More or Better? Shaping the Public Domain

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Abstract

One of the most interesting concepts that emerged from the battle over the continuous expansion of copyright law in the last decade is that of the public domain. After the public domain was identified, many authors struggled to define it, map it, locate its constitutional sources and explain its crucial role in copyright law. This important work poses a viable alternative to the pro-property or commodification of information alternative. The public domain project reminds us that at least under an instrumentalist view of copyright law, the public domain is not merely—or rather should not be—an unintended byproduct, or “graveyard” of copyrighted works, but rather a playground for speech-experiments. Copyright is one of the main tools aimed to create the public domain. This domain is a commons, owned by all and none, a resource which we can use without asking permission. It has a crucial role in personal self-development, learning, experiencing, imagining, speaking with others, creating new works for the benefit of ourselves and wider circles, starting from the immediate interlocutor and up to the entire community. The public domain is the means and the end to “promote the progress of science”. It is where knowledge is created and where it lies, awaiting new interpretations, new applications and new meanings.

Once we accept that the public domain is not only a “negative”, we need to figure out how we would like it to be constructed. In this article I would like to add my contribution to the construction of the public domain. In performing this task, we need not ignore the elaborate political thought about freedom of speech. The public domain and free speech are two sides of the same coin. Both notions aim at constructing a communicative sphere, where people can interact with each other in various circles, whether it is an interpersonal circle, a communitarian one or a wider political circle. In this sense, both are derivatives of a political notion, which is a particular conception of democracy. Accordingly, it is useful to learn from the lessons of the free speech-copyright conflict in our task of constructing the public
domain, within copyright law. What kind of public domain are we interested in? I apply the notions of quality and quantity. These are fuzzy terms. At best, we would like to have a combination of both: we would like to construct a public domain that has more information and more speech of better quality. The article explores how these fuzzy terms interact with various theoretical justifications of both free speech jurisprudence, and then with various theories of copyright law, and concludes with tying all the ends together – examining how we can better construct the public domain
Chapter IV
More or Better? Shaping the Public Domain

Michael D. Birnack*

1. INTRODUCTION

The battle over the continuous expansion of copyright law in the last decade takes place in several and sometimes overlapping fields. The issue is fought in Congress, in the popular media and in less-popular blogs, in courtrooms and in lengthy law review articles. History, constitutional and legislative texts, economics and justice are all part of the sophisticated discourse that has emerged from these (as yet undecided?) battles. Many ideas and concepts – some new and some renewed – have emerged from the debate over the contours of the legal right which enables an author (or owner) to control most of the uses of his or her work by others. One of the most interesting concepts that emerged is that of the public domain.

After the public domain was identified,1 many authors struggled to define it,2 map it,3 locate its constitutional sources,4 and explain its crucial role in copyright

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law. This important work poses a viable alternative to the pro-property or commodification of information alternative. I shall call this academic endeavor the **public domain project**.

The **public domain project** juxtaposed the public domain with the commodification of information. The project reminds us that at least under an instrumentalist view of copyright law, the public domain is not merely – or rather should not be – an unintended byproduct, or ‘graveyard’ of copyrighted works, but its very goal. I subscribe to this project and in this article will take it to be the baseline: copyright is one of the main tools aimed to create the public domain. This domain is a commons, owned by all and none, a resource which we can use without asking permission. It has a crucial role in personal self-development, learning, experiencing, imagining, speaking with others, creating new works for the benefit of ourselves and wider circles, starting from the immediate interlocutor and up to the entire community. The public domain is the means and the end to ‘promote the progress of science’ (in the US Constitution’s formulation), or for ‘the encouragement of learning’ (in the language of the Statute of Anne). It is where knowledge is created and where it lies awaiting new interpretations, new applications and new meanings. It is not a graveyard, but a playground for speech-experiments.

In the daily application of copyright law practitioners and courts naturally focus on the rights accorded to authors and their scope and hence the public domain is often viewed as the ‘negative’. One of the main goals of those who are engaged in the public domain project is to ‘reify the negative’: only if ‘it’ has a name, an organizing concept, can it be part of the copyright discourse, and not its residue. Once we accept that the public domain is not only a ‘negative’, we need to study its legal roots, and more so, to figure out how we would like it to be constructed. ‘We’ in this sense, is ‘we the people’, for whom copyright law was designed. The public domain project geared up with definitions; it is inspired by theories of copyright law and its constitutional history. It should also be aware of various unintended consequences, such as its distributive affects. These are the foundations. Constructing the public domain is a much-needed task and much of the scholarly work conducted in this field

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in recent years accumulates to form such a construct. In this article I would like to add my contribution to the public domain project. What kind of public domain are we interested in? I will be applying the notions of quality and quantity.

Before I flesh out some of the fuzziness of the twin terms of quality and quantity, I would like to draw a parallel of the commodification-public domain conflict: it is the conflict between copyright law and freedom of expression (or freedom of speech, or the First Amendment, which will all be used interchangeably). The conflict between copyright law and the principle of free speech is apparent to some, mostly to those who are engaged in the public domain project, but not to courts, especially not in the US. American courts have routinely rejected the argument that there is a conflict between copyright law and free speech.\(^\text{12}\) This persistent rejection has accumulated into a denial of the conflict. In previous work I explored some aspects of the free speech/copyright law interface, including an attempt to find out why courts denied the conflict.\(^\text{13}\) One of the explanations draws on a distinction between an internal and an external conflict. I argued that instead of claiming that there is no conflict, we should in fact identify two conflicts. One is between copyright law and freedom of expression, portrayed as a conflict between two separate legal fields, each deriving from distinct theories (and in some places, from distinct constitutional sources). This is the external conflict. The other is an internal conflict, within copyright law. It is the tension that lies and motivates the entire copyright scheme, at least under an instrumentalist view thereof: the conflict between the public’s long-term goal of enhancing creativity and the individual author’s short-term interest in maximizing his or her gains by executing control over the work. This is the internal conflict. Courts tend to mix the two, and especially they tend to internalize the external conflict into the internal one. One of the reasons they hang on in justifying the internalization is that both copyright and freedom of speech share the same goal (‘the shared goal argument’), or as the US Supreme Court stated, ‘copyright law [is] the engine of free expression’.\(^\text{14}\) However, once free speech concerns are internalized, courts tend to downplay the role of free speech. This is one of the ways by which the (external) conflict is denied.

In our task of constructing the public domain, we need not ignore the knowledge we gained in political theory, namely, the elaborate political thought about freedom of speech. The public domain and free speech share the same goals.\(^\text{15}\) In fact, I would


\(^\text{14}\) ‘In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression’ – Harper & Row v. Nation Publishers, 471 U.S. 539, 558 (1985).

\(^\text{15}\) Zimmerman makes a convincing argument that the first amendment mandates the public domain. See supra note 4, at 325.
argue, they are two sides of the same coin. In the public sphere, where the parties are the state and the citizen, we often assert the principle of freedom of speech and when we address the private sphere, we often turn to the market and the role of the public domain therein. But the two concepts – the public domain and the free speech principle – are very close to each other, even if their particular conceptions might differ. This argument requires much elaboration, which I will not undertake here, but for a few rather dense comments. In a nutshell, both the public domain and the principle of free speech construct, or aim at constructing, a communicative sphere, where people can interact with each other in various circles, whether it is an interpersonal circle, a communitarian one or a wider political circle. In this sense, both the public domain and the idea of freedom of speech stem from the same source. They are both derivatives of a political notion, which is a particular conception of democracy. Both concepts are simultaneously liberal and social in nature, in that they attempt to facilitate the personal and political discourse, so to serve both the individuals who take part therein and the polity to which they belong. The public domain and freedom of expression vary in their legal meaning. The public domain allows a privilege to use expressive raw material, whereas the legal meaning of free speech is to provide the speaker with a negative liberty, which is not to be interfered with. Obviously, the assumption about the close connection of the public domain and the free speech principle can be debated. I would ask the reader to suspend the doubts, as I believe the argument that follows will reinforce this claim.

