BRIEF THOUGHTS ABOUT IF VALUE/THEN RIGHT

ALFRED C. YEN*

CONTENTS

* Professor of Law and Dean's Distinguished Scholar, Boston College Law School. The author would like to thank Celine DeSantis and Iris Ryou for their research assistance.

INTRODUCTION

I am honored to have the opportunity to celebrate Professor Wendy Gordon's scholarship. Her work is synonymous with rigor and excellence, and our understanding of copyright is better because of it.

In this brief Essay, I will discuss something of interest to Professor Gordon and others, namely the "if value/then right" principle and its consequences for intellectual property, particularly copyright law. That principle, which the U.S. Copyright Act does not embrace,[1] expresses the intuition that "*wherever value is received, a legal duty to pay arises, regardless of whether imposing that legal duty serves public welfare*."[2]

The if value/then right principle concerns Professor Gordon because she believes that it expresses socially unproductive hostility to free riding.[3] If a legal obligation to pay arises whenever someone receives a benefit from another, copyright rights (and indeed all IP rights) would be quite broad, extending to all cases of free riding.[4] Professor Gordon believes, however, that copyright law should allow copying that, in principle, supports the creation of new works without unduly damaging copyright incentives because doing so gives society the benefit of new works based on harmless copying without causing the loss of other works. Of course, copyright does not completely follow this prescription. Professor Gordon sees various aspects of copyright that appear motivated not by concern for overall social welfare but by general hostility to free riding. She

[1] *See infra* notes 26-28 and accompanying text (giving examples of copyright doctrines that permit borrowing, such as the idea/expression dichotomy, substantial similarity, and fair use).

[2] Draft from Wendy J. Gordon, Professor of Law, Bos. Univ. Sch. of Law, to Members of "A Celebration of the Work of Wendy Gordon" Symposium 2 (June 14, 2019) (on file with the Boston University Law Review) (quoting from an excerpt Professor Gordon emailed to symposium participants prior to publication). Other discussions of if value/then right include Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation,* 65 NOTRE DAME L. REV. 397, 405-06 (1990) (questioning idea that relationship between value and ownership justifies granting trademark rights); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 178-80, 244 (1992) [hereinafter Gordon, *On Owning Information*] (examining impact of pro-plaintiff rule in providing incentive and fostering creativity); Peter Lee & Madhavi Sunder, *Design Patents: Law Without Design*, 17 STAN. TECH. L. REV. 277, 285-88 (2013) (suggesting that current protection of design patents is expansive); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1065-69 (2005) (disapproving of the goal of eliminating free riding).

[3] E-mail from Wendy Gordon, Professor of Law, Bos. Univ. Sch. of Law, to Alfred C. Yen, Professor of Law, Bos. Coll. Law Sch. (Nov. 17, 2019) (on file with author).

[4] *See* Gordon, *On Owning Information*, *supra* note 2, at 167 ("[W]hen taken literally, as a standalone prohibition on free riding, the restitutionary claim is drastically overbroad. A culture could not exist if all free riding were prohibited within it.").

then wonders why the law is so hostile to free riding and investigates the appeal of "if value/then right" as a possible explanation.[5]

Professor Gordon has good reason to worry about the consequences of embracing if value/then right. Courts do not directly cite the principle, but they follow it in problematically expansive copyright decisions that consider copying sufficient to establish infringement. For example, in *Bridgeport Music, Inc. v. Dimension Films*,[6] the Sixth Circuit held that all instances of digital sampling, no matter how small, constitute copyright infringement.[7] This decision was remarkable because it overlooked the well-established rule that de minimis borrowings do not constitute infringement.[8] Moreover, the belief that any uncompensated taking establishes a fundamental wrong clearly influenced the court's decision to overlook the de minimis principle.[9] It is beyond the scope of this Essay to discuss why cases like *Bridgeport Music* are problematically broad. For now, it will suffice to note that *Bridgeport Music* expanded the scope of copyright infringement in ways that other courts have not.[10]

