

# Fordham Intellectual Property, Media and Entertainment Law Journal

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Volume 19 *Volume XIX*  
Number 2 *Volume XIX Book 2*

Article 2

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2008

## The Social Contract and Authorship: Allocating Entitlements in the Copyright System.

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### Recommended Citation

Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System.*, 19 Fordham Intell. Prop. Media & Ent. L.J. 413 (2008).  
Available at: <https://ir.lawnet.fordham.edu/iplj/vol19/iss2/2>

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### Cover Page Footnote

My most heartfelt thanks go to Wendy Gordon, Adam MacLeod and Shubha Ghosh for providing me with extremely insightful and generous comments on earlier drafts of this Paper. I am deeply grateful to and indebted to Paul Goldstein, Deborah Rhode, Carol West and Angela Kupenda, whose friendship, kindness and guidance have made my intellectual, academic and personal journey a truly rich, wonderful and rewarding experience. I also express my most sincere thanks to the Editors of the Fordham Intellectual Property, Media & Entertainment Law Journal for their insightful comments to drafts of this Article and their excellent editorial work. All errors in this Article are, of course, mine alone. This Article is lovingly dedicated, as always, to my family.

# The Social Contract and Authorship: Allocating Entitlements in the Copyright System

Alina Ng\*

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## INTRODUCTION

It is interesting to note that the property protected in the copyright system are works of authorship, defined within eight illustrative categories as: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works in § 102 of the Copyright Act,<sup>1</sup> and yet, authorship as a creative human endeavor has received very little attention as a legal concept that may aid jurists and policy makers in setting an acceptable balance between private property rights and public interests in literary and artistic works as the protected subject matter of copyright law. This Article argues that understanding the notion of creative authorship as a unique, yet fundamentally intrinsic, human expression will assist copyright policy makers and judges in reaching policy and legal decisions that reflect more accurately the realities of creating literary and artistic works. Here, this Article makes a call for a clear demarcation between authorial rights in literary and artistic works, and the economic rights to print, publish and distribute these works.

A good place to start thinking about authorial rights in literary and artistic works is to identify the role of the author within the copyright system. This Article argues that contrary to scholarly literature that contends the role of the romantic author in the copyright system is antiquated and is an inaccurate depiction of the actual process of creativity, the notion of the romantic author is actually the most important concept in copyright to assist in fairly

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<sup>1</sup> 17 U.S.C. §§ 101–1332 (2006) [hereinafter The Copyright Act]; *id.* § 102 (providing eight illustrative categories of works of authorship).

allocating rights and entitlements in literary and artistic works. When we think of the reverence society gives William Shakespeare as an author and playwright, what we really see is the special connection that an author has with his audience, or readers, and in Shakespeare's case, this author–reader connection is second to none. Shakespeare has had, and continues to have, an immense influence on his audiences and readers. Harold Bloom refers to him as “the most influential of all authors during the last four centuries.”<sup>2</sup> In his account of Shakespeare as a poet, Ralph Waldo Emerson acknowledges the weight of Shakespeare's words and likens him to “some saint whose history is to be rendered into all languages . . . .”<sup>3</sup> An author's connection with his or her audience transcends the boundaries of society, time and culture, and Shakespeare's influence through his work is but one illustration of the role authors have in society and human life. The way in which Shakespeare's work and life has molded society's literary and artistic development and cultural formation as a poet and playwright in seventeenth-century Elizabethan England and as a present-day author who speaks with a contemporary voice that resonates with our present and future times<sup>4</sup> suggests that there is more to the notion of the creative individual and authorship as an essentially human activity than that which is presently acknowledged within the copyright system.

Shakespeare, who lived from 1564 to 1616,<sup>5</sup> wrote and published his works from 1593 to 1609,<sup>6</sup> well before the Statute of Anne was passed by Parliament in 1710 to recognize literary rights in manuscripts.<sup>7</sup> The patronage system, wherein authors wrote for

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<sup>2</sup> HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* xiii (2d ed. 1997) [hereinafter BLOOM, *THE ANXIETY OF INFLUENCE*].

<sup>3</sup> *Id.* at xvi (“[H]e is like some saint whose history is to be rendered into all languages, into verse and prose, into songs and pictures, and cut up into proverbs; so that the occasion which gave the saint's meaning the form of a conversation, or of a prayer, or of a code of laws, is immaterial, compared with the universality of its application.”).

<sup>4</sup> See NORTHROP FRYE, *NORTHROP FRYE ON SHAKESPEARE* 1 (Robert Sandler ed., 1986).

<sup>5</sup> See *id.*

<sup>6</sup> HAROLD BLOOM, *GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS* 16–18 (Warner Books 2002) [hereinafter BLOOM, *GENIUS*].

<sup>7</sup> The Statute of Anne was 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

an aristocratic class for financial reward, public recognition and protection, was the prevalent method by which authors earned their dues.<sup>8</sup> Shakespeare, as most playwright authors did in his time, depended on this system for his livelihood.<sup>9</sup> Authors provided a service to their patrons and were rewarded or punished by what their works did for their audiences.<sup>10</sup> What authors received from their patrons was a reward or honor for their service and work, and the idea that authors could own their literary and artistic creations through property rights did not fit well with the traditional patronage system.<sup>11</sup>

Shakespeare was a talented dramatist<sup>12</sup> and left such a pronounced mark on literature that his work continues to speak to society with a voice that is still powerful four hundred years

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therein mentioned.” Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.). The Statute of Anne benefited authors to the extent that it allowed authors to acquire the copyright in their work that before the statute was the sole prerogative of publishers and members of the Stationers’ Company, the London publishing guild. See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 145 (Vanderbilt Univ. Press 1968) [hereinafter PATTERSON, *COPYRIGHT*].

<sup>8</sup> HAROLD BLOOM, *THE WESTERN CANON: BOOKS AND SCHOOL OF THE AGES* 43 (Riverhead Books 1994) [hereinafter BLOOM, *THE WESTERN CANON*].

<sup>9</sup> Two of Shakespeare’s early poems, *Venus and Adonis* and *The Rape of Lucrece*, were dedicated to his patron, the Earl of Southampton. See BLOOM, *THE ANXIETY OF INFLUENCE*, *supra* note 2, at xx. An outbreak of plague in 1593 or 1594 forced theaters to close, and Shakespeare was forced to earn his living through other means. See FRYE, *supra* note 4, at 10.

<sup>10</sup> Texts were thought to be an action (as opposed to a thing) that would cause reactions in those who came in contact with them:

[Texts might] ennoble or immortalize worthy patrons . . . move audiences to laughter or tears . . . expose corruption or confirm the just rule of the monarch or assist in the embracing of true religion, in which case their authors were worthy of reward . . . [or] move men to “sedition and disobedience” or to “detestable heresies” in which case their authors deserved punishment.

MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 13 (Harvard Univ. Press 1993).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> See BLOOM, *THE ANXIETY OF INFLUENCE*, *supra* note 2, at xvi. Emerson describes Shakespeare as

a full man, who liked to talk; a brain exhaling thoughts and images, which seeking vent, found the drama next at hand. Had he been less, we should have had to consider how well he filled his place, how good a dramatist he was—and he is the best in the world.

*Id.*

later.<sup>13</sup> Being in the patronage system and producing plays, poems and sonnets for his patrons, however, had a significant impact on what he wrote and produced. Shakespeare was popular and well liked<sup>14</sup> but probably refrained from venturing into contemporary politics in his works because of censorship<sup>15</sup> and the need to court favors from patrons.<sup>16</sup> Although Harold Bloom suggests that Shakespeare's works resulted from his independent individuality and remarkable intellect<sup>17</sup> and were not shaped by state power or fidelity to his patron,<sup>18</sup> the influence that patrons would have had

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<sup>13</sup> See *id.* at xiii.

<sup>14</sup> FRYE, *supra* note 4, at 9 (“Shakespeare seems to have been popular and well liked both as a person and as a dramatist. He never engaged in personal feuds, as many of his contemporaries did, and his instinct for keeping out of trouble was very agile.”).

<sup>15</sup> See *id.* (noting that any play containing references to contemporary politics would not be staged).

<sup>16</sup> See *id.* at 10 (“Shakespeare seems to have had the instincts of a born courtier: *Macbeth*, for example, would have been just right for James I, who had come to London from Scotland a few years earlier.”).

<sup>17</sup> Harold Bloom, in defining “genius,” refers to Shakespeare several times. See, e.g., BLOOM, GENIUS, *supra* note 6, at 9–11. Bloom quoted Thomas Carlyle, the Scottish essayist, satirist and historian during the Victorian era, as having remarked, “[i]f called to define Shakespeare’s faculty, I should say superiority of intellect.” *Id.* at 9. Bloom also quotes William Blake as stating “[t]he ages are always equal but genius is always above its age.” *Id.* at 10. Bloom goes on to state that “[w]e cannot confront the twenty-first century without expecting that it too will give us a Stravinsky, or Louis Armstrong, a Picasso or Matisse, a Proust or James Joyce. To hope for a Dante or Shakespeare, a J.S. Bach or Mozart, a Michelangelo or Leonardo, is to ask for too much, since gifts that enormous are very rare.” *Id.*

<sup>18</sup> Some scholars of literary study argue that the social order of the English Renaissance period reduced playwrights of that period to time-servers or subverters of state power. See BLOOM, THE ANXIETY OF INFLUENCE, *supra* note 2, at xvi–xvii. Harold Bloom, arguing against this position, emphasizes the influence Shakespeare had in his era:

Who wrote the text of modern life, Shakespeare or the Elizabethan–Jacobean political establishment? Who invented the human, as we know it, Shakespeare or the court and its ministers? Who influenced Shakespeare’s actual text more, William Cecil, Lord Burghley, the First Secretary to Her Majesty, or Christopher Marlowe? . . . [W]e need to assert that high literature is exactly that, an aesthetic achievement, and not state propaganda, even if literature can be used, has been used, and doubtless will be used to serve the interests of a state, or of a social class, or of a religion, or of men against women, whites against blacks, Westerners against Easterners.

*Id.* at xvii.

as the masters or employers of authors<sup>19</sup> on the kind of works their authors produced would be difficult, if not impossible, to ignore.<sup>20</sup>

Sir Thomas Babington Macaulay was quick to recognize the detrimental effect of patronage upon literary and artistic creations. In his 1841 parliamentary speech opposing the extension of the then copyright term of twenty-eight years, he remarked that he

could conceive of no system more fatal to the integrity and independence of literary men than one under which they should be thought to look for their daily bread to the favour of ministers and nobles. I can conceive no system more certain to turn those minds which are formed by nature to the blessings and ornaments of our species into public scandals and pests.<sup>21</sup>

In his speech, Macaulay goes on to acknowledge the copyright system as the “only one resource left” to ensure authors continue to

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<sup>19</sup> Jane Bernstein, in writing on print culture and music in sixteenth-century Venice, identified patronage to fall into three distinct categories. JANE BERNSTEIN, PRINT CULTURE AND MUSIC IN SIXTEENTH-CENTURY VENICE 105–06 (Oxford Univ. Press 2001). The first and most traditional was one of service to the patron for payment to have a composer’s work printed. *Id.* The second was a dedication of a work to a potential patron with whom a composer was seeking employment. *Id.* The third form of patronage moved towards a market system where a composer completed a work and sought a patron to dedicate the work to in return for payment or favors. *Id.*

<sup>20</sup> Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) [hereinafter Netanel, *Copyright*] (“[I]n a world with neither copyright nor massive state subsidy, authors would likely rely heavily on private patronage, forcing them to cater to the tastes, interests, and political agenda of the wealthy, rather than seeking a broader, more varied consumer audience. Copyright thus serves to support a robust, pluralist, and independent sector devoted to the creation and dissemination of works of authorship.”); see also Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 79, 83 (1992) (“Patronage supports only those authors whose creative efforts meet the patron’s taste. Patronage depresses authorship by shutting the author off from the wider audience that he might hope to reach.”); Alan C. Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209, 223 (1984) (reviewing JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984)) (“With the advent of commercial printing and the relative demise of the patronage system, the literary community burgeoned . . .”).

<sup>21</sup> Sir Thomas Babington Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841), in FOUNDATIONS OF INTELLECTUAL PROPERTY 310 (Robert Merges & Jane Ginsburg eds., 2004).

produce literary and artistic works and are remunerated through the rights that copyright provides.<sup>22</sup>

While the creation of the market for literary and artistic works through the copyright system may be the best way to remunerate authors for their creativity, the statutory scheme providing property rights on utilitarian ideals to meet a larger social goal—that of promoting “the Progress of Science and useful Arts”<sup>23</sup>—removes from contemporary copyright jurisprudence the moral and ethical considerations necessary to create the ideal conditions for authentic authorship to occur and connect authors with society.<sup>24</sup> Ronald Dworkin, in *Law’s Empire*, argues that understanding a legal system is a matter of making the best interpretative sense of it.<sup>25</sup> Law and its practice, to Professor Dworkin, ought to be construed as a general principle of political integrity that comprises various social constraints to create equality and provide moral justification

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<sup>22</sup> *Id.*

<sup>23</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>24</sup> One area of moral and ethical norms that has not been fully explored in copyright is the idea that the fundamental human rights of an author ought to be considered as natural rights. See generally Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497 (2004). Digital media today also facilitates authorship by authors, who write and collaborate for personal, social, moral or other forms of non-economic rewards that are not a part of the utilitarian calculus for copyright. See Erez Rueveni, *Authorship in the Age of the Conducer*, 54 J. COPYRIGHT SOC’Y U.S.A. 285, 288 (2007). The present copyright regime also focuses on the external commercial value of a work and its dissemination to the widest portion of society without much consideration of the intrinsic processes of artistic creation and inspiration. See generally Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006).

<sup>25</sup> According to Professor Dworkin:

General theories of law . . . must be abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it. But for all their abstraction, they are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. . . . Legal philosophers debate about the general part, the interpretive foundation any legal argument must have . . . . Any practical legal argument, no matter how detailed and limited assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others.

RONALD DWORKIN, *LAW’S EMPIRE* 90 (Fontana Press 1986).

for its political power.<sup>26</sup> Conceiving the copyright system as a policy of the legislature for economic regulation<sup>27</sup> gives rise to the need to calibrate the extent of authorial rights against the social costs of property rights<sup>28</sup> to ensure that the rights provided to authors are not more than is necessary to provide the incentive to create.<sup>29</sup> The difficulty of calibrating costs against benefits

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<sup>26</sup> One of the main tenets of law as integrity is that it “supposes that law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.” *Id.* at 95–96.

<sup>27</sup> Thomas Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 278 (2004) (stating that Congress’s Intellectual Property Power is not limited by any general norm and that the exclusive rights provided under copyright law were another form of economic regulation that Congress used to confer economic rent on favored special interests); see also PATTERSON, COPYRIGHT, *supra* note 7, 143 (stating that the first copyright statute, the Statute of Anne, was not meant to benefit authors, but was a trade-regulation statute enacted to resolve chaos in the book trade caused by the final lapse in 1694 of its predecessor, the Licensing Act of 1662, and to prevent a continuation of the booksellers’ monopoly); Chris Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 533 (2004) (“American copyright law has been set on a utilitarian foundation . . . [that] constructs copyright as a creature of positive law, by which exclusive rights (limited, in their application, by the express constraints set out in the Intellectual Property Clause) may be offered, or withheld, on whatever basis is rationally calculated to benefit the public.”).

<sup>28</sup> According to Nachbar:

The set of rights conferred by intellectual property law is, economically, no different than the set of rents resulting from other limits on competition. Both forms of intervention in markets provide a set of protections calibrated by both the definition of the market they regulate and the scope of their restrictions on free competition to provide particular beneficiaries the power to extract from the market more than they could get without the limiting regulation.

Nachbar, *supra* note 27, at 355.

<sup>29</sup> Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 8 (1995) (“The goals of encouraging the creation and dissemination of new works require a carefully balanced set of rights given to authors and privileges granted to users of copyrighted works. It must give authors an incentive to create, but it must also limit this incentive so that other authors can create new works that build on original works.”). The balance between private incentives and public access is a difficult one to draw from a utilitarian standpoint. Professor Mark A. Lemley states:

Proliferation of economic literature on intellectual property over the last two decades has improved our understanding of the economics of innovation and intellectual property considerably, but it has not given us a magic bullet or told us where to draw the line between protection and the public domain. . . . The optimal scope, strength, and duration

inherent in any utilitarian system of rights,<sup>30</sup> the uneasy application of property rights in creative works to create an artificial scarcity in public goods,<sup>31</sup> and the reliance on an imperfect market to allocate creative resources efficiently<sup>32</sup> characterize a utilitarian-based conceptualization of the copyright system that justifies the

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of intellectual property protection depend on the type of creation at issue, on the nature of innovation in the particular industry in question, on the particular kind of invention (and inventor) at issue, and on the market context.

Mark A. Lemley, *Property, Intellectual Property and Free Riding*, 83 TEX. L. REV. 1031, 1066 (2005) [hereinafter Lemley, *Property*]. Professor Christopher S. Yoo states that the “[b]asic principles of welfare maximization require that works be priced at marginal cost because it is at that point that the social benefits of producing an incremental unit no longer exceed the social costs.” Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 227 (2004) (footnote omitted).

