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Rights, Privileges and Access to Information

Alina Ng, Mississippi College School of Law
ABSTRACT

Protecting property rights in creative works represent a classic institutional approach to a specific economic problem of non-rivalness and non-excludability of information. By providing the copyright owner with an enforceable right against non-paying members of society, copyright laws encourage the production and dissemination of literary and artistic works to society for the purposes of learning. Implicit in the grant of property rights is the assumption that commercial incentives foster creative activity and productivity. In recent years, literary and artistic works have increasingly become the subject matter of exclusive property rights and control, particularly as new technologies emerge to provide users of creative works with greater access to informational goods. As a result of expanding property rights in literary and artistic works, society’s access to, and use of, information has, however, been severely restricted by increasing access costs despite the development of enabling technologies to facilitate greater access. This Article examines the general social claim to a right of access to information for the purposes of furthering the constitutional goals of promoting progress, and proposes that the question of access to information is a question of sustainable resource use that should not evoke the exclusionary rights of a strict property rule. The rights under copyright laws protect economic privileges in information and govern society’s use of informational resources. They do not provide copyright owners with a general right to exclude socially beneficial uses of informational works, are specifically tailored to increase social welfare, and must be distinguished from a property right to exclude others from use of a thing. Exclusionary property rights in creative works, arise, if at all, to protect an author’s creative integrity, validate the importance of authentic authorship, and provide personal and moral incentives for authors to produce creative works of social value. Property rights and economic privileges, this Article proposes, encourage the production of informational goods and are necessary to ensure the advancement of science and the useful arts in accordance with the Constitutional goals of the copyright system.
RIGHTS, PRIVILEGES, AND ACCESS TO INFORMATION

ALINA NG
MISSISSIPPI COLLEGE SCHOOL OF LAW
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I. INTRODUCTION: RIGHTS IN INFORMATION

The Nature of the Firm\(^1\) and The Problem of Social Cost\(^2\) are two pieces of work that have had a profound impact on legal scholarship\(^3\) and the Royal Swedish Academy of Sciences heralded Coase’s theories as “among the most dynamic forces behind research in economic science and jurisprudence” when they awarded Coase the Nobel prize in 1991.\(^4\) The contribution Coase made was significant because he demonstrated, in these two articles, the role of transaction costs in the emergence of firms and institutional arrangements in the legal system. In this first instance, firms exist because the presence of transactions costs - the cost of negotiating contracts to their conclusion - make it cheaper for an entrepreneur to organize various factors of production within a firm than to form multiple contracts with each production unit and enter into open-ended contracts that leave room for the details to be agreed upon after the general terms of the contract is concluded.\(^5\) In the second instance, institutional arrangements in legal systems become necessary to allocate resources when transaction costs prohibit market transactions from occurring to achieve the optimal arrangement of rights - the rights and duties of private individuals must be set by governmental institution when the cost of bringing about a contractual arrangement on the market exceeds the value of production after the rearrangement.\(^6\) In his acceptance speech for the Nobel Prize, Coase emphasized this pivotal point in the Problem of Social Cost: that the role of legal systems within an

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1 R. H. Coase, The Nature of the Firm, ECONOMICA 386 (1937)
3 Stewart J. Schwab, Coase’s Twin Towers: The Relation between the Nature of the Firm and the Problem of Social Cost, 18 J. CORP. L. 359 (1993) (stating that “[m]uch ink has been spilled over [both] article[s]. Both are justly famous, and together they make Coase a richly deserving recipient of the Nobel Prize in Economics.”)
5 The Nature of the Firm, supra note 2 at 390-392
6 The Problem of Social Cost, supra note 3 at 15-17
The articles are important articles in the field of economic science because they demonstrated that legal rights - whether they arise via contract or as private property - defined an individual’s entitlement with respect to use of a production resource, entitling a right-holder to use a resource in specific ways without necessarily recognizing an inherent right in the resource itself. A less well-known piece by Coase expands his ideas on the role of institutional governance and the grant of property rights in encouraging production of public goods, which to a significant extent, illuminates the issue raised in this Article: whether private property rights in literary and artistic works that are protected through copyright laws allow a right-holder to control society’s access to information for the purposes of progress. Coase’s *The Lighthouse in Economics*, which was published in 1974 by the Journal of Law and Economics, sought to demonstrate that, contrary to conventional economic thinking at that time, government intervention was not necessary to procure the production of public goods - if there are sufficiently well defined property rights that allow the producer of a public good to recover or internalize positive externalities generated by the production activity. The question of access to information in copyright is often inextricable from the question of rights in literary and artistic works because society’s ability to use information to engage in civic discourse, research, and social dialogue depend heavily on whether rights over information can be used by right-holders to restrict access. When the question of rights is couched within property-type metaphors in conventional copyright talk, a right-holder appears entitled to prevent access to information. By speaking of the right to “exclude others” from using intellectual works, analogizing information to land, and thinking of copyright infringement as “trespass” on the copyright owner’s “exclusive domain,” property rights over information seem to entail an exclusive possessory right in information that

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9 Coase departed from economic thinking at time, which believed that government intervention in the form of a tax was necessary to reduce negative externalities i.e., spillovers that are not accounted for in the price of the good produced, and which affect parties external to the production of the good. Coase argued that to impose a tax upon the producer of the externality would result in a reduction in the value of production.

10 See, e.g., White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908); Fox Film v. Doyal, 286 U.S. 123 (1932); Commissioner of Internal Revenue v. Wodehouse, 337 U.S. 369 (1949)


would entitle the right-holder to exclude the rest of the world from the information. Yet, it remains unclear whether information can accurately be thought of as property. Property, in its conventional sense, is a finite and scarce resource - such as land, chattels, and personal items. Unlike finite and scarce resources, information contained in literary and artistic works, like light from a lighthouse, is non-rival (where use of the resource does not deplete it) and non-excludable (where use of the resource cannot be limited once made available to society) in consumption. The fact that one person’s reading of Victor Hugo’s Les Misérables does not diminish another person’s ability to read the novel and understand its story line, nor is anyone else excludable from enjoying the narrative of the novel just because one person has read it, means that information contained in creative works is, like light from a lighthouse, a public good - that once made publicly available, may be consumed by society at zero marginal cost. It is this public good nature of literary and artistic works, which requires production incentives in the form of state-granted property rights to create the scarcity necessary to provide commercial value to such goods. For without rights, producers of public goods will lose their incentive of making goods available to society if there is no way of recovering the investment made in producing the good. Economic analysis of the law finds justification for property rights in literary and artistic works on the premise that social benefits accruing from increased incentives to create, i.e., greater contribution to the collective pool of knowledge for progress, outweigh the administrative and social burdens of protecting and enforcing property rights. However, achieving this level of economic efficiency between providing the right amount of incentives to maximize the production of informational works, and ensuring that the level of legal protection does not raise the cost of using information to a level where access is barred remains elusive.

This Article argues that the balance between rights in and access to information will remain elusive because the property metaphors we use to conceptualize copyright and the boundaries we imagine around informational resources mischaracterizes the

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13 See Henry E. Smith, Intellectual Property as Property: Delineating Entitlements in Information, 116 YALE L. J. 1742 (2007) (“At the core of controversies over the correct scope of intellectual property lies grave doubts about whether intellectual property is property.”) [hereinafter Smith, IP as Property]
14 Economists generally consider light houses to be the quintessential public good, the services for which can only be provided by the government by taxing the public. See R. H. Coase, The Lighthouse in Economics, 17 J. L. & ECON. 357 (1974) (“the impossibility of securing payment from the owners of the ships that benefit from the existence of the lighthouse makes it unprofitable for any private individual or firm to build and maintain a lighthouse.”). [hereinafter Coase, The Lighthouse]
16 Keith Aoki, Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I, 18 COLUM.-VLA J. L. & ARTS 1, 20-21 (1993) (“intellectual property law tries exorcising the specter of information underproduction by granting exclusive property rights to producers as incentives and rewards (producers can now charge for access to their commodity), in exchange for anticipated social benefits arising from disclosure and widespread access to such newly created information (justifying the property grant)”)
17 Daniel A. Farber, Free Speech without Romance: Public Choice and the First Amendment, 105 HARV. L. REV. 554, 563 (1991) (arguing that political speech have to be protected as public goods or political information, like other forms of information, will be underproduced)
19 Id. (“Striking the balance between access and incentives is the central problem in copyright law.”)
nature of information as the subject matter of exclusive rights. Information, unlike most subject matter of a property right, including bonds, securities and currency, is infinite, abundant, and boundless. Information, as a representation of knowledge contained in literary and artistic works, cannot be likened to finite and limited resources that are usually the subject matter of exclusive legal rights such as land, water, minerals, cattle or lobsters, where the recognition of exclusive property rights aid in their conservation and preservation. Information need not be conserved or preserved from overuse - being a public good, use of information as a resource does not deplete it. Information bears greater similarity to air or light, the use of which is a matter of experience rather than consumption, and is therefore, free to all. Property rights granted over information encourage their production to create an abundance of informational resources for social benefit, and are essentially different from property rights in finite resources, which are granted to protect an abundant resource from being depleted and becoming scarce from unregulated consumption or overuse. Arguably, for resources that exists in infinite, abundant, and boundless forms, property rights only serve one specific purpose: to allow producers of the resource to recover their investment in producing it. The economic value of property rights and customary norms regulating use of finite and limited resources is in their protection against the depletion or abuse of the resource. In that situation, it makes perfect sense to employ a “right to exclude” approach as a means of protecting a scarce resource that is susceptible to exhaustion by excluding those who will lessen the value of the resource. However, for infinite and unlimited resources such as information, property rights serve to stimulate and foster productivity by providing an incentive to produce and distribute the resource to society. In this latter situation, any rights of exclusion are more limited in application. Rather than define boundaries of ownership to prevent socially wasteful conduct through exclusion, they provide a legally enforceable mean of receiving payment for the provision of a socially valuable good or service. The exercise of a property right in the case of informational goods, this Article suggests, only allows only the assertion of an entitlement to be paid for the provision of a good and does not entail a possessory right to exclude society from use of that resource.

The parallels between light and information production are significant in this case. In The Lighthouse in Economics, Coase challenged the conventional economic assumption that lighthouses, being the quintessential public good, could only be provided by the government by taxing the public. Coase asserts that lighthouses may be privately

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20 Empirical studies suggest that with finite resources, property rights help to conserve the resource. See JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE 142-144 (1998)

21 See International News Service v. Associated Press, 248 U.S. 215 (1918) (Brandeis, J., dissenting) (“information is free as the air to common use”); see also 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) (that information should be free to allow for free expression)

22 See Robert C. Ellickson, Property in Land, 102 YALE L. J. 1316 (1992) (describing how the right to exclude is employed in private and communal land ownership to reward labor and prevent overuse) [hereinafter Ellickson, Property in Land]

produced and provided, as long as there are state established and enforced property rights that would allow the light house owner to collect levies from vessels benefitting from the lighthouse at the port without the lighthouse owner having to undertake individual negotiations with vessels, or switch off the lighthouse when a non-paying ship approaches its range, to achieve the excludability necessary to make the provision of lighthouse services profitable.24 Unlike land, light cannot be parcelized to achieve the exclusivity necessary to receive payment for use.25 Economists similarly reason that the provision of information requires laws to establish and enforce property rights to sustain creative productivity by authors. As information in literary and artistic works is limitless and infinite, authors require state established and enforced property rights to allow them to prevent non-paying members of the public from free-riding on the provision of such works to paying members of society.26 Copyright legislation establishes the creator’s exclusive rights in informational goods and facilitates the private production of informational materials by temporarily limiting public access to works.

But, public access to informational goods have, in recent times, become a social concern as private incentives to recover financial investments from public uses of literary and artistic works appear to take precedence over the welfare of those relying on information produced through the exercise of property rights in informational goods as a possessory right that entails a general right to exclude society from using information.27 Progress and advancement in the sciences and useful arts require incremental changes towards a better or improved state, and are essentially contingent on the availability of knowledge and information to guide those changes.28 Having reliable and valuable information available to society for learning is, however, is only a preliminary step in advancing the sciences and arts.29 The other necessary component in promoting progress

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24 See Coase, The Lighthouse, supra note 5, at 375.
25 See Ellickson, Property in Land, supra note 8, at 1328-1330 (explaining how technologies for marking boundaries lead to increased parcelization of land)
26 See William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325, 328 (1989) (without copyright protection “anyone can buy a copy of the book when it first appears and make and sell copies of it. The market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work.”) [hereinafter Landes & Posner, An Economic Analysis of Copyright Law]; see also Robert M. Hurt & Robert M. Schuchman, The Economic Rationale of Copyright, 56 AM. ECON. REV. 421 (1966) (“A copyright is a grant of the aid of state coercion to the creators of certain “intellectual products” to prevent for a period of years the “copying” of these products.”). 
28 See David W. Opderbeck, Deconstructing Jefferson’s Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy, 49 JURIMETRICS J. 203, 235 (2004) (presenting a critical realist perspective that information has an ethical social dimension that should be reflected in a robust information policy to ensure that the grant or restraint of access to information will encourage the development of communities contributing towards “human flourishing.”).
is providing society with the freedom to use information to develop new forms of
knowledge and information.\textsuperscript{30} When information access costs, which include transaction
costs in the transfer of property rights, become prohibitively high and deter efficient
public use of information to garner useful social knowledge\textsuperscript{31}, use of information for the
purposes of generating new research and producing new knowledge is hampered.
Established research norms in the scientific community, for example, require the sharing
of knowledge as a matter of professional conduct to make scientific knowledge accessible
to achieve progress in the field. These norms encourage scientists to test the veracity of
claimed observations and “contribute to the same body of certified knowledge”, treat
scientific findings as “a product of social collaboration…dedicated to the scientific
community”, thirst for truth rather than pursue self-interests, and verify all scientific
claims before accepting them as fact.\textsuperscript{32} The early disclosure of research findings have
allowed scientists to benefit from the research work of other scientists.\textsuperscript{33} As research
indicate that lighthouses services in England in the seventeenth and eighteenth centuries
were poor in quality for a variety of reasons, and one of these reasons was the private
individual’s drive to maximize profits from the provision of light and lack of quality
control by the state\textsuperscript{34}, there is a need in present times to ensure that the maximization of
private profits through the copyright laws system does not undermine society’s ability to
use the information for learning. Lighthouse service dues imposed by private individuals
were high because part of it was paid to the King, whose favor was constantly courted by
private individuals seeking a lighthouse patent.\textsuperscript{35} While producers of literary and artistic
works need no longer court the favor of the Crown or society’s nobility to support their
work\textsuperscript{36}, the financial gains from the market, as the new patron for commissioning the
production of creative works, may subjugate the public’s interest to access accurate and

\textsuperscript{30} Jessica Litman, \textit{The Public Domain}, 39 EMORY L. J. 965 (1990) (arguing that authors need access to a
repository of knowledge to create new works of authorship)

\textsuperscript{31} See Niva Elkin-Koren, \textit{Copyrights in Cyberspace – Rights Without Laws?}, 73 CHI.-KENT L. REV. 1155,
1197 (1998) (“Acquiring licenses to use particular information may involve prohibitively high transaction
cost and may prevent licensing from occurring in the first place. The high transaction costs may increase
the cost of information, and may, therefore, reduce the accessibility of informational works.”).

