

TOWARDS A MORE COMPREHENSIVE APPROACH TO THE PROMOTION OF CREATIVITY

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“Sir, . . . no man but a blockhead ever wrote, except for money.”

—Samuel Johnson²

“[I]nstead of marveling[] with Johnson, how any thing but profit should incite men to literary labour, I am rather surprised that mere emolument should induce them to labour so well.”

—Thomas Green³

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² JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 641 (Alfred A. Knopf, 4th prtg. 1992) (1906).

I. INTRODUCTION

Article I, Section 8, Clause 8 of the United States Constitution, commonly referred to as the Copyright and Patent Clause, provides that in the interest of promoting “Science and useful Arts,” protection of limited duration will be afforded to authors for their works.⁴ The fundamental rationale behind this protection is to provide an incentive to create—man, so the old saw goes, is above all a self-interested animal and will be more motivated by activities that redound to his economic benefit.⁵ This maxim, while it has grown a bit worn around the edges, is not entirely flawed: people are naturally prone to act in their own interest, and the desire for financial gain can often embody that self-interest.

However, recent research has shown that motivation to create involves a more complex interplay of incentivizing factors that depend deeply on context, and in some of those contexts monetary gain does not incentivize, and can even discourage creative performance.⁶ Sociopsychological factors such as fairness, reputation, and identity, for example, can have profound effects on creativity and in certain contexts prove more powerful than financial incentives. Indeed, as will be shown, the unexpected introduction of money where sociopsychological factors are at play can at times actually create a less productive admixture for creativity.⁷

Furthermore, financial and sociopsychological factors are not alone in influencing creativity. The concept of pleasure, in its myriad forms, can also play a powerful role. As with sociopsychological factors, in certain cases, creativity can flourish in the absence of monetary benefit through purely sensual rewards. The rewards derived from the pleasure may be sourced to the actual *process* of creativity, or impelled by an inexplicable but undeniable need for the pleasure of creating,⁸ or sourced to the thematic content, manifested in a creative product that is overtly sexual in nature.⁹

The environment these financial, social, and sensual factors interact

³ THOMAS GREEN, EXTRACTS FROM THE DIARY OF A LOVER OF LITERATURE 2 (1810).

⁴ U.S. CONST. art I, § 8, cl. 8.

⁵ See Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 780 (2009). Wong summarizes the copyright incentive mechanism particularly well, stating: “The ‘incentive theory’ posits that creators will be motivated to create new works through the grant of exclusive rights, from which they may reap benefits (i.e., profit) through engaging in market transactions.” *Id.*; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (citing perhaps a more pithy encapsulation: “[copyright protection] . . . motivate[s] the creative activity of authors and inventors by the provision of a special reward . . .”).

⁶ See Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 422 (2002).

⁷ See *infra* Part II.C.

⁸ Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 522–23 (2009) [hereinafter Tushnet, *Economies of Desire*].

⁹ This can be seen in literary genres such as Slash fiction. *Id.* at 528.

in can also play a determinative role in both quality and quantity of creative output. A looser, freer environment, for example, often provides the opportunity for greater experimentation and more opportunities for creative discovery. In short, being allowed more fully to creatively play rather than being driven towards a particular result can, in many contexts, serve as a more productive spark to that breakthrough moment.

Closely related to environment, how a project is structured can also prove significant in determining the nature and degree of creativity. This is perhaps most powerfully evidenced in recent online projects, where the structuring of projects in smaller work increments, without restriction of time, qualifications, or personality, allows a much greater opportunity for aggregate creative contribution. Potentially interactive-limiting behaviors such as age, gender, or ethnicity are removed. As a result, the suburban grandmother can contribute and even develop online relationships with the nose-ringed urban youth. This overlooked face-to-face social friction is eliminated by the nature of these types of internet projects, creating more possibility for interaction and thus more creative output. Given the relatively new landscape of the internet and the attendant explosion of creativity, along with all of the additional factors that contribute to creativity, the continued relative neglect of Congress in considering these factors in its incentivizing copyright regime calculus is bewildering.

The focus of this paper, after the introductory remarks of this first Part, will therefore be an effort to provide a comprehensive understanding of the factors that contribute to creativity and to underscore how copyright law as currently constructed has in certain cases rendered less fertile or even killed the golden goose of creativity it contends to nurture, through its ignorance of creativity's more complex nature. To that end, the second Part will introduce the more complex system of financial, sociopsychological and sensual rewards that aggregate to a threshold reward level impelling creativity and discuss the specific contexts that fall under each reward-type. The third Part will address those variables in greater detail and specifically analyze their interplay in motivating creativity. As will be seen, factors ranging from sex to fairness can prove active bedfellows in the motivational alchemy. In the fourth Part, we will address the frictions to this rewards universe, noting particularly how environment can play a significant role in enhancing creative output. Finally, we will address the role of project structure in motivating creativity, particularly in terms of the new interactive possibilities offered by the internet.

II. THE RAINBOW OF MOTIVATORS TO CREATIVITY

As stated above, copyright as currently constructed works on the assumption that promoting creativity is accomplished through providing an

economic self-interest engine, granting what are effectively monopolies to works that authors have created, to provide them the exclusive opportunity to profit from their labor. With the explosion of monetarily unrewarded creativity witnessed over the past decade on the internet, the question of how to optimally promote creativity is being increasingly called into question.¹⁰ Understanding what the exact appropriate framework should be to bring shape to the debate is the first order of business, and so we begin our analysis there.

A. Benkler's Penguin

As noted at the outset, recent research has suggested that copyright law is myopic in constructing a system that incentivizes exclusively through financial contours. Yochai Benkler in his article *Coase's Penguin*, argues that the threshold reward ('R') that incentivizes creativity is the sum not simply of financial rewards ('M'), but also of various sociopsychological ('SP'), and sensual ('H'= 'hedonism' or 'pleasure') rewards.¹¹ While Benkler provides additional parameters and limitations in his analysis, for our purposes here the relationship can essentially be expressed as follows:¹²

$$R = M + H + SP$$

It is important to understand in this model that all of the individual elements on the right half of the equation need not be present to achieve a threshold R. In certain contexts, M, SP, or H may be zero. It is only essential that in the aggregate they reach the threshold motivating R for productive creativity to occur. Benkler notes further that in addition to positive values for each of these variables, negative values may also play a role.¹³ Contexts that possess a threshold R may therefore lose that threshold with the introduction of an unwanted or unanticipated additional reward element.

An example here may help give better clarity. In the context of physical intimacy for example, if upon the completion of a passionate bout of love-making, one party were to pull out their wallet to demonstrate their appreciation and enthusiasm, the intimacy (SP) and pleasure (H) gained would be jarringly and forever reduced.¹⁴ Offering money in this context would not only have a negative effect, but would also result in something akin to outrage. One might rightly argue this context is not exactly a *creativity* context and so perhaps does not apply. The context is helpful,

¹⁰ Wong, *supra* note 5, at 780 ("'Incentive theory' and a wholly economic analysis of copyright law do not fully explain all the principles that form part and parcel of modern copyright law, and do not easily accommodate the influence of other theories . . .").