<sup>30</sup> There is some difficulty encountered in utilitarianism, which is to balance the collective welfare of society against the property rights of authors (creating social costs that society bears for the grant of these rights). Professor Dworkin states:

Utilitarian arguments encounter a special difficulty that ideal arguments do not. What is meant by average or collective welfare? How can the welfare of an individual be measured, even in principle, and how can gains in the welfare of different individuals be added and then compared with losses, so as to justify the claim that gains outweigh losses overall?

RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 232 (Gerald Duckworth & Co. 1991). Using an example of the effect segregation has on welfare, Dworkin states, “[t]he utilitarian argument that segregation improves average welfare presupposes that such calculations can be made. But how?” *Id.*; see also Lemley, *Property*, *supra* note 29, at 1066 (“[I]t is hard—and perhaps even impossible—to ever calibrate intellectual property law perfectly.”).

<sup>31</sup> See Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality and Restriction on Academic Freedom*, 8 CORNELL J.L. & PUB. POL’Y 541, 546–47 (1999) (“Because an author can prevent free riders from copying and distributing an author’s work without paying copyright royalties, copyright protection creates an artificial scarcity in the means of accessing a creative work and gives the copyright owner a monopoly in the resulting market for such access.” (footnotes omitted)).

<sup>32</sup> See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1613 (1982) [hereinafter Gordon, *Fair Use*] (“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 interests in dissemination and private interests in remuneration.” (footnote omitted)).

grant of private rights in terms of common good.<sup>33</sup> Utilitarianism as a basis for copyright jurisprudence, directed towards the ultimate goal of promoting “the Progress of Science and useful Arts”<sup>34</sup> for welfare maximization, however, creates an uncertainty as to the proper allocation of entitlements in literary and artistic works. The law, as it presently stands, allows authors to recover the cost of investment in creative production from commercial markets without any limitations or restraints on the exercise of rights. Authors may seek as much financial remuneration for their works through the market for as long as is necessary to provide an economic incentive for authors to create and produce works.<sup>35</sup> The difficulty in identifying the precise point at which entitlements should be extended to facilitate an author’s recovery of market profits as an incentive to create works for the general public benefit<sup>36</sup> creates a legal system that subjects rights to collective

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<sup>33</sup> See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 798–99 (1985) (“Utilitarianism is a consequentialist or teleological theory, while libertarianism and contractarianism are deontological theories. The primary difference between these two types of ethical theories is that in consequentialist theories rights must always be justified in terms of the good, while in deontological theories, at least some rights require no justification and may be exercised regardless of their consequences.” (footnotes omitted)).

<sup>34</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>35</sup> Ryan, *supra* note 31, at 545 (“Incentive theory assumes that creative expression will likely be squelched and constricted if authors are not afforded some copyright protection to ensure a financial return on the costs of creating and disseminating their original works.”); see also Yoo, *supra* note 29, at 215. Yoo argues that without rights over creative works, third parties will be able to copy and distribute works without incurring the first-copy cost borne by authors and will thereby “deprive authors of any reasonable prospect of recovering their fixed-cost investments and would thus leave rational authors with no economic incentive to invest in the production of creative works.” *Id.* The result of this situation is an economic inefficiency resulting from monopolistic pricing practices as authors price their works at a substantially higher price than their marginal cost of production. See William Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700–03 (1988).

<sup>36</sup> For literature on this point, see as examples Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 133 (1999) (“[A] loss of social welfare [from copyright] is acceptable up to the point required to induce creation of the work, but not beyond.”); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1205 (1996) (“[C]opyright protection beyond that necessary to compensate the author for lost opportunities would generate no additional incentive to create and would discourage production of additional copies . . . .”); Yoo, *supra* note 29, at 216–17

social welfare but which, concurrently, provides very little certainty and order in a legal system designed to allocate property rights in literary and artistic works. The copyright system was established as a legal institution to provide authors with the freedom to produce works of authorship independent of nobility and state government patronage.<sup>37</sup> Yet, ironically, the copyright system produces a new form of patronage—that of the market—which now subjects authors to commercial forces as their new patron.

A legal system that is intended to provide authors with the freedom to create that is independent of patronage would best serve its intended purpose by creating the ideal environment that would allow authorship to flourish for society's benefit. Professor Paul Goldstein had earlier conceived of the copyright system as concerned solely with authorship, and not the protection of authors or publishers, nor the security of author or consumer welfare, the bolstering of international trade balances or the protection of art.<sup>38</sup> The law is indeed, as Professor Goldstein succinctly explained, about “sustaining the conditions of creativity that enable an individual to craft out of thin air, an intense, devouring labor, an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*,”<sup>39</sup> for unless the law creates an environment that would encourage authors to create works of authorship that is independent of extrinsic forces and influences, society may not have access to works that are crafted from an author's individual and autonomous creativity.

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(“[C]opyright protection must exist, but should be calibrated to the lowest level that still provides sufficient return to support creation of a work.”).

<sup>37</sup> According to Martha Woodmansee, the English romantic poet William Wordsworth believed:

The [Copyright] Bill has for its main object, to relieve men of letters from the thralldom of being forced to court the living generation, to aid them in rising above degraded taste and slavish prejudice, and to encourage them to rely upon their own impulses, or to leave them with less excuse if they should fail to do so.

MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 145 (Columbia Univ. Press 1994).

<sup>38</sup> Goldstein, *supra* note 20, at 302.

<sup>39</sup> *Id.*

Fitting copyright law within the framework of utilitarianism may overemphasize the role of the market as an institution to provide economic rewards for authorial labor.<sup>40</sup> Utilitarianism undermines or ignores other non-economic conditions necessary for creative and authentic authorship, such as the ability of authors to use creative resources with ease or engage in collaborative authorship.<sup>41</sup> True authorship in an authentic sense that is independent of government subsidies, patrons and the market is essentially an activity that can only occur when other individuals (authors, readers and publishers) within society are constrained by particular moral and ethical norms based on an underlying social agreement that provides for the entitlement of rights in creative works on ideas of justice and fairness. Shifting the ethics for copyright from a utilitarian-based approach, which justifies property rights as necessary to further larger public goals, towards

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<sup>40</sup> See Dale A. Nance, *Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 764–65 (1990) (defining the copyright system as comprising both utilitarian and teleological ideas as distinct from one another); Samuel E. Trosow, *The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital*, 16 CAN. J.L. & JURIS. 217, 226–27 (2003) (describing the economic model for copyright protection developed by William Landes and Richard Posner, as a “modern variant of utilitarianism,” in which protection furthers “the efficient allocation of resources in a market setting”). To Professor Nance, utilitarianism measures common good by the satisfaction of human preferences without judgment on the appropriateness of the preferences. Nance, *supra*, at 764. The “measurement is done . . . by allowing aggregate preferences to be registered by the operation of the market . . . by the demand that is revealed” in the market. *Id.* at 764–65. Professor Nance contrasts teleological theories on the basis that judgments are made on the appropriateness of the common good and states that “[i]n the context of intellectual property, this would translate into an argument based on the intrinsic values of knowledge and aesthetic experience, values deserving governmental support despite, indeed because of, the insufficiency of consumer demand, even in a well-functioning market.” *Id.* at 765. Other scholars treat utilitarianism as a branch of teleological thought. See, e.g., Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1552 (1982) (citing utilitarianism as a popular theory among teleological scholars); Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 232 (2006) (“Utilitarianism is the most well-known teleological or consequentialist theory of ethical justification.”); Thomas M. Scanlon, *Rawls’ Theory of Justice*, 121 U. PA. L. REV. 1020, 1047 (1973) (citing utilitarianism as the “principal example” of teleological theories).

<sup>41</sup> Thierry Joffrain, *Deriving a (Moral) Right for Creators*, 36 TEX. INT’L L.J. 735, 781 (2001) (“[M]ore than profit drives the creative process . . . . The driving force behind creativity may be connected to the ‘intrinsic motivation’ of creators.” (footnote omitted)).

a natural rights framework, which justifies the grant of rights as natural entitlements, allows authorial and social rights in literary and artistic works to be allocated on principles of fairness and justice. A conceptualization of the copyright system based on natural rights principles rewards authors for their individual creativity rather than mere production or economic investment and allows creative authorship to occur without relying on the commercial market as an institution to allocate entitlements between authors and society in the copyright system.

This Article is divided into three parts. Part I of this Article argues that romanticism as a notion of authorship within the copyright system provides an important analytical tool to assess the role of authors within society and facilitate our understanding of the process of creative authorship. This part of the Article suggests that literary studies on romantic authorship minimize the central role of authors in the copyright system and identifies the need for a comprehensive understanding of authorial rights vis-à-vis readers and publishers/distributors in the copyright system. Part II builds an ethics for the copyright system on principles of natural law and natural rights that is distinct from utilitarianism. The main consideration of this part of the Article is the acknowledgement that authors and society have natural rights in literary and artistic works, which consequently imposes moral obligations on authors and their readers on how these works may be used. The use of a deontological framework to guide moral and ethical considerations within the copyright system affects the areas of property rights and access, the alienability of these rights, society's right to pursue knowledge and excellence, and the moral rights of authors. This part of the Article provides a detailed analysis for a copyright ethics that grants rights in creative works as natural rights of the author that preclude the necessity of drawing references to a larger social or political goal. Part III considers the essence of the social contract theory as a basis to allocate rights and entitlements in creative works within society and calls for the judiciary to play a greater role in setting these rights and entitlements to ensure justice and fairness. This part of the Article also calls for limitations and restraints on the exercise of these rights and for entitlements based on contractarianism as

espoused by traditional and more contemporary social contract philosophers. The Article concludes that conceiving copyright ethics based on natural law and natural rights produces a dynamic in the legal system that facilitates a fairer distribution of rights and entitlements in creative works among all the parties in the copyright system. If the aim of the copyright system is to encourage authentic authorship that is independent of patronage by the commercial market, a shift in copyright ethics must occur to grant rights and entitlements as a fundamental and natural right of the author and to impose simultaneous moral obligations on authors to make their works available to society in accordance with the social agreement an author has with other members of society.

### I. CONTEXTUALIZING AUTHORSHIP

In contextualizing authorship within the copyright system, the notion of the romantic author immediately comes to the forefront of scholarly debate as a notion that is socially constructed as a response to the emerging copyright markets of the early sixteenth and seventeenth centuries, and is often dismissed by copyright and literary studies scholars as an unrealistic representation of how authors truly create. Romanticism as a literary, artistic and intellectual movement that emphasizes the individual as a creator, who produces creative works from intrinsic human emotion, imagination and thought,<sup>42</sup> does however show us how authors as individuals relate and respond to market and commercial forces and teaches an important lesson—that there are a great number of works of creative authorship that are not produced for the commercial market but which have met great social and readership success. John Milton’s contract for the first publication of *Paradise Lost* provided for a mere payment of £5.00 (five pounds) for the publisher’s right to “have hold and enjoy” the manuscript

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<sup>42</sup> See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH. 4, 25 (2004) (“[The flair of romanticism is] related to the individual’s ability and talent to create intellectual goods from scratch.”).

without interference from the author.<sup>43</sup> The publisher, Samuel Simmons, required the assurance that Milton, as the author, would not “print or cause to be printed or sell dispose or publish the said Booke or Manuscript or any other Booke or Manuscript of the same tenor or subject.”<sup>44</sup> When the contract was signed in 1667,<sup>45</sup> authorship was subject to the control of the state through censorship laws governing the printing of books through licenses.<sup>46</sup> In this time, when Charles II returned to the monarchy following the English Civil War and the rule of Oliver Cromwell, the Licensing Act of 1662 regulated the works of authorship that could be printed in order to prevent the printing of “Seditious, Treasonable and Unlicensed Books and Pamphlets” and for the “Regulating of Printing and Printing Presses” as a measure for safeguarding the government.<sup>47</sup> Authorship was controlled by the authorities, and it was several years before a license to print *Paradise Lost* was granted.<sup>48</sup> *Paradise Lost* established Milton as “one of the very greatest poets of the modern world.”<sup>49</sup> To Professor Harold Bloom, Milton, “so palpable a genius that it can seem redundant to characterize his gift,”<sup>50</sup> authored a “magnificent” poem and epic in *Paradise Lost*.<sup>51</sup> Yet Milton, writing before romanticism as an intellectual movement took off in the late eighteenth and early nineteenth centuries, wrote to express his internal turmoil as a blind man who, in prison, faced the death

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<sup>43</sup> Milton’s Agreement With Mr. Symons for *Paradise Lost* (Apr. 27, 1667), in 1 THE POETICAL WORKS OF JOHN MILTON 283 (Samuel Egerton Brydges ed., John Macrone 1835); ROSE, *supra* note 10, at 27.

<sup>44</sup> ROSE, *supra* note 10, at 27.

<sup>45</sup> *Id.*

<sup>46</sup> Censorship in England was through copyright. By granting the Stationers’ Company, the trade guild comprising bookbinders, booksellers and printers, with the right to suppress the printing of prohibited books, the government maintained control of the printing presses. PATTERSON, COPYRIGHT, *supra* note 7, at 114–42.

<sup>47</sup> *Id.* at 134.

<sup>48</sup> The authorities were suspicious of John Milton, who had worked for Cromwell’s revolutionary government, and who was also excluded from general amnesty when the restoration of the monarchy occurred following the fall of Cromwell’s government. Harold Bloom, *Introduction* to JOHN MILTON, *PARADISE LOST* xxi–xxvi (Gordon Teskey, ed., W.W. Norton & Co. 2005) (1667).

<sup>49</sup> *Id.* at xxvii.

<sup>50</sup> BLOOM, GENIUS, *supra* note 6, at 50.

<sup>51</sup> *Id.* at 52.

penalty following the fall of Cromwell's government,<sup>52</sup> and produced a work of literary and poetic greatness that made a significant impact upon society and those who read it. Yet, *Paradise Lost* was a work that was not influenced by the possibility of market commercialization.

Authorship in this context therefore places the author in a unique position as the creator and producer of literary and artistic works in the center of the copyright legal system comprising authors, readers and the publisher/distributor. Before a work is put before the public, an author must conceive of a work and engage in an intricate process of creativity to produce the work. The composition of *Paradise Lost* as a creative endeavor occurred independently of the reading public, who largely regarded Milton as a criminal and one guilty of sedition,<sup>53</sup> of financial rewards from publication and distribution of the book<sup>54</sup> or of government patronage or control of the work.<sup>55</sup> Milton's authoring of *Paradise Lost* occurred within a set of circumstances so unique to his individual situation<sup>56</sup> that the form of authorship can be regarded

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<sup>52</sup> See *id.*

<sup>53</sup> John Milton was thought to be a "political controversialist, as a disestablishmentarian (someone who opposes an 'established' state-run church), as an enemy of bishops and of hiring priests (ministers paid for their work), as a proponent of divorce, as a defender of regicide, and as the chief propagandist under the dictatorship of Oliver Cromwell"—in short, as a vigorous proponent of everything, so that after 1660, he was regarded by many in England as criminal and seditious. MILTON, *supra* note 48, at xxvii.

<sup>54</sup> Authorial rights over the literary and artistic works were not formed at this point, and the market for books was controlled by booksellers and publishers rather than authors. ROSE, *supra* note 10, at 28.

<sup>55</sup> The composition of *Paradise Lost* occurred between the start of the downfall of Cromwell's reformation government around 1658 and the restoration of the English monarchy to Charles II. MILTON, *supra* note 48, at xxiii–xxv.

<sup>56</sup> *Paradise Lost* was written in part during the fall of Cromwell's government. *Id.* Nine of the men who signed Charles I's execution were themselves executed. *Id.* Sir Henry Vane the Younger, to whom Milton addressed a sonnet in 1652, was also executed. *Id.* Milton was not among those who were formally excluded from the Act of Pardon and could come out of hiding but was later arrested and imprisoned. *Id.* Milton's "feelings in this period, which reveal his resolution as an artist and a prophet, are recorded in verses from the invocation to Book Seven (lines 24–28) of *Paradise Lost.*" *Id.* at xxv; see BLOOM, GENIUS, *supra* note 6, at 51 ("In 1660, with the Stuart Restoration in progress . . . [Milton] went deep into internal exile by composing *Paradise Lost.* Contemplating when young, a Puritan triumph in England, Milton said of the hymns and hallelujahs of the saints, 'some one may perhaps be heard offering at high strains in new

as an intrinsic expression of his own artistic soul in his literary work and, to borrow Milton's own words in his speech opposing the licensing of the printing of books,<sup>57</sup> as a manifestation of his "precious life-blood . . . embalmed and treasured up on purpose to a life beyond life."<sup>58</sup> Professor Roberta Rosenthal Kwall refers to this form of authorship as a manifestation of an author's "intrinsic dimension of creativity" that is "characterized by spiritual or inspirational motivations . . . inherent in the creative task itself" and which can be the result of the author's "desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance."<sup>59</sup>

Milton wrote *Paradise Lost* within the context of his experiences in his own society during the fall of the Reformation, was influenced by other authors and writers of his time,<sup>60</sup> and published and distributed his work to the reading public in a manner that was uniquely his own.<sup>61</sup> Contextualizing authorship as the creation and production of a work that manifests an author's unique nature and personality requires a willingness to accept authors within the copyright system as autonomous individuals possessing natural rights in their work that are separate from

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and lofty measures to sing and celebrate.' What that Song of Triumph would have been like, we cannot know, but surmise holds that it would have been a Spenserian romance on the Matter of Britain, raised to the ecstasy of a redeemed nation. Instead, Cromwell dies, the Revolution of the Saints failed, and blind Milton composed *Paradise Lost*.").

