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I. INTRODUCTION

¶1 Copyright laws emerged out of necessity when the earliest printing presses were introduced into the book trade. After the Statute of Anne codified an assortment of censorship, licensing, and trade-control rules to produce the world's first copyright statute in 1710,[1] it soon became clear in the United Kingdom and in the United States that all rights in creative works were provided by statute.[2] Copyright laws have steadily expanded since the Statute of Anne to protect owners of creative works. In the past decade, attacks on these expansions by left-leaning critics have become visceral and intense. As copyright owners assert absolute property rights over creative works and critics argue that state interests operate to balance and limit statutory rights, perhaps the terms of this debate might be clarified through a determination of whether copyrighted material is property in a legal sense. If copyright is indeed property in a de jure sense, is it the same thing as "literary property"? If so, then copyright law provides copyright owners with the absolute right to own and control literary works in the same way that a natural property right provides real property owners with the perpetual, exclusive, and absolute right to own and control property to the exclusion of all others. The purpose of this Article is to explore the notion of literary property, to determine whether literary property may be equated with copyright, and, if so, to assess what the implications might be for modern copyright law as it adapts to newly emerging technological, social, and cultural trends.

¶2 In Part II, this Article examines the notion of literary property as a distinct legal concept, which protects an author's natural right in a manuscript because of the innate connection between a creator and his work. This discussion shows that literary property safeguards an author's creative interests and expectations against the rest of society, including printers and publishers who purchased the right to print the manuscript. Part III considers whether literary property can be equated to the modern property right that statutory copyright creates. Part III concludes that literary property and copyright are distinct legal concepts, and proposes that the two different bases for recognizing

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[1] For excellent studies on the history of the copyright system, see LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993). *See also* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1–37 (1966) (presenting a concise account of the first 350 years of copyright law).

[2] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834); Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.) (Gr. Brit.).

ownership of creative works—natural property and economic incentives—should be explicitly recognized as separate and distinct ideas to ensure clarity in policy that determines legal entitlements to creative works. Part IV evaluates how such a separation of natural property and economic incentives affects and shapes the debate of the elusive balance between private rights and the public interest. Part IV surmises that a separation of rights from incentives and the acknowledgement of specific norms recognizing authors' entitlements and obligations will allow the copyright system to realize its constitutional goal of "promot[ing] the Progress of Science and useful Arts.[3]

II. LITERARY PROPERTY AS A LEGAL CONCEPT

¶3 The full extent to which literary property can be said to safeguard an author's natural right over his own work may be a matter of pure academic speculation.[4] What appears certain, however, is that literary property predates statutory copyright and protects an author's personal interest and individuality to a greater extent than an industry-based entitlement intended to control the mass production and publication of the work. Authors produced literature before the invention of the printing press made copying cheap and easy, and, while plagiarists were often severely admonished for representing someone else's work as their own,[5] pirates, who reproduced works in their totality, were often praised for preserving the integrity of the original work.[6] Thus, even before copyright existed to protect commercial rights to print, publish, and distribute, noneconomic incentives motivated authors to express themselves through poetry, songs, and literature, expecting the community to respect the personal integrity of authors. Conceivably, the author's expectation that society will respect personal rights that protect the author's creative integrity exists independently of any printing privileges or rights to print manuscripts that the state awards to some publishers and authors to encourage development of a printing industry and capitalistic trade in literary and artistic works.[7] Before Gutenberg introduced the printing press, printing privileges and monopolies were not needed to encourage the development of a publishing industry; nor were printing licenses required to control the types of works.[8] It would have been clear without the intense competition that moveable-type print technology introduced into the market for

[3] U.S. CONST. art. I, § 8, cl. 8.

[4] There does not appear to be evidence of actual protection of literary property, but the term has often been used interchangeably with copyright to signify some proprietary or ownership right to the work. Mark Rose, for example, refers to the early copyright struggle between booksellers in England as "the question of literary property." *See* ROSE, *supra* note 1, at 4. Lyman Ray Patterson and Stanley Lindberg, on the other hand, suggest that literary property and copyright are essentially different things. *See* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 122 (1991). To them, the rights of authors should not be treated as copyright but as a "companion body of law." *See id.*

[5] AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 9 (1899) ("You may search through the huge compilations of Justinian without lighting upon a word indicative of any right possessed by the author of a book to control the multiplication of copies; and yet books abounded even before the invention of printing, and though the pirate escaped animadversion, not so the plagiarist.").

[6] MARCUS BOON, IN PRAISE OF COPYING 34 (2010).

[7] JANE A. BERNSTEIN, PRINT CULTURE AND MUSIC IN SIXTEENTH-CENTURY VENICE 10 (2001) (describing the emerging printing industry in Venice when the Venetian Senate granted the first printing monopoly to Johannes de Spira).

[8] For a discussion of state control of publishing activities to prevent sedition and heresy, see ROSE, *supra* note 1, at 31–32.

literary works[9] that, as a matter of natural law, the sole possessor of any rights to a manuscript, poem, or song would be its author. Literary property seemed to protect the author's expression at natural law, while statutory rights to print and publish manuscripts provide an economic incentive to invest in the printing industry. These separate rights that emerge from entirely different sources, as evidenced by the relationship between authors and publishers that developed when printing and publishing became a robust and profitable trade in Europe and the United States, had served separate and distinct interests in creative works.

A. Author's Expectations and Publishing Norms

¶4 Although the notion of literary property has not been well defined in literature and very little has been written specifically about literary property in the context of authors' creative rights in their works,[10] it appears to be another source of rights and obligations for the author. From historical evidence on author–publisher relationships in the developing book trade in late seventeenth century England, scholars have deduced that literary property, as the right of the author, was a larger right that encompassed the publisher's copyright. The earliest preserved contractual agreement that transferred a right to print from the author to his publisher was John Milton's publication contract with Samuel Simmons for *Paradise Lost* in April of 1667.[11] For the manuscript of *Paradise Lost*, Milton received five pounds upon signing the contract and an additional five pounds after each edition of the manuscript was sold.[12] The contract provided for the publication of three editions of the manuscript of 1,300 copies each.[13] Both Milton and Simmons agreed that these three editions would not run more than 1,500 copies each.[14] Scholars of eighteenth century English literature consider the payment of twenty pounds to have been an extremely modest payment for the manuscript of an epic poem at that time, but evidence of the amount typically paid for the sale of a manuscript when Simmons purchased *Paradise Lost* is too scant to conclusively determine that Milton was underpaid for the poem.[15] Generally, a publisher's unfair treatment of an author might indicate a superior position in the author–publisher relationship that would have allowed the

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[9] For a description on the impact of moveable-type printing presses on the literary market, see PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 26 (2004) (describing how a capitalistic market for the book trade developed as Gutenberg's print technology spread).

[10] The notions of literary property and authorship have been examined in relation to the commodification of literature, and some scholars of law and literary studies have attributed the emergence of literary property and authorship to the commodification of literature with the development of the book market in the eighteenth century. *See, e.g.*, ROSE, *supra* note 1, at 1–2; MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 22–33 (1994); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992).

[11] Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence on Their Relations*, 17 LIBRARY 250 (1995).

[12] Peter Lindenbaum, *Milton's Contract*, 10 CARDOZO ARTS & ENT. L.J. 439, 441 (1992).

[13] *Id.*

[14] *Id.*

[15] There is some evidence that Milton's contemporaries were paid much more for their work. Richard Baxter, for example, received a total of £170 over a thirteen- to sixteen-year period for his *Saint's Everlasting Rest*. He received £10 for the first publication of the manuscript. There is also evidence, albeit unreliable, that John Dryden received £20 for the manuscript of *Troilus and Cressida* in 1679. *Id.* at 442–43.

publisher to control all of the rights to print and sell manuscripts. But this did not appear to be the case with Milton's contract. On the contrary, Milton appeared to have superior bargaining power in this arrangement, as the contract contained provisions that protected Milton as an owner of specific property rights in the manuscript even after the right to print the work had been assigned to Simmons.

¶5 Perhaps the most telling sign that Milton retained some form of literary property in *Paradise Lost* after assigning the right to print to Simmons was that one of the clauses in Milton's contract allowed him to "demand an accounting of sales at reasonable intervals."[16] Should Simmons have failed to provide such accounting after Milton demanded one, Simmons would have been required to pay him the five pounds for the whole impression immediately, rather than after completing the sale of 1,300 copies.[17] This clause indicates that both Milton and Simmons thought the author possessed some form of property right in the work even after the right to print it had been assigned. Because only a co-owner of a property interest or a beneficiary in a trust relationship could demand an accounting of sales,[18] it appears that both Milton and Simmons considered the author of a manuscript to be its owner while the printer is put in the position of a trustee for as long as the printer owned the limited right to print the work.

¶6 Professor Peter Lindenbaum furthermore points to the provision capping the number of copies Simmons could print to suggest that Milton possessed some form of property right in the work.[19] The provision capped the number of prints to 1,500 and ensured that the printer's profits would not disproportionately exceed the author's.[20] This further supports the claim that the printer's right to reproduce the work was limited when compared to the author's more encompassing property right. Studying the same contract, Lyman Ray Patterson observes that Milton agreed to refrain from interfering with publication of the work, which Professor Patterson argues would be unnecessary if assigning rights to the printer conveyed all existing legal rights in the work.[21]

¶7 Milton's publication contract for *Paradise Lost* provides rare and invaluable evidence of literary property as an author's right, acknowledged by both authors and publishers, even before authors were recognized as capable of owning copyrights in their work. Before the Statute of Anne was passed in 1710,[22] copyright, as the right to print, publish, and vend literary works, could be owned only by printers and publishers who were members of the Stationers' Company, the trade guild regulating the book publishing

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[16] *Id.* at 443.

[17] *Id.*

[18] Magruder v. Drury & Maddox, 235 U.S. 106 (1914); Gillmor v. Gillmor, 694 P.2d 1037 (Utah 1984).

[19] Lindenbaum, *supra* note 12, at 443.

[20] *Id.*

[21] PATTERSON, *supra* note 1, at 74. Patterson also examined two conveyances by the poet James Thomson. *Id.* at 74–75. The first was from Thomson to Millar, a publisher, which contained the specific assignment of the right to print with the benefit of all additions, corrections, and amendments that Thomson might make to the work after the assignment of the copyright. *Id.* at 74. The second conveyance from Millan, a bookseller, to Millar granted the right to lawfully claim all profits from the printing and publishing of the poems. *Id.* at 75. Patterson highlights that both conveyances emphasized the transfer of different rights. *Id.* Thomson transferred the copyright together with what Patterson called "the author's creative rights"—the control over the work to make additions, corrections, and amendments notwithstanding the ownership of copyright. *Id.* The emphasis on profits arising from the printing and publishing of the poems in the second conveyance suggests that copyright was of a more limited nature than the author's right. *Id.*

[22] Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

business.[23] Ownership of copyright in a book was recorded in the register book of the Stationers' Company by the stationer licensed by the Crown to print the book.[24] Authors, who only rarely owned a copyright in their work that was entered into the company's register, were generally excluded from owning the right to print and publish their work. Yet Milton's publication contract suggests that authors had a more complex relationship with their publishers than is commonly assumed, even before authors were recognized as legitimate copyright holders by the Statute of Anne. One could deduce from Milton's contract that the author possessed creative and proprietary rights in the work as its creator—rights that provided the author with ownership and control over the work even after he sold it to the printer. These rights were separate and distinct from the publisher's copyright and were viewed as more limited rights to print and recover profits from sales of the work.

¶8 Milton's contract is not the only historical evidence that suggests authors had a more encompassing right in their work than modern copyright provides. The publication contracts between early American authors and their publishers after the passing of the first U.S. copyright statute of 1790[25] also allude to an author's continued proprietary and creative control over their work, even after the sale of the manuscript and assignment to the publisher.[26] For instance, the March 1868 publication contract between Ralph Waldo Emerson and Ticknor & Fields (which later became Houghton Mifflin Company) for the publication of *May-Day and Other Pieces* contained a clause that granted Ticknor & Fields "the sole right to publish" the work for the duration of the agreement, which appears to have been carved out of Emerson's larger proprietary interest[27] and to provide a written order for the printing of any additional editions that Ticknor & Fields considered expedient.[28] Emerson had the option to terminate the contract at any time,

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[23] Russ VerSteeg, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 526–28 (2000).

[24] Early copyright was intertwined with Crown censorship policies as the government sought to control the publication and distribution of what were considered heretical and seditious materials. The Stationers' Company was the perfect body, and copyright the perfect instrument, to implement these policies through an intricate system of licensing laws. *See* PATTERSON, *supra* note 1, at 114–42.

[25] Act of May 31, 1790, ch. 15, 1 Stat. 124, *repealed by* Copyright Act of 1909, ch. 320, 35 Stat. 1075.

[26] Publication contracts that predate the 1790 Copyright Act would be ideal to show that authors clearly had rights that were separate from the rights of publishers. There is, however, a paucity of contracts that showed a clear distinction between author and publisher, in part because of certain personalities of well-known authors writing at that time. Benjamin Franklin, for example, was a well-known author who wrote before the first U.S. Copyright Act was passed. He was also a publisher, and printed and distributed his own work. Hence, there was no need to address the separate rights of publisher and author. Thomas Paine was also famous for his revolutionary work, *Common Sense*, but published it anonymously because of its treasonous content. As such, there is no suggestion of the author's separate claim to the contents of the manuscript.

[27] Contract for publication of *May Day and Other Pieces* between Ralph Waldo Emerson and Ticknor & Fields cl. 2 (Mar. 4, 1868) (on file with Houghton Library, Harvard University); *see also* Contract for publication of *Uncle Tom's Cabin, New Edition with Illustrations, a Bibliography and an Introductory Account of the Work* between Harriet Beecher Stowe and Houghton, Osgood & Co. cl. 6 (Nov. 21, 1878) (on file with Houghton Library, Harvard University).

[28] Clause 4 of the contract reads:

> The said party of the first part [Emerson] shall deposit with such printers as the parties hereto shall mutually agree upon, the stereotype plates of the said work, and whenever the said parties of the second part [Ticknor & Fields] think it expedient to print an edition of the said work, the said party of the first part shall give a written order for printing the required number of copies, and no copies shall be printed from the plates of said work

which would require that he purchase all remaining copies in Ticknor & Fields's possession at cost.[29] It is notable that even given the Supreme Court's 1834 decision of *Wheaton v. Peters*, which held that authors do not have a common law property right separate from the statutory right to print and publish,[30] Emerson's contract protected the author's right to control the contents of his manuscript from any alteration or modification by requiring the author to provide stereotype plates of the work and authorization for the publication of any new editions. This right appears to be independent of statutory copyright. The termination clause of the contract further affirms, implicitly, the author's proprietary right in his creative expression by protecting a claim to restitution of the published work that should belong only to a property owner.[31] It would have made more business sense for Ticknor & Fields to require Emerson to purchase the remaining stock at market price upon termination of the publication contract and seek contractual damages for reliance loss.[32] However, this was not the agreement between author and publisher in this case. By providing Emerson with the option to terminate the contract at any time with only the penalty of purchasing the remaining stock at cost, Ticknor & Fields appeared to recognize Emerson's property right in the work itself—a larger proprietary right that included the more limited statutory right to print that was assigned to Ticknor & Fields in the publication contract with Emerson.[33]

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without such written order.

Contract for publication of *May Day and Other Pieces*, *supra* note 27, cl. 4.

[29] Clause 6 of the contract reads:

> The party of the first part can at any time terminate this agreement by giving to the parties of the second part written notice of his intention so to do; and in the event of his terminating this agreement, he shall purchase at its cost all the stock of the said work the parties of the second part shall have on hand, paying therefor in cash.

Id. cl. 6.

[30] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[31] *See, e.g.*, GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 11 (2d ed. 2006) (arguing that restitutionary claims vindicate property rights of its claimant, with which the defendant had interfered); Hanoch Dagan, *Restitutionary Damages from Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES L. 115, 129–30 (2000) (arguing that the notion of property rights is a highly contested concept that is open to competing interpretations, and hence, cannot be used as a basis to justify claims of restitution); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279 (1989) (defining restitution as (1) a recovery based on unjust enrichment and (2) a restoration in kind of a specific property). In Emerson's case, the fact that the publisher would return printed copies of the book to Emerson at cost price, even when Emerson terminated the agreement, suggests that the publisher saw restitution as a way to restore Emerson's property right in his expression contained in the work.

