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Authors and Readers: Conceptualizing Authorship in Copyright Law

Alina Ng

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Authors and Readers: Conceptualizing Authorship in Copyright Law

by
ALINA NG*

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I. Introduction

One of the most difficult questions in copyright law is the extent of private property rights over literary and artistic works. Property law teaches us that rights which entitle owners to exclude and prevent others from using their property erect barriers that limit public accessibility and use of these property. One of the main critiques made against copyright enthusiasts is that their view that copyright's cup of entitlement, being half full, should continue to be filled as much as possible to ensure that those who produce creative works should be remunerated for their efforts. These critiques, eloquently expressed by the many voices guarding the public domain, argue that the public should be entitled to use literary and artistic works to freely express views and create other forms of creative works. An overly extensive system of property rights governing how literary and artistic works should be used provide dangerous controls that the owner, exerting rights over public use of the work, will stifle creativity and freedom. I do believe that property rights in literary and artistic works have a real potential to create monopolies and deadweight losses in markets for information goods and that there is presently a need to address the balance between private rights in copyright against the public domain. More fundamentally, however, there is a need for us to question the proper basis for the grant of property rights in literary and artistic works. Acknowledging that copyright is a reward for economic investment in the production of creative works will lead us into a confrontation with the question of how much property rights are needed to reward that investment—a question that focuses on how much is put into producing the work. Looking at copyright as a law to encourage creative authorship for the purposes of connecting authors with society shifts our attention to a different and, in my mind, a more profound question of how much property rights are needed to ensure that authors obtain just rewards for their works from society—a different question that focuses on how much an author takes from and is responsible to give back to society.

As the introduction of the printing press in England in 1476 marked the beginning of copyright as a regulatory grant for censorship and press control, publishers were thought of as the true owners of literary and artistic works.1 Today, owners of creative works have extensive legal rights to recover investments made in the production and distribution of

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1. Members of the book trade in England had developed a printing right when the printing press was introduced before forming the Stationer's Company in 1557. When Caxton introduced the printing press, there was a need to protect published works. This early form of copyright protected the interest of members of the book trade. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 4 (1968).
such works. However, the position of the author in creating a work and the process of authorship itself, the precise activity that produces works of literary and artistic value in the commercial marketplace, is seldom considered as a distinctive component in the copyright equation. Copyright inquiries into the balance between private rights to control uses of works and public interests of access to building blocks for the creation of new works focus on the tensions between owners of rights and advocates of the public domain. Rights, we believe, must continue to provide the incentive to produce works without unduly encroaching upon the public’s right to use the work.

Current scholarship in the field of law and economics and theories of technological development establish an urgent case for a balanced copyright system in our society. To ensure that society’s creative freedom and expression remain free, copyright owners’ rights must reach only as far as necessary to provide an incentive to create and must not unduly affect society’s rights to use and build upon existing works. In economic terms, the social costs society bears for unduly extensive rights is the inability to benefit from products that the law aims to produce for learning and growth—literary and artistic works. Property rights that

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2. Although authors are recognized as initial owners of copyright (17 U.S.C. § 201(a) (2000)), ownership may be transferred (§ 201(d)). Copyright Act of 1976, 17 U.S.C. § 201 (2000). The exclusive rights under 17 U.S.C § 106 (which provides the rights to reproduce, make derivative works, distribute, publicly perform, display and make digital audio transmissions) may be owned by someone other than the author. 17 U.S.C. § 106. Section 101, defines the owner of any of the exclusive rights under § 106 as the owner of the right and not to the author. 17 U.S.C. § 101.

3. The benefit the public receives from the author’s work justifies granting a monopoly over the use of works. According to the Supreme Court, a copyright is “the equivalent given by the public for benefits bestowed by the genius and skills and meditation of individuals.” Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).


5. Wendy Gordon, Render Copyright unto Caesar: On Taking Incentives Seriously, 71 U. CHI. L. REV. 75, 75 (2004) (arguing for a different set of incentives for authors whose works are used not for monetary gain but in line with the “freedom to be creative, rewrite, and be imaginative.”); Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 COLUM. L. REV. 257 passim (2007) (arguing for proper resource allocation through property rights and showing the positive effects of innovation spillovers); Lawrence Lessig, Intellectual Property and Code, 11 ST. JOHN’S J. LEGAL COMMENT. 635, 637 (1996) (arguing that the architecture of the Internet will protect intellectual property in a manner that is more extensive than the protection that the law provides).

6. Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 YALE L.J. 283, 285, 288 (1996) (arguing that there is a need for a copyright system to provide support for democratic civil discourse).
capture social benefits for copyright owners create deadweight losses that society should not bear.\(^7\)

The creative process in the production of literary and artistic works is a theme in copyright law, which seems to not have gotten sufficient attention to allow scholars and thinkers of copyright law to view authorship as the act deserving of property rights granted under the law. Creative works, by the labor of an author, should properly belong to the author through the very act of creativity.\(^8\) However, authors and owners of copyrighted works are often thought of collectively as the rights holders of creative works\(^9\) without separating the person who creates a work from the business that invests in its production and distribution. This may be even more evident today when large-scale collaboration among many different authors to produce a single work may happen across geographical borders. This form of collaboration creates a necessity for the identification of an institution as the right holder of the collaborative work.\(^10\) Authorship, however, is a process that is deeply embedded in existing culture and convention, which may not benefit from the clear cut boundaries that copyright law draws to protect owners of these rights. In fact, Northrop

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8. The idea that an author should have property rights in his work is predicted on John Locke's articulation of a man owning, as property, that which his labor produces from nature. *John Locke, Two Treatises of Government* 288 (Cambridge University Press 1988) (1960). London booksellers argued before Parliament that authors had a property right in literary works based on their labor, which they then could sell to the booksellers. My thoughts on this, which would require a completely separate analysis, is that transfer of ownership in property rights in works by the author should be done in limited situations, if at all. This would suggest inalienability of property in literary and artistic works and would be a call for a more paternalistic state intervention into the market for these works.

9. This is particularly so in common law countries, where a natural person who created the work is not necessary for the recognition of an author. Paul Goldstein, *International Copyright: Principles, Law and Practice* 205 (2001). Under French law, an author's rights can only vest in corporations in limited situations—only for collective works and computer programs created in the course of employment. *Id.* Under German law, an author must be a natural person. *Id.* In the United Kingdom and United States, employers may be the first owners of copyright although the author is generally recognized as the original owner. *Id.*

10. According to Professor Goldstein:

   Over the past several decades, the problem of identifying a work's author or authors have been magnified by the trend to large-scale collaboration in the creation of literary and artistic works. Motion pictures, computer programs, and collective works such as encyclopedias are examples. This development has placed particular strains on the civil law tradition, which has had to reconcile a philosophical commitment to the autonomy of the individual author with the economic pressure to consolidate ownership in a single individual or institution to facilitate a work's exploitation in the marketplace.

*Id* at 204.
Frye, one of the most distinguished literary critics of the twentieth century, recognized that new works are not produced independent of existing works that surround them and that all forms of creative works are built upon works which are already in existence.\footnote{To Professor Frye:} In Professor Frye's mind, most works are an imitation of other works but are treated as separate inventions "distinctive enough to be patented."\footnote{See id. at 96. Professor Frye explains: This state of things makes it difficult to appraise a literature which includes Chaucer, much of whose poetry is translated or paraphrased from others; Shakespeare, whose plays sometimes follow their sources almost verbatim; and Milton who asked for nothing better than to steal as much as possible out of the Bible \ldots the central greatness of \textit{Paradise Regained}, as a poem, is not the greatness of the rhetorical decorations that Milton added to his source, but the greatness of the theme itself, which Milton passes on to the reader from his source. \textit{Id.}} The author himself is seldom an autonomous being, creating works by himself and his process of authorship hardly ever independent of existing works and cultural influences.\footnote{According to Professor Mark Rose: What much current literary thought emphasizes \ldots is that texts permeate and enable one another, and so the notion of distinct boundaries between texts becomes difficult to sustain. Indeed, in what sense does the literary work exist objectively at all? Many critics reject any notion of the text as a stable, independent object, insisting on the centrality of the reader's role in reproducing the text. Many critics, too, reject any sense of the text as an object that exists apart from the culture that produced it or the succeeding cultures that have appropriated and, for their own purposes, reproduced it. Thus the concept of the historically transcendent masterpiece, the notion of the work that speaks to us directly, person to person, across the age disappears, and along with it goes the notion of the creative genius, the autonomous author. \textit{Mark Rose, Authors and Owners} 3 (1993).} The focus of the law on copyright owners instead of authors as the property right holders allows individuals and institutions, who may have never persevered through the process of authorship to assert property rights that may draw lines "between works,"\footnote{See id.} prevent public access to existing works

\begin{itemize}
\item Rose, Mark. \textit{Authors and Owners}. Cambridge University Press, 1993.
\end{itemize}
that are necessary for the creation of new works, 15 and introduce an economic bias to the arguments for strict enforcement of those rights. 16

This article argues that the more central theme to the copyright equation is the right of the author. By recognizing author's rights as property rights as distinct from the present copyright owner's rights, the law will be able to provide society with the works that copyright law aims to produce through the grant of property rights and the freedom to use these works for the development of new works through a more efficient market. Market inefficiencies, which result from a market for a good that cannot be accurately priced to reflect the activities of the producer and consumer, 17 may be corrected to a large extent by identifying the author as the producer of the work and his or her readers as the consumer. A system that places authors as the property right owner of the work will create very different market dynamics from the present as soon as we attach property rights to the process of authorship and separate the author from the owner of the right. When we connect authors to their readers, we will see the emergence of a market for creative and literary works which is less prone to inefficiencies and failures and is better equipped for an efficient allocation of resources. This requires a separation of authors from the present definition of "owners" under the present copyright system and the

15. This is particularly so especially when new technologies provide the public with the ability to capture and share information, knowledge and stories. The need to ask permission for the use of existing works creates a presumption that use of works without prior permission is illegal and creates a chilling effect on creativity. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 185 (2004).

16. Businesses often provide economic reasons to enforce their rights when their products are pirated. These reasons are often the loss of sales, the competitive disadvantage to enterprises that free-ride on the research and development and marketing expenses of legitimate enterprises, the possibility of product liability from defective imitation products, loss or goodwill or prestige by a brand, where counterfeits are freely available, and the expense of monitoring the market and instituting legal proceedings against infringers. Michael Blakeney, The Phenomenon of Counterfeiting and Piracy in the European Union: Factual Overview and Legal and Institutional Framework, in ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS THROUGH BORDER MEASURES, LAW AND PRACTICE IN THE EU 7 (Oliver Vrins & Marius Schneider eds., 2006).


Copyright markets will not, however, always function adequately. Though the copyright law has provided a means for excluding nonpurchasers and thus has attempted to cure the public goods problem, and though it has provided mechanisms to facilitate consensual transfers, at times bargaining may be exceedingly expensive or it may be impractical to obtain enforcement against nonpurchasers, or other market flaws might preclude achievement of desirable consensual exchanges. In those cases, the market cannot be relied on to mediate public interest in dissemination and private interests in remuneration.