I would like to respond to this concern about if value/then right by making two observations that shed light on the principle's appeal and its consequences for copyright law. First, I will offer the law and economics "ultimatum game" as a partial explanation for the influence of if value/then right.[11] Experimenters designed this game to test the division of a windfall by two people. The experimenter offers a windfall of money (say $100) to Person *A*. The only condition to receipt of the windfall is that Person *A* must offer to share it with Person *B*. Person *A* can choose to share any portion of the windfall with Person *B*, but there is a catch. Person *A* can make only one offer for sharing with Person

[5] Email from Wendy J. Gordon, Professor of Law, Bos. Univ. Sch. of Law, to Members of "A Celebration of the Work of Wendy Gordon" Symposium (July 21, 2019) (on file with author); *see also* Gordon, *On Owning Information*, *supra* note 2, at 238-44.

[6] 410 F.3d 792 (6th Cir. 2005).

[7] *Id.* at 801 ("[A] sound recording owner has the exclusive right to 'sample' his own recording."). Later, the court wrote "Get a license or do not sample." *Id.*

[8] *See id.* at 797-98 (referring to district court's use of de minimis principle, but then reversing).

[9] *See id.* at 801 (quoting with approval biblical admonition "Thou shalt not steal") (citing Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting same admonition at beginning of opinion holding defendant liable for sampling)).

[10] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880-81 (9th Cir. 2016) (rejecting *Bridgeport Music*'s elimination of de minimis principle); Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004) (applying de minimis principle to find that three-note sample was not infringement).

[11] *See* Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 370-72 (1982) (introducing and describing "ultimatum game" concept).

B, and if Person *B* rejects the offer, then both forego the windfall.[12] The ultimatum game has gained fame in part because its results illustrate that something beyond economic self-interest governs human behavior.[13] Person *A*'s offer to share with Person *B*, no matter how small, represents a windfall to Person *B* as well. Even if Person *A* offers only $1 out of $100, acceptance makes Person *B* financially better off than rejection. One might therefore expect that those in Person *B*'s position typically accept Person *A*'s offer—even if it is small. However, this is not what happens. Instead, those receiving the offer typically reject it unless the offer approaches twenty percent of the original windfall.[14] Pondering the possible reasons for why Person *B* typically rejects low offers of sharing provides insight into why society might accept the if value/then right principle. In particular, people apparently accept the notion that it is better for all to go without the benefits of a windfall unless there is appropriate reciprocity among all those responsible for creating the windfall.[15]

Second, the persistence of if value/then right does not necessarily mean that the principle leads to broader intellectual property rights. Although if value/then right may justify claims from an upstream creator against any downstream beneficiary, the same principle also generates claims against our hypothetical creator from others upstream from her. Thus, taking if value/then right seriously means that intellectual property law should account for both of these possibilities. Such accounting can limit the scope of intellectual property rights.

I. THE ULTIMATUM GAME

One reason to be puzzled about if value/then right is its rejection of some "Pareto-superior" social arrangements—namely, arrangements that increase the welfare of some without harming the welfare of others.[16] Economists generally

[12] *Id.* at 371 ("The difference between the amount c (>0), which can be distributed, and a_1 is what player 1 wants to leave for player 2. Given the decision of player 1 player 2 has to decide whether he accepts player l's proposal or not. If 2 accepts, player 1 gets a_1, and player 2 gets $c - a_1$. Otherwise both players get zero.").

[13] *See* Eric van Damme et al., *How Werner Güth's Ultimatum Game Shaped Our Understanding of Social Behavior*, 108 J. ECON. BEHAV. & ORG. 292, 292 (2014) (explaining that ultimatum game, first introduced by Güth in 1982, proved to be an influential study because it challenged the assumption that individuals are selfish and rational); Werner Güth & Martin G. Kocher, *More than Thirty Years of Ultimatum Bargaining Experiments: Motives, Variations, and a Survey of the Recent Literature*, 108 J. ECON. BEHAV. & ORG. 396, 399 (2014) ("The ultimatum game has been relevant as an empirical example and as guidance for developing new theoretical models of other-regarding preferences.").

