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Literary Property and Copyright

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LITERARY PROPERTY AND COPYRIGHT

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Abstract

Even when the first subject matter of copyright control was literary works, the specific rights of authors who produce these works had never been clearly articulated. Copyright laws have protected a statutory right to distribute the work to the public that may be broadly owned by both author and publisher while the common-law right of property over the work, which would have protected an author’s creative interest in the work, have been dismissed by the courts as a legitimate source of law. This paper examines literary property as a form of authorial rights, which authors may potentially have over works of authorship and which is both separate and distinct from statutory copyright. By looking at publication contracts between manuscript publishers and authors such as John Milton, Ralph Waldo Emerson, Harriet Beecher Stowe, Henry Thoreau, and Oliver Wendell Holmes, this paper suggests that there are two sources of rights over literary and artistic works - one at common-law and another at statute – as evidenced by the fact that authors retained personal property rights over their work after exclusive rights to print were assigned to the publisher. Should the notion of literary property be accepted as another source of right for the author, there will be immense implications for how scholars, jurists, and policy-makers understand and shape copyright laws. If literary property is acknowledged as separate from statutory copyright, then ownership of the work and ownership of the specific rights under §106 of the Copyright Act would entail different entitlements. The author’s role in the copyright system will be more clearly defined as ownership of literary property delineates rights owned and obligations owed by authors who produce literary works for the rest of society. Finally, this paper argues that social expectation to access creative works may be checked against the authors’ right to protect their creative personality and integrity as well as the publishers’ right to receive fair payment for the use of the work if a clear conceptual distinction between literary property and copyright is drawn.
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Copyright laws emerged out of necessity when the earliest printing presses were first introduced into the book trade. After the Statute of Anne codified an assortment of censorship, licensing, and trade-control rules to produce the world’s first copyright statute in 1710, it soon became clear in Anglo-American legal systems that the only rights which could exist over creative works had to be statutorily granted by the legislature. Copyright laws have steadily expanded since the Statute of Anne to protect owners of creative works. In the past decade or so, attacks against these expansions by left-leaning critics have become more visceral and intense. As copyright owners assert absolute “property” rights over creative works and critics retaliate with reminders that state interests operate to balance and limit statutory rights, one cannot help but wonder if the terms of this debate may be clarified by engaging in a dialogue to determine if copyright is, in a legal sense, “property.” If copyright is indeed property in a *de jure* sense, then is copyright the same thing as “literary property”? If this question is answered affirmatively, then copyright does provide an owner of creative works with the absolute right to own and control their works in the same way natural property rights provide owners with perpetual, exclusive, and absolute rights to own and control property to the exclusion of all others. The purpose of this article is to explore the notion of literary property, whether literary property may be equated with copyright, and if both may be considered legally equivalent, the implications for current debates and jurisprudence on the extent and limitations of modern copyright laws when confronted with newly emerging technological, social, and cultural trends.

To facilitate this analysis, I have divided this paper into three parts. In Part 1, I examine the notion of literary property as a distinct legal concept, which protected the author’s natural right in the manuscript because of the natural connection between a creator and the work created. It will appear from the discussion that literary property safeguarded an author’s creative interests and natural expectations from having created the work against the rest of society, including printers and publishers who purchased the manuscript and the right to print from the author. In Part 2, I consider if literary property can be considered the equivalent of the more modern “property” right that statutory copyright recognizes over creative works. I conclude that both are distinct legal concepts and propose that two conceptions of property over creative works - natural property and economic incentives - be explicitly recognized, separated, and treated as discrete to ensure clarity in policy and legal debates as entitlements over creative works are determined. In Part 3, I evaluate how such a separation of natural property and economic incentives affects and

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1 For excellent studies on the history of the copyright system, see *Mark Rose, Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) and *Lyman Ray Patterson: Copyright in Historical Perspective* (Vanderbilt University Press 1968). For a concise account of the first 350 years of copyright law, see Benjamin Kaplan’s 1966 James S. Carpentier Lectures. *Benjamin Kaplan, An Unhurried View of Copyright* 1-37 (Columbia University Press 1966)

shapes debates on the elusive balance between private rights and public interest. Here, I surmise that a separation of rights from incentives and the recognition of specific norms recognizing authors’ entitlements and obligations will allow the copyright system to realize it’s constitutional goal of promoting progress of science and the useful arts.

**PART II: LITERARY PROPERTY AS A LEGAL CONCEPT**

The full extent to which literary property existed as a right that authors naturally possessed over works they created may be a matter of pure academic speculation. What appears certain is that literary property pre-dated copyright protection and protected an author’s personal interest and individuality more so than an industry-based entitlement to control the mass production and publication of the work. Authors wrote and produced literature way before the invention of printing and while a plagiarist was often severely admonished for representing someone else’s work as theirs, the pirate or copyist was often praised for preserving the integrity of the original work. This would certainly suggest that even before copyright existed to protect commercial rights to print, publish, and distribute, authors have been motivated by other non-economic incentives to express themselves through poetry, songs, and literature while expecting their personal integrity as the author of the work to be respected by the rest of their community. Conceivably, the author’s expectation that society respect personal rights, which protect the author’s creative integrity, came from a different source from and existed independently of any printing privileges or right to print manuscripts awarded to printers (and some authors) by the state to encourage the development of the printing business and a capitalistic trade in literary and artistic works. Printing privileges and monopolies were not needed to encourage the development of a publishing industry nor were printing licenses required to control the type of works that could be printed before Gutenberg introduced the printing press. It would have been clear, without the intense competition that moveable-type print technology introduced into the market for literary works, that the sole possessor of any rights over a manuscript, poem, or song would be, as a matter of natural law, the person who wrote it. Literary property appeared to protect the author’s expression at natural law while state-granted rights to print and publish manuscripts provided the economic incentive necessary to encourage investments in the print

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3 There does not appear to be evidence of actual protection of literary property but the term has often been used interchangeably with copyright to signify some proprietary or ownership right over the work. Mark Rose, for example, refers to the early copyright struggle between booksellers in England as “the question of literary property.” See Mark Rose, Authors and Owners 4 (Harvard University Press 1993). Lyman Ray Patterson and Stanley Lindbery, on the other hand, suggests that literary property and copyright are essentially different things. To Patterson, the rights of authors should not be treated as copyright but as a “companion body of law.” See L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright 122 (The University of Georgia Press 1991)

4 Augustine Birrell, Seven Lectures on the Law and History of Copyright in Books 9 (Cassel and Company, Ltd. 1899) (“You may search through the huge compilations of Justinian without lighting upon a word indicative of any right possessed by the author of a book to control the multiplication of copies; and yet books abounded even before the invention of printing, and though the pirate escaped animadversion, not so the plagiarist.”)

5 Marcus Boon, In Praise of Copying 34 (Harvard University Press 2010)

6 Jane A. Bernstein, Print Culture and Music in Sixteenth-Century Venice 10 (Oxford University Press 2001) (describing the emerging printing industry in Venice when the Venetian Senate granted the first printing monopoly to Johannes des Spira)

7 For state control of publishing activities to prevent sedition and heresy, see Rose, supra note 3 at 31-32

8 For a description on the impact of moveable-type printing presses on the literary market, see Paul Starr, The Creation of the Media: Political Origins of Modern Communication 26 (Basic Books 2004) (describing how a capitalistic market for the book trade spread as Gutenberg’s print technology spread)
business. These separate rights that emerge from entirely different sources is evident in the relationship between author and publisher as printing and publishing became a robust and profitable trade in Europe and the United States.

A. AUTHOR’S EXPECTATIONS AND PUBLISHING NORMS

Although the notion of literary property has not been well defined in the literature and very little has been written specifically about the idea in the context of the authors’ creative rights in their work, it appears to be another source of rights and obligations for the author. One thing that scholars have deduced from historical evidence on author-publisher relations in the developing book trade in late-seventeenth century England is that literary property, as the right of the author, was considered distinct from and had encompassed the publisher’s copyright. The earliest preserved contractual agreement that transferred a right to print from the author to his publisher was John Milton’s publication contract with Samuel Simmons for Paradise Lost in April of 1667. In this contract, Milton agreed to accept five pounds at the commencement of the contract, five pounds at the end of the first edition (when 1,300 copies had been sold to “particular reading Customers”), and five pounds each at the end of the second and third impressions (of 100 works each) in return for the manuscript of Paradise Lost. Both Milton and Simmons agreed that these three editions would not run more than 1,500 copies each. Scholars of eighteenth-century English literature consider the payment of twenty pounds for the manuscript of an epic poem extremely modest by the standards of that time, but evidence of the amount typically paid for the sale of a manuscript when Simmons purchased Paradise Lost is too scant to conclusively determine that Milton was underpaid for the poem. While a publisher’s unfair treatment of an author might indicate a superior position in the author-publisher relationship that would have allowed it to control all of the rights to print and sell manuscripts, this did not appear to be the case with Milton’s contract and the circumstances surrounding its signing. To the contrary, Milton appeared to have the upper hand in this arrangement, as the contract contained provisions that protected Milton as an owner of specific property rights in the manuscript even after the right to print the work had been assigned to Simmons.

Perhaps the most telling sign that Milton retained some form of literary property in Paradise Lost after assigning the right to print to Simmons was that one of the clauses in Milton’s contract allowed him to demand an accounting of sales at reasonable intervals. Should Simmons fail to provide such accounting as demanded, Simmons would be under a duty to pay Milton the five pounds for the whole impression as if it were due then rather than after

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9 The notions of literary property and authorship have been examined in relation to the commodification of literature, and some scholars of law and literary studies have attributed the emergence of literary property and authorship to the commodification of literature with the development of the book market in the eighteenth century. See, for example, MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 22-33 (Columbia University Press 1994); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 1 (Harvard University Press 1993); and Peter Jaszi, On the Author Effect: Contemporary Copyright and Collective Creativity, 10 CARDOZO ARTS & ENT. L. J. 293 (1991-1992).

10 Peter Lindenbaum, Authors and Publishers in the Late Seventeenth Century: New Evidence on their Relations, THE LIBRARY, s6-17 (3) (1995) p. 250-269


12 Id. at 442-443
completing the sales of 1,300 copies of the poem. The inclusion of such a clause into the contract indicates that both Milton and Simmons thought that the author of a manuscript possessed some form of property right in the work even after the right to print the work was assigned to a printer. Because the right to demand an accounting of sales was a legal or equitable right that only a co-owner of a property interest or a beneficiary in a trust relationship could own, it appears that both Milton and Simmons considered the author of a manuscript its property owner, putting the printer in possession of the manuscript in the position of a trustee for as long as they owned the more limited right to print the work. Peter Lindenbaum also points to another clause in the contract that suggests that Milton was in possession of some form of property right in the work. The cap on 1,500 copies of the work that Simmons could print ensured that the printer’s profits would not disproportionally exceed the author’s due and provides additional evidence to support the claim that the printer possessed a more limited right to print the work that stemmed from the author’s more encompassing property right. Studying the same contract, Lyman Ray Patterson further observes that Milton had agreed that he, as the author, would refrain from interfering from the publication of the work—a clause that Professor Patterson argues would be unnecessary if the assignment of rights in a work to a printer conveyed all legal rights that existed in the work.

Milton’s publication contract for *Paradise Lost* thus provides a rare and invaluable glimpse into a notion of literary property as an author’s right acknowledged by both authors and publishers even before authors were recognized as capable of owning copyright in their work. Before the Statute of Anne was passed in 1710, copyright, as the right to print, publish, and vend literary works, could be owned only by printers and publishers who were members of the Stationers’ Company, the trade guild regulating the book publishing business. Ownership of copyright in a book was recorded in the register book of the Stationers’ Company by the stationer licensed by the Crown to print the book; authors, who on rare occasions owned a copyright in their work that was entered into the company’s register, were generally excluded from owning the right to print and publish their work. Yet Milton’s publication contract suggests that authors had a more complex relationship with their publishers than is commonly assumed even before their standing as legitimate copyright holders was recognized by the Statute of Anne. It is deducible from Milton’s contract that the author possessed creative and proprietary rights in the work as its creator, rights which provided the author with ownership and control over the

13 Id. at 443
14 Id.
15 LYMAN RAY PATTERTON, COPYRIGHT IN HISTORICAL PERSPECTIVE 74 (Vanderbilt University Press 1968).
16 Early copyright was intertwined with Crown censorship policies as the government sought to control the publication and distribution of what were considered heretical and seditious materials. The Stationers’ Company was the perfect body, and copyright the perfect instrument, to implement these policies through an intricate system of licensing laws. Id. at 114-142
work even after the manuscript was sold to the printer and which were separate and distinct from
the publisher’s copyright, viewed as a more limited right to print and recover profits from sales
of the work.

Milton’s contract is not the only historical evidence that suggests that authors had a more
encompassing right in the work than copyright. The publication contracts between early
American authors and their publishers after the passing of the first U.S. copyright statute of 1790
also allude to an author’s proprietary and creative control over the work that the author would
retain after the sale of the manuscript and assignment of copyright to the publisher.17 For
instance, the March 1868 publication contract between Ralph Waldo Emerson and Ticknor &
Fields (which later became Houghton, Mifflin and Company) for the publication of May-Day and
Other Pieces contained a clause that granted Houghton, Mifflin “the sole right to publish” the
work for the duration of the agreement which appears to have been carved out of Emerson’s
larger proprietary interest.18 For the consideration of four hundred dollars for the publication of
the first two thousand copies of the work and twenty-five cents for additional copies of the work
printed thereafter, Emerson agreed to deposit the stereotype plates for his work with the printers
and provide a written order for the printing of any additional editions of the work that Houghton,
Mifflin considered expedient.19 Emerson had the option of terminating the contract at any time he
chose, upon which he was required to purchase all the remaining copies of the work in
Houghton, Mifflin’s possession at cost.20 It is notable that even given the Supreme Court’s 1834
holding that authors did not have a property right in their manuscripts through common law that
was separate from the statutory right to print and publish21, Emerson’s contract protected the

17 I tried to find publication contracts that predated the 1790 Copyright Act to show that authors clearly had rights
that were separate from the rights of publishers. There is, however, a paucity of contracts that showed a clear
distinction between author and publisher because of the personalities of well-known authors writing at that time.
Benjamin Franklin, for example, was a well known author who wrote before the first U.S. Copyright Law was
passed. Franklin was also a publisher and printed and distributed his own work. Hence, there was no need to address
the separate rights of publisher and author. Thomas Paine was also famous for his revolutionary work,
Commonsense, but published it anonymously because of its treasonous content. As such, there is no such allusion to
the author’s separate claim to the contents of the manuscript.
18 Copy on file with author; original contract available at Houghton Library Special Collections, Harvard College
Library
19 Clause 4 of the contract reads:

“The said party of the first part (Emerson) shall deposit with such printers as the parties hereto shall mutually agree
upon, the stereotype plates of the said work, and whenever the said parties of the second part (Ticknor & Fields)
think it expedient to print an edition of the said work, the said party of the first part shall give a written order for
printing the required number of copies and no copies shall be printed from the plate of said works without such
written order.”

Copy on file with author; original contract available at Houghton Library Special Collections, Harvard College
Library
20 Clause 6 of the contract reads:

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

Id.
21 Wheaton v. Peters, 33 U.S. 591 (1834)
author’s right to control the contents of his manuscript from any form of alteration or modification by requiring the author to provide the stereotype plates of the work to the printer and a written order to authorize the publication of any new additions of the work. This appears to be a right that is separate from and independent of statutory copyright. The termination clause of the contract further affirms, implicitly, the author’s proprietary right in his creative expression by protecting a claim to restitution of the published work that should belong only to a property owner.

It would have made more business sense for Houghton, Miflin to require Emerson to purchase the remaining stock at market price upon termination of the publication contract and seek contractual damages for reliance loss. However, this was not the agreement between author and publisher in this case and by providing Emerson with the option to terminate the contract at any time with only the penalty of purchasing of remaining stock at cost, Houghton, Miflin appeared to have recognized Emerson’s property right in the work itself—a larger proprietary right in the work that encompassed their more limited statutory right to print that was assigned to them in their publication contract with Emerson.