If, then, the public domain and freedom of speech share a close connection, in shaping the public domain we can learn from the sophisticated discourse on freedom of speech. Accordingly, there is no need to reinvent the wheel and it is useful to learn from the lessons of the free speech-copyright conflict (the external conflict) in our task of constructing the public domain, within copyright law. In this I take seriously the (American) judicial internalization of the conflict, which points to the shared goal of copyright law and of free speech theory. The public domain represents our free speech concerns within the realm of copyright law.

Back to the tools of the discussion that will follow: quantity and quality. These are fuzzy terms. At best, we would like to have a combination of both: we would like to construct a public domain that has more information and more speech of better quality. This is also true of most physical and virtual assets, such as our property. It is also true of more general political ideas, such as the market, whether that of goods or that of ideas. The terms ‘quality’ and ‘quantity’ are strange to the economic discourse, but I think they can be applied with some necessary modifications. In the

16. I would further argue that the public domain is an off-spring of the idea of progress, which was a dramatic and lively idea during the eighteenth century, and thus served as part of the intellectual background of the American constitutionalization of copyright law. The idea of progress and the First Amendment also share a common intellectual cradle. For further discussion, see M.D. Birnhack, ‘The Idea of Progress in Copyright Law’, 1 Buffalo Intellectual Property L.J. 3-58 (2001).

commercial market quantity is sometimes translated into ‘growth’ and quality is sometimes translated into efficiency. In the marketplace of ideas quantity is translated into volume of speech and quality is translated into the idea of a robust discourse, one that can produce the truth, or informed decisions of the polity. Each term can be applied in relation to various subject matters: to content, to speakers/authors, to listeners/consumers. There are related difficulties with these terms, such as who determines the quality and according to which criteria? As we proceed in our exploration, I shall try to unpack these variables.

However, in a world of limited resources, quantity and quality often find themselves on rival sides of the fence and are incommensurable. We must often choose whether we prefer the one at the expense of the other. In the context of information and speech, we often have to choose whether we want more speech at the expense of quality, or are we willing to settle for somewhat less (‘how much less?’) information, but of better quality.

The conflict between the ‘more’ or ‘better’, i.e., between quantity and quality, is not unfamiliar in close contexts such as the (old) media. Commercial television channels are driven by the need to sell as many advertisements as possible, and hence tend to adopt the content to fit the commercial atmosphere. As a result, many such channels tend to address the lowest common denominator, so as to attract as many viewers as possible. In other words, they give up quality, so as to attract quantity. We end up with 500 channels, and nothing to view.18

In the pages that follow, I examine how quality and quantity interact first within the free speech theory and then within copyright law. Recall that free speech has a close relationship to the public domain. Hence, the external copyright law/free speech conflict is mirrored within copyright law by the commodification/public domain conflict. Free speech theory includes various strands, some of which presuppose or implicitly endorse either quality or quantity. To the extent that these variables conflict with each other, each of the various strands has a preference as to which is preferable. This preference is extended to the public domain. Copyright law, in as much as it is understood to reflect a market-based theory prefers quantity and expresses a disbelief in quality. This preference is instrumental: quantity, so the supporters of the competitive market argue, will produce quality. The latter cannot be promoted on its own.

The table is now loaded with complex concepts: copyright law, the public domain, commodification of information, and also freedom of speech. The task of this chapter is to sort these out, so to learn how we can construct the public domain in the best possible manner. This article will proceed in the following way: the next section discusses free speech jurisprudence in order to figure out whether its basic principles prefer (either explicitly or implicitly) one of the above discussed variables

to the other. The third section will undertake the same mission regarding copyright law. The fourth section will tie the conclusions from the previous two sections.

2. SPEECH: MORE OR BETTER?

This section explores the underlying and hidden assumptions of the free speech principle to the variables of quantity and quality, under various theories of free speech. The conclusions will serve us later in defining the public domain, which we are constructing.

2.1. TWO PARADIGMS OF THREATS TO SPEECH

Free speech is considered to be a fundamental human right. It is listed in most constitutions of liberal democracies and even if not enumerated it is nevertheless recognized and protected. The paradigmatic understanding of the principle of free speech is the governmental one: it is considered to be a shield in the hands of the citizen in the face of a censorial government. It is a somewhat romantic view, but it is still a valid one. There are numerous theories that offer explanations for this fundamental human right. Some focus on the individual, others on the polity. Some focus on a particular value (tolerance, for example) or a social interest (letting steam off).

However, limiting the First Amendment to the governmental paradigm would be unjustifiably narrow. Many now realize that free speech is threatened not only by governments, but by private entities as well. Call this the corporate paradigm. When in a remote town there is only one newspaper, one radio station and one TV station and all are owned by the same person or corporation, then the principle of free speech in that town is likely not to deliver, even though the government does not interfere. If most users use Google to find out the best item in the ocean


21. See T. I. Emerson, The System of Freedom of Expression, New York, Random House, 1970, p. 7. Freedom of speech is more than a legal rule. It deeply affects the political culture of a given society. It defines the private and the public spheres: the citizens’ sense of liberty, and the political discourse. Hence, we may say that the principle of free speech has an educational role, and a historical one too. But these are all other parts of the story.

22. This would be repeating at least one of the Lochner sins: we should not immunize the ‘private’ realm from scrutiny just because it regulates the relationships between citizens, rather than the relationship between the government and citizens. There is nothing novel in this view: this is how the Supreme Court explained its interference in the question of libel, in New York Times v. Sullivan, 376 U.S. 254 (1967).
of online information, but Google eliminates some items due to their content,²³ or changes the PageRank of some sites,²⁴ then free speech is endangered, even though the government did not tell Google what to do or not to do. When library patrons’ choice of access to information is limited by technology designed to filter ‘obscene’ or ‘indecent’ material, then free speech is not fully accomplished.²⁵

Unlike the governmental paradigm, the corporate paradigm is not always conceived as an issue of free speech. This is especially so with our American friends.²⁶ The sources of this focus on the state and the refusal to view market-based limitations as a problem of free speech requires a research of a different kind – a historical, social and cultural one, and I will not attempt to do so here. Those who focus on the first, governmental paradigm, designate the government a limited role: it should not interfere and if it does, it should be in an indirect manner aimed to achieve other goals,²⁷ or be narrowly tailored to serve a compelling government interest.²⁸ Free speech is portrayed as the counterpart of the Hohfeldian duty not to interfere: it is the right not to be interfered with. Free speech is thus a negative right.²⁹

Those who are not obsessed with the idea that the government is the only source of all evil, search for threats to the principle of free speech everywhere. They offer a much richer concept of free speech. Once they identify a threat to speech, they wish to amend it, no matter whether the threat emanated from the state or from a private entity. The solution might be to take various measures and one of these is governmental interference. Under this model the government is designated an active role. It might be called upon to amend market failures. This can be in the form of antitrust laws, preventing one corporation from controlling all informational outlets in a community or creating a public forum, or supporting public, non-commercial broadcasting. It might be in the form of imposing limitations on campaign financing,

²³. See D. McCullagh, ‘Google Yanks Anti-Church Sites’, Wired (March 21, 2002), available at <www.wired.com/news/politics/0,1283,51233,00.html> (Google removing links to anti-Scientology sites upon copyright infringement notification, under the DMCA); or see Google’s explanation for not removing anti-Semitic results for the search ‘Jew’: <www.google.com/explanation.html>.
²⁷. This idea is reflected, for example in the American distinction between regulation of speech and regulation of behavior. The Supreme Court developed a test to identify the regulation which aims at the behavioral parts of an act, even though it might affect the speech elements therein. See United States v. O’Brien, 391 U.S. 367 (1968). Examples are flag burning (Texas v. Johnson, 491 U.S. 397, 404 (1989) and recently functional code (Universal Studios Inc. v. Corely, 273 F.3d 429 (2d Cir. 2001)). This distinction has yet to respond to the Speech Act theory of Austin.
²⁸. See e.g. Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783 (2004).
or imposing mandatory rights of access, as in the fairness doctrine which used to be part of the American landscape, but was later abolished.  