¹¹ Benkler, *supra* note 6, at 378.

¹² *Id.* at 426–28.

¹³ *Id.* at 427.

¹⁴ *Id.* at 428.

however, in illustrating the overarching point of people being moved to act through sociopsychological factors (love) and hedonistic factors (sex), and having that desire to act actually diminished through the introduction of a monetary reward. Similarly, if guests invited over for a well-prepared meal were to offer a post-prandial check rather than wine to show their appreciation, not only would the social experience be diminished, it is likely it would not be repeated.¹⁵ These examples show that money does not always increase one's desire to perform, and underscore the point that one size does not fit all in the world of incentivizing.¹⁶

The broader implication of Benkler's model, however, is that the motivating system of creativity is unquestionably more involved than simply waving money at people. As Tushnet has also noted, "the lived experience of many creators . . . is (and always has been) richer and messier than the language of incentive can accommodate . . . [d]esire, love [and] pleasure" must be wrestled with "even if the law has difficulty accommodating them."¹⁷ While Benkler's model provides overarching categories, the classification of the specific subcategories remains to be addressed. A closer look at these specific subcategories now warrants our attention.

B. Money and Creativity

Of the three variables in our collection of creative motivators, the concept of money as incentivizer is perhaps the most easily grasped, and perhaps the starkest yet clearest examples of money as a creative enabler come from the lives of certain authors. Charles Dickens, for example, wrestled with the specter of debt, haunted from his early youth by being pressed at age twelve to work in a shoe-polish factory and ultimately witnessing his own father's financial ruin, culminating in his father's serving time in debtor's prison.¹⁸ Dickens himself expressed feeling indignation at the demeaning work he was forced to endure in his youth and a determination to move to richer pastures.¹⁹ It is reasonable to assume from this background alone that we owe a healthy part of Dickens' drive to create to his early abhorrence of these sorts of financial straits.²⁰

¹⁵ *Id.*

¹⁶ Wendy Gordon, *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-By-Case Responses to Market Failure*, 8 J.L. & INFO. SCI. 7, 31 (1997).

¹⁷ Tushnet, *Economies of Desire*, *supra* note 8, at 516.

¹⁸ See FRED KAPLAN, *DICKENS: A BIOGRAPHY* 38–41 (1988).

¹⁹ *Id.* at 41.

²⁰ ALFRED TRUMBLE, *IN JAIL WITH CHARLES DICKENS* 104 (1896). It is interesting to note that Dickens would combine his fear of insolvency with a tireless advocacy for reform, weaving searing indictments of debtor's prison into his stories, such as *The Pickwick Papers*, ultimately influencing reform. *Id.* However, in Dickens prime years of writing, the debtor's prison was on prominent and horrifying display. *Id.* As Trumble notes at the time he criticized the system in the *Pickwick Papers* in 1836, "the monstrosity was at its worst. The prevalent system of imprisonment for debt rendered the hideous [jail] a tool at the hands of a vengeful enemy The outrages to which it lent itself, at the call of swindling lawyers and commercial extortioners, had commenced to attract public attention." *Id.*

Dickens would further evidence his appreciation for the financial model of copyright by his advocacy for its recognition in the United States, where at the time no such incentive existed for foreign authors.²¹ For Dickens, sociopsychological factors of reputation and the pleasure of writing likely played a role, but the evidence suggests these were subordinate, and it was the money that drove Dickens to create as substantially as he did.

Mark Twain was also, at certain points of his creative arc, spurred to produce for financial reasons.²² Having invested recklessly in what was hoped to be a revolutionary typesetting machine, Mark Twain saw his fortune vanish.²³ While a friendly and knowledgeable financier was able to help him declare bankruptcy and remove the bulk of his debts legally, Mark Twain insisted on paying back all of his creditors in full, and did so by engaging in an extensive speaking and reading tour.²⁴ Twain's creative output during this time was of cultural benefit to society, and may have enhanced his social status, but it was indisputably money that incentivized this performance.

While these writers provide telling examples of the power of money for creative output, perhaps no one expressed the sentiment more baldly than Samuel Johnson, who explained his motivation for undertaking the ambitious task of editing Shakespeare as follows:

I look upon this as I did upon the Dictionary: it is all work, and my inducement to it is not love or desire of fame, but the want of money, which is the only motive to writing that I know of.²⁵

To some degree, the darker circumstances of debt these authors experienced create an overly negative picture of money as a motivator. In these cases, there is a menacing financial maw to be escaped rather than a financial promise to be pursued; more an unappealing financial stick of debt than an aspirational carrot of riches. Nonetheless, in terms of context, these stories are helpful for our purposes because they cleanly illustrate a purely financial driver at play and show that money can have a demonstrable incentivizing effect of its own.

²¹ For a concise summary of Dickens difficulties with U.S. Copyright in the nineteenth century, see generally *Dickens v America*, THE ECONOMIST, <http://moreintelligentlife.com/story/dickens-vs-america> (last visited Dec. 16, 2013).

²² See OXFORD UNIV. PRESS, A HISTORICAL GUIDE TO MARK TWAIN 42–43 (Shelley Fisher Fishkin, ed. 2002).

²³ *Id.*

²⁴ *Id.*

²⁵ SIR JOHN HAWKINS, THE LIFE OF SAMUEL JOHNSON, LL.D. 363 (2d ed. 1787).

C. Sociopsychological Factors

Although money plays a role in creativity for some, it has a distasteful role to play for other creative minds. As famed author Robert Graves once noted, “[t]here is no money in poetry, but there's no poetry in money either.”²⁶ If authors profess this sort of disdain for money, what are the other factors that drive them? As will be shown in the next section, fairness, attribution, and identity can also play a significant role in determining creative output.

1. Fairness

A normative sense of fairness can play a surprisingly powerful role in creative performance and, in certain contexts, can even prove more motivating than financial incentives. Gneezy and Rustichini, for example, studied an Israeli day care that was addressing a problem of late pick up among parents.²⁷ To address the situation, the day care imposed a fine for every fifteen minutes a parent was late in picking up their child.²⁸ Surprisingly, the rates of tardiness increased rather than decreased after the fine was imposed.²⁹ It would seem that once the parents were simply encumbered by threat of a monetary loss and no longer under a civic duty to pick up their child, they were less motivated to perform their duty. That is to say financial gain (through desire to avoid financial loss) was a *less* motivating factor than their sense of civic obligation.³⁰

While these findings are surprising, we would be remiss to extract broad behavioral conclusions from such an experiment. After all, the fine imposed by the day care center addressed what is in effect a penalty rather than a reward—people do not necessarily perceive the absence of financial loss as a financial gain. Secondly, there may well have also been some question as to how much behavior was driven by other effects such as age or gender. For example, were those picking up their children overwhelmingly of one gender, and might that overrepresentation have had a skewing effect? Were they from a relatively narrow age range? Or did the very nature of a smaller day care, where interaction is necessarily iterative and those who do not comply will suffer a potentially adverse ongoing label, compel compliance and might this prove less so in a context where the parental groups have less iterative contact with each other?