Some commentators argue that restitutionary claims vindicate property rights of its claimant, with which the defendant had interfered. See GRAMHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 11 (Oxford University Press 2006). Hanoch Dagan offers a different argument. He argues that the notion of property rights is a highly contested concept that is open to competing interpretations —and hence, cannot be used as a basis to justify claims of restitution. Hanoch Dagan, Restitutionary Damages from Breach of Contract: An Exercise in Private Law Theory, 1 THEORETICAL INQUIRIES L. 115, 129-130 (2000). Douglas Laycock, however, provides a useful conceptual definition of restitution as (1) a recovery based on unjust enrichment and (2) a restoration in kind of a specific property. Douglas Laycock, The Scope and Significance of Restitution, 67 TEX. L. REV. 1277, 1279 (1989). In Emerson’s case, the fact that the publisher would return printed copies of the book to Emerson at cost price, even when Emerson terminated the agreement, suggests that the publisher saw restitution as a way to restore Emerson’s property right in his expression contained in the work.

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

The publication contracts between Houghton Mifflin and other authors such as Harriet Beecher Stowe, Henry Thoreau, and Oliver Wendell Holmes show the same implicit recognition of an author’s property rights in his work by the publisher in the reversion or destruction of stereotype plates after termination of contract and in the promise to publish the work in ways that will affirm the author’s creative personality (“in good style”).

Clause 7 of the publication contract between Harriet Beecher Stowe and Houghton, Osgood, and Company (November 21, 1878) for the new edition of Uncle Tom’s Cabin reads:

“If, at the expiration of five years from date of publication, or at any time thereafter, the demand for said work should not be sufficient in the opinion of the parties of the second part (Houghton, Osgood) to render its publication profitable, then this agreement shall end, and the party of the first part (Stowe) shall have the option to take from the parties of the second part, the stereotype or electrotypes plates (and engravings if any) of said work and whatever copies they may then have on hand; or, should he fail to take said plates and copies at cost, then the parties of the second part shall have the right to dispose of the copies at hand as they may see fit, free of copyright, and to destroy the plates...”

In the contracts for the publication of Henry Thoreau’s works (Excursions (1863), his letters (1865), A Yankee in Canada, with Anti-Slavery and Reform Papers (1866), and the Maine Woods (1864)) entered between his younger sister, Sophia Thoreau, and Ticknor & Fields was a clause that ensured the publishers printed and published the work “in good style.”

The contracts for the publication of Oliver Wendell Holmes between Holmes and Ticknor & Fields (or Houghton, Mifflin) for his poems (1867), The Autocrat at the Breakfast Table (1867), The Guardian Angel (1866), Mechanism
As a legal concept, the term *literary property* often connotes an individual right that grants its owner exclusive ownership over a work. Copyright cases suggest three distinct but interrelated characteristics of the idea of literary property, each of which will be discussed below: first, it conveys a proprietary right; second, it protects a creative interest; and third, it arises from an author’s natural right. Literary property grants the author proprietary rights over the work by recognizing the author’s expectation to maintain control over the work even when the work is subjected to the provisions of the copyright act. In 1985, for example, the Supreme Court decided that an author had the right to control the first public appearance of unpublished expressions and that society’s expectation to have access to the work was secondary to the right of the author. Because the Copyright Act of 1976 protects works as soon as they are fixed on a tangible medium of expression, the court’s decision to deny the defense of fair use while the work has been fixed (putting expression on paper, for example) but remains unpublished protects the author’s right to decide whether to publish a work in the first place and where, and in what form the work will be published, which is a common-law right that falls outside the explicit rights specified in the copyright act. The right to confidentiality, privacy, and creative control of the work is a proprietary right that protects the author’s personality and individuality—a right that is, in essence, personal even if it is commercially valuable to author and publisher. More importantly, the court’s explicit protection of the creative space necessary for authors to develop their ideas during the prepublication stage and polish their work for public dissemination acknowledges authors’ personal interest in how their work projects their personality and individuality to their reading public. Furthermore, the case law resulting from a famous case between J. D. Salinger and Random House protects an author’s right to control the use of unpublished letters that have been made publicly available through library archives on the same

in Thought and Morals (1870), and Medical Essays (1883) has a similar clause that the publisher print and publish the work “in good style.”

Copies on file with author; original contracts available at Houghton Library Special Collections, Harvard College Library  
26 17 U.S.C.A. §102  
27 The specific rights that the copyright act recognizes upon fixation are the rights to reproduction, distribution, derivatives, and public performance and display. §106  
28 Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (stating “[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.”)  
29 As the Court explained, “[t]he right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher...the commercial value of the right lies primarily in exclusivity.” Harper & Row, at 2226-2227  
30 “The period encompassing the work’s initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the “right to control the first public distribution” of his work...echoes the common law’s concern that the author or copyright owner retain control throughout this critical stage...The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term “news value” to be gained from premature publication of the author's expression.” Id. at 2227-2228

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principle that “the copyright owner owns the literary property rights, including the right to complain of infringing copying” of the letter’s expression.\textsuperscript{31}

While literary property protects the proprietary interest of authors, the right is more limited in scope in that it appears to protect only authors’ creative interests in their work. Generally, the commercial interests of authors are protected through statutory copyright law,\textsuperscript{32} but, at least in the United States, the creative rights of authors do not receive the same degree of protection through the copyright statute.\textsuperscript{33} The notion of literary property, because of its genesis in the author’s natural right as the creator of the work, protects creative rights: authors’ personal right to protect their personality as expressed in their work from distortion by others in society. This right serves the important function of ensuring that the author of a work has the ability to preserve the integrity of that work once it is made publicly available because it represents the author’s personality and makes a unique contribution to society through the author’s authentic expression. Given the important contribution that the author’s expression makes to society, Professor Patterson argues, it is only in society’s interest to reciprocate by protecting the author’s creative interest in that work.\textsuperscript{34} Authors expect two things from making their creative pursuits available to society: payment for their work, and preservation of their creative personality and the integrity of their work. As the copyright act facilitates the work’s commodification to garner rewards from the market, the non-economic interests of authors can be protected by an explicit recognition of literary (or creative) property through common law. Literary property rights also arise from authors’ natural rights in their work and are attributed to the relationship between the creator of a work and the work that is created. The idea that authors own property in their work because that work embodies their personal individuality pre-dates the earliest copyright statute\textsuperscript{35} and was acknowledged not because of an existing social convention but as a fundamental human right of individuals to own that which they create through their labor.\textsuperscript{36} In protesting censorship of literary work, John Milton proclaimed that books “contain a potency of life in them to be as active as the soul was whose progeny they are” and “preserve as in a vial the purest efficacy and extraction of that living intellect that bred them”\textsuperscript{37}, revealing the author’s understanding of his

\begin{footnotes}
\item [32] 17 U.S.C.A. §106
\item [33] The creative rights of authors of works of visual art also receive some degree of protection. §106A protects an artist’s creative rights in visual arts from plagiarism (the right to claim authorship of the work) (§106A(a)(1)(A)), integrity (the right to prevent the use of the author’s name for work that the author did not create) (§106A(a)(1)(B)); and misrepresentation (the right to prevent use of name as the author of a work in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to the author’s honor) (§106A(a)(2)). This provision has very strict boundaries and is limited in its application. What amounts to a “work of visual art” is defined narrowly under the copyright act. See §101.
\item [34] Ray Patterson, supra note 11 at 70-71
\item [35] The Statute of Anne 1710 was the first copyright statute to be passed in England and explicitly recognized the right of authors to print, reprint, and publish literary works
\item [36] The most familiar idea that supports the author’s natural right in the work is probably John Locke’s passage in the Two Treatises of Government that every man has property in his person, and when he removes something out of nature to mix it with his own labor, he has property in it. The passage in Locke’s Two Treatises of Government states: “Through the earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This no body has any right to but himself. The “labor” of his body, and the “work” of his hands, we may say, are property is. Whatsoever then he removes out of the state of nature hath provided, and left in it, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property.” John Locke, The Second Treatise on Civil Government 20 (Prometheus 1986)
\item [37] John Milton, Areopagitica, in PARADISE LOST 342 (Gordon Teskey ed.) (W.W. Norton Company 2005)
\end{footnotes}
work as an extension of his personality or individuality—as a part of him. Even if the process of literary creation inevitably builds upon existing works, the very act of mixing personal expression with literary resources and ideas from the commons (or nature) would create an author’s literary property right in the work that justifies authorial control over how the work is used, particularly when a public use of the work goes against the author’s intention for creating that work in the first place. In summary, therefore, literary property is a right that protects authors’ expectations as separate from those of publishers, is proprietary in nature, limited to the protection of creative rights, and exists because of the natural connection between the creator of a work and the work that is created.

B. LITERARY PROPERTY AS A NATURAL RIGHT

Modern copyright protecting economic rights of copyright owners, whether author or publisher, exists because statute created it. The legislature, courts, and scholars have long recognized the economic role statutory copyright plays in encouraging and rewarding creative production for public benefit. The genesis of literary property, which protect less tangible interests of a human creator, such as personality and identity, may, however, be less certain. While it is clear that statutory copyright developed as socio-economic conditions evolved and created a demand for creative materials, which could, arguably, be best met when the state expressly protected economic rights of creative and artistic individuals and their publishers, it is equally clear that literary property does not have a similar state-sanctioned genealogy. Instead, a literary property right over a piece of creative work would have its origins in a more general moral and political philosophy that protects one’s individuality from invasion in a somewhat visceral, intuitive, and primitive way. Literary property rights accord with certain a basic moral and ethical principle that the individual creator of a creative work should be able to own and control his or her work, which, in a very palpable sense, is an embodiment of the creator’s individual personality. In a 1644 speech before the English Parliament opposing state licensing of printers and censorship of printed materials, John Milton alluded to this very point when he stated that books “contain a potency of life in them to be as active as that soul whose progeny they are” and that “they do preserve as in a vial the purest efficacy and extraction of that living

38 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts”); Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (“copyright law ultimately serves the purpose of enriching the general public through access to creative works”). See also, Maureen Ryan, Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom, 8 CORNELL J.L. & PUB. POL’Y 541, 544 (1999) (“Given the Framers’ predilection for open inquiry and the high value they placed on innovation in ideas and technology, it makes sense that the Framers’ focus in enacting the Copyright Clause was encouraging maximum production and dissemination of new works.”); Steven Hetcher, Desire Without Hierarchy: The Behavioral Economics of Copyright Incentives, 48 U. LOUISVILLE L. REV. 817, 819 (2010) (describing legal scholars’s reliance on the incentive theory as the primary motivation for creativity)

39 See, JANE A. BERNSTEIN, PRINT CULTURE AND MUSIC IN SIXTEENTH-CENTURY VENICE 18-21 (Oxford University Press 2001) (describing how the commercialization of music printing in sixteenth century Venice led music composers and publishers to seek printing privileges (an early form of copyright) to commercialize their work and distribute it to the public). See also WOODMANSEE, THE AUTHOR, ART, AND THE MARKET, supra note 9 at 52-53 (describing how legal recognition of proprietary ownership of authors and publishers in the work through legislation facilitated its distribution)
intellect that bred them.”\textsuperscript{40} This idea that printed materials are a receptacle containing an author’s intellect and creative personality draws the clear distinction between an author’s expectation to have control of the manuscript itself through some form of literary property, which protects the manuscript in its entirety, and an economic interest in publishing and selling the work as one right from a bundle of rights, which stems from the author’s proprietary interest or ownership of the manuscript.\textsuperscript{41}

Several normative narratives have been advanced to support the acknowledgement of literary property as a natural right of the author. John Locke’s labor theory has often been cited as support for the normative proposition that authors ought to have property rights in the products of their creative labor.\textsuperscript{42} Instrumental within this line of thinking is Locke’s notion that individuals have property and ownership over their person and hence, the labor of one’s body and work of one’s hand - when mixed with commonly available resources from nature - should produce a thing that may be appropriated out of nature and be protected as a proper subject matter of a property right.\textsuperscript{43} Another normative narrative supporting the author’s property right in a work, which scholars also refer to, is Wilhelm Hegel’s writings about property as an important attribute of freedom and thus, necessary for the development of the author as a social being.\textsuperscript{44} Hegel’s personality theory\textsuperscript{45}, to a very large extent, forms the foundation for the protection of certain inalienable moral rights owned only by the creator of a work in authors-rights centric jurisdictions, such as France and Germany. These rights, such as the rights of attribution, integrity, disclosure, and withdrawal, protect the creator’s individuality or personality, which, subsumed by the work, should not be separated from the author as a person and sold to another. In these jurisdictions economic rights are completely alienable from the creator of the work.


\textsuperscript{41} Scholars have noted this important distinction between ownership of the manuscript and ownership of a right to print and sell the manuscript. See for example, L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. J. 1, 29 (1987) (stating that “[t]he author, as creator of the new work, clearly had the right to ‘judge when to publish, or whether he will ever publish,’ and nothing in the statute inhibited this right. The bookseller, however, could own the copyright only by reason of assignment. Ownership by reason of creation and ownership by way of assignment, of course, are substantially different. Natural-law arguments support the former, but not the latter”).


\textsuperscript{43} JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 20 (Prometheus Books 1986) (“Whatsoever, then, [a man] removes out of the state that Nature hath provided and left it in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property.”)


\textsuperscript{45} GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 45 ((T.M. Knox ed.) (Clarendon Press 1952) (“The principle that a thing belongs to the person who happens to be the first in time to take it into his possession is immediately self-explanatory and superfluous, because a second person cannot take into his possession that is already the property of another. Since property is the embodiment of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is required”)
while moral or “personality-type” rights remain attached to the creator and can never be sold. Apart from certain provisions in the Visual Artists Rights Act and certain state applicable legislation, moral rights are not generally recognized in the United States. Of course, Hegel, who wrote at the tail end of the German idealist period, was also influenced by the work of Immanuel Kant and Kant’s theory of property as an acquired right to something held in common over which one asserts a free will to possess. Intellectual property scholars have also relied on Kant to find support for an author’s property right in the work.

Whether one relies on the works of Locke, Kant, or Hegel, one will arrive at the same conclusion that there are natural rights, which belong to the author and exists even if not explicitly recognized by a legal system and made into a legal right. We would agree that there is a natural right to life and that it is morally and ethically wrong to take the life of another even without laws making it a crime to commit murder. In the same way that we would agree that it is morally and ethically wrong to impose undue restraints on another person’s ability to speak freely because we recognize an individual’s inherent right to free speech even without First Amendment guarantees, we would also agree that an individual in society will have the right to own that which he or she produced - whether produced through manual or intellectual labor. In some sense, a thing produced from intellectual labor may be more “connected” to the personality or individuality of its creator than something created through manual labor and, as a result, more deserving of a natural property right that would allow its owner to control how society uses the thing. Such a right should exist even if there are no laws specifically protecting or recognizing that right. There is a difference between a natural right and a legal right and we must take great care to distinguish between these two. A right promulgated by law i.e., a legal right, and a right that exists as a basic, fundamental, or intrinsic right i.e., a natural right, are not the same type of rights. Legal rights sometimes affirm natural rights. Sometimes they don’t. Laws prohibiting the willful taking of another’s life, for example, affirms the individual’s natural human right to life. On the other hand, laws facilitating genocide - while still laws - do not. They go against an individual’s natural right to life. Whether we consider such laws to be proper laws in the first place, is a discussion beyond the scope of this paper.

46 For a comparison between both moral-rights based, such as Germany and France, and economic-rights based, such as the United States, jurisdictions see, Neil Netanel, Copyright Alienability Restrictions and the Enhancement of Author Autonomy, 24 RUTGERS L.J. 347 (1993)
47 17 U.S.C.A. §106A
49 BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 730 (Touchstone 2007)
50 IMMANUEL KANT, THE METAPHYSICS OF MORALS 49 (Mary Gregor ed.) (Cambridge University Press 1996) (“a right to a thing is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others.”)
52 See, for example, an account of the Nuremberg Laws in LENI YAHIL, INA FRIEDMAN, AND HAYA GALAI, THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY, 1932-1945 67-70 (Oxford University Press 1990); MARION A. KAPLAN, BETWEEN DIGNITY AND DESPAIR: JEWISH LIFE IN NAZI GERMANY (Oxford University Press 1999)
53 This question about the moral content of laws strikes at the heart of legal theory and the study of what law really is. Legal positivism believes that laws do not necessarily have to abide by particular moral standards for them to be considered proper and valid “laws.” The idea that men would possess certain natural and imprescriptible rights is nothing more than “rhetorical nonsense” and “nonsense upon stilts” to a legal positivist. See, Jeremy Bentham, Nonsense Upon Stilts or Pandora’s Box Open or The French Declaration of Rights Prefixed to the Constitution of
suffices to point out that man’s natural expectations to a fundamental way of living in a society may be supported, denied, or simply ignored by the laws of a legal system regardless of whether we accept the basic premise that an individual possesses certain natural and imprescriptible rights. The copyright system - a legal institution charged with the sole purpose of promoting progress in society - is no exception. An author’s natural expectation to literary property may, in the same way, be supported, denied, or ignored by the copyright system.

