aim of [the author] in preparing the defendants’ book was... to furnish original poetry on the sentiment of flowers, and to do it in such a form as to be much less expensive, and to circulate in hands, which could not so well afford to purchase the existing and larger and more expensive treatises on that subject.” And, “[i]f the leading design is truly to abridge and cheapen the price, and that by mental labor is faithfully done, it is no ground for prosecution by the owner of a copyright of the principal work.” Echoing the early English cases that interpreted the Statute of Anne, Webb thus suggests that fair use can play a distributive role by favoring those defendants whose adaptations are especially inexpensive and accessible.

The early history, judicial development, and codification of fair use all support the notion that it serves, in part, to alleviate the burdens that copyright imposes on poorly financed creators who build upon existing works and on poorly financed consumers who benefit from inexpensive copies. But recent fair use case law and commentary have turned away from these distributive ideals, a development to which I turn in Part IV.

E. Irrelevance

Perhaps more important than any of these doctrinal limits is the simple fact of copyright’s practical irrelevance to poorly financed creators.

49. 29 F. Cas. 511, 520–21 (C.C.D. Mass. 1847).
50. Id. at 518.
51. Id. at 518–19.
52. Id. at 519. Thanks to Wendy Gordon for drawing my attention to Webb.
Copyright has traditionally been enforced against commercial entities that have the capacity to produce and distribute lots of copies of creative works—not against amateur artists, home copyists, or others who are unlikely to come to the attention of copyright holders. People truly unable to bear the expenses imposed by copyright have, until recently, been unable to publish iterative creativity in a way that triggers copyright enforcement. So copyright's burdens were largely irrelevant to them.

In sum, various features of copyright law have served to benefit poorly financed creators (and, indirectly, some poorly financed consumers). Copyright's subsidizing function helps attract financing to creators who could not otherwise afford to create. Exceptions to copyright's exclusive rights help people who might not otherwise be able to bear the expenses that copyright imposes. Fair use, in particular, favors classes of users (and uses) that are likely to be underfunded. It can also facilitate the creation of new works that are affordable for poor consumers. Finally, the burdens that copyright might impose on creativity have conventionally been irrelevant to users of copyrighted works whose activities are too trivial to come to anyone's attention.

By enabling creation and dissemination that might not otherwise occur, these features of copyright aim in part to enlarge the creative pie. But they have traditionally done so in a way that broadens and diversifies the distribution of opportunities to create and to experience creative works. This tradition is changing, as I discuss below. But before lamenting copyright's recent turn away from the principle of broad distribution of expressive opportunities, I next examine whether this principle was ever justified in the first place.

III. Distribution of Expressive Opportunities

Copyright regulates expressive activity. It controls the extent to which creators can build upon existing works in order to make commentary, collage, and other types of iterative creativity. Copyright also influences the availability and cost of expressive works that can be experienced by readers and other consumers of creativity. Copyright thus implicates concerns with freedom of expression and access to expressive opportunities that animate First Amendment jurisprudence and communications policy. An examination of these two bodies of law illustrates the importance of the norm of broad distribution of expressive opportunities.

A. The Rationale for Broad Distribution

Theorists of distributive justice explain the variety of ways in which resources can be distributed in a society: willingness to pay, desert, need, or per capita shares, for example.\textsuperscript{54} In U.S. society, willingness to pay predominates as a distributive method; but it is not all-encompassing. Some resources—votes, food, health care, housing—are allotted according to criteria that yield broader distribution than the market likely would.

Courts and commentators typically view freedom of speech and other constitutional rights as entitlements that should not and do not depend on willingness to pay. Economist Arthur Okun, for example, counts freedom of speech among "[a] vast number of entitlements and privileges [that] are distributed universally and equally and free of charge to all adult citizens of the United States."\textsuperscript{55} The Supreme Court agrees that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."\textsuperscript{56}

A preference for broad distribution of the right to speak, and even of affirmative expressive opportunities, makes sense in light of the various justifications for freedom of expression.\textsuperscript{57} Insofar as speech is an element of political participation and citizenship,\textsuperscript{58} its ideal distribution would mirror our chosen distribution of political power: that is, one person, one vote. We do not buy and sell votes, and we have abolished poll taxes, because we do not see willingness to pay as a relevant qualification for political participation.\textsuperscript{59} Voting is part of political participation; speaking up about

\textsuperscript{54} See generally, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 3–4, 21 (1983); PETER WESTEN, SPEAKING OF EQUALITY 146–51 (1990).

\textsuperscript{55} ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 6 (1975); see also WALZER, supra note 54, at 101.

\textsuperscript{56} Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

\textsuperscript{57} See Benkler, supra note 15, at 377–78 (summarizing scholarship that explains "why a democratic system such as ours would seek to decentralize its information production sector").

\textsuperscript{58} See, e.g., Alexander Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245, 255 ("[V]oting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments . . . ."); id. at 257 (including "[p]ublic discussions of public issues" among the activities that the First Amendment protects); see also Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 882–84 (1963) (explaining that one "main function of a system of freedom of expression is to provide for participation in decision-making through a process of open discussion which is available to all members of a community").

\textsuperscript{59} As the Supreme Court has explained, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966). Similarly, Michael Walzer notes:

Each citizen is entitled to one vote simply because he is a citizen. Men and women who are ambitious to exercise greater power must collect votes, but they can't do that by purchasing them; we don't want votes to be traded in the marketplace, though virtually everything else is traded there, and so we have made it a criminal offense to offer bribes to voters.

MICHAEL WALZER, RADICAL PRINCIPLES 247 (1980).
politics, and about society more generally, is another part.\textsuperscript{60} Both are valuable to democratic citizenship regardless of an individual citizen's willingness to pay for them.

Politics aside, if speech is necessary for individual autonomy and well-being,\textsuperscript{61} then like other life necessities (food, health care, housing) it should ideally be available to everyone who needed it, not just to those who can pay for it.\textsuperscript{62} Expression is a way to establish identity, vent anger, develop mental capacities, educate children, and make a mark on the world. It would be inhumane and homogenizing to distribute these capacities only to those who are willing and able to pay for them.

It also makes sense to distribute expressive opportunities widely if we value speech for its substantive communicative impact—its contribution to the search for truth\textsuperscript{63} or to a rich culture. With these ends in mind, we want to ensure that the widest possible variety of views are expressed\textsuperscript{64}—including the views of those who are unwilling or unable to pay for the privilege of speaking.\textsuperscript{65} If speech opportunities were distributed only by the market, we would miss some unique perspectives of those who cannot afford to pay. Even those who could theoretically afford to speak would be unlikely to pay a price that reflects the full social benefits of speaking.\textsuperscript{66}

\textsuperscript{60} See generally Balkin, supra note 15 (expanding on Meiklejohn's defense of political speech and developing a broader theory of democratic culture).

\textsuperscript{61} See Emerson, supra note 58, at 879 ("Expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self."). \textit{See generally C. Edwin Baker, Human Liberty and Freedom of Speech} (1989).

\textsuperscript{62} \textit{Cf.} Walzer, supra note 59, at 241 ("Consider the case of medical care: surely it should not be distributed to individuals because they are wealthy, intelligent, or righteous, but only because they are sick.").

\textsuperscript{63} See Emerson, supra note 58, at 881–82 (identifying the attainment of truth as one of the main functions of a system of free expression).

\textsuperscript{64} As Justice Black put it, "[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." \textit{Associated Press v. United States}, 326 U.S. 1, 20 (1945). Emerson writes: 

In the traditional theory, freedom of expression is not only an individual but a social good. It is, to begin with, the best process for advancing knowledge and discovering truth. Considered in this aspect, the theory starts with the premise that the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition.

Emerson, supra note 58, at 881.

\textsuperscript{65} \textit{Cf.} Laurence H. Tribe, \textit{American Constitutional Law} 786 (2nd ed. 1988) [hereinafter Tribe, Constitutional Law] ("[W]hen the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth?").

\textsuperscript{66} See Daniel A. Farber, \textit{Free Speech Without Romance: Public Choice and the First Amendment}, 105 Harv. L. Rev. 554, 558–60 (1991) (describing positive externalities associated with speech and asserting that "the disparity between the private and social value...is greater for speech than for typical consumer goods"). \textit{But see} Kathleen M. Sullivan, \textit{Free Speech and Unfree Markets}, 42 UCLA L. Rev. 949, 960 (1995) (suggesting that speech can produce negative externalities as well).
As Kathleen Sullivan summarizes: "Whether the exchange of ideas is valued for its connection to truth, self-government, or individual autonomy, the point in each setting is that speech is valuable independent of people’s willingness to pay for it." In principle, therefore, speech and opportunities to speak should not be distributed solely via market mechanisms.

In practice, however, the ability to communicate effectively often does track willingness to pay. It costs money to print a book, to broadcast a television advertisement, or even to make a phone call: hence A.J. Liebling’s quip that “[f]reedom of the press is guaranteed only to those who own one.” The reality of the speech marketplace can be difficult to square with the egalitarian premises of freedom of expression. But the inequities are also difficult to rectify: the government cannot afford to provide everyone with a printing press or a television studio.