The two paradigmatic views of free speech and of the government’s role – the governmental paradigm and the corporate paradigm – correspond to different conceptions of free speech. The next sub-section will explore various conceptions of free speech, in order to find out their underlying assumption or bias towards the variables of quantity and quality.

2.2. FIRST (AMENDMENT) PRINCIPLES

This is neither the place nor there is a need to rehearse and survey the numerous free speech theories. Accordingly, what follows is a modest attempt to figure out how the quality/quantity dimension acts within the main relevant theories. Roughly speaking, free speech justifications can be divided into two groups: those that view the ideal of free speech as an end and those that view it as a means to achieve another goal.

The various theories that focus on the individual speaker, which belong to the first group of justifications, are less relevant here, as they view the importance of speech and of maintaining a regime that protects the freedom to speak, in the actual act of speaking. Whatever speech a person finds to be beneficial to him or her should be protected. Rodney Smolla captured this idea eloquently, in writing that ‘the self-realization that comes from speech is qualitatively different from other forms of pleasure-seeking’, and the difference is that ‘the fulfillment that comes from speech is bonded to man’s capacity to think, imagine and create.’ Accordingly, what matters is that everyone who so wishes can speak. The quality of the speech is measured only according to the speaker and never on the basis of its content. Content is a matter to be determined by the speaker. Furthermore, the overall quality or quantity of the speech is simply a matter for other considerations, not for the theory of free speech as offered by these scholars. Accordingly, the discussion that follows focuses on the second group of justifications, those that view the principle of free speech in an instrumental manner. These are the ‘Search for the truth’ theory, associated with John Stuart Mill; ‘self government of the sovereign people’, a theory associated

32. Ed Baker focuses on ‘expressive liberty’, and argues that the state is required to respect the person’s autonomy. For his discussion in the context of the copyright-speech relationship, see: C.E. Baker, ‘First Amendment Limits on Copyright’, 55 Vand. L. Rev. 891-951 (2002).
34. Later on I will juxtapose some theories of free speech with some theories of copyright law, but will omit the deontological theories. This does not mean that under these conceptions of either legal field there is no conflict; to the contrary. See Baker’s analysis, supra note 32. However,
with Alexander Meiklejohn, and contemporary theories, which rely on theories of democracy and celebrate participation and/or deliberation.

2.2.1. The Search for the Truth

This pervasive rationale of free speech is committed to the quantitative dimension: it strives to assure that every speaker and every expression enters the marketplace of ideas. Quantity here refers both to speakers and to content of speech. This commitment, though, is instrumental. It is the best way, so the theory holds, to produce the best \textit{quality} of speech, measured by one criterion only – the truth.

The origins of the ‘search for the truth’ theory, often referred to as the ‘marketplace of ideas’ theory, is outlined in John Stuart Mill’s famous essay \textit{On Liberty}, though credit belongs to John Milton. It is the argument about the ability of the marketplace of ideas to produce the truth. Mill established it on the fallibility of decision-makers—especially the state, which might misjudge the truth to be false. Instead of the government, only the market can produce truth. Freedom of speech marks the line between the market and the government and forbids the latter to cross that line. Thus, the principle of free speech is an instrument to achieve truth.

The task here is to examine the construction of the public domain under the quality-quantity parameters.

\begin{itemize}
\item \textbf{36.} See J. Milton, \textit{Areopagitica} (1640), Santa Barbara, Bandanna Books edition, 1992, at pp. 20, 32, 42. Milton’s argument, however, was aimed at licensing only, i.e., pre-publication restraints only. Post-publication punishment did not raise any problem in his view. See id. at pp. 43-44.
\item \textbf{37.} Mill, \textit{supra} note 35, at 20-36. Other reasons are that even erroneous opinions might contain a portion of truth (at 46), that truth requires the false opinion as a background for sustaining itself (at 36) and that without a background of false opinions, the truth might become dogmatic (at 40).
\item \textbf{38.} This rationale has been criticized on several grounds. One critique is that truth is relative and not objective. A possible answer to this is that whatever the market produces is the truth. Schauer notes that this answer begs the question, for it does not explain why it is this process that is preferable (\textit{supra} note 31, at 20). Sunstein makes a similar point: C.R. Sunstein, \textit{Democracy and the Problem of Free Speech}, New York, The Free Press, 1993, p. 25: If the process leads to an objective truth – Sunstein asks how exactly the process occurs. If it creates (a relative) truth, he asks for a description of the preconditions of a market which would be capable of so doing. Another possible answer is that ‘the value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself’ – W.P. Marshall, ‘In Defense of the Search for Truth as a First Amendment Justification’, \textit{30 Ga. L. Rev.} 1-39 (1995), p. 4.
\end{itemize}
Millian rationale was incorporated into US free speech jurisprudence in Justice Holmes’ famous dissent in *Abrams v. United States*:39

‘But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test for truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.’

The rationale is pervasive in cases where the government wishes to regulate speech. The marketplace demands a free flow of information without any imposed inhibitions. It should be a place of pure laissez-faire. The rationale is indifferent to the *quality* of the speech. This indifference is deliberate. It derives from the skepticism in government’s ability to distinguish true from false: Government cannot determine ‘good speech’ or ‘bad speech’. This is one of the sources of the American constitutional doctrine of content-neutrality.40 In a 1994 case, the Supreme Court stated that –

‘Laws of this sort [content-based regulation, M.B.] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions ‘rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.’”41

Of course, those who hold this view are likely to be interested in having a better public discourse, but they deliberately blind themselves to the content of the speech and its qualitative aspect. The marketplace, they believe, will produce the truth and hence the better quality of the discourse.

One result is that the marketplace of ideas allows repetitions of speech. The government would not be entitled to silence someone, or prefer one speaker to another based on the fact that the second speaker’s speech has already entered the marketplace. Once speech is involved, i.e., an idea, the government is prohibited from interfering with it. The reason is, again, the infallibility of the government: it is not for the government to say whether an idea as uttered by A is the same as the idea uttered by B. This has an obvious implication for copyright law.

It is also clear that for the market to function better, we should be interested that *all* the opinions and ideas that strive to take part in it will find their way inside.

