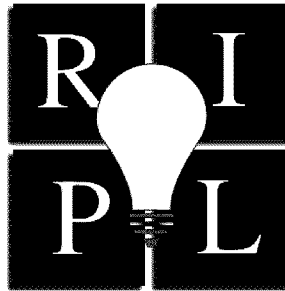


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THE AUTHOR'S RIGHTS IN LITERARY AND ARTISTIC WORKS

ALINA NG

ABSTRACT

Authorship and creativity are products of authentic human expression that the law must encourage in order for works to be produced. The commercial market for literary and artistic works encourages the creation of diverse works to meet popular consumer demand. Focus on popular demand may, however, result in works that lack social, educational and cultural value or utility. Natural law philosophy suggests that the copyright system should be an ethical and moral institution that would, in turn, promote the progress of society through authentic authorship. While economic incentives offer authors market rewards that may facilitate the creation and dissemination, economic rights represent only a portion of rights, which the copyright system should recognize in the author. This paper makes the case for the recognition of property rights in the author's creation, which originating from an author's the act of creativity and authorship, is a right to the author's literary and artistic creation that is good against the world, and, if protected, will result in authentic expressions of greater significance upon the progress of science and the useful arts in society.

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THE AUTHOR'S RIGHTS IN LITERARY AND ARTISTIC WORKS

ALINA NG*

INTRODUCTION: THE STATUTORY RIGHTS

The exclusive statutory rights under the copyright system aim to facilitate the dissemination of literary and artistic works.¹ Section 106 provides authors, as the first owner of copyright², with the exclusive right to reproduce, make derivatives, distribute, and publicly perform and display the work.³ These exclusive rights protect the positive act of making literary and artistic works available to society for the promotion of science and the useful arts.⁴ Empowered by Constitutional mandate, Congress protects these specific acts of publicly disseminating works to facilitate market commercialization of creative works by preventing the general public from exercising the exclusive rights under section 106 without the permission of the author or copyright owner.⁵ The legal entitlement to distribute and disseminate these works therefore provides an economic privilege that is exclusive to the author of a work to ensure that monetary rewards for making the work available to the public may be reaped.⁶ The entitlement is essentially a state privilege or incentive granted by Congress to fulfill a larger social and public goal.⁷ In economic analysis, these rights allow authors to recover, first, the fixed costs necessary for the first production of a work, and, secondly, the marginal costs of production in reproducing the original work for printing, binding, distribution, and dissemination.⁸

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¹ 144 CONG. REC. H 9,946, 9,951 (1998).

² 17 U.S.C. § 201(a) (2006).

³ *Id.* § 106.

⁴ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106.

⁵ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106.

⁶ 17 U.S.C. § 106; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.").

⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("The monopoly privileges . . . [Are] a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius . . ."); *Mazer v. Stein*, 347 U.S. 201, 219 (1953) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful arts.'"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

⁸ William Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–28 (1989) (stating that in the absence of copyright protection, anyone may purchase copies of works, reproduce and sell them at the marginal cost of production undercutting the initial

Without copyright protection, non-paying members of society will be able use the work without paying for it, thereby free-riding on the efforts of the author and will thereby deprive the author of the due market rewards for creating and distributing the work.⁹

The statutory rights under the current copyright system represent modern law and economics ideals that the recognition of property rights in literary and artistic works will maximize collective social welfare by allocating scarce resources in the most economically efficient way.¹⁰ The idea that granting exclusive rights in literary and artistic creations will result in more of their production is intuitive—authors will not produce if their works may be appropriated by the public, especially when the product of their creativity is essentially non-excludable and non-rival.¹¹ The conceptualization of property rights according to Harold Demsetz's famous 1967 article, *Toward a Theory of Property Rights*,¹² exemplifies the economic approach towards entitlements in literary and artistic works.¹³ Demsetz argues that privatization of common resources and the emergence of private property rights occur whenever technological and market changes affect the costs and benefits of internalizing both positive and negative externalities.¹⁴ The development of well-

costs of producing the first copy of the work.). Landes and Posner provide an excellent discussion on the basic economics of the copyright system. *See id.* at 326–44.

⁹ *See generally* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005) [hereinafter Lemley, *Free Riding*] (accounting for intellectual property law's theory of reducing externalities by recognizing property rights in goods that are essentially public goods, and the economic, legal and practical difficulties).

¹⁰ *See* Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POL'Y 867, 873 (1990) ("Property rights are a response to scarcity. Scarcity manifests itself where people envisage different uses of a resource that are incompatible."); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades and Ecosystems*, 83 MINN. L. REV. 129, 134 (1998) ("[L]aw and economics scholars note that the payoffs from property are very strongly associated with scarcity. Nobody bothers to create property for some resource that lies around in abundance."); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1138 (2000) ("[T]he most common justification for granting property rights [is] to enable market allocations of scarce resources . . .").

¹¹ *See* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (2007). Professor Smith explains that while information is considered public good because of its non-rival and non-excludable nature, creating the information and making it useful requires inputs from the creator, which are rival and "susceptible to efforts to exclude." *Id.* Intellectual property regimes, which include the copyright system, "reflect a concern that, in their absence, people will have too little incentive to engage in certain activities with respect to information, whether discovering it, commercializing it, or using it to lower consumer search costs." *Id.*

¹² Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

¹³ *See generally id.* (analyzing the role of property rights through economic theory). *See also* Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331, 331 (2002) ("The point of departure for virtually all efforts to explain changes in property rights is Harold Demsetz's path breaking article . . . [It] is still widely cited and reproduced . . .").

¹⁴ Demsetz, *supra* note 12, at 350.

If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects . . .

. . . .

defined private hunting territory among the Montagnes Indians, Demsetz hypothesizes, was the emergence of the fur trade and the need to prevent free hunting of furry animals in the forest to preserve the trade value of fur as it increased.¹⁵ Garrett Hardin's article, *The Tragedy of the Commons*, published a year later,¹⁶ alluded to the same point: unless some form of governance is used to set aside commonly held resources to private control, men, being economically rational, will seek to maximize their gains by taking out as much as possible from the commons, or putting in as much waste as possible without having to bear the cost of cleaning the commons.¹⁷ As a result of each man acting in his own self-interest, the limited resources available to all will be exhausted. One way of protecting the commons from complete depletion through overuse is the institution of private property.¹⁸

Both articles by Professors Demsetz and Hardin often provide neoclassicists with the economic foundation to support the privatization of intellectual property and the expansion of property-type rights in information and knowledge.¹⁹ The logic is straightforward: without exclusive rights in information and knowledge to protect

... [P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization. Increased internalization . . . results from changes in economic values, changes which stem from the development of new technology and the opening of new markets

Id.

¹⁵ *Id.* at 352–53.

¹⁶ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

¹⁷ *Id.* at 1244–45.

¹⁸ *See id.* at 1247 (“[O]ur legal system of private property plus inheritance is unjust—but we put up with it because we are not convinced, at the moment, that anyone has invented a better system. The alternative to the commons is too horrifying to contemplate. Injustice is preferable to total ruin.”).

¹⁹ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 314 (1996).

[T]he inherent inefficiency of the public domain in the neoclassical scheme [cause] neoclassicists [to] posit that, ideally, all scarce resources should be owned, or ownable, by someone. Scarce resources that are not subject to individual control are, in effect, deprived of their social value. . . . they will necessarily be used in ways that neither reflect nor enhance their social value. . . . [this] reflects the neoclassical assumption that ownerless resources will be exploited without regard to the externalities arising from their use.

Id.; *see also* LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 22 (2001) (referring to Hardin's tragedy and asserting that not every commons justify privatization of resources by stating that “[w]e . . . can't jump from the observation that a resource is held 'in common' to the conclusion that 'freedom in a commons bring ruin to all' Where there is a benefit from leaving a resource free, we should see if there is a way to avoid overconsumption, or inadequate incentives, without its falling under either state or private (market) control.”); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, Part I*, 18 *COLUM.-VLA J.L. & ARTS* 1, 6 (1993) (describing the trend towards enclosure to protect the information commons and stating that “[w]hile the public domain of intellectual property has not yet been exhausted or fully enclosed . . . several disturbing trends towards this enclosure have continued in U.S. intellectual property law. These trends have increasingly turned elements of what had . . . been considered common culture, ideas and information into forms of private intellectual property.”); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 *ECOLOGY L.Q.* 713, 719–25 (2007) (explaining that the law has generally treated real and intellectual property within the traditional precepts of property and cites Demsetz's and Hardin's work as having developed a utilitarian justification for real and intellectual property rights).

works from being freely appropriable by the public, creativity and innovation will cease.²⁰ Creators and inventors will not invest in the production of works, which are non-rival and non-exclusive, when the public is able to take creative works and use them without compensating those who invested in their production.²¹ By protecting the exclusive rights under section 106, Congress provides the economic incentives necessary to encourage creators of literary and artistic based content to produce works and disseminate them to society through the market within a classic utilitarian framework.²² Statutory copyright protection over creative works is therefore a cost, a temporary monopoly²³, which the public bears “to stimulate artistic creativity”²⁴ for society’s general good. As statutory rights in literary and artistic creations are state granted incentives to encourage authors to create and publicly disseminate works, the bundle of rights granted under section 106, which allows a copyright owner to perform certain actions with respect to the public dissemination of the work, appears as a culmination of disaggregated segments of legal interests in creative works.²⁵ Through the Copyright Act, a right-holder is entitled to perform the positive act of making copies of a work, creating derivatives, distributing, or publicly performing or displaying the work.²⁶ Statutory rights in literary and artistic works epitomizes Professor Wesley Hohfeld’s conceptualization of property rights as a mere collection of legally protectable interests in an object, which defines legal relations among legal actors, rather than ownership of the object itself.²⁷ Building on the conception of property as an aggregation of rights in the Hohfeldian sense, contemporary property law scholars dismiss the idea of property as a “right of ownership” or a “right in a thing” as an antiquated view, and instead embrace a fragmented “bundle of rights” view in place to represent various abstract interests to certain uses of a particular thing.²⁸ The statutory rights under section 106, rather than present a definite legal meaning to the rights of an author in his literary and artistic creation—the protectable “thing” defined as protectable subject matter under section 102—is in legal effect, a collection of ad hoc rights that an author has over what the law regards as “scarce resources.”²⁹ “Property rights” under the present copyright system, devoid of any particular legal reference to an

²⁰ See Aoki, *supra* note 19, at 6; Landes & Posner, *supra* note 8, at 326–29.

²¹ See Smith, *supra* note 11, at 1744.

²² See 17 U.S.C. § 106 (2006); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

²³ *Sony*, 464 U.S. 417 at 429; see also *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 28 (1979) (“A copyright, like a patent, is a statutory grant of monopoly privileges.”).

²⁴ *Sony*, 464 U.S. 417 at 432.

²⁵ See Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 446–56 (2009) [hereinafter Ng, *Social Contract*] (discussing the copyright system as encompassing authors, readers, and publishers/distributors, each with different legal interests).

²⁶ 17 U.S.C. § 106.

²⁷ WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 28–30 (photo. reprint 1978) (1919) (compiling Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) and Wesley Newcomb Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 26 YALE L.J. 719 (1917)).

²⁸ Tom Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69–71 (J. Roland Pennock & John W. Chapman eds., New York Univ. Press 1980).

²⁹ See *id.*

author's rights in relation to the work, suggesting of an *in rem* right, would be more appropriately classified as "economic privileges," or *in personam* rights, to conduct particular actions to make a work publicly available.³⁰

The *in rem* nature of the author's rights in his literary and artistic creations may have been lost in early development of the copyright system in the United Kingdom³¹ and in this country.³² The earliest case to address the question of the author's rights here in the United States is *Wheaton v. Peters*.³³ When Henry Wheaton, the court reporter and author of twelve volumes of United States Supreme Court case reports from 1816–1827, brought a copyright infringement action against his successor as the reporter for the United States Supreme Court, Richard Peters, Wheaton alleged that Peters's condensation of reports of the United States Supreme Court cases from the organization of the Court to the commencement of Peters's report in January 1827 without any significant abbreviation or alteration was a direct violation of the copyright in his case reports from 1816–1827.³⁴ The applicable copyright statutes at that time were the 1790 and 1802 Acts,³⁵ and the requirements for seeking the benefit of copyright protection under the Acts were for all authors of maps, charts or books to deposit the first copy of the work with the clerk's office in the district court in which the author or copyright proprietor resided,³⁶ and to deliver to the Secretary of State a copy of the work within six months after its publication.³⁷ Attorneys for Peters contended that the exclusive rights in the case reports were provided for by the Copyright statute and thereby required Wheaton, as the author, to deposit the reports as a mandatory requirement for protection.³⁸ Justice McLean, in giving the decision of the Court, stated that all rights, which an author could possess in literary and artistic works, were statutorily provided.³⁹ The constitutional mandate for Congress to "promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their

³⁰ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789–92 (2001) (discussing *in rem* versus *in personam* rights).

³¹ *E.g.*, Millar v. Taylor, (1769) 98 Eng. Rep. 201, 218 (K.B.) (holding that the author had a common law copyright, which is separate from statutory copyright); Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 843 (H.L.) (holding that the author's right at common law has been replaced by statutory copyright and could no longer co-exist with statutory copyright); Pope v. Curl, (1741) 26 Eng. Rep. 608, 608 (Ch.) (holding that an author does not part with his property in a composed letter by sending them to someone else).

³² *E.g.*, *Wheaton v. Peters*, 33 U.S. 591, 592 (1834) (holding that the author only has rights that are statutorily granted).

³³ *Id.*

³⁴ *Id.* at 593–95.

³⁵ See *id.* at 594.

³⁶ Copyright Act of 1790, ch. 15, § 3, 1 Stat. 124, 126 (amended 1802) (current version at 17 U.S.C. (2006)).

³⁷ *Id.* § 4.

³⁸ See *Wheaton*, 33 U.S. at 595. Wheaton delivered eighty copies of the reports to the Secretary of State under the Reporter's Salary Act, but not under the Copyright Act. *Id.* at 612. The Court held that the deposit of eighty copies did not exonerate Wheaton from depositing a single copy of the report under the Copyright Act. *Id.* at 667. The deposit of eighty copies did not excuse the deposit required under the Copyright Act as the eighty volumes were delivered for a different purpose. *Id.*

³⁹ *Id.* at 660–61.

respective writings and discoveries⁴⁰ allowed for the creation of a new right for a limited time.⁴¹ Congress, according to Justice McLean, by the 1790 Copyright Act did not sanction an existing property right that authors had in common law.⁴² The 1790 Act created new statutory rights to print, reprint, publish and vend instead.⁴³ The decision of *Wheaton v. Peters* set the tone for the development of future copyright jurisprudence in the United States, at least with respect to statutory rights being the only rights authors have in literary and artistic works. The decision provided the foundation for the current law and economics ideal that carefully calibrated statutory rights in literary and artistic works will fulfill a fundamentally utilitarian purpose of promoting the progress of science and the useful arts.⁴⁴ By maximizing collective social welfare through the creation of a wide spectrum of literature and art, copyright law fulfills its fundamental goals of advancing public interests through the individual efforts of authors.⁴⁵

Treating rights in literary and artistic works as originating solely from statutory provisions have a significant impact in how we think about the rights of the author. Statutory rights affirm the economic basis of the copyright system: by granting entitlements to copyright owners act exclusively with respect to creative works, the law implicitly acknowledges the use of specialized entitlements to govern the use of scarce resources in the tradition of the Coase Theorem.⁴⁶ Where the initial allocation of rights with the copyright owner provide a mechanism to internalize the costs of producing and disseminating works,⁴⁷ statutory rights also facilitate copyright markets that allow for literary and artistic works to be commercialized.⁴⁸ The possibility of reaching a bargain between copyright owners and the public for the use of creative works through market negotiations is a way to achieve economic efficiency in the Coasean sense.⁴⁹ Where the copyright market fails to allow such bargains, fair use may then facilitate non-consensual transfers of rights.⁵⁰ Central to the system of statutory copyright is the market that facilitates the establishment of legal relations

⁴⁰ U.S. CONST. art. I, § 8, cl. 8.

⁴¹ See *Wheaton*, at 592.

⁴² *Id.*

⁴³ *Id.* at 660–61.

⁴⁴ See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 138 (Stanford Univ. Press 2003) (1994) (“[T]he American culture of copyright centers on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers, a calculus that appears to leave authors at the margins of its equation.”) [hereinafter GOLDSTEIN, *COPYRIGHT'S HIGHWAY*].