Id.
conceptualization of non-authors as interest or privilege holders. As with any grant of privilege, non-authors are limited in what they are entitled to.\textsuperscript{18} This article concludes with a proposal: if we conceive copyright law as an institution to correct market failures,\textsuperscript{19} the conception of the author as the primary property right holder provides an opportunity for copyright as an institution to set a more balanced approach for the grant of property rights to encourage the process of authorship for the ultimate benefit of society.

II. Ownership of Authorship

At the heart of the copyright system is the author of a creative work. The Berne Convention, establishing a union to protect literary and artistic works, recognizes by virtue of Article 1 that the rights being protected through copyright law are the rights of authors.\textsuperscript{20} Authors are the first beneficiaries of rights under the law and provide a reference point as to how long rights over the work should exist.\textsuperscript{21} However, authors are not identified with as much precision as the rights protected under law\textsuperscript{22} and this may be because of the divergences in national law on some aspects of authorship after the Convention was promulgated.\textsuperscript{23} In 1990, the World Intellectual Property Organization (WIPO), in the draft “Model Provisions for Legislation in the Field of Copyright,” attempted to provide a definition for an author, which would incorporate the divergent views of what would

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18. Professor Augustine Birrell explains:
The struggle, ‘Property or Privilege,’ has substance in it. If authors or their assigns could make out that their right to the exclusive multiplication of copies of their books ought to be regarded as property, in the same way as lands, houses, goods and chattels, it followed that this right was one of indefinite duration, and could be so disposed of in the market \textit{inter vivos}, or bequeathed or left to descend to relatives according to the laws of inheritance. If, on the other hand, it was not property but privilege, then its term of enjoyment could and would be measured, limited, restricted, according to the wording of the Letters Patent, or of the Act of the Legislature or other document which created it.

AUGUSTINE BIRRELL, LAW AND HISTORY OF COPYRIGHT IN BOOKS 14 (1899).

19. In a previous article, I suggested that we may view copyright law as providing the institutional intervention needed to correct market inefficiencies where the producer of a creative work would like to capture positive externalities created from the work. Alina Ng, Copyright’s Empire: Why the Law Matters, 11 MARQ. INTELL. PROP. L. REV. 337, 356 (2007).


21. Id. at art. 7 (measures the term of protection granted under the convention as the life of the author plus fifty years).


23. Common law courts have emphasized more on the labor and skill needed to produce new works in recognizing authors for protection under the law while civil law countries such as Germany will judge the level of creativity involved in producing the work before granting protection. See id. at 359-60
\end{flushleft}
amount to authorship. This draft law raised significant disagreement among member states and interest holders, and WIPO’s work on producing a Draft Model Law ceased. When the WIPO Copyright Treaty was produced in 1996, the treaty, although stating in its preamble that it desired to “develop and maintain the protection of the rights of the authors in their literary and artistic works in a manner as effective and uniform as possible,” did not define who an author is.

However, connecting the original author and the process of authorship with the grant of property under copyright provides us with a deeper understanding to the questions we ask about rights and access in copyright law. As Professor Peter Jaszi argues, the construct of authorship has been “deployed and transformed in legal discourse and has given rise to important doctrinal structures in the law of copyright” even though the notion of authorship has been an uncritically accepted one. The present structure for copyright law is grounded on an unquestioned acceptance of authorship that entitles authors to rewards for that “distinct and privileged category of activity, that generates products of special social value.” But the idea of authorship goes beyond an identification of just rewards for creative activities and really is, as Professor Jaszi thinks, the “specific locus” of the private rights-public access contradiction, which lies at the heart of copyright law. Far from being a noncontroversial idea in copyright thought, the idea of authorship shapes our conceptualization of the law. The use of the concept of authorship in previously decided cases has had the effect of separating the author from the work itself, has allowed works of minimal creative effort to be protected by the law, and

24. Id. at 361.
25. Id.
26. Id. at 362-63.
28. See id. at 466.
29. See id. at 457.
30. The United States Constitution gives “Congress ... [the] Power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 1, 8.
31. The romantic idea that the author is tied to the creative fruits of his labor as an expression of individualism and an assertion of self in an infinite and transcendental sense was replaced as the idea of what amounted to a “work” became a central consideration in the courts’ adjudication of infringement cases as in the cases of West v Francis, D’Almaine v. Boosey and Stowe v. Thomas. See Jaszi, supra note 22, at 476-77.
32. Professor Jaszi cites Bleistein v. Donaldson Lithographing Co. and Alfred Bell & Co. v. Catalda Fine Arts, Inc. and explains:
The Bleistein opinion, with its emphasis on the “work” and its abdication of a judicial role as aesthetic arbiter, both effaces and generalizes “authorship,” leaving this category with little or no meaningful content and none of its traditional associations.
has created the conditions for a market for literary works to exist.\textsuperscript{33}

Authorship in copyright today is a legal artifact allowing a market for creative works to function and at the same time is also a reversion to early versions of romantic authorship that allows autonomous individuality on the part of the author. Seen this way, the concept of authorship provides a fundamental contradiction between collective market economics of commercialization and the individual prerogatives of an author to exercise complete control over how the work is used.\textsuperscript{34}

The cursory treatment of the idea of authorship by international copyright conventions and the unquestioned acceptance of the idea as a central part of the law necessitates a deeper analysis of the role that the

In so doing, the opinion rationalizes a significant expansion of copyright protection. In effect, the revision of “authorship” in Bleistein was instrumental in broadening and generalizing the category of works that could be considered as copyrightable commodities . . . Alfred Bell completed the partial transformation of copyright doctrine that began in Bleistein. This maneuver secured for many modestly aesthetic productions the same advantages of copyright protection afforded to conventional literary and artistic works. From a commercial standpoint, these advantages are very significant indeed. In one sense, the effacement and revision of “authorship” performed in these opinions represents a simple response to economic pressures, which generated demand for legal regulation of the market for new categories of intangible goods. In another sense, these decisions represent the last stage in the commercialization of cultural production. Under Alfred Bell’s “minimalist” and “democratized” vision of “authorship,” copyright doctrine offers no sound basis for distinguishing between oil paintings, art reproductions, motion pictures, lamp bases, poems, and inflatable plastic Santa Clauses.

\textit{Id.} at 483-85.

33. Professor Jaszi explains:

[T]he identification of the autonomous “work” as the subject of copyright protection was crucial to the development of the secondary market in literary and artistic productions. Practically, rapid change in reproduction and distribution technologies called for an abstract concept of the subject of legal protection. Ideologically, the new emphasis on the “work” minimized the threat to free exchange posed by the notion of an intimate link between the “author” and her productions . . . the maturation of the “work” as a legal concept increased the leverage of publishers and other purchasers of “authors” rights. Once the penumbral concept of the “work” was firmly in place, the purchasers could acquire a general dominion over the imaginative territory of a particular literary or artistic production. Publishers could use this “authority” to exclude from the territory not only strangers but the very “author” who first delimited it.

\textit{Id.} at 478.

34. Professor Jaszi summarizes his ideas by stating:

In sum, “authorship” is simultaneously an artifact of the marketplace in commodity art and a throwback to early, preindustrial ideas of the artist’s relation to society. Thus regarded, “authorship” contains within itself the contradiction at the base of all copyright doctrine. The conflict is not the familiar opposition between ownership and access, but the more fundamental, generative tension between the collectivism of the marketplace and the prerogatives of the autonomous individual.

\textit{Id.} at 502.
concept of authorship can play in our effort to identify a solution to the private rights-public access contradiction, which has permeated legal thinking throughout copyright law's history. The author and the very process of authorship itself are so special to the law of copyright that this article argues that property rights given by law must be attached to the author who creates literary and artistic works, and that the process of authorship and creativity itself should form the basis for the grant of an exclusive property right in a work. The economic incentive justification for the grant of property rights in literary and artistic works, I think, do not afford as cogent an argument for protecting literary and artistic works, because justifying property rights over literary and artistic works in economic terms will put works intended to benefit society in a commercial market and made available only to paying segments of society. Facilitated by property rights over works, this will create inevitable boundaries to access as copyright owners seek to recover consumer surpluses and positive externalities, which should be left to the public for further development. By recognizing property rights in literary and artistic works because an author, through a creative process of authorship, produced a work, copyright law will reward creativity that benefits society and allow authors a more stable connection with their readers and audiences.

I begin this article with the idea of an author and the process of authorship to demonstrate the reason why property rights are rightfully attached to the creative and autonomous author rather than the investor seeking to recover the investment in the commercial market. I argue that attaching property rights to authors and not the more general category of owners (which may include non-authors) changes many of the economic arguments that justify the expansion of rights into the public domain and provides a more substantial argument for greater public access for the development of new works. The recognition of authors and the process of creative authorship will also change the role of copyright law as an institution that balances private control and public access where new technologies allow private ordering of rights to an institution that encourages and facilitates creativity for the benefit of society. Only through the author's conceptions and authorship in greater depth can we

35. In his foreword to Professor Benjamin Kaplan’s James Carpentier Lectures, Dean William Warren speaks of the challenges in balancing different social interests and notes that it is significant that this balance between the interests of the creator and the interests of society is couched in constitutional language. William C. Warren, Foreword to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, at vii (1967). Robert Kastenmeier's foreword to The Nature of Copyright makes a similar observation by noting that the consumer's need to freely use material is a consistent factor against the author or distributor of creative works. Robert Kastenmeier, Foreword to L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT, at xi (1991).
reach a fairer allocation of creative resources between segments of society that are willing and able to pay for the use of creative works and the majority of society, which may not have access to or the ability to pay for the use of creative works but which may be in greater need for such works for education, growth and development.36

A. The Author

The author in copyright history, especially before the Statute of Anne,37 had been regarded as a separate entity from the printer or publisher of a work. The distinguishable rights of a book owner over the manuscript as a physical object made out of ink and parchment from the rights of an author over the text itself indicated an early separation between the person who created the work and the person who invested in publishing it.38 In fact, early forms of copyright practiced by the book trade showed more of an economic interest by the book-sellers in the physical embodiment of a text rather than the text itself.39 Printing privileges that were given to printers in the 1400s allowed books to be printed in large quantities and

36. Access to educational materials, for example, is crucial to the development of human resources to contribute to the economic development of developing countries. Through education the quality of life of citizens of developing countries improves. Underpinning the Millennium Development Goals is education, which works towards eradicating poverty, reducing child mortality and combating HIV/AIDS. Four years of primary education raises the output of a farmer in Uganda by 7 percent. A Zambian mother with primary education would be able to give her child a 25 percent better chance at survival than a mother without education, and HIV infection among educated girls are significantly lower. CONSUMER INTERNATIONAL, COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITY IN COPYRIGHT LAWS 1-2 (2006), available at http://www.consumidoresint.org/a2k/.

37. The Statute of Anne, passed by the English Parliament in 1710, is the first copyright statute and was intended by Parliament to be an “Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned.” Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.).