Yet policymakers and courts have attempted in more modest ways to achieve a broader distribution of speech opportunities than the market might otherwise produce. Government speech subsidies, constitutional doctrines that ensure access to inexpensive speech media, and rules compelling some speech distributors to carry the messages of others all reflect a norm of broad distribution of expressive opportunities even, and perhaps especially, to those who cannot afford to pay for them. The next subpart will describe some of these efforts.

67. Sullivan, supra note 66, at 963.
68. See, e.g., C. Edwin Baker, Giving the Audience What it Wants, 58 OHIO ST. L.J. 311, 385–411 (1997) (critiquing the “reliance on the marketplace to determine the content and the distribution of media”); William Van Alstyne, The Mobius Strip of the First Amendment: Perspectives on Red Lion, 29 S.C. L. REV. 539, 562 (1978) ("[F]reedom of speech is... abridged by a government policy that adheres only to a private property system and a market-pricing mechanism in determining who shall be able to speak."). Within copyright scholarship, see, for example, James Boyle, Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property, 53 VAND. L. REV. 2007, 2033 (2000) (noting that “[t]he idea of consumer sovereignty rests on the compelling argument that people know what is good for them and can value it accordingly” and arguing that “it is particularly hard to say that information can be valued in such a way”); Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”, 97 MICH. L. REV. 462, 539 (1998) (“Creative and informational works affect individual and social self-determination in a variety of ways, many of which are not registered, much less measured, by markets.”); 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, 1631 (1982) (“When defendant’s use contributes something of importance to public knowledge, political debate, or human health, it may be difficult to state the social worth of that contribution as a dollar figure.”).
70. See OKUN, supra note 55, at vii (“Money is used by some big winners of market rewards in an effort to acquire extra helpings of those rights that are supposed to be equally distributed.”).
71. See BAKER, supra note 61, at 46 (arguing that the goal of “equality of individual opportunities for communication relies on plausible theoretical assumptions,” but that it “is unworkable” and that “on any plausible definition, it requires state intervention of tremendous scope”).
I should concede at the outset that the policies and doctrines that aim to distribute speech broadly are arguably minor, and exceptional, efforts at the margin of a system that does largely allocate expressive opportunities via markets. But given the normative case in favor of broad distribution and the tradition of pursuing that goal at least in modest ways, I believe that the right conclusion to draw from the prevalence of market distribution of speech opportunities is that mechanisms for achieving broad distribution are difficult and pose their own risks—not that the goal has been or should be abandoned.

B. Government Efforts to Distribute Expressive Opportunities Broadly

1. Speech Subsidies.—One way to pursue the goal of broad distribution of expressive opportunities is through government subsidies: expending public funds or offering government resources for free or at a discount, in order to facilitate speech by those who might not otherwise afford it. The Federal Communications Commission (FCC) pursues this strategy when it gives telephone subsidies and broadcast spectrum discounts; state and local governments pursue this strategy when they make public property available for parades and other speech activities; the courts pursue this strategy when they apply special First Amendment scrutiny to limits on speech in those public forums. These subsidy schemes, and the jurisprudence that supports them, are often controversial. But the controversy seems to stem primarily from the difficulty of implementing subsidies that truly benefit those who need them, not from fundamental disagreement about the norm of broad distribution.

The FCC, in the exercise of its authority under the Communications Act of 1934, subsidizes communication in various ways. The Communications Act describes its purpose, in part, “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” This language suggests concern not only with the total quantum of communication resources, but also with their distribution: the goal is to make communication service available and affordable to everyone.

A variety of FCC programs serve this goal. The Lifeline and LinkUp programs subsidize telephone service for low-income households. The E-Rate program provides internet access subsidies for schools, libraries, and

72. See infra subpart III(C).
rural health care providers in order to “assure that no one is barred from benefiting from the power of the Information Age.” When auctioning commercial broadcast licenses, the FCC has offered special credits for bidders with no or few other media interests. The credits are designed to ensure that “small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.” In addition, the FCC has created a new radio broadcasting category—low power FM radio—designed to “encourag[e] diverse voices on the nation’s airwaves and creat[e] opportunities for new entrants in broadcasting.” The focus here is not only on generating more communication, but also on diversifying the messages that are available to listeners and on distributing opportunities to disadvantaged individuals and groups.

All of these FCC initiatives have been controversial. In telephony, universal service programs are criticized because of distortions purportedly caused by the funding mechanisms they employ, and because some of the subsidies are not targeted at poor customers. The broadcast spectrum bidding credits have been characterized as inefficient, anti-innovation, counterproductive, and subject to abuse. Low-power FM radio was initially limited by Congress in response to objections from incumbent broadcasters. But these criticisms stem from perceived problems with the mechanism by which the FCC has pursued the goal of broad distribution of expressive opportunities. They do not go to the heart of the norm itself, which continues to animate communications policy.

Another way that government subsidizes expressive opportunities is by making public spaces available as speech fora. As Justice Roberts famously

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79. See, e.g., Ross C. Eriksson et al., Targeted and Untargeted Subsidy Schemes: Evidence from Postdivestiture Efforts to Promote Universal Telephone Service, 41 J.L. & ECON. 477, 478 (1998) (arguing that untargeted subsidies create “pure waste” because the “expenditure on the untargeted individual fails to promote the desired end” and “magnifies the economic distortions in the sector generating these funds”); see also James Alleman, et al., Universal Service: The Poverty of Policy, 71 U. COLO. L. REV. 849, 856 (2000) (“If the objective...is to promote subscription, most of the price interventions...are unnecessary. More limited programs, targeted at marginal subscribers, could meet this objective at lower cost, and with less interference with a competitive market.”).
observed, streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." The availability of these public fora facilitates communication by those speakers who do not have access to private property from which to broadcast their messages.

The courts play a role in ensuring the availability of public property for speech. The public forum doctrine gives special First Amendment protection to speech in public places like parks and streets. In a discussion of protests on public forum property, Jack Balkin explains the connection between the doctrine and distribution of speech opportunities, especially to those who cannot afford to pay for them:

[W]hat is crucial to situations in which protesters seek access to a public forum is that most of the protesters in such situations do not, in fact, own much property...[T]he reason why public forums are essential to liberty of expression is that otherwise one's right to speak would depend upon one's ability to purchase property rights from private parties.

Balkin and others suggest that the rationale for the public forum doctrine does not merely limit restrictions on speech in existing public fora; it may also require their provision (or the provision of some alternative speech subsidy) in the first place.

The subsidy that public fora supply for poorly financed speakers would be undercut if the government charged substantial fees for the privilege of speaking. The Supreme Court seemed to recognize that in Murdock v. Pennsylvania, invalidating a license fee applied to public distribution of religious literature by Jehovah's Witnesses with the egalitarian emblem that "[f]reedom of speech, freedom of the press, freedom of religion are available...


83. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The doctrine may be honored more in the breech than in the observance. The Court often declares that some piece of public property is a "nonpublic forum" and therefore subjects restrictions on speech there to very little scrutiny. See, e.g., id. at 46–53 (subjecting the state's limitations on access to the school mail system to reasonableness review).


85. Id. at 400 ("If there were no guarantee of public forums like streets and parks, and we left the strikers to the vicissitudes of the marketplace, I suspect many would think that their free speech rights had been denied, even though they were formally guaranteed the right to speak."); see also TRIBE, CONSTITUTIONAL LAW supra note 65, at 979–80, 998 (explaining that "[t]he public forum doctrine is an important recognition that it is not enough for government to refrain from invading certain areas of liberty" and recognizing that "[t]he state may, even at some cost to the public fisc, have to provide at least a minimally adequate opportunity for the exercise of certain freedoms").
to all, not merely to those who can pay their own way.  

Although the precise reach of Murdock is unclear, some lower courts read the case to insist that speech permit fees be no more than "nominal," or that they include an indigence exception, in order to preserve speech opportunities for poorly financed speakers.  

In sum, various government efforts broaden the distribution of expressive opportunities by subsidizing speech. The courts, for their part, defend the subsidy traditionally provided by public forum property.

2. Preserving Inexpensive Media.—The norm of broad distribution of speech opportunities also emerges when speakers challenge regulations that restrict relatively affordable methods of communication. In Martin v. City of Struthers, the Supreme Court invalidated an ordinance banning residential handbilling and observed that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." Because door-to-door canvassing is so inexpensive, it is the communication method of choice for many poorly financed speakers. In Martin the Court took this reality into account, applied the norm of broad distribution of speech opportunities, and was therefore especially skeptical of a regulation that effectively silenced poorly financed speakers even as it theoretically left open alternative channels of communication.


87. In Central Florida Nuclear Freeze Campaign v. Walsh, for example, the Eleventh Circuit invalidated an ordinance requiring that demonstrators pay for additional police protection in order to receive a demonstration permit. 774 F.2d 1515 (11th Cir. 1985). The court cited Murdock for the proposition that "[a]n ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment." Id. at 1523. The court went on to explain:  

[I]ndigent persons who wish to exercise their First Amendment rights of speech and assembly and as a consequence of the added costs of police protection, are unable to pay such costs, are denied an equal opportunity to be heard. . . . [T]here is no provision in the ordinance which exempts those persons from paying the costs for additional police protection who are unable to pay. The granting of a license permit on the basis of the ability of persons wishing to use public streets and parks to demonstrate, to pay an unfixed fee for police protection, without providing for an alternative means of exercising First Amendment rights, is unconstitutional.  