[14] *See, e.g.*, Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, J. ECON. PERSP., Spring 1995, at 209, 210 ("Offers of less than 20 percent are frequently rejected."); Simon Knight, *Fairness or Anger in Ultimatum Game Rejections?*, 3 J. EUR. PSYCHOL. STUDENTS 2, 11 (2012) (stating same).

[15] *See infra* Part I (discussing preferences when windfall is not shared appropriately).

[16] *See* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 97-98 (1988) (exemplifying that situation *A* is Pareto superior to situation *B* if in situation *A* at least one person is better

consider Pareto-superior moves desirable because they increase overall social welfare without imposing losses on anyone.[17] In a sense, Pareto-superior moves represent gains without any offsetting losses.

In some cases of uncompensated borrowing, the downstream author and society stand to benefit from creation of a new work based on the downstream borrowing, while the upstream author suffers no loss from the borrowing. In other words, the borrowing does not result in competition or substitution for any stream of revenue already enjoyed by the upstream author. For example, the borrower might be a search engine using thumbnails of copyrighted images in search results,[18] or the borrowing might be so small that it is unrecognizable.[19] In such situations, allowing uncompensated borrowing would improve the welfare of the downstream borrower and those who consume or use her work while causing no decrease in the upstream author's welfare. Such uncompensated borrowing could be accepted as normatively desirable because society's total welfare is increased without imposing losses on anyone. However, if value/then right rejects this argument simply because the downstream borrower benefits without paying the upstream author.

One can certainly argue that it is foolish to embrace if value/then right because it rejects some Pareto-superior social changes. Those adopting this argument may hope that judges would quickly reject if value/then right reasoning as soon as they realized the existence of lost Pareto-superior improvements. Proponents of such thinking probably find the persistence of if value/then right puzzling because it exemplifies an irrational policy.

The ultimatum game suggests that, in some cases, people actually prefer to forego Pareto-superior arrangements when the windfalls in question are not shared appropriately. The ultimatum game involves two people who stand to benefit from a windfall. Remember, the ultimatum game always involves acceptance or rejection of a Pareto-superior state of affairs. Any shared amount of the windfall leaves Person *B* better off than she previously was. Thus, every proposed division represents a Pareto improvement for a hypothetical two-person society comprised of Persons *A* and *B*. The fact that real people in Person *B*'s position often reject Person *A*'s proposal demonstrates that people sometimes willingly forego windfalls if those windfalls are not properly distributed or shared.

Unfortunately, there is no complete explanation for why those in Person *B*'s position forego Pareto-superior arrangements. However, one significant theme

off than she was in situation *B* and if no one is worse off in situation *A* than she was in situation *B*).

[17] *See, e.g.*, *id.* at 100 ("Allocations that are Pareto superior increase at least one person's utility without adversely affecting the utility of another; they produce winners but no losers.").

[18] *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1169-70 (9th Cir. 2007) (holding that search engine display of thumbnail images on third-party websites was fair use).

[19] *See* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004) (applying de minimis principle to find that three-note sample was not infringement).

appears to be reciprocity.[20] Intuitively, if Person *B* helps Person *A* get a windfall, it is not right for Person *A* to share almost none of it with Person *B*, even if Person *B*'s help is minimal (in other words, if Person *B* does nothing more than accept his proposed share of the windfall).[21] Instead, Person *A* has an obligation to share an appropriate portion of his windfall with Person *B*.[22] This moral intuition is apparently strong enough that people will pass up modest financial gain to enforce the intuition as a norm.[23]

This intuition may explain why if value/then right has appeal. Our downstream defendant (Person *A*) may be in position to enjoy a windfall—the work he has created—but he needed the "help" of the upstream author (Person *B*), from whose work he copied. Under the principle derived from the ultimatum game, the downstream defendant has an obligation to share his windfall appropriately with the upstream author.[24] If no offer has been made, society

[20] *See* Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOS. REV., Dec.-Jan. 1998-99, at 6, 8-9 (explaining that there are many situations in which humans act generously and reciprocally rather than self-interestedly); *see also* Camerer & Thaler, *supra* note 14, at 218 (explaining that ensuring fairness between parties outweighs cost of rejecting windfall benefits); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 706-08 (2006) (explaining that ultimatum game demonstrates that people will not only cooperate at cost to themselves but also punish others at cost to themselves).

