Property, Persona, Permission

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Abstract:

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By
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Information overload confronts us everyday. In such a situation, attention is scarce and the ability to focus attention has value. In short, the explosion of information means we live in an attention economy. As theorist Richard Lanham has posited, the key assets in the attention economy (e.g. writings, images) are part of the cultural conversation which leads to and elevates the importance of intellectual property because intellectual property is the way our society manages such assets. Put differently, authors now have two interests: the copyrighted work and the reputation that travels with that creation as it enhances the author’s ability to focus future attention. In this view authors want credit, and they want control over how a work is used lest such use harm their reputations. Thus authors assert quasi-intellectual property interests (e.g., attribution and the right of publicity) to protect their non-copyright interests in the creations.

Accordingly this Paper examines the nature these interests in an attention economy. Probing the theoretical foundations of the interests shows that the claims are incoherent and unbounded. Indeed, they extend control over creations in much the same way as the Romantic view of authorship, but now this author-centered view expands into trademark or trademark-like claims. Recognizing such interests as legal rights is unnecessary. To do so upsets what Larry Lessig has described as the balance between fostering free (what this Paper calls unfettered) uses of culture and permission-based uses towards an even more permission-based system than is already in place. In addition the premise of these claims ignores historical and literary theory as well as economic theory as advanced by Professors Brett Frischmann and Mark Lemley regarding spillovers—positive externalities generated by access to ideas and information. All of these theories offer a view of creation where one draws on previous works to create and then one’s work fosters the next cycle of creation. Last the Paper finds that even if these quasi-intellectual property interests receive legal recognition, their theoretical foundations show that they are tied to the author and must end upon her death.

This Paper is part of a series of works aimed at investigating the nature and extent of control one may have and/or exert over a work. Previous work set forth the normative theories behind creators’, heirs’ and society’s interests in the works. It found that the nature of the attention economy in conjunction with labor-based and persona-based property theories support the position that in life a creator has strong claims for control over her intangible creations as copyrightable works but that after death such claims vanish. In short, it drew a line between life and death. This Paper examines a different dimension of potential rights during life: the growth of trademark-like claims offered by authors to perpetuate control beyond that which copyright recognizes. As such this Paper explains further the nature of author rights during life as balanced against the nature of creation and creative systems.
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Introduction

Information overload confronts us everyday. In such a situation, attention is scarce and the ability to focus attention has value. In short, the explosion of information means we live in an attention economy. As theorist Richard Lanham has posited, the key assets in the attention economy (e.g. writings, images) are part of the cultural conversation which leads to and elevates the importance of intellectual property because intellectual property is the way our society manages such assets.¹ Furthermore, as a reputation or attention economy emerges,² the distinction between copyright and trademark interests dissolves. In theory intellectual property law presumes a split between copyright and trademark interests. One, copyright, protects the expression of an idea and the distribution of that expression. The other, trademark, protects consumers by indicating source or sponsorship of the thing to which the trademark is attached. Yet, this distinction collapses or is false in the eyes of creators. For in a reputation or attention economy, trademark or trademark-styled rationales may explain how one builds a personal brand that then draws people to one’s copyrighted works. In addition, creators may see their work as extensions of themselves and thus look not just to copyright and trademark to protect their interests but to quasi-intellectual property claims such as the

¹ See Richard Lanham, The Economics of Attention 259 (2006); see also infra note 76 and accompanying text.
² See Deven R. Desai, Property, Persona, and Preservation, Temple L. Rev. (forthcoming) (examining motivations behind creation and the growth of attention economics as a way to explain the way online creation generates value but not in a pure monetary manner); Greg Lastowka, Digital Attribution: Copyright and the Right To Credit, 87 B.U. L. Rev. 41, 51-63 (2007) (tracing monetary and reputation incentives for creation and showing where the two intersect and diverge); see also infra note 76 and accompanying text. Roberta Kwall’s work provides a detailed articulation of the view supporting moral rights as reputational rights and explains shows how such rights encompass “the right of integrity, the right of attribution, and the right of disclosure.” Roberta Rosenthal Kwall, Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century, 2001 U. Ill. L. Rev. 151, 152 (2001).
right of publicity or attribution, and even privacy as other ways to characterize their interests.\(^3\)

Although it appears that the intellectual property holder who asserts such varied claims protects separate interests—be they copyright, brand, integrity, attribution, dignity, or privacy interests—close examination of the way such claims function and the theoretical bases for them reveals that regardless of how the claim is stated, the interest is often one of control over the use of the creation which arguably is the subject matter of copyright and copyright alone. In short, as intangibles continue to play an important if not dominant role in the economy, whenever the law seeks to limit the extent of intellectual property rights in one context, those benefiting from the right understandably look for ways to extend their control over a work.\(^4\) The growing use of trademark and trademark-styled claims to extend copyright interests is an example of this behavior. Nonetheless, little theory supports such expansive control and allowing such overlapping claims has the potential to disrupt the intellectual property system if not make it meaningless.

As Larry Lessig has written, intellectual property law requires a balance between fostering free (what this Paper calls unfettered) uses of culture and permission-based uses

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\(^{3}\) See Madhavi Sunder, *IP*\(^3\), 59 STAN. L. REV. 257, 274-275 (2006) (noting that intellectual property law can support identity interests of the poor but be co-opted to vindicate other interests such as the right of publicity and trademark holder’s dilution claims).

\(^{4}\) Cf. R. Anthony Reese, The New Unpublished Public Domain, 85 Tex. L. Rev. 585, 613 (2007) (“Copyright law no longer provides a copyright owner with the right to control the use of older unpublished works. Those who own copies of such works, however, may well want to continue to exercise such control.”); see also James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (detailing the way in which public privilege to use material covered by intellectual property law recedes as licensing behaviors designed to address gray areas of use possibilities in turn act to expand intellectual property law’s reach). As James Boyle has noted when a market shifts such that previous technological advantages no longer offer a competitive edge and profit, industries will look for a “legal edge” to protect their business. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 133-134 (1996) (emphasis in original). This Paper offers that such expansion of claims and legal tactics will arise even prior to a decline in business model.
This balance is not anarchic; instead, such a balance has property and contract working together to maintain the balance. The growing trend to rally trademark, quasi-intellectual property claims, and privacy protection for material under the subject matter of copyright poses a serious threat to this balance. Indeed, this trend ignores the history of copyright battles and opens the door to further mischief by copyright interests as it falls prey to a fundamental problem that lies behind intellectual property law: What theories ground intellectual property law?

Twenty years ago Justin Hughes explained that both labor-based and persona-based theories animate intellectual property, and it may be that that both understandings are needed to justify it. But as Hughes noted, “Both of the grand theories for intellectual property—labor and personality—have their own strengths and weaknesses.” In addition, they are “grand generalizations” that “we cannot avoid” so we must “face such generalizations squarely and assemble them consciously.” When one looks at the theories offered to explain copyright and trademark interests of creators, these grand generalizations are at work. In addition, quasi-intellectual property and privacy-based claims with their attendant generalizations enter the picture. Although each view may have some bearing on the claims offered, together they do not present a coherent, balanced system. Instead they offer a system that allows a creator to assert control over

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5 See Lawrence Lessig, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY xvi (2004). Rather than free or open this Paper uses the term unfettered as the term free seems despite best efforts to be confused with free-riding and giving away something as opposed to the underlying freedom aspect of the term that Lessig advances.
6 Id.
8 Id.; see also generally PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY (1996).
9 Hughes, supra note 7, at 365. Hughes notes that labor and persona “have much more of a siren’s call than property rights.” Id. at 366. This idea may explain why they are rallied, sometimes together, to defend and explain property. As argued in this Paper this conflation fosters problems in seeing what interests are at stake and what should limit property claims sought in the name of these interests.
10 Id. at 366.
all uses of their nonrivalrous creations and as such destroy the balance intellectual property law requires. This situation is exacerbated when one considers the almost unlimited temporal dimension of intellectual property rights, and the fact that not only creators but their heirs or assigns can assert the rights. A recent example highlights the problem.

Stephen James Joyce, James Joyce’s only living heir, manages the Joyce estate and has often tried to prevent academic uses of public material related to Joyce and prevented public readings of such material. The estate’s claimed grounds for such actions are that it was stopping work that exceeded “the bounds of scholarship” or invaded privacy and that authors should be able to preserve the integrity of their work. Thus in the name of privacy and integrity, the estate threatens and limits legitimate use of the material so much so that in one instance Professor Carol Schloss, a James Joyce expert, had to sue the estate of James Joyce to protect her ability to use material for her scholarship. The Joyce estate is not alone in such behavior. The estates of T.S. Elliot, J.R.R. Tolkien, J.M. Barrie, J.D. Salinger, Sylvia Plath, Samuel Beckett, and Bertolt

11 See infra note 291.
13 See id.; see alsoDefs.’ Reply to Pl.’s Opp’n to Defs.’ Mot. to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss’s Am. Compl., Shloss v. Joyce, No. CV 06-3718 (N.D. Cal. 2007), 2007 WL 444886 (“Joyce objected to Shloss's plan for a book about Lucia Joyce because it is an invasion of privacy.”), “While Defendants have alleged that a priority of the Estate is to protect the privacy of the Joyce family, it has not stated that copyright interests are used for this purpose. Instead, as can be seen from the correspondence, Joyce's goals have been to protect family privacy (i.e., by not providing assistance with books on private family matters) and defend the integrity, spirit and letter of James Joyce's works.”).
Brecht have expressed similar displeasure at and/or desires to control academics’ approach to the creator’s work.\textsuperscript{15}

Here one can see the expansive power of attribution, integrity, privacy, and other non-copyright claims. All augment the restrictions on the ability to use what would otherwise be allowed under copyright. Furthermore, they lack the boundaries copyright doctrine offers to balance between the author and the public’s interest in a work.

In other words, it is often difficult to separate which claim is asserted, which theory is behind the claim, or which rationale explains a judicial decision in this context.\textsuperscript{16} For example one commentator examined the “law of biography”—that is the law governing the ability to write biographies—and found that area of the law is “Molded by copyright law and enlivened by privacy law.”\textsuperscript{17} In explaining this idea, she notes that “Although the copyright statute does not explicitly mention privacy, privacy concerns often inform copyright decisions.”\textsuperscript{18} Given the way in which estates articulate their positions, this insight applies to all copyrighted matter, not only the law of biography. Thus, it seems that Hughes’s insight that both labor and persona interests animate intellectual property law in general has an additional component—privacy.

\textsuperscript{15} See Max, supra note 12, at 36 (noting the Elliot estate’s view of academic work); Ethan Gilsdorf, \textit{Lord of the Gold Ring}, BOSTON GLOBE, 10, November 16, 2003 (noting the Tolkien estate’s approach to literary material); Matthew Rimmer, \textit{Bloomsday: Copyright Estates and Cultural Festivals}, 2 SCRIPTED, 383, 393, 427 (September, 2005) (citing the Barrie’s estate exertion of resurrected property interests to stop later work based on Peter Pan and noting the other author’s estates tendency to thwart historians).

\textsuperscript{16} See e.g., Rebecca Tushnet, \textit{Naming Rights: Attribution and Law}, 2007 Utah L. Rev. 781 (2007) (acknowledging the incentives for attribution rights but finding that the nature of attribution claims varies too much to justify a legal claim for the interests); Mark McKenna, \textit{The Right of Publicity and Autonomous Self-Definition}, 67 U. PITT. L. REV. 225 (2005) (examining several theories offered to explain the right of publicity and finding none fully or coherently explain the interests the right seems to vindicate).


\textsuperscript{18} Id. at 312.
Privacy, however, is a broad concept and may not have a precise subject matter.\textsuperscript{19} Furthermore in the context of the issues of this Paper, privacy claims often functions as proxies for property interests.

Still the privacy turn reveals the larger problem. Attribution, publicity, and integrity, all have intuitive appeal and force. The interests are real and lie behind some of the reasons one may create. The arguments seeking legal status for these interests and demanding legal recourse to vindicate the claims look to property to explain and justify their claims. Yet, the nature of these claims shows that they lack intellectual property’s boundaries. In addition, they lack coherent normative foundations to guide disputes regarding competing interests. So, if one wishes to engage with or use material for one’s creation, one may face not only the already hard to navigate world of fair use but the more vague and ungrounded claims of attribution, publicity, integrity, and privacy. In such a world the balance between unfettered and permission-based creation tilts further to the permission-based approach with no countervailing force on the unfettered side. When that occurs rather than a creative system based on coherent foundations, an imbalanced system that shuts down creative potential is in place.

As such Part I of this paper sets forth what practical interests are at stake in creation, what theories may support those interests, and how the attention economy impacts these interests. Part II shows how the tensions between the perspectives have permeated, confused, and conflated the issues at several key times in the history of copyright. In addition, that presentation demonstrates that the arguments offered more and more by individuals today as author’s rights mirrors the arguments marshaled by the

\textsuperscript{19} See e.g., Daniel J. Solove, \textit{A Taxonomy of Privacy}, 154 U. PENNSYLVANIA LAW REVIEW 477 (2006) (noting the wide array of privacy arguments and understandings of what the term means to offer a framework from which one can being to parse privacy in many contexts).
first publishers. In essence the issues are about control more than any other interest. Part III examines the basis for authors’ trademark and trademark-like claims such as attribution, integrity, and publicity in a creation. That investigation shows that such claims run contrary to trademark doctrine and unnecessarily expand authorial rights. Part IV sets forth the literary, historical, and economic theories that explain the nature of creative systems. That understanding shows how advocates of author centered rights overstate their position and ignore the temporal issues that arise when trademark, quasi-intellectual property, and privacy interests are invoked. The section argues that these errors upset the balance intellectual property systems require. Part V offers that little supports granting legal status to quasi-intellectual property interests. Indeed, even if one believes such claims are necessary, once one appreciates the nature of creative systems at the very least a temporal restraint is necessary to maintain the balance intellectual property systems require. As such the Paper concludes that the theoretical arguments in favor of such a right at best point to the individual and support her interests while alive so such interests must terminate at the creator’s death. Death is a natural and theoretically supported dividing line between a creator’s interests and society’s interests in allowing others to use creations to further creative production in general.