[32] *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936) (The law "may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him. [The] object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the *reliance interest*.").

[33] The publication contracts between Houghton Mifflin and other authors such as Harriet Beecher Stowe, Henry David Thoreau, and Oliver Wendell Holmes show the same implicit recognition of an author's property rights in his work by the publisher in the reversion or destruction of stereotype plates after termination of contract and in the promise to publish the work in ways that will affirm the author's creative personality. The publication contract for Harriet Beecher Stowe's new edition of *Uncle Tom's Cabin* reads:

> If, at the expiration of five years from date of publication, or at any time thereafter, the demand for said work should not be sufficient in the opinion of the parties of the second

¶9 As a legal concept, the term literary property often connotes an individual right that grants exclusive ownership of a work. Copyright cases suggest that there are three distinct but interrelated characteristics of literary property, each of which will be discussed below: literary property (1) conveys a proprietary right, (2) protects a creative interest, and (3) arises from an author's natural right. Literary property grants the author proprietary rights in the work by recognizing the author's expectation to maintain control of the work even when it is subject to the Copyright Act. In 1985, for example, the Supreme Court held that an author has the right to control the first public appearance of unpublished expressions and that society's expectation to have access to the work was secondary to the right of the author.[34] Because the Copyright Act of 1976 protects works as soon as they are fixed in a tangible medium of expression,[35] the Court's decision to deny the defense of fair use once the work has been fixed but remains unpublished protects the author's right to decide whether to publish a work as well as when, where, and in what form. These common law rights fall outside the explicit rights in the Copyright Act.[36] The right to confidentiality, privacy,[37] and creative control of the work is a proprietary right that protects expression of the author's personality and individuality.

> part [Houghton, Osgood & Co.] to render its publication profitable, then this agreement shall end, and the party of the first part [Stowe] shall have the right at his option, to take from the parties of the second part, at cost, the stereotype or electrotype plates (and engravings if any) of said work and whatever copies they may then have on hand; or, should he fail to take said plates and copies at cost, then the parties of the second part shall have the right to dispose of the copies on hand as they may see fit, free of copyright, and to destroy the plates . . . .

Contract for publication of *Uncle Tom's Cabin*, *supra* note 27, cl. 7. In the contracts for the publication of Henry David Thoreau's works entered between his younger sister, Sophia Thoreau, and Ticknor & Fields was a clause that ensured the publishers printed and published the work "in good style." Contract for publication of *Excursions* between Sophia E. Thoreau and Ticknor & Fields (Sept. 1, 1863) (on file with Houghton Library, Harvard University); Contract for publication of *Letters of Henry D. Thoreau* between Sophia E. Thoreau and Ticknor & Fields cl. 3 (Mar. 20, 1865) (on file with Houghton Library, Harvard University); Contract for publication of *The Maine Woods* between Sophia E. Thoreau and Ticknor & Fields cl. 3 (May 2, 1864) (on file with Houghton Library, Harvard University); Contract for publication of *A Yankee in Canada with Anti-Slavery and Reform Papers* cl. 3 (Sept. 3, 1866) (on file with Houghton Library, Harvard University). The contracts for the publication of Oliver Wendell Holmes's works have a similar clause that the publisher print and publish the work "in good style." Contract for publication of *The Autocrat of the Breakfast Table* between Oliver Wendell Holmes and Ticknor & Fields cl. 3 (May 13, 1867) (on file with Houghton Library, Harvard University); Contract for publication of *The Guardian Angel* between Oliver Wendell Holmes and Ticknor & Fields cl. 4 (Nov. 26, 1866) (on file with Houghton Library, Harvard University); Contract for publication of *Mechanism of Thought and Morals* between Oliver Wendell Holmes and Fields, Osgood & Co. cl. 3 (Dec. 7, 1870) (on file with Houghton Library, Harvard University); Contract for publication of *Poems by Oliver Wendell Holmes* between Oliver Wendell Holmes and Ticknor & Fields cl. 3 (May 13, 1867) (on file with Houghton Library, Harvard University).

[34] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

[35] 17 U.S.C. § 102 (2006).

[36] The specific rights that the Copyright Act recognizes are the rights to reproduction, distribution, derivatives, and public performance and display. *Id.* § 106.

[37] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–99 (1890) ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.") (footnotes omitted).

In essence, it is a personal right even if it is commercially valuable to the author and publisher.[38] More importantly, the Court's explicit protection of the creative space necessary for an author to develop her ideas during the prepublication stage and polish her work for public dissemination acknowledges the author's personal interest in how the work projects the author's personality and individuality to the reading public.[39] Furthermore, the doctrine arising from a famous case between J.D. Salinger and Random House protects an author's right to control the use of unpublished letters that have been made publicly available through library archives on the same principle that "[t]he copyright owner owns the literary property rights, including the right to complain of infringing copying" of the letters' expression.[40]

¶10 While literary property protects the proprietary interest of authors, the right is more limited in scope in that it appears to protect only the authors' creative interests in their work. Generally, the commercial interests of authors are protected through statutory copyright law,[41] but, at least in the United States, the creative rights of authors do not receive the same degree of protection through the copyright statute.[42] The notion of literary property, because of its genesis in the author's natural right as the creator of the work, protects creative rights: the author's personal rights to protect his personality, as expressed in the work, from distortion by others in society.[43] This right serves the important function of ensuring that the author of a work can preserve the integrity of that work once it is made publicly available because the work represents the author's personality and makes a unique contribution to society through the author's authentic expression. Given the important contribution that the author's expression makes to society, Professor Patterson argues it is in society's interest to reciprocate by protecting the author's creative interest in that work.[44] Authors generally expect two things from making their creative pursuits available to society: (1) payment for their work and (2)

[38] *See Harper & Row*, 471 U.S. at 553 ("The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher; . . . the commercial value of the right lies primarily in exclusivity.").

[39] *Id.* at 555 ("The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the 'right to control the first public distribution' of his work echos [sic] the common law's concern that the author or copyright owner retain control throughout this critical stage. The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term 'news value' to be gained from premature publication of the author's expression.") (citations omitted).

[40] Salinger v. Random House, Inc., 811 F.2d 90, 94 (2d Cir. 1987).

[41] 17 U.S.C. § 106.

[42] The creative rights of authors of works of visual art also receive some degree of protection under § 106A. *See id.* § 106A(a)(1)(A) (protecting authors from plagiarism by providing the right "to claim authorship of that work," also known as the right of attribution); *id.* § 106A(a)(1)(B) (protecting the right of integrity by providing the right to prevent the use of the author's name for work that the author did not create); *id.* § 106A(a)(2) (protecting against misrepresentation by providing the right to prevent use of "name as the author of a work in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to [the author's] honor or reputation"); *id.* § 106A(a)(3)(A) (protecting authors from intentional distortion, mutilation, or other modification of the work); *id.* § 106A(a)(3)(B) (protecting against any destruction of work of recognized stature). This provision has very strict boundaries and is limited in its application. What amounts to a "work of visual art" is defined narrowly under the Copyright Act. *See id.* § 101.

[43] Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1213 (1998).

[44] PATTERSON, *supra* note 1, at 70–71.

preservation of their creative personality and the integrity of their work (although authors may be motivated to create for other reasons such as fame, notoriety, or to inspire social and political reform). As the Copyright Act facilitates the work's commodification to garner rewards from the market, the noneconomic interests of authors can be protected by an explicit recognition of literary (or creative) property through common law.

¶11 Literary property rights also arise from authors' natural rights in their work and are attributed to the relationship between an author and his work. The idea that authors own property in their work because that work embodies their personal individuality predates the earliest copyright statute[45] and was acknowledged not because of an existing social convention but as a fundamental human right of individuals to own that which they create through their labor.[46] In protesting censorship of literary work, John Milton proclaimed that books "contain a potency of life in them to be as active as that soul was whose progeny they are" as well as "preserve as in a vial the purest efficacy and extraction of that living intellect that bred them,"[47] revealing the author's understanding of his work as an extension of his personality or individuality—as a part of him. Even if the process of literary creation inevitably builds upon existing works, the very act of mixing personal expression with literary resources and ideas from the commons (or nature) creates an author's literary property right in the work that justifies authorial control over how the work is used, particularly when the public use of the work goes against the author's intention for creating that work in the first place. Therefore, literary property is a right that protects authors' expectations separately from those of publishers, is proprietary in nature, is limited to the protection of creative rights, and exists because of the natural connection between an author and his work.

B. Literary Property as a Natural Right

¶12 Modern copyright law, which protects the economic rights of copyright owners, whether author or publisher, is statutorily created. The legislature, courts, and scholars have long recognized the economic role that statutory copyright plays in encouraging and rewarding creative production for public benefit.[48] The genesis of literary property

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[45] The Statute of Anne 1710 was the first copyright statute to be passed in England and explicitly recognized the right of authors to print, reprint, and publish literary works. *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

[46] The most familiar idea that supports the author's natural right in the work is probably John Locke's passage in his *Second Treatise on Civil Government* that every man has property in his person, and when he removes something out of nature to mix it with his own labor, he has property in it. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 20 (Prometheus Books 1986) (1690) ("Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body, and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state of that Nature hath provided and left in it, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.").

[47] JOHN MILTON, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644), *reprinted in* PARADISE LOST: AN AUTHORITATIVE TEXT, SOURCES AND BACKGROUNDS, CRITICISM 339, 342 (Gordon Teskey ed., 2005).

[48] Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . ."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative 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."); *see also* Steven Hetcher, *Desire Without Hierarchy: The Behavioral Economics of Copyright*

rights, which protect less tangible interests of a human creator such as personality and identity, may be less certain. Statutory copyright developed as socio-economic conditions evolved to create a demand for creative materials, which legal protection of authors' and publishers' economic rights aim to meet.[49] This idea that printed materials are receptacles containing an author's intellect and creative personality draws a clear distinction between, on one hand, an author's expectation to have control of the manuscript itself through some form of literary property (which protects the manuscript in its entirety), and, on the other hand, an economic interest in publishing and selling the work as one right from a bundle of rights (which stems from the author's proprietary interest or ownership of the manuscript).[50]

¶13 Several normative narratives have been advanced to support the acknowledgement of literary property as a natural right of the author. John Locke's labor theory has often been cited as support for the normative proposition that authors ought to have property rights in the products of their creative labor.[51] Instrumental within this line of thinking is Locke's notion that individuals have property rights in and ownership of their person, and hence the labor of one's body and the work of one's hand—when mixed with commonly available resources from nature—should produce a thing that may be appropriated out of nature and be protected as a proper subject matter of a property right.[52] Another normative narrative supporting the author's property right in a work is Wilhelm Hegel's writings about property as an important attribute of freedom and thus necessary for the development of the author as a social being, whose dignity and value as an individual thrive on the ability to control resources from one's external environment.[53] Hegel's

Incentives, 48 U. LOUISVILLE L. REV. 817, 819 (2010) (describing legal scholars' reliance on the incentive theory as the primary motivation for creativity); Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 CORNELL J.L. & PUB. POL'Y 541, 544 (1999) ("Given the Framers' predilection for open inquiry and the high value they placed on innovation in ideas and technology, it makes sense that the Framers' focus in enacting the Copyright Clause was encouraging maximum production and dissemination of new works.").

[49] *See* BERNSTEIN, *supra* note 7, at 18–21 (describing how the commercialization of music printing in sixteenth century Venice led music composers and publishers to seek printing privileges (an early form of copyright) to commercialize their work and distribute it to the public); *see also* WOODMANSEE, *supra* note 10, at 52–53 (describing how legal recognition of proprietary ownership of authors and publishers in the work through legislation facilitated its distribution).

[50] Scholars have noted this important distinction between ownership of the manuscript and ownership of a right to print and sell the manuscript. *See, e.g.*, L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 29 (1987) ("The author, as creator of the new work, clearly had the right to 'judge when to publish, or whether he will ever publish,' and nothing in the statute inhibited this right. The bookseller, however, could own the copyright only by reason of assignment. Ownership by reason of creation and ownership by way of assignment, of course, are subtantially [sic] different. Natural-law arguments support the former, but not the latter.").

[51] *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 297 (1988); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1539; Weinreb, *supra* note 43, at 1222–23; Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523 (1990).

[52] LOCKE, *supra* note 46, at 20.

[53] *See* Hughes, *supra* note 51, at 330; Christian G. Stallberg, *Towards a New Paradigm in Justifying Copyright: An Universalistic–Transcendental Approach*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 333, 348 (2008); David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 389 (2010). For a more general application of this idea to property law, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

personality theory,[54] to a very large extent, forms the foundation for the protection of certain inalienable moral rights owned only by the creator of a work in author's rights-centric jurisdictions, such as France and Germany. These rights, such as the rights of attribution, integrity, disclosure, and withdrawal, protect the creator's individuality or personality which, subsumed by the work, should not be separated from the author as a person and sold to another. In these jurisdictions, economic rights are completely alienable from the creator of the work while moral or "personality-based" rights[55] (rights that protect the personality and integrity of the author) remain attached to the creator and can never be sold.[56] Apart from certain provisions in the Visual Artists Rights Act[57] and specific state legislation,[58] moral rights are not generally recognized in the United States.[59] Of course, Hegel, who wrote at the tail end of the German idealist period, was also influenced by the work of Immanuel Kant[60] and Kant's theory of property as an acquired right to something held in common, over which one asserts a free will to possess.[61] Intellectual property scholars have also relied on Kant to find support for an author's property right in the work.[62]

¶14 Whether one relies on the works of Locke, Kant, or Hegel, one will arrive at the same conclusion that there are natural rights that belong to the author and exist even if they are not explicitly recognized by a legal system and made into a legal right. One may agree that there is a natural right to life and that it is morally and ethically wrong to take the life of another, even without laws making it a crime to commit murder.[63] Likewise, in the same way that one may agree that, even in the absence of First Amendment guarantees, it is morally and ethically wrong to impose undue restraints on another person's ability to speak freely because one recognizes an individual's inherent right to free speech, one may also agree that an individual in society has the right to own that

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[54] GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 45 (T.M. Knox trans., Oxford University Press 1952) (1821) ("The principle that a thing belongs to the person who happens to be the first in time to take it into his possession is immediately self-explanatory and superfluous, because a second person cannot take into his possession what is already the property of another. Since property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite.") (endnote omitted).

[55] Troutt, *supra* note 53, at 347.

[56] For a comparison between both moral-rights based jurisdictions such as Germany and France and economic-rights based jurisdictions such as the United States, see Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993).

[57] *See* 17 U.S.C. § 106A (2006).

[58] California Art Preservation Act of 1980, CAL. CIV. CODE § 987; New York Artists' Authorship Act of 1984, N.Y. ARTS & CULT. AFF. LAW § 14.03.

[59] Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407 (2009).

[60] BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 730 (2007).

[61] IMMANUEL KANT, THE METAPHYSICS OF MORALS 49 (Mary Gregor ed. & trans., Cambridge University Press 1996) (1797) ("[*A*] *right to a thing* is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others.") (footnote omitted).

[62] ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 78–81 (2011); Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. REV. 1, 8 (1997); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1062 (2008).

[63] However, criminal laws often reflect the standards of morality. Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 208 (1994) ("[T]he doctrines that comprise the 'special part' of the criminal law appear to track quite closely morality's absolute prohibitions: we are, for example, enjoined by both the criminal law and morality not to kill, rape, maim, torture, abuse, or frighten other persons.").

which he produced—whether produced through manual or intellectual labor.[64] In some sense, a thing produced from intellectual labor may be more "connected" to the personality or individuality of its creator than something created through manual labor. The resulting product would be more deserving of a natural property right, allowing its owner to control how society uses the product. Such a right should exist even if there are no laws specifically protecting or recognizing that right.

¶15 There is a difference between a natural right and a legal right; one must take care to distinguish between these two. A right created by law (a legal right) is a different type of right than a basic, fundamental, or intrinsic right (a natural right). Sometimes legal rights affirm natural rights, but not always. Laws prohibiting the willful taking of another's life, for example, affirm the individual's natural human right to life. On the other hand, laws facilitating genocide—while still laws[65]—do not. Whether the laws are proper in the first place is beyond the scope of this Article.[66] For this Article's purposes, it suffices to note that the laws of a legal system can support, deny, or simply ignore man's natural expectation of a fundamental way of living, regardless of whether one accepts the basic premise that an individual possesses certain natural and imprescriptible rights. The copyright system—a legal institution charged with the sole purpose of promoting progress in society[67]—is no exception. Just because an author's natural expectation of literary property is not explicitly acknowledged by the copyright system does not mean that it does not exist.

