Copyright and Inequality

Lea Shaver
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The prevailing 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. The majority of the world’s people experience copyright law not as a boon to consumer choice, but as a barrier to acquiring knowledge and taking part in cultural life. The resulting patterns of privilege and disadvantage, moreover, reinforce and perpetuate preexisting social divides. Class and culture combine to explain who wins, and who loses, from copyright protection. Along the dimension of class, the insight is that just because new works are created does not mean that most people can afford them. Copyright protection inflates the price of cultural works, with implications for cultural participation and distributive justice, as well as economic efficiency. Along the dimension of culture, the insight is that is not enough for copyright theory to speak generally of new works; it matters crucially what language those works are created in. Copyright is likely to be an ineffective incentive system for the production of works in “neglected languages” – those 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 on issues ranging from fair use to fashion and everything in between.

* Associate Professor of Law, Indiana University Robert H. McKinney School of Law; J.D., Yale Law School; M.A., University of Chicago. I would like to thank Graeme Austin, Dennis Corgill, Eric Dannenmaier, Susan DeMaine, Eric E. Johnson, Robert Katz, Benjamin Kele, Molly Land, Catherine Ann Lemmer, Gerard Magliocca, David Orentlicher, Margaret Tarkington, Carleton Waterhouse, and R. George Wright for their particularly helpful comments during the drafting of this article. I am also grateful to, Elisa Doll, Rose Shingledecker, and Danielle Teagarden for their outstanding research assistance. This Article is made available to the public under the terms of a Creative Commons Attribution 4.0 International license.
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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, policymakers and scholars have spoken of Africa’s “book famine.”²


² See, e.g., 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.”); 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.’”); Peter Ripkin, African Literature in the Literary Market Place Outside Africa, 17 AFR. BOOK PUBLISHING REC. 289, 289 (1990) (“On a continent with a recognized ‘book famine’... many authors are still being published outside the continent while those who prefer to publish with African publishing houses suffer the fate of limited access to the reading public, because of distribution problems in the country of publication and beyond.”); Hans M. Zell, The Other Famine, 37 LIBRT 294 (1987) (overviewing the problem of the African “book famine” as part of a meeting to study and address it); James Currey, The State of African Studies Publishing, 85 AFR. AFF. 609 (1986) (describing an academic book famine such that scholarly books about Africa could not be obtained by scholars in Africa due to the high cost relative to local wages, and shortages of foreign-exchange that make it difficult to import goods from abroad, including books); Michael Crowder, The Book Crisis: Africa’s Other Famine, 1985 AFR. BIBLIOGRAPHY xvi (1986) (publishing an address given to the twenty-fourth annual general meeting of the
The phrase appears to have originated in the 1980s when economic crises across the African continent sparked critical shortages of both food and books. 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. Where books are physically available for purchase, they are often exorbitantly expensive. Academics and university students in developing countries experience great difficulty meeting their book needs. For ordinary people in

Standing Conference on Library Materials for Africa, London, 1986). See also Brook Baker, Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled 4 (Ne. Univ. Sch. of Law Pub. Law & Theory Faculty Research Paper Series, No. 142-2013, 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.)

3 The term may have been coined in the 1980s, as economic decline across much of the African continent sparked both literal famine and a collapse in the market for books. See Hans M. Zell, Publishing in Africa, in INTERNATIONAL BOOK PUBLISHING: AN ENCYCLOPEDIA 366, 366 (Philip Gabriel 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 Brazilina Studies, Working Paper No. CBS-80-07, 2007) available at http://hdl.handle.net/10535/4243, archived at http://perma.cc/ND4M-ZLV8. 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 AFRICA 175, 175 (Graziano Kratli & Ghislaine Lydon eds., 2010) (describing periods of book-famine and book-wealth as recurring patterns influencing intellectual trends on the continent and complaining that “Any 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 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 41, 56 (Lea Shaver ed., 2011) (noting that the required readings for the freshman year of college in Rio de Janeiro or Sao Paolo cost between R$2578 and R$3908 — 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 127-59, 165-67 (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 __, at 56-57 (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). Bear in mind that Brazil is the world’s seventh-largest economy, occasionally trading places in the rankings with the United Kingdom.
these countries, the 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 their own home. Yet 44% of American children grow up in families that have trouble paying for basic needs. In such homes, even a single ten-dollar book that a child will soon outgrow is not an easy purchase. Outside of the individual home, socioeconomic status also correlates with vast disparities in the availability of books in neighborhood stores, libraries, and public schools. In addition to cost, language can also be a barrier for minority populations. More than 60 million U.S. residents speak a language other than English at home. Many public libraries stock at least a modest Spanish collection, and programs to provide free Spanish-language books to Hispanic families have shown a significant impact upon early childhood reading. It becomes more difficult, however, for such strategies to reach speakers of lesser-spoken languages such as Tagalog (1.6 million U.S. speakers), Hmong (211,000), or Navajo (169,000).

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

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12 Ryan, supra note ___ at 3.

13 See, e.g., Klaus von Grabmer 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).
It is a bedrock principle of both doctrine and scholarship that copyright protection exists to incentivize authors and publishers to produce more works. 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. Reflecting the 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.” Alongside this primary focus on production, however, much less attention has been paid to questions of distribution. Although copyright scholarship has addressed questions of just allocation of protection and freedom between creators and users, this narrow focus can miss the impact of more radical social inequalities within both groups. How does copyright

14 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.”

15 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).


> 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.


18 Margaret Chon, _Intellectual Property “From Below”: Copyright and Capability for Education_, 40 U.C. DAVIS L. REV. 803, 813 (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
law impact opportunities for people to access knowledge and take part in cultural life across social divides of class and culture? Such questions of inequality and distributive justice currently lie in the peripheral vision of copyright scholarship, doctrine, and policymaking.

The relative silence of copyright scholarship on questions of distributive justice 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. The distributive justice implications of IP protection 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 slow to draw the logical parallel to express concern for the poor’s ability to access copyrighted works. Even less attention has been dedicated to the problem of language. Membership in certain linguistic groups profoundly limits the world of materials that an individual can effectively utilize. Yet the copyright literature has largely overlooked this problem.

The failure to account for how profoundly social inequalities shape access to copyrighted materials has also led copyright lawmaking in


Patent scholar Michael Abramowicz previously called attention to this neglect, offering an unconventional law-and-economics perspective to suggest that copyright law’s traditional concern for incentives should give way to a greater concern for access in markets where the supply of works is already immense and varied. Michael Abramowicz, An Industrial Organization Approach to Copyright Law, 46 Wm. & Mary L. Rev. 33, 104-06 (2004) (offering an unconventional law-and-economics perspective to suggest that copyright law’s traditional concern for incentives should give way to a greater concern for access in markets where the supply of works is already immense and varied). Although Abramowicz’s argument is framed primarily in terms of economic efficiency, he suggests in concluding that copyright law might also prioritize access over incentives in some contexts for reasons of distributive justice. Id. at 104-08.

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 view, 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. 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. 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. 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 a key barrier to greater 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 how representative the South African experience is, concluding that despite differences, price and language barriers also

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impact access to books in wealthier countries such as the United States.