I. Creators’ Changing Interests

20 This section, Creator’s Interests, is adapted from this Paper’s companion piece, Property, Persona, and Preservation, TEMPLE L. REV. (forthcoming). That paper explained control over property while alive. This paper explores how long such control should last after death if at all. As such this section presents the foundations for understanding the interests and foundations for life interests as that understanding is required to follow how death operates to shift away from control.
An intellectual property system where creators have no claims, in essence, one without property would make little sense. As Larry Lessig argues a well-functioning intellectual property system requires both property and contract. In simpler terms creators of course have interests in their creations. The question is what are the contours of the interests? As the Internet and technology-based creation expand, the interests claimed by creators and the theories offered to explain those interests may shift for the author can often publish her work directly and eliminate the traditional corporate publisher.\footnote{See supra note 2; see also YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (examining the way in which peer-to-peer production changes the economic dynamics of production).} As more people come to an author’s distribution point, direct sales of copyrighted material are possible. Furthermore in such a system not only the expression of the idea but the way in which that expression draws attention and builds reputation has power.\footnote{Id.} These interests and new ways of generating value are real. Whether the law can or should provide a way to address these interests is the question.

As such this section sets forth how this situation currently operates by examining the possible interests that one may assert when one creates. From there the section presents the theoretical underpinnings of such claims.\footnote{The theoretical foundations for intellectual property most pertinent to this Paper are labor-based, persona-based, and economic as they are the ones offered to explain claims regarding the extent to which a creator or her heirs should control a given work. More generally “U.S. IP laws are premised on four justifications”: instrumental utilitarianism, Lockeian “labor-desert theory”, personality theory, and custom-based theory. See Keith Aoki, Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development), 40 U.C. DAVIS L. REV. 717, 734 n. 47 (2007). In addition some have argued that the rationales offered in support of the author’s right to control her work go too far by overstating the nature of authorship and the motives behind an author choosing to create. See e.g., Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of “Authorship”, 1991 DUKE L. J. 455 (1991); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996) (detailing and criticizing the manifestation of the Romantic view of authorship). Indeed, one of this Paper’s goals is to explore and delineate the nature of such control.} After this presentation of the
practical and theoretical interests behind creators’ shifting claims, the Paper turns to the history of these perspectives to track their evolution and see whether they are justified.

A. Practical Economic Interests

The expression of one’s ideas has value as part of the copyright system. Under copyright one can prevent others from using or reproducing the expression. Often if one wants to use another’s expression, one must pay the creator. A traditional explanation for allowing this type of control is that without it, creators would lack incentives to create.²⁴ Underlying this view is the understanding that once the author creates the work, the marginal cost of copying it is essentially zero and without the ability to control such copying the author would be unable to generate income for her work and as such lack motivation to create.²⁵ Even in situations where incentives are not immediately apparent this rationale has force. For example, much of the user-generated content found on the Internet—blogs, YouTube and other videos, personal Web pages, MySpace pages, and so

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²⁴ Under copyright law authors own their creations and have the right to control them. The font of this right is Article I, section 8 of The Constitution which states that “Congress shall have the Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The Supreme Court has explained the Copyright Clause as a “limited grant … by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); See also Joshua A.T. Fairfield, Virtual Property, 85 B.U. L. REV. 1047, 1049 (2005); Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031, 1031 (2005); but see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11, 213-214 (2003) (expressly stating that incentive interests must be balanced against administrative and access costs); Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St. L.J. 517, 520 (1990) (“copyright protects works whose creation does not depend on the economic incentive of copyright.”)

²⁵ See e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, Inc. 471 U.S. 539, 547 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”)
—seems to be generated for reasons other than direct monetary gain. Yet as the Internet, digital creation, and digital distribution evolve, the entertainment industry has taken notice and begun to explore ways to harness this productivity by paying for the creation of content and then generating revenue by either charging for access or attaching advertising to the content. In short as new ways to generate capital from creation emerge, creators will likely seek compensation for their creations. At that point, the copyright system allows them to extract payment for works that are otherwise replicated at little to no cost.

B. Practical Personal Interests

In addition to the potential economic value one derives from creating, one may feel connected to one’s creations and even see it as part of one’s persona or as an extension of one’s being. The public’s focus on and interest in tangible items that have

26 See generally, Brett Frischmann and Mark Lemley, Spillovers, 107 COLUM. L. REV. 257, 279-281 (2007). See also Margaret Jane Radin, Property Evolving in Cyberspace, 15 J.L. & Com. 509, 515 (1996), (“Cultural norms can substitute for legal property rights as an incentive for production. In many situations, contrary to Benthamite reasoning, people produce without monetary benefit-internalization incentives. It could be that information will be abundantly produced in cyberspace even absent property rights. In the utopian vision, people create even if they cannot internalize a substantial portion of the social benefit to themselves.”).
28 See Kirsner (noting the growth of payment for inclusion of user generated content on social network Web sites and the payments from $13,000 to one performer, $35,000 to another and the growth in bookings and notice from agents for these previously unknown performers). One talent agency “has created an online unit devoted to scouting out up-and-coming creators of Internet content —particularly video—and finding work for them in Web-based advertising and entertainment, as well as in the older media.” David H. Halbfinger, Talent Agency Is Aiming To Find Web Stars, THE NEW YORK TIMES, October 25, 2006, at C1.
29 See Hughes, supra note 7, at 289-90.
30 See Zadie Smith, Fail Better, THE GUARDIAN, January 13, 2007, at 1-6 (“A writer's personality is his manner of being in the world: his writing style is the unavoidable trace of that manner. … [S]tyle is a personal necessity, [] the only possible expression of a particular human consciousness.”); accord JOSEPH...
a connection to a famous person presents another example of the idea that one is somehow connected to something outside oneself. Consider the memorabilia market where letters, a shirt, even sandals can have great economic value as items, or memorabilia. So although a letter may have value as an expression of ideas, the physical manifestation of that expression, the thing itself or artifact has value because of its connection to the act of authorship. For example, one Beatrix Potter letter sold for 8,200 pounds, an early notebook of John Lennon’s “thoughts, drawings, and poems” sold for $304,340 and Dr. Martin Luther King’s papers were obtained for $32 million to prevent the sale and secure the rights to the papers for Morehouse College, Dr. King’s alma mater.

A note from Bill Clinton to Monica Lewinsky or from George W. Bush to Karl Rove may have no substance to it, but as an artifact with a connection to a major figure, it

L. SAX, PLAYING DARTS WITH A REMBRANDT 21-22 (2001) (noting that under a moral rights view of art physical items are “a constituent part of the artist’s personality”).

31 See e.g. Lior Jacob Strahilevitz, The Right To Destroy, 114 YALE L.J. 781, 817, n. 144 (2005) (noting the value of Babe Ruth’s jersey as memorabilia). On the general growth of sports memorabilia industry and the importance of unique items connected to individual players see Michael Pastrick, Note: When a Day at the Ballpark Turns a “Can of Corn” into a Can of Worms: Popov v. Hayahsi, 51 BUFF. L. REV. 905, 912-914 (2003) (noting the value of “one of a kind items similar to the record setting home run ball”); cf. Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 HOU. L. REV. 903, 915-916 (2003) (noting and quoting the California Supreme Court’s argument in Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) that parody works “do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect.”). In a recent auction for Joe DiMaggio items, everything from his shower sandals to a letter from Marilyn Monroe to Joltin’ Joe were auctioned with an expected return of $4 million (the Monroe letter’s minimum bid was for $20,000). John McGrath, Where have DiMaggio’s shower sandals gone? GLOBE AND MAIL, R9, April 13, 2006.

32 See e.g., Greg Lastowka, The Trademark Function of Authorship, 85 B.U. L. REV. 1171 (2005) (arguing that authorship marks have value and function similar to trademarks such that consumers should be protected from misattribution of authorship).

33 Pounds 8,200 for Beatrix Potter letter MAIL ON SUNDAY, 12, March 19, 2006.

34 Lennon’s Noteworthy Book Sale AUSTRALIAN, World 1, April 21, 2006.

35 See Shalia Dewan, The Deal That Let Atlanta Retain Dr. King’s Papers, THE NEW YORK TIMES, June 27, 2006, at A11 (detailing the $32 million the city of Atlanta paid for Dr. King’s letters). One author has suggested that the papers could have been sold for a higher figure. See Sax, supra note 30 at 146-148 (detailing earlier actions by the King family to extract economic gains from Dr. King’s works noting that in 1999 the papers estimated value was between $30 and $50 million).
will have some extra economic value, because they are seen as extensions of the person to whom they were connected. Thus not only some creators but the public maintains the perspective that creations are manifestations of a part of the creator’s persona.

Another dimension of the personal interest is privacy. One may write something but not wish to release it to the public. Indeed, the value of the notebooks, letters, and so on of famous people stems in part from the rarity of the item: it has not been published and made available to the world. From the author’s view withholding such material may be by design, but two possible reasons can explain such plans. One reason may be that the letters were truly private communication and never intended for public consumption. Another reason may be that one wishes to publish the material but under one’s own terms and at a time of one’s choosing. These two interests are not the same but are often couched as issues of private versus public treatment of material. In simplest terms one can appreciate that the general use of what one thought of as a private communication could be offensive. If one saw the material as an extension of oneself, use in general could be seen as a violation, and if the use placed one’s words out of context or

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36 See e.g., Steven Semeraro, An Essay on Property Rights in Milestone Home Run Baseballs, 56 SMU L. REV. 2281, 2882 n.4, (2003) (noting Mark McGwire’s 70th home run ball sold for more than $3 million); Melanie Skehar, Comment: Who Really Owns the Zapruder Film After the JFK Act: The Sixteen Million Dollar Question, 34 SW. U. L. REV. 325, 340 (noting valuations of President John F. Kennedy assassin Lee Harvey Oswald’s memorabilia artifacts—“a wallet, letters, a diary, photographs, and a marriage license”—ranging from $70,000 to $90,000); cf. Serena Morones, Exclusive Autograph Deals: What Value to the Athlete and Their Fans?, 22 ENT. & SPORTS LAW 10 (2004) (noting $1 billion a year sports memorabilia industry and examining autograph and sports memorabilia market and finding that an unworn jersey signed by a player may lose half its value at time of resale).

37 See e.g., Randall T.E. Coyne, Toward a Modified Fair Use Defense In Right of Publicity Cases, 29 WM. & MARY L. REV. 781, 801 (1988) (“The success of the product is determined not by the strength or content of its message, but rather by the popularity of the person portrayed.”), Semeraro, supra note 36 at 2295 (arguing “By hitting the baseball, the batter creates a connection between the baseball and his reputation; without the connection the ball would not be nearly so valuable.”).

38 See e.g., Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), petition for reh’g denied, 818 F.2d 252, cert. denied, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987) (preventing biographer’s use of author’s private letters on grounds that such use was not fair use).
used the expression in ways of which one disapproved, such use may be seen as even more of a violation.

To be clear one need not agree with these perspectives. Indeed whether they are theoretically supported is yet to be seen. For now, the point is that they exist and have sway over creators and some parts of society.

Despite an understanding of the interests one can identify, the theoretical basis for those assertions is missing. Specifically, as Justin Hughes identified, labor-based and persona-based theory must now be addressed for as the later investigation of the history of these claimed interests shows, these two theories drive much of the policy and perspectives at issue when one addresses the contours of creation. In addition, those seeking to further their control over a creation draw on these underlying theories to justify their claims for control. Whether those appeals are grounded in the theories or pick only pieces of them to reach the desired result can only be determined with a view of the theories in place. As such the next two sections seek to present labor and persona theory as foundations from which one can understand and analyze the appeals for expanded author’s rights.

C. Labor-based Theoretical Interests

Lockean, labor-based arguments for intellectual property are a major way in which intellectual property rights are justified and permeate the way the law views

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39 See Hughes, supra note 7 and accompanying text.
Creation involves one’s labor. Insofar as one has labored to produce something, one owns it. Recent calls to treat intellectual property as real property and claims of alleged theft or piracy of intellectual property that equate intellectual property to real property indicate that the natural rights view may be at high mark. Nonetheless, as Wendy Gordon and Alfred Yen have argued natural rights theory has important limits. Indeed Adam Mossoff, one of the more ardent proponents of a natural rights approach to intellectual property, acknowledges as much. Possession is a

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40 See e.g., Yen, supra note 24, at 524-529,520-539 (tracing the Lockean view of natural law and labor-based copyright in England and the United States); accord Aoki, supra note 23 (noting Locke’s labor-based theory as a key way to justify intellectual property); Wendy Gordon, Intellectual Property in THE OXFORD HANDBOOK OF LEGAL STUDIES 624 (2003) (“On the philosophical side, theories developed from a Lockean base have been the most influential in IP.”). Although there is a debate regarding whether intellectual property should be seen a real property, see, e.g., Gordon at 619 (investigating the question “Is it Property?”); Rochelle Cooper Dreyfuss, Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 NOTRE DAME L. REV. 397, 406-410 (1990) (tracing the shift to a pure property approach to trademark rights and noting the way in which this shift limits the potential for expressive use of trademarks); Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031, 1032 (2005) (arguing that use of “[t]he rhetoric of real property, with its condemnation of ‘free riding’ by those who imitate or compete with intellectual property owners,” has resulted in “a legal regime for intellectual property. . . in which courts seek out and punish virtually any use of an intellectual property right by another”), Hughes has noted that the products of intellectual labor especially writings have been viewed as property for hundreds of years. See Justin Hughes, Copyright and Incomplete Historiographies: Of Privacy, Propertization, and Thomas Jefferson, 45 ARIZ. L. REV. 371 (2003) [hereinafter Mossoff, What Is Property?]; cf. Margaret Jane Radin, A Comment on Information Propertization and its Legal Milieu, 54 CLEV. ST. L. REV. 23, 28 (2006) (noting “Many proponents of information propertization have pushed an analogy with real property.”). For an example of the popular position that real property is the best way to understand intellectual property see Mark Helprin, A Great Idea Lives Forever. Shouldn’t Its Copyright? NY TIMES, Section 4, May 20, 2007.