So the rationale is interested in maximizing the quantity of speech. Barriers on access to the marketplace of ideas should be removed. But note, it is a marketplace of ideas. Accordingly, the rationale strives to recognize ideas and distinguish them from non-ideas. Any asserted speech that is not an ‘idea’ does not contribute to the emergence of truth and thus is unworthy of the protection guaranteed by the First Amendment.\footnote{This is a categorical approach to the subject matter of free speech, articulated by the Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). The Court listed a few categories of expressions, and explained: ‘such utterances are no essential part of any expression of ideas….’ The full list of the ‘low level’ speech includes ‘the lewd and the obscene, the profane, the libelous, and the insulting or “fighting words”’ – id. In other words, the marketplace rationale tries to separate ideas from non-ideas. This attempt is well illustrated in the area of obscenity. For sixteen years the Court struggled to define ‘obscenity’: Roth v. United States, 354 U.S. 476, 484 (1957) defined an expression as obscene if it is ‘utterly without redeeming social value’. But Miller v. California, 413 U.S. 12 (1973), redefined obscenity (a definition which is still valid today – see Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)). Roth’s test was replaced with ‘Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value’. The ‘utterly without’ value was replaced with the less rigid demand of ‘lacks serious value’. The result is that more material is considered obscene under Miller, than under Roth, and if obscene – it is not an ‘idea’, and not protected by the First Amendment. Justice Brennan, who delivered the opinion of the Court in Roth dissented in this case as well as in a companion case, and frankly admitted giving up the task of defining obscenity. See Paris Adult Theater v. Slaton, 413 U.S. 49, 83-84 (1973).}

Interestingly, the metaphor of the ‘marketplace of ideas’ is so often used, that we do not pause to question it. Once we do, it is obvious that it reflects the quintessential commodification of information: it applies the competitive market theory, a-la Adam Smith, to intellectual products.\footnote{See also Schauer, supra note 31, at 19-20.}

\subsection*{2.2.2. Democracy}

A second public-oriented rationale for freedom of speech aims even more directly at the political realm than the marketplace of ideas rationale. It is the understanding that free speech is crucial for maintaining – at least – and assisting in nurturing and flourishing – at most – democracy. Once understood as an inseparable part of democracy, the question becomes, what is the best conception of democracy? Obviously, this is a fundamental issue of political science. For our purposes here, I shall examine two main answers: a majoritarian conception of democracy and a deliberation-participation conception.\footnote{Emerson bundles the two together, when he speaks of ‘participation in decision-making by all members of society’ – see supra note 21, at 7. Both versions find an authoritative anchor in Brandeis’ concurrence in Whitney v. California, 274 U.S. 375 (1927) at p. 375.}
Self Government

The first to articulate a coherent and influential theory of free speech based on a democratic concept was Alexander Meiklejohn. His basic premise was the principle of self-government: it is ‘We, the People’ that govern, and government derives its powers from the consent of the people. This notion of the people’s sovereignty should be understood on the background of the alternative: ruling by monarchs, aristocrats and other non-elect rulers. This notion of self-government finds support also in James Madison’s words:

‘A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power knowledge gives.’

Based on this premise, Meiklejohn explained the principle of free speech and modeled it after the New England Town Meeting. The meeting is open to all: ‘every man is free to come. They meet as political equals.’ It convenes to discuss

45. See A. Meiklejohn, ‘Free Speech and its Relation to Self-Government’ (1948), reprinted in Political Freedom: The Constitutional Powers of the People, New York, Harper Brothers Publishers, 1948. The rationale has had great influence on American free speech jurisprudence. Justice Brennan’s opinion for the Court in New York Times, 376 U.S. at 270-271 enriched us with the observation/command, that free speech cases should be considered ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ Against this background, the Court affirmed the right to criticize public officials. This was recognized as an almost literal incorporation of Meiklejohn’s thesis: see H. Kalven, A Worthy Tradition: Freedom of Speech in America, New York, Harper & Row, 1988, p. 67. In a subsequent case, the Supreme Court stated that ‘[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government.’ – see Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Justice Brennan himself hinted that New York Times echoes Meiklejohn’s theory – see W.J. Brennan, ‘The Supreme Court and the Meiklejohn Interpretation of the First Amendment’, 79 Harv. L. Rev. 1-20 (1965), p. 18. See also Justice Thomas’ dissent in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) (affirming Buckley v. Valeo and its permission to restrict contributions to political campaigns). He writes that ‘The founders sought to protect the rights of individuals to engage in political speech because self-governing people depend upon the free exchange of political information. And that free exchange should receive the most protection when it matters the most – during campaigns for elective office.’ – id. at p. 917.

46. Meiklejohn, supra note 45, at pp. 9-19.

47. See C. Sunstein, ‘Free Speech Now’, 59 U. Chi. L. Rev. 255-316 (1992), pp. 256-257. In this sense, it is akin to the eighteenth century’s cry for equality: the French citizens who took over the Bastille in the name of ‘liberty, equality and fraternity.’ For them, ‘equality’ meant self-government, not equality among people in the way we interpret the Equal Protection clause of the Fourteenth Amendment today.


49. Meiklejohn, supra note 45, at p. 24. This model and the extent to which it is applicable to the vast and populous modern state is one ground of critique of this theory. See Schauer, supra note 31, at p. 38, 43.
political issues and to reach decisions on public policy.\(^50\) This is a political arena, and its final aim is ‘the voting of wise decisions.’\(^51\) Freedom of speech is required to assure the effectiveness of the process, so that the governed/governing citizens are informed (‘they must know what they are voting about’).\(^52\) Without freedom of speech the political process will fail.

Much can be said (and indeed, has been said) about this rationale, but here we are interested in the dimension of quality/quantity. The purpose of the town meeting and of the political process in Meiklejohn’s view is to produce an informed decision. Naturally, we would be interested that the political process produces the best possible decision and we may assume that a prerequisite for the best decision is having the best information possible and the best views heard. Hence, the rationale declares a clear interest in the quality of the public discourse. We may further assume that diversity enables various ideas to be tested – a notion borrowed from the marketplace of ideas rationale – and so the self-government rationale is interested also in the quantity of the speech.

Meiklejohn’s interest in the quality of the political debate was not translated into a clear prescription. He wrote that the government can, and ‘has a heavy and basic responsibility to promote the freedom of speech’, but this is by means of education, by providing information and the like,\(^53\) not by direct intervention. There seems to be only one place where the self-government rationale is more willing to intervene, but Meiklejohn did not say how this intervention can or should be carried out. This is the case of repetition. The self-government rationale resents repetitions. A town meeting – or a political process – would be better off if ten people expressed ten different views, rather than expressing the same idea ten times. Meiklejohn called such a repetition a waste of time, and explained that, ‘what is essential is not that everyone shall speak, but that everything worth saying shall be said.’\(^54\) This resentment towards repetitions reinforces the interest in the quality of the debate, even at the expense of disappointing some speakers who have nothing new to say. It is a preference of quality to participation. But again, Meiklejohn did not clarify if this resentment to repetitions allows interference to stop them.

### 2.2.3. Participation

Contemporary theories of democracy build on Meiklejohn but hold a deeper or wider notion thereof. Our understanding of democracy might include more than self-government that is exercised by the casting of a ballot. We might understand

\(^{50}\) Meiklejohn, supra note 45, at pp. 24-26.
\(^{51}\) Id. at p. 26. Later on, Meiklejohn reaffirmed his emphasis on the electoral aim of the process. See id. at 97 (1960) (citing Art. I, § 2, cl. 1 of the Constitution).
\(^{52}\) Id. at p. 26.
\(^{53}\) Id. at pp. 19-20.
\(^{54}\) Id. at 26.
the political process as a ‘collective self-determination’\textsuperscript{55} or as a ‘deliberative democracy.’ This is the view that self-government in a democracy is composed not only of the momentary act of voting, but also of what happens in between elections; that the ongoing civic life is one of constant decisions, public-political and private-individual acts. A further central notion of democracy – if not the most important one – is political equality.\textsuperscript{57} This is not just the equality of citizens in the sense that no king rules the people and it is also more than Meiklejohn’s statement that the process is open to all. It is political equality in the sense that ‘the identity, the resources and the power of the speaker do not matter’,\textsuperscript{58} but what matters is only ‘the force of the argument.’\textsuperscript{59}

This richer content of what we mean by ‘democracy’ has direct implications on our current exploration. Once we are interested in the process of deliberation for its own sake, as an end and not just as an instrument aimed at producing better political decisions, the concern for the quality of the discussion is paramount. This conception of democracy declares a more explicit and vigorous interest in the quality of the discourse than the rationales we have seen thus far. Once we further insist on the relevance of political equality, we cannot ignore the fact that some markets, sometimes, malfunction.\textsuperscript{60} The markets are controlled by powerful speakers, who silence, de facto, less powerful speakers. The richer conception of democracy allows governments to interfere in the marketplace of ideas in such situations, with the goal of improving the quality of the discourse.\textsuperscript{61}