¶16 In English and American copyright systems, this expectation of a natural literary property right appears to have been quashed by judicial application of early copyright statutes. The earliest statutory codifications of copyright as an exclusive right to print, publish, and distribute literary works in the United Kingdom and in the United States occurred in the 1700s with the Statute of Anne and the 1790 Copyright Act, respectively. Following the enactment of both statutes, the highest courts in each legal system declared

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[64] Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1402 (2010).

[65] For accounts of the Nuremberg Laws, see, for example, MARION A. KAPLAN, BETWEEN DIGNITY AND DESPAIR: JEWISH LIFE IN NAZI GERMANY (1998); LENI YAHIL, THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY, 1932–1945, at 67–73 (Ina Friedman & Haya Galai trans., 1990).

[66] This question about the moral content of laws strikes at the heart of legal theory and the study of what law really is. Legal positivism postulates that laws do not necessarily have to abide by particular moral standards for them to be considered proper and valid "laws." The idea that men possess certain natural and imprescriptible rights is nothing more than "rhetorical nonsense" and "nonsense upon stilts" to a legal positivist. *See* JEREMY BENTHAM, *Nonsense Upon Stilts, or Pandora's Box Opened, or the French Declaration of Rights Prefixed to the Constitution of 1791 Laid Open and Exposed—With a Comparative Sketch of What Has Been Done on the Same Subject in the Constitution of 1795, and a Sample of Citizen Sieyès*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM, RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 317, 330 (Philip Schofield et al. eds., 2002). Natural lawyers, on the other hand, see laws as necessarily embodying a specific moral content. Laws that ignore or reject moral precepts of justice, fairness, or righteousness should not be considered laws in the true sense—even if passed by the legislature or declared by the courts of a legitimate legal system. The maxim *lex injusta non est lex* ("an unjust law is not a law") defines a natural lawyer's position on this issue. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 364 (2d ed. 2011). A contemporary debate on this point is seen in Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[67] Feist Publications, Inc. v. Rural Telephone Company, Inc., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts'").

that these statutes were the only sources of rights to literary works and explicitly denied the existence of the author's natural literary property right.[68] Following the House of Lords's decision, the United States Supreme Court announced in 1834 that Congress creates all rights to literary works in the United States—none exist at common law, save for a very specific and limited right to first publication for works that were not yet published.[69] While these cases have been cited as settling the question of literary property,[70] the specific factual scenarios from which these cases emerged raise uncertainty as to the exact judicial determination about the nature of an author's rights in creative works. *Donaldson v. Beckett* involved a dispute between two booksellers over the exclusive right to reprint James Thomson's classic, *The Seasons*—a dispute that did not involve the author.[71] The respondent, Thomas Beckett, on behalf of various London booksellers and printers, claimed the exclusive right to print and make copies of the book was a perpetual entitlement, which the publisher procured through the author's assignment of copyright.[72] The common law right at issue in this case was the specific right to print and publish the work, which Thomson assigned to his publisher. The notion of literary property, when used by booksellers and printers in this case, referred to the rights to print, publish, and sell—the same specific rights protected under the Statute of Anne. The question of literary property in *Donaldson v. Beckett* did not seek to determine the character of an author's natural expectation to have control over his identity as expressed in the work. The questions posed were simply not structured to answer what rights an author has over that which he creates. For example, the first legal question asked "[w]hether, at common law, an author of any book or literary composition had the *sole right of first printing and publishing the same for sale*, and might bring an action against any person who printed, published, and sold the same without his consent."[73] Subsequent questions posed to the House were also not structured to answer the question about the author's rights.[74] Instead, the notion of authors' natural rights was

[68] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.) (Gr. Brit.); *see also* U.S. Copyright Act 1790, 1 Stat. 124 (1790); Statute of Anne, 1710, 8 Anne, c.19.

[69] *Wheaton*, 33 U.S. (8 Pet.) at 661.

[70] *See, e.g.*, Oren Bracha, *The Statue of Anne: An American Mythology*, 47 HOUS. L. REV. 877, 889, 900 (2010) ("[T]he debate [on literary property] was formally concluded with the decision of the House of Lords in *Donaldson v. Becket* . . . . While *Wheaton v. Peters* had some aspects that were peculiar to the United States, the main question of copyright as a common law property right was identical to that litigated in the British literary property debate, and most of the opposing sides' arguments on this issue were duplication of that debate. When a majority of the Supreme Court ruled against common law copyright, hope of achieving recognition of absolute property rights through this channel dwindled.") (footnotes omitted); Michael J. Madison, *Beyond Invention: Patent as Knowledge Law*, 15 LEWIS & CLARK L. REV. 71, 86–87 (2011) ("*Wheaton v. Peters* was the first major opinion of the Court to deal with copyright, and as copyright scholars know well, the Court concluded that the federal copyright statute, with its limited term and scope of rights, extinguished the concept of literary property with respect to works that fell within its scope. This brought American law into line with its English cousin [*Donaldson v. Beckett*]."); Marybeth Peters, *Constitutional Challenges to Copyright Law*, 30 COLUM. J.L. & ARTS 509, 512 (2007) (stating that "[t]he controversy over what was meant by 'secure' in the Copyright Clause was settled in *Wheaton*, and I don't believe anybody proposes to fight that battle again" on the Court's decision that Congress was legislating a new right instead of acknowledging an existing right in common law with the passing of the 1790 Copyright Act).

[71] *Donaldson*, 1 Eng. Rep. 837, 838.

[72] *Id.*

[73] *Id.* at 846 (emphasis added).

[74] For the five questions that the House of Lords was asked to answer, see *id.* at 846–47.

introduced in the case to support the economic rights to print and publish creative works.[75] The House rejected this notion in order to prevent booksellers' monopolistic control of the publishing industry.[76] The House never drew a distinction between authors' natural rights and publishers' economic interests (that is, between literary property and statutory privileges)[77] and the case should not be read as suggesting that the only rights authors have in a work are explicitly provided by statute.[78] Similarly, *Wheaton v. Peters* addressed specific facts that left the question of literary property largely unanswered. The disputants in this case were Supreme Court reporters who asked the Court to determine whether common law property rights protected the publication and sale of previously reported decisions.[79] The Supreme Court decided this case in its formative years, when Justices sought the widest dissemination of the law.[80] Deciding in favor of a common law property right for a court reporter would have restricted free speech and press in a newly formed country dedicated to the promotion of ideas and debate for progress.[81] At that specific point in American history, the Court had no choice but to decide that a perpetual property right in court reports would expire as soon as they were published and that statutory copyright would protect the exclusive right to publish and vend such reports after publication. Given the dispute over the exclusive rights of publication and sale, the fact pattern in *Wheaton v. Peters*, as in *Donaldson v. Beckett*, did

[75] The questions were structured to deal with the specific claim that *booksellers* had an exclusive right to print and publish books purchased from individual authors in perpetuity. Edward Thurlow, the Attorney General, in his opening remarks for Donaldson observed:

> The booksellers . . . had not, till lately, ever concerned themselves about authors, but had generally confined the substance of their prayers to the legislature, to the security of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of exclusively multiplying copies, had not they found it necessary to give a colourable face to their monopoly.

17 PARL. HIST. ENG., H.L. (1774) 953, 954 (Gr. Brit.).

[76] Professor Patterson states this "was the only decision which would destroy the monopoly of the booksellers, and there is little question that the decision was directly aimed at that monopoly." PATTERSON, *supra* note 1, at 177–78. Patterson then cites Lord Camden's statement that "[a]ll our learning will be looked [sic] up in the hands of the Tonsons and [sic] Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are." *Id.* at 178 (quoting 17 PARL. HIST. ENG. at 1000).

[77] Patterson, *supra* note 50, at 18 ("[I]t is important to remember what copyright entailed and did not entail at that time. At the time copyright owners had the exclusive right to publish works as those works were written, but only for a limited period of time—fourteen years with a possible renewal term of an additional fourteen years. Copyright owners did not have the exclusive right to prepare derivative works, such as abridgements, translations, or digests. The distinction between the use of the copyright and the use of the work, therefore, was fundamental.").

[78] PATTERSON, *supra* note 1, at 174 ("The actual holding of the *Donaldson* case is that the author's common-law right to the sole printing, publishing, and vending of his works, a right which he could assign in perpetuity, is taken away and supplanted by the Statute of Anne. The case did not hold that the author's rights at common law consisted *only* of the right of printing, publishing, and vending his works . . . .").

[79] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 593–94 (1834).

[80] *See* Craig Joyce, *"A Curious Chapter in the History of Judicature":* Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325 (2005).

[81] *Id.* at 384–85 ("In a case that saddened and pained the Justices themselves even as they rendered a decision indispensable to the progress of a national jurisprudence, the Court assured that henceforth American law should be owned by no one—and thus owned by all, for the benefit of all. In retrospect, in a nation dedicated to free speech, free press, and the widest possible dissemination and debate of facts and ideas, the outcome could not have been otherwise.").

not give the Court the opportunity to consider the broader natural rights of an author beyond his statutory rights to publish and sell his work.[82]

¶17 Whether one chooses to believe that judges create binding law or merely declare existing law as cases come before them,[83] one jurisprudential point remains to be made for the purposes of this Article. The author's literary property right in the work does not cease to exist simply because copyright statute or judicial decisions do not explicitly acknowledge that right exists by law—a natural right exists even without legal affirmation. An author's literary right at common law would be evidenced through customary practices, as with the publication contracts discussed, and through natural expectations that evolve from the interactions of authors with their publishers and the public. The author's expectation of a literary property right cannot be nullified by a more limited recognition of a specific right to publish and sell the work. Statutes, which are enacted for specific policy purposes, and case law, which is peculiar to distinctive factual patterns, cannot possibly represent the full spectrum of rights that may arise from an individual's creation of a literary or artistic work. The enactment of a law by Congress that denies the humanity of men may be law, but that would not change the natural fact that men are human beings by nature. In the same way, a literary property right, if it exists as a natural right, does not have to be expressly validated by positive copyright law for it to be a legitimate expectation or interest. The express recognition of particular statutory privileges to publish and sell a work exclusively should not be taken to suggest that these privileges constitute all of the rights that authors have in their work. Nor should it be assumed that literary property and statutory copyright are mutually exclusive principles protecting separate interests of an author at different times along a seamless continuum of events that begins at the initial conception of a creative idea and that ends with the dissemination of the expression to the public. It is important to see how the distinction between an author's natural interest in how the work is used and economic

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[82] *See* PATTERSON & LINDBERG, *supra* note 4, at 64 ("[*Wheaton*'s] 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 . . . .").

[83] Whether judges create or merely declare the law is a contentious issue in jurisprudence. John Chipman Gray, for example, is well known for his belief that judges create, rather than discover, the law. *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 96 (1909) ("[T]he absurdity of the view of Law preëxistent to its declaration is obvious."); *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 321 (Kermit L. Hall et al. eds., 2d ed. 2005) ("Sometimes judges make federal common law to govern specific issues, as when they fill a gap in a federal statutory scheme."). Other scholars are inclined to believe that judges merely declare existing laws or norms that are discoverable or act in the capacity of a rule-making agency of the state. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 150 (Anders Wedberg trans., Lawbook Exchange 2009) (1945) (arguing that courts always apply pre-existing law, stating that the view "that there is no law existing before the judicial decision and that all law is created by the courts" is false); *see also* H.L.A. HART, THE CONCEPT OF LAW 132 (1961) ("In a system where *stare decisis* [the doctrine of precedent] is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body."). For a natural-rights oriented perspective on this issue, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 87 (1977) ("[J]udicial decisions enforce existing political rights," which "depend[] upon both the practice and justice of [a civil society's] political institutions."). This issue on the role of courts, however, bears very little impact on the discussion in this Article, which aims to demonstrate the existence of a broader literary right besides the rights recognized by copyright statutes and case law. Whether statute and precedent are morally right or not, and whether they accurately represent law and norms, is beyond the scope of this Article. It suffices to assume that a literary property right is a natural right that may or may not be affirmed by the legislature or judiciary.

interests, naturally arising from the work's publication and public dissemination, is blurred when courts state that literary property only protects a right to first publication before a work is published and that statutory copyright protects the author's exclusive rights to print and sell the work post-publication.[84] Literary property would be an interest that authors continue to have even after a publisher commits to publishing and disseminating their work. Accepting that there could possibly be a natural right that protects an author's literary property will result in significant changes to copyright jurisprudence because this will, as Professor Lyman Ray Patterson believes, clarify the inconsistency in ideas and values, which plague copyright law.[85]

C. Protecting Authors' Identity and Creative Rights

¶18 The acceptance of the author's natural literary property right raises a new set of normative questions that must be answered: (1) what would literary property rights protect?; (2) would such rights be alienable in the same way as statutory copyright?; and (3) how would natural rights, if not explicitly recognized by the copyright system, be statutorily protected? These questions should be answered carefully if the protection of an author's literary property at common law is to reconcile some of the inconsistencies among institutional values (such as whether copyright should protect the author or promote learning) that Professor Patterson identified in the copyright system.[86] Furthermore, the disparity in expressive power among authors, publishers, and consumers of creative works, which could fundamentally affect society's ability to learn, conduct research, and communicate, potentially hampering the progress of science and useful arts in the long run,[87] may be narrowed by solutions to these normative questions. Also, copyright pessimists in England and the United States, who see authors' rights as an extension of the copyright monopoly in a creative work, might resist the proposition to create a literary property right for authors.[88] Commentators, such as then-Professor (now

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[84] *See, e.g.*, Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909) ("At common-law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost. At common-law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."); Tribune Co. of Chi. v. Associated Press, 116 F. 126, 127 (C.C.N.D. Ill. 1900) ("Literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner . . . . With voluntary publication the exclusive right is determined at common law, and the statutory copyright is the sole dependence of the author or owner for a monopoly in the future publication.").

[85] PATTERSON, *supra* note 1, at 220 ("There is little doubt that a recognition of authors' creative rights could reshape American copyright law, not by changing fundamental ideas, but by bringing those ideas into proper recognition and perspective, and doing so consistently with the copyright statute.").

[86] *Id.* at 181 (the four basic ideas that Patterson identified as underlying early American copyright law are: (1) to protect the author's rights; (2) to promote learning; (3) to provide order in the book trade as a government grant; and (4) to prevent harmful monopolies).

[87] *See, e.g.*, John M. Kernochan, *Practical Limitations on Authors' Rights*, 24 COLUM.-VLA J.L. & ARTS 263, 267–68 (2001); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1 (2010); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319 (2003).

[88] Borrowing a term coined by Paul Goldstein to describe a position taken regarding the fundamental purpose of copyright laws. *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 11 (rev. ed. 2003) ("[C]opyright pessimists . . . see copyright's cup as half empty: they accept that copyright owners should get some measure of control over copies as an incentive to

Justice) Breyer, have expressed doubt regarding the necessity of copyright incentives to encourage the production of artistic works.[89] These commentators may challenge the claim that literary property rights must be recognized to protect the author's natural noneconomic interest in the work. Possible objections to the notion of authors' literary property rights as proposed here can be broadly characterized into three distinct camps: (1) that literary property will support greater expansion of exclusive rights over creative works; (2) that the protection of the author's natural rights will affirm the unrealistic notion of the romantic author; and (3) that the subject matter of literary property (information) should be available for public use. However, this Article argues that these objections are unsustainable if one gives careful thought to the scope of literary property's protection and what its recognition will accomplish in the copyright system.