⁴⁵ *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talent of authors . . . in ‘Science and the useful Arts.’”).

⁴⁶ See generally Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397 (1997) (accounting for the modern law and economics tradition set by Ronald Coase).

⁴⁷ See *id.* at 412–13.

⁴⁸ 17 U.S.C. § 106 (2006); Robert Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 4–5 (1995).

⁴⁹ See Farber, *supra* note 46, at 401.

⁵⁰ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1657 (1982) [hereinafter Gordon, *Fair Use*].

between copyright owner and the public to allow bargains for uses of works covered by section 106.⁵¹ These legal relations between copyright owner and the public embody perfectly Professor Grey's conception of property in the "modern capitalist economy" as an intangible collection of rights within an "abstract institution," which are not "rights of ownership" or "rights in things."⁵² There is no legal effect, at least to legal realists, as to whether statutory rights are characterized as "property" for they do not imply an *in rem* nature with respect to literary and artistic works.⁵³ For the purposes of legal analysis therefore, statutory rights of an *in personam* nature, attach to a person or legal entity—the author or copyright owner—rather than the work, are enforceable against a single person or small number of identifiable persons⁵⁴, and establish legal relations for consensual market bargains to occur.⁵⁵

Neoclassicism's emphasis on market rewards to provide the incentive for authorial creativity, and developing copyright laws, which look to the market as the best mechanism to efficiently allocate resources by putting creative works in the hands of parties willing to pay the most for the work⁵⁶ has three important consequences on how parties within the copyright system—authors, publishers and distributors, and society—relate to each other and with the creation, dissemination and use of literary and artistic works.⁵⁷ Beyond the still unproven neoclassicist's assumption that such economic incentives have a positive correlative effect on an author's creative production,⁵⁸ there are other effects of an over reliance on market incentives to generate authorial creativity and productivity. The first effect of a market-centric approach to the copyright system is that it projects authorship, which may be understood as an expression of an author's individual experience and personality, as a primarily economic-driven activity.⁵⁹ This causes the public to treat works of authorship as a commercial commodity resulting in less respect for the process of creative authorship when these works are used.⁶⁰ Second, the market based approach may have blurred the important distinction between property and

⁵¹ See *id.* at 1602.

⁵² Grey, *supra* note 28, at 69–71.

⁵³ *Id.*

⁵⁴ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360 (2001) ("[P]roperty rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of other persons ("the world") from the thing. . . . [P]roperty rights are different from *in personam* rights . . . [Which] attach to persons as persons and obtain against one or a small number of other identified persons.").

⁵⁵ Gordon, *Fair Use*, *supra* note 50, at 1612–13.

⁵⁶ RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 11–17 (2000).

⁵⁷ See Netanel, *supra* note 19, at 306–14.

⁵⁸ See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 351 (1970)

To demonstrate that an initial publisher's costs are high, while reproduction costs are low, is not sufficient to establish the need for copyright protection. Rather, one must examine other factors - the probable speed and ferocity of competitive response, the presence of subsidies, the ability of buyers to channel revenue to publishers and authors in the absence of protection - before it can be said that copyright protection is needed.

Id.

⁵⁹ See Netanel, *supra* note 19, at 308–09.

⁶⁰ See *id.* at 364.

statutory rights and allowed copyright owners e.g. publishers, distributors, printers, who may have financially invested in the production and public dissemination of the work, but who have not been involved in its creative production, to assert exclusive property-type rights in the expressive content of the work against the public.⁶¹ Property rights in an author's creation define ownership rights in the work itself and involve a unique right *in rem* to exclude.⁶² This right ought to be only asserted by the creator of a work. Third, the market based approach establishes the commercial market as a new patron of authors and artists, compelling creators of literary and artistic works to produce works for the public, and to ensure that they are remunerated for their works through the market, authors and artists may produce works that appeal to the general masses at the expense of producing works of authentic authorship, which, being a result of an author's or artist's expressive individuality, may be of greater authorial or artistic value to the progress of science and the useful art in society.⁶³

This paper examines the economic basis for the copyright system, and suggests that a predominantly economic approach to the copyright system will result in a bifurcated approach to thinking about authorial rights that ignores a more fundamental tenet of property rights pertaining to an author's ownership in a work. Neoclassicism's emphasis on market rewards as the appropriate mechanism to generate authorial creativity and productivity is the perfect justification for protecting entitlements in literary and artistic works: as markets change and develop, so too should the entitlements copyright owners have over the uses of their works. Neoclassicists argue that expanding private rights "into every corner where consumers derive value from literary and artistic works"⁶⁴ will encourage the production of a wide diversity of literary and artistic works to ultimately benefit society.⁶⁵ On the other hand, copyright minimalists, while relying also on wealth maximization and economic efficiency as the basis for their argument,⁶⁶ criticize the relentless expansion of copyright as an unhealthy impediment upon technological, cultural and economic development.⁶⁷ This second approach to thinking about rights in literary and artistic works focuses on the grant of rights as an incentive for creativity and productivity to serve the public.⁶⁸ Entitlements in literary and artistic

⁶¹ See Ng, *Social Contract*, *supra* note 25, at 456.

⁶² See Merrill & Smith, *supra* note 30, at 789–91 (describing the nature of *in rem* rights).

⁶³ Tyler Cowen & Alexander Tabarrok, *An Economic Theory of Avant-Garde and Popular Art, or High and Low Culture*, 67 S. ECON. J. 232, 241 (2000) (expressing concern over artists shifting away from authentic expressions and contribution to the advancement of knowledge and towards producing for market sales because of the potentially large earnings in the "superstar" market).

⁶⁴ GOLDSTEIN, *COPYRIGHT'S HIGHWAY*, *supra* note 44, at 216.

⁶⁵ See *id.* (stating that extending rights "into every corner where consumers derive value from literary and artistic works. . . . [Will] promote political as well as cultural diversity, ensuring a plenitude of voices, all with the chance to be heard."); Netanel, *supra* note 19, at 314–16.

⁶⁶ Netanel, *supra* note 19, at 308 (stating that both economic approaches to the copyright system "purport[] to take wealth maximization and allocative efficiency as [their] organizing principle").

⁶⁷ *Id.* at 294–96 ("[E]xpansion may . . . pose[] the danger of chilling discourse and cultural advancement [While] a broad, expanded copyright may, in effect, stifle transformative uses in a way that parallels . . . private censorship.").

⁶⁸ *Id.* at 337–38.

works, being secondary to the public interest,⁶⁹ have to be calibrated against the public value or social cost for the grant of the entitlement,⁷⁰ an incredibly difficult, if not impossible, task for law makers: how would we calibrate the exact extent of entitlements to generate the necessary amount of creative works for society's benefit?⁷¹ Both neoclassicism and copyright minimalism regard the grant of entitlements as a right to use the work in a particular way and accentuate the "bundle of sticks" metaphor that deemphasizes the *in rem* nature of an author's property right the work.⁷²

Part I of this article offers a more detailed analysis on the economic foundation of the copyright system to show how law and economics jurisprudence has elevated the importance of the copyright market as an incentive for authorship and creativity, and in that process, undermined the notion that most forms of authorship of significant cultural or educational value are products of an author's intrinsic, or authentic, expression, which is seldom influenced by market rewards. Part II goes on to suggest that recognizing an author's natural rights of ownership in literary and artistic works will encourage authentic authorship by making author's morally responsible for their creations. Natural law influence on the copyright system must go beyond providing a basis to recognizing the author's rights in their creation towards setting moral standards for authentic authorship and public uses of works. As an increase in the storehouse of knowledge and information in society will facilitate communicative discourses and provide raw materials to inspire other forms of creativity, there is a need to ensure that rights do not inhibit access to works, and in Part III, this article explains how the right to exclude, which follows the *in rem* conception of the author's rights, can only be exercised by the author in situations where his creative personhood is affected by a public use. Finally, in Part IV, this article explores the legal implications of recognizing ownership rights of the author, which are conceptually and legally distinct and separate from statutory rights under section 106 in works, and calls for different legal treatments for ownership rights in literary and artistic works and statutory entitlements to publicly disseminate the work.

I. THE ECONOMIC FOUNDATION OF THE COPYRIGHT SYSTEM

It was the eighteenth century poet and writer Samuel Johnson who said that "[n]o man but a blockhead ever wrote, except for money."⁷³ Johnson's sentiment

⁶⁹ *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The copyright law . . . makes reward to the owner a secondary consideration.").

⁷⁰ Kreiss, *supra* note 48, at 8 ("The goals of encouraging the creation and dissemination of new works require a carefully balanced set of rights given to authors and privileges granted to users of copyrighted works.").

⁷¹ Lemley, *Free Riding*, *supra* note 9, at 1066 ("[I]t is hard—and perhaps even impossible—to ever calibrate intellectual property law perfectly.").

⁷² See HOHFELD, *supra* note 27, at 28–30 (discussing property rights as a collection of legal interests); Netanel, *supra* note 19, at 306–14, 336–41 (discussing neoclassicism and copyright minimalist theory); Merrill & Smith, *supra* note 30, at 789–91 (discussing *in rem* property rights).

⁷³ JAMES BOSWELL, II BOSWELL'S LIFE OF JOHNSON 14 (Henry Frowde ed., Oxford 1904) (1791) (quoting Samuel Johnson).

represents the predominant view that authorship is an economic driven activity.⁷⁴ Authors have to be paid for their creativity and productivity. One way to ensure that literary and artistic works are produced would be to have patrons engage authors to write: Shakespeare himself courted favors from patrons and wrote plays, which would appeal to particular individuals.⁷⁵ Patronage, however, was regarded as being “fatal to the integrity and independence of literary men” for they would then have to look for “their daily bread to the favour of ministers and nobles.”⁷⁶ The ability to sell their works on the market was thought to be the better form of remuneration for authors.⁷⁷ That way, authorship will be free of the will of the author’s patron and literary and artistic production will “seek[] a broader, more varied consumer audience”⁷⁸ thereby allowing the author to reach a broader audience for his work through the market.⁷⁹ The copyright market for literary and artistic works is therefore the other way through which authors may be remunerated for their creativity and productivity: authors sell their work to a reading audience, who pays the author the market value for the work.⁸⁰ Economic theory seeks to encourage authorship by the promise of market rewards, and through the market, authors are remunerated for their creativity.⁸¹ Statutory rights ensure that market rewards are appropriable.⁸² Without the exclusive rights granted under section 106, authors and their publishers will not be able to recover from society the market value for works, which are non-exclusive and non-rival in consumption, and therefore susceptible to free-riding by the public.⁸³ Although the greatest number of works may be encouraged by market rewards from the sale of an author’s work to his audiences, which in turn contributes to the creation of diverse forms of literary and artistic creations, it is uncertain if progress of the sciences and the useful arts may actually be achieved through such creative diversity. Copyright markets may not necessarily generate literary and artistic works of social, cultural, and educational utility, while the recognition of rights under section 106 may not necessarily encourage authentic authorship of significant value to scientific or artistic progress.⁸⁴ This part of the article explores a possible alternative to the well understood meaning of scientific and artistic progress, why copyright markets may not generate works that contribute

⁷⁴ See Netanel, *supra* note 19, at 308.

⁷⁵ NORTHROP FRYE, NORTHROP FRYE ON SHAKESPEARE 10 (1986) (“Shakespeare seems to have had the instincts of a born courtier: *Macbeth*, for example, would have been just right for James I, who had come to London from Scotland a few years earlier.”).

⁷⁶ Thomas Babington Macaulay, *A Speech Delivered in the House of Commons on the 5th of February 1841*, in FOUNDATIONS OF INTELLECTUAL PROPERTY 310 (Foundation Press 2004).

⁷⁷ *Id.*

⁷⁸ Netanel, *supra* note 19, at 358.

⁷⁹ Paul Goldstein, *Copyright (Copyright and Legislation: The Kastenmeier Years)*, 55 LAW & CONTEMP. PROBS. 79, 83 (1992) [hereinafter Goldstein, *Copyright*] (“Patronage depresses authorship by shutting the author off from the wider audience he might hope to reach.”).

⁸⁰ Macaulay, *supra* note 76, at 310.

⁸¹ See *Mazer v. Stein*, 347 U. S. 201, 219 (1954) (stating that the copyright system is based on the conviction that personal economic incentive is the best way to “advance public welfare through the talents of authors”).

⁸² See *id.*

⁸³ Lemley, *Free Riding*, *supra* note 9, at 1041–42.

⁸⁴ See Cowen & Tabarrok, *supra* note 63, at 241 (stating that artists may shift away from authentic expressions and contribution to the advancement of knowledge because of the potentially large earnings in the “superstar” market).

toward this meaning of progress, and how statutory rights under the copyright system encourage the widest public dissemination of creative works but not the process of authentic authorship.

A. *Promoting the Progress of Science and the Useful Arts*

Congress grants statutory rights to authors for a limited duration in accordance with its constitutional powers “[t]o promote the [p]rogress of [s]cience and useful [a]rts.”⁸⁵ The promotion of the progress of science and the useful arts is, fundamentally, the aim and purpose for granting exclusive rights in writings and discoveries to authors.⁸⁶ The temporary monopoly conferred by copyright laws induces authors and artists to create and release their works to the public.⁸⁷ An author’s genius and learning must be rewarded, even if society has to bear a cost for the grant of that reward.⁸⁸ The Constitutional clause providing Congress with this power to ensure the progress of science and the useful arts allows laws to be passed to secure for authors, for a limited duration, the exclusive right to their respective writings and discoveries.⁸⁹ This “intellectual property clause”⁹⁰ of the constitution does not necessarily enable Congress to confer unlimited monopoly privileges that are intended to only benefit the private interests of the copyright holder.⁹¹ The clause is rather intended to ultimately uphold the public’s interest in access to the fruits of authorial and artistic labor.⁹² Ultimately, the grant of temporary private rights benefits society by “promoting broad public availability of literature, music, and the other arts.”⁹³ To ensure that society reaps the benefit of authorial and artistic labor, private monopoly rights under copyright laws are limited in scope, and lasts only for a limited duration to ensure that the public are the ultimate beneficiary of an author’s works.⁹⁴ The statutory duration for protection limits the author’s exclusive rights, after which works fall into the public domain and become freely available for society’s use so that, in the words of Justice O’Connor, the “public will not be permanently deprived of the fruits of an artist’s labors.”⁹⁵

⁸⁵ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106A(d) (2006).

⁸⁶ U.S. CONST. art. I, § 8, cl. 8.

⁸⁷ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).

⁸⁸ Macaulay, *supra* note 76, at 311 (“[C]opyright . . . is a tax on readers for the purpose of giving a bounty to writers. . . . [A]dmit[ing], however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, [Macaulay] willingly submit[s] to this severe and burdensome tax.”).

⁸⁹ U.S. CONST. art. I, § 8, cl. 8.

⁹⁰ See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1772 n.1 (2006) (pointing out the inaccuracy of the term “intellectual property clause” despite the term’s general usage).

⁹¹ U.S. CONST. art. I, § 8, cl. 8; *Sony*, 464 U.S. at 429.

⁹² U.S. CONST. art. I, § 8, cl. 8; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

⁹³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

⁹⁴ *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“[A]lthough dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.”).

⁹⁵ *Id.* (citing *Sony*, 464 U.S. at 429).

The progress of science and the useful arts as a goal of the copyright system justifies the monopoly power that copyright holders have over their works for the duration of protection.⁹⁶ The cost on society while authors and their publishers own exclusive rights to use and disseminate the work is high for the rights under section 106 entitle copyright owners to dictate their terms upon which access to their works may be given.⁹⁷ Copyright owners may choose to deny all forms of social access to their work while copyright protection subsists in the work—the law allows this—even though a right to exclude society from creative works can only exist when ownership *in* the work can be established.⁹⁸ Chief Justice Hughes, in *Fox Film v. Doyal*,⁹⁹ alluded to the *in rem* nature of the right in literary and artistic creations when he stated that “[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property”¹⁰⁰ even though it must be pointed out that the right to vend or license, granted under the copyright statute, is distinct from a general right to exclude. The social costs of inaccessibility and negotiation for the use of the work is high but it is a price that the copyright system is willing to bear to ensure the production of creative works to benefit society—an inherently utilitarian philosophy that some evils are tolerable to achieve the greatest good for the most number of people.¹⁰¹ In this same spirit, Sir Thomas Babington Macaulay acknowledged that copyright “is a tax on readers for the purpose of giving a [benefit] to writers” in a speech before the House of Commons in 1841.¹⁰² He went on to say that this tax is “an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures” but he conceded that there is a necessity to reward “genius and learning” and to grant this reward, he was willing to “submit even to this severe and burdensome tax.”¹⁰³

The word “progress” in the intellectual property clause connotes an evolution or development from the present status quo into a better, improved and more advanced future.¹⁰⁴ The idea that scientific and artistic progress will be achieved in society’s best interest, by granting exclusive rights to authors for a limited time to encourage the production of creative works, makes the social costs of monopoly rights in literary and artistic works bearable: the means here would justify the ends.¹⁰⁵ Existing

⁹⁶ *Sony*, 464 U.S. at 429–30.