²⁶ DAVID MORLEY, *THE CAMBRIDGE INTRODUCTION TO CREATIVE WRITING* 198 (2007).

²⁷ See Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 *J. LEGAL STUD.* 1, 4–5 (2000).

²⁸ *Id.*

²⁹ *Id.* at 8.

³⁰ This behavior is somewhat reminiscent of an observation by Confucius in his *Analects*: “Govern the people by regulations, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their accord.” *THE ANALECTS OF CONFUCIUS* 88 (Arthur Waley trans., George Allen & Unwin, Ltd. 1938).

Given these lingering questions, broader conclusions at this point would be unwise, but there are still other contexts that have been brought to light where the rational actor model has failed. One research experiment analyzed a series of interactive bargaining games to assess to what degree the rational actor model might apply.³¹ In one such game, the first player was given a sum of money and told he could divide it as he wished with the second player. The second player was then given the option to decide whether the arrangement was agreeable. If the second player rejected the offer, then neither player received any money.³² The rational actor model would predict that the second player would accept *any* offer greater than zero, as he would be financially enriched in doing so. This, however, did not prove the case.³³

As it happened, the more skewed the first player's offer moved from an equitable 50/50 division between players, the less likely the second player was to accept the offer, choosing instead to receive nothing rather than participate in an unfair distribution of money.³⁴ This finding is perhaps surprising to those who unqualifiedly tout the rational actor model, but to others, this fully resonates, speaking simply to our sense of fairness, a motivating drum which beats louder at times than our desire for financial gain.³⁵

Following Benkler's model, fairness here would best qualify as a sociopsychological value, but this particular experiment, it must be conceded again, does not lend itself neatly to that model. Here, after all, the output is simply the *receipt* of M, rather than M serving to another end, to a threshold R that impels us to further action. What the experiment does suggest, however, is that sociopsychological factors are more powerful than monetary motivators in certain contexts, a finding that further comforts our

³¹ See Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 368, 374 (1982) (explaining that "bargaining games" have a specific meaning in economic literature and are particularly useful in experimentation contexts as they have a clear ending point). In more economic parlance: "[s]ince the length of the play is bounded from above, there is always a player . . . who has to make the final decision." *Id.* at 368.

³² *Id.* at 371. As stated in more technical terms:

The subject chosen to be player 1 then declares which amount a_1 he claims for himself. The difference between the amount c (>0), which can be distributed, and a_1 is what player 1 wants to leave for player 2. Given the decision of player 1[,] player 2 has to decide whether he accepts player 1's proposal or not. If 2 accepts, player 1 gets a_1 and player 2 gets $c-a_1$. Otherwise both players get zero. Every subject in the subgroup of players 1 got a form . . . which informed him about the total amount c to be distributed. Player 1 had to write down the amount of money a_1 which he demands for himself.

Id.

³³ *Id.* at 374.

³⁴ As something of a sidebar, it is interesting to note that this experiment was conducted using graduate students in Economics, who one might imagine are particularly attached to behaviors equated with the rational actor. In short, even a group presumably committed particularly to the assumptions driving its economic models behaved against their training and background.

³⁵ Tushnet, *Economics of Desire*, *supra* note 8, at 544 & n.109.

contention that factors other than money belong in the creative conversation for copyright.

It is important to make the point that copyright law has made some efforts towards building a sense of fairness into its provisions. Fair use, in particular, allows an author to use another's work, but provides that the second author will be limited by: "(1) the purpose and character of the use . . . [;] (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . [;] and (4) the effect of the use upon the potential market for or value of the copyrighted work."³⁶ This is a laudable balance worth commending, and does promote creativity to a degree outside of the financial incentives model. Nonetheless, it is perhaps worth noting that the provision's fourth factor, which functions as a careful guardianship of the original author's market, harkens back to copyright's overarching preoccupation with financial incentives.

2. Right of Attribution

Another factor that seems to compensate significantly for a lack of financial reward is the right of attribution. This phenomenon is particularly well evidenced in the area of fan fiction.³⁷ Authors in this context find rewards merely in the fact of being recognized for their creativity and imagination in crafting their alternate universes. Furthermore, authors would appear to not only find rewards in being recognized, but to manifest a strident outrage at any *false* attribution. As Tushnet puts it:

[F]an creators are usually highly concerned with proper attribution. . . . [V]erbatim copying without attribution when the copier apparently expects to receive credit for the words or images as if they were her own, is one of the most serious offenses against the fan community, and when the plagiarism is discovered, fans are likely to publicly excoriate the plagiarist.³⁸

It is important to understand and concede that the copyright laws currently do take right of attribution into consideration in their calculus. Indeed, in some ways right of attribution might be considered at the foundation of the exclusive rights that copyright gives. However, the core point here is to understand that this context suggests something more profound—that power of attribution alone, without any accompanying financial reward, can be enough. Being recognized for one's contribution seems to have strong social value and that value is all the more important

³⁶ 17 U.S.C. § 107 (2006).

³⁷ Rebecca Tushnet, *Payment in Credit: Copyright Law And Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 152 (2007) [hereinafter Tushnet, *Payment in Credit*].

³⁸ *Id.* at 155.

where economic incentives are absent.³⁹ It is also important to underscore again, that this attribution operates as something of a currency of its own, where relative wealth is reflected in the popularity, circulation, and conversation of others, not in any financial gain.⁴⁰

An interesting side note to this lies in negative attribution, where authors insist at the outset of their work that they have no rights or interest in any of the characters they create.⁴¹ This could in part stem from an imperfect understanding of the law, derived from a concern that an author may be infringing, and hoping by disclaimer to create a shelter from legal action. However, one could also argue that this statement resonates positively in terms of attribution as well, albeit perhaps ironically, in terms of signaling a pure creative desire of the author. The disclaimer pronounces all the more loudly to the audience that there is no financial interest involved, giving these authors an artistic credibility not available to their for-profit oriented counterparts.

Broadly speaking, the right of attribution is a way to establish an author's identity. Identity can come in many forms, however, and once identity is established, this sociopsychological factor can be one of the most powerful incentivizers to action. This we address in the next subsection.

