

DISSONANT HARMONIZATION: LIMITATIONS ON “CASH N’
CARRY” CREATIVITY

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“*Who is that?*”
“*Nobody. The author.*”¹

ABSTRACT

Even though creativity lies at the heart of present copyright laws, the impulse to create—or more precisely what triggers such creativity—remains largely unexamined.² Coinciding with the

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¹ MARC NORMAN & TOM STOPPARD, SHAKESPEARE IN LOVE 49–50 (1998).

² That does not mean that creativity itself has not been examined as part of the debate over cultural appropriation and the public domain. To the contrary, most of the works cited in this article deal with the issue of authorship—and by natural extension creativity—within the confines of this ongoing debate. As Professor Julie Cohen recognizes in her recent article, social sciences may provide useful analyses for reconfiguring the method of protection for so-called creative works. Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1190–92 (2007). Professor Cohen’s approach, like many other articles cited herein, places authorship and creativity within a broader view that owes much to the postmodernist, post-structuralist rejection of the centrality of authorship. *Id.* at 1164; see *infra* notes 14–20 and accompanying text. What I propose to do is reposition the question of protectable creativity—and its correlative authorship—away from the intertextuality of post-structuralism and back to the issue of the *processes* by which individuals create new works. Once we understand what causes authors, artists, and others to engage in acts of aesthetic creativity, we will be better able to create domestic and international copyright standards that encourage these processes and, consequently, encourage the creation of new aesthetic works. Such an analysis requires an examination of the psychological, sociological, and scientific explanations for creative processes. Understanding these processes should enable us to craft narrowly tailored authorial rights that encourage creativity, while reducing undue

digital demand for access to information, new standards for “cash ‘n’ carry” creativity are being urged with little regard to what level of authorial³ control may be required to ensure continued enrichment of the public domain through the creation of vibrant new works. Scientific, psychological, and sociological studies indicate that “cash ‘n’ carry” creativity fails to implement the critical triggering mechanisms for the creative impulse. Moreover, such “cash ‘n’ carry” attitudes toward authors’ rights threaten to establish new international harmonization standards that continue the inequality of earlier protection regimes. Instead of freeing works for the public domain, current movements such as “access to knowledge,” if not carefully circumscribed in the copyright area, may adversely impact efforts by developing nations and previously excluded voices to protect local creative industries. Dissonances between the roles of culture industries in economic development, and perceived boundaries of the public domain, must be respected. In fact, new international standards for the protection of “authors’ rights” should actually be broadened in certain instances to allow protection for those voices whose creative works have been excluded or ignored in previous regimes, including protection for indigenous works of folklore and other traditional cultural expressions, and for works whose intellectual creativity has been previously under appreciated, including traditional “women’s arts.” Ultimately “cash ‘n’ carry” creativity as an international standard, without sufficient calibration for cultural and other dissonances, will only continue to marginalize the already-excluded. Effective harmonization requires more.

INTRODUCTION

There is no question that the latter decades of the twentieth

intrusions into the public domain. While all creators may not be motivated by the same incentives, such individualized motivation should not prevent the adoption of a system which affords a general benefit to motivated authors. See, e.g., Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 82–85 (1998) (noting that authors may be motivated by their identification with the products of their work, such as through concepts of creativity, intentionality, and identification with the res, all of which should be afforded protection in the intellectual property scheme).

³ For purposes of this Article, unless directly specified to the contrary, I use the terms “author” and “artist” interchangeably. Thus, although I speak of “authorial control,” I include within this term the control of all creators of aesthetic works. Unless scientific, sociological, or other evidence demonstrates that the impulses toward aesthetic creativity differ for authors as opposed to artists or composers, there seems little reason to apply different standards of authorial control.

century saw a purported increase in the amount of harmonization activities geared toward the general arena of copyright and its companion neighboring rights. Since the 1990s, we have seen a plethora of harmonization attempts: from the international codification of “Berne plus” standards in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),⁴ to the “Internet” treaties—the World Intellectual Property Organization (WIPO) Copyright Treaty⁵ and the WIPO Performances and Phonograms Treaty,⁶ from the TRIPs Agreement and language of various free trade agreements regarding the role of copyright protection in the digital arena,⁷ to the European Union directives regarding Copyright in the Information Society.⁸ Although international and regional attempts at harmonization have occasionally stumbled—consider the aborted attempts to establish an audiovisual performances treaty⁹ or a broadcast treaty¹⁰ in the past decade—there is little reason to believe that harmonization efforts will not continue apace, at least at the regional level, in the

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9–14, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPs]. I refer to these as “Berne plus” simply because TRIPs added some critical new harmonization concepts regarding the lack of protection for ideas and other non-expressive elements and the extension of protection to computer programs and selected databases as literary works under Berne. *Id.* arts. 9–10; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

⁵ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 152, 36 I.L.M. 65 [hereinafter WCT].

⁶ World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

⁷ TRIPs, *supra* note 4, arts. 9–14. All of the Free Trade Agreements negotiated between the United States and diverse countries since 2000 have included numerous provisions regarding the protection of intellectual property rights. *See, e.g.*, Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004, 44 I.L.M. 544; Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026. Since the free trade agreement with Singapore, the agreements have also included language that appears to strongly resemble the Digital Millennium Copyright Act of the United States, particularly in connection with the copyright enforcement mechanisms on the internet. *See* Free Trade Agreement, U.S.-Sing., arts. 16.1–.10, May 6, 2003, 42 I.L.M. 1026; *see also* 17 U.S.C. §§ 512, 1201–1205 (2000). Although common usage continues to use initial capitals to describe “the Internet,” such usage is no longer seems appropriate given the internet’s wide spread and long standing use. Capital letters subconsciously tell us all that the “Internet” is something so new that we cannot yet be expected to deal with the problems it poses. The time for such complacency, along with the initial capital letters, is long past.

⁸ Council Directive 2001/29, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EC).

⁹ Diplomatic Conference on the Protection of Audiovisual Performances, Dec. 7–20, 2000, *Basic Proposal for Administrative and Final Provisions of the International Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conference*, U.N. Doc. IAVP/DC/4 (Sept. 22, 2000).

¹⁰ World Intellectual Prop. Org. [WIPO], Standing Comm. on Copyright & Related Rights, *Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, U.N. Doc. SCCR/14/2 (Feb. 8, 2006).

near future.¹¹

There may be no more significant issue than the present and future debates over the scope of rights to be granted authors for their works. Regardless of the philosophical basis on which copyright protection is granted,¹² the heart of the issue remains the extent to which authors (and other creators) should have the right to control the use of their works by third parties.¹³ A significant, and I believe included, corollary to this control right, is the question as to what the scope of any such control should be—is it exclusive? Under what circumstances, if any, does it give way to other interests? What is the value of such control? Compensatory?

¹¹ The success of harmonization efforts, given the growing philosophical divide between so-called “North” countries, including most notably the United States and members of the European Union, and “South” countries, and the multiplicity of fora which are now addressing aspects of intellectual property protection, including the “regime change” (as described by Laurence Helfer in his seminal article), are topics that are beyond the scope of this Article. *E.g.*, Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 7–9 (2004). So too is the equally intriguing question of whether any of these purported harmonization attempts actually promote predictable “harmonized” protection of intellectual property rights. I have elsewhere expressed my skepticism of the end results of such processes and the need for better procedures to assure greater clarification of what “harmonization” we have actually achieved. Doris Estelle Long, “*Democratizing*” *Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT’L & COMP. L. 217, 224–27 (2002) [hereinafter Long, “*Democratizing*” *Globalization*]; Doris Estelle Long, “*Globalization*”: *A Future Trend or a Satisfying Mirage?*, 49 J. COPYRIGHT SOC’Y U.S.A. 313, 348–56 (2001) [hereinafter Long, *A Future Trend*]. I do not intend to repeat those concerns here, but merely wish to state that my general skepticism about the end result of such efforts remains unchanged absent procedural reform. Such skepticism about the practical effects of “harmonization” does not mean that the process of attempting to achieve harmonization is not a valuable one in and of itself. To the contrary, even aborted efforts to achieve harmonization serve the valuable informational purpose of allowing all parties to recognize areas of dissonance. Even if such dissonance is not overcome, at least the clear articulation of the dissonance serves a valuable predictive role insofar as international standards are concerned, and allows publishers, distributors, and other public disseminators of copyrighted works to conform their behaviors to predictable norms. Long, “*Democratizing*” *Globalization*, *supra*, at 246–47; Long, *A Future Trend*, *supra*, at 355–56.

¹² For a brief discussion of the various bases for supporting copyright protection, see *infra* Part I.

¹³ I employ the term “use” not to suggest that copyright necessarily includes the right to control the “use” of the work, such as the right to read the work, but simply in order to suggest that “control” includes all aspects of any third party use of a work, including the uses of publication, distribution, performance, display, and derivation, regardless of the communication media involved. Such “control” also necessarily includes consideration of what qualifies as “fair” and “compulsory” uses, as those terms are generally defined under current national and international regimes. *See, e.g.*, 17 U.S.C. §§ 106–107, 118 (2000) (defining authors’ rights under U.S. copyright, fair use, and certain compulsory licenses, respectively); TRIPs, *supra* note 4, art. 13 (defining fair use by allowing limited exceptions to use prohibitions); *cf. N.Y. Times Co. v. Tasini*, 533 U.S. 483, 502–04 (2001) (recognizing that digital media may implicate rights different from those granted for print and holding that newspaper articles searchable in an online database are different from those found on microfilm because of enhanced accessibility of online articles).

Hortatory? Prohibitive?

Authorship¹⁴ has been at the heart of copyright protection since at least 1710 when the Statute of Anne recognized an exclusive right of authors to control the publication of a limited category of works.¹⁵ While there is a strong historical reason to believe that such authorial control may have initially been the result of a miscalculation by the publishing industry in attempting to reassert their original printer’s monopoly over protected works (at least in part),¹⁶ over time the role of the author as the center of rights in his or her work has achieved both domestic and international acceptance.¹⁷ Yet, in the latter decades of the twentieth century and first decade of the twenty-first century, authorship and its correlative creativity have “taken it on the chin,” so to speak. The importance of authorship has been questioned; creativity has been largely disconnected from it, and any authorial control under copyright is rapidly devolving into a “cash ‘n’ carry” compensatory right,¹⁸ reducing the relationship between authorship, copyright, and control to little more than an economic right of compensation.¹⁹

¹⁴ An examination of the precise acts required to be classified as an “author” under positive law is beyond the scope of this article. For an excellent discussion of the concepts informing “authorship” determinations under diverse regimes, see generally, Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003). I am using authorship broadly to mean an individual or group of individuals who create an aesthetic work. While I do not discuss the precise actions which give rise to a claim of authorship, clearly authorship lies at the heart of any creativity analyses. More to the point, while I do not support the purportedly “romantic” notion of authorship, my normative assumption, for reasons explained in greater detail below, is that a focus on the human creator of a work is proper and, indeed, necessary.

¹⁵ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (providing for the protection of “Books, and other Writings”).

¹⁶ See, e.g., MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 35–36 (1993).

¹⁷ See, e.g., 17 U.S.C. § 201 (2000); see also WCT, *supra* note 5, arts. 6–8; TRIPs, *supra* note 4, art. 9; Berne Convention, *supra* note 4, art. 5.

¹⁸ I do not dispute that “cash ‘n’ carry” creativity has some facial desirability in today’s internet age. The concept of an automatic license for works posted on the internet with a (possible) minimum payment to the author for the use in question has the strong appeal of facial convenience and potentially reduced transaction costs. See, e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 202 (2004) (proposing a simplified “reward system”). What I contend is that such “cash ‘n’ carry” convenience ultimately ill serves the primary goal of new work creation by directly contradicting the impulses to aesthetic creativity.

¹⁹ See, e.g., *id.*; Jerome H. Reichman & Tracy Lewis, *Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 337, 349–50 (Keith E. Maskus & Jerome H. Reichman eds., 2005). I do not mean to suggest that Professors Reichman, Lewis, and Fisher advocate reduction of authorial control to a pure “cash ‘n’ carry” level of protection. However, the licensing scheme recommended by Professor Fisher and the liability rule system advocated by

Before we can determine what the contours of copyright protection should be in the twenty-first century, we need to determine what authorship means in connection with the impulse to create new works. Is authorship a value to be cherished and encouraged because it represents some fount of creativity? If so, is creativity encouraged through economic exploitation rights alone? Or does authorship represent more than an economic relationship to one's work? Does it represent a value of personality or individuality that requires some form of legal protection, much as a person's home requires protection against uninvited intruders, regardless of its economic value? What type of legal protection is required? Compensation? Control? Attribution? Is authorship a legal construct which has lost its meaning in today's Digital Age where everyone is a "creator" and new works are created through digital manipulation which any twelve-year-old can accomplish? The questions we face are broad and the answers are critical. There is no doubt that, given today's vibrant reproductive culture,²⁰ issues

Professors Reichman and Lewis present a slippery slope to a "cash 'n' carry" protection system where the only question regarding third party uses of copyrighted works would be "how much compensation, if any, is the author entitled to?" FISHER, *supra* note 18, at 207; Reichman & Lewis, *supra*, at 350. While "cash 'n' carry" creativity may well be "supported" by the postmodernist deconstruction of authorship, such a protection system would ill serve the goals of copyright to encourage the creation of new works. *Infra* Part II; *see, e.g.*, U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power to enact federal copyright legislation "[t]o promote the Progress of Science and useful Arts"); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (stating that the goal of copyright law is to encourage the "creation and publication of new expression"). The greater authorial control supported by this Article, however, does not eliminate the ability to overcome such control through licenses and other contracts. It simply means that such restrictions should generally be imposed only on agreement of the affected parties.

