

Book Reviews

Copyright's Cultural Turn

CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE. By Julie E. Cohen. New Haven, Connecticut: Yale University Press, 2012. 352 pages. \$55.00.

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Introduction

How ironic that the scholarship on the area of law most directly regulating the culture industries has long resisted learning from scholarship on culture! Rather than turning to cultural studies, anthropology, geography, literary theory, science and technology studies, and media studies, over the last few decades copyright scholars have relied largely on economics for methodology.

However, the hegemony of law and economics in copyright is yielding. The exhortation of some of this school to commodify creativity to render it market tradable is increasingly exposed as deficient both as a sufficient mechanism to improve people's lives and as a vision of what makes a life good in the first place. Most importantly, by failing to recognize the importance of creative works beyond their economic value, a policy dictated

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by economic analysis alone might fail to provide sufficient limits on the rights of copyright holders.

Julie Cohen's new book, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice*,¹ marks a major effort to craft a jurisprudence of information law that goes beyond law and economics. Cohen, a celebrated scholar of intellectual property and privacy, brings her formidable talents to the fore in this book to ask scholars in both fields to pay more attention to culture. Cohen argues that the dominant approach to copyright and privacy fails to understand the role of information in people's actual lives. We have become too enamored with abstract claims of human behavior that turn out to be incomplete upon closer examination, she tells us. Mining a broad vein of contemporary theory ranging from science and technology studies to cultural studies, Cohen seeks to inform policy on intellectual property and privacy with an understanding of what she calls the networked self, the individual embedded in a complex structure of social and technological circumstances.²

Cohen's book is part of what we believe to be a "cultural turn" in intellectual property thinking. Her book is part of an emerging school of analysis, which brings interdisciplinary insights from fields other than economics to explore the deeper significance and role of cultural products. Beginning with Rosemary Coombe and Keith Aoki, legal scholars have sought to learn from the humanities and social sciences beyond economics to better understand why we create, how we create, who creates, and the effects of cultural production on social and economic well-being.³ Increasingly, scholars writing in this vein draw their normative vision from the work of Martha Nussbaum and Amartya Sen, who drew attention to the need to improve quality of life by enhancing the capabilities of each person.⁴ An intellectual property policy would thus be evaluated by a new metric, not

1. JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012).

2. *Id.* at 6–8.

3. *See generally* ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293, 1355 (1996) (calling for recognition of "hybridities, pluralisms, and localisms" when considering intellectual property law).

4. *See, e.g.*, MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 7 (2012) [hereinafter SUNDER, *FROM GOODS TO A GOOD LIFE*] (drawing upon the work of Sen and Nussbaum to consider how intellectual property laws can promote human freedom and development); Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821, 2823 (2006) (proposing a substantive equality principle to guide global intellectual property policy making); Brett Frischmann & Mark P. McKenna, *Intergenerational Progress*, 2011 *WIS. L. REV.* 123, 137; Lea Bishop Shaver, *Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge*, 4 *I/S: J.L. & POL'Y FOR THE INFO. SOC'Y* 235, 239 (2008); Madhavi Sunder, *IP*³, 59 *STAN. L. REV.* 257, 313–15 (2006) [hereinafter Sunder, *IP*³] (applying the capabilities approach to conflicts in intellectual property law).

simply increased products (in the form of patents, copyrighted works, or trademarked goods), or its contribution to the gross domestic product, but rather its role in enhancing human capabilities. Rejecting the stylized utilitarianism of law and economics,⁵ Cohen explicitly embraces the capabilities approach of Nussbaum and Sen.⁶

Cohen's book defies easy summary, and we do not seek to do so here. It covers a broad legal landscape from copyright and privacy to communications policy. She critiques liberal policies for what she sees as their inattention to the endogeneity of the individual self, that is, the dialectic process between culture and subjectivity, with each influencing the other.⁷ She argues for the importance of play as a "vital catalyst of creative practice, subject formation, and material and spatial practice."⁸ Cohen seems to define "play" as not rigid, rather than not work.⁹ One of her primary concerns is the inevitable creep toward total control (legal, cultural, and technological) of a digital information society. Cohen advocates, instead, for flexibility and gaps in the digital networked environment because these interstitial spaces are where creativity and self-formation may fruitfully occur.¹⁰ She offers three strategies to enhance the possibility of play: access to knowledge, operational transparency, and semantic discontinuity.¹¹ The first two strategies are largely well-known, but the third requires elaboration. By semantic discontinuity, Cohen means an incompleteness in the legal and technical landscape that leaves unregulated spaces for individual action.¹²

In an early review, Jack Balkin agrees with Cohen that we all need what he calls "room for maneuver," but worries that semantic discontinuity may be insufficient to offer this space without more planned policy making.¹³

5. COHEN, *supra* note 1, at 21 ("An adequate theoretical framework for information law and policy must allow the definition of rights without insisting that they be amenable to neutral, quasi-scientific reduction, and must permit formulation and discussion of instrumental goals without imposing the Procrustean requirements of utilitarianism.").