Part II, “Copyright and Inequality,” builds on the insights of the case study to theorize two dimensions of social inequality that are particularly significant for copyright policy. 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 – both within and across societies – profoundly shape the degree to which individuals are able 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 benefit of greater selection is enjoyed primarily by wealthier consumers. Along the dimension of culture, the 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 failing to make books available in certain “neglected languages,” which limits life opportunities to read for speakers of those languages.

The article concludes by exploring ways in which copyright scholarship, legislative reform, and judicial doctrine might respond to a new recognition of social inequality. Part III, “Copyright and Social Justice,” reconnects the lessons of the earlier parts to the question of how to make copyright work better for all people: promoting broad access to cultural works, creating the conditions for a flourishing of literatures in all languages, and enabling a truly participatory culture. One set of answers lies in looking for ways to bring down the cost of copyrighted works, so that more people can afford to purchase them in the marketplace. Ultimately, however, public policy must also grapple with the inadequacies of copyright law as a mechanism to encourage creative production. Copyright’s system of market-based incentives premised on exclusive control over copies works very poorly to support the creation and distribution of works that are relevant and accessible to the poor.

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.23 Mbeki may have overstated the case.

slightly. White and black are no longer synonymous with rich and poor, but the correlation remains very strong.\textsuperscript{24} A three-nation metaphor is probably more accurate.\textsuperscript{25} 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.\textsuperscript{26}

Intersecting with these economic and racial inequalities is the overlapping dimension of linguistic group membership. Under the post-apartheid constitution, South Africa recognizes eleven official languages. These include nine African languages native to the country’s black majority, of which the most widely spoken are Zulu and Xhosa.\textsuperscript{27} Afrikaans, a language descended from Dutch and unique to South Africa, is the third most significant native tongue. Afrikaans is 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 between the white and African populations. English, brought to South Africa through British colonization, has recently emerged as the dominant language of government and commerce, although few South Africans speak it at home. In descending order, the most widely spoken languages in South Africa are at most recent count: Zulu (23%), Xhosa (17%),

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\textsuperscript{24} Nattrass & Seekings, \textit{supra} note __, at 47-49.

\textsuperscript{25} Nattrass & Seekings, \textit{supra} note __, at 48.

\textsuperscript{26} \textit{See} Nattrass & Seekings, \textit{supra} note __, at 48.

Afrikaans (13%), and English (10%), followed by the less populous African languages.

Both the economic and linguistic dimensions of social inequality play out importantly 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.” The politics of language in South Africa are deeply bound up with the country’s colonial and apartheid past. Yet the problem of

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28 S. Afr. Const., 1996. The phrase “indigenous language” lends itself to two equally plausible yet politically very different interpretations. On the one hand, the phrase might be interpreted to mean “the languages of the South Africa’s indigenous peoples.” This would include the Bantu languages of the black ethnic groups, and exclude Afrikaans. On the other hand, the phrase might be interpreted to mean “those languages that are indigenous to South Africa, as opposed to ones imposed by colonial rule and favored globally.” This would include Afrikaans within the category of disadvantaged languages. The ambiguity may have been intentional, since at the time of the constitutional framing, Afrikaans was deeply stigmatized by its close association with apartheid. Yet from a social justice perspective, the Afrikaans-speaking peoples of South Africa have also been victims of discrimination and are disadvantaged by their linguistic group membership relative to English speakers. As South Africa gains more distance from its apartheid trauma, the country may reach a point where it is politically prepared to include Afrikaans alongside the black languages as deserving of protection and elevation.


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. at 228.
“diminished use and status of the indigenous languages” very much continues into the present.\(^{30}\)

One objective indicator of this unequal status is the relative poverty of literature available in the African languages, as reflected in industry data.\(^{31}\) Among locally-produced books, a supermajority are in English (71.7%), followed by Afrikaans (16.6%).\(^{32}\) Sales of books in all African languages combined totaled R231 million or $27 million annually (11.3%). The overwhelming majority of these (89% or R205 million) are student textbooks developed to facilitate primary education in these languages.\(^{33}\) 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 account for a bit over R24 million.\(^{34}\) Only R1.13 million – approximately USD $127,000 – of general trade books (adult and child fiction and nonfiction) are sold each year in all the African languages combined.\(^{35}\) 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 as well as in many countries in Latin America, Asia, and the Pacific. 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

\(^{30}\) Id. The diminished status of indigenous languages is a problem across the African continent. See ORG. FOR AFR. UNI TY, LANGUAGE PLAN OF ACTION FOR AFRICA (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 widespread negative attitudes in Africa toward these languages”). See generally ROBERT PHILLIPSON, LINGUISTIC IMPERIALISM CONTINUED (2009) (summarizing one academically influential view on the politics of indigenous and colonial languages in Africa).

\(^{31}\) PUBLISHERS’ ASS’N OF SOUTH AFRICA, ANNUAL BOOK INDUSTRY SURVEY REPORT (2010).

\(^{32}\) Id. at 43, Fig. 8.1. These data exclude imported books.

\(^{33}\) Educational books include R 204,984,000 in school book purchases and R429,000 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.

\(^{34}\) Id.

\(^{35}\) Id.
languages that over 95 per cent of the literature currently circulating in Africa are written in."36

This is most certainly not to say that there are no books written in South Africa’s black languages. The tradition of publishing in African languages dates back to missionary efforts of the 1800s, including both translations of foreign works and original works by local authors.37 South Africa has produced a number of noteworthy authors and works of literary significance in its black languages. But the overall number of works ever produced in these languages is very small, resulting in extremely limited selection. Moreover, many of these works are out of print or have very few copies in circulation. They are not effectively available to the tens of millions of potential readers in these languages.

The dearth of literature in South Africa’s black languages has been identified as holding back effective education for speakers of these languages. Bilingual education leveraging students’ mother-tongue competency is dramatically more effective than teaching students only in a language foreign to them.38 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.39 It is currently

36 Prah, supra note __, at 302.


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
impossible to pursue higher education in South Africa in languages other than English and Afrikaans, a tremendous disadvantage for students who do not speak either as their native language. A primary reason for the failure to develop higher education systems accessible to speakers of the black languages is the lack of linguistically appropriate teaching materials. Unsurprisingly, higher education achievement varies dramatically according to ethnic group.

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. The catalog was praised as “attractively produced” as well as for

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. at iv.


41 See id. at 1095-97.


offering helpful insight into the state of South African publishing.\textsuperscript{45} 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.\textsuperscript{46} 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.\textsuperscript{47} Indeed, it 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 helping non-English speakers acquire fluency in English. Yet this proposal is hopelessly unrealistic. The vast majority of South African children are not from English-speaking families, and a super-majority live in poverty.\textsuperscript{48} 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.\textsuperscript{49} More affluent 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 also pay a significant portion of their income in school fees... to send their students to poorly resourced, dysfunctional schools. This is not a context in which it is feasible to universalize literacy in a second language.\textsuperscript{50} The goal is as ambitious and improbable as suggesting

\begin{itemize}
  \item \textsuperscript{45} 	extsc{Edwards} \& \textsc{Ngwaru}, supra note \__, at iv.
  \item \textsuperscript{46} See \textsc{Edwards} \& \textsc{Ngwaru}, supra note \__, at 5 (noting that the catalog does not indicate year of publication or whether the work is still in print).
  \item \textsuperscript{47} See generally \textsc{Writing in Nine Tongues}, supra note \__.
  \item \textsuperscript{48} 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 USD) per capita. \textsc{Katherine Hall et al.}, \textit{South African Child Gauge} 81 (2012).
  \item \textsuperscript{50} \textsc{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
that America’s poorest school districts should teach all their students to read and write fluently in Mandarin.