3. Identity

Perhaps the loudest voice and advocate for consideration of incentivizing factors, other than economic ones, comes somewhat ironically from a leader in the field of economics. Amartya Sen has noted the pull of identity as a motivational driver and strongly questioned the absolutist posturing of those who advance the rational actor model.⁴² As Sen states in *Identity and Violence*:

The assumption of narrowly self-interested individuals has evidently appeared to be “natural” to many modern economists There is an argument—an allegedly knockout argument—that . . . takes the form of asking: “if it is not in your interest, why would you have chosen to do what you did?” This wise-guy skepticism makes . . . idiots . . . out of the rest of us, by thoroughly ignoring the variety of motivations that move human beings living in a society, with various affiliations and

³⁹ *Id.* Tushnet notes specifically that “[a]lthough U.S. copyright law presumes that authors will be compensated in money or in control, fan practices use attribution, or credit, as a separate metric.” *Id.* at 135.

⁴⁰ *Id.* at 152.

⁴¹ *Id.* at 154.

⁴² AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* 21 (2006).

commitments.⁴³

Sen is not alone in sensing this long neglected element involved in motivating our behavior. Rosemary Coombe also notes the importance of identity in shaping culture and sees democracy itself endangered when a looser, more free-flowing identity paradigm is replaced by stultifying “fixed positivities of identity.”⁴⁴ Coombe for her part feels a danger in the constricting aspect of identity and advocates towards a greater porousness of fixedness that will allow for a freer flow *between* groups.⁴⁵

While their approaches are different, both authors would seem to agree that identity has its own motivating power and, in certain contexts, can function as the primary activating agent. Indeed, a powerful example can be found in Pericles’ Funeral Oration for fallen soldiers, when Pericles explicitly notes the greater motivating power of honor over money, consoling the grieving when he says: “[o]ne’s sense of honour is the only thing that does not grow old, and the last pleasure, when one is worn out with age, is not . . . making money, but having the respect of one’s fellow men.”⁴⁶

Again, returning to Benkler’s model, identity here has a value more motivating than financial gain and can stand as a sufficient reward in and of itself. Furthermore, it is worth noting that the power of identity is particularly potent: it can push individuals to a level of personal denial that is even existentially threatening—it may be the soldier willing to die for his country, or perhaps the religious martyr to die for his beliefs, or even the social advocate to suffer or die for a cause such as civil rights. In all of these cases, the monumental power of identity motivates more than any other sort of incentive.

Many might counter that no conceivable mechanism exists to legislate for honor or reputation, but such mechanisms do exist and they are not unprecedented. Argentina, for example, recently enacted legislation to provide retirement pensions for those of its authors who have achieved a certain level of notoriety, in effect, signaling to its people and to the world that it honors the contributions of its writers.⁴⁷ As noted by one recipient “[t]he program is magnificent, delivering some dignity to those of us who have toiled our entire life for literature”⁴⁸ Other measures, such as awards for an author’s overall contribution could be equally as easily

⁴³ *Id.*

⁴⁴ ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 296 (1998).

⁴⁵ *Id.* at 295–96.

⁴⁶ THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 150 (Rex Warner trans., Penguin Books 1954).

⁴⁷ Simon Romero, *Argentina’s New Literary Tradition: Pensions for Aging Writers*, N.Y. TIMES, Aug. 12, 2012, at A5.

⁴⁸ *Id.*

implemented. Admittedly, one could counter that this constitutes simply another financial incentive and, while this is in part true, here the reputational incentive is also more operative.

While United States copyright law may be chastised for its relative neglect in engaging how any of the aforementioned motivators to creativity might be engaged, there are still other drivers to creativity underrepresented in the copyright calculus. These revolve around more sensual drivers, factors admittedly more politically problematic and even messy, but which nonetheless deserve and even demand our attention. These we address in the next section.

D. Pleasure and Creativity

In certain contexts, pure sensual pleasure plays a dominant role in promoting creativity. Understanding its creative power can be witnessed in many places, and Hindi religion provides one such telling context. In this tradition, there are several categories of human wants, but there are four primary wants: ‘Artha’ (‘material prosperity’), ‘Kama’ (‘pleasure’),⁴⁹ ‘Dharma’ (‘righteous conduct’) and ‘Moksha’ (‘spiritual liberation’).⁵⁰ While scholars may dispute the hierarchy of these wants in motivating, Kama or pleasure has been described by at least one author as “the most powerful incentive to individual progress.”⁵¹ In the Hindi tradition, it is important to understand that this pleasure may come from any of the senses, from the mind or even from the sexual needs of the body, and its power is understood to be positive if embraced but even destructive if denied.⁵² The crucial point to underscore here for our purposes, however, is simply the explicit understanding and acknowledgement of Kama’s power, a hedonistic power, that incents creativity.

It is important, however, to further distinguish between the pleasure component as perceived and experienced by the reader or end-user—an occurrence that is ultimately not salient or only dimly so as a pleasure driver for the author—from the actual pleasure created for the author by the creative *process* itself. As famed author Isabel Allende has put it, “[w]riting is like making love. Don’t worry about the orgasm, just concentrate on the

⁴⁹ Kama as a term may be more familiar to many as half of the title to the book the Kama Sutra, a treatise on the ways of love in India. Margot Anand, *Preface* to THE KAMA SUTRA OF VATSYAYANA vii–viii (Richard Burton trans., Random House 2002).

⁵⁰ John Carman, Mark Juergensmeyer & William Darrow, A BIBLIOGRAPHIC GUIDE TO THE COMPARATIVE STUDY OF ETHICS 54 (1991); M. Lal Goel, *Religious Tolerance and Hinduism*, UNIV. W. FLA., 4, <http://www.uwf.edu/lgoel/documents/AReligiousToleranceandHinduism.pdf> (last visited Dec. 16, 2013).

⁵¹ KANAIYALAL MANEKLAL MUNSHI, FOUNDATIONS OF INDIAN CULTURE 63 (1962) (further explaining that all of these pleasures qualify as *Kama* in Hindi religion).

⁵² *Id.*

process.”⁵³ In that spirit, it is the purely hedonistic pleasure created from the creative *process* that is our focus in the next subsection.

