COPYRIGHT AND INEQUALITY

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ABSTRACT

The standard theory of copyright law imagines a marketplace efficiently serving up new works to an undifferentiated world of consumers. Yet the reality is that all consumers are not equal. Class and culture combine to explain who wins, and who loses, from copyright protection. Along the dimension of class, the inequality insight reminds us just because new works are created does not mean that most people can afford them, and calls for new attention to problems of affordability. Copyright protection inflates the price of books, with implications for distributive justice, democratic culture, and economic efficiency. Along the dimension of culture, the inequality insight points out that it is not enough for copyright theory to speak generally of new works; it matters crucially what languages those works are being created in. Copyright protection is likely to be an ineffective incentive system for the production of works in "neglected languages" spoken predominantly by poor people. This Article highlights and explores these relationships between copyright and social inequality, offering a new perspective on what is at stake in debates over copyright reform.

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TABLE OF CONTENTS

INTRODUCTION

"Half the world suffers from hunger. The other half wants to lose weight." So read a slogan I once came across, chalked on a campus sidewalk. The irony was aimed at the global food crisis, but the same paradox holds true for another precious resource: reading material. As a reader of this Article, you are almost certainly among the half that is drowning in text—e-mail, news, scholarly articles—not to mention that stack of books you earnestly mean to read, as soon as you can find the time. As this Article goes to print, Amazon.com offers approximately one million books for instant purchase and wireless delivery. Google has indexed forty-five *billion* web pages. As Jack Balkin notes, "Before the Internet, free speech theorists worried about the scarcity of bandwidth for broadcast media. . . . The digital revolution made a different kind of scarcity salient. . . . scarcity of audience attention."[1] As readers in a world of abundance, you and I struggle to cope with excess, to manage our textual diets within the constraints of limited time.

Yet the reality is very different in most parts of the world, where reading material remains scarce in the traditional sense. For decades,

1. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004).

policymakers and scholars have spoken of Africa's "book famine."[2] The phrase appears to have originated in the 1980s when economic crises across the African continent sparked critical shortages of both food and books.[3] The problem of book scarcity, however, is not limited to that continent, nor to that decade. In many developing countries, it remains difficult to locate a bookstore.[4] Where books are physically available for purchase, they are often exorbitantly expensive.[5] Academics and university students in developing countries experience great difficulty meeting their book needs.[6] For ordinary people in these countries, the

2. *See, e.g.*, Walter Bgoya, *Publishing in Africa: Culture and Development*, *in* THE MUSE OF MODERNITY: ESSAYS ON CULTURE AS DEVELOPMENT IN AFRICA 151, 152–53 (Philip G. Altbach & Salah M. Hassan eds., 1996) ("Although there are marked differences in publishing output in different African countries, the situation is generally one of extreme underdevelopment. Descriptions of the situation invariably refer to the continent as 'book starved,' 'bookless,' or as suffering from 'book famine.'"); Michael Crowder, *The Book Crisis: Africa's Other Famine*, *in* 1985 AFR. BIBLIOGRAPHY xvi (1986); James Currey, *The State of African Studies Publishing*, 85 AFR. AFF. 609 (1986); Kwesi Kwaa Prah, *The Difficulties of Publishing in Africa: Random Thoughts on the Casas Publishing Experience*, *in* LANGUAGE AND POWER: THE IMPLICATIONS OF LANGUAGE FOR PEACE AND DEVELOPMENT 301, 301 (Birgit Bock-Utne & Gunnar Garbo eds., 2009) ("In Africa today, there is what is [commonly] described . . . as a 'book famine,' that is a shortage of books, the pricing of books out of the financial reach of most people or the sheer unavailability of books."); Peter Ripken, *African Literature in the Literary Market Place Outside Africa*, 17 AFR. BOOK PUB. REC. 289, 289 (1990); Hans M. Zell, *The Other Famine*, 37 LIBRI 294 (1987).

3. Hans M. Zell, *Publishing in Africa*, *in* INTERNATIONAL BOOK PUBLISHING: AN ENCYCLOPEDIA 366, 366 (Philip G. Altbach & Edith S. Hoshino eds., 1995).

4. Brazil regularly ranks as one of the world's ten largest economies, yet most Brazilian cities have no bookstores. Ronaldo Lemos, *From Legal Commons to Social Commons: Brazil and the Cultural Industry in the 21st Century*, 15 (Univ. of Oxford Ctr. for Brazilian Stud., Working Paper No. CBS-80, 2007), http://www.lac.ox.ac.uk/sites/sias/files/documents/R.%2520Lemos80.pdf, *archived at* http://perma.cc/ND4M-ZLV8?type=pdf. *See also* Murray Last, *The Book and the Nature of Knowledge in Muslim Northern Nigeria, 1457–2007*, *in* THE TRANS-SAHARAN BOOK TRADE: MANUSCRIPT CULTURE, ARABIC LITERACY, AND INTELLECTUAL HISTORY IN MUSLIM AFR. 175, 175 (Graziano Krätli & Ghislaine Lydon eds., 2010) (describing periods of book-famine and book-wealth as recurring patterns influencing intellectual trends on the continent and complaining that "[a]ny visitor to a university campus in Nigeria today will hunt in vain for a bookshop with the latest works: some universities now have no bookshop whatsoever").

5. *See, e.g.*, Pedro N. Mizukami et al., *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, *in* ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 67, 88–89 (Lea Shaver ed., 2008) (noting that the required readings for the freshman year of college in Rio de Janeiro or Sao Paulo cost between R2578 and R3908—the equivalent of 6 to 10 months' earnings at Brazil's minimum wage—and that the prevailing solution to this difficulty is for students to defy copyright law by scanning and printing the required texts).

6. *See, e.g.*, Eve Gray, *Academic Publishing in South Africa*, *in* THE POLITICS OF PUBLISHING IN SOUTH AFRICA 163, 164–67 (Nicholas Evans & Monica Seeber eds., 2000) (describing the modern context of higher education in South Africa, which is attempting to integrate large numbers of students from disadvantaged backgrounds for whom purchasing required textbooks is extremely difficult and estimating that perhaps 35% of students buy the prescribed books, 45% rely on illegal photocopying, and the remaining 20% do not attempt the assigned reading). *See also* Mizukami, *supra* note 5, at 89

situation is even more acute. They simply cannot afford to purchase books for private consumption and generally lack access to even a minimally functional public library.

Although much less extreme, book hunger is also a problem in the United States. Educational research suggests that a powerful predictor of academic performance is the number of books a child has access to in his or her own home.[7] Yet 44% of American children grow up in families that have trouble paying for basic needs.[8] Socioeconomic status correlates with vast disparities in the availability of books—not only in individual homes, but also in neighborhood stores, libraries, and public schools.[9] Language can also be a barrier for minority populations. More than 60 million U.S. residents speak a language other than English at home.[10] Many public libraries stock at least a modest Spanish collection, and programs that provide free Spanish-language books to Hispanic families have shown a significant impact upon early childhood reading.[11] It becomes progressively more difficult, however, for these strategies to reach speakers of lesser-spoken languages such as Tagalog (1.6 million U.S. speakers), Hmong (211,000), or Navajo (169,000).[12]

The conversation on global hunger has begun to recognize that simply producing *more* food is not enough; questions of distribution are fundamental.[13] It is time for the conversation on copyright law to have a similar reckoning.

(describing the difficulty faced by Brazilian students and scholars in legally acquiring required texts in light of high prices, unavailability of works, and limited university library collections).

7. *See, e.g.*, M.D.R. Evans et al., *Family Scholarly Culture and Educational Success: Books and Schooling in 27 Nations*, 28 RES. IN SOC. STRATIFICATION & MOBILITY 171, 187 (2010).

8. *See* Sophia Addy & Vanessa R. Wight, *Basic Facts About Low-Income Children, 2010*, NAT'L CTR. FOR CHILD. IN POVERTY (Feb. 2012), http://www.nccp.org/publications/pdf/text_1049.pdf, *archived at* http://perma.cc/SXU2-WWPA.

9. Susan B. Neuman & Donna Celano, *Access to Print in Low-Income and Middle-Income Communities: An Ecological Study of Four Neighborhoods*, 36 READING RES. Q. 8, 11 (2001).

10. CAMILLE RYAN, LANGUAGE USE IN THE UNITED STATES: 2011, 3 (U.S. Census Bureau 2013).

11. Lee M. Sanders et al., *Prescribing Books for Immigrant Children: A Pilot Study to Promote Emergent Literacy Among the Children of Hispanic Immigrants*, 154 ARCH. PEDIATR. ADOLESC. MED. 771, 772–73 (2000).

12. RYAN, *supra* note 10.

13. *See, e.g.*, KLAUS VON GREBMER ET AL., 2009 GLOBAL HUNGER INDEX, THE CHALLENGE OF HUNGER: FOCUS ON FINANCIAL CRISIS AND GENDER INEQUALITY (2009) (discussing hunger not as a problem of overall shortage of production, but as the product of marginalization and disempowerment of the poorest, as well as gender oppression).

Currently, questions of social inequality and distributive justice lie in the peripheral vision of copyright scholarship.[14] Copyright doctrine and policymaking have also focused overwhelmingly on calibrating incentives to maximize productivity.[15] It is a bedrock principle of both doctrine and scholarship that copyright protection exists to incentivize authors and publishers to produce more new works.[16] An ample body of copyright scholarship queries whether our current system of copyright protection does in fact efficiently provide these incentives and seeks ways to improve the law to encourage even greater productivity.[17] Reflecting this emphasis on creative productivity, the American fair use doctrine authorizes courts to modify the scope of copyright's statutory protection "'when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[18]

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14. *See* Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 812–13 (2007) [hereinafter Chon, *Intellectual Property "from Below"*] (calling for a critical perspective more along the lines of the environmental justice thread within environmental law, highlighting the experiences of developing countries and non-elites, and paying attention to intersectional dimensions of exclusion, including race, class, gender, and nationality). *See also* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2823 (2006) [hereinafter Chon, *Intellectual Property and the Development Divide*] (grounding a critique of the prevailing international IP regime in the framework of human development and proposing a "substantive equality" principle for normatively evaluating international intellectual property law).

15. *See, e.g.*, Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879–82 (2007). Litman writes:

> We have focused so narrowly on the production half of the copyright equation that we have seemed to think that the Progress of Science is nothing more than a giant warehouse filled with works of authorship. When we do this, we miss, or forget, an essential step. In order for the creation and dissemination of a work of authorship to mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program, and build and inhabit the architecture.

Id. at 1880. *Cf.* Gaia Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257, 2258 (2010) (highlighting "diffusion" as a policy value often overlooked in the increasing modern emphasis on "innovation" alone).

16. Copyright law distinguishes between the "work" and the "copy." Charles Dickens's *A Tale of Two Cities* has sold approximately 200 million "copies," but constitutes just one "work."

17. For a thorough and sophisticated review of this literature, see Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 974–77, 981–93 (2012). *See also* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (casting doubt on the conventional wisdom that copyright is either a necessary or efficient means of incentivizing creativity); Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003) (exploring reasons why the case for private property is weaker in the situation of intangible goods).

18. Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (establishing that "transformative" uses of copyrighted material should often be excused from a finding of infringement as "fair use").

Alongside this primary focus on production, a much smaller body of scholarship has focused on issues of distribution. One line of copyright scholarship with a distributive justice emphasis explores the question of how to fairly allocate rights between creators and users.[19] A second line of scholarship contrasts the economic circumstances of industrialized countries with developing ones, suggesting that copyright law must be tailored to these differing circumstances.[20] Yet the broad categories of "creators" and "users," or "industrialized" and "developing" countries, may overlook the even more fundamental impact of social inequalities within these categories. The world in which we live is characterized by profound social divides along lines of wealth and ethnicity. How do these divides of class and culture shape copyright law's impact on opportunities for all people to access knowledge and take part in cultural life?

The relative silence of copyright scholarship on questions of social inequality ought to strike us as odd. It is well recognized that property law generally has significant implications for the distribution of wealth and social advantage, which may be critiqued from a variety of social justice perspectives.[21] The distributive justice implications of intellectual property law are also well recognized in the context of pharmaceutical patents, where the affordability of medicines is a focus of significant scholarly and policy concern. Yet copyright scholars have been relatively slow to draw the logical parallel to express concern for the poor's ability to access copyrighted works.[22] Even less attention has been dedicated to the impact of language divides on the production and distribution of copyrighted works. Membership in certain linguistic groups profoundly limits the

19. *E.g.*, Jessica Litman, *Readers' Copyright,* 58 J. COPYRIGHT SOC'Y U.S.A. 325 (2011), *available at* http://ssrn.com/abstract=1774932; Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1567 (2005) (pointing out that copyright protection creates unequal burdens on creators of expressive works that rely on other copyrighted materials as inputs, such as short films; well-financed creators can afford to obtain licenses, while amateur and under-financed artists enjoy less creative liberty).

20. *E.g.*, MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012) [hereinafter SUNDER, GOOD LIFE]; Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115 (2009), Ruth Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 FORDHAM L. REV. 2379 (2009); P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Amsterdam Law School Legal Studies Research Paper No. 2012–43 (2008), *available at* http://ssrn.com/abstract=2017629.

21. *See, e.g.*, JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

22. *See* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 104–08 (2004) (calling attention to this neglect).

world of materials that an individual can effectively utilize. Yet the copyright literature has largely overlooked this problem.[23]

The failure to account for how profoundly social inequalities of class and culture shape access to copyrighted materials has also led copyright lawmaking in the wrong direction. The dominant account of copyright law emphasizes its virtues in providing market-based incentives for cultural production, implicitly presuming that a greater diversity of offerings is the primary end goal and that accessibility will be relatively unproblematic. Reflecting this conventional wisdom, copyright law has steadily expanded the scope and duration of protection, effectively commodifying an ever-greater proportion of cultural life as objects of trade in a booming global marketplace. Unfortunately, not all people have even a minimally adequate capacity to participate in this marketplace.[24] Copyright protection is making cultural works substantially more expensive, impeding translations into other languages, and inhibiting the emergence of open business models that might reach more people in more places.[25] The very doctrines and policies justified as enhancing the incentives for cultural production are unwittingly reinforcing social disadvantage and exclusion from cultural participation.

My aim in this Article is not to push any particular solution to the problem of copyright and inequality. My more modest goal is simply to put this long-overlooked reality squarely on the table. Only by developing a shared understanding of the problem can we begin a deeper discussion about its ethical implications and possible solutions. This Article focuses specifically on the context of books and opportunities to read and write, as an area of cultural participation of particular importance for education and other life opportunities. Many of the insights about cost and accessibility, however, will also hold true for other genres of cultural creativity.

Part I, "A Case Study in Book Hunger," begins by exploring how social inequalities structure access to copyrighted works in South Africa.

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23. Among the exceptions: a student-authored piece exploring copyright barriers to computerized translation, work by a scholar of linguistics, and a historical perspective on copyright law. Erik Ketzan, *Rebuilding Babel: Copyright and the Future of Online Machine Translation*, 9 TUL. J. TECH. & INTELL. PROP. 205 (2007); Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503 (2000); Lionel Bently, *Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI.-KENT L. REV. 1181 (2007).

24. LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE (2011) (describing barriers experienced in book-selling and purchasing in various contexts across the world in Chapter 5: The Right to Education and Copyright in Learning Materials).