1. Objections to Protecting Author's Literary Property Rights

¶19 The first objection to a notion of literary property is based on the idea that some may use the recognition of this right to justify the expansion of copyright. English booksellers historically argued to expand economic rights to the exclusive use of the work based on moral and ethical arguments in favor of authors' rights. Similarly, the normative argument for literary property was, and continues to be, utilized by corporations and entities other than the author to justify the expansion and perpetuation of an economic monopoly to profit from the publication and sale of the work to the public.[90] More recently, some have used such normative arguments to endorse Congress's extension of the copyright term for an additional twenty years[91] to benefit not just individual authors, but media publishers and corporate copyright owners as well. The objection to the notion of literary property on this basis may be allayed by clarifying that the rights of the individual author, rooted in natural law, are fundamentally distinct from the statutory grant that legislatures provide to facilitate the dissemination of creative works to the public by protecting economic investments.[92] There should be no

produce creative works, but they would like copyright to extend only as far as is necessary to give this incentive, and treat anything more as an encroachment on the general freedom of everyone to write and say what they please.").

[89] Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970) ("It would be possible, for instance, to do without copyright, relying upon authors, publishers, and buyers to work out arrangements among themselves that would provide books' creators with enough money to produce them. Authors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection.").

[90] John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 15 (2011); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 705 (1992); *see also* Patterson, *supra* note 50, at 52 ("[T]he notion of copyright as property serves as the basis for the continued expansion of copyright to the benefit of the entrepreneur.").

[91] *See* Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 224 (discussing arguments put forth to support the Copyright Term Extension Act); Jane C. Ginsburg et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 694 (2000) ("If you provide the proper incentives today, it will not enhance my productivity in the past, but it may promote my productivity in the future. In other words, I may stay and continue to write or do my scholarly thing today because, yesterday, Congress enacted a statute that enhances my reward.").

[92] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37–41 (2003).

intellectual or logical bridge between an author's natural right to the protection of his individuality in a society and the economic rights that the state grants to encourage creative production. Once it becomes clear that the author's natural rights and copyright have distinctly separate legal definitions, it is likely that the fear of perpetual extension of copyright (as the exclusive rights to print and disseminate creative works instead of the right to control use of content) will subside due to the awareness of copyright's inability to control public uses of a work's content. Such control over the use of a work's content would only belong to the author.

¶20 The second potential objection to protecting the author's literary property stems from commentators, who have rejected the commonly accepted version of the solitary author from the Romantic period as an unrealistic representation of how authors and creator produce creative works in reality. These conceptions envisioned the author producing works from thin air or through divine inspiration and epitomizes the greatness and splendor of pure human creativity. Northrop Frye described this individual creator as being "interested in himself, not necessarily out of egotism, but because the basis of his poetic skill is individual, and hence genetic and psychological,"[93] which provides an excellent premise for the recognition of literary property. Sheer creative genius, as the thinking goes, should be rewarded and encouraged through the Copyright Act's grant of exclusive rights. The grant is temporary so that once these rights expire, the products of such creative genius becomes accessible to the general public.[94]

¶21 The problem with this line of thinking is that its faith in the genius creator, who produces a unique and highly original work and is thus entitled to certain rights, runs contrary to expressed skepticism about the author being personally and solely responsible for his creative expression. Michel Foucault, for example, famously described the individual author as a culturally concocted "fiction" to provide discourses with particular social statuses or modes of existing in society. The author is not someone who creates from an inspired source of intelligence and freely shares his creation with the world, but rather one who appropriates and controls the proliferation of discourses in society through the claim of authorship.[95] Similarly, Roland Barthes, who famously proclaimed the death of the author, suggests that a reader should interpret a text independently of the author's background and experience. To Barthes, placing emphasis on the author to

[93] NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 60 (1957).

[94] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that temporary rights of copyright law are "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("[R]eward to the author or artist serves to induce release to the public of the products of his creative genius."); Fox Film Corp. v. Doyal, 286 U.S. 123, 127–28 (1932) ("A copyright . . . is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.'") (quoting Kendall v. Winsor, 62 U.S. (21 How.) 322, 328 (1858)).

[95] Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 159 (Josué V. Harari ed., 1979) ("We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely. The truth is quite the contrary: the author is not an indefinite source of significations which fill a work; the author does not precede the works, he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction.").

understand a text is misplaced; instead, Barthes felt that textual interpretation should focus on the readers as the recipients and interpreters of the work.[96] Legal scholars have proposed theories similar to those of Foucault and Barthes, contending that the author is a socially constructed metaphor to serve a particular cultural purpose, which is to support the commodification of literature in the eighteenth century[97] and establish the author's proprietary ownership over original expressions.[98] In turn, the fulfillment of these cultural goals, supports the expansion of copyright to include most intellectual creation, and the enforcement of proprietary rights prevents social uses of the work for education, development, and progression in society.[99] Yet, contrary to the fear that property rights will stifle innovation, this Article argues that literary property rights will promote societal progress through the encouragement of authentic expressions that will have a more positive and constructive impact on how society develops.

¶22 Creative works that do not necessarily promote progress and diversity in expression might have a detrimental effect on society. In reality, authors promote progress in society by expressing themselves in an authentic manner. Why would critics use the fact that all creators borrow from their predecessors and surroundings in the act of creation to debunk the myth of the Romantic author and then decry the expansion of copyright? The notion of the Romantic author might, as suggested by Professor Lionel Bently, introduce reasonable limitations to copyright expansion.[100] The notion that authorship emanates

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[96] ROLAND BARTHES, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 148 (Stephen Heath trans., 1977) ("[A] text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination.").

[97] WOODMANSEE, *supra* note 10, at 37. Professor Woodmansee explains that eighteenth-century theorists stopped thinking of the author as a craftsman inspired by God in order to establish a commercial market in literary works:

> They minimized the element of craftsmanship (in some instances they simply discarded it) in favor of the element of inspiration, and they internalized the source of that inspiration. That is, the inspiration for a work came to be regarded as emanating not from outside or above, but from within the writer himself. 'Inspiration' came to be explicated in terms of *original genius*, with the consequences that the inspired work was made peculiarly and distinctively the product—and the property—of the writer.

Id.

[98] JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 54 (1996) ("Originality became the watchword of artistry and the warrant for property rights."); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 472 ("The 'authorship' concept, with its roots in notions of individual self-proprietorship, provided the rationale for thinking of literary productions as personal property with various associated attributes including alienability.").

[99] Carys J. Craig, *Reconstructing the Author-self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 228, 230 (2007) ("The authorship myth that animates copyright discourse supports calls for wide protection and generates complacency around the expanding domain of intellectual property and the corporate ownership that dominates the intellectual realm. . . . The problem highlighted here is the power of the individual authorship trope to occlude discussion of the social, educational, or cultural value of downstream or derivative uses of protected works. Because copyright's concept of the work resides in independent, original production, the work of a second-generation producer cannot compete equally as a 'work' of social value that merits protection; the social importance or the cultural value of the second text barely comes within the cognizance of the law.") (footnotes omitted).

[100] *See* Lionel Bently, R. v The Author*: From Death Penalty to Community Service*, 32 COLUM. J.L. &

from a human author and not a corporate persona would set limits to the type of work that may be protected, the level or threshold of protection, the breadth of rights granted, the length of protection, and the distribution and enforcement of rights.[101] The notion of authorship will also provide new direction for copyright reform.[102] Moreover, the connection of an author with his work through the notion of literary property would make the author directly responsible for his creation and its impact on society. Deconstructing the notion of romantic authorship to point out flaws in the legal system and suggest that most authors create by reusing works that have already been created ignores the importance of original and authentic expressions and produces a social expectation that creative works should be alike. When authors are not expected to be original, they would more likely than not produce the same types of works that have little influence on society and the progress of science and useful arts. Making authors identify with their creations through a Romantic vision of authorship and the notion of literary property will likely result in the production of authentic expressions that will positively impact society's progression.[103]

¶23 The third possible objection to the notion of literary property is that information—the subject matter of its protection—should be a resource that is held commonly by society and not subjected to private property. From an economic viewpoint, property rights counter the overuse that usually follows when a limited resource is commonly held. The "tragedy of the commons,"[104] where everyone consumes a resource without caring for it or investing in it until it is depleted completely, may best be avoided by the allocation of private property rights, which defines ownership and draws boundaries around the resource to limit its overuse through a clear right to exclude. However, some scholars point out that there are merits to having particular resources held in common[105] and identify the under-exploitation of a resource as a serious problem when too many

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ARTS 1 (2008).

[101] *See id.* at 92–103.

[102] *Id.* at 103.

[103] *See, e.g.*, Netanel, *supra* note 56, at 429. Professor Netanel suggests that an author not only has rights but responsibilities towards society:

> Truly, the author has a duty to the community, as well as to herself, to use language in a manner that reflects her own ideas and sensitivities. This requires that the author speak with personal integrity, and with a measure of respect and awe for the significance and power of her enterprise. She must recognize that each exercise of her artistic discretion embodies a moral decision that obliges her to produce her best work in her own unique way. At a minimum, the author is obliged to take responsibility for her work. She should not abdicate to another the right to determine whether and in what form her work is communicated to the public. She has a certain duty to maintain her autonomy and authenticity of expression in the face of opposing political, social or market pressures.

Id. (footnote omitted).

[104] The classic explanation of the tragedy of the commons is the overexploitation and consumption of a common resource that ultimately leads to its depletion. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[105] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) (property rights sometimes vests with the general public instead of a private individual where it facilitates socialization among members of a society; here there is no tragedy of the commons as there is benefit to having resources publicly owned as society as a whole benefits from the sharing of that particular resource).

property rights protect a given resource.[106] In certain cases, a resource that serves a particular social function may be considered inherently public property. Speech is a prime candidate for protection as public property, given its role in helping communities and society govern themselves.[107] Against this background, intellectual property scholars have emphasized the need for an "intellectual commons" that is free from the restraints of private property ownership to allow society to use information and creative resources freely.[108]

¶24 The argument for recognizing literary property as a natural right protected by law might also generate disapproval from critics of copyright expansionism. These critics argue that the increase of property rights in resources that should be public property would limit the public domain, which contains information, ideas, and knowledge not subject to intellectual property protection that are freely available for creative reuse.[109] The importance of freedom of information in intellectual creation has inspired a few intellectual property scholars to work on constructing a "cultural commons" to manage informational resources and support the pooling and sharing of these resources.[110] Protecting the author's literary property could be seen as potentially supporting the expansion of proprietary rights in informational resources that should rightfully be available to society as part of the cultural commons.

¶25 Despite critic's fear of expansionism, literary property would not limit the use of creative expression, as feared by critics of copyright expansionism. First, the expansion of copyright is unlikely to affect the use of creative works if rights are exercised in a reasonable and moderate fashion. An author, for example, should enforce literary property rights only if a use of his work undermines his integrity or personality—who he

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[106] *Id.* at 749–50 (identifying holdouts and monopolies as primary problems with privatization). For the leading legal work on the anticommons, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998) ("When there are too many owners holding rights of exclusion, the resource is prone to underuse—*a tragedy of the anticommons*. Legal and economic scholars have mostly overlooked this tragedy, but it can appear whenever governments create new property rights.") (footnote omitted).

[107] Rose, *supra* note 105, at 778.

[108] Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 500–01 (2003) (applying anticommons analysis to use of Internet space); *see also* Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155, 1193–94 (1998) (applying anticommons analysis to intellectual property); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998) (discussing how privatization of biomedical research and patenting of research results could lead to overlapping patent claims that restrict access to biomedical information).

[109] Scholars have called for the resistance against the second enclosure movement into the public domain. *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (describing how information is becoming subject to private control); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37 (2003) ("We are in the middle of a second enclosure movement. It sounds grandiloquent to call it 'the enclosure of the intangible commons of the mind,' but in a very real sense that is just what it is. True, the new state-created property rights may be 'intellectual' rather than 'real,' but once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights.") (footnote omitted); Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783 (2002); *see also* LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP (2010) (stating that history and convention demands easy access to common knowledge and information).

[110] Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010); *see also* Lawrence B. Solum, *Questioning Cultural Commons*, 95 CORNELL L. REV. 817 (2010) (commenting on the idea of a "cultural commons").

is as a creator—and contradicts his intention for producing and distributing the work to society. Second, the placement of checks and balances, such as subjecting the exercise of rights to a reasonable standard and insisting that rights cannot be used to harm legitimate public interests in the use of the work, into the law as it expands may be sufficient to address the problems associated with property expansion. Literary property should not be considered a threat to the prerequisite freedom some scholars see as essential to second-generation creativity. Literary property connects an author with his work on a visceral level because it protects the author's individuality and personality rather than a share of the copyright market. A property right in the work that gives an author autonomous control over his individual expression should encourage authors to create their best work, in a responsible way for society's benefit and to instill the desire in creators of new works to use a predecessor's work responsibly without infringing on literary property rights. Similarly, adopting a literary property right would not enclose the commons; rather it would encourage the production of works that are more authentic, which will ultimately increase cultural and informational resources in the public domain.

2. The Subject-Matter of Literary Property

¶26 A literary property right as proposed in this Article would not protect an author's commercial interest, although it may well support its existence.[111] The right to commercially exploit a work has been capably addressed by copyright legislation, in that the creator of a work is the first owner of copyright. Conversely, literary property protects the author's identity and personality as expressed and contained in a published work.[112] Thus, the subject matter of literary property would be the author's creative interest as held by the work. Hence, Milton's contractual obligation to refrain from interfering with the publication of his work was an agreement to not enforce a literary property right. If the right protects the author's personality and creative identity, rather than the economic aspects of literary and artistic production, there will be very little room for authors to abuse such a right and foreclose reasonable societal uses of the work. Yet, at the same time, protecting the author's integrity and autonomy frees the author from worrying about abuse of the work and allows for greater authenticity in expression.

¶27 The motivation for human creativity should not be reduced to economic or monetary values. As scholars have pointed out, authors, unlike publishers, may be driven and inspired by non-monetary considerations.[113] There is a dire need to harness these

[111] A more specific right to use property, such as a right to commercially exploit, should be based on a broader entitlement in the property. PATTERSON, *supra* note 1, at 10 ("The stationer's copyright can be analogized to a perpetual lease of personal property, a manuscript or copy . . . for one specific purpose, that of publishing. The right of publishing, however, did not vest the ownership of a work itself in the ordinary sense, for this would have given the holder of the right of publishing other rights incident to ownership."); *see also id.* at 218 ("The creative interest is a natural right of the author . . . . While that natural right was deemed to be the economic interest of the author, it was not so limited.").

[112] Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1884 (1990).

[113] ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (2010); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (describing creative inspiration as culturally inspired); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) (identifying spiritual and inspirational motivations for creativity); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*,

noneconomic motivations for creativity and channel them into literary and artistic production. Originality should not be attacked as being unrepresentative of the reality of creative production. Second, third, and fourth generation creators, who build upon and reuse the works of earlier authors, may still be original in their presentation and interpretation of existing works.[114] This Article proposes that the law should not underestimate the power of many individuals expressing themselves in authentic and sincere ways to impact the progress of society in a profoundly positive manner; protecting the author's creative interest is the first step in that direction. The protection of creative interests is particularly important, in part because the Internet and digital technologies cause authors' integrity and autonomy to become more vulnerable. The victimization of one's avatar in the virtual game Second Life,[115] the defacement of artwork distributed online,[116] can damage an author's reputation and leave society with inauthentic works or misleading information.[117] Currently, an author has no real legal recourse to prevent or correct such online violations against his creative identity.[118]

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69 LA. L. REV. 1 (2008) (recognizing that the creation of some works may be motivated by non-monetary incentives and proposing that for such works, fair use be more readily available as a defense against infringement); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (questioning the actual link between commercial incentives and creativity); *see also* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (describing how digital networks encourage creativity that produces non-proprietary work with no real monetary rewards).

[114] One can be entirely original in how one reinterprets existing artwork and literature.

[115] Farnaz Alemi, *An Avatar's Day in Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games*, 11 UCLA J.L. & TECH., Fall 2007 (describing how an avatar—a representation of who one is in an online community—can be victimized by other players without any real legal consequence).

[116] The defacement of artwork may be an act of artistic rebellion against conventional cultural representations. *See* Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 493 (2006) (Professor Katyal describes the vandalism and defacement of public messages as a trend towards "semiotic disobedience," where "today's generation seeks to alter existing intellectual property by interrupting, appropriating, and then replacing the passage of information from creator to consumer. . . . [T]hese recent artistic practices . . . often involve the conscious and deliberate re-creation of property through appropriative and expressive acts that consciously risk violating the law that governs intellectual or tangible property."); Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 80 (2001) (describing defacement of company websites as "a form of political activism against globalism and corporate control of the Internet" and hackers of Internet-posted materials as "reject[ing] societal ideas of intellectual property").