Over several generations, South Africa might eventually achieve the goal of near-universal literacy and fluency in English, as have a few much wealthier countries, such as Sweden. Achieving that goal, however, will require reaching other milestones along the way: building a skilled workforce, enhancing incomes, 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 stepping stone.

B. The Cost Barrier

A common complaint among South African publishers is that South Africa lacks “a culture of reading.” The claim is typically asserted without pointing to any evidence, as if the conclusion were too obvious to require support. As soon as this claim is subjected to critical inquiry, however, a more complex picture quickly emerges. Empirical evidence demonstrates that in fact, South Africans of all classes and ethnicities value and enjoy reading, and would prefer to read more often. They are frustrated in realizing this desire, however, by the unaffordably high cost of books. This evidence is made clear from a survey of reading habits funded by the South African government, working in collaboration with groups representing publishers and booksellers: the National Survey into the Reading and Book Reading Behavior of Adult South Africans.

immerged 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 THE WORLD 103-06 (2011).

51 See, e.g., PRINT INDUSTRIES CLUSTER COUNCIL, PICC REPORT ON INTELLECTUAL PROPERTY RIGHTS IN THE PRINT INDUSTRIES SECTOR 94-95 (2004), 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 DEVELOPMENT COUNCIL, FACTORS INFLUENCING THE COST OF BOOKS IN SOUTH AFRICA 1 (2007) [hereinafter SABDC FACTORS] (“It is generally accepted that South Africa lacks a culture of reading.”). See also id. at x, 95 (identifying the creation of a reading culture in South Africa as an important but long-term goal).

52 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
The National Survey documented very high levels of basic literacy: 92% of South Africans are able to read in their native language.\textsuperscript{53} 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.\textsuperscript{54} Taken together, these data points cast doubt on the conventional narrative that a majority of South Africans are somehow culturally uninterested in reading. As one publisher more accurately admitted: “People often say Black people don’t read. A lot of rubbish! Of course they read, but for some reason they don’t buy books.”\textsuperscript{55} Given that 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 can read in, and the language in which books are being published.\textsuperscript{56}

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%).\textsuperscript{57} In contrast, few respondents cite limited time (15%) or disinterest (7%) as reasons for not reading more.\textsuperscript{58} Readers’ complaints about the high cost of books also match up with their answers to questions about what materials they read. South Africans

\textsuperscript{53} DAC National Survey, supra note __, 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 separate and unequal education. 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%). Id. at slide 27.

\textsuperscript{54} DAC National Survey, supra note __, at slide 15.

\textsuperscript{55} Edwards & Ngwara, supra note __, at 17.

\textsuperscript{56} See discussion supra notes __-__.

\textsuperscript{57} DAC National Survey, supra note __, at slide 67.

\textsuperscript{58} DAC National Survey, supra note __, at slide 67 (“You don’t have time to read books at home” (15%), “The library nearest to you does not have any new or interesting books,” (7%)).
overwhelmingly report that they primarily read newspapers (84%) and magazines (64%), which can be purchased much more cheaply. Dramatically fewer readers report that they usually read books, either fiction (28%) or nonfiction (22%). 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%). In short, the data indicate that South Africans value and enjoy reading every bit as much as do Americans. They simply experience much greater 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 USD $50. Yet poverty alone 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. Books are indeed expensive in South Africa, especially compared to lower prevailing incomes. The same book will typically sell for a much higher price in South Africa than in America. To take a current example, *The Hunger Games* trilogy can currently be purchased online in South Africa for roughly USD $40-50. The same set currently sells in the U.S. for $27. 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. Of course, the pricing disparity is even more extreme in light of the fact that South African incomes are substantially lower than those in the U.S. or U.K.

Across all social classes, the basic difficulty of accessing books dwarfs other reasons that people might give not reading more often. 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, making trade-offs with other discretionary items, 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, working, and under-classes have progressively fewer of these options available to them. A typical black South African family spends 25-50% of its household income on food. 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 textbooks for their children’s schooling. 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%).

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68 DAC NATIONAL SURVEY, supra note __, at slide 95. Time pressures were not cited in significant numbers as a reason for limited reading by any subgroup of survey respondents. 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.

69 Prabhala, supra note __.

70 Prabhala, supra note __.

71 DAC NATIONAL SURVEY, supra note __, at slide 95.
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. 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 market through retailers located in upscale malls, where prices are set as high as this elite market segment can bear. South Africa boasts a population of nearly 50 million people. Yet the market of individual book buyers is estimated at only 50,000.\textsuperscript{72} A book that sells 5,000 copies is considered a bestseller.\textsuperscript{73} Meanwhile, Zulu-language newspapers, which sell for just 25-cents a copy, are doing a thriving business.\textsuperscript{74} Nearly twice as many South Africans purchase a Zulu-language newspapers each day as will purchase a book in any language in an entire year.

South African publishers, however, seem remarkably resistant to admitting that high prices on books create a barrier 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.\textsuperscript{75} Perhaps not coincidentally, however, the survey was soon followed by another report on “Factors influencing the cost of books in South Africa.”\textsuperscript{76} 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 is overwhelmingly to offer a

\textsuperscript{72} EDWARDS \& NGWARU, supra note \textsuperscript{__}, at iv.

\textsuperscript{73} Edward Nawotka, 254:27 PUBLISHER’S WEEKLY 10 (July 9, 2007). As a point of contrast, Indianapolis author John Greene’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).

\textsuperscript{74} The Zulu-language newspaper Isolezwe sold for 2.80 South African Rand per copy in 2011 — approximately 25 cents in U.S. currency. Isolezwe was launched in 2002 and is the third-most popular in the country. Zulu Newspapers Thrive in SA, News24 (Apr. 4, 2011, 14:34), http://www.news24.com/SouthAfrica/News/Zulu-newspapers-thrive-in-SA-20110404. See also EDWARDS \& NGWARU, supra note \textsuperscript{__}, at 5 (“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.”). Edwards and Ngwaru conclude that the popular explanation that South Africa’s black populations lack a “culture of reading,” requires greater skepticism and recognition of the realities of wealth and book affordability. Id. at 16-19.

\textsuperscript{75} DAC NATIONAL SURVEY, supra note \textsuperscript{__}, at slides 135-36.

\textsuperscript{76} SABDC FACTORS, supra note \textsuperscript{__}. 
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. The report never suggests that publishers should or can bring down prices in order to target a larger readership.