\textsuperscript{32} See Rebecca Eisenberg, \textit{Proprietary Rights and the Norms of Science in Biotechnology Research}, 97
YALE L. J. 177, 182-183 (1987) (describing sociologist Robert Merton’s observation of four interrelated
behavioral norms of universalism, communism, disinterestedness, and organized skepticism within the
scientific community)

\textsuperscript{33} \textit{Id.} at 226-228 (describing the communication and sharing of biological materials between the National
Cancer Institute, Bethesda, Maryland and the Pasteur Institute, Paris, which eventually led to the discovery
of the AIDS virus and the development of an AIDS antibody test kit)

\textsuperscript{34} Contributing factors to poor lighthouse services include a lack of technical control of the quality of
lighthouse buildings, the lack of regulations requiring inspection of lighthouse construction and
maintenance, and the need to obtain the Crown’s favor before building a lighthouse. \textit{See} Bertrand, \textit{The
Coasean Analysis of Lighthouse Financing, supra} note 9, at 398-340

\textsuperscript{35} It is noted that James I, for example, granted lighthouse patents to private enterprises to “increase his
own fortune.” \textit{Id.} at 400

\textsuperscript{36} \textit{See} Arnold Plant, \textit{The Economic Aspects of Copyright in Books}, 1 ECONOMICA 167, 170 (1934) (“The
belief has been widely held that professional authorship depends for its continued existence upon this
copyright monopoly; or upon an alternative which is considered worse viz. patronage.”).
unbiased informational content as producers of information seek to maximize their profits from the commercialization of their works on the market.\textsuperscript{37}

This Article argues that it is imperative to accurately define the legal entitlements that the copyright owner and society have over informational goods to determine the extent to which copyright owners may exclude society from using literary and artistic works for research, civic discourse, and social dialogue for the purposes of achieving progress in the sciences and useful arts. The question of access is, arguably, most accurately analyzed by characterizing information as a resource for learning and knowledge development that is the subject matter of various use privileges rather than of an exclusive right of ownership. Property rights in information, as commonly understood, encourage both its creation and public dissemination.\textsuperscript{38} As the protection of a property right in unlimited resources, such as information, serve a completely different purpose from the protection of a property right in scarce resources, the need to acknowledge property rights as serving a production, rather than conservation, function, when it comes to informational resources is great. The most important consequence of treating rights in information as serving a conservation function, rather than a production function, is the creation of multiple claims, which authors, copyright owners, and users of literary and artistic works can assert over information resulting in the excessive fragmentation of ownership rights and the under-use of informational resources as raw materials for progress of the sciences and useful arts.\textsuperscript{39}

Part II of this Article examines the rights-access debate and argues that the tension between the grant of copyright and the need for public access is attributable to the influence of law and economics and american legal realism in copyright jurisprudence that had downplayed the in rem nature of property rights by emphasizing economic efficiency and political influence in the creation of rights, and undermined the rights of the author as the creator and owner of literary and artistic works. The effect of these school of thought on copyright law is the emergence of a narrow and specific conception of property rights in literary and artistic works that views rights in literary and artistic works as a bundle of positive use rights in informational resources that resonates with in personam rights governing specific legal relationships and activities in society. The rights-access debate is, therefore, couched as a question of use privileges in respect to a particular resource shared between the owner of a copyright and society. Part III of this Article explains that the question of ownership rights in a particular “thing,” which imposes a general impersonal duty of abstention on society, is separate and distinct from the use privileges inadvertently brought to the forefront of copyright jurisprudence by law.

\textsuperscript{37} See Boyle, The Second Enclosure Movement, supra note 2, at 50-52 (explaining the need for creators of information to exert greater control over consumers in the aftermarket and describing its effect on access to information)

\textsuperscript{38} Aoki, supra note 16 at 192 (“copyright laws...grant property rights to creators in order to encourage disclosure and dissemination of new creations for aggregate social benefit”)

\textsuperscript{39} Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 HARV. L. REV. 621 (1998) [hereinafter Heller, The Tragedy of the Anticommons] (arguing that when many private individuals are able to exercise a right of exclusion over the use of a scarce resource, the tragedy of the anticommons, i.e., that rational individuals acting separately may waste a resource by under-consuming it, may occur)
and economics and American legal realism. The distinction between the in rem right in creative works and the in personam use privileges of informational resources is observable as a matter of historical fact from the earliest conception of copyright as a right to print, economic theory from the perspective of controlling and reducing information-costs when protecting literary and artistic works, and legal principle from the distinctions we draw between protectable expressions and non-protectable ideas, and between illegal copying and fair uses of creative works. Part IV of this Article explores how an explicit acknowledgement of this distinction between in rem rights and in personam privileges changes the rights-access debate in copyright law by protecting and conserving the author’s creative personality to encourage creative productivity, and facilitating production and dissemination of information for use in scientific and artistic progress. Part V presents a normative proposal: that the author’s rights to his literary and artistic creation must be protected as a right to exclude society from using a “thing” if society’s use of a work adversely affects the author’s creative personality. If copyright law is serious about encouraging progress of society through the copyright system, the law must acknowledge the role of the author is creating works that promote progress and advancement of society. Part VI concludes by revisiting the lighthouse analogy to information to highlight that information contained in literary and artistic works, like light from a lighthouse, may be costly to produce. High production costs require “property rights” in these situations to protect an economic privilege to recover payment for the provision of a public good. These privileges are not property rights of the in rem kind, which serves to conserve and protect scarce resources from depletion.

II. DEFINING THE RIGHTS-ACCESS DEBATE

Defining the central problem in copyright law is a useful starting point to begin thinking about information as a resource for progress and development that is subjected to various use privileges rather than exclusive possessory rights. By granting exclusive rights in literary and artistic works to copyright owners, the law has inadvertently lessened society’s ability to use information freely.40 British poet, historian, and politician, Sir Thomas Babington Macaulay, resisted the expansion of the copyright term in England in 1841 and referred to copyright as a “tax on readers for the purpose of giving a bounty to writers, but acknowledged the necessity of “giving a bounty to genius and learning” and “willingly submit[ed] to this severe and burdensome tax.”41 300 years after the first copyright act was passed, rights continue to expand despite increasing pushback from society against the encroachment of rights into the sphere containing free information for general use - the public domain.42 This continuous expansion of rights suggests that there is an inherent economic value in literary and artistic works, which copyright owners try to capture from society by asserting exclusive possessory rights.

40 William M. Landes, Copyright, Borrowed Images, and Appropriation Art: An Economic Approach, 9 GEO. MASON L. REV. 1, 6-7 (2000) (identifying access cost to be one of the cost of copyright protection - the other is the administrative and enforcement cost of the system)
42 Litman, The Public Domain, supra note 36; see also Boyle, The Second Enclosure Movement, supra note 2
against all members of society.\textsuperscript{43} Information creates wealth because it gives its owner advantage and power over others by providing the necessary intelligence to out-perform competitors in the market, guide strategic decision-making, and direct economic growth.\textsuperscript{44} When exclusive rights are granted over information, they provide the owner with exclusive control over who is permitted to use the information, when the information may be used, and how the information is used.\textsuperscript{45} However, in a knowledge-based economy, economic growth is dependent not only on the production and dissemination of information to society but also in society’s ability to generate new wealth from existing forms of information, and the notion that access to information is essential for a healthy social, cultural and economic development is generally accepted in today’s knowledge-driven economy.\textsuperscript{46} Information, after all, represents new wealth that individuals acquire through resourceful thinking and creativity. The growth of private equity financing in the form of venture capital to fund early stage, high-potential start-up companies with the intention of generating a return on investment through an initial public offering, or by way of eventual acquisition by a larger company, for example, is evidence of the investment value of technological know-how and knowledge as a source of wealth.\textsuperscript{47} However, as information becomes increasingly valuable as a resource in the knowledge economy, producers of information seek greater rights to control society’s use of information.

But, control of information as “property” creates concentrated power for the “owner” of information as the rest of society is prevented from the use of information as a necessary resource for development and progress.\textsuperscript{48} The arguments used to justify these

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  \item See Mark A. Lemley, \textit{Property, Intellectual Property and Free Riding}, 83 TEX. L. REV. 1031 (2005) (arguing that copyright does not allow a creator of literary and artistic work to capture the full social value of their work nor is free-riding on the social benefits of literary and artistic works inherently wrong) [hereinafter, Lemley, \textit{Property, Intellectual Property and Free Riding}]
  \item Anthony T. Kronmant, \textit{Contract Law and Distributive Justice}, 89 YALE L. J. 472, 496 (1980) (stating that a person’s wealth include information and that “[i]f we prohibit someone from exploiting potentially valuable information or skills (for example, the skill of deception) we thereby decrease his wealth just as surely as if we were to take some money from his bank account and burn it or transfer it into a common fund”)
  \item Mark A. Lemley, \textit{Ex Ante versus Ex Post Justifications for Intellectual Property}, 71 U. CHI. L. REV. 129, 144 (2004) (“...if we gave only one person control over a particular type of information, that person would restrict the flow of information, raise its price, and make more money than providers do in a competitive market”)
  \item Madhavi Sunder, \textit{IP³}, 59 STAN. L. REV. 257, 314 (2006) (“Development must entail not only economic growth, but also a life that is culturally fulfilling...The United Nations' conception of a “Knowledge Society” articulates this understanding of development. As a U.N. report puts it, “at its best, the Knowledge Society involves all members of a community in knowledge creation and utilization.” Hence, “the Knowledge Society is not only about technological innovations, but also about human beings, their personal growth, and their individual creativity, experience and participation.”)
  \item Olufunmilayo B. Arewa, \textit{Securities Regulation of Private Offerings in the Cyberspace Era: Legal Translation, Advertising and Business Context}, 37 U. TOL. L. REV. 331, 338 (2006) (stating that venture capital financing support start-up companies by providing seed and start-up funds that grow the company and assist in the development of their technology)
  \item Yochai Benkler, \textit{Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain}, 74 N. Y. U. L. REV. 354, 380-381 (1999) (arguing that the power to control informational resources through “state enforce[d] property rules that give [ ] a veto power, backed by credible threat of state force over their use,” will undermine political discourse)
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rights in information, whether efficiency\textsuperscript{49}, reward\textsuperscript{50} or incentive based\textsuperscript{51}, emphasize the rights of the owner to exert control over social uses of information.\textsuperscript{52} The emphasis on rights owner control however, presents a conflict of competing legal values as the ability to control social uses of information contradicts society’s ideals of freedom and liberty to use a free resource for development and creative production.\textsuperscript{53} Protecting entitlements in information as “property” allows possessory rights to expand as new markets develop with technological innovation because the physical limitations of a scarce and finite resource, such as land, do not exist for an infinite and boundless resource as information. Property rights over Blackacre cannot expand because they are necessarily limited by the physicality of the land, but rights over information may be expanded as and when the owner of a copyright convinces lawmakers that there is a need to capture positive externalities from the market because there are no physical limitations to the extent rights may exist.\textsuperscript{54} As copyright owners claim a possessory right to control use of information by excluding society that should only be applied to scarce and limited resources, and assert a general right of exclusion in a way that prevents the emergence of new markets as new technologies create new ways to access and use information\textsuperscript{55}, the rights-access debate has become a critical legal problem in the copyright system now. A more nuanced view of property rights that separates the governance of free resources for the purposes of encouraging production from an exclusionary right to preserve or conserve a limited and

\textsuperscript{49} See Landes & Posner, An Economic Analysis of Copyright Law, supra note 26 at 325 (questioning the extent to which copyright may be explained as a means for “promoting efficient allocation of resources”); William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659, 1699-1717 (1988) (using economic efficiency as a method of economic analysis to analyze the fair use doctrine); Peter S. Menell, An Analysis of the Scope of Copyright Protection for Application Programs, 41 STAN. L. REV. 1045, 1058 (1989) (analyzing legal protection for computer application programs as an efficient allocation of resources where market fail)

\textsuperscript{50} Mazer v. Stein, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant...copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare...Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered”); see also Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 TEX. L. REV. 989, 993 (1997) (“Intellectual Property is fundamentally about incentives to invent and create”)

\textsuperscript{51} Sony Corporation of America, Inc. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) (“The purpose of copyright is to create incentives for creative effort”); see also Stewart E. Sterk, Rhetoric and Reality in Copyright, 94 MICH. L. REV. 1197, 1248 (1996) (“Extensive copyright protection, then, is quite consistent with the popular notion that the market system rewards the deserving”)

\textsuperscript{52} Neil Weinstock Netanel, Market Hierarchy and Copyright in Our System of Free Expression, 53 VAND. L. REV. 1879, 1297 (2000) (describing how corporate entities strategically manage content portfolios to stifle uses of their content and skew public discourse)

\textsuperscript{53} See Sunder, IP\textsuperscript{3}, supra note 46 at 315

\textsuperscript{54} Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property, 112 YALE L. J. 2331, 2343 (2003) (describing how copyright extension is a prime example of rent seeking by copyright holders extracting legislation from the political system)

\textsuperscript{55} Neil Weinstock Netanel, New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age, 76 GEO. WASH. L. REV. 952, 976 (2008) (describing how commercial media incumbents enforce rights against new technology media resulting in a number of new media, such as MP3.com, peer-to-peer file trading systems and user-generated video sites, being enjoined from infringing copyright and driven out of business when the incumbent refuses to license their rights)
finite resource must form the core of the debate. This Article extrapolates these nuances in property law from copyright jurisprudence to demonstrate that the statutory rights in the copyright system are in personam rights, or privileges, to use literary and artistic works, which are separate and distinct entitlements from an in rem right, grounded in the work itself, to exclude society from using property. The dominance of two schools of thought – law and economics and American legal realism – in copyright jurisprudence have, this Article argues, minimized the in rem nature of property rights in literary and artistic works by emphasizing economic efficiency and political influence in the creation and protection of rights, undermining the author as the creator and first owner of property in literary and artistic works, and overlooking the notion of authorship as a central component of progress of the sciences and useful arts in the copyright system.