Id. at 1523–24. Other courts of appeals read Murdock more narrowly to insist that permit fees be no greater than necessary to defray legitimate expenses, but not to limit fees to a "nominal" amount or to require an indigence exception. E.g., Stonewall Union v. City of Columbus, 931 F.2d 1130, 1136–37 (6th Cir. 1991). The Supreme Court granted certiorari to resolve the split in Forsyth v. Nationalist Movement, 505 U.S. 123, 128–29 & n.8 (1992), then decided the case on different grounds.

88. 319 U.S. 141, 146 (1943); see also N.J. Citizen Action v. Edison Township, 797 F.2d 1250 (3d Cir. 1986); City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547 (7th Cir. 1986).  

89. For a discussion of the regulation of poorly financed speakers and inexpensive modes of communication, see Tribe, Constitutional Law, supra note 65, at 979–80. See also Lee C.
The courts’ solicitude for poorly financed speakers has waxed and waned over the years.90 Although the Supreme Court has stressed the need to protect inexpensive modes of communication in the context of restrictions on front yard signs,91 leafleting,92 and billboards,93 it has upheld restrictions on sound trucks,94 sleeping in public parks,95 posting handbills on public property,96 protesting in a jail yard,97 organizing boycotts,98 placing unstamped literature in mailboxes,99 and participating in a government charity drive,100 all over the objections of dissenters who stressed the


90. See, e.g., Laurence H. Tribe, Constitutional Choices 188, 194–98 (1985) [hereinafter Tribe, Choices]; Kreimer, supra note 89, at 123 n.17; Lee, supra note 89, at 765; see also Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 586 n.9 (1983) (describing Martin as “substantially undercut” by subsequent case law); City of Ladeau, 796 F.2d at 1572 (Coffey, J., dissenting) (“The continuing vitality of Martin is questionable.”).

91. In City of Ladue v. Gilleo, the Court invalidated a city’s ban of most signs on residential property in part because “[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.” 512 U.S. 43, 57 (1994).

92. In McIntyre v. Ohio Elections Commission, the Court invalidated a ban on distribution of anonymous campaign literature. 514 U.S. 334 (1995). Describing the breadth of the prohibition at issue, Justice Stevens noted that “[i]t applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources.” Id. at 351. Justice Ginsburg’s concurrence also stressed that the ordinance had been applied to “an individual leafleteer.” Id. at 358 (Ginsburg, J., concurring); see also Lee Tien, Who’s Afraid of Anonymous Speech? McIntyre and the Internet, 75 Or. L. Rev. 117, 130 (1996) (observing that “the McIntyre Court’s concern was firmly grounded in the instrumental rationale that cheap speech is ‘essential to the poorly financed causes of little people,’ and you cannot read McIntyre without sensing great concern for ‘the right of the lonely pamphleteer’ “).

93. In Metromedia, Inc. v. City of San Diego, the Court invalidated a ban on noncommercial billboards, noting the parties’ stipulation that “many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.” 453 U.S. 490, 497 (1981) (quoting the joint stipulation of facts); see also Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977) (invalidating a township ordinance prohibiting “For Sale” and “Sold” signs in part because “[t]he options to which sellers realistically are relegated . . . involve more cost and less autonomy”).

regulations' impact on poorly financed speakers. But the Court recently reaffirmed *Martin* in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, in which it invalidated a village ordinance banning door-to-door advocacy without a solicitation permit. Justice Stevens's majority opinion recounts some of the Court's history of solicitude for poorly financed speakers, and for Jehovah's Witnesses in particular:

For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. Moreover, because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.

Justice Stevens recalls *Martin*’s concern about "the poorly financed causes of little people" and adds that "the Jehovah’s Witnesses are not the only 'little people' who face the risk of silencing by regulations like the Village’s." *Watchtower* thus endorses the Court’s earlier solicitude for poorly financed speakers and its related skepticism about laws that make otherwise inexpensive speech expensive. This approach embraces the norm of broad distribution of speech opportunities and rejects, in this context at least, the idea that speech opportunities should be distributed exclusively on the basis of willingness to pay.

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101. *Superior Court Trial Lawyers Ass'n*, 473 U.S. at 451 (Brennan, J., concurring in part and dissenting in part) (noting that poorly financed groups "cannot use established organizational techniques to advance their political interests, and boycotts are often the only effective route available to them"); *Cornelius*, 473 U.S. at 815 (Blackmun, J., dissenting) ("Access to government property permits the use of the less costly means of communication so 'essential to the poorly financed causes of little people . . .'")); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 315 n.14 (1984) (Marshall, J., dissenting) (arguing that a "content-neutral regulation that restricts an inexpensive mode of communication" will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse); *Taxpayers for Vincent*, 466 U.S. at 820 (Brennan, J., dissenting) (arguing that "signs posted on public property are doubtless 'essential to the poorly financed causes of little people'")); *Adderley*, 385 U.S. at 50--51 (Douglas, J., dissenting) ("Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were."). For a discussion of the Court's failure consistently to promote the needs of poorly financed speakers, see generally *TRIBE, CHOICES*, supra note 90, at 184, 188.

102. 536 U.S. 150 (2002).

103. *Id.* at 160--61.

104. *Id.* at 163. *But cf. id.* at 172--73 (Rehnquist, C.J., dissenting) (noting that the "poorly-financed" Jehovah's Witnesses are represented by a large legal team).
The Court has also recognized the potential of new technologies to facilitate inexpensive speech and the attendant danger of burdening those technologies with extra expenses. In *Reno v. American Civil Liberties Union*, the Court noted the internet’s potential to enable speech by poorly financed speakers:

[The internet] provides relatively unlimited, low-cost capacity for communication of all kinds... Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.105

The Court then went on to invalidate provisions of the Communications Decency Act (CDA) designed to protect minors from harmful material on the internet, in part because the technological safe harbors in the statute were either ineffective or "not economically feasible for most noncommercial speakers."106 The Act did not ban speaking via this new and inexpensive medium, but it did make it expensive in a way that impermissibly disadvantaged the poorly financed speakers whom the medium otherwise empowered.

Congress revised the invalidated provisions of the CDA in the form of the Child Online Protection Act (COPA). COPA applies a "community standard" to gauge what material qualifies as "harmful to minors."107 Although in *Ashcroft v. American Civil Liberties Union* the Supreme Court disagreed with the Third Circuit’s conclusion that application of this community standard necessarily violated the First Amendment, five justices expressed discomfort with the notion that internet speakers should be forced to develop or adopt technology to locate their audience geographically in order to cater to the various community standards of different locales.109 Their objection seems to be that complying with the requirement would be difficult and expensive and that this is especially problematic where the medium regulated is otherwise relatively affordable. As Justice Kennedy put it, "[I]t is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset."110

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110. *Id.* at 595 (Kennedy, J., concurring in the judgment); see also *id.* at 587 (O’Connor, J., concurring in part and concurring in the judgment) ("I agree with Justice Kennedy that, given Internet speakers’ inability to control the geographic location of their audience, expecting them to
Distributive Values

The Court has not been consistent or unanimous on this issue, but an important strand of its jurisprudence expresses a commitment to the goal of broad distribution of expressive opportunities. One way to pursue that goal is to greet regulations of inexpensive speech media with special skepticism, as the Court has now done repeatedly in the internet context and elsewhere.

3. Compelled Carriage.—Congress, the FCC, and state regulators have also attempted to distribute speech opportunities by requiring owners of speech platforms to amplify the voices (or views) of others. For example, the Communications Act authorizes local franchising authorities to require cable operators to designate channel capacity for “public, educational, or governmental use.” A House report has described these channels as “the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.”

The controversial Cable Television Consumer Protection Act of 1992 requires cable television systems to carry certain local broadcast stations without charge, in part because of concern about “the economic viability of free local broadcast television.” In upholding the Act, the Supreme Court explained that preserving threatened broadcast stations is important because “it has long been a basic tenet of national communications policy that the bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask, and would potentially suppress an inordinate amount of expression.”; id. at 590 (Breyer, J., concurring in part and concurring in the judgment) (“The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.”); id. at 605 (Stevens, J., dissenting) (noting that “COPA . . . covers a medium in which speech cannot be segregated to avoid communities where it is likely to be considered harmful to minors” and recognizing that “[t]he Internet presents a unique forum for communication because information, once posted, is accessible everywhere on the network at once” because “[t]he speaker cannot control access based on the location of the listener, nor can it choose the pathways through which its speech is transmitted”). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, took the contrary view that “[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” Id. at 583; cf. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125–26 (1989) (“If [a speaker’s] audience is comprised of different communities with different local standards, [that speaker] ultimately bears the burden of complying with the prohibition on obscene messages.”); Hamling v. United States, 418 U.S. 87, 106 (1974) (“The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit materials does not render a federal statute unconstitutional . . . .”).