41 See e.g., Adam Mossoff, Is Copyright Property?, 42 SAN DIEGO L. REV. 29 (2005) [hereinafter Mossoff, Is Copyright Property?], and Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 ARIZ. L. REV. 371 (2003) [hereinafter Mossoff, What Is Property?]; see Wendy Gordon, A Property Right in Self-Expression: Equality and Individualism In the Natural Law of Intellectual Property 102 YALE L.J. 1533, 1535 (1993) (“When the limitations in natural law’s premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests”); Yen, supra, note 24, at 546-557 (examining natural law and modern copyright to show how natural law on its own terms has inherent limits regarding the way one should treat copyright) and at 557 (“The point is that the property rights authors deserve under natural law are neither unlimited nor perpetual. Many copyright claims must be denied because they imply the privatization of public domain material. More importantly, even if property rights are recognized, it is entirely appropriate to restrict those rights to a limited number of years, thereby eventually dedicating the entire work to the public domain.”).

42 See Mossoff, What Is Property? supra, note 41, at 441 (arguing in general for an integrated, natural rights based view of property and stating “It is important, though, for integrated theorists not to overstate their claims. The integrated theory does much for the property scholar, but it does not do everything. An
key part of the natural rights approach to property. The way one possesses is through labor; and it is labor under Locke’s view that determines one’s property interest. But it is not just labor that justifies property. As Yen has explained, “Since people owned their bodies, Locke reasoned that they also owned the labor of their bodies and, by extension, the fruits of that labor. Thus, a person who mixed her labor with an unowned object became morally entitled to property in that object.” Mossoff argues further that the key in natural law is that possessory rights, the right to acquire, use, and dispose of property, flow from what is “own’s own” which begins with one’s “life, limbs, and liberty.”

Thus there is an inherent limit for property under the natural law view: life. For the focus is on life. To have life and exercise liberty one must be able to support that life which in turn leads to being able to exercise liberty and to have property to support one’s life which results in a familiar triumvirate: life, liberty, and property. As such insofar as intellectual property has become a key if not dominant part of our economy one can

integrated theorist, for example, would be hard pressed to deduce from the possessory rights the optimal term limit for a copyright or patent. The integrated theorist maintains that there should be legal protection as such for intellectual property, but important details of this protection are not deducible from the integrated theory.”)

44 See e.g., Yen, supra note 24, at 522 (noting that possession plays a key role in natural law understandings of property and that this view stems from Roman law); accord, Mossoff, What Is Property?, supra note 41, at 395 (“[T]he substance of the concept of property is the possessory rights: the right to acquire, use and dispose of one’s possessions. … Exclusion therefore represents only a formal claim between people once civil and political society is created, and it has meaning only by reference to the more fundamental possessory rights that logically predate it.”).
45 See Yen, supra note 24, at 523.
46 Id.
48 Id. at 383-384.
49 Id. at 381, 384; see also Gordon, supra note 42, at 1559-1560 (discussing the relationship between liberty, property, and the commons and noting Locke’s view that people have “a right to possess and use as much as was needed to ‘provide for their Subsistence,’”) (citation omitted).
appreciate that one’s creations are treated as a type of property that flows from one’s labor and supports one life.\textsuperscript{50}

D. Persona-based Theoretical Interests

Personality or persona arguments are a key other way to justify intellectual property rights.\textsuperscript{51} In brief, this view holds that the creation somehow is an expression of the creator’s will and personhood.\textsuperscript{52} Thus insofar as one thinks of one’s creations as extensions of oneself or that one invests part of one’s being into one’s creation, one adheres to what Margaret Radin calls the intuitive view of personhood: “Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.”\textsuperscript{53} At this stage one can appreciate that if part of one’s being was constituted in a thing, one should have a claim over it and another’s use of it could pose problems.\textsuperscript{54}

\textsuperscript{50} See Yen, supra note 24, at 557 (“Authors certainly create material in which they deserve property rights.”).

\textsuperscript{51} See Hughes, supra note 7, at 289-90; see also DRAHOS, supra note 8. The theories trace their roots to Immanuel Kant and Georg Hegel. See Roberta Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 NOTRE DAME L. REV. 1945, 1976-1978 (2006); accord William Fisher, Theories of Intellectual Property, in New Essays in the Legal and Political Theory of Property (Stephen Munzer, ed. 2001) at 171, 174. There is, however, some divergence as to how those theorists’ views drive the analysis and whether they are compatible with each other. See Fisher at 191 (noting Kant and Hegel’s differing views of an author’s ability to alienate rights regarding copying); DRAHOS at 79-82 (explicating the difference and clash between Kantian and Hegelian based views of personality and its relation to property).

\textsuperscript{52} William Fisher, Theories of Intellectual Property, in New Essays in the Legal and Political Theory of Property (Stephen Munzer, ed. 2001) at 171, 174. Margaret Radin’s Property in Personhood is one of the most well-known articulations of this view. Radin’s project “attempts to clarify a [] strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of ‘things.’ This ‘personhood perspective’ corresponds to, or is the dominant premise of, the so-called personality theory of property.” Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982).

\textsuperscript{53} Id. at 959. Radin uses the “a wedding ring, a portrait, an heirloom, or a house” as examples of such things. Id.

\textsuperscript{54} Accord
Yet a key to this approach is that it “focuses on the person with whom it ends up—an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing. The same claim can change from fungible to personal depending on who holds it.”55 Accordingly, one may write a short story, and it may well be personal property in Radin’s sense of the term; or it may be a commissioned story, and one may write it with little personal connection to it. In some cases the writing may never be published, be left to someone, and person may find her attachment to the property to be personal. Indeed given the subjective nature of this view, both the creator and the owner of the creation may be bound up with the creation.56

In addition, this subjectivity in a way extends to those who look to personality theory to justify intellectual property rights, for as William Fisher has observed there is a divergence as to how the theory operates and to what parts of intellectual property it should apply.57 As such the theory may be even more malleable than labor-based theory as a way to justify authorial control. For example, one way to understand property claims of this nature is as a way to protect identity.58 As Madhavi Sunder has argued those who were previously the objects of intellectual property because of power relations or because their cultural goods were categorized as public domain goods, now can assert their

55 Id. at 987-988 (using a wedding ring to show that the maker may sell it as a fungible item despite her connection to it from labor and that sometimes a thing can move from fungible to personal as one becomes attached to the thing.).
56 For one account of how this distinction poses problems see generally George H. Taylor and Michael J. Madison, Metaphor, Objects, and Commodities, 54 Clev. St. L. Rev. 141 (2006).
57 See id. at 189-190. Fisher explains “Private property rights, argue contemporary personality theorists, should be recognized when and only when they would promote human flourishing by protecting or fostering fundamental human needs or interests.” Id. The problem rests in determining what are the needs and interests, and as Jeremy Waldron has shown, at least ten possibilities present themselves. Id.
58 See Sunder, supra note 3, at 274-275 (noting identity and intellectual property law interface and cautioning against identity arguments being used to advance non-identity politics interests).
standing as the subject of intellectual property law. This shift means they can “govern[]
the exercise and distribution of cultural power and wealth”\(^{59}\) by asserting intellectual
property rights over cultural goods and thus exercising control over how, if at all, such
goods may be used. Roberta Kwall expresses another view of personality-based
intellectual property and has argued that U.S. copyright law should recognize moral
rights as they protect the “human spirit, an interest that transcends the artist’s concern for
property or even reputation.”\(^{60}\) Nonetheless she offers “Moral rights encompass
essentially three major components: the right of integrity, the right of attribution, and the
right of disclosure.”\(^{61}\)

Although these interests seem disparate, recall that Joyce’s estate used the
vocabulary of identity and integrity to justify its attempts to prevent use and
interpretation of the literary material relating to James Joyce. Sunder notes that such uses
of identity arguments are suspect from her perspective but not surprising.\(^{62}\) Her
observation comports with the problem this Paper addresses: intuitively appealing
arguments that may have some theoretical basis can easily be marshaled to advance other
goals and subvert not only the positions the original arguments advanced but the balance
intellectual property requires in general. By examining what animates these views, one
may discover the boundaries of the claims when the arguments stray from their
foundations.

\(^{59}\) Id.
\(^{60}\) Kwall, supra note 2, at 152.
\(^{61}\) Id.
\(^{62}\) See Sunder, supra note 3, at 275 (“[W]e must be aware that arguments that empower the poor will be co-
opted by the powerful”).
Put differently, Radin points out that there is “personhood interest [] in fungible property” but that interest is on a continuum. The closer to personal property the thing is, the stronger interest or entitlement one has in preserving that property. Thus some items may be so close to personhood that no compensation would suffice and other items may so fungible that “the justification for protecting them as specially related to persons disappears.” Another important aspect of the continuum understanding is that it denies that there is a personhood interest when attachments are fetishistic which here means one asserts an irrational attachment that “is inconsistent with personhood or healthy self-constitution.” So the idea of healthy self-constitution arises within the issue of personal property, but it points to Radin’s shift from property to a broader notion of the importance and power of personhood.

For Radin asserts that “some personhood interests not embodied in property will take precedence over claims to fungible property.” Here the theory moves beyond personal property to other interests. As detailed elsewhere, “when Radin turns to the question of using someone else’s property (e.g., a mall) for speech interests, she argues

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63 See Radin, supra, note 52, at 1008, see also id. at 986-989 (detailing the contours of the personal to fungible property continuum and explaining “Since the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone’s being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum.”); Madhavi Sunder, Property in Personhood, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams, eds. 2005) at 2 (“Far from offering a singleminded assault on commodification, Radin is a ‘philosophical pragmatist’ who acknowledges that economic and cultural inequalities mandate that sometimes even very private things may be bought and sold, but only under carefully regulated circumstances.”).

64 See Radin, supra, note 52, at 987 (“Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”) and at 1005-1006 (explaining that some items are so close to personhood that no compensation would suffice and others

65 See id. at 1005-1006.

66 See id. at 968-969. Insofar as this Paper develops a sense of how to parse what is fetish and what is not in the context of intellectual property it may respond to Fisher’s call to “adequately deal[] with” “the problem of fetishism.” Fisher, supra note 52, at 192.

67 Id. at 1008.
that the speech interests trump based on personhood interests. When two people need use of a space such as a mall, one determines who needs the property more in light of their respective personhood claims.

So if a private owner lacks a high level of personal property interest in the mall (such a claim might approach the fetish end of the continuum), her interests will give way to someone who has the personhood interest in the mall. It is not the personhood in property interest outweighing the mall owner interest. Rather, it is the necessity of the individual or public accessing the non or less personal property so they can have “opportunities to develop and express personhood” that drives this result. “The emphasis here is on personhood not property.” Radin later explained and developed this idea as human flourishing. Nonetheless one can discern its seeds in ideas such as the possible need of “private enclaves … for personhood to develop and flourish” and when Radin argues that someone’s claim over another’s fungible property “is strongest where without the claimed personhood interest, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.”

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68 See Desai, supra note 2, (citing Radin, supra note 52, at 1009).
69 Radin, supra, note 52, Id. at 1010.
70 Desai, supra note 2.
71 See generally Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1903-1915 (1987) (explaining the link between personhood and flourishing and arguing “that market-inalienability is grounded in noncommodification of things important to personhood.”); accord Radin supra note 52; Fisher, supra note 52, at 171 (summarizing that some see this view as supporting the creation of “social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing.”). Professor Julie Cohen’s discussion of Radin’s work notes this distinction but places human flourishing as somewhat separate from Radin’s concept of personhood. Julie Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1383 (2000).
72 Radin, supra note 52, at 1001.
73 Id. at 1015; accord Sunder, supra note 63 at 8 (“Assertions of power over one’s own identity necessarily lead to assertions of property ownership. … Property enables us to have control over our external surroundings. Seen in this light, it is not enough to see all claims for more property simply as intrusions
Thus, although the personhood approach involves property, the idea that one may have a claim over someone else’s property points to a limit on property in this theory. One cannot claim property, or one can claim it but that claim will lose, when another requires that property for personhood or human flourishing. The contours of human flourishing are still to be determined. At this point, for the purposes of this paper, it is enough to know that some notion of what constitutes human flourishing, or more precisely that a system may require the potential for such development, is sufficient. The details of what a system that fosters such potential looks like come later.