<sup>57</sup> John Milton, *Areopagitica* (1664), *A Speech for the Liberty of Unlicensed Printing to the Parliament of England*, in MILTON, *supra* note 48, at 339.

<sup>58</sup> Milton considered books to contain the soul of the author. He states:

books are not absolutely dead things . . . . [They] contain a potency of life in them to be as active as the soul was whose progeny they are . . . . [T]hey do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them . . . [and] he who destroys a good book, kills reason itself, kills the image of God . . . .

*Id.* at 342.

<sup>59</sup> Kwall, *supra* note 24, at 1945.

<sup>60</sup> The character of Satan and Lucifer in Milton's *Paradise Lost*, for example, was influenced by Christopher Marlowe and William Shakespeare. BLOOM, *THE WESTERN CANON*, *supra* note 8, at 158–70.

<sup>61</sup> *Paradise Lost* was an immediate success when it was published in 1667. MILTON, *supra* note 48, at xxvi. It was mentioned in Parliament, given the highest praise by John Dryden, the English poet, dramatist and critic and sold well. *Id.* Milton's readers who were "implacably hostile to Milton on political grounds," had also acknowledged "the poem's greatness." *Id.*

economic rights to print, publish and distribute works. In this sense of authorship, authors independent of publishers and printers of their work are able to enter into and agree to be bound to a social contract that provides for the fair allocation of entitlements in literary and artistic works within a civil society.

#### A. *The Romantic Author*

In literary studies and copyright jurisprudence, the romantic author is an author, who by a sudden stroke of genius, creates a new and original piece of work independently.<sup>62</sup> He or she represents the creative genius in romanticism who has the brilliance, ability and talent to produce new works out of thin air<sup>63</sup> and embodies the romantic ideals of “originality, organic form, and the [conception] of the work of art as the expression of the unique personality of the artist”<sup>64</sup> in human form. In literary studies and copyright jurisprudence, this idea of the romantic author is not well accepted by many scholars in both fields for two primary reasons. The first reason given by scholars is that most authors build upon the works of other authors and are not always entirely original in the works that they create.<sup>65</sup> To adopt a romantic model of

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<sup>62</sup> Depoorter, *supra* note 42, at 25.

<sup>63</sup> *Id.*

<sup>64</sup> Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 295 (1992).

<sup>65</sup> See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1010–11 (1990) [hereinafter Litman, *The Public Domain*] (“An author, be she writer, composer, or sculptor, seeks to communicate her own expression of the world. Her views of the world are shaped by her experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction between the two. Her brain has not organized all of this into neat, separable piles entitled ‘things that happened to me,’ ‘things I read once,’ and ‘things I thought up in a vacuum’ to enable her to draw the elements of her works of authorship from the correct pile. She did not, after all, experience them so discretely. A snatch of a tune she heard was infected by the shape of the place where she was sitting when she heard it; her sense of a pattern she saw was colored by that day’s weather; a conversation she overheard was tainted by the book that she was reading at the time. Her memories of the song, the pattern, the conversation, filtered through her experience, may in fact seem quite unlike the objects she believes they represent. The counterpoint between a sound from one memory and a smell from another may express something quite different from what either seems to say alone. But when the author mines the raw material for her next work, significant portions of it will be the stuff of the outside world mediated by her experience. It is unsurprising, then, that parts of her work will echo the works of others.”).

authorship for the copyright system when authors are, in reality, heavily influenced by their external conditions and experiences would be a “disservice” to authors.<sup>66</sup> In producing new works, authors also collaborate with co-authors and with the general public in collaborative projects facilitated by the Internet and online technologies such as Wikipedia,<sup>67</sup> and are therefore not the solitary individual geniuses creating works in recluse and isolation that the romantic notion of authorship seems to uphold.<sup>68</sup> The second reason given by scholars against the romantic author is that relying on the idea of romantic authorship and originality to provide and expand property rights in literary and artistic works,<sup>69</sup> when applied to the regulation of information in situations far from the ambit of intellectual property,<sup>70</sup> entrenches the romantic author and the idea of individual originality into the copyright system,<sup>71</sup> devalues information sources such as genetic information,<sup>72</sup>

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<sup>66</sup> See *id.* at 1011 (“All works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else’s works.”).

<sup>67</sup> Wikipedia is a collaborative free online encyclopedia. See Wikipedia, [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page).

<sup>68</sup> Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 310 (2006).

<sup>69</sup> James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413, 1468 (1992) (“The rise of this powerful (and historically contingent) stereotype [of the genius whose style forever expresses a single unique persona] provided the necessary raw material to fashion some convincing mediation of the tension between the imagery of public and private in information production.”). The idea of the romantic author provided the conceptual, moral and philosophical justification for giving authors property rights. *Id.*

<sup>70</sup> Professor Boyle argues that the idea of originality, stemming from the notion of romantic authorship, can be seen to have influenced legal scholarship on blackmail, insider trading and case law on the protection of genetic information. *Id.* at 1470–520.

<sup>71</sup> The romantic author is a “socially constructed and historically contingent” idea that is necessary to resolve the tensions of granting property rights over information in the public sphere. *Id.* at 1525. The “figure of the romantic author, the associated theme of originality and the conceptual distinction between idea and expression” reduces these tensions. *Id.* at 1525–26.

<sup>72</sup> Professor Boyle provides the example of the rosy-periwinkle plant of Madagascar used by indigenous tribes to cure diabetes. See *id.* at 1530–31. It was used by a pharmaceutical company to manufacture a drug for chemotherapy treatment and “yielded a drug to cure Hodgkin’s disease and a trade in the drug worth \$100m a year.” *Id.* However, Madagascar, “without an income from its huge biological wealth . . . has chopped down most of its forests to feed its people.” *Id.* As the country could “find no place in a legal regime constructed around a vision of individual, transformative, original

marginalizes the protection of information that does not fit the romantic model of authorship from misappropriation<sup>73</sup> and ignores non-individualistic cultural production.<sup>74</sup> The romantic notion of authorship is therefore seen as a justification for “exclusive monopoly-type rights” that disables the ability to recognize non-authorial-type sources of information and discounts other forms of authorship and downstream uses of works, and ought to be properly accounted for in the copyright system if it is to be “criticized and reformulated.”<sup>75</sup>

The accuracy of this contextualization of the romantic author and this basis for objecting to the notion of the individual author as an independent creator in the copyright system may however be questioned, for an insistence on authorship that is independent and uninfluenced by the works of others in order for an author to be properly recognized as an individual creator is misleading. The influence of other authors and works of authorship, as well as existing works or external experiences and perceptions, upon an author does not make the author less autonomous, original or creative. The best and most talented authors are influenced in one way or the other by other authors, and it is difficult, if not impossible, for authors to write and create without any form of influence, or inspiration by, the works of others.<sup>76</sup> William

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genius, the indigenous peoples are driven to deforestation, or slash-and-burn farming.”  
*Id.*

<sup>73</sup> Professor Jaszi cites the case of *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340 (1991), as an example of this form of marginalization where the Supreme Court decided that facts are not in themselves protected by copyright. Jaszi, *supra* note 64, at 301–02. The only way copyright protection will be provided is if those facts are arranged in a way that is original and “founded in the creative powers of the mind.” *Id.*

<sup>74</sup> Professor Jaszi explains that “[c]opyright law, with its emphasis on rewarding and safeguarding ‘originality,’ has lost sight of the cultural value of what might be called ‘serial collaborations’—works resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades.” *Id.* at 304.

<sup>75</sup> Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights—Comment on Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,”* 68 CHI.-KENT L. REV. 805, 823 (1993).

<sup>76</sup> Professor Bloom speaks about the “anxiety of influence” on an author as the author reads a literary work and explains the influence authors have on each other by stating:

[w]ithout Keats’s reading of Shakespeare, Milton and Woodsworth,  
we could not have Keats’s odes and sonnets and his two Hyperions.

Shakespeare, for example, was influenced by Christopher Marlowe,<sup>77</sup> and John Milton, by both Shakespeare and Marlowe.<sup>78</sup> Yet their works have had a pronounced effect on society, and both Shakespeare and Milton are referred to as the embodiment of geniuses.<sup>79</sup> An author's genius may be measured not only by the romantic notion of originality and creativity but also by the value society places on his or her work by the benefit and enrichment it confers on its readers (for literature), listeners (for music) or viewers (for art).<sup>80</sup> This idea that "genius,"<sup>81</sup> present in the romantic author, may be measured by both originality and creativity as well as social enrichment puts the notion of the romantic author in a different copyright context that recognizes various stages of creativity, originality and social value that are, in reality, attached to a work of authorship. The recognition of varying stages of creativity and originality, as well as social value for a work, removes the author as a mere social construct, devised to justify the grant of property rights over public information, and puts the notion of original authorship at the center of the copyright system to provide the basis for granting entitlements in literary and artistic works according to the varying stages of creativity and originality, as well as the social value of a work, on natural law principles of fairness and justice.

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Without Tennyson's reading of Keats, we would have almost no Tennyson. Wallace Stevens, hostile to all suggestions that he owed anything to his reading of precursor poets, would have left us nothing of value but for Walt Whitman, whom Stevens sometimes scorned, almost never overtly imitated, yet uncannily resurrected . . . .

Bloom, *supra* note 2, at xxiii.

<sup>77</sup> *Id.* at xxi.

<sup>78</sup> Milton's Lucifer and Satan in *Paradise Lost* were influenced by the work of Christopher Marlowe and William Shakespeare respectively. See BLOOM, *THE WESTERN CANON*, *supra* note 8, at 166.

<sup>79</sup> BLOOM, *GENIUS*, *supra* note 6, at 15–30 (discussing Shakespeare), 45–57 (discussing Milton).

<sup>80</sup> Professor Bloom explains that to "confront the extraordinary in a book—be it the Bible, Plato, Shakespeare, Dante, Proust—is to benefit almost without cost. Genius, in its writing, is our best path for reaching wisdom . . . the true use of literature for life." *Id.* at 4–5. He goes on to state a person's "deepest desire is for survival, whether in the here and now, or transcendently elsewhere," and that "[t]o be augmented by the genius of others is to enhance the possibilities of survival, at least in the present and the near future." *Id.*

<sup>81</sup> *Id.*

The second critique against the romantic author, that the notion of the individual genius is used to justify the expansion of property rights,<sup>82</sup> is also a weak critique against the notion of the individual creator as the locus of authorship and creativity in the copyright system, for the expansion of property rights is an affirmation of market influence on the creation and production of literary and artistic works as opposed to the individual author or creator. The law of intellectual property cannot be explained by the notion of the romantic author, and the idea of the individual creator is indeed, in many ways, “affirmatively inimical” to the law of intellectual property.<sup>83</sup> As Professor Ben Depoorter rightly points out, there is no link showing “an increased romantic conception over time to the expanding reaction of intellectual property law.”<sup>84</sup> The expansion of property rights in intellectual property is a result of “changes in economic values that stem from the development of new technology and the opening up of new markets.”<sup>85</sup> Identifying romantic authorship as the basis for granting entitlements in literary and artistic works to authors, whose incentives to create are

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<sup>82</sup> See *supra* text accompanying note 69.

<sup>83</sup> Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882–85 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)). Professor Lemley goes on to explain that the idea of romantic authorship may be invoked to demand strong copyright for first-generation authors and for a wider interpretation of fair use for “a second-generation author who has ‘transformed’ a first-generation work” and that “[i]n practice, the rhetoric of romantic authorship seems to be largely unrelated to the legal rules that govern these cases.” *Id.* at 885.

<sup>84</sup> See Depoorter, *supra* note 42, at 26. Depoorter argues that the expansion of the intellectual property system is not a result of a “romantic conception of authorship”:

For the argument to be upheld, an historical explanation needs to link an increased romantic conception over time to the expanding reaction of intellectual property law. It is questionable whether such a continued rise in the romantic conception of authorship over time has occurred. To the contrary, the economic reality of today’s intellectual property laws, perhaps best exemplified by the rise of corporate copyright ownership and the transfer of employee inventions to employers, conflicts with ‘author- or inventor-centrism’ and romantic notions of authorship. In another view, the conception of authorship is in itself troublesome. If we concede to the deconstructionist viewpoint, authorship is suspect since texts are unstable and originality is inherently problematic.

*Id.*

<sup>85</sup> *Id.* at 28.

intrinsic and not dependent on the commercial market for literary and artistic works, is therefore unlikely to give rise to increased property rights in the present conception of the copyright system where individual rights serve collective welfare maximization and social good. The conception of copyright on utilitarian principles perceives property rights as a statutory grant to further the public interest, deemphasizes the natural rights that an author ought to have by virtue of his or her originality and creativity<sup>86</sup> and finds the notion of the romantic author to have very little relevance in granting entitlements and calibrating rights among parties in the copyright system.

However, a conception of the copyright system based on deontological ethics seeking to encourage authorship that is independent of patronage, government subsidy and the market necessitates the central presence of the romantic author in the copyright system. While the notion of the romantic author gives authors, as original creators of a work, entitlements in literary and artistic works on the basis of fairness and justice and may introduce moral and ethical restraints and limitations on the exercise of these rights as a social agreement authors enter into in a well-ordered civil society, the notion also serves to encourage the production of works of authentic authorship that manifests an author's expression of individual personality in a way that facilitates a diversity in literary and artistic works that are publicly available. Utilitarian philosophy underlying the present copyright system grants rights to authors to allow society to pursue larger goals, such as "the Progress of Science and useful Arts,"<sup>87</sup> and

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<sup>86</sup> Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 367–68 (2004) ("The utilitarian, or public benefit, rationale of copyright law (the 'public benefit rationale') suggests that copyright protection exists to encourage the creation of works and public access to those works. . . . [C]opyright law provides an incentive, in the form of a limited monopoly, for authors to create works . . . [that] is balanced against the public's need for access to the work. . . . [C]opyright is a grant or privilege created by statute, which can then be altered and limited by statute."); see also PATTERSON, COPYRIGHT, *supra* note 7, at 198. Patterson contends that the "tone" of the Copyright Act of 1790 is "completely different from that of the states' acts and the constitutional provision. The ideas of protecting the author and promoting learning have become subordinated to the ideas that copyright is a government grant and a monopoly." *Id.*

<sup>87</sup> U.S. CONST. art. I, § 8, cl. 8.

design these rights to achieve the maximum level of authorial productivity that will allow for the greatest distribution of a work within society.<sup>88</sup> The utilitarian system requires only a minimal amount of authorial creativity in the production of the work<sup>89</sup> and undermines highly original and creative contributions that the romantic author may make to society by creatively producing socially valuable and enriching pieces of literature or artistic works.

The recognition of natural rights in literary and artistic works based on an author's originality and creativity and the social value of a work liberates authors to freely create without setting limits to their creativity and originality defined by that which appeals to the widest segment of society, and encourages the creation of works that are highly original and creative and that bring value to and enrich society. Romantic authorship places authors in the center of the copyright system as the owners of initial entitlements in literary and artistic works, not merely as a social construct that is historically contingent on the development of the commercial market for literary and artistic works,<sup>90</sup> but as individuals within a

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<sup>88</sup> Netanel, *Copyright*, *supra* note 20, at 309. Professor Netanel defines this philosophy of copyright as a "neoclassicist approach," where "copyright is primarily a mechanism for market facilitation, for moving existing creative works to their highest socially valued uses." *Id.* He goes on:

Copyright can best serve this goal, neoclassicism suggests, by enabling copyright owners to realize the full profit potential for their works in the market. In maximizing their profit, neoclassicists argue, copyright owners will both rationalize the 'development' of existing creative works and sell exploitation entitlements to those who are best able to satisfy public tastes.

*Id.*

<sup>89</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250–51 (1902). According to Justice Holmes:

[A] very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the [Copyright] [A]ct. . . . It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.

*Id.*

<sup>90</sup> See Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1329 ("Literary accounts of romantic authorship . . . in the mid-to-late eighteenth century, together with the emergent private

legal system seeking “To promote the Progress of Science and the useful Arts”<sup>91</sup> by encouraging authorship that is highly original and creative and that brings value and enrichment to society. The notion of the highly original and creative romantic author, who produces works that transcend time and cultures, provides authors with a sound basis for acquiring legal entitlements to works that copyright jurisprudence has yet to accept as being based on an author’s natural rights in works of authorship. The next part of the discussion on authorship evaluates the emergence of the author in the copyright system and asserts that the construction of the author to serve the growing commercial market for literary and artistic works, rather than the acceptance of the author as an individual making original and creative contributions to society through the creation, publication and dissemination of a work, mistakenly relies on the market as the institution to encourage creative and artistic production. The market, while facilitating consensual exchanges of property rights in literary and artistic works to reward authors to some extent, discourages the creation of highly original and creative works of authorship that are enriching and of value to society.