C. General Lessons

In beginning with a case study, my aim was to move beyond theoretical predictions to depict the actual workings of a copyright industry within the context of historical and economic realities. 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 those are largely unaffordable. For the vast majority of South Africa’s population copyright protection is simply failing in its intended purpose.

While the particular politics of inequality will vary from country to country, I suggest that the basic dynamics of the price and language barriers may be observed in most developing countries. South Africa is hardly an extreme example of underdevelopment. It may fairly be characterized as the most industrialized, wealthiest, and best-educated country in African sub-Sahara. Even South Africa’s great linguistic diversity – a feature so striking to the American reader – is common to developing countries, whose borders were often drawn by colonial powers without regard to cultural geographies. (There are approximately 190 countries in the world, but more than 5,000 languages.) Hopefully one result of this article will be to inspire similar case studies exploring the problems of unequal access to

77 SABDC FACTORS, supra note __, at xii.

reading material in other contexts, both developing countries and wealthier ones. I chose South Africa for this article primarily because I was relatively familiar with it, having studied and worked there for nearly a year. It also offered the important advantage that I could draw on an ample body of secondary literature available in English.

The experiences of South Africa also shed important light on the workings of copyright law in more affluent ones. 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 United States, 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 simply present contexts where economic constraints and income inequalities are more extreme. The starkness of these dynamics in the developing world may help to highlight previously overlooked ways in which IP protection interacts with such constraints and inequalities. Having once recognized them in the extreme case, it becomes easier to notice that similar dynamics are also more subtly at work in other contexts. The next part of this article departs from the specific context of South Africa to examine the class and culture dynamics of publishing more broadly, offering a theoretical framework that can inform the study of copyright law in any national context.

II. Copyright and Inequality

This Part builds upon the insights gained through 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 in countries at all stages of economic development. Within countries both rich and poor, class and culture combine to explain who wins, and who loses, from copyright protection. 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 audience. 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. 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.

A. Copyright and Class

The conventional law-and-economics theory of copyright, as articulated by Landes and Posner, offers a utilitarian justification for protection against unauthorized reproduction as an effective incentive for the production of new works.\(^\text{79}\) Less frequently acknowledged, however, is a concerning corollary of this theory: copyright protection will also lower the number of copies produced and therefore increase the price of each copy.\(^\text{80}\) As articulated by Landes and Posner, the theory does not predict the magnitude of the resulting price increase and output reduction. 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 40-80% 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 now expired.\(^\text{81}\) Using


\(^{80}\) Landes & Posner, supra note __, 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.

\(^{81}\) 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
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 more than 100%.82 Both of these studies looked at the prices of paper copies of books. In the era of the eBook, the potential for price reductions through digital delivery surely goes even further.

Publishers typically pay authors a royalty of only 15% of the sale price in exchange for their copyright.83 So what explains these substantially more dramatic price impacts? The answer is that the price of books is not determined primarily by the cost of producing them, because the market for books is less competitive than for other goods. 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 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.

82 Xing Li, Megan MacGarvie & Petra Moser, Dead Poets’ Property: Does Copyright Increase the Price of Content? 3 (Nov. 15, 2013) (unpublished manuscript) (on file with author). Their 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 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. According to the authors:

Contemporary series, such as Walker’s British Classics, offered off-copyright titles by William Shakespeare and James Thompson for one or two shillings each [compared to an average price of more than 17 shillings for new editions]. Gall and Inglis’ Landscape Poets offered the work of Byron, Scott, Coleridge, and Wordsworth and other successful authors after it had come off copyright “at a price which will bring it within general reach.” Personal letters document that wealthy consumers would delay book purchases to wait for cheaper editions.

Id. at 26-27.

of this theory is that the market is perfectly competitive. In the context of copyright protection, however, this assumption simply does not hold. A book publisher is guaranteed not to have competition in the supply of a 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 prices as far as economically feasible. In the context of great inequality of wealth, it may be economically rational to target the 10% of the population that holds 90% of the wealth, while bypassing the rest of consumers.

A helpful analogy may be drawn to the context of pharmaceutical drugs. The brand-name drug industry, protected from competition by

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84 To be sure, significant pressure to compete on price exists in many book markets. Even where no identical book is available from a 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. Indeed, 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. 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 available through public libraries. All of these competitive pressures on price, however, are likely to be weaker in smaller book markets, particularly in developing countries and local languages. Bookstores catering to smaller markets, as in South Africa, simply will not stock five different vegetarian cookbooks. The second-hand market in developing countries will also be less robust than in book-wealthy countries. Developing countries also cannot afford to maintain public library systems on par with a country such as the United States, weakening that source of price competition as well. 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. For these reasons, I suspect that the impact of copyright protection on price may be an order of magnitude larger in many markets than was found in Heald’s U.S. research. To my knowledge, however, this research has not yet been conducted.

85 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 60 South African Rand (ZAR) – about $6 U.S. currency – per book. In a print-run of 10,000 copies, however, that figure drops to 10 ZAR – about $1 U.S. – per book. See SABDC FACTORS, supra note __, at 14. Thus it is possible to greatly bring down 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.
patents, leverages its monopoly position to charge high prices. In contrast, players within the generic drug industry must compete to find the cheapest ways of producing and delivering the same drug. 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 had offered to sell the same drug to Thailand’s government for USD $2.00 per tablet.

The existence of a vibrant generic drug industry has been fundamental to expanding access to essential medicines. But in the area of cultural production, there is not vibrant generic book industry, because the law does not leave room for it. The generic medicines industry emerged in certain developing countries that had strategically denied patent protection to medicines, up until the 1990s. This created a situation where the drug industries in the U.S. and Europe could develop along a patent-dependent, high-price business model, while the drug industries in India and Brazil developed along a competitive, low-cost business model. Today both industries serve global markets, with complementary strengths. But in contrast to patent law, copyright protection was internationally harmonized much earlier. Copyright terms of at least 50 years (generally longer) are internationally standard, and have been for a very long time. Thus international copyright law limits the “generic” publishing industry to marketing books at least a half-century old. Only a very few of these 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. On the whole, copyright law restricts the publishing industry to the “brand-name”

86 In many countries regulators have stepped in to limit the prices that brand-name makers can charge in the interests of public health, recognizing that the market itself cannot impose this pressure.

87 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.

model of production, resulting in high-priced works largely unaffordable to all but the wealthy.\textsuperscript{89} Copyright law profoundly limits competition in book publication and distribution; as a result, there is very limited incentive to find cheaper and more efficient ways of doing business, and reduce the price to consumers.

To the extent that copyright makes reading a privilege of those who can afford to pay, it limits opportunities for education, personal development, and self-advancement. Borrowing the framework and terminology of legal and political theorist Joseph Fishkin, I suggest that we need to be attentive to the ways in which copyright’s impact on book affordability creates a “bottleneck” to other life opportunities.\textsuperscript{90} 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 topics continue to enjoy advantages denied to individuals of more meager resources.\textsuperscript{91} Making it difficult for the poor and middle classes to read thus has far-reaching consequences.

