When Users are Authors: Authorship in the Age of Digital Media

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This Article explores what authorship and creative production means in the digital age. Notions of the author as the creator of the work provided a point of reference for recognizing ownership rights in literary and artistic works in conventional copyright jurisprudence. The role of the author, as the creator and producer of a work, has been seen as distinct and separate from that of the publisher and user. Copyright laws and customary norms protect the author’s rights in his creation to provide the incentive to create and allow him to appropriate the social value generated by his creativity as recognition of his contribution towards society. By initially protecting the rights of authors in literary and artistic works as a property right, copyright laws facilitated market transfers of private rights and directed use of these works towards the most socially beneficial uses. This Article proposes that in the digital age, when users of literary and artistic works are increasingly becoming authors themselves, the notion of authorship connects the original author with the work in a market characterized by an abundance of derivative works and remixes by providing a mark of identification. The notion of authorship in the digital age attributes individual and collaborative contributions to the pool of information back to their respective authors. This Article proposes that the networked economy may be sustained in a world where digital technologies facilitate the free flow of information if good works of authorship are rewarded by attributing the original author of the work and authentic works of authorship by responsible authors become an expected norm. Recognizing authorship and protecting ownership rights in the digital age, where open platform technologies and peer production create a plethora, rather than a paucity, of literary and artistic works, is a simple and cost-effective way for the law to address this question of sustainability by acknowledging the moral and ethical components of communal and collaborative production. This Article suggests that recognizing authorship and protecting ownership rights in literary and artistic works in the digital age promotes, rather than restrain, creative activity.
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I. INTRODUCTION

The Internet network design commonly known today as web 2.0 facilitates online collaboration, information sharing, and the interoperability of different standards. A culture of consuming and remixing data and information has grown around an architecture supporting web-based communities, social networking sites, blogs, wikis, and collaborative projects to create a plethora of creative content from an untold variety of sources as users of creative content engage in remixing and reproducing creative works. Characteristics of communal collaboration and collective ownership of creative production prevail on the Internet today and shift the concentration of the law from the author as the creator of the work toward the user of content. As web applications allow for collaborative and interactive remix and reproduction of creative works in a decentralized fashion, users of creative works are no longer passive consumers of content, but have become producers of creative works themselves, a role that was, in the analog world, solely that of the author. While the copyright system served to connect authors with their readers through the market and allow authors to recover payment for the provision of literary and artistic works to the reading public in the analog world, in the digital world, the copyright system, as I suggest here, serves a different function: to ensure that the integrity of the original creator of the work is protected and respected in a world where content can be easily reproduced without the consent or approval of the original author. In order that authors continue to produce works for society, the conditions necessary to encourage authorship to benefit readers must be protected.

1 See for example, Julie Cohen, The Place of the User in Copyright Law, 74 FORDHAM L. REV. 347, 348 (2005) (stating that while copyright is a law of author’s rights, “[a] theory of authors’ rights must be informed by the theory of the user” as recipients of copyrighted works and as new authors); Yochai Benkler, From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access, 52 FED. COMM. L. J. 561 (2000) (stating that “[t]echnology now makes possible the attainment of decentralization and democratization by enabling small groups of constituents and individuals to become users - participants in the production of their environment - rather than by lightly regulating concentrated commercial mass media to make them better serve individuals conceived as passive consumer”); Robert Merges, The Concept of Property in the Digital Era, 45 HOUS. L. REV. 1239-1242-1243 (2008) (describing “digital determinism” as a scholarly trend for IP policy that protects “network friendly policies for a network-dominated world,” of which one focus is on the “viewers and consumers of works” as “users”) [hereinafter Merges, The Concept of Property]

2 Paul Goldstein, Copyright, 55 LAW & CONTEMP. PROBS. 79, 80 (1992) (stating that “[i]t is copyright that makes it possible for audiences - markets - to form for an author’s work, and, it is copyright that makes it possible for publishers to bring these works to market.”) [hereinafter Goldstein, Copyright]

3 Goldstein, Copyright, id. at 80 (stating that “[c]opyright, in a word, is about authorship...[and] sustaining the conditions of creativity that enable an individual to craft out of thin air, and in tense, devouring labor, an Appalachian Spring, a Sun Also Rises, a Citizen Kane...[it] implies not just an author, but an audience, not just words spoken, but individuals spoken to.”)
could threaten the conditions that sustain creative authorship by undermining authorial rights in literary and artistic works, which authors have in their works by virtue of being the creator.4

Copyright laws protect creative works as property of the copyright owner as a carefully calibrated set of exclusive rights, which provide the copyright owner with the exclusive right to use the work in particular ways to the exclusion of others. §106 of the Copyright Act spell out these exclusive rights as the rights to reproduce the work, prepare derivatives, distribute, publicly perform, publicly display, and perform publicly by way of digital audio transmission in the case of sound recordings. The exclusivity provided by these rights serves as a commercial incentive to produce and as an economic reward for creativity.5 But, the incentive and reward was not intended to benefit the creator but rather to increase public welfare by the availability of creative works. It was indeed a reflection of the law’s conventional position on literary and artistic rights when Justice Reed remarked that:

“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts’. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”6

The necessity of encouraging the creation and dissemination of literary and artistic works for the public has been, for a very long time, the cornerstone justifying the protection of creative works as private property of the copyright owner, a necessary “evil,” which society “for the sake of the [common] good” bears in order to have the supply of “good books” for learning that are the products of “literary labor.” 7 The ability to recover the cost of production and dissemination

4 The rights of the author in the work he creates is essentially an economic right, at least in non moral-rights jurisdictions, such as the United States. See Wheaton v. Peters, 33 U.S. 591 (1834) (the rights an author has in the work is provided for solely by statute). However, conceiving of the author’s rights as solely originating from the Copyright Act, undermines an important idea about the production of creative works: that of authorship and the expression of creative individuality contained in each work. For commentary on this issue, see Alina Ng, The Social Contract and Authorship: Allocating Entitlements in the Copyright System, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 413 (2009) (suggesting that emphasizing market rewards as the primary incentive for creativity in copyright jurisprudence may undermine the author’s intrinsic need for authentic expression) ; Roberta Rosenthal Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 NOTRE DAME L. REV. 1945 (2006) (explaining how creativity may be characterized by spiritual or inspirational motivations rather than purely commercial incentives); Michelle Brownlee, Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws, 93 COLUM. L. REV 1157 (1993) (arguing that the copyright system should protect the visual artist’s “style”)

5 For an account of the philosophy behind the incentive and reward paradigms of intellectual property, see Justin Hughes,


7 Speech by Thomas Babington Macaulay in the House of Commons, February 5, 1841, in FOUNDATIONS OF INTELLECTUAL PROPERTY 309 (Foundation Press 2004 Robert Merges and Jane Ginsburg eds.)
of literary and artistic works appeared necessary for authors to continue to produce works for society, and it would appear that writing for commercial remuneration drove many authors to write as professionals.  