The legal distinction between possessory rights of exclusion - used to conserve scarce resources - and economic privileges to use and control resource - used to govern various use rights and encourage the production and dissemination of a non-rival and non-exclusive resource - has yet to be drawn in copyright jurisprudence. The failure to recognize this distinction has immense implications for the copyright system because the statutorily granted rights are specifically designed and carefully laid out to ensure that the copyright owner recovers payment for uses of the work, The rights provided for under the Copyright Act should not entail a possessory right that allow copyright owners to deny society with access to information contained in literary and artistic works. This Article argues that society’s access to information cannot be generally excluded by copyright owners with an in rem right, as a legal matter, because the rights provided for by the copyright system are in personam in nature, which protect a claim for payment a person who uses the work. The entitlements created by the Copyright Act provide copyright owners with economic privileges to use and control informational resources in a specific way to encourage creativity and public dissemination of works consistent with economic thinking that the market is the best form of reward for creativity. Specifically granted rights to use information do not invoke a general property right to exclude society from accessing and using informational resources for progress because they are granted to deal with a specific problem - encouraging investment in producing creative resources that, once made available to the public, cannot be controlled except through legal means. The right to make reproductions of copyrighted works, for example, is a specific privilege that the law grants the copyright owner to provide economic incentives for the production and dissemination of informational works through contractual negotiations on the market.

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58 17 U.S.C.A.§106(a)
which the copyright owner to sell informational resources to those who value them through the market. This allows for more specific arrangements and efficient use of informational resources to be made. Statutory privileges complement a more general possessory right to exclude, which imposes a negative duty on society to restrain from using the work. The right to exclude applies in a uniform manner to everyone in society by clear boundaries, delineated to mark ownership of the work and to communicate behavioral expectations with respect to the work in a socially functional way. This Article suggests that this right belongs only to the author or creator of the work as a form of property right.

The problem at the core of the rights-access debate in copyright law can therefore be couched as an oversight in the legal distinction between a possessory property right of exclusion, which protects scarce resources to conserve them, and economic privileges, which govern uses of information to encourage their production. A jurisprudential slip, which treats both rights in information and privileges to use information as the same thing, will cause practical difficulties in determining how informational resources may be used by society for the purposes of progress, development, and creative production. Appropriate social access to information for the purposes of progress of science and the useful arts depend on recognizing that property rights in information of the in rem kind should exist only to exclude society when public uses of creative works affect an author’s creative personality adversely, for which a general right to exclude may legitimately be used. Uses of informational resources for progress would be, arguably, uses that are generally allowed by in personam privileges as long as payment is made to the provider of the information for producing and disseminating the work, or if permission to use without making the necessary payment is obtained from the copyright owner. As copyright markets tend towards failure, which in turn generates legislative responses to correct that failure in the form of “rights”, and as new technologies increase society’s access to literary and artistic works to enable greater participation in civil dialogue,

60 Id. at 795 (“Exclusion rules represent a simple and universal “organizing idea” that allows a multitude of individuals with a small amount of information to interact in mutually beneficial ways that would be impossible in a world that has only governance rules.”).
61 This involves a discussion on the moral rights of authors, which have limited explicit recognition under copyright laws in the United States, save for §106A, which protects the moral rights of attribution and integrity for works of visual arts. (17 U.S.C.A. §106A (2010))
62 Wendy Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1607-1608 (1982) (markets fail for these reasons - costs and benefits are not internal to the transaction that generated them, there is imperfect knowledge, and the presence of transaction costs.) The production of literary and artistic works will always produce benefits external to the production process, it is many times difficult to have perfect knowledge about a copyrighted work - orphan works, for example, lack pertinent information about the creation of the work, and transaction costs will always exists in negotiating use rights. Because of these characteristics, there is a tendency for the copyright market to fail.
63 Id. at 1612 (stating that state-created property rights correct market failure by providing a means to exclude non-purchasers and allow the market to function.)
political discourse, and creative production, the need for a more precise articulation of entitlements to resolve the question of rights and access to information becomes urgent.

I. MARKET ECONOMICS

The expansion of rights over literary and artistic works is propagated, to a large extent, by the economics of the copyright market. As markets for copyrighted materials usually fail because creative works are considered public goods that are non-excludable and non-rival in consumption, an accurate correlation between production costs and market price cannot be achieved because of the indeterminacy of consumer demand caused by externalities. Once creative works are publicly disseminated, non-paying members of the public cannot be excluded from use of the work and the work, even if used by a wide segment of the public, will not deplete through overuse. Rights, as neoclassical economists argue, provide the mechanism by which the social value for literary and artistic works may be appropriated through a market-set price, which would off-set the fixed and marginal costs incurred in production and dissemination. United States copyright jurisprudence has generally accepted neoclassical economics as the predominant theoretical approach to allocating entitlements in literary and artistic works by granting property rights to the author, as the creator or producer of literary and artistic works, first. Thereafter, the law allows, and facilitates, negotiations and bargaining for use of the work to then take place through the free market and at a price and under terms set by, and agreed upon, by the author and subsequent owners of the work.

However, as the production of public goods will always produce externalities, and as the idea of unrecovered spillover benefits from the production and dissemination of creative works is considered objectionable to many owners of copyright, copyright

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64 Scholars have explored the idea that literary and artistic works are not pure public good because they do not exhibit a systematic bias towards underproduction and are not bounded away from providing efficient level of utilization. See Christopher Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. PA. L. REV. 635 (2007). This Article assumes that literary and artistic works are public goods that are non-rival and non-exclusive in consumption and do not make the more specific distinctions between pure and impure public goods.

65 Neil Weinstock Netanel, Impose a Non Commercial Use Levy to Allow Free Peer-to-Peer File Sharing, 17 HARV. J. L. & TECH. 1, 24 (2003) (stating that copyright laws aim to solve a systematic market failure, which is the under supply of creative expressions that have the characteristics of a public good.)


67 Neil Weinstock Netanel, Copyright and a Civil Democratic Society, 106 YALE L. J. 283, 311-312 (1996) (stating that “[n]eoclassicism has ascended to prominence during the last three decades--a period of marked intellectual property expansion--with the Chicago school’s application of economic analysis to legal institutions. Neoclassical economics views a system of universally applied and clearly defined property rights as a cornerstone of market efficiency. As we shall see, it is the neoclassical sense of allocative efficiency, with its reification of claims to market potential, its emphasis on universal, concentrated, exclusive, and exchangeable property rights, and its subordination of law to market ideals that helps to spur copyright's untoward expansion.”)

68 17 U.S.C.A. §201(a) (2001)

69 17 U.S.C.A. §201(d) (2001)

70 Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 COLUM. L. REV. 257, 267 (2007) (stating that “the obvious implication of the property rights theory is that spillovers are bad, since they drive a wedge
owners seek the expansion of rights to capture portions of the market where there are unrecovered benefits to prevent non-paying members of society from “free-riding” on the investment the author or copyright owner made. And the Courts have consistently held that the temporary cost of the monopoly right, regardless of how long the right lasts, justifies the social end the law seeks to achieve, which is the promotion of progress in the sciences and useful arts. But, the creation and dissemination of a work will only benefit society and advance progress when the costs of negotiating for use of a work by members of society will not be prohibitively high, and does not preclude the inventor or creator of a work from engaging in negotiations that will bring about the most socially optimal behavior with respect to the intellectual work. Harold Demsetz’s piece, Towards a Theory of Property Rights, theorizes that the development of property rights in communal resources will allow the owner of the resource to economize on social use of that resource by exercising the right to exclude others from using the resource. While the economist’s primary rationale for protecting intellectual property as an integral part of the property right system may find basis in Demsetz’s piece, the link drawn between Demsetz’s piece on property rights and intellectual property may be tenuous. Demsetz reasons that unless a resource owner has the right to exclude others from using the particular resource, he is unlikely able to evaluate the effect of the use of his resource, in terms of the social costs and benefits (or externalities) a particular use imposes or brings, upon the rights of other members of the community to undertake the development of the

between private and social value and prevent the perfectly informed inventor from making optimal decisions. From the supply side, spillovers are uncaptured benefits that could be captured to increase incentives to invest, and from the demand side, spillovers reflect unobserved, lost signals of consumer demand that fail to guide investment and management decisions.

71 Lemley, Property, Intellectual Property and Free Riding, supra note 43 at 1043-1045 (describing how the general objection to free-riding has caused intellectual property laws to expand to cover all social uses of intellectual property)

72 The Supreme Court has held that it is not up to the Courts, but rather Congress, to determine the duration of copyright protection. Eldred v. Ashcroft, 537 U.S. 186, 213 (2003) (stating that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives...”)[h[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces. . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve.”) (citing Stewart v. Abend, 495 U.S. 207, 230 (1990))

73 Mazer v. Stein, supra note 50 at 219 (“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.’”)

74 Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967)

75 Lemley, Property, Intellectual Property and Free Riding, supra note 43 at 1037-1038 (explaining the use of private ownership as an economic solution to the tragedy of the commons and citing Demsetz’s work as establishing property rights as being valuable to society because they limit the presence of uncompensated externalities.)

76 The link is tenuous because intellectual property does not present the same problem of conserving scarce resources that Demsetz’s work was concerned with. Intellectual property laws create the scarcity to give market value to an innovation or creative work. See Lemley, supra at 1055 (stating that “[i]f property law is the creation of barriers to entry, as Demsetz suggests, the question is whether those barriers are properly scaled to the problem. But solving the “problem” of intellectual property does not require complete internalization of externalities.”)
The grant of a general right to exclude by way of property law is, using this economic reasoning, an ideal way of encouraging the production and dissemination of literary and artistic works to the public by providing exclusive personal and economic gains to authors and inventors, who undertake creative and innovative activities to advance public welfare, in the form of an ability to control general social uses of the work.

The economic view of property rights just described eliminates a necessary connection between the owner of a right to exclude and a “thing” owned, and focuses primarily on property rights as a collective bundle of use and enjoyment rights in a particular resource that would allow the resource to be put to its most efficient use. Property rights in this sense define the owner’s rights in a resource vis-à-vis his or her relationship with other members of society rather than the resource owned. The right to sell or give something away is a right one that will create a relationship of seller-buyer and a contract, or donor-donee and a bequest. These relationships of seller-buyer and donor-donee determine behavioral and legal norms among members of a society without necessarily making a normative connection between the owners of a property right with a particular thing that is owned. Professor Tom Grey’s commentary in The Disintegration of Property, in Liberty, Property and the Law, illustrates the disconnection between ownership of a property right and ownership in a thing that is prevalent in the line of property rights and economic thought stemming from Professor Demsetz’s article:

“discourse[s] about property has fragmented into a set of discontinuous usages. The more fruitful and useful of these usages are those stipulated by theorists: but these depart drastically from each other and from common speech. Conversely, meanings of “property” in law that cling to their origin in the thing-ownership conception are integrated least successful into the general doctrinal framework of law, legal theory, and economics. It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economics could easily do without the using the term “property” at all…[t]he development of a largely capitalist market economy toward industrialism objectively demand formulation of its emergent system of economic entitlements in something like the bundle-of-rights form, which in turn must lead to the decline of property as a central category of legal and political thought.”

The emergence of property rights as a bundle of economic entitlements and the disconnection between ownership rights and property rights in a thing owned, has, this Article argues, facilitated the expansion of rights in literary and artistic works because the

77 Demsetz, supra note 74 at 356 (stating “private ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners create incentives to utilize resources more efficiently.”)