E. The Attention Economy and Collapsing Interests

Thus far it appears that the interests are clear. One creates an intangible good such as a writing. One may use copyright and extract value from that expression. In addition, one may have a personal connection to the creation. The creation is then seen as an extension of the creator or at least her persona. Yet this picture misses one more aspect of creators’ interests. A discussion of attention economics and its relation to Internet creation and distribution explains this dimension.

Online creation and distribution has expanded. One can now write and distribute the work directly to the consumer. One can also compose a song and sell that directly to the consumer. Personal Web pages, blogs, wikis, and so on filled with the full range of creations continue to grow in number. Indeed the ability to create and distribute online

into the public domain and violations of free speech. Instead, we may begin to see them as assertions of personhood.”}
seems limitless. But the motivation for such creation is not so clear. Much of this creation is not the pure shift to direct sales of a creation. Instead the creations are posted and shared for free or the content generates revenue based on advertising. Thus the content is vital; but the value it offers does not stem from the ability to extract payment to obtain a copy of the content. Instead it is the ability to focus attention that generates the value; this is an attention economy. As rhetorician and theorist Richard Lanham has posited, the attention economy leads to intellectual property because the key assets in the attention economy are part of the cultural conversation, and intellectual property is the way our society manages such assets.

Insofar as economics addresses how society manages scarce resources, the term information economy implies that information is scarce. But the amount of information available to us is not scarce; rather we face an over abundance of information that may

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74 See e.g., Stefanie Olsen, A Social Site Where Webcams Rule, CNET NEWS.COM, February 23, 2007, http://news.com.com/A+social+site+where+Webcams+rule/2100-1026_3-6161505.html (noting growth of new social network site with 400,000 registered users that offers consistent webcam and instant chat services via “Stickam, a so-called ‘widget’ that people can plug into other social networks to enable live video.”).

75 See e.g., Chuck Salter, GiRL POWER, FAST COMPANY, 104, September 1, 2007, (noting how a seventeen year-old girl started a Web site with free content for teens to use on MySpace and earns close to $1 million a year based on advertising and gaining attention). For broad examination of the digital economy and non-monetary incentives in it see Desai, supra note 2; Lastowka, supra note 2.

76 RICHARD LANHAM, THE ECONOMICS OF ATTENTION 259 (2006). Although Lanham develops the idea of the Attention Economy, the question of the ownership of information and related questions regarding attention have received analysis by others. See e.g., Julie Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1400 (discussing the idea of an attention economy and claims that such an economy requires access to personal information to target consumers); Wendy Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 VA. L. REV. 149, 150-157 (1992) (noting the shift from narrow intellectual property rights to broader rights in intangibles and connecting the shift to the change from a manufacturing based economy to service based economy in which intangibles play a larger role in wealth); Radin, supra note 82, at 517 (“One ‘thing’ that comes to mind is our attention. Information overload means that our attention is scarce. Communicators - advertisers and ideologues - desire it. What are the implications for intellectual property of information overload? Could we make our attention property? Could we meter our attention and make information providers pay us to listen to them?”). The idea is not lost on those who command attention. See e.g., Salter, supra note 75 (documenting Whateverlife’s popularity and the creator, Ashley Qualls perspective: “I have this audience of so many people, I can say anything I want to,”… ‘I can say, “Check out this movie or this artist.” It’s, like, a rush. I never thought I'd be an influencer.’”).

77 LANHAM at 6.
result in information overload. But according to Lanham, capital in such an economy is “the literary and artistic imagination, … [the capacity to] spin new patterns for how we live and to think about how we live. Capital in this view lies in the cultural conversation.”

In short, the information economy is concerned with “a public good that is effortlessly duplicated and distributed;” the information economy concerns nonrivalrous goods which necessarily leads to intellectual property not real property. As Margaret Radin puts it “Cultural norms can substitute for legal property rights as incentives for production.” Thus the cultural assets or norms that make up the attention economy become part of the property system. Given that these items are intangible, they are part of the intellectual property system. Intellectual property law thus can be understood as a “full-fledged legal regime governing the exercise and distribution of cultural power and wealth.” So those who guide attention or help filter and categorize information both on and offline engage with the attention economy. These ideas may seem foreign to intellectual property, but they should not. For example one commentator has described the way in which intellectual property rights further “cultural and social power” and noted that anthropologists and international law recognize intellectual property is “part of

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78 Id. at 7 (noting that each year’s information output “would require roughly 1.5 billion gigabytes of storage” or “the equivalent of 250 megabytes per person” in the world); cf. Frank Pasquale, The Law and Economics of Information Overload Externalities, 60 VAND. L. REV. 135, 140 (2007) (arguing that “Copyright law should adjust the rights of content creators in order to compensate for the ways they reduce the usefulness of the information environment as a whole. Every new work created contributes to the store of expression, but also makes it more difficult to find whatever work one wants.”).
79 LANHAN at 7.
80 Id.
81 See LANHAM at 12, 259 (noting the difference between use of a car as opposed to an idea or its expression).
82 Margaret Jane Radin, Property Evolving in Cyberspace, 15 J.L. & Com. 509, 517 (1996); see also id. (noting the possibility of “monetary metering of our attention.”).
83 See Sunder, supra note 3, at 275.
84 See id. at 13-14. Visual artists, Web designers, car designers, even universities as they develop curricula are examples of those who generate value by capturing attention. Id at 13-17.
the current international language of commerce and human rights” such that people have the right “to be recognized for their cultural creations and to materially benefit from these creations.”

In addition, insofar as attention economists help sort and filter information, they reduce search costs which one commentator has framed as a copyright issue. So here another distinct connection to intellectual property can be seen. For on one hand literary and artistic capital at issue would come under copyright, but on the other hand this capital also points to trademark and brand theory. As explained elsewhere companies engage in brand building so that their brand is “dominant to the point of ubiquity” “and ideally conveys (hopefully positive) information as well.” This understanding relates to the idea that a trademark can help reduce search costs because the consumer sees the mark and relies on information that the brand symbolizes. Thus one could sum up this part of brand and trademark theory as one builds a brand so that consumers search less and information is better communicated; in Lanham’s words, brand builders capture attention.

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85 See e.g., Sunder, supra note 3, at 274 (arguing that intellectual property rights further “cultural and social power” and noting that anthropologists and international law recognize intellectual property is “part of the current international language of commerce and human rights” such that people have the right “to be recognized for their cultural creations and to materially benefit from these creations.”).

86 See e.g., Pasquale, supra note 78, at 140 (explaining the connection between copyright law and “search cost” theory of information economics). As Carl Shapiro and Hal R. Varian have noted the idea of information overload traces some of its history to Nobel Prize Laureate, Herbert A. Simon who stated that “a wealth of information creates a poverty of attention.” CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 6 (1999). The need to sort such information is a search cost.


88 Id.

89 LANHAM, supra note 76, at 18 (“Firms are beginning to outsource the actual manufacture of their products as tangential to their real essence, which brand development and recognition”); see also Laura Heyman, The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law, 80 NOTRE DAME L. REV. 1377, 1377 (2005) (arguing that the copyright creation of material aspect of authorship should be considered separate from the authornym or trademark function of assigning a name of an author to a work and asserting that such a choice of name, either the author’s true or pseudonymous, “are essentially
As such, one can see two ways that the attention economy explains the creator’s interest in her works. First, the substance of the work itself is vital to the attention economy. For in the attention economy capital consists of “the literary and artistic imagination, … [the capacity to] spin new patterns for how we live and to think about how we live. Capital in this view lies in the “cultural conversation.” This capital in the cultural conversation can be understood more concretely as that which falls under copyright—writings, videos, etc. In addition, attention economists have capital as those who build a brand, reduce search costs, and capture one’s attention by those efforts.

Here then is a subtle problem within this issue. Just as one focuses on the copyright side of the issue for the material itself, one can also express a trademark or personal brand interest in one’s creations. For once one builds a name based on one’s creations, one also has a personal connection to that material and brand value beyond the creation itself. Furthermore, as one commands attention through one’s creations, one could argue that attribution is required so that one’s brand is credited and enhanced. Integrity arguments also follow from this logic. Under such a view one asserts that the literary capital is connected to and an extension of the creator with brand implications as well so that if the work is altered the identity and the person are harmed.

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90 Id.
92 See e.g. Heyman, supra note 89, at 1379.
93 See id. at 4 (“Successful artists can be thought of as brand managers, actively engaged in developing, nurturing, and promoting themselves as recognizable “products” in the competitive cultural sphere.”).
94 This view seems to fit with Kwall’s presentation of moral rights. See Kwall, supra note 2, at 152. It is important to note that Kwall is consistent in her theory. Kwall ties the interests to the creator; that is she
F. Summary and Initial Critique of the Interests

In an attention or reputation economy one intuitively has interests in one’s creations. The creation itself may generate capital and as the creation builds one’s reputation, that reputation has value. One may perceive the justification for protecting these interests as a function of labor or of the will one put into the creation or both. Nonetheless probing the theoretical foundations for such views demonstrates that they have limits. Both labor and persona-based theories for intellectual property offer that life is a terminus for a creator’s interests. Labor relates to the way one needs to work to sustain oneself. Persona is tied to the creator herself and those interests would extinguish when she dies. Furthermore, over-attachment to the idea that a work is inviolate and has one meaning resembles an unhealthy fetish rather than a personhood claim. Yet, current moves to expand the trademark aspects of authorship and quasi-intellectual property claims such as attribution or integrity lack or ignore these limits. In addition, the temporal balance is lost in these shifts.

In contrast to this approach, intellectual property should be understood as a system that fosters the potential for creation and productivity. The key to such a system is the balance between inputs and outputs. As one has better inputs, one generates more outputs, which feeds the next cycle of creation. The longer one must wait to use an input including the longer one must incurs costs just to determine whether an input can be used, the less robust the system is. In short, increasing the availability of unfettered inputs keeps them as personal to the creator. As such she limits the rights to the life of the author. See Kwall, supra note 51, at 2003.

See supra note 66 and accompanying text.
increases the potential for overall creation. As such although one may sympathize with and even agree that reputation and attribution interests have value, one must determine what that value is and whether the claimed value is really vindicating a different interest such as the ability to extend control beyond what a well-functioning intellectual property system should allow.

In that sense the new claims for control are not so new. The growth of the Internet allows almost anyone to be a publisher. The course of copyright law shows that publishers seek to expand and extend their controls. To do so, publishers have deployed varying arguments. Some take on labor views and arguably aggrandize the author. In some cases an author’s personal interests have been raised, because authors are simply more sympathetic than publishers. And as authors’ power has grown, they have made similar arguments to vindicate their positions. Thus the next section explores the history of copyright battles and the underlying claims for more control. By taking close readings of the texts and analyzing the arguments, one can see the interests advanced and how the arguments operate. With that understanding in place, one can better see how the current arguments for trademark, trademarkstyled, and privacy interests track and further authorial control to the detriment of the intellectual property system.

II. The Pattern Begins: Copyright Arguments for Perpetual Control

This section sets forth the arguments in copyright history that foreshadow current claims regarding the need for trademark or trademark-styled treatment of authorship such as the call for increased attribution rights. The natural right and persona characterizations
demonstrate what is at stake today and show that at bottom the positions that drove early debates over copyright and control are not only present today but hide in non-copyright claims. In essence the question of control arises in each context. The question becomes what, if anything, grounds a claim for control and what limits are on such control.

A. England’s Early Copyright Battles

The tale of English copyright history may be familiar, but must be examined here as it sets the stage for understanding the forces and arguments at work in both copyright and author-centered trademark arguments asserted today. In brief, the Crown of England used publishers as a vehicle for censorship by granting them a monopoly over printing and selling books and pamphlets. As views changed in England so did laws protecting the booksellers. When the last statute protecting the monopoly lapsed, the booksellers moved to try and protect their position. The arguments raised may sound familiar: “if their Property should not be provided for, ... [the booksellers' livelihood] will be utterly ruined.” When that argument failed, the booksellers argued that “Without some sort of protection to encourage authors, the public interest would be harmed by the

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96 For example, the literature questioning the rationales offered in support of an author’s right to control her work and finding that such positions overstate the nature of authorship draws on copyright history to show the origins of such arguments. See e.g., Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of “Authorship”, 1991 DUKE L. J. 455, 468-471 (1991) (examining authorship in early copyright law); Mark Rose, The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship, 23 Representations 51 (1988) (tracing the debate surrounding early English copyright cases and the underlying theoretical perspectives behind them); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996) (detailing and criticizing the manifestation of the Romantic view of authorship). Indeed, this Paper may be on a similar path as it seeks to show that these arguments appear in trademark and trademark-related claims regarding authorship.

97 See Yen, supra note 24, at 525; see also LESSIG, supra note 5, at 85-88 (describing the early English publishing statutes, the nature of the positive versus the common law bases for copyright, and the monopoly problem copyright posed).

98 See Yen, supra note 24, at 525; accord LESSIG, supra note 5, at 86.

99 See Yen, supra note 24, at 525 (citing Patterson, Private Copyright and Public Communication: Free Speech Endangered, 28 VAND. L. REV. 1161, 1172 (1975); 11 H.C. JOUR. 288).
decreased flow of works.” In short these claims are an early instance of a group with the ability to limit use of intellectual property trying to justify that power and to use the law to maintain that ability.

The booksellers had partial success: the Statute of Anne was passed which gave the authors a maximum of twenty-eight years of copyright protection and the ability to assign that right. As Alfred Yen notes “The booksellers knew that their position in the market was such that authors would, as a practical matter, be forced to sell their manuscripts to the Stationers’ Company if they wanted to get their work published at all.” Yet given the limited terms, the booksellers soon found that they needed to try and extend their control again but this time the legislature refused to accommodate them. As such they turned to the courts and argued for common law copyright based on Lockean notions of labor and property vesting copyright with the author as the laborer. Larry Lessig explains that the distinction made was between positive law as manifested in the Statute of Anne and the common law under which “it was already wrong to take another person’s creative ‘property’ and to use it without his permission.” In other words, the positive law was just a supplement to the common law and even if the Statute’s protection expired, the common law’s protections did not.