Such interference of the government in the marketplace of ideas is an anathema to the Millian rationale of free speech. The Millian objection is even stronger when the governmental interference means that the speech of some speakers is limited. The Millian rationale does not care whether the limitation of quantity is meant to enhance the quality of the debate. Thus, the participatory theory’s preference of quality of the public discourse to the quantity of speech in the marketplace of ideas needs explanation and justification. One route is to convince us that the participatory conception of democracy is better than the alternative of a majoritarian conception,

\begin{flushleft}
\textsuperscript{56} For a discussion of this idea and its shortcomings, see J. Bohman and W. Rehg (eds.), \textit{Deliberative Democracy – Essays on Reason and Politics}, Cambridge (Mass.), MIT Press, 1999; Sunstein, \textit{supra} note 38, at pp. 18-20.
\textsuperscript{58} Sunstein, \textit{supra} note 38, at p. 20.
\textsuperscript{59} Id., at p. 245.
\textsuperscript{60} For an economic analysis of the protection of free speech, see D.A. Farber, ‘Free Speech Without Romance: Public Choice and the First Amendment’, 105 \textit{Harv. L. Rev.} 554-583 (1991) (arguing that in the absence of legal protection for free speech, the market will under-produce information, and government will over-regulate it).
\textsuperscript{61} See e.g., Fiss, \textit{supra} note 55, at pp. 15-17 (arguing that ‘The call for state intervention is based … on the theory that fostering full and open debate – making certain that the public hears all that it should – is a permissible end for the state.’)
\end{flushleft}
which is, by and large, the conception underlying Meiklejohn’s theory of free speech. Such a task exceeds the scope of this chapter.62

An interest in the quality of the debate might justify taking active measures to enhance the quality of speech even at the expense of limiting the quantity of speakers. But does this mean that the interest in quality overcomes the interest in quantity? This last question is illustrated by examining the case of repetition. Repetition seems to enhance quantity, not quality. So if we are more interested in the quality of the discourse, would we allow people to repeat each other’s speech?63 Under a participatory understanding of democracy, the answer should be positive. Participation is valued per se. Quantity, translated into democratic values, means citizens’ participation by way of speech. Judith Lichtenberg advocated that free speech requires both quantity of speech and diversity, and captured it nicely in the phrase ‘multiplicity of voices.’64 How would this view respond to a situation of scarcity, when, for the sake of simplicity, only two people can voice their views, for some technical reason, but there are three people who wish to speak, two of which wish to express the same idea? Who should govern: quality or quantity? It is important to notice that quality in this situation refers to speech, whereas quantity refers to speakers. But once we switch the latter element (quantity) to refer to speech too, then it is clear that quality precedes quantity.

The idea that the state can, and indeed does have a role in improving the marketplace of ideas is not foreign to us: copyright law does exactly that. It is where the law deliberately interferes by providing incentives to produce original expression. In this sense, copyright law is indeed the engine of free expression.65 It is therefore time to turn to copyright law.

3. EXPRESSION: MORE OR BETTER?

Is there a match between copyright law’s preferences in regard of the quantity/quality variables and that of free speech jurisprudence? Before we can address this question, we need to briefly explore copyright law. This area of the law (together with other forms of intellectual property and no doubt other legal inventions) is the source of the threat to the informational public domain and perhaps it is also the place where a cure can be found.

63. Dworkin argues that the approach he advocates (the ‘discriminating approach’) demands that the ‘debate is exposed to the widest variety of ideas possible; it is not also necessary to maximize the sheer quantity of speech.’
64. See Lichtenberg, supra note 57, at pp. 113-114.
65. See supra note 14.
How does copyright law fare in this setting? Does it aim at the ‘more’ or at the ‘better’? At this early point, a series of questions arise: What is ‘quality’? Who determines ‘quality’? Can it be measured? How? And what about the quantitative aspect? Does copyright law prefer more? More authors or more works? The answers matter. An initial (and hence superficial) observation is that copyright law prefers quantity to quality. Indeed, students of copyright law learn that the quality of the work is irrelevant to the copyright protection. A three-year old child’s drawing is protected just as much as Picasso’s paintings. The difference will appear in that the first is unlikely to attract much interest other than that of the proud parents and if copied is unlikely to end up in court. But this does not mean that copyright law is indifferent to the quality of the works. Some copyright law theories are interested primarily in quality and quantity is only a means to achieve it, while other theories emphasize quantity and yet other theories are indifferent to either criteria of our examination.

Once again, the responses to the questions posed here lie with first principles. The following is inevitably a rough and instrumental sketch of some of the familiar theories of copyright, with a singular focus – it aims at exploring its quality/quantity preferences thereof. In the course of this journey, I will take a detour to examine the preferences of the ‘competitive market’ view to these variables.

3.1. AUTHOR-BASED THEORIES

One branch of copyright theories focuses on the individual author. Various and sophisticated arguments claim that an author deserves to own the creation of his or her mind due to this personal, psychological connection between the author and the child of her or his mind. The Lockean theory, as applied to intellectual property claims that the labor the author invested in the raw material makes the author the owner of the outcome, since the labor is an extension of the persona, which is now embodied in the new work. These author-based theories view copyright as a particular case of property, which in turn is interpreted to be a strong, libertarian human right. These theories are usually affiliated with the Continent, where they

66. Paul Goldstein writes: ‘Decisions about the scope of copyright’s subject matter and the reach of its rights will inevitably affect the quantity, quality, and cost of future literary and artistic works – and whether in the future, there is anything on [television] that is worth watching.’. See P. Goldstein, Copyright’s Highway: The Law and the Lore of Copyright From Gutenberg to the Celestial Jukebox New York, Hill and Wang, 1994.


are reflected in positive law, such as the doctrine of moral rights. However, our discussion here, is limited in its scope and is rather simple too.

These rationales are indifferent to the quality/quantity dimension: they do not concern themselves with their outcome beyond the reward to the author. Quality and quantity are not at all understood to be a goal of copyright law. Rather, it is the author who is located at the center of the legal attention, and whatever she creates is worth protection (assuming the conditions of the relevant theory are met, such as mixing labor etc.), no matter whether it enhances the quality of human knowledge or just the quantity thereof. In other words, quality and quantity are relevant only to those justifications of copyright law that are instrumental – those justifications that view copyright as a means to achieve a goal, even if the latter is debated.\(^{69}\)

3.2. INSTRUMENTAL VIEWS OF COPYRIGHT: THE ECONOMIC ANALYSIS

The economic analysis is familiar to students of copyright law: it begins with the nature of creative works as public goods, adds that as long as the cost of copying is cheaper than the cost of creating the original work and in the absence of a technology which can fence out potential copiers – the work will be copied. An author whose work was copied once, or assumes it might happen, may be hesitant and possibly unlikely to produce a second work, or any at all. When this occurs it is considered to be a market failure. The law is interested in promoting the creation of intellectual works, usually a goal taken for granted and not spelled out, other than in the famous US Constitutional clause (‘Congress shall have the power … to promote the progress of science …’) Accordingly, the law should intervene to amend the market failure. It does so by providing authors, or more precisely copyright owners, with adequate incentives.\(^{70}\) This analysis assumes that a proprietary control is the best incentive and that authors are motivated (at least \textit{inter alia}) by financial interests.\(^{71}\) The immediate result of such a theory is an internal tension within copyright law between the author who is awarded control over her work and the public, for whose sake the incentive mechanism was put into place in the first place.\(^{72}\)

Other strands of the economic analysis focus not on preventing potential unauthorized uses of the copyrighted work, but on the flip side of this story. Creative works are considered to have a positive externality: some of them are worth far

\(^{69}\) This means that if and when these theories are juxtaposed with the deontological theories of free speech, and to the extent that there is a conflict between them, the conflict is external rather than internal. This is closer to the European situation than to the American one. \textit{See Copyrighting Speech, supra} note 13.