38. ROSE, supra note 13, at 9. Professor Rose states, “the rights of the bookowners had nothing to do with authorship. True copyright is concerned with rights in texts as distinct from rights in material objects, and its historical emergence is related to print technology.”

39. Id. The primary difference between the interests of the author and the publisher was the value each placed in the work. The author would regard a single piece of work as a product of his labor and therefore of great emotional value to him. The publisher is more concerned with the costs of printing a book in multiple copies. Professor Rose states this point more clearly when he explains:

A manuscript could be produced by one man with a pen and a supply of parchment. Printing an edition of a book, however, required a much more substantial investment of capital than the production of a manuscript, and it resulted not in a single precious object, which often would have been commissioned in advance, but in multiple copies that had to be distributed over time. Printers needed assurance that they would be able to recoup their investment, and so some system of trade regulation as necessary if printing was to flourish.

Id.
distributed. This encouraged a capitalistic enterprise, book trade, to develop though not creative endeavors through autonomous authorship. Authors were given separate privileges, but it appeared from the privileges granted to authors, editors, translators and printers that even in fifteenth century Venice, a fusion of authorship and the print business existed.

The recognition of the author as a separate and autonomous creative individual however, is apparent in the treatment of authors by members of the Stationers' Company in Elizabethan England. The main interest of the printers was the publication and distribution of a work by providing an orderly system within the book trade that allowed for the exclusive right to publish. It was quite apparent that the publisher's right was an economic right to publish, which was separate from the author's creative rights over the integrity of the work. A conveyance of rights from the author to the publisher at that time was a conveyance of rights over the publication of the manuscript, and not a conveyance of the intrinsic value of the creative work. Authors, who sold their manuscripts to publishers, were required

40. JANE BERNSTEIN, PRINT CULTURE AND MUSIC IN THE SIXTEENTH-CENTURY 10 (2001). Professor Bernstein explains in her book that in the fifteenth century:

Venice offered an ideal center for the printing of books. It boasted the best and most advanced distribution system in the world. And because its printers and publishers could not all rely on the patronage of a rules or the church but depended mainly on market forces in order to make their living, the Venetian printing industry, from its inception, became a capitalistic enterprise, producing books in larger quantities and distributing them much further afield than any other European center.

41. ROSE, supra note 13, at 10. Professor Rose explains:

The first author's privilege was one granted in 1486 to Marc' Antonio Sabellico, the historian of Venice, for his Decades rerum Venetarum. According to the grant, Sabellico could choose which printer would publish his book, and any other printer who publish it would be fined 500 ducats. Other privileges issued to authors included one in 1492 to Petro Francesco da Ravenna for Foenix, a pamphlet designed to improve the memory, and one in 1515 to Ariosto, who received lifetime rights in his Orlando furioso with a penalty for infringement set at 1000 ducats. The variety of recipients of privileges—authors, editors, translators, printers—suggests that traces of the medieval conflation of writing and the production of writing under the general conception of "making books" persisted in fifteenth-century Venice.

42. The Stationers' Company was the English guild that comprised bookbinders, booksellers and printers and were primarily responsible for originating the concept of copyright as a right to control the printing and publishing of books. Established on May 4, 1557 by way of Royal Charter, the Stationers' Company was able to develop the concept of copyright into a monopoly over the book trade because of the sanction it received from the Crown, which was granted as a way to control and censor the press. PATTERSON, supra note 1, at 28-41.

43. Id. at 71.

44. These creative rights of authors allow authors to prevent distortions of the work by others and thereby maintaining the integrity of the work. Id.

45 Id. at 73.
to agree to refrain from interfering with the publication of the work, which was the right that the publishers sought. John Milton’s contract for the publication of *Paradise Lost* included a covenant that prevented his interference with the publication of the work.\textsuperscript{46} Professor Patterson argues that this covenant indicated the retention of certain rights over the work. Even though the manuscript is sold, a negative covenant was created by the transfer of rights over the manuscript, as opposed to an outright sale of the work. In other words, although the author transfers the right to print and publish the work to the publisher, the author does not transfer any of the intrinsic value of the work. Rather the author retains the intrinsic value, and the publisher can only exercise the limited right to publish through the negative covenant that prevents the author from interfering with the exercise of that right.\textsuperscript{47}

Professor Patterson’s conception of the author as having rights independent and autonomous from the stationer’s copyright prior to the enactment of the Statute of Anne is an important one that modern copyright law may not have adequately acknowledged.\textsuperscript{48} This idea is important to copyright jurisprudence because it separates an author’s rights over how the work is used by his readers from the limited economic right his publisher has to publish and distribute the work. This demarcation provides an opportunity to explore the extent to which readers may have freedom in using the creative components of a work, which only an autonomous author is entitled to restrict. The right of the publisher is purely the right to make copies of the work as a non-possessory interest, as opposed to a property right, and will not entitle publishers to assert rights over how an author’s reader uses the creative work. Seen in this light, publishers of creative works (which today may be owners of copyright) do

\textsuperscript{46} Id. at 74.
\textsuperscript{47} Professor Patterson explains that the basic premise of the author-publisher relationship is this:

[that] the stationers recognized a duty on their part to pay the author and to obtain his permission to publish his work. That permission, from a legal standpoint, was a negative rather than an affirmative one. The author’s conveyance was in effect a negative covenant—that is, a contract not to object to the publication of the work, rather than a contract granting a right to publish it.

\textit{Id. at 73.} To Professor Patterson:

The distinction is more than one of semantics, and it is helpful because we have here a unique example of a chattel being conveyed not for its intrinsic value, but to enable the purchaser to exercise the right which is being conveyed. The manuscript is more than a symbol, of which a stock certificate is an example, but less than the object of purchase, of which the book itself is an example.

\textit{Id. at 75.}

\textsuperscript{48} \textit{Id. at 77.} In fact, the Statute of Anne may have destroyed the rights that an author has over the work by virtue of his creativity. \textit{Birrell, supra} note 18, at 21.
not possess the legal right to control the way the public use the work. The only claim that copyright owners (aside from the autonomous author) are entitled to, then, is the economic returns from the right to print, publish, and distribute the work. Based on this argument, the use of the work by readers of the work should not be within the control of the publisher, but should lie with the author.

The acknowledgement of authorship and the very act of creativity in writing books defined the autonomous author as separate and independent from his publisher. In opposing censorship and state licensing of book printing, John Milton’s Areopagitica speech elevated the author to a dignified creator of works, who should not be subjected to the control of printers through royal and ecclesiastical censorship. Authors, to John Milton, summon all reason and deliberation in the process of authorship and engage in a process of searching, meditating, and industriousness. They are very likely going to consult and confer with other authors to be informed in the area in which they write. This diligent process of authorship puts authors at a stage of maturity that should not put them within the control of their printers, who may be younger, inferior in judgment and not aware of the labors that accompany the process of authorship. In fact, to Milton, subjecting authors to the control of their printers and publishers, dishonors and derogates them, the book they wrote, and the dignity of learning. Contents of a book to Milton, were creative ideas preserved in a vessel that were a “living intellect” of an author that should not be controlled, and the destruction of a book was a destruction of reason because the ideas in a book were “the precious lifeblood” of the author that was “embalmed and treasured up on purpose to a life beyond life.” Milton’s speech made prior to the enactment of the Statute of Anne pointed out some fundamental concepts in copyright thinking. The first is the concept that authors think and deliberate about their work in consultation and conferment with other authors. Ideas, being building

50. The objection to censorship and licensing was against the Licensing Act 1643 that prohibited the printing and importing of books without the consent of the copyright owner. RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 21-22 (1912).
51. PATTERSON, supra note 1, at 71.
52. Id.
53. Id. See also ROSE, supra note 13, at 28.
55. Id. at 3.
56. Authorship necessarily encompasses an author’s works and materials drawn from other authors. Jessica Litman argues that all authors are somewhat influenced in some degree by the works of others. As Professor Litman says it, “[t]he man who never knew Keats but composed an
blocks for new works, are generated through a thought process that involves using ideas and works that belong to others. The second concept raised in Milton’s speech is that a work is an embodiment of an author’s ideas that continues to influence and shape future thought and authorship after the author passes on. Both these concepts are important in conceptualizing copyright today. An author’s ideas are shaped by those before him and will shape the ideas of those after him. The responsibility copyright law bears to ensure that these ideas are not inaccessible to those who need them in their writing and process of authorship may be met through the recognition that rights should only properly vest with the author of a work.

In more recent literature, the author is seen as the creator of the work, who stands independently from the publisher in the copyright economy. Implicit in Professor Cornish’s 2002 paper, The Author as Risk-Sharer, is identical Ode by magic is a mythical fellow." Jessica Litman, The Public Domain, 39 EMORY L. J. 965, 1000 (1990)


The new builds on the old, and hence depends to a degree, on access to the old. Academics writing textbooks about poetry need to be able to criticize and hence to some degree, use the poetry they write about. Playwrights often base their plays upon novels by others. Novelists use familiar plots to tell their story. Historians use facts about the history they retell. Filmmakers retell stories from our culture. Musicians write within a genre that itself determines how much of the past content it needs to be within the genre . . . All of this creativity depends in part on access to, and use of the already created.

Id.

58. William Shakespeare was collaborative in his literary and cultural productions. Most of his works were derived from classical and modern history and well-known tales of the late Middle Ages and Renaissance period. ROSE, supra note 13, at 25. It was only in the latter part of the eighteenth century that Shakespeare was introduced as an individuated author and adulated. Id. at 122-24.

59. Professor Wendy Gordon, in exploring institutional remedies for the use of copyrighted works that are more inclined to be transformative and useful (as opposed to merely instrumental for the purposes of generating income), states:

All artists create using much they have not created, both in terms of physical and human surroundings and in terms of cultural heritage. The holders of a common cultural tradition resemble the inhabitants of Locke’s state of nature: their riches are largely not of their own making. An artist’s relationship to her tradition sometimes involves quotation and imitation in ways that implicate copyright law. The law insufficiently recognizes that, because predecessors also built on tradition, the claims that they can rightfully assert against the makers of later art should be limited. Current copyright law understates those limits, largely because the law conceives of the “public domain” as an area free of obligations. Under current law, anyone can copy from the public domain, and claim copyright in what he has added, regardless of whether doing so will impair others’ use of the underlying domain that all inherited together.

Gordon, Render Copyright unto Caesar, supra note 5, at 78.
the argument that authors should be given separate interests over their work through their very act of creativity in producing the work. Professor Cornish's paper is concerned with the relationship between the author as the creator of a literary and artistic work and his publisher or producer, who is the "entrepreneur" responsible for publishing and distributing the work to the public. Authors, for a myriad of reasons, have chosen to engage their publishers in a relationship that allowed them to retain their rights rather than transfer complete ownership to their publishers and distributors through an outright sale, even though their publishers and distributors are better able to bear the risks of introducing and distributing the work to the public. Copyright laws in European civil law traditions, such as France and Germany, have traditionally adopted a paternalistic attitude towards authors because of a strong acknowledgement of the autonomous personality of the author and have taken legislative steps to ensure that authors are remunerated adequately. Beyond a mere protectionist attitude towards authors however, is a more conscious effort to preserve the real benefits of a law that is based on the creative act of authorship, to the author. Otherwise the need to have copyright laws today may be replaced by "producers' investment laws" that protect economic investments made by publishers in the publication and distribution of works.