78 See Mazer v. Stein, supra note 50 at 219

79 Tom Grey, The Disintegration of Property, in Liberty, Property and the Law (Richard Eipstein ed.)
economist’s conception of “property rights” need no longer be tied to a thing with delineated bright-line boundaries, and may expand to cover new uses of creative resources as developing technologies open new markets to allow for greater social use of creative works. Unlike the conventional notion of property rights in a thing owned, which is generally limited to the physicality of the thing, the economic conception of property rights as a bundle of rights is flexible and expandable to allow for the capture of all forms of externalities arising from technological development. It is this economic conception of property as a loose bundle-of-rights, which provide copyright owners with the philosophical basis to lobby for expanded rights in literary and artistic works as new markets emerge to provide users of creative works with new ways of using and sharing literary and artistic content. As rights in the law and economics tradition are not tied to the physicality of the thing owned, there are no conceptual or philosophical restraints to prevent rights from expanding with emerging markets in literary and artistic works as a result of technological development. The benefit of expanding rights, for the copyright owner, is a greater control over markets for literary and artistic content without undertaking the responsibilities of developing works for the purposes of progress of science and arts.

Allowing rights to expand over society’s use of creative works as new markets emerge provide an added advantage to the copyright owner. By allowing copyright to expand, the law has decided to put the initial entitlement in literary and artistic works in the hands of the copyright owner and allowed the market to facilitate the attainment of an efficient outcomes in the transfer of user rights in literary and artistic works to the respective users interested in using the work. But, this assumes that the party who values the right to use the work most is willing to pay the price for the particular right to use the work in a market where the absence of transaction costs make the transfer of rights possible. The faith that the copyright system places on the market to effectively transfer rights is questionable because the market for literary and artistic works, as demonstrated, is susceptible to failure. Private rights provide an economic benefit to the copyright owner by establishing entitlements to use the work in the manner defined under the Copyright Act. But, these rights, as Ronald Coase theorized, may only secure optimal outcomes in a perfect market as prohibitively high transaction costs will prevent rational actors from naturally negotiating transfer of entitlements to the party who values it most after the initial allocation of the entitlement has been made. If the most efficient outcome may be achieved through the market, regardless of how the rights are initially allocated, then it does not matter how much rights expand with the development of new markets from new technologies because all parties with an interest in the right to use the work will naturally negotiate the purchase of that right. The initial allocation of the right to use the work in a particular way to the copyright owner as technology develops and new markets emerge does not matter to the economist because the market will facilitate the transfer of the rights to use the work to paying members of society.

However, society’s adverse reaction and push-back to the expansion of rights in literary and artistic works today seems to suggest that Coasean bargains may be failing in leading society to the most socially optimal outcomes. This may be attributable to the

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80 Coase, The Problem of Social Cost, supra note 3
increasing liberties, which the Internet and digital technologies afford users of literary and artistic works. Users of literary and artistic works, with digital technology and new media reproduction programs, seem to no longer be mere passive consumers but active creators and reproducers of works they use. As the autonomy of individual members of society grows with respect various uses of creative works beyond the control of the copyright owner, Coasean bargains become less likely. The socially optimal outcome desired through the grant of legal rights in literary and artistic works to the copyright owner may be elusive as the legal structure of entitlements in literary and artistic works create prohibitively high transaction costs that cause negotiations to breakdown. Where markets fail to facilitate the transfer of entitlement from the copyright owner to the user of the work, the Court may be required to artificially create an efficient market by forcing a transfer of entitlements. In this situation, the economic entitlement of the copyright owner will be protected by a liability, rather than a property, rule, where the courts will attach an objective value to the work and require the infringer of copyright to pay the copyright owner damages for unauthorized uses of the work. But for as long as the law allocates first entitlements in literary and artistic works to the copyright owner, rights will continue to expand as technology develops to protect the rights of the copyright owner against infringing uses.

II. Peer Production and Social Networks

Scholars often attribute the emergence of early copyright laws to the printing press. Ironically, the technology that allowed books to be printed cheaply and disseminated to a wide segment of society, thereby necessitating laws governing public use of information, is the very same technology that allowed education and learning to flourish through greater public access to information. Technological development

81 Yochai Benkler, Viacom-CBS Merger: From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access, 52 FED. COMM. L. J. 561, 579 (2000) (arguing that the legislature should make policy choices, which conceives users of creative works as also producers of content participating as “peers” in a “robust, open social conversation”)
82 Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L. J. 1335, 1336 (1986) (discussing Calebresi and Melamed’s property rule and liability rule distinction and stating that “[w]hen a court cannot avail itself of the Coasean market, it is left to imagine what the parties would have agreed to in a hypothetical-Coasean market. In this market, the right to use a resource would have been secured ultimately by that party who would have paid the most for it. The court then mimics the outcome of the idealized, but unrealized Coasean market by “auctioning” entitlements to those who value them most -- as judged by each litigant’s willingness to pay.”)
84 See MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 3 (Harvard University Press 1993) (“copyright - the practice of securing marketable rights in texts that are treated as commodities - is a specifically modern institution, the creature of the printing press, the individualization of authorship in the late Middle Ages and early Renaissance, and the development of the advanced marketplace society in the seventeenth and eighteenth centuries.”) (emphasis added) [hereinafter MARK ROSE, AUTHORS AND OWNERS]
85 The intellectual community in Venice, for example, grew because of the printing industry. See JANE A, BERNSTEIN, PRINT CULTURE AND MUSIC IN SIXTEENTH-CENTURY VENICE 15 (Oxford University Press 2001) (“Printers and booksellers forged important alliances with members of the intellectual world of
always provides a reason to reassess the effectiveness of incentives encouraging the production of literary and artistic works because the one new technologies offer greater public accessibility of creative works and heightens the free-rider problem of public goods, creating an urgent need for information producers to internalize the additional social benefits created through increased accessibility. As producers of information seek to prevent the proliferation of new technologies by claiming that producers of new technologies are contributorily liable for copyright infringement because these technologies facilitate infringement of copyrighted works, the legal system confronts a difficult question of law that remains unresolved: whether the rights provided to copyright owners under the Copyright Act may be used to prevent the public distribution of new technologies and protect markets when the economic justification for the grant of the right in the first place was to ensure the production of literary and artistic works for public benefit. It is difficult to conceive the statutory rights in the copyright system as intending to be as broad as to allow for right owners to exert rights and prevent the development of burgeoning technologies. To allow these exclusive rights, granted to fulfill a larger public goal of progress, to stifle development in any form would appear irrational. But, the exercise of statutory rights have had the exact effect of dismantling developing technologies. The Grokster website today displays a message, which states: “[t]he United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners.” The site goes on to say, “[t]here are legal services for downloading music and movies. This service is not one of them,” a result of the Supreme Court’s decision in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., where the Court decided that Grokster, Ltd. and StreamCast Networks, Inc., distributors of free file sharing programs on peer-to-peer networks that allowed personal computers to communicate directly with each other without a centralized server, were liable for contributory infringement for the infringing activities of the users of their software. Both companies, the Court held, went beyond mere distribution of the program to taking affirmative steps to encourage and foster copyright infringement by teaching their users how to play copyrighted content and actively urged their users to download copyrighted works.

The Grokster decision has important implications because the Court’s handling of the balance between the exclusive rights of copyright owners against the equally legitimate public right to technological development demonstrates the difficulty in drawing a balance between protecting rights of the copyright owner and the public’s

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Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (describing large scale collaborative projects for information production that do not depend on markets or managerial hierarchy as a result of the availability of free software)

Contributory infringement lies outside statutory copyright and is established by showing (1) the “contributory” infringer was in a position to control the use of copyrighted works by others and (2) had authorized the use without permission from the copyright owner. *Sony Corporation of America, Inc. v. Universal City Studios, Inc.*, *supra* note 51 at 437


interest. The rights of copyright owners were obviously affected by the mass downloads and distribution of copyrighted content: a statistician employed by MGM showed that ninety percent of downloaded materials were copyrighted materials.\textsuperscript{90} But, on the other hand, deciding in the copyright owner’s favor risked the setting of a precedent that will allow copyright owners to assert distribution rights in literary and artistic works and prevent the proliferation of technologies through the doctrine of contributory infringement. The decision of the Supreme Court, founded on contributory infringement and a new theory of inducing infringement, is correct given the intent and purpose behind the distribution of the file-sharing program. The Court was right to focus on the culpability of both companies, rather than the effect of the program on the market for copyrighted content, for the companies’ apparent acts undertaken to encourage infringement resulted in direct damage to the copyright owners. As Justice Breyer pointed out, it is unlikely that the production of creative works will cease simply because peer-to-peer illegal file sharing exists.\textsuperscript{91} But, the active encouragement of technology developers to use their technology to infringe copyrighted content clearly is an inducement to infringement, which is a culpable act of contributory infringement. Both companies distributed their software with the intent of encouraging their recipients to download copyrighted content, took active steps to encourage infringement and sought to appropriate displaced Napster users following Napster’s shut down\textsuperscript{92}, which showed an illegal intent behind the public distribution of the software.

Justice Souter identified the precise query before the Court to be the tension between two separate values in copyright - that of encouraging creative pursuits by protecting creative works from being infringed and promoting innovation in new forms of communication technologies by limiting the circumstances in which copyright may be infringed.\textsuperscript{93} Opening developers of technology to the potential of copyright infringement actions would undoubtedly create a chilling effect on technological growth. But, developing technologies, which sole purpose and intent was not to facilitate illegal downloads of copyrighted content, will find protection from liability within the safe harbors of the staple article of commerce exception enunciated in \textit{Sony v. Universal Pictures Studios}.\textsuperscript{94} The decision of Grokster is right on its specific fact pattern but there is an unstated assumption in the Court’s decision that user downloads and sharing of copyrighted material are illegal acts. This assumption may lead to the erroneous conclusion that legitimate uses of information and knowledge contained in creative works do not include the downloading and sharing of information. The encouragement of creativity and promotion of innovation are legitimate goals of the copyright system but creative and innovative activities depend to a certain degree on access to literary and artistic works because social, economic and cultural development is dependent on users of creative works having access to the materials embodied in literature, music, movies and other forms of creative content. The exchange and sharing of information among

\textsuperscript{90} \textit{Id.} at 922  
\textsuperscript{91} \textit{Id.} at 962 (Citing M. Madden, Pew Internet and American Life Project, Artists, Musicians and the Internet, and Yochai Benkler, \textit{Sharing Nicely: On Sharable Goods and the Emergence of Sharing as a Modality of Economic Production, 114 YALE L. J. 273 (2004)})  
\textsuperscript{92} \textit{Id.} at 923-925  
\textsuperscript{93} \textit{Id.} at 928  
\textsuperscript{94} 464 U.S. 417 (1984)
individuals need not necessarily be an infringement of copyright, and may instead be a valid, legitimate claim to reasonable access to information. It is important for the law to recognize reasonable access to information that reinforces the legitimate needs of society to have access to information for the progress of science and the useful arts. The Supreme Court’s reemphasis on the importance of balancing private rights and public interests in literary and artistic works through the copyright system cannot be understated in this age as social networks increase the potential for public participation in civil discourse, political dialogue and collaborative research.

Contemporary criticisms leveled against the grant of property rights over intellectual works have been based on the unreasonable restrictions on public access to intellectual works. The extension of the copyright term for an additional twenty years, for example, keeps copyrighted works from falling into the public domain for another twenty years, and prevents society from freely using works that they are rightfully entitled to. The recognition of patent rights over business methodologies, as another example, denies society the freedom to use works that are essentially, socially useful information and knowledge over legitimate ways to conduct or operate a business, which ought to be free. Critics of intellectual property rights argue that expanded copyright protection and patent rights will cripple society’s ability to critically exchange ideas over an independent network, such as the Internet, which design promotes free and unrestrained exchange of information and knowledge over an open and commonly held cyberspace. A healthy public domain comprising information, knowledge and intellectual works that is commonly held by society and easily available for use in innovation and creativity is essential for social, cultural and technological development.

These critical commentary against expanding intellectual property rights tells of a deeper legal conundrum in addressing the question of rights and access to information. Legal systems that are essentially utilitarian in nature willingly bear various social costs to maximize overall utility. In the copyright system, the social cost borne to achieve the greatest utility, which is progress of the sciences and the useful arts, are exclusive rights in literary and artistic works. The central difficulty in the right-access debate is the impossibility of calibrating the exact amount of private rights necessary to encourage

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95 The Copyright Term Extension Act expanded the duration of copyright protection from 50 years to 70 years after the life of the author. The Supreme Court in Eldred v. Ashcroft, 537 U.S. 186 (2003), decided by a majority of 7-2 that the Act was not unconstitutional.

96 Business method patents were first recognized in State Street Bank & Trust v. Signature Finance Group, Inc. and affirmed in AT&T Corp. v. Excel Communications, Inc. The Supreme Court decision on whether a process must be tied to a machine or transform an article into something else is pending in the case of Bilski v. Kappos.


98 See Jessica Litman, The Public Domain, 39 EMORY L. J. 965 (1990) (emphasizing the need to ensure that a robust public domain, containing the resources for creativity, exists) and James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 SPG-LAW & CONTEMP. PROBS. 33 (2003) (arguing for an active construction of the public domain to avoid the “propertization” of informational resources)

99 Christopher H. Shroeder, Rights Against Risks, 86 COLUM. L. REV. 495, 508 (1986) (“Various versions of utilitarianism evaluate actions by the consequences of those actions to maximize happiness, the net of pleasure over pain, or the satisfaction of desires.”)
private individuals to dedicate their innovative and creative energies towards creating intellectual assets for the ultimate benefit for society. To recognize private rights as a goal towards achieving general social utility, where creative works are made fully available to members of society willing to pay the price for access (which is generally greater than the marginal cost of producing the intellectual asset), would mean that a balance between private rights and social utility must be reached. The dilemma that ensues from the law’s attempt to ensure that enough intellectual works are created for the public, while at the same time secure sufficient public access to these works to encourage newer forms of innovation and authorship, is a result of the tension between a right to exclude unauthorized use of property and reasonable access to creative works as building blocks for future innovation and creativity.