[21] *See* Bowles & Gintis, *supra* note 20, at 6 ("When asked why they offer more than one cent, proposers commonly say that they are afraid that respondents will consider low offers unfair and reject them as a way to punish proposer's [sic] unwillingness to share.").

[22] *See* Camerer & Thaler, *supra* note 14, at 216-17 (discussing involvement of etiquette and good manners in economic business practice balancing fairness with self-interest).

[23] *See* Bowles & Gintis, *supra* note 20, at 9 ("Those surveyed by pollsters exhibit what we have termed 'basic needs generosity,' a virtually unconditional willingness to share with others to assure them of some minimal standard . . . ."); *see also* Camerer & Thaler, *supra* note 14, at 217 (describing two experiments showing that "competition can push ultimatum offers closer to zero, in ways consistent with [concept of] fairness" in game theory); Schultz, *supra* note 20, at 708 (highlighting differences between ultimatum and dictator games). However, it may be true that raising expected gains can overcome concerns about reciprocity and fairness if the expected gain is sufficiently large. Studies testing this theory have shown mixed results. *Compare* Steffen Andersen et al., *Stakes Matter in Ultimatum Games*, 101 AM. ECON. REV. 3427, 3428 (2011) (showing that significantly "high stakes" variations of ultimatum game may lead to fewer rejections, even if proportions between offering party and responder are significantly unequal), *with* Lisa A. Cameron, *Raising the Stakes in the Ultimatum Game: Experimental Evidence from Indonesia*, 37 ECON. INQUIRY 47, 58 (1999) (showing no significantly different proportional distribution of offers during "high stakes" ultimatum game compared to "low stakes" game, even though responders did exhibit increased willingness to accept given percentage offer in higher-stakes games).

[24] Camerer & Thaler, *supra* note 14, at 217 (explaining that self-interested proposers keep in mind responder's nature to reject seemingly unfair and low offers).

prefers to go without the windfall until appropriate sharing occurs, even if it means rejecting a Pareto-superior improvement in overall social welfare.

II. THE CONSEQUENCES OF IF VALUE/THEN RIGHT

If we accept that if value/then right has sufficient appeal to persist in copyright, it makes sense to think through what its consequences might be. Most think about if value/then right as an expansive force for intellectual property rights.[25] Present law does not make all borrowing from copyrighted works actionable. Doctrines like the idea/expression dichotomy,[26] substantial similarity,[27] and fair use[28] all shield certain types of borrowings from copyright liability. Allowing a copyright plaintiff to recover simply by showing that the defendant borrowed from the plaintiff's work would effectively overrule these doctrines, thereby expanding the scope of copyright.[29] It is possible, however, for if value/then right to have different consequences.

Accepting for the sake of discussion that it is wrong for a downstream borrower to benefit without compensating his upstream sources implies that a person who has not paid such compensation is unjustifiably wealthier than he should be, and this injustice persists until the debt is paid to the upstream source. The power of if value/then right comes in part from plaintiffs asserting that they are the victims of such injustice.

It is a truism to recognize that all authors, including the greatest creative geniuses of all time, have borrowed from others. For example, George Frideric Handel notoriously borrowed from many sources to craft his compositions.[30]

---

[25] *See, e.g.*, Dreyfuss, *supra* note 2, at 405-06 (criticizing lack of coherent limit in owner's right to control and convincing defenses against parodies in trademark cases); Gordon, *On Owning Information*, *supra* note 2, at 166-68 (noting that obligation to pay for all "free riding" eradicates culture); Lee & Sunder, *supra* note 2, at 298 (arguing that if value/then right rationale for design patent rights negates purpose of intellectual property law); Lemley, *supra* note 2, at 1051-52, 1057 (stating that regulation of nonrivalrous use produces absolute protection and discourages innovations).