100 See Yen supra note 24, at 526 (citing L. Patterson, Copyright in Historical Perspective 142 (1968)).
101 See Yen, supra note 24, at 526; accord Lessig, supra note 5, at 86-87.
102 See Yen, supra note 24, at 526 (citing Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 Wayne L. Rev. 1119, 1139 n.54 (1983)). As Benjamin Kaplan details whether authors were actually the focus of the policy is dubious and it is more likely “that publishers saw the tactical advantage of putting forward authors’ interests together with their own, and this tactic produced some effect on the tone of the statute.” Benjamin Kaplan, An Unhurried View of Copyright, Republished (2005).
103 See Yen, supra note 24, at 526; accord Lessig, supra note 5, at 89-90.
104 See Yen, supra note 24, at 526; accord Lessig, supra note 5, at 89-90.
105 Lessig, supra note 5, at 90.
106 Id.
The first case, *Millar v. Taylor*, 107 involved the publishing of James Thomson’s poem “The Seasons.” The first publisher, Millar, had obtained the statutory copyright; it expired; the defendant published the poem; and Millar sued. 108 The key passage reveals the natural right view of copyright:

> [B]ecause it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit, he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide, not to foist in additions: with the other reasonings of the same effect. 109

That view carried the day but was overruled five years later. 110 Nonetheless as one commentator has explained despite the publishers advancing the interest in the name of authors, “*Millar* marked the great transition in legal thought to analyzing copyright as a right of the author.” 111 As such when *Millar* links what is “just” for an author to “pecuniary profits of his own ingenuity and labour” and what is “fit” to an author’s control over “time” and “manner of publication” as well as “accuracy and correctness of the impression,” one sees an early expression of author-centered interests that will reappear whenever an author (or her assigns) seeks to assert rights and control and regardless of whether copyright, trademark, or trademark-related claims are offered as the source of such claims.

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108 *See* Abrams, *supra* note 102, at 1153.
109 98 Eng. Rep. 201, 252 (1769) (opinion of Mansfield, J.); accord Yen, *supra* note 24, at 527 (citing and quoting same); Abrams, *supra* note 102, at 1153 (citing and quoting same); Rose, *supra* note __, at 65 (citing and quoting same).
110 Yen, *supra* note 24, at 528.
111 Abrams, *supra* note 102, at 1153; accord Yen, *supra* note 24, at 528 (“[T]he decision of Millar v. Taylor is important because it established a natural law theory of copyright alongside the economic approach taken by the Statute of Anne. Copyright now existed not only by reason of economic necessity, but also by reason of the natural justice inherent in vindicating the author's labor through the natural law of possession.”).
In *Donaldson v. Beckett*, the same poem was at issue. The copyright had been sold by Millar’s estate to new publishers who again faced an unauthorized publication and again sought an injunction. This time, however, the defendant appealed the case to the House of Lords, and the outcome was different with the House overruling *Millar* and rejecting the common law copyright claim. Thus it would appear that natural law would be purged from copyright. Yet as Yen points out that was not the case for natural law still appears in U.S. copyright understandings. It may be that this persistence is due in part because many have looked to the judicial advisory opinions to the House of Lords which seem to indicate that common law copyright existed but was “preempted by the Statute of Anne;” despite the controlling opinion, the House of Lords’ opinion, explicitly rejected the natural law-based, common law copyright notion altogether.

Nonetheless as Howard Abrams argues, the key issue may be understood as the philosophical one of “the rights of authors or the rights of the public” with the precedent playing less of a role. Lessig’s description of the history comports with this view in that Lessig claims that prior to *Donaldson* there was “no clear idea of a public domain in

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113 Abrams, *supra* note 102, at 1156.
114 Id.
115 Yen, *supra* note 24, at 528 (“Donaldson’s reversal of Millar can be read as the elimination of natural law from copyright theory.”).
116 Id. at 528-529.
117 Abrams, *supra* note 102, at 1156, 1156-1171, and at 1126-1228 (detailing the view of preemption, the nature of the House of Lords opinion and the judicial advisory opinions, and various U.S. legal opinions, including those of Judge Learned Hand, that rely on the advisory judicial opinion rather the House of Lords’ opinion in part because the House of Lords opinion was not fully reported and positing that U.S. views of precedent would look to the judicial opinions but might not appreciate their non-binding, advisory nature); *see also* Yen, *supra* note 24, at 530 (noting the natural law basis for common law copyright claims in the United States).
118 Abrams, *supra* note 102, at 1171.
England.”

He notes that there was celebration in the streets of Scotland where the defendant publishers tended to reside and that in London where the previously entrenched publishers resided, the reaction was that property had been taken and they were ruined. Another way to understand the shift is that there was a fear of an open market between Scotland and England, a fear of competition, and a move “to export copyright control to a region of Great Britain where the Stationers’ writ did not run.”

So prior to U.S. copyright debates, one can discern the pattern: rights and control over intangible goods exist at point A. Once those rights and control are threatened by any number of sources—changes in government, changes in statutes, changes in markets, and so on—a number of arguments are offered to extend that power. One argument is fairness—an industry and those in it will be “ruined.” Another is that without protection the incentives to create will be gone and creation will cease. Yet another is that the work belongs in a natural rights way to the creator because such a result is just given one’s labor in creation. Whether these arguments or others have a solid foundation remains to be seen. For now the point is that the pattern of one group asserting that its control over intangible goods should persist and perhaps expand is not new. In addition, as Yen notes it appears that at least both an economic view and a natural rights view of copyright persisted in U.S. copyright law. As this Paper argues not only those views but persona and related privacy ones have entered the fray as well. The next section looks at common law copyright in the U.S. to understand the way these arguments have evolved and to set

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119 LESSIG, supra note 5, at 93.
120 Id.
122 Yen, supra note 24, at 528 (“Instead of reading Donaldson as the end of natural law in copyright, early American thinkers justified copyright under both natural law and economic principles.”).
the stage for the most recent manifestation of the problem as seen in right of publicity, attribution, and privacy arguments that favor the author over the public.

**B. The United States – Common Law Copyright and Other Errors**

The touchstone case regarding whether copyright flows from the common law or statute under U.S. law is *Wheaton v. Peters.*\(^{123}\) That case held there was no common law copyright in the United States, and copyright was instead “a creature of statute.”\(^{124}\) To be clear, common law copyright, here is not the common law copyright that protected unpublished works; that publication right persisted.\(^{125}\) The distinction lies between the natural law view of common law copyright which was at stake in *Donaldson v. Beckett* and which would have recognized a perpetual right to authors and the right of first publication.\(^{126}\) It is that distinction which concerned the *Wheaton* court:

That an author at common law has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by obtaining a copy endeavours to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.\(^{127}\)

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\(^{123}\) 33 U.S. (8 Pet.) 591 (1834).

\(^{124}\) Abrams, *supra* note 102, at 1185; *see also* id. at 1178 (describing the case as “establish[ing] that copyright in the United States was strictly a statutory creation, without foundation in common law.”); Yen, *supra* note 24, at 529-531 (“common law copyright did not exist in the United States, and Wheaton could claim relief only under the federal copyright statute”; “Wheaton's rejection of common law copyright meant that the federal copyright statute became the only source of copyright protection for a published work.”).

\(^{125}\) *See* Abrams, *supra* note 102, at 1129-1130 (explaining the difference between common law copyright as an overall exclusive right of publication and the alternate meaning of the phrase as protecting a right of first publication).

\(^{126}\) Yen, *supra* note 24, at 530 (“Wheaton explicitly disavowed the existence of common law copyright, which was based in the natural law.”); accord Abrams, *supra* note 125.

\(^{127}\) 33 U.S. (8 Pet.) 591 (1834).
Thus just as 50 years before a work no longer had its statutory protection. Just as before, a highest court faced a claim for perpetual copyright as opposed to the statutory right. And, just as before, the highest court rejected the perpetual copyright claim.

With such a result one might think that the issue is over. Perpetual copyright is dead, and the natural law arguments animating such a position purged from copyright. That, however, was and is not the case.\textsuperscript{128} As Abrams explains the Wheaton court was “tentative” in its assertion that common law copyright did not exist in the United States to the point of suggesting that it did exist in England.\textsuperscript{129} In addition, the dissent took a strong natural law position regarding the basis for copyright asserting “The great principle on which the author’s rights rests, is, that, it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as the faculties of the body.”\textsuperscript{130}

Again one sees that labor is a key part of the analysis and justification. That view foreshadows later approaches to copyright. That is why as Abrams argues, even if the Court misread the English cases, “[I]t is the fundamental philosophic perception of the nature of copyright and its underlying purpose that will ultimately determine the results of these controversies.”\textsuperscript{131} Furthermore, as Yen details natural law arguments can be found throughout copyright jurisprudence.\textsuperscript{132} And as this Paper argues given that intellectual property draws on several theories to justify itself, whenever an intellectual property right is threatened not just natural rights but persona-based, economic, privacy

\textsuperscript{128} See e.g., Yen, \textit{supra} note 24, at 531 (“Although the Wheaton Court rejected the plaintiff’s common law copyright claim, the natural law concepts which inspired common law copyright and early copyright statutes remained part and parcel of copyright jurisprudence.”).
\textsuperscript{129} Abrams, \textit{supra} note 102, at 1183.
\textsuperscript{131} \textit{Id.} at 1186-1187.
\textsuperscript{132} Yen, \textit{supra} note 24, at 531.
and other theories will be marshaled to justify perpetuating control over the intellectual property. In addition, it may be that the theories travel together such that they are difficult to parse. Nonetheless one must parse them to see where the limits of the claims are and to appreciate the way the claims impact the public’s ability to access the materials in question. As such the next section looks at common law copyright as the right of first publication and its relationship to the public domain and to show how several theories lay buried within intellectual property debates and influence the issue today. This examination shows that the key tension is again between the author and the public.

C. The Intertwined Sirens: Labor-Based and Persona-Based Property in Copyright

Although Wheaton is the major case regarding a perpetual common law copyright claim, the right of first publication/common law copyright cases merit analysis as well. For in those cases one can see similar underlying patterns of asserting control and competing theories of what justifies such control. Furthermore, these cases reveal that the author centered view persists from both a labor and persona-based view and that privacy sneaks into the picture. Seeing these connections and how they permeate the early discussions of copyright doctrine allows one to trace the roots and appreciate the contours of the recent calls for attribution, integrity, publicity, and privacy rights over copyrighted works. In short, although these claims do not explicitly invoke common law copyright, their arguments operate in much the same way. As such this section uses the first publication cases to demonstrate further the pattern of trying to assert control whenever
possible and to show how persona and related privacy claims enter the control picture.\footnote{Cf., Reese, supra note 4, at 618-621 (detailing economic and privacy claims as possible motivations to exert control over a work unprotected by copyright).} With that foundation the section following this one looks to publicity claims as the next step in the rhetoric of authorial control.

1. Common Law Copyright: Economic and Persona Interests Travel Together\footnote{Some of the discussion in this section was adapted and summarized in this Paper’s companion piece, \textit{Property, Persona, and Preservation}, TEMPLE L. REV. (forthcoming).}

The case of \textit{Folsom v. Marsh},\footnote{9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).} though famous as the source of fair use doctrine,\footnote{See e.g., \textit{Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.} 471 U.S. 539, 550 (1985).} is important too as one of the key American cases to set forth the principle that an author retains her copyright in unpublished letters. In that case, President Washington had bequeathed his private letters to his nephew, Justice Washington. Then Chief Justice Marshall and a Mr. Sparks obtained the “the interest therein.” They in turn published the \textit{Writings of President Washington} in 12 volumes, 11 volumes of which and included President Washington’s letters both private and public letters. As Justice Story put it:

\begin{quote}
[T]he work itself has been accomplished at great expense and labor, and after great intellectual efforts, and very patient and comprehensive researches, both at home and abroad. The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington, as private and most valuable property.\footnote{\textit{Folsom}, 9 F. Cas. at 345.}
\end{quote}
The defendant had inserted full copies of President Washington’s previously unpublished letters in his *Life of Washington*. In addressing that the letters had been intended for public use, Justice Story wrote “Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author, either to the public, or to some private person, I hold, that the author has a property therein, and that the copyright thereof exclusively belongs to him.”

Here one can see how the siren’s call of labor-based and persona-based property of which Hughes wrote travel together. The language “accomplished at great expense and labor,” “great intellectual efforts,” and “patient and comprehensive researches” explicitly and implicitly call to the reader’s sense of fairness in retaining the fruits of one’s labor. The case does not cite *Millar* but one can almost hear that case declaring that it is “just” for an author to reap “pecuniary profits of his own ingenuity and labour” and that it is “fit” for an author to control the “time” and “manner of publication” as well as “accuracy and correctness of the impression.” An economic claim sneaks in as well in the reference to Congress having spent money heightens the sense of injustice and that a “piracy” has occurred.

To be clear, this rhetorical move is not applied to the letters but to the person or persons who toil to bring the letters to light. Justice Story reserves the persona argument for the letters themselves. He begins this move when he instructs that only the “most unequivocal dedication of private letters and papers by the author” places the letters in the public.