\textsuperscript{89} This presents a difference from the dilemmas of affordability and access found in the settings of health care and education, two instances of public goods that are inherently costly, because they require such intensive inputs of highly skilled labor. In contrast, books are not inevitably expensive. Copyright protection makes them so. As James Love of the advocacy group Knowledge Ecology International has noted, “Knowledge goods are . . . fundamentally different from physical goods and services. They can be copied. They can be shared. They do not have to be scarce. The rich and the poor can be more equal in knowledge goods than in many other areas.” James Love, KEI Remarks on Accepting the MacArthur Award for Creative and Effective Institutions, KNOWLEDGE ECOSYSTEM INTERNATIONAL (Oct. 5, 2006), http://www.keionline.org/node/432, archived at http://perma.cc/STR2-LQPB.

\textsuperscript{90} Joseph Fishkin, The How of Unequal Opportunity, Vol. PHIL. TOPICS (forthcoming Month, Year), http://ssrn.com/abstract=2252445 [hereinafter Fishkin, Unequal Opportunity]. 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.” Id. at 1. He posits that law and policy can more effectively respond to promote equal opportunity when we focus on particular decision moments and developmental processes that produce unequal opportunity. \textit{Id.} at __. \textit{See also} Joseph Fishkin, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (forthcoming 2014) [hereinafter Fishkin, Bottlenecks]. [NOTE TO EDITORS: To be replaced with pin citations to the relevant pages of the book once it is available.]

\textsuperscript{91} Copyright law may not rank highly among the most significant bottlenecks structuring unequal opportunity today. But bottleneck theory provides yet another perspective on how this branch of law and policy can advance or delay social justice. Focusing on any specific bottleneck carries the risk of seeming to focus on a topic of minor importance to the overall cause of social equality. Yet as Fishkin argues, the greatest potential for effective legal and policy reforms lies precisely in understanding and attacking specific sites and mechanisms of unequal opportunity. Fishkin also invites us to think about being born into a family that does
In sum, copyright’s restrictions on reproduction create an artificial scarcity, resulting in higher prices. In the context of income inequality, these higher prices have a much greater impact on some consumers than on other. 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. The truly poor are priced out altogether; worldwide, a billion people currently live on incomes of less than $1.25 per day, or less than $500 per year. 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.

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. Each of us belongs to a particular language community. Largely by accident of birth, we are English speakers, or Thai speakers, or Zulu speakers. These linguistic differences have little importance when it comes to some artistic genres, such as visual art or instrumental music, which are not linguistically encoded. But language has profound importance for text-based material, which can only be enjoyed by members of the language community for whom it was written or translated.

Unfortunately, not all cultures are equally well served by a market-oriented approach to cultural production. Copyright’s rules establish a formal equality among linguistic groups: protection is equally


93 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.
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 market. Systematically, we should expect profit-seeking actors to publish mostly 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.

Meanwhile copyright law creates a barrier to the flow of works from dominant languages to disadvantaged ones. 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, even if the copyright holder were willing to waive the customary licensing fee. In some language markets, these transaction 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, often English. But in language communities where there are simply very few consumers who can afford to purchase books at the prevailing high prices, the economics are not as favorable for producing translations. 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 most-spoken Native American language of 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).

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

94 Supra note ___ and accompanying text.

95 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.” DAC NATIONAL SURVEY, supra note ___, 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
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.”

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. The market for books in English and French is profoundly different from the market for books in other languages. 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.

An analogy may also be drawn between the problem of translation for speakers of non-dominant languages and the problem of adaptation into accessible formats for disabled readers. In fact, we could think of braille as a “language” into which a work is being translated. In both instances, a published work must be converted into the specific format that can be understood by the reader. Scholars and activists have increasingly 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. Readers with these forms of print disability require materials to be adapted for their use. For example, books might need to be converted into braille, limited success to identify ways in which the copyright environment might disadvantage women. See Chris Armstrong, Jeremy de Beer, Dick Kwooya, 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 & Kwooya, supra note __, 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).


printed in a large-print edition, recorded into an audio format, or read aloud by specialized software. Yet only 7% of book titles in wealthier countries, and less than 1% in poorer countries, are available in formats accessible to the blind. Unfortunately, copyright law often poses barriers to the creation of these special formats, treating them as an adaptation or reproduction that requires explicit permission from the copyright holder. Such permission may be burdensome to negotiate, even if the copyright holder is willing to grant it without significant expense. 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, copyright law can be reformed in ways that facilitate access for print-disabled readers. In 1996, the United States enacted a limitation to copyright protection, which permits authorized nonprofits to make and distribute books in specialized formats exclusively for disabled persons, without obtaining a license from the copyright holder. Operating under this provision,


There is a book famine that impacts the world's 285 million blind or visually disabled people. Approximately 90% of the world's visually disabled populations live in developing countries. And for these people, only 1% of published works are available in accessible formats.

Similarly, the other 10% of visually disabled persons living in more modern countries can only access 5% of books. While non-profit organizations in the United States, Europe, and other countries around the world are creating databases of accessible reading materials, these materials cannot be shared with other countries without a treaty or international agreement.

Id. at 29.


While this exception does provide persons with disabilities some rights, it applies only to reproduction and distribution rights. Therefore, the exception does not allow a covered entity to prepare a derivative work, such as an audio book recording. Nevertheless, the “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

This experience suggests that when copyright barriers are lowered, not-for-profit solutions may emerge to serve neglected audiences. This provides some reason for optimism that similar solutions may also work for underserved languages. Yet there are also reasons for caution in presuming that what has worked for print-disabled readers will work for neglected languages. “Translating” a work into braille is an automatic process that can be done entirely by a computer. Translating a work into another language requires a great deal more time and skill, and therefore should be more expensive. 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. Even with this special treatment in copyright law, moreover, the vast majority of works are still not available to print-disabled readers.\footnote{Supra note 98 and discussion.} As a result, there was great celebration in the blind community when Amazon first introduced an eBook reader that could read aloud any eBook purchased from its store. This was followed by dismay and outrage when Amazon disabled the feature after receiving complaints from publishers that such technology constituted an illegal adaptation of the copyrighted work.\footnote{Greg Sandoval, Advocates for Blind Protest Loss of Kindle’s Voice Function, CNET NEWS (Apr. 7, 2009, 3:47 PM), http://news.cnet.com/8301-1023_3-10214427-93.html, archived at http://perma.cc/LYP5-FNKX; The Kindle TTS Issue, READING RIGHTS COALITION, http://www.readingrights.org/kindle-tts-issue, archived at http://perma.cc/HCJ7-DW7X (last visited Feb. 5, 2014); Press Release, National Federation for the Blind, National Federation of the Blind Responds to Authors Guild Statement on the Amazon Kindle 2 (Feb. 12, 2009), available at https://nfb.org/node/1184, archived at http://perma.cc/CLZ4-2XRT.}

administrative complexities. While this exception has provided a remedy, there is a caveat -- only authorized entities have been provided this remedy.