114. Id. § 2(a)(16).
widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'

If some potentially "diverse and antagonistic sources" need assistance from other speech distributors to survive, Congress (with the Court's support) is sometimes willing to mandate that assistance in pursuit of the goal of broad distribution of speech opportunities.

The FCC's (since abandoned) "fairness doctrine" was another form of compelled carriage. It required radio and television broadcasters to present both sides of controversial public issues. One component of the doctrine required that any licensee that broadcasted an attack "upon the honesty, character, integrity or like personal qualities of an identified person or group" in the context of a controversial issue of public importance, offer the target of the attack an opportunity to respond using the broadcaster's facilities. Similarly, broadcasters were required to give political candidates an opportunity to respond to any editorial endorsement by the broadcaster of an opposing candidate. In Red Lion Broadcasting Co. v. FCC, the Court upheld these aspects of the fairness doctrine over a First Amendment challenge brought by regulated broadcasters. The Court explained, approvingly, that the doctrine denied networks "[the] unfettered power to make time available only to the highest bidders." The Court thus explicitly rejected the idea that broadcasting opportunities should be distributed based solely on willingness to pay.

Marsh v. Alabama can also be interpreted as an endorsement of a sort of compelled carriage; indeed, it seems to require compelled carriage in narrow circumstances. In Marsh, the Supreme Court overturned the trespass conviction of a Jehovah's Witness who distributed her religious literature on the sidewalks of a company-owned town that forbade the leafletting. The Court insisted that the trespass law must yield to ensure some means of communicating with the community regardless of the property status of the town. The holding required, in effect, that the sidewalks of the company town "carry" the speech of peaceful pamphleteers.

117. Id. at 396.
118. Id. at 392.
120. Id. at 504–05 & n.1. Marsh is often read even more broadly to expose private property owners to an affirmative constitutional obligation to permit speech on their property, at least in the narrow circumstances in which the private property has all of the attributes of a normal town. See, e.g., Petersen v. Talisman Sugar Corp., 478 F.2d 73, 82 (5th Cir. 1973) (declaring a First Amendment right of access to a labor camp).
The constitutional holding in *Marsh* has not been broadly extended.\textsuperscript{121} The FCC's fairness doctrine has been abandoned altogether. And other forms of compelled carriage are controversial. As I will discuss below, some compelled carriage schemes have been invalidated on the grounds that they violate the speech rights of the compelled carriers. But I conclude that the potential shortcomings of the compelled carriage approach do not undermine the underlying norm of broad distribution of expressive opportunities that unites compelled carriage with the other distributive policies described above.

This norm is supported by First Amendment theory; and it helps explain the strands of policy and case law that promote the broad distribution of speech opportunities via a variety of mechanisms, including direct governmental subsidies of private speakers, public provision of speech fora, constitutional limitations on regulations that burden inexpensive speech media, and policies that force some private property owners to distribute or amplify speech on behalf of others. These policies aim to ensure that the realities of the speech marketplace do not silence poorly financed speakers. The result is not equality of expressive capacity—the rich can still afford more speech than the poor—but rather universal access to some minimal speech opportunities. Sometimes Congress, administrative agencies, or state and local governments undertake these efforts, often with the implicit or explicit endorsement of the courts. Occasionally, as in cases like *Martin v. City of Struthers*,\textsuperscript{122} the courts insist on solicitude for poorly financed speakers on First Amendment grounds.

**C. Objections to Broad Distribution of Expressive Opportunities**

The policies I have described are controversial. The objections seldom focus on the goal of broad distribution of expressive opportunities, however. Instead they point out the difficulties and dangers posed by specific mechanisms for achieving that goal.

Some of the most forceful and successful objections to government efforts to distribute speech opportunities have themselves been couched in terms of freedom of expression. For example, in the 1970s Congress attempted to restrict certain independent campaign expenditures, in part to equalize the distribution of speech opportunities (more specifically, to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections").\textsuperscript{123} In *Buckley v. Valeo*, the Supreme Court invalidated the independent expenditure limitation, insisting that "the concept that government may restrict the speech of some elements of our society in

\textsuperscript{121} See, e.g., Hudgens v. NLRB, 424 U.S. 507, 513–21 (1976) (distinguishing *Marsh* on its facts because a shopping mall was not "the functional equivalent of a municipality" as the privately owned town in *Marsh* had been).

\textsuperscript{122} 319 U.S. 141 (1943).

\textsuperscript{123} Buckley v. Valeo, 424 U.S. 1, 48 (1976).
order to enhance the relative voice of others is wholly foreign to the First Amendment.”

Similarly, in Miami Herald Publishing Co. v. Tornillo, the Court invalidated a Florida statute requiring any newspaper in which a political candidate is “assailed regarding his personal character or official record” to print the candidate’s reply. The statute’s defenders had stressed the need to provide dissidents a means to counter the messages carried by the large media conglomerates that own many metropolitan newspapers. The Court did not question the validity of that goal, but it explained that the statute was invalid because of the burden it imposed on newspapers’ editorial choices and because that burden was triggered by the content of the newspapers’ speech.

Although both invalidated specific attempts to redistribute speech opportunities, neither Buckley nor Tornillo rejected the goal of distributing speech opportunities broadly. As Elena Kagan has concluded, “The Buckley [antiredistribution] principle emerges not from the view that redistribution of speech opportunities is itself an illegitimate end, but from the view that governmental actions justified as redistributive devices often (though not always) stem partly from hostility or sympathy toward ideas—or, even more commonly, from self interest.” The Supreme Court has also explained, in retrospect, that that the problem in Buckley and Tornillo was the danger posed by the redistributive mechanisms—not the goal of broad distribution itself. Justice Breyer has gone so far as to declare that the seemingly antiredistributive language in Buckley simply “cannot be taken literally.”

Some commentators would have extended the Buckley principle to invalidate on First Amendment grounds the fairness doctrine, cable must-carry rules, and all other policies that aim to give some speakers rights of expressive access to private communication platforms. But even this broader objection does not seem to stem from rejection of the goal of broad speech

124. Id. at 48–49.
125. 418 U.S. 241, 244 (1974).
126. Id. at 247–54.
127. Id. at 254.
128. Id. at 256 (“The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter.... The Florida statute exacts a penalty on the basis of the content of a newspaper.”).
130. In addressing the cable must-carry rules discussed above, the Court read Buckley to “stand[] for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.” Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994). The Court also distinguished Tornillo on several grounds, including the fact that the right of reply statute challenged there was triggered by content-based distinctions. Id. at 653–68.
distribution. Instead, the typical objection is that specific mechanisms of speech redistribution sacrifice too much in terms of the expressive interests of the communications platform owners.

For example, in rejecting the idea of a "right of expressive access," Martin Redish and Kirk Kaludis "readily concede that creation of a right of access, at least in theory, might significantly benefit the interests of free expression." But they point to the difficulty of implementing the right in a neutral way that does not harm the expressive interests of wealthy speakers. Charles Fried is similarly concerned that the liberty of some speakers could be sacrificed in the name of community and equality.

There may be some critics who object to efforts to distribute speech opportunities on the grounds that speech, like many other resources, should as a normative matter be distributed based on willingness to pay, without allowances for the poor. This view fails to recognize all of the ways in which the value of speech—to democracy, autonomy, truth-seeking, and culture—is unlikely to be measured by the market. Moreover, it is difficult to square with the speech-distributive policies and constitutional rulings discussed above.

In sum, the distributive norm that best reflects First Amendment theory—and that emerges from important elements of communications policy and First Amendment case law—favors broad distribution of speech opportunities regardless of willingness and ability to pay. This norm can be

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132. Martin H. Redish & Kirk J. Kaludis, The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma, 93 NW. U. L. REV. 1083, 1119 (1999); see also id. at 1130 (suggesting alternative methods of "enriching public debate through the inclusion of the expression of those who normally lack communicative access to the public at large"); id. at 1132 ("As its proponents have argued, creation of a right of expressive access arguably expands the diversity of public debate, thereby bringing about a more thoughtful and better informed electorate.").

133. Id. at 1108–23. Redish & Kaludis explain:

It would ultimately prove to be impossible to structure an expressive system in which all views are equally represented, or in which all speakers possess equal means of communication. Any attempt to achieve such equality will not only prove futile but inevitably prove harmful to the interests of free expression by inexorably leading towards a reduction to the lowest common denominator of expressive power. This is because ultimately, attainment of the goal of economic equality among speakers would, as a practical matter, be feasible only through the suppression of the speech of the economically powerful. By giving rise to such suppression, the myopic pursuit of economic equality among speakers would inescapably undermine the goals sought to be fostered by the guarantee of free expression.

Id. at 1100.


135. Few today would go as far as Herbert Spencer, who opposed public provision of libraries and museums because they give their patrons something they did not earn (while taking money from hardworking taxpayers). HERBERT SPENCER, THE MAN VERSUS THE STATE 402 (London, Williams & Norgate 1892).
effected by requiring owners of communication platforms to deliver the messages of others, by providing government subsidies of various sorts, and by preserving inexpensive methods of speaking. Courts and policymakers sometimes question specific methodologies for promoting broad distribution of speech opportunities, but seldom the goal itself.  