²⁰ *See, e.g.*, ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 6 (1998) (detailing various reproductive uses of intellectual property); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 1-4 (2001) (describing diverse examples of copyright shortcomings in reproductive culture); Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 *TEX. L. REV.* 923, 934-40 (1999) (containing many examples of reproductive culture which he refers to as "recoding"). I do not mean to suggest that reproduction is in any way an inappropriate or undesirable creative activity. To the contrary, the inspirational "reproduction" of others' ideas and works has served as the foundation for some of the most significant works of the Eastern and Western Worlds. However, just as globalization predates its twenty-first century equivalent and yet is different in the Digital Age, so too the nature of reproduction appears to have changed. When Michelangelo copied the works of earlier Roman sculptors, he did so as part of a learning process that ultimately led him to create re-imagined images that bore little resemblance to the Roman inspirations of his work. *See* ROSS KING, *MICHELANGELO & THE POPE'S CEILING* 151 (2003). Similarly, Shakespeare's well known use of others' works as inspiration for his plays is well documented. *See, e.g.*, R. A. Foakes, *Introduction to WILLIAM SHAKESPEARE, KING LEAR* 90 (1997); Michael J. Madison, Comment, *Where Does Creativity Come From? and Other Stories of Copyright*, 53 *CASE W. RES. L. REV.* 747, 760 (2003) (acknowledging the rumors that Shakespeare is reputed to have borrowed extensively from diverse authors,

about creativity, control, and the limits of the public domain may have changed. At a minimum, the question has to be asked whether a change has occurred to the extent that the “rules” for authorial control need to be rewritten.

What I propose to do in this Article is examine the role of authorship through the lens of technology and tradition to determine what values must be included within a harmonized copyright system of the twenty-first century to secure the continued enrichment of the public domain through the creation of new works. In this Article,²¹ I have limited my analysis of “creativity” to creative acts that result in works that represent aesthetic (as opposed to innovative) creativity. I make the distinction for several reasons. First, aesthetic creativity—creativity used to create novels, poetry, music, painting, sculpture, and other works based on aesthetics—has been the focus of copyright protection since the Statute of Anne²² and is, therefore, a more appropriate focus for inquiry regarding authorial control. Second, and even more importantly, aesthetic creativity more clearly reflects the type of creativity whose productive output *should be* the subject of copyright protection, as opposed to other forms of intellectual property protection. Aesthetic works more clearly contain

actors, and playwrights). Yet, few would dispute that the works which both Michelangelo and Shakespeare created ultimately enriched the public domain, laying down truly new works that have in turn inspired subsequent artists. Today, in light of the advances in reproductive technology, inspirational reproduction is push button easy and in many instances does not require the training or skill demonstrated by earlier reproductive works. I do not mean to suggest that works created using such reproductive technologies lack creativity or are unworthy of protection. I merely suggest that the level of reproduction allowed through such digital technologies has radically altered the nature of inspirational reproduction, requiring a renewed examination of the purpose and impact of copyright protection in the Digital Age.

²¹ This is the first in a series of anticipated articles that will examine the nature of creativity and authorial/inventor control. Subsequent articles are intended to explore in greater detail definitions of creativity (from diverse disciplines), as well as the distinctions between creative as opposed to innovative acts, and the legal norms required to satisfy both. As we better understand what “creativity” is and what causes some to “create,” we may be able to develop normative standards that more precisely meet the aesthetic creativity incentivizing goals of copyright.

²² Statute of Anne, 1710, 8 Ann., c. 21 (Eng.). The Statute of Anne is generally recognized as the first copyright law that recognized authors’ rights in their works. Its protection was limited to “Books and other Writings.” *Id.* The first federal copyright statute, purportedly based on the Statute of Anne, included non-aesthetic works, such as charts, among the included categories of protected works. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802). The inclusion of such fact-based works under copyright protection has long proven problematic, largely because of their lack of creativity. *E.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–46 (1991). Fact-based and innovation-based works, such as computer software, and other technological-based works may be more appropriate subjects for patent protection or other legal protection regimes where goals are to encourage and/or reward technological innovation.

expressive content whose unique voice may be lost if protection is not provided to encourage the creation of works which embody that voice.²³

In Part II, I examine the checkered history of authorial protection, with particular emphasis on its early history as a censorship device. In Part II, I explore some of the new teachings about the nature of aesthetic creativity according to recent scientific and psychological studies. In Part III, I focus on what I call the “cash ‘n’ carry” nature of present copyright protection and what is missing from this debate. In Part IV, I consider the concept of the creative act in light of modern technological developments, as well as post-structuralism’s deconstruction of the author. In Part V, I examine the nature of authorship as exemplified by non-traditional means of protecting creativity, including through the burgeoning international focus on the protection of traditional knowledge and on moral rights for creative endeavors. Part VI follows with an examination of the rights authors currently possess to determine when and how to share their works with the public for the first time. In Parts VII and VIII, I discuss the approaches of international human rights regimes to intellectual property rights, as well as the impact of “cash ‘n’ carry” copyright on developing nations and the need for a balance that protects the public domain while assuring the ability of the developing world to partake of the benefits of a growing audience for diverse cultural works. In Part IX, I propose a revised authorial control mechanism that balances both a heightened right of authorial control in certain areas and a reduced level of control in the critical arena of derivative rights. To achieve this balance, further studies on the impulse toward aesthetic creativity need to be conducted to assure that the scope of

²³ I do not mean to suggest that innovative creativity—or more precisely the outputs of such creativity—is less valuable or less worthy of protection under an appropriately calibrated legal regime. I merely suggest that where the goal of protection is “expression” as opposed to “invention” then aesthetic creativity more clearly falls within the types of impulses the copyright regime was designed to encourage. Compare 17 U.S.C. § 102 (2000) (copyright protection resides in “original works of authorship” and not in “any idea, procedure, process, system, method of operation, concept, principle, or discovery”), with 35 U.S.C. § 101 (2000) (patent protection extends to “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”). For reasons that I am continuing to develop, I also believe that errors in encouraging aesthetic creativity may be less capable of remedy. Simply put, while innovative creativity should be encouraged because it *hastens* technological and scientific advances, aesthetic creativity should also be encouraged because a unique voice whose expression is once lost can never be recovered. History is rife with evidence that scientific advances can be rediscovered—although admittedly with lengthy intervals between the time of discovery that patent laws were purportedly designed to reduce. By contrast, each person’s voice is unique. Once silenced, it is lost forever.

authorial control is no greater than required to achieve the goal of incentivizing the creation of new works.

II. REMOVING THE SCARLET LETTER FROM COPYRIGHT’S TAWDRY PAST

There is no debating that copyright has had a checkered past internationally. The first attempts to garner protection for published works of authorship were the notorious printers’ guilds monopolies of the sixteenth century.²⁴ Protection was originally granted in the form of exclusive “patents” granted to stationers for the right to publish a particular manuscript.²⁵ The publisher, *not* the author, was given a perpetual monopoly on the publication of such tracts.²⁶ Behind such exclusive rights, however, was the ugly stepsister of censorship.²⁷ Only works which were granted a license could lawfully be published and subject to the stationers’ exclusive monopoly.²⁸ Thus, in its earliest stages, protection of published works was designed to serve two purposes—to grant publishers an economic incentive to print works for public distribution and to censor works so that only “approved” works would be distributed.²⁹ While the Stationers’ monopoly ended with the termination of the Licensing Act, it was the Stationers Guild’s continued efforts to reacquire their expired rights that ultimately led to the enactment of the Statute of Anne, and its first formal recognition of author’s rights.³⁰

This early censorship history was again at the forefront of the next significant development in authorial rights in Western Europe

²⁴ LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 6 (1968); ROSE, *supra* note 16, at 12; Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 933–34 (2002) (describing various guilds in France and Italy governing printers rights); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC’Y 909, 914 (2002).

²⁵ PATTERSON, *supra* note 24, at 5; ROSE, *supra* note 16, at 11; Gervais, *supra* note 24, at 933; Ochoa & Rose, *supra* note 24, at 914.

²⁶ PATTERSON, *supra* note 24, at 9; ROSE, *supra* note 16, at 12; Ochoa & Rose, *supra* note 24, at 914.

²⁷ PATTERSON, *supra* note 24, at 6, 12; ROSE, *supra* note 16, at 12.

²⁸ PATTERSON, *supra* note 24, at 5; ROSE, *supra* note 16, at 12; Ochoa & Rose, *supra* note 24, at 914.

²⁹ PATTERSON, *supra* note 24, at 6, 12; ROSE, *supra* note 16, at 12. I do not dispute that the Licensing Acts might also have served a competition purpose. *See, e.g.*, Ochoa & Rose, *supra* note 24, at 914 (explaining that when “the Licensing Act of 1662 expired, . . . the book trade [was thrown] into disarray”). However, these market regulation purposes do not eliminate the censoring aspect of the Acts.

³⁰ PATTERSON, *supra* note 24, at 6–7; Ochoa & Rose, *supra* note 24, at 914.

when, during the French Revolution, the royal publishing prerogatives were abandoned.³¹ Similar to the Licensing Act in England, these prerogatives largely served to censor books that failed to achieve royal favor (often due to either their political or scatological content).³² The experiment in eliminating all copyright protections ultimately resulted in a publishing market in such disarray³³ that authorial protection was reinstated—and in a form that placed authors clearly at the center of control.³⁴ In fact, reflecting the human dignity concerns of the French Revolution, the “droits patrimoniaux” (economic rights) enunciated in the law of July 19–24, 1793, expressed that authors’ rights were not merely a privilege of the sovereign but a natural right arising from the authors’ acts of creation.³⁵ This personality basis for placing authors at the center of copyright subsequently served to extend authorial control beyond the mere copying authorizations of the British law and to grant expanded authorial control, including the right of attribution and integrity under moral rights theories.³⁶

Copyright continues to be plagued with its tawdry past as a tool for censorship. Even today, defenses based on free speech concerns are routinely raised in copyright enforcement cases.³⁷ By its very nature, copyright necessarily “restricts you from writing, painting,

³¹ CARLA HESSE, PUBLISHING AND CULTURAL POLITICS IN REVOLUTIONARY PARIS, 1789–1810, at 3 (1991).

³² ROBERT DARNTON, THE FORBIDDEN BEST-SELLERS OF PRE-REVOLUTIONARY FRANCE 4 (1995); HESSE, *supra* note 31, at 5, 11; Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 997–98 (1990).

³³ HESSE, *supra* note 31, at 3–4.

³⁴ Ginsburg, *supra* note 32, at 992, 1009–11 (describing the 1793 French Law intended to protect the rights of the author)

³⁵ *Id.* at 992; see also Daniel Bécourt, *The French Revolution and Authors’ Rights: Towards a New Universalism*, 24 UNESCO COPYRIGHT BULL. 3, 4–5 (1990) (describing the approach to copyright after the French Revolution and noting that the French “decree of 19 July 1793 deals with ‘the property rights of authors’”); Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 581 n.248 (2006) (noting the translation of “droits patrimoniaux”).

³⁶ Ginsburg, *supra* note 32, at 992.

³⁷ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 198, 219–21 (2003) (rejecting a challenge to the Copyright Term Extension Act of 1998 based on both the “limited times” restriction of the Copyright Clause and the First Amendment, because the Act applies only to the author’s form of expression and not to the ideas themselves); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574–75 (1994) (addressing the issue of whether the rap group 2 Live Crew’s song “Pretty Woman” was a transformative parody of Roy Orbison’s song “Oh, Pretty Woman” and thus constituted a “fair use” within the meaning of the Copyright Act); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545–46 (1985) (stating that copyright is intended to increase the exchange and sharing of knowledge, and not prevent it); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434 (2d Cir. 2001) (confronting the issue of whether the Digital Millennium Copyright Act constituted an unconstitutional burden on free speech).

publicly performing, or otherwise communicating what you please”³⁸ in the precise manner in which you desire to express yourself, if that manner of expression takes another’s work as your own.³⁹ It is this early historical role as a censorship device that continues to plague copyright, and, I believe, explains in part the increasingly hostile reaction to authorial control over copyright-protected works.

In order to achieve a useful harmonization standard for the Twenty-First Century that deals effectively with the needs of authors and end-users in the reproduction culture of the Digital Age, we need to, at least, reduce the instinctive hostility toward copyright based on its unfortunate parentage. Even bastard children in many societies are no longer stigmatized for their “illicit” heritage. Copyright should be granted a similar reprieve. The reality is that copyright, while still containing the potential seeds as a tool for censorship, is also a tool for free speech.⁴⁰ More importantly, at least in the early stages of its development, copyright was also perceived as a method for encouraging the creation and dissemination of new works. The Statute of Anne stated that authors were granted rights “for the Encouragement of Learning.”⁴¹ The Copyright Clause of the U.S. Constitution similarly reflected this pro-development bent by affirming that Congress had the right to grant such protection “[t]o promote the

³⁸ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998).

³⁹ Presumably other laws similarly restrict you from expressing yourself precisely as you desire, including laws governing free speech, defamation, and trade secrets.

⁴⁰ See, e.g., Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. TELECOMM. & HIGH TECH. L. 17, 30–31 (2003) (analyzing the arguments presented to support the contention that copyright laws pose a serious threat to the freedom of speech); Doris Estelle Long, “*Electronic Voting Rights and the DMCA: Another Blast from the Digital Pirates or a Final Wake Up Call for Reform?*”, 23 J. MARSHALL J. COMPUTER & INFO. L. 533, 549–50 (2005) (presenting the unintended effects of legislation designed to combat digital piracy on the fundamental rights to vote and to free speech); David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 FORDHAM L. REV. 435, 437–38 (2005) (discussing how copyright laws actually promote free speech and the problems with free speech arguments to the contrary); see also *Eldred*, 537 U.S. at 218–19 (declining to apply strict scrutiny in analyzing a free-speech challenge to the Copyright Extension Act of 1985); *Harper & Row, Publishers, Inc.*, 471 U.S. at 545–46 (interpreting the “fair use” provision of the Copyright Revision Act of 1976 and stating that copyright is intended to increase not hinder free speech); cf. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 1–2 (2000) (arguing free speech as a justification for copyright laws by putting “copyright in a context of other free speech doctrine”).

⁴¹ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

Progress of Science and useful Arts.”⁴² This pro-development focus has continued to be reflected in international developments in the field of copyright and neighboring rights.