In Anglo-american copyright systems, this natural expectation to a natural literary property right appears to have been quashed by judicial application of early copyright statutes. The earliest statutory codification of copyright as an exclusive right to print, publish, and distribute literary works in the United Kingdom and United States occurred in the 1700s with the Statute of Anne and 1790 Copyright Act. Following their enactment, the highest courts in these legal systems declared that these statutes were the only source of rights over literary works and explicitly denied the existence of the author’s natural literary property right. In 1774, the House of Lords declared that the author’s common-law right to his work cannot be supported by any rule or principle of the common-law of the United Kingdom. Following the House of Lord’s decision, Justice McLean on the United States Supreme Court announced in 1834 that any existing rights over literary works in the United States were created by Congress and that none existed at common-law save for a very specific and limited right to first publication for works that were not yet published. While these cases have been cited as settling the question of literary property, the specific factual scenarios from which these cases emerged raise

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1971 Laid Open and Exposed - With a Comparative Sketch of What Has Been Done on the Same Subject in the Constitution of 1795 and a Sample of Citizen Seiyès, in The Collected Works of Jeremy Bentham: Rights, Representation, and Reform 330 (Philip Schofield, Catherine Pease-Watkin & Cyprian Blamires eds.) (Oxford University Press 2002). Natural lawyers, on the other hand, see laws as necessarily embodying a specific moral content. Laws that ignore or reject moral precepts of justice, fairness, or righteousness should not be considered laws in the true sense - even if passed by the legislature or declared by the courts of a legitimate legal system. The maxim “lex injusta non est lex” or “a law that was unjust wouldn’t seem to be the law” defines a natural lawyer’s position on this issue. See, John Finnis, Natural Law and Natural Rights 363 (Oxford University Press 1980). A contemporary debate on this point is seen in H.L.A. Hart, Positivism and the Separation of Laws and Morals, 71 Harv. L. Rev. 593 (1958) and Lon L. Fuller, Positivism and Fidelity to the Law - A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958).

54 supra note 2
55 Decision of Lord Chief Justice DeGrey at 17 Cobbett’s Parl. Hist. 953, 992 (1813)
56 33 U.S. 591, 661 (1834)
57 See for example, Oren Bracha, The Statue of Anne: An American Mythology, 47 Hous. L. Rev. 877, 889-900 (2010) (“the debate [on literary property] was formally concluded with the decision of the House of Lords in Donaldson v. Becket”... “[w]hile Wheaton v. Peters had some aspects that were peculiar to the United States, the main question of copyright as a common law property right was identical to that litigated in the British literary property debate, and most of the opposing sides’ arguments on this issue were duplication of that debate. When a majority of the Supreme Court ruled against common law copyright, hope of achieving recognition of absolute property rights ... dwindled”); Mary Beth Peters, Constitutional Challenges to Copyright Law, 30 Colum. J. L. & Arts 509, 512 (2007) (stating that “[t]he controversy over what was meant by “secure” in the Copyright Clause was settled in Wheaton, and I don’t believe anybody proposes to fight that battle again” on the court’s decision that Congress was legislating a new right instead of acknowledging an existing right in common-law with the passing of the 1790 Copyright Act); and Michael J. Madison, Beyond Invention: Patent as Knowledge Law, 15 Lewis & Clark L. Rev. 71, 86-87 (2011) (“Wheaton v. Peters was the first major opinion of the Court to deal with copyright, and as copyright scholars know well, the Court concluded that the federal copyright statute, with its limited term and scope of rights, extinguished the concept of literary property with respect to works that fell within its scope. This brought American law into line with its English cousin [Donaldson v. Beckett]”).
uncertainty as to the exact judicial determination about the nature of an author’s rights in creative works. Donaldson v. Beckett was a dispute between two booksellers over the exclusive right to reprint James Thompson’s classic, The Seasons, and did not involve an author. The respondent in this case, Thomas Beckett, on behalf of various London booksellers and printers, claimed the exclusive right to print and make copies of the book as a perpetual entitlement, which was procured from the author’s assignment of copyright to the publisher. Here, the common-law right of the author to his work, which Beckett claimed to possess and the House of Lords asked to decide on, was a specific right to print and publish the work that an author could assign to his publisher. The notion of literary property, when used, referred to the rights to print, publish, and sell i.e., the same specific rights protected under the Statute of Anne. The question of literary property in Donaldson v. Beckett did not seek answers about the nature of an author’s natural expectation to have control over his identity as expressed in the work. The first legal question posed, “whether, at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same, without his consent”, and the subsequent questions that followed were simply not structured to answer the question of what rights an author would have over that which he creates. The notion of author’s natural rights were introduced in the case to support the economic rights to print and publish creative works and were rejected by the court to prevent monopolistic control by booksellers over the publication and sales of books. The distinction between the natural rights of the author in the work and the economic interests of the publisher, between literary property and statutory privileges, was never drawn and the case should not be read as suggesting that the only rights that authors have over their work were rights explicitly provided by statute. Similarly, the case of Wheaton v. Peters addresses specific facts that leave the question of literary property largely unanswered. The disputants in this case were Supreme Court reporters who had asked the court to decide if the

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58 For the five questions, which the House of Lords was asked to answer, see 17 COBBETT’S PARL. HIST. 953, 970-971 (1813).

59 The questions were structured to deal with the specific claim that booksellers had an exclusive right to print and publish books purchased from individual authors in perpetuity. The transcript for the case states that Edward Thurlow, the Attorney General, in his opening remarks for Donaldson observed that “[t]he booksellers had not, till lately, ever concerned themselves about authors, but had generally confined the substance of their prayers to the legislature, to the security of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of exclusively multiplying copies, had not they found it necessary to give a colourable face to their monopoly.” 17 COBBETT’S PARL. HIST. 953, 954 (1813).

60 Lyman Ray Patterson states this “was the only decision which would destroy the monopoly of the booksellers, and there is little question that the decision was directly aimed at that monopoly.” Patterson then cites Lord Camden’s judgement that “[a]ll our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.” See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 178 ( Vanderbilt University Press 1968)

61 L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 VAND. L. REV. 1, 18 (1987) (“it is important to remember what copyright entailed and did not entail at that time. At the time copyright owners had the exclusive right to publish works as those works were written, but only for a limited period of time—fourteen years with a possible renewal term of an additional fourteen years. Copyright owners did not have the exclusive right to prepare derivative works such as abridgements, translations, or digests. The distinction between the use of the copyright and the use of the work, therefore, was fundamental.”)

62 Patterson, supra note 58 at 174 (“The actual holding of the Donaldson case is that the author’s common-law right to the sole printing, publishing, and vending of his works, a right which he could assign in perpetuity, is taken away and supplanted by the Statute of Anne. The case did not hold that the author’s right at common law consisted only of the right of printing, publishing, and vending his works...“)
publication and sale of past reported decisions were protected by the author’s common-law property after they had been published. In 1834, during the formative years of the United States Supreme Court when Court Justices sought the widest dissemination of the law\textsuperscript{63}, deciding in favor of a common-law property right for a court reporter meant the restriction of free speech and free press in a newly formed country dedicated to the promotion of ideas and debate for progress.\textsuperscript{64} At that specific point in American history, the court had no other choice but to decide that a perpetual property right in court reports would expire as soon as they were published and that statutory copyright would protect the exclusive right to publish and vend such reports after publication. Given the dispute over the exclusive rights of publication and sale, the fact pattern in Wheaton v. Peters, as in Donaldson v. Beckett, did not give the court the opportunity to consider the broader natural rights of an author beyond the statutory rights to publish and sell the work.\textsuperscript{65}

Whether we choose to believe that judges create binding law or merely declare existing laws as cases come before them\textsuperscript{66}, one jurisprudential point remains to be made for the purposes of this article. The author’s literary property over the work does not cease to exist simply because copyright statute or judicial decisions do not explicitly acknowledge that right to be the law. An author’s literary right at common-law would not be evidenced through customary practices, as with the publication contracts discussed, and natural expectation that evolve from the interactions of authors with their publishers and the public. The author’s expectation of a literary

\textsuperscript{64} See L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright: A Law of Users’ Rights 64 (The University of Georgia Press 1991) (stating that the decision was a “simplistic solution to a complex problem: How to protect the author’s interest in his or her work without at the same time providing the bookseller an unregulated monopoly. This monopoly, of course, is based on the fallacy that ownership of the work is ownership of the copyright and vice versa.”)

\textsuperscript{65} Whether judges create or merely declare the law is a contentious issue in jurisprudence. John Chipman Gray, for example, is well-known for his belief that judges create, rather than discover, the law. (“[T]he absurdity of the view of Law preexistent to its declaration” Gray argues, “is obvious.”) See, John Chipman Gray, The Nature and Sources of the Law 96 (Columbia University Press 1909). See also Kermit Hall, James W. Ely, and Joel B. Grossman, The Oxford Companion to the Supreme Court of the United States 321 (Oxford University Press 2005) (“Sometimes judges make federal common law to govern specific issues, as when they fill a gap in a federal statutory scheme.”) Other scholars incline to believe that judges merely declare existing laws or norms that are discoverable or act in the capacity of a rule-making agency of the state. See Hans Kelsen, General Theory of Law and State 150-2 (The Lawbook Exchange 2009) (the view that “there is no law existing before the judicial decision and that all law is created by the courts is false”; courts always apply pre-existing law). See also H.L.A. Hart, The Concept of Law 132 (“In a system where stare decisis [i.e., to be bound by past precedent] is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body.”) For a natural-rights oriented perspective on this issue, see Ronald Dworkin, Taking Rights Seriously 87 (Harvard University Press 1977) (The role of the courts is to enforce existing political rights of individuals and this requires the court to arrive at a right decision taking into account “the practice and justice of its political institution.”) This issue on the role of the courts, however, bears very little impact on the discussion in this paper, which aims to demonstrate the existence of a broader literary right besides the rights recognized by copyright statutes and case-laws. Whether statute and precedent are morally right or not, and whether they accurately represent law and norms, is beyond the scope of this paper. It suffices to assume that a literary property right is a natural right that may or may not be affirmed by the legislature or judiciary.
property right cannot be nullified by a more limited recognition of a specific right to publish and sell the work. Statutes, which are enacted for specific policy purposes, and case law, which are peculiar to distinctive factual patterns, cannot possibly represent the full spectrum of rights that may arise from an individual’s creation of a literary or artistic work. Conceivably, Congress may tomorrow pass legislation that states that “from now on, man is considered to be an inanimate object.” Would this be the law? Yes, certainly from the vantage point of a legal positivist. Does that mean that man ceases to exist as living beings once this law is passed? No, it doesn’t. In the same way, a literary property right, if it exists as a natural right, does not have to be expressly validated by positive copyright law for it to be a legitimate expectation or interest. The express recognition of particular statutory privileges to publish and sell a work exclusively should not be taken to suggest that these privileges constitute all of the rights that authors have over their work. Neither should it be assumed that literary property and statutory copyright are mutually exclusive principles protecting separate interests of an author at different times along a seamless continuum of events that begins at the initial conception of a creative idea and which ends with the dissemination of the expression to the public. It is important to see how that distinction between an author’s natural interest over how the work is used and the economic interests, which naturally arise from the publication and public dissemination of a work, is blurred when courts state that literary property only protects a right to first publication before a work is published and that statutory copyright protects the author’s exclusive rights to print and sell the work post-publication.  

67 Literary property would be an interest that authors continue to have even after a publisher commits to publishing and disseminating the work. There is much value in our acceptance that there could possibly be a natural right that protects an author’s literary property. On this point, one should be very hesitant to contest Professor Lyman Ray Patterson’s counsel that the explicit recognition of the author’s rights at common-law would clarify the inconsistency in ideas and values, which plague copyright law today.  

C. PROTECTING THE AUTHOR’S IDENTITY AND CREATIVE RIGHTS

Accepting that the author has a natural literary property right in the work, however, raises a new set of normative questions that must be answered. What would a literary property right protect? Would such a right be alienable in the same way statutory copyright is? How would a natural right, if not explicitly recognized by the copyright system, be protected as a property of the author? These questions should be answered carefully if the protection of an author’s literary property at common-law is to allay some of the inconsistencies in institutional

67 See for example, Justice Day’s decision in Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909) (stating that “[a]t common law, the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner’s common-law right was lost. At common law an author had a property in his manuscript, and might have an action against anyone who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period”) and Judge Seaman in Tribune Co. of Chicago v. Associated Press, 116 F. 126, 127 (1900) (stating that “[l]iterary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner ... With voluntary publication the exclusive right is determined at common law, and the statutory copyright is the sole dependence of the author or owner for a monopoly in the future publication.”)

68 Patterson, supra note 1 at 220 (“There is little doubt that a recognition of authors’ creative rights could shape American copyright law, not by changing fundamental ideas, but by bringing those ideas into proper recognition and perspective, and doing so consistently with the copyright statute.”)
values that Professor Patterson identified in the copyright system.\textsuperscript{69} and not exacerbate further the problems we currently face, where the disparity in expressive power among authors, publishers, and readers or users of creative works could, in an especially fundamental way, affect society’s ability to learn, conduct research, and communicate with each other that will, in the long-run, hamper the progress of science and the useful arts.\textsuperscript{70} It may also be that proposing a literary right for authors will be met with strong resistance in anglo-american copyright systems by copyright pessimists\textsuperscript{71}, who may see the author’s rights as an extension of, or worse, a bolt that secures, the copyright monopoly over creative works and may not be looked upon favorably.\textsuperscript{72} Commentators, such as Professor Breyer (as he then was), who expressed doubt over the need to protect the author’s moral and economic interests to encourage the production of literary and artistic work\textsuperscript{73}, may challenge the claim that the author’s literary property must be recognized to protect the author’s natural non-economic interest in the work. Possible objections to the notion of the author’s literary property as proposed here may be broadly characterized into three distinct camps. However, I believe that these objections cannot be sustained if careful thought is given to what literary will protect and what its recognition will accomplish in the copyright system.

The first objection to a notion of literary property is based on the idea that the author’s rights may be used to justify the expansion of copyright - the economic right to use a work exclusively - over creative works. The basis for this objection may be attributed to the manner in which english booksellers had historically used moral and ethical arguments for the author’s rights, advanced by natural right philosophers like Locke, to support the expansion of an economic right to use the exclusive use of the work. The normative argument for literary property, in other words, was, and continues to be, utilized by corporations and entities other

\textsuperscript{69} Id. at 181 (the four basic idea that Patterson identified as underlying early American copyright law are (1) protect the author’s rights; (2) promote learning; (3) provide order in the book trade as a government grant; and (4) prevent harmful monopoly)


\textsuperscript{71} Borrowing a term coined by Paul Goldstein to describe a position taken about the fundamental purpose of copyright laws. \textit{See, PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 15} (Hill and Wang 1994) (“copyright pessimists ... see copyright’s cup as half empty: they accept that copyright owners should get some measure of control over copies as an incentive to produce creative works, but they would like copyright to extend only as far as is necessary to give this incentive, and treat anything more as an encroachment on the general freedom of everyone to write and say what they please.”)

\textsuperscript{72} Thomas Babington Macaulay’s speech before the House of Commons against the extension of copyright illustrates the aversion to author’s rights. He states “[i]t is good that authors should be remunerated; and the least exceptional way of remunerating them is by a monopoly [in the form of a copyright]. Yet monopoly is an evil...[i]t is a tax on readers for the purposes of giving a bounty to readers...I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit to this severe and burdensome tax.” Thomas Babington Macaulay, \textit{A Speech Delivered in the House of Commons on the 5th of February, 1841, available in FOUNDATIONS OF INTELLECTUAL PROPERTY 310-311} (Foundation Press 2004) (Robert P. Merges and Jane C. Ginsburg eds.)