Exclusive rights provide copyright owners with a clear baseline right to exclude non-paying members of society from using the work in ways specifically set out by the Copyright Act. These statutorily enumerated rights allow market transactions to occur by facilitating consensual transfers of clearly defined and articulated entitlements in literary and artistic works, for payment, to the party who values the right most in the form of a Coasean bargain. The idea behind statutorily-recognized property rights in literary and artistic works is a manifestation of classical law and economics thought on cost-benefit forms of legal analysis: that in order to encourage authorship and increase public welfare, authors must be paid for their work with exclusive rights, which will allow their works to be commercialized on the market. The assumption behind a law and economics approach to the copyright system is that an author will only decide to create a work when the author is assured that the expected market revenue from sale of the work exceeds his cost of expression.

However, the diverse forms of content produced and disseminated today through the Internet demonstrate that creators of literary and artistic works may be driven by non-economic factors, which are independent of the commercial rewards from the sale of the work through a robust copyright market. The proliferation of community-based content with Web 2.0 shows us that the production and dissemination of creative works may occur without the rights we have come to associate as being necessary for revenue generation through, what we would like to hope is, an efficient copyright market. This observation is not intended to be critique of the copyright system just because new and enabling technologies have increased public participation within the sphere of creative production and dissemination to change the traditional balance between private and public interest that the legal system has sought to achieve. Scholars have often doubted the necessity for copyright in facilitating creative production. More than four decades ago, Benjamin Kaplan, in his 1966 James Carpentier Lectures in Columbia University, had suggested that the copyright system and the controls it imposes on creativity “will appear unneeded” and will be “merely obstructive” to sectors of production where integrated systems, being developed at that time, would provide greater public accesses to creative works, and where “the law of the future would lose patience rather quickly with the mere idiosyncratic withholding of access.” Copyright, to Professor Kaplan, is “likely to recede [and] lose relevance” in

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8 For a description of the copyright market in 18th century Germany, see, MARTHA WOODMANSEE, THE AUTHOR, ART AND THE MARKET 35-55 (Columbia University Press 1994)

9 See Carol Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 557, 590 (1988) (explaining that the preference for clearly defined legal rights, or “crystals” among legal academics in the 1980s was attributable to the fact that “precise entitlements facilitate the efficient allocation of goods; they allow us to identify right-holders and to organize trades with them until all goods arrive in the hands of those who value them most”)

10 For a discussion on the economics of the copyright system, see William Landes & Richard Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325 (1989)
production of works that are produced through some form of public support. Five years later, his former student, Stephen Breyer, expressed similar sentiments with respect the copyright system by observing that the abolition of the copyright system would not have much of an impact on the production of most types of books and may instead benefit the public by reducing book prices, eliminating transaction costs of seeking permission to copy, and increasing the circulation of most books that would continue to be produced in the absence of copyright. In his remark that “the case for copyright in books rests not upon proven need, but rather upon uncertainty as to what would happen if protection were removed,” Professor Breyer adopts the position of a copyright skeptic, doubting the necessity for a copyright system in encouraging creative production.12

I am not really sure if we should lose faith in the copyright system as a system to encourage creativity just because technological development has made creative works more accessible to the general public. I am a copyright optimist and I think that the copyright system will continue to be a vehicle to encourage authorship in the digital age. While we have conventionally thought of the copyright system as providing economic incentives for authorship, we may now think of the copyright system as necessary to provide personal, moral or non-economic incentives for authorship in the digital age, where the ease of accessing and remixing creative works may require that a work’s integrity be preserved and the author’s personality be protected. As the law shifts its focus from author and publisher towards users, and as our conventional understanding of authorship changes, the way we think about property rights in creative works, and the purposes they serve, may have to change too. Property rights in the analog world served the purposes of encouraging investment of time and money into creating and producing works of authorship to facilitate learning by provided a simple baseline right of excluding non-paying members of society from using the work without paying for the use of the work. In the analog world, property rights served to make abundant what was scarce. In the digital world, property rights in literary and artistic works serve an entirely different function from that in the analog world. In the digital world, property rights may be needed, not to exclude society, but to manage the use of creative resources in a situation where technology and digital media provide users with the essential tools to use existing works and produce new ones. When the user is also the producer of new works of authorship, the market is not characterized by a paucity of literature and other forms of creative works, but of an abundance of works of diverse types. Here, property rights are not needed to encourage the production of creative works as works are continuously produced by users. But, property rights may be needed to sustain the continuous production of creative works by identifying owners of literary and artistic works, facilitating transfers of use rights between the original creator of a work and their users, and protecting the authorial integrity of authors.

11 BENJAMIN KAPLAN, COPYRIGHT IN HISTORICAL PERSPECTIVE 119-121 (Columbia University Press 1968) [hereinafter KAPLAN, COPYRIGHT IN HISTORICAL PERSPECTIVE]

In the next three parts of this Article, I explore the conventional notion of authorship in the analog world, how that notion of authorship has changed in the digital world, and what that means for our conception of rights in the networked economy. In Part IV, I explore what it means to protect property rights in literary and artistic works, and I suggest that these rights may be important in achieving a balance between integrity in creativity and responsibility in use of these works. In Part V, I argue that while it is important for the law to ensure that social welfare is advanced through the grant of property rights in literary and artistic works, it is perhaps more important for the law to ensure that individual rights of authors are protected in order to ensure sustained production of creative works in the networked economy. Individual rights of authors, I think, should be curtailed only in exceptional circumstances. In Part VI of this Article, I defend the copyright system as a system designed to encourage authorship that extends beyond the production of literary and artistic works towards sustaining individual creativity and authentic forms of authorship. In conclusion, I assert a need for us to think about the copyright system differently. Copyright is less a legal system restricting development in society and more of a legal system encouraging authorship in diverse forms. Conceiving the copyright system as protecting authorial integrity, assures sustainability of creative endeavors in the digital age when users are also authors of literary and artistic works.