6. *Id.* at 21 ("The theory of capabilities for human flourishing satisfies both requirements, and supplies the underlying normative orientation for the analysis developed in this book.").

7. *Id.* at 7.

8. *Id.* at 223.

9. *Id.* at 55.

10. *Id.* at 227.

11. *Id.* at 31.

12. *See id.* (defining "semantic discontinuity" as "an interstitial complexity that prevents the imposition of a highly articulated grid of rationality on human behavior and instead creates spaces within which the play of everyday practice can move").

13. As Jack Balkin has observed:

First, semantic discontinuity might be only a second-best solution to the problem of freedom. Surely one would want at least some rules, technologies, and practices that directly protected individuals from overreaching by powerful public and private entities. . . .

. . . .

Anita Allen has suggested that Cohen's views might not be as hostile to liberalism as she suggests.¹⁴

We seek here to flesh out Cohen's important arguments in two ways—first, by contextualizing them through comparison with the reigning law and economics approach; and second, by highlighting some key insights of a cultural analysis of copyright. (We confine our arguments to intellectual property, not taking up Cohen's ambitious undertaking to analyze privacy under the same umbrella.) Cohen herself does not frame her approach as a contrast to law and economics. But given the dominance of that approach in legal scholarship, Cohen's book marks a major methodological departure. Cohen writes, "The mainstream of debate about copyright theory and policy . . . tends to ignore or discount the well-established humanities and social science methodologies that are available for investigating the origins of artistic and cultural innovation."¹⁵ In addition to embracing the normative goals of enhancing play and realizing the networked self, the major contribution of her book is to broaden the methodological tools available for analyzing intellectual property policy.

Here, we further develop a cultural approach to intellectual property policy that focuses on expanding human capabilities. Our goal is not to replace law and economics with another, allegedly complete jurisprudential system, but to supplement it with a broader set of disciplines with which to understand our world and to allow greater questioning of the ideological entailments of any particular jurisprudential approach. The capabilities approach does not repudiate economics, but simply changes the metrics for judging economic progress and development. Sen, after all, earned his Nobel prize in economics.¹⁶

. . . . Gaps and ambiguities in code and law that benefit individuals might also benefit powerful corporations, and vice versa.

Jack M. Balkin, *Room for Maneuver: Julie Cohen's Theory of Freedom in the Information State*, 6 JERUSALEM REV. LEGAL STUD. 84–85 (2012).

14. Anita Allen, *Configuring the Networked Self: Shared Conceptions and Critiques*, CONCURRING OPINIONS (Mar. 6, 2012, 6:14 PM), <http://www.concurringopinions.com/archives/2012/03/configuring-the-networked-self-shared-conceptions-and-critiques.html#more-59028>; see also MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 35 (2011) ("Capabilities belong first and foremost to individual persons, and only derivatively to groups."); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 152–53 (1970) (examining the consequences associated with the concept of individual liberty). Cohen embraces Nussbaum's normative vision, but Nussbaum herself is avowedly liberal, as is Sen. The difference may be in how each characterizes liberalism. Nussbaum and Sen see it as an approach that embraces individual definition of what constitutes a good life, while Cohen worries that liberalism relies upon the mistaken view that individuals are autonomous beings, capable of such self-definition. The divergence between the views may not prove practically decisive. Cohen's policy prescriptions seem to largely track traditional liberal ones.

15. COHEN, *supra* note 1, at 18.

16. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1998*, NOBEL PRIZE, http://www.nobelprize.org/nobel_prizes/economics/laureates/1998/index.html.

We follow Cohen's call to situate intellectual property policy in the lives of real people,¹⁷ by imagining how intellectual property might affect the life of Vasanti, "a small woman in her early thirties who lives in Ahmedabad."¹⁸ Martha Nussbaum introduces Vasanti in writing on how to create capabilities.¹⁹ Vasanti is illiterate, without resources of her own, having left her abusive husband, and earns a meager income from "making eyeholes for the hooks on sari tops."²⁰ As Nussbaum describes, Vasanti's life chances improved dramatically with a loan from the Self-Employed Women's Association, a world-class not-for-profit organization that happened to be based in Vasanti's hometown.²¹ As Nussbaum shows through her focus on Vasanti, the capabilities approach is inherently focused on people's actual lives. We note that our discussion of Vasanti is hypothetical, lacking the ethnographic realism of Nussbaum's work, science and technology studies, or Cohen's ideal approach.