Even in its earliest manifestations, copyright law has been closely linked to the issues of distribution and trade.⁴³ The Berne Convention itself arose from the concerns of Victor Hugo and others over the lack of sufficient international protection for their creative endeavors.⁴⁴ The most evident declaration internationally of the potentially pro-creative function of copyright may be the TRIPs Agreement. Firmly founded in the utilitarian view of copyright,⁴⁵ TRIPs, in its preamble, stresses that the reason behind the treaty was the members’ “[d]esir[e] to reduce distortions and impediments to international trade.”⁴⁶ “Whether or not intellectual property laws [including copyright] may be justified under theories of natural law,⁴⁷ labor,⁴⁸ or personality,⁴⁹ TRIPs establish[ed] [an]

⁴² U.S. CONST. art. I, § 8, cl. 8; *see also* PATTERSON, *supra* note 24, at 193 (“The dominant idea in the minds of the framers of the Constitution appears to have been the promotion of learning.”); Ginsburg, *supra* note 32, at 999 (suggesting that the author’s and inventor’s interests were subordinate to the public benefit). *But see* Ochoa & Rose, *supra* note 24, at 927–28 (suggesting that the true purpose behind the enactment of the Copyright Clause was to combat monopolistic practices).

⁴³ The Licensing Acts, which formed the focal point for the disputes that eventually gave rise to the Statute of Anne, were, at their core, trade acts that granted certain publishers the right to publish (trade in) certain authorized works. *See* Ochoa & Rose, *supra* note 24, at 914–15.

⁴⁴ *See generally* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 46–47 (1987) (discussing the history of the Berne Convention including the early concern of authors over lack of international protection for their works). In 1878, the French Government organized an international literary congress in Paris, convened under the Presidency of Victor Hugo. *Id.* at 46. These efforts eventually evolved into the convening in 1883 of a conference in Berne, whose efforts resulted in the establishment of the Berne Convention in 1886. *Id.* at 50–51. One of the key issues addressed was the protection of works by foreign authors against a booming piracy business. *Id.* at 51.

⁴⁵ *See, e.g.*, Long, “Democratizing” *Globalization*, *supra* note 11, at 243.

⁴⁶ TRIPs, *supra* note 4, pmbl.

⁴⁷ *See, e.g.*, Orit Fischman Afori, Essay, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 497, 498–501 (2004) (discussing the effect of Article 27 of the Universal Declaration of Human Rights, which is based on natural law, on the United States Constitution Copyright Clause, which is based on utilitarian considerations); A. Samuel Oddi, *TRIPs—Natural Rights and a “Polite Form of Economic Imperialism”*, 29 *VAND. J. TRANSNAT’L L.* 415, 417–18 (1996) (arguing that natural rights, derived from natural law, have been the primary theory in the field of intellectual property law); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517, 517 (1990) (arguing for the “restoration of the natural law to our copyright jurisprudence” (internal footnote omitted)). *But see* Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 *HAMLIN L. REV.* 65, 66 (1997) (arguing against a natural law justification for copyright law and instead advocating a Lockean model). *See generally* INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 141–47 (Anthony D’Amato & Doris Estelle Long eds.,

international philosophy for their protection—utilitarianism, or more precisely *trade* utilitarianism.”⁵⁰ While the growing pirate market for copyrighted goods demonstrates that “trade” does not necessarily require *in all cases* that the creation of new works be at the *heart* of trade in copyrighted works, without such new works to replenish the marketplace (and the encouragement of their creation through the appropriate legal regime), legal trade and its benefits, including the establishment of viable culture industries which can be used to assist developing countries in achieving sustainable development, would be severely, if not fatally, curtailed.

As Kamil Idris, Director General of WIPO, recognized, intellectual property is a “Power Tool for Economic Growth” for all countries.⁵¹ “[Intellectual] P[roperty] is native to all nations and relevant in all cultures, and . . . has contributed to the progress of societies. . . . [I]t is a force that can be used to enrich the lives of individuals and the future of nations—materially, culturally and socially.”⁵² The so-called “culture industries” of publishing, music, and films form a significant source of market power for developed countries.⁵³ Shahid Alikhan’s work, *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries*, demonstrates that culture industries have served as a potent source for commercial and industrial development.⁵⁴ These so-called culture industries are directly impacted by the scope of protection granted to copyrighted works. Without adequate incentives, new works, which are the fuel for such culture industries, may not be created or, perhaps more

1996).

⁴⁸ See generally INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY, *supra* note 47, at 171–76 (citing many sources that discuss the problem of intellectual property protection for works created in the course of an employment relationship); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 300–02 (1988) (providing several justifications for ownership of intellectual property including Lockean labor theory); Yen, *supra* note 47, at 554–57 (discussing Lockean labor theory and the concept of a public domain for authorship).

⁴⁹ See generally INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY, *supra* note 47, at 171–76.

⁵⁰ Long, “*Democratizing*” *Globalization*, *supra* note 11, at 243 (footnotes from original omitted) (emphasis and footnotes added).

⁵¹ KAMIL IDRIS, WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH 1 (2d ed. 2003).

⁵² *Id.* at 2.

⁵³ See *id.* at 23; see also SHAHID ALIKHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES 41 (2000) (discussing the economic value of effective protection of intellectual property); Doris Estelle Long, *First, “Let’s Kill All the Intellectual Property Lawyers!”: Musings on the Decline and Fall of the Intellectual Property Empire*, 34 J. MARSHALL L. REV. 851, 871–72 (2001) (examining the current trends that are reducing copyright protection domestically and abroad and citing diverse relevant sources regarding the same).

⁵⁴ ALIKHAN, *supra* note 53, at 41.

significantly, may not be distributed for the benefit of the public at large.⁵⁵ The critical question is the extent to which copyright (or some other form of legal protection) actually *supports* the creation and dissemination of new works.

II. CREATIVITY – THE MISUNDERSTOOD MUSE

Creativity, like art, may be indefinable—premised largely on a subjective view of the creator or viewer. As Marcel Duchamp famously stated, “Anything is art if an artist says it is.”⁵⁶ Perhaps creativity is what the creator says it is as well. Copyright, however, has not been quite so generous. Even under U.S. law, which seems to have one of the most lenient standards for creativity under copyright law, only works which have a “modicum of creativity” are protectable.⁵⁷ Creativity similarly stands at the center of harmonized standards for international copyright protection. Thus, for example, collections of factual information (databases) must only be protected to the extent they constitute “intellectual creations.”⁵⁸

Despite the centrality of creativity to present copyright regimes, there is no unanimous decision on what qualifies as protectable “creative effort.” While “fine art” or “great literature” might be a conceivable basis on which to discriminate between protectable works, U.S. law has long rejected any such distinctions, at least on a superficial basis.⁵⁹ Aside from the fundamental rule of thumb,

⁵⁵ I do not mean to suggest that copyright protection should only be available for published works. Publication, or some other form of public dissemination (through display or performance, for example) may be a function of market popularity. Works whose market appeal may preclude commercial dissemination in one era, may prove popular in another. To fashion copyright protection on the narrow border between publication and non-publication may be an unwarranted restriction on authorial control. I also do not mean to suggest that the presence of a strong copyright regime necessarily results in commercial development of culture industries. There are numerous issues involved in development that are beyond the scope of this article. Nevertheless, as Alikhan indicates, copyright protection is a necessary, but not sufficient, requirement for the development of domestic culture industries. *Id.* at 44–45.

⁵⁶ Brief of Amici Curiae Brennan Center for Justice et al. in Support of Petitioners’ Request to Set Aside the FCC’s Remand Order at 24, *Fox Television Stations, Inc. v. Fed. Comm’n. Comm’n*, No. 06-1760 (2d Cir. Nov. 30, 2006) (quoting Marcel Duchamp), *available at* <http://www.fepproject.org/courtbriefs/FoxvFCC.pdf>.

⁵⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). Moreover, the protection of such works is limited to a period of the life of the author, plus seventy years. 17 U.S.C. § 302(a) (2000).

⁵⁸ TRIPs, *supra* note 4, art. 10, para. 2. Although some countries, including the European Union, provide protection for compilations which lack originality under *sui generis* regimes, such protections are plainly outside the scope of works protected under copyright. *See, e.g.*, Council Directive 2001/29, *supra* note 8, para. 47–48.

⁵⁹ *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250–51 (1903) (proposing an

which appears to be violated frequently when applied art or plastic media are involved,⁶⁰ U.S. courts have been notably unhelpful in establishing any sort of workable definition for protectable “creativity” under copyright. According to the U.S. Supreme Court “sweat” alone is insufficient.⁶¹ Yet, some level of creative labor *is* sufficient, particularly where that labor includes some type of artistic judgment or intellectual choice.⁶² At the international level, creativity (or its more precise international term “intellectual creation”) is similarly lacking in definition.⁶³

This definitional void continues when more mundane sources are considered. Wikipedia, the symbol of the collaborative culture of the Digital Age, defines creativity as “a mental process involving the generation of new ideas or concepts, or new associations between existing ideas or concepts.”⁶⁴ The Encyclopedia Britannica (online version) defines creativity as the “[a]bility to produce something new through imaginative skill, whether a new solution to a problem, a new method or device, or a new artistic object or form.”⁶⁵ Funk and Wagnalls Standard Dictionary defines creativity as “[t]he quality of being able to produce original work or ideas in any field,”⁶⁶ while the Oxford English Dictionary defines creativity as “[c]reative power or faculty; ability to create.”⁶⁷ Even Merriam-

anti-discrimination rule for the determination of whether a work is copyrightable without regard to quality). Whether in fact courts are actually impacted by such determinations, however, is an open question, particularly in cases where the media in which a work is contained appears to have a direct impact on its protectable nature. *See infra* note 60 and accompanying text.

⁶⁰ *See, e.g.,* Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985) (holding that department store mannequins were not subject to copyright protection); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (holding that a plastic replica of an antique bank was not protectable); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 268 (S.D.N.Y. 1959) (holding that a plastic copied reduction of Rodin’s Hand of God constituted an infringement).

⁶¹ *Feist Publ’ns Inc.*, 499 U.S. at 359–60.

⁶² *Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., Inc.*, 945 F.2d 509, 512 (2d Cir. 1991) (finding compilation of Chinese-American businesses copyrightable); *Kregos v. Associated Press*, 937 F.2d 700, 704–05 (2d Cir. 1991) (finding compilation of baseball statistics could not be said as a matter of law to be precluded from copyright protection).

⁶³ *See, e.g., infra* notes 157–64 and accompanying text.

⁶⁴ Wikipedia, Creativity, <http://en.wikipedia.org/wiki/Creativity> (last visited Apr. 23, 2007).

⁶⁵ Encyclopedia Britannica Concise, Creativity, <http://www.concise.britannica.com/ebc/article-9361851/creativity> (last visited Apr. 23, 2007).

⁶⁶ FUNK & WAGNALLS STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 304 (international ed., 1965). It contains the same existential origination definition for “to create” as the Oxford English Dictionary Supplement discussed *infra* note 67 and presents the same lack of insight into the impulses behind the creative acts. *Id.* at 303.

⁶⁷ THE OXFORD ENGLISH DICTIONARY 1135 (2d ed. 1989). It further defines “create” as “to produce where nothing was before.” *Id.* at 1134. While one of the definitions appears to reflect the creative and innovative endeavors covered by current copyright and patent

Webster's Online Dictionary defines creativity as "the quality of being creative [or] the ability to create."⁶⁸ The circular reasoning does not end with the dictionary definitions. Edward Albee himself defined the essence of creativity as follows: "The thing that makes a creative person is to be creative and that is all there is to it."⁶⁹

Scientists, sociologists, and psychiatrists apparently have had no greater success in determining what aesthetic creativity is or how to encourage it.⁷⁰ Creativity has been variously associated with frontal lobe activity,⁷¹ schizophrenia,⁷² and "genius."⁷³ Analysis of "creative

regimes, its definition of "create" reflects the role of creation as existential origination, establishing a definition that far exceeds even the modest legal threshold "modicum of creativity" of present copyright regimes. It also gives no insight into the impulses behind the creative activities it defines.

⁶⁸ Merriam-Webster Online Dictionary, Creativity, <http://www.m-w.com/dictionary/%20creativity> (last visited Apr. 23, 2007). The identical definition is also contained in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 532 (1971) and in MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 293 (11th ed., 2005). These dictionaries, however, provide slightly different definitions for "create." Webster's Third defines "create" as "to bring into existence . . . to produce . . . along new or unconventional lines." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 532, while Merriam-Webster's defines "create" as "to produce through imaginative skill . . . to make or bring into existence something new," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*, at 293. The first definition seems to track a bit more closely the concept of innovative creativity, while the second seems to include both innovative and aesthetic creativity. None of these definitions provides much guidance as to the impulses behind the creative acts they define.

⁶⁹ Robert J. Sternberg, *Expert's Forum: Developing Creativity*, DUKE GIFTED LETTER (Duke Univ., Durham, N.C.), Summer 2001 (quoting Edward Albee), *available at* http://www.dukegiftedletter.com/about_dgl/index.html.

⁷⁰ This Article is not intended as an exhaustive overview of studies on creativity but is merely intended to highlight some current scientific thoughts on creativity. In-depth studies of the literature in the fields of science, psychology, and rhetoric could provide useful insights into what triggers or nurtures aesthetic creativity, or at least into what areas should be further investigated, but are beyond the scope of this article.

⁷¹ Fred Balzac, *Sudden Emergence of Visual Creativity in Patients with Frontotemporal Dementia*, 4 NEUROPSYCHIATRY REVS., June 2003, *available at* http://www.neuropsychiatryreviews.com/jun03/jun03_frontotemporal.html; Carol Cruzan Morton, *Brain Regions May Sap or Spur Creativity*, FOCUS, Dec. 12, 2003, *available at* http://focus.hms.harvard.edu/2003/dec12_2003/neurology.html. *See generally* ALICE W. FLAHERTY, THE MIDNIGHT DISEASE: THE DRIVE TO WRITE, WRITER'S BLOCK, AND THE CREATIVE BRAIN 147 (2004); John H. Flowers & Calvin P. Garbin, *Creativity and Perception*, in HANDBOOK OF CREATIVITY 147, 147 (John A. Glover et al. eds., 1989) (noting the lack of literature on the topic of creativity and perception); Anne Stahl, *Till Death Do Us Part: The Marriage of Art and Madness*, chap. 4 (Apr. 1994) (unpublished thesis, Dun Laoghaire College of Art and Design), *available at* <http://www.annestahl.com/thesis/index.htm>.