\textsuperscript{73} Stephen Breyer, \textit{The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs}, 84 HARV. L. REV. 281, 282 (1970) (stating “[i]t would be possible, for instance, to do without copyright, relying upon authors, publishers, and buyers to work out arrangements among themselves that would provide books' creators with enough money to produce them. Authors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection.”)
than the author to justify the expansion and perpetuation of an economic monopoly to profit from the publication and sale of the work to the public. More recently, such normative arguments supporting the author’s natural entitlement to protection of their rights have been used to endorse Congress’s extension of the copyright term for an additional twenty years to benefit not just individual authors, but media publishers and corporate copyright owners as well. The objection to the notion of literary property on this basis may be allayed be clarifying that the rights of the individual author, rooted in natural law, are fundamentally distinct from the statutory grant that legislatures provide to facilitate the dissemination and communication of creative works to the public through exclusive rights protecting economic investments in purchasing, publishing, and distributing the work. There should be no intellectual or logical bridge between an individual’s natural right to the protection of his individuality in a society and the economic rights provided that the state grant in order to fulfill an institutional goal such as progress. Once it clear that the author’s rights and copyright are distinctly separate legal notions, the discomfort with accepting literary property as a natural right of the author for fear of perpetual extension of copyright will very likely subside.

The second objection to protecting the author’s literary property will most likely stem from commentary that has forthrightly rejected the commonly accepted version of the solitary author or artist from the Romantic period following the Enlightenment, who producing works from thin air or through divine inspiration, epitomizes the greatness and splendor of human creativity in its purest form. This individual creator, described by Northrop Frye as being “interested in himself, not necessarily out of egotism, but because the basis of his poetic skill is individual, and hence genetic and psychological”, provides an excellent premise for the recognition of literary property. Sheer creative genius, as the thinking goes, should be rewarded and encouraged through the grant of exclusive but temporary rights in the copyright act so that once these rights expire, the products of such creative geniuses would become accessible to the general public for learning and education. The problem with this line of thinking, however, is

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74 John Tehrenain, Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property), 82 U. COLO. L. REV. 1, 15 (2011); Dianne Leenheer Zimmerman, Information as Speech, Information as Goods: Some Thoughts on Marketplace and the Bill of Rights, 33 WM. & MARY L. REV. 665, 705 (1992); see also Patterson, supra note 39 at 52 ("the notion of copyright as property serves as the basis for the continued expansion of copyright to the benefit of the entrepreneur")

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


77 NORTHROP FRYE, THE ANATOMY OF CRITICISM 60 (Princeton University Press 1957)

78 Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984) (Justice Stevens stating that “[c]opyright is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-128 (1932) (Chief Justice Hughes stating that “[a] copyright ... is ‘at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects’”); U.S. v. Paramount Pictures, 334 U.S. 131, 158 (1948) (Justice Douglas stating that the “reward to the author or artist serves to induce release to the public of the products of his creative genius”)
that it’s faith in the genius creator, who produces a unique and highly original work and thus entitled to certain rights, runs contrary to expressed skepticism about the author being personally
and solely responsible for his creative expression. Michel Foucault, for example, famously
described the individual author as a culturally concocted “fiction” to provide discourses with
particular social statuses or modes of existing in society - the author is not someone who creates
from an inspired source of intelligence, who then freely shares his creation with the world, but is
rather someone who appropriates and controls the proliferation of discourses in society through
the claim of authorship. Roland Barthes, in an equally famous fashion, also proclaimed the
death of the author, in that the interpretation of a text should occur independently of the author’s
background and experience as texts, ultimately, are read by a reader. To Barthes, the undue
emphasis on the author as the creator of the work in making sense of a text is misplaced; instead
the focus on how texts would be interpreted should be its readers as the recipient and interpreter
of the work. Legal scholars have also proposed, thinking along the same lines as Foucault and
Barthes thought, that the author was a socially constructed metaphor to serve a particular cultural
purpose, which, in this case, was to support the commodification of literature in the eighteenth
century and establish the author’s proprietary ownership over original expressions. This will,
in turn, support the expansion of copyright over most intellectual creation and, through the
enforcement of proprietary rights, prevent social uses of the work for education, development,
and progression in society. However, contrary to this fear that property rights will stifle

79 Michel Foucault, What is an Author?, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST
CRITICISM 159-160 (Cornell University Press 1979) (Josué V. Harari ed.) (“We are used to thinking that author is so
different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning
begins to proliferate, to proliferate indefinitely. The truth is quite the contrary: the author is not an indefnite source
of signifcations which fill a work; the author does not precede the works; he is a certain functional principle by
which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free
manipulation, the free composition, decomposition, and recomposition of fiction.”)
80 Roland Barthes, The Death of the Author, in IMAGE, MUSIC, TEXT 148 (Hill & Wang 1977) (Stephen Heath trans.)
(“a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue,
parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was
hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed
without any of them being lost; a text’s unity lies not in its origin but in its destination.”)
81 MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 37
(Columbia University Press 1993) (Explaining that eighteenth-century theorists stopped thinking of the author as a
craftsman inspired by God in order to establish a commercial market in literary works, stating that these theorists
“minimized the element of craftsmanship ... in favor of the element of inspiration, and they internalized the source
of that inspiration. That is, the inspiration for a work came to be regarded as emanating not from outside or above,
but from within the writer himself. “Inpiration” came to be explicated in terms of original genius, with the
consequences that the inspired work was made peculiarly and distinctively the product - and the property - of the
writer.”)
(“stating that [t]he “authorship” concept, with its roots in notions of individual self-proprietorship, provided the
rationale for thinking of literary productions as personal property with various associated attributes including
alienability”); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLÉENS: LAW AND THE CONSTRUCTION OF THE
INFORMATION SOCIETY 54 (Harvard University Press 1996) (“Originality became the watchword for artistry and the
warrant for property rights.”)
83 Carys J. Craig, Reconstructing the Author-self: Some Feminist Lessons for Copyright Law, 15 AM. U. J. GENDER
SOC. POL’Y & L. 207, 228-230 (2007) (stating that “[t]he authorship myth that animates copyright discourse supports
calls for wide protection and generates complacency around the expanding domain of intellectual property and the
corporate ownership that dominates the intellectual realm ... The problem highlighted here is the power of the
individual authorship trope to occlude discussion of the social, educational, or cultural value of downstream or
derivative uses of protected works. Because copyright’s concept of the work resides in independent, original
innovation and progress, it is argued here that literary property rights will instead promote progress of society through the encouragement of authentic expressions and voices that will have a more positive and constructive impact on how society develops. Creative works that do not necessarily promote progress and diversity in expression may have a detrimental effect on society if works that are produced do not teach and educate. In reality, authors and creators - those who create and express themselves in the most authentic manner with the intent of making a positive influence - promote progress in society through their work. Why would anyone use the fact that all creators borrow from their predecessors and surroundings in the act of creation to debunk the myth of the romantic author only to decry the expansion of copyright? The notion of the romantic author may, as suggested by Professor Lionel Bentley, introduce reasonable limitations to copyright expansion. Moreover, connecting an author with his work through the notion of literary property will make the author directly responsible for their creations and how their work impacts society. Deconstructing the notion of romantic authorship to point out flaws in the legal system applauds likeness and similarities in expression - authors are, after all, not expected to be original - and will, more likely than not, produce the same types of works that have little influence on society and the advance science and the useful arts; making authors identify with what they create through a romantic vision of authorship and the notion of literary property will more likely result in the production of authentic expressions that, in turn, will impact society’s progression in a positive way.

The third possible objection to the notion of literary property is that information - the subject matter of its protection - should be a resource that is held as common and not private property. Conventionally, from an economic viewpoint, property rights counter the overuse that usually follows when a limited resource is held in common. The “tragedy of the commons”66, where everyone consumes a resource without caring for it or investing in it until it is depleted completely, may best be avoided by the allocation of private property rights, which define ownership and draw boundaries around the resource to limit its overuse by a clear right to exclude. Some scholars have, however, pointed out that there are merits to having particular resources held in common and identified the under-exploitation of a resource as a serious
problem with having too many property rights over any given resource. In some cases, a resource that serves a particular socializing function may be considered inherently public property. Speech would be a prime candidate to be protected as public property, given its self-organizing role in communities and society. Against this background, intellectual property scholars have emphasized the need for an “intellectual commons” that is free from the restraints of private property ownership so that information and creative resources may be freely available for future use as new works and knowledge are produced. Arguing for literary property as a natural right, which the law should protect, may generate disapproval from critics of copyright expansionism, who argue that the increase of property rights over resources that should be public property will result in the enclosure of a free unencumbered space generally known as the “public domain”, where information, ideas, and knowledge not subject to intellectual property or in which intellectual property has expired are freely available for creative reuse. An unencumbered and free commons of information and knowledge is considered so important to intellectual creation that a few intellectual property scholars have begun to proactively work on constructing a “cultural commons” to manage informational resources and support the pooling and sharing of these resources. It must be clear, however, that the idea of literary property would not limit use of creative expression as feared by critics of copyright expansionism. For one, the expansion of copyright should not affect use of creative works if rights are exercised in a reasonable and moderate fashion. Inbuilt checks into the law as they expand may be sufficient to address the problems with property expansion. More fundamentally on a conceptual level, literary property cannot (and should not) be considered a threat to the prerequisite freedom some

it facilitates socialization among members of a society; here there is no tragedy of the commons as there is benefit to having resources publicly owned as society as a whole benefits from the sharing of that particular resource)

88 Id. at 749-750 (identifying holdouts and monopolies as primary problems with privatization); for the leading legal work on the anticommons, see Michael Heller, The Tragedy of the Anticommons: Property in the Transaction from Marx to Markets, 111 HARV. L. REV. 621, 624 (1998) (Professor Heller explains the problem with under-exploitation of resources by stating: “[w]hen there are too many owners holding rights of exclusion, the resource is prone to underuse--a tragedy of the anticommons. Legal and economic scholars have mostly overlooked this tragedy, but it can appear whenever governments create new property rights”).

89 Rose, supra note 85 at 778

90 Michael A. Heller and Rebecca S. Eisenberg, Can Patents Deter Innovation? The Anticommons in Biomedical Research, 280 SCIENCE 698-701 (1998) (discussing how privatization of biomedical research and patenting of research results could lead to overlapping patent claims that restrict access to biomedical information); Niva Elkin-Koren, Copyrights in Cyberspace - Rights Without Laws?, 73 CHI.-KENT L. REV. 1155, 1193-1194 (1998) (applying anticommons analysis to intellectual property); Dan Hunter, Cyberspace as Place and the Tragedy of the Digital Anticommons, 91 CAL. L. REV. 439 (2003) (applying anticommons analysis to use of Internet space)

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

92 Michael J. Madison, Brett M. Frischmann, & Katherine J. Strandburg, Constructing Commons in the Cultural Environment, 95 CORNELL L. REV. 657 (2010). See also Lawrence B. Solum, Questioning Cultural Commons, 95 CORNELL L. REV. 817 (2010) (commenting on the idea of a “cultural commons”)
scholars see as essential to second generation creativity. Literary property connects an author with his work on a visceral level because it protects the author’s individuality and personality rather than a share of the copyright market. A property right in the work, which gives an author autonomous control over his individual expression, should, as a consequence of that connection between personhood and work, direct authors towards creating their best work in a responsible way for society’s benefit and instill the desire in new creators to do the same by using a predecessor’s work responsibly without triggering an assertion of a literary property right to besmirch one’s standing as a new author. A literary property right, in other words, will not enclose the commons but instead encourage more authentic works that will, in turn, increase the wealth of the public domain by a rise in authentic creations.

To be absolutely clear then, a literary property right as proposed today would not protect an author’s commercial interest, although it may well support its existence. The right to commercially exploit a work has been well taken care of by copyright legislation, which recognizes the creator of a work as the first owner of copyright. Literary property, on the other hand, protects the author’s identity and personality as expressed and contained in a work as a thing, not unlike a receptacle, rather than a resource. The subject matter of literary property, thus, would be the author’s creative interest as held by the work. Hence, Milton’s contractual obligation to refrain from interfering with the publication of his work was an agreement to not enforce a literary property right. As the right protects the author’s personality and creative identity - creative, rather than economic, aspects of literary and artistic production - there will be very little room for authors to abuse such a right and foreclose reasonable societal uses of the work. Yet, at the same time, protecting the author’s integrity and autonomy frees the author from worrying about abuse of the work once released and distributed to the public and, as a consequence, allows for greater authenticity in expression. The motivation for human creativity should not be reduced to economic or monetary values. As it has been well put, authors, unlike publishers, may be driven and inspired by non-monetary considerations. There is a dire need to harness these non-economic motivations for creativity and channel them into literary and artistic production that occurs today. Originality - even for second, third, and subsequent generation

93 A more specific right to use property, such as a right to commercially exploit, should be based on a broader entitlement in the property. Patterson, supra note 1 at 9-10 (likens ownership of copyright to ownership of a perpetual lease that has ownership-like entitlements, stating “copyright can be analogized to a perpetual lease of personal property, a manuscript or copy...for one specific purpose. that of publishing. The right of publishing, however, did not vest the ownership of a work itself in the ordinary sense, for this would give the holder of the right of publishing other rights incident to ownership) and at 218 (“The creative interest is a natural right of the author ...[w]hile that natural right was deemed to be the economic interest of the author, it was not so limited.”)

94 Diane Leenheer Zimmerman, Copyrights as Incentives: Did We Just Imagine That?, 12 THEORETICAL INQUIRIES L. 29 (2011) (questioning the actual link between commercial incentives and creativity); Roberta Rosenthal Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 NOTRE DAME L. REV. 1945 (2006) (identifying spiritual and inspirational motivations for creativity); ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (Stanford University Press 2010); Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 U.C. DAVIS L. REV. 1151 (2007) (describing creative inspiration as culturally inspired); Lydia Pallas Loren, The Pope’s Copyright? Aligning Incentives With Reality by Using Creative Motivation To Shape Copyright Protection, 69 L.A. L. REV. 1 (2008) (recognizing that the creation of some works may be motivated by non-monetary incentives and proposing that for such works, fair use be more readily available as a defense against infringement). See also, YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (Yale University Press 2007) (describing how digital networks encourage creativity that produces non-proprietary work with no real monetary rewards)
creators\textsuperscript{95} - should be a celebrated virtue and not attacked as being unrepresentative of the reality of creative production. The law, as I propose here, should not underestimate the power of many individuals expressing themselves in authentic and sincere ways to impact the progress of society in a profoundly positive way and protecting the author’s creative interest will be the first step, I argue, in that direction. This is important with the internet and digital technologies, in particular, as the integrity and autonomy of authors become more vulnerable. The destruction of one’s avatar on Secondlife\textsuperscript{96}, the defacement of artwork distributed online\textsuperscript{97}, or the alteration of research data and scholarly work shared through an internet hosting service\textsuperscript{98} leaves an author with damaged reputation and society with unauthentic works or, worse still, wrong and misleading information. The author, at this point, has no real legal right to prevent or correct such violation against his creative identity.\textsuperscript{99}

As a literary property right protects an author’s creative interest, the right should not be alienable in the same way statutory copyright is. Most scholars, who believe that authors should have creative and personality rights over how their work is used, see these personal rights as inalienable because they protect an author’s individuality or personality as expressed in a work.\textsuperscript{100} This is not surprising since the author’s literary property right, with its genesis in natural