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138 *Id.*
139 *Id.* at 345-346.
140 The term piracy is used throughout the case to describe the taking that was alleged.
The more full expression of the persona perspective is found earlier in the case when Justice Story offers “That the original work is of very great, and, I may almost say, of inestimable value, as the repository of the thoughts and opinions of that great man, no one pretends to doubt” and then again when Justice Story explains that in a sense all letters are literary “for they consist of the thoughts and language of the writer reduced to written characters, and show his style and his mode of constructing sentences, and his habits of composition.” Although Justice Story did not decide the case on these grounds, the phrases “repository of the thoughts and opinions,” “thoughts and language of the writer,” “show his style and his mode of constructing sentences,” and “his habits of composition” give the letters a sense of person, a sense that they are embodiments of the author. By imbuing the letters with parts of the author, Justice Story conflates the author with the letters to support his presentation of why they are important.

So in this early case one can see both labor and persona rationales informed the decision. At this point, although the persona rationales were not the explicit grounds for the ruling, they are present. In short, two grounds for author’s rights are seen and will influence the later analysis of author’s rights.

2. Common Law Copyright Ends but Labor and Persona Interests Remain

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141 Folsom, 9 F. Cas. at 345.
142 Id. at 346.
143 As Hughes notes both views may be necessary to understand intellectual property. See Hughes, supra note 7.
Folsom involved common law copyright as a matter of first publication. As Professor Anthony Reese has succinctly put it “State ‘common law’ copyright, as it was called, usually covered a work from the time of its creation and protected the owner against unauthorized initial publication of the work.” In essence, under common law copyright protection lasted as long a given work remained unpublished; in other words, it could last forever. The publication requirement for Copyright Act protection, however, does not persist today for “The 1976 Copyright Act ended this division of labor between state law protecting unpublished works and federal law protecting primarily published works.” Under the 1976 Copyright Act (the “Copyright Act”), copyright vests in any work created “on or after January 1, 1978.” Creation occurs upon fixation “in a copy or phonorecord for the first time.” As such it may appear that the first publication interest would have been removed as well. That, however, is not the case. Again publishers enter the picture and offer varying arguments regarding the ability to control a creation. In addition, authors begin to offer arguments regarding wishing not to have a work disseminated. In tracing these arguments one can see the roots of labor, persona, and privacy arguments that lie behind today’s intellectual property claims.

144 Reese, supra note 4, at 588 (noting that in the common law copyright context the term common law refers to either state statutory or decision-based law).
146 Reese at 589; accord Harper & Row Publishers, Inc. v. Nation Enterprises, Inc. 471 U.S. 539, 552 (1985) (“Among its other innovations, [the Copyright Act] eliminated publication ‘as a dividing line between common law and statutory protection,’”) (citations omitted); but see Ned Snow The Copyright Conundrum, 55 UNIVERSITY OF KANSAS L. REV. 501, 540 (2007) (arguing that “the common-law right of first publication furthers only an author’s privacy interest” and that interest is not preempted by the Copyright Act).
147 17 U.S.C. § 302(a); accord Harper & Row Publishers, Inc. v. Nation Enterprises, Inc. 471 U.S. 539, 552 (1985) (declaring “[the Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine,” and noting the “exten[sion] [of] statutory protection to all works from the time of their creation.”).
149 But see Snow, supra note 146.
In *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, just as in *Folsom*, a President’s writings were at issue. In *Nation* a magazine published direct quotes from President Ford’s memoirs and the publisher of the memoirs sued for copyright infringement. Part of the Court’s analysis found that the Copyright Act “recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works.”

Here, unlike the previous persona interest seen in *Folsom*, the Court changed the focus to an economic one: “the commercial value of the right [of first publication] lies primarily in exclusivity.” The Court acknowledges that privacy interests may come into play when one has no intention of publishing a work, “It is true that common-law copyright was often enlisted in the service of personal privacy” but distinguishes between the first publication issue in that sense and in its “commercial guise” when an author intends to publish the work and requires control over the manner of publication.

As the dissent argued, the majority opinion rested on notions of theft. The commercial focus can lead one away from seeing that part of the theft claim rests on the same positions seen in *Millar* and *Folsom*. For in supporting the position that the author (and really the publisher) should have control over the economic benefits of first publication and not protecting such an interest amounts to theft, the Court wrote “But copyright assures those who write and publish factual narratives … that they may at least enjoy the right to market the original expression contained therein as just compensation

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151 *Id.*
152 *Id.* at 552.
153 *Id.* at 553.
154 *Id.* at 554-555.
155 *Id.* at 594 (“At several points the Court brands this conduct thievery.”)
for their investment.”

The Court also offered that “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor.” The notion of “just compensation for their investment” on the publisher side and “a fair return for an ‘author’s’ creative labor” on the creator side is by now familiar.

The new move occurs when the Court slips in a privacy perspective by offering that an author also has a right “not to speak publicly.” In other words authors have right to keep things private. The oddity is that the author did not choose not to speak in general. Rather the author and really the publisher choose not to speak at a given time. The Court cheats as it supports the publication interest, an economic interest, as control over when an author wishes to publish the work by conflating it with First Amendment principles which support both the right to speak and choosing not to speak at all.

Nonetheless in the context of the case, the public and private distinction enters and turns on questions of publication of material. That distinction leads to the question of when is a work published? And that question leads to a certain type of privacy perspective becoming more fully embedded as an author’s right in the later cases.

For example, in *Lish v. Harper’s Magazine Foundation*, a writer who was known for a particular writing style and whose private writing classes had an almost cult-like following had sent a letter to his students that contained some of the author’s famous

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156 *Id.* at 556-557 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575, 97 S.Ct. 2849, 2857, 53 L.Ed.2d 965 (1977)). Arguably *Zacchini* is animated by a lobar-based view of creation as the Court was concerned with taking the entirety of one’s act which was a result of labor and thus stripping the creator of the ability to sustain his life by exploiting his work.

157 *Id.* at 558 (citing and quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S.Crt. 2040, 2043, 45 L.Ed.2d 84 (1975)).

158 *Id.* at 559 (citing and quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968)).

159 *Id.*
writing style. Harper's Magazine obtained a copy of the letter and published an edited version of the letter. The magazine asserted a fair use defense but when the court examined the second of the four fair use factors—the amount and nature of the use—it found that despite the author’s distribution of the letter to 48 students, the letter was not a publication within the Copyright Act. As the court noted the Act refers to publication as “distribution of copies … of a work to the public” and although the Act does not define publication, the House Report provides that public means “persons ‘under no explicit or implicit restrictions with respect to disclosure of its contents.’” The letter at issue in Lish had explicit statements regarding the confidential nature of the class which the court took to encompass the letter. Thus, the court concluded that explicit restrictions were in place such that the work was unpublished.

Yet, one of the cases the Lish court relies on, Wright v. Warner Books, Inc., reveals that when the public distribution restriction is not explicit, the logic seems to be one of intent to disclose and that a privacy logic is at work. As the district court in Wright noted regarding the Second Circuit’s opinion in Salinger v. Random House, Inc., “what motivated the Court of Appeals in Salinger, at least in part, was concern over J.D. Salinger's right to privacy.” In Salinger a biographer quoted from Salinger’s unpublished letters and Salinger sued to prevent the publication of that material. The Wright court is correct; the Second Circuit did mention Salinger’s private nature—

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161 Id.
162 Id. at 1101-1102.
163 Id. at 1102.
164 Id. at 1102.
166 Id. at 111.
168 Wright, 748 F.Supp. at 111.
“[Salinger] has not published since 1965 and has chosen to shun all publicity and inquiry concerning his private life.’—in the opinion’s statement of facts.169 But when Chief Judge Oakes mentioned this point in New Era Publications International, APS v. Henry Holt & Co.,170 he did so in a dissenting opinion and stated:

While I do not completely agree with Judge Leval's fair use analysis [in New Era Publications International, APS v. Henry Holt & Co.171], it seems to me the majority unnecessarily goes out of its way to take issue with Judge Leval's opinion. Doing so, even by way of dictum, tends to cast in concrete Salinger v. Random House, Inc. Salinger is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications not present here by virtue of Hubbard's death.172

In short, Chief Judge Oakes sought to limit Salinger to its facts and found that the death of the claimant in New Era curtailed any privacy claims that might have justified the outcome in Salinger. Indeed, that is precisely what Judge Leval held in his opinion in New Era.

New Era involved the publication of a biography of L. Ron Hubbard that criticized Mr. Hubbard and quoted extensively from Hubbard’s works.173 In that sense the case parallels Folsom; but unlike Folsom, the work in New Era involved passages that had never been published.174 At the district level in that case, the plaintiffs argued “that the private nature of some of the Hubbard documents, particularly diaries and personal letters, should favor a finding of infringement.”175 Judge Leval rejected this position “It is universally recognized, however, that the protection of privacy is not the function of our

169 Salinger, 811 F.2d at 92.
170 884 F.2d 659, 661 (2d Cir.1989) (Miner, J., concurring), denying reh'g of, 873 F.2d 576 (2d Cir.1989), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1071 (1990) ("New Era I ").
174 Id. at 1498.
175 Id. at 1504.
copyright law.” As Judge Leval explained some confusion may arise because of first publication common law copyright which was aimed at privacy.

What then is one to make of this shift? On one hand, as with the natural law arguments, an error seems to be at work. Courts have misinterpreted or misapplied previous case law by bringing a privacy concern, a truly personal concern, into a question of control over publication, an economic concern. On the other hand, the privacy interests persist and animate the decisions. Again a philosophical perspective, even if erroneous in its application, appears and drives the understanding of author’s interests. So in addition to the idea that labor raises issues of just compensation and the ability to control a work, the idea that an author should have control as a matter of privacy becomes part of the analysis. The economic and the personal interests are not so separate anymore.

If one recalls the economics of attention and the personhood ideal offered above, one can see that an author who creates public works such as a novel or has a personal image may assert that her private letters and emails could be protected from a labor and a persona standpoint. For once one has a built an individual brand name through the creation of works of personal expression, one can command interest, focus attention, and garner more acclaim. Put differently one might assert that from a public or private perspective one should be able to control one’s identity. Indeed as one commentator has noted, the right of publicity which grew from privacy interests, may be understood as protecting the ability to define oneself autonomously; that is the ability for anyone to

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176 Id.
177 Id. (citing Warren and Brandeis); accord Salinger v. Random House, Inc. 811 F.2d 90, 94 (2nd Cir. 1987).
control how their image is used. In general, these arguments point to non-copyright ways to exert control over creations.

III. The Modern Pattern: Non-Copyright Interests Expand Authorial Control

Recent arguments and understandings from copyright about the nature of authorship and the overemphasis on the Romantic author of necessity inform this Paper. In that sense, part of this Paper’s project seeks to explore and reveal the limits of the rationales offered to support interests which may look like and perhaps even be considered intellectual property in general as they impact future rights. For as the next sections show, although the nature of authorship may indeed be best understood as a system of give and take between authors and society, even where the idea of the author as sole creator is not accepted, recent discussions of the trademark or trademark-like aspects of authorship reintroduce the Romantic author image and its attendant problems for the unfettered use of information.

The move to offer authors a trademark-like interest in their name calls the right of publicity to mind. As discussed in the next section, although that doctrine has recently been examined to offer a more coherent understanding of its operation, it does not resolve the tension between the author and society. Furthermore the shift to trademark and

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180 See Reese supra note 4, at 617.

181 As such this paper is informed by the insights of Keith Aoki, Anupam Chander, Margaret Chon, and Madhavi Sunder, regarding distributive justice issues and intellectual property. See Aoki supra note 23; Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 Cal. L. Rev. 1331, 1339 (2004); Margaret Chon, Intellectual Property and the Development Divide, 27 Card. L. Rev. 2821 (2006). In addition this Article seeks to pursue Peter Drahos’s implicit invitation to “construct[] interdisciplinary approaches and theories of intellectual property law.” See DRAHOS, supra note 8, at 33.
trademark-like approaches to author’s interests in a creation mirrors the way that publishers deployed author-based natural law arguments to vindicate publisher rights. In short, when one with an interest in a work finds that copyright does not offer a way to exert control over something she values, she will likely turn to other sources of the law to exert and maintain that control. As such, this section examines those non-copyright rationales to see their origins and limits and show how the same arguments from copyright’s history animate the interests asserted in the non-copyright context.

A. Authorship and Brands

The Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* has garnered much attention. The case is important to this Paper because it

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182 Cf. Reese, *supra* note 4, at 613 (“Copyright law no longer provides a copyright owner with the right to control the use of older unpublished works. Those who own copies of such works, however, may well want to continue to exercise such control.”); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (noting that trademark claims were asserted to vindicate copyright interests).


184 Accord Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 Utah L. Rev. 781, 783 (2007) (“In recent years attribution has received substantial attention from copyright scholars and activists, in part because of the Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*.”). For examples of such attention see e.g., id.; Tom W. Bell, *Misunderestimating Dastar: How The Supreme Court Unwittingly Revolutionized Copyright Preemption* 65 Md. L. Rev. 206 (2006) (arguing that the way in which the decision has been interpreted by lower courts has impacted unfair competition and copyright law in ways well beyond the matter the decision addressed); Mary LaFrance, *When You Wish Upon a Dastar: Creative Provenance and the Lanham Act*, 23 CARDOZO ARTS & ENT. L.J. 197 (2005) (arguing that “The ultimate holding of the case - that section 43(a) cannot be used to create a quasi-copyright claim in works with respect to which the statutory copyright has expired - is consistent with the overall federal intellectual property regime, and is arguably consistent with the current language of section 43(a)” but that the decision’s failure to address reverse passing off and offers a solution recognizing authors “the right to prevent others from using an author's name and reputation as a marketing tool to attract customers for works to which the author did not in fact contribute”; Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263 (2004) (examining U.S. law after *Dastar* and finding no room for attribution under either copyright or trademark but proposing such a right be adding to the Copyright Act; Laura Heyman, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005); and Lastowka, *supra* note 32.
further demonstrates the pattern of attempting to assert authorial rights to perpetuate and prolong control over a work but this time the shift lies in claiming trademark and trademark-like interests such as attribution to justify such control.