⁷² ANTONIO PRETI, THE GIFT OF SATURN: CREATIVITY AND PSYCHOPATHOLOGY, <http://serendip.brynmawr.edu/serendipia/Serendipia-Preti.html> (last visited Apr. 23, 2007); JASON STUART RATCLIFF, SCHIZOPHRENIA AND HUMAN NATURE, at Part 3 (2002), <http://www.angelhaunt.net/schizophrenia/sandhn.htm>; James Claude Jackson, *Exploring the Relationship Between Schizophrenia, Affective Illness, and Creativity*, at iii (Aug. 2001) (unpublished Ph.D. dissertation, Rosemead School of Psychology, Biola University), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/0d/83/10.pdf.

⁷³ MICHAEL MICHALKO, CRACKING CREATIVITY: THE SECRETS OF CREATIVE GENIUS 2 (2001); DEAN KEITH SIMONTON, GENIUS AND CREATIVITY: SELECTED PAPERS 79 (1997); Tracy

processes” indicates that little is known about how the so-called “flash of genius” that imbues the concept of creativity with so much mysticism occurs. Despite the claim in a recent article of *Scientific American Mind* that “[p]iece by piece, researchers are uncovering the secrets of creative thinking,”⁷⁴ the reality is that although much more scientific study has been directed in recent years to “knowledge management” and creative processes, including discovering which portions of the brain are implicated in creative thinking—the distinction between so-called right hemisphere and left hemisphere activity⁷⁵—the precise triggers that result in creative thought remain unclear. Even more unfortunate, scientific and psychological studies of creativity do not presently appear to differentiate between aesthetic and innovative creativity, making it difficult to determine the precise impulses which lead authors, artists, and others to create aesthetic works. Mihaly Csikszentmihalyi studied ninety-one creative individuals in the 1990s to determine what gives rise to the creative impulse, which he defined as “a process by which a symbolic domain in the culture is changed.”⁷⁶ He described ten “polarities,” integration of which he determined was present in creative people.⁷⁷ These “polarities” included “generalized libidinal energy” and restraint, convergent and divergent thinking, and fantasy and reality.⁷⁸ Unfortunately, however, this impulse toward fantasy, imagination, *or* innovation does not explain why certain individuals create aesthetic works while others do not. Since the goal of copyright is to encourage the creation and dissemination of such works, encouraging the impulse toward aesthetic creativity should be the focus of authorial rights

V. Wilson, How Geniuses Work, <http://people.howstuffworks.com/genius.htm> (last visited Apr. 23, 2007).

⁷⁴ Ulrich Kraft, *Unleashing Creativity*, SCIENTIFIC AMERICAN MIND, April 2005, at 17.

⁷⁵ BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN: A COURSE IN ENHANCING CREATIVITY AND ARTISTIC CONFIDENCE 26 (rev. ed. 1989); Roger W. Sperry, Nobel Lecture: Some Effects of Disconnecting the Cerebral Hemispheres (Dec. 8, 1981), available at http://nobelprize.org/nobel_prizes/medicine/laureates/1981/sperry-lecture.html.

⁷⁶ MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION 8, 12 (1996). Among the people whom Dr. Csikszentmihalyi included within his study were artists, musicians, actors, physicists, psychologists, and chemists. *Id.* at 12–14. He did not differentiate between aesthetic and innovative creative processes. *Id.* at 12.

⁷⁷ *Id.* at 76.

⁷⁸ *Id.* at 57–65. Others have described additional characteristics which may be indicative of creativity, including sustained curiosity, dedication, willingness to work, and asymmetrical thinking. Charles L. Owen, Speech at the International Conference on Design Research and Education for the Future: Design Thinking. What It Is. Why It Is Different. Where It Has New Value. 10–11 (Oct. 21, 2005), available at http://www.id.iit.edu/papers/owen_korea05.pdf.

granted in such works.⁷⁹ That does not mean that innovative creativity is not valuable, or may not even be caused by some of the same impulses toward aesthetic creativity. But given the different types of works produced by aesthetic, as compared to innovative, creativity, we cannot assume that the same impulses produce these works. Further examination of the impulses toward *aesthetic* creativity is required so that authorial control can be better calibrated.

Carl Jung indicated that we are all “creative” in some manner, positing that creativity is one of the fundamental impulses in man, closely tied with the animus and anima archetypes.⁸⁰ Post-structuralist condemnations of the concept of individuated authorship also place creativity within everyone’s potentialities. According to Roland Barthes in his seminal work *The Death of 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.”⁸¹ Under this post-structuralist view of the interpretive process of textual appropriation, creativity is necessarily a collaborative process. Language may be selected by the author, but that selection is only one-half of the “creative process.” The second half is the interpretation of the indeterminate text of the author. Such interpretive meaning is not derived from subjective authorial consciousness. To the contrary, it is the result of each reader’s own consciousness and experiences. Thus, under the broadest teachings, each of us is engaged in the creative process each time we read a book or view a painting.⁸² Michel Foucault’s “What is an Author?”⁸³

⁷⁹ I do not mean to suggest that the doctrine of election is necessarily implicated as a result of the dichotomous drives of innovative and aesthetic creativity. Certain works may implicate both types of creativity. Such crossovers, however, may prove to be more limited than current practice indicates. Thus, for example, software for operating systems may prove to be creatures of innovative creativity where impulses should be encouraged under patent regimes—not copyright. Until the relationship between innovative creativity and software creation is more fully understood, elimination of the doctrine of election may be premature. See generally Long, *supra* note 53, at 879–94 (discussing the implications of the doctrine of election on various types of intellectual property, including copyright).

⁸⁰ CARL G. JUNG, *MAN AND HIS SYMBOLS* 216 (M.-L. von Franz et al. eds., 1964); see also Kraft, *supra* note 74, at 18 (quoting Psychology Professor Steven M. Smith as stating: “Creative thinking is the norm in human beings and can be observed in almost all mental activities.”).

⁸¹ ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 148 (Stephen Heath trans., 1977).

⁸² See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 15, 24–28 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the history of collaborative authorship); *infra* note 115 (citing works that discuss the feminist critique of authorship); see

can ultimately be answered with an equally simple response: “Everyone.”

Even if we may all be potential authors whose every work might qualify as “creative,” there is no question that not all creative works are equal. I don’t mean to suggest that future copyright protection should incorporate a value judgment regarding whether the creation of the work in question specifically promotes the progress of science⁸⁴ or possesses a uniqueness of vision to improve the future public domain. Not only is such line drawing unworkable, it is undesirable. Just as tastes change, so too may the progress-promotional value of works. What I do mean to suggest, however, is that not all creative works are equal in their value to the public domain. Although to a certain extent the ideas behind all works are necessarily derivative, their expression may not be. It is this expressive value which copyright seeks to promote because it is this expressive value which enriches the public domain for others to use. Shakespeare’s poetry, Michelangelo’s sculpture, and Dadaist collages were all so critical to the “progress of science” because they inspired others to look at the world in new ways and communicate that vision in new expressions. While we cannot hope to distinguish predictably which works may have the same progressive importance in the future, we at least know that one of our goals must be to ensure that such types of works are encouraged. A future standard that limits its goals solely or largely to encouraging reproductive creativity, such as Duchamp’s *Mona Lisa*⁸⁵ or Koons’ *String of Puppies*,⁸⁶ would ultimately impoverish the public domain for future generations. Even though criticism of past works through parody,

also DARIAN LEADER, *STEALING THE MONA LISA: WHAT ART STOPS US FROM SEEING* 89 (2002) (noting the role of the receiver of works in the creation of art); Doris Estelle Long, *Protecting Diversity in the Global Information Ecosystem: A Post Structural Analysis of Folklore, Authorship and the Marginalization of Indigenous Creativity* (unpublished manuscript, on file with author) (discussing the “changing nature of authorship in today’s postmodernist world”).

⁸³ MICHEL FOUCAULT, *What Is An Author?*, in *THE FOUCAULT READER* 101, 101 (Paul Rabinow ed., 1984).

⁸⁴ I am using the term “science” in the broad sense in which it was used in U.S. colonial copyright statutes and in the Copyright Act of 1790—to encourage the promotion of education, learning, and arts—and *not* in the more modern sense of innovative creativity. Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1802); see PATTERSON, *supra* note 24, at 197 (describing the purposes of the Copyright Act of 1790).

⁸⁵ See E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1483–84 (1993) (describing how Dadaist Marcel Duchamp parodied the *Mona Lisa* by adorning a cheap reproduction with a moustache and a goatee).

⁸⁶ See *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992); Ames, *supra* note 85, at 1473.

collage, or reconfigurations is important, it cannot be the only type of work or even the most important type of work whose creation copyright should seek to promote. While labels can be problematic and rhetoric can impede analysis, the reality is that, regardless of the policy upon which you rely to support some form of public domain, or even how large you believe that public domain should be, the public domain undeniably nurtures the development of future works. It must be strengthened and nourished, but such nourishment should not be at the cost of encouraging creative works which will expand the creative domain for future generations. While our own creative spark should be encouraged, future legal regimes must be careful to encourage not merely reproductive creativity, but also the *enrichment* of creativity if the public domain is to remain a vibrant source for future creative endeavors.

III MONEY FOR NOTHIN' AND CHECKS FOR FREE⁸⁷

Since aesthetic creativity, or more precisely the method for sparking aesthetic creativity, is currently so poorly understood, early legal regimes cannot be faulted for using the monetary incentives of economic exploitation rights as a method for encouraging the creation of new aesthetic works. Yet, not all works are created based upon the carrot of money if the work achieves some critical or market-based success.⁸⁸ Based upon informal surveys I have engaged in with students and artists, the extent to which money actually incentivizes the creation of new works depends on a multiplicity of factors, including the nature of the work, its complexity, and its commercial appeal. Certain types of work that are highly individualistic in nature, including songs, poetry, novels, paintings, and photography, are often created by authors with little thought as to the economic reward available for

⁸⁷ DIRE STRAITS, *Money For Nothing, on BROTHERS IN ARMS* (Warner Bros. Records 1985).

⁸⁸ As Jessica Litman wisely recognized: "If payment were the most important consideration . . . most [authors] would probably not write anything at all—they'd be doing something more remunerative with their talents and their time." Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 249 (1996–1997); see also Bradford S. Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law*, 20 BERKELEY TECH. L.J. 1613, 1626–27 (2005) (demonstrating that external rewards may not be a predominant incentive for creativity). This does not mean, however, that economic compensation does not play a role in encouraging individuals to devote greater time to aesthetic creative endeavors. Absent compensation, creators could not obtain a livelihood solely from their aesthetic activities. They would have to engage in other professions, necessarily reducing their artistic output.

such works. I do not mean to suggest that such works may not be created solely for personal profit, as in the instance of an individual who pursues a career as a photographer or songwriter. I merely contend that the potential for such profit is not necessarily *required* in order to encourage individuals to *create* such works. Thus, there is at least some category of work that would be created regardless of legal protections. For these works then, copyright cannot really be said to fulfill any role in encouraging their creation.⁸⁹ (It may, however, be useful in encouraging the public dissemination of such works).⁹⁰

Other categories of complex, collaborative works tend to be created generally only if some form of reward is available to encourage their creation. Most artists and students generally do not create software programs, video games, motion pictures, or other works whose creation requires the collaboration of several people without financial support or the promise of future payment for their efforts. That does not mean that there are not individuals who will not participate in the creation of such works without monetary compensation. Open Source⁹¹ and other public collaborative works, such as Linux⁹² and Wikipedia,⁹³ are strong indications to the contrary. But, it does suggest that the number of creative individuals who will participate in such efforts is relatively

⁸⁹ History is ripe with aesthetic creative endeavors undertaken when copyright protection did not exist, including the creation of numerous literary, artistic, and musical works during the Renaissance, and the creations of such monumental works as the Mahabharata and Bhagavad-Gita in South Asia, the Analects of Confucius in China, and the Thousand and One Nights in the Middle East. See TERESA M. AMABILE, CREATIVITY IN CONTEXT 15 (1996) (discussing the role of “intrinsic motivation” in eliciting creativity); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1970–72 (2006) (discussing non-economic inspirations for creative works); *infra* note 124.

⁹⁰ Even if copyright protection does not directly serve to encourage the creation of new works, similar to the Stationers’ Acts from which copyright protection originally sprang, such protection serves to encourage the monetary investment required to disseminate such works. See *supra* notes 24–30 and accompanying text (describing the Stationers’ Acts). While the development of digital media of communication, including the internet, may have reduced the costs of such dissemination, it has not eliminated them. Although an analysis of the distributed costs of copyrighted works on the internet are beyond the scope of this article, it should be noted that such costs are not at zero. Moreover, from the point of view of international copyright protection, given the lack of significant internet penetration in many countries, and the high costs of internet access in others, traditional distribution techniques with their concurrent high transaction costs remain necessary activities to be encouraged under copyright regimes.

⁹¹ Open Source Initiative, Home Page, <http://www.opensource.org/> (last visited Apr. 23, 2007).

⁹² Linux Online, Home Page, <http://www.linux.org/> (last visited Apr. 23, 2007).

⁹³ Wikipedia, Home Page, <http://www.wikipedia.org/> (last visited Apr. 23, 2007).

small.