\textsuperscript{95} One can be entirely original in how one reinterprets existing artwork and literature
\textsuperscript{96} Farnaz Alemi, \textit{An Avatar’s Day in Court: A Proposal For Obtaining Relief and Resolving Disputes in Virtual World Games}, 2007 UCLA J.L. & TECH. 6 (2007) (describing how an avatar - a representation of who one is in an online community - can be victimized by other players without any real legal consequence)
\textsuperscript{97} The defacement of artwork may be an act of artistic rebellion against conventional cultural representations. \textit{See}, Michael L. Rustad, \textit{Private Enforcement of Cybercrime on the Electronic Frontier}, 11 S. CAL. INTERDISC. L.J. 63, 80-81 (2001) (describing defacement of company websites as “a form of political activism against globalism and corporate control of the Internet” and the hacking of internet posted materials to “reject societal ideas of intellectual property”); Sonia K. Katyal, \textit{Semiotic Disobedience}, 84 WASH. U. L. REV. 489, 493 (2006) (describing the vandalism and defacement of public messages as a trend towards “semiotic disobedience”, where “today’s generation seeks to alter existing intellectual property by interrupting, appropriating, and then replacing the passage of information from creator to consumer ... these recent artistic practices ... often involve the conscious and deliberate re-creation of property through appropriative and expressive acts that consciously risk violating the law that governs intellectual or tangible property”)
\textsuperscript{98} Deliberately altering information and data that an author has shared online will misinform the author’s targeted audience, who will expect reliable information. \textit{See}, Blodwen Tarter, \textit{Information Liability: New Interpretations for the Electronic Age}, 11 COMPUTER/L.J. 481, 484 (1992) (“Information consumers want reliable data on which to base decisions ... With the advent of broad electronic distribution of data, however, has come an attitude change ... the myth of machine infallibility seems to create a demand for a higher standard of quality for machine-readable data than for traditionally distributed information”). As more and more information and data become accessible through the internet, there is a greater responsibility for authors of information and knowledge to make sure that data distributed online is reliable and accurate. \textit{See}, J.H. Riechman and Paul F. Uhlir, \texti{A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment}, 66-SPG LAW & CONTEMP. PROBS. 315 (2003) (describing the need for accurate, reliable, and accessible data in scientific research)
\textsuperscript{99} Some remedies may be available through the online service provider’s end user license agreement or terms of service. The adequacy of these remedies to protect an author’s creative interest is questionable as these agreements regulate the relationship between service provider and user and are enforced by the service provider. Courts have yet to decide on the enforceability of these agreements in a court of law although courts have decided that shrink-wrap licenses are enforceable (ProCD v. Zeidenberg, 86 F. 3d. 1447 (3rd. Cir. 1996); Vernor v. Autodesk, Inc. 621 F. 3d. 1102 (9th. Cir. 2010). The courts have also enforced open-source licenses. \textit{See}, Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)
\textsuperscript{100} \textit{Patterson}, \textit{supra} note 1 at 219 (“The author ... may appropriately be given broader protection than the publisher for the purpose of protecting his creative interest. This interest is unique and appropriate for the author alone, and it should be recognized as a personal right, which is inalienable”); Netanel, \textit{supra} note 83 at 409-430
law and the ideal of personal autonomy, would fall within a category of rights that scholars and the law have long thought to be inalienable - the rights to life, personal liberty, not suffer gratuitous pain, and satisfaction of basic needs (such as water, food, and healthcare). An author’s expression is in fact so personal to his individuality and so essential to the author flourishing as an autonomous creator capable of making positive contributions to society that all authentic expressions cannot (and should not) be treated as marketable commodities. It is impossible to subtract an author’s sense of self from an expression of that self in truly authentic and sincere expressions that a literary property right, protecting such expression, cannot be alienable- even if the author were to enter into a contract for sale of that right. To be clear, therefore, the rights that are alienable under the copyright act are specific rights to use the work and not the expression in the work in the same way that freedom and liberty are not alienable (one cannot sell oneself into slavery) while labor and skill are (one can contract to work and employment). While statutory rights can be assigned away by authors to publishers because the economic interest in the work is often shared by both author and publisher, literary property should always remain with the individual creator because the right is inherently tied to an intrinsic and distinguishing attribute of the author - his personality - regardless of whether the creation of the work was entirely original or an original reinterpretation of a predecessor’s work. As Francis Hargrave once pointed out, “a literary work...like the human face, will always have some singularities, some lines, some features, to characterize it, and to fix and establish its identity.” This distinctive personal mark of each author in the work should as well secure the creative interests of its author. In this light, the “question of literary property” is not as much a commercial struggle between booksellers, as Mark Rose had put it, as it is the separation of authorial-publisher identities, which should have been long disconnected.

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102 Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1905-1906 (1987) (suggesting that some personal attributes of a person cannot be separated from an sold in the market place. Professor Radin explains: “Universal commodification undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self. A better view of personhood should understand many kinds of particulars —one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these as monetizable or completely detachable from the person ... is to do violence to our deepest understanding of what it is to be human.”)
103 Terrance C. McConnell, Inalienable Rights: The Limits of Consent in Medicine and the Law 8-9 (Oxford University Press) (the inalienable right to life cannot be contracted away even if the contract was freely entered into)
104 Rose, supra note 1 at 125
105 Id. at 4
More important than the content of the author’s literary property and its alienability is the question of how such a natural right, when not explicitly recognized by the copyright system, can be used to protect an author’s interest. Philosophers who advocate legal positivism as a general jurisprudence resist the legal recognition of a right just because a social, cultural, or human expectation exists as a “natural right.” Bentham, for example, rejected and denounced France’s declaration on the rights of men in 1789, famously saying that a “right, the substantive right, is the child of law: from real laws come real rights” but only imaginary rights can come “from imaginary laws”, which he thought the “law[s] of nature” were. But other philosophers, who were highly regarded positivists, have acknowledged the possible existence of natural rights that, in some ways, give birth to legal rights. One of the most well-known jurist in anglo-american jurisdiction, H. L. A. Hart, believed that moral or natural rights imposed morally justifiable limitations on other people’s freedom so that an equal distribution of human freedom can be achieved across a given society. The existence and social recognition of natural rights, however, does not necessarily impose an obligation on the state to convert these rights into legal rules although states may take steps to give natural rights actual legal force. While the recognition of a natural right, to take the literary property of the author as an example, may inspire social support and even state endorsement, that step of converting a natural right into law is a gigantic one for any state to take. Institutional commitment to enforcing a natural right as a legal right will necessarily come with taking that step. And as Amartya Sen pointed out, coercive legal sanctions may not be as sensible a mechanism for enforcement as social criticism, open discussion, and cultural changes may be. To the extent that Sen’s observation accurately captures the inadequacies of the law in protecting and enforcing natural human rights such as a woman’s right to voice her opinion about how her family is raised and cared for, the author’s natural right in his expression may be better protected and enforced by international organizations such as UNESCO or non-governmental bodies, research centers, and academic institutions leading a change in social and cultural mindset. It would also be worthwhile to consider the protection and enforcement of literary property as a legal right that the author alone holds. Giving the author’s natural right actual legal force could - theoretically - be done in one of two ways: if the legislature passes specific legislation (or amends the copyright statute) or the courts develop specific case-law on the author’s rights.

The primary objection to making the author’s natural right a legal right is the curtailment of other forms of individual freedom. Explicitly protecting literary property as a legal right would make it illegal to destroy an artist’s painting or deface a sculpture, which, as Professor Katyal points out, may be a legitimate form of self-expression for another individual. If so, the fear would be that another individual’s right to free expression would then be limited in order to

107 H. L. A. Hart, Are There any Natural Rights?, 64 THE PHILOSOPHICAL REVIEW (2) 175, 178 (1955) (“it is I think a very important feature of a moral right that the possessor of it is conceived as having a moral justification for limiting the freedom of another and that he has this justification not because the action he is entitled to require of another has some moral quality but simply because in the circumstances a certain distribution of human freedom will be maintained if he by his choice is allowed to determine how that other shall act”)
108 Sen, supra note 104 at 441-443 (discussing how natural rights have been more effectively enforced without legal rules and sanctions)
109 Id. at 443
110 Katyal, supra note 94
ensure authorial autonomy and security. However, even if one were to be convinced that as a matter of theory, an author’s natural right in his expression provides moral justification for the limitation of the freedom of speech on the basis that a limitation on the freedom of speech brings about “a certain distribution of human freedom” that can only be maintained through such limitations on other freedoms - for example, the authors’s basic human right to participate in cultural life and engage in cultural activities for the full development of their personalities may only occur if other members of society respect how their creative personalities are expressed and refrain from using these works in ways that undermine that individuality\textsuperscript{111} - introducing literary property as a natural right into the copyright system through an amendment of copyright legislation will most likely be, at this time, practically impossible. As Professor Jessica Litman has pointed out, the legislative process in the passing of copyright law occurs at a negotiation table with primarily industry-dominated players with largely economic interests.\textsuperscript{112} One of the greatest challenges one would face in introducing a moral and natural right into copyright legislation, as proposed in this article therefore, is its introduction in the negotiation process in copyright legislation drafting. Unless there are significant voices pushing for a change in copyright legislation to protect the author’s rights, a resulting legislation will be silent on natural rights issues that an authentic author would care about.\textsuperscript{113} Although legislative recognition of a creative right for authors is likely to further the institutional goals of progress by providing authors with greater security in how their expression may be used once distributed in society and hence, encouraging more authentic expressions for social and cultural advancement, the fact that such a right may be a blanket curtailment on other freedoms and constitutional guarantees, such as speech and press publications, may be a real impediment to its recognition.

Maybe, then, it will make more sense to rely on the courts to develop case-law on the author’s rights. The courts would be able to develop case-law on the author’s creative interest as they arise on a case-by-case basis. The development of the law in this area will require “perceptive analysis and careful distinction” and Professor Patterson believes that the courts are in the best position to do this.\textsuperscript{114} Professor Patterson, however, does postulate that the federal courts may be the better avenue to develop the author’s creative interest as the field of copyright has long been preempted by Congress.\textsuperscript{115} I argue that it may still be possible that state courts are not preempted from developing its own body of case-law on the author’s rights under §301 of the Copyright Act for two reasons. The first reason is that the author’s creative right is not a right that is equivalent to the exclusive rights protected under federal statute in §106. Arguably, the

\textsuperscript{111} Orit Fischman Afori, Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497 (2004) (arguing that Article 27(2) of the Universal Declaration establishes the rights of authors as human rights)

\textsuperscript{112} Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 CORNELL L. REV. 857, 860-861 (1987) (“Indeed, the statute’s legislative history is troubling because it reveals that most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines”); Jessica Litman, Copyright Legislation and Technological Change, 68 OR. L. REV. 275 (1989) (describing how the process of drafting copyright statutes through negotiations among industry representatives became entrenched in copyright law-making); see also JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001)

\textsuperscript{113} Litman, Copyright Legislation and Technological Change, id. at 299 (describing how interests that were absent from the bargaining table were shortchanged in the compromises that emerged throughout the various legislative enactments)

\textsuperscript{114} PATTERSON, supra note 1 at 220

\textsuperscript{115} Id. at 219
rights in 106, including the derivative right under paragraph (2), protect economic interests that are vastly different from the author’s creative interest protecting personality and individuality. Secondly, literary property protects the author’s expression as contained in the work as opposed to the work itself, which as protectable subject matter under §§102 and 103, is different from authorial expression. Allowing the courts to make normative and prescriptive judgements that introduce moral and ethical principles that protect authors into the copyright system, when legislation has not explicitly made them an integral part of the system, requires one to accept the proposition that judges do have an overriding duty to decide cases based on a set of sociopolitical norms that uphold principles of justice and fairness. I have argued elsewhere that the copyright system may be understood as a loosely formed political contract for social development, which would provide identifiable norms that would guide judges in making decisions when confronted with a difficult copyright case. A judge could, hypothetically, decide according to the moral and ethical convictions of society that literary and artistic works be used and produced for the purposes of promoting progress and come to a decision that would reflect these convictions and protect the author’s creative interest. If one is able to accept the idea that the legal system has an underlying integrity that is built on unitive principles, which create a genuine society and not a “bare community”, as Professor Ronald Dworkin has argued, it becomes possible to see the role the courts may have in protecting the natural rights of authors while having copyright’s institutional goal of progress in mind.

PART III. COMMON-LAW PROPERTY AND STATUTORY COPYRIGHT

Would copyright law become redundant if the law were to protect literary property as a common-law right of the author as suggested in this article? As discussed in Part II earlier, the suggestion that the author’s literary property be protected as a natural right may invite criticism from copyright pessimists, who may consider the protection of literary property as an expansion of rights that would further limit the public’s ability to access creative works for use. And a lot of scholarly work had focused on the apparent conflict between the grant of a property right to encourage creative production and the need for access to creative works to feed the wheel of progress. Many of these works see flaws of the system that need reform, especially when the Internet and digital technologies has increased the users’s ability to interact with the work as a new and legitimate form of free expression. It seems that copyright scholars and practitioners continue to see the copyright legal system as inadequate in dealing with technological progress that brings advancement, not just of science and the useful arts, but of society, culture, and the way political discourses are conducted. When Benjamin Kaplan began his 1966 James S. Carpentier Lecture at Columbia Law School by saying that “[a]s a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the “communications revolution” of our time, then to pronounce upon the inadequacies of the present copyright act, and finally to encourage all hands to cooperate in

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116 ALING NG, COPYRIGHT AND PROGRESS OF SCIENCE AND THE USEFUL ARTS (Edward Elgar 2011)
117 RONALD DWORKIN, LAW’S EMPIRE (Harvard University Press 1986)
118 See for example, Peter K. Yu, Digital Copyright Reform and Legal Transplants in Hong Kong, 48 U. LOUISVILLE L. REV. 693 (2010); Jessica Litman, Real Copyright Reform, 96 IOWA L. REV. 1 (2010); Shira Perlmutter, Freeing Copyright From Formalities, 13 CARDOZO ARTS & ENT. L.J. 565 (1995)
119 See Lawrence Lessig’s “remix culture” in LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Penguin Press 2009)
getting a Revision Bill passed¹²⁰, he might have had such unquestioning resignation that the copyright system has failed to promote progress and is thus in dire need of reform in his mind.

Literary property rights may, however, further the institutional goals of the copyright system instead of preventing progress as feared. A literary property right may bridge the gap between the wants of authors and creators, their publishers and distributors, and society with the larger goal of progress as the ultimate goal in a legal system that is wanting in authentic creations that make positive contributions to the trajectory of social progress and cultural development. It may be important to see that the rights provided under the copyright act serve a particular purpose, which is to encourage publication and distribution of creative works to a society in need of creative materials. Without these statutory rights, the proper economic investments will not be made to convert an author’s expression into literary and artistic works that may then distributed to society for use in education, research, cultural programs, and study. Indeed, very few authors are able to reach the masses without support from a publisher. The statutory rights provided by the copyright act serves this important publishing and distributive function. Literary property, on the other hand, serves a completely different function. It encourages authors and other creators to create authentically and communicate their work to the public without apprehension of misuse or abuse of the work once it is distributed into society. It provides legal affirmation of the author’s expectation to express himself without fear of creative abuse in the same way an individual expects to safe from harm when leaving his home. Both copyright and literary property serve this dual purpose of publishing and distributing and encouraging authentic expression in ways that should ultimately promote the progress of science and the useful arts.

A. COPYRIGHT AS AN ECONOMIC INCENTIVE TO PUBLISH

Statutory rights under the copyright system facilitate investment in publishing and disseminating literary and artistic works by providing the exclusive rights to the copyright owner. Generally, because copyrighted works are considered “public goods” and therefore subject to free-riding, where a copier may produce subsequent copies of a work at marginal cost without paying its actual price¹²¹, the law provides owners of copyright, with the exclusive right to reproduce, make derivatives, distribute, and publicly perform and display the work to exclude non-paying members of the public and encourage that first investment in publishing and distributing the work. These exclusive rights protect the positive act of making literary and artistic works available to society to promote the progress of science and the useful arts by allowing the copyright owner to recover fixed costs for the first production of a work and subsequent marginal costs of production when the original work is reproduced for reprinting, binding, distribution, and dissemination to the public. Without copyright protection giving its owners exclusive rights, non-paying members of society will benefit from the investments made by the copyright owner and use the work without paying for it, thereby benefitting from what economists call a “positive externality” i.e. a transaction spillover into society which provides a benefit, but, which is also not accounted for in the price of the good. While some scholars have pointed out that free-riding on positive externalities or spillovers provide long term benefits towards the legal system’s goal of progress and should therefore not be internalized by the

¹²⁰ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1 (Columbia University Press 1966)
¹²¹ Id. at 74
copyright owner, the point to be made here is that these exclusive rights encourage the publication and dissemination of creative works by copyright owners, who may otherwise invest their resources in other efforts.