1. The Ineffable Urge

For some artists, their need to create defies rational analysis or incentive models—it is purely transcendent, an “intrinsically ineffable” experience with an irresistible pull.⁵⁴ As stated by Neil Simon’s Anton Chekhov in *The Good Doctor*, when explaining his need to write: “I ask myself the question . . . what force is it that compels me to write so incessantly . . . [a]nd the answer is quite simple. . . . I have no choice. . . . I am a writer . . . [and s]ometimes I think I may be mad.”⁵⁵ The more challenging question to ask in these cases might be, rather, how to *stop* them from creating. Other authors describe the need to write further as an effort to rage against mortality. One group of writers surveyed, for example, when questioned as to why they wrote, gave reasons that ranged from, “[t]o thumb my nose at Death,” “[b]ecause to create is Godlike” and “or else I would die.”⁵⁶

These quotations suggest that authors seem to derive an irresistible personal pleasure—a hedonistic ‘H’, following Benkler’s model—that is enough all by itself to set the creative engine in motion.⁵⁷ These statements of undeniable urges underscore a dissonance between copyright’s primary chosen method for motivation and the full panoply of what motivates this creative set.⁵⁸

However, it is fair for legislators to furrow their brows and feel mildly at a loss at this—how, after all, can an ineffable urge be legislatively induced? Perhaps, following the testimony of the writers discussed above, we are best served standing aside and simply letting the creative shamans shake.

One might argue that here copyright law is functioning well for these constituents, albeit differently. By providing automatic protections to those who cannot stop themselves from producing, copyright prevents potential unscrupulous appropriations of these individuals’ work. However, if it is argued that this is in fact how copyright law functions, and that in fact such authors with these irresistible creative urges are the rule rather than the exception, copyright law’s constitutional foundation becomes more tenuous,

⁵³ LINDSAY ANDREOTTI & BRIAN HILGENDORF, *SEX, INTIMACY & BUSINESS: A REVOLUTION HAS BEGUN . . . IT’S TIME TO GET UNDRRESSED* vii (2006).

⁵⁴ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151–52 (2007).

⁵⁵ NEIL SIMON, *THE GOOD DOCTOR* act 1, sc. 1 (1974).

⁵⁶ Tushnet, *Economies of Desire*, *supra* note 8, at 523.

⁵⁷ *Id.*

⁵⁸ *Id.* at 515 (noting that “[c]opyright’s incentive model largely bypasses a persuasive account of creativity that emphasizes a desire for creation, grounded in artists’ own experiences of creation.”).

lacking a clear, direct function as a promoter of creativity.

It might also fairly be argued at this point that some of the current remedies provided under copyright law, such as injunctive relief or destruction of materials, do address the needs of the ineffably urged, and do not speak to incentivizing financially.⁵⁹ The argument would be that such remedies serve primarily to prevent others from profiting from the author's work. While it is true that such remedies provide a less clear financial purpose, the motivation would still ultimately seem to at least in part be an effort to guard financial value for the original author. Specifically, by preventing others from producing such works and by destroying work in violation of that author's copyright, such remedies help the author receive the full measure of their financial reward.

While for our "ineffable urge" authors there is pleasure that manifests in the actual process, in other contexts this hedonistic element actually manifests in the product created. A most striking example of this can be found in the realm of slash fiction, which we address in the next section.

2. Slash fiction

Slash fiction has been described as a subset of fan fiction comprising exclusively imagined gay relationships between famous fictional characters.⁶⁰ Stories in this genre are furthermore written online with no apparent consideration of financial reward. We might hold that this context provides another example of our "ineffable urge" authors, but there is an additional twist: here the characters we are familiar with—superheroes, action figures, buddy cops—part in particularly striking ways from their original sexual roles, and it would seem the authors derive something of an explicit hedonistic reward in introducing sexual content to their work.⁶¹ Their creations range from the merely suggestive to the uncomfortably explicit—and they can be found in great abundance online. One of the less salacious examples, functioning at a more printable Harlequin romance level, helps to give something of a sense of this genre:

Bruce [Batman's alter ego] kisses him tentatively at first, lightly brushing his lips against Clark's [Robin's alter ego] in an exploratory kind of way, then parting them to draw Clark's bottom lip into his mouth. Clark gives a small whimper as he does this, and I [Lex Luthor] shift slightly in

⁵⁹ See generally 17 U.S.C. § 502 (2006) (explaining remedies for injunctions); 17 U.S.C. § 503 (Supp. V 2011) (explaining impounding and disposition of infringing articles).

⁶⁰ See NORMAN BRYSON, MICHAEL ANN HOLLY & KEITH MOXEY, VISUAL CULTURE: IMAGES AND INTERPRETATIONS 304–05 (1994); see also Cohen, *supra* note 54, at 1199.

⁶¹ Amy Harmon, *In TV's Dull Summer Days, Plots Take Wing on the Net*, N.Y. TIMES, August 18, 1997, at A1.

my seat.⁶²

It is important to underscore that slash fiction of this sort is not isolated—there are numerous websites dedicated entirely to this type of fiction, some sites even entirely to Batman and Robin.⁶³ Furthermore, it is trafficking in understatement to note that these characters are indeed deviating from their traditional roles. Returning again to our rewards model, while here the reward in the pure joy of creation plays a role, it would seem that it is particularly the sexual nature of the creation and its overt representation that incites this creativity.

Returning to our fuller rewards equation then, money, sociopsychological factors, and pleasure all serve in various forms to motivate creativity. They need not all be present in all contexts, but together or individually they must reach an aggregate threshold reward to incite creativity. However, what we would argue here is that the equation is further complicated and affected by the nature of the *playing fields*, and the relative *frictions* in those playing fields to achieving creativity, which in turn vary what the necessary threshold aggregate reward will be. Those environments which affect the value of the threshold reward we now turn our attention to.

III. ENVIRONMENT'S INFLUENCE ON THE CREATIVE PROCESS

While there are financial, sociopsychological, and hedonistic factors that are important to consider in terms of the rewards they bring to the individual, there are external factors that also merit our attention if we hope for a fuller understanding of the creative process. One area that merits closer scrutiny relates to the nature of the actual *environment* of the creator.⁶⁴

A. Creative Play

Another field rife with potential for enhancing creative productivity is 'creative play,'⁶⁵ which might be described in its ideal form as a fully relaxed and open environment, or a looseness in a creative space that allows for a higher comfort level with experimentation, reducing concern over failures or perceived irrationality. Creating the playground for the creatively

⁶² AlexisBroken, *The Other*, SQUIDGE.ORG, http://www.squidge.org/~peja/smallville/TheOther_AlexisBroken.htm (last visited Dec. 16, 2013).

⁶³ FANFICTION, <http://www.fanfiction.net/search.php?keywords=batman&ready=1&type=story> (last visited Dec. 16, 2013) (a search for Batman stories alone produced 8,371 results); batman_slash, LIVEJOURNAL.COM, <http://batman-slash.livejournal.com/> (last visited Dec. 16, 2013) (showing a site dedicated purely to Batman and Robin Slash fiction); see bradygirl_12, *Fortress of Solitude*, <http://bradygirl-12.livejournal.com/8617.html> (last visited Dec. 16, 2013) (compiling a collection of Batman and Robin Slash fiction links).

⁶⁴ Cohen, *supra* note 54, at 1189.