\(^{72}\) \textit{See Birnhack, Copyright Law and Free Speech, supra} note 12, at p. 1292.
beyond the cost of production. The benefits of a work are difficult to measure: how much is Shakespeare’s work worth to humankind? The right created by the law and vested with the author intends to enable the author to internalize at least part of this positive externality. A further strand offers the familiar economic analysis of (real and all other kinds of) property: in order to facilitate transactions between people, a prerequisite is that the asset at stake can be separated from others, defined, evaluated and is transferable.

There are ongoing debates about the meaning of the economic analysis, its (lack of) empirical basis, its underlying assumptions, and its implications: how should the general theoretical framework be translated into particular legal rules? For example, what does it imply as to the optimal duration of copyright protection? Here we focus on two variables: quality and quantity. The economic analysis, however we articulate it, creates incentives for producing new works and is indifferent to the use of the works thus produced. In this sense, it is looking for the best incentives to produce more works. It seems, then, that the quantitative dimension is more important than the qualitative one. But can we say that this rationale is indifferent to the quality of the works?

The answer is negative. Copyright law, under its economic analysis, does have a strong preference for the qualitative dimension. Various copyright law mechanisms are applied to make sure that the works created are different from each other. Difference, it is submitted, serves as a proxy of quality. The whole point of the incentive theory is to prevent the duplication of the same works (and this includes works that are considered to be ‘substantially similar’). Repeating someone’s expression without their permission undermines their financial rewards and undermines their incentives to create intellectual works in the first place. So the market view strongly objects repetitions of expression. The preference is apparent in various copyright law doctrines, most clearly in the requirement of originality and the doctrine of substantial similarity. As for originality, some jurisdictions settle for a technician’s labor, others require that the origin of the work is to be found with the author rather than someone (or something) else, and some require creativity. However

73. Cooter and Ulen summarize this idea: ‘Granting exclusive property rights to the creator of an idea allows him or her to appropriate much of its social value’. See R. Cooter and T. Ulen, Law & Economics, 3rd ed., Reading (Mass.), Addison-Wesley, 2000, p. 128; see also W.J. Gordon, ‘Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives’, in Elkin-Koren and Weinstock Netanel, supra note 6, at p. 149.
74. See Eldred v. Ashcroft, 537 U.S. 186 (2003), especially the dissenting opinion of Justice Breyer.
75. This is clearer in patent law, and especially the novelty and non-obviousness requirements.
76. It does, however, allow repetition of ideas. This distinction reflects the idea/expression dichotomy. Repetitions of expressions are allowed only under the fair use defense, which makes sure that the use is socially beneficial.
we interpret the requirement and its theoretical underpinnings, it is meant to assure that the work at stake is different from other works. A new work means not only that there are more works (which on its own would be a quantitative measure), but that it enriches the creative sphere. However, even once we accept that quantity is a proxy for quality, this does not necessarily imply that quality is improved. The task of so determining is left to the market. Since the economic analysis aims at creating a better functioning market, this would be a good point for a short detour and for addressing the more general question: How do markets respond to the variables of quantity and quality?

3.3. Markets

Do markets prefer ‘more’ or do they prefer ‘better’? What does it mean to have a better market? These questions might sound somewhat obscure to the (Chicago/Milton Friedman) trained (capitalist) economist. Whatever an efficient market produces is the optimal quality. And as to quantity – we are likely to hear the same response – whatever the efficient market produces is the optimal quantity. In other words, the view which holds the ideal of a perfectly competitive market, places its cards on the efficient market. Of course, this is an unsatisfactory response, on both its prongs. Efficiency needs to be defined as well. Whatever criteria we choose to define these terms will have an underlying, even if hidden, assumption as to quality and quantity. Let us inquire this line of thought.

3.3.1. Quality

Quality is something, which cannot be pre-determined. Whatever the market produces is good. This is the slogan of the economist. The point at which supply meets demand determines the price of the product, and determines the product. It might not be the best, in terms of the product’s properties: there might be an easier-to-use product, or a safer one, or a more durable one, but production costs, and hence price, would be much higher. The costs would be too high to meet the demand curve, and hence the product would not be supplied, or would be supplied only to the few who can afford the high price. Think of cars: technological knowledge today enables the production of much safer cars that will provide better protection of their passengers. Cars might be easier to use. But to produce such a car would cost more than most can afford. In addition, our preferences, risk aversion and the alternatives also determine the price we are willing to pay. So we settle for a cheaper car, which is not as safe as it should be and perhaps not as easy to use, but it is one that is affordable and preferred choice amongst the various options. The economist would say that this is the quality that

78. The normative underlying assumptions of economics, especially when applied to the law, were the subject of fascinating exchange some 26 years ago. See articles in 9 J. of Legal Stud. (1980) and 8 Hofstra L. Rev. (1980).
the market settled for and as long as the market forces were not manipulated (as in the case of a price cartel between manufacturers), this is the only ‘quality’.

In other words, the market as such is indifferent to quality. It might be, as it often is, that the government interferes with the market and requires certain levels of safety by way of setting standards. The market then internalizes this requirement and adjusts accordingly. However, we could explain this interference by the government in setting minimal standards as a correction of various market failures. Individual users lack the ability to evaluate the potential risks of certain products or to obtain the relevant information. Many, even when informed about the risks, under-evaluate them due to cognitive failures: we tend to appreciate the ‘here and now’ much more than the ‘probable’ and ‘futuristic’.

The traditional law and economic analysis is trained to identify market failures and to offer amendments, but it instructs us not to interfere with an un-failed functioning market. This implies that economic theory and hence economic analysis is neutral. This would of course be a flawed conclusion. Efficiency can be defined in various ways, some of which are incompatible with each other. These definitions reflect assumptions and claims about interpersonal comparisons, rationality of agents, distributive justice, about the possibility and desirability of quantifying that which is unquantifiable or need not be so and other assumptions. Consider for example the Pareto optimum criteria of welfare. It instructs that changes are efficient only if at least one person is better off and no one is in a worse position. Even though its initial appeal was that it eliminates interpersonal comparisons, it was later understood that it does exactly that, for example when a policy change will make one person slightly worse off and many others tremendously better off. This results in comparing the minor loss of the one person to the potential gains of the many others.


81. Think about love or misery. Economists assume that money can buy love, contrary to the Beatles, and will respond that love and other ‘positive’ emotions can be quantified as having an infinite value and hence beat all other interests at stake. Misery can be compensated for with money, and courts do that on a daily basis. A person that was injured might be happy to receive a monetary compensation ex post. But how many would agree to loose their leg for a huge sum, ex ante?

3.3.2. Quantity

Economists are naturally happy when the numbers show growth in the market: more jobs, more products, more sales, more money. Economists are willing to work hard to produce ‘more’, but it is not the quantity that is valued per se. Sometimes ‘quantity’ is a shortcut and means for other goals.

Economists often act to allow more players to enter the market. They work hard to enact antitrust laws and enforce them, so that no one is excluded from the market due to artificial barriers set by the incumbent players. Such antitrust laws might be interpreted as aiming at ‘more’ players, but in fact, they are aiming at correcting what is perceived as a market failure. Quantity is just an indication, or a shortcut, for competition. What is valued here is not participation in itself, but competition. Competition is good because it is considered to be the best operating mode of the market. It is valued because it assures us, so the economists assure us, that the market functions well. That quantity is just an indication and not a goal, is illustrated in the cases in which economists acknowledge ‘natural monopolies’. Sometimes, one is enough and is the best mode of the market. In such situations quality is achieved through minimal quantity.83

When we talk about quantity of activities, the quantity indicates and serves growth. Growth is not a neutral term. It reflects the enlightenment idea of progress, that more is better.84 Indeed, it often is. More activity in the market means that more people have jobs and more people have more money to spend or invest, and these result – though not always – in a better quality of life. In this use of the variable of ‘quantity’, it serves as a means to achieve other goals, such as quality of life. Quantity is thus an indication of quality, the latter referring not to the internal functioning of the market itself, but to the external affects of a well-functioning market.