Such protection of statutory rights under the current copyright system is exemplary of modern law and economics ideals that protecting property rights in literary and artistic works maximizes collective social welfare as scarce resources are allocated in the most economically efficient way. This idea that granting exclusive rights in literary and artistic creations will result in more of their production is intuitive from an economic perspective - authors will not produce if their works may be easily appropriated by the public, especially when the product of their creativity is essentially non-excludable and non-rival, and therefore subject to use without payment. Harold Demsetz's famous 1967 article, Toward a Theory of Property Rights, exemplifies the economic approach towards property-like entitlements in literary and artistic works. Demsetz argues that property rights facilitate the internalization of externalities and often, new property rights emerge when the benefits of internalizing externalities outweigh the costs of that internalization. This usually occurs when new technology develops and new markets open. To Professor Demsetz, a newly formed and growing market - the fur trade - was the impetus that led to the establishment of well-defined private hunting territory among the Montagnes Indians as was the emerging book market the source of exclusive copyright over literary works in 17-18th century England. Garrett Hardin's, The Tragedy of the Commons, published a year later, makes a related point: that unless some form of institutional governance is used to set commonly held resources aside to private control, men, being economically rational creatures, are likely to take as much out of the commons as possible to maximize their gains, or put in as much waste as possible without having to bear the cost of cleaning the commons, without investing in building it up. As a result of each man acting out of selfish self-interest, limited resources available to all in the will be depleted and gone. One way of protecting the commons from complete depletion through overuse is, as lawyers sometimes see it, the institution of private property.

Both articles by Professors Demsetz and Hardin provide a neoclassical justification that supports the privatization of creative works as well as the expansion of property-type rights in information and knowledge. The logic is difficult to deny: if creative works are so easily appropriable, no author or publisher will invest time or money to produce and disseminate creative works to the public when there are no guarantees of a return on investment; without exclusive rights over such works to prevent their free use by the public, creativity and innovation

123 The exact “public good” nature of creative works has been explored elsewhere. See, Christopher S. Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. PA. L. REV. 635 (2007). For the purposes of this article, it suffices to say that creative works cannot be excluded and is non-rival as a broad economic principle.
124 Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 350 (1967)
125 Id. at 351
126 Hardin, supra note 84
127 Hanoch Dagan and Michael A. Heller, The Liberal Commons, 110 YALE L.J. 549, 559-560 (2001) (stating that “the conventional wisdom for many social scientists is that commons property generally leads to tragedy. This claim--a truism of first-year law classes--is usually introduced as one of the strongest justifications for the institution of private property”)

will ultimately cease. By protecting the commercial value in the work through the exclusive rights under §106, the law provides the economic incentives necessary to encourage creators of literary and artistic to produce works and disseminate them to society through the market. While termed a “property right” that protects commercial investments from spillovers into a market, it must, however, be clear that statutory copyright is intended to serve a larger goal - a temporary monopoly is granted to the copyright owner but these exclusive rights are to stimulate artistic creativity for society's general good. Statutory rights do not preserve a commons from overuse as property rights are commonly thought to do. Functionally, statutory rights make sure that creative works are generated and distributed to the public in order to increase the common repository of knowledge as soon as copyright in the work expires. The knowledge commons is enriched with the expiration of the property right - there is no real depletion of the commons as a tragedy that Professor Hardin feared. As such, statutory rights in literary and artistic creations, being state granted incentives to encourage authors to create and publicly disseminate works, may be better understood as a collection of disaggregated legal interests to use creative works in specific ways that will facilitate publication and dissemination to this public. Therefore, statutory copyright, while considered as a “property” right, are not ownership rights in a work as an object for possessory control against the rest of the world - an in rem right as traditionally understood - but a in personam right that defines a specific legal relationship between author, publishers, and user of a work as that relationship applies to the publication and distribution of a specific work. Despite the general acceptance among property scholars that “property” may well relate to a bundle of rights that perform various state-prioritized functions and have nothing to do with property as a legally defined boundary drawn around a thing to effectively exclude the rest of the world from its use, this same idea may not have influenced copyright jurisprudence as much - given our general thought of statutory copyright as a property right in a work. On this point, I have suggested elsewhere that “property rights” under the present copyright law, absent particular legal references to the author's literary property rights in relation to the work in an in rem sense, would be more appropriately classified as “economic privileges” and recognized as in personam rights establishing specific contract-type relationships among parties responsible for producing, publishing, distributing, and using the work in the copyright system instead of absolute interests in the work as a privatized resource.

It may well be likely that as statutory copyright is designed to encourage investments in producing creative works for economics returns from the market, these rights will not encourage the production of authentic works in the same way the recognition of literary property will. The

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130 Conventionally an in rem right meant a right “against a thing” in latin, see Thomas W. Merrill and Henry E. Smith, The Property/Contract Interface, 101 COLUM. L. REV. 773, 782 footnote 28 (2001) but clarified by Wesley Hohfeld to mean “one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.” See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 72 (Yale University Press 1919).
131 Merrill and Smith id. at 365 (“The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy”)
132 See Alina Ng, Rights, Privileges, and Access to Information, 42 LOY. U. CHI. L.J. 89 (2010)
emphasis neoclassical economics place on market rewards as incentive for authorial creativity and the development of copyright laws that look to the market as the best mechanism to efficiently allocate resources for production, publication, and distribution of creative works in the hands of authors and publishers have long-term consequences for the kind of literary and artistic works that are produced. The neoclassicist's assumption that economic incentives have a positive correlation with an author's creative production is still unproven but even if we accept that assumption as true, there are still other, and perhaps more dire, effects of an over reliance on market incentives to generate authorial creativity and productivity. The first effect of a market-centric approach to the copyright system is that it portrays the act of creativity and authorship - the expression of an author's individual experience and personality - as a primarily economic-driven activity. It is possible that this may cause the public to treat works of authorship and other creative works as a commercial commodity resulting in less respect for the process of creative authorship when these works are used. Second, the market based approach may have blurred the important distinction between property and statutory rights and allowed copyright owners e.g. publishers, distributors, printers, who may have financially invested in the production and public dissemination of the work, but who have not been involved in its creative production, to assert exclusive property-type rights in the expressive content of the work against the public. Property rights in an author's creation define ownership rights in the work itself and involve a unique right in rem to exclude. This right ought to be only asserted by the creator of a work. Third, the market based approach establishes the commercial market as a new patron of authors and artists, compelling creators of literary and artistic works to produce works for the public, and to ensure that they are remunerated for their works through the market, authors and artists may produce works that appeal to the general masses at the expense of producing works of authentic authorship, which, being a result of an author's or artist's expressive individuality, may be of greater authorial or artistic value to the progress of science and the useful art in society.

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

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133 See Zimmerman, Copyrights as Incentives, supra note 92
134 Séverine Dusollier, The Master’s Tools v. The Master’s House: Creative Commons v. Copyright, 29 COLUM. J.L. & ARTS 271, 290 (2006) (arguing that “consumerism is as much a threat to copyright as the increasing commodification of copyright ... [t]urning copyrighted works into commodities has recast the public as individual consumers, and focusing on consumers makes explicit the recognition of a copyright regime that considers creative works solely as commodities to be exchanged in a market”)
135 Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 TEX. L. REV. 989, 1033 (1997) (arguing that the derivative right in paragraph (2) §106 should remain an authors right and stating “it seems odd that a legal provision that ostensibly exists for the benefit of creators (artists or authors, for example) should confer rights instead on the owners of intellectual property rights. As anyone who has ever published a book, a screenplay, or a song can attest, authorship and ownership are not necessarily the same thing”)
136 I have explored the idea of “authentic authorship” in a previous work. Although deeper analysis of the idea is warranted, see Alina Ng, The Author’s Rights in Literary and Artistic Works, 9 J. MARSHALL REV. INTELL. PROP. L. 453, 486 (2010) for a preliminary discussion.
“valuable books” will be supplied to society, Macaulay believed. However, it is important to note that when the copyright market replaces the rich and noble as the author’s patron, a separate set of problems arise. The author, instead of being bound to create works of literature and art for a human patron, is now bound to produce for a corporate or marketplace patron. Recording contracts between performing artists and recording companies are just one example of the constraints that the marketplace and corporate patronage impose on creativity today. But even the effects of market-based constraints on authorial creativity was felt as far back as 18th century Germany when a market for literature emerged. German playwright and philosopher Johann Christoph Friedrich Schiller broke off from the patronage of the Duke of Württemberg when the possibility of selling his works on the market presented itself. Schiller referred to the reading public as his “school, sovereign and trusted friend” and began his career as a professional writer by “appealing to no other throne then the human spirit”. The literary market, however, turned out to be indifferent and unrewarding to Schiller's more authentic and intellectually-demanding philosophical works on ethics, aesthetics and reason. The fame and economic rewards Schiller yearned from the public were only acquired to a certain extent by works that the public demanded at that time i.e. historical narratives and not the philosophical works that were his forte. Schiller never found the reward he expected from the literary market and in 1792, he accepted the patronage of the Danish Duke of Augustenburg, who gave him the intellectual freedom necessary to produce more authentic forms of authorship. Schiller, reflecting on his experience with the literary marketplace, noted that the demands of the market for works that appealed to a wide segment of the paying public was, in reality, irreconcilable with the demands of authentic expression. It seems unfortunate that contemporary copyright markets could be just as unreceptive to literary and artistic works that do not conform to the expectations of popular culture or carry widespread appeal because authors and creators who seek to make a living out of selling their works to the public may have to exchange personal authorial or artistic integrity for contemporary and more popular creations. When the copyright system treats creative works as marketable commodities instead of personal expressions of creativity, it may leave individual creators with little choice than a compromise on their own artistic authenticity and integrity. To a large extent, the reluctance of the courts to make artistic judgements about creative works in deciding whether they would be eligible for copyright protection mitigates some of the harshness of the marketplace for authentic creations. Some authors may willingly surrender the economic rewards of the market place to engage in more authentic pursuits of expression.

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137 Supra note 70 at 310
138 Todd M. Murphy, Crossroads: Modern Contract Dissatisfaction as Applied To Songwriter and Recording Agreements, 35 J. MARSHALL L. REV. 795, 816-817 (2002) (discussing the contractual relationship between recording artists and their recording companies)
139 WOODMANSEE, THE AUTHOR, ART AND THE MARKET, supra note 9 at 41
140 Id. at 82
141 Bleistien v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Justice Holmes recognizing that as “some works of genius would be sure to miss appreciation. ... until the public had learned the new language in which their author spoke. ... the etchings of Goya or the paintings of Manet” may not have evoked the public’s admiration “when seen for the first time”)
142 The recognition from producing outstanding work may be a non-economic incentive to produce works that re more authentic. See Catherine L. Fisk, Credit Where It’s Due: The Law and Norms of Attribution, 95 GEO. L.J. 49, 56 (2006) (“even when the author, inventor, discoverer, or artisan made little or no money from the work itself, it has long been an honor to be credited with good work. Great artists of all kinds have destroyed work that they thought did not measure up to their standards, even when they might have profited more (at least in the short term) from selling their lesser works rather than destroying them”)
However, unless an author deliberately decides to do so, the copyright market will mould creative expression to satisfy the demands of popular public tastes, which could prevent the production of more authentic works that may have greater influence on how science and the useful arts advances.

The final point to be made about copyright as an incentive to produce and secure rewards from the market is its protection of the owner and not just the author of the work. Even though the copyright act recognizes the author as the first owner of copyright, the exclusive rights that are protected under 106 are fully assignable and may be owned by an owner of copyright through an assignment of rights from the author. This appears to have resulted in a concentration of ownership rights in the intermediary who disseminates works of the author to his readers but whose primary interest in the work may be purely commercial in nature and misaligned from the institutional goals of the copyright system. Unlike authors, who create and produce works as a form of personal expression, and users, who use expressions embodied in the work for personal enjoyment, learning, research, or as a source of inspiration and ideas for the creation of new works, a publisher does not have an interest in the work as an expression of creativity but in a work itself as a marketable commodity that may bring in profits from the marketplace. The commoditization of works to capture social surpluses is a natural consequence of statutory copyright. Although the exclusive rights under §106 are intended to facilitate dissemination of creative expressions of individual creators through the market to ultimately benefit the public and advance science and the useful arts, these rights have a tendency to secure the position of the intermediary publisher in a monopoly position for the publication and distribution of works. Without competition for the publication and distribution of the work in the market, there will be a “chilling-effect” on creativity and innovation that depend on the use of creative works from earlier generation as it becomes increasingly difficulty to “clear rights” before using a copyrighted work. Protecting economic interests in the distribution and sale of

143 17 U.S.C.A. §201(a)
144 §201(d)
145 §106 states that the “owner of copyright” has the exclusive right to reproduce the work, make derivatives, perform and publicly display and perform publicly by way of digital audio transmission”
146 See for example, Jeffrey Stavroff, Damages in Dissonance: The “Shocking” Penalty for Illegal Music File-Sharing, 39 CAP. U. L. REV. 659 (2011) (such as seeking statutory damages damages against non-commercial infringers); Joshua N. Mitchell, Promoting Progress with Fair Use, 60 DUKE L.J. 1639, 1656 (2011) (stating that “Congress has appeared susceptible to lobbying pressure from industry groups like the Motion Picture Association of America (MPAA) and its music-industry counterpart, the Recording Industry Association of America (RIAA), which push for increased--and not obviously progress-promoting--protections, to the detriment of Congress’s constitutional responsibilities”); Fred H. Cate, The Technological Transformation of Copyright Law, 81 IOWA L. REV. 1395, 1458 (1996) (describing the interests of information providers in “strong, even unconstitutional, levels of copyright protection”)
147 Edmund W. Kitch, Elementary and Persistent Errors in the Economic Analysis of Intellectual Property, 53 VAND. L. REV. 1727, 1735 (2000) (defining economic monopoly as having “the exclusive right to sell into a market without competition”)
148 For clear chilling-effect of a still tentative copyright on public use of the work, see Robert Spoo, Copyright Protectionism and Its Discontents: The Case of James Joyce’s Ulysses in America, 108 YALE L.J. 633, 662 (1998) (“the purported copyright in Ulysses, unless it is recognized as illusory, will likewise receive a twenty-year reprieve from the public domain and will continue to exert a chilling effect upon publishers well into the next century. The effects of monopoly will go on being felt: Readers will pay noncompetitive prices for Estate-approved editions of Ulysses; scholars will be discouraged from producing alternative versions of the novel in print and electronic-text
literary and artistic works could well be a hindrance, rather than an impetus, to progress as public access to creative works in all forms - artwork, music, literature, software programs, visual works, and research materials - if we are not clear that the protection given by statute to copyright owners serve as an incentive to make works available to the public as furtherance of a prioritized goal and should be exercised with that goal in mind. Perhaps relabeling the exclusive rights as statutory privileges that entitle the copyright owner to sell and distribute the work exclusively for the purposes of furthering an institutionally-identified priority, i.e. progress, may prevent exercises of §106 rights that may sidetrack from copyright’s goals. The key to keeping on track with the goal of progress is a deeper understanding the different facets of a “property right” and how the exercise of §106 rights are limited by this understanding.