[117] Deliberately altering information and data that an author has shared online will misinform the author's targeted audience, who will expect reliable information. *See* Blodwen Tarter, *Information Liability: New Interpretations for the Electronic Age*, 11 COMPUTER/L.J. 481, 484 (1992) ("Information consumers want reliable data on which to base decisions. . . . With the advent of broad electronic distribution of data, however, has come an attitude change. . . . [T]he myth of machine infallibility seems to create a demand for a higher standard of quality for machine-readable data than for traditionally distributed information."). As more and more information and data become accessible through the Internet, there is a greater responsibility for authors of information and knowledge to make sure that data distributed online is reliable and accurate. *See* J.H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROBS. 315 (2003) (describing the need for accurate, reliable, and accessible data in scientific research).

[118] Some remedies may be available through the online service provider's end user license agreement or terms of service. The adequacy of these remedies to protect an author's creative interest is questionable as these agreements regulate the relationship between service provider and user and are enforced by the service provider. Courts have yet to decide on the enforceability of these agreements in a court of law although courts have decided that shrink-wrap licenses are enforceable. *See* Vernor v. Autodesk, Inc. 621 F.3d 1102 (9th Cir. 2010); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). Courts have also

¶28 Because a literary property right protects an author's creative interest, the right should not be alienable in the same way as statutory copyright rights. Many scholars who believe that authors should have creative and personality rights to the use of their work see these personal rights as inalienable because they protect an author's individuality or personality as expressed in a work.[119] This is not surprising, since the author's literary property right, with its genesis in natural law and the idea of personal autonomy, would fall within a category of rights that scholars and the law have long thought to be inalienable, such as the rights to life, personal liberty, and protection from gratuitous pain, as well as the satisfaction of basic needs, such as water, food, and healthcare.[120] An author's expression personifies his individuality and is so essential to the author flourishing as an autonomous creator capable of making positive contributions to society that all authentic expressions cannot, and should not, be treated as marketable commodities. Because it is impossible to subtract an author's sense of self from authentic and sincere self-expressions, a literary property right protecting such expression should not be alienable[121] even if an author enters into a contract to sell that right.[122] Therefore, the rights that are alienable under the Copyright Act are specific rights to use the work and not the expression contained in the work in the same way that freedom and liberty are not alienable (one cannot sell oneself into slavery), whereas skill and labor are

enforced open-source licenses. *See* Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008).

[119] *See, e.g.*, PATTERSON, *supra* note 1, at 219 ("The author . . . may appropriately be given broader protection than the publisher for the purpose of protecting his creative interest. This interest is unique and appropriate for the author alone, and it should be recognized as a personal right, which is inalienable."); Netanel, *supra* note 56, at 409–30 (arguing that an author's right to autonomy should be inalienable because of power imbalances, the personal connection between creator and work, paternalism, and communitarian principles that are prevalent in the copyright system). The Copyright Act has also made the right to terminate grants of copyright under § 203(a)(5) inalienable. For discussion, see Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 814 (2010) (describing Congress's policy of protecting authors from agreements made from a weaker bargaining position under § 203). The Supreme Court has also affirmed the inalienable termination right of the author as provided by that statutory provision. *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 495 n.3 (2001) (referring to § 203(a)(5) as "inalienable authorial right to revoke a copyright transfer"); Stewart v. Abend, 495 U.S. 207, 230 (1990) ("The 1976 Copyright Act provides a single, fixed term, but provides an inalienable termination right.") (citing 17 U.S.C. §§ 203, 302 (2006)).

[120] *See* Anita L. Allen, *Privacy, Surrogacy, and the* Baby M *Case*, 76 GEO. L.J. 1759, 1788–89 (1988) (citing DIANA T. MEYERS, INALIENABLE RIGHTS: A DEFENSE (1985)).

[121] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905–06 (1987) (suggesting that some personal attributes cannot be separated and sold in the market place). Professor Radin explains:

> Universal commodification undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self. A better view of personhood should understand many kinds of particulars—one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human.

Id.

[122] RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 78–79 (1998) (arguing that one cannot enter into a contract to sell oneself into slavery because the object of the right—freedom—cannot be transferred); *see also* TERRANCE MCCONNELL, INALIENABLE RIGHTS: THE LIMITS OF CONSENT IN MEDICINE AND THE LAW 8–9 (2000) (reviewing cases to establish that the inalienable right not to be killed cannot be contracted away even if the contract was freely entered into).

(one can contract to work and employment). While statutory rights are often assigned by authors to publishers, literary property should always remain with the individual creator. The right is inherently tied to the author's personality, an intrinsic and distinguishing attribute of the author, regardless of whether the work is newly conceived or a reinterpretation of another author's work. Each author's distinctive personal mark in the work should also secure the creative interests of its author. In this light, the "question of literary property" is less a commercial struggle between booksellers, as Mark Rose articulated,[123] and more the separation of authors' identities from publishers' identities that should have been long disconnected.

¶29 More important than whether the author's literary property can be alienated is the question of how such a natural right, when not explicitly recognized by the copyright system, can be used to protect an author's interest. Philosophers who advocate legal positivism resist the legal recognition of a right merely because a social, cultural, or human expectation exists as a natural right. Bentham, for example, rejected and denounced France's *Declaration of the Rights of Man* in 1789, famously saying that "[*r*]*ight*, the substantive *right*, is the child of law: from *real* laws come *real* rights," but only imaginary rights can come from "*imaginary* laws," which he called the "laws of nature."[124] But other philosophers, who were highly regarded positivists, have acknowledged the possible existence of natural rights that can give birth to legal rights. One well-known scholar in U.S. jurisprudence, H.L.A. Hart, believed that moral or natural rights impose morally justifiable limitations on other people's freedom in order to achieve equal distribution of human freedom across a given society.[125] However, the existence and social recognition of natural rights does not necessarily impose an obligation on the state to convert these rights into legal rules, although states may take steps to give natural rights actual legal force. While the recognition of a natural right, such as the literary property of the author, may inspire social support and even government endorsement, such conversion of a natural right into law can be a complicated undertaking. Institutional commitment to enforcing a natural right as a legal right would necessarily follow this conversion. But as Amartya Sen points out, social criticism, open discussion, and cultural change may be effective ways of protecting and enforcing natural rights without legislative action.[126] Sen observes that natural human rights, such as a woman's right to voice her opinion about how her family is raised and cared for, has "far-reaching ethical and political relevance," which may be better addressed "by means of social criticism as well as public debates and agitation."[127]

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[123] ROSE, *supra* note 1, at 4 (quoting FRANCIS HARGRAVE, IN DEFENCE OF LITERARY PROPERTY 7 (2d ed. 1774) (Gr. Brit.)).

[124] JEREMY BENTHAM, *Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution*, *in* 2 THE WORKS OF JEREMY BENTHAM 489, 523 (John Bowring ed., Edinburgh, William Tait 1843); *see also* Amartya Sen, *Rights, Laws and Language*, 31 OXFORD J. LEGAL STUD. 437, 439 (2011) (internal quotation marks omitted) (discussing Bentham's views on natural rights).

[125] H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 178 (1955) ("[I]t is I think a very important feature of a moral right that the possessor of it is conceived as having a moral justification for limiting the freedom of another and that he has this justification not because the action he is entitled to require of another has some moral quality but simply because in the circumstances a certain distribution of human freedom will be maintained if he by his choice is allowed to determine how that other shall act.").

[126] Sen, *supra* note 124, at 441–43 (discussing how natural rights have been more effectively enforced without legal rules and sanctions).

[127] *Id.* at 443.

Similarly, the author's natural right in his expression may be better protected and enforced by international organizations, such as the United Nations Educational, Scientific, and Cultural Organization or non-governmental bodies, research centers, and academic institutions leading a change in social and cultural mindsets. It would, however, still be worthwhile to consider the protection and enforcement of literary property as a legal right that the author alone holds. There are two avenues to give legal force to an author's natural right: (1) Congress could pass specific legislation (or amend the copyright statute); or (2) courts could develop specific case law on authors' rights.

3. Making the Author's Natural Right a Legal Right

¶30 The primary objection to making the author's natural right a legal right is the curtailment of other individual freedoms, such as the freedom to express one's self or assert personal or political viewpoints. Explicitly protecting literary property as a legal right would make it unlawful to destroy an artist's painting or deface a sculpture outside the specific provisions of § 106A of the Copyright Act.[128] But, as Professor Katyal points out, the destruction and vandalism of creative works may also be a "profoundly expressive" form of "semiotic disobedience."[129] If so, some may fear that the right to free expression could be limited to ensure authorial autonomy and security. But even if an author's natural right in his expression provides a moral justification to limit freedom of speech, amending copyright legislation to introduce literary property as a natural right would be practically impossible under current practices. As Professor Jessica Litman points out, the legislative process for copyright law occurs at a negotiation table primarily with industry-dominated players with primarily economic interests.[130] Therefore, one of the greatest challenges to introducing a moral and natural right into copyright legislation, as proposed in this Article, is its introduction in the negotiation process in copyright legislation drafting. Unless there are significant voices pushing for a change in copyright legislation to protect the author's rights during the negotiation process, the resulting legislation will be silent on the natural rights issues that authors may care about.[131] Statutory recognition of a creative right for authors would likely promote progress in the arts by providing authors greater security in how their expressions may be used and would likely advance society and culture by encouraging the production of authentic expressions. However, the fact that such a right may infringe on other freedoms and constitutional guarantees, such as freedom of speech and freedom of the press, may be an impediment to its recognition.

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[128] *See* 17 U.S.C. § 106A (2006).

[129] Katyal, *supra* note 116, at 568–69.

[130] Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) ("Indeed, the statute's legislative history is troubling because it reveals that most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 278 (1989) [hereinafter Litman, *Copyright Legislation and Technological Change*] (describing how the process of drafting copyright statutes through negotiations among industry representatives became entrenched in copyright law-making); *see also* JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

[131] Litman, *Copyright Legislation and Technological Change*, *supra* note 130, at 299 (describing how interests that were absent from the bargaining table were shortchanged in the compromises that emerged throughout the various legislative enactments).

¶31 Perhaps it makes more sense to rely on courts to develop case law on the author's rights. Then, courts could develop case law on the author's creative interest as they arise on a case-by-case basis. The development of the law in this area "will require perceptive analysis and careful distinction," which Professor Patterson believes courts are in the best position to do.[132] Further, Professor Patterson postulates that federal courts would be a better avenue than state courts to develop the author's creative interest, since federal copyright law expressly preempts state copyright law.[133] This Article argues that state courts might not be preempted from developing case law on the author's rights under § 301 of the Copyright Act for two reasons.[134] First, the author's creative right is not a right that is equivalent to the exclusive rights protected by § 106.[135] Arguably, the rights in § 106, including the right to derivative works right under § 106(2), protect economic interests that are vastly different from the author's creative interest, which protects the author's personality and individuality. Second, literary property protects the author's personality represented in the work (such as stylistic preferences and artistic forms), as opposed to the expression in the work itself. An author's creative work is protectable subject matter under §§ 102 and 103. But authorial expressions that take special form, such as a work that an author specifically creates to teach and educate children, will not be protected under these provisions if their ideas are used for a purpose that is completely in opposition to the intention of the author, such as to propagate violence among children. Allowing courts to make normative and prescriptive judgments that would introduce moral and ethical principles that protect authors in the copyright system would require one to assume that judges have an overriding duty to decide cases based on a set of sociopolitical norms that uphold principles of justice and fairness. This is particularly true where legislation has not explicitly integrated these principles. The author of this Article has argued elsewhere that the copyright system may be understood as a loosely formed political contract for social development, which provides identifiable norms that could guide judges confronted with a difficult copyright case.[136] Hypothetically, a judge could decide, according to the moral and ethical convictions of society, that literary and artistic works can be used and produced for the purposes of promoting progress, and come to a decision that reflects these convictions and protects the author's creative interest. If the legal system has an underlying integrity that is built on unitive principles, which represents the legal system's commitment to creating a "genuine [community] rather than a bare community,"[137] it is possible that the courts could have a role in protecting the natural rights of authors while keeping in mind copyright's institutional goal of promoting artistic progress.

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[132] PATTERSON, *supra* note 1, at 220.

[133] *Id.* at 219.

[134] *See* 17 U.S.C. § 301 (2006) (establishing the criteria for federal preemption of state copyright law).

[135] *See id.* § 301(b)(3) (indicating that preemption does not apply to "rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106").

[136] *See* ALINA NG, COPYRIGHT LAW AND THE PROGRESS OF SCIENCE AND THE USEFUL ARTS (2011).

[137] RONALD DWORKIN, LAW'S EMPIRE 214 (1986).

III. COMMON LAW PROPERTY AND STATUTORY COPYRIGHT

¶32 Would copyright law become redundant if the law were to protect literary property as a common law right of the author as suggested in this Article? As discussed in Part II, the suggestion that the author's literary property be protected as a natural right may invite criticism from copyright pessimists, who may consider the protection of literary property as an expansion of rights that would further limit the public's ability to access creative works for use. Additionally, many scholarly works have focused on the apparent conflict between the grant of a property right to encourage creative production and the need for access to creative works to feed the wheel of progress.[138] Much of this literature sees the flaws of a system that needs reform,[139] especially when the Internet and digital technologies have increased the user's ability to interact with the work as a new and legitimate form of free expression.[140] Copyright scholars and practitioners seem to continue to view the copyright system as inadequate in dealing with technological progress that brings advances, not only of science and useful arts, but also of society, culture, and the way political discourse is conducted. When Benjamin Kaplan began his 1966 James S. Carpentier Lecture at Columbia University School of Law, he stated that:

> As a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the "communications revolution" of our time, then to pronounce upon the inadequacies of the present copyright act, and finally to encourage all hands to cooperate in getting a Revision Bill passed.[141]

This quote indicates that Professor Kaplan may have had an unquestioning resignation that the copyright system has failed to promote progress and is thus in dire need of reform.

¶33 Literary property rights could, however, further the institutional goals of the copyright system rather than prevent progress, as some have feared. A literary property right could bridge the gap between the interests of those involved (such as authors, publishers, and society) and the ultimate institutional interest of promoting progress in a legal system that lacks authentic creations that make positive contributions to the trajectory of social progress and cultural development. The rights provided under the Copyright Act serve a particular purpose: to encourage publication and distribution of creative works in a society in need of creative materials. Without these statutory rights, the proper economic investments will not be made to convert an author's expression into literary and artistic works that may then be distributed to society for use in education,

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[138] Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM.-VLA J.L. & ARTS 1, 8–10 (1993) (describing the growing body of legal commentators since 1981 who have become interested in how the expansion of intellectual property rights affect the public domain).

[139] *See, e.g.*, Litman, *supra* note 130; Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565 (1995); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693 (2010).

[140] *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 69 (2008) (describing a method of creation that uses the Internet and digital technologies, which "remixes" portions of works created across multiple media to produce a new work).

[141] KAPLAN, *supra* note 1, at 1.

research, cultural programs, and study. Indeed, very few authors are able to reach the masses without financial support from a publisher. The statutory rights provided by the Copyright Act serve this important publishing and distributive function. Literary property, on the other hand, would serve a completely different function. It would encourage authors to create authentically and share their work with the public without fear that the work will be misused or abused once it is distributed into society. It would also provide legal affirmation of the author's expectation to be able to express himself. Both copyright and literary property encourage publication and distribution of creative works, as well as the creation of authentic expression, ultimately promoting the progress of science and useful arts.

A. Copyright as an Economic Incentive to Publish

¶34 Statutory rights under the copyright system facilitate investment in publishing and disseminating literary and artistic works by providing exclusive rights to the copyright owner. Generally, because creative works are considered to be "public goods," and therefore subject to free-riding, where a copier may produce subsequent copies of a work at marginal cost without paying its actual price,[142] the law provides copyright owners with the exclusive right to reproduce, make derivatives, distribute, and publicly perform and display the work to exclude non-paying members of the public and encourage the initial investment in the work. These exclusive rights protect the positive act of making literary and artistic works available to society to promote the progress of science and useful arts by allowing the copyright owner to recover fixed costs for the first production of a work and subsequent marginal costs of production when the original work is reproduced for reprinting, binding, distribution, and dissemination to the public. Without copyright protection giving its owners exclusive rights, non-paying members of society will benefit from the investments made by the copyright owner and use the work without paying for it, thereby benefitting from what economists call a positive externality—a transaction spillover into society that provides a benefit but which is also not accounted for in the price of the good.[143] Some scholars point out that free-riding on positive externalities, or spillovers, provides long-term benefits toward the legal system's goal of progress to argue that they should not be internalized by the copyright owner.[144] However, this Article argues that these exclusive rights encourage the publication and dissemination of creative works by copyright owners who may otherwise invest their resources in other efforts.