The author's distinct right, however, was not clearly separated from the rights of publishers and printers over the work, and the Statute of Anne and subsequent early English copyright decisions did not explicitly set the author's rights aside from the publisher's rights. Since then, the

61. Id.
62. Id. at 3-4.
63. Id. at 6-11.
64. Id. at 12.
65. Id.
66. The author is not mentioned specifically in the Statute. The only benefit that authors had over their publishers was the right to renew the copyright. Beside that right to renewal for two consecutive fourteen year period, the author did not have greater rights than his publisher or anyone who is given the rights by the author. Professor Patterson comments that "[t]he only difference between an author's securing a copyright and another's securing a copyright was that the author did not have to purchase the right." PATTERSON, supra note 1, at 146.
67. Donaldson v. Beckett, 17 Cobbett's Parl. Hist. 953 (1813), laid down the rule that any rights that the author had by way of common law was replaced by the rights provided for in the Statute of Anne. Professor Augustine Birrell laments:

Whether this judicial opinion as to the existence at Common Law of perpetual copyright in an author and his assigns was sound may well be doubted, and possibly if the House of Lords had held in Donaldson v. Beckett that perpetual copyright had survived Queen Anne, an Act of Parliament would, sooner or later, have been passed curtailing the rights of authors. But how annoying, how distressing, to have evolution
author's rights over his work were never explicitly acknowledged as a possible set of rights, which could exist as the entitlement that authors have over their work and from which the economic rights to print and publish free from interference are derived. This situation, where the author's rights are treated as inseparable and equal to the rights of publishers and printers, causes significant difficulties in ensuring that private incentives provided to authors under the law are sufficient to generate creative works for use by the public, especially when the rights are enforced by owners of rights, who may not have necessarily created the work. A shift of focus to the process of creativity and authorship will arguably make copyright analysis more balanced as rights and incentives are tied to the very act of creating for the public, removing the law from a trade or market regulating role to a creativity or authorship facilitating role. The balance between

 artificially arrested and so interesting a question stifled by an ignorant legislature, set in motion not be an irate populace clamoring for cheap books . . . but by the authors and their proprietors, the bookseller.

 Birrell, supra note 18, at 22.

 68. In the United States, the decision of Wheaton v. Peters arrived at the conclusion that the first copyright statute in the United States, the Copyright Act 1790 created a new statutory copyright and did not sanction an existing right at common law that belonged to the author. 33 U.S. 591 (1834). Professor Craig Joyce states:

 The basic premise of the Court's opinion—that copyright is a monopoly recognized by law primarily for the benefit of the public rather than the author, and is therefore attended by appropriate limitations and conditions—has remained the cornerstone of construction in this field down to the present day. Likewise, the federal courts have never since doubted that, upon publication, the author's common law right of property in his manuscript comes to an end, to be replaced, if at all, by an entirely new statutory right in the copies of his work; or that, in deference to the public's paramount interest in the wide dissemination of ideas, the latter may be fully secured only upon faithful compliance with the formalities prescribed by Congress.


 69. Copyright owners, who do not engage in the process of authorship and creativity, may not understand the thought process of an author is producing a work. Professor Wendy Gordon foresees a problem when new authors are confronted with the need to calculate the costs for using existing works. Wendy J. Gordon, Authors, Publishers and Public Goods: Trading Gold for Dross, 36 Loy. L.A. L. Rev. 159, 190-191 (2002). Professor Gordon speaks of Lewis Hyde and his book The Gift, which provides that an important part of the process of authorship is the gratitude that a new author has for his predecessor’s work, instilling in the new author a sense of gratitude, which he then repays with his new creation. Monetary payment and a sense of calculation will interfere with this process. Id. Professor Gordon states:

 Imagine a composer inspired by a book that she read as a child to make an opera of it. Can you imagine her genuine impulse of creativity surviving the calculating process? Calculating the license cost; comparing the cost of that license with the license to use other books; manufacturing an inspiration to match whatever book bore a license fee she can afford . . . that is not the way that many of our best creative people operate. Those whose motivation is intrinsic are not free to calculate, to search for the cheapest license or the author’s heir who doesn’t object to being reinterpreted and criticized.

 Id.
public interests and private rights\textsuperscript{70} may be found in the role authors have to play in the process of creating literary and artistic works for their readers.

The author of a work need not be a literary or artistic genius for copyright to be granted in his work. Most authors use existing works in their authorship\textsuperscript{71} and the idea that an author produces a work without deriving inspiration and direction from the works around him idolizes an author and the realities of collaborative authorship in a surreal fashion.\textsuperscript{72}

What is more important, as Professor Jane Ginsburg comments, is the human creativity that lies at the heart of any copyright regime, whether it is the common or civil law.\textsuperscript{73} To Professor Ginsburg, the author is the "human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work."\textsuperscript{74} The right that an author has to exert control over the work stems from the act of molding the work to the author's vision.\textsuperscript{75} Professor Ginsburg identifies six principles of authorship, which point towards the nature of activities that can properly constitute authorship, which can be applied to this article to set out the proper conditions for authorship for the purposes of protection of the work. The first principle, that authorship places mind over muscle, identifies the author as the one who conceptualizes the work and not the person executing directions to complete the work.\textsuperscript{76}

\begin{enumerate}
\item The balance the law traditionally strikes is between the protections granted the author and the public use or access granted everyone else. The aim is to give the author sufficient incentive to produce. Built into the law of intellectual property are limits on the power of the author to control use of the ideas she has created.\textsuperscript{70} \textsuperscript{77}
\item Professor Benjamin Kaplan commenting on the standard of proof for original authorship in a copyright dispute states:
\begin{quote}
The defendant in an infringement action may have a hard job establishing by definite proof that the plaintiff resorted to prior works and was thus a copyist not an author, even when there is a good natural chance that he did so because similar works abounded. But if that was the condition of the prior art, the defendant may well be believed when he undertakes to show that he took from that store and not from the plaintiff... the courts will sometimes hold simply on a footing of common sense, without precise proof, that the plaintiff must have leaned whether consciously or not on the preexisting material.
\end{quote}
\textsuperscript{71}
\item Shakespeare, for example, was made to be "the epitome of original genius" even though his work was essentially a collaborative. \textsuperscript{72}
\end{enumerate}

\textsuperscript{70} "The balance the law traditionally strikes is between the protections granted the author and the public use or access granted everyone else. The aim is to give the author sufficient incentive to produce. Built into the law of intellectual property are limits on the power of the author to control use of the ideas she has created."
\textsuperscript{71} \textsuperscript{77} LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 134 (1999).

\textsuperscript{72} \textsuperscript{77} Professor Benjamin Kaplan commenting on the standard of proof for original authorship in a copyright dispute states:
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The defendant in an infringement action may have a hard job establishing by definite proof that the plaintiff resorted to prior works and was thus a copyist not an author, even when there is a good natural chance that he did so because similar works abounded. But if that was the condition of the prior art, the defendant may well be believed when he undertakes to show that he took from that store and not from the plaintiff... the courts will sometimes hold simply on a footing of common sense, without precise proof, that the plaintiff must have leaned whether consciously or not on the preexisting material.
\end{quote}


\textsuperscript{74} \textit{Id.} at 1092.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at 1072.
must demonstrate that he produced the work.\textsuperscript{77} The third principle equates originality with authorship although the standard for what amounts to originality differs from case law to case law.\textsuperscript{78} The fourth principle is that skilled reproductions are works of authorship.\textsuperscript{79} 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.\textsuperscript{80} And, the sixth principle is the presumption of authorship for works made for hire.\textsuperscript{81}

The six principles of authorship set out by Professor Ginsburg identify the parameters wherein different constituents within the process of authorship may be identified for the purposes of rewarding the author for creative production.\textsuperscript{82} Authors, who demonstrate mental activity, skill and effort, originality, and intent to engage in the process of authorship, deserve the recognition provided by copyright laws to exert artistic control over uses of the work. Where authors produce creative works, they should be entitled to the protection that copyright proclaims to provide.\textsuperscript{83} This article focuses on the first five principles of Professor Ginsburg's principles of authorship. The sixth principle, the principle that works for hire are presumed to provide the employer of the author with first authorship, is a principle that adheres to the economic justification for investors of copyrighted materials being given the full protection of the law because of their investment and control over how the work is produced. The work-for-hire provisions in copyright are classic examples of a deviation from common principles of authorship and creativity explored in this article.

\textsuperscript{77} Id. at 1077.
\textsuperscript{78} Id. at 1078-82.
\textsuperscript{79} Id. at 1082-85.
\textsuperscript{80} Id. at 1085-88. To Professor Ginsburg:
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 to whether they intended to share the spoils of creativity, that is, whether they intended to be joint owners of the copyright. Id. at 1087.
\textsuperscript{81} Id. at 1088-92.
\textsuperscript{82} Professor Ginsburg calls these the "Six Principles in Search of an Author" to synthesize the authorities in three common law (United States, United Kingdom, and Australia) and civil law countries (France, Belgium, and Holland) as well as Canada, a mixed jurisdiction country. Id. at 1071-72.
\textsuperscript{83} Cornish, supra note 60, at 12. Providing a moral justification for protecting creativity is what the copyright system is about. Id. Protecting authors and the process of authorship is the reason "we continue to have copyright laws which derive their legal value and moral force from the act of creativity." Id.
section. Authorship here does not vest with the author who created and produced the work through a lengthy process of authorship but rather vests with an employer, whose economic interests in protecting the work may obscure the more important aspects of the quest for creativity under the law. Property rights in literary and artistic works, which provide a significant amount of control over how accessible creative works are for public use, should only be granted when an author produces the work through a process of thought, collaboration, and expression in the true spirit of authorship.

B. Property Rights in Literary and Artistic Works

Among the numerous reasons given to justify the grant of property rights in literary and artistic works, the natural justice argument is perhaps

84. In the United States, this is provided for by § 201(b) of the Copyright Act 1976, which gives an employer all of the rights in the copyright. 17 U.S.C. § 201(b) (2000). A demonstration of the hiring party’s right to control the “manner and means by which the product is accomplished” is sufficient for the party to be regarded as an employer for the purposes of the act. Some of the considerations, though not exclusive, are:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.


85. Ginsburg, supra note 73, at 1091-92. Professor Ginsburg asks:

[SHould we conclude that, despite the U.S. constitutional nod to authors, and modern Continental droit d’ auteur, copyright in essence designs to reward the best exploiter? Or should 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? . . . [a] copyright law for “continuity experts” or, as the French might more pithily put it, “le droit d’ auteur sans auteur,” is what generalization of the U.S. doctrine of works made for hire and its foreign law analogues ultimately promises. It is not, I believe, what modern copyright/authors’ rights laws were meant to protect. Without belittling the role of investment in common and civil law copyright regimes, those regimes moral center, their reason d’etre, remains human creativity.

Id.