II. Authorship in the Analog World

In the analog world, creative expressions of an author occur in the form in which they were expressed. Works produced are seldom alterable or manipulable, and if they are, any alteration or manipulation to a work of authorship will often require great skill and be difficult or costly. Once fixed as a form of expression, works of authorship in the analog world usually endures in the form it was first created. The continuity in creative production from the moment of conception of the idea to its full and complete expression of authorship would mean that the cost of expression is usually very high for the author, who would invest a great deal of time and labor in creating a work of authorship. Authorship was essentially an individualistic activity in that the creator of a work often created alone, or if not alone, with identifiable co-authors or co-creators. No doubt, authors would borrow from existing works, and allow other author’s works to shape their own work, but they often still retained their individual style and personality in their work. William Shakespeare was influenced by Ovid, Geoffrey Chaucher and Christopher Marlowe to a large degree, and he borrowed extensively from the Bible. Nevertheless, as an individual author, Shakespeare still maintained a separate identity as the creator of his own works uniquely his, and distinct from authors of contemporaneous works. Works of authorship in the analog world are usually personal expressions of the author and are often attributable to the original creator the work, primarily because works in analog form is not easily altered.

13 William Landes and Richard Posner, An Economic Analysis of Copyright, 18 J. LEGAL STU. 325 (1989) (calling the author’s time and effort in producing the work, and the publisher’s cost of soliciting, editing and setting the manuscript in type, the “cost of expression” in any given work) [hereinafter Landes & Posner, An Economic Analysis of Copyright]

14 HAROLD BLOOM, SHAKESPEARE: THE INVENTION OF THE HUMAN 6 (Riverhead Books 1998) (stating that “[i]t cannot be said that Shakespeare imitated Chaucer and the Bible in the sense that he imitated Marlowe and Ovid.”)
Dissemination of works in analog form usually has to be done through a publisher, who bears the costs of printing, binding and distributing copies of the work. Costs of production and dissemination of a work to society is usually costly. Due to the high costs of expression, production, and dissemination, a system of property rights in literary and artistic works may have been necessary to encourage the production and creation of these works for society’s benefit.

III. AUTHORSHIP IN THE DIGITAL WORLD

In the digital world, the conventional modes of authorship prevalent in the analog world described above appear to have changed drastically. With the Internet and digital media, where real world information is converted to binary numeric form in ones and zeros, works of authorship become more readily alterable and manipulable. As a result, authorship in the digital world is characterized by a culture eager to share and remix individual works of authorship. Where costs of alteration and manipulation of original works of authorship would have been prohibitive in the analog world, which is not the case with digital technologies. Works are alterable and manipulable at a fraction of the original cost of production. As a result, authorship of literary and artistic works is characterized by significantly different qualities in the digital age. In the digital age, authorship is generally communal, in that an author usually creates a work as part of a creative community with, sometimes, unidentifiable contributors and supporters. An author may be an unidentifiable contributor to a collaborative project. Authors readily share their works with each other and incorporate other works into their own as part of a remix culture. Works of authorship are usually collaborative projects of several authors. Wikipedia is often cited as the quintessential example of a collaborative project involving thousands of volunteer contributors and attracting 65 million visitors to their website monthly. More than 85,000 active contributors work on more than 14,000 articles in more than 260 languages. Dissemination of works of authorship produced in the age of digital media is often done by distributing the work on the Internet through peer-to-peer networks, and the need for a publisher or printer is often minimized by the author’s ability to digitally reproduce the work at marginal cost, and distribute the work to a ready audience because of the connectivity of the Internet - an opportunity that was simply not present in the analog world. Digital technologies have certainly reduced the cost of producing and disseminating the work. The resulting effect of digital technologies is increased creativity and the production of diverse forms of literary and artistic works by users of creative works, who are not necessarily professional authors. In the digital world, property rights in literary and artistic works serve to sustain this mode of production by providing individual authors due recognition for their contribution to a collective pool of

15 Landes & Posner, An Economic Analysis of Copyright


17 Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy (Penguin Group 2008)

knowledge and information. Rather than serve a production function, as in the analog world, property rights in the digital age sustain creative production by providing due recognition and attribution for works of original authorship. Let me explain what I mean by this.

IV. PROPERTY RIGHTS IN THE NETWORKED ECONOMY

When we speak of property rights in literary and artistic works within the copyright system, we had conventionally meant the set of rights provided for under §106 of the Copyright Act. These rights provide the author or copyright owner with certain exclusive uses of the works, such as the right to make reproductions and derivative works, distribute, and publicly perform and display the work, to allow the author or copyright owner to recover the cost of producing and disseminating the work. These rights “assure contributors to the store of knowledge a fair return for their labors.”19 The production and dissemination function of these rights in copyright law may not be as important in the networked economy because of the significantly lower costs of producing and disseminating the work. Where the creation and production of literary and artistic works are driven by community norms, rather than market incentives, the exclusive rights under §106 may have a lesser role to play in encouraging creative and artistic production in the digital age by providing economic incentives to create. As the production and dissemination of works is communally driven and dependent upon the vast connectivity of the Internet, rather than a personal and economic investment of time and money to bring a work to fruition before rewards from the market are forthcoming, §106 rights may be less of an incentive for creativity in the digital age. Where creativity occurs for non-economic gains, the rights, which assure authors and copyright owners commercial rewards from the market become, as Professor Kaplan puts it, “only one among a number of expedients for stimulating creativity.”20 But, this does not mean that the foundational conceptualization of copyright laws as a property right in literary and artistic works completely loses its relevance in the networked economy.

The creation of a market for literary and artistic works is still an inherent result of the copyright system in the networked economy. Markets for literary and artistic works do not disappear just because technological development has brought about deep-rooted changes in the production functions of creative activities. While the copyright system had conventionally connected the author with their audiences in the analog world, by allowing efficient market transfers of rights in literary and artistic works between authors and those who use their works, in the digital world, authors are connected with their audiences through a recognition of contribution to the collective pool of knowledge by those who use works of authorship in their own work. In a market characterized by a plethora, rather than paucity, of creative works, a robust copyright system, which protects literary and artistic works by providing a mark of authorial identification though baseline ownership rights in the work, assure authors of the personal recognition many non-economic driven creators seek for their contributions made towards information-sharing and knowledge-building within the community of creative


20 Kaplan. Copyright in Historical Perspective 122
producers. By providing an ownership right as a mark of identification of original authorship, users and new authors of literary and artistic works are able to identify the original author of a work, obtain permission to incorporate an older work into a newer one, and provide recognition and attribution where it is due. The copyright system in the networked economy therefore facilitates the free flow of information for sustained creativity by recognizing that authorship in the networked economy must be sustained by other non-economic incentives, such as recognition for contribution to the community. The role of property rights in literary and artistic works, if recognized through a robust copyright system, will be to provide a simple and cost effective way of addressing the sustainability of creative production by protecting the creative integrity of the author in the work and providing a mark of identification for recognizing creative contributions. Collaborative and communal authorship in the networked economy also raises some profound ethical and moral concerns beyond the legal issues we speak about and discuss. One ethical or moral concern arising from collaborative or communal use of content is the use of shared content for purposes which were not anticipated nor intended by the original creator of the work. One of the most important roles of the copyright system, when ethical or moral concerns arise, is to provide a mark of authorial identification to allow ethical or moral judgments to be made about particular uses of creative works especially in copyright jurisdictions, which have less extensive moral rights protection for authors.