¶35 The protection of statutory rights under the current copyright system maximizes collective social welfare by ensuring scarce resources are allocated in the most economically efficient way. This idea that granting exclusive rights in literary and artistic creations will result in more of their production is intuitive from an economic perspective—authors will not produce if their works may be easily appropriated by the public, especially when the product of their creativity is essentially non-excludable and

[142] Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 164 (2002).

[143] Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 9 (2005).

[144] *See* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258 (2007); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

non-rival,[145] and therefore, subject to use without payment. Harold Demsetz's famous 1967 article, "Toward a Theory of Property Rights," exemplifies the economic approach towards property-like entitlements in literary and artistic works.[146] Demsetz argues that property rights facilitate the internalization of externalities, and often new property rights emerge when the benefits of internalizing externalities outweigh the costs of that internalization. This usually occurs when new technology is developed and new markets open.[147] To Professor Demsetz, a newly formed and growing market—the fur trade—was the impetus that led to the establishment of well-defined private hunting territory among the Montagnes Indians,[148] just as the emerging book market was the source of the establishment of exclusive copyright in literary works during the seventeenth and eighteenth century in England. Garrett Hardin's "The Tragedy of the Commons," published a year later, makes a related point: unless some form of institutional governance sets aside common resources to be privately controlled, men, being economically rational creatures, are likely to take as much out of the commons as possible to maximize their gains and to put in as much waste as possible without having to bear the cost of cleaning the commons, without investing in building it up.[149] As a result of each person acting their own self-interest, limited resources that are available to all will be depleted.[150] As some lawyers see it, the purpose of the institution of private property is to protect the commons from complete depletion through overuse.[151]

¶36 Both Professor Demsetz's and Professor Hardin's articles provide a neoclassical justification that supports the privatization of creative works and the expansion of property-like rights in information and knowledge. The logic is difficult to deny: if creative works are too easily appropriated, authors and publishers will not invest time or money to produce or disseminate creative works to the public when there are no guarantees of a return on investment. Without exclusive rights in such works to prevent their free use by the public, creativity and innovation would likely decline. By protecting the commercial value in the work through the exclusive rights under § 106, the law provides economic incentives to encourage creators of literary and artistic works to produce works and disseminate them to society.[152] While termed a "property right" that protects commercial investments from spillovers into a market, statutory copyright is intended to serve a larger goal—a temporary monopoly is granted to the copyright owner, but these exclusive rights are to stimulate artistic creativity for society's general good.

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[145] The exact "public good" nature of creative works has been explored elsewhere. *See* Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007). For the purposes of this Article, it suffices to say that creative works cannot be excluded and are non-rival as a broad economic principle.

[146] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967).

[147] *Id.* at 350.

[148] *Id.* at 351.

[149] Hardin, *supra* note 104.

[150] *Id.*

[151] Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 559–60 (2001) ("[T]he conventional wisdom for many social scientists is that commons property generally leads to tragedy. This claim—a truism of first-year law classes—is usually introduced as one of the strongest justifications for the institution of private property.") (footnote omitted).

[152] *See* Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004) (discussing the economic arguments for intellectual property).

Statutory rights do not preserve a "commons" from overuse as property rights are commonly thought to do. Functionally, statutory rights make sure that creative works are generated and distributed to the public to increase the common repository of knowledge as soon as a work's copyright expires. The knowledge commons is enriched with the expiration of the property right—there is no real depletion of the commons, the tragedy that Professor Hardin feared.[153] As such, statutory rights in literary and artistic creations, as state-granted incentives to encourage the creation of artistic works, might be better understood as a collection of disaggregated legal interests to *use* creative works in specific ways that will facilitate publication and dissemination to the public. Therefore, statutory copyright, while considered as a property right, is not an ownership right in a work as an object for possessory control against the rest of the world—an in rem right as traditionally understood.[154] Rather, it is an in personam right that defines a specific legal relationship between author, publisher, and user of a work as that relationship applies to the publication and distribution of a specific work. Despite the general acceptance among property scholars that property relates to a bundle of rights that performs various state-prioritized functions and has nothing to do with property as a legally defined boundary drawn around a thing to effectively exclude the rest of the world from its use,[155] this same idea may not have influenced copyright jurisprudence as much—given the general thought of statutory copyright as a property right *in* a work. On this point, the author of this Article has suggested elsewhere that property rights under the present copyright law would be more appropriately classified as "economic privileges."[156] These privileges should be recognized as in personam rights establishing specific contract-type relationships among parties responsible for producing, publishing, distributing, and using the work in the copyright system. They should not be seen as creating absolute interests in the work as a privatized resource and should be treated differently from the author's literary property rights, which are distinct rights in rem.[157]

¶37 Because statutory copyright is designed to encourage investments in creative works, these rights might not encourage the creation of authentic works in the same way the recognition of literary property would. The emphasis that neoclassical economics places on market rewards as the best mechanism to efficiently allocate resources for production, publication, and distribution of creative works has long-term consequences for the kind of literary and artistic works that are produced. The neoclassicist's assumption that economic incentives are positively correlated with creative production is

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[153] *See* Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 U.C. DAVIS L. REV. 855 (2007).

[154] Conventionally an in rem right meant a right "against a thing" in Latin. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 782 & n.28 (2001). However, this term has been clarified by Wesley Hohfeld to mean "one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people." WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 72 (Walter Wheeler Cook ed., 1919) (footnote omitted).

[155] Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001) ("The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy.").

[156] *See* Alina Ng, *Rights, Privileges, and Access to Information*, 42 LOY. U. CHI. L.J. 89, 104 (2010).

[157] *Id.*

still unproven.[158] Even accepting that assumption as true, there are still other, and perhaps more dire, effects of an overreliance on market incentives to generate authorial creativity and productivity.

¶38 The first upshot of a market-centric approach to the copyright system is that it portrays the act of creativity and authorship—the expression of an author's individual experience and personality—as a primarily economically driven activity. It is possible that this may cause the public to treat works of authorship and other creative works as a commercial commodity, resulting in less respect for the process of creative authorship when these works are used.[159] Second, the market-based approach may have blurred the important distinction between property and statutory rights and allowed copyright owners (such as publishers, distributors, and printers, who may have financially invested in the work but not been involved in its creation) to assert exclusive property-like rights in the expressive content of the work against the public.[160] Property rights in an author's creation define ownership rights in the work itself and involve a unique right in rem to exclude. Only the creator of the work ought to be able to assert this right. Third, the market-based approach establishes the commercial market as a new patron of authors and artists, compelling creators of literary and artistic works to produce works for the public. To ensure that they are remunerated for their works through the market, authors and artists may produce works that appeal to the general masses at the expense of producing works of authentic authorship. As more authentic works of authorship are a result of an artist's expressive individuality, they may be of greater authorial value to the progress of science and useful arts in society.[161]

¶39 When considering the protection of literary property rights of authors, it is useful to evaluate the effectiveness of the copyright market in producing authentic forms of authorship that will contribute towards the advancement of knowledge or the progress of society. Macaulay expressed immense faith in the copyright system when he commented that the system would free authors from the patronage of ministers and nobles by providing an alternative source of payment for their work.[162] Macaulay believed that "men whose profession is literature, and whose private means are not ample" should be "remunerated for their literary labour" through the copyright system so that "valuable

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[158] *See* Zimmerman, *supra* note 113.

[159] Séverine Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 290 (2006). In this article, Dusollier argues that "consumerism is as much a threat to copyright as the increasing commodification of copyright." *Id.* She goes on to state that "[t]urning copyrighted works into commodities has recast the public as individual consumers, and focusing on consumers makes explicit the recognition of a copyright regime that considers creative works solely as commodities to be exchanged in a market." *Id.*

[160] Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1033 (1997). Professor Lemley argues that the derivative right in paragraph (2) § 106 should remain an author's right, and states that "it seems odd that a legal provision that ostensibly exists for the benefit of creators (artists or authors, for example) should confer rights instead on the *owners* of intellectual property rights. As anyone who has ever published a book, a screenplay, or a song can attest, authorship and ownership are not necessarily the same thing." *Id.*

[161] The author of this Article has explored the idea of "authentic authorship" in a previous work. Although deeper analysis of the idea is warranted, see Alina Ng, *The Author's Rights in Literary and Artistic Works*, 9 J. MARSHALL REV. INTELL. PROP. L. 453, 486–88 (2009) for a preliminary discussion.

[162] Thomas Babington Macaulay, A Speech Delivered in the House of Commons on the 5th of February, 1841, *in* FOUNDATIONS OF INTELLECTUAL PROPERTY 309, 310 (Robert P. Merges & Jane C. Ginsburg eds., 2004).

books" would be supplied to society.[163] However, it is important to note that when the copyright market replaces the rich and noble as the author's patron, a separate set of problems arise. The author, instead of being bound to create works of literature and art for a human patron, is now bound to produce for a corporate or marketplace patron.

¶40 Recording contracts between performing artists and recording companies are just one example of the constraints that the marketplace and corporate patronage impose on creativity today.[164] But the effects of market-based constraints on authorial creativity were felt as far back as the eighteenth century, when a market for literature emerged in Germany. German playwright and philosopher Johann Christoph Friedrich Schiller broke off from the patronage of the Duke of Württemberg when the possibility of selling his works on the market presented itself.[165] Schiller referred to the reading public as his "school, [his] sovereign, [and his] trusted friend" and began his career as a professional writer by "appealing to no other throne than the human spirit."[166] The literary market, however, turned out to be indifferent and unrewarding to Schiller's more authentic and intellectually demanding philosophical works on ethics, aesthetics, and reason. The fame and economic rewards Schiller yearned for from the public were, to a certain extent, only acquired by creating works that the public demanded at that time, such as historical narratives rather than the philosophical works that were Schiller's forte.[167] Schiller never found the reward he expected from the literary market, and in 1792, he accepted the patronage of the Danish Duke of Augustenburg, who gave him the intellectual freedom necessary to produce more authentic forms of authorship. Schiller, reflecting on his experience with the literary marketplace, noted that the demands of the market for works that appealed to a wide segment of the paying public was, in reality, irreconcilable with the demands of authentic expression.[168]

¶41 Unfortunately, contemporary copyright markets could be just as unreceptive to literary and artistic works that do not conform to the expectations of popular culture or carry widespread appeal because authors and creators who seek to make a living by selling their works to the public may have to exchange personal authorial or artistic integrity for contemporary and more popular creations. When the copyright system treats creative works as marketable commodities instead of personal expressions of creativity, it may leave individual creators with little choice but to compromise their own artistic authenticity and integrity. To a large extent, courts' reluctance to make artistic judgments about creative works in deciding eligibility for copyright protection mitigates some of the harshness of the marketplace for authentic creations.[169] Some authors may willingly surrender the economic rewards of the marketplace to engage in more authentic

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[163] *Id.*

[164] Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 816–17 (2002) (discussing the contractual relationship between recording artists and their recording companies).

[165] WOODMANSEE, *supra* note 10, at 40.

[166] *Id.* at 41 (quoting, as translated, FRIEDRICH SCHILLER, SCHILLERS WERKE, NATIONALAUSGABE (Herbert Meyer et al. eds., 1958)).

[167] *Id.* at 82.

[168] *Id.* at 84.

[169] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("[S]ome works of genius would be sure to miss appreciation . . . until the public had learned the new language in which their author spoke. . . . [T]he etchings of Goya or the paintings of Manet" may not have evoked the public's admiration "when seen for the first time.").

pursuits of expression.[170] However, where an author does not make that deliberate decision, the copyright market will mold creative expression to satisfy the demands of popular public tastes, which could prevent the production of more authentic works that may have greater influence on how science and useful arts advance.

¶42 The final point to make about copyright as an incentive to produce and secure rewards from the market, is that it protects the owner and not just the author of the work. Even though the Copyright Act recognizes the author as the first owner of a copyright,[171] the exclusive rights that are protected under § 106 are fully transferrable[172] and may be owned by an owner of copyright through an assignment of rights from the author.[173] This has resulted in a concentration of ownership rights in the intermediaries who disseminate works of the author to his readers, but whose primary interest in the work may be purely commercial in nature and misaligned from the institutional goals of the copyright system.[174] Unlike authors, who create works as a form of personal expression, and users, who consume works for enjoyment, inspiration, learning, research, and so on, a publisher does not have an interest in the work as an expression of creativity. Rather, a publisher is interested in the work itself as a marketable commodity that may provide profits. The commoditization of creative works to capture social benefits or positive externalities from the production of creative works is a natural consequence of statutory copyright. Although the exclusive rights under § 106 are intended to facilitate dissemination of creative expressions of individual creators through the market to ultimately benefit the public and advance science and useful arts, these rights have a tendency to secure the a monopoly position of the intermediary publisher for the publication and distribution of works.[175] Without competition for the publication and distribution of works in the market, it becomes increasingly difficult to "clear rights" before using a copyrighted work, causing a "chilling effect" on creativity and innovation that depends on the use of creative works from earlier generations.[176] Protecting economic interests in the

[170] The recognition from producing outstanding work may be a noneconomic incentive to produce works that are more authentic. *See* Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 56 (2006) ("Even when the author, inventor, discoverer, or artisan made little or no money from the work itself, it has long been an honor to be credited with good work. Great artists of all kinds have destroyed work that they thought did not measure up to their standards, even when they might have profited more (at least in the short term) from selling their lesser works rather than destroying them.").

[171] 17 U.S.C. § 201(a) (2006).

[172] *Id.* § 201(d).

[173] *Id.* § 106 (stating that the "owner of copyright" has the exclusive right to reproduce the work, make derivatives, perform and publicly display, and perform publicly by way of digital audio transmission).

[174] *See, e.g.*, Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1458 (1996) (describing the interests of information providers in "strong, even unconstitutional, levels of copyright protection"); Jeffrey Stavroff, *Damages in Dissonance: The "Shocking" Penalty for Illegal Music File-Sharing*, 39 CAP. U. L. REV. 659 (2011) (such as seeking statutory damages against non-commercial infringers); Joshua N. Mitchell, Note, *Promoting Progress with Fair Use*, 60 DUKE L.J. 1639, 1656 (2011) (stating that "Congress has appeared susceptible to lobbying pressure from industry groups . . . which push for increased—and not obviously progress-promoting—protections, to the detriment of Congress's constitutional responsibilities") (footnote omitted).

[175] Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1735 (2000) (defining economic monopoly as "hav[ing] the exclusive right to sell into a market without competition").

[176] For clear chilling effect of a still tentative copyright on public use of the work, see Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce's* Ulysses *in America*, 108 YALE L.J. 633, 662 (1998) ("[T]he purported copyright in *Ulysses*, unless it is recognized as illusory, will likewise receive a twenty-year reprieve from the public domain and will continue to exert a chilling effect

distribution and sale of artistic works could be a hindrance, rather than an impetus, to public access to creative works in all forms—artwork, music, literature, software programs, visual works, and research materials—if one is not clear that the statutory protections for copyright owners serve as an incentive to make works available to the public in furtherance of a prioritized goal and should be exercised with that goal in mind. Perhaps relabeling the exclusive rights as statutory privileges that entitle the copyright owner to sell and distribute the work exclusively *for the purposes of furthering an institutionally identified priority* (in other words, progress) may prevent the exercise of § 106 rights that would take away from copyright's goals. The key to keeping on track with the goal of progress is a deeper understanding of the different facets of a property right and how the exercise of § 106 rights are limited by this understanding.