IV. The New Distributive Consequences of Copyright

As demonstrated in Part II, several features of copyright have traditionally served to broaden opportunities to create expressive works. The distributive goal embedded in copyright is consistent with a norm that runs through First Amendment case law and communication policy: speech has value independent of the speaker or recipient’s ability to pay for it; we should therefore attempt to distribute speech opportunities more broadly than the market otherwise would. Recent technological developments seem to be distorting copyright’s distributive functions, however. This Part describes those changes and copyright law’s failure, thus far, to address them in a way that promotes the broad distribution of expressive opportunities.

A. How Technology Triggers New Copyright Burdens

Traditionally, copyright’s distributive impact has operated by benefiting poorly financed creators as much as or more than it burdens them. As I discuss above, copyright helps some poorly financed artists hit the big time. They get funded by publishers, record companies, or movie distributors; they are able to make their work and distribute it to a wide audience. At this point the artist (or, more likely, the corporate sponsor) may have to deal with the burdens imposed by copyright—for instance, clearing rights before the movie hits the theaters—but that seems fitting given that copyright’s benefits made this exposure possible. As for those poorly financed creators who never receive the benefit of copyright, they have traditionally escaped its burdens as well, thanks to copyright’s exceptions and its practical irrelevance to impecunious amateurs. In sum, only those poorly financed creators who have benefited from copyright’s largess have been forced to bear its costs—until recently.

This logic worked when reusing copyrighted works in a significant way involved substantial expense apart from the cost of copyright licenses. Where iterative creativity is expensive, it depends on the type of investment that copyright facilitates.  

136. See Stanley Ingber, The First Amendment in Modern Garb: Retaining System Legitimacy—A Review Essay of Lucas Powe’s American Broadcasting and the First Amendment, 56 GEO. WASH. L. REV. 187, 230 (1987) (observing that when the legal process fails to produce constitutionally ideal case law, “critics often blame the Court’s analysis, rather than recognizing that, due to conflicting value goals, the law has limitations as to what it can accomplish”).

expensive anymore. Most artists could afford *Tarnation’s* $218 budget. They might even be able to afford the computer and software that Caouette borrowed to make the film. With some technical savvy, they could also distribute a film over the internet, as Negativland did with *The Mashin’ of the Christ*.

A 2003 survey conducted by the Pew Internet and American Life Project found that 44 percent of U.S. internet users had posted material online. Forty percent of internet users with household incomes below $30,000 had done so. Some of those internet publishers do not even own computers: 95 percent of public libraries in the United States offer free access to computers and the internet. Many technologically empowered speakers use their new tools to mix and mash the cultural artifacts that saturate daily life. Expressive cultural commentary necessarily incorporates elements of the culture, which now overwhelmingly includes copyrighted texts, images, and sounds.

With the power to create and distribute creative works on a large scale, and the impetus to use the copyrighted cultural building blocks that are at hand, comes the specter of copyright infringement. For example, Brian Burton (a.k.a. DJ Dangermouse) spent two weeks working with $400 worth of software on a computer in his bedroom to create *The Grey Album*, which combines vocals from Jay-Z’s *The Black Album* with beats sampled from the Beatles’ *White Album*. Rolling Stone Magazine declared the result “an ingenious hip-hop record that sounds oddly ahead of its time.”

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140. Id. at 8.


142. The Pew Internet and American Life Project reports that 18% of adult respondents with internet access “[t]ake material [they] find online—like songs, text or images—and remix it into [their] own artistic creation.” Pew Internet & Am. Life Project, Internet Activities, available at http://www.pewinternet.org/trends/Internet_Activities_3.02.05.htm (last updated Mar. 2, 2005).


the record company that owns the rights to the Beatles' sound recordings, declared it a copyright infringement and sent cease and desist letters to Burton and others who distributed *The Grey Album* in record stores and over the internet.\textsuperscript{145}

New technology thus enables upstart amateurs to become large-scale producers and distributors of creative works. That is a boon for creativity and for the broad distribution of creative opportunities. But it also means that the threat of copyright enforcement is real for a class of creators who have traditionally been spared copyright's burdens. These new burdens might be bearable if copyright's benefits to poorly financed speakers increased apace. But inexpensive technology for creativity and distribution empowers some creators who do not stand to benefit monetarily from copyright because their work does not have commercial appeal or because they do not want to exploit it commercially. The primary mechanism by which copyright aspires to encourage creativity (protecting creators from copiers who would drive down the market price for copies of their work) does not benefit these nonmarketplace creators. They are not monetarily benefited by copyright, but they are now burdened because technology gives them power to practice iterative creativity on a scale that is likely to come to the attention of copyright holders.\textsuperscript{146} This development upsets copyright's distributive logic and changes copyright from a system that seems, on balance, to benefit poorly financed creators, to one that endangers their ability to express themselves using powerful cultural artifacts.

**B. The Insufficiency of Copyright Exceptions**

 Technologically enabled users of copyrighted works, for whom the burdens of copyright are now relevant, do not necessarily fall within the categories of users who are favored by statutory exceptions. The existing narrow exceptions within copyright law seem to be targeted at those specialized entities (schools, 4-H clubs, public radio stations) that have traditionally been equipped to make actionable reuses of copyrighted material but too poor to afford copyright licenses.\textsuperscript{147} The internet and digital copying technology make substantial reuses of copyrighted material easy not just for these identifiable groups, but for any individual with access to the technology.

\textsuperscript{145} *Beatles Remix is Banned by EMI*, DAILY TELEGRAPH (London), Feb. 17, 2004, at 7.

\textsuperscript{146} As Jack Balkin observes:

[At the very moment when ordinary people are empowered to use digital technologies to speak, to create, to participate in the creation of culture, and to distribute their ideas and innovations around the world, businesses are working as hard as possible to limit and shut down forms of participation and innovation that are inconsistent with their economic interests.]


\textsuperscript{147} *But cf. Litman, supra note 40*. 83 Tex L. Rev. 1564 2004-2005
C. The Failure of Fair Use

Because fair use is more context-specific and open-ended than the specific statutory exceptions for libraries and other special users, it offers some promise as a mechanism for preserving broad distribution of expressive opportunities in the wake of recent technological developments. But over the past twenty years or so, fair use has come to focus on the correction of market failure to the exclusion of the distributive concerns that helped to shape the origins of the doctrine.  

In much of contemporary copyright commentary and jurisprudence, fair use steps in only where transaction costs or copyright holder intransigence make a voluntary bargain impossible. Where, by contrast, there is a functioning market for reuse of copyrighted works, courts are less likely to excuse unauthorized reuse and commentators are less likely to complain.  

If the reuse was so important, the logic seems to go, why didn’t the defendant just pay for it? For example, in Harper & Row Publishers v. Nation Enterprises, the Supreme Court rejected The Nation magazine’s claim that an article that included excerpts of President Ford’s unpublished memoir was fair use. Here, permission to excerpt the memoir was available for a fee. (Indeed, Harper & Row had sold such permission to Time for $25,000.) Under these circumstances, the Court held that the defendant had no excuse for not purchasing permission, despite arguments about the social value of the unauthorized use: “[T]o propose that fair use be imposed whenever the social value [of dissemination] outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.” The Court thus suggests that a speaker building on copyrighted works should simply pay for permission to do so and that a payment requirement imposes no meaningful restriction on speech. This view echoes the reasoning applied in a related context in Zacchini v. Scripps-Howard Broadcasting Co. There, the Court rejected a First Amendment defense to a right of publicity action against a television station that broadcast video footage of the plaintiff’s human cannonball act. The Court stressed that Zacchini did not object to publication of his act; rather, he “simply wants to be paid.” Most recently, the Sixth Circuit held (without mentioning fair use) that sampling

148. See Netanel, supra note 53, at 20–23 (describing the recent narrowing of fair use).
149. See id. at 21 (“Since Harper & Row, the market-centered view of fair use has steadily gained ground. Courts have repeatedly invoked the bare possibility of licensing in potential markets for the copyright holder’s work to deny fair use.”).
151. Id. at 542–43.
152. Id. at 559 (quoting Gordon, supra note 68, at 1615).
154. Id. at 578.
155. Id.
three unrecognizable notes from a sound recording amounts to copyright infringement, summing up its analysis: "Get a license or do not sample."\textsuperscript{156}

Several commentators have adopted similarly enthusiastic views about reliance on markets (and correspondingly narrow views of fair use). For example, Tom Bell has asserted that "the scope of the fair use defense rises and falls with the transaction costs of licensing access to copyrighted works."\textsuperscript{157} These cases and commentators do not acknowledge the possibility that iterative creativity could be stifled by the mere expense of seeking and paying for permission to incorporate copyrighted expression into a new work. "Get a license or do not sample" is no answer to a would-be creator who does not have the money to participate in the license marketplace.