Arguably, the reason the law struggles with the question of rights and access is because we, as legal scholars, have been looking for the answers to the problem in the wrong places. We have tried to calibrate the optimum level of rights to provide the incentive to create and leave everything else free for the public to use by relying on economics to provide answers to a legal problem. We have also framed the rights-access question as a matter of political clout, where the most politically influential party to the copyright bargain gets what they want to which social activism is the best response. The utilitarian sees statutory rights as a temporary price, which society pays in order to achieve the long term benefits of having literary and artistic works available in the public domain. Sir Thomas Babington Macaulay’s Parliamentary Speech in 1841 exemplifies the utilitarian view that these exclusive rights in creative works are a necessary evil that must be endured for the long term benefits of having creative works for public use. He says:

“The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures. I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax. Nay, I am ready to increase the tax, if it can be shown that by so doing I should proportionally increase the bounty…”

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100 William Patry, The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision, 67 GEO. WASH. L. REV. 359, 387 (1999) (“calibrating the exact level of incentive protection required to bring collections of information to the market is an impossible task, one which, even theoretically, has proved vexing.”)

101 JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001) (arguing that copyright laws are a product of industrial interests represented at the negotiating table when laws are being drafted)

102 Niva Elkin-Koren, What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons, 74 FORDHAM L. REV. 375, 387-388 (2005) (“Creative Commons is a form of political activism and is best understood as a social movement seeking to bring about social change. It responds to proposals calling for political activism against the enclosure of intellectual property. Like its predecessors, the open source movement and free software, it seeks to change the social consequences of copyright law by instantiating an alternative.”) [hereinafter Elkin-Koren, What Contracts Cannot Do]

103 Thomas Babington Macaulay, supra note 41 at 311
But, as technological development creates new markets and copyright owners seek to expand rights, the balance between rights and access seems impossible. Critical legal scholarship’s response to the problem seeks to garner public support to push back against expanding rights as a form of social activism against political influence in copyright laws by large media conglomerates and publishing houses.104 This social push back against the expansion of rights is possible because of the technology, which has developed to facilitate peer production of content and collaborative modes of creation through social networking sites.105 The reason access to information has become a central issue in copyright policy debates is because existing technological platforms have been built upon the infrastructure of the Internet to facilitate online discussion and actively gather a citizenry for the information society, which uphold libertarian notions of freedom, autonomy, individual liberty, and human rights. This form of social activism, this Article argues, is a result of influences from the critical or realists school of thought, which believes in the indeterminacy of the law and advocates for solutions to legal problems through real-world social responses or activism.106 The real world social response to the expansion of rights in literary and artistic works is to create an awareness of the inequities of lessening access to information and of the impact of greater rights upon individual autonomy. But, real world social responses to the problem do not provide a solution to the legal question of how the law may achieve a balance between protecting rights and granting access over informational resources.

III. THE UNEASY PATH OF RIGHTS EXPANSION

Professor Ralph S. Brown, in a 1985 Article, laid down three underlying principles in the copyright system, which Congress, other policy makers, or judges may adopt when making decisions on whether existing rights under the copyright system, ought to be expanded to cover new forms of creative works.107 The first is a “morally principled approach [which] exalts authors … [as] the bearers and creators of our culture,

104 Elkin-Koren, What Contracts Cannot Do, supra note 102 at 375-376 (“The legislative process is captured by the content industries…As public choice theorists have shown, small homogenous groups that have a lot to gain, such as the content industries, have persistently pressured for even stronger proprietary rights. Courts seem to be shorthanded, failing to set constitutional limits to extensive intellectual property rights. Finally, international pressure on national governments makes it difficult to rely on the global arena for remedying the deficiencies of intellectual property laws at the domestic level. Given this background, private ordering--self-regulation voluntarily undertaken by private parties--turns out to be an attractive option. It promises to allow individuals and communities to figure out, on their own, a way to bypass the increasingly protectionist global intellectual property regime.”)

105 Id. at 396 (“Technology…is utilized to enable new social practices related to creative works. These new practices would ultimately change how we understand the creative process and reconstruct social relations related to creative works. By using new technologies, Creative Commons’ strategy expands the horizon of potential measures for provoking a change. It reflects the view that legal rules do not dominate behavior, but rather constitute one factor in a complex matrix of human activity.”)

106 Roscoe Pound, The Call for a Realist Jurisprudence, 44 HARV. L. REV. 697, 698-699 (1930) (criticizing the realist’s rejection of former conceptions of legal understanding - actualities, rationalists and positivists - and the realist’s view that “[r]eason is an illusion. Experience is not the unfolding of an idea. No “pure fact of law” is to be found in rules since the existence of rules of law, as anything outside of the books is an illusion.”)

107 Ralph S. Brown, Eligibility for Copyright Protection: A Search for Principled Standards, 70 MINN. L. REV. 579 (1985)
both high and popular.”108 Professor Brown calls this principle the “exaltation of authorship”109, which glorifies the author as the autonomous individual producing works of authorial or artistic genius for society.110 The second principle Professor Brown lays down is the constitutional principle, which emphasizes that the Congressional powers under the intellectual property clause was intended to promote the progress of science and the useful arts, and was not intended, as Professor Brown states, “to maximize the returns to authors and inventors.”111 The rights of the author, therefore, are subservient to the public interest under the second principle, and this requires Congress, in legislating, and judges, in deciding cases, to balance the public interest against the private rewards the law provides authors. The third principle identified by Professor Brown is based on the economics of the market place with respect to the inherently public good nature of creative works.112 As literary and artistic works, by their nature, cannot be depleted nor extinguished by public uses, and are incapable of any form of exclusive control, which will allow authors to prevent non-paying members of the public from copying and distributing the work, the state must intervene and pass copyright laws to ensure that authors and creators are able to legally exclude others from copying or using the work without their permission.113

While these principles provide useful guidance as to when rights in literary and artistic works may be justifiably expanded, they do not provide a workable solution to the question of rights and access over informational resources in literary and artistic works. In the commercial market for literary and artistic works, the “exaltation of authorship” principle has less value in assisting Congress and judges decide the extent of private rights premised solely on rewarding the creative genius of an author or artist. Under the Copyright Act, artistic worth in literary and artistic works is not a basis for the grant of rights. Utilitarian works, which perform purely instructional functions, such as computer programs, are regarded as literary works under §101114, and the Supreme Court has, on separate occasions, held that pictorial illustrations functioning as an advertisement are pictures subject to copyright protection115, that an original selection, coordination and arrangement of facts may merit copyright protection over the way those facts are presented116, and that commercial designs with an aesthetic value and utilitarian function, such as a statue used for a table lamp base, is eligible for copyright protection as a work of art.117 Works of creative authorship may also be commissioned today under the “work-for-hire” doctrine118, making authorship an endeavor that is essentially

108 Id. at 589
109 Id.
110 Under this principle, authors are regarded as the “creator and bearer of our culture, both high and low” and ought to be rewarded for their creations. See id.
111 Id. at 592
112 Public goods generally do not diminish by consumption and are not readily appropriable. Id. at 596
113 Id.
114 Object codes containing instructions to a computer in binary code (e.g. “01101001” instructing a computer to add two numbers and save the results) are literary works under copyright laws. See Apple Computer, Inc. v. Franklin Computer Corp., 714 F. 2d 1240 (1983)
115 Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903)
commercial or market driven, and less an expression of creative talents or artistic genius. As such, the first principle of exalted authorship will offer very little help on how private rights fare against the public interest. Compared to the exalted authorship principle, the second principle, which is based on the utilitarian model for rights, emphasizes progress as the ultimate goal for which rights serve. The third principle, which recognizes rights as serving an incentive function for the provision of public goods, relies on economics to justify the grant and expansion of rights. Both these two principles are grounded in policy-oriented realism and highlight the need to recognize private rights in order to encourage the creation information for society’s benefit. However, both the latter two principles do not offer any normative guidance as to how the law in this area may be developed to ensure that rights serve the purposes of production and dissemination, yet allow for public accessibility to information for the progress of science and the useful arts.

Rights expansion treads such an uneasy path because the exact extent of the statutory entitlement granted to copyright owners remain unresolved and answers to the question of rights and access remains forthcoming. The question of rights and access cannot be resolved by economic analysis nor social or political activism because the question of what the statutory rights entail is essentially a legal one. If they are property rights in the conventional sense to which a right to exclude attaches, then the question of access to information becomes a real concern because the copyright owner is legally entitled to exclude society from using the information as the owner of informational resources. However, if the rights under the copyright statute are a lesser right than a property right of the in rem kind, and the copyright owner does not have a general right to exclude society from using the information, then the question of access is more readily resolvable because the use of informational resources by both the copyright owner and society becomes an issue of resource management. If the rights under the copyright statute are merely economic privileges to use the information in such a way that would promote progress and serve a production function, then the copyright owner has no real right to exclude society from having access to information. As the Copyright Act was passed to encourage production of literary and artistic works by reward, the rights under the copyright act should be recognized as economic privileges, which protects a right to use literary and artistic works for the purposes of encouraging production and dissemination the work to the public and recovering payment for uses of the work from the public. Statutory rights provided under §106 of the copyright statute is, arguably, an economic entitlement that is separate from the larger property right of the author. As statutory rights are economic privileges, they protect a right to receive payment for use of a work and do not entail a possessory right to exclude society from using informational resources.

III. PROPERTY RIGHTS AND ECONOMIC PRIVILEGES

The distinction between a right that attaches to a thing and a right that is a personal right possessed by an individual suggests that rights in literary and artistic works may comprise a right to exclude use of creative expression and specifically enumerated rights to use literary and artistic works in ways Congress deems to be rewards for
creative production. An owner of property has rights over that which he owns in rem, meaning that a property owner has an interest in the property or thing, which is good against the rest of the world. An interest in personam, on the other hand, are personal interests individuals possess that arise by virtue of a relationship with the property owner and, which are personal to a person and do not 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 metaphorically, attached, or tied, to the land. A lien over land as a security for the payment of a debt may providing a creditor with a temporary security interest over a property as an interest in rem, but creates an in personam right as the right arises by way of a personal interest that the creditor has to have the debt repaid by the borrower. The lien holder’s right is therefore a personal right, or a right in personam, which may be traced back to the creditor-debtor relationship existing between the lien holder and the property owner.

This distinction between a right in rem and in personam rights offers insight into the private right – public domain discussion in copyright jurisprudence by distinguishing a right to exclude society from using the work and a right to recover payment from society for using the work. An author, by virtue of the property right in literary and artistic works, has a right in rem that is good against the rest of the world. This right in rem, belonging to authors, implies an ability to control social uses of the work because of the author’s literary property. But, besides a property right in a work arising by virtue of an author’s act of creation, which, arguably, entitles authors to exclude society from using the work to conserve creative integrity or preserve the authenticity of a work so that works be used only for the purposes of progress, the law also recognizes certain rights in authors to restrict the rest of the world from reproducing, distributing, making derivative works, publicly performing and digitally transmitting the work through the Copyright Act. The recognition of these entitlement in literary and artistic works, while attached to literary and artistic works as a right in rem, actually stems from a personal contractual

119 For an elaborate treatment of the legal interaction between rights in rem and in personam, see WESLEY NEWCOMB HOFFFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 68-114 (Yale University Press 1919). Hohfeld identifies 4 types of in rem/in personam classifications. First is the fundamental classification of primary rights into in rem and in personam rights; second, classification of judicial proceedings into in rem and in personam; third, judgments or decrees in rem or in personam; and fourth, enforcements in rem or in personam. Id. at 69. For the purposes of analysis in this Article, the use of the phrases in rem and in personam is specifically applied to the discussion on primary rights belonging to the author and copyright owner.
120 Id. at 72
121 Id.
123 Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, supra note 59 at 850 (“Security interests arise with an in personam agreement between a debtor and a creditor to make a transfer of the full bundle of in rem rights to the creditor upon the happening of a future contingent event, nonpayment of the debt.”)
124 Id.
125 17 U.S.C.A. §106

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relationship, or an interest in personam between the copyright owner and the rest of society as represented by Congress, to recover profits from market commercialization of the work as a reward for creative production. An economic interest that is protected to encourage the reproduction and wide dissemination of the work to the public in order to fulfill the constitutional intent of promoting the progress of science and the useful arts, arguably, should not entail an absolute right to exclude society from using the work - all that the right entails is a right to recover payment for the use of the work. The quid pro quo between copyright owners and society is the temporary rights as rewards for making works fully available for public use through market mechanisms so that society will have literary and artistic works to facilitate learning. Rights in personam, which copyright holders have by virtue of the copyright statute, is generally not present as an entitlement that an owner of real or other forms of personal property has by virtue of their ownership of land or a thing - they are contractual rights that are generally regarded to be in personam in nature. This right in personam is particularly pertinent to literary and artistic works because of the peculiar constitutional recognition of literary and artistic property as a right given to encourage innovation and creativity to further the interests of the general public and that of society, and not as a right in itself pertaining to basic notions of human freedom, liberty, equality and democracy underpinning the 5th and 14th Amendments of the U.S. Constitution. The copyright owner’s right under the Copyright Act is therefore, arguably, a personal right, which may be traced back to a constitutional agreement between the producer of literary and artistic work and the society in which he lives.