B. THE DIFFERENT FACETS OF A PROPERTY RIGHT

Many property scholars believe, on some fundamental level, that property rights are about establishing boundaries around resources through exclusive control of that resource by the property owner. William Blackstone is often quoted as providing the quintessential definition of what a property right would look like - it is a “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹⁴⁹ Some scholars argue that this right to exclude is the defining characteristic of a property right - its sine qua non.¹⁵⁰ Indeed, without a right to exclude others from trespass, theft, and use of the property, the notion of property would be meaningless. The right to exclude provides normative meaning to the concept of ownership in a society.¹⁵¹ The idea of property as a right to exclude is also integral part of copyright jurisprudence.¹⁵² However, scholars have also come to understand the word “property” as legal phraseology that define different legal relationships among members of society in relation to a particular resource. Property is not, per se, a right in the resource itself.¹⁵³ Given that property law provides the normative rules that define the relationship between the owner of a resource against the rest of the world, some scholars hypothesize that the strength of property rights vary on a continuous scale and are utilized strategically by the state based on the size of the resource, range of activities allowed over the resource, cost of monitoring and enforcing those rights, and fluctuating value of the resource.¹⁵⁴ Property rights - exclusionary on one extreme and organizational or governmental on the other - as Professor Henry Smith labels two polar ends of

formats. In particular, the benefits of digitalization and cyberspace will be lost or muted where Ulysses is concerned”
¹⁵¹ id. at 732
¹⁵² Nive Elkin-Koren, Copyright Policy and the Limits of Freedom of Contract, 12 BERKELEY TECH. L.J. 93, 99 (1997) (“Copyright law overcomes [free riding] and encourages creation by providing creators with a legal right to exclude others. It allows them to use the power of the federal government to exclude non-payers and to deter potential free-riders. By legally excluding non-payers, the law allows creators to collect fees for the use of their works and secure a return on their investment”)
¹⁵³ Merrill, supra note 148 (“the institution of property is not concerned with scarce resources themselves (‘things’), but rather with the rights of persons with respect to such resources”)
of property functionality on a spectrum of varying degree rights\textsuperscript{155}, provide signals or information to society as to how a particular resource is to be used. The relationship between property owner and the resource become more definite and as a result, society’s conduct toward the resource more effectively managed.\textsuperscript{156}

Statutory rights under §106, even though considered “exclusive” under the provision of §106, should not be exercised in an exclusionary way in light of what property scholars think the functionality of property is. In the copyright system, where creative production has been made, as some scholars see it, a privatized activity that should be subject to public values\textsuperscript{157} and the advancement in science and arts depend on the public being able to access and use knowledge and information easily, the application of the statutory rights cannot feasibly be seen as being exclusionary in a sense that the public should be denied access to the work unless permission to have access is granted by the copyright owner. Professors Hardin and Densetz’s concern that resources in the commons will be depleted through overexploitation does not apply to creative works. There is no necessity for use of an exclusionary rule to prevent public access to creative resources.\textsuperscript{158} In fact, new generations of authors and creators need to be able to use collective knowledge, research findings, and documented experiences to guide their own explorations and experiments in creating new materials for society. The exercise of the rights under §106, if exclusionary in practice, will make the development of culture, accessible education, or economic growth difficult, if not impossible. Hence, on the spectrum of property functionality as developed by Professor Smith, statutory copyright would actually lie in the opposite end of the spectrum from an exclusionary rule at the organizational or governance pole, where each specific entitlement accruing to the copyright owner is articulated carefully. As Professor Smith pointed out, this would be in contradistinction to a more exclusionary function of a patent right that denies access to a patent for those without permission to use.\textsuperscript{159} If we were to think of copyright as functioning on a different scale for the other form of intellectual property designed to advance science and the useful arts - patents - it may become clearer that statutory copyright isn’t about establishing fences around creative works to deny public access for the purposes of establishing its value.\textsuperscript{160} The value of a copyrighted work is often clear - it is the value a reader/user would be willing to pay for the use of an author’s expression, which the market readily sets.\textsuperscript{161} Where the

\textsuperscript{155} Id. at S455-S457 (“exclusion and governance are strategies that are at the poles of a continuum of methods of measurement, which we can add to the more familiar continuum from private property through the commons to open access”)

\textsuperscript{156} Id. at S473 (“Rights are precise or specified to the extent that they protect attributes by preventing a range of unauthorized actions. The result is that if one surveyed states of the world in which actors undertake a range of unauthorized behaviors, the return to the owner of the right will show less variance the more precise the right is; precision contributes to greater security of the right.”)

\textsuperscript{157} Shubha Ghosh, Deprivatizing Copyright, 54 CASE W. RES. L. REV. 387 (2003)

\textsuperscript{158} Smith, Exclusion Versus Governance, supra note 152 at S485 (“exclusion is the basic first pass at addressing potential problems of overexploitation”)


\textsuperscript{160} Id. at 1082-1083 (the difficulty in valuing patented inventions and the “multidimensional nature of activities” surrounding use of a patent compels the use of an exclusionary, and not a governance, strategy)

\textsuperscript{161} David W. Barnes, The Incentives/Access Tradeoff, 9 NW. J. TECH. & INTELL. PROP. 96, 116 (2010) (describing how information is usually provided to users at a fixed price)
market fails, copyright law has the in-built mechanism of fair use to correct market failures.\textsuperscript{162} The structure of copyright laws gives itself to specific rules of governance that manage societal use of creative works. Thus, statutory copyright in a “property” sense is not a “perimeter defense” as James Acheson describes it\textsuperscript{163} but a bridged connection between authors and their readers to serve a very specific institutional goal. It is not intended to grant exclusionary rights nor is it intended to create an open access public right to literary and artistic works. Rather, it is intended to provide heavy regulation of how works are published, disseminated, and used.

Recognizing that rights in literary and artistic works originating from statute serve to govern and regulate various uses and interests, both economic and non-economic (including recreational, research, educational uses), in creative works will clarify how we think about the literary property right of the author. Statutory rights affirm a basic economic principle underlying the copyright system: by granting a bundle of entitlements over creative works to copyright owners exclusively under §106, investments in the publication and dissemination of creative works to the public will be made. Producers of creative works will be more willing to invest in publication and distribution if they have exclusive rights to use the work. In a classically Coasean fashion, the copyright act allows the market to ultimately decide who will be able to use a particular work, how that work would be used, and when it will be used by providing the exclusivity needed for contractual bargains to occur among authors, publishers, and users so that rights to use the work may be efficiently allocated.\textsuperscript{164} To a large extent, scholars influenced by Coase have abandoned the idea of property as a right against the rest of the world and embraced property as state device to allocate use rights. The concept of property as “a bundle of rights,” institutionalized by new institutional economics, embrace the idea that contractual relationships - and not a general right to exclude - lie at the heart of property law.\textsuperscript{165} The focus on contractual relations between right owner and identifiable parties to that contract changes our understanding of property as a right in a resource against the rest of the world into an abstract collection of aggregated rights that do not represent real ownership rights in things. In this light, statutory copyright, embodying various use rights under §106, do not relate as much to a right in the work that is good against an infinite and unidentifiable group of people as they do a right to exclusive use of the work that is enforceable against a single person or small number of identifiable persons who the use of the work without paying the contract price. It facilitates the transfer of creative works to higher-valued uses and resolve disputes among authors, publishers, and users of creative works. But they do not protect the author’s creative personality as expressed in the


\textsuperscript{163} JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE 82 (University Press of New England 1988)

\textsuperscript{164} PATRICIA AUFDERHEIDE AND PETER JASZI, \textit{RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT} 39 (University of Chicago Press 2011) (describing how Ronald Coase’s work made an impact on copyright and the principles of fair use); Dan L. Burk and Julie E. Cohen, \textit{Fair Use Infrastructure for Rights Management Systems}, 15 HARV. J. L. TECH 41 (2001-2002) (applying Coase to the Supreme Court’s decision in Sony v. Universal City Studios stating that “if the Court had held provision of VCRs to be contributory infringement, a market for video recorders and video rentals still would have emerged. Under a Coasean theory of arbitrage, assuming manageable transaction costs, if there were money to be made from the sale of VCRs, one would expect home electronics manufacturers to negotiate a license from the copyright holders”); Frank H. Easterbrook, \textit{Cyberspace vs. Property Law}, 4 TEX. REV. L. & POL. 103, 111 (1999-2000) (arguing that technology moves “us closer to the world in which the Coase Theorem prevails” and bargaining to use intellectual property becomes easier)

work from abuse when the work is distributed to an infinite and unidentifiable group of people, as would a property right.

C. CONCEPTUAL DIFFERENCES BETWEEN PROPERTY AND COPYRIGHT

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

This distinction between in rem and in personam rights offers insight into the conceptual differences between literary property and copyright. The author’s natural right in his expression lends itself to an entitlement over creative works that would exclude everyone in society - an indefinite class of individuals - from using the work in a way that would damage an author’s creative personality or mar its quality and purpose. If an author’s creative interest is protected by literary property protecting a right over his expression as contained in the work, an in rem right good against the rest of the world would be created. A creator’s creative right would lie on the exclusionary pole of property entitlement that Professor Smith spoke about. And it makes sense to protect the author’s creative interest and personality through an exclusionary rule. The author’s expression is not going to be easily valued - while creative works may have a market value in the price that a consumer would willingly pay for, how anyone put a market price on the expressive qualities of individuals such as Monet, Beethoven, or Shakespeare or in more contemporary times, creators such as Hernan Bass, Joshua Bell, or the late Samuel

166 Sir William Blackstone, Commentaries on the Laws of England 331 (William G. Hammond ed.) (Bancroft-Whitney Company 1890) (it is right “to a definite thing against all the world”)
167 Id. (it is a right “against certain persons though not to a definite thing”)
168 In Re Roundtree, 448 B.R. 389, 407 note 10 (2011)
169 For a collection of Bass’s recent work, see Mark Coetzee, Hernan Bas, and Rubell Family Collection, Hernan Bas: Works from the Rubell Family Collection, December 5, 2007–November 28, 2008 (Rubell Family Collection 2008)
170 For sample of Bell’s music, see http://www.joshuabell.com/ (last visited January 9, 2012)
It would seem more probable that an exclusionary right would protect creative interests better by requiring that the rest of the world respect the expressive qualities of the person who created the work. In this sense, the creator’s interest will be protected by a property rule that, if infringed, should be remedied through the grant of an injunction. The economic rights that the law grants authors and copyright owners to exclusive reproduce, distribute, making derivatives, publicly performing and display, and to digitally transmit the work are rather personal rights to use the work that stems from ownership of copyright - not the work - that allows for the recovery of profits from sale and distribution of the work. These rights create entitlements to sell and distribute the work exclusively and create an in personam right against a specific individual or entity that infringes this personal right. Statutory right only entail a personal right to recover payment for the use of the work and not an absolute right to exclude the whole of society from using the work. As such, when statutory rights are infringed, the proper remedy should be damages that would be consistent with the protection of an entitlement through a liability, and not a property, rule. This makes equal sense too - rights to sell and distribute works are more easily valued through the market by how much the public is willing to pay for the work. Movies, CDs, individual music downloads through itunes, books, subscription services and other forms of creative works on the market have a somewhat fixed and marginally variable price. As such, it would be more reasonable to tailor specific governance-type rules for economic rights on the other end of Professor Smith’s property scale to facilitate easy transfer and bundling of rights in literary and artistic works for public use.

These two distinct rights in literary and artistic works - in rem and in personam rights - ensure that creators are granted the autonomy to authentically express themselves through literary and artistic works and at the same time effectively dissemination of these works to the public through the market. In rem rights encourage creativity and expression without the constraints that might exist if creators fear abuse of their creativity by the public when the work is distributed. In personam rights encourage wide dissemination of these works to the public. The sovereign right of the creator as property owner of a work allows a creator to deny access to the work based on an absolute right to exclude when he assesses a use to undermine his creative personality. When the creator of a creative work considers a use to undermine his rights in such a fashion, he may enforce it against the infringer. This right is good against the world and applies to an infinite number of individuals who owe the corresponding duty to refrain from infringing the creative rights of the author. An economic right, however, does not include the right to exclude as a property right does but rather originates from a contractual relationship between the author and society to make the work available or accessible for market value. As this distinction between property (in an in rem sense) and copyright (in an in personam sense) does not appear as doctrine in copyright law - at least not since Donaldson v. Beckett and Wheaton v. Peters where the notion of literary property was dismissed - there is little normative guidance to provide answers to the question of how authors, copyright owners, and users of literary and artistic works would be treated.

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\textsuperscript{171} \textit{Anthony Cronin, Samuel Beckett: The Last Modernist} (De Capo Press 1997)

\textsuperscript{172} Guido Calebresi and Douglas A. Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View of the Cathedral}, 85 Harv. L. Rev. 1089 (1972)

\textsuperscript{173} Id.

\textsuperscript{174} I have argued elsewhere that the copyright system may be seen as a political agreement or social contract among the state, authors, publishers, and users of creative works to promote the progress of science and the useful arts. \textit{See}, Alina Ng, \textit{The Social Contract and Authorship: Allocating Entitlements in the Copyright System}, 19 Fordham Intell. Prop., Media & Ent. L. J. 413 (2008)
artistic works should treat entitlements over literary and artistic works. Statutory rights that recognize specific rights to use creative works have been labelled “property rights” giving rise to the assumption that such rights are in rem rights, which allow the copyright owner to generally exclude society from using literary and artistic works as things subject to a right to exclude. This has a significant impact on the copyright system because it denies access to legitimate public use rights, such as the right to print, distribute, or share derivative works to communicate ideas, develop culture, and educate. The congressional grant of a right to print implicitly assumes that society will be able to use the work as long as the use does not unreasonably interfere with the copyright owner's right to receive payment for the production and dissemination of the work to society. It provides the institutional support that law and economics scholars from the new institutional school believe is needed for copyright owners to enter into contracts for the sale and public distribution of what is essentially a resource that is non-rival and non-excludable. There is a need for the law to be clear about the conceptual differences between property protecting the individual creator’s right to personhood, autonomy, and expressive identity and copyright that facilitates a political goal - the progress of science and the useful arts - if it is to ultimately fulfill its institutional goal and direct society towards advancement. The law needs to separate both and it is likely that the copyright debate will change its shape. But there will be challenges that the law will face and this is discussed in Part IV below.

PART IV: SHAPING THE COPYRIGHT DEBATE

Conventional understanding of copyright debate sees private property pitted against the public domain as copyright owners and public users struggle for control and access to creative works. While the public domain symbolized the public sphere central to a thriving civil society, wherein cultural artifacts may be freely exchanged without the shackles that follow private patronage or state subsidies, it was taken to be an innate product that emerged from the term limitation in copyright law and very little was written specifically about it. It was in the last two decades or so that the public domain began to emerged, not as residual space to hold works which were not subject to copyright, but as a device necessary to enable society to produce new forms of authorship and other forms of works essential to the progress of science. Today, the protection of the public domain from the intrusion of property rights has become an affirmative discourse that is the defining ethos for the public side of the copyright debate. More effort is taken today to increase the visibility of the public domain as a space susceptible to the tragedy of the anticommons than ever before. Professor Boyle’s use of environmentalism as a broad social movement to conserve, restore, and improve the health of the environment as a metaphor

176 See e.g. David Lange, Recognizing the Public Domain, 44 LAW & CONTEMP. PROBS. 147 (1981) (arguing that individual rights in the public domain should be proactively protected against the increasing recognition of intellectual property rights)
for the politics that should shape the direction of intellectual property policy is a fine example of the effort IP minimalists take to defend public rights against private property. The interests that arise with the production, dissemination, and use of creative works is, however, not just between copyright owners and the general public. A proper discourse about rights and entitlements over creative works must involve an analysis of corresponding duties and obligations that come from the protection of such rights and perhaps more importantly, the proper relationship among authors who create, publishers who publish and disseminate, and the public who use the work. Copyright law has not been very clear about these relationships and the kind of rights - as well as duties - that these parties possess in an institution clearly intended to achieve a positive agenda i.e., the progress of science and the useful arts. If the copyright debate is reshaped into a tripartite discourse among creator, publisher, and user of creative through the explicit recognition of authorial rights as literary property and its separation from economic rights as statutory privileges and support for public rights as user rights, with the recognition of the corresponding duties of all parties, the private property - public interest gridlock that has stalled real progress through the law facilitating production and dissemination of authentically created works may be removed.

A. JUDICIAL CHALLENGES AND WHEATON V. PETERS

The biggest challenge to moving in the direction proposed in this paper is the judiciary’s general adherence to precedence and the principle of stare decisis to, as far as possible, stand by decisions previously rendered and not disturb settled points of law. Subsequent Supreme Court cases following Wheaton v. Peters have taken the decision that all rights over creative works are statutorily created to be well settled law. Proposing that the author’s literary right be recognized at common-law would require a review and overrule of Wheaton v. Peters if today’s Supreme Court decides that Wheaton v. Peters may have been incorrectly decided or if it’s application should be limited to to the specific circumstances surrounding the dispute between Henry Wheaton and Richard Peters. Even if state courts were not preempted by federal law to develop their own body of case law on the authors rights, as suggested in this paper, there is still the need to bring a case specifically on the author’s common-law rights up to the Supreme Court.