[26] *See* 17 U.S.C. § 102(b) (2018) (allowing free borrowing of ideas by excluding them from copyright protection); Baker v. Selden, 101 U.S. 99, 105 (1880) (explaining that copyright does not protect a plaintiff's ideas); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930) (finding no copyright infringement when defendant only borrowed ideas from plaintiff's work); *see also* Satava v. Lowry, 323 F.3d 805, 810 (9th Cir. 1993) (finding that plaintiff cannot prevent others from making realistic sculptures of jellyfish because that is an idea).

[27] *See* Funky Films, Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1076 (9th Cir. 2006) (finding that copyright infringement requires proof that two works are "substantially similar"); Arnstein v. Porter, 154 F.2d 464, 475 (2d Cir. 1946) (finding that infringement requires a degree of similarity amounting to "improper appropriation").

[28] *See* 17 U.S.C. § 107 (stating that fair use of copyrighted work is not infringement).

[29] *Id.*

[30] *See* George J. Buelow, *The Case for Handel's Borrowings: The Judgment of Three Centuries*, *in* HANDEL TERCENTENARY COLLECTION 61, 65-67 (Stanley Sadie & Anthony

Mozart based his Thirty-Seventh Symphony on one by Michael Haydn.[31] Brahms frequently borrowed from Beethoven.[32] And Handel himself became a "victim" of borrowing at the hands of Gustav Mahler, who used a theme from *Messiah* in his First Symphony.[33]

Similarly, in painting, Édouard Manet clearly borrowed the composition and subject matter for his works *Olympia* and *The Luncheon on the Grass*.[34] Van Gogh imitated the look and composition of Hiroshige.[35] Roger Brown freely admitted basing some of his *Puerto Rican Wedding* on Edward Hopper's *Nighthawks*.[36] And Stanley Kubrick appears to have found inspiration for a scene in *The Shining* from a photograph by Diane Arbus.[37]

Hicks eds., 1987) (observing Handel's borrowings from other composers to create "his own style").

[31] *See* Georg Predota, *"Good Composers Borrow, Great Ones Steal!,"* INTERLUDE (July 24, 2016), http://www.interlude.hk/front/good-composers-borrow-great-ones-steal/ [https://perma.cc/7HWX-QCR8] (discussing Mozart using symphony by Michael Haydn as basis for his Thirty-Seventh Symphony).

[32] *See* Charles Rosen, *Influence: Plagiarism and Inspiration*, 4 19TH-CENTURY MUSIC 87, 88-89 (1980) (mentioning Brahms borrowing from Beethoven in Brahms's Symphony no. 1, Piano Sonata in C Major, and in his Piano Concerto no. 1); Scott Simon, *Brahms: Breaking the Mold Beethoven Built*, NPR (July 14, 2007, 10:05 AM), https://www.npr.org/templates/story/story.php?storyId=11947519 [https://perma.cc/K8H4-3UVY] (mentioning Brahms borrowing from Beethoven's Fifth and Ninth Symphonies in Brahms's Symphony no. 1).

[33] *See* Timothy Judd, *3 Musical Allusions to Handel's "Hallelujah Chorus*,*"* LISTENERS' CLUB (Mar. 25, 2016), https://thelistenersclub.com/2016/03/25/3-musical-allusions-to-handels-hallelujah-chorus/ [https://perma.cc/X869-SU94] (suggesting echo of *Hallelujah* chorus in Mahler's First Symphony); Michael Lewanski, *On Mahler's 1st Symphony, or, Why Only a Conductor Could Have Written This Piece*, MICHAEL LEWANSKI, CONDUCTOR: BLOG (Mar. 11, 2016), http://www.michaellewanski.com/blog/2016/3/11/dg2at8i1bz67qvkucneoiy0na7pzw3 [https://perma.cc/JP4L-L656] (indicating that finale of Mahler's First Symphony resembles lines "[a]nd he shall reign for ever and ever" from Handel's *Messiah*).