Finally, while the focus of this Article is on the role of copyright in actually encouraging the *creation* of new works, their public dissemination must be considered as a significant subsidiary goal. If all of the creative works which we seek to encourage remained moldering in desk drawers and hidden in artists' studios, then "science" would not progress. At some level the public dissemination of works must be considered as a subsidiary goal of copyright protection. Economic exploitation rights clearly provide publishers, producers, broadcasters, and manufacturers with an incentive to disseminate popular works. Yet, I would suggest that where commercialization is the goal, economic exploitation rights might serve to do more than merely incentivize distribution. Where works need to be perfected in order for their usefulness or accessibility to be enhanced, such as in the case of video games, economic exploitation rights may also serve to encourage such perfection prior to marketing. While people may willingly collaborate to *create* software, they may be less willing to spend the time and creative labor debugging such software or creating user interfaces that make the software accessible to the less technologically adept among us. There is a good reason why Linux remains largely inaccessible to most consumers. Large special-effect, multi-collaborative films (the so-called "Hollywood blockbuster") similarly require economic incentives for such large scale investments of time and money.⁹⁴

While it is undeniable that the offer of economic exploitation rights may help incentivize aesthetic creativity in certain cases, the utility of such motivation does not necessarily mean that money is the *only* incentive to be used or that the only form of authorial control which should be granted is the right to monetary compensation for unauthorized uses. The creative act must be respected and the author's relationship to her work honored in order to encourage creative people to engage in creative acts.

⁹⁴ I do not mean to suggest that "blockbusters" are better or worse than "indie" films. To the contrary, both serve important roles in expanding the public domain. A system which encourages one type of film to the exclusion of the other would result in a culturally deprived public domain. The fact that many such large budget movies fail to make a profit does not reduce the significance of the commercial distribution incentive in copyright. There is no present indication that authors must be *guaranteed* an economic recovery to encourage their creative efforts, although clearly for some creators a guaranteed salary or other source of income may be required for them to devote significant time to creative endeavors.

IV. HONORING THE CREATIVE ACT

In today’s technological, post-structuralist world, creative effort has been devalued to the point where money appears to be the only compensation to which an author is entitled. Scholarship regarding the balance to be struck between authors’ and end users’ “rights” has been extensive and is not easily quantifiable. Over the past several decades numerous challenges have strongly criticized the long-standing property-based paradigm of authorial rights. Over time, authorship as the center of creative activity has been questioned.⁹⁵ The evolution of fair use from an occasional equitable exception to authorial control⁹⁶ to a public right⁹⁷ has been championed. The public domain as a created “commons” has been urged,⁹⁸ re-constituted into a regulatory access mechanism,⁹⁹ and

⁹⁵ See Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights—Comment on Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of Work”*, 68 CHI.-KENT. L. REV. 805, 824–25 (1993); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1322–27 (1996); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 302 (1992). See generally, e.g., THE CONSTRUCTION OF AUTHORSHIP, *supra* note 82, at 13 (containing a collection of articles “to revive interdisciplinary investigation of our ways of conceptualizing creative production”).

⁹⁶ See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901) (noting that “a fair and bona fide abridgment of the work” is not a violation of copyright laws).

⁹⁷ See, e.g., *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (setting forth, in dicta, the opinion of Judge Stanley Birch that fair use “is better viewed as a right”); L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USER’S RIGHTS* 193–96 (1991) (stating that personal use of copyrighted work does not violate the copyright); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 33–34 (1994) (arguing that “before we succumb to calls for further enhancement of the rights in the copyright bundle, we need to reexamine the intellectual property bargain from the vantage point of the public, on whose behalf, after all, the copyright deal is said to be struck in the first place”); Judge Stanley Birch, *The Brace Lecture at New York University: Copyright Fair Use: A Constitutional Imperative* 39–40 (Nov. 1, 2006), available at www.csusa.org/pdf/brace_2006_lecture.pdf (contending that without provision for fair use, the Copyright Act of 1976 would be unconstitutional).

⁹⁸ See, e.g., YOCHAI BENKLER, *WHITE PAPER FOR THE FIRST AMENDMENT PROGRAM, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCH. OF LAW, PROPERTY, COMMONS, AND THE FIRST AMENDMENT: TOWARDS A CORE COMMON INFRASTRUCTURE* 7–8 (2001), available at http://www.community-wealth.org/_pdfs/articles-publications/commons/paper-benkler2.pdf (discussing the care that must be taken to ensure that legislation and regulations controlling information production and exchange do not impede the First Amendment); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 18–19 (2004) (arguing that “[t]he burden of this law now vastly outweighs any original benefit”); 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, 361–63 (1999) (arguing that public domain enclosure threatens free speech).

⁹⁹ See, e.g., James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 36–37 (2003) (discussing property rights created by the state).

ultimately championed as a source of creative endeavor whose protection is nearly more important than those of the original author.¹⁰⁰ In fact, depending on the technology at issue, copyright is often seen as the stumbling block to creativity, where authorial rights impede the creation of new works no matter how reproductive such works may be.¹⁰¹ Over time, copyright in the Digital Age has become the villain of free speech,¹⁰² whose only value may be a limited compensation right designed to free creative works from the shackles of authorial control.¹⁰³ The reproductive culture of the Digital Age has both profited from, and fueled, this spiraling descent.

Part of the explanation for the current disrepute in which copyright finds itself is due to the integral nature of copyright to content on the internet and in all other forms of digital communication. Copyright continues to be the form of intellectual property protection that is most often used to control content of everything: from webpages,¹⁰⁴ to search engine results;¹⁰⁵ from the software that runs the computers at the heart of the internet,¹⁰⁶ to the databases that make the internet such a valuable research tool.¹⁰⁷ Any form of expression that becomes so useful is bound to find itself under attack. Copyright regimes have also managed to stumble when faced with technological advances that alter business

¹⁰⁰ See, e.g., FISHER III, *supra* note 18, at 7–8 (proposing three alternatives to the current copyright system); Reichman & Lewis, *supra* note 19, at 345.

¹⁰¹ LESSIG, *supra* note 98, at 19–20; Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2312 (1994) (arguing for a new legal regime).

¹⁰² See, e.g., Hon. Marybeth Peters, *Copyright Enters the Public Domain*, 51 J. COPYRIGHT SOC'Y U.S.A. 701, 728 (2004) (urging the adoption of “[a] more sensible approach” to copyright enforcement by the courts).

¹⁰³ FISHER III, *supra* note 18, at 8–9; Reichman & Lewis, *supra* note 19, at 345, 365.

¹⁰⁴ See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1365–67 (N.D. Cal. 1995) (suit against website creator and his internet service provider for copyright infringement).

¹⁰⁵ See, e.g., *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 948 (9th Cir. 2002), *superseded*, 336 F.3d 811, 822 (9th Cir. 2003) (originally holding that use of full size copyrighted images by a search engine constituted copyright infringement, then holding that “thumbnail” images constituted fair use); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 831, 859 (C.D. Cal. 2006) (granting plaintiff's motion for a preliminary injunction against Google and barring use of plaintiff's copyrighted pictures on Google's search engine), *rev'd*, 487 F.3d 701 (9th Cir. 2007) (following the same fair use reasoning as Kelly to uphold use of pictures on search engine).

¹⁰⁶ See, e.g., *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1243 (3d Cir. 1983) (granting Apple a preliminary injunction which prevented defendant from “copying . . . Apple's operating system computer programs”).

¹⁰⁷ See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 341 (1991) (holding that compilations such as telephone directories are copyrightable if their facts have been “selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”) (emphasis and internal citation omitted).

models and force long standing culture industries to reconstitute themselves.¹⁰⁸ No one appreciates creative destruction¹⁰⁹ and the culture industries of the United States (and other developed countries) have shown no greater fondness for it than any other industry which discovers that communicative technological developments have passed them by. As Marybeth Peters, Register of Copyrights in the U.S., so poignantly (and I would suggest, so presciently) pointed out, the pyrrhic victory of the Copyright Term Extension Act, which added an additional twenty years to pre-existing copyrighted works,¹¹⁰ served as a rallying cry for the copywrong forces:

Whatever the merits of term extension—and the merits in terms of copyright principles were slim—term extension helped to mobilize an outcry against copyright law that has gone on to address issues far beyond term extension itself. . . . The day may come when even the most aggressive copyright owner rues the day that term extension was passed, because the fallout may outweigh whatever benefit copyright owners might ultimately receive.”¹¹¹

Copyright, however, has been on a collision course with the public domain for a long time. This collision course is the natural result of a steady erosion in the value accorded the creative act.

It seems contradictory to use the terms “post-structuralism” and “authorship” in the same breath. Admittedly, at the heart of post-structuralism is a deconstruction, even a rejection, of the construct of authorship as presenting some kind of creative, conscious act.¹¹² A full exposition of the focus on language over consciousness, and words over text, that lie at the heart of the post-structuralist philosophy of creation is beyond the scope of this Article. When,

¹⁰⁸ The history of the culture industries’ standard reaction to technological change has been well documented. Whenever a new format arises, the original reaction has been to avoid the technology, condemn it when it appears inevitable, and later embrace the technology when its profit potential has been appreciated. Thus, for example, the uses of both television and video recordings were challenged initially, then ultimately embraced, by the motion picture industry. FM broadcasts and digital audio recorders met similar fates from the recording industry. See, e.g., LESSIG, *supra* note 98, at 19–20 (arguing that the burdens on creativity outweigh the benefits of copyright protection); Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 112–13 (2005) (promoting a balance between regulation and innovation).

¹⁰⁹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (3d ed. 1950).

¹¹⁰ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998).

¹¹¹ Peters, *supra* note 102, at 710–11.

¹¹² For a good general background on post-modernism and post-structuralism, see generally THE ROUTLEDGE COMPANION TO POSTMODERNISM (Stuart Sim ed., 2d ed. 2005).

however, one of the key works entitled “What Is an Author?”¹¹³ replies by condemning the concept of authorial consciousness, and another announces “The Death of the Author,”¹¹⁴ you get a sense of the level of rejection of constructs of authorship as representative of individuated creative genius.¹¹⁵ Under this post-structuralist view of the interpretive process of textual appropriation, aesthetic creativity is necessarily a collaborative process. Language may be selected, consciously or unconsciously depending on where you stand on the post-structuralist/postmodernist spectrum, but that selection is only half of the creative process. The second half is the interpretation of the indeterminate text of the author. Such interpretive meaning is not derived from the subjective authorial consciousness. To the contrary, it is the result of each reader’s own consciousness and experiences.¹¹⁶

¹¹³ FOUCAULT, *supra* note 83, at 101.

¹¹⁴ BARTHES, *supra* note 81, at 142.

¹¹⁵ The individuated role of authorship has also been attacked under a feminist perspective on intellectual property. See, e.g., Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 554 (2006); Ann Bartow, *Women in the Web of Secondary Copyright Liability and internet Filtering*, 32 N. KY. L. REV. 449, 449–50 (2005); Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519, 521–22 (2006); Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL’Y & L. 431, 433–34 (2006).

While it is difficult to categorize the nature of the challenge given the creative newness of feminist studies on intellectual property, it would appear that the feminist challenge is not based on a denigration of creative processes itself, but instead posits a concept of authorship that incorporates relational theories of creativity leading to a broader definition of collaborative work. Burk, *supra*, at 523–24. Developing feminist critiques on authorship also appear to be based on concerns over male-dominated power structures represented by patriarchal individuated originality and the “proPERTIZATION” of authorial works. *Id.* at 546–47; see also Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 70 (1994) (arguing that copyright laws are not gender-neutral). Given the early stage of feminist criticism of intellectual property, it is difficult to determine the precise contours that feminist critiques of authorship may take. Scholars in the area have already noted the conflicting views regarding feminist goals and male power domains. See, e.g., Burk, *supra*, at 544–48 (discussing divergences in feminist theory generally); Halbert, *supra*, at 451–52 (“While some feminists problematize the construction of authorship, others may suggest that owning property is itself an important feminist right.”). There is a strong argument that a feminist critique of authorship may well support the present arguably patrimonial authorship concept because women artists, authors, and other creators have the growing power to participate in the culture industries. See, e.g., Halbert, *supra*, at 433–34. In addition, it would appear that feminist perspectives on valuing feminine works and the perceived nurturing and spiritual nature of women-created art may actually support stronger considerations of ethical, moral rights-type regimes. See, e.g., Burk, *supra*, at 524 (“[F]eminine experience may lend itself to collective and collaborative understanding, rather than to the individual and confrontational understanding that characterizes patriarchy.”).

¹¹⁶ See generally STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 67 (1980) (dissecting the effect of language on the reader); BARTHES, *supra* note 81, at 146 (“We know now that a text is not a line of words releasing a single ‘theological’ meaning . . . but a multi-dimensional space in which a variety of writings, none of them original, blend and clash.”); Peter Jaszi, *Toward a Theory of Copyright: The*

Thus, under post-structural analysis, literature is not the result (if it ever was) of an author’s individuated originality.¹¹⁷ Instead, it is the result of intertextuality—of a collaboration between author and reader that goes beyond the reader merely reading the words selected by another.¹¹⁸ The centrality of the reader’s role in the creative process, as the interpreter of textual meaning, has the potential to tip the balance between author and the public almost exclusively in favor of the public interest. Since the role of authorial consciousness is diminished under a post-structuralist view of creativity, the need for a putative author’s ability to control the economic exploitation of her work through the property rights of copyright appears similarly diminished. If all creativity, therefore, involves appropriation, then *a fortiori* appropriation is creative.¹¹⁹ Following this construct to its logical conclusion, if every appropriation is creative, then nothing is “not creative.” Ultimately, creativity itself becomes a meaningless construct.

Technology has made the determination of what acts of creativity should qualify as protectable even more difficult. Technology quite simply enables all of us to appropriate greater elements of prior works with greater ease. As John Leland recognized: “The digital sampling device has changed not only the sound of pop music, but also the mythology. It has done what punk rock threatened to do: made everybody into a potential musician”¹²⁰ David Sanjek similarly acknowledges in his article “*Don’t Have to DJ No More*”: *Sampling and the “Autonomous” Creator*:

Metamorphoses of “Authorship,” 1991 DUKE L.J. 455, 502 (discussing the interplay between the development of copyright law and the variable definition of authorship); Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 101 (2006) (arguing that Google’s book use constitutes a fair use and is not copyright infringement); Woodmansee, *supra* note 82, at 25 (exploring the evolving process of writing and its implications on the law).

¹¹⁷ Often expressed as the need to find one’s voice.

¹¹⁸ See *supra* note 116 and accompanying text.