### *B. Authorship in Copyright Jurisprudence*

Contemporary copyright scholarship on authorship presents the author as a socially constructed figure that lacks precise or definite meaning.<sup>92</sup> Martha Woodmansee calls the author a “recent invention”<sup>93</sup> that was conceived to elevate the status of writers as

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sphere of the marketplace and civil society, provided a framework to begin speaking of the ‘private property’ of authors, which was underwritten by their ‘originality’ and protected via copyright law. The possibility that an ‘original’ idea of an author might be possessable as ‘property’ entered copyright through the discourse of romantic authorship.”); Boyle, *supra* note 69, at 1462 (“Encouraged by an enormous reading public, by several apocryphal tales of writers who were household names yet still lived in poverty, and by a new, more romantic vision of authorship, writers began to demand greater economic returns from their labors. One obvious strategy was to lobby for some kind of legal right in the text—the right that we would call copyright.”).

<sup>91</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>92</sup> See Zemer, *supra* note 68, at 251. Zemer notes that contemporary scholarship on authorship convincingly argues that the “author is deconstructed into a vessel through which many influences and experiences are poured.” *Id.*

<sup>93</sup> WOODMANSEE, *supra* note 37, at 36.

craftsmen by labeling them geniuses who do something that is “utterly new, unprecedented, or . . . produces something that never existed before.”<sup>94</sup> By bearing the mark of a genius author, instead of a working craftsman, German writers during the Renaissance period in the eighteenth century could establish ownership over the products of their labor and justify the recognition of legal rights in works in the form of copyright law.<sup>95</sup> The English poet Edward Young, in his *Conjectures of Original Composition*, perceived of the revered author as one whose work “stand[s] distinguished,” and in which he has the “sole property” that alone can “confer the noble title of an author[,] that is, of one who . . . thinks and composes[,] while other invaders of the press, how voluminous and learned soever . . . only read and write.”<sup>96</sup> The idea of the author as a creative genius therefore was a way by which writers of literary works could obtain status and wealth without the aid of their patrons by selling their works to the reading public through the commercial market for books.<sup>97</sup> Mark Rose affirms this conception of the author as a social construct and refers to the author as a “cultural formation” that is “inseparable from the commodification of literature.”<sup>98</sup> Professor Rose proposes proprietorship as the identifying mark on the modern author that represents the person who is the “originator and therefore the owner of a special kind of commodity, the work.”<sup>99</sup> This special relationship between author and the work establishes a link between originality and ownership that provides the foundation for the copyright system, which had developed as a response to the printing press, the individual and romantic author, and the commercial marketplace,<sup>100</sup> and to allocate legal entitlements in

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<sup>94</sup> *Id.* at 39.

<sup>95</sup> *Id.* at 36, 39.

<sup>96</sup> *Id.* at 39.

<sup>97</sup> *See id.* at 37.

<sup>98</sup> ROSE, *supra* note 10, at 1.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 3 (“[C]opyright [is] the practice of securing marketable rights in texts that are treated as commodities [and is a] specifically modern institution, the creature of the printing press, the individualization of authorship in the later Middle Ages and early Renaissance, and the development of the advanced marketplace in the seventeenth and eighteenth centuries.”).

literary and artistic works by “drawing lines between works” and “where one text ends and another begins.”<sup>101</sup>

It is unclear if this conception of the romantic author as an individual creative genius truly obscures copyright jurisprudence on the process of authorship and blinds the law to the reality of creative and cultural production in the copyright system, as literary thinkers suggest. Northrop Frye pointed out that literary works are seldom independently created works that bear no relation to already existing works.<sup>102</sup> Literature is never isolated as an individual piece of work that is not an imitation of other works, and to Professor Frye, it would be a pretension for the copyright system to treat all art works as “an invention distinctive enough to be patented,”<sup>103</sup> for

[t]his 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.<sup>104</sup>

It is indeed difficult, if not impossible, to imagine the lone poet, sitting with a pencil and a few blank pieces of paper, producing a poem “*ex nihilo*,” or “from nothing,”<sup>105</sup> as an image representing how creative works of authorship are produced. The critique literary thinkers have against this image of the romantic author is its failure to reflect the reality that creative production is a process of using existing works, reinterpreting the work and incorporating its idea into a new work or form of expression. The primary concern with the use of this notion of romantic authorship as a basis for the grant of rights in creative works through the copyright system is that the law will make it difficult for authors to

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<sup>101</sup> *Id.*

<sup>102</sup> See NORTHROP FRYE, AN ANATOMY OF CRITICISM 97 (Princeton Univ. Press 1957).

<sup>103</sup> *Id.* at 96.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 97.

use the works of other authors in their creation of new works by creating legal barriers to accessing existing works of authorship.<sup>106</sup>

However, access barriers to other forms of copyrighted works arise from property rights, granted as an incentive to create, that allow authors to commercialize their work on the market for economic rewards, and which are not in any way related to the notion of the romantic author. Access barriers exist as a legal protection to prevent non-paying members of society from using a work by creating an artificial scarcity needed to make a work marketable as a commodity and to provide authors with economic rewards for their work within a utilitarian-based copyright system.<sup>107</sup> Property rights are therefore a utilitarian legal measure used to encourage the production of literary and artistic works for the greater good of society<sup>108</sup> by maximizing social welfare and redistributing wealth through market institutions in the system.<sup>109</sup>

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<sup>106</sup> *Id.* at 98 (“The copyright law, and the mores attached to it, make it difficult for a modern novelist to steal anything except his title from the rest of literature . . .”).

<sup>107</sup> Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright*, 18 HARV. J.L. & TECH. 85, 126 (2004) (“[D]eadweight loss[]’ . . . [is] the principal cost of enforcing scarcity in a good which is otherwise available in abundance.”); Ryan, *supra* note 31, at 545–47 (“Because an author can prevent free riders from copying and distributing an author’s work without paying copyright royalties, copyright protection creates an artificial scarcity in the means of accessing a creative work and gives the copyright owner a monopoly in the resulting market for such access.”).

<sup>108</sup> See Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 100 (1997) (“Copyright monopoly induces production of information by allowing non-payers to be excluded and information to be marketed at a monopoly price. At the same time, however, copyright law limits this monopoly to serve the ultimate purpose of maximizing access to information. The law thus regulates access to information by balancing incentives to create and accessibility of information.”); Kreiss, *supra* note 29, at 7–8 (“In copyright theory, the more works that are disseminated, the more this goal [of promoting the Progress of Science] is advanced. . . . [T]he rights given to copyright authors are a means to an end rather than an end in itself. . . . [T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)) (footnotes omitted)).

<sup>109</sup> Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 U.C. DAVIS L. REV. 855, 869 (2007) (“Property rights, as defined and enforced by legal institutions, may facilitate the definition of wealth or welfare. . . . [T]he structure of markets will also determine how wealth or welfare is both defined and allocated. For example, in a perfectly competitive market, buyers and sellers

Professor Frye's concern that new authors will not have access to expressions in existing works, which are a natural part of the literary and artistic culture and are used to inspire the creation of new works and in expressing new thoughts, is a consequence of expanding property rights in creative works from a perceived tragedy of the commons,<sup>110</sup> which posits that commonly held open resources, such as information, will be depleted through overuse and underinvestment by the public.<sup>111</sup> The resulting expansion of property rights in information is a counter-tragedy on the opposite side of the coin, known commonly to property and intellectual property scholars as the "tragedy of the anticommons,"<sup>112</sup> that, when applied to intellectual property law, reveals the susceptibility of information, which includes literary and artistic works, toward over-propertization, under-use and inaccessibility.<sup>113</sup>

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respond solely to price signals, and price adjusts to allocate resources based on buyers' willingness to pay and sellers' willingness to accept.").

<sup>110</sup> The "Tragedy of the Commons" was explored in an article written by Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). Here, the use of the word "commons" is an "open access" to a common resource that is not to be confused with a "common pool resource" that is not prone to depletion due to common resource management. Carol Rose, *Left Brain, Right Brain, and History in the New Law and Economics of Property*, 79 *OR. L. REV.* 479, 480–81 (2000).

<sup>111</sup> Mark Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 *U. CHI. L. REV.* 129, 141–43 (2004) (discussing the nature and origin of the tragedy of the commons as an argument to prevent the overuse of information and seek stronger and perpetual property rights in information).

<sup>112</sup> Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621, 624 (1988). The tragedy of the anticommons occurs when resources are underused as opposed to overuse in the tragedy of the commons. When multiple owners are given the right to exclude others from a scarce resource without giving anyone the effective privilege of use, the tragedy of the anticommons will result. Professor Heller uses empty Moscow store fronts in a state-controlled (as opposed to a market facilitated) property system as a paradigm of the anticommons. *Id.* at 622–25. For discussion of the tragedy of the commons in relation to the concept of the anticommons in property law, see Lee Anne Fennell, *Common Interest Tragedies*, 98 *NW. U. L. REV.* 907, 933–40 (2004), and also see ROSE, *supra* note 10. The tragedy of the anticommons has also been applied to the fragmentation that property rights will cause over the use of information on the Internet, which will result in greater transaction costs to clear rights and prevent the development of new information or knowledge. See Dan Hunter, *Cyberspace as Place, and the Tragedy of the Anticommons*, 91 *CAL. L. REV.* 439, 511–12 (2003).

<sup>113</sup> Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 *TEX. L. REV.* 989, 997–98 (1997). Intellectual property rights limit access to and use of old works for improvement. Professor Lemley explains that:

The propensity of property rights to create access barriers to information is the primary reason why markets may not efficiently allocate entitlements in literary and artistic works, resulting in the inaccessibility to works that conventional literary thinking mistakenly attributes to the notion of the romantic author and the requirement for “originality” and “creativity” in the production of a work.<sup>114</sup> Markets are imperfect and sometimes fail for various reasons. Sometimes, it may be too expensive for new authors to negotiate for use of a work (transaction costs for obtaining permission may be too high), it may be too difficult for authors to enforce the law against those who infringe their rights, or market deficiencies may preclude consensual exchanges between authors in the copyright system.<sup>115</sup> Relying on the market to efficiently allocate entitlements to creative works and provide economic

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[t]he creators of old works can, if they choose, refuse to distribute them to anyone at all, at any price, during the duration of intellectual property protection. . . . [T]hey can and do exercise control over who can use their creation, the purposes for which they can use it, and the price they must pay . . . [and] use these rights not only to obtain a return on their investment in research and development, but also to exercise content control over subsequent uses of their works or to prevent the development of a competitive market for their products.

*Id.*; see also Hunter, *supra* note 112, at 511 (stating that gene patents contribute to the anticommons by blocking innovative uses of gene fragments and prevent the recognition that better uses are possible).

<sup>114</sup> Anna Nimus, *Copyright, Copyleft and the Creative Anti-Commons* (2006), [http://subsol.c3.hu/subsol\\_2/contributors0/nimustext.html](http://subsol.c3.hu/subsol_2/contributors0/nimustext.html).

<sup>115</sup> Gordon, *Fair Use*, *supra* note 32, at 1613. Professor Gordon argues that the judiciary should consider use of a work to be fair use when a defendant to an infringement claim could not purchase the right to use the work through the market, allowing the use of the work would serve the public interest and there would be no substantial impairment to the copyright owner’s incentives. *Id.* at 1601. On the point of market failures, Professor Gordon states:

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 interests in dissemination and private interests in remuneration.

*Id.* at 1613.

rewards to authors fails to produce the kind of works that authentic authorship guarantees with the recognition of the romantic author as a creative individual, producing literature and art within a well-ordered copyright society.<sup>116</sup> The realization that the market cannot support authentic expressions of authorship occurred to German poet, philosopher, historian and dramatist Friedrich von Schiller, the hard way.<sup>117</sup> When breaking away from the patronage of the Duke of Württemberg to be a professional author, Schiller had referred to the public as being “everything” to him and exalted in the grandiosity of authorship that came from “appealing to no other throne than the human spirit.”<sup>118</sup>

However, the market turned out to be a difficult patron in giving rewards for original creative expressions of the human spirit, as Schiller, who became deep in financial debt, later found out as he stated that “the German public forces its writers to choose according to commercial calculations rather than the dictates of genius. I shall devote all my energies to this *Thalia*, but I won’t deny that I would have employed them in another sphere if my condition placed me beyond business considerations.”<sup>119</sup> Eventually, in accepting a pension from Prince Friedrich Christian von Schleswig-Holstein-Sonderburg-Augustenburg a decade later, Schiller stated that it is “impossible in the German world of letters to satisfy the strict demands of art and simultaneously procure the minimum support for one’s industry.”<sup>120</sup> Putting the market and the common good before the recognizing of the inherent rights of authors in their creations in classical utilitarian thinking<sup>121</sup> affirms

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<sup>116</sup> WOODMANSEE, *supra* note 37, at 41–42.

<sup>117</sup> *Id.* at 40–41.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 80. For a detailed treatment of Schiller’s experience with the reading public and the commercial market, see *id.* at 59–86.

<sup>120</sup> *Id.* at 41.

<sup>121</sup> Professor Rawls explains this idea in Lectures of the History of Moral Philosophy:

[C]lassical utilitarianism starts with a conception of the good—as pleasure, or as happiness, or as the satisfaction of desire, preferences, or interests; and it may also impose the condition that these desires, preferences, or interests be rational . . . in a teleological doctrine, a conception of the good is given prior to and independently of the right (or the moral law); thus, for example, utilitarianism defines the right as maximizing the good (say, as happiness or the satisfaction of

the market as the patron for authorship, undermines the process of authorial creativity and defeats the purpose of the copyright system to encourage the creation of literary and artistic works for the benefit of society by compelling authors to produce creative works that appeal to the preferences of the commercial market.<sup>122</sup> By conceiving the author as a social construction responding to the emerging commercial market for books, literary scholarship discards an important concept in copyright jurisprudence that may be used to fairly allocate entitlements in literary and artistic works and that is independent of market dynamics. For example, the use of Ernest Hemingway's conversational anecdotes, reminiscences, literary opinions and comments on some of his fictional characters in an independently published work of authorship by a less well-known author and friend, A. E. Hotchner, ought to be recognized as a separate work of authorship that did not affect the market for other literary creations by Hemingway when the raw materials used in creating the work were obtained with the consent and approval of Hemingway.<sup>123</sup>

Authentic authorship occurs when a fair and just distribution of entitlements can be made among all parties in the copyright system. Utilitarian-based copyright systems that emphasize the institution of the market to facilitate resource allocation offer an unstable foundation for providing fairness and justice in the distribution of legal entitlements among authors, readers and publishers/distributors. There are many contributing factors that

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rational preferences), and moral worth of character as having, say, a character that can be relied on to lead us to do what is right.

JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 222 (Barbara Herman ed., Harvard Univ. Press 2000).

<sup>122</sup> Netanel, *Copyright, supra* note 20, at 309. Professor Netanel explains that with neoclassicist (the approach to copyright that favors expansion of property rights in literary and artistic works) economics, copyright is a mechanism for copyright owners to put "existing creative works to their highest socially valued uses" and "realize the full profit potential for their works in the market." *Id.* Copyright's purpose is to determine the worth of creative works and provide a guide for resource allocation rather than ensure that authors have the incentives to create. *Id.*

<sup>123</sup> *Estate of Hemingway v. Random House*, 244 N.E.2d 250, 256 (N.Y. 1968). In this case, the New York Court of Appeals decided that Hotchner could draw freely from his conversations with Hemingway to write and publish articles about him where these materials were obtained through consent. *Id.* at 255–56.

encourage creativity and the production of literary works. The unique creative process of authorship that occurs with each individual author produces so diverse an assemblage of literary and artistic works within society that it would be unfair and unjust to assume that all forms of creative works may be valued by the commercial market's sole valuation of creative works. Our musical experience of Mozart is very different from our musical experience of Bob Dylan, and it would be difficult, if not impossible, to value these different composers and their musical compositions by way of a single metric unit<sup>124</sup>—that of social progress in “Science and useful Arts”<sup>125</sup>—in the case for copyright. The fact that creative works may have economic value on the market does not lessen the importance of the author figure and the notion of romantic authorship as notions that give rise to the recognition of natural rights that are separate and incommensurable with economic rights over works. Collective works and copyrighted works of corporate ownership are valued differently

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<sup>124</sup> Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 799–800 (1994). Professor Sunstein explores the claims that human values are plural and diverse (i.e., not reducible to some larger and more encompassing value) and human goods are not commensurable (i.e., assessable along a single metric), and emphasizes the need for legal scholars to regard the notion of incommensurability of human goods as requiring sustained interest for legal systems to function well. *Id.* at 780, 861. On the point of music valuation, Professor Sunstein asks that we:

Consider the suggestion that a single metric is available with which to align our different kinds of valuation. For example, Mozart may be valued in a different way from Bob Dylan, but there may be a metric by which to value different composers; and, along that metric, Mozart may be superior to Dylan. (I believe that any such metric would be false to our experience of music, and hence I do not think that this sort of approach will work; but I am trying here to show how the two claims might be separated.) In any case some people think that there are diverse values—pleasure from a warm sun, gratitude from unexpected kindness, and so forth—while also believing that these can all be reduced to a general concept like utility, happiness, or pleasure. Utilitarians need not deny the diversity of human goods, or that pleasures and pains come in different forms. The claim of incommensurability is that no unitary metric accounts for how we actually think and that the effort to introduce one misdescribes experience . . . [and] that the misdescription can yield both inaccurate predictions and bad recommendations for ethics and politics.

*Id.* at 799–800.