25. See *infra* discussion at notes 84 to 87.

Empirical data demonstrate that South Africans of all ethnicities and social classes enjoy reading and would like to read more often, yet they are frustrated in pursuing this desire. Even relatively affluent South Africans identify the high price of books as the greatest barrier to wider reading. For the poor, reading is simply an unaffordable luxury. In addition to the price barrier, opportunities to read are sharply limited by the language community to which one belongs. Only a tiny fraction of books are published in the native languages of the country's black majority, reinforcing the disadvantaged status of these groups. This Part concludes by considering to what extent the South African experience is unique or representative of experiences in many other countries.

Part II, "The Inequality Insight," builds on the case study to theorize two dimensions of social inequality that are particularly significant for copyright policy: class and culture. Along the dimension of class, the fundamental lesson is that just because books are being written does not mean that most people can afford them. Rather, inequalities of wealth and poverty profoundly shape individuals' ability to satisfy their book needs in the marketplace. Copyright protection also significantly drives up the price of books. This burden falls hardest on the poor, while the corresponding benefit of greater selection is enjoyed primarily by wealthier consumers. Along the dimension of culture, the essential insight is that we cannot simply speak generally about book production; it matters vitally what languages books are being produced in. The market for copyrighted works is serving some language communities very well, but is utterly failing to make books available in the "neglected languages" predominantly spoken by poor people. The Part concludes by considering what the inequality insight brings to copyright scholarship.

Part III, "Recommendations," leverages the inequality insight to begin to explore the question of how to make copyright work better for all people. How might copyright scholarship, legislative reform, and judicial doctrine respond to a new recognition of social inequality, adopting reforms to promote broader access to cultural works, creating the conditions for a flourishing of literatures in all languages, and enabling a truly participatory culture? This Part identifies possible answers both within and beyond copyright law and suggests directions for future research.

I. A CASE STUDY IN BOOK HUNGER

South Africa's long struggle against racial apartheid is well known. Although formal discrimination is now overcome, its legacy lingers. President Thabo Mbeki famously spoke of post-apartheid South Africa as comprised of not one, but two nations: one white and prosperous, the other black and poor.[26] Though white and black are "*no longer* synonymous with rich and poor" in South Africa, the correlation remains very strong.[27] A three-nation metaphor is probably more accurate today.[28] At the top sits an increasingly racially diverse elite. A narrow middle class consists mostly of urban white-collar workers, including most of the country's white, Indian, and "coloured" populations, as well as many black South Africans. The marginalized black majority includes the urban unemployed and the rural poor.[29]

Intersecting with these economic and racial inequalities is the overlapping dimension of linguistic group membership. Under its post-apartheid constitution, South Africa recognizes eleven official languages. These include nine African languages native to the country's black majority, of which the two most widely spoken are Zulu and Xhosa.[30] Afrikaans, a language descended from Dutch and unique to South Africa, is the third most significant native tongue, spoken both by the white minority that controlled the apartheid government and by the "coloured" ethnic group, which was assigned by apartheid rules to a middle status

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26. *See* Nicoli Nattrass & Jeremy Seekings, *"Two Nations"? Race and Economic Inequality in South Africa Today*, 130 DAEDALUS 45 (2001). The source quotes Mbeki's 1998 speech:

> One of these nations is white, relatively prosperous, regardless of gender or geographical dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure. This enables it to argue that, except for the persistence of gender discrimination against women, all members of this nation have the possibility of exercising their right to equal opportunity, and the development opportunities to which the Constitution of 1993 committed our country. The second and larger nation of South Africa is black and poor, with the worst-affected being women in the rural areas, the black rural population in general and the disabled. This nation lives under conditions of grossly underdeveloped economic, physical, educational, communication and other infrastructure. It has virtually no possibility of exercising what in reality amounts to a theoretical right to equal opportunity, that right being equal within this black nation only to the extent that it is equally incapable of realisation.

Id. at 45.

27. *Id.* at 47–49.

28. *Id.* at 48.

29. *See id.*

30. STATISTICS SOUTH AFRICA, CENSUS 2011: CENSUS IN BRIEF 23 (2012), http://www.statssa.gov.za/Census2011/Products/Census_2011_Census_in_brief.pdf, *archived at* http://perma.cc/S443-9HC3.

between the white and African populations. English, initially brought to South Africa through British colonization, has more recently emerged as the dominant language of government and commerce. Yet few South Africans speak English at home. In descending order, the most widely spoken languages in South Africa are: Zulu (23%), Xhosa (16%), Afrikaans (13%), and English (10%), followed by the less populous African languages.[31]

Both the economic and linguistic dimensions of social inequality play a significant role in shaping access to reading material.

A. The Language Barrier

South Africa's constitution imposes a positive duty upon the State to promote the use of the country's native languages: "Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."[32] The politics of language in South Africa are deeply bound up with the country's colonial and apartheid past.[33] Yet the problem of "diminished use and status of the indigenous languages" very much continues into the present.[34]

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31. *Id.* at 24 fig.2.3. The total South African population is estimated at 51 million. IsiZulu is the first language for approximately 11.6 million; isiXhosa for 8.2 million; Afrikaans for 6.9 million; English for 4.9 million; Sepedi for 4.6 million; and Setswana for 4.1 million; IsiNdebele, Sesotho, Setswana, SiSwati, Tshivenda, and Xitsonga each have between one million and four million native speakers.

32. S. AFR. CONST., 1996, ch. 1 § 6.

33. *See, e.g.*, Vic Webb, *Language Policy in Post-Apartheid South Africa*, *in* MEDIUM OF INSTRUCTION POLICIES: WHICH AGENDA? WHOSE AGENDA? 217, 228 (James W. Tollefson & Amy B. M. Tsui eds., 2003). Webb writes:

> The main South African languages are deeply embedded in the political history of the country. Colonialism and apartheid have meant that the languages have all acquired sociopolitical meanings, with English currently highly prestigious, Afrikaans generally stigmatized, and the Bantu languages [including Zulu] largely without economic or educational value. The languages have thus developed asymmetric power relations: although the main Bantu languages are numerically in the majority, they are, along with Afrikaans, 'minority languages' in terms of power and prestige. In contrast, English, although numerically a smaller language, is politically, economically, and educationally dominant, and is by far the preferred language of the public media, with a very high status. In the South African context, English is the major language, with Afrikaans lower on the power hierarchy, and the Bantu languages effectively marginalized.

Id.

34. *Id.* The diminished status of indigenous languages is a problem across the African continent. *See* ORG. OF AFR. UNITY, THE LANGUAGE PLAN OF ACTION FOR AFRICA 4 (1986) (referring to the "negative estimation in which indigenous African languages are generally held in Africa, by the general public," and laying out plans of action "to counter the present widespread negative attitudes in Africa towards these languages"). *See generally* ROBERT PHILLIPSON, LINGUISTIC IMPERIALISM

One objective indicator of this unequal status is the relative poverty of literature available in the African languages, as reflected in industry data.[35] Among locally-produced books, a supermajority are in English (71.7%), followed by Afrikaans (16.6%).[36] Sales of locally-produced books in all African languages combined (11.3%) totaled R231 million or $27 million annually. The overwhelming majority of these (89% or R205 million) are student textbooks developed to facilitate primary education in the African languages.[37] This genre is of recent origin, a direct result of post-apartheid education policy, which has prioritized native language instruction. As a distant second, religious books in the African languages account for a bit over R24 million.[38] Only R1.13 million—approximately $127,000—of general trade books (adult and child fiction and nonfiction) are sold each year in all the African languages combined.[39] This represents 0.04% of total South African book sales. It does not amount to even one U.S. cent for every African-language speaker in South Africa.

Given these spending patterns, it becomes clear that the majority of South Africans—precisely that majority historically most abused by colonialism and apartheid—have almost no access to books in their native language for pleasure reading or adult learning. Indeed, variations on this theme prevail across the African continent. Kwesi Kwaa Prah, speaking of the African book famine, notes: "It is important to remember that only about 10 per cent of Africans can read and write the colonial languages with any degree of finesse. It is in these colonial languages that over 95 per cent of the literature currently circulating in Africa are written in [sic]."[40]

This is not to say that there are *no* books written in South Africa's indigenous languages. The tradition of publishing in African languages dates back to missionary efforts in the 1800s, including both translations of foreign works and original works by local authors.[41] South Africa has

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CONTINUED (2009) (summarizing one academically influential view on the politics of indigenous and colonial languages in Africa).

35. PUBLISHERS' ASS'N OF SOUTH AFRICA, ANNUAL BOOK PUBLISHING INDUSTRY SURVEY REPORT 2010 (2011).

36. *Id*. at 43 fig.8.2. These data exclude imported books.

37. Educational books include R 204,984,000 in school book purchases and R 429,000 in ABET workbooks. This represents a total of R 205,413,000 or 89% of total sales of print books in the African languages. *Id*.

38. *Id*.

39. *Id*.

40. Prah, *supra* note 2, at 301–02.

41. *See generally* Nhlanhla Maake, *Publishing and Perishing: Books, People and Reading in African Languages in South Africa*, *in* THE POLITICS OF PUBLISHING IN SOUTH AFRICA 127 (Nicholas Evans & Monica Seeber eds., 2000) (providing a history of how publishing in South Africa's various

produced a number of noteworthy authors and works of literary significance in African languages. The total number of works produced in these languages is very small, however, resulting in extremely limited selection for would-be readers. Moreover, many of these works are out of print or have very few copies in circulation.

The shortage of published literature in South Africa's African languages has been identified as holding back effective education for speakers of these languages. Bilingual education leveraging students' mother-tongue competency has been found to be dramatically more effective than teaching students only in a language foreign to them.[42] South Africa's official policy on language-in-education reflects these findings. Yet implementation often lags behind policy, even in primary schooling, due to the absence of teaching materials in the local languages.[43] It is currently impossible to pursue higher education in South Africa in languages other than English and Afrikaans. This creates a tremendous disadvantage for the majority of South Africans who do not speak either as their native language.[44] A primary reason for the failure to

languages, with special emphasis on the African languages, has been impacted by the social dynamics of missionary influence, British colonialism, apartheid, and the modern post-apartheid era). *See also* Phaswane Mpe & Monica Seeber, *The Politics of Book Publishing in South Africa: A Critical Overview*, *in* THE POLITICS OF PUBLISHING IN SOUTH AFRICA 15 (Nicholas Evans & Monica Seeber eds., 2000) (providing a general history of book publishing in South Africa in the nineteenth and twentieth centuries); Bgoya, *supra* note 2, at 165 (providing an insightful broader sketch of publishing in European and African languages on the African continent).

42. *See also* ADAMA OUANE & CHRISTINE GLANZ, WHY AND HOW AFRICA SHOULD INVEST IN AFRICAN LANGUAGES AND MULTILINGUAL EDUCATION 4 (2010), http://www.eric.ed.gov/ERICWeb Portal/detail?accno=ED540509, *archived at* http://perma.cc/Z9AV-3ZFM (noting that "Africa is the only continent where the majority of children start school using a foreign language").

43. VIV EDWARDS & JACOB MARRIOTE NGWARU, AFRICAN LANGUAGE PUBLISHING FOR CHILDREN: WHERE NEXT? iv (2010), http://www.informafrica.com/wp-content/uploads/2012/05/ African-Language-Publishing-children.pdf, *archived at* http://perma.cc/FN7Z-NVXV. According to the report:

> One of the major obstacles to the expansion of African language publishing for the schools market is the failure to implement the language-in-education policy. At the international level, the arguments for mother-tongue based bilingual education are well rehearsed: students who have a sound foundation in the mother tongue participate more actively, feel more confident about their learning and outperform peers who operate only through the medium of a second language. While language-in-education policy in South Africa is supportive of this policy, the rate of implementation is extremely slow and, in the absence of bilingual provision, parents [selecting a school for their child] veer to education in English, the language of highest status. A further consequence is that publishers are reluctant to invest without a market-spend large enough to make African language publishing viable. The absence of teaching materials in turn affects the willingness of teachers to use African languages as the medium of instruction.

Id.

44. E. Koch & B. Burkett, *Making the Role of African Languages in Higher Education a Reality*, 19 SOUTH AFRICAN J. OF HIGHER EDU. 1089, 1089–1107 (2005).

develop higher education systems accessible to speakers of the African languages is the lack of linguistically appropriate teaching materials.[45] Unsurprisingly, higher education achievement varies dramatically according to ethnic group.[46]

In response to criticism of the dearth of publishing in languages beyond English and Afrikaans, the Publisher's Association of South Africa produced a comprehensive catalog of African-language titles.[47] The catalog was praised for being "attractively produced,"[48] as well as for offering helpful insight into the state of South African publishing.[49] It did not, however, stem the public criticism. On the one hand, the catalog clearly demonstrates that there is not a complete absence of literature in African languages. On the other hand, it reveals how limited such publishing is: fewer than 600 titles per African language, across all genres.[50] Reflecting the dependency of the African-language publishing market on the educational market, nearly all of the titles in the catalog are geared toward children and teenagers.[51] Indeed, it may well may be that most copies of these books are being purchased by affluent parents and elite schools to help English-speaking children develop acquired fluency in an African language.

An outsider might suppose that the best way to overcome the language barrier to reading in countries like South Africa is to target efforts to help non-English speakers acquire fluency in English. Yet this proposal is unrealistic. The vast majority of South African children are not from

45. *See id.* at 1095–97.

46. Whereas 18% of white South Africans enroll in a tertiary educational institution, only 8% of black South Africans do. Vusi Gumede, *Poverty, Inequality and Human Development in a Post-Apartheid South Africa*, 14 tbl.3 (Sept. 2010) (conference paper) (presented at "Overcoming inequality and structural poverty in South Africa: Towards inclusive growth and development," Johannesburg, Sept. 20–22, 2010), http://www.vusigumede.com/content/academic%20papers/Poverty%20&%20Inequality%20Conference%20paper%20(Sept%202010).pdf, *archived at* http://perma.cc/YH5-HEMV (analyzing 2008 government data).

47. PUBLISHERS'ASS'N OF SOUTH AFRICA, WRITING IN NINE TONGUES: A CATALOGUE OF LITERATURE AND READERS IN NINE AFRICAN LANGUAGES FOR SOUTH AFRICA (2007) (updated with supplements in 2008 and 2009) [hereinafter WRITING IN NINE TONGUES]. *See* EDWARDS & NGWARU, *supra* note 43, at iii (describing the publication of the catalog as a response to criticism from the Ministry of Arts and Culture).

48. Hans M. Zell, *Publishing in Africa: Where Are We Now? Part Two: Accomplishments and Failures*, 20/1 LOGOS 169, 173 (2009), *available at* http://www.hanszell.co.uk/articles/LOGOS_20.1_final_06Apr09.pdf, *archived at* http://perma.cc/7CV5-TCKM.

49. EDWARDS & NGWARU, *supra* note 43, at iii.

50. *See* EDWARDS & NGWARU, *supra* note 43, at 5 (noting that the catalog does not indicate year of publication or whether the work is still in print).

51. *See generally* WRITING IN NINE TONGUES, *supra* note 47.

English-speaking families, and a super-majority live in poverty.[52] Although the formal apartheid policy of racially segregated and profoundly unequal public education was abolished in 1995, two separate and unequal school systems still exist.[53] This is not a context in which it is a simple matter to universalize literacy in a second language.[54] Over several generations, South Africa may eventually achieve the goal of near-universal literacy and fluency in English, as have a few much-wealthier countries, such as Sweden or Singapore. Achieving that goal, however, will require reaching other milestones along the way: building a skilled workforce, enhancing incomes, making substantially greater public investments in education, and leveraging a "virtuous cycle" of intergenerational human capital accumulation. Enabling children and adults to read and learn in the languages they already understand is a critical part of this process.