At present, many other countries do not have any provision in copyright law designed to promote access for print-disabled readers. The cause recently received a boost with the adoption of a new international agreement at the World Intellectual Property Organization. The Marrakesh Agreement encourages countries to enact limitations on copyright protection to facilitate the production of adaptive formats for disabled readers.\textsuperscript{103} It is too early to judge how successful this effort will be at expanding access to works for the print disabled. The treaty includes many restrictions on the distribution of these materials, which may prove to make it difficult in practice to do what is in theory permitted. Moreover, the treaty will in practice primarily benefit disabled readers who happen to be fluent in the dominant languages of international publishing, since it contains no parallel provision to encourage the translation of works into other languages.

III. COPYRIGHT AND SOCIAL JUSTICE

Copyright’s system of exclusive rights makes it more difficult for people to access and engage with those works, erecting artificial barriers to learning, self-advancement, and participation in cultural life. These barriers are easily overcome by the relatively privileged, but are often insurmountable for those with fewer advantages in life. In the United States, we can see this exclusionary dynamic operating at the level of social class. In many other countries, relative wealth or poverty remains a very powerful factor, but 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 a greater awareness of social inequality might reshape scholarship, copyright law, and innovation policy.

\textsuperscript{103} World Intellectual Property Organization, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013.
A. More Books for Whom?

The dominant theoretical approach to copyright law understands the project of copyright scholarship and jurisprudence as determining the economically “optimal” degree of protection, as if a single approach would be optimal for all.\(^{104}\) 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.”\(^{105}\) “More books for whom?” is a question that the prevailing theoretical frameworks of copyright scholarship never ask.

Perhaps this collective blind spot is a product of who we are and where we come from. As a group, copyright scholars tend to be fluent in global languages – such as English and French – in which copyright’s incentive structure has proven particularly effective at enhancing the diversity of works available for purchase. We are relatively wealthy, and can choose to allocate our substantial disposable income among books and other luxury goods. Located in major research universities, we also enjoy supremely convenient access to the best-funded libraries in the world. As a group, we do not fail to complain when we notice that copyright law impedes our own ability to access, create, and distribute cultural works.\(^{106}\) Fortunately, our legal expertise and professional experience positions us well to

\(^{104}\) See generally Landes & Posner, supra note __. \But see\ Molly 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).

\(^{105}\) See, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012) [hereinafter SUNDER, GOOD LIFE], Madhavi Sunder, *IP*, 59 Stan. L. Rev. 257 (2006) [hereinafter Sunder, *IP*]. Sunder’s work queries whether IP law enhances opportunities for all people to participate in cultural production and innovation, and whether it effectively enables disadvantaged creators to obtain both recognition and remuneration for their creativity.

both recognize the legal roots of our problems, and to suggest solutions to our legislatures and courts.\textsuperscript{107}

Overall, copyright law works quite well for copyright scholars at leading universities. Its protections give us control over our own writings, which we can choose to invoke or to waive, as we believe best suits our own interests.\textsuperscript{108} Its incentives help to stimulate the production of an ever-greater variety of informative and entertaining works for our professional and personal development. Its limitations on access and use of copyrighted works only rarely pose significant problems for us. From this perspective, it is easy to miss the more profound problems posed for the 99% of the world that does not enjoy the same privileged position of access.

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.\textsuperscript{109} Rhetorically, both the narrative of

\textsuperscript{107} See, e.g., Brief of Amicus Curiae Academic Authors and Legal Scholars in Support of Defendants-Appellees and Affirmance, Cambridge Univ. Press v. Becker, Nos. 12-14676-FF & 12-15147-FF (8th Cir. Apr. 25, 2013), available at http://ssrn.com/abstract=2259697 (arguing that academic publishers’ allegations that professors’ copying of course materials constitutes infringement should be dismissed under a broad reading of fair use as excusing essentially any reproduction for the purposes of classroom discussion and academic criticism or commentary); Brief Amici Curiae of 133 Academic Authors in Support of Defendants-Appellees and Affirmance, Authors Guild, Inc. v. Hathitrust, No. 12-4547-cv (2d Cir. June 4, 2013), available at http://ssrn.com/abstract=2274402 (arguing that the digital library should be permitted to continue offering online access to 7.3 million works of uncertain copyright ownership).

\textsuperscript{108} Increasingly, American legal scholars are opting for Creative Commons licenses and online distribution of their scholarly articles at free-to-download websites such as bepress and SSRN. This makes a scholars’ work more widely available to readers and allows them to reap the professional benefits of increased readership, reputation, and diffusion of their ideas. See James M. Donovan & Carol A. Watson, Citation Advantage of Open Access Legal Scholarship, 103 L. Libr. J. 553 (2011) (noting that Open Access articles account for half of current law faculty output in the U.S. and are cited 58% more frequently than other articles of the same age from the same journal). American legal scholars have been much slower to openly license their casebooks, where distribution is still mediated by for-profit publishers who charge law students as much as $200 per copy. See Matt Bodie, The $200 Casebook, Prawfsblawg, http://prawfsblawg.blogs.com/prawfsblawg/2013/04/the-200-casebook.html, archived at http://perma.cc/5SQN-KMXB (posts and comments).

\textsuperscript{109} 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 better understood not as foundational truths, but as ideologically appealing arguments developed to justify copyright protection. See,
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.

Take a moment now to look more closely at this implied audience at the periphery of our gaze. What do you imagine them to be like? The startling feature of this imagined audience, I suggest, is how greatly and consistently its members resemble ourselves. Perhaps because the imagined audience member is, in fact, ourself. And what do we look like? We are relatively affluent, or at least a member of an affluent community, such that they can afford to be relatively insensitive to price. 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. From this privileged perspective, 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. Perhaps some of these offerings are being produced in languages we do not speak. No matter, more than enough choices remain. In our affluence of resources and opportunities, we might even choose to acquire fluency in a second language to further expand our choices. Copyright protection promises to raise the quality, the diversity, at the very least the sheer number of offerings placed upon the table. How could this be a bad thing? But can your peripheral vision stretch farther 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

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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.

The author- and publisher-focused narratives of copyright also tend to focus our attention on opportunities for earning income from creativity as a professional author. Yet very few people can hope to occupy this role. Even among those of us who do earn our livings as professional writers, most of us earn that living from a combination of teaching, honoraria, and other expertise- and reputation-based mechanisms. Royalties received from the sale of copyrighted works are typically modest except for truly blockbuster authors. Everyone has an interest, however, in engaging in culture as amateur creators and participants... 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 more broadly. We should ensure that the often-elusive promise of livelihood opportunities from copyright protection does not obscure attention to the broader underlying problem of barriers to access, mass participation, and a truly democratic culture.

To do this, however, we must reframe the scholarly

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110 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.

111 Balkin, supra note __, 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 Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L. J. 283 (1996) (arguing that copyright law should be evaluated in terms of its success at promoting the
discussion of copyright law to prioritize expanding access as a policy goal alongside promoting creativity.

Almost two decades ago, Ruth Gana Okediji first invoked a “development perspective” to suggest that the specific modes of IP protection practiced today are likely inappropriate for promoting innovation and economic development in African and other developing nations. More recently, a growing number of scholars have used the philosophical framework of “human development” to frame normative critiques of international intellectual property law. 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 production of cultural and informational works in a democratic sphere relatively independent of government subsidy and elite patronage).