3.4. THE DEMOCRATIC VIEW OF COPYRIGHT LAW

The economic analysis assumes that more knowledge promotes the social welfare and thus is desirable. But it is not the only possible view of the goal of copyright law. We might query the social advantages of knowledge and find out that we can answer by pointing to democratic values.

Let us look at the route this view has taken in US copyright law. The Constitution, legislators, scores of judges, scholars and practitioners have repeated the goal of copyright law: it is to promote the progress of science and useful arts. ‘Science’ is to be understood as ‘knowledge’.85 But few have paused to think what this actually

84. See Birnhack, supra note 16.
means. Why, in fact, is promoting the progress of knowledge important? Of course, it reflects an ideal of modern society that values knowledge per se. We measure progress, among other things, according to rates of literacy. We think learning treats us well. But then again, why? One answer might turn on the individual: the more we learn and know, the more we achieve pleasure and avoid misery. By knowing more we can make better judgments about what is good for us. This utilitarian view is hard to argue with (ignoring romantic views of ignorance as a blessing). But the theory of (Anglo-American) copyright law is not fixed on the individual or at least not on the individual alone. Rather, the collective lies at the core of copyright law. The good that we find in the promotion of knowledge should be evaluated according to the polity. In this sense, copyright law is to achieve a political ideal. We should be asking why is knowledge and the promotion thereof a good thing for the polity at large? The answer is that we believe that knowledge serves values that we, in a democratic society, cherish. This invites a further question: what are these values, or put differently, what is our conception of democracy?

A few scholars advocated a democratic understanding of copyright law. Neil Netanel offers a ‘democratic paradigm.’ 86 In his view, copyright law serves two functions. One is that of production and the other is a structural function. The latter means that copyright law creates and fosters an independent sector of speech, it is independent from the government. Netanel’s main concern for the fate of free speech falls within the classic governmental paradigm: that which is concerned with governmental controls of free speech. This indicates the democratic value which he seeks to protect and promote: that of self-government. This in turn indicates a specific conception of democracy (and here I depart from describing Netanel’s view): it is one of a majoritarian view. We have already seen this theory in our discussion of free speech. It is the Millian distrust in government coupled with the Meiklejohnian majoritarian view of democracy. This of course does not mean that this is all that Netanel finds in democracy. Indeed, his view includes additional values such as pluralism and diversity and participation. 88

For the purpose of the argument, I will separate the majoritarian view from the richer conceptions of democracy. What is the instruction of the majoritarian view in the shaping of copyright law? It seems that it is interested in fostering more private speech to counter governmental power. The emphasis is, accordingly, on the production and quantity of expressions. This view is indifferent to the content and quality of the speech.

Other conceptions of democracy are concerned not only with the risk of governmental abuse of power, but of any abuse of power. This is the corporate paradigm, similar to the one we have seen in our discussion of the participatory conception of free speech theory. These conceptions are guided by the Millian view that wishes to protect us not only against the ‘tyranny of political rulers’, but also against the

86. Weinstock Netanel, supra note 26.
87. Id., at pp. 288, 341, 352.
88. Id., at pp. 343, 362.
Copyright law enables not only financial advantages to its holders, but also acts as cultural control and political power. Those who hold this conception of democracy are interested in maximizing the dissemination of knowledge and minimizing control over intellectual works. This view, as proposed by Niva Elkin-Koren, draws on the political theory of Habermas and advocates that we create a deliberative sphere which is insulated from the effects of both government and market.90 Once the market affects this deliberative sphere and thus determines de facto its contents, there are immediate distributive consequences. Not everyone can participate on an equal basis. Some participants’ speech is limited, in that their ability to use raw expressive material to create their own expression is limited. Accordingly, this view focuses not only on production of knowledge (speech/expression), but on assuring its dissemination and access.91

Instead of a majoritarian view that focuses on the once-in-every-few-years elections, we can view democracy to be interested also in what happens between elections: this view holds that citizens form their political views not only immediately before voting, but in any daily social practice.92 Accordingly, the weight of the self-government principle shifts from the singular act of voting to the on-going collective deliberation. Accordingly, the public discourse gains more importance than under the majoritarian view. A robust public domain provides both the resources of such a debate and its forum.

This conception of democracy instructs us to construct copyright law in a way that would maximize citizens’ ability to participate in the collective self-government and deliberation. It is committed to preserving a robust public sphere. This means an emphasis on dissemination of knowledge and access to it, but also an emphasis on assuring that other citizens can participate in an active way in the democratic process, and not only in the role of passive listeners. Participation, in this context, means active usage of intellectual works and hence requires a rich public domain. This view is interested not only in more speech, but in having more participants and a better quality of speech, so to promote the public discourse. More and better knowledge enables us, collectively, to make better decisions about our (collective) life.

The democratic view departs from the market view on the dimension of quantity/quality. It takes a firmer position than the market view: both quantity and quality are valued per se. The political goal of enhancing human knowledge (‘promoting the progress’) and an interest in the use of the works as an inseparable

89. Mill, supra note 35, at pp. 5-9.
91. See Benkler, supra note 90.
92. See Elkin-Koren, supra note 90, at pp. 218-234.
part of their production dictates a clear instruction: the more works we have and the more speakers participate in the public discourse and the better works we have, the more we progress.

But we have to fine tune these terms, since in many cases we cannot have both the ‘better’ and the ‘more’ at the same time. The case of repetition sharpens the terms and the democratic view’s position. When a citizen repeats what someone else has already said – repeating Martin Luther King’s I Have A Dream without permission – this indeed enhances the quantity of expression, but only in a technical way. Because it is an exact repetition of the expression, it seems that it does not add new ideas. The market view would object to this repetition for it does not consider multiple, identical, expressions to enhance either the quantity or the quality of the public discourse. At first sight, it seems that the democratic view agrees: if we detach ideas from the people who hold them and focus on the former alone, then repetitions of expressions might not be considered to improve the quality of the public discourse. But if we pay attention to the speakers and not only to the speech, then their participation is valued per se. The value of participation reflects not only the value of self-government, but also that of equality: that there should be no limitations on the participation in the deliberative process. Furthermore, repetition might depend on context. Some repetitions of expressions might create new meanings, and thus new ideas, despite the use of the same form. Hence, although it seems just a duplication of speech, it is in fact new speech.

However, to deduce that the democratic view allows repetitions of expression per se is a hurried and unwarranted conclusion. The democratic view is not blind to the economic structure of copyright law, and shares much (but not all) of the ideas of the market view. It differs in that it refuses to give up other values. So the democratic view might run into a conflict: promoting participation through allowing repetitions might undermine the incentive theory. This tension reflects the internal conflict of copyright law. It is solved by copyright’s mechanisms, and especially the fair use defense. The defense is supposed to consider various factors to help us determine whether the use undermines the incentive theory, and whether it enhances the democratic values we are interested in. A democratic view would instruct us to operate the fair use defense in a manner that better reflects its basic values, and to avoid the flaws created by the market view.