[34] *See* Rolf Læssøe, *Édouard Manet's "*Le Déjeuner sur l'herbe*" as a Veiled Allegory of Painting*, 26 ARTIBUS ET HISTORIAE 51, 200-01 (2005) (stating that Manet borrowed his figures in Raimondi's engraving from Raphael's lost drawing *The Judgement of Paris*); John F. Moffitt, *Provocative Felinity in Manet's* Olympia, SOURCE: NOTES HIST. ART, Fall 1994, at 21, 21 (noting that Manet derived his "cat-plus-courtesan" motif from Titian's Venus of Urbino, which he had seen in Florence about ten years prior).

[35] *See* Janet A. Walker, *Van Gogh, Collector of "Japan*,*"* 32 COMPARATIST 82, 92-96 (2008) (discussing techniques, compositions, and subject matter of Japanese woodcut prints imitated by van Gogh).

[36] *See* Gail Levin, *Edward Hopper: His Legacy for Artists*, *in* EDWARD HOPPER AND THE AMERICAN IMAGINATION 109, 114 (Julie Grau ed., 1995) ("*Puerto Rican Wedding* is a kind of neighborhood corner view. . . . Of course another part of it is, I think a kind of reference to Edward Hopper's *Nighthawks*. One side of the painting is sort of a café view which isn't really like or isn't set up like an imitation of *Nighthawks*, but still refers to it very much.").

[37] *See* ARTHUR LUBOW, DIANE ARBUS: PORTRAIT OF A PHOTOGRAPHER 376 (2016) (explaining portrait of Roselle twins becoming, "through its evocation in Stanley Kubrick's

Examples like these imply that every copyright plaintiff who asserts an if value/then right claim against a downstream borrower has herself borrowed from those upstream to her.[38] In most if not all cases, those borrowings by copyright plaintiffs have not been paid for.[39] I would venture to guess that there is no such thing as an author who has paid everyone from whom a creative benefit has been derived.

The unpaid debts that every author owes bring nuance to our understanding of if value/then right, which operates on the premise that downstream defendants who do not pay their upstream sources enjoy an unjustified windfall.[40] In a sense, when those defendants fail to pay, they become wealthier than they should be while making the upstream authors poorer than they should be.[41] Making downstream defendants pay presumably fixes both of these problems by putting both plaintiff and defendant where they should be.[42]

But what happens if our hypothetical upstream author (Person *B*) has unpaid debts to sources upstream from *her*? Unless these debts get paid, our hypothetical author will enjoy unjust windfalls as surely as the downstream defendant that she is suing.[43] One might take the position that no problem exists because no one is suing our hypothetical author (Person *B*). If that were the case, we might infer that none of those possible plaintiffs cares about the unpaid debt. However, this position is not airtight. The possible plaintiffs might not know about our author's borrowings. Alternatively, they might care but believe (perhaps correctly) that they would face significant obstacles trying to recover. Indeed, they might simply be less brazen about asserting borderline intellectual property rights than our hypothetical author.

Accordingly, if the legal system takes seriously the idea of trying to make sure all unpaid creative borrowings get paid for, there is a lot of work to do.

---

film *The Shining* and countless other reproductions, an image almost as iconic as Edvard Munch's *The Scream*. Its chief qualify is instead something otherworldly, a haunted stillness and strangeness").

[38] *See* Buelow, *supra* note 30, at 65-67 (highlighting borrowings by Handel in his compositions); Læssøe, *supra* note 34, at 201 (acknowledging Manet's borrowings from Raphael's *The Judgment of Paris*); Levin, *supra* note 36, at 113-15 (explaining that Brown borrowed from Hopper's *Nighthawks*).

[39] *See* Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 78 (2004) ("All artists create using much they have not themselves created, both in terms of physical and human surroundings and in terms of cultural heritage.").