Part I reviews some of the principal deficiencies of law and economics as a complete method for intellectual property policy making. Part II seeks to go beyond economics by articulating how a cultural approach focused on enhancing human capabilities would change the ways we understand and regulate cultural production and exchange.

I. Why Economics Is Not Enough

The two principal deficiencies of the law and economics approach are both well-known. First, the foundational understanding that monopoly rights on information are generally necessary to induce the creation of that information has been called into question by seemingly innumerable sources. Second, a single-minded focus on efficiency neglects the distribution of resources in society.

A. *Why Do Writers Write?*

What justifies copyright law? For scholars writing from the perspective of law and economics, we need copyright law because of market failures that would prevail in its absence.²² Without copyrights, authors would not write because their creations would simply be copied freely by others without any

17. COHEN, *supra* note 1, at 4–6.

18. NUSSBAUM, *supra* note 14, at 2; *see also* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 16 (2000) [hereinafter NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT].

19. NUSSBAUM, *supra* note 14, at 2–6.

20. *Id.* at 2. Vasanti's occupation seems to epitomize the division of labor described by Adam Smith a century and a half earlier.

21. *Id.*

22. *See* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1435 (1989) (describing the market failures that would ensue in a world without clearly defined property rights).

monetary benefit to the authors.²³ Lacking remuneration available through enforceable rights, creativity would grind to a halt.²⁴ As Cohen writes, “[B]oth copyright lawyers and copyright scholars tend to assume that copyright law is centrally important in stimulating a high level of creativity.”²⁵ While it is reasonable to argue that the millions of dollars required to develop a new software package, video game, or movie might not be forthcoming were it not for the promise of a monetary reward protected by a copyright, it is not so clear that music and books would not be written without this inducement.

Scholars have questioned the claim that creativity falters without monetary reward. Yochai Benkler has observed that direct monetary incentives proved unnecessary for the creation of enormous software packages such as Linux or knowledge resources such as Wikipedia.²⁶ Eric Von Hippel, Kal Raustiala, and Chris Sprigman have shown how a variety of industries exhibit creativity in the absence of effective copyright protections.²⁷ Reviewing psychological studies of creativity, Diane Zimmerman, Jeanne Fromer, and Greg Mandel show that economic incentives are often not the driving force behind creativity.²⁸ Rebecca Tushnet shows that

23. *See id.* at 1435–36 (outlining the free rider problem).

24. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 40 (2003) (“In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying, with the result that the work may not be produced in the first place because the author and publisher may not be able to recover their costs of creating it.”); ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 14 (4th ed. 2006) (“Intellectual property protection is necessary to encourage inventors, authors, and artists to invest in the process of creation. Without such protection, others could copy or otherwise imitate the intellectual work without incurring the costs and effort of creation, thereby inhibiting the original creators from reaping a reasonable return on their investment.”); Gordon, *supra* note 22, at 1348 (“That economics should be a focus of attention is unsurprising, since both copyright and patent law are seen as serving primarily economic incentive functions.”); Mark A. Lemley, *Private Property*, 52 *STAN. L. REV.* 1545, 1550 (2000) (“By and large, intellectual property exists only where there is a public goods problem—where people need incentives to invest in the creation of new things.”); Maureen A. O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 *DUKE L.J.* 479, 484 (1995) (“Traditional literary works such as books resemble public goods in that an author is unlikely to make the investment to create the book if all may copy it without fee upon its publication.”).

25. COHEN, *supra* note 1, at 100.

26. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 5–6 (2006).

27. *See generally* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *VA. L. REV.* 1687 (2006); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06, 2006).

28. Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 *N.W. U. L. REV.* 1441, 1443–44 (2010); Gregory N. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 *U.C. DAVIS L. REV.* 283, 285–86 (2010); Diane

“artists’ own experiences of creation” often reveal a desire to create rather than an economic motivation.²⁹ Eric Johnson concludes that “the social science literature leads to the identification of a general rule that intellectual labors will tend to flourish naturally, without external rewards.”³⁰ None of this suggests that money is irrelevant, only that focusing on it exclusively neglects a significant amount of human creation and motivation.