<sup>125</sup> U.S. CONST. art. I, § 8, cl. 8.

from the works of individual authors in terms of economic, social or communal, rather than personal, value,<sup>126</sup> but it would be a shortcoming of copyright jurisprudence to relegate the romantic author and its notion of authorship to mere social constructs responding to an emerging commercial market for creative works. By denying authors and the process of creative authorship their due recognition as separate and distinct non-economic notions, we may have ignored and missed an important part of copyright jurisprudence that provides the basis for just and fair allocation of legal entitlements in a civil copyright society.

### C. *Authors, Readers and Publishers/Distributors*

The importance of the central roles of authors and creative authorship in the copyright system may have been neglected as a result of early copyright law development within the book-publishing business.<sup>127</sup> The privileges granted to printers to print books represented the earliest form of copyright, which begun as a publisher's right to print copies of a work and prevent any unauthorized printing of the same work.<sup>128</sup> The right was essentially an economic right which protected the receipts of profits from publication of a work and prevented the piracy of books that would undercut profits.<sup>129</sup> Generally, the title of a work

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<sup>126</sup> Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1, 5 (2001). The doctrine on joint authorship doctrine focuses largely on economic rather than personal rights but yet, as Professor Kwall argues:

[J]oint authorship implicates the personal rights of creators on a most fundamental level because the doctrine concerns itself with who qualifies for authorship status. Authorship recognition is especially critical for the majority of nondominant authors who contribute to collaborative works because without recognition they are denied any sort of right of attribution by virtue of inadequate federal protection for their moral rights. In practice, the operation of the joint authorship doctrine privileges the voices of dominant authors over those of nondominant contributors, thereby submerging the voices of those who furnish qualitatively important, although quantitatively less significant, components of a particular work.

*Id.*

<sup>127</sup> PATTERSON, COPYRIGHT, *supra* note 7, at 43–44.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 44.

and the name of the person who was entitled to publish the book would be entered into a register book with the Stationer's Company,<sup>130</sup> the guild for bookbinders, printers and publishers.<sup>131</sup> In this early copyright system, there was no explicit mention of the rights of an author over the work by virtue of the author's creative authorship of the work, and authors, specifically excluded from membership of the Stationer's Company, had very little influence on the development of this early form of copyright as a right to print and publish books and manuscripts.<sup>132</sup>

However, an author's rights over uses of the manuscript itself appear to be implicitly recognized in the relationship and contractual dealings for the sale of the manuscript between authors and publishers.<sup>133</sup> Lyman Ray Patterson argues that these contracts between authors and publishers, which require a promise from authors not to interfere with the publication of a work,<sup>134</sup> or which allowed a retention by the author of his right to make additions, corrections and amendments to the work after it was sold,<sup>135</sup> indicate that the publishers had only a very narrow right to publish a work and that authors possessed a residual right in works that was not automatically transferred to the publisher by sale of the manuscript.<sup>136</sup> Authors therefore had a creative right in the work that publishers recognized as an author's continued interest in the work by virtue of the author's creativity, which the publisher had very little control over.<sup>137</sup>

This separation of authors' rights from the narrow right of publishers to publish manuscripts is an important separation between natural and economic rights that ought to be

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<sup>130</sup> *Id.* at 51.

<sup>131</sup> For a detailed discussion on the Stationer's Company, see *id.* at 28–41.

<sup>132</sup> *Id.* at 64–65.

<sup>133</sup> *Id.* at 65–67.

<sup>134</sup> *Id.* at 73. John Milton's contract for *Paradise Lost* included a promise that Milton, as the author, would not interfere with the publication of the work. *Id.* at 74.

<sup>135</sup> *Id.* at 74–75. In a contract between the poet James Thomson and the publisher Millar, Thomson assigned the "right and property of printing" and "all benefit of all additions, corrections, and amendments which should be afterwards made in the same copies." *Id.*

<sup>136</sup> *Id.* at 75.

<sup>137</sup> *Id.* at 75–76.

acknowledged as creating two distinct sets of rights—property entitlements and economic privileges—in copyright jurisprudence. The Statute of Anne blurred this distinction by codifying the stationer’s copyright<sup>138</sup> while emphasizing the authors as being vested with the copyright in their works to limit the monopoly that publishers had over the book trade.<sup>139</sup> This strategy employed by Parliament to break up the monopoly of publishers caused any natural rights that authors had in their work by virtue of their creative authorship to merge with the economic privilege that publishers possessed to profit from the publication and dissemination of a work.<sup>140</sup> This merger of natural entitlements

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<sup>138</sup> *Id.* at 146. Professor Patterson contends:

The most significant point about the statutory copyright is that it was almost certainly a codification of the stationer’s copyright. The similarity of the two is too great to be coincidental . . . . [T]he stationer’s copyright was probably the only copyright familiar to Parliament . . . . The method of acquiring the statutory copyright was similar to that for acquiring the stationer’s copyright—registration of the title of a work prior to publication in the register books of the Stationer’s Company . . . the protection given by the statute was the same protection given by the stationer’s copyright—protection from the piracy of printed works.

*Id.*

<sup>139</sup> *Id.* at 145. As Professor Patterson states:

The Statute of Anne is usually thought of as having vested the copyright of works in their authors; and, superficially, the language of the statute conveys the idea that the act was especially to benefit authors. It did enable authors for the first time to acquire the copyright of their works, and to this extent, it was a benefit to them. . . . Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author’s copyright was more a matter of form than of substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against monopoly.

*Id.* at 145–47.

<sup>140</sup> Augustine Birrell states:

[The Statute of Anne] gave away the whole case of the British author, for amidst all the judicial differences during the last century on

with economic privileges prevents a proper legal analysis of author's rights and the notion of creative authorship in a way that is independent of the economics of the commercial marketplace. As Professor Patterson explains, copyright

was to become a concept to embrace all the rights to be had in connection with published works, either by the author or publisher. As such, it was to prevent a recognition of the different interests of the two and thus preclude the development of a satisfactory law to protect the interests of the author as author.<sup>141</sup>

Judicial decisions appearing to deny the existence of the author's rights served to further entrench these natural property entitlements of an author within the statutory framework for copyright. Publishers started to promote the idea that authors had natural rights in their creation that were independent of the Statute of Anne to provide the basis for a perpetual copyright to publish and sell books as assignees of the author's right.<sup>142</sup> In *Millar v. Taylor*,<sup>143</sup> the publishers sought to establish a perpetual common law copyright for the author to prolong the publisher's statutory protection, which had expired under the Statute of Anne.<sup>144</sup> The case was an action brought by one publisher, Andrew Millar, against another, Robert Taylor, and did not involve authors, although the assertion of the booksellers that they derived their rights from the author's common law rights, the basis for their asserting a perpetual right to publish books,<sup>145</sup> put authors' rights in their literary and artistic creations at the center of the dispute. The Court of King's Bench ruled that authors had a copyright at

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copyright there was a steady majority of judges in favor of the view that but for the Statute of Anne an author was entitled to perpetual copyright in his published work. This right (if it ever existed) the Act destroyed.

AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 21–22 (Rothman Reprints 1971) (1899).

<sup>141</sup> PATTERSON, COPYRIGHT, *supra* note 7, at 151.

<sup>142</sup> *Id.* at 158.

<sup>143</sup> *Millar v. Taylor*, 4 Burr. 2303 (K.B. 1796).

<sup>144</sup> PATTERSON, COPYRIGHT, *supra* note 7, at 168.

<sup>145</sup> *Id.* at 168–69.

common law that the Statute of Anne did not take away, recognizing that authors had certain natural rights in the works that they create.<sup>146</sup> The House of Lords' decision in *Donaldson v. Beckett*<sup>147</sup> five years later overruled *Millar v. Taylor* and decided that the author's common law right to the sole printing, publishing, and vending of his works was replaced by the Statute of Anne.<sup>148</sup> The case of *Donaldson v. Beckett* is generally taken to represent the proposition that an author's right at common law was abolished by the Statute of Anne and that the only rights authors had over the work was a statutory one.<sup>149</sup> Professor Patterson argues that the court treated the author's perpetual common law right as supplanted by the Statute of Anne to address the monopoly of publishers over the book trade.<sup>150</sup> By acknowledging that an

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<sup>146</sup> Lord Mansfield based his decision on the justice of recognizing an author's right:

It is just that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect. . . . But the same reasons hold, after the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print, and in a cheaper volume.

*Millar*, 4 Burr. 2303, 2398. Justice Yates dissented in this decision. Justice Yates said this of the common-law property right in literary works claimed by the booksellers:

[B]ut the property claimed here is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence damage or affect them. Yet, these are the phantoms which the author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.

*Millar*, 4 Burr. 2303, 2362 (Yates, J., dissenting).

<sup>147</sup> *Donaldson v. Beckett*, 4 Burr. 2408 (H.L. 1774).

<sup>148</sup> PATTERSON, COPYRIGHT, *supra* note 7, at 174.

<sup>149</sup> *Id.* at 173.

<sup>150</sup> *Id.* at 174–75.

author had a right at common law and deciding that the right was replaced by a statutory right limited in duration, the court effectively prevented publishers from claiming that they were assignees of a perpetual common law authorial right that would allow their continuous monopoly over the publication of books.<sup>151</sup> Aimed directly at destroying the publishers' monopoly by discarding the author's common law copyright,<sup>152</sup> the decision of *Donaldson v. Beckett* had the effect of merging the author's natural rights in the creation of a work with that of the limited right to print provided under the Statute of Anne, leading to a fallacious understanding that the author had no other rights over the work other than the limited rights provided by the Statute of Anne to profit from the publication and sale of the work.<sup>153</sup>

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<sup>151</sup> For a treatment of the legal questions before the House of Lords, see *id.* at 175–79.

<sup>152</sup> Lord Camden, in giving his decision, stated that unless the publisher's monopoly was limited “[a]ll our learning will be looked up in the hands of the Tonsons and Lintons of the age, who will set what price upon which their avarice chuses to demand, till the public becomes as much their slaves, as their own hackney compilers are.” *Id.* at 178. Lord Chief Justice De Grey also noted that the publisher's use of the author's common law right was a way to prolong their monopoly. His Lordship stated:

The truth is, the idea of a common-law right in perpetuity was not taken up until after that failure (of the booksellers) in procuring a new statute for the enlargement of the term. If (say the parties concerned) the legislature will not do it for us, we will do it without their assistance; and then we begin to hear of this new doctrine, the common-law right, which, upon the whole, I am of opinion, cannot be supported upon any rules or principles of the common law of this kingdom.

*Id.*

<sup>153</sup> Professor Patterson explains:

If the author no longer had the common-law right to publish, and was denied common-law remedies, the conclusion that he had no rights except those provided by the statute is almost self evident. The fallacy in this conclusion, of course, is that the court and the Statute of Anne did not purport to deal with anything more than the copyright in its most limited form. But the fallacy was obscured by the conclusion that except when the author complied with the terms of the statute, publication resulted in a gift of the work to the public. As long as the relationship was between the author and publisher—that is, a two dimensional affair—it was fairly easy to say that the author retained certain rights upon selling the copy. The making of a gift of the work to the public, however, resulted in the inference of an abdication of all rights.

*Id.* at 176.

Sixty years later, in *Wheaton v. Peters*,<sup>154</sup> the United States Supreme Court faced the identical question that was before the courts in *Millar v. Taylor* and *Donaldson v. Beckett* on whether the author possessed a common law right in the work that was independent of the statutory rights under the Copyright Act of 1790.<sup>155</sup> The Copyright Act of 1790, the first copyright statute passed in accordance with Congress's constitutional powers, was an act for the encouragement of learning<sup>156</sup> by granting printing, reprinting, publishing or vending rights over maps, charts and books to authors and proprietors.<sup>157</sup> Like the Statute of Anne, the proprietor of a work is treated as being on the same footing as the author, and the rights provided for, which were wholly statutory and not based on any natural rights that the author had over the work, were regarded to be all the rights that the author would have in his or her work after its publication.<sup>158</sup> *Wheaton v. Peters* affirmed this view when Justice M'Lean, writing for the majority, asserted that an author's literary property can only be claimed by statute:

[A]n author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual

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<sup>154</sup> *Wheaton v. Peters*, 33 U.S. 591 (1834).

<sup>155</sup> *See id.* at 608.

<sup>156</sup> Only the title of the Act mentions learning. The protection of the author and the promotion of learning were secondary to the ideas that copyright is a government grant and a monopoly. PATTERSON, COPYRIGHT, *supra* note 7, at 198.

<sup>157</sup> *See* Copyright Act of 1790, 1 Stat. 124 (May 31, 1790) (repealed 1909).

<sup>158</sup> The Act was generally restrictive in nature. Provisions in the Act provided for restrictive limitations, limited the benefits to citizens and residents of the United States, required actions to be brought within a one-year limitation and legalized the piracy of foreign works. PATTERSON, COPYRIGHT, *supra* note 7, at 200. According to Professor Patterson:

[I]t is difficult to come to any conclusion except that the copyright provided for was wholly statutory, without any reliance upon natural rights of the author. The conclusion that inevitably follows is that the copyright under the federal act did not . . . merely affirm and protect rights of the author; it created them.

*Id.*

and exclusive property in the future publication of the work, after the author shall have published it to the world.<sup>159</sup>

Justice M'Lean goes on to state further that "[t]he argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscripts, or in the sale of his works, when first published."<sup>160</sup> To Justice M'Lean, Congress, in passing the 1790 Act, "did not legislate in reference to existing rights"<sup>161</sup> and that "Congress . . . instead of sanctioning an existing right, as contended for, created it."<sup>162</sup>

The decision of *Wheaton v. Peters*—that copyright was statutorily created and had not originated at common law—set the trajectory for the development of copyright jurisprudence that is today based entirely on positive, as opposed to, natural law.<sup>163</sup> Professor Patterson and Stanley Lindberg argue that the decision was too simplistic a solution to a complex problem in which the publishers sought monopoly over the publication of books based on the fallacy that the ownership of the copyright is the same as the ownership of the work.<sup>164</sup> Without resolving the question of how an author's interest in the work can be protected without giving

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<sup>159</sup> *Wheaton*, 33 U.S. at 657.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 661.

<sup>162</sup> *Id.*

<sup>163</sup> Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317, 324–25 (2000). Professor Hamilton notes that the Court in *Wheaton v. Peters* precluded natural law considerations in copyright law in its refusal to consider the application of English copyright law in the United States, basing its decision on a theory or philosophy that would trump statutory law (John Locke's theory of property was widely available and discussed at the time of the decision) or give the Courts greater judicial power to interpret the Constitution's copyright clause. *Id.* Professor Hamilton states that "[b]y explicitly and firmly placing copyright law in the hands of Congress, the Court's reading of the Copyright Clause in *Wheaton v. Peters* distanced federal copyright law from any necessary connection to natural law. . . . [T]hat copyright law is, first and foremost, statutory law." *Id.*

<sup>164</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 64 (Univ. of Ga. Press 1991) [hereinafter PATTERSON & LINDBERG, *THE NATURE OF COPYRIGHT*].

publishers their desired market monopoly,<sup>165</sup> the decision in *Wheaton v. Peters* set the tone for future copyright thinking by indicating that the natural rights of authors in their creative works are the same economic statutory rights that copyright proprietors possess to publish and distribute works in the form of a narrow “copyright” or right to copy.<sup>166</sup>

However, the distinction between the natural rights of the individual author and the economic statutory rights of the publisher, or copyright proprietor, is an important distinction that ought not to be ignored in copyright jurisprudence because both authors and publishers serve entirely different purposes within the copyright system and are encouraged by entirely different values in making literary and artistic works available to the public. The early separation of authors from their publishers and the book-printing business in England prior to the Statute of Anne<sup>167</sup> and the wholesale manner in which rights to print and vend a particular manuscript was transferred to the publisher<sup>168</sup> indicated separate

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<sup>165</sup> Patterson and Lindberg contend:

[T]he *Wheaton* case suffered from the defect of its virtue, for its holding was a simplistic solution to a complex problem: How to protect the author’s interest in his or her work without at the same time providing the bookseller an unregulated monopoly. This monopoly, of course, is based on the fallacy that ownership of the work is ownership of the copyright and vice versa, which can be traced to the *Millar* and *Donaldson* cases.

*Id.*

<sup>166</sup> Professor Alfred Yen argues:

Like *Donaldson*, *Wheaton* can be read as requiring the elimination of copyright’s natural law dimensions in favor of increasing emphasis on copyright’s economic theory. First, *Wheaton* explicitly disavowed the existence of common law copyright, which was based in the natural law. Second, *Wheaton*’s rejection of common law copyright meant that the federal copyright statute became the only source of copyright protection for a published work. Since the federal statute arose under constitutional authority to promote the useful arts, it seemed natural for courts to adopt this purpose as copyright’s guiding principle.

Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 530 (1990).

<sup>167</sup> See PATTERSON & LINDBERG, THE NATURE OF COPYRIGHT, *supra* note 164, at 112.