B. The Different Facets of a Property Right

¶43 Many property scholars believe, on some fundamental level, that property rights are about establishing boundaries around resources through exclusive control of that resource by the property owner. William Blackstone is often quoted as providing the quintessential definition of what a property right should look like—it is a "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[177] Some scholars argue that this right to exclude is the defining characteristic of a property right—its sine qua non.[178] Indeed, without a right to exclude others from trespass, theft, and use of the property, the notion of property would be meaningless. The right to exclude provides normative meaning to the concept of ownership in a society.[179] The idea of property as a right to exclude is also an integral part of copyright jurisprudence.[180] However, scholars have also come to understand property as a legal term that defines different legal relationships among members of society in relation to a particular resource. Property is not, per se, a right in the resource itself.[181] Given that property law defines the relationship between the owner of a resource against the rest of the world, some scholars hypothesize that the strength of property rights varies on a continuous scale and that the state utilizes them strategically depending on the size of the resource, the range of activities that the owner of a resource is allowed, the cost of monitoring and

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upon publishers well into the next century. The effects of monopoly will go on being felt: Readers will pay noncompetitive prices for Estate-approved editions of *Ulysses*; scholars will be discouraged from producing alternative versions of the novel in print and electronic-text formats. In particular, the benefits of digitalization and cyberspace will be lost or muted where *Ulysses* is concerned.").

[177] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3–4 (William G. Hammond ed., 8th ed. 1890); *see also* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 601 (1998).

[178] Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

[179] *Id.* at 732.

[180] *See* Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 99 (1997) ("Copyright law overcomes [free-riding] and encourages creation by providing creators with a legal right to exclude others. It allows them to use the power of the federal government to exclude non-payers and to deter potential free-riders. By legally excluding non-payers, the law allows creators to collect fees for the use of their works and secure a return on their investment.").

[181] Merrill, *supra* note 178, at 731–32 ("[T]he institution of property is not concerned with scarce resources themselves ('things'), but rather with the rights of persons with respect to such resources.").

enforcing those rights, and the fluctuating value of the resource.[182] Property rights—exclusionary on one extreme and organizational or governmental on the other[183]—provide signals or information to society as to how a particular resource is to be used. As property rights are used by the government to define the relationship between the property owner and the resource more clearly, society's conduct toward the resource will be more effectively managed.[184]

¶44 Statutory rights under § 106, even though they are "exclusive," should not be exercised in an exclusionary way in light of what property scholars think is the functionality of property. In the copyright system, some scholars see creative production as a privatized activity that should be subject to public values[185] and the advancement in science and arts as depending on the public's ability to access and use knowledge and information easily. Therefore, to these scholars, the application of the statutory rights cannot feasibly be seen as exclusionary in the sense that the public should be denied access to the work unless the copyright owner grants the public permission to access the work. Professors Hardin and Demsetz's concern that resources in the commons will be depleted through overexploitation does not apply to creative works. As exclusionary rights are often used to deal with the problem of over exploitation, there is no necessity for its use to prevent public access to creative resources because, unlike natural resources that are susceptible to depletion through overuse, creative resources are not scarce and will not deplete through overexploitation.[186] In fact, new generations of authors and creators need to be able to use collective knowledge, research findings, and documented experiences to guide their own explorations and experiments in creating new materials for society. The exercise of the rights under § 106, if exclusionary in practice, will make the development of culture, accessible education, or economic growth difficult, if not impossible. Hence, on the spectrum of property functionality Professor Smith developed, statutory copyright would not lie on the exclusionary rule pole, but at the organizational or governance pole, where each specific entitlement that accrues to the copyright owner is carefully articulated. As Professor Smith points out, this contradicts a more exclusionary function of a patent right that denies access to a patent for those who do not have permission to use the patent.[187]

¶45 If one thinks of copyright as functioning on a different scale than patent (the other form of intellectual property designed to advance the progress of science and useful arts), it may become clear that statutory copyright is not about denying public access for the

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[182] *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454 (2002).

[183] *Id.* at S455 (Professor Henry Smith labels the two polar ends of property functionality on a spectrum of rights of varying degrees. He states that "exclusion and governance are strategies that are at the poles of a continuum of methods of measurement, which we can add to the more familiar continuum from private property through the commons to open access.").

[184] *Id.* at S473 ("Rights are precise or specified to the extent that they protect attributes by preventing a range of unauthorized actions. The result is that if one surveyed states of the world in which actors undertake a range of unauthorized behaviors, the return to the owner of the right will show less variance the more precise the right is; precision contributes to greater security of the right.").

[185] Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 (2003).

[186] Smith, *supra* note 182, at S485 ("[E]xclusion is the basic first pass at addressing potential problems of overexploitation.").

[187] Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1786–87 (2007).

purposes of establishing the creative work's value.[188] The value of a copyrighted work is often clear—it is the value a reader would be willing to pay for the use of an author's expression, which the market readily sets.[189] Where the market fails, copyright law has the built-in mechanism of fair use to correct the failure.[190] The structure of copyright law, with clearly enumerated rights under § 106, lends itself to specific rules of governance that manage societal use of creative works. Thus, statutory copyright, in a property sense does not establish perimeters or a fence around a limited resource, but rather creates a bridged connection between authors and their readers to serve a very specific institutional goal. It is not intended to grant exclusionary rights, nor is it intended to create an open access public right to literary and artistic works. Rather, it is intended to provide heavy regulation of how works are published, disseminated, and used.

¶46 Recognizing that statutory rights in literary and artistic works serve to govern and regulate various uses and interests, both economic and noneconomic (including recreational, research-related, and educational uses), in creative works will clarify how one should think about the literary property rights of the author. Statutory rights affirm a basic economic principle underlying the copyright system: by granting a bundle of entitlements to creative works to copyright owners exclusively under § 106, investments in the publication and dissemination of creative works to the public will be made. Producers of creative works will be more willing to invest in publication and distribution if they have exclusive rights to use the work. In a classical Coasean fashion, the Copyright Act allows the market to ultimately decide who may use a particular work, how that work may be used, and when it may be used by providing the exclusivity needed for contractual bargains to occur among authors, publishers, and users so that rights to use the work may be efficiently allocated.[191] To a large extent, scholars influenced by Coase have abandoned the idea of property as a right against the rest of the world and embraced property as a state device to allocate use rights. The concept of property as "a bundle of rights," institutionalized by new institutional economics, embraces the idea that contractual relationships—and not a general right to exclude—lie at the heart of property law.[192] The focus on contractual relations between the owner of a right and identifiable parties to that contract changes the understanding of property from

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[188] *See id.* at 1802–03 (the difficulty in valuing patented inventions and the "multidimensional nature of the activities" surrounding patent use compels the use of an exclusionary, and not a governance, strategy).

[189] *See* David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96, 116 (2010) (describing how information is usually provided to users at a fixed price).

[190] 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 (1982).

[191] PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 39 (2011) (describing the impact of Ronald Coase's work on copyright and the principles of fair use); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 47 n.19 (2001) ("We suspect that if the Court [in *Sony Corp. of America v. Universal City Studios, Inc.*] had held provision of VCRs to be contributory infringement, a market for video recorders and video rentals still would have emerged. Under a Coasean theory of arbitrage, assuming manageable transaction costs, if there were money to be made from the sale of VCRs, one would expect home electronics manufacturers to negotiate a license from the copyright holders."); Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 111 (1999) (arguing that technology "mov[es] us closer to the world in which the Coase Theorem prevails" and bargaining about intellectual property becomes easier).

[192] Merrill & Smith, *supra* note 155, at 376–78.

a right in a resource against the rest of the world into an abstract collection of aggregated rights that do not represent real ownership rights in things. In this light, statutory copyright, embodying various use rights under § 106, does not relate as much to a right in the work against an infinite and unidentifiable group of people, but to a right to the exclusive use of the work that is enforceable against a single person or a small number of identifiable persons who use the work without paying the contract price. It facilitates the transfer of creative works to individuals in society who put the work to its most valuable use and resolves disputes among authors, publishers, and consumers of creative works. But it does not protect the author's creative personality, as expressed in the work, from abuse when the work is distributed to an infinite and unidentifiable group of people, as a property right would.

C. Conceptual Differences Between Property and Copyright

¶47 The conventional view is that the owner of property has certain rights to those resources which he owns. For example, property owners have a right in rem, a right or an interest in the property or thing, which is good against the rest of the world.[193] In rem rights create an entitlement to control access to, or use of, a resource that may be enforceable against an unlimited and indefinite group of people, who individually owe a duty to refrain from accessing or using that resource. Commentators on the law distinguish an in rem right from an in personam right. In personam rights represent personal interests that an individual possesses by virtue of a personal or contractual relationship with the person who owes the corresponding duty. In personam rights are personal to the right-holder and they neither pertain to, nor convey, property ownership in a thing.[194] An owner of real property, for example, has rights in rem in the land he owns and is entitled to enforce a right to exclude all others from trespassing on his land. The rest of the world owes a specific duty to respect this right of the property owner to exclude others from encroaching upon the land. The right the property owner exercises stems from ownership of the land and is attached to the land. Contrast this with a lien on land as a security to recover payment of a debt. The right to repayment of a debt is an in personam right against the debtor even though a security interest given as collateral for the debt may create an interest in rem to secure payment of the debt.[195] The lien holder's right is therefore a personal right, or a right in personam, traceable to the creditor-debtor relationship between lien holder and property owner.

¶48 This distinction between in rem and in personam rights offers insight into the conceptual differences between literary property and copyright. The author's natural right in his expression establishes an entitlement to creative works that excludes everyone in society—an indefinite class of individuals—from using the work in a way that would damage an author's creative personality or mar its quality and purpose. Protecting an author's creative interest by creating a literary property right in his expression contained in his work creates an in rem right, which means the right is enforceable against the rest

[193] 1 BLACKSTONE, *supra* note 177, at 331 (defining an in rem right as "the right to a definite thing against all the world").

[194] *Id.* (defining an in personam right as "the right against certain persons, though not to a definite thing").

[195] *In re* Rountree, 448 B.R. 389, 407 n.10 (Bankr. E.D. Va. 2011).

of the world. The right would lie on the exclusionary pole of property entitlement that Professor Smith spoke about.[196] Indeed, it makes sense to protect the author's creative interest and personality through an exclusionary rule. The author's expression cannot be easily valued—while creative works may have a market value in the price that a consumer would willingly pay, how can anyone put a market price on the expressive qualities of individuals such as Monet, Beethoven, or Shakespeare, or in more contemporary times, creators such as Hernan Bas,[197] Joshua Bell,[198] or the late Samuel Beckett?[199] It would seem more probable that an exclusionary right would protect creative interests better by requiring that the rest of the world respect the expressive qualities of the person who created the work. In this sense, the creator's interest would be protected by a property rule that, if infringed, should be remedied through the grant of an injunction.[200] The economic rights that the law grants authors and copyright owners, including the right to exclusively reproduce, distribute, make derivatives, publicly perform and display, and digitally transmit the work, are personal rights to use the work that stem from ownership of copyright—not the work—that allows for the recovery of profits from sale and distribution of the work. These rights create entitlements to sell and distribute the work exclusively and create an in personam right against a specific individual or entity that infringes this personal right.

¶49 Statutory rights only entail a personal right to recover payment for the use of the work and not an absolute right to exclude the whole of society from using the work. As such, when statutory rights are infringed, the proper remedy should be damages that are consistent with the protection of an entitlement through a liability, and not a property rule.[201] This makes equal sense too—rights to sell and distribute works are more easily valued through the market by how much the public is willing to pay for the work. Movies, CDs, individual music downloads through iTunes, books, subscription services, and other forms of creative works on the market have a somewhat fixed and marginally variable price. As such, it would be more reasonable to tailor specific governance-type rules for economic rights on the other end of Professor Smith's property scale to facilitate easy transfer and bundling of rights in literary and artistic works for public use.

¶50 These two distinct rights in literary and artistic works—in rem and in personam rights—ensure that creators are granted the autonomy to authentically express and at the same time effectively disseminate these works to the public through the market. In rem rights encourage creativity and expression without the constraints that might otherwise exist if creators fear abuse of their creativity by the public when the work is distributed.

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[196] *See generally* Smith, *supra* note 182.

[197] For a collection of Bas's recent work, see HERNAN BAS & MARK COETZEE, WORKS FROM THE RUBELL FAMILY COLLECTION, DECEMBER 5, 2007–NOVEMBER 28, 2008 (2007).

[198] *See* JOSHUA BELL, http://www.joshuabell.com/ (last visited Jan. 27, 2012) (providing a sample of Bell's music).

[199] *See* ANTHONY CRONIN, SAMUEL BECKETT: THE LAST MODERNIST (1997).

[200] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972) ("In our framework, much of what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property."). As a general rule, an injunction would be available where an entitlement protected by a property rule is removed from its owner without the owner's permission.

[201] *Id.*

In personam rights encourage wide dissemination of these works to the public. The sovereign right of the creator as property owner of a work allows the creator to deny access to the work based on an absolute right to exclude when he assesses a use to undermine his creative personality. When the creator of a creative work considers a use to undermine his rights in such a fashion, he may enforce his exclusionary right against the infringer. This right is good against the world and applies to an infinite number of individuals who owe a corresponding duty to refrain from infringing the creative rights of the author. An economic right, however, does not include the right to exclude as a property right does, but rather originates from a contractual relationship between the author and society to make the work available or accessible for market value.[202] As this distinction between property (in an in rem sense) and copyright (in an in personam sense) does not appear as doctrine in copyright law—at least not since *Donaldson v. Beckett* and *Wheaton v. Peters*[203] dismissed the notion of literary property—there is little normative guidance to provide answers to the question of how authors, copyright owners, and consumers of literary and artistic works should treat entitlements to literary and artistic works.

¶51 Statutory rights that create specific rights for copyright owners to use creative works have been labeled property rights, giving rise to the assumption that such rights are in rem rights, which allow the copyright owner to generally exclude society from using their work. This has a significant impact on the copyright system because it denies access to legitimate public use rights, such as the right to print, distribute, or share derivative works to communicate ideas, develop culture, and educate. The congressional grant of a right to print implicitly assumes that society will be able to use the work as long as the use does not unreasonably interfere with the copyright owner's right to receive payment for the production and dissemination of the work to society. It provides the institutional support that law and economics scholars from the new institutional school believe is needed for copyright owners to enter into contracts for the sale and public distribution of what is essentially a resource that is non-rivalrous and non-excludable. There is a need for the law to be clear about the conceptual differences between property that protects the individual creator's right to personhood, autonomy, and expressive identity and copyright that facilitates a political goal—the progress of science and useful arts—if it is to ultimately fulfill its institutional goal and direct society towards advancement. The law needs to separate the two, and it is likely that the copyright debate will change its shape. But there will be challenges that the law will face and this is discussed in Part IV below.

IV. SHAPING THE COPYRIGHT DEBATE

¶52 Conventional understanding of the copyright debate sees private property pitted against the public domain, as copyright owners and public users struggle for control and access to creative works. While the public domain symbolizes the public sphere central

[202] The author of this Article has argued elsewhere that the copyright system may be seen as a political agreement or social contract among the state, authors, publishers, and users of creative works to promote the progress of science and useful arts. *See* Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413 (2009).

[203] *See supra* notes 68–82 and accompanying text.

to a thriving civil society, wherein cultural artifacts can be freely exchanged without the shackles that follow private patronage or state subsidies, it has been accepted as an innate product that emerges from the term limitation of copyright and very little was written specifically about it. In the last two decades or so, the public domain has been portrayed as necessary to enable society to produce new forms of authorship and other forms of works essential to the progress of science, rather than as a residual space to hold works that are not subject to copyright.[204] Today, the protection of the public domain from the intrusion of property rights has become an affirmative discourse that is the defining ethos for the public side of the copyright debate.[205] More effort is taken today to increase the visibility of the public domain as a space susceptible to the tragedy of the anticommons[206] than ever before.

¶53 Professor Boyle's use of environmentalism—a broad social movement to conserve, restore, and improve the health of the environment—as a metaphor for the politics that should shape the direction of intellectual property policy[207] is a fine example of the effort intellectual property minimalists take to defend public rights against private property. However, the interests that arise with the production, dissemination, and use of creative works are not just between copyright owners and the general public. A proper discourse about rights to creative works should include an analysis of corresponding duties and obligations that arise from the protection of such rights as well as through the proper relationship among authors, publishers, and consumers of the work. The relationships between these parties and their rights and duties are not clear under copyright law, an institution clearly intended to achieve a positive agenda—the progress of science and useful arts. If the copyright debate is reshaped into a tripartite discourse among creators, publishers, and consumers of creative works by explicitly recognizing authorial rights as literary property distinct from economic rights, the private property–public interest gridlock that has stalled real legal progress could be removed.