112 Ruth L. Gana [Okediji], *The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL’Y 316, 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, Okediji 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 __, at 4 (citing for the origination of the “calibration” term: Daniel Gervais, *TRIPS and Development, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO MAXIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* (Daniel Gervais ed., 2007)).

113 See, e.g., Sunder, *GOOD LIFE*, supra note __; Chon, *Intellectual Property “From Below”*, supra note __ (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 __; Julie 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 values 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.
welfare. 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 problems of distributive justice within every country, including wealthy ones such as the United States. Inequalities of income among consumers within those countries powerfully impact the market for copyrighted works. Nor is financial inequality the only form that matters for access to cultural works. Differences in culture, language, and disability are also essential to reckon with, if copyright is to work for all.

B. Rethinking Copyright Law

For decades, developing countries have been urged that the solution to the book famine is to provide greater support to their publishing industries through stronger copyright protection. That advice is simply wrong. It is certainly reasonable to hope that copyright protection would increase the total number of works created—at least for types of works that are appealing to readers with significant disposable income. Decades of experience suggest, however, that copyright protection will fail to stimulate greater production of affordable works and works in neglected languages. Ending book hunger depends instead upon encouraging the production and distribution of books in higher volume at more affordable prices, in a wider variety of languages. There is no reason to believe that stronger copyright protection will advance this goal. Effective solutions are far more likely to come in the form of carving out legal exceptions to copyright protection.

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. 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 tax dollars, providing them free of charge to primary and secondary students. In the United States, more than a billion dollars of tax revenue is spent each year to purchase books for community libraries. These public

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

115 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.
funding mechanisms work in tandem with the for-profit publishing market to address 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.\textsuperscript{117}

Greater recognition of social inequality calls for an even greater emphasis on legal and policy interventions to address such market failures. Copyright protection is conventionally conceived as a solution to a market failure: the tendency of markets to underinvest in the provision of public goods. Less well recognized, however, is the fact that copyright protection introduces new market failures of its own: inadequate availability of works in neglected languages, and works that are technically available but prohibitively expensive. Billions of people are currently unable to meet their book needs through market mechanisms. Even in a book-wealthy country like the United States, it is a wealthy person indeed that can support their “book habit” entirely through private purchases of new books. Most of us rely to greater or lesser extent on alternative strategies such as second-hand purchases, library borrowing, and taking full advantage of free online content. People with lower incomes find themselves even less well equipped to meet their book needs through private purchases. Unfortunately, they are also less likely to have access a thriving marketplace for used books, good public libraries, and the Internet. 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 basic fact is true of reading material as well.

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, however, are an expensive access strategy. America’s local libraries spend more than USD \$10 billion per year.\textsuperscript{118} On average, about 10\% goes to purchases of books and other media; the bulk of cost is


\textsuperscript{117} See Susan B. Neuman, 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).

\textsuperscript{118} PUBLIC LIBRARIES SURVEY, supra note __, at 2.
overhead in the form of facilities and staff.\footnote{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 difficulty in visiting 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. \textit{See Sei-Ching Joanna Sin, Neighborhood Disparities in Access to Information Resources: Measuring and Mapping U.S. Public Libraries’ Funding and Service Landscapes}, 33 \textsc{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, \textit{Public Library Facility Closure: An Investigation of Reasons for Closure and Effects on Geographic Market Areas}, 31 \textsc{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).} Even this significant investment has a limited ability to solve the problem of book hunger in America.\footnote{See \textit{Understanding OER}, OER Africa, \url{http://www.oerafrica.org/understanding-oer}, archived at \url{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.} The public library strategy, however, is likely not cost-efficient enough to meet the vastly greater needs of countries with fewer public resources. Countries such as South Africa may need to adopt more radical solutions, such as legalizing educational photocopying, liberalizing the rules related to unauthorized translations, or allocating public textbook funds to the production of Open Educational Resources.\footnote{PUBLIC LIBRARIES SURVEY, supra note \_, at 9. In absolute terms, however, this is a substantial source of book purchasing, totaling $1.26 billion in a recent year. \textit{Id}.}

Rethinking copyright law with an awareness of inequality requires being attentive to the impact that choices within copyright law 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 restrict the resale or rental of books, artwork, movies, and many other types of works.\(^{122}\) 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.\(^{123}\) Less frequently acknowledged is its critical impact on price and affordability: thriving markets in used and rental works bring down the cost to consumers of accessing such works.\(^{124}\) 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 price new works lower. Digital works such as music downloads and eBooks are often exempted from first sale doctrines, and distributors may prohibit their resale. This has problematic implications for affordable access as the market increasingly transitions to digital delivery. A greater recognition of inequality in copyright policy suggests that extending the first sale doctrine to eBooks would improve affordability and access.

Empirical research suggests that copyright term extensions result in much higher prices.\(^{125}\) 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.\(^{126}\) For political reasons, however, a reduction in the term of copyright protection is not a realistic

\(^{122}\) 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.


\(^{125}\) See discussion supra notes __ – __.

possibility. But other aspects of copyright law might be adjusted to promote broader affordability. For example, American copyright law provides a statutory licensing scheme for musical compositions and recordings. 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, making it much easier for translators and publishers to obtain rights to sell translated works and serve neglected audiences.

Fair use doctrines—known in other 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 concept of “transformative” use, which is generally interpreted to require altering the underlying work in a way that adds new meaning and message. (This is somewhat in tension with one of the specific examples of fair use cited in the statute: distribution of multiple copies of a work for classroom use.) 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 work, such doctrines might be developed to accord greater freedom for translations into neglected languages. Translation is not currently recognized as a type of transformative use, but arguably it should be. The 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.

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127 National legislatures have limited freedom to set the length of copyright protection. International treaties require all 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. Since the Berne Convention was first introduced, the required term of protection has steadily lengthened, and never shortened.


129 Salah Basalamah, a professor of translation and interpretation studies at the University of Ottawa, argues persuasively that 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, in IN TRANSLATION: REFLECTIONS, REFRACTIONS, TRANSFORMATIONS 117, 117-32 (Paul St-Pierre & Prafulla C. Kar eds., 2007).
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.

An awareness of the impact of copyright protection on the affordability of protected works and distributive justice concerns also counsels caution regarding current proposals to extend intellectual property protection to fashion design. Scholars have disagreed as to whether the hoped-for benefit of more innovative fashion design is likely to materialize.\textsuperscript{130} Missing from the discussion, however, has been attention to the distributive justice implications of expanding IP rights to fashion. An inflationary effect on the cost of clothing should be expected. This will further strain the household budgets of the poor. Meanwhile the benefits of more innovative clothing design, assuming they arrive at all, would be reaped primarily by more affluent consumers, who can afford to pay more for the latest fashions.