[40] *See id.* at 76 (explaining that artists borrowing downstream may feel obligated to create or may create out of gratitude as they are not providing monetary consideration).

[41] *See id.* at 86 ("[T]he person free of copyright obligations receives what feels like a gift. . . . The dark view of gift . . . emphasizes the resentment to which gift can give rise and the relations of unequal status that it can enforce.").

[42] *See id.* at 80 ("Denying them use of a work or making them pay for it simply restores them to their status quo ante, the classic function of corrective justice.").

[43] *See supra* notes 30-39 and accompanying text (describing downstream authors benefiting from work of upstream authors without repaying debts).

Many if not infinite claims must be brought and adjudicated before society can have any confidence that all figurative accounts have been settled.[44] Candidly, this state of affairs is so unlikely to be reached that, if we consider the settling of accounts important, some kind of injustice will persist indefinitely.

There is, however, an alternative. Society could decide to forgive the debts associated with certain borrowings. For example, these borrowings might be minimal[45] or take only stock items that appear in many similar works.[46] Regardless, the idea here is that there are certain types of borrowings that every author commits—borrowings sufficiently common that it makes no sense for society to make them the subject of lawsuits.[47] Instead, it is better to recognize that every author "victimizes" those upstream with such borrowing and that every author (or at least every reasonably successful author) gets "victimized" by those downstream who borrow this way. Deciding that all of these open accounts are forgiven is simpler and fairer than trying to settle them all through litigation.[48]

The foregoing shows that if value/then right is not necessarily a force for the expansion of intellectual property rights. It works that way only when considered

[44] *See* Gordon, *supra* note 39, at 89 (finding "wide range of contexts in which imposing . . . a duty to negotiate and pay for licenses generates on the whole more costs than benefits for society").

[45] *See supra* note 9 and accompanying text.

[46] *See* Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986) (citing Reyher v. Children's Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976)) (finding that scenes resulting from choice of setting or situation are unprotectible "scenes a faire"); *Reyher*, 533 F.2d at 91 ("Copyrights, then, do not protect thematic concepts or scenes which necessarily must follow from certain similar plot situations.").

[47] *See supra* notes 30-39 and accompanying text (establishing numerous documented borrowings not subject to litigation).

[48] Similar reasoning underlies the concept of average reciprocity of advantage in property law. In the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), Pennsylvania Coal complained that antisubsidence laws made some of its coal worthless because it could not excavate the coal without causing the land above to subside. Pennsylvania Coal therefore argued that the laws effected a Fifth Amendment taking of its property. *Id.* at 414-15 (finding that inability to mine coal robs coal of intrinsic value constituting a taking under Fifth Amendment). The Supreme Court ruled in favor of Pennsylvania Coal. *Id.* at 416. In so ruling, the Court used average reciprocity of advantage to differentiate simple, constitutional regulation from laws that imposed unconstitutional takings. *Id.* at 415-16 (balancing rights of public against rights of private landowners). Simple regulations might impose burdens on property owners, but the overall burdens and benefits of the regulatory scheme would roughly balance out. *See id.* at 415 (distinguishing between eminent domain and taking of private property). By contrast, laws that placed disproportionate burdens on a few property owners while conferring benefits on others would not exhibit an average reciprocity of advantage, thereby becoming constitutionally vulnerable. *Id.* at 416 ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change.").

narrowly, as a principle to be deployed between one plaintiff and one defendant. However, when if value/then right gets applied to all authors or an entire community of authors, it suggests that some borrowings should not be actionable and therefore limits intellectual property rights. Indeed, this conception of if value/then right might explain why copyright has limiting doctrines such as the idea/expression dichotomy, fair use, and substantial similarity.[49] Perhaps those doctrines excuse borrowings of the sort that all authors commit "against" one another.

CONCLUSION

It is unfortunately beyond the scope of this brief Essay to explore fully the consequences of if value/then right. However, it is my hope that future scholarship concerning this principle considers more fully the source of its appeal and the possibility that if value/then right can limit the scope of intellectual property rights.

[49] *See supra* notes 26-28 and accompanying text.