These two distinct rights in literary and artistic works ensure that authors engage in creative production of literary and artistic works for society’s benefit and the dissemination of these works to the public. While the right in rem generates authorial creativity and production of original works of authorship, the right in personam encourages the dissemination of these works to the public. The property right of an author in the work is a sovereign right of a property owner over the work, which subject to a few legal and moral limitations, such as when a work is used to undermine the integrity of the work or used in a way that causes harm to society, is an absolute right good against the world that allows an author to deny access to the work based on an absolute right to exclude. A property owner is under no obligation to grant another person access to the property, even for monetary exchange. An economic right, however, does not carry with it the right to exclude in the same way a property right does, but rather takes the form of a contractual relationship between the author and society to make the work available or accessible for market value. An encroachment of the author’s economic right, i.e., the right to commercial profits from the dissemination and sale of a work, does not therefore invoke an absolute right to exclude use of the work based on a property right, or a right in rem, against the use of the work by way of an injunction but rather

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126 Art. 1, §8, cl. 8 U.S. Constitution
127 Arthur L. Corbin, Rights and Duties, 33 YALE L. J. 501, 509 (1924) (“Property” rights are among the rights said to be “in rem”; contract rights among those “in personam.”)
129 See Jacque v. Steenberg Homes, supra note 122
suggests of a form of contractual breach, which remedies, if any, have to be sought in an action in personam against the person who has conducted an act to adversely affect the author’s economic right. An author pursuing the economic interest by making a work commercially available on the market implicitly agrees to grant the public access to and reasonable uses of the work, and should, as a matter of law, not be entitled to later claim a superior right in rem over the work - unless the integrity of its contents is affected. The expression of in rem and in personam interests in creative works, therefore, provides some normative legal guidance that balances property rights of copyright owners against the legitimate needs of society to have access and offers an interpretation of property rights in literary and artistic works that is grounded in legal doctrine and theory of property rights.

As this distinction between a property right and an economic privilege does not appear as a matter of doctrine in copyright jurisprudence there is little normative guidance to provide answers to the question of how authors, copyright owners and users of literary and artistic works should behave in the legal system. The statutory rights recognizing specific rights to use literary and artistic works are called property rights and this label gives rise to the assumption that these exclusive rights are property rights of the in rem type, which allow the copyright owner to generally exclude society from using literary and artistic works as a thing subject to a right to exclude. This assumption has a significant impact on the right-access question because positive use rights, such as the right to print or create derivative works, recognizes competing uses of literary and artistic works for the purposes of progress through fair use principles and the idea/expression dichotomy. 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. The exclusive right to print only serves the purposes of artificially creating boundaries in order to provide copyright owners with institutional support to produce and disseminate a good, which is non-rival and non-excludable. The positive right to print or reproduce literary and artistic works is, therefore, an in personam right, which the copyright owner has that does not create in rem rights in the work.

The claim that the statutory rights under §106 of the Copyright Act are economic privileges and not property rights (that belong to the author) finds support in the historical documentation of early copyright law, in the theory of economics on information cost, and in an established legal principle that separate ideas from expression. Historical evidence seems to suggest that authors had always had a separate right in the work that was separate and distinct from the publisher’s right to print the manuscript. Economic

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130 17 U.S.C.A. §107 (statutory codification of the fair use principles), Baker v. Selden, 101 U.S. 99 (1879) (laying down the principle that expressions are protected and ideas are not)
131 Coase, The Lighthouse, supra note 8 at 375 (stating that public goods, such as light from a lighthouse may be provided privately, and the role of the government was “limited to the establishment and enforcement of property rights in the lighthouse...The problem of enforcement was no different for them than for other suppliers of goods and services to the shipowner. The property rights were unusual because they stipulated the price that could be charged.”)
132 In the same way as the Crown supported the building of lighthouses by granting rights to private enterprises to build lighthouses and levying tolls against shipowners. Id. at 364
theory also suggests of a distinction between property rights and economic privileges in copyright when reducing information-costs in protecting creative works while allowing uses of informational resources through an exclusion and governance strategy. This same distinction between property rights and economic privileges is also observable as a matter of legal principle in copyright law from the distinctions the law draws between protectable expressions and non-protectable ideas.

I. AS A MATTER OF HISTORY

Early publishing contracts in England show that authors retain what appears to be a literary property when assigning the right to print to the printer. A publishing contract for the publication of a book would include a clause requiring the author to refrain from selling the manuscript to someone else without the consent of the publisher and from interfering with the publication of the work once the manuscript was sold. The publication contract for Paradise Lost, for example, contained a clause requiring John Milton to refrain from publishing or printing the work. The inclusion of such a clause was, as Professor Lyman Patterson pointed out, unnecessary unless the publisher recognized a residual right that the author had in the manuscript, which would allow him to interfere with the publication of the work.\textsuperscript{133} This residual right indicated that the conveyance of the right to print the manuscript was not a complete conveyance of the author’s rights but a mere assignment of a specific right to use the manuscript in a particular way i.e., to print and publish the work. It would appear that the author still retained an absolute property right in the work over the more limited copyright that the publisher owned following an assignment. The way early publishing contracts were drafted provides an important piece of evidence to demonstrate that a property right in the manuscript belonging to the author and a more specific and limited right to use the work in a particular way were two separate and distinct legal rights. The retention of a property right in the work would suggest that the publishing contract between the author and his publisher conveyed a mere right to use the work and not a complete sale of the work as a thing. Professor Patterson sees an author’s conveyance of a copyright as a negative covenant to refrain from exercising the full extent of his rights once the copyright has been sold. The publishing contract is not a sale of the entire work as a “thing” that was subject to a property right. As Professor Patterson explains:

“…it points up the value of analyzing the author’s conveyance in terms of a negative covenant rather than the sale of his work. The distinction is more than semantics, and it is helpful because we have here a unique example of a chattel being conveyed not for its intrinsic value, but to enable the purchaser to exercise the right which is actually being conveyed. The manuscript is more than a symbol, of which a stock certificate is an example, but less than the object of purchase, of which a book itself is an example.”\textsuperscript{134}

\textsuperscript{133} Lyman Ray Patterson, Copyright in Historical Perspective 74 (Vanderbilt University Press 1968)
\textsuperscript{134} Id. at 75
The fact that early publishing contracts were not absolute transfers of ownership in the work but were rather assignments of a specific right to print and publish, which were more similar to a personal license than an outright conveyance of property, supports the claim that the right to print a work is a mere economic privilege and not a property right. Even before the first legislation to expressly grant rights to print and publish books, The Statute of Anne, was passed to establish rights in literary and artistic works as a statutory right in 1710, the author’s rights and the publisher’s rights as two separate and distinct rights seem to have been evident. But, this distinction may have been lost in the trilogy of court cases interpreting the Statute of Anne and the U.S. Copyright Act of 1790. In 1769, the U.K.’s Queen’s Bench Division, in Millar v. Taylor\textsuperscript{135}, decided that the author has a perpetual property right in the work that was separate from the statutory right to print manuscripts for 14 years granted to authors and publishers under the Statute of Anne. The Court decided that the author’s literary property existed at common law outside the statutory rights provided by the Statute of Anne, and Lord Mansfield, writing his decision for the Court last, traced the source of that common law to natural law principles\textsuperscript{136}, stating that the author’s right had to survive the statutory right otherwise:

“[the author] is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty edition. Anyone may print, pirate, and perpetuate the imperfections to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.”\textsuperscript{137}

The House of Lords, the highest court in the U.K., overruled the decision of Millar v. Taylor in 1774 in Donaldson v. Beckett\textsuperscript{138}, deciding that the only rights in literary and artistic works were copyrights granted by statute and that the author’s common-law right in his or her literary creation, if they ever existed, had been abolished by the Statute of Anne.\textsuperscript{139} The decision was intended to deny British booksellers a claim over books in perpetuity - a claim they previously had by virtue of the Crown Licensing Acts until they were repealed and replaced by the Statute of Anne granting limited protection\textsuperscript{140} - by asserting a common-law copyright that was acquired from the author.\textsuperscript{141} But, the decision itself acknowledged the important contributions authors make to society through their works of authorship and hinted at the need to let society have access to

\textsuperscript{135} 4 Burr. 2303 (1769)
\textsuperscript{136} Id. at 2398 (stating “it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common-law, to protect the copy before publication.”)
\textsuperscript{137} Id.
\textsuperscript{138} 1 Eng. Rep. 837 (1774)
\textsuperscript{139} (stating that “The Statute of Anne was not declaratory of the common law, but introductive of a new law, to give learned men a property which they had not before.”) Id. at 843
\textsuperscript{140} PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 41-43 (Hill and Wang 1994) [hereinafter GOLDSTEIN, COPYRIGHT’S HIGHWAY]
\textsuperscript{141} Id. at 44
works while encouraging authors to create. What was objectionable was the potential control that publishers could have over literary and artistic works, and not the notion of a literary property owned by the author of work. When the U.S. Supreme Court decided the issue of the author’s common-law copyright in 1834 in Wheaton v. Peters, the Court decided, as did the House of Lords in Donaldson v. Beckett, that the only rights in literary and artistic works were statutorily granted and that common law property rights of the author did not exist. Copyright in U.S. Supreme Court Reports existed by way of statute and not at common-law, and required compliance with statutory formalities before the right could be enforced. But, underlying the decision in Wheaton v. Peters wasn’t a question of whether an author had literary rights in the work, and whether the Copyright Act replaced rights that authors had in their work, if they did have literary rights at common-law. The controversy in Wheaton v. Peters was rather the conflict between state power to protect literary and artistic works against federal power to protect works under statutory copyright law. Wheaton v. Peters, arguably, addressed the constitutional issue between state and federal powers when it came to protecting literary and artistic works, but a lot is left to be said about the author’s literary property. While the Courts rejected the author’s natural rights in their work and decided that the only rights in creative works were statutory rights, the issue of the exact nature of entitlements in creative works remains unsettled because the author’s prepublication right - the right to make changes, maintain the integrity of the work, increase creative input - has to be larger then the rights to print and publish that was granted in the statute. As evidence exists to suggest that the author retained rights that were not completely assigned to the publisher when the manuscript was sold and as the trilogy of cases on statutory rights were primarily concerned with the public’s ability to access creative works from the publisher (and not the author), the distinction between the rights of authors in their work that were retained

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142 Lord Camden, in rejecting the author’s common-law copyright, hailed the value of good works of authorship while condemning the monopolistic practices of the booksellers, stating, “[i]t was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy [of] such men to traffic with a dirty bookseller for so much [as] a sheet of letter press...what situation would the public be in with regard to literature, if there were no means for compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked upon 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.” L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USER RIGHT 41-42 (The University of Georgia Press 1991)

143 Lord Camden opposed perpetual copyright as put forward by the respondent bookseller and stated “[[t]he arguments attempted to be maintained on the side of the Respondents, were found on patents, privileges, Star-chamber decrees, and the bye laws of the Stationer’s Company: all of them the effects of the grossest tyranny and usurpation; the very last places in which I have dreamt of finding the very last trace of the common law of this kingdom; and yet by a variety of subtle reasoning and metaphysical refinements, have they endeavored to squeeze out the spirit of the common law from premises, in which it could not possibly have existence.” Id. at 41

144 33 U.S. 591 (1934)

145 Id. at 592 (“Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right, secured for a limited time, by the provisions of that law. The right of an author to a perpetual copyright does not exist by the common law of Pennsylvania.”)

146 GOLDSTEIN, COPYRIGHT’S HIGHWAY, supra note 140 at 55 (“However much it voiced the English discourse, Wheaton v. Peters was at bottom a distinctively American decision, representing a victory for federal power over state power”)
and never assigned and state-granted privileges of publishers to publish works for the public remains two distinct legal concepts that were never specifically adjudicated.

II. AS A THEORY OF ECONOMICS

The distinction between property rights and economic privileges is also a natural legal response to an economic theory on information costs. The economic theory of information costs posits that rational individuals will search for the best product or service on the market until the marginal cost of searching for information about products or services on the market exceeds the marginal benefit of the search.\textsuperscript{147} Users of literary and artistic works are sometimes willing to bear high search costs to find works, which individual expression will satisfy the purpose for which it is sought. A movie producer, for example, may expand considerable information cost searching for the perfect piece of music to serve as the film’s theme song. An author may also expand high information costs to search for the perfect art piece to describe in their work. Researchers often spend countless hours searching for the perfect piece of evidence to support their hypotheses. In such cases, where existing works are used as part of a new piece of art, literature, or creative work, the creator of the work will often expand considerable information cost searching for the right work of authorship to fit into their own creative work. In such cases, the value of the work to the user is incredibly high. Other users of literary and artistic works, such as a music listener or movie goers, may spend less time searching for the “best” product on the market because the work searched for is substitutable. A person may decide not to watch a particular movie or listen to a particular song if a substitutable product is available. The amount of information cost a user is willing to incur depends on whether the work is used for its expressive component and whether the user is a creator of a new work or a consumer of content. A work is generally not substitutable when it is used for its specific expressive content.