86. Four major arguments can be advanced to justify the copyright system: first, natural justice, where an author’s expression of his personality in the work justify the grant of rights; second, the economic argument, where reward is given to those who invest in the production of creative works through the grant of rights; third, the cultural argument that rewarding creativity for the production of creative works that are of considerable national asset and fourth, the social argument that creative works contribute to the advancement of society and their creation should therefore be rewarded through the copyright system. STEPHEN STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 3-4 (2d ed. 1989). The copyright system has also been seen as playing an important role in allowing for “public education and expressive diversity” within a democratic civil society. Netanel, supra note 6, at 324.
the strongest justification in the United States and in most commons law traditions. Based most commonly on John Locke's theory that a person should have property over that which he labors and that an author should be allowed to control a work that is an external representation of his inner personality, the natural rights justification provides a moral basis for the recognition of property rights in works. In more recent times, economics have provided a further justification for the grant of property rights over creative works that are essentially public goods in nature. The rationale for the economic argument is premised on the notion that property rights will allow an internalization of positive externalities from the production of creative works and prevent what is conventionally known as the "tragedy of the commons."  

87. Although there are traces of utilitarian thinking throughout copyright's history, there is a strong natural rights argument favoring authors and their labor in producing the work. PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 7 (2001); see also ROSE, supra note 13, at 38-41 (stating that the most common figure between the author and the book in the sixteenth and seventeenth centuries was that between parent and child).


89. R.R. Bowker states:

[There is nothing which may more rightfully be called property than the creation of the individual brain. For property (from the Latin proprius, own) means a man's very own, and there is nothing more his own than the thought, created, made out of no material thing (unless the nerve-food which the brain consumes in the act of thinking be so counted), which uses material things only for its record or manifestation. The best proof of ownership is that if this individual man or woman had not thought this individual thought, realized in writing or in music or in marble, it would not exist.]

BOWKER, supra note 50, at 3.

90. The grant of rights in most common law jurisdictions has been into every situation where the economic value of the goods can be realized based on the premise that rights are necessary as an incentive for continued investment in the production and publication of creative works. GOLDSTEIN, supra note 87, at 8.

91. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 638 (2001). The application of property theories to copyright is intended to efficiently allocate resources in the market for creative works. Without these rights, copyright owners will not be able to capture the full value of their works and some of that value will be lost. If this occurs, then there cannot be an efficient allocation of resources as users who are willing to pay more for the enjoyment of the additional value will not be able to do so. See also Netanel, supra note 6, at 314-15.

92. Owners of communal property or property which is a commonly owned will diminish the value of the property as each person will tend to overuse the property and allow others to bear the cost of that use. Negotiating an agreement to regulate behavior and police the use of that property will be high as there are too many people involved in negotiating a mutually satisfactory agreement. Granting a private right to exclude others from using the property allows the owner to internalize the benefits and costs of others use of the property. Harold Demsetz, Towards a Theory of Property Rights, 57 AM. ECON. REV. PAPERS & PROC. 347, 359 (1967), available at http://www.compilerpress.atfreeweb.com/Anno%20Demsetz%20Property%20Rights.htm. Professor Demsetz argues that this same analysis applies to copyright: "[i]f a new idea is freely appropriable by all, if there exist communal rights to new ideas, incentives for developing such
The difficulty with applying property law ideas to literary and artistic works is the use of property law ideas on what is essentially intangible. Protecting land from being overused is worlds apart from protecting expressions in art, music, and plays that are free for everyone to use. The difference between land and creative works lie primarily in the fact that creative works are not prone to depletion or over use. Unlike land or other resources that property law aims to protect, creative expressions are neither limited nor finite resources. In fact, increased usage of creative works in the public domain produces new forms of works rather than depletes them. As ideas build upon other ideas, having fewer restrictions on the use of literary and artistic works is beneficial. Allowing some form of ideas will be lacking. The benefits derivable from these ideas will not be concentrated on their originators. If we extend some degree of private rights to the originators, these ideas will come forth at a more rapid pace.” Id. at 359.

93. Professor Carrier explains that “[a]s a public good, information is nonexclusive and nonrivalrous. Nonexclusivity prevents others from the possession of information (in contrast to tangible property, for which physical restraints often are sufficient).” Nonrivalrousness on the other hand, means that “one person’s consumption does not diminish the amount of the good for others to consume—that is multiple persons can use the information without depleting it.” Michael Carrier, Cabining Intellectual Property Through a Property Paradigm, 54 DUKE L. J. 1, 32 (2004).

94. Ideas released to the world are generally free. Indeed the recipient of an idea receives instruction without lessening that of the instructor and the person who lights his taper at one person, receives light without darkening the other. LESSIG, supra note 57, at 58 (quoting Thomas Jefferson).

95. New works are always being formed from existing works. Professor Jessica Litman conceives:

[C]omposers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already “out there” in some other form.


96. Professor Benjamin Kaplan in his 1966 James Carpentier Lecture in Columbia Law School mentions the need for adequate public access to works. He states that at the time the lecture was given:

[S]elf-interest on the part of authors and publishers has usually resulted in adequate public access to works, and the law had rarely had to become insistent. Probably the law of the future will lose patience rather quickly with the mere idiosyncratic withholding of access. But I should hope there will ever be play for the humane development of the “moral rights” of authors to prevent abuses in the exploitation of their creations. This will indeed be especially important if copyright itself recedes as a significant control. . . . I am suggesting that copyright or the larger part of its controls will appear unneeded, merely obstructive, as applied to certain sectors of production and that here [the electronic system for scholarly production] will lapse into disuse and may disappear.

KAPLAN, supra note 71, at 120-21.
positive externalities to exist benefits the communal pool of creative resources far greater than if property law was extended to allow for the full internalization of creative resources, if that is at all possible.\textsuperscript{97} Copyright's intellectual trajectory has always been a quest for some limitations to property rights over creative works because the monopoly created from the grant of property rights creates a barrier to the accessibility of these works and denies the public the opportunity to use these works.\textsuperscript{98} This balance between private rights and public interests imposes a continuous responsibility on law and policy makers to ensure that rights owners are able to recover their investment in the production of the work and that the public is not denied access to these works through the overly restrictive exercise of these rights.\textsuperscript{99}

\textsuperscript{97} Some form of positive externalities will always be free for the public use and cannot be internalized. Professor Mark Lemley suggests:

[T]he effort to permit inventors to capture the full social value of their invention—and the rhetoric of free riding in intellectual property more generally—are fundamentally misguided. In no other area of the economy do we permit the full internalization of social benefits. Competitive markets work not because producers capture the full social value of their output—they do not except at the margin—but because they permit producers to make enough money to cover their costs, including a reasonable return on fixed-cost investment. Even real property doesn't give property owners the right to control social value. Various uses of property create uncompensated positive externalities, and we don't see that as a problem or a reason people won't efficiently invest in their property. Analogously, I argue that full internalization of positive externalities is not a proper goal of tangible property rights except in unusual circumstances, for several reasons: (1) there is no need to fully internalize benefits in intellectual property; (2) efforts to capture positive externalities may actually reduce them, leaving everyone worse off; and (3) the effort to capture such externalities invite rent-seeking. Lemley, supra note 7, at 1032.

\textsuperscript{98} Justice Holmes in \textit{White-Smith Music Publishing Co. v. Apollo Co.} comments that the rights in copyright should only be endured for only as long as necessary. 209 U.S. 1, 19 (1908) He states:

[I]n copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is \textit{in vacuo}, so to speak. It restraints the spontaneity of men, where but for it, there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition on conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute . . .

\textit{Id.}

\textsuperscript{99} In fact, Professor Shubha Ghosh, in discussing the government's privatization of cultural production through copyright and the need to deprivatize copyright so that cultural production serves the public good states that,

[T]he historical evidence . . . illustrates that copyright has never been a purely private right. Copyright debates, from the inception of copyright in early English history to the political and legal battles over international copyright in the United States, have
In this article, I suggest that creative authorship rather than economic investment should be the basis for the grant of property rights over the work. The grant of these rights to authors by virtue of the act of creativity and process of authorship will free works from being commodities that will generate revenue to cover the cost of printing and publishing them. Property rights will facilitate and encourage authorship, creativity, and the production of new creative works when they are granted as a reward for the creative act of imagining and expressing one’s thoughts, ideas and beliefs. Authorship for the benefit of society is the central concern in the private rights-public interest debate in copyright and the grant of a property right in a work must ensure that the monopoly over the uses of the work is a temporary one that will benefit society. By recognizing the rights over the work as belonging to the person who authored the work, the law will effectively address the public interest component of the copyright debate by removing works from the collectivism of the commercial marketplace and putting the rights of control on the autonomous individual author, who produced the work through the availability and accessibility of other works in the public domain. In other words, property rights granted as a result of authorship recognizes an author’s relationship and responsibility towards his readers and removes a work from being an income-generating market.

always pitted private rights and interests against public values . . . the record does not support copyright’s status as a purely private right secured by the government.


100. Professor Jaszi makes the comment:

[T]he terminology of the “work,” denoting a free-standing abstraction as the subject of literary property, emerged only in the mid-eighteenth century through judicial elaboration of the statutory framework. In the immediate sense, this development was one consequence of the commercialization and commodification of print culture that proceeded apace throughout the eighteenth century. Active commerce in use-rights in literary property separate from physical manuscripts themselves, eventually called forth the new terminology. In effect, the ‘work’ was the commodity form or objectification of the “author’s” labor, and the publisher was able to realize the surplus value of that labor.

Jaszi, supra note 27, at 473-74.

101. By doing this, there will be significant changes in the market for creative and literary works. Romantic authorship, embodying the values of “individual self-proprietorship, creative autonomy, and artistic originality” had “initially facilitated the development of a commodity market in intellectual productions” but this idea “had the potential to interfere with the further development and smooth functioning of that market.” Id. at 501. To Professor Jaszi:

As such, “authorship” may not so much facilitate commodification as impede it. Thus, the overall incoherence of the law’s account of “authorship” may be best understood as reflecting a continuing struggle between the economic forces that (at least in the abstract) would be best served by the further depersonalization of creative endeavor and the ideological persistence of an increasingly inefficient version of individualism.

Id. at 501-2.
commodity to allow owners their recovery of publication and distribution costs.

A stronger case for property rights over literary and artistic works can be made for the author's relationship with society and his responsibility towards his readers than the economic justifications for recovery of investment discussed here for several reasons. The first reason is that the concern that property rights will put creative works in the control of a few individuals or entities\textsuperscript{102} will be less pronounced where property rights are granted for authorship and creativity because an author realizes the need to have access to other forms of creative works for inspiration, ideas and guidance and are less driven by the need to recover investments made in the production of the work.\textsuperscript{103} Second, authors are less likely to seek a full internalization of positive externalities precisely because they have benefited from another author's work and are more inclined than the corporate copyright owner to understand the desirability of allowing some forms of externalities to be free for the benefit of society.\textsuperscript{104} Third,

\begin{flushleft}
102. The maximization of intellectual property rights and the exercise of those rights in the most extreme and restrictive way is a reminiscence of European feudalism in the middle ages. Professor Lessig explains:

\[\text{[U]nder feudalism, not only was property held by a relatively small number of individuals and entities. And not only were the rights that ran with that property powerful and extensive. But the feudal system had a strong interest in assuring that property holders within that system not weaken feudalism by liberating people or property within their control to the free market. Feudalism depended upon maximum control and concentration. It fought and freedom that might interfere with that control . . . this is precisely the choice we are now making about intellectual property. We will have an information society. That much is certain. Our only choice now is whether that information society will be free or feudal. The trend is toward the feudal.}\]

\textit{LESSIG, supra} note 15, at 267.