⁶⁵ *Id.* at 1190.

playful to play, in short, is a crucial part of promoting creativity.⁶⁶

The individual incentive model of copyright is poorly suited to such a setting. Rather than simply enjoying an unstructured freedom, it is inevitable in such settings that concern over full attribution and individual intellectual property rights emerge. Whose idea germinated that which was ultimately created? Who was *most* responsible for the idea reaching creative fruition? Whose contribution is copyrightable? The setting quickly becomes fraught with a rights tension and creativity inevitably suffers.

Those who would argue that copyright's joint authorship provisions might serve as an equitable solution in such a context are either strangers to the actual creative process or only imperfectly understand the ramifications of the joint authorship statute. Under the joint authorship model, each party is entitled to an indivisible piece of the whole as one might be in a real property tenants-in-common context. Copyright law therefore creates the very real possibility that parties only marginally involved in the heavy lifting will find themselves with a glorious windfall—an indivisible right to the *entire* work. While it is true that the law provides further for mutual intent of joint authorship at the time of the creation, there are many contexts where such intent is difficult to prove or disprove, and a person's sense of their own original intent at times becomes suspiciously changeable when significant amounts of money hang in the balance. Thus, any creative minds spearheading a project and envisioning providing for such a creative playground of multiple participants would naturally hesitate upon a fuller understanding of copyright's legal solution.

A more thoughtful division under joint authorship would be possible and is not unprecedented in other areas of law. Comparative negligence schemes under tort law, for example, apportion fault on a percentage basis between the parties—for example, one party might be deemed 15% liable and the other 85%. Is it inconceivable that creative rewards might be apportioned in a similar manner? There is admittedly a difference between apportioning retrospective fault and prospective rights, but such distinctions are not insurmountable. Certain contexts might also be difficult to adjudicate, but such percentages are at times already equally difficult to adjudicate in current shared-liability cases. Yet courts manage. This small change in copyright alone would promote creativity by creating a legal approach that fits less jarringly with this creative environment.

This is not the only type of environment, however, which influences creativity. The promotion of the chance encounter is another environment that lends itself to the process and now merits our attention.

⁶⁶ *Id.* (“Research in the psychology of creativity . . . suggests that unstructured freedom to ‘see what happens’ is an important determinant of creative success.”).

B. *The Chance Encounter*

Closely analogous to the notion of creative play, is what some researchers have termed “the chance encounter.”⁶⁷ As Julie Cohen notes, order is not always the ideal format for the creative moment—it is in disruption, in things not proceeding as planned, where eureka moments are often born.⁶⁸ Where creative play calls for an unrestrictive and open environment, encouraging the chance encounter calls for an environment that is not only open, but is also rife with the possibility of random collisions across disciplinary, social, or other borders. The higher the potential for these encounters, the higher their number and ultimately the higher the likelihood that at least a few chance encounters produce a winning creative ticket.

The operation of this theoretical notion is perhaps brought to focus most elegantly and simply in a commercial for Reese’s Peanut Butter Cup. In that advertisement two pedestrians—one with peanut butter and the other with chocolate—collide accidentally, jumbling their foods together in the process.⁶⁹ Each complains of the unwanted new combination, only to exclaim upon taking a taste that this chance encounter has produced “two great tastes that taste great together.”⁷⁰

It is such chance encounters, such unscheduled happenings, in short, that so often lead to the elusive epiphanies. The songwriter Tommy James also experienced such a chance epiphany that led him ultimately to musical fortune.⁷¹ James tells the story:

So we went in the studio, and we pasted this thing together out of drums here, and a guitar riff here. . . . We had most of the words to the song, but we still had no title. And it's just driving us nuts, because we're looking for like a “Sloopy” or some crazy name – it had to be a two-syllable girl's name that was memorable and silly and kind of stupid sounding. . . . So Ritchie Cordell, my songwriting partner and I, are up in my apartment up at 888 Eighth Avenue in New York. And finally we get disgusted . . . we go out on the terrace . . . [a]nd the first thing our eyes fall on is the Mutual of New York Insurance Company. M-O-N-Y. True story. . . . We said, “That's perfect! What could be more perfect than

⁶⁷ *Id.* at 1191. (“Scholars who point to the importance of the chance encounter that yields unexpected fruit are describing both creative play and a different sort of play altogether.”).

⁶⁸ *Id.* at 1190.

⁶⁹ See TelevisionArchives, *Reeses Commercial Robby Benson Donny Most*, YOUTUBE (June 15, 2011), http://www.youtube.com/watch?v=gwGQ_w9lgHw&feature=related.

⁷⁰ *Id.*

⁷¹ *Songwriter Interviews: Tommy James*, SONGFACTS, http://www.songfacts.com/blog/interviews/tommy_james/ (last visited Dec. 16, 2013).

that?”⁷²

And so was the song “Mony, Mony” born, reaching number one in the U.K. and peaking at number three in the U.S. Billboard Hot 100 in 1968.⁷³

Creating the possibility for these sorts of chance encounters by its very nature cannot be planned, but the problem is that under copyright law such chance encounters create legal tension. Digital sampling, for example, which served as the backbone of rap in the early eighties, presents a good example of copyright’s discomfort with these looser environments. MC Hammer’s “Can’t Touch This”⁷⁴ or Vanilla Ice’s “Ice, Ice Baby”⁷⁵ were produced through digital borrowings, mixing and matching popular song bits, throwing samples together to see what would happen. This practice was a viable way for street performers and those less economically endowed to creatively and economically experiment.

Unfortunately, the courts were not sympathetic. Following the holding in *Bridgeport Music v. Dimension Films* in particular, a decided chill was put on the practice.⁷⁶ There, the court held that “even when a small part of a sound recording is sampled, the part taken is something of value.”⁷⁷ The court was sensitive to the criticism that it would be stifling creativity, but noted in its defense that many hip-hop artists had already chosen a “live and let live” approach to sampling and that still others had of their own accord gone the licensing route.⁷⁸ This apparently comforted the court in believing that it was reasonable to hold that digital sampling of even a tenth of a second would constitute copyright infringement.⁷⁹ The court held further that this was a difficult but necessary ruling to protect incentives and help incentivize creativity, a statement hard for those thereby barred from sampling to logically digest.⁸⁰

The difficulty of such a ruling ultimately lies in the lack of balance between the rights of the individual and the rights of the public to benefit from that creative work, as well as the relative lack of accounting for other important roads to creativity. In an effort to incentivize the original individual, copyright law has in effect shackled an entire market of creative

⁷² *Id.*

⁷³ *Mony Mony*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mony_Mony (last visited Dec. 16, 2013).

⁷⁴ Compare RICK JAMES, *Superfreak*, YouTube, <https://www.youtube.com/watch?v=QYHxGBH6o4M> (last visited Dec. 16, 2013), with MC Hammer, *Can’t Touch This*, YOUTUBE, <https://www.youtube.com/watch?v=otCpCn0l4Wo> (last visited Dec. 16, 2013).