¹¹⁹ Such creative appropriation is recognized in cases such as *Feist Publications, Inc.*, where selection of the elements to appropriate may itself form the basis for a claim of originality. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356–57 (1991). Similarly, appropriated materials that are translated into different media or styles may result in a protectable work. Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) (holding that even though the opening riff and copied first line of a rock song were duplicated, the rap parody did not substantially copy the original ballad); *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) (deciding that defendant’s appropriation of a portion of plaintiff’s photograph was transformative and, thus, a fair use).

¹²⁰ David Sanjek, “*Don’t Have to DJ No More*”: *Sampling and the “Autonomous” Creator*, reprinted in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 82, at 345 (quoting John Leland, *Singles*, SPIN, August 1988).

[I]t should be evident that the elevation of all consumers to potential creators thereby denies the composer or musician an aura of autonomy and authenticity. If anyone with an available library of recordings, a grasp of recorded musical history, and talent for ingenious collage can call themselves a creator of music, is it the case that the process and the product no longer possess the meanings once assigned them?¹²¹

John Leland, in addressing the issue of digital musical sampling, echoes this concern over the impact of postmodernist views of creativity and authorship, when he states in his article in SPIN: “Being good on the sampler is often a matter of knowing what to sample, what pieces to lift off what records; you learn the trade by listening to music, which makes it an extension more of fandom than musicianship.”¹²²

At its heart, copyright should be directed toward encouraging “musicianship” as well as “sampling.” In drawing the lines regarding the scope of rights to be granted to an author in this Digital Age, we must not craft authorial control so narrowly as to threaten “musicianship,” nor favor reproductive creativity over enriching creativity. While the author may not be the sole determinative of the meaning of a work, intertextuality does *not* remove the author from his/her central position in the creation of new works. To the contrary, without a work to interpret, without the initial words or paint to react to, such intertextuality—and more precisely the public’s role in the interpretive process—could not occur.

V. PERSONALITY AND RELATIONSHIP AS MEANS OF ENCOURAGING CREATIVITY

Authors often express their relationship to their works in highly personal terms that are not bound by economic considerations. The instinct to create and the sense of creative ownership over their works are often closely bound up with the creative vision. Thus, for example, Michelangelo often spoke of drawing the image out of the stone that was already within the marble he sculpted.¹²³ Writers

¹²¹ *Id.*

¹²² *Id.* (emphasis omitted) (quoting John Leland, *Singles*, SPIN, August 1988).

¹²³ See BrainyQuote.com, Michelangelo Quotes, <http://www.brainyquote.com/quotes/authors/m/michelangelo.html> (last visited Apr. 20, 2007) (“I saw the angel in the marble and carved until I set him free.”). See generally JOHN ROSS, MICHELANGELO AND THE POPE’S CEILING (Pimlico 2003) (discussing Michelangelo’s views of creativity).

similarly discuss their works in terms of crafting a story whose characters take over the action. In essence, the stories write themselves.¹²⁴ The author is merely the individual who has been gifted with the ability to translate the characters’ wishes into readable prose.¹²⁵

This sense of a personal relationship between the creator and his or her work and the valuing of this relationship as enduring outside the economic underpinnings of copyright is expressed most clearly through moral rights legislation. Under a moral rights regime, such as the one embodied in Article 6*bis* of the Berne Convention,¹²⁶ the author’s connection with a work exists even *after* copyright has been transferred. Such a personal relationship requires more than *credit* or even compensation. To the contrary, as a moral rights regime recognizes, it requires a sense of control over what happens to an author’s work.¹²⁷

¹²⁴ MADELEINE L’ENGLE, WALKING ON WATER: REFLECTIONS ON FAITH & ART 185 (1980) (discussing a writer’s inability to change a character’s fate); STEPHEN KING, ON WRITING 163 (2000) (noting that stories “pretty much make themselves”); Kwall, *supra* note 89, at 1957 (discussing the connection between creativity and self-abnegation); Interview by Stephen Capen with Paulo Coelho in S.F., Cal. (Oct. 14, 1995), <http://www.worldmind.com/Cannon/Culture/Interviews/coelho.html> (discussing how part of *The Alchemist* wrote itself); Interview by Fans with Anne Rice, <http://www.randomhouse.com/features/annerice/interview.html> (last visited Apr. 24, 2007) (explaining how Lestat “took over” *The Vampire Chronicles*); Fiction Debut Author Roundtable, <http://www.authorsontheweb.com/features/0206-debut/debut-q1.asp> (last visited Apr. 24, 2007) (diverse authors describe how they were driven by their own creations to write); Q & A with Bruce Bauman, <http://www.brucebauman.net/qa.html> (last visited Apr. 24, 2007) (discussing how “the characters demanded the story take on the life it did”).

¹²⁵ See, e.g., Kwall, *supra* note 89, at 1965–66 (discussing notion of creativity as a divine gift derived from an external source).

¹²⁶ Berne Convention, *supra* note 4, art. 6*bis* (requires protection of the “non-economic” rights of patrimony and integrity). Given its greatest level of protection domestically in civil law countries, moral rights protection not only allows authors and artists to protect the integrity of their works against harmful alterations, it also allows creators to withdraw their works from publication under certain circumstances and guarantees authors the right to control the first publication of their works. See generally INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY, *supra* note 47, at 85–93 (explaining modern tendency to rely on neighboring rights, as opposed to expanding copyright law, to protect intellectual property with advances in technology); see also *infra* note 131; James M. Treese, *American Law Analogues of the Author’s “Moral Right,”* 16 AM. J. COMP. L. 487, 487 (1968) (contemplating whether there are comparable American legal protections for the moral rights that France has recognized).

¹²⁷ See Visual Artists Rights Act, 17 U.S.C. § 106A(a) (2000); Kwall, *supra* note 89, at 1992–93; see also Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 85 (1997) (evaluating the complexity of moral rights and their implications on the arts); Roberta Rosenthal Kwall, “Author-Stories”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 22–23 (2001) (suggesting moral rights are strongly connected with protecting authorial dignity); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478 (1968) (discussing the two main elements of France’s equivalent to copyright law).

Authorial control is more than a metaphysical desire. Some artists' visions are so closely tied to their personal relationship with a work that they actively maintain installations,¹²⁸ remove deteriorating works from public view,¹²⁹ or even decline to sell most of their works during their lifetime.¹³⁰

A lack of authorial control, in fact, may actually result in a disincentive for artists to create new works in certain instances.¹³¹ Thus, for example, Bruce Connor, a well-known collage artist, stopped creating collages in 1964 because he feared loss of control over his work and identity.¹³² While Bruce Connor chose not to create in the face of lack of control over his work, Terry Yumbulul was faced with a far more serious consequence when his attempt to prevent a deculturizing use of a morning star pole he created resulted in threatened expulsion from his tribe with consequential prohibition against creating further works.¹³³ Under the traditions

¹²⁸ For example, Damien Hirst volunteered to replace the decaying tiger shark in his installation entitled "The Physical Impossibility of Death in the Mind of Someone Living." Carol Vogel, *Swimming With Famous Dead Sharks*, N.Y. TIMES, Oct. 1, 2006, at 228.

¹²⁹ Christo and Jeanne-Claude removed their installation Valley Curtain in 1972 in Rifle, Colorado, after only twenty-eight hours when a gale was reported. See JONATHAN FINEBERG, CHRISTO AND JEANNE-CLAUDE: ON THE WAY TO THE GATES, CENTRAL PARK, NEW YORK CITY 32 (2004); Christo and Jeanne-Claude Biography, <http://www.christojeanneclaude.net/bio.html> (last visited Apr. 24, 2007). Similarly, during their famous "The Gates" installation in Central Park, the artists paid for workers to install and remove the gates as well as answer questions and hand out fabric swatches. See generally Christo and Jeanne-Claude, The Gates, <http://www.christojeanneclaude.net/tg.html> (last visited Apr. 24, 2007) (discussing "The Gates" project). But cf. *Martin v. City of Indianapolis*, 192 F.3d 608, 613-14 (7th Cir. 1999) (affirming contract giving artist the right of removal on the decision to remove or alter an installation).

¹³⁰ Mary Sue Schneeberg is an example of an artist who retained most of her artistic output, declining to display works publicly during her lifetime. David Siders & Nancy Brome, *Schneeberg's Modesty Kept Paintings Hidden Only Family Saw Some of Her Works*, MILWAUKEE J. SENTINEL, Aug. 16, 2001, at B2. Many artists have similarly declined to sell their works. See, e.g., Teddy Ng, *Village Woman Paints Unusual Story*, CHINA DAILY, Jan. 27, 2007, available at http://www.chinadaily.com.cn/cndy/2007-01/27/content_794276.htm (Chang Xiufeng, referred to as "Grandmother van Gogh," declines to sell her works); Glenn O'Brien, *Cream of Wheat Paste*, ARTFORUM, Mar. 1994, at 76 (Revs, a well-known graffiti artist, refuses to sell work).

¹³¹ This does not mean that authorial control must be "absolute" or that fair use should not continue to mediate between authorial control and socially beneficial free uses. But it does mean that the fair use doctrine should be applied in an equitable manner to assure that the encouragement of authors to create new works is not unduly restricted.

¹³² John P. Bowles, *The Bruce Conner Story Continues*, ART J., Spring 2000. This loss of control was tied in part to the consumer demands of the modern art market, but also underscores the very real loss that a diminished authorial right may have on new work creation. *Id.*

¹³³ See *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481; see also *Milpurrurru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240, 245 (discussing how indigenous artists could be threatened with expulsion because their tribal designs were incorporated into carpets without permission).

of the tribe, the knowledge and art which Terry Yumbulul both used to create the morning star pole, as well as the pole itself, belonged to the tribe as a collective right. If expulsion had occurred, he would have lost the right to practice his art, including any rights to his previous work.¹³⁴

On its face, there may be a distinction between the personal relationship of a sole author under Western regimes, and the generally collective ownership regimes of traditional knowledge holders like Terry Yumbulul. This distinction at its core, however, is largely one of degree. The reactions of the collective to the deculturizing use of their work are no less heartfelt or personal than those of individual artists.¹³⁵ This personal relationship supports the view that authorial control must provide for more than an opportunity for compensation (or credit).

Given the personal nature of many creative acts, any diminution in authorial control must be carefully circumscribed and must include recognition of the personality rights of the artist to assure that creation is not discouraged.¹³⁶ These personality rights do not

¹³⁴ *Milpurruru*, 54 F.C.R. at 246.

¹³⁵ See, e.g., MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 45 (2003) (analyzing the debate and status of the world's indigenous societies fighting to protect their traditional knowledge); CROSS-CULTURAL CONSUMPTION: GLOBAL MARKETS, LOCAL REALITIES 12–13 (David Howes ed., 1996) (discussing the “marketization of culture”); WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–1999), at 6–7 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf> (reporting on the needs and expectations of creators in the traditional literary, artistic, or scientific fields through a study of various worldwide regions); Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 244–46 (1998) (confronting the “commodification” of culture in the twentieth century). While in Panama in August 2006, I spoke with a woman from the Embera tribe who described her personal sense of loss when she saw “sacred” objects sold in marketplaces to non-Embera members.

¹³⁶ This concern over the protection of the personal relationship between an artist and her work is not diminished by the corporate ownership of certain works under work for hire or corporate assignment doctrines. As many countries recognize, at the heart of any work for hire is an individual artist with a personal relationship to the work. While in cases of work for hire the presence of compensation seems to be the primary motivating factor in the creation of new works, the number of cases involving challenges to subsequent unforeseen uses of such works indicates that compensation alone is not the sole motivation for creation. Thus, for example, John Huston's estate successfully challenged the unauthorized broadcast of a colorized version of his film, *THE ASPHALT JUNGLE* (Metro-Goldwyn-Mayer 1950), in France because such colorization harmed his artistic vision. See *Huston v. La Cinq, Cour de Cassation*, JCP 1991 II 21731 (Fr.); *Turner Entm't Co. v. Huston*, Cour d'appel [CA] [regional court of appeal] Versailles, Dec. 19, 1994, civ. ch., No. 68, Roll 615/92, available at <http://peteryu.com/intip/turner.pdf>. More recently, numerous directors challenged editing software which could be used to edit out objectionable words and scenes. *Huntsman v. Soderbergh*, No. Civ. A02CV01662RPMMJW, 2005 WL 1993421, at *1 (D. Colo. Aug. 17,

necessarily require the full grant of moral rights protection provided under continental protection regimes¹³⁷ but, as explained more fully below,¹³⁸ require revised protection for the rights of integrity and disclosure (first publication). While the grant of such rights may restrict certain unauthorized future uses of an artist's work, so long as such rights are not absolute, they form a critical element in the encouragement of the creation of new works.

VI. PRIVACY AND THE ARTISTIC IMPERATIVE

The need to assure that authorial control must include more than a right to compensation is further supported by the growing awareness of the privacy issues that are implicated in the publication, display, or performance of an individual's work. Most importantly, the issue of control over the first appearance of a work, whether through publication, performance, or display, becomes critical.¹³⁹ Such control not only values the author's relationship to his work, but recognizes the individual's right to protect private thoughts and personal musings from public scrutiny until the artist is ready to share her work.

The widespread popularity of the internet has lead to the increasing threat of publication of works without control by their artists and authors. Bootleg recordings, master tapes, and even pirate manuscripts find their way onto websites and into the public before the copyright owner has authorized such use.¹⁴⁰ The issue is

2005). The challenges ultimately resulted in several of the software companies filing a declaratory judgment action. *Id.* After passage of the Family Movie Act of 2005, Pub L. No. 109-9, 119 Stat. 218, 222, the court dismissed the claims involving the unauthorized editing of the movies in question. *Huntsman*, 2005 WL 1993421, at *2.

¹³⁷ For example, I am opposed to any extension of the grant of withdrawal. *See supra* note 126. Such withdrawal is unnecessary if an artist has been granted the right to determine first publication of her work. Moreover, most moral rights regimes grant rights that last beyond the author's lifetime. For reasons discussed more thoroughly below, some rights, such as first publication, should end with the author's death. *See infra* Part IX.

¹³⁸ *See infra* Part IX.

¹³⁹ Regardless of demand or public interest, artists have consistently refused to deliver or display works unless, and until, they believe the work is completed. *See, e.g.*, FINEBERG, *supra* note 129, at 3, 7; STANLEY WEINTRAUB, *WHISTLER: A BIOGRAPHY* 131 (1974).