In *Dastar* yet again a President’s writings were at issue (though he wrote the material in question a few years prior to being elected President). Yet again a corporate publisher, here Doubleday, acquired the rights to the work. Doubleday then sold the television rights to a different corporate publisher, Twentieth Century Fox Film Corporation (Fox) which in turn used another corporate entity, Time, Inc., to create the series. Time then assigned its rights in the television series back to Fox. Doubleday renewed the copyright in the book; Fox, however, did not renew the copyright in the television series. After Fox’s copyright expired, another publisher, Dastar, produced its version of the series based on the work covered by the expired copyright. In short, yet again a publisher sought a way to prevent others from publishing of a work once its copyright had expired. The Supreme Court denied that Dastar needed to attribute the work once it passed into the public domain. In a perhaps curious twist, after the decision, some legal academics have raised the cry that *Dastar* neglected the importance of a right of attribution and that such a right is necessary as a trademark or trademark-like interest.

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185 *Dastar*, 539 U.S. at 25.
186 *Id*.
187 *Id.* at 26.
188 *Id*.
189 *Id.* at 33.
190 *See generally* Heymann, *supra* note 184; Lastowka, *supra* note 32; *but see* Ginsburg, *supra* note 184 (finding that neither copyright nor trademark provide a viable way to offer attribution rights). In contrast, Rebecca Tushnet examined attribution rights thinking that such a right was necessary and could function but upon reflection argued that it does not fit well within U.S. copyright law. *See* Tushnet, *supra* note 184.
Still, the arguments for such a right vary. Even before *Dastar*, Professor Roberta Kwall has argued an attribution right is required.\(^{191}\) Professor Kwall explicitly grounds the call for an attribution right in “the dignity and personality interests of the author, and the ability of the author to command her reputational due.”\(^{192}\) Kwall, however, explicitly states that such rights must be limited to the life of the author.\(^{193}\) In contrast, two recent calls for a right of attribution have looked to trademark law to explain the right as a way to fulfill the traditional explanation for trademark law: reducing consumer search costs and protecting the good will of the producer of the goods.\(^{194}\) One such call offers a limited trademark approach\(^{195}\) while the other offers an unlimited and dangerous trademark approach.\(^{196}\)

As one commentator has offered, under a limited trademark approach, attribution acts as an incentive because authors will gain more for their work as they increase their reputation and that will lead to greater economic gains.\(^{197}\) In addition, that commentator argues that non-economic interests such as fame and a desire to control the quality of the body of work, even if that required destroying otherwise valuable creations but of inferior quality from the author’s view, are furthered by attribution as the creator will allow only

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\(^{191}\) *See* Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 *WAS. L. REV.* 985 (2002) (calling for a federal right of attribution for copyrightable works because copyright and trademark law fail to address personality or other non-monetary interests with which an attribution interest is concerned).

\(^{192}\) *Id.* at 996.

\(^{193}\) *See* Kwall, *supra* note 51, at 2003.

\(^{194}\) *See* Heymann *supra* note 184; Lastowka, *supra* note 32, at 1188; *but see* Mark McKenna, *Schechter’s Triumph? The Real Shift in Trademark Law’s Normative Foundation*, 82 *NOTRE DAME L. REV.* 1839 (2007) (examining the history of trademark doctrine and finding that its roots begin in a natural rights understanding of property and that the modern, search costs approach to trademarks cannot claim to draw on trademark law’s origins for legitimacy but rather must be evaluated on its own terms).

\(^{195}\) *See generally* Lastowka, *supra* note 32.

\(^{196}\) *See generally* Heymann, *supra* note 184.

\(^{197}\) *See* Lastowka, *supra* note 32, at 1176.
the works she deems worthy to be offered to the public.\textsuperscript{198} Thus attribution seems to further incentives to create and respects a creator’s choice regarding what will bear her name. Furthermore, attribution may operate to reduce consumer confusion.\textsuperscript{199}

As such the author argues that trademark law should offer a limited right of attribution and only apply when attribution marks “meet three criteria: 1) they should be prominently placed (or deserve to be placed) on the exterior of the work; 2) they should be placed (or deserve to be placed) there with the hope of establishing goodwill and driving sales of the product; and 3) they should serve to designate creative authorship to readers who would care about this authorship.”\textsuperscript{200} This approach seeks to distance itself from the moral rights, persona approach to attribution and takes a utilitarian approach\textsuperscript{201} that “focus[es] on the manner in which authorial attribution practices benefit society, [so that] we can move beyond” the “zero-sum game in which authors and artists must find some foothold (ethical, legal, or rhetorical) by which to obtain entitlements from society that are currently lacking.”\textsuperscript{202} Nonetheless, the underlying logic of author control is present in this approach as an economic claim.

Another commentator argues for an unlimited trademark approach where attribution recognizes the creator’s choice in affixing her name to a work or choosing to use a pseudonym or perhaps creating under several different names.\textsuperscript{203} But that commentator explicitly denies the connection with the author per se. Instead, the idea is that authorship has a copyright component addressing the fact of the creation of the work.

\textsuperscript{198} Id.
\textsuperscript{199} Id. at 1179-1180.
\textsuperscript{200} Id. at 1233.
\textsuperscript{201} Id. at 1180.
\textsuperscript{202} Id. at 1175-1176.
\textsuperscript{203} See Heymann, supra note 184, at 1394-1412: (“A writer can write under her own name or under a pseudonym; if she chooses a pseudonym, she can choose one that is plain or exotic, gender neutral or gender suggestive.” Id. at 1396.)
(“where the question is who holds the rights to exploit the text, to what degree, and for how long”) and a trademark one, the branding choice regarding what name is affixed to the creation. Under this argument it is the trademark component that justifies attribution, as under this view the author is “dead” and secondary to the reader; the author is reduced to a non-being and is merely a mark affixed to a work so that the reader knows what she has chosen to read.

In addition this trademark approach claims to avoid the Romantic authorship view that arguably steered copyright law into overemphasizing the author as sole creator of a text. Yet when one examines the grounds for the author as trademark argument, one finds that the Romantic author has returned with similar problems that it presented in copyright law imported to trademark law.

B. The Return of the Romantic Author

How then does attribution fit with the history of copyright battles and these trademark or trademark like views? Recall that in Millar v. Taylor, the issue was

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204 Id. at 1379.
205 See id. at 1379-1380. Elsewhere Heymann has further posited that the interests of copyright and trademark are separate and that the law can cabin each interest so that copyright will address copyright interests and trademark will address trademark interests. See generally Laura Heymann, The Trademark/Copyright Divide, 60 S.M.U. L. REV. 55 (2007). As this Paper
206 See Heymann, supra note 184, at 1389-1391.
207 See id. at 1414-1432 (presenting trademark law and arguing that an author’s name functions just as a trademark does with source not being an issue).
208 See id. at 1145-1146 (explicitly denying that her approach is a call for moral rights and connecting moral rights to the Romantic author perspective).
publisher extension of copyright control over a work. In finding for the publisher and asserting a natural rights view of copyright the court wrote:

It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit, he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide, not to foist in additions: with the other reasonings of the same effect. 210

This language is not only the language of a natural rights approach to copyright, but as will be shown it is also the language of author-centered trademark and attribution claims. This analysis should not be surprising. As Mark McKenna has noted trademark law has roots in a natural rights understanding of property; not the search cost theory that animates modern trademark law.211 The irony of attribution and trademark arguments applied to authorship today is their attempt to adhere to a search cost argument while in essence offering a natural rights approach. In addition, the arguments try to reject the Romantic author approach to copyright but functionally resurrect it.

First there is the post-modernist problem. The unlimited trademark approach claims to draw on a post modernist understanding of the nature of authorship to justify its position that the choice of name is best seen as an arbitrary branding one:212 “In the postmodernists’ view, the primacy given to the author’s interpretation (via biography or otherwise) was misplaced: Each reader brings his or her own meaning to a text, and each of those meanings is as equally valid as the author’s, if not more so.”213 In addition, there is a relationship between the author and her readers in that the author has necessarily

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210 98 Eng. Rep. 201, 252 (1769) (opinion of Mansfield, J.); accord Yen, supra note 24, at 527 (citing and quoting same); Abrams, supra note 102, at 1153 (citing and quoting same).
211 See McKenna, supra note 194.
212 Id. at 1380 (“[T]his choice of an author's name for each created work is a branding choice.”).
213 Id. at 1388.
been a reader of others and imports that experience in her writing which in turn is interpreted by her readers.\textsuperscript{214}

Yet, by asserting that the choice of name is a branding one that must be honored so that the public can understand the name affixed to the work in the way in which the \textit{one who chose the name wishes}, the unlimited approach does nothing more that shift the place of the Romantic author view. For under that view, deference is given to the author as sole arbiter and decision maker regarding how the text is to be understood and interpreted.\textsuperscript{215} The post modernist view seeks to stop that view by revealing the relationship between the creator, the reader, and that upon which the creator draws to create in the first place.

By holding that attribution choices must be honored as trademarks, the unlimited approach requires that the creator’s choice, regardless of that creator being an individual or corporate entity,\textsuperscript{216} controls and that the law “ensure[s] that the original attribution survives republication.”\textsuperscript{217} Not only is this a Romantic author view it also is the same rationale in the early copyright battles. For the unlimited view might as well have used the \textit{Millar} court’s words and offered that it is “just, that another should not use [an author’s] name, without his consent” and “fit he should choose to whose care he will trust

\textsuperscript{214} \textit{Id.} at 1389 (citing and quoting Terry Eagleton, \textsc{LITERARY THEORY: AN INTRODUCTION} 74 (1983)). This understanding comports with Wilhem Dilthey’s understanding of the nature of autobiography and biography wherein one’s life is informed by others’ lives and thus one’s life informs others’ lives as well. As such like the author reader relationship, the autobiographer and biographer draw on and create from each other. \textit{See Deven R. Desai, \textsc{Property, Persona, and Preservation}, TEMPLE L. REV.} (forthcoming) (examining Dilthey’s theory of history and comparing it to literary theory).

\textsuperscript{215} \textit{See Heymann, supra} note 184, at 1393-1394.

\textsuperscript{216} \textit{See id.} and at 1415-1418 (noting the way in which corporations choose various trademarks and then arguing that author naming choices are much the same), at 1419-1420 (arguing that the author name choice functions as a trademark). As Tushnet details for many works attribution is incoherent in part because of the numerous people who contribute to the creation of a work or a derivative work especially in corporate contexts. \textit{See Tushnet, supra} note 184, at 797-802 (exploring numerous difficulties of attribution in multiple-author works).

\textsuperscript{217} \textit{Id.} at 1447.
the accuracy and correctness of the impression; to whose honesty he will confide, not to foist in additions: with the other reasonings of the same effect.” In short the view that ensures an original intent sounds in Romantic authorship.218

Indeed if one accepts that the author’s identity is irrelevant and one should focus on the text not the “identity or persona of the author”219 and that all authorship is pseudonymous,220 exactly why one must honor “the integrity of the organizational system”221 to reduce consumer confusion is unclear. After all, the identity tells the reader nothing and the reader will bring whatever interpretations she wishes to the text,222 so stripping the name from the text harms little other than some possible increase in search cost when a reader looks for a new text.223 Yet if upon reading, the identity is not important, how search costs matter in the long run is hard to see. The argument, if compelling at all, is compelling on a natural rights and Romantic author understanding.

In contrast, the limited approach examines the same idea that the Romantic view of authorship fails to appreciate the nature of authorship but acknowledges that despite the academic criticism of such a view,224 society cares about the actual identity of the

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218 Cf. Jaszi supra note 23, at 497-498 (arguing that moral rights approaches embrace a Romantic author perspective); but see Roberta Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 NOTRE DAME L. REV. 1945, 1957-1958, 1969-1970 (2006) (describing a system where the author has control over her work in life but returns it to the community at death and the idea of author’s stewardship as entailing inspiration that fuels creation but as part of a cyclical process).
219 See Heymann, supra note 184, at 1391, 1449.
220 Id. at 1449.
221 Id. at 1442.
222 Id. at 1392 ("We (and I am including lower courts in this) do not formally inquire of the authoring judge to determine his intentions in writing a particular opinion or even conduct research into the judge's personal background or history or extrajudicial writings to give meaning to the words in the opinion. Rather, we focus solely on the words of the opinion, pondering the turns in the language and attempting to come up with our interpretation of its meaning. The occurrence of circuit splits and the proliferation of law review articles only attest to the truth of the theory: that of multiplicity of meaning, depending on the reader.").
223 Cf. Tushnet supra note 16, at 803 (noting how pseudonyms impact the issue of authorial identity).
224 See Lastowka supra note 32, at 1183-1184.
creator at times because of the connection between the creator and a thing,\textsuperscript{225} and that society wishes to “explor[e] the personalities and lives of those who have created socially prominent works.”\textsuperscript{226} In addition the limited approach disavows equating authorship to trademark\textsuperscript{227} in part because of the problems of obtaining a trademark in a personal name but also because of a sensitivity to extending the right of attribution to cases where the name is used to denote works not created by the author such as with ghost written or licensed creations.\textsuperscript{228} Furthermore the limited approach distinguishes “between collaborative and individual authorship”\textsuperscript{229} because society has a greater interest in knowing whether an individual creation is from a particular writer rather than a creation such as a film where society knows that several if not hundreds of people were part of the creation.\textsuperscript{230} In other words, an attribution right that required communicating each and every source for a large, collaborative work makes less sense than for a smaller work where one expects that the creator will be the same as the last time one purchased a creation with that creator’s name on it.\textsuperscript{231}

Nonetheless the requirements that attribution marks “meet three criteria: 1) they should be prominently placed (or deserve to be placed) on the exterior of the work; 2)
they should be placed (or deserve to be placed) there with the hope of establishing goodwill and driving sales of the product; and 3) they should serve to designate creative authorship to readers who would care about this authorship.” Implicitly raise the concern that a full trademark approach will take hold under the guise of a right of attribution.