In the networked economy, there may be a shift to protect individual rights under the copyright system as rights, which take precedence over the collective societal goals of learning and growth because of the author’s changing motivation for creativity. If authors in the networked economy are motivated by altruistic, rather than purely economic, reasons for creating works, protecting the individual author’s rights is not going to lessen the contributions these authors make towards social welfare. Instead authors motivated by altruistic ideals may need to have individual rights protected against less-than-altruistic uses in order for sustained creativity to occur in the networked economy. According to Professor Ronald Dworkin, individual rights are private rights held by individuals when there are no collective goals that justify the denial of the right or provide sufficient justification to impose losses or injury upon the individual person. 21 In this sense, the rights under copyright law, if we were to base our conceptions of rights in literary and artistic works on Professor Dworkin’s account of individual rights, would have a strong anti-utilitarian aspect because the maximization of the public’s interest for learning and education would be subordinate to the exercise of individual rights under copyright law. Using Dworkin’s theory on the concept of rights, it is possible for copyright jurisprudence to begin developing a common idea of the kind of rights authors, as the creator of literary and artistic works, should have under a robust copyright system to sustain creativity in the networked economy before we engage in a debate of whether limitations ought to be drawn to prevent the expansion of individual rights so that larger social goals to promote the progress of science and art will not be affected. The effect of abridging individual rights however, may have more

21 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92 (Harvard University Press 1977) (discussing the nature of individual rights and distinguishing them from collective goals, stating that “[i]t follows from the definition of a right that it cannot be outweighed by all social goals.”)
detriment to a legal system than an inflation of such rights, especially when the grant of individual rights are justified on principles of equal concern and respect for the individual author. An abridgment of individual rights of the author undermines the very legal institution of rights that provide ground rules for a society dependent on authorial creativity for progress and education, and individual authorial rights should only be abridged in the interest of the public when the social cost of an expansion is not necessary to protect the individual author’s right.22

While it is true that copyright law had conventionally aimed to provide enough economic incentives for authors to motivate the creation of new works to encourage the creation of literary and artistic works for public benefit, these foundational assumptions that authors are economically driven to create by the potential of commercialization of the work on the market may be challenged by the demonstrable proliferation of literary and artistic works on the Internet, which production was motivated by the creator’s personal reasons, which were not based upon an economic benefit or reward. Copyright laws recognize authors for the contributions they make to culture, music and art through the production of literary and artistic works, and to reward authors for engaging in these activities, the law grants authors a temporary monopoly over society’s use of their work because of the ultimate contribution creative activities makes towards building a more learned and educated society.23 The control copyright laws provide authors over use of their works by controlling the making of unlawful or unauthorized reproduction or derivatives, distribution for sale, or the public display or performance of their works24 must at the same time be balanced against the recognized fact that creative works are also building blocks of creativity, which provide authors and artists with the creative raw materials that authors and artists need to use and build upon in order to create something new. These building blocks of creativity may be playwright characters, novel plots, software logic, legal arguments and ideas that authors use to create to express themselves creatively in new ways are the very essence of authorship and creative production.25 These building blocks of creativity – the ideas, plots, story-lines and characters fall outside the law and are free to be used in other forms of creative works. In copyright law, the requirement for originality26 and creative expression27 for protection, ensure that the other parts of a work that is important for others to

22 Id., (stating that when individual rights give way to collective welfare, “the putative right adds nothing and there is no point to recognizing it as a right at all.”)

23 “…the authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the creative monopoly is a necessary condition to the full realization of such creative activities.” MELVILLE B. NIMMER ET. AL., CASES AND MATERIALS ON COPYRIGHT 30 (Lexis Publishing 2000)


26 See Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (1936); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)

build upon remain free and uncontrolled by the author. These include a system of ruled lines and heading used for book-keeping\textsuperscript{28}, ideas and themes of plays\textsuperscript{29}, and compilations of factual information.\textsuperscript{30}

By craving out protected parts of a work and setting boundaries to which an author may legitimately exercise copyright control, the law ensures other authors that there are parts of works that form the body of works that are available to society for free and which can be used without the need to obtain authorization from the original author. This guarantees that some building blocks for creativity are available to those who create new works from available and existing resources. The fair use doctrine is also an important legal doctrine in the copyright system to ensure authors of the ability to use existing works to create new ones. At common-law, the doctrine allowed courts to interpret the law in a way that would allow for creativity to occur, especially in situations, where the strict application of the law would stifle creative efforts.\textsuperscript{31} The courts have been generous with the application of the doctrine and have based its application in equity or fairness without attempting to define its boundaries for application.\textsuperscript{32} The fair use doctrine was statutorily codified with the 1979 Act and four statutory factors were introduced to assist the courts with the analysis of what may constitute a fair use of a creative work. The Supreme Court case of \textit{Sony v. Universal City Studio}\textsuperscript{33}, for example, demonstrates the Court’s reluctance to interfere with private home uses of copyrighted materials. At a time when videocassette recorders new on the market and were being used by private home users to record televised broadcasts for the purposes of time-shifting - recording the televised program to be viewed at another time - the question of what were allowable private uses of copyrighted content was a pertinent question. To hold that private time-shifting of televised broadcasts in the home amounted to an infringement of copyright laws would allow private rights of the copyright owner to affect, not a general public use, but a specific private use of the work by individuals within the privacy of their homes. The Court decided that the use of VCRs to time-shift content need not be a productive use for it to be fair under the law.\textsuperscript{34} More importantly, the Court decided that where the economic harm caused by the private uses of copyrighted content was minimal, in that the potential market for the copyrighted content, or its economic value, was not harmed by the private use of the work, the use was most likely fair.\textsuperscript{35} The Court’s decision demonstrated how

\begin{itemize}
\item \textsuperscript{28} Baker, \textit{id.}\n\item \textsuperscript{29} Nichols v. Universal Pictures Corp., 45 F.2d 119 (1930)
\item \textsuperscript{30} Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1990)
\item \textsuperscript{31} Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc., 621 F.2d 661, 662 (1939)
\item \textsuperscript{32} Time Incorporated v. Bernard Geis Associates, 293 F. Supp. 130, 144 (1968)
\item \textsuperscript{33} 464 U.S. 417 (1984)
\item \textsuperscript{34} Id. at 455
\item \textsuperscript{35} \textit{Id.}
\end{itemize}
the law would respond to an inefficient copyright market, which does not effectively allocate rights in creative resources between owner and user. In these circumstances, where the market place does not generate socially desirable outcomes, the Court would assume the role of the efficient copyright market by allocating rights in the use of creative resources through the fair use doctrine.  