Unfortunately, this narrow focus on market failure has arisen at the very time that copyright should be more attentive to distributive concerns. As I describe above, copyright has traditionally either subsidized poorly financed creators or left them alone because their activities fell within an exception or did not come to anyone's attention. But now almost everyone has the potential to make and widely disseminate creative works, even without the subsidizing effect of copyright. Copyright can burden these newly empowered creators without benefiting them and thereby threaten their creative endeavors. Copyright's distributive impact is thus shifting away from the valuable norm of broad distribution of expressive opportunities that is reflected in the First Amendment jurisprudence and communications policy. But contemporary copyright is ill-equipped to address that shift because the preoccupation with market failure often leads courts and commentators to ignore distributive concerns altogether.

V. Responding to the Changing Distributive Consequences of Copyright

How should copyright grapple with its new distributive consequences? What would it mean for copyright to make allowances for poorly financed creators in order to serve the goal of broad distribution of expressive opportunities? I survey several possible approaches below. But first, I offer

\begin{itemize}
\item \textsuperscript{156} Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).
\item \textsuperscript{157} Tom W. Bell, \textit{Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine}, 76 N.C. L. REV. 557, 583 (1998); see also Jane C. Ginsburg, \textit{Authors and Users in Copyright}, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 15 (1997) ("[T]he primary justification for exempting private copying as fair use has been transaction costs, but these are much attenuated in the digital world."); Trotter Hardy, \textit{Property (and Copyright) in Cyberspace}, 1996 U. CHI. LEGAL F. 217, 233 (noting the limited uses of copyrighted material to which the fair use defense applies); Edmund W. Kitch, \textit{Can the Internet Shrink Fair Use?}, 78 NEB. L. REV. 880, 881 (1999) (predicting that the internet will enable easy and efficient communication between users of copyrighted work and copyright owners, which will reduce the market failure situations which justify fair use doctrine). Although Wendy Gordon originated the fair use as market failure theory, her notion of market failure was broader and more open to distributive and First Amendment concerns than many more recent courts and commentators have been. See Gordon, supra note 68, at 1631.
\end{itemize}
A simple proposal. The proposal is incomplete and tentative, for reasons I discuss below, but I hope it will contribute to an ongoing conversation about copyright reform in the digital age.

A. A Proposal

The fair use doctrine could be adjusted to ensure that creators who are not subsidized by copyright are also not burdened—thus restoring copyright’s former distributive logic. Specifically, fair use analysis could consider whether a defendant who is creatively reusing a copyrighted work is exploiting the monetary benefits that copyright offers. Where she is not (because, for example, she allows anyone to copy her work for free) the burden that copyright would impose on her probably outweighs the benefit, thus potentially endangering her ability to engage in interactive creativity. A presumption that such a defendant’s use is fair would help copyright address its new distributive consequences.¹⁵⁸

The presumption would directly benefit poorly financed creators who forgo the monetary benefits of copyright for reasons of independence, or ideology, or market reality. It could thus prevent copyright from becoming an unbearable burden in those cases in which it does not provide a recompensing benefit—the very cases that trigger my concern about copyright’s new distributive consequences.

The proposal may seem like an odd way to address my distributive concerns, however, because it is not limited to poorly financed creators. After all, well-heeled corporations and successful artists sometimes disclaim the monetary benefits of copyright. Take the Beastie Boys and David Byrne—successful musicians who have licensed some of their works for free reuse under Creative Commons licenses.¹⁵⁹ I would not exclude them from the presumption in part for administrative reasons: it may be easier to determine whether a work is copyright-financed than to determine whether its creator is well or poorly financed in general. Even apart from that administrative issue, extending the presumption to well-financed creators may be justified by the benefit that would flow down to subsequent

¹⁵⁸ This is similar to Jessica Litman’s proposal to “recast[] copyright as an exclusive right of commercial exploitation.” Litman, supra note 138, at 180. But unlike Litman, I am focused here on allowing creative reuses that amount to new works of authorship. I understand Litman’s proposal to extend more broadly to include pure copying. I acknowledge below that the limits copyright imposes on pure copying may raise distributive concerns of their own, but they are not the focus of this Article.

My proposal is also inspired in part by C. Edwin Baker’s claim that individuals have a First Amendment right to make and broadly distribute noncommercial transformative works that include copyrighted material. Baker, supra note 53, at 918. Like Litman, Baker would excuse some pure copying as well. Id.

generations of creators—including poorly financed creators—who can build without charge on freely licensed new works of authorship.

I do imagine circumstances, however, in which the presumption I propose should be overcome. The presumption should be defeated, for example, where the plaintiff can show that the defendant’s use competes with the plaintiff’s commercial exploitation of her own work, undermines her market, and thus destroys her ability to create and disseminate her work. A copyright holder who is herself poorly financed, and whose creativity and dissemination may therefore depend especially heavily on successful commercial exploitation, will be especially likely to make such a showing.

Clearly, this proposal builds upon elements that are already present in fair use analysis. Noncommercial uses are favored over commercial uses. Uses that harm “the potential market for or value of the copyrighted work” are disfavored. My proposal differs from the standard fair use analysis by defining noncommercial uses as those that do not exploit the monetary benefits of copyright, by making the allowance of creative noncommercial uses presumptive and by requiring the plaintiff to make a strong showing of harm to her ability to create and disseminate her own work in order to defeat the presumption. And finally, in contrast to some recent fair use analysis, I would not allow the existence of a market for permission to reuse the plaintiff’s work to defeat a fair use claim.

B. Additional Applications of the Norm of Broad Distribution

Although my proposal might address problems faced by poorly financed creators who do not exploit copyright’s benefits, it leaves other distributive issues unresolved. Specifically, it is not helpful to the poorly financed creator who is attempting to exploit his work commercially but has not yet generated profits he could use to pay copyright permission fees. His creative efforts might be stifled by the prospect of copyright-related expenses that exceed his current ability to pay. This aspect of copyright’s distributive impact could be addressed in a number of ways.

1. Fair Use.—In addition to my proposed reform of fair use, the doctrine could be modified in other ways that would be responsive to the

160. Here again I echo Jessica Litman, who would count as infringement under her reform proposal “large-scale interference” with a copyright holder’s opportunities for commercial exploitation. Litman, supra note 138, at 180; see also Baker, supra note 53, at 918 (suggesting that limitations on noncommercial copying and distribution may be appropriate where they have “the likely consequence of largely destroying, not merely reducing, the market for authorized copies of the copyrighted material”).


162. Id. § 107(4).

163. Cf. Ayres v. City of Chi., 125 F.3d 1010, 1017 (7th Cir. 1997) (explaining that a ban on sale of t-shirts burdens speech although it allows shirts to be given away, because sale defrays the cost of expression).
needs of poorly financed creators. Courts could simply take ability to pay into account as part of the fair use calculus. Or, to use the language of the statutory fair use provision, avoiding unaffordable license fees could be considered a valid “purpose” of unauthorized copying.

2. Categorical Exceptions.—Another approach to pursuing the goal of broad distribution of expressive opportunities would expand the existing collection of narrow legislative exemptions for specified users and uses of copyrighted works to include additional types of users who likely could not afford copyright licenses and to cover additional uses by those already statutorily favored because of their inability to pay. To be effective, such a solution would have to extend beyond the narrow categories of specially favored users identified in the current Act. Given the broad availability of the technology that is making copyright relevant to new classes of people, it is difficult to imagine a comprehensive categorical solution. But this approach may be useful for clearly identifiable groups of poorly financed creators.

3. Remedies.—The Copyright Act provides a variety of remedies for infringement, including injunctions, actual damages, defendants’ profits attributable to infringement, and statutory damages of up to $150,000 per work. 164 Criminal prosecution is also possible under certain circumstances. 165 Jed Rubenfeld has proposed that the remedy for infringement of a copyright holder’s exclusive right to make derivative works be limited to allocation of the defendant’s profits; no injunctions or damages should be available. 166 As Rubenfeld describes the proposal, “If the producer of a derivative work offers the work for free, he is immune from suit altogether.” 167 Although Rubenfeld does not focus on distributive concerns, his remedy proposal would effectively limit copyright liability to those who successfully exploit the monetary benefits of copyright and who thereby generate profits with which they can pay to incorporate copyrighted works. Until such profits are generated, creators could proceed free from the threat of copyright liability. Even poorly financed creators could therefore afford to build upon copyrighted works.

4. Price Discrimination.—The needs of poorly financed creators might also be addressed by facilitating voluntary price discrimination. 168 As

165. Id. § 506.
167. Id. at 57.
Wendy Gordon has pointed out, the basic structure of copyright has traditionally facilitated a limited form of price discrimination by distinguishing mere “consumers” (e.g., readers who buy a book but do not reproduce it and therefore do not implicate any of the copyright holder’s exclusive rights) from “publishers” (e.g., magazines who buy the right to serialize the book). When copyright holders charged one relatively low price to consumers for a copy of a work and a much higher price to publishers for permission to reproduce it, the distinction was probably a rough reflection of ability to pay in an age when reproduction was expensive. That crude type of price discrimination is of no avail to the new community of poorly financed creators, however. Their willingness to pay is low, but they have the tools and the desire to communicate by creatively reusing and redistributing copyrighted works, not merely by consuming those works themselves. Under these circumstances, effective price discrimination would have to use a metric other than type of use; but distinguishing users more precisely may not be worth copyright holders’ while.