¹⁴⁰ In response to this problem, Congress enacted the Artists' Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (codified in scattered sections of titles 2, 15, 17, 18, 28, and 36 of the U.S.C.), which imposed criminal and civil liability for unauthorized reproduction and/or distribution of a "work being prepared for commercial distribution." 17 U.S.C. § 506(a)(1)(C) (2005). Despite these efforts, figures on piracy remain staggering, if not precisely verifiable. *See, e.g.*, *Bush Creates New Post to Fight Global Piracy*, TECHREPUBLIC.COM, July 22, 2005, available at <http://articles.techrepublic.com.com/2100-1009-5800092.html> (reporting the U.S. Department of Commerce's estimate of an annual loss of \$250 billion in business revenue from global piracy).

not merely the lost sales that may result from such distributions, but the loss of the author’s right or ability to control how, when, and if her work is seen.

The right to control the first publication has long been recognized as a critical element of moral rights internationally, even though such a right has not yet made it into international standards.¹⁴¹ The U.S. approach, recognizing that any such first publication right does not prevent fair use, may be an adequate compromise *so long as the unpublished nature of the work is given sufficient weight in any fair use determination*.¹⁴² While it appears Congress added the sentence regarding unpublished works to avoid a per se prohibition against any fair use involving an unpublished work,¹⁴³ the House Report stresses that *Harper & Row Publishers, Inc. v. Nation Enterprises*, which treated the unpublished nature of President Ford’s memoirs as a key factor in negating a fair use defense,¹⁴⁴ remains valid precedent for fair use determinations: “The general principles regarding fair use of unpublished works set forth by the Supreme Court in *Harper & Row v. Nation Enterprises* still apply.”¹⁴⁵

Current cases indicate that the unpublished nature of the materials may tip the scales on the second statutory factor—the nature of the copyright work¹⁴⁶—but ultimately does not appear to be given any particular significance in deciding fair use. In a typical case, *NXIVM Corporation v. The Ross Institute*, the court was faced with the unauthorized posting of portions of copyrighted business training seminar materials.¹⁴⁷ The unpublished nature of

¹⁴¹ France, Mexico, and Ukraine are among the countries which recognize a nearly absolute right of first publication. Compare Berne Convention, *supra* note 4, art. 6*bis* (stating no right of first publication required), with 17 U.S.C. § 107 (2000) (implying first publication is a factor but does not prevent a fair use defense from being successfully mounted).

¹⁴² Under section 107 of the U.S. Copyright Act, the statute expressly provides: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [statutory] factors.” 17 U.S.C. § 107. Created in response to the court’s decision in *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987), involving the “first publication” (although *not* the first public *access*) of certain Salinger letters in a biography, and similar cases which prohibited any use of unpublished materials as a “fair” one, this sentence was added to section 107 by the Fair Use of Unpublished Works Amendment, Pub L. No. 102-492, 106 Stat. 3145 (1992). The purpose of the amendment according to the legislative history was “to clarify the intent of Congress that there be no per se rule barring claims of fair use of published works.” H.R. REP. NO. 102-836, at 1–2 (1992), reprinted in 1992 U.S.C.C.A.N. 2553, 2553.

¹⁴³ H.R. REP. NO. 102-836, at 2.

¹⁴⁴ 471 U.S. 539, 595 n.19, 599–600 (1985).

¹⁴⁵ H.R. REP. NO. 102-836, at 9.

¹⁴⁶ 17 U.S.C. § 107 (the second statutory factor is “the nature of the copyrighted work”).

¹⁴⁷ 364 F.3d 471, 475–76 (2d Cir. 2004).

the materials was not disputed.¹⁴⁸ After citing the divergent views of the amendment to section 107¹⁴⁹ and the *Harper & Row* case,¹⁵⁰ the court, without analysis, upheld the district court's determination that the second statutory factor "favor[ed] plaintiffs."¹⁵¹ The unpublished nature, however, did not tip the balance in the plaintiff's favor. To the contrary, the "transformative" use of the materials intended as a form of criticism was stressed in concluding that defendant's use was fair.¹⁵²

To date, since the 1992 Fair Use Amendment, numerous cases have dealt with unpublished works, but few of these works had actually been "undistributed" prior to the defendants' allegedly infringing actions. The closest case dealing with unauthorized "publication" of an unpublished manuscript appears to be *Bond v. Blum*.¹⁵³ The use of plaintiff's unpublished manuscript in a child custody case was found to be fair:

Where, as here, the use of the work is not related to its mode of expression but rather to its historical facts and there is no evidence that the use of Bond's manuscript in the state legal proceedings would adversely affect the potential market for the manuscript, one cannot say the incentive for creativity has been diminished in any sense.¹⁵⁴

The acknowledgement of the critical relationship between first publication and creativity is a valid step in assuring that in cases of truly unpublished works—i.e., those which have *not* been publicly distributed or made available to the public—authorial control is maintained, absent exigent circumstances. As the court in *Bond*

¹⁴⁸ *Id.* at 480. The materials were *not* undistributed. They were "unpublished" because their distribution was limited to those who signed confidentiality agreements. *Id.* at 475.

¹⁴⁹ 17 U.S.C. § 107.

¹⁵⁰ 471 U.S. 539 (1985).

¹⁵¹ *NXIVM Corp.*, 364 F.3d at 480.

¹⁵² *Id.* at 486–87 (relying on the transformative nature of use to defend ultimate conclusion of fair use); see also *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 626, 629 (7th Cir. 2003) (quasi-secret nature of secure tests did not prevent fair use); *Nuñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (holding that defendant's new use of unpublished photographs was sufficiently transformative to protect him under the fair use provision); *Payne v. The Courier-Journal*, No. Civ.A. 3:04CV-488-R, 2005 WL 1287434, at *3 (W.D. Ky. May 31, 2005) (holding that use of an unpublished manuscript in an autobiographical context was transformative and, thus, protected under fair use provisions); *Shell v. City of Radford*, 351 F. Supp. 2d 510, 513 (W.D. Va. 2005) (holding that photographs obtained in a police investigation and used by police constituted fair use); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 413 (S.D.N.Y. 1997) (use of unpublished photographs in a film was transformative in that the photographs were used to create "a distinct visual aesthetic and overall mood").

¹⁵³ 317 F.3d 385, 390 (4th Cir. 2003).

¹⁵⁴ *Id.* at 396.

implicitly recognized, failure to apply the greater deference standard of *Harper & Row*,¹⁵⁵ may erode the creation incentive of aesthetic creativity as artists fear a loss of control over the critical determination of when the work is actually a completed one.¹⁵⁶

VII. TEACHINGS FROM THE HUMAN RIGHTS REGIME

Much recent literature focuses on the desaggregating impact of the human rights regime on the ability of an intellectual property owner to control the use of his work, particularly in the area of pharmaceutical and agro-chemical inventions.¹⁵⁷ Cultural

¹⁵⁵ 471 U.S. at 564.

¹⁵⁶ History is ripe with tales of authors who either destroyed their own drafts or left orders for such drafts and other unpublished manuscripts and journals to be destroyed. Robert Louis Stevenson, for example, notoriously burned drafts of his works, including the first draft of *Dr. Jekyll and Mr. Hyde*. Random House, *Dr. Jekyll and Mr. Hyde*, About This Book, <http://www.randomhouse.com/catalog/display.pperl?isbn=9780553212778> (last visited Apr. 24, 2007). Agatha Christie went so far as to kill one of her principal detectives in a novel written more than twenty years prior to its publication date to avoid having him be co-opted after her death. See Agatha Christie Biography, http://biblio.com/authors/603/Agatha_Christie_Biography.html (last visited Apr. 24, 2007). First publication rights would support the authors' demonstrated desire to control public access to their creations. Such first publication right, however, would appear to become less critical after the artist's death. There is historical value in unpublished manuscripts, which give us a critical insight into the creative processes. Once an artist is no longer alive, and therefore no longer available to determine whether or if his work is a completed one, the first publication right no longer seems necessary. *Accord* Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 37–40 (2006) (advocating limiting an author's control over derivatives to her lifetime). While it is arguable that an artist might decide not to create if he could not have absolute control over the future of all created works, even after his lifetime when his legacy would presumably be protected by his estate, the few artists who fall into this category do not warrant extending the right of first publication beyond the author's death. This does not mean that other doctrines more firmly situated within the general area of law dealing with personal privacy might not prevent such unauthorized publications of letters and other personal information. Such protection, however, is outside the focus of this article—that is, an analysis of the protection of creative values to assure continued creation of new works and maintenance of a vibrant public domain.

¹⁵⁷ Intellectual Property Rights and Human Rights, Sub-Comm'n on Human Rights Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/Res/2000/7 (Aug. 17, 2000); see, e.g., Obijiofor Aginam, *Between Life and Profit: Global Governance and the Trilogy of Human Rights, Public Health and Pharmaceutical Patents*, 31 N.C. J. INT'L L. & COM. REG. 901, 902–04 (2006) (arguing that pharmaceutical patents and free trade initiatives have marginalized public health imperatives, especially in the context of the global AIDS emergency); Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT'L & COMP. L. 247, 249 (2003) (discussing the conflicting views towards the patentability of plant species and describing how this is a particularly fierce debate in the context of globalization because of human rights and ethical concerns); Wesley A. Cann, Jr., *On the Relationship Between Intellectual Property Rights and the Need of Less-Developed Countries for Access to Pharmaceuticals: Creating a Legal Duty to Supply Under a Theory of Progressive Global Constitutionalism*, 25 U. PA. J. INT'L ECON. L. 755, 761 (2004) (discussing how TRIPs has affected the abilities of poor countries to treat and prevent HIV/AIDS); Jim Chen, *Biodiversity and Biotechnology: A Misunderstood Relation*, 2005 MICH. ST. L. REV. 51, 56 (2005)

appropriation, through deculturalizing commodification, however, has become an increasing source of significant criticism among international agencies and scholars in the human rights arena.¹⁵⁸ Such critiques, however, do not necessarily lead to the conclusion that human rights and intellectual property rights regimes are polar opposites. To the contrary, many human rights documents actually support intellectual property protection as a method for assuring the recognized human right to participate in one's culture.¹⁵⁹ Such participation rights include an express recognition of authorial rights to their created works.¹⁶⁰

(explaining how the global south, which is rich in biodiversity, blames northern notions of intellectual property for exploiting their biological resources); Amit Gupta, *Patent Rights on Pharmaceutical Products and Affordable Drugs: Can TRIPS Provide a Solution?*, 2 BUFF. INTELL. PROP. L.J. 127, 131 (2004) (discussing whether TRIPs harms the ability of countries to promote health with respect to pharmaceutical patents and suggesting changes that should be made within the TRIPs agreement); Helfer, *supra* note 11, at 4–6 (explaining how the global expansion of intellectual property rights has created concerns in several areas of public policy, including public health, which in turn has caused international “regime shifting” to help manage the complexities in the changing environment); Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, 39 U. MICH. J.L. REFORM 433, 435–36 (2006) (describing the conflict between western nations and developing nations with respect to “biopiracy”); Dennis S. Karjala, *Biotech Patents and Indigenous Peoples*, 7 MINN. J. L. SCI. & TECH. 483, 486–88, 505–07 (2006) (discussing how patent rights in biotechnology affect the concerns of indigenous peoples); David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1, 32 (2003) (describing the adoption of Resolution 2000/7 by the U.N. Commission on Human Rights that called for the consideration of human rights norms in the context of international intellectual property regimes).

¹⁵⁸ See, e.g., BROWN, *supra* note 135, at 44–47 (noting the positive effects on Australian aborigines after the Australian courts ruled that aboriginal artists deserved copyright protection, which had previously been disallowed because of the “folkloric” nature of the art); CROSS-CULTURAL CONSUMPTION: GLOBAL MARKETS, LOCAL REALITIES, *supra* note 135, at 142–43, 149 (arguing that the Hopi Native American tribe should have been able to prevent Marvel Comics from using their cultural images); Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 278 (2004) (arguing that the international intellectual property community should integrate protection of traditional knowledge into the TRIPs agreement); Long, *supra* note 135, at 239 (describing the threat of globalization to native and indigenous cultures and offering potential solutions based in intellectual property law); Doris Estelle Long, *Traditional Knowledge and the Fight For the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 617, 620–21 (2006) (arguing that there should be better intellectual property protection for “traditional knowledge”); Angela R. Riley, “Straight Stealing”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 80 (2005) (criticizing the widespread use of indigenous peoples’ culture as offensive and noting the lack of copyright protection available).

¹⁵⁹ See, e.g., International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 15, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 27, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

¹⁶⁰ See generally Afori, *supra* note 47, at 503–04 (stating that authors have a natural right to the results of their labor); Dr. Peter Drahos, *The Universality of Intellectual Property*

Thus, Article 27 of the Universal Declaration on Human Rights recognizes that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”¹⁶¹ Article 27 goes on to affirm that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹⁶² Similarly, Article 15 of the International Covenant on Economic, Social and Cultural Rights recognizes “the right of everyone” to “take part in cultural life” and to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹⁶³ While these regimes do not specify the type of protection that authors should be accorded, they clearly demonstrate that some form of authorial control is required as a matter of human right. Moreover, since these treaties speak of protection of “moral . . . interests,”¹⁶⁴ clearly more than compensation must be provided to authors. The issue of whether copyright can qualify as a human right, given its potentially positive law origins, is beyond the scope of this Article. What these documents demonstrate, however, is an underlying assumption regarding a creator’s relationship to his work. In the creation of a workable international standard for authorial control, any such standard should be informed by the human rights treatment of such control.

While overly strong intellectual property regimes may severely limit cultural participation by restricting certain modes and images of communication,¹⁶⁵ an unduly weakened intellectual property rights system may well deny the recognized right of cultural participation, particularly if such denial is combined with a continued refusal to protect previously excluded works of aesthetic creativity, including works of traditional cultural expression. If participation in a culture includes the right of authors to have their

Rights: Origins and Development, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS (1999), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> (providing a history of intellectual property doctrines and emphasizing the importance of information in the modern world); Robert L. Ostergard Jr., *Intellectual Property: A Universal Human Right?*, 21 HUM. RTS. Q. 156, 161–62 (1999).