However, with the networked economy, when users are increasingly authors themselves, this legal dynamics of the copyright system may have to change. Where the copyright system was primarily concerned with encouraging the production of literary and artistic works for public benefit in the analog world, the copyright system would be more concerned with sustaining creative authorship of works that will further the goals of the copyright system further. Where the primary worry in granting rights in literary and artistic works has been a monopolistic control over creative works by authors and copyright holders in ways, which may restrict public access, I think that in the networked economy, the primary worry for the copyright system will not the misuse of rights by authors or copyright owners but the disrespect for the process of authorial integrity and respect for authentic works of authorship by the general public in a way, which will deter authors from fully expressing themselves through works of authorship and creativity. The worry for the copyright system in the network economy will probably not be whether society will be able to benefit from the works of authors but whether authors will have the personal motivation to continue writing for society’s benefit if there are no safeguards to protect the author’s integrity and personality contained in the work through various authorial rights such as the right to be attributed or the right to protect the integrity of the work. In the networked economy, there may be a greater need to protect individual authors and their non-economic rights in literary and artistic works but, also to recognize the moral obligations authors and their users owe each other. In the networked economy, there may be a greater need for a greater balance to be achieved between those who create literary and artistic works and those who use the same works to create new ones. The balance that the law will seek to achieve in the network economy will no longer be between incentives and access. Rather, the balance that the copyright system will aim to achieve in the digital age is between integrity in creation and responsibility in use of literary and artistic works.

V. BALANCING PRIVATE RIGHTS AGAINST PUBLIC INTEREST

The fine line between protection and freedom, property and access, and integrity and responsibility is based a legal demarcation between private rights and public property, or public domain. Conventional legal, and economic, literature builds upon the idea of copyright as a temporary monopoly over intellectual creation probably from the principle that authors, who labored over the production of manuscripts, were like farmers, who, having mixed their labor with the soil, were entitled to property over that which they labor. This labor theory of property rights is perhaps most famously attributed to John Locke, whose idea that a man who removes

from nature that which was originally a part of nature, and who mixes his labor with it, makes
the new thing his property.\textsuperscript{37} In common law, for example, the idea that the author’s property in
his creation was so entrenched that no one was entitled to take another’s creative property
without permission.\textsuperscript{38} The financial rewards of authorship through the recognition of property
right in literature also slowly gained acceptance with the Statute of Anne 1710.\textsuperscript{39} The right to
print and distribute literature was to encourage authorship, promote learning\textsuperscript{40} and allow public
access to works, which previously were inaccessible because of the perpetual control booksellers
had over the sale of books.\textsuperscript{41}

While what began as an incentive for authorship to flourish later became a right to recover
investments made to produce new works, the earliest rights to print and reproduce to encourage
authorship continued to expand to include rights of display, adaptation and performance, which
attach economic value to works, and, which allow authors to sell their works commercially to the
public. Authors recovered their investments made in producing works by taking advantage of the
economic benefit from public sale of works.\textsuperscript{42} As commercial value in works grow and as
investments increase, the rights to economic exploitation of works become increasingly valuable
rights to encourage authorship and protect media businesses.\textsuperscript{43} The Copyright Term Extension
Act, the Digital Copyright Millennium Act and database protection laws, such as the European
Database Directive\textsuperscript{44}, are laws that have been enacted to protect commercial, rather than
individual authorial, interests. Advocacy for increased rights over creative works have based
their arguments on a property rights theory that a certain amount of control and exclusivity over
property ensured its social value, and encouraged continuous investment in maintaining and
improvising upon existing works. More modern theories within the law and economics school
take up the argument for private rights in creative works further by arguing that private property
rights are necessary for preservation and maintenance of the value of the work.\textsuperscript{45} Works that are
free for all to use without the restraint of private rights will be overused by the public as many

\textsuperscript{37} JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 20 (Prometheus Books 1986)

\textsuperscript{38} LAWRENCE LESSIG, FREE CULTURE 90 (The Penguin Press 2004) [hereinafter LESSIG, FREE CULTURE]

\textsuperscript{39} HARRY RANSOM, THE FIRST COPYRIGHT STATUTE 105-106 (University of Texas Press 1956)

\textsuperscript{40} Craig W. Dallon, The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public

\textsuperscript{41} LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 28-30 (The University of
Georgia Press 1991)

\textsuperscript{42} Edmund W. Kitch, Taking Stock: The Law and Economics of Intellectual Property Rights, 53 VAND. L. REV.
1727 (2000)

\textsuperscript{43} LESSIG, FREE CULTURE at 9

\textsuperscript{44} Directive 96/9/EC of the European Parliament

\textsuperscript{45} See Ben Depoorter, The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law,
9 VA. J. L. & TECH. 4, 18-27 (2004) (describes the use of property rights to protect the value of information goods
and transaction costs involved in the management and enforcement of the rights in these goods)
will use free resources without regard for the cost that the use imposes on others, namely the
depletion of natural resources, as in the overgrazing of common pastures. Garrett Hardin’s 1968
article on the tragedy of the commons has been used, whether rightly so or not, to justify
copyright protection in works i.e., that literary and artistic works should be kept out of the public
domain and under a property-type regime because unless necessary steps are taken to preserve
information and creative works from overuse and depletion by the public, these works will be
depleted in the same way commonly held resources deplete from overuse.46

Advocacy for public interest rights of access to creative works, on the other hand, has
always been based on the promotion of learning in the public interest. Rights are only granted
over works because authors have to be paid with financial incentives in order to create new
works for the benefit of society. Art, culture, literature and music must be continuously produced
to enrich the public and allow culture and society to grow. New technologies and the Internet’s
ability to build bridges and networks among creators around the world have raised the advocacy
for access to copyrighted materials to new heights. The argument is that these new technologies
allows for authors and creators from different nationalities to collaborate together and work
towards building a new creative culture. At the heart of the public interest argument in favor of
restricted copyright is the need to have access to information, knowledge and creative works for
a civil democratic society.47 Access to information and knowledge must be ensured for growth
and development to take place and many public interests groups and international organizations
have recognized the important role information, knowledge and creative works play in a
community or nation and have advanced strong arguments for increased access as a basic human
right to development and growth.48 The health of the public domain, or the commons, is the
central theme at the heart of public interest advocacy. The public domain, the area ineligible for
private ownership and the contents of which may be used by the public for free, may be in
danger of being eroded by private property rights, and unless we are careful, we may actually
find ourselves in the middle of a second enclosure movement involving intellectual property, the
argument goes. The public domain, our environment for free content, may be contaminated by
laws and rules enclosing knowledge information and content in the interest of a few private
owners and excluding the rest of society from being able to enjoy a free and healthy commons.
The movement to privatize content that is free to the public for use, as much as it is necessary to