A. *Judicial Challenges and* Wheaton v. Peters

¶54 The biggest challenge to moving in the direction proposed in this Article is the judiciary's general adherence to precedent. Supreme Court cases following *Wheaton v. Peters* have interpreted the decision in *Wheaton* as determining that all rights to creative works are statutorily created to be well-settled law.[208] Proposing that the author's literary

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[204] Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990).

[205] *See, e.g.*, David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981) (arguing that individual rights in the public domain should be proactively protected against the increasing recognition of intellectual property rights).

[206] Heller, *supra* note 106. For specific commentary on the effect of property rights on the public domain, see Hunter, *supra* note 108, arguing that the increase of property rights cyberspace will lead to a tragedy of the "digital anticommons." *See also* Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453 (2002) (showing how the tragedy of the anticommons can arise with copyrighted works); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005) (arguing that anticommons will arise when rights in virtual property overlap).

[207] *See* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997). Scholars have since written much about the public domain.

[208] *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 214–15 (1954) ("Congress may after publication protect by copyright any writing of an author. Its statute creates the copyright. It did not exist at common law even though he had a property right in his unpublished work.") (footnote omitted); Globe Newspaper Co. v. Walker, 210 U.S. 356, 363 (1908) ("[T]he reasoning and the decree of the court [in *Wheaton v. Peters*]

right be recognized at common law would require a review and overrule of *Wheaton v. Peters* if today's Supreme Court decides that the case may have been incorrectly decided or if its application should be limited to the specific circumstances surrounding the dispute between Henry Wheaton and Richard Peters. Because only the Supreme Court can overrule one of its own decisions, state courts and lower federal courts are not at liberty to depart from *Wheaton*'s ruling, even if convinced that the author should have creative rights at common law.[209]

¶55 If the Court is persuaded that authors should have natural rights in their works separate from copyright, and that natural law could be a valid source of moral and legal rights for authors, the Supreme Court might reconsider *Wheaton*—specifically, the institutional make-up of the actors within the copyright system (authors, publishers, and consumers). Overruling a long-standing case that has provided the foundational basis for the current copyright system would be difficult, if not impossible. Justice Breyer, for example, desires stability in the law over change, uncertainty, and discontinuity. Cases that have become "well embedded in national culture," such as *Miranda v. Arizona*, which the general public has come to associate with the affirmation of the arrestee's constitutional rights to remain silent and to legal representation, would be extremely difficult to overrule, even if the Court considers them wrongly decided.[210] The same goes for cases that have set standards for public conduct, which then invite investments of "time, effort and money based on [a] decision," because judicial practices that ignore these types of public reliance would also "threaten[] economic prosperity," as people become more reluctant to make investments based on laws that might change easily.[211] Hence, the decision to overrule a case is only made where there are exceptional circumstances, or "special justification," in the Court's words.[212] Previous cases have been overruled by the Court when their "conceptual underpinnings" have been "removed or weakened" by developments in statute or judicial doctrine and when their decisions become "irreconcilable with competing legal doctrines or policies."[213] Other justifications for overruling a previous Court decision include where there is incoherence or inconsistency in the law caused by "inherent confusion created by an unworkable

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decidedly favor the conclusion that Congress not only created a new right in the copyright statute, but that the remedies therein given are the only ones open to those seeking the benefit of the statutory right thereby created."); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 15 (1908) ("[T]his case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory.") (citing Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)); Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907) ("In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution . . . ."); Holmes v. Hurst, 174 U.S. 82, 85 (1899) ("While the propriety of [*Wheaton v. Peters* and *Donaldson v. Beckett*] ha[ve] been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute."); Banks v. Manchester, 128 U.S. 244, 252 (1888) ("A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress.") (citing *Wheaton*, 33 U.S. (8 Pet.) at 662, 663).

[209] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (admonishing the Court of Appeals for refusing to follow *Wilko v. Swan*, which it overruled).

[210] STEPHEN BREYER, AMERICA'S SUPREME COURT: MAKING DEMOCRACY WORK 152–53 (2010).

[211] *Id.* at 152.

[212] Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

[213] Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

decision," where "the decision poses a direct obstacle to the realization of important objectives embodied in other laws," and where they are considered "outdated" and "inconsistent with the sense of justice or with the social welfare."[214] *Wheaton v. Peters* is deeply embedded in the copyright system and overruling this decision would affect many commercial and personal arrangements that are organized around its decision that statute is the only source of legal rights to creative works. Modern discourse on the nature of rights in creative works appears to have strengthened the conceptual underpinnings of the *Wheaton* decision and does not seem to justify a judicial inquiry into the merits of overruling the decision. State courts would also be preempted from developing state jurisprudence on the author's rights even if the Court overruled the case.[215] However, the Court may still explicitly recognize the author's literary property and overrule *Wheaton v. Peters* if it is convinced that the decision poses a direct obstacle to the realization of the institutional goals of the copyright system.

B. Potential Legislative Responses

¶56 Congress may also be an appropriate branch of government to protect the author's literary property. Assuming that the legislative problems that Professor Litman identified can be overcome, such as by having broader representation of author interests during the deliberative process before copyright laws are passed, the proposed changes advocated in this Article may be introduced into the copyright system as policies become new laws. While courts, especially the Supreme Court, may shape copyright jurisprudence through the development of case law, Congress may create a more congenial environment for groups of authors, publishers, and consumers of creative works that facilitates cooperation towards the larger institutional goal of progress. Bills that have been introduced recently have favored the rights of copyright owners over authors of creative works, including creators of software that supports web-based platforms on the Internet and consumers of creative works.[216] A step in the direction proposed in this Article includes the recognition that parties in the copyright system—authors, publishers, and users—have significantly different, but equally legitimate, interests in creative works. A possible starting point for the legislation to protecting literary property is to clarify that copyright owners are just one party in a tripartite group of entities with certain rights and duties that should be oriented toward copyright's institutional goal. A clear articulation of the author's literary property and the entitlements and obligations that the recognition of the right would create ought to send a signal to society that copyright laws passed by Congress protect and obligate authors, publishers, and users to ultimately benefit society at large.

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[214] *Id.* at 173–74 (1989).

[215] *See supra* notes 134–137.

[216] Both laws provide the Attorney General of the United States with the power to commence action against websites that facilitate the infringement of copyrighted works. *See* Protect IP Act of 2011, S. 968, 112th Cong. § 3 (2011); Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102 (2011). Neither law addresses the interests of authors or creators and the users of their work as they target websites that could have both infringing and non-infringing works and require their shut-down. These laws deny the other two parties in the copyright system access to Internet platforms, which could facilitate communication between those who create and those who benefit from creative works.

¶57 As a general rule, any legislation passed by Congress to give effect to the proposal in this Article should have prospective effect to comply with the rule of law.[217] As Professor Joseph Raz has argued, laws should only apply to conduct that occurs after the law has gone into effect, so that it can provide guidance.[218] In this light, any legislation passed by Congress today to give effect to a separate literary right that belongs only to authors or other creators of creative works should only affect future conduct and not have retroactive effect. However, recent copyright legislation, such as the Copyright Term Extension Act,[219] extends copyright protection to literary and artistic works by another twenty years, has been applied retroactively to works created before the act in which there is copyright protection. In *Eldred v. Ashcroft*, the Supreme Court observed that throughout history, Congress has made it a practice to grant authors and other creators of creative works with existing copyrights "the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime."[220]

¶58 As the Court pointed out, the first Congress provided protection to existing and future works alike through the first federal copyright statute, the 1790 Copyright Act, and that since then, "Congress has regularly applied duration extensions to both existing and future copyrights."[221] The Court relied on *McClurg v. Kingsland*, which applied the Patent Act of 1839 retroactively to a patent secured in 1835 on the basis that Congress's power to legislate on patents is absolute under the Constitution and that legislation can be modified to "not take away the rights of property in existing patents."[222] It further decided that the fact "that the enlarged term covers existing copyrights" was not "a sound objection to the validity of a copyright term extension, enacted pursuant to the same constitutional grant of authority."[223] Conceivably, laws protecting the author's literary property—or the creator's creative property more generally—that Congress passes today may apply retroactively to copyrighted works already in existence and protected under the present regime so that the protection of all rights in literary and artistic works will be governed under the same statutory regime.

C. The Institutional Goal to Advance Science and Useful Arts

¶59 In the final analysis, literary property and copyright should entitle and obligate authors, publishers, and society to promote progress through the use and production of creative works. In *Copyright Law and the Progress of Science and the Useful Arts*, the author of this Article argued that the most important component in a legal institution charged with advancing society and culture through such use of creative works is the

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[217] Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) (indicating that the Rule of Law should "protect against anarchy," "allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of [their] actions," and guarantee against "official arbitrariness"). Modern accounts of the Rule of Law typically emphasize five elements: (1) the capacity to guide people in the conduct of their daily affairs, (2) efficacy, (3) stability, (4) supremacy of legal authority, and (5) instrumentalities of impartial justice. *Id.* at 8–9.

[218] JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214 (2d ed. 2009) ("One cannot be guided by a retroactive law.").

[219] Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. §§ 302–304).

[220] 537 U.S. 186, 200 (2003).

[221] *Id.* at 200–01.

[222] 42 U.S. (1 How.) 202, 206 (1843).

[223] *Eldred*, 537 U.S. at 203–04.

connection between the author and his reader and, on a much larger and broader scale, the creator of creative works and his public audience.[224] By acknowledging and, where possible, protecting literary property rights of the author, the law will encourage more direct and authentic contribution towards progress as authors become more encouraged to express themselves freely in ways that will have a greater impact on social and cultural advancement. Explicit recognizing that authors are directly connected with their work on a personal and visceral level would not only protect the author's creative interest, but would increase authors' awareness of their moral and ethical obligations toward readers of their work and society at large.

¶60 Explicitly recognizing literary property would also create moral and ethical duties for society to recognize authors for their contributions by attributing their work to them and to refrain from using works in ways that detract from the author's intended contribution to the literary arts. Thus the copyright system must separate the role of the publisher from the author so that it becomes clear that while publishers are entitled to economic rewards for publishing and distributing works to society, their rights as copyright owners under the copyright statute are significantly different from the property rights of authors and other creators because of the lack of a personal relationship with the work.

¶61 A healthy thriving society should resolve issues of public morality, which is greatly needed in the copyright system today as a collective whole. This call for increased public participation in the resolution of constitutional issues, such as the progress of science and useful arts, is not new. Scholars have counseled against alienating moral discussion of "how active and responsible citizens should constitute themselves" to courts and the judicial process."[225] Moral discussions should be society's responsibility. There may be a need, therefore, for individual authors and users to articulate how copyright rules and practices enrich or deprive an individual author's or user's sense of self to put citizen participation on issues of public morality back in the public's hands and to invigorate citizen participation in moral discourses within the copyright system.[226] Such participation in moral discourse about copyright's institutional aims may already be taking place, as with the discourses that surround open content and open software and copyright licenses.

¶62 Online petitions opposing the Stop Online Piracy Act, the Protect IP Act and the Online Protection and Digital Enforcement Act have already generated an official White House response laying out what President Obama's administration will and will not support.[227] This is an important step in encouraging public discourse on issues of morality and ethics that will have profound effects on copyright's institutional goal, but there is more to think about. For example, there is also a need to be aware of the differences between two distinguishable bases for recognizing property rights in creative works. Conventional understanding of property rights in the Lockean just-dessert theory

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[224] NG, *supra* note 136, at 125–28.

[225] Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 531 (1988).

[226] *Id.* at 552 (arguing that public participation in moral discourses may be improved despite "our historical commitment to judicial review even if judicial review frustrates citizen participation").

[227] Victoria Espinel et al., *Combating Online Piracy While Protecting an Open and Innovative Internet*, WE THE PEOPLE, https://wwws.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet (last visited Mar. 5, 2012).

and the Hegelian personality theory protect resources because they are appropriated—or taken—from their surroundings. But the premise for protecting literary property is not that resources are appropriated to one's person; rather, it is based on the author's giving of her creative self to her surroundings. The essential premise for protecting literary property is that an author makes a personal and authentic contribution to social and cultural progress by giving her creative self to her surroundings. Because the author's role is to give rather than take resources from society, the author should be protected to the extent that his giving is violated or abused by society. Otherwise, the act of creation should not be consistent with private control over creative resources. The law should refrain from enforcing these controls unless society's use of the work affects the author's individuality or creative personality in ways that will prevent the creation of authentic works of authorship. It is important for the community to continuously reengage in discussions to take control of public morality discourses about the copyright system.

V. CONCLUSION

¶63 By conceptualizing the copyright system as comprising of three distinct parties—authors, publishers, and the public—each with separate interests in literary and artistic works, it becomes evident that authors and publishers fulfill very different roles in the copyright system. Essentially, authors create works that can advance science and the arts, while publishers provide a channel for delivering authors' expressions to their readers. Although some authors may create their work for profit, many authors create works solely or largely for noneconomic reasons, such as building their reputations, contributing to knowledge and learning, or communicating ideas or telling stories. Publishers, on the other hand, are typically profit-motivated and invest in the publication and dissemination of creative works to recover financial gains from the market.[228] Thus, it is surprising that, given the distinct and sometimes conflicting interests of authors and publishers, modern copyright law treats the interests and expectations of both in the same way.[229] But because copyright law is statutory and is augmented by a prolific body of case law, jurists and scholars of copyright law have given very little attention to the separate roles authors and publishers play in society, their different expectations from the creation and distribution of works, and the effect their different roles and expectations have on copyright's institutional goal of promoting progress in science and useful arts. Courts typically defer to Congress where intellectual property laws are concerned, and often yield to policy decisions evident in legislation. As a result, courts have not attempted to separate the rights and expectations of the author from those of the publisher.[230]

[228] Even non-profit publishers, such as independent and academic presses, must make sufficient profits to support their operations to continue publishing creative works.

[229] *See* 17 U.S.C. § 106 (2006) (providing exclusive rights in creative works, this section protects copyright owners without distinguishing between author and publisher).

[230] *See, e.g.*, Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 6 (1966) ("Congress may . . . implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. . . . It is the duty of . . . the courts in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress."). The Court in *Eldred v. Ashcroft* more recently affirmed its role as the implementer of congressional copyright policies. 537 U.S. 186, 222 (2003).

¶64 This Article proposes that literary property and copyright are distinguishable and separable legal concepts and that separating these rights and developing laws to protect authors' interests in their creations is necessary if the copyright system is to ultimately fulfill its institutional goal of promoting the progress of science and arts. The author plays a specific role in the copyright system that cannot be fulfilled by other parties in that system—to contribute creative works that readers may use for society's benefit. To the extent that such works embody their author's creative personality and authentic expression, the copyright system should explicitly recognize literary property of authors as a natural right. The law has been very clear that all rights to literary and artistic works emanate solely from copyright law. As a result, there is little room for the common law to develop a coherent body of rules that would protect an author's expectations and rights separately from those of the publisher. But this should not preclude the explicit recognition of literary property by the judicial system, the legislature, and the public. Justice McLean's statement in *Wheaton v. Peters*, that any assertion of rights in creative works must be sustained under acts of Congress,[231] should not be taken as a closed and concluded matter if one is committed to the pursuit of progress. Following *Wheaton v. Peters*'s reasoning has facilitated the development of rich, statutory-based copyright jurisprudence in the United States. However, the existence of common law literary rights that an author should have in his work should be evaluated to protect the expressive freedom necessary for authors to produce authentic works.

¶65 A creator's interest in her creation is often two-fold. There is the economic interest in selling the work and making a profit from its sales. But there is also a non-economic interest in protecting the personality of the creator and integrity of the work once it is disseminated into society. This Article has argued that, to protect noneconomic interests of the author as the creator of a work, it is necessary to reevaluate the question of literary property and authors' natural rights to that which they create. Reasons to reject the notion of literary property do not seem sustainable if one carefully considers what explicitly recognizing literary property would achieve, the fundamental differences between literary property and statutory copyright, and literary property's role in facilitating the progress of science and useful arts. The arguments presented here should apply to the broader community of creative producers. Although this Article is written from the author's perspective and from the vantage point of literary property rights, its reasoning and argument are nevertheless applicable to all creative fields.

[231] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834).

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