103. New authors are potentially copiers of existing works and are those who feel the impact of strict copyright laws as materials needed to create new works are protected by the laws of copyright under the present system. Professor Waldron argues:

\[\text{[A]n institution like intellectual property is not self justifying; we owe a justification to anyone who finds that he can move less freely than he would in the absence of the institution. So . . . although the copiers may be denigrated as unoriginal plagiarists or thieves of others' work, still they are the ones who feel the immediate impact of our intellectual property laws. It affects what they may do, how they may speak, and how they may earn a living. Of course nothing is settled by saying that it is their interests that are particularly at stake; if the tables were turned, we should want to highlight the perspective of the authors. But as things stand, the would-be copiers are the ones to whom a justification of intellectual property is owed.}\]


104. Professor Lemley speaks of the undesirability of internalizing all positive externalities. He states:

\[\text{The assumption that intellectual property owners should be entitled to capture the full social surplus of their invention runs counter to our economic intuitions in every other segment of the economy. We do not permit producers to capture the full social value}\]
\end{flushleft}
property rights in creative works are more likely to achieve an efficient allocation of resources when the rights are granted to authors who, through the process of authorship, are more likely to recognize the necessity for the temporary nature of the property right so as to ensure that the work falls to the public domain as soon as the right expires.\textsuperscript{105}

Property rights in literary and artistic works of a temporary nature are an ingenious way to ensure the production of creative works for the public. Unless we are inclined to rely on a state subsidized patronage system for the production of creative works, the property rights system is an ideal way to ensure that literary and artistic works are produced for society’s growth and development.\textsuperscript{106} The property rights system has been criticized for the precise reason that these rights may be used to erect fences that prevent public use of the works and create excessive control over how these works are used.\textsuperscript{107} The justification for fences and control is often an economic one—that there is a need to protect the investment that has been made to produce the work, or else the public will use the work in an inefficient way, creating a disincentive for creative production.\textsuperscript{108} By shifting the grant of
property rights to the individual author, arguments for fences and excessive control are no longer valid because the precise nature of authorship is dependent on having access to works and being able to use existing works in new ones. Recognizing authorship as the basis for the grant of the property right in creative works puts authors in better connection with their readers and will create a more balanced relationship between the grant of private rights and public interests.

C. Readers and the Public Interests

Professor Paul Goldstein, in a 1992 article, speaks of authorship as an encompassing concept that brings both an author and his audience or reader within its embrace. The author must have an audience to communicate his work, tell his story, play his music and express his personality. Without this important component in the copyright equation, the author’s incentive to create will not be complete. An author’s recognition for his works come from an audience and the grant of a property right in his work for his authorship can only make sense when the rewards for his labor flow from those he had written for. Professor Goldstein states three conditions that

It may sound paradoxical, but in a very real sense protection of the commons was one of the fundamental goals of intellectual property law. In the new vision of intellectual property, however, property should be extended everywhere—more is better. Expanding patentable and copyrightable subject matter, lengthening the copyright term, giving legal protection to “digital barbed wire” even if it is used in part to protect against fair use: Each of these can be understood as a vote of no confidence in the productive power of the commons. We seem to be shifting from Brandeis’s assumption that the ‘noblest of human production are free as the air to common use’ to the assumption that any commons is inefficient, if not tragic.

Id at 40.

109. To Professor Goldstein:

Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft out of thin air, and intense devouring labor, an Appalachian Spring, a Sun Also Rises, a Citizen Kane. Copyright is as much about the pages of deleted text, the scenes that lie on the cutting room floor, as it is about the refined work, the final cut, that ultimately reaches the author’s public. But copyright—and authorship—are only in part about the act of creation. If creation is all there was to authorship, copyright could comfortably leave the author scribbling alone in his far-off garret. Authorship in its contemporary sense implies not just an author, but an audience; not just words spoken, but individuals spoken to.


110. Professor Goldstein explains that there is more to creation than “an author scribbling alone in his far-off garret.” Id. In fact, “[a]uthorship in its contemporary sense implies not just an author, but an audience; not just words but individuals spoken to.” Id.

111. Authorship to Professor Goldstein indicates a relationship between authors and readers. He states:

By authorship, I mean authors communicating as directly as circumstance allows with their intended audiences. Copyright sustains the very heart and essence of authorship
must coincide for authorship in its modern form to flourish between an author and his readers. The first condition is the technology that must exist to bring an author's work to his desired readers. Gutenberg's printers were the earliest technology to make the author-reader relationship possible. The connectivity of the Internet today makes this connection stronger and wider as authors and readers are connected online without the constraints of reproduction costs and geographical boundaries. The second condition for authorship to flourish is a political environment in which no sovereign entity impedes the communication between the author and his intended audience. The development of civil society discourse and freedom of speech today are far removed from the monopolies and licensing control of governments in England and continental Europe in the sixteenth and seventeenth centuries. Early copyright statutes removed literary and artistic works from government control and today, copyright has been conceived as an institution that supports democratic culture and creative expression. The third condition that will allow authorship to

by enabling this communication, this connection. 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. Id.

112. To Professor Goldstein, the author's audience are those "whom the power of his vision can command." Id. at 81.

113. Id.

114. Id.

115. Much of the Internet's potential to connect people, including authors and readers, may remain to be discovered. Professor Lessig speaks of the difficulty of predicting how the Internet will develop and states:

The architects who created the first protocols of the Net had not sense of a world where grandparents would use computers to keep in touch with their grandkids. They had no idea of a technology where every song imaginable is available within thirty seconds' reach. The World Wide Web (WWW) was the fantasy of a few MIT computer scientists. The perpetual tracking of preferences that allows a computer in Washington State to suggest an artist I might like because of a book I just purchased was an idea that no one had made famous before the Internet made it real ... [y]et there are elements of this future that we can fairly imagine. They are the consequences of falling costs, and hence falling barriers to creativity. The most dramatic are the changes in the cost of distribution; but just as important are the changes in the cost of production. Both are the consequences of going digital: digital technologies create and replicate reality more efficiently than nondigital technology does. This will mean a world of change.

LESSIG, supra note 57, at 7.

116. Goldstein, supra note 109, at 81.

117. Professor Netanel states:

Copyright is a limited proprietary entitlement through which the state deliberately and selectively employs market institutions to support a democratic civil society. Copyright law provides this support in two fundamental ways. First, through its production function, copyright encourages creative expression on a wide array of political, social and aesthetic issues. The activity of creating and communicating such expression and the expression itself constitutes vital components of a democratic civil
flourish is an economic system that facilitates direct communication between authors and readers. Markets for literary and artistic works determine the strength of this connection between authors and readers. A market driven by what an author's readers would like to read, listen and watch provides an author's reward for his labor, and in turn creates the necessary incentive for him to produce new literary and artistic works.

The opportunities for true authorship to flourish in today's digital economy are plentiful, primarily because of the connection authors now have with their readers and their ability to reproduce and distribute works at marginal cost. Professor Kaplan in 1966 spoke of technologies that would allow downstream users of copyrighted materials to be billed for exact uses of copyrighted materials with the precise royalties paid to the respective copyright owners. More recently in Copyright's Highway, Professor Goldstein with the same foresight, identified the metaphorical celestial jukebox that performs similar functions of connecting authors and their readers in an interactive way, so that readers may choose the works society. Second, through its structural function, copyright serves to further the democratic character of public discourse. By according authors and their assigns a proprietary entitlement, copyright fosters the development of an independent sector for the creation and dissemination of original expression, a sector composed of creators and publishers who earn financial support for their activities by reaching paying audiences rather than by depending on state or elite largess.

Netanel, supra note 6, at 347.

118. Goldstein, supra note 109, at 81.

119. Connecting authors with their readers is the ultimate aim of copyright. Professor Goldstein conceives the digital world as perfecting the author-reader relationship. He states in his conclusion to his book, Copyright's Highway:

The digital future is the next, and perhaps ultimate, phase in copyright's long trajectory, perfecting the law's early aim of connecting authors to their audiences, free from interference by political sovereigns or the will of patrons. The main challenges will be to keep this trajectory clear of the buffets of protectionism and true to copyright's historic logic that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works.

PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 236 (1994).

120. Professor Kaplan speaks of "secondary and later exploitations" of creative works that will be done through applied systems:

The ingenuity which devises the systems will no doubt be capable of welding-in bookkeeping apparatus that can continue for the whole copyright period to bill the customers monthly or weekly with exact copyright charges per work used, as well as with system tolls, and then to make precise royalty remittances to the copyright owners. . . what is suggested, on more sober reflection, is methods by which large repertories of works will be made available for a great variety of uses, and charges and remittances figured on a rough-and-ready basis, all with liberal application of some principle of "clearance at the source" to prevent undue bother down the line to the final consumer.

KAPLAN, supra note 71, at 120-21.
they want and pay the price for the work's worth. The online streaming of music today is a classic example of what was envisioned in years before. Rhapsody, for example, is a membership based music service that allows music listeners to access millions of songs, get personalized music suggestions tailored to their tastes and transfer their music to portable music players for a monthly fee. Apple's iTunes store creates a digital entertainment superstore online with as many as 6 million songs, 100,000 podcasts, 30,000 audio books, 600 TV shows, 500 movies and iPod games. These services provide a copyright user with choices that were never possible before creative works were digitized and put on the Internet, thereby creating opportunities for better and stronger connections between authors and their audiences.

Digital technologies have also provided readers with an opportunity to participate in the authorship process that was never before possible, but which now facilitates a greater connection between the author and his readers. Movie edits by fans and audiences through digital technologies indicate a desire on the part of the public to connect with their authors. Previously, the only way an author obtained an idea of what his readers wanted was through the sales of his works in the market. Fan edits of the Phantom Menace of the new Star Wars movies and the Purist Edit of the

121. Professor Goldstein states:

The metaphor that best expresses the possibilities of the future is the celestial jukebox, a technology-packed satellite orbiting thousands of miles above earth, awaiting a subscriber's order—like a nickel in the old jukebox, and the punch of a button—to connect him to any number of selections from a vast storehouse via a home or office receiver that combines the power of a television set, radio, CD player, VCR, telephone, fax, and personal computer.

GOLDSTEIN, COPYRIGHT'S HIGHWAY, supra note 119, at 199.