(provides an account of economic literature that gave rise to a view of property rights as the right to internalize the
full social value of property)

47 See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283 (1996) (develops a
theoretical framework emphasizing copyright as a state measure to use market institutions to enhance the democratic
nature of a civil society)

48 See Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to
Human Rights*, 26 CARDOZO ARTS & ENT. L. J. 775 (2009) (arguing for copyright law to adopt a normative
framework encompassing social and cultural norms on access to knowledge, development policy and human rights)
encourage authorship, may very much threaten the health of the commons.\textsuperscript{49} The movement to enclose private property may further disrupt the creative processes taking place among authors and may ultimately destroy the ecology of the public domain, the necessary ingredient for a healthy environment encouraging authorship to flourish.\textsuperscript{50}

In more recent years, there has been increased focus on a much wider issue that goes beyond merely recognizing the importance of a public domain. A lot of work is currently being done on developing the commons as a shared resource for everyone. Common property, such as libraries, playgrounds and parks are available for everyone’s use in whichever way one chooses and likewise, common resources, which include the Internet, spectrum airwaves for broadcasting and wireless communication and common knowledge about science, culture and our environment should also, in the same light, be made freely available to all. The premise for this argument is that property and resources that are publicly inherited and jointly developed and shared must be available to all and must be actively protected and managed so that the benefits of these resources is used for the good of all. The expression of the need to manage the commons for society’s collective benefit is succinctly explained in a webblog, OnTheCommons.org, which is dedicated to building a movement to manage the commons fairly and sustainably:-

“A commons-based society refers to a shift in values and policies away from the market-based system that dominates modern society, especially over the past 30 years. The foundation of the market is narrowly focused on private wealth, while the commons is built upon what we all share—air, water, public spaces, public health, public services, the Internet, cultural endowments and much more. One of the most compelling ideas being raised today is the possibility of evolving from a market-based society to a commons-based society. The commons has always been an element of human civilization. But its central role in sustaining all societies has recently been rediscovered, inspiring new lines of thinking in fields ranging from high technology to public health to business. A commons-based society is one that values and protects commons assets, managing them for the benefit of everyone. Market-based solutions would be valuable tools in a commons-based society, as long as they do not undermine the workings of the commons itself.”\textsuperscript{51}

These different sides of the private property – public access argument cannot be ignored. All present very compelling reasons for ensuring a healthy and proper environment for authorship and creativity to flourish, although much more work has to be done to specifically address the question of authorship and the non-economic motivation for creativity in the user-

\textsuperscript{49} The commons has been identified as that area where resources are free, not necessarily without cost but if there is a cost, it is neutrally or equally imposed. Larry Lessig, \textit{The Architecture of Innovation}, 51 DUKE L.J. 1783, 1788 (2002)


\textsuperscript{51} \url{http://www.onthecommons.org/content.php?id=2522} (last visited January 29, 2010)
author of the networked economy. There is an undeniable need for minimal rights to encourage authorship and at the same time these rights cannot restrict the larger societal need to use works of authorship in the production of new works. There is indeed a very narrow space between private rights and public interests – that narrow space between “zero and one,” which requires a consideration for the developments that have taken place within the realm of copyright. With the current debates that are taking place in many international and regional forums, there is however, a long forgotten but increasingly pressing need to restore the balance that has traditionally defined copyright law for so long and present an affirmative case for copyright law as the legal institution centered on the very essence of encouraging creative authorship by protecting the author’s integrity. It is easy to get caught up in the debate of necessitating stronger rights under the law to encourage innovation and restraining those expanding rights to ensure the development of a healthy environment for creativity and authorship to occur that in the heat of the debate, we may however lose sight of what the law is and the ideals the law strives to achieve. Rights under copyright law protect authors as right holders in literary and artistic works, and these rights have been granted to create an atmosphere where authorship flourished.\textsuperscript{52} The initial cost to society upon the grant of the right in early copyright statutes was the cost of a temporary monopoly over the reproduction of books for a limited number of years. The Government in the grant of the right acknowledged that the right imposed a cost on society because of the monopoly that authors had over the work for the duration of copyright. The right is nonetheless a recognized right that imposed a social cost that ultimately served a larger social goal for the monopoly rights contributed to the production of new works by authors, which then increased public knowledge as new books and creative works are produced.\textsuperscript{53} The right has been expanded throughout the course of copyright law’s history but the resulting effect was the protection of businesses rather than the author as the creator of literary and artistic works.

As private commercial rights expand, greater cost is imposed upon society as society has less access to creative works. However, increased social cost due to commercial practices should not be a reason for curtailing the rights of authors under the copyright system simply because access to works has become more difficult through the practices of copyright owners. The initial cost of a temporary monopoly anticipated by the legislature when giving the right to authors has not changed even when rights in literary and artistic works are expanded. Society is still required to use works within particular boundaries defined by law and still bears transaction costs of

\textsuperscript{52} It is stated that “copyright tends also to serve the material expectations and psychological cravings of the individual creative worker: it gives him an opportunity (though by no means the certainty) of reward for his efforts; conventional recognition for the feat of creating a work; a means (though not a very good one) of preserving the artistic integrity of the work through controlling its exploitation.” BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75 (Columbia University Press 1967)

\textsuperscript{53} It is stated that it is “society’s duty to go as far as it can possibly go in nurturing the atmosphere in which authors and other creative artists can flourish. I agree that the copyright law should encourage widespread dissemination of works of the mind. But it seems to me that, in the long pull, it is more important for a particular generation to produce a handful of great creative works than to shower its school children with unauthorized photocopies or to hold the cost of a jukebox play down to a dime, if that is what it is these days.” BARBARA RINGER, THE DEMONOLOGY OF COPYRIGHT, BOWKER MEMORIAL LECTURE (1974), reprinted in MODERN COPYRIGHT FUNDAMENTALS 24-25 (Ben H. Weil & Barbara Friedman Polansky eds., 1985)
negotiations for use rights or to obtain permission for uses of the literary and artistic works. The expansion of rights has not changed the cost that the legislature anticipated when giving rights over works to authors to encourage them to create new literary and artistic works. There is nothing that is different in terms of social cost for the expansion of rights today than the original grant of rights under the Statute of Anne in 1710. The effect of not expanding rights however has a more adverse effect on the copyright system because a failure to expand rights would suggests that rights in literary and artistic works are not legitimate rights in the first place and are rights that were only given as a matter of convenience when the rights were originally recognized as they can be overridden and ignored by general claims for social efficiency or increased social welfare. There must be a very compelling reason to curtail rights as technological and social environments change, and the reason must be a great social cost that is unwarranted and unnecessary that goes beyond the cost of the original rights anticipated by early copyright laws.