<sup>168</sup> See *id.* at 113–14.

and distinct interests in a work that persists even today.<sup>169</sup> The author-publisher relationship, one that exists between the creator of a literary and artistic work and the entrepreneur, is a necessary relationship to bring a completed work to the public.<sup>170</sup> While an author invests creative resources, individual expression and personal authorship in creating and producing a work, it is the publisher who invests financially to print or publish a work and distributes it to the public.<sup>171</sup>

Professor Patterson's historical documentation on the legal development of copyright as a narrow right of the publishers to print, publish and profit from the work, pertaining only to an economic interest in the work provided for by statute, provides an important perspective on the nature of an author's right.<sup>172</sup> Originating in individual creativity and authorship and separate from a narrow right to print and publish that may be assigned to a publisher, the author's natural rights to the work are outside the ambit of the statutory copyright,<sup>173</sup> rights which ought to be understood as an affirmation of the author's economic interest but

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<sup>169</sup> See William Cornish, *The Authors as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 (2002) (“[T]he entrepreneurs have secured copyright in the name of the author but use their contractual deals to reap most of the advantages from the exclusive right. So it was in the beginning, with the clique of London booksellers who secured the Statute of Anne in 1710, and so no doubt it ever shall be.”).

<sup>170</sup> Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 426 (2003) (“[T]he relationship between authors and their publishers . . . largely determines who creates what types of copyrighted works and whether those works' distribution promotes the public welfare.”).

<sup>171</sup> Professor Cornish calls the author the “literary or artistic creator” and refers to the publisher or producer as the “entrepreneur who contracts to bring the work to the public in one or other form.” Cornish, *supra* note 169, at 2.

<sup>172</sup> See PATTERSON, COPYRIGHT, *supra* note 7, at 77.

<sup>173</sup> Professor Patterson argues:

The evidence available to us clearly indicates that the stationers recognized the author's property rights. They recognized also other rights of the author, rights which can be called creative rights, although the term undoubtedly did not occur to them. That such rights may not have been fully developed need hardly concern us, for their existence at all shows that the stationers were aware of the continuing interest of the author in his works by reason of the fact that he created them. And it is this point which confirms the other evidence as to the limited scope of the stationer's copyright.

*Id.*

not the entire set of rights in a work. In light of the historical development of copyright, the much wider natural rights that authors have, besides the limited economic rights provided to them and proprietors of their work under copyright statutes, provide the basis for which property entitlements may be recognized. Without undermining society's right to access creative works, the rights of authors may be separated from the rights of publishers/distributors. The rights authors have as property entitlements arise from their individual creativity and authorship; economic privileges statutorily created to ensure publication and dissemination of creative works to the public, on the other hand, are granted to publishers and distributors of creative works to provide investment incentives to publishing and distributing the work to society as a matter of public policy. These rights work to encourage the creation, publication and distribution of creative works to the public. By recognizing three parties to the copyright system—authors, readers and publishers/distributors—the copyright system may allocate entitlements in literary and artistic works among them in a manner that is fair and just in accordance with a social agreement to a civil copyright society. A fair and just allocation of entitlements will not be possible unless: the author is recognized as being a separate individual possessing property entitlements in his or her creations within the copyright system; readers are acknowledged as being entitled to literary and artistic works that contribute to knowledge and the pursuit of excellence and access to a pool of creative resources for learning and education; and publishers/distributors are entitled to recover their financial investments in publishing and distributing works to the public. It is only when these different rights are properly recognized through the copyright system that authentic authorship can occur in a manner that ultimately benefits society.

## II. NATURAL LAW, NATURAL RIGHTS AND COPYRIGHT

Understanding authors' rights as being the same as the economic rights of publishers, granted by way of statutory provisions, may be the primary reason for a failure to see authors as individuals possessing rights because of their creative

authorship, rights not granted by way of statute in accordance with constitutional goals and congressional policies to “promote the Progress of Science and the useful Arts”<sup>174</sup> in society. As a result of this understanding, copyright and literary scholars argue that the notion of authorship has become a cultural, political, economic and social construction that persisted in copyright jurisprudence because of the way judges and scholars came to view creative authorship as an “uncritically accepted notion” that is “grounded on an uncritical belief in the existence of a distinct and privileged category of activity, that generates products of special social value, entitling the practitioners (the ‘authors’) to unique reward.”<sup>175</sup>

The aim of this Article is to suggest otherwise—that a critical examination of the historical trajectory of copyright law and the notion of the romantic author and creative authorship reveals a separate and distinct role that authors have in the copyright system, a role which necessitates the recognition of their individual rights as existing independently against the utilitarian goals and aims of the copyright system. Property rights in literary and artistic works ought to only be owned by authors by virtue of their creative authorship, with rights over the use of these works allocated within the copyright system in accordance with contractarian notions of justice and fairness. As “the Progress of Science and the useful Arts”<sup>176</sup> is dependent on the works that authors produce and create for society, authors are therefore under a moral or ethical obligation to society to produce and create for the common good of society. The allocation of rights over literary and artistic works must therefore be premised on theories of natural law and natural rights that recognize both property rights that authors have over the works by virtue of their creative authorship and the rights society possesses to use those works for development and growth.<sup>177</sup> Part

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<sup>174</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>175</sup> Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991 DUKE L.J. 455, 459–66 (1991).

<sup>176</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>177</sup> Wendy Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) [hereinafter Gordon, *A Property Right*]. Professor Gordon argues that a natural rights theory can protect both the interests of authors and the public:

II of this Article builds on the discussion of Part I, which establishes the centrality of authors and creative authorship in the copyright system, by setting the foundations for authorial property rights in natural rights theory, and proceeds to discuss how moral rights support these natural rights of authors and the process of creative authorship within a copyright system. Part II of this Article also considers the natural rights of society to the pursuit of knowledge and excellence that is made possible through literary and artistic works as well as society's right to access these works for progress and development, and the manner in which these public interests ought to be balanced against the rights of authors.

A. *Property Rights in Literary and Artistic Works*

The most commonly cited natural law theory supporting property rights in intellectual property is John Locke's perspective that one who mixes individual labor with what nature has provided acquires property in what is produced.<sup>178</sup> Locke's reasoning that men may, by natural reason, make use of all things that are common to all men to improve the conditions of life through the "Labour of his body" and "Work of his hands" and obtain property in that which he has mixed his labor with<sup>179</sup> provides a unique theory of property that supports the grant of strong intellectual property rights to creators and authors as those who use creative materials common to all creators and authors to produce something new.<sup>180</sup> Conceiving property rights in literary and artistic works

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

*Id.*

<sup>178</sup> Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179, 1179–81 (2003).

<sup>179</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. II, § 27 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

<sup>180</sup> Gordon, *A Property Right*, *supra* note 177, at 1540 ("Locke's labor theory of property and allied approaches have been used so frequently as a justification for creators' ownership rights that Locke's Two Treatises have been erroneously credited

via Locke's natural law philosophy offers a compelling alternative to copyright analysis that focuses on an individual author's creative efforts, and values authorship as an activity that is, in deontological terminology, a good in itself.<sup>181</sup> A natural law analysis of the copyright system that is independent of the economics of the commercial market removes from copyright jurisprudence the difficulties associated with setting the balance between private rights and social goals that is necessary in a copyright system founded on utilitarian principles.<sup>182</sup>

Reliance on Locke's theory of property raises two fundamental points about the centrality of authors and the notion of creative authorship to the copyright system as an institution to encourage authorship. First, Locke's idea that authors may acquire property rights in things common to nature with which they merge individual labor supports a notion of authorship that reflects the reality of authorial creativity as a socially interdependent activity that draws inspiration from ideas and works that surround an author.<sup>183</sup> An author may use the works of and be inspired by the creative expressions of other authors and creators and still satisfy the requirements of originality and creativity in his own work of

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with having developed an explicit defense of intellectual property." (footnotes omitted)).

<sup>181</sup> See Yen, *supra* note 166, at 517.

<sup>182</sup> *Id.* at 539. Professor Yen notes the inherent difficulties of economic analysis of the copyright system:

The normative use of economics in copyright suffers from, among other things, the problems inherent in defining and measuring society's welfare. To be sure, certain components may be known in a general fashion, but constructing a scale which successfully measures the existence and value of each of these components is impossible. Indeed, the very construction of such a scale would certainly involve the identification and evaluation of rights implicit in natural law reasoning. This realization alone weakens the basis for grounding copyright theory in economics alone.

*Id.*

<sup>183</sup> See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 300 (1988) ("A society that believes ideas come to people as manna from heaven must look somewhere other than Locke to justify the establishment of intellectual property. The labor theory of property does not work if one subscribes to a pure 'eureka' theory of ideas.").

authorship to acquire property rights in the work created.<sup>184</sup> As authors depend on works of other authors to produce their own original and creative works of authorship, they bear a moral and ethical obligation to other authors to ensure the same freedom and rights to access their own works to encourage creative authorship in other authors and creators. Second, Locke's theory of property incorporates moral and ethical limitations into the natural rights of man to acquire property rights over that in nature which he has improved upon, and authorial property rights over literary and artistic works, by virtue of these limitations, are therefore not absolute but rather subjected to natural law restraints. These moral and ethical limitations in Locke's theory are twofold. The first limitation is that man's acquisition of property by labor must leave "enough, and as good left," in the common for others to use, for Locke reasons that someone who "leaves as much as another can make use of, does as good as take[s] nothing at all."<sup>185</sup> This limitation provides a natural limitation to the acquisition of rights that is determined by whether enough is left in the common for others to use and improve upon. If society's ability to use things in the common is significantly reduced by the grant of property rights, natural law will prohibit the recognition of the right,<sup>186</sup> and when applied to authorial rights, this proviso in Locke's theory introduces a moral and ethical limitation that sets the extent to which property rights over literary and artistic works may reach. The second natural law limitation in Locke's theory on the exercise of property rights is the waste prohibition that forbids waste of

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<sup>184</sup> Yen, *supra* note 166, at 554 ("[A]uthors do not truly labor alone. Although it is certainly true that authors are extremely gifted and industrious, the popular vision of authors as people who create new things from nothing is simply false. No author has lived an entire life on a proverbial desert island. Instead, authors live and work as members of an artistic community and a broader society whose creations, values and experiences form an integral part of the author's creative vision. Authorship is therefore not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion and transformation of input gained from the author's experience within a broader society.").

<sup>185</sup> LOCKE, *supra* note 179, bk. II, § 33.

<sup>186</sup> Gordon, *A Property Right*, *supra* note 177, at 1563–64 ("[C]reators should have property in their original works, only provided that such grant of property does no harm to other persons' equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage. All persons are equal and have an equal right to the common.").

things in the common. While Locke believed that God gave the world to all men in common for their benefit and to support life,<sup>187</sup> he also believed that men have a moral responsibility to society to use things in the common in a way that would enrich their lives and not cause prejudice to others,<sup>188</sup> for to waste things in the common would deprive others of their equal share to things in the common.<sup>189</sup> As the wasted property may be the “Possession of any other,”<sup>190</sup> authors have a moral and ethical obligation to use works of their creation in a way that would generate benefit or value, or stand to lose property rights in their work.<sup>191</sup> An author who creates a work and attaches no value to it loses property rights in the work by virtue of Locke’s waste prohibition.<sup>192</sup> In the copyright system, this limitation on property rights is particularly important in the law’s approach to the treatment of orphan works—literary and artistic works whose owners cannot be identified or located after a reasonable search—as society will be entitled to use these works without fear of infringing the property rights of the copyright owner.<sup>193</sup>

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<sup>187</sup> See LOCKE, *supra* note 179, bk. II, § 32.

<sup>188</sup> See *id.* §§ 33–34.

<sup>189</sup> *Id.* §§ 37–38. Locke states that if products of nature perished in the possession of one man without use, it would be an offense against “the common law of Nature” and he would be “liable to be punished”:

[For] he invaded his neighbour’s share, for he had *no Right farther than his Use* called for any of them, and they might serve to afford him Conveniences of Life. . . . [I]f either the Grass of his Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering and laying up, this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.

*Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Damstedt, *supra* note 178, at 1195 (“[A]n individual who polices the waste prohibition can be said to have done as good as take nothing at all from the owner.”).

<sup>192</sup> *Id.* at 1195–96.

<sup>193</sup> For treatment of orphan works in the copyright system, see, for example, Mark H. Greenberg, *Reason or Madness: A Defense of Copyright Growing Pains*, 7 J. MARSHALL REV. INTELL. PROP. L. 1 (2007) (considering the issues pertaining to orphan works and offering an analysis and critique of the pending Orphan Works Act 2006); Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 202 (2007) (applying a compensatory remedy approach to orphan works); Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 12 J. TECH. L. & POL’Y 395 (2007) (proposing solutions to the

A deontological theory of copyright law will also include, besides the labor theory of property, a personality-based philosophy that justifies an author's entitlement to property rights in his or her creation because the work manifests the author's personality or self.<sup>194</sup> Steeped in continental thinking on the author's moral rights over literary and artistic creations, the personality philosophy is best known through the work of Georg Wilhelm Friedrich Hegel, who believed that a person's personality was "that which struggles to lift itself above this restriction [of being only subjective] and to give itself reality, or in other words to claim that external world as its own."<sup>195</sup> In light of this philosophy of property as a person's entitlement to control resources in his or her external environment, an entitlement closely linked to his or her personality, Margaret Radin argues that a hierarchy of entitlements and a spectrum of rights of different strengths will emerge depending on how closely connected an entitlement is to a person's personality.<sup>196</sup> If literary and artistic works are, as John Milton says, the "precious life blood" of an author that is "embalmed and treasured up on purpose to a life

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orphan works problem); David Sherman, *Cost and Resource Allocation Under the Orphan Works Act of 2006: Would the Act Reduce Transaction Costs, Allocate Orphan Works Efficiently, and Serve the Goals of Copyright Law?*, 12 VA. J.L. & TECH. 4 (2007) (highlighting how the goals of the copyright system are undermined by the presence of orphan works and describing the economic and cultural costs associated with these works); Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789 (favoring legislation reform to address orphan works).

<sup>194</sup> Hughes, *supra* note 183, at 330.

<sup>195</sup> *Id.* (quoting G. HEGEL, PHILOSOPHY OF RIGHT 39 (T.M. Knox trans., 1967) (1821)).

<sup>196</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986 (1982).

Professor Radin envisions rights form a continuum from fungible to personal depending on the relationship of a particular right to personhood:

A general justification of property entitlements in terms of their relationship to personhood could hold that the rights that come within the general justification form a continuum from fungible to personal. It then might hold that those rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.

*Id.*

beyond life,”<sup>197</sup> it necessarily follows that authors ought to have strong property rights in their creations if they represent an author’s most intimate being. Creators of literary and artistic works, because of this close relationship between person and work, ought not be separated. This inseparability of person and work forms the basis for moral rights protection in works.<sup>198</sup> Moral rights, in a copyright system based on moral and ethical philosophy, are necessary to support creative authorship and encourage authors to create literary and artistic works by assuring authors that the integrity of their works and personality will be protected by the law.<sup>199</sup>

### B. Moral Rights

The present function of the copyright system, aimed to protect the economic interests of copyright owners by facilitating market transactions for creative works, serves to discourage authors from creative authorship where the law fails to adequately acknowledge an author’s non-economic interests or moral rights in a work. The attribution society makes to an author for a work created, or the respect society shows an author by not mutilating or using the work in derogatory ways, may mean more to an author than the financial rewards that commercialization of the work may reap.<sup>200</sup> Encouraging creative authorship in society through the copyright system necessitates the acknowledgement of moral rights of authors in their creation for two reasons. The first reason to acknowledge the moral rights of authors is that authors, more often than not, write and create for personal non-economic gains, and an

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<sup>197</sup> Milton, *supra* note 57, at 342.

<sup>198</sup> See Linda Lacey, *Of Bread and Roses and Copyright*, 1989 DUKE L.J. 1532, 1542 (1989) (“The personhood theory of intellectual property thus supports not only the idea of copyright in artistic products, but also the idea of moral rights.”).

<sup>199</sup> See *id.* at 1548–49.

<sup>200</sup> Roberta Rosenthal Kwall, *Copyright and The Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2–3 (1985) (“Because copyright law protects works that are the product of the creator’s mind, heart, and soul, a degree of protection in addition to that which guarantees financial returns is warranted. The 1976 Act does not purport to protect the creator, but rather the copyright owner. Nevertheless, a creator, regardless of whether he holds the copyright in his work, has a personal interest in preserving the artistic integrity of his work and compelling recognition for his authorship.”).

acknowledgement of moral rights recognizes an author's individual expression of personality in the creative process of authorship that is separate from the economic right in a work.<sup>201</sup> By protecting an author's personal expression in a work and regarding literary and artistic works as an inalienable extension of an author's personality that entitles an author to restrict uses of the work by blocking publication of the work—determining the manner in which authorship is attributed and preventing material changes and uses of the work in ways that contradict the author's artistic vision, even after the exclusive right to market the work has been granted to another<sup>202</sup>—moral rights jurisdictions in the continental tradition assure authors of the protection of their personal dignity and individual personality that is expressed in their creations.<sup>203</sup> By protecting the moral rights of authors, copyright law ensures that an author's personal integrity remains intact after the creation is made available to the public and this, as a result, encourages the kind of authentic authorship that contributes to the pursuit of excellence within society.

The second reason that necessitates the protection of the moral rights of authors affirms a natural right of individuals within society to pursue knowledge and excellence as a human good. By recognizing moral rights of authors, society is ensured of works of authentic authorship that are of significant value to authors and

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<sup>201</sup> Edward Damich, *The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 27–28 (1988). In explaining the theoretical basis for the French *droit moral*, Professor Damich cites Joseph Kohler's dualist theory of author's rights that a work is the expression of the author's personality with a property aspect to it that signifies the work's economic value:

According to Kohler the author creates a work of art and thus projects his personality into it. The work also has an economic value which can be commercially exploited and is treated like property. The work, however, still remains the projection of the author's personality, which, as the primary value, must take precedence over the economic aspect.