B. The Cost Barrier

A common complaint among South African publishers is that South Africa lacks "a reading culture."[55] The claim is typically asserted without

52. In 2010, 60% of South African children were estimated to live below the poverty line, which is set at a monthly income of R575 (approximately $50) per capita. KATHARINE HALL ET AL., SOUTH AFRICAN CHILD GAUGE 2012 81 (2012).

53. *See generally* Nicholas Spaull, *Poverty & Privilege: Primary School Inequality in South Africa* (Stellenbosch Econ. Working Papers, Paper No. 13/12, 2012), *available at* http://www.ekon.sun.ac.za/wpapers/2012/wp132012/wp-13-2012.pdf, *archived at* http://perma.cc/5TNL-6Q2K (describing the dualistic nature of education in South Africa, its roots in apartheid history, and identifying the factors that contribute to high or low educational achievement between and within them). Affluent and middle-class South Africans pay a significant portion of their income in school fees to send their students to well-resourced, high-functioning schools; the poor majority of South Africans, unable to afford high school fees, send their children to poorly resourced, dysfunctional schools.

54. Philippe Van Parijs, a philosopher who writes on language policy and justice, has helpfully framed the challenges involved in using education to remedy linguistic disadvantage. He notes that providing all children with the life advantages of fluency in a dominant language is relatively simple and cost-effective when there are only a few non-native speakers easily immersed in a publicly-subsidized education system. This situation exists in many parts of the United States, where children of immigrants can easily be integrated into the English-speaking school system. The immersion strategy rapidly becomes more difficult and expensive, however, when the number of children needing second-language instruction is high, and teachers with the requisite fluency in the target language are costly to recruit. PHILIPPE VAN PARIJS, LINGUISTIC JUSTICE FOR EUROPE AND FOR THE WORLD 103–06 (2011).

55. *See, e.g.*, PUBLISHERS'ASS'N OF SOUTH AFRICA & PRINT INDUSTRITIES CLUSTERS COUNCIL, PICC REPORT ON INTELLECTUAL PROPERTY RIGHTS IN THE PRINT INDUSTRIES SECTOR 94–95 (2004), www.publishsa.co.za/downloads/intellectual_property_report.pdf, *archived at* http://perma.cc/WS2J-LABB (asserting that "lack of a reading culture" plagues Africa generally, resulting in low readership for published products); SOUTH AFRICAN BOOK DEV. COUNCIL, FACTORS INFLUENCING THE COST OF BOOKS IN SOUTH AFRICA 1 (2007) [hereinafter SABDC FACTORS] ("It is generally accepted that

pointing to any evidence, as if the conclusion were too obvious to require support. To some, the phrase simply reflects the observable fact that South Africans—of all races and classes—engage with books less frequently than their counterparts in the United Kingdom. Others see a thinly veiled racism lurking behind the invocation of "culture": the suggestion that black South Africans in particular are somehow culturally uninterested in reading. Edwards and Ngwaru suggest that the "culture of reading" discourse must acknowledge the realities of poverty, book affordability, and language barriers.[56] Indeed, empirical evidence demonstrates that South Africans of all classes and ethnicities value and enjoy reading, and would prefer to read more often—but they are frustrated in realizing this desire by the unaffordably high cost of books.

The National Survey into the Reading and Book Reading Behavior of Adult South Africans, funded by the South African government working in collaboration with groups representing publishers and booksellers, serves to illustrate this point.[57] The National Survey documented very high levels of basic literacy: 92% of South Africans are able to read in their native language.[58] Among the illiterate, the overwhelming majority (89%) explain that they did not have the opportunity to learn to read as a child, but would like to learn to do so now (75%).[59] Despite a lingering pocket of illiteracy, South Africans as a whole indicate that they enjoy reading more than shopping and just as much as watching sports.[60]

Taken together, these data points cast doubt on the theory that a majority of South Africans are somehow culturally uninterested in reading.[61] As one publisher more accurately put it: "'People often say

South Africa lacks a culture of reading."). *See also id*. at x (identifying the creation of a reading culture in South Africa as an important but long-term goal).

56. EDWARDS & NGWARU, *supra* note 43, at 16–19.

57. The survey was conducted by TNS Research Surveys with funding from the Department of Arts and Culture through the South African Book Development Council in June 2007. To achieve a sample of respondents reflective of the nation's diversity, the survey was conducted along the national census model, using researchers who visited households door-to-door and interviewed the adult (16 and over) member of the household who most recently celebrated his or her birthday. SOUTH AFRICAN BOOK DEVELOPMENT COUNCIL, NATIONAL SURVEY INTO THE READING AND BOOK READING BEHAVIOUR OF ADULT SOUTH AFRICANS (2007) [hereinafter SABDC NATIONAL SURVEY].

58. *Id.* at slide 26. The survey methodology did not rely on self-reported literacy, but actually required respondents to demonstrate literacy to the interviewer by reading text from a card in the language of their choice. The remaining pocket of illiteracy is overwhelmingly concentrated among elderly black South Africans—a legacy of the country's history of racially segregated and unequal education.

59. *Id*. at slide 27.

60. *Id.* at slide 15.

61. *See also* EDWARDS & NGWARU, *supra* note 43, at v ("There are many indications in fact that Africans *do* read when the content is affordable, accessible, and of interest. *Isolezwe*, the daily Zulu

Black people don't read. A lot of rubbish! Of course they read, but for some reason they don't buy books.'"[62] Given that the vast majority of South Africans *can* read and *enjoy* reading, why do so many of them purchase so few books? One answer, of course, is that for many South Africans there is a problematic mismatch between the language they speak and the language in which books are being published.[63] A second important answer also emerges quite clearly from the National Survey: the books are unaffordable.

Several different data points from the National Survey converge on this conclusion. First, when asked why they do not read more often, respondents overwhelmingly cite the affordability and availability of books as the primary barriers. The most common answers include: "Books are expensive" (45%), "Books are so expensive that you cannot afford to buy them" (33%), and "There is no library near where you live" (27%).[64] In contrast, few respondents cite limited time (15%) or disinterest (7%) as reasons for not reading more.[65] Readers' complaints about the high cost of books also match up with their answers to questions about what materials they read. South Africans overwhelmingly report that they primarily read newspapers (84%) and magazines (64%), which can be purchased much more cheaply than books.[66] Dramatically fewer readers report that they usually read books, either fiction (28%) or nonfiction (22%).[67] When they do obtain a book, respondents are much more likely to borrow it from a library (48%) or a friend (41%) than to purchase a book either new (26%) or second-hand (18%).[68] In short, the data indicate that South Africans highly value and enjoy reading, but they experience difficulty getting their hands on books.

Extreme poverty is a very real problem in South Africa. Nearly half of the South African population lives below the official poverty line, defined by a monthly per capita income of approximately $50.[69] Yet poverty alone

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newspaper in Durban, for instance, has a circulation of more than 95,000, outperforming the English-language dailies from the same publisher.").

62. *Id.* at 17.

63. *See* discussion *supra* notes 32 to 53.

64. *Id.* at slide 67.

65. *Id.* ("You don't have time to read books at home" (15%) and "The library nearest to you does not have any new or interesting books" (7%)).

66. *Id.* at slide 57.

67. *Id.*

68. *Id.* at slide 74.

69. Based on 2008 government data using the poverty line of 502 Rand. Gumede, *supra* note 46, at 15. Approximately half of black South Africans live in poverty, compared to only 2% of whites. *Id.* at 15 tbl.4. Reflecting this material inequality, life expectancy is 74 years among white South Africans, but only 45 years among blacks. *Id.* at 10–11 tbl.1.

does not explain the widespread complaints about the high cost of books. Even respondents identified by the survey analysts as "affluent" complained that books were so expensive they could not afford them.[70] Books are indeed expensive in South Africa. Copies of Nelson Mandela's autobiography, the Oxford English Dictionary, and South African literary Nobelist J.M. Coetzee's most famous novel all sell for approximately *twice* as much in South Africa as in the United States or United Kingdom.[71] The price disparity is even more problematic in light of the fact that South African incomes are substantially lower than those in the U.S. or U.K.[72] Per capita gross national income is approximately $7,500 in South Africa, compared to $40,000 in the United Kingdom and $50,000 in the United States.[73]

The basic difficulty of accessing books dwarfs other reasons people give for not reading more often, across all social classes.[74] The degree of difficulty experienced, however, varies in proportion to the level of wealth of the individual or household. More affluent South Africans cope with high prices by rationing their book purchases, borrowing books from libraries and friends, or opting for reading material that is made freely available online. Another popular approach among South Africans who travel internationally is to stock up on books while abroad in countries where the selection is much broader and the prices lower. South Africans of the middle and lower classes have progressively fewer of these options available to them. A typical black South African family spends 25–50% of

70. SABDC NATIONAL SURVEY, *supra* note 57, at slide 95. The "white affluent" group reports obtaining books primarily by sharing with friends and through book clubs. *Id*. During the year that my husband and I lived in South Africa, borrowing from friends was the major way that we gained access to books, having found the university library inadequate and the private bookstores quite expensive. Among less affluent South Africans, expense remains the primary complaint, joined by complaint of lack of access to a library. *Id*.

71. Andrew Rens, Achal Prabhala & Dick Kawooya, *Intellectual Property, Education and Access to Knowledge in Southern Africa* 6 (tralac, Working Paper No. 13/2006, 2006), *available at* http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20061002_Rens_IntellectualProperty.pdf, *archived at* http://perma.cc/W9S8-CTXQ.

72. *GNI Per Capita, Atlas Method (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GNP.PCAP.CD (data tables) (last visited Feb. 5, 2014). The World Bank data tables indicate that, for 2012, the gross national income per capita for the following countries were: South Africa, $7,610; United Kingdom, $38,670; United States, $52,340.

73. *Id*.

74. SABDC NATIONAL SURVEY, *supra* note 57, at slide 95. Only the elderly poor and teenagers expressed agreement with the statement that reading was difficult and therefore less enjoyable than other activities. The elderly poor will have limited fluency as readers because they were denied educational opportunities during apartheid. Teenagers have limited fluency because their educations are not yet complete. Yet even among these reading-challenged groups, the technical difficulty of reading was cited as a less important factor than the cost of obtaining books. Time pressures were not cited in significant numbers as a reason for limited reading by any subgroup of survey respondents.

its household income on food.[75] In the context of painful choices to be made between basic necessities such as food and shelter, high book prices make it impossible for most families to purchase even the basic textbooks required for their children's schooling.[76] It should come as no surprise, then, that most South African households have no books in the home (51%); while relatively few have 20 or more (10%).[77]

In this context, there is no irony in the fact that South Africa's largest book retailer is named Exclusive Books; book-buying is indeed a very exclusive activity. South Africa boasts a population of nearly 50 million people, but the market of individual book buyers is estimated at only 50,000.[78] Targeting a tiny market of affluent book-buyers in just two of the country's eleven official languages, South African publishers print small runs and set prices as high as this elite market segment can bear. A book that sells 5,000 copies is considered a bestseller.[79] Meanwhile, Zulu-language newspapers, which sell for just twenty-five cents a copy, are doing a thriving business.[80] *Isolezwe* publishes daily with a circulation of more than one million readers. Its competitor *Ilanga* publishes twice a week with a readership upwards of 800,000.[81] To put these numbers in perspective: nearly *twenty times* as many South Africans purchase a Zulu-language newspaper *each day* than will purchase books in *any language* during the course of a year. South African publishers seem remarkably resistant, however, to admitting that high prices on books create a barrier

75. Achal Prabhala, *Economic Analysis of Income and Expenditure Patterns in South Africa: Implications for the Affordability of Essential Learning Materials* 8, 15 tbl.1 (Access to Learning Materials Project of the Consumer Institute SA, Working Paper No. SA-9-11, 2004).

76. *Id.* at 10.

77. SABDC NATIONAL SURVEY, *supra* note 57, at slide 66.

78. EDWARDS & NGWARU, *supra* note 43, at iv.

79. Edward Nawotka, *Cape Town Book Fair Looks to Conquer Africa*, PUBLISHER'S WEEKLY, July 9, 2007, at 10. As a point of contrast, Indianapolis author John Green's bestselling work *The Fault in Our Stars*, sold 150,000 copies in its first month of publication—primarily to teenaged readers. Frank Bruni, *Kids, Books and a Five-Hankie Gem*, N.Y. TIMES, Feb. 22, 2012, http://bruni.blogs.nytimes.com/2012/02/22/kids-books-and-a-five-hankie-gem/?_r=0 (noting also that the first run printing was 300,000).

80. The Zulu-language newspaper *Isolezwe* sold for 2.80 South African Rand per copy in 2011—approximately twenty-five cents in U.S. currency. *Isolezwe* was launched in 2002 and is the third-most popular newspaper in the country. *Zulu Newspapers Thrive in SA*, NEWS24 (Apr. 4, 2011), http://www.news24.com/SouthAfrica/News/Zulu-newspapers-thrive-in-SA-20110404. *See also* EDWARDS & NGWARU, *supra* note 43, at v ("There are many indications in fact that Africans *do* read when the content is affordable, accessible and of interest. *Isolezwe*, the daily Zulu newspaper in Durban, for instance, has a circulation of more than 95,000, outperforming the English-language dailies from the same publisher").

81. SOUTH AFRICAN AUDIENCE RESEARCH FOUNDATION, MAGAZINE AND NEWSPAPER READERSHIP, Dec. 2013, 1, 3, http://www.saarf.co.za/amps/readership.asp. The exact estimates are 1,065, 000 for *Isolezwe* and 812,000 for *Ilanga*.

to greater reading. This conclusion was stubbornly resisted in the National Survey's concluding narrative, which dismissed readers' complaints about the expense of books as a "perception" problem to be "managed" by booksellers.[82]

C. General Lessons

In beginning with a case study, my aim was to move beyond traditional theoretical predictions to depict the actual workings of a copyright industry within the context of historical and economic realities.[83] The prevailing theory of copyright law imagines a marketplace efficiently serving up new works to an undifferentiated set of consumers. Empirical inquiry, however, suggests a much different story. Copyright protection has succeeded in creating a profitable publishing industry in South Africa. Yet this industry effectively serves only a tiny sliver of society. The market for copyrighted works is functioning reasonably well only from the perspective of affluent English speakers. From the perspective of the disadvantaged majority, the market is dysfunctional. Very few books are being produced in the needed languages, and even these are largely unaffordable. For the vast majority of South Africa's population, copyright protection is failing at its intended purpose.

This failure stems in part from inequalities of wealth. The market responds to the "effective demand" of readers with significant discretionary income, but not to the "latent demand" of poor readers who want and need books but cannot afford to pay the prevailing price. The

82. SABDC NATIONAL SURVEY, *supra* note 57, at slides 135–36. The South African Book Development Council is a nonprofit organization that lobbies the South African government on book policy; historically it emerged out of several industry groups involved in publishing, such as the Publishers' Association of South Africa, the South African Booksellers' Association, and the Paper Manufacturers Association of South Africa. Perhaps not coincidentally, however, the survey was soon followed by another report on "Factors influencing the cost of books in South Africa." SABDC FACTORS, *supra* note 55. Yet this second report does more to obscure than to reveal the true sources of high book prices in the South African context. The tone of the report overwhelmingly offers a justification for high book prices. The report complains of the expense of paper, the high markup in retail, the shortage of skilled employees, and generally bemoans the difficult situation of publishers. Ultimately, it advises that the government should spend more on purchasing books through libraries. SABDC FACTORS, *supra* note 55, at xii. The report never suggests that publishers should or can bring down prices in order to target a larger readership.