⁹⁷ See 17 U.S.C. § 106 (2006); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

⁹⁸ 17 U.S.C. § 106; *Fox Film*, 286 U.S. at 127.

⁹⁹ 286 U.S. 123 (1932).

¹⁰⁰ *Id.* at 127.

¹⁰¹ See Peter J. King, *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century*, in *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS 11–12* (Harold Hyman et al. eds., 1986) (explaining that Jeremy Bentham, the father of utilitarianism, for example, thought that governments were a “vast evil” but were necessary to maximize the happiness of all individuals, who collectively make up a society).

¹⁰² Macaulay, *supra* note 76, at 311.

¹⁰³ *Id.*

¹⁰⁴ See Oliar, *supra* note 90, at 1789 tbl.1, 1790–1807 (analyzing James Madison’s suggested use of the word “advancement” with Charles Pinckney’s suggested use of the word “promotion” in crafting the intellectual property clause).

¹⁰⁵ See 1 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 1:3 (2008).

Perhaps the most striking characteristic of the Copyright-Patent Clause is that it is the only clause in the original Constitution, other than the Preamble,

literature on the idea of progress focuses on achieving progress by ensuring that the beneficiaries of literary and artistic creations—society—has access to the author's work. Professor Oliar, examining the records from the Constitutional Convention of 1787, emphasizes that the idea of progress was originally intended to be a constitutional limitation on Congress's intellectual property powers: Congress may only grant exclusive rights in literary and artistic works only if there is an advancement of knowledge in society.¹⁰⁶ The judiciary, Professor Oliar proposes, ought to take a proactive step to declare statutory enactments unconstitutional if the cost to society outweighs the marginal benefits of a particular copyright law.¹⁰⁷ Society's progress justifying the grant of exclusive rights is therefore measured by the benefits society receives from an author's creativity and the degree of public accessibility to the knowledge contained in literary and artistic works.¹⁰⁸ If society has greater access to knowledge, society will grow into a better and improved future.¹⁰⁹ To encourage the creation of as much literature and art as possible thereby contributes towards this idea of progress, for knowledge is advanced through as much works of authorship as may be encouraged through the grant of exclusive rights to authors.¹¹⁰ In this light, Justice O'Connor's remark that "[c]opyright is intended to increase and not to impede the harvest of knowledge" in *Harper & Row Publishers, Inc. v. Nation Enterprises* exemplifies this utilitarian ideal.¹¹¹

The advancement of knowledge by encouraging authors to generate as much creative works as possible by granting them exclusive rights will certainly contribute towards a certain degree of social progress in the sciences and the useful arts. Most works of authorship contain an immense reservoir of knowledge and information, which may be used as building blocks for new forms of creativity and authorship.¹¹² Progress is definitely a result of innovative and creative uses of existing materials, which is only made possible by ensuring a certain degree of public access to the underlying ideas in creative works of authorship.¹¹³ A book on mathematical science

which states an ultimate goal to be served by its allocation of power; it begins by providing the justification for such legislation as Congress may choose to adopt

Id.

¹⁰⁶ Oliar, *supra* note 90, at 1810.

¹⁰⁷ *Id.* at 1840–41.

¹⁰⁸ See *Eldred v. Ashcroft*, 537 U.S. 186, 247–48 (2003) (Breyer, J., dissenting).

¹⁰⁹ Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 53 (2001) ("Access to existing work is a necessity. Access is required to enrich the future builders, so that they will not have to reinvent the wheel. It is also required as the raw material for the new knowledge."); Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 758 (2001) (arguing that progress means the dissemination of knowledge, rather than qualitative improvement of the knowledge base); Lawrence B. Solum, *Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 45 (2002) (disagreeing with Pollack's conception of progress and stating that the phrase "to promote the [p]rogress of" means "to encourage" the advancement of the activity).

¹¹⁰ Pollack, *supra* note 109, at 758–60.

¹¹¹ 471 U.S. 539, 545 (1985).

¹¹² See Birnhack, *supra* note 109, at 45–46 (illustrating that virtually all works borrow from previous works, analogizing the phenomenon to a builder adding bricks to existing bricks to create a new structure).

¹¹³ *Id.*

provides society with the knowledge on the methods of operation or diagrams employed by the author so that future engineers, for example, may use them: the reason for publishing a book is to “communicate to the world the useful knowledge which it contains.”¹¹⁴ While those of us who think about copyright law consistently look to legal institutions—laws and courts—to promote progress¹¹⁵, I would like to suggest that progress is also a matter of ethical conduct on the part of authors, for as much as progress is dependent on the quantity of work authors create, it is dependent to a greater extent on the quality of work authors produce. The copyright system has thus far rewarded all forms of creativity to promote progress.¹¹⁶ In *Bleistein v. Donaldson Lithographing Co.*,¹¹⁷ Justice Holmes affirms that any work of commercial value to the public will be protected, even if the work, such as an advertisement, lacks “aesthetic or educational value.”¹¹⁸ It doesn’t matter to the law what kind of work is created—databases of information in the public domain, such as a telephone directory, for example, are protected—as long as it is created with some minimal degree of originality and creativity.¹¹⁹ However, progress, arguably, depends on the kinds of work authors write for the advancement of knowledge.¹²⁰ The improvement of society depends also on the type of literature and art, which author’s produce and make available to society.¹²¹ What we read influences our lives and who we eventually become.¹²² We, as individuals, make up society. The literary and artistic materials available for our use determine how we progress as a society. It is entirely plausible that our use of the English language and understanding of human nature today, as Professor Harold Bloom claims, is indeed attributable to the playwright and poet William Shakespeare: literature has a profound way of swaying society in ways, which may not be immediately apparent.¹²³ Harriet Beecher Stowe’s *Uncle Tom’s Cabin* highlighted the immorality of slavery in the American south in a novel that was impossible to ignore, and made the American Civil War an imminent

¹¹⁴ *Baker v. Selden*, 101 U.S. 99, 103 (1880).

¹¹⁵ *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The Copyright Term Extension Act (“CTEA”) was challenged as being unconstitutional and Justice O’Connor, in giving the decision of the court, also stated that “[t]he CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain.” *Id.* at 205.

¹¹⁶ *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily . . .”).

¹¹⁷ 188 U.S. 239 (1903).

¹¹⁸ *Id.* at 252.

¹¹⁹ *Feist*, 499 U.S. at 358 (“[T]he originality requirement is not particularly stringent. . . . [N]ovelty is not required. Originality requires only that the author make the selection or arrangement independently . . . and that it display some minimal level of creativity.”).

¹²⁰ *See* Marc K. Temin, *The Irrelevance of Creativity: Feist’s Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN. ST. L. REV. 263, 280–84 (2006) (comparing copyright protections for fictional and nonfictional works and discussing each’s impacts on the “advancement of knowledge”).

¹²¹ *See id.*

¹²² *See generally* MADAME DE STAEL-HOLSTEIN, *THE INFLUENCE OF LITERATURE UPON SOCIETY* (William Pearson & Co. 1835) (examining the historical influence of literature on ancient and modern societies, and the reciprocal influence).

¹²³ *See* HAROLD BLOOM, *SHAKESPEARE: THE INVENTION OF THE HUMAN 4* (1998) (“Personality . . . is a Shakespearean invention, and is not only Shakespeare’s greatest originality but also the authentic cause of his perpetual pervasiveness.”).

certainty ending the horror of slavery and oppression of another human being.¹²⁴ Just as works of literature—fictional and non-fictional—and art may steer society towards improvement and advancement in knowledge, literature and art may also derail society from progress.¹²⁵ Pornography, works undermining our conceptions of justice, liberty and freedom, or works inciting war, violence and hatred do not advance knowledge or progress of the sciences and the useful arts—yet these works are protected as literary and artistic works under the copyright system.¹²⁶ Unlike the patent system until 1966,¹²⁷ social or beneficial utility is not a prerequisite for copyright protection.¹²⁸ The copyright market, I would like to suggest here, facilitates the creation of works that may have little beneficial or social utility, and may ultimately frustrate the intent of the Constitution to promote progress in the sciences and arts to benefit society.

B. The Copyright Market

The set up of the copyright market encourages profit-driven forms of authorship.¹²⁹ Judge Leval of the United States District Court for the Southern

¹²⁴ HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN OR LIFE AMONG THE LOWLY* (Modern Library ed. 2001) (1852). In Jane Smiley's Introduction to *Uncle Tom's Cabin* she stated, "When Abraham Lincoln met [Harriet Beecher Stowe] at the White House in 1862, he allegedly remarked: 'So, you're the little woman who wrote the book that started this great war!'" *Id.* at vi.

¹²⁵ See, e.g., Tracy Reilly, *The "Spiritual Temperature" of Contemporary Popular Music: An Alternative to the Legal Regulation of Death-Metal and Gangsta-Rap Lyrics*, 11 VAND. J. ENT. & TECH. L. 335, 338–51, 392–97 (2009) (analyzing the history of popular music, its alleged detrimental effects on society, and proposing that parents and educators are best equipped to protect children from violent and obscene music).

¹²⁶ Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854–55 (5th Cir. 1979) ("There is no other statutory language from which it can be inferred that Congress intended that obscene materials could not be copyrighted. Moreover, there is good reason not to read an implied exception for obscenity into the copyright statutes."); see *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theater, or monthly magazines, as they are, they may be used to advertise a circus.

Bleistein, 188 U.S. at 251.

¹²⁷ See *Lowell v. Lewis*, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8,568), *abrogated by* *Brenner v. Manson*, 383 U.S. 519, 533 (1966).

[T]he law requires . . . that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society. The word "useful" . . . is incorporated into the act in contradistinction to mischievous or immoral. . . . [A] new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention.

Id.

¹²⁸ *Burrow-Giles Lithographing Co. v. Sarony*, 111 U.S. 53, 59 (1884) ("[P]atents . . . cannot . . . be issued to the inventor until the novelty, the utility, and the actual discovery or invention . . . have been established by proof. . . . Our copyright system has no such provision . . .").

¹²⁹ See *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992).

District of New York, in *American Geophysical Union v. Texaco, Inc.*, captured the precise nature of the market when he stated that “[t]he copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.”¹³⁰ The copyright market provides the mechanism through which copyright owners recover the cost of investing in the creation and production of creative works, and obtain profits from the exploitation and commercialization of their works.¹³¹ The market represents the author’s audience and readers, from whom authors receive remuneration for their creativity and productivity.¹³² While the whole economic philosophy of the copyright system is the creation of the market to remove authors from ministerial, church or government patronage, and allow authors to write with integrity and independence,¹³³ the same economic philosophy results in authors writing for commercial profits from a new patron: the public.¹³⁴ The author’s profits from the sale of his work will be proportionate to the commercial value the public places on a work, which in turn will produce an economic incentive for the author to create works with the widest public appeal.¹³⁵ The statutory rights granted under section 106 strengthen this economic incentive to authors further.¹³⁶ By providing authors and copyright owners with exclusive control over uses of the work, the commercial value of the work increases as works cease to be freely appropriable by the public without the knowledge and consent of the author or copyright owner.¹³⁷ Creative works, which are non-exclusive and non-rival, may be distributed and disseminated to the public through the market with the assurance of legal sanctions being imposed upon those who use works without paying the necessary market value of the work to the author or copyright owner.¹³⁸ Fundamentally, the grant of section 106 rights to the author supports and sustains the copyright market as Coasian negotiations and bargains are facilitated to shift entitlements to use literary and artistic works to the party who values them the most, and who is willing to pay the market price for it.¹³⁹ The copyright system, in accordance with the constitutional goal to promote the progress of science and the useful arts, uses the

¹³⁰ 802 F. Supp. 1, 27 (S.D.N.Y. 1992).

¹³¹ See *Loew’s Inc. v. Columbia Broad. Sys., Inc.*, 131 F. Supp. 165, 173–74 (S.D. Cal. 1955) (“[T]he courts have taken a broad view of copyright protection in order to give the copyright proprietor the exclusive right ‘to any lawful use of his property whereby he may get a profit out of it.’” (quoting *King Features Syndicate v. Fleischer*, 299 F. 533, 536 (2d Cir 1944))).

¹³² See Macaulay, *supra* note 76, at 310.

¹³³ See *id.*

¹³⁴ GOLDSTEIN, COPYRIGHT’S HIGHWAY, *supra* note 44, at 4 (“[T]he marketplace will determine whether a work has commercial value. . . . [I]f the work has commercial value, copyright’s aim is to put that value in the copyright owner’s pocket.”).

¹³⁵ See Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 194 (2006) (“[T]he author’s hope of commercial success is often what keeps them chained to the typewriter and keeps their publisher paying the rent.”).

¹³⁶ See 17 U.S.C. § 106 (2006).

¹³⁷ See *id.*; 11 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 66 (2009).

¹³⁸ See 17 U.S.C. §§ 106, 502, 504.

¹³⁹ See Gordon, *Fair Use*, *supra* note 50, at 1605–06.

market to effectively transfer privately owned works to members of society willing to pay the price to obtain access to use literary and artistic works.¹⁴⁰

Copyright markets do not function perfectly all the time to allow for such market transfers of rights to the party willing to pay the highest price for it. Markets fail sometimes because transaction costs are insurmountable and there may be a lack of information necessary for decision-making.¹⁴¹ In such situations, Coasian negotiations and bargains become impossible, and the fair use doctrine will apply to effectuate socially desirable transfers that cannot be achieved through the market.¹⁴² The fair use doctrine, a common-law judicially conceived doctrine establishes limitations on the exercise of the exclusive rights of the copyright owner if the use of a work without the permission of the author or copyright owner is justified based on “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹⁴³ Section 107 of the Copyright Act has given express statutory recognition to the doctrine and provides a list of four factors that the courts may consider in any fair use analysis as an affirmative defense to an infringement claim:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴⁴

The doctrine, “predicated on the author’s implied consent to ‘reasonable and customary’ use when he released his work for public consumption,”¹⁴⁵ has an added effect on authorship. As fair use is negated by the showing of potential harm to the actual and derivative market,¹⁴⁶ there will be an incentive for authors to produce works with the widest public appeal and commercial value, ascertained not only by the value of originals but also of derivatives in the marketplace, to prevent public uses of a work, which present a demonstrable harm to existing and future markets.¹⁴⁷ Despite its nebulous legal contours and objectives,¹⁴⁸ and the fact that

¹⁴⁰ See Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 *CARDOZO ARTS & ENT. L.J.* 345, 393 (1993).

¹⁴¹ Gordon, *Fair Use*, *supra* note 50, at 1613.

¹⁴² *Id.* at 1614.

¹⁴³ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

¹⁴⁴ 17 U.S.C. § 107 (2006).

¹⁴⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

¹⁴⁶ *Id.* at 568 (“[The fair use] inquiry must take account not only of harm to the original but also of harm to the market for derivative works.”).

¹⁴⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (stating that commercial uses are presumptively unfair and noncommercial uses require proof of harm or adverse effect on the potential market for the work and laying down the requirement of proof of some meaningful likelihood of future harm to the potential market from the use of the work); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (limiting Sony’s statement to situations where the use is an exact duplication—if the work serves as a market replacement, it is less likely to

the four factors of section 107 are not exhaustive in a fair use consideration,¹⁴⁹ the effect of a particular use on the potential market for the original work appears to be highly determinative of the issue.¹⁵⁰ The reason for this is simple: if the overall goal of the copyright system is to provide a reward to authors to encourage creativity, the law on fair use should also protect the rewards that an author will derive from the market, both actual and potential, for the original work to keep within the larger goals of the copyright system.¹⁵¹ Substantial harm to a derivative market, for example, would weigh against the finding of fair use as one of the economic incentives for the creation of original works is the ability to license derivatives.¹⁵² Using the creative expressions of authors “without paying the customary price” for use of the work, as in the creation of The Harry Potter “Lexicon” from J.K. Rowling’s popular *Harry Potter* book series, will not be considered fair use even if the creation of the secondary material provide a substantial benefit to society: to find for fair use in such a case would be to deprive authors of their incentive to create.¹⁵³

The development of the copyright market from the grant of rights under section 106 and the application of the fair use principles under section 107 is an

be fair use; where the use of a work is transformative, market substitution is less likely but the use will most probably be not a fair use if it affects a derivative market).