This Article proposes that a curtailment of rights under copyright laws would be acceptable only when three conditions are met. First, the ideals identified under the original recognition of rights, i.e. to encourage authorship and the creation of literary and artistic works, will be at stake if rights were expanded. Second, a competing right (and not a social goal) would be abridged if the right were to be expanded. Third, that there would be a cost to society that would go far beyond the cost paid to grant the original rights under copyright if the rights were to be expanded. This test stresses the importance of rights and the need to take copyright seriously. Where the rights under copyright can be undermined and ignored easily, authorship will be affected because the original rights that authors had over their works, when not upheld when society and the environment changes, would appear to be a sham, which in turn results in disrespect for original works of authorship. One of the consequences of social disrespect for original works of authorship is the use of works in ways that contradict the non-economic motivations for authorial creativity, which has produced the vast amount of creative works by volunteer authors that proliferate through the Internet today.

VI: DEFENDING THE COPYRIGHT SYSTEM

This Article recognizes that the role copyright law has in encouraging the creation of literary and artistic works ultimately contributes to the larger social goal of encouraging education, research and access to information. The convergence and development of information and communication technologies does have a significant impact on how literary and artistic works are created and used. From these developments, there is a recognized need to maintain the rights of authors and creators of creative works and yet ensure that the public’s need for access to these works is met. However, we must not lose sight of the individual author’s rights under copyright law, which should trump social goals if the law is to be taken seriously. An author has the right to exercise his individual right under law even if it affects social welfare to some extent if it means that the author’s integrity in the work as an original work of authorship is preserved. I think that undermining the rights of authors in favor of the public interest will destroy the copyright system as an institution designed to encourage authorship. As rights expand together with the development of new information and communication technologies, society bears a cost
as the maximization of collective welfare through the copyright system is compromised. However, as demonstrated by the three tenet test supporting the expansion of author’s rights in Part V of this Article, the loss to society from an expansion of individual author’s rights may be imaginary and marginal, at most. This is because the costs of a temporary monopoly over works, which is the increased transaction costs that is incurred in seeking permission to use original works of authorship, remain the same even as rights expand. That portion of the copyright equation doesn’t change. Transaction costs become lower as technologies converge to narrow the gap between author and user, and when the individual author’s rights expand together with the development of new technologies in the networked economy, the cost to society from the expansion of those rights remains low. On that premise, it would appear to be a grave mistake on the part of the legal system to abridge rights under copyright as technology develops based on the premise that there will be an increased cost upon society from an expansion of those rights.

This Article aims to bring our attention back to the basic ideologies of copyright despite the raging debates on the reach of private rights in the networked economy. To not lose sight of what the copyright system aims to achieve, which is the creation of an environment where authorship can flourish so that literary and artistic works can be produced for public benefit is an important aim for us in the digital age. Ultimately, the public benefits from the availability of literary and artistic works from a robust copyright system because the system itself provides the necessary balance between competing rights of individual authors, who at times create for non-economic reasons, and their audiences, who will comprise users of their works and new authors seeking inspiration and ideas from existing works. By taking the copyright system, as an institution designed to facilitate original authorship, seriously, we implicitly trust the law to take our hopes for the future and aspirations to a better world into account, and that the law recognizes and protects the various communities that have built up around the legal system. Any change in copyright law will be in the right direction if this is acknowledged by those who make and design the laws. The law is less about recognizing commercial interests in content and creative works, protecting infrastructure that carry those works, or enclosing information and knowledge in the public in the narrow sense, but rather to ensure that there are certain conditions that exist to encourage authorship, one of which is the author’s individual right to control how his work is used by the public to preserve authorial integrity. The law must also have regard for the number of communities and communal interests, which share and build upon commonly held content in the networked economy. Individual authorial rights under the law should not be expanded where the social cost for new authors to use existing works as inspiration to create new works will exceed the original cost anticipated by the legislature when first granting the right. How far a right expands must ultimately depend on to the cost that society bears for the expansion.

Professor Dworkin, in *Law’s Empire*, emphasizes that law is merely not about rules, principles and judge-made law, but rather about our attitude towards the law and our interpretation of, and belief in, the legal system. Individual rights under copyright law cannot be abridged simply because society feels an increased invasion of the collective welfare of having access to literary works. To abridge rights that easily suggests that the initial recognition of the right was not genuine and was given by the legislature as a matter of convenience. The
unfortunate effect of an abridgment of rights will be public disregard and disrespect for the copyright system as an institution to create the conditions for original authorship to occur and protect the process of creative production by individual authors. In *Law’s Empire*, Professor Dworkin explains:

“Law’s empire is defined by attitude, not territory or power or process...It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his public commitments to principle are, and what these circumstances require in new circumstances. The protestant character of law is confirmed, and the creative role of private decisions acknowledged, by the backward-looking, judgmental nature of judicial decisions, and also by the regulative assumption that though judges must have the last word, their word is not for that reason the best word. Law’s attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith in the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.”

Perhaps there is a need for us to understand copyright laws in the same light. As an institution that aims to provide the best route to the future, copyright laws must ensure that the proper conditions for authorship exists so that society’s welfare is maximized through the creation of diverse forms literary and artistic works. It is true that the creative community is united in spirit to ensure that the best conditions for authorship exist, even if divided in the ideas on the best way to achieve this. When we recognize and understand that the rights that the law gives authors are very important in encouraging authentic and original authorship, and truly lie at the heart of our social goal of maximizing collective welfare through the use of creative materials for learning and education, we come to the answer to the present debate about rights in the networked economy when users are also authors of literary and artistic works. The debate of balancing private rights against public interests misses the point we are trying to make, which is that the proper conditions for authorship must exist before literary and artistic works can be created for the public. This can only happen when we take copyright law as an institution designed to facilitate original authorship seriously.