The fact that some users treat creative works as substitutable while others do not demonstrate that there is a discernible difference between the value users place on works depending on its intended use. For works that are non-substitutable, for which users place a higher value, rights should protect more than just the economic value of the work. They protect the author’s creative personality and authorial integrity against uses of the work in ways that may, without legitimate reason (such as the pursuit of research for progress), undermine the author’s integrity and deter the creation of new works. In such cases, a property right allowing the author to exclude society would be justified because a property right in the work as a creative expression of authorship protects the work as a thing and protects the author and his or her authentic expression. The value of such protection is in the freedom a right to exclude gives authors that would allow them to continually create. On the other hand, the value users place on substitutable works is

\textsuperscript{147} George J. Stigler, \textit{The Economics of Information}, 69 J. POL. ECON. 213, 214 (1961) (discussing the consumer’s search for a commodity with the best market price considering the differences in the terms of sale e.g. performance of more services or larger range of varieties in stock, and stating that “[a]ny buyer seeking the commodity would pay whatever price is asked by the seller whom he happened to canvass, if he were content to buy from the first seller. But, it the dispersion of price quotations of sellers is at all large (relative to the cost of search), it will pay, on average, to canvass several sellers.” (emphasis added)
largely an economic value that does not correlate with the expressive content of the work. The use of a work for which society consumes as more passive users need only be protected with an economic privilege that entitles the right-holder to receive payment for the work. An absolute right to exclude society cannot be justified when the value users place on a work is purely economic and not expressive. The statutory rights under §106 of the Copyright Act would protect the right of the copyright owner to receive payment for these uses of works that are consumptive in nature - as long as the user uses the work in the ways laid out in 106, the copyright owner is entitled to receive payment - and should not be applied as a general exclusionary right of ownership in the work against society collectively. In this situation, economic privileges protecting the right to use the work in a particular way assure the copyright owner of payment for these uses. The right to exclude society from use of the work is not necessary or desirable for uses of literary and artistic works that a user is not willing to expand tremendous information search costs because in cases where works are substitutable, a user is more likely using the work as a consumer of goods, for which payment for use is due. Only when a work is used specifically for its expressive content would the exercise of a right to exclude be justifiable to protect the integrity of a work of authorship. Economic privileges protect commercial interests in recovering payment while exclusionary rights ensure that an author’s personal interest in undertaking the production of a creative work is protected in a situation where the author’s integrity and creative personality may be threatened by the use of his or her expression.

To a large extent, a user who uses the work as a creator for its expressive content, and a consumer who uses a work for its commercial content, uses different aspects of a work. The creator uses portions of a work that, at common-law, was thought of as being the literary property of an author because of the very act of creation and authorship. In searching for, and using, another author’s specific form of expression, the second author is not using the work for the information it contains as a resource but rather for the first author’s creativity and authentic expression. As such, the right that protects the author’s creativity is a property right that evokes a right to exclude. But, when a consumer uses work as a resource, whether for entertainment or education purposes, he or she is not as concerned about the expressive content of the work as much as the information it conveys. In cases where the user is a consumer and not a creator, the use of the work does not threaten the personality of the creator as contained in the work itself. Rather, the use would involve uses that competes with other use rights that are granted specifically under the Copyright Act, such as the right to make reproductions or derivatives. In these cases, the specific use rights that have carefully calibrated by Congress to reflect the balance between private and public interest are affected when a consumer uses the work in a way that potentially reduces the ability of the copyright owner to recover rewards from the market place. The primary concern of a copyright owner is not the protection of a work’s integrity but the payment of fees for the use of a work, for which there in no need for an exclusionary control over the work - a personal right to compel the consumer to pay for

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148 Millar v. Taylor, supra note 135
149 Smith, IP as Property, supra note 13 at 1807-1808 (“Historically, in English Law, a statutory limited-term exclusive right over publishing and selling competed with a more robust common law right that gave property in the work itself. In our terms, common law copyright is more based on the exclusion strategy.”)
using the work will suffice. Information costs theory that a consumer would willingly expand search costs to find goods they want when the benefit of the search outweighs its cost indicates that the more costly the search, the more likely it would be for a portion of a work that would be protected by an exclusionary property right rather than a personal privilege for the recovery of investment in production and dissemination of a work.

III. AS A PRINCIPLE OF LAW

The third observable distinction between property rights and economic privileges in copyright is in subtle distinction in how the common-law protects the core expression of works from being taken and used and the management or governance\(^{150}\) of various rights to use works through statute. The protection of the common-law over core expressions of creativity can be noted in how the law makes ideas and facts underlying works of authorship free for society\(^{151}\) to expand upon,\(^{152}\) while ensuring that original expressions are not pirated.\(^{153}\) The decision of Judge Hand in Sheldon v. Metro-Goldwyn Pictures, for example, was not based on the economic losses the copyright owner suffered from a motion picture pirating a play, but on the copying of a specific series of plots from the play that represented the expression of authorship.\(^{154}\) And in Nichols v. Universal Picture Corp., Judge Hand considered the same issue - whether the core expression of a playwright had been pirated - and came to the conclusion that it was not given the generality of the theme used in the second work.\(^{155}\) But, in many other instances, the content of the law does not see to the protection of expression as “literary property,”\(^{156}\) and protects instead the commercial potential of the work to encourage its production and dissemination to society. The protection of rights to distribute\(^{157}\), perform\(^{158}\) and display\(^{159}\) publicly, and, in the case of sound recordings, perform publicly by means of digital audio transmission,\(^{160}\) ensure the recovery of market profits and relate minimally to any form of literary property of the author. Compulsory licensing provisions for nondramatic

\(^{150}\) See Henry E. Smith, Exclusion vs. Governance: Two Strategies for Delineating Property Rights, supra note 58
\(^{151}\) Baker v. Selden, supra note 130; see also Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2nd Cir. 1930)
\(^{152}\) Hoehling v. Universal City Studios, 618 F. 2d 972, 980 (1980) (“Knowledge is expanded...by granting new authors of historical works a relatively free hand to build upon the work of their predecessors.”)
\(^{153}\) Sheldon v. Metro-Goldwyn Pictures, 81 F.2d 49 (1936)
\(^{154}\) Id. at 55-56 (“The play is the sequence of the confluent of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning. That as it appears to us what the defendant had done here; the dramatic significance of the scenes we have recited is the same, almost to the letter.”)
\(^{155}\) Nichols v. Universal Pictures Corporation, supra note 151 at 121 (“In the two plays at bar we think both as to incident and character, the defendant took no more - assuming that it took anything at all - than the law allowed. The stories are quite different.”)
\(^{156}\) Id. (“It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial violations.”) (emphasis added)
musical works, noncommercial broadcasting, secondary transmissions by cable systems and the public performance of a sound recording by means of a subscription digital audio transmission, also ensure transfer of the work to society in return for the payment of a fee for using the work that indicates an in personam right to receive payment for use of the work rather than an in rem right in the work itself. The Digital Millennium Copyright Act also manages the various uses of informational resources to ensure that the copyright owner recovers payment for use of their work by making it an offense to circumvent technological measures that effectively controls access to a work. What the Digital Millennium Copyright Act therefore controls is the use of informational resources that a copyright owner is rightfully entitled to claim payment for through the set up of “fences” to exclude non paying members of society. Arguably, a user who willingly pays should be allowed to use the information protected unless the use is of the author’s creative expression in a way that undermines the integrity of the work and detracts from the progress of science and the useful arts. This subtle distinction in the law between the rights of the author and the privileges of the copyright owner may explain why society regards plagiarism by students to be wrong even when no commercial harm is done to the copyright owner: because what has been taken is the original author’s tangible personality, or literary property, as expressed in a work of authorship and represented as one’s own. This distinction also explains why the law requires a copy of a work be substantially similar to the original for there to be an infringement of copyright: because the appropriation of the essence of another’s original expression represents the taking of a core protectable interest in the work itself, such as the detailed plots of a play. The separate right of the author and privilege of the copyright owner also explains why the law protects the author of a commissioned work as a joint-author with an equal and undivided interest in the work when the work is clearly intended to belong to the commissioner of the work.

IV. RIGHTS AND PRIVILEGES IN INFORMATION: WHAT THIS MEANS

The claim that there are separate property rights and economic incentives in literary and artistic works has significant meaning for copyright law. Real property and intellectual property include the same right to exclude the rest of the world from use of the property as a resource. For literary and artistic works, the right to exclude others from use of a work is treated as constituting the “property” right of the copyright owner. But, the significant differences in physical nature between real and intellectual property

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163 17 U.S.C.A. §111 (c) (2001)
164 17 U.S.C.A. §114 (d) (2) (2001)
166 Smith, IP as Property, supra note 13 at 1809 (“the Digital Millennium Copyright Act (DMCA) of 1988 prohibits an activity - namely, circumventing “a technological measure that controls access to a [copyrighted] work”)
167 Sheldon v. Metro-Goldwyn Pictures Corp. 81 F.2d 49 (1936)
169 Fox Film Corp. v. Doyle, 286 U.S. 123, 127 (1932) (noting copyright owner’s “right to exclude others from using his property”)
coupled with the Constitutional goal of granting intellectual property rights in the first place renders a possessory right to exclude informational resources from society through copyright laws unfitting in an institution designed to promote progress of science and the useful arts. The administrative costs for protecting copyright is also significantly higher that real property given the intangibility of literary and artistic works.\textsuperscript{170} For real property, there will always an identifiable number of infringers who infringe the possessory right of exclusion, and it is generally easier to identify, numerically, the times in which the right to exclude is affected. For literary and artistic works, which are, as a general rule, non excludable and non rival, protecting the right to exclude may be impossible because the right can be infringed an infinite number of times without the copyright owner realizing it, or being able to keep track of each infringement. The public good nature of literary and artistic works makes the right to exclude a difficult, if not impossible, right to protect, even if that was the right entitlement a copyright owner should have. A copyright owner may be able to prevent the reading of a physical copy of the work, refuse the reading of a copy of a manuscript, or the listening to a musical composition while the work is in his or her sole possession. However, as soon as the work is disseminated, the right to exclude becomes obsolete right because it is virtually impossible to prevent others from having access to the story line making up the novel, or sheet notes making up a musical composition. Once a literary and artistic work has been put on the market, the right to exclude loses its meaning and even if technology were employed to exclude others from reading the novel or listening to the composition, the essence of a work is never completely protected by the right to exclude. The difficulty of enforcing a right is not a reason to not protect it. But, when a right belongs solely to the author, and not the copyright owner, a refusal to enforce an exclusionary entitlement is well justified because the essence of what is protected is not an entitlement or interest in recovering payment for the use of a work but a tangible and well defined “thing”: the author’s creative personality and authorial integrity.

Another significant difference between real property and literary and artistic works is that there is less of a connection between the personality of the owner and the thing owned. Land, a finite resource, may have special meaning to its owner. A land owner, who inherited a land, raised a family and lived there for his or her life would have sentimental value in the land that would not be quantifiable through an assessment of fair market value for the land.\textsuperscript{171} In fact, the market may severely undercut the landowner’s accumulated value in a piece of land when the owner’s non-economic value is taken into account.

\textsuperscript{170} \textbf{William M. Landes}, \textit{Copyright, Borrowed Images, and Appropriation Art: An Economic Approach}, 9 Geo. Mason L. Rev. 1, 7 (2000) (“The second major cost of a copyright system are administrative and enforcement costs. These include the costs of setting up boundaries or erecting imaginary fences that separate protected and unprotected elements of a work. They also include the costs of excluding trespassers, and apprehending and sanctioning violators. These costs tend to be greater for intangible than tangible property.”)

\textsuperscript{171} The courts have been unwilling to sell co-owned land to achieve a partition if one co-owner has been “in actual and exclusive possession of a portion of the property for a substantial period of time ... has made her home on the property, and ... derive[d] her livelihood from the operation of a business on ... the property, as her family before her has for many years.” \textit{See}, Delfino v. Vealencis, 436 A. 2D 27, 33 (1980)
Many land owners refuse to sell land on which they have spent their lives or made substantial emotional investment in the property. In the same way, an author of literary and artistic works may have personal and sentimental connection to the product of his personality, and maybe reluctant to see the public use the work in a way, which is contrary to his original intent or personality. Authors have considered their work their “precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life.” and a book has often been likened to a progeny of its author. But the connection between authors and their work is, in some sense arguably, stronger than the land owner who has lived on the land for his whole life because a work is the creation of the author that is produced as a result of authorial and creative labor and which represents his or her creative personality. In this sense, property rights that are similar in effect to that moral rights of authors in continental Europe offer the author assurance in that the public will not use the work in a way that adversely affects the author’s artistic creativity and authentic personality, but which also create an added responsibility on society to use works in ways that contribute towards, or at minimum do not harm, the progress of science and the useful arts.

This part of this Article explains the legal consequences of making a distinction between property rights and economic incentives upon the institution of copyright law. First, from the publisher’s point of view, the rights under the Copyright Act serve only as an incentive to produce and disseminate information and provide an exclusive right which assures publishers that the investments made in producing and distributing the work to society will be recoverable through the market. Publishers do not have rights in the work and are not entitled to exercise a general right to exclude society from using the work. The right to exclude others from using the work that a copyright owner has in its limited form serves only to enforce a contractual right to recover payment from society. Second, the public is entitled to use the information contained in literary and artistic works for the purposes for which the copyright system exists to further progress in the science and useful arts unless the use of the work amounts to an unreasonable interference with the copyright owner’s ability to receive payment for the work or if the

172 Justice Posner in Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir.1988) (stating that “‘just compensation’ has been held to be satisfied by payment of market value...Compensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners are “inframarginal,” meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not “for sale”). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it “personal”) value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use.”)


175 MARK ROSE, AUTHORS AND OWNERS, supra note 84 at 38

176 Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 OHIO ST. L. J. 517, 554 (1990) (“The author alone conceives of the work, develops its ideas, and brings the work to fruition. The finished work captures the author's original mental product. Thus, the author's claim to property in her work is even more complete and total as the laborer's claim in her acorns [that she gathers].”)
use adversely affects the original author's creative personality and authorial integrity. Society's ability to use literary and artistic works in ways consistent with the Constitutional intent for progress of science and arts will be protected against the exercises of a possessory right to exclude that denies access and prevents technological development. Third, the property right of the author is a specific right that protects the author's autonomy or individuality and entitles the author to exclude society from using the work when the use adversely affects his creative personality. The protection of the author's personality is important in encouraging the creation of works for the benefit of society because the right protects authorial freedom to create authentic works of authorship without fear of author's integrity being undermined or disparaged.