*Id.*

<sup>202</sup> Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994).

<sup>203</sup> Kwall, *supra* note 126, at 23 (“The various components of the moral rights doctrine reflect the unmistakable reality that this doctrine is concerned with protecting the author's personal dignity and the human spirit reflected in her artistic creations.”).

their readers, as authors who are assured of the protection of their personal artistic integrity are more likely to invest their individual personality and creativity in producing literary and artistic works that resonate with the human soul. The inspiration, solace and wisdom that readers of all generations find in great works of authentic authorship stem from the creativity of authors and writers who had the courage to pursue the inner promptings of their individual personality and as a result, make a marked contribution to society. There is a natural inclination for the human mind to always return to its need for “beauty, truth and insight,” as Harold Bloom reminds us,<sup>204</sup> and the acknowledgement of an author’s moral rights in works assures society of creations that embody the beauty, truth and insight that represents the author’s authentic self.

### *C. Rights to Pursue Knowledge and Excellence*

Natural rights of individuals within society, predicated on a theory of natural law, exist to equip every human person with the right to make decisions to fulfill their highest potential.<sup>205</sup> Natural law philosophers adhere to the belief that there are basic human goods that are common to all men,<sup>206</sup> which if pursued within a legal system, allow men to achieve their highest moral potential<sup>207</sup> and maintain a cohesive social order within society.<sup>208</sup> By

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<sup>204</sup> HAROLD BLOOM, *WHERE SHALL WISDOM BE FOUND?* 1 (Riverhead Books 2004).

<sup>205</sup> JACQUES MARITAIN, *NATURAL LAW: REFLECTIONS ON THEORY & PRACTICE* 77 (St. Augustine Press 2001) (“Every human person has the right to make its own decisions with regard to its personal destiny, whether it be a question of choosing one’s work, of marrying the man or woman of one’s choice or of pursuing a religious vocation.”).

<sup>206</sup> *Id.* at 77–78. These rights include fundamental human rights such as “the right to existence and life; the right to personal freedom,” the right “to conduct one’s own life as master of oneself and of one’s acts,” the right to pursue “a moral and rational human life,” the right to pursue the eternal good, “the right to keep one’s body whole,” the right to property, the right to marry and raise a family and the right to free association. *Id.*

<sup>207</sup> ROBERT GEORGE, *MAKING MEN MORAL* 1 (Oxford Univ. Press 1993) (explaining that traditional natural law thinking on morality, politics and law maintains that law has a legitimate role to help people make themselves moral by preventing self corruption of men who act upon a choice to indulge in immoral activities, preventing the emulation of this behavior by others, preserving the “moral ecology in which people make their morally self-constituting choices” and educating people about what is morally wrong and right).

<sup>208</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 217 (Oxford Univ. Press 1980) (“[P]ublic order . . . concerns the maintenance . . . of the physical environment and

encouraging authentic authorship through copyright laws, a greater amount of creative works manifesting the genuine expressions of an author's artistic personality will be produced, presenting individuals in society with a plethora of literary and artistic choices as to what to read and pursue. These choices individuals within society have as a result of a copyright system that encourages authentic authorship protect and validate the natural right of individuals to pursue knowledge and excellence as basic human goods that are inherently good in themselves. Whether individuals within society make this choice to pursue knowledge and excellence<sup>209</sup> is a question that the law may not be equipped to deal with, for the imposition of moral choices upon individuals in society may cause deleterious results.<sup>210</sup> However, by presenting these choices, the law adopts a moral standpoint that affirms the natural right of individuals within society to pursue knowledge and excellence as a chosen activity.<sup>211</sup>

Incorporating natural rights of individuals to the pursuit of knowledge and excellence into the copyright system introduces a moral and ethical dimension to the law that sets certain boundaries around how an author's property and moral rights in literary and artistic works may arise. An author's use of materials in the

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structure of expectations and reliances essential to the well being of all members of a community, especially the weak. Inciting hatred amongst sections of the community is not merely an injury to the rights of those hated; it threatens everyone in the community with a future of violence and of other violations of right, and this threat is itself an injury to the common good and is reasonably referred to as a violation of public order.”).

<sup>209</sup> *Id.* at 65. Professor Finnis argues that not everyone recognizes the value of knowledge, or that there are no “pre-conditions” for the recognition of that value. He explains that “[t]he principle that truth (and knowledge) is worth pursuing is not somehow innate, inscribed in the mind at birth.” *Id.*

<sup>210</sup> The question of whether copyright law may impose upon individuals the duty to pursue a morally worthy activity and whether people have a “right to do wrong” is a controversial question that natural law theorists grapple with. For the ongoing debate on this issue, see generally GEORGE, *supra* note 207, at 110–28.

<sup>211</sup> By encouraging works of authentic authorship, the law presents individuals with a choice to pursue an activity that contributes towards the development of their best individual moral potential. As Harold Bloom reminds us, “[i]t matters, if individuals are to retain any capacity to form their own judgments and opinions, that they continue to read for themselves. How they read, well or badly, and what they read cannot depend wholly upon themselves, but why they read must be for their own interest.” HAROLD BLOOM, *HOW TO READ AND WHY* 21 (Simon & Schuster 2000).

common to create literary and artistic works ought to be such that it corresponds with society's right to pursue knowledge and excellence through his or her work. Besides the "enough, and as good left" and "prohibition against waste" conditions setting limitations to an author's rights in Locke's theory of property,<sup>212</sup> recognizing society's right to the pursuit of knowledge and excellence through an author's work also creates a corresponding moral and ethical obligation upon authors to produce works that would contribute to that purpose. These natural rights of individuals in society ought to also create a moral and ethical obligation on authors to create works that are an authentic expression and reflection of their personality and artistic soul for moral rights to be acknowledged and protected.

#### *D. Rights to Access Literary and Artistic Works*

Copyright scholarship on society's rights to access literary and artistic works for the creation of new works, education, research, cultural growth and development, and artistic and literary inspiration is both rich and abundant.<sup>213</sup> The present copyright system, requiring the maximization of the aggregate amount of collective social welfare as a normative utilitarian aim,<sup>214</sup> seeks to assure society of access to literary and artistic works through the efficient allocation of entitlements in the commercial market.<sup>215</sup> However, the incommensurability of values attached to creative authorship,<sup>216</sup> difficulties with calibrating the right amount of entitlements between authors, readers and publishers/distributors,<sup>217</sup> and the market failures that usually

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<sup>212</sup> LOCKE, *supra* note 179, bk. II, §§ 33, 38.

<sup>213</sup> See generally LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURES AND CONTROL CREATIVITY (Penguin Press 2004) [Hereinafter LESSIG, FREE CULTURE]; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Random House 2001) [Hereinafter LESSIG, THE FUTURE OF IDEAS]; Kreiss, *supra* note 29; Lemley, *Property*, *supra* note 29; Litman, *The Public Domain*, *supra* note 65; Netanel, *Copyright*, *supra* note 20.

<sup>214</sup> Ghosh, *supra* note 109, at 870.

<sup>215</sup> Trosow, *supra* note 40, at 227.

<sup>216</sup> See Sunstein, *supra* note 124, at 799.

<sup>217</sup> See Nachbar, *supra* note 27, at 278.

accompany intangible goods such as creative works<sup>218</sup> make it difficult to facilitate fair consensual exchanges of entitlements between copyright owners and the public in the market.<sup>219</sup>

The ethical and moral dimension to copyright law cannot be ignored if we are serious about creating literary and artistic works for social progress and cultural development.<sup>220</sup> The notion of romantic authorship focuses on the process of creativity, the process of using works from the commons to reach new grounds,<sup>221</sup> as that which is deserving of an entitlement. The focus

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<sup>218</sup> See Gordon, *Fair Use*, *supra* note 32, at 1613.

<sup>219</sup> David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 11 (2004). The chance of possessing market power, for example, could impede fair exchanges of entitlements. As Professor McGowan explains:

For works the public demands, and for which there are imperfect substitutes, copyright offers authors a chance at some degree of market power. There may be very few such works, so the discounted value of that power might be very modest. It is still possible, though, that the lure of market power causes authors to invest too many resources in prospecting for copyright riches.

*Id.*

<sup>220</sup> ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 54 (Duke Univ. Press 1998) (“Scholars have shown how our intellectual property laws—copyright in particular—have developed without due regard for the public interest, ignoring our social interests in freedom of speech, promoting expressive activity, or protecting the public domain.”).

<sup>221</sup> Ghosh, *supra* note 109, at 861. Professor Ghosh tells the fable of the intellectual property commons to describe the use of creative materials that, unlike the commons that Garrett Hardin envisioned, is not prone to depletion and overuse. Professor Ghosh’s fable is as follows:

Imagine a denizen of the commons. One day she looks out beyond the pastures shared with her fellow residents to the ocean that surrounds the communal island. She sees what at first looks like an optical illusion, the play of clouds and water, but what slowly reveals the jagged peaks of a mountain range. Beyond the boundaries of her commons, past the ocean waves, lies land, and on that land appears to be another world, another set of possibilities. Driven by whatever need or interest, imperfectly defined and understood, she decides to pursue this destination, planning the travel arrangements, thinking through the journey. After she takes off for the new world, our voyager notices that several fellow denizens are pursuing the same dream. As the race continues, each traveler wants to arrive first, unsure of what is in store for her on the new commons. When they reach the new commons, many of the vexing problems from the old world come back to haunt them, and the voyagers seek new solutions and social arrangements to address familiar tensions.

on this process and the grant of entitlements as a natural right reveres the creative process of authorship that involves taking materials from the common and incorporating pieces of works from nature and the public domain to form a new work. Contrary to the conventional wisdom expressed in copyright and literary scholarship that the romantic author is an autonomous being who creates alone, authors in reality create as an individual member of society.<sup>222</sup> Rights of access to literary and artistic works are a reflection and affirmation of the rights of all authors in society to create and be engaged in the process of authentic authorship. The recognition of society's rights to access literary and artistic works for inspiration and the production of other forms of creative works function to provide restraints on the rights of authors, because authors, who produce works through the use of other forms of existing works in the common, owe a moral and ethical obligation to make their works available to other members of society in order to serve the same purposes of encouraging authentic authorship in other authors. The natural rights of society to access literary and artistic works provide natural law restrictions on how property and moral rights of authors may be exercised within a civil society. Having identified the role of authors as being central in the copyright system as well as the natural rights that they possess vis-à-vis the natural rights that other individuals within society possess in relation to literary and artistic creations, the next part of this Article, Part III, proceeds to discuss how these rights are arranged within a society according to the social contract in order to achieve fair and just distribution of entitlements.

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*Id.* The intellectual commons as Professor Ghosh's fable indicates is "about looking outward, about exploring new horizons, and ultimately about expanding the existing commons." *Id.*

<sup>222</sup> Yen, *supra* note 166, at 554. ("No author has lived an entire life on a proverbial desert island. Instead, authors live and work as members of an artistic community and a broader society whose creations, values and experiences form an integral part of the author's creative vision. Authorship is therefore not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion and transformation of input gained from the author's experience within a broader society. Works of authorship therefore capture more than the author's personality alone. They capture a combination of the author's personality, the society in which she lives, and the works of other authors.").

## III. COPYRIGHT CONTRACTARIANISM

Theories on the social contract stretch across a wide range of individual beliefs about what a civil society and government should look like. Contemporary political philosophy on the social contract, perhaps most popularly identified in the writings of John Rawls,<sup>223</sup> suggests that a civil society predicated on notions of justice and fairness can only exist if individuals within that society agree upon certain standards and manners of behavior. In *A Theory of Justice*, Rawls explains that the guiding idea in his conception of the social contract is that the “principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”<sup>224</sup> Earlier natural law writings by Thomas Hobbes,<sup>225</sup> John Locke<sup>226</sup> and John-Jacques Rousseau<sup>227</sup> during the Age of

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<sup>223</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 11 (Harvard Univ. Press 1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*].

<sup>224</sup> *Id.*

<sup>225</sup> Hobbes saw men as possessing certain natural rights and liberties that could be transferred or renounced in consideration of a reciprocal right that is transferred to them or for some other good they hoped to receive for their own benefit. Governments form by way of institution when men agree collectively with each other to submit themselves to an assembly of men or a government to represent and protect them, and they collectively consent to conferring sovereign power to this institution. THOMAS HOBBS, *LEVIATHAN* 228–29 (Penguin Classics 1985) (1651).

<sup>226</sup> John Locke perceived men as being “free, equal and independent” in a state of nature and only subject to political power by consent, which is done “by agreeing with other Men, to joyn and unite into a Community for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.” LOCKE, *supra* note 179, bk. II, § 95. Locke goes on to state that “[w]hen any number of men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to act and conclude the rest.” *Id.*

<sup>227</sup> Rousseau believed that man’s transition from the state of nature to a civil state “produces a very remarkable change in [him]”:

[B]y [its] substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.

Enlightenment, when ideas of the rational individual acting on his or her own best interests were assertively advanced as the basis for which societies were formed, put forward a theoretical framework that predicated democracy on a coherent political system where individuals surrender their rights and liberties to a sovereign to rule over them.

The social contract theories offer a fundamental theory about individual, societal and governmental or state relations that provides an important tool to deepen our understanding of the copyright system and what the law aims to achieve through the grant of statutory rights that create a temporary monopoly over literary and artistic works for which society bears the cost.<sup>228</sup> This

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JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 195 (Everyman 1993) (1762). Rousseau then adds:

What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses. If we are to avoid mistake in weighing one against the other, we must clearly distinguish natural liberty, which is bounded only by the strength of the individual, from civil liberty, which is limited by the general will; and possession, which is merely the effect of force or the right of the first occupier, from property, which can be founded only on a positive title.

*Id.* at 195–96.

<sup>228</sup> The monopoly arises through the recognition of property rights over literary and artistic works under the Copyright Act. *See generally* 17 U.S.C. § 106 (2006). Whether the statutory grant and exclusive rights over creative works is really necessary for the book printing business is debatable as a demonstration that initial publication costs are high compared to the significantly lower reproduction costs of copyrighted works are insufficient reasons to provide copyright protection. Other factors such as lead time advantage, the threat of retaliation by the publisher and the existence of other ways of sustaining a publisher's revenue provide other incentives that may cast doubts on the extent copyright is needed to provide an incentive for publication. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 299–304 (1970). The social utility of copyright is often a highly debatable matter and a quick response to Professor Breyer's article demonstrates the divided views on this issue. *See generally* Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971) (arguing that copyright provides an efficient system to ensure authors have the financial and intellectual incentives to write and that publishers are able to produce a wide variety of books for the public). Professor Breyer replies and clarifies that his earlier article sets an analytical framework for assessing the desirability for copyright protection for different forms of copyrighted materials. *See* Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75, 75 (1973).

Article argues that copyright law ought to be about the encouragement of authentic authorship by encouraging authors to be creative in their production of literary and artistic works for the public to benefit from. The law is much less about the publication, dissemination or commercialization of creative works and more about setting the optimum conditions in which authors and creators are encouraged to produce these works that will appeal to and benefit the public. The fundamental tenet of the social contract theory—that individuals within society arrive at a mutually beneficial agreement to be governed by a state authority, moral norms or a theory of justice as fairness<sup>229</sup>—is a particularly important philosophical idea to help us understand the historical trajectory of copyright law that has led us to this point and to provide us with a road map as to where we should head for the future with copyright policies and law.

When applied to copyright jurisprudence, the social contract theory helps us see clearly that the system that developed to control the reproduction and dissemination of books as the printing press emerged has produced a state in society in which entitlements over literary and artistic works are seldom fairly or justly settled and allocated. The constitutional clause promoting the “Progress of Science and useful Arts”<sup>230</sup> is a perceived limitation on Congress’s intellectual property law-making power that ought to subject intellectual property laws to the condition that they “promote the Progress of Science and the useful Arts,”<sup>231</sup> thereby signifying that private entitlements over literary and artistic works are indeed subject to some form of public consensus

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Perhaps the most famous objection to overly extensive copyright protection in duration was expressed by Sir Thomas Babington Macaulay in his speech before the House of Commons by referring to copyright as a “tax on readers for the purpose of giving a bounty to writers.” Macaulay, *supra* note 21.

<sup>229</sup> See generally RAWLS, A THEORY OF JUSTICE, *supra* note 223.

<sup>230</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>231</sup> *Id.*; see Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L. J. 1771, 1810 (2006). Professor Oliar studied the intellectual property records from the Federal Convention of 1787 and argues that the constitutional clause was intended by the Framers to be a limitation on the kind of intellectual property laws that Congress could enact. *Id.* If so, then intellectual property laws must be subjected to the condition that knowledge is advanced and society improved. *Id.*

that society should progress<sup>232</sup> when intellectual property owners are given rights over goods that are inherently public.<sup>233</sup>

#### A. *Collective Agreement in Society*

The underlying rationale for the grant of exclusive rights over artistic works is to provide an author with the means of recovering payment for the work by setting up a mechanism by which an author's readers may reward an author's creative endeavors through the free market.<sup>234</sup> For this reason, an author is ultimately beholden to the commercial marketplace as his or her patron, for it is the author's readers who will reward creative authorship through the payment of royalties.<sup>235</sup> The commercial market for literary and artistic works is therefore an important institution to ensure that authors and creators are connected to the public, the ultimate

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<sup>232</sup> "Progress" would involve an advancement or improvement in society. It would also include the improvement of knowledge, the progress of civilization, the advancement of human happiness, service and learning, the "general good of mankind," and "the cultivation and improvement of the human mind." *Id.* at 1808.