Not only have scholars undermined the incentive theory’s empirical foundation, they have also pointed out the costs of a single-minded focus on propertization. James Boyle and Carol Rose have observed the central role of the public domain of information in enriching our lives, a role often forgotten in the headlong rush to commodify.³¹ Jessica Litman, Peter Jaszi, Keith Aoki, David Lange, Peter Lee, and Brett Frischmann have demonstrated the importance of the public domain to downstream innovation and creativity, renewing the adage that we all stand on the shoulders of giants.³² The recognition of the essential importance of the public domain counters the call for increasing commodification; this scholarship counters the view that if the public domain had been properly parceled out, it would have been deployed in the most efficient manner.

B. *Who Gets What?*

Martha Nussbaum tells a story from Charles Dickens’ *Hard Times* to illustrate a central failing of utilitarianism.³³ Circus girl Sissy Jupe is asked by her teacher to imagine herself in a nation where there are “fifty millions of money.”³⁴ The teacher inquires, “[I]sn’t this a prosperous nation, and a’n’t you in a thriving state?”³⁵ Sissy does not know how to answer the question.³⁶

Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 29 (2011).

29. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009).

30. Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 627 (2012).

31. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 38–39; Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 89, 89–90.

32. See Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain (Part I)*, 18 COLUM.-VLA J.L. & ARTS 1, 2–3 (1994) (advocating for fewer copyright restrictions on artists); David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn 1981, at 147, 176 (arguing against privatizing the public domain); Peter Lee, *Toward a Distributive Commons in Patent Law*, 2009 WIS. L. REV. 917, 917 (contending that the public domain can more effectively increase access to downstream patented health technologies for low-income communities); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990) (asserting that the public domain can solve problems of authorship).

33. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 18, at 60.

34. CHARLES DICKENS, *HARD TIMES* 42 (Paul Negri & Kathy Casey eds., 2001).

35. *Id.*

She later tearfully explains to a friend that she could not answer the question “unless I knew who had got the money, and whether any of it was mine.”³⁷

The traditional economic approach to intellectual property fails to pay attention to the just distribution of the benefits of intellectual property. This distributional inattention leads to a number of results. First, enthralled with the single motivation of granting strong property rights to authors to induce creation, such approaches fail to value the contributions and concerns of potential users. Second, a singular focus on ability and willingness to pay will induce the creation of the works sought by those with some degree of market power—leading, for example, to the production of many drugs to treat baldness but few remedies for malaria. The inventions and works most useful to the poorest are forgotten under this theory, often lacking sufficient market incentive to induce their creation. Finally, the poorest may lack the ability to access creative works that are protected by globalized exclusionary laws—laws that fence them out.

While utilitarianism can build in some distributional concerns through such features as the diminishing marginal utility of the dollar,³⁸ the wealth-oriented approach championed by William Landes and Richard Posner lacks even that feature.³⁹

II. What Do Cultural Studies Teach Us?

If not economics alone, then what else? Other disciplines in social science and humanities can supplement our effort to understand the role of intellectual property in the lives of people like Vasanti. The introduction of psychology, sociology, cultural studies, literary theory, geography, anthropology, performance, and science and technology studies does not render economics irrelevant. We seek not to *supplant* economics, but to *supplement* it from insights in other academic studies. Indeed, Julie Cohen canvasses scholarship in all of these fields in order to better understand the reality of people’s everyday lives. Economics alone among academic fields cannot supply the insights needed to define information policy. In addition to paying attention to supply and demand curves and deadweight loss, we

36. *Id.*

37. *Id.* at 42–43.

38. William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581, 603 (2007) (proposing that utilitarianism can be egalitarian and explaining, “[W]hen combined with weak and plausible assumptions of diminishing marginal utility and randomized distribution of utility functions, it tends toward a rough egalitarianism, at least with respect to the distribution of basic resources or goods.”).

39. Matthew D. Adler, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law*, 31 B.C. ENVTL. AFF. L. REV. 591, 593 (2004) (“[C]onsider that a transfer of wealth from rich to poor is not going to be Kaldor-Hicks efficient, or pass a cost-benefit test traditionally understood, but it will increase overall well-being assuming that—as seems quite plausible—money has diminishing marginal utility.”).

need to develop and analyze ethnographies, quantitative and qualitative empirical research, psychologies, and sociologies of intellectual property.