**VII. Conclusion**

This Article has suggested that the copyright system has a larger role to play in the networked economy than in the analog world. The copyright system serves an important function, which is to connect authors with their audiences through the market. This function of

54 RONALD DWORKIN, LAW’S EMPIRE 413 (Fontana Press London 1986)
connecting authors and audience through market institutions in the analog world served to allow efficient transfers of rights in literary and artistic works to take place. In the digital world, the function of the copyright system of connecting authors with their audiences serves to recognize original authorship and protect ownership rights in literary and artistic works, especially when communal and collaborative uses of works raises moral and ethical concerns about the social uses of particular works of authorship or art. The sustainability of the networked economy, when users increasingly become authors, is heavily dependent on a strong and robust copyright system, which protects the individual rights of the author. Yet, we cannot deny the tension that lies between private rights and public interests that lie at the heart of copyright jurisprudence. As authors and users of creative works become more empowered through new technologies, the Internet being a prime example, monopoly rights over the use of intellectual and creative works have extended globally to include transmission rights, public communication rights, and broadcasting rights. As rights expand as legal responses to social, cultural and market changes brought about by converging information and communications technologies, there is an increasingly important need to identify the proper allocation of entitlements in literary and artistic works among authors, publishers, and the public at large, particularly as these entitlements affect the ability of society to have access to information for education, research, and general development. As society has greater access to, and use of, creative materials in novel ways through new communication and digital technologies, there is a need to rethink the fundamental purposes of the copyright system, evaluate the legal implications of rights expansion, and consider if the best response to rights expansion is to abridge rights in literary and artistic works. This Article suggests that there is a very important need to recognize that individual rights, protected through copyright laws, serve to encourage diverse forms of authorship, and that it is more important to allow these rights to expand under law than to abridge them to protect a social goal or public interest. The reason for this is because the recognition of authorial rights under copyright laws promotes respect for original authorship and sustains the production of creative works for society. Individual rights should not be undermined until and unless the expansion of the right imposes a cost to collective social welfare, which goes beyond the cost originally paid by society in the grant of rights to authors under copyright laws.

The right balance within copyright law is a difficult question. It is a difficult question because the balance copyright law strives to achieve is often missed for the larger socio-economic and developmental goals, which have been put forward by advocates of social justice and the development agenda, or product investment goals advocated by copyright owners defending economic investments in the production of creative works. Both arguments present valid points of view. On one hand, anyone, who has invested time and money in producing new works, would want to be able to protect others from unfairly profiting from their effort. Creative works poses a classic public good problem, where non-paying members may easily free-ride on the provision of the goods to paying members of society - unless laws are passed to allow owners to exclude non-paying members of society from using the good. On the other hand, the public requires access to works for learning, education, and for use as building blocks of creativity to

55 World Intellectual Property Organization Copyright Treaty 1996
develop new works of authorship and art. Here, advocates of the public domain resist rights expansion in literary and artistic works because of the restrictions exclusive rights place on the freedom to use content for the purposes of progress. This Article acknowledges the validity and legitimacy of the arguments and recognizes that there are specific rights and interests that private right holders and public interest groups strive to protect. However, this Article suggests that the copyright system provides the freedom that is necessary in order for the public to have access to creative works and that a true understanding of copyright law removes the necessity to debate the boundaries between private rights and public goals, even as new technologies appear to change the balance between private and public interests. The information age and the networked economy provide an opportunity for us to reexamine the fundamental purposes of copyright law and demonstrate that the balance between rights and access exists within the law.

At the heart of copyright jurisprudence is the idea that when authors are encouraged to produce original and authentic works of authorship, social welfare is increased by the availability of diverse forms of literary and artistic works for society’s use in the creation of new works to promote progress of the sciences and useful arts. The pursuit of an answer to the balance between author’s rights and user interests in copyright law cannot be isolated from political philosophy about individual and collective rights, duties, and obligations. The inextricable link between copyright law and the larger moral questions on rights and responsibilities stems from the conception of copyright as an institutional, and legal, right, given to authors of literary and artistic works to produce works of authorship to meet a social need. The rights of authors in works, however, do not compete, and should not be seen as competing, with larger social goals, as is assumed in present copyright debates and discourses. The present situation is not a question of balancing private interests and social goals because there is no real balance to achieve between a private property right belonging to the author of a work, and a public goal to further the progress of science and the useful arts – these are not conflicting rights but rather complementary institutional goals of the copyright legal system. The question I think we should refrain from asking is whether we have inflated rights to the extent that the public right to access works is restricted because a balance cannot be readily drawn between private rights and social goals. Individual rights and social goals are not in actual conflict. We only need to talk about achieving a balance between different rights when we have to make policy choices between two equally legitimate and competing rights e.g. an author’s property right in his literary and artistic creation against a copyright owner’s statutory right to reproduce the work or make derivatives. When society’s rights as a whole are involved for the progress of science and the useful arts, for example, the question is not a question of where the proper balance between two competing interests lies but how private institutionalized interests further this public goal. We must recognize that there is a clear difference between collective goals and private interests, and between society’s rights and the rights of members of society.

I hope that in the various parts of this Article I have demonstrated that when users of literary and artistic works are also authors of new works, the law must acknowledge that protecting the individual rights of the author are paramount in sustaining a creative culture in the networked economy and must be guaranteed. Otherwise, authors in the digital age, writing for
non-economic reasons, may lose the incentive to collaborate and create works for the community in which they belong. The idea/expression dichotomy and fair use doctrine demonstrate that non-protectable ideas, as well as protectable portions of expressive content, may be used within legally defined boundaries as building blocks for new forms of creativity. These are illustrations that within the law itself are mechanisms to encourage creative activity and diverse forms of authorship to occur. Where the expansion of private rights appear to undermine public or social goals, a three tenet test is proposed to determine when extension of rights under copyright is not acceptable, especially when the effect on the public’s rights to access creative works for learning and education is a significantly higher cost than the cost anticipated by the legislature when the rights were first given to authors. Finally, this Article defends the copyright system as being effective in achieving the balance between private rights and public interests. The copyright system, this Article suggests, provides the legal solution to many of the economic, political, and social questions we struggle with as technology develops and society changes. Technological development and social change is not the root cause of the problems we encounter in the copyright system. The social, economic, and political issues, which arise from our changing environment as technology develops, new markets emerges, and Internet usage grows may not the consequence of expanding rights in literary and artistic works but rather a misunderstanding of the nature of the law and the ideals it strives to achieve. This Article concludes by offering a slightly different perspective to the discussions taking place today and suggesting that many of the questions we ask today about the copyright system is answerable through a reference to the ideals of copyright law as an institution. We may be surprised by the richness of the copyright system to provide a fair system where authorship and creativity flourishes to the benefit of society when we look towards the history of the legal system as well as cultural forces surrounding the law’s development for the answers to the questions we pose today.