124. Professor Goldstein explains this point by stating:

Authors and publishers will direct their efforts and their resources toward those audiences that will pay for their works. Whenever Congress withholds a right from a particular market, allowing free use, it effectively shuts off the most effective means of communication between an author and her audience—the price mechanism. Assured of exclusive rights in some markets—the theatrical and television motion pictures markets, for example—authors and producers will shape their works to the tastes of theater and television audiences. Denied rights in other markets—the home videotape rental market, for example—authors and producers have no reason to aim their efforts at the possibly quite different tastes of audiences in these markets. To the extent that the tastes of audiences that get the work free diverge from the tastes of those who pay, the variety of works overall will diminish, as will authorship generally.

Goldstein, supra note 109, at 83-84.

AUTHORS AND READERS

Two Towers of the Lord of the Rings movie trilogy\textsuperscript{126} have, however, communicated audience preferences to movie producers George Lucas and Peter Jackson in a manner that is only possible because of digital technologies in the market. Garageband.com, an online music hosting site for independent musicians, allows music listeners to review music that is uploaded on the site, and to influence the way in which music is discovered and promoted by reviewing new songs. Songs with the highest reviews are played on the air over the radio.\textsuperscript{127}

Greater author-reader connection through technologies that are available today facilitates greater authorship in a more vibrant copyright market than was possible before. The public interest in creative works can be better served when authors are sufficiently connected to their readers to produce creative works that their readers want and are willing to pay for.\textsuperscript{128} The incentives under the law are designed to encourage authorship and to benefit the public by ensuring that authors produce works that their readers want.\textsuperscript{129} Property rights over creative works provide authors some necessary control over uses of their works so that they are able to obtain the market rewards that come with the production of creative and literary works that appeal to their readers.\textsuperscript{130} Many provisions of copyright facilitate the engagement between authors and readers and allow authorship—a process between conceiving an idea for a work and finally handing the work over to an author's readers—to occur.\textsuperscript{131} This connection


\textsuperscript{128} The consumers ultimately decide what will be published. Goldstein, supra note 109, at 82.

\textsuperscript{129} These rights under the law are important because they provide authors with a connection to their readers through the price that readers are willing to pay for the work. Professor Goldstein points this out by stating:

Uncontrolled use in new markets not only can deprive producers of the revenues they need to continue doing their work but may also muffle the signals they need to hear about popular preference. No one, not even the most ardent copyright pessimist, has sought to rebut the argument that the production and consumption of information are connected, and that there is no better way for the public to indicate what they are willing to pay in the marketplace. Uncompensated use inevitably dilutes these signals.

GOLDSTEIN, COPYRIGHT'S HIGHWAY, supra note 119, at 216-17.

\textsuperscript{130} To Professor Goldstein:

Free markets for goods and free markets for ideas are closely, in not perfectly, entwined. Copyright has historically mediated between the two . . . with the great revolutions of the eighteenth century came the political freedom and the commercial markets that, together with cheap printing, for the first time ensured writers that their work, their ideas, and their livelihood could be committed to the marketplace.

Id. at 232.

\textsuperscript{131} Digital technologies will reduce the role that printers and publishers have in the copyright market, and allow for a more direct connection between authors and their readers.
between authors and readers that allows an author to produce a work that his readers most want to see is an ideal that if attained through the copyright system, will create an abundance of literary and artistic works that will benefit society as a whole. This however depends on whether the law allows for the connection between authors and readers and if it does, whether the free economic market for literary and artistic works will allow authorship to flourish for the benefit of society.

III. Digital Technologies and Authorship

Perhaps the most significant impact of digital technologies on the landscape for literary and artistic production is the development of a networked economy, which allowed digital, as opposed to analog content, to be distributed to infinite points across the network and at marginal cost. The emergence of digital technologies has changed thinking on the law in significant ways. First, new technologies have made the processes of access, use and making copies of a work virtually indistinguishable, thus giving rise to new questions of authorship and extent of rights. The second change in copyright thinking lies in the application of law and economics jurisprudence, which has conventionally been used to further understanding of particular ideas within the law, such as the fair use exception, to new situations of author-reader relationships.

Professor Goldstein rightfully points out that “tomorrow’s author, artist, or composer who has access to a networked computer—most will—can bypass not only these corporate entities but also libraries and retail outlets, to communicate directly with his intended audience.” Id. at 235.

To Professor Goldstein, extending nghts 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.” Id. at 236.

An analog world is described as the representation of our sensations in the real world. Professor Vaidhyanathan explains:

We live in an analog world. The sensations we experience are manipulations of light and matter, interpreted by our organs and mind as waves. These waves have several aspects to them, most significantly frequency and amplitude. When someone plucks a guitar string, her finger vibrates the string, the string vibrates the air, and the air vibrates our eardrums. We can represent the pluck in many ways, including a drop of ink on music staff paper. This is analog representation.


Professor Vaidhyanathan believes:

Copyright was designed to regulate only copying. It was not supposed to regulate one’s rights to read or share. But now that the distinctions among accessing, using, and copying have collapsed, copyright policy makers have found themselves faces with what seems to be a difficult choice: either relinquish some control over copying or expand copyright to regulate access and use, despite the chilling effect this might have on creativity, community and democracy.

Id. at 152-53.
over the Internet. Third, new technologies have also provided authors with the ability to control and monitor uses of their work, and to exclude usages and access to the work by their readers in ways that were not foreseen by the law. Authorship and the relationship between authors and readers will be reshaped by the emergence and possibilities of new technologies and it is important that the law provide the environment where authorship and the relationship between authors and readers can flourish to ensure the continuous production of literary and artistic works for the public.

A. Transaction Costs for Negotiating Use

The central theme in this article, the need to recognize authors as the property right owner of literary and artistic works, places authorship at the core of copyright protection. Authors, by virtue of their act of creation and authorship, should be entitled to protection under the very body of law that is designed to facilitate creative endeavors as opposed to economic investments. The grant of rights to authors acknowledges that the very act of creativity builds upon works of others and therefore recognizes access to existing works by other authors as an important component of the law that cannot be overlooked. The grant of property rights through the copyright system operates as a mechanism to lower transaction costs. As rights are defined, market negotiations for the use of a work become possible. These property rights are necessary in a world where transaction costs make contractual negotiations with every possible reader of an author’s work impossible. Where transaction costs for negotiating a license are

136. Such as the potential for corporate censorship and the problems that will arise from a close monitor of the different uses of a work under the “Celestial Jukebox” metaphor. Id. at 158.

137. Professor Lessig comments:

[T]rusted systems regulate in the same domain where copyright law regulates, but unlike copyright law, they do not guarantee the same public use protection. Trusted systems give the producer maximum control—admittedly at a cheaper cost, thus permitting many more authors to publish. But they give authors more control (either to charge for or limit use) in an area where the law gave less than perfect control. Code displaces the balance in copyright law and doctrines such as fair use. LESSIG, CODE AND OTHER LAWS OF CYBERSPACE , supra note 70, at 135.

138. Professor Sag explains that property rights are used to lower transaction costs and that property rights, introduced into a legal regime, are sometimes the “lowest transaction cost solution.” Markets, to Professor Sag, will operate more efficiently with property rights. Matthew J. Sag, Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency, 81 TUL. L. REV. 187, 209 (2006).

139. If transaction costs did not present a difficulty, then it would be possible to negotiate contracts with every possible reader in the absence of copyright. Professor Sag speaks of a truly Coasian world without transaction costs or market inefficiencies and states that in such a world:

[T]here would be no reason to assume that any level of copyright scope was superior.

The reason for this is that if there are literally no transaction costs, an author can
low, the grant of property rights in works does not create barriers for accessibility to new authors because new authors are able to enter negotiations with previous authors for the use of their works, particularly when the Internet facilitates these negotiations. With digital technologies, there is a better chance for authorship to flourish and for authors to be better connected with their readers so that works of literary and artistic value that are produced benefit society. The rights granted as property provide this incentive for creative production as authors obtain rewards for their labor from their readers and new authors are able to negotiate the rights to use existing works for the creation of new works precisely because of the lowered transaction costs for negotiations that are created by the Internet.

The grant of property rights in creative works, however, comes with some social costs, one of which is the refusal to allow the use of works for new ones and the existence of monopolies if works are priced much higher than the marginal cost of production, resulting in a transfer of resources from readers back to authors. The possibility of deadweight losses from monopoly pricing is also very real when property rights are granted in creative works. However, monopolies in creative works are fairly uncommon because of the substitutability of creative works for one another. Professor Goldstein correctly pointed out that readers of a novel would migrate to other works if an author’s publisher were to set the book at a substantially higher price. In fact, the radio industry found music to contract with the whole world to obtain their assurance of sufficient rewards for her endeavors—she does not need copyright. Similarly, broad copyright scope does no harm in a zero-transaction-cost world because second generation authors can always contract with copyright owners for any rights they need.

Id.

140. Professor Trotter Hardy explains that the Internet lowers transaction costs in three ways—first, the cost of communication between people, second, the cost of computer recording of transaction data and third, the communication costs facilitating institutional innovations like rights clearing houses. Cyberspace, to Professor Hardy, operates to connect people in a way that they would not have connected before and as a result, this lowers transaction costs where it would have been extraordinarily high before. Trotter Hardy, Property (and Copyright) in Cyberspace, U. CHI. LEGAL F. 217, 237 (1996).

141. The exclusive period wherein only the owner of a copyright has control over the work may create potential monopolies. To Professor Carrier:

[1]n this way the right to exclude may provide incentives by allowing the recovery of expenditures and profits, it may also (to the extent that other products are imperfect substitutes for the protected invention) allow inventors to charge a price significantly above the marginal cost of production. IP holders thus could reap monopoly profits, effectuating a transfer of resource from consumers.

Carrier, supra note 93, at 45.

142. Id.

143. Professor Goldstein states:
be highly substitutable works when the American Society of Composers, Authors, and Publishers (ASCAP) raised their licensing fees in 1940.\textsuperscript{144} Works from the public domain were broadcasted as a retaliation against the higher licensing fees and “race” and “hillbilly” music, thought to be of lesser value then, were accepted by music listeners and eventually evolved to the genres of soul and country music that are known today.\textsuperscript{145} Technologies have also developed that allow for authors to price discriminate perfectly and therefore avoid deadweight loss problems in the market, allowing readers, who are willing to pay more for the work to purchase a different package from readers, who are less inclined to spend as much.\textsuperscript{146}

The grant of property rights to authors is unlikely to present a severe challenge to negotiating rights for the use of existing works in the creation of new works. New authors are, in most situations, able to communicate with other authors and seek permission to use their works. This is particularly so when technologies have made the cost of negotiations for the use of rights or transaction costs marginal. The availability of standardized licenses that state what others can and cannot do with a work also contribute significantly to a more conducive environment whereby authors may communicate with each other to seek the necessary permission to use each other’s work.\textsuperscript{147} As transaction costs are so low, the grant of property rights in creative and literary works does not create a barrier to accessibility to existing works, especially when the person from whom permission is sought is another author. In situations where transaction costs are high, fair use will provide a solution that allows authors to use works without seeking prior permission.