<sup>233</sup> Economists generally view information products as "public goods" that display two characteristics. See Christopher Yoo, *Copyright and Public Goods Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 637 (2007). First, public goods are non-rivalrous, i.e., the consumption of the good by one person does not prevent the consumption of the good by another. *Id.* Second, public goods are non-excludable, i.e., that it would be difficult for the owner of a public good to exclude some members of the public from enjoying the goods. *Id.* However, because technology allows some works to be excludable through technological protection measures, copyrighted materials are said to be club goods; that is a form of public goods, that while non-rivalrous, are to some extent excludable. See *id.* at 678–79.

<sup>234</sup> Professor Paul Goldstein believes that authorship entails a direct communication between authors and their intended audiences. Professor Goldstein states, "[c]opyright sustains the very heart and essence of authorship 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." Goldstein, *supra* note 20, at 302.

<sup>235</sup> Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 507 (1945) ("We do not expect that much of the literature and art which we desire can be produced by men who possess independent means or who derive their living from other occupations and make literature a by-product of their leisure hours. Support by the government or by patrons on which authors used to depend, is today no good substitute for royalties.").

beneficiaries of an author's creativity and work.<sup>236</sup> Besides ensuring authorship and the production, publication and distribution of literary and artistic works, the market also serves to compel authors to write for and appeal to the widest segment of society as authors begin viewing the public as their patron. The public provides market demand that inclines authors and creators to write for the masses, as the most widely received and accepted works provide authors and creators with the guarantee of authorial success.<sup>237</sup> Through the grant of property rights over literary and artistic works as incentives for creation, owners of copyright become entitled to internalize and appropriate benefits that accrue to the public from the availability of the work on the market.<sup>238</sup> As it is difficult to ascertain with absolute certainty the true social value of intellectual property,<sup>239</sup> copyright owners may be inclined

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<sup>236</sup> The market participants conventionally are comprised by authors or creators, copyright users (new authors and pirates) and consumers. See RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOE? 8 (Edward Elgar 2000) (1963).

<sup>237</sup> Augustine Birrell points out that highly popular authors and creators are most likely to reap rich pecuniary rewards from the public:

To gain and retain the ear of this public even for a decade, to tickle their fancy, to win their confidence, is (to a prolific writer) to make a fortune. . . . Half-a-dozen really popular novels . . . a couple of successful long-running plays, will put their authors in possession of a sum of money more than equalling in amount to the slow accumulations of thirty years of a laborious and successful professional life.

BIRRELL, *supra* note 140, at 196.

<sup>238</sup> This is done through the copyright owner's right to prevent others from making copies. The social costs of reduced access to these works are offset by the incentives provided to create the work in the first place. This balance between access and incentives is the central concern in copyright law. To achieve economic efficiency, copyright doctrines must maximize the benefits from the incentive to create while balancing the losses from reduced access and the administration of copyright protection. See William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). For a more recent discussion on recovering the fixed cost of producing copyrighted works from society, see Richard Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57 (2005).

<sup>239</sup> The difficulty in valuing copyrighted works stems from a lack of standard evaluation criteria that can be applied to all works to set one work apart from another. Any form of authorship will undoubtedly be socially valuable by contributing to "the Progress of Science and useful Arts." U.S. CONST. art. 1, § 8, cl. 8. However, any criteria developed to value a work will be subject to an individual evaluator's personal assessment. Professor Jane Ginsburg speaks of this difficulty in evaluating works for different levels of creativity in compilations and works of information. See Jane C. Ginsburg, *Creation*

to price literary and artistic works beyond the marginal price of production, known as rent seeking, of which society bears the costs of this restricted access to particular creative works<sup>240</sup> unless acceptable substitutes for the particular work are available.<sup>241</sup>

Markets, however, do not operate with the constraints of morality that are so important in the copyright system to ensure access to literary and artistic works for new authors and to safeguard society's interest in pursuing knowledge and excellence through the availability of literary and artistic works. As David Gauthier explains, "[i]n leaving each person free to pursue her interest in her own way, the market satisfies the ideal of moral anarchy" where individuals live within a society that knows no "deeper artifice of morality."<sup>242</sup> However, as Professor Gauthier rightfully points out, the "world is not a market" and "morality is a necessary constraint on the interaction of rational persons,"<sup>243</sup> particularly when this interaction of rational persons involves the exchange of entitlements over intangibles such as literary and artistic works, an exchange which general function in society is to serve an inherently moral purpose of allowing individuals to pursue knowledge and excellence, and encouraging authors to engage in authentic forms of creative authorship.

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*and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1899–1900 (1990).

<sup>240</sup> In intellectual property law, many of the issues, the Digital Millennium Copyright Act, patent reform and database protection being some of them, are highly contested among many conflicting interests. See Mark Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532 (2000). Strong interest groups push for certain agendas and Congress may respond favorably to certain interest groups and overlook the interests of the general public. See *id.*

<sup>241</sup> The copyright market is actually a market where substitutes abound, quite unlike the market for patents, where property rights in patents may confer a large market share that may present entry barriers. The copyright market for literary and artistic works is different. One author's expression is easily substitutable for another author's. This is probably because of the idea/expression distinction in copyright that makes ideas not copyrightable and allows them to be incorporated in other works. See Goldstein, *supra* note 20, at 84.

<sup>242</sup> DAVID GAUTHIER, *MORALS BY AGREEMENT* 84 (Oxford Univ. Press 1986).

<sup>243</sup> *Id.*

In the present copyright market, where the internalization of external benefits is one of the main functions of property rights<sup>244</sup> and free-market exchange becomes impossible as property owners hold out from disclosing the true value of their property,<sup>245</sup> cooperation among all parties within the copyright system for the benefit of society is unlikely to occur. Intellectual property scholars have pointed out the dangers of allowing complete internalization of social benefits through the extension of property rights,<sup>246</sup> recognizing that free-riding is a natural and desirable consequence of industrial spillovers that contribute towards industrial innovativeness and social growth and development.<sup>247</sup> Many scholars have also argued that the attempt by copyright owners to recover all external benefits through copyright has a detrimental effect upon society<sup>248</sup> and that the public's right to

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<sup>244</sup> Harold Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967).

<sup>245</sup> See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–07 (1972).

<sup>246</sup> Some of the effects of extending intellectual property to allow for the internalization of externalities are the creation of deadweight losses that will have an adverse effect on a competitive market, the interference with another's ability to create, rent seeking behavior by rights owners, and the high administrative costs that will arise from the enforcement of these rights. Lemley, *Property*, *supra* note 29, at 1058–59.

<sup>247</sup> Free-riding by society drives innovation and industries with greater spillovers to develop more innovation than industries with fewer spillovers. See Brett Frischmann & Mark Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 259–60 (2007).

<sup>248</sup> Professor Lawrence Lessig, for example, argues that technology in the form of code provides copyright owners almost perfect control over the distribution and use of content. See LESSIG, *THE FUTURE OF IDEAS*, *supra* note 213, at 22–23, 147. This form of control diminishes the vast potential for innovation on the Internet. See *id.* Professor Lessig also argues that the expansion of intellectual property provides large media conglomerates the ability to affect how ordinary citizens live their everyday lives by preventing the development of new and more efficient technologies. See LESSIG, *FREE CULTURE*, *supra* note 213, at 162. Professor Jessica Litman argues that the public interest was not a consideration in the drafting of 1976 Copyright Act. JESSICA LITMAN, *DIGITAL COPYRIGHT* 71–74 (Prometheus Books 2001). The Act was drafted by representatives of copyright businesses with the public interest unrepresented in the legislative process. See *id.* The effect of the Copyright Act is the forced compliance of the public to a law that they do not understand. *Id.* Professor Siva Vaidhyanathan argues that the Government's 1995 White Paper, which confirmed the application of copyright to cyberspace, did not consider the public interest as a factor in setting a fair copyright balance. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 159–60 (N.Y. Univ. Press 2001). As a result, copyright owners gained more power to control, private interests prevailed over the

access literary and artistic works should prevail as soon as copyright owners recover the costs of production and dissemination through the rights provided.<sup>249</sup> A vibrant public domain is necessary for creativity,<sup>250</sup> and allowing all forms of external benefits to be captured through excessive claims of property rights over creative works would have the effect of enclosing the common pool of creative resources open to all for public use.<sup>251</sup> The balance that copyright law must strike between providing rights as incentives to create and providing public access to creative materials to promote democratic civil discourse within the public<sup>252</sup> allows the free flow of culture in society<sup>253</sup> and ensures that economic growth and wealth distribution in a

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public, media conglomerates exerted influence on global copyright policy making and technology allowed copyright owners to prevent the public from getting access to their works. *Id.* Professor Wendy Gordon criticizes the 1998 Copyright Term Extension Act as having very little effect on the creativity of present authors and instead having negative effects upon creative people, who require access to existing works for inspiration in expression. Wendy Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 187 (2003).

<sup>249</sup> If copyright's primary purpose is to encourage authors to write and produce creative works, then these works should be placed in the public as soon as the law's purposes have been met. See John M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 512–13 (1999). Also consider the judgment of Justice Stewart in *Twentieth Century Music Corp. v. Aiken*, where he states, “[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Chief Justice Hughes expressed a similar opinion when he stated that the “sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Justice Douglas, citing Chief Justice Hughes, also stated the same opinion in his judgment: “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . [T]he reward to the author or artist serves to induce release to the public of the products of his creative genius.” *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

<sup>250</sup> Professor Jessica Litman argues that the public domain provides the raw materials necessary for authorship to occur. See Litman, *The Public Domain*, *supra* note 65, at 965. Copyright is based on the idea of originality but most authors rely upon existing works to create new ones and are seldom inspired to independently create a completely new work. *Id.* at 968. The public domain offers authors a vast source of creative resources by reserving non-copyrightable materials to the commons. *Id.* at 975.

<sup>251</sup> James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

<sup>252</sup> See generally Netanel, *Copyright*, *supra* note 20.

<sup>253</sup> See generally Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257 (2006).

country's development process occurs.<sup>254</sup> Achieving this balance in the copyright system necessitates a collective agreement among all parties to the copyright system to ensure that each party acts in the interests of society as a whole within the boundaries of their legal entitlements.

In this situation, a circumstance for justice, described by Professor Rawls as “the normal conditions under which human cooperation is both possible and necessary,” arises as “social cooperation makes possible a better life for all than any would have if each were to try to live solely by his efforts.”<sup>255</sup> Rawls identifies two conditions that give rise to the conditions for justice—an objective circumstance that makes human cooperation both possible and necessary and a subjective circumstance that reflects the different plans for life as well as the diversity of philosophical and religious beliefs and political and social doctrines that reflects the needs and interests of the subjects of cooperation.<sup>256</sup> These two conditions, present in the copyright system, raise the circumstances for justice that make cooperation among all parties to the copyright system both possible and necessary.

### *B. Copyright and the State of Nature/Original Position*

Rawls' conception of justice as fairness begins with the principles of justice as the object of the original agreement for cooperation.<sup>257</sup> These principles of justice are “those which rational persons concerned to advance their interests would accept in this position of equality to settle the basic terms of their association.”<sup>258</sup> In order to achieve this, “one must establish that, given the circumstances of the parties, and their knowledge, beliefs, and interests, an agreement on these principles is the best way for each person to secure his ends in view of the alternatives

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<sup>254</sup> See generally Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

<sup>255</sup> RAWLS, A THEORY OF JUSTICE, *supra* note 223, at 126–27.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 118–19.

available.”<sup>259</sup> This agreement for cooperation begins at the original position as a purely hypothetical status quo where any agreements reached among the parties will be fair for the original position as “a state of affairs in which the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces.”<sup>260</sup> To achieve procedural fairness, Rawls stipulates that this agreement must be made behind a veil of ignorance:

[where] no one knows his place in society, his class position or social status . . . his fortune in the distribution of natural assets and abilities, his intelligence [and] strength . . . [or] his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this . . . the parties do not know the particular circumstances of their own society . . . its economic or political situation, or the level of civilization and culture it has been able to achieve.<sup>261</sup>

In the copyright system, the original position in which an agreement for cooperation according to the principles of justice as fairness wherein all parties to the copyright system—authors, readers and publishers/distributors—may secure their best interest in light of the alternatives available is therefore the position where all parties, not knowing the particular circumstances of the present copyright society, would agree to conduct their affairs and activities in a manner that achieves justice among all the parties involved. This means that authors, readers and publishers/distributors must agree to cooperate in a just distribution of entitlements in literary and artistic works to ensure the mutual benefit of all, which requires certain moral or ethical restraints on the exercise of rights in literary and artistic works according to what is just to all parties.

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<sup>259</sup> *Id.* at 119.

<sup>260</sup> *Id.* at 120.

<sup>261</sup> *Id.* at 137.

### *C. Justice and Fairness in the Copyright System*

A conception of justice in the copyright system according to the social contract theory provides a guiding framework to subject the exercise of rights and allocation of entitlements in literary and artistic works to moral and ethical judgment. A utilitarian-based system lacks the capacity to make value judgments to help us assess the fairness of particular positions taken by Congress, the courts and parties to the copyright system. From the perspective of a pure utilitarian, the extension of the copyright term and property rights over literary and artistic works, for example, is an acceptable way to protect the economic interests of copyright owners by ensuring that investments made in producing works are protected and that works are continually exploited in accordance to the statutory rights that the law recognizes. From a justice and fairness perspective of the social contract, this would be morally and ethically wrong because resources for society's use are kept away from the reach of the public. The agreement that all parties within the copyright system cooperate to achieve the best interests of all parties is violated if the public is denied access to creative works that are needed for other forms of creative production and authentic authorship. Conversely, the violation of an author's moral rights by subjecting the work to derogatory treatment against the artistic vision of the author also violates the social contract, for the best interest of the author is undermined when respect for his authentic expression through creative authorship is not duly given. These value judgments and ethical assessments will not be possible without the recognition of a cohesive social agreement among all parties to the copyright system to cooperate and act in each other's best interests.

### *D. Role of the Judiciary*

The judiciary's role so far has been to defer to congressional wisdom on matters of intellectual property policy.<sup>262</sup> Changing the philosophical foundation of the copyright system and embracing

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<sup>262</sup> See Paul Schwartz & William Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334 (2003).

the concept of a social contract among all parties to the copyright system allows for greater judicial power to make moral and ethical assessments on principles of justice and fairness in a way that would enhance the role of the copyright system to encourage authentic authorship and the creation of literary and artistic works that would ultimately be of value and benefit to society. Judges would also be able to take a more proactive role in defining the rights and obligations of all parties to the copyright system based on their natural rights and moral and ethical obligations to each other without being bound by the statutory provisions of the Copyright Act.

#### CONCLUSION

A utilitarian-based copyright system, while aiming to increase social welfare by granting property rights in literary and artistic works, has thus far produced a market for literary and artistic works that does not necessarily encourage authentic authorship and the creation of works that serves to ultimately benefit society. The system has created an environment which facilitates the production of works that will be successfully commercialized on the market but which appears to operate to the benefit of copyright owners most of all. Authors and their readers are not the primary beneficiaries of the present copyright system, which seems to be functioning as a legal system that protects the interests of economic investors in the production of creative works more than the interests of the author and the public. By recognizing that there are both natural rights which authors acquire and possess by virtue of their labor and personality, and natural rights that society has to pursue knowledge and excellence through literary and artistic works, the copyright system may approach the allocation of entitlements and the recognition of rights in works on a principle of justice that promotes fairness among all parties to the copyright system.

Professor Patterson and Stanley Lindberg remind us that the copyright system is comprised of three parties with legitimate and valid interests in literary and artistic works. It would be a mistake for the law to emphasize the rights of any one party without

considering the effect of that emphasis on the rights and entitlements of the other two parties. By acknowledging a social contract among all parties to the copyright system, we will be reminded that all three parties are a necessary and vital component to ensuring authentic authorship for the benefit of society as a whole. As it is aptly stated by Professor Patterson and Stanley Lindberg:

Traditionally viewed as a law for authors and artists, copyright was actually originated by publishers and has a long history of having benefited entrepreneurs much more than creators. A major purpose of this book, [The Nature of Copyright], is to explain the vagaries of history that caused this anomaly and thus to justify a new—and long overdue—perspective of copyright law: copyright as a law for consumers as well as for creators or marketers. All three of these groups—authors, publishers (or other entrepreneurs), and customers—are users of copyrighted materials, which is why the copyright law consists of three parts: a law of author's rights, a law of publishers' rights and a law of users' rights.<sup>263</sup>

A comprehensive theory of copyright law ought to account for these three interests in its jurisprudence. The present utilitarian-based copyright system does not account for all three interests. By evaluating the copyright system from a natural law/natural rights contractarian perspective, all three interests may be accounted for to enable the law to allocate entitlements in literary and artistic works in accordance to principles of justice and fairness so that authentic authorship may occur for the benefit of society.

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<sup>263</sup> PATTERSON & LINDBERG, THE NATURE OF COPYRIGHT, *supra* note 164, at 3–4.