¹⁴⁸ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–06 (1990) (“[N]either the decisions that have applied [the doctrine] for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives. . . . Judges do not share a consensus on the meaning of fair use.”); cf. Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1141 (1990) (commenting that Judge Leval’s “analysis supports allowing fair use when his criteria are met . . . [i]t does not support restricting fair use to his criteria . . .”).

¹⁴⁹ 17 U.S.C. § 107 (2006) (listing four factors for consideration of the fair use defense, not requisite elements) (emphasis added); see, e.g., *Harper & Row*, 471 U.S. at 560 (“The factors enumerated in the section are not meant to be exclusive . . .”).

¹⁵⁰ See *Harper & Row*, 471 U.S. at 566 (“This last factor [the effect on the market] is undoubtedly the single most important element of fair use.”); see also William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1669–1672 (1988). This article looks at Justice Blackmun’s and Justice O’Connor’s broad conception of the “potential market” for the original work in *Sony*, that the potential market is a “group [of persons] who would . . . be willing to pay to see” the work, and in *Harper & Row*, that “[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied” respectively. Fisher III, *supra* at 1670–71 (quoting *Sony Corp of Am.*, 464 U.S. at 485 (Blackmun, J., dissenting) and *Harper & Row*, 471 U.S. at 566). The article also stated:

[I]n almost every case in which the fair use doctrine is invoked, there will be *some* material adverse impact on a “potential market” After all, in any such suit, the defendant is seeking to use the plaintiff’s copyrighted work in a fashion ostensibly forbidden by section 106 of the Copyright Act. . . . [T]he version of the market-impact factor adopted in *Harper & Row* will almost always tilt in favor of the plaintiff and is therefore nearly useless in differentiating between fair and unfair uses of copyrighted materials.

Fisher III, *supra* at 1671.

¹⁵¹ Leval, *supra* note 148, at 1110 (“[T]he function of fair use as integral to copyright’s objectives leads to a coherent and useful set of principles. . . . [T]he use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”).

¹⁵² *Campbell*, 510 U.S. at 593 (“Evidence of substantial harm to [the derivative market] would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals.” (citing 17 U.S.C. § 106(2))).

¹⁵³ *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008).

incredibly strong motivation for economic driven forms of authorship. While the original work in itself may be commercially valuable, the primary market value in a work is in the possible commercial exploitation of other forms of creative works that are derived from the original.¹⁵⁴ The author alone is seldom capable, financially and strategically, of marketing the work or transforming the original work into a different artistic medium without the assistance of a publisher and financier.¹⁵⁵ Even if the author may have the financial capability and market connections to market the work or transform the original into a new medium, he may lack business acumen to manage the commercial exploitation of the work.¹⁵⁶ The rights under section 106 provide the original author with the ability to transfer ownership of the copyright to a party, which may be capable of bringing the work to the market.¹⁵⁷ At the end of the day, the present copyright system is indeed about money.¹⁵⁸ Authors assign or transfer their copyright in a work in return for royalties or payment of a fee.¹⁵⁹ Songwriters assign their copyright in musical compositions to a musical publisher in return for a royalty payment, musical publishers assign the right to publicly perform the composition again for royalty payments of some sort, novelists sell their derivative rights in literature to movie studios in return for the promise of royalties from box office sales, and playwrights sell their plays to theatrical producers for a fee.¹⁶⁰ The copyright market exists to ensure that such transfers occur to bring the work from the author to society and enables the copyright system to fulfill its distributive goals: the market connects authors with their readers.¹⁶¹

The copyright market, I would like to suggest here, is not necessarily conducive towards authentic forms of authorship, which would contribute towards the advancement of knowledge or the progress of society. Contrary to Macaulay's faith that the copyright system will free men of letters from the patronage of ministers and nobles, and encourage them to produce works of authorship with integrity and independence,¹⁶² the copyright market in itself is its own patron for authorship.¹⁶³

¹⁵⁴ 17 U.S.C. § 106; see William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 474 (2003) (“[A] copyrighted work's derivative works may have commercial value after the original work has lost it.”).

¹⁵⁵ See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 254 (1996) (stating that the “print world” only allows those wealthy enough to afford the costs of publishing a book to become “published authors” while the digital environment allows for self-publication without such costs).

¹⁵⁶ See *id.*

¹⁵⁷ 17 U.S.C. § 201(d).

¹⁵⁸ GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 44, at 4.

¹⁵⁹ Michael B. Reddy, *The Droit De Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509, 532 (1995) (stating that most authors do not exploit their work, but instead assign their rights to a company for publication in exchange for up-front money or royalties).

¹⁶⁰ See *id.*

¹⁶¹ Goldstein, *Copyright*, *supra* note 79, at 80 (“It is copyright that makes it possible for audiences—markets—to form for an author's work, and it is copyright that makes it possible for publishers to bring these works to market.”).

¹⁶² Macaulay, *supra* note 76, at 310.

¹⁶³ See MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 81–86 (Columbia Univ. Press 1994) (recounting Johann Christoph Friedrich Schiller's shift from writing for royalty to writing for the public and noting that any fame and economic reward was only derived from the types of work that the public demanded at that time).

German playwright and philosopher Johann Christoph Friedrich Schiller referred to the reading public as his “school, sovereign and [his] trusted friend” when he fled the patronage of the Duke of Württemberg and exalted the grandiosity of “appealing to no other throne than the human spirit” as he began his career as a professional writer.¹⁶⁴ The literary market, however, turned out to be indifferent and unrewarding to Schiller’s more authentic and intellectually-demanding philosophical works on ethics, aesthetics and reason.¹⁶⁵ The fame and economic rewards Schiller yearned from the public were only acquired to a certain extent by works that the public demanded at that time, which were historical narratives half the merit of his greater works—works written “with the greatest expense of spirit” but “rewarded with aversion” by the public.¹⁶⁶ In 1792, Schiller accepted the patronage of the Danish Duke of Augustenburg, who gave him the intellectual freedom necessary for authentic authorship and Schiller, reflecting on his experience with the literary marketplace, noted the irreconcilability of the demands of the market with the demands of art.¹⁶⁷ “Utility,” Schiller remarked, “is the great idol of our age, to which all powers are in thrall and to which all talent must pay homage. Weighed in this crude balance, the insubstantial merits of art scarce tip the scale, and bereft of all encouragement, she shuns the noisy market-place of our century.”¹⁶⁸ Contemporary copyright markets may be equally unreceptive to literary and artistic works, which do not conform to the expectations of popular culture or carry widespread appeal. Justice Holmes in *Bleistien v. Donaldson Lithographing Co.* alluded to the aversion the market may have towards works of authentic literary and artistic expressions when he states that “some works of genius would be sure to miss appreciation. . . . [U]ntil the public had learned the new language in which their author spoke. . . . [T]he etchings of Goya or the paintings of Manet” may not have evoked the public’s admiration “when seen for the first time.”¹⁶⁹ Some authors willingly surrender the economic rewards of the market place to engage in more authentic pursuits of expression,¹⁷⁰ but unless an author decides to do so, the copyright market is more likely than not going to produce works of authorship that

¹⁶⁴ *Id.* at 41.

¹⁶⁵ *Id.* at 81–82 (noting that Schiller tried to write for the public tastes in the hope of introducing his readers to more demanding works once his reader base was established, but was unsuccessful).

¹⁶⁶ *Id.* at 82–83.

¹⁶⁷ *Id.* at 83–84.

¹⁶⁸ *Id.* at 85–86.

¹⁶⁹ 188 U.S. 239, 251 (1903).

¹⁷⁰ Cowen & Tabarrok, *supra* note 63, at 234. This article states that Beethoven, for example, [W]rote his late string quartets to satisfy his creative urges, knowing the works were too complex to satisfy a wide public audience at that time. Donatello and Michaelangelo . . . would walk away from commissions if they could not determine the content of the project. James Joyce chose a level of esoterica for his *Finnegans Wake* that excluded most of the world’s reader, even intellectually inclined ones. Today, movie stars will sometimes accept a lower cut of the box office if they can work on project of their own choosing. In a sample of over 1000 U.S. painters, 70% reported rejecting on more than one occasion high-paying but artistically unfulfilling commissions.

conform to the demands of popular public tastes without contributing to the advancement of knowledge or the progress of science and the useful arts.¹⁷¹

Furthermore, the copyright market may not provide the strongest support for the identified end of the copyright system as progress in the sciences and the useful arts is not necessarily achieved by having a diverse amount of literary and artistic works that are available to the public. The grant of statutory rights in literary and artistic works that may be owned by a copyright owner,¹⁷² who is not necessarily the author or creator of the work, has resulted in a concentration of ownership rights in the intermediaries who disseminate works of the author to his readers—intermediaries whose primary interest in the work is purely commercial in nature.¹⁷³ Unlike the author, intermediaries do not undertake the individual creative labor and personal expression an author necessarily does to bring a work to fruition and unlike the reader, the intermediary is not as concerned with the contents of a work for personal enjoyment, individual learning or inspiration and ideas for future authorship and creativity.¹⁷⁴ For the intermediary, the primary interest in a work is the amount of profits the work will reap from the marketplace.¹⁷⁵ Early English copyright, besides being a method for Crown censorship of seditious and heretical material, was, after all, a way in which London printers maintained control over the book trade.¹⁷⁶ The exercise of exclusive monopoly rights by someone other than the author or artist, who has not undertaken a process of authorial or artistic creativity to produce the work, is likely to be driven by the intention to maximize profits from the exploitation and commercialization of the work, especially when financial investments have been made to reproduce and disseminate the work to the public.¹⁷⁷ The resulting effect of monopoly rights in the hands of intermediaries is the over-commodification of works in an attempt to capture all social surpluses in creative works.¹⁷⁸ While intended to facilitate dissemination of creative expressions of individual authors and artist through the market to ultimately benefit the public and promote the progress of science and the useful arts, the exclusive rights under section 106 have a tendency to secure the position of intermediaries in a monopoly

¹⁷¹ *Id.* at 241 (asserting that artists may shift away from authentic expressions and contribution to the advancement of knowledge towards producing for market sales because of the potentially large earnings in the “superstar” market).

¹⁷² See 17 U.S.C. § 101 (2006) (defining “copyright owner” as “the owner of that particular right” comprised in a copyright).

¹⁷³ See W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 841 (2007) (explaining that among the many intermediaries in the music copyright landscape are publishers that primarily act as royalty-collectors and bookkeepers, performing rights organizations that license the right to perform copyrighted musical compositions, and mechanical licensing organizations that license the right to physically reproduce the copyright work).

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 114–15 (Vanderbilt Univ. Press 1968) [hereinafter PATTERSON, HISTORICAL PERSPECTIVE].

¹⁷⁷ See Cardi, *supra* note 173, at 841 (describing publishers as royalty-collectors and bookkeepers).

¹⁷⁸ See Lemley, *Free Riding*, *supra* note 9, at 1037 (“The rise of property rhetoric in intellectual property cases is accordingly closely identified not with common law property rules in general, but with a particular view of property rights as the right to capture or internalize the full social value of property.”).

position.¹⁷⁹ The present copyright system as an institution to promote progress is heavily criticized in many respects, primarily because the laws, which are designed to advance knowledge in society, do not achieve their ends satisfactorily. Academic and scholarly communities, start-up businesses, social and cultural activists, and technology developers note the chilling effect of the copyright market on innovation and progress,¹⁸⁰ and the ordinary lay person on the street will have difficulty understanding the need to “clear rights” before using a copyrighted work.¹⁸¹ Protecting private economic interests in literary and artistic works extensively under a property-type regime will be a hindrance, rather than an impetus, to progress as public access to creative works in all forms—including artwork, music, literature, software programs, visual works, and research materials—become barred by the exercise of private property-type rights of exclusion.¹⁸² As creative works become sources of income and revenue for media businesses, these works come to be regarded as business assets, rather than creative expressions, to which unrestricted public access will cause depreciations in their commercial value and marketability.¹⁸³ As a result of the conception of literary and artistic works as business assets, rather than creative expressions, copyright owners are today inclined towards exercising exclusive control over these works through law enforcement and technological protection measures to the extent that public access to these works many times becomes very difficult, if not impossible.¹⁸⁴

What if progress of the sciences and the useful arts however, means holding authors to a higher standard of authorship and creativity, and encouraging authors to undertake a moral responsibility towards the advancement of knowledge for society? What if we remove the economic lenses through which we have conventionally looked through to understand the copyright system and market theory, and replace them with fresh lenses of ethics and moral philosophy to understand an institution with a goal of advancing knowledge in a completely different light? With an age-old philosophy to provide a novel vision for contemporary analysis, will we eventually arrive at a different, more workable solution to promoting the progress of science and the useful arts for society’s benefit today? I think we will. A more cohesive rights based system for authentic

¹⁷⁹ See Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMPETITION L. & ECON. 541, 552 (2005) (“The case of [performing rights organizations] . . . fit[] into the paradigm of a natural monopoly.”).

¹⁸⁰ Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 67 (2002) [hereinafter Menell, *Digital Future*] (“[T]he intrusive and chilling effects of copyright’s most recent protections against digital piracy have aroused concerns about the freedom of technology companies to innovate, the ‘rights’ of consumers to engage in fair use of protected works . . .”).

¹⁸¹ JESSICA LITMAN, *DIGITAL COPYRIGHT* 29 (Prometheus Books 2001) (“[C]opyright rules are complicated and hard to understand.”).

¹⁸² See Menell, *Digital Future*, *supra* note 180, at 67.

¹⁸³ Kenneth Cukier, *A Market for Ideas*, *ECONOMIST*, Oct. 2005, at 1 (“In recent years intellectual property has received a lot more attention because ideas and innovations have become the most important resource, replacing land, energy and raw materials.”).

¹⁸⁴ See 17 U.S.C. §§ 1201–1204 (2006) (making it a civil infringement and criminal offense to circumvent copyright protection measures and to threaten the integrity of copyright management information); LITMAN, *supra* note 181, at 143–44 (pointing out that with sections 1201–1204, it becomes illegal to circumvent measures preventing unauthorized access to a work, which includes using someone else’s password to gain access to a subscribed publication or using software to view a DVD that is regionally incompatible with the player).

authorship is surely more conducive to the question of literary independence and integrity than a system of ad hoc statutory rights and economic incentives, which forces most authors to surrender their authentic expressions to public tastes in order to receive remuneration for their works, and, which direct the production and dissemination of literary and creative works towards segments of society willing to pay the most for the work.¹⁸⁵ While the market is important to provide a source of remuneration to authors and creators, authorial and artistic integrity in a work of authorship has a more significant bearing on how we progress, develop and improve as a society. In the remainder of this article, I explain why a more comprehensive system of authorial rights will move us in the direction of progress in the sciences and the useful arts.

C. Author's Rights

Copyright jurisprudence gives limited recognition to the author's rights in his literary and artistic creations and to the general concept of authorship.¹⁸⁶ The earliest copyright, which took the form of a right to print, did not conceive of any special rights that the author had in the work.¹⁸⁷ The printer's guild, which controlled the formation of early copyright, the Stationer's Company, would occasionally grant authors the right to print their own works,¹⁸⁸ but it wasn't until Parliament's attempt to break-up the monopoly that the Stationer's Company had over the book trade through the Statute of Anne 1710,¹⁸⁹ that the author emerged as an independent right holder in literary and artistic works.¹⁹⁰ Although the statute gave the author legal standing with respect to their works, authors still wrote under the auspices of patrons when the statute was passed.¹⁹¹ The author began to break

¹⁸⁵ See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 91–92 (1985) (advocating for personal, moral rights for creators which would foster creativity but harm the economic interests of producers and publishers) [hereinafter Kwall, *Copyright and the Moral Right*].

¹⁸⁶ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”).

¹⁸⁷ See WILLIAM F. PATRY, PATRY ON FAIR USE § 1:5 (West 2009).

¹⁸⁸ PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 176, at 64–66.

¹⁸⁹ Statute of Anne, 1710, 8 Anne. c. 19 (Gr. Brit.).

¹⁹⁰ PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 176, at 147.

Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author's copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. . . . [T]he author was used primarily as a weapon against monopoly.

Id.

¹⁹¹ DUSTIN GRIFFIN, LITERARY PATRONAGE IN ENGLAND 1650–1800 10 (Cambridge Univ. Press 1996).