⁷⁵ Compare Queen & David Bowie, *Under Pressure*, YOUTUBE, <https://www.youtube.com/watch?v=Gpn8MANhdLU> (last visited Dec. 16, 2013), with Vanilla Ice, *Ice, Ice Baby*, YouTube, <https://www.youtube.com/watch?v=rog8ou-ZepE> (last visited Dec. 16, 2013).

⁷⁶ See generally *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (2005).

⁷⁷ *Id.* at 801–02.

⁷⁸ *Id.* at 804.

⁷⁹ *Id.* at 801–02. Note that while the court held digital sampling constituted copyright infringement, in this case they did not actually reach the question of whether a fair use defense might be available.

⁸⁰ *Id.* at 802–04.

possibility. The regime as now constructed, demands either increased costs to comply, which will exclude those with less money, or a heightened expertise, excluding those less adept at instrument performance, often also excluding those with less money. Regardless of its effect on classes of performers, from an absolute level, it effectively removes a fertile set of tools for the chance encounter and also leaves those less economically fortunate sitting on their hands.

Copyright law has therefore, proven relatively unhelpful in these environments to the creative process, adding a level of difficulty or friction to achieving creative output. By creating an environment that makes the concept of creative play more difficult and makes embracing the chance encounter model a risky legal process—and even if it is simply perceived so—copyright law has still thereby worked a hindrance to the promotion of creativity.

In some emerging areas, however, the affirmative denial and even aggressive departure from the financial incentive model has proven remarkably robust as a new incentivizing model. Indeed, in some of these contexts, they have resulted in the creation of entirely new social platforms. These we address in the next section.

IV. MINIMIZING THE FRICTION TO CREATIVITY: PROJECT STRUCTURE

The emergence of the Internet in the last twenty years has produced a revolutionary new platform for creativity. By providing new access and communications systems for reaching interested populations through websites, or through social media such as Facebook or Twitter, intentionally or unwittingly historically excluded participants in the traditional social setting now can have a productive place on the creative dance floor.

This new platform also provides not only a means of access to promote work to others, but a whole new way for participants to interact and work *with* each other. The emergence of fan fiction and slash fiction serve as two examples of creative projects that could not have known similar success without this facilitated interactive possibility.

As we will see in the next section, there are other interactive projects that by their very nature further encourage that creativity. Carefully constructing the nature of the project so that overlooked barriers to contribution such as personality frictions among participants, timing of contribution, and even the nature of communication itself are eliminated, can create a resulting universe of such diminished friction that the necessary threshold to motivate creativity is significantly reduced. This may diminish or even eliminate the need for financial rewards. This can be true in contexts that have traditionally been almost entirely run on a for-profit model.

Open Source Design provides a particularly telling example of this new construct. These projects consist generally of smaller, manageable software coding projects for a group of volunteer software developers where money is not involved.⁸¹ These projects have proved so successful that these non-profit enterprises have on occasion found themselves competitive with the heavy hitters of the for-profit industry.⁸² This is counterintuitive for the incentives model embraced by copyright. As Benkler put it:

Imagine that back in the days when what was good for GM was good for the country, and advisory committee of economists had recommended to the President of the United States that the federal government should support the efforts of volunteer communities to design and build cars, either for sale or for free distribution to automobile drivers.⁸³

What accounts for this ongoing willingness to donate one's expertise so willingly? What factors make this project successful in a way that copyright law as constructed does not account for? The primary factors we address in the following sections.

A. Peer Production

One of the transformational changes that these Open Source projects bring that is easy to overlook is a fundamental change in the social relationship between participants, making all parties more equal players in the relevant creative space. In a traditional organizational model, there is a limited group of decision-makers and an established hierarchical structure. While such a hierarchical model offers clarity by reducing the number of decision-makers, it also inherently accepts that the sacrifice for this clarity will be that some participants with relevant information will, at certain decision points, be left out of the decision-making process, creating loss of relevant information at that input point in the interests of order.⁸⁴ Organizational researchers have termed this reduction of input "lossiness," and businesses, increasingly aware of this issue, have in recent years struggled to minimize that lossiness while still trying to maintain their traditional hierarchical structures.⁸⁵ Yet where hierarchy remains, it is inevitable that lossiness will also remain.

Peer production offers a radically different approach in that there is

⁸¹ *Open-source software*, WIKIPEDIA, http://en.wikipedia.org/wiki/Open-source_software (last visited Dec. 16, 2013).

⁸² *Id.*

⁸³ Benkler, *supra* note 6, at 371.

⁸⁴ *Id.* at 411. (noting that by creating a hierarchy of agents, "it creates a boundary around the set of available agents and the set of available resources that limits the information available about what other agents could have done with these same resources . . .").

⁸⁵ *Id.* at 408–12.

essentially no hierarchy. Each individual contributes and each can advocate for what they perceive as the best approach. While this might raise concerns of chaos, a simple set of rules of participation have proved effective in preventing this, and the upside has been the virtual elimination of lossiness.⁸⁶

While peer production does have this advantage, particularly in terms of reaching maximum creativity, it must be remembered that it has its limitations and will not work in every environment:

[P]eer production will thrive where projects have three characteristics. First, . . . they must be divisible into components, . . . each of which can be produced independently of the production of the others. . . . Second, the granularity of the modules is important and refers to the sizes of the project's modules. . . . [T]he modules should be predominately fine-grained, or small in size. . . . Third, and finally, a successful peer production enterprise must have low-cost integration, which includes both quality control over the modules and a mechanism for integrating the contributions into the finished product.⁸⁷

In short, while a computer project that involves individual modules for code lends itself to a peer production approach, something like writing a novel or building a house will not.⁸⁸ Nonetheless, the key point to keep in mind is that where this structure applies, a great part of the motivation to produce comes from the *construct* or *nature* of the project under this analysis. It is by creating smaller modules and easy integration that productivity is enhanced. It is true that there are still sociopsychological benefits that come, but they follow from structure: the benefits of community and participation are a *result* of a well-constructed peer production organizational model.

B. Anonymity

The structuring of the task is therefore critical to encouraging participation and creating a social construct that individuals are attracted to participate in. There arguably also seems to be an effect in terms of the nature of the social contact in these internet projects.

Specifically, in these contexts, every contributing party has greater relative anonymity afforded them. This might range from a permanent anonymity where one's appearance is not known, or even a more temporary

⁸⁶ *Id.* at 377. (leads to an "improved identification and allocation of human creativity.").

⁸⁷ *Id.* at 378–79.

⁸⁸ *Id.* at 379.