83. An earlier work of mine applied a similar approach to patent law, using a case study of the workings of patent law around the development and commercialization of the light bulb to test and refine patent theory. That article also offered an in-depth discussion of the merits and limits of the case study methodology for intellectual property scholarship. *See* Lea Shaver, *Illuminating Innovation: From Patent Racing to Patent War*, 69 WASH. & LEE L. REV. 1891 (2012), *available at* http://ssrn.com/abstract=1658643.

failure also has to do with inequalities of language. The market responds more strongly to the high-volume sales potential of dominant languages and rationally declines to invest resources in serving smaller language markets. Particularly where culture and class overlap—where speakers of local languages are also poor—the market-based incentives generated by copyright protection are simply insufficient to motivate publishing.

While the particular politics of inequality will vary from country to country, I suggest that the basic dynamics of the price and language barriers will be observed in most developing countries. South Africa is a unique country, as every country is unique. Its widespread poverty and many languages, however, are hardly exceptional for a developing country. South Africa may fairly be characterized as the most industrialized, wealthiest, and best-educated country in Sub-Saharan Africa. Even South Africa's great linguistic diversity is common to developing countries, whose borders were often drawn by colonial powers without regard to cultural geographies. There are 190 countries in the world, but more than 5000 languages. I chose South Africa as the site of my case study primarily because I was relatively familiar with the country's social and political context, having studied and worked there for nearly a year early in my career. It also offered the important advantage that I could draw on an ample body of secondary literature available in English. I hope that one result of this Article will be to inspire similar case studies exploring the problems of unequal access to reading material in other countries, which may identify similarities and differences across national contexts.

Perhaps less intuitively, the experiences of a developing country such as South Africa can also shed important light on the workings of copyright law in more affluent countries. Poverty, inequality, and the legacies of racial discrimination are acute, glaring features of the modern South African reality. But they are also present in the United States. Even in the U.S., books are too expensive for many would-be readers, and linguistic minorities face very limited selections at any price. Fifty million Americans are poor. Sixty million Americans speak a language other than English. Book famine may be a problem confined to developing countries, but book hunger exists much more broadly. Developing countries present contexts where poverty, income inequality, and linguistic divides are more extreme. The very starkness of these dynamics in a country like South Africa can serve to render visible previously overlooked ways in which copyright protection interacts with such inequalities. Having once recognized these dynamics in an extreme case, it becomes easier to notice

that similar dynamics are also at work, more subtly, in industrialized countries.

II. THE INEQUALITY INSIGHT

This Part builds upon the case study to elaborate a broader theoretical framework for thinking about how the market-based mechanisms of the copyright system interact with social inequality. Class and culture combine to explain who wins, and who loses, from copyright law. Along the dimension of class, the key insight is that copyright protection makes cultural works more expensive, pricing out a substantial portion of the potential readers. Along the dimension of culture, the lesson is that copyright's incentive system is more effective in some language markets than in others. The creative industry is hard at work to provide more and more material to the lucrative English-speaking market; meanwhile, entire language communities are neglected because of their relative poverty. My point is not that copyright law is inevitably bad for the poor. My point is that copyright law been designed without awareness of these unequal impacts—and as a result, has tended to worsen them rather than alleviate them. To achieve a creative economy that includes everyone, and offers opportunities to all, we must approach the design of copyright law with a better understanding of these disparities. Social inequality cannot be a side note, an asterisk, or an afterthought to theories about how copyright law incentivizes the production of creative works. Although neglected by standard copyright theory, inequality is a glaring fact of the real world that profoundly shapes the impact of copyright protection on the production of books and other cultural goods. Only when the inequality insight is brought to bear can copyright regimes be designed in ways that will preserve incentives and rewards for authors while also addressing social justice.

A. Copyright and Class

The traditional law-and-economics account of copyright, as articulated by William Landes and Richard Posner, offers a utilitarian justification for protection against unauthorized reproduction as an effective incentive for the production of new works.[84] Less frequently acknowledged is a concerning corollary of their model: stronger copyright protection will

84. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

also lower the number of copies produced and increase the price of each copy.[85] Landes and Posner did not venture to predict whether the resulting price increases and output reductions would be large or small. Later empirical research, however, suggests that copyright protection inflates the cost of books significantly. Paul Heald has documented that popular American novels still under copyright are on average 40 to 80% more expensive, available in half as many editions, and more than ten times as likely to be out of print, compared to similar titles in which copyright has expired.[86] Using historical data from the United Kingdom, Xing Li, Megan MacGarvie, and Petra Moser found that an extension in the term of copyright protection increased the prices of books to which it applied by nearly 150%.[87]

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85. Landes & Posner, *supra* note 84, at 336–39. "What happens to the number of copies produced by copiers and by the author as the level of copyright protection rises? Since price will rise, the total number of copies will fall." *Id.* at 339.

86. *See generally* Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031 (2008). Heald's analysis focused on popular American novels originally published between 1913 and 1933. This time period allowed comparison of works for which copyright protection had already expired (those published 1913–1922) with works still under copyright protection (those published 1923–1932). Some of the more famous titles in the public domain set included *Pollyanna*, *O Pioneers!*, *Tarzan of the Apes*, *A Portrait of the Artist as a Young Man*, *The Age of Innocence*, and *Ulysses.* The copyrighted set included titles such as *The Great Gatsby*, *Winnie-the-Pooh*, *A Farewell to Arms*, *The Good Earth*, and *Brave New World*. In all, each data set included more than 160 individual titles. Heald compared the modern availability of these two groups of popular books. Heald found that the two sets of works were indistinguishable during their respective terms of copyright protection, both in terms of the percentage of works still in print and the number of editions available. This confirmed that the two groups were good points of comparison, without significant underlying differences due to other causes. As the earlier set of works fell into the public domain, however, the indicators of availability began to diverge. Works that had entered the public domain were more likely to be currently in print, were available in a greater number of editions, and were less expensive. The scale of these differences was significant. For example, of the titles still under copyright, 26% were out of print at the time of the study. (Keep in mind that the data set looked only at best-selling novels, which are more likely than most books to remain in print decades later.) Of the titles that had fallen into the public domain, however, only 2% were currently out of print. Overall, both sets of books sold for an average price of $20. But when the lens is narrowed to compare subsets of these books that are most popular today—for which economies of scale in printing may be greatest—a strong pricing differential emerges. Depending on the precise methodology of comparing prices, the copyrighted books were on average 40% to 80% more expensive than the public domain titles.

87. Xing Li, Megan MacGarvie, & Petra Moser, *Dead Poets' Property—How Does Copyright Influence Price?*, 17–18 (June 8, 2014), *available at* http://ssrn.com/abstract=2170447. The authors' analysis is made possible by a change in U.K. copyright law that doubled the term of copyright protection for works whose authors were still living, but not for works whose authors had already passed away. Prior to passage of the U.K. Copyright Act of 1814, the term of copyright in that jurisdiction was 14 years, renewable for another 14 years if the author was still living at the time of expiration. The Act extended the term of copyright protection from 14 years to 28 years for works by dead authors. The authors found that publishers would routinely lower the cost of books as they approached their copyright expiration date, as both buyers and sellers anticipated that titles would become available more cheaply once they fell out of copyright protection. The authors found that

Authors typically earn a royalty of only 15% of a book's sale price in exchange for their copyright.[88] So what explains these substantially more dramatic price impacts? One answer is that copyright distorts the normally efficient nature of free markets, by restricting competition between book suppliers. Economic theory suggests that industries will naturally gravitate to the lowest profitable price point for their goods, given the prevailing demand curve and the costs of production. An assumption of this theory, however, is that the market is perfectly competitive. In the context of copyright protection, however, this assumption simply does not hold. Coyright protection guarantees that a book publisher will *not* have competition, at least as to the supply of any particular title. The publisher can thus set the price of a particular title at whatever level it chooses, rather than responding to competitive pressure to lower price to the marginal cost of production, as microeconomic theory generally predicts. Particularly in the context of great wealth inequality, it may be most profitable to set prices high, targeting only the narrow segment of consumers able to pay a premium.[89]

To be sure, significant pressure to compete on price exists in many book markets. Even where no *identical* book is available from a

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publishers would routinely lower the cost of books as they approached their copyright expiration date, as both buyers and sellers anticipated that titles would become available more cheaply once they fell out of copyright protection. The authors also offer anecdotal historical evidence that books were affordable only to wealthy and institutional purchasers during the term of copyright, but often became available at popular prices after copyright expired. *Id.* at 26–27.

88. *See E-Book Royalty Math: The House Always Wins*, AUTHORS GUILD (Feb. 3, 2011), http://www.authorsguild.org/authorship/e-book-royalty-math-the-house-always-wins-2/; *Royalty Rates for Introductory Textbooks?*, CHRONICLE OF HIGHER EDUCATION (last visited Feb. 5, 2014) http://chronicle.com/forums/index.php?topic=73372.0; *Quick Contract Guide*, PUBLISHLAWYER.COM, http://publishlawyer.com/quick-guide/#QTell_me_about_royalties_in_book_contracts (last visited Feb. 5, 2014).

89. In the book-publishing context, it is unclear whether the low-volume, high-price sales strategy actually *is* the most profitable one, or whether the industry has simply not yet explored a potentially *more profitable* low-cost, high-volume strategy. To be sure, publishers must recoup the costs of reviewing, editing, printing, and delivering books, while also promising royalties to the author. But there are multiple strategies for making this economic equation work. Economies of scale make it possible to reduce the price of a book when a publisher increases the number of copies printed. In a print-run of 250 copies, the costs of printing are R60—about $6 U.S. currency—per book. In a print-run of 10,000 copies, however, that figure drops to R10—about $1 U.S.—per book. *See* SABDC FACTORS, *supra* note 55, at 14. Thus it is possible to greatly reduce book prices in the context of a high-volume, low-cost sales strategy. A publisher that is risk-averse, however, would rather print too few copies than too many. There is surely also an inertia involved in attempting to buck the prevailing model. Lower-cost books will require lower-cost distribution systems, for example. The dominant strategy in the South African book sector currently is to target the most affluent segment of the market by printing few copies and selling them at a high price per copy. Newspapers offer a dramatic example of the other extreme, printing on cheap paper with low-cost distribution mechanisms, and selling the same content to tens of thousands of readers.

competitor, an effective substitute might well be. One publisher's *Cooking Vegetarian Meals* may be forced to compete on price with another publisher's *Guide to Vegetarian Cooking*. For some types of works, consumers may view various titles as entirely interchangeable, making decisions essentially on price. "Pulp fiction" romance and crime novels come to mind as examples or works the market likely views as highly substitutable. Retailers may put pressure on publishers to lower prices, because they share consumers' interest in high-volume sales. Publishers of new books may also have to set their prices lower to compete with the availability of books on the second-hand market and availability through public libraries.

All of these competitive pressures on price, however, are likely to be weaker in smaller book markets, such as in developing countries and in local languages. These smaller, less mature markets will feature fewer publishers, limiting the ability of retailers to play one off the other to get the steepest discount. The second-hand market in developing countries will also be less robust than in book-wealthy countries, because fewer used books are in circulation. Developing countries also cannot afford to maintain robust public library systems, weakening that source of price competition. The total number of available titles makes a difference as well. English-speaking consumers can choose from *a million* titles in the Kindle marketplace alone. Within this pool, there should be at least reasonably close substitutes for most works. In languages where there may be only *a few hundred* titles in print, however, there is much less ability for readers to substitute between titles.

An analogy to the context of pharmaceutical drugs may be helpful. Firms within the brand-name drug industry, protected from competition by patents, leverages their market power to charge higher prices. In contrast, firms within the generic drug industry must compete to find cheaper ways of producing and delivering the same drug as their competitors.[90] Price differences between these two models of production are therefore extreme. For example, when Thailand issued a compulsory license in 2007 for the heart medication Clopidogrel, it was able to secure the drug from an Indian generic producer at a cost of USD $0.028 per tablet—less than three pennies. The brand-name company holding patents on Clopidogrel

90. The generic drug industry produces medicines whose patent terms have expired, or which are not protected in the country of production, even if they may still be under patent in other countries.

had offered to sell the same drug to Thailand's government for USD $2.00 per tablet.[91]

The existence of a vibrant generic drug industry has been fundamental to expanding access to essential medicines. In the area of cultural production, however, we lack a similarly vibrant "generic book industry." The much longer term of copyright protection limits the "generic" publishing industry to marketing only extremely old books.[92] Among these, only a few are classics of enduring appeal, primarily in the fields of fiction and poetry—precisely the category of books where Heald found large price reductions when copyright protection was removed.[93] On the whole, copyright law restricts the publishing industry to the "brand-name" model of production.

To put it another way, copyright's restrictions on reproduction create an artificial scarcity, which predictably results in higher prices. In the context of income inequality, these higher prices have a much greater impact on some consumers than on others. The wealthiest consumers are able to pay top dollar to fully satisfy their information and entertainment desires. For people of modest incomes, higher prices significantly limit access to cultural works. Worldwide, one *billion* people currently live on incomes of less than $1.25 per day, or less than $500 per year.[94] The advantages of copyright protection are reaped primarily by those already privileged: affluent consumers, the most successful creators, and major publishing houses and other copyright holders located in industrialized countries. Meanwhile the burdens of copyright protection, in the form of higher prices, fall hardest on the already disadvantaged. Copyright was

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91. *Thailand Issues Compulsory Licence to Buy Plavix Generics from India*, THIRD WORLD NETWORK, Aug. 29, 2007, http://www.twnside.org.sg/title2/wto.info/twninfo080706.htm, *archived at* http://perma.cc/Z3EZ-QQKJ. For a discussion of the Clopidogrel case and more extensive data on price differentials between on-patent and off-patent medicines, see Chan Park & Arjun Jayadev, *Access to Medicines in India: A Review of Recent Concerns*, *in* ACCESS TO KNOWLEDGE IN INDIA: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION, AND DEVELOPMENT 78, 88 (Ramesh Subramanian & Lea Shaver eds., 2011).

92. The precise term of copyright protection varies from country to country, and may be dependent upon the type of work, the date it was published, and other unique facts, such as when the author died. Only books published in 1871 or earlier can be counted upon to be free of copyright restrictions in every country. *See* Kristina Eden & Anne K. Beaubien, *HathiTrust: digital access at the intersection of interlibrary lending potential and the protection of intellectual property rights*, 40 INTERLENDING & DOCUMENT SUPPLY 94, 96 (2012).

93. *See* discussion *supra* notes 84–86.

94. WORLD BANK, THE WORLD BANK GROUP GOALS: END EXTREME POVERTY AND PROMOTE SHARED PROSPERITY 6–7 (2013), *available at* http://www.worldbank.org/content/dam/Worldbank/document/WB-goals2013.pdf, *archived at* http://perma.cc/99ZW-LNYQ.

long ago described as a tax on readers, for the benefit of authors.[95] The inequality insight enables us to recognize this tax as a regressive one.

B. Copyright and Culture

Copyright also complicates the emergence and flourishing of literature in languages spoken predominantly by the poor—what we might call the "neglected languages" of for-profit publishing.[96] By accident of birth, each of us belongs to a particular language community. We are English speakers, or Thai speakers, or Zulu speakers. These linguistic differences have little to no importance when it comes to artistic genres that are not linguistically encoded, such as visual art or instrumental music. But language has profound importance for text-based material, which can only be enjoyed by speakers of the language in which it was written (or translated). This reality is captured by the Estonian poet problem: an author working in the Estonian language might be the most gifted poet on earth,but there will be little to no market demand for her works.[97]

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95. The notion of copyright as a tax dates back at least to February 5th, 1841, when Macaulay invoked it to oppose an extension of copyright's term in Britain, arguing that a term extension would significantly raise prices but only negligibly impact incentives:

> The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget that a tax on innocent pleasures is a premium on vicious pleasures. I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit to even this severe and burdensome tax. Nay, I am ready to increase the tax, if it can be shown that by so doing I should proportionally increase the bounty. My complaint is this, that my honorable and learned friend doubles, triples, quadruples the tax, and makes scarcely any perceptible addition to the bounty.