The patronage system, as inherited from the Renaissance and strengthened during the first part of the eighteenth century, operated in such a way as to sustain the cultural authority of the traditional patron class

Despite the conventional view, there was no rapid or complete changeover during the century from an aristocratic culture to a commercial culture, no sudden change from a patronage economy to a literary marketplace.

away from the patronage system and started looking towards the marketplace as a source of recognition and reward for his literary and artistic efforts as an audience emerged for his work years later.¹⁹² Samuel Johnson's 1755 letter rebuking Lord Chesterfield's extension of patronage for the Dictionary after Johnson had found success in the marketplace and no longer needed any form of patronage¹⁹³ is deemed the "Magna Carta of the modern author"¹⁹⁴ and signaled a change in times when the "professional author" became "both economically feasible and socially acceptable."¹⁹⁵ The author's claim to rights in their creative works became more pronounced as authors began to equate originality with the writer's own genius, thereby elevating the writer as a mere craftsman "whose task is to utilize the tools of his craft for their culturally determined ends" to an author, the genius who does "something utterly new, unprecedented, or . . . produces something that never existed before."¹⁹⁶ Edward Young's *Conjectures on Original Compositions* makes an early case for conferring property rights on the author as one who "thinks and composes" while others "only read and write,"¹⁹⁷ which Professor Martha Woodmansee hypothesizes, provided German authors with the basis for asserting ownership in their literary and artistic creations in the form of a copyright law.¹⁹⁸ The idea of the original author who labors to produce a work was also eventually used by the Stationer's Company to perpetuate their copyright monopoly after the Statute of Anne limited it to a maximum duration of twenty-eight years.¹⁹⁹ Contemporary copyright scholarship on the author has unfortunately painted the author as an inconsequential social construct that was conceived as a result of changing market forces or "powerful commercial interests, and political influence,"²⁰⁰ which developed with the commercialization of literary and artistic works,²⁰¹ and which very notion of the lone

Id.

¹⁹² *See id.*

¹⁹³ Letter from Samuel Johnson to Lord Chesterfield (Feb. 7, 1755) in 1 THE LIFE OF SAMUEL JOHNSON, LL. D.: INCLUDING A JOURNAL OF HIS TOUR TO THE HEBRIDES 215–17 (Claxton, Remsen & Haffelfinger 1868).

¹⁹⁴ MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 4 (Harvard Univ. Press 1993).

¹⁹⁵ *Id.*

¹⁹⁶ WOODMANSEE, *supra* note 163, at 37–39.

¹⁹⁷ *Id.* at 39.

¹⁹⁸ *Id.*

¹⁹⁹ *See* Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 846 (H.L.) (appeal taken from Ch.); Millar v. Taylor, (1769) 98 Eng. Rep. 201, 203 (K.B.).

²⁰⁰ Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 270–71 (2008).

²⁰¹ ROSE, *supra* note 194, at 1 (referring to the author as a "cultural formation" that is "inseparable from the commodification of literature"); *see* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 459 (1991) ("Legal scholars' failure to theorize copyright relates to their tendency to mythologize 'authorship,' leading them to fail (or refuse) to recognize the foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one."); Bracha, *supra* note 200, at 267.

Is not authorship in modern copyright discourse merely a harmless declaratory layer of rhetoric, a relic of bygone times that has little influence on 'real' copyright law? After all, even a cursory look at copyright doctrine seems to confirm that romantic authorship is just that. . . . [I]n "real" copyright law, originality is a minimal requirement that has little to do with the romantic vision and that

individual genius conflicts greatly with modern forms of collaborative authorship and creative efforts.²⁰² This deconstruction of the author, I would like to suggest here, removes from copyright jurisprudence a natural entity, and not just a social construct, who, if given more attention and scrutiny, will contribute immensely to the end goals of the copyright system by advancing knowledge for the progress of science and the useful arts.

Authors and artists play a significant role in the copyright system by engaging in the process of authorship to create literary and artistic works for society. Authorship may indeed take various forms and creative works may be produced in solitude or through collaboration but one thing remains constant: the very first step of bringing literary and artistic works to the public to promote progress in the sciences and useful arts lies with the author or creator of a work.²⁰³ Even works produced by media conglomerates or works for hire begin with human creators.²⁰⁴ Human creativity indeed lies at the heart of any copyright regime in both the common and civil law author-based systems,²⁰⁵ and cannot be dismissed without removing from the institution of copyright law the central impetus for the advancement of knowledge within society.²⁰⁶ Professor Jane Ginsburg considers the author the “human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work.”²⁰⁷ The right that an author has to exert some artistic control over the work would stem from the author’s act of molding the work to the author’s own vision²⁰⁸—an act of individual authentic authorship, which coupled with a moral obligation to advance knowledge in society, will contribute towards the progress of science and the useful arts.²⁰⁹ U.S. Copyright law has not, however, recognized, or rather may have overlooked, the author’s rights in their creations as legally and conceptually separate and different from the economic rights granted generally to copyright owners under

“author” is a technical legal term that may mean some legal entity who is not the actual creator.

Bracha, *supra*.

²⁰² See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 295 (1992) (“[T]he persistence of the notion of ‘authorship’ in American copyright law makes it difficult for any new legal synthesis, which would focus on the reality of collective creativity, to emerge.”).

²⁰³ See PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 176, at 70 (“The author . . . is a creator, and as such his work differs from that of others. First, his work is an extension of his personality; second, his work constitutes contributions to the culture of society. Since his contributions to society are unique and particularly valuable, it is to the interest of society to give special protection to the author’s personal interest in those contributions.”).

²⁰⁴ E.g. Lewis Lazare, *Has Chicago Lost Its Edge?: Fresh Talents Needed to Boost Local Ad Agencies*, CHI. SUN-TIMES, Aug. 2, 2002, at 55 (reporting that Chicago’s ad agencies need to hire the best creative talents if they want to obtain “the most fascinating and effective work”).

²⁰⁵ Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1068 (2003) (“Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work.”).

²⁰⁶ See *id.* (placing human creation at the center of the institution of copyright law).

²⁰⁷ *Id.* at 1092.

²⁰⁸ See *id.* at 1068 (“Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert.”).

²⁰⁹ See *id.* (implying that moral rights is concurrent with copyright law which stems from the Constitutional requirement of progress of sciences and the useful arts).

the copyright act. The exclusive rights provided under the copyright act protect the commercial value of the work, but recognizing the author's rights, will I think, protect a different value in the work—the author's authentic artistic value and individual contribution towards the advancement of knowledge in society. The copyright system must not lose sight of the clear ethics of its legal institution—works of genuine creativity must be encouraged before works of significant cultural, social or educational value can be produced to contribute towards the advancement of knowledge and the progress of the sciences and useful arts. While the market may set a commercial value and be willing to pay a price for a work based on its appeal to the masses, a work may damage the make-up of society by encouraging its departure from social, ethical, and moral norms: Hitler's *Mein Kampf*, for example, contained the "unmistakable attitude of aggression revealed throughout its pages," and being the "authentic source of Nazi doctrine"²¹⁰ led to the eventual Nazi regime of aggression, genocide, destruction and social reconstruction.²¹¹ The value of a work for the purposes of progress of the sciences and the useful arts lies less in its market or commercial value, and more on the authentic expression of the author that is contained within to serve copyright's ends and goals.²¹²

Copyright law generally protects original works of authorship that are fixed in any tangible medium of expression, which falls within one of these eight categories: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works,²¹³ recognizes the author of a work as the initial owner of the statutory rights.²¹⁴ The Berne Convention, which sets the minimum standard for copyright protection among its signatory member states, sees the protection of the rights of authors in their literary and artistic works to be its primary concern,²¹⁵ but does not define who an author is.²¹⁶ The 1976 U.S. Copyright statute explicitly protects original works of *authorship* but does not define who an author is in its definition section in 17 U.S.C.

²¹⁰ Harold Leventhal et al., *The Nuremberg Verdict*, 60 HARV. L. REV. 857, 864–65 (1947).

²¹¹ *See id.*

²¹² *See* Henderson v. Tomkins, 60 F. 758, 765 (C.C.D. Mass. 1894) ("Under the copyright side of the statute, however, especially so far as it relates to dramatic compositions, what appeals to the sense of curiosity, or excites wonder, is especially valuable, and therefore must be protected, or the purpose of the statute would fail in a very large measure."); *see also* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) ("Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.").

²¹³ 17 U.S.C § 102 (2006).

²¹⁴ *Id.* § 201.

²¹⁵ Berne Convention for the Protection of Literary and Artistic Works pmb., Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 ("The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works . . .").

²¹⁶ *See id.* art. 2 (defining the subject matter of protection). This could be because there was little doubt as to who an author is among the earliest signatories to the convention. *See* 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 358 (2d ed. 2006).

§ 101.²¹⁷ The Copyright statute protects “copyright owners” as the owner of the exclusive rights under section 106 but does not separate, nor distinguish, the rights of the author as the creator of the work, from the rights of those who derive their rights in the work from the author’s collective bundle under the statute, such as the publisher, printer or distributor of the work.²¹⁸ It is, however, important for the development of copyright system to distinguish between those who produce works as a creative expression of their individuality from those who undertake the task of printing, publishing and distributing the work. While rights of the author may generally be regarded as a property right in the work on principles of natural law and original acquisition of property rights through creation, it is difficult to conceive of the rights of financial and other non-authorial investors in a work, who undertake the task of disseminating the work to the public, to be more than economic privileges, or *in personam* rights, to perform certain actions with respect to the work: economic privileges that arises from the copyright statute to encourage the performance of specific tasks of bringing works to society in fulfillment of the intent of the copyright system to promote progress are conceptually and substantially different from property rights in literary and artistic works, which carry with them a general right to exclude the rest of the world from the use of creative components in the work.²¹⁹ Some copyright scholars have argued that if the law were to recognize the author’s property right in the work, the right would be adequately justified on principles of natural law and natural rights.²²⁰ Although copyright minimalists suggest that seeking to protect property rights of authors would lead to the over propertization of

²¹⁷ 17 U.S.C. §§ 101–102; see also David Nimmer, Address, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV., 1, 175 (2001) (“Just as early copyright statutes in the United States provided no attempt to give definition to who constitutes and ‘author,’ the governing act at present, passed in 1976, is similarly laconic.”) [hereinafter Nimmer, *Copyright in the Dead Sea Scrolls*].

²¹⁸ See 17 U.S.C. § 106 (providing that “the owner of copyright” has exclusive rights in copyrighted works); see also Nimmer, *Copyright in the Dead Sea Scrolls*, *supra* note 217, at 187 (“[T]he editor or collaborator, with respect to her own contributions, still qualifies as an individual author.”).

²¹⁹ See generally William Cornish, *The Author as Risk-Share*, 26 COLUM. J.L. & ARTS 1 (2002) (examining authors’ moral rights and investors’ rights under French and German law and advocating for a similar distinction in common law countries). The interests of authors and the interests of investors in creative works are different—authors are interested in the creative component of the work while investors generally interested in the works market value. *Id.* at 1–3. Copyright laws and producers’ investment laws serve very different purposes and there is a need to separate the rights of those who create the work from those who invest in the work. *Id.* at 11–13. While copyright serves the purposes of benefitting creative authorship, producers’ investment laws protect the economic investment in a work. *Id.*

²²⁰ See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) (“[A] properly conceived natural-rights theory of intellectual property would provide significant protection for free speech interests.”) [hereinafter Gordon, *Self-Expression*]; Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891, 893 (2006) (“Locke’s property philosophy guarantees authorial rights, but it also acknowledges the collective role of the public in the creative process.”). See generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (analyzing Locke’s labor theory and Hegel’s personality theory for property as the justification for intellectual property).

literary and artistic works, and the exclusion of society from uses of the work,²²¹ I would argue that the converse is true: the grant of property rights to authors in their works will not only enable greater public access to creative works but will also provide the copyright system with a moral and ethical foundation to encourage authors to engage in authentic authorship to advance knowledge within society and contribute towards scientific and artistic progress.

Professor Jane Ginsburg in her article, *The Concept of Authorship in Comparative Copyright Law*, lays down six principles of authorship, which offers a workable framework to acknowledge when an author's creative effort will amount to authorship for the purposes of recognizing property rights in literary and artistic works that are produced.²²² The first principle—that authorship places mind over muscle—identifies the author as the one who conceptualizes the work and separates him from the person executing directions to complete the work.²²³ The person, who invests in the creation of a work by providing financial and marketing support, such as a publisher or distributor, should therefore not be entitled to exercise property rights of exclusion in works—rights of an *in rem* nature—which stem from creative expressions of authorship rather than financial investments or non-authorial type contributions to the production of the work. The second principle is that the more the author relies on a machine, for example a camera or a computer, to produce the work, the more an author must demonstrate that he, rather than the machine, produced the work.²²⁴ The third principle equates originality with authorship although the standard for what amounts to originality differs from case to case.²²⁵ Both these principles identify a requirement that the author, in order for the work to be a work of creative authorship, be original in the creation of the work.²²⁶ This calls for a review of original authorship as a legal standard for the initial recognition of property rights in literary and artistic works, and this paper suggest that there may be a need to assess creativity and original expressions of authorship on a higher standard than the present legal standard of minimal creativity to justify the grant of property rights in the work of an *in rem* nature to the author. The fourth principle is

²²¹ *E.g.*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413, 1468 (1992) (“[R]omantic vision of authorship . . . provided the necessary raw material to fashion some convincing mediation of the tension between the imagery of public and private in information production.”); Ben Depoorter, *The Several Lives of Mickey Mouse: Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH. 1, 23 (2004) (“Because intellectual authorship is intrinsically exceptional . . . [the] romantic conception of authorship carries with it a normative command for stronger protection of intellectual work.”); Mark A. Lemley, Book Review, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 885 (1997) (“Intellectual property protection encourages authors to invest time and effort in the creation of new works of authorship, but taken to an extreme, such protection can make the creation of new works virtually impossible by locking up all of the possible sources from which a new author can work.”).

²²² Ginsburg, *supra* note 205, at 1072–91.

²²³ *Id.* at 1072.

²²⁴ *Id.* at 1074–77.

²²⁵ *Id.* at 1078–82; see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348, 358 (1991) (holding that a collection and arrangement of facts in an original way would qualify the compiler as an author). Hence there is a minimum amount of originality and creativity required for a work to be a work of authorship. *Feist*, 499 U.S. at 348, 358.

²²⁶ Ginsburg, *supra* note 205, at 1074–78.

that skilled reproductions of more than negligible level are works of authorship.²²⁷ The fifth principle requires intent on the part of the creator of the work to be regarded as the author, which may become more of an issue when there is contention of authorship status in a collaboratively produced work by one or more collaborator seeking the status of an author.²²⁸ The sixth principle is that the commissioner of a work made for hire is also the author²²⁹ although one would be extremely skeptical about the status of authorship with respect to the commissioner of a work.²³⁰ The commissioner has not invested in creative authorship and cannot be given the right of the author who created the work: one is either the creator of a work, or one is not.²³¹ The last three principles address forms of authorship, which may not fit the traditional romantic model of the autonomous author, who creates an individual work of authentic authorship based solely on individual experience and personality, but introduces a conception of authorship that is largely collaborative and interdependent.²³² Collaborative works are also works of authorship, but requires the identification of the author or authors, who may individually and collectively exercise property rights in literary and artistic works.²³³

II. NATURAL LAW INFLUENCES IN THE COPYRIGHT SYSTEM

Natural law influences in the copyright system have concentrated on the rights of an author in relation to his literary creation. Two theories of property rights in the natural law tradition have frequently been advanced to support property rights in works for authors—John Locke's labor theory that the author who mixes labor with what nature has provided acquires property in what is produced and Friedrich Hegel's personality theory that creative works should be protected as the property of the author because the work manifests the author's personality.²³⁴ Both labor and personality theories, I think, provide adequate justification for recognizing property

²²⁷ *Id.* at 1082–85.

²²⁸ *Id.* at 1085–88.

Intent . . . does not make a contributor more or less creative, but it may supply a means to sort out the equities of ownership in cases in which more than one contender is vying for authorship status. There, the problem is not so much whether the contenders intended to be creative, as whether they intended to share the spoils of creativity, that is, whether they intended to be *joint* owners of the copyright.

Id. at 1087.

²²⁹ *Id.* at 1088–92.

²³⁰ *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (“As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”).