Cohen's work is part of what we might term the *cultural* turn in intellectual property law. We identify here two central insights of the cultural turn in intellectual property scholarship: the relationship between cultural products and the self, and the relationship between culture and human development, which we might characterize as the relationship between goods and a good life.⁴⁰

Neither the stylized model of human behavior nor distributional neglect marks the most significant deficiency of the economics approach to copyright. As one of us (Sunder) has written, "The fundamental failure in the economic story of intellectual property has to do with information's role in cultural life and human flourishing."⁴¹ Cohen's book, like the work of Rosemary Coombe before her,⁴² seeks to better understand the way that creative works affect us. Understanding the cultural life of intellectual property (to borrow Coombe's wonderful phrase) helps us recognize that creative works are not just passively consumed objects unrelated to human subjectivity. Cultural works are raw materials from which we form ourselves and societies.

The traditional law and economics approach to copyright imagines a stylized world in which the end goal is to satisfy individual preferences by creating works those individuals desire. Understood in this way, the goal of copyright law thus becomes the creation of products for our consumption. This neglects the interplay of the cultural works with people and with each other. But what if we understood creative works as crucial to education, socialization, and even the creation of our own identities?⁴³

A. *The Situated, Networked Self*

Cohen's account is particularly helpful in elaborating the latter connection. "[C]ulture is not a fixed collection of texts and practices," she writes, "but rather an emergent, historically and materially contingent process through which understandings of self and society are formed and reformed."⁴⁴ To use the popular terminology of Bruno Latour, human beings

40. See SUNDER, FROM GOODS TO A GOOD LIFE, *supra* note 4, at 31–44 (criticizing the tendency of intellectual property scholars to focus only on the proper alignment of economic incentives and introducing a cultural intellectual property framework).

41. *Id.* at 31.

42. COOMBE, *supra* note 3.

43. See SUNDER, FROM GOODS TO A GOOD LIFE, *supra* note 4, at 64–76 ("Participatory culture is instrumentally and intrinsically related to promoting freedom, engendering equality, and fostering human and economic development.").

44. COHEN, *supra* note 1, at 25.

are “hybrids” of the techno-cultural milieus in which we live.⁴⁵ Culture and technology shape us as much as we shape them.

One of the central insights of the new cultural studies of intellectual property centers on the relationship between goods and persons. Cohen’s view of “culture” takes seriously the constitutive role of technologies and cultural artifacts in configuring the self. “Our beliefs, goals, and capabilities are shaped by the cultural products that we encounter, the tools that we use, and the framing expectations of social institutions,” Cohen writes.⁴⁶ Cohen is highly influenced by Science and Technology Studies (STS), which posits selves as hybrids of technology, goods, and ideologies.⁴⁷ At the same time, as Cohen argues, selves are not passive receptors of technologies, but are dynamic agents in a back and forth with technologies.⁴⁸

The situated, networked self stands in contrast to the liberal self who makes her life in opposition to or outside the boundaries of culture. The situated self is an endogenous creation of the system itself. Selves and technologies are mutually engaged in recursive processes of creation and recreation.

Cohen moves from describing the imbrication of self formation and culture to offering some thoughts on how and why law ought to direct this relationship. She is first and foremost concerned with the freedom-enhancing function of what she calls the “play of everyday practice.”⁴⁹ Individuals, she argues, ought not be too constricted in their technological and cultural play.⁵⁰ She calls this flexibility semantic discontinuity.⁵¹ Notably, Cohen’s calls for semantic discontinuity or more room for play are not motivated by a singular desire to promote more innovation or creative expression.⁵² She views play in cultural worlds as essential to personal

45. See BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 3 (Catherine Porter trans., 1991) (describing hybrids as “half engineers and half philosophers” who attempt to navigate the interconnectivity of science and culture). See generally Alain Pottage, *The Materiality of What?*, 39 J.L. & SOC’Y 167 (2012) (elaborating on the insights of actor-network theories in Science and Technology Studies, particularly Latour’s theory).

46. COHEN, *supra* note 1, at 2.

47. See *id.* at 25 (“The approaches that I identify as most pertinent . . . focus careful, critical attention on the ‘hybrid’ assemblages that emerge where politics, economics, technology, ideology, and discourse intersect.”).

48. See *id.* at 50 (“Embodied, situated users interact with networked information technologies on a day-to-day basis, often turning those technologies to new purposes and adapting them in unexpected ways.”).

49. See *id.* at 50–57 (stressing the importance of understanding the “ordinary, everyday ways that people use information”).

50. See *id.* at 57 (“[T]he play of everyday practice is the means by which human beings flourish. . . . It therefore must be a central consideration in evaluating the constellations of legal, institutional, and technical developments with which this book is concerned.”).

51. *Id.* at 239–41.

52. *Id.* at 227.

freedom and *self*-creation.⁵³ She notes, the “reservation of authority to shape the material conditions of everyday life promotes both innovation and psychological and social well-being.”⁵⁴ For Cohen, the more interesting benefits of cultural play are unexpected; she prizes either play for play’s sake or accidental innovation that arises from cultural play.