4. THE PUBLIC DOMAIN AND THE MARKET

The discussion thus far makes it clear that in order for us to construct the public domain we must turn to first principles, not only of copyright law, but of free speech jurisprudence as well. Free speech jurisprudence and the public domain, derive
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from the same political theories. The first principles stem from our concepts and conceptions of the market and its role in a liberal-democratic state and from our conception of democracy and the role of the government, to name just a few main points. Hence, we should also maintain coherency when articulating the details and doctrines of copyright law and of free speech jurisprudence: each rule needs to fit the respective concept from which it derives, which in turn needs to fit basic principles. The theories of each field are not estranged. The two fields share the same theoretical cradle.94

The two fields cover, to a great extent, the same subject matter. Most of the speech covered by the free speech principle is also considered to be an ‘expression’ under copyright law. The two subject matters are not entirely congruent, as free speech law excludes some kinds of expressions (such as obscenity and fighting words in the US, or hate speech in Germany and France) which might, nevertheless, be copyrighted. Free speech also covers ideas, which are excluded from copyright protection, and of course, copyright protection is limited in its duration and is subject to some exceptions such as the fair use defense. So not all ‘speech’ is also ‘expression’ and vice versa, but most of the time, most of the ‘speech’ is also ‘expression’ and vice versa.

Given these baselines, it is time to tie the loose ends. Do our conceptions of each field, measured along the variables of quality and quantity and along the crucial issue of governmental intervention, match in a coherent manner? How do we wish to construct the public domain: do we want it to have more expressions, ideas and information, or do we prefer the domain to be a rich, diverse, and useful reservoir? In other words, do we prefer more or better? We could have blinded ourselves to our ex-ante preference as to each theory of each of the two fields, copyright law and free speech jurisprudence, ‘mix’ the various theories together and then figure out which produces the best pair. But the requirement of coherency obliterates some of these matches.95 Accordingly, I will focus on two possible pairs: firstly, what happens (or should have happened) when we hold a market view of copyright law, i.e., the familiar incentive theory and a marketplace of ideas theory of free speech? The second pair of rationales will be the democratic ones: what happens when we hold a majoritarian or a participatory view of free speech and a democratic view of copyright law?96

95. Another issue, which I will not delve into at this point, is that we might hold an eclectic theoretical view, i.e., hold simultaneously more than one theory of either free speech or of copyright law (or of both).
96. A full-scale analytical inquiry should have created a full-chart of all relevant rationales of both free speech theory and of copyright law, and examine all possible matches (or mismatches). However, I leave the discussion of the matches which involve deontological views to another day.
4.1. THE MARKET AND THE MARKETPLACE OF IDEAS

Copyright, when read under the economic analysis and free speech jurisprudence, when read under the Millian ‘search for the truth’ theory, vision the market as the best way to achieve their goals – growth and the truth, respectively. Due to the belief in the market, the dimension of quality/quantity does not raise any serious implications under this intersection. Both rationales believe that the quantity of speech or expressions should be enhanced. Both shy away from declaring an explicit interest in improving the quality of the market (either the marketplace of ideas or the market of commodified expressions). But quantity serves as a proxy for quality: both rationales wish that the market will improve, but they refuse to do anything active to promote this wish.

The two legal fields depart in the case of repetitions of speech, or what we would call ‘copying’ in copyright law terms. Copyright law insists that expressions differ from each other (this is evident in the requirement of originality and in the doctrine of substantial similarity). While the marketplace of ideas theory is indifferent to repetitions, copyright law is not. To the contrary: it strives to prevent repetitions of expressions. Repetition of ideas is allowed under the idea/expression dichotomy and some repetition of expression is also permitted under the fair use defense. The task of examining whether one expression repeats another is left in the hands of the government – as an enforcer of copyright law and as the provider of the judicial system.

In the US, understood under the marketplace rationale, the First Amendment rejects the kind of interference that copyright law requires. It is the kind of interference that the well-known case of Buckley v. Valeo overruled in the context of limitations on campaign finance: limiting speech of some elements of our society in order to enhance the relative voice of others. Buckley declared this to be ‘wholly foreign’ to the First Amendment.97

Once we are guided by a market-based analysis in both copyright law and in free speech jurisprudence, we might be able to deduce some practical instructions from the theoretical inquiry: that the government’s role should be minimized to situations of market failure; that only ‘more’ can serve as a legitimate means to promote the market, while the semi-declared goal of promoting the ‘better’ is deliberately left unattended. This view leaves us with a minimal state and with a public domain that is run like a market, and which is left to itself.

It is a busy market, with a lot of ‘noise’ and few quality filters: everything enters the market and all the expressions and speech acts compete with each other. The criterion is that of the market, which seems to prefer that which it can quantify in dollars, i.e., that which sells and if we can sell more at lower costs – it is better. The result is the marketplace of ideas and expressions we have now: there is a lot of content, but most of it is rather shallow, repetitive, and very much on the side of the mainstream. It is not the sort of speech that provokes new ideas or poses

97. 424 U.S. 1, 48-49 (1976).
any challenges to the status quo. Indeed, entertainment sells better than political discussions, sports sell better than in-depth documentaries, and sex sells more than anything else. The content is measured not on its speech-value, but on its ability to sell advertisements, so we – the citizens now transformed into consumers – can buy more. The marketplace subjects ideas to the logic of the market. Indeed, the off-mainstream ideas, the innovative ones, often stem from none, or at least less commercial settings, such as the academia, or marginalized individuals or groups.

This is the marketplace of ideas we currently have, in which the public domain is reduced to serve the market and is not considered to have a value of its own. Do we have an alternative?

4.2. **DEMOCRATIC VIEWS OF COPYRIGHT AND OF FREE SPEECH**

Under democratic views – with their many nuances – of both copyright law and of free speech jurisprudence, we need not shy away from explicitly attempting to promote the quality of our intellectual reservoir and of our public sphere. This is a situation of congruence of all the dimensions we have been discussing. Copyright law interferes in free speech, but it is explained, under its democratic view, to serve the political goal of promoting progress, which in turn is explained as a reference to our conception of democracy. So it is interference in the marketplace of ideas for the sake of improving the *quality* of the public discourse. This is exactly the kind of interference that the participatory view of free speech is interested in and allows. Assuming we would hold consistent conceptions of democracy under both legal regimes, the congruence allows us to make the *shared goal argument*: we can say that the two legal regimes do strive to achieve the same goal. We can even say that copyright is the engine of free speech. We can base the *shared goal argument* and the engine metaphor on a normative basis, void of originalist references to the history of the Constitution, or to its structure and text.

This is the most attractive picture we can draw: it rests on solid free speech theory, on solid copyright theory, achieves theoretical coherence and has clear lessons for us when shaping the public domain. Read under these theories, both copyright law and free speech jurisprudence aim at a rich and diverse public domain, in which deliberation can take place without any impediments, in which all who wish can participate, regardless of their market power. It is a public domain, which is interested in the exchange between the multiple voices and their expressions, which realizes that new ideas form when old ideas interact. In other words, this is a public domain that rejects cultural control, which is executed through the use of property rights; it is a public domain that is required by the best reading we can offer for both copyright law and for free speech jurisprudence. It is a public domain which enables new participants to join in, build on the existing work, and that acknowledges that

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98. See *supra* note 14.
repetition in a different context changes the meaning of a work, and thus should be considered a new work.99

5. CONCLUSION

Our public domain keeps shrinking, although more works than ever before are being created. It expands in quantity, but shrinks in quality. If we care about our polity and about the civil community that we share with our neighbors, we should not give up the goal of having the best public domain possible. When our free speech jurisprudence is inspired and guided by such a quest, then a robust public domain is (constitutionally) required. If we further base copyright law on this basis (a task which at least in the Anglo-American legal tradition is possible both as a matter of history and as a matter of statutory and constitutional interpretation), then we have two solid pillars on which to build a public domain which serves its purpose, i.e., it serves us as a political community, rather than serve very few (commercial) stakeholders. Governments have a role to promote this public domain. Unfortunately, they too often fail in the process.