¹⁶¹ Universal Declaration of Human Rights, *supra* note 159, art. 27.

¹⁶² *Id.*

¹⁶³ International Covenant on Economic, Social and Cultural Rights, *supra* note 159, art. 15.

¹⁶⁴ *Id.*

¹⁶⁵ See COOMBE, *supra* note 20, at 209; CROSS-CULTURAL CONSUMPTION: GLOBAL MARKETS, LOCAL REALITIES, *supra* note 135, at 150–51.

“moral and material interests” in their works protected, then per se exclusion from the public domain based on an exclusively Western construct of what such interests should represent is problematic to say the least. Human rights regimes may further provide useful guidance in the form of expanded appreciation for collectively managed/owned rights in works of aesthetic creativity.¹⁶⁶ Such regimes may also provide a basis for enhancing protection for previously excluded voices, including works of indigenous peoples based on traditional knowledge and gender arts.¹⁶⁷ At a minimum, they remind us that authorial control is a critical element of a cultural life.

VIII. SUSTAINABLE DEVELOPMENT AND THE DIGITAL CULTURAL DIVIDE

Much of the current literature about copyright protection in the Digital Age assumes that the costs of production and distribution have been so significantly diminished by the possibilities of digital communication that concerns about protection of the dissemination enhancing values of copyright are, at worst, an impediment and, at best, an irrelevancy in crafting global harmonization standards. The Draft A2K Treaty, and its rejection of any expansion of copyright-protectable categories (including those necessary to include previously excluded voices, such as works reflecting traditional knowledge),¹⁶⁸ seems to be similarly based on the assumption that reducing copyright protection will open the expanded “cultural commons” to a broader playing field. There is an equivalent assumption that a reduction in copyright protection will result in across-the-board expanded end user access. In other words, all end users will benefit equally from a reduced protection

¹⁶⁶ See *supra* notes 133–35 and accompanying text (discussing Terry Yumbulul and the collective nature of much traditional knowledge).

¹⁶⁷ Many of the works which have been traditionally excluded from present intellectual property regimes include works representing the so-called hearth arts, including dressmaking and other sewing arts, and recipes and food preparation. See, e.g., *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996) (recipes); *Fashion Originators Guild of Am. v. FTC*, 114 F.2d 80 (2d Cir. 1940) (dressmakers).

¹⁶⁸ See Consumer Project on Tech., *Treaty on Access to Knowledge: Draft*, art. 3–7, (May 9, 2005), available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf (providing that “works lacking in creativity should not be subject to copyright or copyright-like protections”). Such limitation would presumably include any attempt to extend copyright or *sui-generis* protection to cover previously excluded works of traditional knowledge.

regime. Any such expansion, however, only continues the inequality of the digital cultural divide.¹⁶⁹

In the developed world, discourse on internet public policy focuses largely on the Westernized concern over the balance to be struck between private rights (generally protected under trademark and copyright laws) and public access to “information.” This focus reflects a cultural bias that excludes or marginalizes most of the world’s cultures and concerns, in favor of the same debate over private rights that has marginalized many cultures’ non-technological innovation and creativity.

As Gail Hawisher and Cynthia Selfe demonstrate in their introduction to *Global Literacies and the World-Wide Web*, cyberspace is largely Anglo-centric in nature.¹⁷⁰ This Anglo-centricity, which admittedly has its roots in history,¹⁷¹ includes the use of English as the primary language of the Net, “the economic and political ordering of Web resources at the service of capitalism, democracy, and other free-market forces,” and “reliance on westernized instantiations of authorship, visual design, text, and representation.”¹⁷² Fortunately, non-English web sites are coming into existence in greater numbers. Despite this hopeful sign, Anglo-centric methods of communication remain embedded in the operational structure of the Web.

Debates by western nations over the replacement of outdated distribution techniques for albums, films, software, literature, and other copyrighted material to take advantage of the Digital Age ignore the multinational impact of the elimination of traditional media. Increasingly, defenders of currently unauthorized uses of copyrighted work on the internet assert that the creation of digital distribution systems provide transactional cost reductions that validate a reconfiguration of authorial rights.¹⁷³ The assumption

¹⁶⁹ See, e.g., Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1347 (2004) (noting that the current state of intellectual property law “favors the Western world”).

¹⁷⁰ Gail E. Hawisher & Cynthia L. Selfe, *Introduction to GLOBAL LITERACIES AND THE WORLD-WIDE WEB* 1–10 (Gail E. Hawisher & Cynthia L. Selfe eds., 2000).

¹⁷¹ Originally developed from the ARPANET program by the U.S. Department of Defense, it makes sense that the internet would be Anglo-centric in language and structure in its incipiency. See, e.g., BARRY M. LEINER ET AL., INTERNET SOCIETY, A BRIEF HISTORY OF THE INTERNET (2003), available at <http://www.isoc.org/internet/history/brief.shtml#Origins> (describing the early stages of the internet and its progression to the world wide web and the system we know today). Given the global reach of the internet, however, such Anglo-centricity, or more precisely the limits which such Anglo-centricity imposes, is no longer justifiable.

¹⁷² Hawisher & Selfe, *supra* note 170, at 9.

¹⁷³ Numerous defenders of internet piracy have suggested that once record companies

that digital distribution will and should replace hard goods distribution systems ignores a fundamental truth of the internet. It is not available to everyone. "If 'hard' sources of goods and information are removed or significantly reduced in favor of the lure of cyber-information, the *economic* have-nots will be rapidly transformed into *informational* have-nots, with catastrophic results in today's increasingly globalized information economy."¹⁷⁴

Reluctance to re-examine Western-based assumptions about key legal issues surrounding the internet will only serve to continue the marginalization of "the Other" from yet another domain of literacy. Just as current intellectual property regimes reward technological and individual creativity over non-technological and communitarian efforts,¹⁷⁵ so too the debate over internet policy favors technology over culture. By denigrating the value of protecting intellectual property because of its relatively easy accessibility in digital form and by emphasizing that the solution to the exponentially increasing unauthorized use of copyrighted works on the internet is less protection or more digital distribution, legal policy threatens to undermine current efforts to fashion international remedies that protect traditional knowledge, folklore, and other forms of indigenous innovation and cultural expression.¹⁷⁶ If works of individual authors, which fit within the narrow constraints of traditional forms of intellectual property, are no longer worthy of strong protection and should be relatively freely exploitable without constraint, how can the cultural expressions of indigenous peoples be safe from deculturizing exploitation? Even more problematic from a trade development point of view, less intellectual property protection may also mean less opportunity for developing countries to create viable domestic culture industries.¹⁷⁷ The so-called "culture industries" of publishing, music, and films increasingly

develop inexpensive digital distribution systems, piracy will shrink. *See generally* Doris Estelle Long, *Intellectual Property on the Internet and the Cultural Digital Divide*, in THE IMPACT OF INFORMATION TECHNOLOGY ON GLOBALIZATION SUPPLEMENT: INTELLECTUAL PROPERTY AND SOCIAL NEEDS IN A NETWORKED WORLD 10, 12 (Santa Clara Univ. Ctr. for Science, Tech., & Society, STS NEXUS Issue No. 3.2 Supp., 2003), *available at* <http://www.scu.edu/sts/nexus/upload/3.2%20supplement.pdf> (discussing the digital divide between westernized nations and the rest of the world).

¹⁷⁴ *Id.* at 12.

¹⁷⁵ *See, e.g.,* Long, *supra* note 135, at 244–47 (discussing dilemmas faced by developing nations).

¹⁷⁶ *See generally* WORLD INTELLECTUAL PROP. ORG., *supra* note 135, at 5–8 (discussing many attempts to protect the non-technological "traditional knowledge" of diverse countries and cultures and the lack of international protection regimes for this form of intellectual property).

¹⁷⁷ *See* IDRIS, *supra* note 51, at 16.

form a significant source of market power for developing countries.¹⁷⁸ They are the easiest to nurture because aesthetic creativity, unlike scientific or technological innovation, does not require a particular educational background or a level of technical achievement. Numerous developing countries have successfully used copyright protection to develop domestic cultural industries based on the production and dissemination of copyrighted works. These industries, in turn, have aided in increasing gross domestic production, ultimately helping countries in their efforts at creating sustainable economic growth.¹⁷⁹ Yet, if copyright protection is reduced for the sake of digital convenience, we may be condemning others to fewer economic opportunities in the future, not more.

An international standard incorporating “cash ‘n’ carry” creativity would also fail to provide developing countries with the necessary tools to reverse harms of commodification of cultural works by outside distributors in ways that are either deculturizing or that deprive authors of compensation for their underlying works.¹⁸⁰ To a certain extent, the protection of traditional knowledge is an issue concerning wealth transfer. If the creative aspects of traditional cultural expressions were protected similarly to the works protected under present copyright regimes, there is no question that a certain amount of wealth transfer would occur that does *not* occur now. We need a harmonization standard that recognizes the digital cultural divide and that allows enough breathing space for culture industries in developing countries to grow so that sustainable development is an achievable goal. “Cash ‘n’ carry” creativity leaves uninterrogated the inequalities of access and capacity of the public domain, and ultimately preserves them to the harm of the Third World.¹⁸¹

¹⁷⁸ ALIKHAN, *supra* note 53, at 80–81.

¹⁷⁹ *See generally id.* at 64–80 (demonstrating how Asian, African, and South American countries have taken advantage of the internet and intellectual property rights to grow their economies); IDRIS, *supra* note 51, at 25 (demonstrating how the sale of traditional music boosts a country’s GDP).

¹⁸⁰ Examples of such deculturizing uses include unauthorized pop music borrowings from indigenous artists, tourist souvenirs, and comic book heroes. *See, e.g.*, BROWN, *supra* note 135, at 5–7 (concerning publication of native songs online); Kimberly Christen, *Gone Digital: Aboriginal Remix and the Cultural Commons*, 12 INT’L J. CULTURAL PROP. 315, 324–25, 328–29 (2005) (discussing the creation of DVDs about aboriginal culture, which take images and sounds of traditional cultures—obtained for free because of a lack of ownership concept—and distribute them for profit); Long, *supra* note 158, at 622 (stating that most indigenous groups do not wish to have their folklore and practices commercialized); Riley, *supra* note 158, at 72 (explaining that cultural music such as the Navajo “Beauty Way” song can be downloaded illegally for free on the internet).

¹⁸¹ *See, e.g.*, Chander & Sunder, *supra* note 169, at 1351–54 (discussing four main inequalities of access and capacity between developed nations and the Third World).

IX. HARMONIZING THE DISSONANCE

In creating a future harmonization standard for copyright, we must give authors breathing space to create while avoiding the mistakes of the past in connection with presently excluded voices. This requires some lessening of past barriers (such as in connection with traditional knowledge), but does *not* require a dismantling of all authorial control. To the contrary, to create a more workable future standard, we should limit the impetus for “cash ‘n’ carry” creativity to assure that aesthetic creativity is encouraged. This requires the grant of some level of authorial control beyond compensation for use. At a minimum, based on the personal relationship between authors and their works, and their desire to control the creation of their works, authorial control must include enhanced first publication rights. Such rights, however, would terminate at the author’s death and would *not* be descendible. The purpose of the first publication right is to honor the creator’s right to determine when his work is complete, and, therefore, ready for publication/dissemination. Such creative decisions necessarily require a living author. The purpose of this right is *not* to protect the image of the author or her privacy, but only the creative determination of what comprises a “work” and its mode of first publication (if at all).

Fair use must be balanced against aesthetic creative incentivization goals. Since copyright is the only intellectual property right that actually provides a large free compulsory license for use of its works,¹⁸² this free license should be offered in a nuanced manner. Fair use is a critical component in a copyright system, but it is not the supreme component in assuring the future of a vibrant public domain. Thus, for example, while there may be instances in which a right of first publication may be trumped by fair use, those instances should be relatively rare. Fair use should *not* become the mechanism through which authorial rights are transformed into “cash ‘n’ carry” creativity. The question of derivative works must be dealt with in a manner where authorial control over derivative uses supports the creativity incentivizing goals of copyright.

Just as compensation alone is an insufficient right, compensation for all uses of any portion of a copyright protected work is similarly inappropriate. Too much control over derivatives can be as harmful

¹⁸² Otherwise known as “fair use.” See 17 U.S.C. § 107 (2000).

to the public domain and the encouragement of aesthetic creativity as too little. These suggested limitations are directed solely to the narrow issue of the scope of rights which authors and other creators should receive in an effort to craft a harmonized standard of protection that more properly serves the goals of encouraging aesthetic creativity. As copyright is reconfigured to reflect the needs of the Digital Age, there are other aspects which must be considered. These include expanded definitions of originality and authorship to incorporate the many works of collaborative creativity that are increasingly becoming the creative norm, even when such collaboration may be cross-generational. As such new definitions are incorporated into any regime, the needs of all countries and peoples must be considered or dissonant harmonization will become the insurmountable obstacle to the desired goal of harmonization.

CONCLUSION

“Cash ‘n’ carry” creativity as an international standard, without sufficient calibration for cultural and other dissonances will only continue to marginalize already-excluded voices, without achieving the desired goal of enhanced creation of new works. In order to create a truly effective authorial right—carefully bounded by the needs of incentivization, public dissemination, and end user access—more study is required to determine what rights, if any, encourage aesthetic creativity. More study is also required to determine the relationship between aesthetic and innovative creativity, including any differences in what motivates possessors of such creativity to create works and inventions, respectively. Insights into differences between the two should help craft copyright and patent regimes that more appropriately serve their distinctive goals. While “cash ‘n’ carry” creativity has the facial ease of increased end user access with some level of compensation for authorial rights, it is too broad a brush for today’s global digital media. Science may help us calibrate the differences so that authors, end users, and developing countries may benefit from a more rational approach. Hopefully, when *aesthetic* creativity is better understood, we will be able to create international standards that will decrease the dissonance and more adequately serve the goals copyright was designed to serve. Effective harmonization requires no less.