Even this description of the importance of cultural play may not go far enough. Freedom in the cultural sphere is as important, if not more so, as freedom in the political sphere. The fact that cultural images and values are so powerful a factor in shaping selves and societies is the very reason that individuals need to be able to speak back to culture and reshape it over time. Moreover, the cultural sphere is where individuals find *meaning* in their lives. Culture is a sphere in which individuals share with and seek to understand others. Culture is a sphere that individuals often do not want to leave, or step outside, because culture gives their lives value.⁵⁵ At the same time, cultural mores can limit individual freedom, especially when individuals are without sufficient rights to joke about, critique, transgress, and rewrite culture. Culture is both a source of shared meaning and a set of tools for change.⁵⁶ Play in culture must include the right to challenge existing culture using the signifiers of that culture itself. The focus on cultural embeddedness does not mean that individualism is lost to the requirements of the community. Rather the idea is that the individual must be understood in context; the individual cannot be stripped from her situation, which is constitutive. At the same time, the individual must have the ability and right to go beyond the limits of her culture and seek to transform it.

Cohen’s book is also marked by a concern for particularity that is characteristic of STS. Path dependence, ethnography, and time and place—rather than an abstract search for immanent and universal truths—are all watchwords of STS. Cohen’s call of attention to the situated and embedded self in networks of technologies and ideologies requires greater attention to the actual, not theoretical, conditions of creation. Cohen calls for “good story-telling” about how actors create within particular networks.⁵⁷

All of this gives some elaboration to the theoretical insights of cultural theory, especially the theories of STS on which Cohen relies so heavily. But what of the implications of this theory for law, current legal conflicts, and

53. *Id.*

54. *Id.*

55. See generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (critiquing expressive association law for forcing members to choose either their culture or their freedom).

56. *Id.* at 498.

57. COHEN, *supra* note 1, at 268. For examples of ethnographies of scientific innovation in STS, see THE SCIENCE STUDIES READER (Mario Biagioli ed., 1999) and ANDREW HARGADON, HOW BREAKTHROUGHS HAPPEN: THE SURPRISING TRUTH ABOUT HOW COMPANIES INNOVATE (2003).

real people in their everyday lives? Because Cohen focuses here on elaborating a theoretical account, this book does not seek to apply it in any detail to current controversies. In contrast to the law and economics model of copyright law, which would justify limitations on author's rights only where there is market failure, a cultural approach would limit rights where they may unduly affect self-actualization. "Autonomy is exercised, and self-determination pursued, by working through culture," Cohen writes.⁵⁸ "Laws granting rights in artistic and intellectual expression should be designed with that process in mind."⁵⁹ Some of Cohen's concrete suggestions in this regard include advocacy for a "personal use" right that is context sensitive and the reservation of a broad range of remix rights to users.⁶⁰

B. *Culture and Capabilities*

Culture is a key component of not only individual self-actualization, but human development generally. Cohen, like a growing handful of intellectual property theorists in recent years,⁶¹ turns to the work of Martha Nussbaum and Amartya Sen to flesh out these connections.

The "capabilities approach" to development pioneered by Amartya Sen and Martha Nussbaum offers a critique of the utilitarian account of development as measured by GDP or technological advancement alone. Sen's vision of "development as freedom" is pluralist, measuring development by assessing an individual's ability to exercise many freedoms, including market-oriented freedom. As Nussbaum has further articulated, central human freedoms range from the fulfillment of basic needs, such as the right to life and health, to more expansive freedoms of movement, creative work, and participation in social, economic, and cultural institutions.⁶²

Adopting the capabilities approach (first put forward by an economist, no less!) reaffirms the continuing centrality of economic analysis. At the

58. COHEN, *supra* note 1, at 104.

59. *Id.*

60. *Id.* at 246–47.

61. *See supra* note 4.