²³¹ Ginsburg, *supra* note 205, at 1091 (“[S]hould we maintain that vesting authorship in employers for hire is an aberration whose aspirations to the copyright mainstream we should resist lest copyright lose both its humanist cast and the moral appeal that flows therefrom?”).

²³² *Id.* at 1082–91.

²³³ 17 U.S.C. §§ 101, 201(a) (2006); *see, e.g.*, Janky v. Lake County Convention & Visitors Bureau, Nos. 07-2350, 07-2762, 08-1606, 2009 U.S. App. LEXIS 17207, at *11–12 (7th Cir. Aug. 3, 2009) (discussing co-ownership).

²³⁴ Hughes, *supra* note 220, at 297–300, 330–32 (discussing Lockean theory and Hegelian theory).

rights of authors in their literary and artistic works that are larger and more encompassing than the statutory rights provided for under section 106. Property rights in the natural law tradition represent a standard of morality that may not be necessarily captured and reflected in a statutory enactment adequately.²³⁵ By recognizing natural rights of authors, the copyright system conforms to a larger ethics of promoting the progress of sciences and the useful arts through the works of authors.²³⁶ It was a brilliant law professor who had once said that “[t]here are many different types of relation between law and morals and there is nothing which can be profitably singled out for study as *the* relation between them”²³⁷ and it is with great trepidation that I venture to suggest otherwise for the copyright system—for a legal system intended to promote the progress of science and the useful arts, and advance knowledge for society cannot be properly understood without an understanding of a larger ethics of author’s rights and authentic authorship.²³⁸ The single relation between jurisprudence and ethics, or law and morals, in copyright lie in the rights and obligations, which authors, as the creator of literary and artistic works, and society, as the user of those works, have towards each other in the tradition of a hypothetical social contract to “accept certain moral principles”²³⁹ with respect to the kind of literary and artistic works authors create for society, and the manner in which society uses these works for social, educational and cultural growth.²⁴⁰

A. *Natural Law, Legal Positivism and the Copyright Tradition*

Since the decision of *Wheaton v. Peters*,²⁴¹ rights under the copyright system have been a matter of positive laws, provided for by statutory provisions under the federal Copyright Act. The courts have generally accepted the proposition in *Wheaton v. Peters* that the only rights under the copyright system are the exclusive rights that had been newly created by Congress in the Copyright Act,²⁴² and have deferred to Congress in deciding matters of copyright policy that would set the appropriate balance of interests between copyright owners and the public.²⁴³ In *Eldred v. Ashcroft*, the United States Supreme Court refrained from second-guessing Congress’s decision to expand the scope of copyright protection from fifty to seventy years after the life of the author under the Copyright Term Extension Act 1998.²⁴⁴ Justice Ginsburg, in delivering the decision of the Court, stated that when it comes to the implementation of the constitutional aim of promoting progress, Congress’s policies, whether good or bad, if not within the purview of the courts for the “wisdom

²³⁵ Ng, *Social Contract*, *supra* note 25, at 419; see Gordon, *Self-Expression*, *supra* note 220, at 1541 (discussing moral duties under natural law theory).

²³⁶ See Kwall, *Copyright and the Moral Right*, *supra* note 185, at 91–92.

²³⁷ H.L.A. HART, *THE CONCEPT OF LAW* 185 (Clarendon Press 1994).

²³⁸ Ng, *Social Contract*, *supra* note 25, at 419.

²³⁹ JOHN RAWLS, *A THEORY OF JUSTICE* 16 (Harvard Univ. Press 1971).

²⁴⁰ Ng, *Social Contract*, *supra* note 25, at 457.

²⁴¹ 33 U.S. 591 (1834).

²⁴² *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

²⁴³ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2002).

²⁴⁴ 537 U.S. 186, 186, 222 (2002).

of Congress' action . . . is not within [the Court's] province to second-guess."²⁴⁵ The court's consistent deference to Congressional powers in setting the proper policies for promoting the progress of sciences and the useful arts may have entrenched the view that rights in literary and artistic works are essentially statutory rights based on positive law and that there are no other rights outside the Copyright Act, which an author could possess by virtue of his creating the work.²⁴⁶ Justice Steven's observation in *Sony* that "[t]he judiciary's reluctance to expand the protections afforded by the copyright without expressive legislative guidance is a recurring theme"²⁴⁷ best summarizes the reluctance of the courts to look at the rights of authors as being a larger and more cohesive whole than the present bundle of rights provided for under the statute.²⁴⁸

An author's rights however, cannot be limited solely to the exclusive rights to use the work in the particular ways laid out in section 106. The rights of the creator of a work should be greater than the right to make copies or derivatives, or distribute or publicly perform or display the work.²⁴⁹ The creator of a work owns the work in a way that excludes everyone else.²⁵⁰ The metaphor of paternity used in the sixteenth and seventeenth century to describe the relationship between the author and his work as that of parent and child is a helpful figure in conceptualizing the rights of the author in relation to the work: there is only one creator who could have, like a parent, naturally begotten the work, and regardless of how the law later defines the owner of the work to be, the author of the work remains its creator.²⁵¹ Locke's and Hagel's theories, both in the natural law tradition, provide a convincing argument that literary and artistic works should be protected as the author's property.²⁵² An author who labors and uses works in the public domain to bring a new work to fruition deserves to own the work as his property.²⁵³ Likewise, an author who pours his authentic expressions into a literary and artistic work would have extended part of his personality and ought to be entitled to property in the work protected as a form of natural right.²⁵⁴ A critical examination of the historical trajectory of copyright law, the development of the notion of the romantic author, and the requirement of originality in creation of the work reveals that authors have had separate and distinct roles from that of the publisher, printer or distributor in the copyright system.²⁵⁵ The individual rights of authors appear to have, by historical evidence,

²⁴⁵ *Id.* at 222.

²⁴⁶ *See id.*

²⁴⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

²⁴⁸ *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1883–89 (2007) (discussing *Sony* and other relevant case law and stating that “[w]here expansive constructions of statutory rights would have meaningfully constricted historic copyright liberties, these courts refused to interpret rights so broadly.”).

²⁴⁹ Ng, *Social Contract*, *supra* note 25, at 424–25 (advocating a natural rights based copyright system instead of the current utilitarianism based system).

²⁵⁰ 17 U.S.C. §§ 106, 201(a) (2006).

²⁵¹ *See* ROSE, *supra* note 194, at 38.

²⁵² Hughes, *supra* note 220, at 297–300, 331–32 (discussing Lockean theory and Hegelian theory).

²⁵³ *See id.* at 297–300 (discussing Lockean property theory).

²⁵⁴ *See id.* at 331–32 (discussing Hegelian property theory).

²⁵⁵ PATTERSON, *HISTORICAL PERSPECTIVE* *supra* note 176, at 77 (asserting that English printers appeared to have recognized a property right and a creative right, which authors possess);

existed independently from the utilitarian goals and aims, and economic policies, of the copyright statute, and if conceived as a matter of natural law, authors would have ownership of the work, and not just ownership of section 106 rights to conduct particular actions with respect the work, but the recognition of natural right of authors would also imply moral obligations and ethical duties owed by authors to the public in what they have created and produced: the inclination towards progress of the sciences and the useful arts and the advancement of knowledge in society as a natural order would require the recognition of natural rights and obligations on both the author and his audience.²⁵⁶ As the progress of science and the useful arts, and the advancement of knowledge, is dependent on the type of works authors create, authors are therefore under a moral or ethical obligation to society to produce and create works that will further the common good of society, and promote progress.²⁵⁷ The acknowledgement of authorial rights over literary and artistic works premised on theories of natural law and natural rights therefore recognize both property rights that authors have over the works by virtue of their creative authorship and the rights society have to use those works for development and growth.²⁵⁸ However, the analysis of authorial and societal rights in literary and artistic works cannot end with the acknowledgement that such rights may be founded on Locke's and Hagel's rights theories because in practical legal terms, these rights must be acknowledged and protected under a system of laws.

ROSE, *supra* note 194, at 20 (offering sixteenth and seventeenth century examples of courts upholding the authors rights in his work); WOODMANSEE, *supra* note 163, at 51–52 (stating that German authors would also claim ownership of their authorship—the creative form taken by the work—and the German copyright laws, *Urheberrecht*, protected the author as the creator or originator of the work allowing the publisher to function as the author's agent in the eighteenth century); see also L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 73 (1991).

The failure to articulate the distinction between the work and the copyright has proved to be the major flaw in nineteenth-century copyright jurisprudence. . . . After the grant of statutory rights was enlarged in the 1909 [United States Copyright] act, the distinction between the work and the copyright receded into the background.

PATTERSON & LINDBERG, *supra*.

²⁵⁶ See Ng, *Social Contract*, *supra* note 25, at 424–25 (encouraging a copyright system based on natural law which is divergent from the current utilitarian, economic based system). Burdens and obligations placed under classical natural law cannot be done in an “unequal fashion even if they are aimed at the common good.” ST. THOMAS AQUINAS, *ST. THOMAS AQUINAS ON POLITICS AND ETHICS* 55 (Paul E. Sigmund ed. & trans., W.W. Norton & Co. 1988).

²⁵⁷ Ng, *Social Contract*, *supra* note 25, at 464 (“By protecting the moral rights of authors, copyright law ensures that an author's personal integrity remains intact after the creation is made available to the public and this, as a result, encourages the kind of authentic authorship that contributes to the pursuit of excellence within society.”).

²⁵⁸ See Gordon, *Self-Expression*, *supra* note 220, at 1535 (arguing that a natural rights theory can protect both the interests of authors and the public).

Natural rights theory . . . is necessarily concerned with the rights of the public as well as with the rights of those whose labors create intellectual products. When the limitations in natural law's premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests.

Id.

As the ethical and moral dimension of the copyright system is wider and more encompassing than the statutory rights of the Copyright Act, the common law would be the best guardian of social conduct on the part of the author and his readers as to what kinds of acts would contribute to progress and the advancement of knowledge. State common-law rights of the author, which protected pre-published works,²⁵⁹ have been abolished by the 1976 Copyright Act, which protects works of authorship as soon as it is fixed in a tangible medium of expression,²⁶⁰ thereby eliminating the distinction between published and pre-published works²⁶¹ and common-law and statutory rights.²⁶² The significance of this is immense. The statutory rights represent a bundle of rights of an *in personam* nature, which allow the copyright owner to do certain things with respect to the work but do not convey a more general sense of property of the *in rem* type to which a general right of the author to exclude the rest of the world would attach to.²⁶³ Professor Lyman Patterson points out that the author may transfer any of the rights under section 106 because they are divisible but that such a transfer, while conveying “title to the copyright does not constitute transfer of title to the work. . . . [T]he 1976 Act . . . does not deal with the ownership of the work, only with ownership of the copyright.”²⁶⁴ The “key difference,” as Professor Patterson highlights, is “that common-law copyright is no longer available to vest ownership of the work in the author.”²⁶⁵ The key question now is therefore whether property rights in creative works may be vested in the author without the common-law copyright under a more general natural law theory of property or moral rights in literary and artistic creations. The answer would be an affirmative yes, if we are willing to consider the recognition of the author’s rights in literary and artistic works as a moral judgment made about the process of authorship and the resulting work, which is created as necessary to promote the progress of science and the useful arts within a larger more cohesive ethical framework for the copyright system. The premise of natural law is this: that there are certain fundamental truths about human nature and human needs that are accessible to each one of us as rational beings.²⁶⁶ One of the truths in natural law is that all men

²⁵⁹ Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1214 (1999).

Under the regime created by the 1909 Act, an author received state common law protection automatically at the time of creation of a work. This state common law protection persisted until the moment of a general publication. When a general publication occurred, the author either forfeited his work to the public domain, or, if he had theretofore complied with federal statutory requirements, converted his common-law copyright into a federal statutory copyright.

Id. (footnote omitted) (citations omitted).

²⁶⁰ Copyright Act of 1976, 17 U.S.C. §§ 101–102 (2006).

²⁶¹ *Id.*; Estate of Hemingway v. Random House, 244 N.E.2d 250, 254 (N.Y. Ct. App. 1968) (“Common law copyright [before the 1976 Act protected] an author’s proprietary interest in his literary and artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely.”).

²⁶² 17 U.S.C. § 301(a).

²⁶³ L. Ray Patterson & Christopher M. Thomas, *Personal Use in Copyright Law: An Unrecognized Constitutional Right*, 50 J. COPYRIGHT SOC’Y U.S.A. 475, 517 (2003).

²⁶⁴ PATTERSON & LINDBERG, *supra* note 255, at 120–21.

²⁶⁵ *Id.* at 121.

²⁶⁶ AQUINAS, *supra* note 256, at 50 (“[I]t is evident that as to the general principles of reason . . . there is a single standard of truth and right for everyone which is known by everyone.”).

ought to seek knowledge as a desired end as a moral obligation²⁶⁷ offers an ethical basis upon which property rights may be separated from economic incentives and from which an author's rights may be predicated. Property rights of an author in works of authentic authorship affirms an author's genuine contribution to progress and the advancement of knowledge through literary and artistic works, and removes authors from the patronage of the copyright marketplace by encouraging authentic expressions. Property rights of an author in his creations, which is founded on a philosophy of natural law expresses the ethical view that the moral content of a work is more important than the commercial value of the work on the market. In the same spirit that St. Augustine had when he declared that "an unjust law is no law at all,"²⁶⁸ it may be asserted that a work that is devoid of authentic content to promote progress or advance knowledge is not a work of authorship nor is its creator an author. An author has a moral obligation to society to promote progress or advance knowledge through their works even when society believes that they have a right to dangerous, indecent or immoral works.²⁶⁹

B. Authentic Authorship

The phrase "authentic authorship" here refers to the process of authorship and creativity, which represents more than an author's labor and personality poured out into the production and creation of a literary and artistic work. It is taken to connote the right of the author to have the law acknowledge authentic expressions that manifests his individual creativity where the author produces a work that makes a genuine contribution towards the advancement of knowledge and the improvement of society by promoting the progress of science and the useful arts, but it also suggests of a moral obligation on the part of the author to produce works for society with those ends in mind. Authentic authorship, while it will definitely include works representing the intrinsic dimension of the artistic soul in the spiritual sense,²⁷⁰ it is not necessarily so confined. Authentic authorship also does not confine itself to the romantic notion of the individual genius creating in isolation, although it would include it, for it is well accepted today that authors create using existing works of authorship and are often inspired by works of other authors.²⁷¹ By "authentic authorship," I mean a unique contribution of a unique human experience made by the author on his part to the general pool of knowledge and information available to the public to provide society with literary and artistic materials that will encourage social, cultural and educational growth. Works of authentic authorship are generally not created for the market, a patron, or for government subsidies.²⁷² They are the

²⁶⁷ Mortimer Adler & Bill Moyers, *A Dialogue on the Nature of Goodness*, in AQUINAS, *supra* note 256, at 193–96.

²⁶⁸ SAINT AUGUSTINE (BISHOP OF HIPPO), ON FREE CHOICE OF THE WILL bk. 1, 8 (Thomas Williams trans., Hackett Publ'g Co. 1993).

²⁶⁹ See Ng, *Social Contract*, *supra* note 25, at 467.

²⁷⁰ For an excellent account of the relationship between spirituality and artistic innovation, see Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006).

²⁷¹ Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966–67 (1990).

²⁷² See Ng, *Social Contract*, *supra* note 25, at 426.

individual expressions of authors written to convey useful information, thoughts, ideas or simple musings to benefit, and not harm, society.²⁷³ The individual author is in a “unique position as the creator and producer of literary and artistic works in the center of the copyright legal system comprising other authors, readers and the publisher/distributor:” he produces a work that can either improve or adversely affect, and in extreme situations destroy, the fabric of society.²⁷⁴ “Before a work is put before the public, an author must conceive of a work and engage in an intricate process of creativity to produce the work.”²⁷⁵ An ethics for the copyright system must encourage this form of authentic authorship in art, music and literature to avoid authorial creativity from being determined solely by popular demand on the commercial market.²⁷⁶ The idea of authentic authorship does not guarantee the creation of works that will only further the interests of society.²⁷⁷ Works detrimental to society’s interest may still be created but the idea of authentic authorship provides a benchmark to assist us in deciding whether the work is a work of authorship. Seditious materials may do more harm than benefit to society and may properly be regarded as not being works of authorship to which its writer is entitled to a property right.

