

Christopher Buccafusco & David Fagundes

Chicago-Kent College of Law  
565 W. Adams St.  
Chicago, IL 60661  
cbuccafusco@kentlaw.iit.edu

Southwestern Law School  
3050 Wilshire Blvd.  
Los Angeles, CA 90010  
dfagundes@swlaw.edu

### The Moral Foundations of Copyright Law

Law regards utility as the core organizing principle of Anglo-American copyright law. The Progress Clause expresses this aspiration in terms of a familiar bargain: We extend exclusive rights to authors only for the purpose of incentivizing them to engage in the kind of cultural production that they otherwise wouldn't. Courts repeat this admonition, emphasizing that copyrights do not vest in authors because they are a moral entitlement growing from their labor, but rather because they are a necessary financial incentive to produce original works of authorship. Our copyright law is thus supposed to revolve around tangible economic harm to authors. Exclusive rights prevent authors from being undercompensated for their efforts, and thereby preserve an optimal level of creative production.

But despite the insistence that copyright resides on cost-benefit foundations, laypeople, legislators, and even some courts appear driven by moral considerations apart from utility-maximization when facing or resolving infringement scenarios. Owners of works often frame their objections to infringement in terms of the intrinsic moral harm caused by unauthorized use. These objections arise even when the purported infringement has brought the owner no economic loss. Courts, too, frequently speak in the language of morality when deciding copyright cases. This practice persists even after the Supreme Court attempted to extirpate the morality-inflected "sweat of the brow" theory in *Feist v. Rural Telephone Service*. And legislators, too, invoke the language of intrinsic authorial entitlements when pushing for copyright expansion, despite the Constitution's exclusive focus on utility.

This is copyright's morality puzzle. The dominant, utilitarian narrative of copyright is the only one law appears to entertain, and the one it has exclusively promoted since the Progress Clause was ratified in 1787. Yet despite the century and a quarter of consistent cost/benefit language, creators, judges and legislators do not seem to have gotten the memo. Rather, each of these groups frequently invokes non-welfarist rationales for protecting owners' rights in their works (and for sanctioning unauthorized use).

What accounts for the persistence of morality in American copyright? Why do laypeople and law people alike continue to think about copyright in frameworks more reminiscent of moral

rights, rather than utility? The answer may be found in moral foundations theory (MFT). Recent research in MFT has shown that our reactions to moral issues are not a product of socialization, as is commonly believed. Rather, the research indicates that they are determined to a large extent by innate instincts. We argue that MFT provides the best explanation for the conflicts inherent in copyright's morality.

Our argument proceeds as follows. In Part I, we briefly outline the major insights of MFT. We then begin Part II by elaborating in more detail copyright's morality puzzle, and then explain how MFT makes sense of it. Finally, the Conclusion explores future directions for research as well as the implications of MFT for copyright policy and for law more generally.