178 See James Boyle, A Politics for Intellectual Property: Environmentalism for the Net?, 47 DUKE L. J. 87 (1997); Scholars have since written much about the public domain
179 Stare decisis et non quieta movere literally means “[t]o stand by things decided, and not to disturb settled points.” BLACK’S LAW DICTIONARY 1443 (8th ed. 2004)
180 See, for example, Holmes v. Hurst, 174 U.S. 82, 85 (1899) (“[w]hile the propriety of [Wheaton v. Peters] ha[ve] been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act, in other words, that, while a right did exist by common law, it has been superseded by statute”); Globe Newspaper Co. v. Walker, 210 U.S. 356, 363 (1908) (“Congress not only created a new right in the copyright statute, but that the remedies therein given are the only ones open to those seeking the benefit of the statutory right thereby created”); Mazer v. Stein, 347 U.S. 201, 214-215 (1954) (“Congress may after publication protect by copyright any writing of an author. Its statute creates the copyright. It did not exist at common law even though he had a property right in his unpublished work”); White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 15 (1908) (“this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory”); American Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907) (“In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution”); Banks v. Manchester, 128 U.S. 244, 252 (1888) (“A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of congress”)
for a review of Wheaton v. Peters before state courts would be free to develop state jurisprudence on the author’s rights. State courts and lower federal courts are not at liberty to depart from the ruling in Wheaton v. Peters, even if convinced that the author does have creative rights at common-law because only the Supreme Court may overrule one of its own decisions.\(^\text{181}\)

If the idea that author’s have natural rights in their works that are separate from copyright is persuasive and the Court is amenable to the idea that natural law could be a valid source of moral and legal rights for authors and other creators of creative works, the Supreme Court may be inclined to reconsider the decision of Wheaton v. Peters and its implication on the institutional make-up of the copyright system i.e., the relationships between authors, publishers, and users that determine the role each party plays in advancing science and the useful arts through creative works. Overruling a long-standing case that has provided the foundational basis for the copyright system as we know it today will be a difficult, if not impossible, decision. Justice Breyer, for example, desires stability in the law over change, uncertainty, and discontinuity. Cases that have become “embedded in national culture”, such as Miranda v. Arizona, which the general public have come to associate with the affirmation of the arrestee’s constitutional rights to remain silent and to legal representation, would be extremely difficult to overrule, even if the Court consider them to be wrongly decided.\(^\text{182}\) The same goes for cases that have set standards for public conduct, which then invite investments of “time, effort and money based on [a] decision”, because judicial practices that ignore these types of public reliance will also threaten “economic prosperity” as people become more reluctant to make investments based on laws that might change easily.\(^\text{183}\) Hence, we see that the decision to overrule past cases is only made where there are exceptional circumstances or “special justification” in the Court’s words.\(^\text{184}\) Previous cases have been overruled by the Court when their “conceptual underpinnings” have been “removed or weakened” by developments in statute or judicial doctrine or when their decision become “irreconcilable with competing legal doctrines or policies”, there is incoherence or inconsistency in the law caused by “inherent confusion created by an unworkable decision” or where “the decision poses a direct obstacle to the realization of important objectives embodied in other laws”, or where they are considered “outdated” and “inconsistent with the sense of justice or with the social welfare.”\(^\text{185}\) Wheaton v. Peters is such a deeply embedded opinion in the copyright system and overruling its decision will affect many commercial and personal arrangements that have been made based on its decision that statute is the only source of legal rights over creative works. More modern discourse on the nature of rights in creative works appear to have strengthened rather than weakened the conceptual underpinnings of Wheaton’s decision and do not seem to justify a judicial inquiry into the merits of overruling the decision. However, the Court may still explicitly recognize the author’s literary property and overrule Wheaton v. Peters if it may be convinced that the decision poses a direct obstacle to the realization of the institutional goals of the copyright system.

**B. POTENTIAL LEGISLATIVE RESPONSES**


\(^{182}\) Stephen Breyer, America’s Supreme Court: Making Democracy Work 152-153 (Oxford University Press 2010)

\(^{183}\) Id. at 152


\(^{185}\) Patterson v. McLean Credit Union, 491 US 164, 173-174 (1989)
Congress may also be an appropriate branch of government to protect the author’s literary property. Assuming that the legislative problems that Professor Litman identified may be overcome e.g. by having broader representation of author/creator interests during the deliberative process before copyright laws are passed, the proposed changes advocated in this article may be introduced into the copyright system as policies become new laws. While the courts, especially the Supreme Court, may shape copyright jurisprudence through the development of legal doctrine and resolution of copyright disputes, Congress may through careful deliberation and formulation of policy create a more congenial environment for groups of authors, publishers, and users of creative works that facilitates their contribution and cooperation towards a larger institutional goal i.e. progress. Bills before Congress at the time of this writing that could become law - the Stop Online Piracy Act and the Protection of Intellectual Property Act - favor rights of copyright owners over authors and other creators of creative works, including software that support web-based platforms on the Internet, and users of creative works. A step in the direction proposed in this article may be the recognition that parties in the copyright system - authors/creators, publishers, and users - have significantly different, but equally legitimate, interests in creative works. A possible starting point for the legislation towards protecting literary property is a clarification that copyright owners are just one party in a tripartite group of entities with certain rights and duties that should be oriented toward copyright’s institutional goal. A clear articulation of the author’s literary property and the entitlements and obligations that the recognition of the right would create ought to send a signal to society that copyright laws passed by Congress protect and obligate authors, publishers, and users to ultimately benefit society at large.

As a general rule, any legislation passed by Congress to give effect to the proposal in this paper should have prospective effect to comply with the rule of law. If laws are to be capable of guiding the behavior of its subjects and motivating behavior, as Professor Joseph Raz has argued, it should exist as a legal rule at the time of the behavior to provide any form of guidance to the public. In this light, any legislation passed by Congress today to give effect to a separate literary right that belongs only to authors or other creators of creative works should only affect

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186 H.R.3261, 112th Congress (2011-2012)
187 S.968, 112th Congress (2011-2012)
188 Both laws provide the Attorney-General of the U.S. with the power to commence action against websites that facilitate the infringement of copyrighted works. See §3 Protect IP Act (available at The Library of Congress Bill Text Version; at http://thomas.loc.gov/cgi-bin/query/z?c112:S.968) and §102 Stop Online Piracy Act (available at The Library of Congress Bill Text Version; at http://thomas.loc.gov/cgi-bin/query/F?c112:1.:./temp/~c112nOf030:e11714) (last visited January 14, 2012). Neither law address the interests of authors or creators and the users of their work as they target websites that could have both infringing and non-infringing works and require their shut-down. These laws deny the other two parties in the copyright system access to Internet platforms, which could facilitate communication between those who create and those who benefit from creative works.
189 Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8-9 (1997) (Explores the purpose of the rule of law as protecting against anarchy, allowing people to plan their activities with reasonable confidence by knowing the legal consequences of their actions, and guaranteeing against “official arbitrariness. Modern account of the rule of law emphasize five elements - to guide people in the conduct of their daily affairs, efficacy, stability, supremacy of legal authority, and impartial justice)
190 JOSEPH RAZ, THE AUTHORITY OF LAW 214 (Oxford University Press 1979) (“One cannot be guided by a retroactive law”)
future conduct and not have retroactive effect. However, more recent copyright legislation protecting interests over creative works, the Copyright Term Extension Act extending copyright protection to literary and artistic works by another 20 years, has been applied retroactively to works created before the act in which there is copyright protection. In Eldred v. Ashcroft, the Supreme Court observed that throughout history, Congress has made it a practice to grant authors and other creators of creative works with existing copyrights “the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.” As the Court pointed out, the first Congress provided protection to existing and future works alike through the first federal copyright statute, the 1790 Copyright Act and that since then, “Congress has regularly applied duration extensions to both existing and future copyrights.” The Court relying on McClurg v. Kingsland, which applied the Patent Act of 1839 retroactively to a patent secured in 1835 on the basis that Congress’s power to legislate on patents is absolute under the Constitution and that legislation can be modified to “not take away the rights of property in existing patents”, then decided that “[n]either is it a sound objection to the validity of a copyright term extension, enacted pursuant to the same constitutional grant of authority, that the enlarged term covers existing copyrights.” Conceivably, laws protecting the author’s literary property - or the creator’s creative property more generally - that Congress passes today may apply retroactively to copyrighted works already in existence and protected under the present regime so that the protection of all rights in literary and artistic works will be governed under the same statutory regime.

C. THE INSTITUTIONAL GOAL TO ADVANCE SCIENCE AND THE USEFUL ARTS

In our final analysis, literary property and copyright should entitle and obligate authors, publishers, and society to promote a clearly identified institutional goal of promoting progress through the use and production of creative works. In Copyright and Progress of Science and the Useful Arts, I argued that the most important nugget in a legal institution charged with advancing society and culture through such use of creative works is the connection between the author and his reader and, on a much larger and broader plane, the creator of creative works and his public audience. By acknowledging and, where possible, protecting literary property rights of the author, the law will encourage more direct and authentic contribution towards progress as authors become more encouraged to express themselves freely in ways that will have a greater impact on social and cultural advancement. Such explicit recognition that authors are directly connected with their work on some personal and visceral level does not only protect the author’s creative interest but should also make each author more aware of his moral and ethical obligations toward his readers and society at large, such as the moral obligation to produce works that do no harm to their readers and society and to make positive contributions towards progress whenever it is possible. Explicit recognition of literary property should also create moral and ethical duties on society to give recognition to authors and other creators of creative works for their contributions by attributing their work to them and refraining from using works in ways that

192 Id. at 200-201
193 1 How. 202, 11 L.Ed. 102 (1843)
194 Id. at 206
195 Eldred, supra note 191 at 203-204
196 Ng, supra note 116 at 125-128
detract from the author’s intended contribution to the literary arts. The copyright system must also separate then the role of the publisher as a conduit between author and reader from the author himself so that it becomes clear that while publishers are entitled to economic rewards for their publishing and distributing works to society, their rights as copyright owners under the copyright statute is significantly different from the property rights of authors and other creators because of the lack of personal relationship with the work.

One of the responsibilities of a healthy thriving society is to resolve issues of public morality, which is greatly needed in the copyright system today, as a collective whole. This call for increased public participation in how constitutional issues, such as the progress of science and the useful arts, is resolved is not new. Scholars have counseled against our alienating moral discourses about “how active and responsible citizens should constitute themselves”, which should be ours to figure out, to the courts and the judicial process. There may be a need, therefore, to get individual authors and users to articulate how copyright rules and practices, such as the practice of treating creative works as possessory commodities, enrich or deprive an individual author’s or user’s sense of self to put citizen participation on issues of public morality back in the public’s hands and to invigorate citizen participation in moral discourses within the copyright system. Such participation in moral discourse about copyright’s institutional aims may already be taking place. Online petitions opposing the Stop Online Piracy Act, the Protect IP Act and the Online Protection and Digital Enforcement Act have already generated an official White House response laying out what President Obama’s administration will and will not support. This is an important step in encouraging public discourse on issues of morality and ethics that will have profound effects on copyright’s institutional goal but there is a lot more for us to think about. For example, there will also be a need for us to be aware of the differences between two distinguishable bases for recognizing property rights in creative works. Conventional understanding of property rights in the Lockean just-dessert theory and the Hegelian personality theory protect resources because they are appropriated - or taken - from their surroundings. But the premise for protecting literary property is not because resources are appropriated to one’s person. The premise for protecting literary property is because one’s person is communicating - or giving - one’s creative self to their surroundings. The author doesn’t take but gives and should be protected to the extent that his giving is violated or abused by society. Otherwise, the act of creation should not mesh with private control over creative resources. The law should refrain from enforcing these controls unless society’s use of the work affects the author’s individuality or creative personality in ways that will prevent the creation of authentic works of authorship. It is important for the community to continuously reengage in these discussion to take control of public morality discourses about the copyright system.

PART V: CONCLUSION

By conceptualizing the copyright system as comprising three distinct parties with separate interests in literary and artistic works—authors, publishers, and the public—it becomes

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198 *Id.* at 552 (discussing how public participation in moral discourses may be improved despite “our historical commitment to judicial review even if judicial review frustrates citizen participation”)
evident that the authors and the publishers of such works fulfill very different roles in the copyright system. Essentially, authors create works for their readers that can be used to advance the sciences and the arts, while publishers provide a channel for conveying authors’ expressions as embodied works of literature or art to their reader. Although authors may create their work to make profits from the market, many also create solely or largely for non-economic reasons, such as to build their reputation, to contribute to knowledge and learning, or for the sheer pleasure of communicating ideas or telling stories. Publishers, on the other hand, are typically profit-motivated and invest in the publication and dissemination of creative works for the purposes of recovering financial gains from the market. Thus it is surprising, given the distinct and sometimes conflicting interests of authors and publishers, that modern copyright law treats the interests and expectations of both in the same way. But because the law that applies to the production and use of literary and artistic works is statutory-based and augmented by a prolific body of case law interpreting and applying its specific provisions to authors and publishers as a general group of “copyright owners”, jurists and scholars of copyright law have given very little attention to the separate roles authors and publishers play in society, the different expectations they hold, and how these different roles and expectations affect copyright’s institutional goal of promoting progress in the arts and sciences. Courts have traditionally been deferential to congressional powers where intellectual property laws are concerned and often yield to policy decisions made through the legislative process and, as a result, have never attempted to separate the rights and expectations of the author from those of the publisher.

This paper proposes that the literary property and copyright are distinguishable and separable legal concepts and that such a separation of these rights as well as the development of specific laws to protect authors’ interests over their creations is necessary if the copyright system is to ultimately fulfill its institutional goal of promoting the progress of science and the arts for society’s benefit. The author plays a specific role in the copyright system that cannot be fulfilled by other parties in that system, which is to contribute creative works that readers may use for their development individually or as a community through education, research, entertainment, or creative production. To the extent that such works embody their author’s creative personality and authentic expression, the copyright system should explicitly recognize literary property of authors as a natural right to protect their authentic individuality as and when their works are disseminated and made available to society. While the law has been very clear that all rights over literary and artistic works emanate solely from the copyright statute, and as a result, there been very little room has been made for the common law to develop a coherent body of rules that would protect an author’s expectations and rights separately from those of the publisher, the

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

201 §106 of the Copyright Act 1976, which provides exclusive rights in creative works, protects the “owner of copyright” and does not distinguish between author and publisher. 17 U.S.C.A. (2001)

202 The Supreme Court in *Graham v. John Deere Co. of Kansas City*, for example, stated that “Congress may ... implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim” and that it is the duty of the courts “in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress,” 383 U.S. 1, 6 (1996). The court in *Eldred v. Ascroft* more recently affirmed their role as the implementor of congressional copyright policies when it stated that “the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause [and that] [t]he wisdom of Congress' action ... is not within [the court’s] province to second-guess,” 537 U.S. 186, 222 (2003).
explicit recognition of literary property is not precluded from the judicial system, legislative process, and certainly public discourses on the morality of the copyright system. Justice McLean’s statement in Wheaton v. Peters that any assertion of rights in creative works must be sustained under acts of congress\textsuperscript{203}, should not be taken as a closed and concluded matter if we are committed to the pursuit of progress. While following Wheaton v. Peter’s reasoning has facilitated development of rich copyright jurisprudence in the United States that is statutory based, there is still reason to evaluate the existence of common-law literary rights that an author should have in his work as its creator to ensure that the expressive freedom necessary for authentic forms of creative works to be produced is protected. This paper has argued that to protect non-economic interests of the author as the creator of a work, a revisit and \textit{reevaluation} of the question of literary property and the authors’ natural rights over that which they create is absolutely necessary. Reasons to reject the notion of literary property do not seem sustainable if we carefully think about the notion of literary property, what it’s explicit recognition will achieve, its fundamental differences from statutory copyright, and its role in facilitating the progress of science. The arguments presented here should apply to the broader community of creative producers. Although this article was written from the author’s perspective and from the vantage point of literary property rights, it reasoning and argument would nevertheless be applicable to all other creative fields.

\textsuperscript{203} Wheaton v. Peters, 33 U.S. 591, 661 (1834)