[O]ne author’s expression will always be substitutable for another’s. Were Elmore Leonard’s publisher imprudent enough to charge $75 for a copy of his latest work, I expect Leonard would soon see many of his readers migrate to works, perhaps of James Ellroy at $19.95, not to speak of paperback reprints of the classics—Chandler, Hammet and Cain—at $4.95.

\textsuperscript{144} PAUL S. CARPENTER, MUSIC: AN ART AND A BUSINESS 111 (1950).
\textsuperscript{145} JOHN RYAN, THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY 1 (1985).
\textsuperscript{146} Trusted systems have developed to allow price discrimination for literary and artistic works. Professor Lessig explains this system:

\begin{quote}
You could get access, say, to the New York Times and pay a different price depending on how much of it you read. The Times could determine how much you read, whether you could copy portions of the newspaper, whether you could save it to your hard disc and so on. But if the code you used to access the Times site did not enable the control the Times demanded, then the Times would not let you onto its site at all.
\end{quote}

\textsuperscript{LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, supra note 70, at 129.}
\textsuperscript{147} See, e.g., Creative Commons licenses, \textit{available at} http://creativecommons.org/license/ (last visited April 4, 2008).
B. Fair Use and Authorship

Fair use under §107 of the Copyright Act allows limitations upon the property right in circumstances where the use of the work is regarded to be a fair use. Where the use of the work is for such purposes as "criticism, comment, news reporting, teaching, scholarship or research,"148 the use is not regarded as infringing upon copyright. Professor Wendy Gordon has argued that the fair use provision is really a mechanism employed by the courts to affect a market transfer when consensual bargains between the copyright holder and the user may not occur through the market because the market fails to allocate resources efficiently.149 Professor Gordon's argument is an exceedingly compelling one. In many situations, market failures occur, especially in markets for literary and artistic works. In these markets, costs and benefits are often not internalized, perfect knowledge may not be attainable and the presence of transaction costs could all cause a market to fail in allowing consensual bargains to occur.150 When the market fails to allow public dissemination of works through consensual bargains, fair use operates to allow a user to depart from using the mechanisms of the market place to negotiate rights for the use of the work. Where three conditions are present—market failure, social desirability in allowing use and the absence of substantial injury to the copyright owner—fair use is justified.151

The application of fair use in this digital age may be difficult. Using Professor Gordon's test, fair use may not be applied in a situation where consensual bargains may take place.152 The Internet and digital technologies, however, have corrected many of the failings in the market for literary and artistic works by connecting authors and their readers in unprecedented ways. An author's fans know much more about the author of their favorite work through the information available on the Internet. Authors are often contactable through e-mail addresses listed on their web pages. Fair use has a very limited role to play on the Internet because the technologies, which so ably connect authors with their readers allow for contractual negotiations to take place. Far from the market failing to reach socially desirable transfers and allocation of rights, the Internet has produced an almost perfectly efficient market for literary and artistic works. The fair use justification for denying an author his rights in the

149. Gordon, Fair Use as Market Failure, supra note 17.
150. Id. at 1607-08.
151. Id. at 1614.
152. Id. at 1615.
work does not apply when technologies allow for efficient negotiations to take place between authors.

Outside the Internet, however, fair use has a vital role to play in ensuring future generations of authors are able to have access to creative works. Where authors are not able to communicate through new technologies, it becomes important that there is a mechanism in the law, which allows an author to use works without infringing the rights of another author. The need to have some form of "implied consent" to the use of the work in situations where the author would have consented if perfect market conditions had existed is particularly important in situations when transaction costs for negotiating rights are too high. Education materials are an example. Premier educational institutions have materials that are needed by educators around the globe, where connection with the author to negotiate rights may be impossible and transaction costs insurmountable. The success of the MIT Open Courseware indicates a genuine need for educational materials that are made available to other educators, who may not have access to the necessary technologies to engage in consensual bargains with other educators.

Justice Stevens, in delivering the decision of Sony Corp. of America v. Universal City Studios, states a presumption of future harm to the copyright owner if a use of a work is for commercial purposes in the court’s determination of "the effect of the use upon the potential market for or value of the copyrighted work." The presumption is a fair one because uses of a work for commercial purposes carve out a portion of a copyright holder’s market entitlement and negotiating rights to use the work are a socially desirable manner of allocating resources in a commercial market. However, when a work is used for non-commercial purposes, Justice Stevens suggests a presumption against harm to the copyright holder and the likelihood of harm must be demonstrated by the copyright holder. There may be a viable reason to also presume that when a work is used for purposes of education, the use is a fair one. The market for literary and artistic works, particularly for education purposes, may not provide the necessary mechanisms to allow consensual bargains to

153. Id. at 1616-17.
154. Id. at 1616.
155. MIT OpenCourseWare has an average one million visits per month and 500,000 translations. See MIT OpenCourseWare, http://ocw.mit.edu/OcwWeb/web/home/home/index.htm (last visited Oct. 7, 2007).
157. Id. at 451.
159. Sony, 468 U.S. at 417.
take place between authors and readers. The harm to authors by the use of a work in an educational setting is minimal and social welfare is served by the fair use doctrine as an exception to the author's exclusive control over his work. Where transaction costs are prohibitive to allow for the transfer of rights between authors and readers, fair use as a legal doctrine is the most suitable tool we have to provide the mechanism that allows for access to works.

C. Author's Control Through Technologies

Through technologies, authors have perfect control over their works. Their ability to price discriminate and control the manner in which their works are used and accessed through trusted systems allow for almost perfect markets for literary and artistic works to exist. The property rights in works allow authors the exclusive control over how their works are used; and the limited application of fair use to situations where the Internet does create almost perfect markets with low transaction costs may create barriers to access by other authors if the author decides to withhold permission. In fact, Professor Vaidhyanathan sees the celestial jukebox metaphor as creating unlimited potential for corporate censorship. The ability of authors to control uses of their works provides many opportunities for works to be disseminated to as wide a readership as an author would like and encourages a more vibrant and active authorship process by connecting authors to their readers. Technological development has progressed so much that authorship today has a completely different meaning than authorship before. However, there is also a possible setback from the use of technology by authors in their creative endeavors and in their relationship with the public—the withholding of access to their works through technology, price discrimination, censorship and the full exercise of property right over their works.

Copyright law has an inbuilt mechanism, which may provide a satisfactory solution to the potential problem of withholding access. Compulsory licensing provisions in the law allow for transmissions by cable systems, public performances of sound recording, the making

160. Professor Vaidhyanathan comments:
A highly critical film review or scholarly article demands that the critic or scholar have the confidence to reuse portions of the original work in the subsequent work. If the copyright holder wanted to work the Celestial Jukebox more efficiently, it could exact higher rent for critical use, deny permission entirely, or exact retribution by limiting access to other works in the future...the potential for corporate censorship under the Celestial Jukebox is unlimited.

Vaidhyanathan, supra note 133, at 158.
162. Id. § 114(2).
and distributing of phonorecords, coin-operated phonorecord players and non-commercial broadcasting to be subjected to publicly administered rates. These provisions provide for a balance between the grant of property rights, which provide authors with the exclusive rights over the work and other authors and the public’s rights to have access to the work. The construct of compulsory licenses, however, is subject to Article 9 of the Berne Convention for the Protection of Literary and Artistic Works that states that authors of literary and artistic works have the exclusive rights of authorizing the reproduction of their works in any manner or form. Article 9(2) provides three requirements for national legislation of members of the Berne union to authorize reproductions—that the use qualifies as one of “certain special cases,” that the reproduction “not conflict with the normal exploitation of the work” and that the reproduction “not unreasonably prejudice the legitimate interest of the author.” If equitable remuneration is granted to the copyright holder, the requirement of Article 9(2) that a reproduction not “unreasonably prejudice the legitimate interests of the author” will be met.

IV. Conclusion: Authors, Readers and the Market for Works

The grant of property rights to copyright owners and not authors in today’s system creates a market for literary and artistic works that does not encourage the development of authorship and the process of creativity needed for the production of works for the public. The ultimate goal of the copyright system is to provide incentives for authors to create and produce literary and artistic works for their readers. The copyright system replaced the crown patronage for literary and artistic production and copyright laws replaced censorship and licensing practices of the sixteenth and seventeenth centuries precisely to allow free and uncensored authorship to occur for the benefit of society. The grant of the property right to authors provides the necessary incentives for authors to imagine, write and express themselves in works that their readers would like to receive and this process of authorship and author-reader connection is encouraged through a temporary but exclusive control that authors have over their works. Professor Patterson argues that the right that printers and publishers (and
other copyright owners) have is a negative covenant. This thought is a compelling one when we consider the notion of authors and authorship with the development of the market for creative and literary works and find ways to ensure that creative authorship continues to flourish to produce an abundance of literary and artistic works for the public.

Print privileges created a market for the trade of manuscripts as physical objects, but the value of the expression in a manuscript as separate from its physical manifestation was never acknowledged in the early copyright statutes and cases. The market for creative and literary works grew in response to commercial trade in literary and artistic works—as a commodity that provided revenue for the investment that copyright owners made in their works. However, the rights of copyright owners are, I believe, subject to the author. For as Professor Jaszi rightfully pointed out, the idea of authorship has been continually used and redeployed in debates about copyright protection, which indicates to a large extent the central role authors and the process of authorship play in copyright law. The law after all is about creativity and authorship rather than investments. The market for literary and artistic works ought to work towards creating the necessary incentives for authorship to flourish and to connect authors with their readers. Market mechanisms should facilitate creativity and move from protecting economic interests of copyright owners to ensuring authorship flourishes as well as enable greater author-reader connections. Property rights provided through copyright enable authors to receive incentives for their labor in creating the work, encouraged by the price that their readers are willing to pay for their work. These rights allow the law to recognize authors as the primary contributors to literary and artistic diversity in the market.

The market for literary and artistic works, when controlled by copyright owners, will give rise to the problems associated with expanding property laws to internalize all externalities in the market as identified by Professor Lemley in his article, *Property, Intellectual Property and Free Riding.* The attempt to fully internalize all externalities is a concern that follows the rights that lie with copyright owners, whose primary concern is the recovery of investments made in the publication and distribution of the work. Due to the investment made in publishing and distributing the work, any form of enjoyment by the public is an externality that must be internalized to ensure that the investment made in the work is fully

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170. *Patterson,* supra note 1, at 73.
172. *Cornish,* supra note 60, at 12.
recovered. The grant of property rights to authors, on the other hand, expects positive externalities to be present and enjoyed by the public because the nature of authorship and creativity lies less in the economic investment in producing a work and more in the creativity, labor, imagination and use of other existing works in bringing literary and artistic works to fruition. Copyright law is intended to ensure that the public has literary and artistic works that they may use and the rights that the law provides must ensure that literary and artistic works are produced. The best guarantee that the law can have for an abundance of literary and artistic works for the public is to ensure that authors have the necessary incentives to create. This is done through the grant of the property right in works for the act of creating; and the license copyright owners have to publish and distribute the works should not overshadow the rights of the author. For if it does, we may indeed need to have a perfectly acceptable answer to why we should need copyright when there may be a better call to have producers' investment laws.174

174. Cornish, supra note 60, at 12.