\section*{C. Thinking Outside the Box}

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: textbooks, religious titles, and newspapers. All three of these genres reflect the relative efficiency of production models based on alternative incentive systems. The authorship and printing of textbooks is stimulated by government procurement. Religious publications are motivated primarily by evangelism rather than profit. Newspaper publishing's business model relies on high-volume sales of time-sensitive content.

and advertising revenue, rather than protection from copyists. Other nonprofit efforts are also at work to subsidize the production of books in South Africa’s local languages. These not-for-profit or low-cost-copy models have succeeded where copyright law has failed in producing literature in local languages.

A realistic awareness of market failures should also encourage governments to 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. She points out that IP is clearly not the only way to incentivize innovation; neither is there an empirical consensus that they are more efficient than prizes, government procurement or commons-based production. A sizeable body of literature now exists exploring these alternative incentive schemes.

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131 The nonprofit group Room to Read, for example, estimates that 80% of South African schools lack a library. For a donation of USD $20,000 supporters can subsidize the creation of a library. A donation of USD $15,000 subsidizes the creation of an original children’s book in an African language. See Make Your Mark: Sponsor a Project!, 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, available at http://www.roomtoread.org/document.doc?id=551, archived at http://perma.cc/87XP-CVUM.

132 Kapczynski, supra note __ (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).

133 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 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 but the marketplace could also provide cheap copies to private purchasers.

do not rely on the price mechanism to recover the creators’ investment, they hold greater promise for addressing distributive justice concerns.135

Complementing Kapczynski’s work to highlight innovation policy alternatives is the important recognition that incentives for creativity and the distribution of creative works already exist, even without specific governmental action to augment them. 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.136 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.137 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.

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.138 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.139 Advertising is a widespread strategy used to generate

135 Kapczynski, supra note __.

136 Tushnet, supra note __.

137 Johnson, supra note __.

138 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’ Revenues 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.

139 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 15, 22 (Lea Shaver
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 even because of... the lack of intellectual property protection. From fashion to food, the lure of profits and the competitive pressure to improve offerings stimulate significant creativity; no government incentives required.

In many developing countries, copyright enforcement is 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 a week, selling disks by the tens of thousands through street vendors and small shops at very low prices. Brazil’s tecnobrega music scene also relies on low-cost sales through street vendors; this method of distribution operates as free advertising for artists that then earn income from performances and sale of merchandise. In Egypt, illegal street sales and downloads are of great concern to record labels... but not to Egyptian musicians, who earn their living through live performances, including a substantial business in private parties.

In all of these examples, widespread piracy of foreign works fed the rise of a distributional infrastructure based on low-cost, high-volume sales at prices broadly affordable to local audiences. Local content producers subsequently emerged to take advantage of the new

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economic opportunities presented by that infrastructure. The end result has been more, not less, creativity. Brazilian scholars Mizukami and Lemos theorize this phenomenon of for-profit but non-exclusive creativity as “open business,” a reference to open source software.\textsuperscript{144} Compared to copyright-centric business models such as traditional publishing, open business models are likely to do a better job of producing higher volume at lower cost and effectively serving low-income consumers, while also enhancing livelihood opportunities for artists and distributors. Although it seems counterintuitive, reducing copyright protection may actually increase the economic incentives to create and distribute new works though open business models, while lowering the cost of those works.

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 in ways that take account of structural injustices and oppression. 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.\textsuperscript{145} Keith Aoki has suggested that this basic but often overlooked insight about property is even more obscured in the intellectual property context.\textsuperscript{146} By recognizing and exploring the adaptability of (intellectual) property regimes, we may open the door to more “syncretic” ways of designing IP regimes to suit different cultures, geographic, and development contexts.\textsuperscript{147}


\textsuperscript{146} Aoki, *supra* note __, at 721.

\textsuperscript{147} Aoki, *supra* note __, 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 very] 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.
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 a disadvantaged community’s ability 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 protect and advance the interests of individual creators within disadvantaged communities in realizing the livelihood opportunities from their creations and protect the works from unfair commercial exploitation by others. The twin goals of advancing the interests of disadvantaged communities as both creators and users of culture can pull in somewhat counter 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.148

Like Aoki, I suspect that the best solutions may instead lie in something like a “limited commons” or “common property regime” of the sort described by Elinor Ostrom and Carol Rose – protecting free access and adaptation by members of the contributing community, while setting conditions for outsiders to exploit its commercial value.149 For example, nations might revise their copyright law to treat works in neglected languages differently from works in dominant languages. Permitting unauthorized copying and reproduction of Zulu works would drive down prices of individual copies to levels where most Zulu speakers could actually afford to purchase them. At the same time, the existing market for English works would not be impacted. South Africa’s copyright law might also specify that a license is still required to adapt a Zulu-language book into a movie or

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148 Aoki, supra note __, at 721.

149 Aoki, supra note __, at 768; Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (1990); Carol 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). 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, IP³, supra note __, at 326-30.
to translate it into English; this would preserve potentially lucrative licensing opportunities for Zulu-language authors. Alternatively, a statutory licensing scheme might be established to regulate the reproduction and distribution of works in neglected languages. This would overcome transaction costs and allow for greater competition in production and distribution, tending to increase the supply of copies at 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 need not be all-or-nothing. It can take different forms to serve different aims, in recognition of the different characteristics of different markets.

CONCLUSION

In a perfect world, all people would enjoy extensive opportunities to enjoy 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 reading material that suits their needs. 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: “writers do not come out of houses without books.”

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 is to cultural goods more expensive, limiting access by poor and middle-income consumers. Linguistic inequalities produce a compounding dimension of privilege and disadvantage, because the publishing market tends to almost entirely

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neglect less profitable languages. Once this disparate impact 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 a political impossibility, the class insight suggests that further extensions should be opposed on the grounds of distributive justice. Similarly, cost concerns recommend great caution in expanding copyright or copyright-like protection to fashion design, which would likely burden low- and middle-income consumers with higher clothing prices. Another avenue for adjusting copyright law to respond to the inequality insight is the design of exceptions and limitations to copyright. Book hunger may be substantially alleviated by permitting personal photocopying and unlicensed translations into neglected languages. More radically, “fair use” might be interpreted to permit nonprofit distribution of books to low-income readers. The culture insight also points to the possibility of creating exceptions and limitations that apply only to neglected languages. This 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 protection is 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 population: books that are cheap, in local languages, and culturally relevant to marginalized groups. Nor should we expect solutions to book hunger from market mechanisms alone, any more than in meeting the educational, health care, or housing needs of poor populations. Government subsidies, public investment, and nonprofit efforts are likely to be crucial to serving low-income consumers, 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. The first generation of law-and-economics research focused on how to adjust copyright law to maximize revenue to copyright holders in the interest of incentives. The second generation of law-and-economics research should pay attention to financial incentives and business models that do not rely on exclusive control over copies and identifying market failures that call for government and non-profit intervention.

An often-quoted statement by John Maynard Keynes posits that “The political problem of mankind is to combine three things: economic efficiency, social justice, and individual liberty.” The perspectives of economic efficiency and individual liberty have
profoundly informed our discussion of copyright law. Yet the perspective of social justice has been comparatively absent. Reckoning with the ways in which social inequality impacts the market for copyrighted work begins to supply this missing perspective. In the end, the inequality insight also leads us back to economic efficiency and individual liberty. For 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.