One recent example merges the categorical and price discrimination approaches. Congress recently acted to encourage copyright holders to offer discounts to a certain class of speakers—operators of small internet radio stations who play copyrighted sound recordings. Members of Congress “strongly encouraged” the Recording Industry Association of America (RIAA) to negotiate a rate for small webcasters based not on a per-performance fee, but on a percentage of webcaster revenue. In the face of congressional encouragement, the RIAA and a group of webcasters did negotiate a revenue-based alternative rate structure, which Congress officially blessed in the Small Webcaster Settlement Act of 2002. The history of the Act suggests the possibility, and possible limitations, of congressional action to address the needs of poorly financed speakers who reuse copyrighted works. It has been criticized as a back-room deal between copyright holders and only the largest and best organized of the “small” webcasters, creating an alternative rate structure that hobbyist webcasters still cannot afford. And, of course, if Congress had not created a digital sound recording performance right in the first place, then webcasters would not have faced crippling performance fees. Nonetheless, the Small Webcaster Settlement Act offers a model—voluntary price discrimination in
the shadow of potential government action—that may ultimately benefit other poorly financed speakers.

5. Fostering Inexpensive Dissemination Technology.—Distributive values may come into play not only when poorly financed speakers face direct liability for copyright infringement, but also in cases of secondary liability for those who facilitate their expression. For example, the Supreme Court is now deciding the fate of distributors of peer-to-peer software that allows individual computer users easily to distribute files to multiple other individual users via the internet.  

Although peer-to-peer software can be used to distribute any type of file, it is most widely known for facilitating the unauthorized distribution of copyrighted music files. The case currently before the Supreme Court, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, seeks to hold distributors of peer-to-peer software secondarily liable for infringement by their users.

The outcome of this case is relevant to copyright’s distributive impact because peer-to-peer technology can be an extremely useful dissemination tool for poorly financed creators. Although the internet is rightly lauded for facilitating cheap speech, some internet applications are cheaper than others. Peer-to-peer technology is relatively inexpensive from the point of view of a distributor because the costs of distribution are shared among the network of individual users who receive and redistribute files. This is especially important for video files, which are so large that hosting them on a traditional webpage can be prohibitively expensive. Thanks to the recent development of BitTorrent, a peer-to-peer software program designed specifically for video and other large files, even video distribution can now be cheap.

Application of the norm of broad distribution of expressive opportunities suggests that this kind of technology should be regulated, if at all, in a way that aims to preserve its potential to facilitate poorly financed creators’ dissemination of their own works. That seems to be the approach the Supreme Court has taken to internet regulation generally; soon we will see whether it takes the same approach to peer-to-peer technology.

6. Other Approaches.—There are other alternatives for dealing with the difficulties that copyright poses for poorly financed creators: for example, some sort of copyright voucher could be distributed by the government on

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174. See Volokh, supra note 105.
175. See Wu, supra note 105, at 1179–81.
177. See supra notes 105–10 and accompanying text.
the basis of ability to pay;\textsuperscript{178} or, as several commentators have suggested, Congress could grant immunity for some reuses of copyrighted works, coupled with a levy or tax distributed to copyright holders (which I imagine could be assessed on a sliding scale to accommodate the poor).\textsuperscript{179}

Some of these reforms might address even broader distributive concerns than I have raised here. I have focused primarily on distributive issues that relate to poorly financed creators who are incorporating copyrighted material into new works that they would like to share with others. But distributive concerns are also raised by the fact that some people cannot afford to acquire copyrighted works for their own personal use. These concerns have been recognized at least since the Statute of Anne, which included a provision by which the government could receive and act upon complaints about unreasonable book prices.\textsuperscript{180} And some of the early fair use and fair abridgement cases discussed above benefited poorly financed readers by excusing defendants who produced inexpensive versions of copyrighted books.\textsuperscript{181} Modern-day copyright provisions that seem to address the needs of poorly financed consumers include the first sale doctrine\textsuperscript{182} and various provisions that provide for the needs of libraries (which in turn serve poorly financed users).\textsuperscript{183} Many commentators have expressed concern that developments in digital dissemination and licensing practices may threaten these distributive features of copyright.\textsuperscript{184}

The norm in favor of broad distribution of expressive opportunities that I have identified may not seem as relevant to consumers of copyrighted works as it is to those who incorporate copyrighted material into new works of authorship. But as Joseph Liu, Rebecca Tushnet, and others have pointed out, mere "consumption" of creative works can implicate the same concerns with autonomy and democratic culture that trigger solicitude for poorly financed speakers.\textsuperscript{185}


\textsuperscript{181} See supra subpart II(D).


\textsuperscript{184} See, e.g., LITMAN, supra note 138, at 81; Reese, supra note 182, at 620–23.

A full analysis of this distributive aspect of copyright is beyond the scope of this Article, as is a definitive evaluation of the various potential responses to copyright's changing distributive impact. My goal here is merely to identify broad distribution of expressive opportunities as an important goal that should inform copyright policy, and to suggest some of the various mechanisms by which copyright might deal with its distributive consequences in the wake of the changing economics of copyright and creativity.

C. Open Questions: Enforcement, Deterrence, and Pricing

My discussion of potential approaches to copyright's changing distributive impact is tentative in part because of a number of open questions about copyright's real world effects. How often is copyright enforced against poorly financed creators? Short of actual enforcement, are poorly financed creators frequently deterred by copyright? Or do they ignore it, or manage to negotiate discounted rates for permission to build upon copyrighted works? I hope to address these questions in future research.

These enforcement, deterrence, and pricing questions are now complicated by the potential for technological enforcement of (and beyond) copyright. Content owners and technologists have attempted to develop encryption methods and other techniques of technological protection that control how their works may be accessed and used, without resort to the traditional mechanisms of copyright enforcement. Congress reinforced these technological protection measures by prohibiting circumvention of certain technological controls (and provision of tools that make circumvention possible) in the Digital Millennium Copyright Act of 1998.186

Technological protection measures have important distributive consequences because they can make copyright enforcement (and even control that goes beyond the exclusive rights of copyright) automatic. Where technological protection is effective, copyright holders no longer have to calculate whether a threat or lawsuit against a poorly financed creator is worth the time and expense. Even poorly financed creators who operate below the copyright radar can be stifled by technological protection. On the other hand, technological protection measures might facilitate price discrimination that benefits poorly financed creators. Their deployment and impact is thus another empirical question that should inform a response to copyright's distributive impact.187


187. Technological protection measures are not yet ubiquitous. Some content producers have found implementation difficult. And some schemes have been abandoned in the face of consumer resistance. See generally R. Polk Wagner, Information Wants to be Free: Intellectual Property and the Mythologies of Control, 103 COLUM. L. REV. 995, 1015–16 (2003); Peter S. Menell, Envisioning Copyright Law's Digital Future, 46 N.Y.L. SCH. L. REV. 63, 193 (2002–2003). But
D. Objections to Broad Distribution Through Copyright

As my discussion of Buckley v. Valeo and Miami Herald Publishing Co. v. Tornillo illustrated, efforts to distribute expressive opportunities broadly sometimes raise practical difficulties and may even cause more problems for free expression than they solve. Sometimes they simply sacrifice too much speech in the name of broadly distributing speech opportunities. These difficulties could plague copyright reform efforts motivated by distributional concerns. But they need not. Unlike the redistributive scheme at issue in Buckley, the types of copyright reform I have described would not forbid speech (or speech-related expenditures) by anyone. Unlike the scheme invalidated in Tornillo, the reforms I have discussed would not impose burdens on speakers on the basis of the content of their speech. I do not suggest equalizing the relative opportunities of poorly financed creators by newly restricting the creative opportunities of the wealthy. As it is, copyright restricts everyone’s creative opportunities in an effort to bolster them. I merely suggest that we consider lifting that restriction where it threatens to impose an unmanageable burden on creators who are not well-financed by the copyright system.

Constitutional concerns aside, the basic theory of copyright itself suggests that we should be cautious about reforms that would achieve distributional goals at the expense of promoting creativity. Abolishing copyright altogether, for example, would totally eliminate the burden that copyright imposes on poorly financed creators, but it might also impoverish the culture by removing the monetary incentives that subsidize and motivate creativity.