LORD MACAULAY & LADY TREVELYAN, SPEECHES: THE COMPLETE WRITINGS OF LORD MACAULAY 279 (Kessinger Publishing 2004).

96. The analogy is to the "neglected diseases" problem identified in medicine, where the market-based incentives for drug research cause more resources to be directed to baldness than to tuberculosis. *See, e.g.*, Belen Pedrique et al, *The Drug and Vaccine Landscape for Neglected Diseases (2000–11): A Systematic Assessment*, Oct. 24, 2013, *available at* http://www.msf.org/sites/msf.org/files/ed0f-piis 2214109x 13700780.pdf .

97. *See* Ilse Lehiste & Rimvydas Šilbajoris, *Marie Under's Poetry: Some Problems of Translation*, 29 LITHUANIAN Q.J. ARTS & SCI. (1983), *available at* http://www.lituanus.org/1983_ 3/83_ 3_05.htm (exploring the difficulties of translating Estonian poetry and bemoaning that despite the incredible beauty and sophstication of Under's poetry and the devoted efforts of many talented translators into English and German, she has not gained the international recognition she deserves); Harvey Hix & Kätlin Kaldmaa, *An Anthology of Contemporary Estonian Poetry, On the Way Home*, 24 ESTONIAN LITERARY MAGAZINE (2007), *available at* http://elm.estinst.ee/issue/24/anthology-contemporary-estonian-poetry-way-home/ (discussing the high quality of Estonian poetry, the difficulties of translating it, and the difficulty of publishing it because of fear that no one will buy it).

Although linguistic group membership dramatically shapes access to reading material, language seems to be a blind spot in thinking about copyright and book policy. Birgit Brock-Utne and Halla Holmarsdottir have commented:

> Language is without doubt the most important factor in the learning process, for the transfer of knowledge and skills is mediated through the spoken or written word. The paradox is that educational programs and schemes are often designed to pay more attention to the structures and curricula than to language policy.[98]

Similarly, language is without a doubt the most important factor in the market for cultural works, yet efforts to inform copyright policy typically overlook it.[99] This is problematic. The market for books in English is profoundly different from the market for books in Zulu. It is very likely that the particular system of incentives and limitations that works very well for one language community will not be ideal for others.

Copyright's rules establish a formal equality among linguistic groups: protection is equally available to authors from all language communities, creating works in any language. But beyond this formal equality lies a very disparate impact, because not all languages are equal from the perspective of the marketplace. The global book publishing industry is organized around specific language communities, and the Anglo-American

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98. Birgit Brock-Utne & Halla B. Holmarsdottir, *Language Policies and Practices in Tanzania and South Africa: Problems and Challenges*, 24 INT'L J. EDUC. DEV. 67, 73 (2004), *available at* http://www.hakielimu.org/files/publications/document54lang_policies_tz_sa_en.pdf, *archived at* http://perma.cc/M247-S92Q (citation omitted).

99. The National Survey into the Reading and Book Buying Behavior of Adult South Africans was not well designed to explore the impact of language barriers on reading. The only language-related item offered to respondents as a possible reason for not reading more was, "The library nearest to you does not have any books in your language." SABDC NATIONAL SURVEY, *supra* note 57, at slide 64. Yet most South Africans lack any reasonable access to a library, putting them in a poor position to evaluate the nature of its offerings. The phrasing of this item also makes it impossible for a survey respondent to accurately agree with it if their library has even a *single* book in their language. Yet a library with only a handful of books in one's language is scarcely better than no library. A recent study of copyright's impact on learning materials in several African countries also largely overlooked this dimension of inequality, even as it worked mightily to incorporate a gender perspective, seeking with limited success to identify ways in which the copyright environment might disadvantage women. *See* Chris Armstrong, Jeremy de Beer, Dick Kawooya, Achal Prabhala & Tobias Schonwetter, *Introduction*, *in* ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT 1, 14–17 (Armstrong et al. eds., 2010) (acknowledging that extensive efforts to illuminate gender inequalities at the intersection of copyright and access to learning materials produced hints of possible dynamics but not yet meaningful conclusions). *But see* Rens, Prabhala & Kawooya, *supra* note 71, at 9–11 (highlighting both language barriers and sensory disabilities as significant factors in accessing suitable educational materials in the South African context, and advocating procurement of open access textbooks and various copyright reforms as solutions).

publishing industry occupies the dominant position vis-à-vis second-tier publishing markets such as German and Korean.[100] Systematically, we should expect profit-seeking publishers to publish in languages read by large numbers of affluent consumers, where the returns on investment will be greatest. Profit-minded actors should rationally show less interest in publishing in languages read by smaller numbers of predominantly poor people. Indeed, the market for copyrighted works has produced millions of original books in English, but only several hundred in Zulu, and even fewer in South Africa's other African languages.[101]

Compounding this problem, those works that have been translated for smaller book markets tend to go out of print more quickly. When an author wins the Nobel Prize for literature, the substantial global publicity helps to drive sales of their books, at least temporarily. Novels of recent Nobel Prize winners are therefore among the works most commonly translated into foreign languages. In languages such as German and French, these translations will remain in a publisher's "backlist" and be continually available for sale, even after the initial wave of high demand has passed. In a language such as Slovenian, however, the book is likely to become unavailable for sale after just a few years.[102] In short, not all cultures are equally well served by a market-oriented approach to cultural production.

It is not merely that copyright *fails to encourage* the production of books in neglected langauges; copyright law is to some extent *actively stifling* such production. Copyright law requires anyone who would translate a work into another language to seek a license from the copyright holder. This imposes significant transaction costs—the effort of locating the proper rightsholder, negotiating the terms of the contract, and arranging for payment—in addition to the fee actually charged for the translation rights and the cost of the translation itself. In some language markets, these costs are bearable and many foreign works are in fact translated and made available to readers beyond the author's own language community. In languages with small but affluent populations—such as Dutch or Korean—a substantial portion of literature is available because it has been translated from an original in another language, typically

100. JOHN B. THOMPSON, MERCHANTS OF CULTURE 12–13 (2010).

101. *Supra* notes 47–51 and accompanying discussion.

102. MIHA KOVAČ ET AL., DIVERSITY REPORT 2010: LITERARY TRANSLATION IN CURRENT EUROPEAN BOOK MARKETS: AN ANALYSIS OF AUTHORS, LANGUAGES, AND FLOWS 28 (2010), *available at* http://www.wischenbart.com/upload/Diversity-Report_2010.pdf.

English.[103] But in less affluent language communities, the economics of translation are not as favorable. This is the situation of Zulu in South Africa. It is also the situation of some languages spoken within the United States, such as Navajo (the Native American language in widest use in North America) and Tagalog (spoken by more than one million Filipinos living in the U.S. as well as millions more still living in the Philippines).[104]

An analogy may be drawn between the problem of translation for speakers of nondominant languages and the problem of adaptation for disabled readers. [105] In both instances, a published work must be converted into the specific format that can be understood by a particular reader.[106] Copyright law imposes a hurdle to the creation of translations and accessible formats, by treating them as adaptations that require explicit permission from the copyright holder. Such permission may be burdensome to negotiate, even if the copyright holder were willing to grant it without a fee. At the same time, mainstream publishers may view these markets as too small to be economically worth serving by producing special editions.

With awareness of this problem, however, copyright law can be reformed in ways that facilitate access for readers not served by the marketplace. In 1996, the United States enacted a limitation to copyright protection, which permits authorized nonprofits to make and distribute books to print-disabled persons, without obtaining a license from the

103. JOHN B. THOMPSON, MERCHANTS OF CULTURE 12–13 (2010).

104. *See supra* note 12 and accompanying text.

105. Scholars and activists have recently drawn attention to the need for copyright law to be attentive to the special needs of persons with perceptual disabilities, such as blindness, deafness, or dyslexia. *See, e.g.*, Brook K. Baker, *Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled*, 3 (Ne. Univ. Sch. of Law Pub. Law & Theory Faculty Research Paper Series, No. 142, 2013) (noting that a "book famine" also exists for the blind and print-disabled even in wealthy countries, although the problem is worse in developing countries and for blind readers not fluent in English, and laying the blame on copyright's barriers to translation and adaptation of texts into alternative formats); Nicolas Suzor et al., *Digital Copyright and Disablity Discrimination: From Braille Books to Bookshare*, 13 MEDIA & ARTS L. REV. 1 (2008), *available at* http://ssrn.com/abstract=1138809; Raja Kushalnagar, Balancing Perceptually Disabled Consumers' Rights Against Copyright Holders' Rights (May 7, 2010) (unpublished L.L.M. thesis, University of Houston Law Center), *available at* http://ssrn.com/abstract=1475449; James Love, *KEI Statement on the Marrakesh Agreement on Copyright Exceptions for Blind Persons*, KNOWLEDGE ECOLOGY INTERNATIONAL (June 26, 2013), http://www.keionline.org/node/1765, *archived at* http://perma.cc/8CQU-GLT9; James Love, *KEI (Press) Statement on Adoption of Marrakesh Treaty for Blind*, KNOWLEDGE ECOLOGY INTERNATIONAL (June 27, 2013), http://www.keionline.org/node/1767, *archived at* http://perma.cc/DR66-RG9A. *See also infra* note 110 and accompanying text (describing the Marrakesh treaty to facilitate access to works for print-disabled audiences).

106. For example, blind readers might require their books to be converted into braille, printed in a large-print edition, recorded into an audio format, or read aloud by specialized software.

copyright holder.[107] Operating under this provision, the nonprofit organization Benetech offers more than 200,000 titles free of charge to hundreds of thousands of print-disabled readers.[108] More recently, the University of Michigan and the Hathi Trust have partnered to make millions of library books available to blind readers in accessible digital formats.[109] Such efforts are now expanding internationally, aided by the adoption of the Marrakesh Treaty at the World Intellectual Property Organization.[110]

This experience demonstrates that when copyright barriers are lowered, not-for-profit solutions may emerge to serve neglected audiences.[111] Similarly, targeted exceptions or limitations to copyright protection might create the room for innovative non-profit models to serve readers in neglected languages. To be sure, translation involves unique challenges. Converting a work into adaptive formats is a largely automatic process that can be done almost instantly by computer.[112] Translating a novel requires a great deal more time and skill. The distribution of adaptive-format works in the U.S. has also taken advantage of Internet and postal delivery infrastructures that are not as well developed in poorer countries, particularly in rural areas. Copyright law needs to allow room for

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107. Legislative Branch Appropriations Act, 1997, Pub. L. No. 104-197 § 316 (codified at 17 U.S.C. § 121 (2013)) ("Limitations on Exclusive Rights: Reproduction for Blind or Other People with Disabilities"). *See also* DAVID NIMMER, NIMMER ON COPYRIGHT §§ 8.07[B], 8.13[E] (describing accommodations for disability in U.S. copyright statutes). Mary Bertlesman describes the law's operation in practice:

> [T]he "Chafee exception" has provided a remedy for organizations devoted to supplying accessible materials. Prior to the "Chafee exception," organizations would need to get permission from individual copyright owners, which proved to be a slow and laborious process filled with significant administrative complexities. While this exception has provided a remedy, there is a caveat—only authorized entities have been provided this remedy.

Mary Bertlesman, *The Fight for Accessible Formats: Technology as a Catalyst for a World Effort to Improve Accessibility Domestically*, 27 SYRACUSE J. SCI. & TECH. L. 26, 36–37 (2012).

108. *How Bookshare Works*, BOOKSHARE, https://www.bookshare.org/_/aboutUs/howBookshare Works, *archived at* http://perma.cc/5H9H-DUDE (last visited Jan. 23, 2014).

109. These operations were challenged by publishers but upheld in U.S. courts as permitted by the Chafee Amendment and fair use. Authors' Guild, Inc. v. Hathi Trust, 755 F.3d 87 (2d Cir. 2014).

110. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013. The Marrakesh Agreement encourages countries to enact limitations on copyright protection to facilitate the production of adaptive formats for disabled readers. *See also* Marjorie Kennedy, *Seeing a Future for Accessible Reading Materials: The WIPO Treaty for the Visually Disabled*, 18 PUB. INT. L. REP. 27, 31 (2012); Aaron Scheinwald, Note, *"Who Could Possibly Be Against a Treaty for the Blind?"*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 445, 477 (2012).

111. *See also* discussion *infra* notes 156–60 and accompanying text (discussion of social publishing models to serve low-income readers in neglected languages).

112. The website www.robobraille.org offers a free service for noncommercial users, which will convert common text files into mp3 audio files, braille, accessible e-book files, and other formats.

innovative approaches to solve those problems. For example, crowd-sourcing software could help to coordinate volunteer labor to translate large numbers of works—but not if those activities are condemned as copyright infringement. Similarly, cell phone companies could deliver translated works to mobile platforms in rural areas—but they need assurance that this will not open them to legal liability.

During the Marrakesh Treaty's negotiation, the issue of the need for translation for blind readers of non-dominant languages was raised but proved too controversial.[113] As finally adopted, the treaty specifically abstained from addressing the problem of translation.[114] This is not the first time that international treaty-making processes have recognized but failed to meaningfully address the problem of language barriers in access to reading material. In the nineteenth century, many nations freely permitted unauthorized translations.[115] Around the turn of the century, France led an international push to require all countries to reserve translation rights to the holder of the copyright in the original work.[116] Colonial administrators and others in India repeatedly objected that exclusive translation rights would impede the production of works in India's many native languages.[117] As a dependent colony, however, India did not have the political heft to defend its national interests in copyright treaty negotiations.[118]

During the post-WWII era of decolonization, newly independent countries pushed mightily for modifications to international copyright

113. Catherine Saez, *How the Main Issues for the Marrakesh Treaty for the Blind Were Solved in the Nick of Time*, IP WATCH, July 1, 2013, http://www.ip-watch.org/2013/07/01/how-the-main-issues-of-the-marrakesh-treaty-for-the-blind-were-solved-in-the-nick-of-time/.

114. Marrakesh Treaty at footnote 4: "Agreed Statement concerning Article 4(3): It is understood that this paragraph neither reduces nor extends the scope of applicability of limitations and exceptions permitted under the Berne Convention, as regards the right of translation, with respect to persons with visual impairments or with other print disabilities."

115. *See, e.g.*, Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 212 nn.8–27, 217 (1983) (discussing early English and American cases declining to treat translations as infringement, and the legislative shifts in 1870 and 1909 that expanded control over translations). *See also*, Lionel Bently, *Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI.-KENT L. REV. 1181 (2007) at 1205–08 (discussing Indian cases in the 1890s holding that unauthorized translations were not an infringement of either Indian or United Kingdom copyright law).

116. This was achieved through a series of international treaties beginning in the latter half of the 1800s and culminating in amendments to the Berne Convention in 1808. *See* Bently, *id*. at 1216–20.

117. *Id*. at 1187–88, 1218, 1221–22, 1226–32.