In the case of *Stanley v. Georgia*, an appellant was convicted of private possession of obscene matter.²⁷⁸ The appellant appealed, contending that state law, which made the private possession of obscene materials illegal, violated the First Amendment and was unconstitutional as a result.²⁷⁹ Justice Marshall in delivering the decision of the United States Supreme Court²⁸⁰ held that the appellant’s “right to be let alone . . . to read or observe what he pleases . . . to satisfy his intellectual and emotional needs in the privacy of his own home”²⁸¹ without Government interference was unquestionable.²⁸² “If the First Amendment means anything,” Justice Marshall goes on to say, “it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”²⁸³ Furthermore, to Justice Marshall, the assertion that exposure to pornography would lead to deviant social behavior was an insufficient reason for the State to interfere with the private possession of such materials.²⁸⁴ Commenting that “the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.”²⁸⁵ Justice Marshall clearly set a bright line rule that prevented

²⁷³ *See id.*

²⁷⁴ *Id.* at 428.

²⁷⁵ *Id.*

²⁷⁶ *See* Cowen & Tabarrok, *supra* note 63, at 241.

²⁷⁷ *See* Ng, *Social Contract*, *supra* note 25, at 435.

²⁷⁸ 394 U.S. 557, 558 (1969).

²⁷⁹ *Id.* at 559.

²⁸⁰ *Id.* at 558.

²⁸¹ *Id.* at 564–65.

²⁸² *Id.* at 565.

²⁸³ *Id.*

²⁸⁴ *Id.* at 566–67.

²⁸⁵ *Id.* at 567.

states from interfering with the private individual's choice of reading material.²⁸⁶ While states and governments are generally restricted in what they may do with respect society's use of such materials in the privacy of their own homes, save for situations where the rights of the public is affected by such use,²⁸⁷ the acknowledgement of an author's moral obligation towards society by being authentic in their creative works of authorship provides the copyright system with a moral compass to make value judgment on the type of literary and artistic works that ought to be created for society and the type of literary and artistic works society ought to read or use for the advancement of knowledge or progress in education, culture or art without requiring government interference with the kinds of works that are produced and used.

C. Social Access to Creative Works

As most authors generally use works from the public domain and existing works of authorship to create new works of their own, the idea of authentic authorship does not allow an author to preclude reasonable social access to use of the work. The law's encouragement of authentic authorship will facilitate greater social access to an author's work for an author, who borrows from others to produce new works, by natural order and natural law, ought to make his work equally available to the public, and other authors, for use.²⁸⁸ Existing doctrines within the copyright system—the idea/expression dichotomy, merger doctrine and fair use—aim to make creative works more accessible to the public to aid in the creation of new works of authorship.²⁸⁹ It was Judge Hand who had remarked that the basic personality traits of the characters in Shakespeare's plays were ideas that were “as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species.”²⁹⁰ Within the framework of the copyright system, access to ideas for public use is a matter of right: section 102(b) of the Copyright Act states that copyright protection does not extend to any idea, “regardless of the form in which it is described, explained, illustrated, or embodied in such work.”²⁹¹

However, the notion that authentic authorship ought to be protected as a matter of morality would also recognize a natural right that men generally have to pursue knowledge.²⁹² Acknowledging a natural right to knowledge²⁹³ would mean

²⁸⁶ *Id.*

²⁸⁷ *Breard v. City of Alexandria, LA.*, 341 U.S. 622, 640 (1951) (“The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.” (quoting *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949)), *abrogated by Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 631–33 (1980).

²⁸⁸ See Ng, *Social Contract*, *supra* note 25, at 426.

²⁸⁹ 17 U.S.C. §§ 102, 107 (2006). See generally *Baker v. Selden*, 101 U.S. 99 (1879) (idea/expression dichotomy and merger doctrine); *Harper & Row Publishers, Inc. v. Nat'l Enters.*, 471 U.S. 539 (1989) (fair use); see also *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1144 (10th Cir. 2009) (applying the merger doctrine).

²⁹⁰ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120–21 (2d Cir. 1930).

²⁹¹ 17 U.S.C. § 102(b).

²⁹² AQUINAS, *supra* note 256, at 192–96.

²⁹³ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59–80 (1980).

recognizing that society has a right to have knowledge that would promote progress conveyed to them for use in research, education, development and learning. This right would therefore correspond with the author's moral obligation to produce works of authorship that would fulfill this purpose.²⁹⁴ Conversely, the public, in accessing works of authorship, must respect the author's property right in the work—the right to generally exclude society from uses of the work that contradicts his purpose for creating the work—and would be under a moral obligation to the author to use the work in a way that will further the goals of the copyright system. Using a chemistry book to manufacture homemade spirits to cause public harm,²⁹⁵ or the looking to the Bible to justify a war, would be a breach of the moral obligation society has towards the author of a work. While the obligation society has towards the author of a work of authentic authorship would be similar to a respect for an author's moral rights within the European tradition, the moral obligation here pertains more specifically to uses of a work, which departs from the general purposes of promoting the progress of science and the useful arts within society.²⁹⁶ The work may not necessarily be used in a derogatory or offensive manner to offend the author's paternity or integrity moral right but may be used in a way that departs from the general purposes of advancing knowledge.²⁹⁷ If that occurs, the moral obligation towards the author is breached.

III. PROPERTY RIGHTS AND ECONOMIC INCENTIVES

Protecting the author's rights in literary and artistic works therefore highlights the issue discussed in the earlier part of this paper—that there is a need to separate property rights in literary and artistic works that authors have by virtue of their creative endeavors, and economic incentives to disseminate the work to the public to fulfill the constitutional mandate.²⁹⁸ The reason for such a distinction between property rights and economic incentives is that both serve essentially different purposes with respect to the public's interest in having literary and artistic works to promote progress.²⁹⁹ Property rights in literary and artistic works are premised on the idea that authors have a natural right in their creations because they created it.³⁰⁰ They are connected to the work in a way that is unique and different from the publisher or distributor of the work. Recognizing the author's natural property right in the work will facilitate greater authorial confidence to create works that are authentic expressions of their individuality, and allow authors the right to the exclusive use of their property, subject to the moral obligation to make their work

²⁹⁴ See Ng, *Social Contract*, *supra* note 25, at 466–67. *But see* FINNIS, *supra* note 293, at 65 (“This is not to say that everyone actually does recognize the value of knowledge, or that there are no pre-conditions for recognizing that value. The principle that truth (and knowledge) is worth pursuing is not somehow innate, inscribed on the mind at birth.”).

²⁹⁵ *Stanley v. Georgia*, 394 U.S. 557, 567 (1969).

²⁹⁶ See C. PROP. INTELL. art. L121-1 to L121-9 (Fr.).

²⁹⁷ See *id.* art. L121–L122.

²⁹⁸ See Cornish, *supra* note 223, at 11–13.

²⁹⁹ See Glen Pudelka & Etienne Kairis, *A Fair Use of Harry? A United States vs. European Perspective of Copyright Law*, 21 INTELL. PROP. J. 379, 384 (2009) (Can.).

³⁰⁰ See Hughes, *supra* note 220, at 297–300, 331–32.

available to society to promote the progress of science and the useful arts and advance knowledge.³⁰¹ Economic incentives, which arise through statutory provisions, facilitate the dissemination of works over the copyright market by creating legal barriers to uses of the work to prevent non-paying members of society from free-riding upon the effort of its creator.³⁰² Central to this distinction between property rights and economic incentives in the copyright system is the conceptual and legal differences between two natures of legal rights—the right that is good against the world, and the right that is good only against particularly identified individuals or entities—which must inform our analysis of the author’s property rights in literary and artistic works.³⁰³

Legal systems generally have two modalities of rights to regulate the use of resources differently—the right *in personam* identifies the specific rights to use resources between specific individuals and the right *in rem* identifies a particular resource (the thing to be protected) and the person (the owner of the thing), who acts as the “gatekeeper or regulator” of the thing protected.³⁰⁴ *In personam* rights provide a governance strategy with respect the use of resources, where “rights to resources are defined in terms of permitted and restricted uses” and *in rem* rights provide and exclusion strategy by “restricting access to a particular resource rather than by specifying permitted or prohibited uses.”³⁰⁵ While the rights under the copyright system have consistently been referred to as property rights, these rights in reality are carefully enumerated rights in literary and artistic works that specifically stipulate the rights to use in specific ways.³⁰⁶ The rights to print, distribute, make derivatives, publicly perform or display works on the copyright market under § 106 are exact rights to use creative works and is, as a matter of reality, a method of governance of how these works are used by society.³⁰⁷ Arguably the economic incentives under section 106 do not provide copyright owners with a general right of exclusion from use of the works.³⁰⁸ Furthermore, the fair use provisions of section 107 and compulsory licensing for non-dramatic musical works of section 115 provide specific limitations on the rights of the copyright owner, which prevents the copyright owner from having “complete control over all possible uses of the work.”³⁰⁹ The author’s rights on the other hand, based on a theory of natural law that the author has property in that which he creates and that all men have a right to pursue knowledge, acknowledges a more general right of the author to exclude access to the work from uses of the work, which contradicts his purposes for creating it—to

³⁰¹ See Ng, *Social Contract*, *supra* note 25, at 464–65.

³⁰² See 17 U.S.C. § 106 (2006); *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990).

³⁰³ See Merrill & Smith, *supra* note 30, at 789–92.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 791.

³⁰⁶ *Dowling v. United States*, 473 U.S. 207, 216–17 (1985) (“A copyright . . . comprises a series of carefully defined and a carefully delimited interests to which the law affords correspondingly exact protections. ‘Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright,’ which include the rights ‘to publish, copy and distribute the author’s work.’” (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546–47 (1985))).

³⁰⁷ See Merrill & Smith, *supra* note 30, at 791.

³⁰⁸ See *id.*

³⁰⁹ *Dowling*, 473 U.S. at 217 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984)).

advance knowledge or promote the progress of science and the useful arts.³¹⁰ A general right of exclusion of the *in rem* nature with author's is not inconsistent, and may in fact be reconcilable, with the *in personam* nature of the economic incentives. The statutory rights under section 106 provide a strategy that would allow copyright owners to profit from the work on the market—in other words, making works commercially valuable to reward creativity.³¹¹ The author's rights under a more general natural law theory allow authors to authentically express themselves through their work—in other words, making the work intrinsically valuable to reward authentic authorship devoted to promoting progress and advancing knowledge.

A. *The Right to Exclude*

If we were to think of a larger ethics for the copyright system—to promote the progress of science and the useful arts and advance knowledge for the benefit of society through works of authentic authorship—we must acknowledge that the author's property rights in his work would allow him to generally exclude society from uses of the work. However, there is a substantial difference between the exclusionary right of the author based on natural law and the exclusionary right of copyright owners based on the economics of the copyright market, which has been used to prevent even non-commercial uses of works.³¹² The right of the author would be based on a moral ideal: that works of authentic authorship will improve society and contribute towards its betterment because as a matter of natural law, all men ought to seek, desire, and want knowledge as a basic human need,³¹³ and an author, writing with that purpose as an end, is, as a result, deserving of property rights to recognize and protect his creativity and contribution. An author who writes for progress and advancement of society would be entitled to, by virtue of a property right he has in the work, exclude society from using the work as a general rule.³¹⁴ The right to exclude society from using the work would be consistent with the *in rem* nature of property but as a matter of ethics or morality, an author ought to only exercise a general right of exclusion when society uses the work in a way, which unreasonably interferes, or affect, the author's authentic expression.³¹⁵ The use of a chemistry book to build a home bomb system, for example, would be against the author's purpose for creating the work and ethics of the copyright system. In this situation the author would be entitled, both on legal and moral grounds, to exclude society from use of the work. Economic incentives do not carry with them a general

³¹⁰ See Ng, *Social Contract*, *supra* note 25, at 466–69.

³¹¹ See 17 U.S.C. § 106 (2006); *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990).

³¹² See, e.g., Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES, Sept. 9, 2003, at A1 (reporting on the music recording industry filing infringement lawsuits against individuals who share copyrighted music without charging a fee or deriving economic benefit).

³¹³ FINNIS, *supra* note 293, at 59–80.

³¹⁴ U.S. CONST. art. I, § 8, cl. 8.

³¹⁵ See Merrill & Smith, *supra* note 30, at 789–92; Ng, *Social Contract*, *supra* note 25, at 463 (citing Lacey, *supra* note 297, at 1548–49).

right of exclusion even if the law current says they do.³¹⁶ Economic incentives grant specific entitlements to perform certain acts with respect to a given resource. Government created property rights, such as patents and copyright, do not entail an *in rem* right to exclude but are rather *in personam* rights of governance with respect to a resource.³¹⁷ For intellectual property, the government created property right is intended to address the public good nature of information and prevent social misappropriation of goods that are non-rival and non-excludable.³¹⁸ The “property right” in intellectual property provides a legal mechanism to govern information resources and use in the most efficient manner,³¹⁹ and ought not to include general rights of exclusion against society for social uses of the work that is not in direct competition with the business of the copyright owner or, which do not lower the work’s commercial value on the market. In government created property rights, such as copyright, rights do not attach to a particular thing, but rather to certain uses of the thing, and do not identify a person to manage the resource, but rather to use the resource in the most efficient manner.³²⁰

B. Market Dissemination

Economic privileges within the copyright system are intended to encourage creation of commercially valuable works and to facilitate market dissemination of these works. They serve a purpose: to put information resources in literary and artistic works to the most economically efficient uses.³²¹ They are calibrated to ensure that creators and publishers recover their investment in creating and producing the work for the public, but they also ensure that the public has access to the information in the work needed to spur new forms of creativity and innovation.³²² This is why doctrines such as idea/expression, merger, and fair use are so deeply embedded within the fabric of copyright jurisprudence: the most economically efficient use of a given resource would require a careful assessment of where government-created property rights should end, so as to not create dead weight losses upon society, and what kind of use rights society ought to have with respect the work to ensure that the value of the work is maximized and that the work is put to its most efficient use by society.³²³ As the incentives provided for under section 106 are designed to ensure a work’s commercial marketability to encourage creativity and dissemination, the economic privileges copyright owners have are entitlements to

³¹⁶ See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

³¹⁷ See Brian M. Hoffstadt, *Dispossession, Intellectual Property, and the Sin of Theoretical Homogeneity*, 80 S. CAL. L. REV. 909, 932 (2007).

³¹⁸ PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 37, 195, 370 (18th ed. 2005); Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. ON DISP. RESOL. 439, 450–52 (2003).

³¹⁹ See, e.g., Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 129–30, 135–36 (2000) (arguing that the patent system is a unilateral contract between the government and general community of inventors).

³²⁰ Merrill & Smith, *supra* note 30, at 791.

³²¹ Landes & Posner, *supra* note 8, at 325–26.

³²² See Ng, *Social Contract*, *supra* note 25, at 420–23.

³²³ See Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, J. ECON. PERSP. 57, Spring 2005, at 63–65, 72–73.

recover, from the market, the cost of producing a work.³²⁴ These entitlements, when of an *in personam* nature with respect to clearly permissible uses, ought not to be used, as a matter of legal principle, as a general right to exclude society from uses of the work that do not affect the commercial value of the work on the market—such as the use of cartoon characters by fans.³²⁵ Furthermore, it is also legally impossible to “steal” a resource that is the subject matter of certain government enumerated uses, and not the subject of ownership rights of the more exclusionary *in rem* nature.³²⁶ Arguably, the economic incentives to disseminate creative works in the market should only be enforced in special circumstances when the use of the work erodes the incentive to perform any of the acts specified in section 106 on the copyright market. A claim for copyright infringement of the economic privileges of the copyright owner can only be legally justified when there is a clear case of unfair competition by a market competitor using the work in infringement of the specific use-rights enumerated by Congress under section 106.³²⁷

C. Encouraging Authentic Human Expression

As the copyright system is essentially economic centric, the inattention to encouraging authentic human expression to promote progress of the sciences and the useful arts is notable. The reason this is important, particularly from a moral and ethical view point, is because of the propensity for creative works to sway the public and society in particular directions, sometimes in ways that are only observable with hindsight.³²⁸ It is only with hindsight that we observe the effect of works such as *Mein Kampf* and *The Negro as Beast*, which incited the lynching of 2,500 innocent people between 1885 and 1990,³²⁹ on society. Authentic human expression with the end purpose of promoting progress and advancing knowledge on the part of the author or artist should be encouraged as a moral obligation within the copyright system as authentic forms of authorship would make a more significant contribution to the progress of science and the useful arts by refusing to give in to current sentiments or tastes of the market audience.³³⁰ Popular works do not necessarily promote progress nor advance knowledge for the betterment of society, especially when their authors write without that aim as an end.³³¹ D.W. Griffith's *The Birth of a Nation* was a “masterpiece” in the eyes of the public when it was released in 1915.³³² Particularly with Griffith's recreation of civil war battles,³³³ the movie was

³²⁴ See Ng, *Social Contract*, *supra* note 25, at 480.