I. THE INCENTIVE TO PRODUCE AND DISSEMINATE

Separating the author's property right from the copyright owner's economic privileges allows for clearer analysis of the incentives provided for by statute and what these entitlements entail. The incentive to produce and disseminate creative works take the form of exclusive privileges to use information in the ways specified in §106 of the Copyright Act. But, these rights allow exclusive uses of information which does not include a possessory right. While possessory rights with a general right to exclude and use rights with specifically enumerated entitlements may belong to an owner of property, both are conceptually and legally distinct concepts that serve different purposes. Possessory rights in property allow the property owner to conserve and preserve resources that are scare and prone to depletion from over use. Use rights on the other hand, aims to put resources to their most optimal use and hence, take the form of governance or management of resources that are not necessarily extinguishable through over use. For literary and artistic works that are not extinguishable in the same way most natural resources such as forestry or marine life are, rights serve not to conserve but to govern their uses to ensure that a resource that is needed to fulfill a public need for progress of science and the useful arts remains available for society’s use.177 It defeats the law’s purpose of encouraging production and dissemination of creative works if the rights granted by statute entail possessory rights that copyright owners may use to exclude society from using works that have been published and distributed to the public.

Protecting the copyright owner’s interest as economic privileges to use creative works in specifically enumerated ways fulfills the law’s intent more precisely. The production of creative works, like the building of a lighthouse, involves the use of scarce resources such as labor, expenses, and time. Coupled with the fact that literary and artistic works are non-rival and non-excludable once distributed to the public, the need to provide incentives to private individuals to undertake creative production becomes great. The economic privileges under the Copyright Act serve to encourage undertaking in production and dissemination of creative works by ensuring that investments in creativity are recoverable from the market and are balanced against the interest of society in using the work. These privileges to use creative works exclusively provide copyright producers

177 Use rights apply more appropriately when a resource is needed by society for various reasons, such as water, and should be subjected to more specific governance rules. See Henry E. Smith, Governing Water: The Semicommons of Fluid Property Rights, 50 ARIZ. L. REV. 445 (2008)
with legally enforceable rights as a necessary mechanism to collect payment for public uses of a non-rival and non-excludable good in the same way property rights allow lighthouse owners to collect levies from ships in their path. These privileges serve to provide a resource for society and require the copyright owner to exercise personal contractual-type rights as a provider of goods against users of their work. Economic privileges do not provide copyright owners with possessory rights over the work consistent with ownership of property and therefore, do not entail control over how society uses the work - as long as use of the work is paid for.

II. PUBLIC ACCESS TO INFORMATION

The separation of property rights from economic privileges will also ensure greater public access to information as the general public will be entitled to use informational resources as long as the use, if it falls within the statutorily enumerated rights of the copyright owner, is paid for. The grant of economic privileges rather than possessory rights of exclusion requires copyright owners to monitor uses of their works and, where necessary, protect their works through technology requiring payment before works are released to the public for use. Conceptualizing the copyright owner’s right as a privilege distances the law from the application of the doctrine of contributory infringement against burgeoning technology that may increase society’s access to and use of informational resources and puts the burden of monitoring works for the purposes of recovering their investment on the copyright owner rather than the legal system. Furthermore, as economic privileges are not necessarily connected to the physicality of a “thing” owned, they are malleable to social needs for accessing informational resources for the purposes of progress in the science and useful arts. The public cannot be excluded from using the work just because new markets emerge from the development of new technologies, and in situations where access is increased by the development of new technologies, economic privileges may be changed to accommodate changing social culture - through a more comprehensive and flexible system of compulsory licenses.178 Treating entitlements granted to copyright owners as privileges rather than rights also provides the legal system with greater flexibility when balancing the entitlement to recover investments from the market with the entitlement to access and use works for the purposes of progress through fair use principles. While fair use is an affirmative defense to a copyright infringement suit179, the treatment of copyright entitlements as privileges that are granted specifically to reward creativity for society’s benefit will allow the law to regard uses of works for the purposes of science, art, research, and education as consistent with the Constitution’s goal and therefore presumptively fair, shifting the burden upon the copyright owner to prove that the use was not within society’s entitlement to use the work for advancement. Conceivably, the only way for which society’s entitlement for the advancement of science and the useful arts may be properly

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178 The Berne Convention for the Protection of Literary and Artistic Works (Paris 1971), which sets international copyright standards, only provides for compulsory licenses under Articles 11bis(2) (for broadcasts and public communication by wireless means or when the communication is made by an organization other than the original one when the communication is made to the public by wire by rebroadcasting a broadcast of the work) and 13 (for musical works and words contained in them). 179 17 U.S.C.A. §107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work...is not an infringement of copyright”) (emphasis added)
realized would be for the copyright system to treat rights that were previously considered “property” as specifically enumerated state-granted privileges to use literary and artistic works instead.

III. *The Author’s Right to Exclude*

The final area of entitlements, that has received very little attention - perhaps because of the treatment by courts and scholars of the common-law right in literary and artistic works - is the author’s right in his or her creation. While a specific literary property has not been explicitly protected within the copyright system as a separate property right that belongs exclusively to the author as the creator of the work, the recognition and protection of such a right appears necessary if the institutional goals of the copyright system is to be achieved. This Article has argued that the law should recognize a separate author’s rights as a property right protecting the creative personality of the author to provide authors with the freedom to produce authentic works of authorship without fear that the work may be undermined or disparaged once published and distributed. Assuming that great authors create great works for the benefit of society without the lure of commercial success, as Lord Camden candidly recognized\(^{180}\), the protection of a personal right for authors will not hamper, but conversely, will more likely than not contribute towards progress when great works of authorship can be produced by an author’s authentic expression that is not internally censored for fear of what society may do with the work. Property rights in literary and artistic work entitles the author to exercise a possessory right over the work to exclude uses that adversely affects his or her creative personality in ways that are not conducive towards the promotion of progress, and is, arguably, the most important right in the copyright system to facilitate the production of authentic works of authorship that convey both reliability and integrity in content - hence making positive contribution to the collective body of information and knowledge - to further society’s progress. The production of such works of authentic authorship will most likely evade the copyright system until and unless authors are encouraged to produce works that make positive contributions towards advancement of science and the arts through the law’s recognition that literary property in creative works protect the core component of genuine creativity that makes the production of such works possible.

V. *A Normative Proposal*

This Article presents a normative proposal for the treatment of entitlements of three parties with interests in literary and artistic works in the copyright system - the author as the creator of the work, the copyright owner as the investor who makes the publication and distribution of the work possible, and society as users of the work. By treating statutory rights and property rights as two legally separate conceptually distinct entitlements, the law will be in a better position to determine how these different interests in literary and artistic works may be protected. The economic privilege to use works in a particular way rewards investments in the production and distribution of works to society. The recognize that copyright owners must have a mechanism to recover their investment

\(^{180}\) Millar v. Taylor, supra note 142
in making the work available to society while ensuring that these mechanisms remain malleable towards the needs of society to have access to works. The essential goal of the Copyright Act is to create exclusive rights, which will enable copyright owners to recover payment for uses of their works, which once published and disseminated, are non-rival and non-excludable. The economic privileges under the Copyright Act fulfills two goals - first, the investment in producing works that are in nature public goods for society, and second, the publication and dissemination of the work. But, statutory rights are not the only rights, which exist in literary and artistic works. By virtue of being the creator of a work, the author has a property right in the work, which the law ought to protect if promoting progress of science and the useful arts through works of authorship remains the goal of the copyright system. Recognizing the author’s ownership of the work as a product of his creative personality will encourage authentic authorship as a productive activity. When the law protects the author’s personality, the law expresses an intent to protect a work as a thing owned by the person who created it - giving its creator the liberty and freedom to create works with greater authenticity, integrity, and reliability.

The effect of this distinction between property and privilege on legal analysis of copyright questions is significant. Protecting an entitlement to use the work as a privilege to use allows for a consideration of reasonableness in the determination of whether the conflicting use amounts to an infringement of the entitlement - a conflicting use must be an unreasonable interference with the the use and enjoyment of the entitlement before the use may be enjoined. The law on land use nuisance demonstrates the requirement for reasonableness in the use of a resource. An injunction may be granted for a nuisance that is a substantial, intentional and unreasonable interference with the use of another’s land, or if the substantial interference is the unintentional result of negligence, recklessness, or abnormally dangerous activity, and the courts have been inclined to balance two competing use rights in deciding whether to enjoin a use that causes substantial harm. Treating statutory copyright as an economic privilege with several use rights rather than a property with a possessory right to exclude shifts the law’s focus from infringement of copyright with every use that is contrary to the rights under §106 to a consideration of how informational resources may be put to its best use taking into account the need to provide incentives and allow access. The incorporation of this form of analysis into the copyright system creates a presumption that social uses of literary and artistic works are, as a matter of law, legitimate uses of the work that must be balanced against a competing use to recover investments in production and distribution of the resource. The fair use doctrine, arguably, will no longer be an affirmative defense because all social uses of the work would be presumptively fair, putting on the copyright owner, as the Plaintiff, a burden of showing an unreasonable interference with their entitlement. Conceivably, an injunction will not necessarily be granted for every use by the public that the law deems unreasonable - where the equities require that damages be granted instead of an injunction, the law may do so. As a general rule, the copyright owner cannot exercise a right to exclude under the entitlements granted to them under the Copyright Act.

181 Restatement (Second) of Torts §826
182 Morgan v. High Penn Oil Co., 77 S. E. 2d 682 (1953); Estancias Dallas Corp. v. Schultz, 500 S. W. 2d 217 (1973)
This normative proposal also carves out a separate property right for the author in the work that is protected as a matter of natural right. The authentic expression of authors play a significant role in promoting the progress of science and the arts because authentic works of integrity communicates reliability of content for the purposes of learning, study, and research - activities that directs the growth and progress of society. By protecting literary property, the law sets a standard of conduct for the production and use of literary and artistic works that require the creation of works making positive contributions towards the betterment of society and use of works by the public in ways that do not undermine or disparage the integrity of the work so that the production of authentic works of authorship is reduced. The protection of literary property, while recognizing the author’s personality in a work, is a related but separate issue from moral rights, which protects the personal interest and integrity of the author. With literary property however, rights provide the legal system with tools to shape social conduct to guide the production and use of literary and artistic works towards progress of the sciences and arts - authors are encouraged to contribute in positive ways towards progress through the protection of their creative personality and society is able to refer to norms of social conduct in the use of literary and artistic works with the aim of progress of science and arts as a collective goal. The protection of literary property must be regarded as a step towards establishing social norms of conduct that generate creative activities geared towards society’s advancement rather than an expanding system of possessory rights to restrict access to works.

VI. CONCLUSION: LESSONS FROM THE LIGHTHOUSE

It is difficult, if not impossible, to calibrate the optimal balance between the protection of private rights in literary and artistic works and the grant of access to information need by society. Economics suggests that the public good nature of literary and artistic works justify expansion of rights because externalities generated by the production of creative works should be internalized to prevent uncompensated uses of creative works. American legal realism, on the other hand, resist expanding property rights as a encroachment into the public domain by industrial interest groups and a limitation of society’s right to use creative works for innovation and development. The tension between private and public entitlements in literary and artistic works highlights a need for balance between private rights and public interest that the legal system has yet to achieve. These conflicting approaches to the copyright dilemma bring attention to the tension created by the grant of temporary monopolies over literary and artistic, and yet existing approaches to the dilemma has offered limited normative guidance on the treatment of the issues involved. A doctrinal and institutional approach involving a deeper analysis of our understanding of property law principles may provide a viable solution to the copyright dilemma by suggesting that rights in literary and artistic works are really two fold – a right in rem based on an author’s property right in the work by virtue of the author’s original authorship that is good against the world, and an economic right in personam to recover profits from the commercialization of the work, which stems from the statutory rights granted by Congress under the present Copyright Act. The doctrinal and institutional approach to the property rights-public interest dilemma
described in this Article, arguably, puts copyright jurisprudence on a more stable foundation allowing the law to evolve through legally accepted principles of property law independent of the social, technological and cultural changes, which constantly shifted the delicate private rights – public interest balance with ease. Analyzing the copyright dilemma through conventional property law doctrines yield better solutions to a legal system tasked with managing competing use rights in literary and artistic works as a resource for progress.

Light from a lighthouse provide immeasurable guidance to vessels traveling and maneuvering the seas at night. The provision of light is a much needed service, which must be encouraged, because light, while abundant in the day, is such an immensely scarce, and invaluable, resource to seamen and vessels during the night. If lighthouse services are to be privately provided, property rights become a necessary state provided mechanism to allow private lighthouse builders to recover their investment and maintenance cost incurred in providing lighthouse services. But, these “property” rights are enforceable only for the purposes of recovering levies from vessels and do not entail a possessory right to exclude vessels from using light from the lighthouse as a navigational tool. It would be, first, physically impossible to exclude vessels from using the light by any means other than turning the light off, and, second, even if turning the lighthouse off was an option to exercising a right to exclude, it would be inherently immoral to do so when vessels depend solely on lighthouses to navigate them towards safe land. These state granted rights do not entail a possessory right in light but provide an enforceable mechanism for recovering payment. Similarly, rights provided under the Copyright Act to encourage the production of literary and artistic works allow only for the recovery of payment for use of the information and do not entail a possessory right in the information itself nor a right to exclude society from having access to information. These entitlements, being economic privileges that are not confined to the physicality of the work protected, are tools that the law has to manage competing claims to information. They do not preclude society’s use of the work and give society’s claim to access to information for the purposes of progress legitimate ground. Information, like light, provides the necessary guidance to those using it, and should not be protected with an absolute right to exclude. The absolute right to exclude is only a right the author has as a recognition of personal autonomy and individuality, and is necessary to protect the author’s personality and integrity to ensure that works of authentic authorship continue to be produced. Arguably, creative personality, unlike light, is tangible and definable and may be owned by a single person: the author of a work. But, this discussion would be the subject of another piece of work.