Reforming copyright more modestly in order to accommodate poorly financed creators would not necessarily threaten creativity, however. It is not clear that the current level of copyright protection is necessary to generate the creativity that we now get from copyright holders or that the current level of investment in creativity is optimal. Furthermore, the pent-up creativity that poorly financed speakers might produce if some of the burdens of copyright were lifted might outweigh any reduction in creativity by those who were disincentivized by the change—especially if the reform rewarded those creators who disclaim some of copyright’s exclusive rights and thus make a valuable contribution to the public domain.

others seem firmly established. The motion picture industry has adopted a system that involves encrypting movie files and distributing the keys only to manufacturers of DVD players that do not permit the files to be copied. Technologies for circumventing this protection have been held to violate the DMCA. See Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

188. See supra subpart III(C).
189. See LANDES & POSNER, supra note 13, at 56; Breyer, supra note 21.
Even if reforming copyright in order to accommodate the needs of poorly financed creators sacrificed some quantity of total creativity relative to the current system, that change could be justified by the goal of broadly distributing expressive opportunities. Perhaps we could make do with a slightly smaller creative pie in exchange for sharing the pie more evenly (or—perhaps a closer analogy—letting more cooks into the kitchen). The compelling justifications for protecting and promoting expression do not seem to justify an uncompromising “more is better” approach, standard copyright theory notwithstanding. The ideal of democratic citizenship cannot be well-served if only a few citizens participate, even if their participation is massive. The ideal of individual autonomy cannot be realized by a few people speaking their minds, even if they have a lot to say. The ideal of truth-seeking through vigorous debate cannot be achieved if only the views of a few people are articulated, even if those views are plastered all over newspapers, television, and the internet. And the goal of promoting progress in science and the useful arts cannot truly be realized by simply generating more and more of the same type of expression from the same sources. After all, copyright promotes creativity not merely for its own sake, but “for the general public good.”

The public good depends—for all of the reasons just described—on broad distribution of expressive opportunities and on promotion of expression from a broad array of sources.

Some may argue that making the creative pie bigger is always good in the copyright context, regardless of the direct distributive consequences, because every new copyrighted work generates some public domain element that trickles down to benefit even poorly financed speakers. Those poorly financed creators who cannot afford licenses to incorporate copyrighted works can simply build upon the public domain that is ultimately enriched by copyright incentives.

This trickle down theory assumes that those public domain elements that escape the reach of copyright are adequate substitutes for the expression that copyright protects. In some cases this might be true. Where the second-generation creator just needs to reuse an abstract idea, or a generically catchy tune, she can probably find what she needs in the public domain; or, if not in the public domain, in the realm of material that copyright holders have voluntarily licensed for free reuse.

But if a creator wants to create a work like *The Mashin’ of the Christ* or *Tarnation* that juxtaposes specific cultural artifacts, it is no answer to tell her that she is free to use the abstract “ideas” that those artifacts incorporate, or

190. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
192. There are growing collections of such freely reusable works. *See, e.g.*, Creative Commons, *at* http://www.creativecommons.org (last visited Mar. 14, 2005).
to reuse public domain or freely licensed works that may not have the same cultural significance. As Rebecca Tushnet has argued, copying existing works is often an act of self-expression that cannot be replicated with different raw materials.\textsuperscript{193} The fair use doctrine recognizes this fact in the context of parody, which is often excused on the grounds that some copying is necessary in order to "conjure up" the work that is being mocked.\textsuperscript{194} But the fair use status of nonparodic works that rely in part on copying for their expressive impact is less certain.

A creator who cannot afford to obtain permission to incorporate existing copyrighted works may thus be forced to sacrifice her creative autonomy and compromise her message. This is not to say that alternatives to unauthorized reuse of copyrighted material are never adequate. But they are surely inadequate for some creators whose self-expression depends on incorporating specific works that are not in the public domain.

The creative urge to cut and paste existing cultural artifacts into something new is not unique to the digital age. Earlier iterations involved real scissors and real paste, not their electronic equivalents.\textsuperscript{195} But in an age in which our culture is increasingly saturated by copyrighted images, sounds, and texts, this type of creativity may be especially important. As Jack Balkin observes, "[T]he products of mass media, now everywhere present, are central features of everyday life and thought. Mass media products ... have become the common reference points of popular culture. Hence, it is not surprising that they have become the raw materials of the bricolage that characterizes the Internet."\textsuperscript{196} In this environment, creativity that aspires to cultural commentary may not succeed if it is entirely original or incorporates only public domain works or those that have been licensed for free reuse.

One final potential objection is worth noting. Some might argue that whatever distributive problems copyright poses cannot and should not be solved with copyright reform, but instead should be addressed with cash transfer payments to the poor. If the problem is that the rich have more expressive power than the poor, the logic would go, then the solution is to make the poor richer instead of possibly distorting incentives to create by

\textsuperscript{193} Tushnet, \textit{supra} note 185, at 568–74; \textit{see also} Balkin, \textit{supra} note 15, at 4–5 ("People participate in culture through building on what they find in culture and innovating with it, modifying it, and turning it to their purposes.").

\textsuperscript{194} The market failure rationale also comes into play here, as courts find it implausible that copyright holders would voluntarily license parodies of their own works. \textit{See}, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) ("[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."); \textit{see also} LANDES & POSNER, \textit{supra} note 13, at 158–59 (characterizing negotiating for a parody license as "a high-transaction-cost negotiation, which the fair use privilege for parody avoids").

\textsuperscript{195} \textit{See generally} BRANDON TAYLOR, COLLAGE: THE MAKING OF MODERN ART (2004).

\textsuperscript{196} Balkin, \textit{supra} note 15, at 12.
changing the rules of copyright. This argument is an application of the general preference, articulated repeatedly in the law and economics literature, for redistribution through the tax and transfer system rather than through legal rules.  

There are several problems with the argument when applied to the distribution of opportunities to build upon copyrighted works. First, one of the classic objections to redistribution through legal rules does not apply in this context. The argument is that legal rules are a haphazard method of redistribution because they only affect people who happen to get into legal disputes—or, at most, those whose behavior is the target of the legal regime. This objection does not make sense, however, where the target of the distributive scheme is not income, wealth, or well-being generally, but instead a resource that is specific to the legal regime in question. Copyright law reform may not be a very thorough or systematic way to distribute income. But if the goal is distribution of opportunities to express oneself by building on copyrighted works, then the fact that copyright law only directly impacts copyright holders and users of copyrighted works makes copyright reform a precise, not haphazard, method of redistributing this specific resource.  

Second, giving poorly financed speakers more money is simply not responsive to the values that justify broad redistribution of expressive opportunities. Imagine that a sidewalk pamphleteer is told that the sidewalks are off limits to her, but is then given $1000 that she may use, if she chooses, to purchase a thirty-second advertisement for her cause on a local radio station. She may, instead, use the money to get her car fixed and feel better off for it. But society will have sacrificed the public benefits from her speech—benefits that flow from maintaining a well-functioning democracy, from cultivating the autonomy of every individual, and from exposing ourselves to diverse ideas. So, instead of giving her a cash subsidy, we subsidize her speech directly (by opening the sidewalks to it) in order to realize its special benefits.  

This reasoning supports a broader point: we do not value speech and creativity merely for the utility they generate for willing buyers; so it is not ideal to allocate speech opportunities via the market and it would not be ideal
even if everyone had equal purchasing power.\textsuperscript{200} The practical problems associated with alternative distribution mechanisms may justify some reliance on the marketplace—despite its theoretical misfit in this context.\textsuperscript{201} But that does not mean that the resulting problems can best be solved simply by moving money around. Changes in the rules of copyright itself may be more sensitive to the values, including nonmarketplace values, that copyright should be designed to serve.\textsuperscript{202}

VI. Conclusion

I began my exploration of distributive values in copyright by describing copyright’s traditional distributive role: It has subsidized creative opportunities for people who could not otherwise afford to create or disseminate their work. And it has typically burdened only those poorly financed creators who also enjoyed its benefits. These features, I have argued, helped to make copyright consistent with important strands of First Amendment law and communications policy that reflect the norm of broad distribution of expressive opportunities.

I have shown how copyright’s effects on the distribution of expressive opportunities are changing. New technologies for making and distributing creative works are making powerful creativity possible for poorly financed creators. But when this kind of powerful creativity builds on the work of others, it can trigger copyright enforcement. So while the benefits of copyright may be less necessary for poorly financed creators than they were in the past, the burdens are heavier. And they can fall on those who do not exploit the benefits that copyright offers.

Unfortunately, just as these technological changes are distorting copyright’s distributive impact, standard copyright analysis has become increasingly blind to distributive concerns. Some courts and scholars would lift the burdens of copyright only in narrow instances of market failure, without regard to the ability of creators to participate in the market. Copyright now needs to come to terms with the ways in which it may endanger the expressive opportunities of those who cannot afford to pay for permission to build upon copyrighted works. Instead, it seems increasingly to ignore distributive concerns altogether.


\textsuperscript{201} Cf. \textit{id.} at 1633 (arguing that “political power isn’t a commodity” but “coneed[ing] readily that in this domain it is hard to figure out what kinds of restrictions on market transactions would be defensible”).

\textsuperscript{202} Copyright reform might also be less expensive and more politically feasible than cash transfers would be.
Dealing with the needs of poorly financed creators is likely to be difficult, controversial, and potentially in tension with other important goals. A full analysis of possible methods for distributing opportunities to build upon copyrighted works will require a better understanding of the problems and opportunities that copyright poses for these creators. Empirical work might also reveal the degree to which price discrimination, underenforcement, and other voluntary mechanisms could help to promote broad distribution of creative opportunities. This analysis should be undertaken with the understanding that maximizing total creativity by relying on the markets created by copyright is not the only goal that is relevant to a regime that regulates expressive opportunities. Copyright should serve distributive values as well.