62. Sunder, *IP³*, *supra* note 4, at 313–14 (footnotes omitted); *see also* NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 18, at 78–80; *id.* at 5 (defining capability as "what people are actually able to do and to be" in a given society); AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999) [hereinafter SEN, DEVELOPMENT] ("Focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization."); *id.* ("Development can be seen, it is argued here, as a process of expanding the real freedoms that people enjoy."); AMARTYA SEN, INEQUALITY REEXAMINED 37 (1992) (emphasizing "the gap between *resources that help* us to achieve freedom and the extent of *freedom itself*"); Amartya Sen, Equality of What?, The Tanner Lecture on Human Values (May 22, 1979), available at <http://www.uv.es/~mperezs/intpoleco/Lecturcomp/Distribucion%20Crecimiento/Sen%20Equality%20of%20what.pdf> (defining "basic capabilities" as "a person being able to do certain basic things").

same time, “the impact of economic growth on human capabilities can be extremely variable, depending on the nature of that growth (for example, how equitable and employment-intensive it is, and whether the economic gains from growth are used to address the deprivations of the most needy.)”⁶³ Jean Drèze and Sen stress, for example, that “‘uncaging’ the tiger” of economic development includes the “removal of barriers to using markets,” but requires us “to go *well beyond* liberalization.”⁶⁴ The practical usability of market opportunities, they note, depends on “basic capabilities—including those associated particularly with literacy and education (and also those connected with basic health, social security, gender equality, land rights, local democracy).”⁶⁵

Moving beyond law and economics shifts not only our descriptive landscape, but also the end posts. The normative vision underlying the standard law and economics approach largely embraces wealth as the ultimate value, for practical purposes, if not theoretically elegant ones. While Kaplow and Shavell recognize “the defects in the conceptual and normative foundations of wealth maximization,” they believe that “analysis based on wealth maximization” may yet prove “analytically useful.”⁶⁶ They offer the same defense with respect to “efficiency.”⁶⁷

The human capabilities approach on which Cohen bases her work has a different goal in mind. Martha Nussbaum, one of the principal architects of this approach, reminds us of its origins, when philosophers and developmental economists stopped to “[s]uppose for a moment that [they] were interested not in economic or political theory but just in people.”⁶⁸ As the late Mahbub ul Haq, the mastermind behind the U.N. Human Development Reports, explained in the first such report in 1990: “People are the real wealth of a nation. The basic objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives.”⁶⁹

A copyright law grounded in the capabilities approach, in contrast to traditional law and economics analysis, ought to focus then on more than the creation of more goods. We need to measure law’s success by its ability to better the lives of real people. In short, a cultural turn in intellectual property provides new answers to the fundamental question: What is intellectual property for?

63. JEAN DRÈZE & AMARTYA SEN, *INDIA: DEVELOPMENT AND PARTICIPATION* 37 (2002).

64. *Id.* at 308.

65. *Id.*

66. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 997 (2001).

67. *Id.*

68. NUSSBAUM, *supra* note 14, at 3–4.

69. UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 1990*, at 9 (1990).

Seeking to set out a broad theoretical account, Cohen does not herself seek to offer examples of how her theory affects real people in real situations. This makes it harder to figure out how the book's arguments might work out in practical form. In particular, it is important to understand the need for particularity in the context of an intellectual property law that has become globalized. Because of TRIPS, American intellectual property scholars must increasingly consider contexts outside the United States.⁷⁰ We must thus address contemporary issues in international copyright, from access to copyrighted materials for the disabled and the poor, to how to enhance the ability of peoples around the world to create their own knowledge of the world.

Which brings us back to Vasanti. We suggest that a cultural approach to copyright premised on the capabilities approach needs to attend to how copyright law can expand her capabilities. Vasanti is illiterate (or at least was so at the time of Nussbaum's writing), so she will perhaps be keen on educational texts that might help her learn to read. What is Vasanti's ability to access educational works? What about Vasanti's access to popular works that comprise a common, cross-cultural lexicon like J.K. Rowling's *Harry Potter* series? Market theorists are content with whatever culture the market produces, paying no attention to who produces it, who can access it, or for whom it is written. The new cultural theorists begin with a deep engagement with culture and build the theory from there. Culture gives us a common vocabulary, a shared set of experiences on which to build. If Vasanti is unable to access works that the whole world knows⁷¹ she may be excluded from cross-cultural discourse.⁷²

Does someone like Vasanti find time for play—described by Nussbaum as one of the ten basic capabilities?⁷³ Perhaps Vasanti enjoys Bollywood films. Some of the works that Vasanti might learn from or enjoy may be priced out of reach or unavailable in her vernacular language, Gujarati. If she enjoys big-budget film productions, Vasanti might want a copyright law that enables producers to invest capital into a film and earn a reasonable rate of return. She might also want to enjoy rights to critique the work. Vasanti must be engaged in creating her world. She might well want the ability to speak back, through cultural works themselves—perhaps to criticize many Bollywood films for their disproportionate attention to the lives of the very

70. The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) imposes minimum standards of intellectual property protection and enforcement on member nations. WORLD TRADE ORG., UNDERSTANDING THE WTO 39 (5th ed. 2011).