⁸⁸ *Id.* at 376.

anonymity where appearance is known but not available when interaction takes place, so that if a person feels more creative in pajamas they may indulge that desire. In-person conversations between parties in this Peer Production context are normally not involved. Participants do not need to follow a certain fashion, look a particular way, or possess social graces beyond e-courtesy if they do not wish to. In short, they are judged in this setting rather on the *quality* of their participation rather than the quality of their social bonhomie. The implications of this are significant—this new social context adds creative minds that may have found traditional social settings difficult, finding themselves marginalized by others or absenting themselves of their own accord from the creative process. This context provides the sociopsychological rewards to these individuals that under traditional models were unavailable to them. Furthermore, by its meritocratic construct, it speaks to greater fairness, which we have already seen can serve all by itself as a significant creative motivator.

It is important to note further that this social construct not only would attract those who are socially awkward under traditional social contact models, but bring more interaction between creative individuals as they are in no measure impeded by any limiting stereotyping, conscious or unconscious, of race, age, gender, or disability. The sixty-year old grandmother now has the potential to bond with the twenty-five year old computer professional because neither is distracted by appearances or differences. This makes for new transformational creative partners, which in turn creates that much more creative possibility.

C. Asynchronousness

Anonymity is not the only aspect of this social construct that is unique to this new social setting, however. By falling outside of any particular time-frame, the asynchronous nature of projects happening on the internet further distinguishes the social constructs of the internet from traditional group settings. It is important to remember that creativity operates outside of time constraints. Put another way, creativity resists commodification: it does not happen on command nor does it spring in a steady amount from a predictable set of individuals. It is a fool's proposition therefore, to command workers to "be creative" from nine to five and then have them turn off their creative buttons at 5:01 P.M.⁸⁹ Such work time constraints do not exist in the timelessness of the internet where participants can take part in a project at any point of the day and come and go as they please. The result is that this process allows the capturing of creativity as it happens. Suddenly, those people who are at their creative

⁸⁹ *Id.* at 376. ("Human creativity cannot be assumed to be an on-off switch of suitability for a job, as simple models of industrial production might treat labor.").

best at 6:00 A.M. may engage their inspiration when it is at its peak. Furthermore, they can find themselves now in creative partnership with the night owls who do their best work late at night. As Benkler states:

Given the high variability among individuals and across time in terms of talent, experience, motivation, focus, availability, etc., human creativity is an especially difficult resource to specify for efficient contracting or management.⁹⁰

By creating a flat, non-hierarchical model that is not time-restricted, suddenly access to human creativity, availability, and talent is dramatically improved. Understanding these creative advantages, it is less surprising that these projects are able to compete so ably with for-profit, time-partitioned enterprises such as Microsoft or Oracle.⁹¹ From the broader legal perspective, their success should further send a clarion call to the guardians of copyright law that these environments are worthy of close consideration as complements to the financial incentives approach.

V. CONCLUSION

Congress and the courts have long engaged the battle to incentivize creativity, but their relatively focused application of the financial incentives model to induce creativity merits reassessment given our current understanding of what induces creativity. Recent research has shown that there are a variety of other factors that induce the creative state—fairness, attribution, identity—factors that are not fully engaged in the copyright creativity calculus. Even those provisions of the copyright regime that do not directly speak to such financial gain, such as injunctive relief or fair use, either simply address financial motivations less directly or fail to squarely engage the other motivators to creativity addressed here—and these creative colors deserve a fuller place on the copyright palette. For as it is, artists with no financial incentives are nonetheless producing works eagerly—and where copyright even threatens, creative efforts still burgeon. As argued here, this is due not only to social and hedonistic factors underrepresented in the copyright regime, but also to a failure to appreciate the role of environment and particularly the fundamentally transformative nature that the internet offers, rendering a more frictionless exchange that in effect reduces the level of reward needed to induce creativity.

⁹⁰ *Id.*

⁹¹ *Id.* at 371. Benkler explains:

The intuitions of the late twentieth-century American resist the idea that thousands of volunteers could collaborate on a complex economic project. It certainly should not be that these volunteers will beat the largest and best-financed business enterprises in the world at their own game. *And yet, this is precisely what is happening in the software industry.*

Id. (emphasis added).

While there are some promising copyright concepts on the horizon, unfortunately many of these efforts are currently coming from outside of copyright law, essentially pushing the copyright regime to the side. Certain popular rock bands, for example, have informally negotiated with their fans, agreeing to allow bootlegging of their concerts but asking for fans to purchase their studio recordings, and studies suggest that fans have positively responded and bands have not suffered financially.⁹² Also, in the realm of fan fiction, certain original artists have forgone their intellectual property rights and fully indulged their fan fiction counterparts, on some occasions even inviting fans to submit their fan fiction characters and offering to write the fan fiction derivatives into future episodes of the original.⁹³ These approaches were presciently imagined by Justice Breyer in an article written over forty years ago.⁹⁴ Breyer, however, would seem to have been a lonely voice in the copyright wilderness as these approaches have moved forward without encouragement from the copyright regime as currently constructed.

It would seem that, in pursuit of these new legal models, creative individuals are clearing a new intellectual property path independent of copyright law, an ominous development for the copyright regime, one that suggests still more urgently that a more comprehensive approach to incentivizing creativity, and one not centered on financial interests alone, is needed. For ultimately, if society perceives an unfair disconnect, or even simply an inadequate connection, between the law and normative behavior, they will simply stop respecting and ultimately stop obeying the law.⁹⁵ This may in part already be occurring in the realm of copyright law and account for the current rampant unauthorized posting of copyright material on the internet.⁹⁶ And rampant disregard of copyright is a strong suggestion that copyright law as constructed is flawed. Taking the aforementioned elements

⁹² Tushnet, *Payment in Credit*, *supra* note 37, at 147.

⁹³ 21 MASASHI KISHIMOTO, NARUTO: SHONEN JUMP 192 (2007). Author Masashi Kishimoto writes:

Lately, it's been getting really difficult for me to come up with new characters. It's so hard to design good ones that . . . we decided to hold a new event! . . . [A] 'design and mail in your own original characters to . . . Kishimoto' competition! The most excellent works will be printed in *Jump* comics! In addition, I will copy and illustrate the best design, and that too will be printed!!

Id.

⁹⁴ See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970) ("A copyright system . . . is not the only way to resolve this conflict. It would be possible, for instance, to do without copyright, relying upon authors, publishers, and buyers to work out arrangements among themselves that would provide books' creators with enough money to produce them.")

⁹⁵ Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA L. REV. 1, 17 (2008) ("When the mismatch between social norms and the law are significant, citizens lose trust in the law."); see also Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 225 (1997) (explaining that moral judgments determine the likelihood of committing future crimes).

⁹⁶ Loren, *supra* note 95, at 17–18.

that fuel the creative engine into consideration moving forward is essential, otherwise copyright law may find itself, sooner rather than later, squarely landed in the ash heap of irrelevance.