³²⁵ LESSIG, *supra* note 19, at 182 (stating that the Fox network claimed to “own” the cartoon characters of Bart Simpson and his father and disallowed fans from using them on a fan website).

³²⁶ See *id.* at 183 (“Copyright interests obsess about the ability for content to be ‘stolen’ . . .”).

³²⁷ See 17 U.S.C. §§ 106, 501 (2006).

³²⁸ See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258, 1260, 1264, 1277–78 (1992).

³²⁹ *Id.* at 1264.

³³⁰ See Cowen & Tabarrok, *supra* note 63, at 241.

³³¹ See Delgado & Stefancic, *supra* note 328, at 1264–65.

³³² Leslie Beatty, *Griffith's Film Work Deserves Recognition*, LEXINGTON HERALD-LEADER, Mar. 1, 2004, at A7.

³³³ *Director's Guild Drops Award Named for D.W. Griffith*, CHI. TRIB., Dec. 15, 1999, at 2.

praised for its “technical and artistic merits”³³⁴ but it was also used by segments of society to propagate racial stereotypes in immorally degrading ways.³³⁵ While the copyright system’s primary philosophy is economic based, it is suggested that an economic philosophy, which does not have moral principles or ethical benchmarks as standards against which value judgments may be made, will be inconsistent with the institution’s general objectives of promoting the progress of science and the useful arts for the improvement of society.³³⁶ A system with such a goal as an end must make value judgments as to the moral content of literary and artistic works that are produced within its system. The creation of literary and artistic works in all forms does not assure of progress in the direction envisioned by the Constitution.³³⁷ The creation of literary and artistic works with authentic content created to meet men’s basic need to pursue knowledge in the natural law sense most probably will.

IV. ORIGINAL AUTHORSHIP AS A LEGAL STANDARD

The present legal standard for recognizing property rights in literary and artistic works is low.³³⁸ The law does not currently require that a work eligible for copyright be unique, different from other works or novel.³³⁹ According to the courts in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, the law does not require the same standards of novelty required by patent law for the grant of a right in the work.³⁴⁰ The court stated that “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’”³⁴¹ The courts are also not inclined to make any artistic judgment on the aesthetic value of the work,³⁴² and Justice Holmes in *Bleistein* emphasized the dangers for “persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”³⁴³ However, this paper suggests a higher standard of originality than the present, which ought to be introduced in deciding when property rights may be first acquired in literary and artistic works that represent an author’s authentic expression that promotes progress and advances knowledge. The standards for first acquisition of property rights in land and chattels, including other forms of intellectual property besides copyright, is a standard, which requires some form of appropriation, a setting aside and claiming the property as one’s own against other resources that are freely available to

³³⁴ Delgado & Stefancic, *supra* note 328, at 1265.

³³⁵ *Id.* There was a chase scene in which “a black man with animal-like traits pursues a young white woman until she leaps to her death from a pedestal-like perch at the edge of a cliff.” *Id.*

³³⁶ Ng, *Social Contract*, *supra* note 25, at 481.

³³⁷ *See generally* Olliar, *supra* note 90 (exploring the Framers’ intent in creating the “Intellectual Property Clause”).

³³⁸ 17 U.S.C. § 102 (2006); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily . . .”).

³³⁹ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

³⁴⁰ *Id.* at 102–03.

³⁴¹ *Id.*

³⁴² *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

³⁴³ *Id.* at 251.

society.³⁴⁴ This standard is missing in copyright jurisprudence, and property rights are recognized in literary and artistic works based on the slightest variation of a work from other works that are in existence in the public.³⁴⁵ It is therefore possible that there may be “a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others.”³⁴⁶ This minimal standard however, signifies a lower legal expectation for recognizing property rights in literary and artistic works, and serves to discourage authors and artists from engaging in the production of works of individual and authentic authorship of a higher moral standard that are aligned with the Constitutional goals of promoting the progress of science and the useful arts, thereby shifting the focus of authorial effort towards profiting from the economic privileges of statutory copyright towards market gains.

It is suggested here that Courts should not be deterred by the lack of clearly defined parameters as to what kinds of works are of authentic authorship that will contribute towards the advancement of knowledge nor shy away from making value judgments about the moral content of works. Justice Stewart in *Jacobellis v. Ohio*,³⁴⁷ commenting on whether the film “The Lovers” before the Court was obscene, decided that it wasn’t but began his judgment with what is known as “one of the most famous phrases in the entire history of the Supreme Court opinions”³⁴⁸—that what amounted to obscenity is difficult to define, but if confronted with it, “I know it when I see it.”³⁴⁹ In the same light, judges will know whether a work will contribute towards progress and the advancement of knowledge when they see it. Seditious works do not promote progress nor advance knowledge. Works inciting hatred and encouraging discrimination also do not. Materials encouraging immoral, illegal and dangerous conduct may be literary and artistic creations for the purposes of the copyright system but if judges make value judgments, they will intuitively know that these works may not be considered works of authorship for property rights to be granted and their creator, not an author, whom the law would consider to be an owner.

A. *First Acquisition of Property Rights*

Property law generally recognizes first property rights in land or chattels in one of five ways—first possession, discovery, creation, accession, and adverse possession.³⁵⁰ In all instances, save for literary and artistic works, is a legal requirement that the person seeking property rights assert some form of ownership

³⁴⁴ See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

³⁴⁵ See 17 U.S.C. § 102 (2006); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

³⁴⁶ *Bell*, 191 F.2d at 103 (citation omitted).

³⁴⁷ 378 U.S. 184 (1964).

³⁴⁸ Paul Gerwitz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1023 (1996).

³⁴⁹ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

³⁵⁰ *E.g.*, *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (first possession); *Johnson v. McIntosh*, 21 U.S. 543 (1823) (discovery); *Omaha Standard, Inc. v. Nissen*, 187 N.W.2d 721 (Iowa Sup. Ct. 1971) (accession); *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (N.1952) (adverse possession).

in the property claimed by acquiring it.³⁵¹ In other areas of intellectual property, such as patents and trademarks, rights are only acquired and granted after some significant effort is exerted to distinguish the property claimed from other property in society.³⁵² For patents, there is a requirement that the invention in which patent is claimed be novel and non-obvious,³⁵³ and for trademarks, ownership is only granted when the mark has been used in commerce in connection with goods or services in the marketplace to set aside the good from other goods on the market.³⁵⁴ The trivial variation from existing works, which copyright law presently requires as a legal standard, do not hold authors to a higher standard of authorship: they are not required to produce works that would contribute to the progress of science and the useful arts nor is it required that their works be sufficiently distinct from other works to justify ownership rights in a particular “thing.”³⁵⁵ Creators of literary and artistic works are not under a moral obligation to produce works with content that will advance knowledge. There are presently no articulated ethical standards to hold authors, who write for an audience morally responsible for the content they create. To be eligible for property rights from a natural law perspective, rights ought to be granted in literary and artistic creations that are the authentic expressions of authors, which satisfy society’s natural right to pursue knowledge.³⁵⁶ The work ought to be an individual effort by the author to meet the Constitutional goals of advancing knowledge or promoting progress, and not merely a trivial variation from the existing pool of creative works that are already available to society, for ownership rights of the *in rem* nature to attach to. The work has to be a clearly identifiable “thing” to belong to the author and the author must have distinguished the work sufficiently from the pool of creative works to be deemed the “owner” of the work before general exclusionary rights can be exercised against society and the general public.

B. In Rem and In Personam Rights

The importance of setting a higher standard for first acquisition of property rights in literary and artistic works is because of the weight of the rights claimed by authors in their work if they are rights that pertain to property in the work. The right of the author to exclude the rest of the world from use of the work as the owner is an absolute right in real property law.³⁵⁷ The right *in rem* attaches to a property and a use of the property against the wishes of the owner is a trespass of the owner’s

³⁵¹ See, e.g., *Van Valkenburgh*, 304 N.Y. at 98 (requiring “occupation under a *claim of title*” for a finding of adverse possession) (emphasis added).

³⁵² See 15 U.S.C. § 1051 (2006); 35 U.S.C. §§ 102–103 (2006).

³⁵³ 35 U.S.C. §§ 102–103.

³⁵⁴ 15 U.S.C. § 1051.

³⁵⁵ See 17 U.S.C. § 102 (2006); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (requiring only a “modicum of creativity” to satisfy the originality requirement).

³⁵⁶ Ng, *Social Contract*, *supra* note 25, at 467

³⁵⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (“[T]he right to exclude others [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))); see also *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159–60 (Wis. 1997) (exemplifying a property owner’s absolute right to exclude in the context of a landowner and a trespasser).

rights.³⁵⁸ By setting the legal standard for first acquisition of property rights in literary and artistic work on a higher standard, the law will be able to distinguish this right from the economic rights that publishers, printers and distributors of literary and artistic works obtain by way of statute—resource governance use-rights of an *in personam* nature. The author, by virtue of the property right, may exclude society from uses of his work as a matter of law. However, an ethics for the copyright system will make authors morally obliged to convey their works to society for uses that will promote progress and make their works accessible for the purposes of advancing knowledge.³⁵⁹ Statutory entitlement in literary and artistic works however, provide a personal interest, or an interest *in personam*, to copyright owners to generate profits from the market commercialization of the work, and as a matter of law, cannot be exercised in a way to generally exclude society for two reasons—economic incentives do not relate to a thing (they relate to certain *uses* of a thing) and do not conceive of an owner by which the thing could be owned (copyright owners under the copyright statute are rather *right holders*). These two distinct rights in literary and artistic works, I think, will ensure that authors engage in creative production and dissemination of literary and artistic works for society's benefit: the right *in rem* generates authorial creativity and production of authentic works of authorship to meet the end goals of progress and the advancement of knowledge, and the rights *in personam* encourages market dissemination of these works to the general public.

C. Property Rights of the Authors

Having established that the foremost right of an author as a property owner of the work is the particular right to exclude the rest of the world from actions that will affect the work, it is important to note that the author will be legally entitled to exclude actions by the public with respect to the property, which he has not consented to. As the property right to exclude is attached to a particular work of authorship, the author cannot justify controlling the actions of the public, when their actions do not affect the authentic expression of the author, particularly when the author is morally obliged to create works for social betterment. Just as a home owner who plants beautiful flowers on his property cannot prevent his neighbor from receiving the pollen bees bring from his flowers onto his neighbor's land, an author cannot prevent society from benefitting from his work by claiming that the work is protected as his property. The right to exclude is therefore a unique negative right in the property to prevent uses of the property without the owner's consent, and this right imposes a duty on others to refrain from actions that will affect the rights of the property owner with respect to the property.³⁶⁰ In the same way, an author's property right, which is grounded in natural precepts, is also a negative right to ownership of the work and its expressive content, as opposed to positive rights of use.

Being a negative right, the exercise of the right to exclude by a property owner requires a defined property or identifiable thing to exclude others from. There must

³⁵⁸ *Jacque*, 563 N.W.2d at 159–60.

³⁵⁹ See Ng, *Social Contract*, *supra* note 25, at 467.

³⁶⁰ See, e.g., *Jacque*, 563 N.W.2d at 159–60.

be a requirement that a thing be appropriated to the owner's self and capable of exclusive possession by its owner before a right to exclude others from a property can be maintained, and for the right to be of practical legal value to its owner.³⁶¹ The imposition of a duty upon the rest of the world to respect a property owner's right to exclude others from the property carries with it a requirement that the property owner conveys the intention to appropriate the property from the common area, which available to the rest of the world, is out of the parameters of claimed property that the property owner carves out from society for himself.³⁶² In *Pierson v. Post*, the fox hunting case of first possession that sets the rules establishing new roots of title, and first property rights, in an animal pursued over common ground, the court held that the mere pursuit of an animal, without appropriating the animal and bringing it within the control of the hunter precluded a finding of a new root of title by way of first possession.³⁶³ It is only when the hunter, in the words of Tompkins J., "manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control" that first possession, establishing a new property right, may be found.³⁶⁴ The right to exclude is therefore premised on an unequivocal act by the property owner to possess the property within defined parameters, setting the property aside from commonly held property, which will permit the property owner to control use of the property, and exercise exclusive dominion and possession of the property against the rest world.³⁶⁵

In the same token, authors are bound to treat literary and artistic works in the same fashion as a property owner is bound to treat the property with respect to the property he owns. An author therefore may exercise the right to exclude others from the use of his creative work if he has done something to appropriate the property claimed and prevent others from using the work by exercising the right to exclude. This may be demonstrated by a work of authentic authorship created to promote the progress of science and advance knowledge. The author however, is restricted in what he can do with the work once it has been distributed to the public, for there will be positive externalities, such as the ability of society to use the work in ways facilitated by new technologies, which the author cannot rightfully control by seeking to expand set property rights into areas that are essentially the public domain.³⁶⁶ Where the use affects the author's personality or individuality, such as an act, which affects the author's expressive content or authentic authorship, the author is justified in exercising the right to exclude since creative rights never leave the author, even when the economic incentives to profit from the publication and distribution have been assigned to a printer, publisher and distributor.³⁶⁷

³⁶¹ See *Hinman v. Pacific Air Transport*, 84 F.2d 755, 757–59 (9th Cir. 1936) (defining the extent of ownership of the airspace above the appellants' land for purposes of determining whether appellee's airplanes trespassed onto the land).

³⁶² See *id.* at 758.

³⁶³ 3 Cai. R. 175, 179–80 (N.Y. Sup. Ct. 1805).

³⁶⁴ *Id.* at 178.

³⁶⁵ *Id.* at 178–80.

³⁶⁶ See *Hinman v. Pacific Air Transport*, 84 F.2d 755, 757–59 (9th Cir. 1936) (finding that the Appellants cannot expand their property rights to all the airspace above their land, because the space that is not in use by the Appellants is the public domain).

³⁶⁷ See Ng, *Social Contract*, *supra* note 25, at 456.

CONCLUSION: THE AUTHOR'S RIGHTS

The philosophical basis for the copyright system as it stands presently over emphasizes an economic idea—that the progress of science and the useful arts may be best achieved by encouraging authors to create as much works as possible through private monopolies.³⁶⁸ This economic idea requires a robust and content-neutral market to fulfill that goal and the grant of certain exclusive rights to protect non-rival and non-exclusive works from misappropriation.³⁶⁹ The grant of government-created property rights in literary and artistic works to ensure the most economically efficient uses of information resources requires a difficult, if not impossible, balance of private and public interests in creative works. Private copyright owners consistently seek an extension of government granted monopolies over uses of literary works and the public, on the other hand, consistently seek legitimate needs for and rights to access.³⁷⁰ These conflicting approaches to the copyright system creates dilemma and highlights the tension created by the grant of temporary monopolies over literary and artistic works to encourage the creativity for the benefit of society. Neoclassicist and copyright minimalist viewpoints provide an economic centric approach towards analyzing authorial rights but offer limited normative guidance on the treatment of the issues involved.³⁷¹ A legal interpretation the authors rights from a property law perspective provides a middle-ground approach to the copyright dilemma by suggesting that the author's rights in literary and artistic works are really two fold comprising a right *in rem* based on an author's property right in the work by virtue of the author's original authorship and creative production that good against the world, and an economic right *in personam* to recover profits from the commercialization of the work, which stems from the statutory rights provided for under the copyright system.³⁷² The separation of property rights, which belongs to an author, and economic incentives, which authors may freely assign to printers, publishers and distributors puts copyright jurisprudence on a more stable foundation allowing the law to evolve through legally accepted principles of property law, which will acknowledge and encourage authors to undertake individual expressive creations of authentic authorship that contributes to scientific and artistic progress, and which will afford greater confidence and respect in the legal system of comprising rights and duties of the author, his publisher/distributor, and the public.³⁷³ More importantly however, this distinction opens a much desired door into an ethics for the copyright system to hold authors and society to a moral obligation to produce and use works of authentic authorship for the advancement of knowledge and the betterment of society. A more complete inquiry into an ethics for the copyright system, while briefly explored here, is of course, the subject of another paper.

³⁶⁸ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

³⁶⁹ Netanel, *supra* note 19, at 289.

³⁷⁰ Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 196–97 (2003).

³⁷¹ Netanel, *supra* note 19, at 308, 337.

³⁷² See Merrill & Smith, *supra* note 30, at 789–92.

³⁷³ See Ng, *Social Contract*, *supra* note 25, at 456.