71. SUNDER, FROM GOODS TO A GOOD LIFE, *supra* note 4, at 94.

72. See NUSSBAUM, *supra* note 14, at 7 (describing how the lack of access to historical, economic, political, and literary works can cut an individual off from a full understanding of a culture).

73. *Id.* at 34.

rich or their depiction of women like her. As Foucault famously noted, culture can be disciplinary, seeking to confine freedom and identities.⁷⁴ So too is culture a tool for reform; cultural revolution results from people seeking to transgress their cultural boundaries.

Vasanti is part of a global copyright order where any creative work automatically receives copyright protections across most of the world. Perhaps there should be market segmentation, allowing for cheaper or even free works to be made available to Vasanti—perhaps through labeling—and more expensive versions to wealthier individuals.

Cohen is concerned with flexibilities in new technologies that allow her to manipulate cultural works—are these technologies available to Vasanti? Vasanti's access to capability-enhancing tools (from libraries to the Internet) in turn affects her capacity to create and contribute to our global cultural heritage. Her potential to be a creator of intellectual works, themselves protected by fair intellectual property laws, might even offer economic value for her and her family.

C. *Objections*

There are two principal objections to the idea of expanding our methodological inquiry beyond economics and our normative vision beyond incentivizing creativity. The worry about methodological pluralism is that it complicates the analysis too much to be useful. A similar worry attends normative pluralism—but with an additional concern that to entertain values other than efficiency is to authorize the dramatic expansion of intellectual property rights. We consider these concerns here.

Too Complex. The elegant simplicity of the syllogism that more property rights yields more creativity,⁷⁵ however, leads to substantial error. Cohen worries about “legal scholars’ reluctance to engage culture in its own right, without the filters supplied by simplistic economic models or by more complex models derived from the life sciences.”⁷⁶ Recognizing the myriad of variables involved in the creative process will expand our intellectual creativity policy making beyond simply the copyright term and scope to involve issues such as the creative environment, the availability of existing cultural work for commentary and manipulation, and the freedom of

74. See generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (trans. Alan Sheridan, Vintage Books, 2d ed. 1995) (1975) (constructing a theory of society that links the creation of the modern penal system to the rise of enlightenment thinking and illustrating that the existence of society is inherently disciplinary).

75. We recognize that many scholars have pointed out the economic value of the public domain, so economic analysis does not necessarily lead to maximalist copyright. Yet, important strains of the economics approach still exhort more protection. More fundamentally, even recognizing the public domain's economic value is not sufficient, as we argue. Both copyrighted works and the public domain have non-economic value.

76. COHEN, *supra* note 1, at 24.

expression. As Cohen points out, we create within physical environments that interact with our intellectual energies in often unexpected ways.

It is indeed daunting to consider the bewildering complexity and irrationality of culture, history, and psychology. Yet, it only makes sense to economize on theory if the results will not be too far off, if the omitted details are largely unimportant. Paul Krugman describes this as “mistaking beauty for truth.”⁷⁷ As we have written elsewhere, “[I]f our move [to add additional values to intellectual property decision making] adds complexity, it is just the complexity necessary to get things right. *Narrowing the calculus to ease the calculation will likely lead to the wrong answer.*”⁷⁸ As John Law writes, “If this is an awful mess . . . then would something less messy make a mess of describing it?”⁷⁹

Too Much Intellectual Property. Many liberal theorists of intellectual property rights worry that to entertain values other than efficiency is to authorize the dramatic expansion of intellectual property rights. We believe that the additional normative concerns provide resources to limit that expansion. The economic rationale counsels nearly boundless expansion as long as it can be justified by some (even implausible) claim that more property rights induce more creativity. A pluralist account of intellectual property might counsel restraint in expanding rights. Consider a real world instance of this: in England, an appeals court “relied on human rights law to establish a compulsory license allowing a paper to publish a memo of a secret meeting with Prime Minister Tony Blair, despite claims that it would infringe copyright.”⁸⁰

Conclusion

How should we think about the domain of human life subject to copyright? Should we focus exclusively on information and other transaction costs, free riding, optimum terms, and remuneration? Or should we include concerns such as inspiration, desire, emotion, predicament, necessity, anger, joy, hunger, ennui, anomie, network, bodies, children, death, play, and love?

Cohen’s book marks a major effort to expand the vocabulary and concepts of intellectual property. We celebrate this effort. Scholars should seek to make intellectual property law more human.

77. Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 2, 2009, <http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html>.

78. Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls’s Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563, 577 (2007).

79. JOHN LAW, AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH 1 (2004).

80. Chander & Sunder, *supra* note 78, at 578.