118. To my knowledge, no one has yet done the empirical work to ascertain exactly what impact India's shift on translation rights had on the production of works in translations, along the lines of research by Paul Heald, Xing Li, Megan MacGarvie, and Petra Moser discussed *supra* at notes 70–72.

treaties to facilitate translation into their native languages.[119] The issue prompted a confrontation described by some commentators as a "crisis in international copyright."[120] As a compromise measure, the Berne Appendix was amended to permit compulsory licenses for translations.[121] Yet the apparent victory by developing countries proved illusory. The treaty placed so many conditions and restrictions upon the issuing of such translation licenses as to make the mechanism completely impractical.[122] Few countries have ever enacted the domestic legislation required to take advantage of the translation provisions, and it appears that no licenses have actually issued.[123] The Berne Appendix remains a monument to the failure of copyright law to effectively address the problem of linguistic inequality in access to reading material.

Copyright may also be stifling the production of works in neglected languages by impeding open, commons-based production models that might be more effective in reaching low-income readers. Folktales and folk music, which exist in every culture, demonstrate the potential vibrancy—and egalitarianism—of collective creativity. Folk culture flourishes in the freedom to retell a story heard from another. Yet once that story is put down on paper, copyright law restricts this traditional freedom. Copyright's regime of exclusive ownership facilitates the investment of capital in production and distribution, but it throws sand in the gears of collective creativity. This trade-off is likely worthwhile in languages such as English, where the copyright-based publishing model has proven highly productive. But neglected languages may be suffering the disadvantages of copyright protection for grassroots creativity, without reaping the benefits of copyright protection for corporate-financed creativity.[124]

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119. Charles F. Johnson, *The Origins of the Stockholm Protocol*, 18 BULL. COPYRIGHT SOC'Y U.S.A. 91 (1970). *See also* Nora Maija Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 J. COPYRIGHT SOC'Y U.S.A. 402 (1982); Irwin A. Olian, Jr., *International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris*, 7 CORNELL INT'L L.J. 81 (1974).

120. Sacks, *Crisis in International Copyright: The Protocol Regarding Developing Countries*, J. BUS. L. (U.K.), Jan.–Apr. 1969, at 26; Johnson, *supra* note 119 at 91.

121. Protocol Regarding Developing Countries, U.N.T.S. No. 11850, vol. 828, pp. 221–93. *See also* Saleh Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503 (2000).

122. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 107–09 (2000).

123. SUSAN ŠTRBA, INTERNATIONAL COPYRIGHT LAW AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES 108 (2012).

124. *See also infra* notes 155–82 and accompanying text (offering suggestions for how to leverage the inequality insight to promote affordable publishing, particularly in neglected languages).

C. More Books for Whom?

Almost two decades ago, Ruth Gana Okediji invoked a "development perspective" to suggest that the specific modes of intellectual property protection practiced today are likely inappropriate for promoting innovation and economic development in African and other developing nations.[125] More recently, a growing number of scholars have used the philosophical framework of "human development" to frame normative critiques of international intellectual property law.[126] An important contribution of this line of scholarship is to call attention to the reality that the goods protected by copyright are not simply another "widget," but have particular importance to human flourishing.[127]

Yet the rhetorical frame of "development" can make it seem as if the only inequality that matters is the inequality between rich countries and poor ones. In fact, copyright protection implicates issues of distributive

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125. Ruth L. Gana [Okediji], *The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL'Y 315, 317 (1996). *See also id.* at 319–20 (identifying the philosophical roots of a natural rights-based justification for intellectual property protection specifically in the worldview of the French Enlightenment). Okediji's argument is that neither patent nor copyright protection are inherently problematic for development; rather, the problem lies in the particular models of protection currently practiced in the West, which were exported to developing countries. *Id.* at 326. In particular, she argued that the high degree of copyright protection and blanket prohibitions on reproducing printed works without payment to a copyright holder as fundamentally inappropriate to a developing country context where access to literature must be expanded cheaply. She pointed out that developed countries in Europe and North America went through periods where the law tolerated widespread copying of books to encourage access to learning, arguing that all countries need time to leverage this strategy of development before it becomes viable to consider higher levels of copyright protection. *Id.* at 327. As some scholars have since put it, a "contextual 'calibration'" is needed to adapt copyright law to the differing circumstances of countries at different stages of economic development, recognizing both the costs and benefits of copyright protection for public welfare. Armstrong et al., *supra* note 99, at 4 (quoting Daniel Gervais, *TRIPS and Development*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA (Daniel Gervais ed., 2007)).

126. *See, e.g.*, SUNDER, GOOD LIFE, *supra* note 20, at 15–16; Chon, *Intellectual Property "From Below," supra* note 14 (offering a distributive justice critique of international copyright law, drawing in part on human capabilities theory); Chon, *Intellectual Property and the Development Divide*, *supra* note 14; Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007). *See also* Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775 (2009) (calling for a shift from a "property paradigm" to a framework of human rights). This more explicitly normative framework, Wong argues, better accommodates the wide range of moral valu*f*es implicated by copyright law, including self-expression, cultural development, the generation of new knowledge, access to knowledge, and inclusive economic growth. *Id*. at 792–93. As Wong acknowledges, human rights norms do not themselves tell us how to resolve the tensions inherent in copyright rules' allocation of exclusive control and common access, but they can provide a useful grounding for understanding the public interests implicated by copyright law.

127. *See, e.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 227–66 (2012).

justice within every country. Inequalities of class among consumers within those countries powerfully impact the market for copyrighted works. Differences in culture and language are also essential to reckon with, if copyright is to advance, rather than hinder, social justice. The inequality insight challenges us to go beyond national contrasts to more fully account for the complex reality of social inequality, in order to remedy it.

Achieving this goal will require seeing copyright law from a new perspective. The dominant theoretical approach to copyright law understands the project of copyright scholarship and jurisprudence as determining the optimal degree of protection. Sometimes this is conceived as purely an economic question, in which the "optimal" point is defined as maximizing productivity.[128] Other scholars have sought to redefine the optimal level of protection with reference to noneconomic values, such as freedom of speech or democratic culture.[129] Both the law-and-economics and free culture lines of scholarship have largely overlooked the problem of inequality. "More books for whom?" is a question that the prevailing theoretical frameworks of copyright scholarship never ask.[130]

The dominant narratives of copyright law also serve to obscure problems of inequality and access. Copyright policy has long proceeded from two foundational commitments. First is the notion of romantic authorship—the idea that creators of copyrightable works engage in a unique form of labor, which morally justifies an exclusive property interest. Second is the utilitarian notion that legal protections against cheap reproduction are required to optimally incentivize creative activity.[131]

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128. *See generally* Landes & Posner, *supra* note 84.

129. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

130. Madhavi Sunder has focused sustained criticism on the conventional incentives-focused theory of intellectual property law, citing the "neglect of distribution" as its "central failure." *See, e.g.*, SUNDER, FROM GOODS TO A GOOD LIFE, *supra* note 20, at 29 (2012); Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257 (2006). Sunder's work queries whether intellectual property law is well designed to enhance opportunities for all people to participate in cultural production and innovation, and whether it effectively enables socially disadvantaged creators to obtain both recognition and remuneration for their creativity.

131. More recently, American copyright scholarship has enjoyed a critical turn, more deeply querying these previously sacred assumptions and finding them lacking. This line of scholarship suggests that these two propositions are best understood not as foundational truths, but as ideologically appealing arguments developed to justify copyright protection. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT (1992); MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (1994);

Rhetorically, both the narrative of romantic authorship and the narrative of incentives focus attention on authors and publishers. The question for law and policy is thereby framed as how to best protect the financial (and sometimes moral) interests of cultural property holders. The audience who stands to benefit from the hoped-for greater productivity of authors and publishers is present only implicitly. Readers lie at the periphery, rather than the focus, of both the authorship and the incentives narratives.[132]

From the privileged perspective of an affluent English speaker, creative production resembles a constantly expanding buffet of choice laid before us, among which we may select the most appealing options until we are full. For us, the price a copyright holder may set on a copy of a work is only very rarely a barrier to accessing it, if not by personal purchase then by obtaining a borrowed or second-hand copy. We enjoy the good fortune of being able to take it for granted that we will be able to access that portion of new works that appeals to us. Copyright protection promises to raise the number, the diversity, and the quality of offerings placed upon the table. How could this be a bad thing? But can your peripheral vision stretch further still? If so, you might see, standing back behind you, a hungry crowd. They are the poor. They are a majority of the world. They too admire the buffet. But they realize it is not laid for them. For some of us, the proliferation of new works is a bounty, opening up new worlds of consumer choice, new horizons of creativity to explore. For most of the world's population, however, the expanding universe of new cultural works is yet another site of social privilege from which they are effectively excluded.

Moreover, reading may be a particularly important site of social privilege. Reading is a pathway not only to the acquisition of knowledge and educational and professional advancement, but also to becoming an active participant in civic and cultural life, including as a writer offering

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Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973 (1994) (reviewing THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE and AUTHORSHIP AND COPYRIGHT, and offering an explanation for why copyright law has been relatively impervious to the postmodern critique of authorship, primarily because it relies on the trope of romantic authorship more as a useful fiction than as a foundational commitment); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413 (1992); Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2012); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

132. *See* Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y U.S.A. 325 (2011) (suggesting that copyright law has drifted away from its historical concern for readers as authors and owners became central, and arguing that the ultimate purpose of copyright law should be to encourage reading.)

one's own ideas and perspectives. In the context of formal education, children from wealthier or poorer families arrive at their first day of school at vastly different starting points in respect to their exposure to books and the development of reading skills. And long after formal education has ended, adults who can easily afford to purchase books offering guidance on career advancement, health practices, and personal finance will continue to enjoy advantages denied to individuals of more meager resources. Making it difficult for the poor and middle classes to read thus has far-reaching consequences for social justice.

The equal opportunity theory of Joseph Fishkin offers a useful perspective on this problem.[133] Fishkin's work seeks to reorient equal opportunity law by focusing more concretely on "the *how* of unequal opportunity: specific ways different people's opportunities differ, at different junctures, that have consequences for the trajectory of their lives."[134] He posits that law and policy can more effectively respond to promote equal opportunity when we focus on particular decisive moments and developmental processes that produce unequal opportunity.[135] Of particular concern are instances where a particular qualification or instrumental good is necessary to a broad range of later opportunities; such sites often function as "bottlenecks" excluding less advantaged persons from a wide range of later opportunities.[136] Copyright's impact on book production and affordability creates one such "bottleneck" to other life opportunities, making it extremely difficult for people already disadvantaged by class and culture to become literate and thereby access essential developmental opportunities.[137] Indeed, we can think about the bottleneck issue even more broadly. In many countries, speaking and reading the majority or colonial language is a precondition to many life opportunities, forming a very powerful bottleneck. Expanding the availability of vernacular literature can help people around the bottleneck

133. Joseph Fishkin, *The How of Unequal Opportunity*, 40 PHIL. TOPICS 27 (2013), *available at* http://ssrn.com/abstract=2252445 [hereinafter Fishkin, *Unequal Opportunity*]. *See also* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2014) [hereinafter FISHKIN, BOTTLENECKS].

134. Fishkin, *Unequal Opportunity*, *supra* note 133, at 27.

135. *Id*. at 28.

136. FISHKIN, BOTTLENECKS, *supra* note 133, at 10–19.

137. "Essential developmental opportunities are those that people need in order to develop the traits and capacities that will enable them to proceed along not just a few paths, but many or even most or all of the paths their society offers." FISHKIN, BOTTLENECKS, *supra* note 133, at 124. Fishkin identifies literacy as a prime example of an essential developmental opportunity. *Id*. at 124–25.

by making it possible, for example, to acquire higher education or job training without first mastering a foreign language.[138]

The author and publisher centered narratives obscure copyright law's broad impact on equal opportunity, focusing our attention instead on a much more limited slice of opportunity: opportunities for earning income from creativity as a professional author. Yet very few people can hope to occupy this role. Even among professional writers, most earn their living from a combination of teaching, honoraria, and other expertise and reputation-based mechanisms. Royalties received from the sale of books are typically modest, even within the English-language publishing industry, except for truly blockbuster authors.[139] Everyone has an interest, however, in engaging in culture as an amateur creator and participant—a role that is more active than the role of "consumer." The social value of sports is realized not primarily in the livelihood opportunities offered to professional athletes, but in the broad participation of billions of ordinary people—the same is true of literature and culture. We should ensure that the often-elusive promise of livelihood opportunities from copyright protection does not obscure attention to underlying problems of barriers to access, mass participation, and a truly democratic culture.[140] To do this,

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138. Fishkin also invites us to think about being born into a family that does not speak society's dominant language as another bottleneck to opportunity, arguing that policy needs to both help people through this bottleneck (for example, by helping them develop English skills) but also around it (by reforming the opportunity structure to increase the range of jobs that do not require English.). FISHKIN, BOTTLENECKS, *supra* note 133, at 172.

139. Novelist Patrick Wensink, author of *Broken Piano for President*, penned a self-revealing piece humorously contrasting public assumptions about the material rewards of literary success with the much more humble reality. Wensink writes:

> [T]here's a reason most well-known writers still teach English. There's a reason most authors drive dented cars. There's a reason most writers have bad teeth. It's not because we've chosen a life of poverty. It's that poverty has chosen our profession. Even when there's money in writing, there's not much money.

Patrick Wensink, *My Amazon Bestseller Made Me Nothing*, SALON.COM (Mar. 15, 2013, 7:00 PM), http://www.salon.com/2013/03/15/hey_amazon_wheres_my_money/, *archived at* http://perma.cc/C2V2-V2PK. In his case, even hitting the Amazon.com bestseller list netted a meager $12,000 in income. *Id.*

140. Balkin, *supra* note 129, at 7. In this article, Balkin suggests that the goal of freedom of expression should be expanded beyond traditional concerns with democratic process to emphasize a broader conception of democracy in cultural participation. This requires ensuring that not only elites, but *everyone* has a fair chance to participate in the production of cultural works, ideas, meanings, and communities. *Id.* at 3–6. This requires particular protection for the freedom to appropriate and build on existing cultural resources: to take existing culture, modify it, disagree, and turn it in a new direction. *Id.* at 5. Although Balkin was writing from the perspective of freedom of expression law, the concept of democratic culture and its emphasis on interactivity and mass participation also fit very well with a broader view of social justice and human rights as guiding principles for copyright law. *See also* Netanel, *supra* note 129 (arguing that copyright law should be evaluated in terms of its success at promoting the production of cultural and informational works in a democratic sphere relatively

however, we must reframe the discussion of copyright law to prioritize expanding access as a policy goal alongside promoting creativity.

III. RECOMMENDATIONS

Copyright protection is intended to encourage the creation of new works, but its system of exclusive rights also makes it more difficult for people to access and engage with those works. By making reading a privilege of those who can afford to pay, copyright law can create barriers to a broader set of life opportunities for education, personal and professional development, cultural participation, and democratic dissent. These barriers are easily overcome by the relatively privileged, but are often insurmountable for those with fewer advantages in life. This exclusionary dynamic operates at the level of social class, and is additionally complicated by the intersection of class with linguistic group membership. This restricts the ability of most of the world's people not only to read for pleasure and knowledge, but also to use reading as a stepping-stone to their own critical thinking and creativity—to take part in cultural life as both a consumer and a creator of knowledge.

Restructuring copyright law to promote a more equitable vision of cultural exchange and participation begins by recognizing this disparate impact. The final Part of this Article goes further to explore the question of what to do about this problem. How can we transform copyright law into a vehicle for expanding opportunities and advancing equality, instead of accidentally reinforcing social disadvantage? This Part presents several suggestions for how the inequality insight might reshape copyright law and support for creativity, along four lines of enquiry. First, I explore ways that the inequality insight can inform existing debates on aspects of copyright regime design—ranging from the length of the term of protection, to resale rights, to statutory licensing, to fair use and fair dealing. Next, I draw attention to the potential of policy levers and private initiatives beyond copyright law to promote creativity that is accessible to all. Third, I explore the existence of financial incentives for creative production that do not rely on copyright-based exclusion, suggesting that these open business models hold promise for responding to the inequality

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independent of government subsidy and elite patronage). Haochen Sun offers a related concept of "cultural power" in arguing that copyright law should reflect the responsibilities of copyright holders to society given the importance of authors' works in empowering the public at large to discuss and critique social issues. Haochen Sun, *Copyright and Responsibility*, 4 HARV. J. SPORTS & ENT. L. 263, 292–95 (2013).

insight. Finally, I explore the potential virtues of a "syncretic" approach to copyright design, which more creatively incorporates aspects of protection and openness in light of inequality insight.

A. Rethinking Copyright Law

Rethinking copyright law in light of the inequality insight requires being attentive to the impact that choices within copyright law—the details of copyright regime design—have on affordability of works. Books may be privately shared, loaned to the public, resold to new owners, rented for a profit, copied for classroom distribution, translated into new languages, or adapted into new formats only to the extent that copyright law permits those practices. At present, these choices are often made without consideration of their impact on accessibility and distributive justice in the context of social inequalities.

For instance, the U.S. "first sale doctrine" limits the ability of copyright holders to forbid the resale or rental of books, artwork, movies, and many other types of works.[141] The first sale doctrine is traditionally justified in terms of economic liberty, reflecting the common law right of a property holder to dispose of his chattels as he pleases.[142] Less frequently acknowledged is its critical impact on price and affordability: thriving markets in used and rental works can bring down the cost to consumers of accessing such works.[143] Used copies are typically resold at a lower cost; the availability of cheaper used works in the marketplace may also provide a competitive pressure to lower the price of new works. Currently, digital works such as music downloads and e-books are often exempted from first sale doctrines, allowing publishers or distributors to prohibit their resale. This may have problematic implications for affordable access as the market increasingly transitions to digital delivery. A greater recognition of inequality in copyright policy suggests that scholars and policymakers should examine whether extending the first sale doctrine to e-books would improve affordability and access.

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141. 17 U.S.C. § 109 (2013). The name comes from the idea that the copyright holder has the right to set the terms of the *first* sale of a work, but not subsequent sales. Thus, law students do not need the permission of the publishers to resell their used textbooks.

142. *See* H.R. REP. NO. 98-987, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899 (citing Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 982 (1928)).

143. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 586 (2003), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2233&context=bclr.

A second aspect of copyright regime design that can be informed by the inequality insight is copyright term—the length of time for which copyright protection endures. As discussed earlier, empirical research suggests that copyright term extensions result in much higher prices.[144] This fact suggests that significantly reducing the term of copyright protection—perhaps even to the 14 years originally provided in the U.S. by the Copyright Act of 1790—could dramatically improve the availability and affordability of books. Even the editors at the Economist have argued that increasingly lengthy copyright terms make little sense in a world where the costs of creative production are continually declining.[145] For political reasons, however, a reduction in the term of copyright protection is not a realistic possibility.[146] Further extensions in the term of copyright, however, might be opposed on grounds of distributive justice.

Other aspects of copyright law, however, might more easily be adjusted to promote affordability. For example, American copyright law provides a statutory licensing scheme for musical compositions and recordings.[147] This system reduces the transaction costs of obtaining permission to perform and record musical works. A regulatory body is charged with negotiating standard rates, and private digital rights clearinghouses facilitate easy purchasing at those rates. The result is that it has become relatively easy and cheap to obtain a license to record and sell a song. Composers and musicians probably earn more than they would in the absence of such a streamlined marketplace for permissions. This model might be adapted to facilitate automatic licenses for book translations. This would make it much easier for translators and publishers to obtain rights to market translated works and serve neglected audiences.

Fair use doctrines—known in many countries as fair dealing—could also be adjusted to promote access and affordability across dimensions of social inequality. The touchstone of American fair use jurisprudence is the

144. *Supra* notes 86–87.

145. Editorial, *Copyright and the Law: Rip. Mix. Burn.*, ECONOMIST, June 30, 2005, http://www.economist.com/node/4128994/print, *archived at* http://perma.cc/3KAJ-4CSY (commenting on the Supreme Court's filesharing decisions and recommending a return to the original term of copyright—14 years, renewable once at the option of the copyright holder).

146. National legislatures have very limited freedom to set the length of copyright protection. International treaties require copyrighted works to be protected for at least the lifetime of the author plus an additional 50 years. Countries are free to provide a longer term of copyright but not a shorter one. Berne Convention for the Protection of Literary and Artistic Works art. 7, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, 12, Jan. 1, 1996, 1869 U.N.T.S. 299.

147. 17 U.S.C. § 115 (2010). *See* W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835 (2007).

concept of "transformative" use, which is generally interpreted to require altering the underlying work in a way that adds new meaning and message. The fair use analysis also takes into account the potential for "market harm," which is understood as depriving the copyright holder of expected sales. With some adjustments, fair use doctrine might be developed to accord greater freedom for translations into neglected languages. Translation has not yet been recognized as a form of transformative use under U.S. copyright law, but arguably it should be.[148] The ultimate determination of fair use would therefore hinge on the question of market impact, which should take into consideration whether the original author had reasonable expectations of generating sales within a particular language or not. This would allow the law to facilitate unlicensed translations into neglected languages without disrupting the existing market for licensed translations in those languages with a well-functioning publishing industry.

B. Looking Beyond Copyright Law

The few examples provided in the previous section demonstrate the potential of the inequality insight to inform choices within copyright law. But the inequality insight should also push us to look beyond copyright law for effective solutions to book hunger. It is already taken for granted that the provision of health care and education require a mixture of for-profit activity and social subsidy. This is true of reading material as well.

Despite the theoretical emphasis on market provision of cultural works, the book industry has in fact long been the product of a mixture of market activity and public effort. Publicly subsidized universities employ many of our authors and train nearly all of them.[149] National programs for the arts often provide income support to writers and other creators. In wealthier countries, education departments purchase tens of millions of books with

148. *See, e.g.*, Authors' Guild, Inc. v. Hathi Trust, 755 F.3d 87, 101 (2d Cir. 2014) (clarifying that rendering works into formats accessible to print-disabled readers is not a transformative use and analogizing in dicta that "similarly, the non-English-speaking audience cannot gain access to untranslated books written in English and an unauthorized translation is not transformative simply because it enables a new audience to read a work"). This statement, however, may overstate the analogy between adaptive formatting and linguistic translation. Salah Basalamah, a professor of translation and interpretation studies at the University of Ottawa, argues persuasively that (unlike format shifting) a translation necessarily endows the original work with new meaning and new message and must be seen as transformative. Salah Basalamah, *Translation Rights and the Philosophy of Translation: Remembering the Debts of the Original*, *in* IN TRANSLATION: REFLECTIONS, REFRACTIONS, TRANSFORMATIONS 117, 117–32 (Paul St-Pierre & Prafulla C. Kar eds., 2007).

149. Even private universities are publicly subsidized, through tax breaks, student loan support, research and creative grants, and individual charitable giving.

tax dollars, providing them free of charge to primary and secondary students.[150] In the United States, more than one *billion* dollars of tax revenue is spent each year to purchase books for community libraries.[151] These public funding mechanisms work in tandem with the for-profit publishing market to address recognized market failures—points at which the market alone would produce a suboptimal result. These public distribution mechanisms are particularly critical for low- and middle-income readers.[152] The inequality insight calls for an even greater emphasis on legal and policy interventions to address such market failures.

The set of solutions designed to address the shortfalls of the marketplace must vary from country to country. In the United States, public libraries have functioned as a major strategy to address the problem of inequality in opportunities for reading. Public libraries are, however, an expensive access strategy. America's local libraries spend more than $10 billion per year.[153] Even this significant investment has a limited ability to address the problem of book hunger in America.[154] The public library

150. In the United States, college students must purchase their own textbooks, but they do so with support from federal financial aid in the form of educational loans.

151. INSTITUTE OF MUSEUM & LIBRARY SERVICES, PUBLIC LIBRARIES IN THE UNITED STATES SURVEY: FISCAL YEAR 2010, 9 (2013), *available at* http://www.imls.gov/assets/1/AssetManager/PLS2010.pdf, *archived at* http://perma.cc/EY4B-5T5M [hereinafter PUBLIC LIBRARIES SURVEY].

152. *See* Susan B. Neuman & Donna Celano, *Access to Print in Low-Income and Middle-Income Communities: An Ecological Study of Four Neighborhoods*, 36 READING RES. Q. 8, 11–12 (2001) (studying the availability of books and other print resources in two low-income and two middle-income neighborhoods and discussing how the unequal availability of print resources impacts early literacy development in children).

153. PUBLIC LIBRARIES SURVEY, *supra* note 151, at 2. On average, about 10% goes to purchases of books and other media; the bulk of cost is overhead in the form of facilities and staff. *Id.* at 9. In absolute terms, this is a substantial source of book purchasing, totaling $1.26 billion in 2010. *Id.*

154. Like the American system of public education, our public libraries are overwhelmingly locally funded. They both reflect and reinforce our society's patterns of economic privilege and disadvantage. We should not have unrealistic notions that our public libraries ensure that all Americans enjoy fairly equal or even adequate access to reading material. Most working adults would find it difficult to visit a public library during its open hours. Vast differences exist in the quality of facilities and the ease of access. Private costs are also involved in accessing the public resource: transportation, payment of late fees, and an adult's time to accompany children. These factors all limit the potential of the American public library to overcome the underlying inequalities of market-based access to reading material. *See* Sei-Ching Joanna Sin, *Neighborhood Disparities in Access to Information Resources: Measuring and Mapping U.S. Public Libraries' Funding and Service Landscapes*, 33 LIBR. & INFO. SCI. RES. 41 (2011) (analyzing census tract data and statistics from the Public Libraries Survey and finding that there were significant funding and service variations across U.S. library systems, and that library systems in lower-income or rural neighborhoods were relatively less funded and offered fewer information resources); Christie M. Koontz, Dean K. Jue & Bradley Wade Bishop, *Public Library Facility Closure: An Investigation of Reasons for Closure and Effects on Geographic Market Areas*, 31 LIBR. & INFO. SCI. RES. 84 (2009) (analyzing the reasons for public library closures from 1999 to 2003 and finding that geographic market areas around permanently closed libraries tended to include poorer and less educated patrons).

strategy is likely too expensive to meet the vastly greater needs of countries with fewer public resources. Developing countries may need to adopt more innovative solutions, such as subsidizing the production of Open Educational Resources—textbooks and other learning materials that may be downloaded, printed, used, and shared free of charge.[155]

Already, a new field of "social publishing" is emerging to serve readers in neglected languages.[156] Nonprofit organizations such as the African Storybook Project in South Africa and Pratham Books in India produce childrens' books in their countries' local languages and distribute them at the lowest possible cost. Because of copyright restrictions, neither the African Storybook Project nor Pratham Books is able to translate and adapt existing children's literature. Instead, both organizations rely on programs to cultivate new authors in local communities to produce original works. Both organizations leverage private charitable contributions as well as government subsidizes in the form of direct budgetary support or government book purchases. Both organizations have also determined that their social mission fits best with "open licensing" practices, typically through Creative Commons licenses. Under such licenses, the author and publisher disclaim most of copyright law's protections in order to *encourage* copying, translation into other languages, and adaptation to other reading levels.

A realistic awareness of market failures should encourage governments to further explore alternatives to copyright protection for incentivizing the creation and distribution of books for neglected audiences. Patent scholar Amy Kapczynski has urged scholars and policymakers to move beyond "intellectual property internalism," or the tendency to focus too narrowly on intellectual property as the primary or sole way of incentivizing innovation.[157] She points out that IP is clearly not the *only* way to

155. *See Understanding OER*, OER AFRICA, http://www.oerafrica.org/understanding-oer, *archived at* http://perma.cc/ADS2-MEWL (last visited Jan. 27, 2014):

> In its simplest form, the concept of Open Educational Resources (OER) describes any educational resources (including curriculum maps, course materials, textbooks, streaming videos, multimedia applications, podcasts, and any other materials that have been designed for use in teaching and learning) that are openly available for use by educators and students, without an accompanying need to pay royalties or licence fees.

Id.

156. "Social publishing" is the term coined at Pratham Books to describe its model. Here, "social" refers both to the socially minded mission and to the socially networked nature of production.

157. Kapczynski, *supra* note 17 (detailing ways in which an IP-centric approach to innovation disadvantages the poor and undermines information privacy, arguing that legal scholars and policymakers should place greater emphasis on alternative incentive mechanisms such as government procurement, prizes, and commons-based production).

incentivize innovation; neither is there an empirical consensus that they are more *efficient* than prizes, government procurement or commons-based production.[158] A sizeable body of literature now exists exploring these alternative incentive schemes.[159] Kapczynski's added insight is that because these systems do not rely on the price mechanism to recover the creators' investment, they hold greater promise for addressing distributive justice concerns.[160]

C. Creativity without Copyright

The prior section drew attention to ways that governments can encourage book publishing and access to books through mechanisms beyond copyright law. Complementing this strategy, it is important to acknowledge that incentives for creativity and the distribution of creative works *already* exist, even without governmental action to augment them. In some contexts, lowering the degree of copyright protection may help to facilitate more affordable access, while these alternative incentives help to ensure a continual supply of new works.

People sing, create, and write for a variety of reasons, not necessarily for economic reward. Rebecca Tushnet writes about copyright law's failure to recognize psychological drives such as love, desire, and passion as the primary impulses behind creative production.[161] Julie Cohen emphasizes the centrality of play as a driving force of creativity, which constitutes its own incentive.[162] Yochai Benkler details how the networked

158. The "prize" mechanism for incentivizing creativity offers a reward to creators that may be funded by a business, nonprofit organization, or a government. The prize incentive has a long tradition in the literary field. When designed for the purpose of stimulating innovation, however, prize competitions typically have strict criteria and conditions such that the resulting creativity must be made available on an open basis. "Government procurement" refers simply to tax-funded purchasing. Public library and schoolbook purchases are one type of government procurement. To the extent that authors and publishers know that there is likely to be a market for their works from libraries and schools, this constitutes an incentive for creative production. The limited success of children's literature in Zulu appears to be due to this incentive mechanism. If government purchasers insisted as a condition of adoption that the book also be dedicated to the public domain, then the authors would earn revenue from government sales while the marketplace could also provide cheap copies to private purchasers.

159. *See, e.g.*, Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361 (2009); Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents—Prizes Debate*, 92 TEX. L. REV. 303 (2013); James Love & Tim Hubbard, *The Big Idea: Prizes to Stimulate R&D for New Medicines*, 82 CHI.-KENT L. REV. 1519 (2007); Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441 (2013).

160. Kapczynski, *supra* note 17.

161. Tushnet, *supra* note 130.

162. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF (2012); Julie E. Cohen, *Creativity*

economy newly empowers creative production driven by diverse motivations and in unconventional institutional contexts.[163] Eric E. Johnson has argued that the foundational assumption of intellectual property protection–that external incentives such as copyright are necessary to incentivize innovation–is more fallacy than fact.[164] Johnson argues that the vast outpouring of nonmarket creativity on the Internet is merely the latest proof of what recent research from a variety of disciplines points to: the existence of inherent motivation to create.[165]

Financial incentives for creative production also exist, even without copyright protection. Putting creative work out into the world to find its audience brings with it a variety of economic opportunities. Musicians may sell records of their work, but they also earn income from performing and teaching.[166] Authors can sell their books, but they also hold professorships and earn honoraria for speaking. Popular artists of all varieties can leverage their reputation and fan base to sell merchandise, ranging from tee shirts to autographed copies.[167] Advertising—on the radio, on television, and in print—is a widespread strategy used to generate revenue while offering access to content on a free or cheap basis. Kal Raustiala and Christopher Sprigman have documented that creativity and innovation thrive across a variety of industries despite—or perhaps *because of*—the lack of intellectual property protection.[168] From fashion to

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and Culture in Copyright Theory, 40 U.C. DAVIS L. REV. 1151 (2007); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005).

163. YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006).

164. Johnson, *supra* note 130.

165. *Id*. at 647–57.

166. An empirical study by Peter DiCola suggests that revenue streams unrelated to copyright account for the vast majority (78%) of income earned by professional musicians in the United States. Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 305 (2013). Professor DiCola suggests that public policies apart from copyright may ultimately provide more important incentives for musical productivity, such as support for music education in schools, municipal regulation of live music venues, and other public investments in the arts. *Id.* at 341.

167. This is a common revenue stream for musicians in Brazil's *tecnobrega* scene, an industry to which copyright law applies in theory but is irrelevant in fact, due to widespread infringement. For an explanation of the alternative business models that have arisen within this creative industry, see Pedro Nicoletti Mizukami & Ronaldo Lemos, *From Free Software to Free Culture: The Emergence of Open Business*, *in* ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH IN INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 13, 20–22 (Lea Shaver ed., 2010). Film artist Nina Paley dedicated her animated movie *Sita Sings the Blues* to the public domain rather than accept a pittance for the rights from a distribution company. Anyone can download the film for free from her website, sitasingstheblues.com. The increased audience works to her advantage by motivating merchandise sales from the same website: everything from signed DVDs to teeshirts.

168. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012).

food, the lure of profits and the competitive pressure to improve offerings stimulate significant creativity—no government incentives required. In many cases, copying actually incentivizes the copied firms to improve their products and introduce new ones to respond to the competition. Raustiala and Sprigman dub this phenomenon the "knockoff economy."

Developing countries offer additional examples of thriving creative production in the absence of intellectual property protection. Even in industries where copyright law applies in theory, enforcement is often very weak. These contexts offer many examples of creative industries that have learned to thrive through alternative business models that do not rely on exclusive control over copying. For example, the Nigerian film industry produces an estimated 30 new films per week, selling disks by the tens of thousands through street vendors and small shops at very low prices.[169] Though piracy is rampant, the industry survives and thrives by producing low-budget films in high volume, leveraging the same distribution infrastructure through which the pirated disks flow. Brazil's *tecnobrega* music scene also relies on low-cost sales through unlicensed street vendors; this method of distribution operates as free advertising for artists, who then earn income from performances and sale of merchandise.[170] In Egypt, illegal street sales and downloads are of great concern to record labels—but not to Egyptian musicians, who primarily earn their living through live performances, including substantial earnings from private parties.[171]

In all three of these examples, widespread piracy of foreign copyrighted works fed the rise of a distributional infrastructure based on high-volume sales at affordable prices. Local content producers then emerged to take advantage of the new economic opportunities presented by that alternative distributional infrastructure. Brazilian scholars Mizukami and Lemos theorize this phenomenon of for-profit but non-exclusive creativity as "open business," a reference to open source

169. Stevina U. Evuleocha, *Nollywood and the Home Video Revolution: Implications for Marketing Videofilm in Africa*, 3 INT'L J. EMERGING MARKETS 407, 408 (2008). *See also* Brian Larkin, *Degraded Images, Distorted Sounds: Nigerian Video and the Infrastructure of Piracy*, 16 PUB. CULTURE 289 (2004) (noting that the illegal industry in pirated Western films provided the infrastructure for Nigeria's local film industry to emerge); Ramon Lobato, *Creative Industries and Informal Economies: Lessons from Nollywood*, 13 INT'L J. CULTURAL STUD. 337, 346–47 (2010) (noting the irony in that as the Nigerian film industry has matured, it has increasingly called for copyright enforcement to protect its interests, despite owing its existence to piracy).

170. Mizukami & Lemos, *supra* note 167.

171. Nagla Rizk, *Stories from Egypt's Music Industry: De Facto Commons as Alternatives to Copyright*, *in* ACCESS TO KNOWLEDGE IN EGYPT: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 92, 122 (Nagla Rizk & Lea Shaver eds., 2010).

software.[172] Compared to the copyright-centric business models deployed by the traditional publishing industry, open business models may do a better job of serving low-income consumers, enhancing livelihood opportunities for local artists and distributors, and incentivizing local creative production rather than reliance on cultural imports.

The assumption is widespread that copyright protection is the most important and effective incentive for cultural production. This is simply not universally true. In South Africa, African-language publications are most plentiful in three genres: newspapers, textbooks, and religious titles. All three of these genres reflect the relative efficiency of production models based on alternative incentive systems. Newspaper publishing's business model relies on high-volume sales of time-sensitive content and advertising revenue, rather than protection from copyists. The authorship and printing of textbooks is stimulated by government procurement rather than market demand. Religious publications are motivated primarily by evangelistic motivations rather than profit-seeking. These alternative production models have succeeded where copyright law has failed in producing accessible literature in local languages. Other nonprofit efforts are also at work to subsidize the production of books in South Africa's local languages. Room to Read uses charitable donations to sponsor the production of original children's books in African languages.[173] The African Storybook Project seeks to translate appealing children's stories that may then be reprinted and adapted free of copyright restrictions.[174]

The conventional wisdom about copyright as an incentive for creative production requires more nuance. For many types of creative works, copyright protection does indeed enhance the incentives to create, directing significantly greater investments of resources to creative production. For example, strong copyright protection is ideally suited to incentivizing high-budget movies and mass-market novels. Other types of

172. Mizukami & Lemos, *supra* note 167, at 17–20.

173. The nonprofit group estimates that 80% of South African schools lack a library. For a donation of $20,000, supporters can subsidize the creation of a library. A donation of $15,000 subsidizes the creation of an original children's book in an African language. *See Make Your Mark: Support our Work!*, ROOM TO READ, http://www.roomtoread. org/Page.aspx?pid=334, *archived at* http://perma.cc/5VXQ-X3YA (last visited July 11, 2013). An example of one of these books—*My Granny Is a Dancer but I Just Want to Play*, written by Kerry Saadien-Raad and illustrated by Vusi Malindi—was published by Room to Read in several South African languages. *See* Kerry Saadien-Raad, *My Granny Is a Dancer but I Just Want to Play*, *in* ROOM TO READ, A DECADE OF READING: ROOM TO READ CELEBRATES OUR TENTH YEAR 42, 42–69 (2009), *available at* http://www.room toread.org/document.doc?id=551, *archived at* http://perma.cc/87XP-CVUM.

174. THE AFRICAN STORYBOOK PROJECT, DIGITAL STORYTELLING FOR MULTILINGUAL LITERACY DEVELOPMENT (2013), http://www.saide.org.za/sites/default/files/afr%20storybook% 20sept%202013 %20%282%29.pdf.

creative works, however, are produced for reasons unrelated to financial incentives, or because of financial incentives that do not rely on copyright protection. Copyright protection is more of a neutral force in academic journal publishing, where authors' incentives relate to reputation and impact, rather than royalties. And in other instances, strong copyright protection may actually do more harm than good. Copyright protection does not provide meaningful financial incentives to for-profit publishing in neglected languages, and may be holding back the emergence of not-for-profit and open business models that could better serve low-income readers.

D. Syncretic Approaches to Copyright

Copyright scholars concerned about the uneven benefits and burdens of copyright protection should try to think "outside the box" of existing frameworks, fundamentally redesigning copyright law in ways that take account of structural inequalities. Even in its traditional context, property is not a fixed and objective concept; rather there are many possible ways of configuring potential "'rights, powers, privileges and immunities'" in our conceptions of property—and these choices are inherently political.[175] Keith Aoki has suggested that this basic but often overlooked insight about property is even more obscured in the intellectual property context.[176] By recognizing and exploring the adaptability of property regimes, we may open the door to more "syncretic" ways of designing IP regimes to suit different cultural, geographical, and developmental contexts.[177]

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175. Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 721 (2007) (quoting JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 32 (2000)).

176. Aoki, *supra* note 175, at 721.

177. *Id.* at 720–21. Aoki's concept of syncretism argues for adapting "western IP laws" to "local conditions and understandings about local practices" to build legal regimes that may be radically different from dominant IP structures. *Id*. at 721. Aoki also noted this paradox at the heart of copyright:

> [The] conditions that give rise to exploitation . . . may also help create conditions for vibrant cultural production. In order to address exploitation, expanded IP rights may help, but at the expense of extinguishing vibrant, communal cultural production. A key question is whether it is possible for expanded IP rights and vibrant, communal cultural production to coexist or whether the former makes the later impossible. A syncretic legal sensibility that attempts to dialogue with and engage preexisting difference and inequality related to that difference, instead of subsuming alternate modes of cultural production, is crucial when approaching these issues.

Id. at 800.

What is needed is a system of rights, privileges, and immunities in cultural works that advances distributive justice and substantive equality by accomplishing two goals. First, it should respect and promote the ability of ordinary people to access, enjoy, perform, reinvent, and share cultural works—despite disadvantages such as poverty, language, or lack of the human and social capital needed to navigate complex legal rules. Second, it should advance the interests of individual creators—particularly within disadvantaged communities—in realizing the livelihood opportunities from their creations and in protecting their works from unfair commercial exploitation. The twin goals of advancing the interests of disadvantaged communities as both creators and users of culture may pull in somewhat opposite directions. On the one hand, the interest in access and freedom to create implies a need to lower the property aspects of cultural creativity. On the other hand, the interest in protection and livelihood implies a need to extend and enhance the property features of cultural works. This tension, however, can be a creative one. Embracing it challenges us to think beyond what Aoki framed as the "on/off-either/or" trap of conventional IP thinking.[178]

Like Aoki, I suspect that the best solutions will lie in something like a "limited commons" or "common property regime" of the sort described by Elinor Ostrom and Carol Rose.[179] Such regimes protect free access and adaptation by members of the contributing community, while setting conditions for outsiders to exploit its commercial value.[180] For example, a nation such as South Africa might revise its copyright law to treat works in neglected languages differently from works in the dominant publishing languages.[181] Permitting unauthorized copying and reproduction of Zulu works would drive down prices of individual copies of these works to levels where most Zulu speakers could actually afford to purchase them, without impacting the existing market for English works. South Africa's copyright law might also specify that a license is still required to adapt a Zulu-language book into a movie or to translate it into English; this would

178. *Id.* at 721.

179. *Id.* at 768; ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479 (2000); Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

180. Sunder also recognizes the possibilities of "some rights reserved" solutions in her discussion of Creative Commons' proposed cultural heritage license as a way to mediate the tension between values of openness and protection from exploitation. Sunder, *IP*^{3}, *supra* note 130, at 326–30.

181. This suggestion is further explored in Lea Shaver, *Local Language Limitations*, working paper at http://ssrn.com/abstract=2468422.

preserve potentially lucrative licensing opportunities for Zulu-language authors. Alternatively, a statutory licensing scheme might be established to regulate the reproduction of works in neglected languages. This could lower transaction costs and allow for greater competition in production and distribution, which would tend to increase supply and lower prices. Funds generated through such licenses could be returned to the authors or shared within an authors' cooperative that supports the development of emerging authors. These suggestions serve to illustrate the point that copyright protection is not all-or-nothing. Responding to the inequality insight, copyright protection can take different forms in different contexts, in recognition of the different characteristics of different markets.

CONCLUSION

In a perfect world, all people would enjoy extensive opportunities to take pleasure in and learn from affordable, accessible reading materials in their own language. In practice, however, opportunities to read are sharply limited by inequalities of class and culture. This is a problem not only in terms of the ability of any given individual to obtain suitable reading material. It also creates barriers to cultural participation by limiting the ability of readers to become thinkers, speakers, and writers who "talk back" to the texts composed by others. When people are deprived of access to books in a language they understand, they lose the opportunity to engage in the written world as both a consumer and as a creator of culture and knowledge. As Doris Lessing, the Zimbabwean winner of the Nobel Prize for Literature put it: "[W]riters do not come out of houses without books."[182]

It is time for scholarship, doctrine, and lawmaking to reckon with the reality of inequality and seek ways to make copyright law part of the solution, rather than part of the problem. The first step is to recognize that copyright protection does not impact all people equally. Its intended benefits, in the form of an expanded variety of creative works, are accessible primarily by the already privileged. Meanwhile, a pervasive side effect of copyright protection is to make cultural goods more expensive, limiting access by poor and middle-income consumers.

182. Doris Lessing, *A Hunger for Books*, GUARDIAN, Dec. 7, 2007, http://www.guardian.co.uk books/2007/dec/08/nobelprize.classics, *archived at* http://perma.cc/E549-ERLR (illustrating in a poignant essay the difference that books can make in a rural African childhood, the persistent hunger for books in her native Zimbabwe, and the passion for reading and writing that emerges as soon as books are present).

Linguistic inequalities produce a compounding dimension of privilege and disadvantage because the for-profit publishing sector tends to neglect less profitable languages. Once the impact of social inequality has been acknowledged, the next question is what to do about it.

This Article does not push any particular answer to that second-order question, although it does suggest some promising lines of inquiry. Relaxing copyright protection is likely to lower the price of cultural works and therefore result in broader access. Although reducing the duration of copyright protection is probably a political impossibility, the inequality insight suggests that further extensions of copyright term should be opposed on the grounds of distributive justice. Another avenue for adjusting copyright law to respond to the inequality insight is the design of exceptions and limitations to copyright, including first-sale rules, statutory licenses, exemptions for not-for-profit organizations, and judicial interpretation of fair use and fair dealing. Importantly, the inequality insight highlights the possibility of creating exceptions and limitations that apply only to neglected languages. This form of market segmentation could alleviate the book famine where it is most extreme, without impacting more profitable publishing markets.

More broadly, scholarship and policymaking cannot persist in the naïve assumption that copyright-based incentives are both necessary and sufficient to incentivize a well-functioning market for cultural goods. The current copyright system is simply not succeeding in incentivizing a market for the type of books needed by most of the world's people: books that are cheap, in local languages, and culturally relevant. Nor should we expect solutions to the problem of book hunger from market mechanisms alone. Government subsidies, public investment, and nonprofit efforts are likely to be crucial to serving low-income readers, particularly in neglected languages. Open business models premised on greater freedom to translate, copy, and distribute may also prove to be significantly more effective at ensuring the wide availability and affordability of a broad selection of books.

An often-quoted statement by John Maynard Keynes posits that "[t]he political problem of mankind is to combine three things: Economic Efficiency, Social Justice, and Individual Liberty."[183] The perspectives of economic efficiency and individual liberty have profoundly informed our discussion of copyright law. Yet the perspective of social justice has been

183. JOHN MAYNARD KEYNES, ESSAYS IN PERSUASION 344 (W.W. Norton ed. 2011). The book of essays was originally published in 1932.

comparatively absent. Reckoning with the ways in which social inequality impacts the market for copyrighted works begins to supply this missing perspective. In the end, the inequality insight also leads us back to economic efficiency and individual liberty. A system of creative production and exchange that excludes most of the world from participation is also not economically efficient. Nor does it effectively promote individual liberty for all. To promote all three of these values, copyright policy and scholarship must account for the realities of social inequality.