For although the limited application of the right that seeks to eliminate deception may work within a search costs understanding of trademark, the right still functions within trademark rationales and that causes a problem. Insofar as an author is offered a trademark interest, dilution and good will arguments—the same sort of natural law arguments that McKenna identifies as part of trademark law—travel with the interest. Those interests offer creators a way to exert a right of control over society’s use even when society would otherwise not be required to do so. For example, suppose one wished to use part of an author’s work and attributed the work but the author disapproved of the work. By invoking goodwill, an attribution right would allow an author or her heirs to claim that attribution must be policed and curtailed when such attribution or association would harm the brand.

Put differently, the issue will come again to one of control. To understand further how the logic of control dominates the analysis, an examination of the right of publicity is needed.

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232 "Id." at 1233.
233 See id. at 1221 (“Until and unless we look to trademark’s anti-deception theories to fix the result of Dastar, awarding new attribution ‘rights’ will simply introduce a new stripe of property-like protection to an already crowded (arguably overcrowded, overcomplicated, and under-theorized) field of law.”).
234 Cf. Kwall, supra note 2, at 158 (“In addition to sharing a concern for authorial control over the presentation of texts to the public, both moral rights and publicity rights focus on assaults to the author's reputation and personality.”).
C. Publicity and Personal Interests as Proxies for Property

The right of publicity is often stated as the “right to control the use of [one’s] name and likeness[] for commercial purposes.”\(^{235}\) Although this formulation seems coherent, recent articles have examined the doctrine and found that it lacks a theoretical foundation.\(^{236}\) This incoherence arguably stems from the way the doctrine encompasses economic and non-economic interests present in intellectual property law.\(^{237}\) The economic interests track the labor-based interests set forth above, and the non-economic interests track the persona interests. If one thinks of the attention economics view, one sees that intuitively one may express a labor-based view of the things that represent one’s image and a persona based view of the reputation and integrity interests one may have in those works. But one’s personal image does not fit well within the idea of labor.

As Professor McKenna has explained, when one presses on the normative bases for the right of publicity only one thing is clear: it revolves around individual control of one’s image and things related to that image. So as with copyright, trademark, and attribution debates, the right of publicity offers another example of the pattern of a creator seeking broad control yet lacking a normative basis for such control. To understand how this happens in publicity doctrine one must start with privacy; for a quick survey of the literature about the right of publicity and its oddities shows that the doctrine

\(^{235}\) See Stacey Dogan and Mark Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 Stan. L. Rev. 1161, 1162 (2006); accord McKenna, supra note 179, at 228.

\(^{236}\) See Dogan and Lemley at 1162 (noting two distinct problems: claims regarding the merchandising of one’s persona and claims regarding harms to one’s reputation and offering “One root of the problems with these cases lies in the elusiveness of a theoretical justification for the right of publicity”); McKenna at 230 (noting several explanations for the right of publicity and finding “the right of publicity is anything but coherent.”)

\(^{237}\) See Robert C. Post, Rereading Warren and Brandeis: Privacy, Property, and Appropriation, 41 CASE W. RES. 647, 659 (1991); McKenna, supra note 179, at 235.
traces its roots to one article, *The Right to Privacy*, by Samuel Warren and Louis Brandeis.\(^{238}\)

As some have described, Warren and Brandeis had a personal motivation in writing the article: they were tired of the press hounding their families and publishing private facts, photographs, or personal artifacts.\(^{239}\) Warren and Brandeis also claimed a higher purpose for their endeavor: they argued that technology and the press had reduced public discourse to trivial interests and gossip and that their solution was necessary to prevent further decline if not save the press from prurient pursuits.\(^{240}\) The law of the time, however, did not provide a clear recourse for this problem, and as good attorneys, the authors drew on existing legal doctrine such as “breach of trust [and] common law copyright” to make their case that personality interests should be protected.\(^{241}\) In essence, the article argued for a claim to protect affronts to personal, private information from being placed into the public realm.\(^{242}\) Thus, personal artifacts such as journals, pictures, letters, and the like that would be subject to common-law copyright were also to be protected insofar as they were purely private. Under their articulation, one would be able to protect one’s “private life, habits, acts, and relations” insofar as they had “no legitimate connection” with one’s public life.\(^{243}\) Despite drawing on and conflating the first publication, property interest of common law copyright, the right is personal here. It is not about control over how or when one might publish the work. It is purely the idea of keeping the items secret from a personal dignity view.

\(^{238}\) Accord McKenna, *supra* note 179, at 228.
\(^{240}\) See Dogan and Lemley, *supra* note 235, at 1168-1169.
\(^{241}\) Accord McKenna, *supra* note 179, at 234.
\(^{242}\) See Dogan and Lemley, *supra* note 235, at 1168-1169.
Here one sees a narrow, distinct interest in protecting one’s persona. And, similar to the logic of common law copyright, as long as one kept the material private, or unpublished, the public would not be allowed to have access to the information. The interests here are non-economic. As Professors Dogan and Lemley explain:

[T]he cases involving well-known individuals tended to involve blatant misrepresentations that could harm their reputations in the community. The cause of action, in other words, remained deeply rooted in offense to person, to acts that caused “pain and mental stress” by stripping celebrities of control over their reputations and associational choices.\(^{244}\)

Yet, just as common-law copyright evolved and offered a language of control over commercial exploitation of the works and protection from misappropriation of the author’s work, the publicity cases often contained “property-like” language regarding the right. Soon the right of publicity embraced the interest in preventing the misappropriation of the author’s name or likeness—a purely commercial, economic interest—in short a property interest.\(^{245}\)

Professor McKenna’s examination of the doctrine elucidates the shortcomings of the various normative explanations for the right of publicity. Based on his investigation, he argues that the doctrine is best understood as protecting the ability to define oneself autonomously.\(^{246}\) According to McKenna, self-definition interests lie at the heart of the right of publicity and allows an individual to prevent the unwanted use of one’s persona to endorse someone or some thing regardless of whether the individual has chosen to be public or not.\(^{247}\) Under this approach when another uses one’s persona, for example in an advertisement, both the private person (i.e., non-celebrity and in a sense unpublished

\(^{244}\) See Dogan and Lemley, supra note 235, at 1169-1170 (citing and explaining same).

\(^{245}\) See id. at 1169-1170 (citing and explaining same).

\(^{246}\) See generally McKenna, supra note 179.

\(^{247}\) See id. at 279-285 (explaining that celebrities and non-celebrities have the same interest in control over how they are seen by the public).
person) and the celebrity have an interest in controlling the use of his or her persona.\(^{248}\) The privacy and the economic concerns are present, but they do not fully explain the rights the law provides under the right of publicity. Autonomous self-definition thus seeks to provide a foundation for both the economic and non-economic property interests at stake in publicity cases. So it appears the right of publicity comes back to attribution and control. Professor Kwall’s explication of moral rights shows how.

Kwall links moral rights to “the right of integrity, the right of attribution, and the right of disclosure.”\(^{249}\) She then offers:

The similarity between moral rights and publicity rights should be underscored[]. Doctrinally, moral-rights protections are analogous to publicity rights in at least two ways. First, both the right of publicity and moral rights "seek to protect the integrity of texts by rejecting fluidity of interpretation by the public in favor of the author's interpretation."\(^{250}\)

Here one sees the fully author-centered view of moral rights and the right of publicity. In addition, Kwall holds that both rights protect author’s economic interests by offering ways to protect “authorial control over the presentation of texts to the public and ways to protect against “assaults to the author's reputation and personality. The essence of a moral-rights injury lies in the damage caused to the author's personality, as that personality is embodied in the fruits of her creation.”\(^{251}\) In other words, one might say that Kwall sees the rights as protecting the copyright interests (economic) and the personal brand or trademark interests (non-economic) both of which are present in a creation and of growing importance in an attention economy. So as Dogan and Lemley, Kwall, and McKenna agree the interest is personal but not about privacy. Rather the

\(^{248}\) \textit{Id.}\n\(^{249}\) \textit{See} Kwall, \textit{supra} note 2, at 152.\n\(^{250}\) \textit{Id.} at 159.\n\(^{251}\) \textit{Id.}
interest is control. Furthermore the distinction between copyright and trademark interests collapse. The author claims both interests but maintains that they travel together.

D. Implications of Non-Copyright Claims to Expand Authorial Control

In the copyright context, whenever the ability to control a work was limited, those who benefited from the current control system offered arguments from both a labor and a persona rationale to extend and expand that control. The idea of truly perpetual copyright as a matter of natural law lost. Of course one can argue about copyright’s optimal term and that copyright’s term runs too long, but for the purposes of this Paper the key point is that copyright does expire at some point and at that point the amount of unfettered material available for others to use as they create increases. Today, however, as reputation and attention take on greater importance and authors can be their own publishers, copyright no longer suffices or captures the interests at stake in creation. Control over the publication of the work in a narrow sense matters but use of the work in all contexts including ideas of attributing work to an author takes on new importance. Now the individual as publisher is able to assert that when one creates a copyrightable work trademark, attribution, and right of publicity interests go with that creation. Again one must remember that the key case on this issue involved a publisher trying to extend

252 For a discussion of the nuances of these questions see e.g., Matthew J. Sag, Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency, 81 Tul. L. Rev. 187 (2006).
copyright control. In short the pattern persists: when copyright does not afford control, those who previously had control will want to “continue to exercise such control” and will rally arguments from other contexts as proxies for property rights and the control such rights provide.

The danger of allowing such expanded control is that trademark, attribution, and right of publicity claims fail to account for the necessity of other’s ability to use creations as inputs for their creations. In addition, although copyright’s fair use doctrine is far from perfect, it is better developed than in the non-copyright doctrines. Last, the temporal problem is exacerbated in the non-copyright doctrines. For although Kwall argues that attribution and related rights must be tied to the life of the author, other approaches open the idea that attribution and integrity claims should last as long as a trademark does. A trademark’s duration lasts as long as it is in use which is a low threshold requirement. So it may be that one must always fear that an author or her estate could assert, as the Joyce and other estates have, that new works and commentary may not use the underlying work because it somehow perverts meaning, harms integrity, or is something with which the author’s work should not be associated. In short, these new claims threaten the balance between author and public with which the copyright system has struggled for many years.

253 Cf. Ginsburg, supra note 184, (“Respect for the copyright public domain counsels against conflating the two regimes, lest the attribution right be leveraged into control akin to that sought by Twentieth Century Fox in Dastar.”).
254 Reese, supra note 4.
255 See id., at 619 (noting the Joyce controversy and stating “While the estate can currently use the copyright in James Joyce’s unpublished works to refuse their publication, there is little reason to think that Stephen’s interest in controlling those works will change once their copyrights expire.”).
256 For example McKenna admits his approach does not address where the autonomous self-definition must give way to speech interests. See McKenna, supra note 179, at 293 (noting that “other interests” including First Amendment ones may “outweigh the individual’s autonomy interest” and “leav[ing] to others the job of determining how to resolve the conflicts.”).
257 Cf. Reese, supra note 255.
To understand these harms better, one must consider the nature of creative systems and how expanded author’s rights would affect such systems. The next section takes up this task.

IV. Creative Systems and Intergenerational Equity

Recall that the problem for any intellectual property system is balance.258 The concern is that once the copyright term has expired or in the face of otherwise fair use claims an author or heir can and will offer non-copyright rationales to maintain control over ideas that should be unfettered and available for all to use.259 Before turning to the way to find balance, one must understand the problems such expansive claims present. To see the nature of those problems, one must how understand creative systems operate.

Put differently, the reason one wants balance in intellectual property systems is to foster creative cycles. The history of copyright battles and the arguments that went with them show that once an intellectual property right is granted, whoever benefits from that right will seek to expand that right.260 The demands for more trademark, attribution, integrity, and publicity rights can be understood as new ways to expand the author centered view of creation, for the arguments offered to support those rights function in

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258 See supra notes 5 to 6 and accompanying text.
259 See e.g., Rimmer, supra note 15, at 398 (noting the Barrie estate’s claim that “‘Unauthorized works, which contain the Peter Pan characters and elements from the original work, are not adaptable in the U.S., without the permission of the Hospital, being protected by the laws of trademark and unfair competition.’”); cf. Ginsburg, supra note 184, at 264-265 (describing the interplay between credit for authorship and sales of works).
260 See supra note 4.
the same way that the author-centered copyright arguments did. This view ignores the
give and take of creativity.

In short, creation requires an individual’s effort and perhaps even inspiration to
fashion something new.  Yet that process itself requires that the individual be part of a
system from the individual draws to create. Without the system’s offering of inputs for
the creator’s use, creation would not be possible. Accordingly, a coherent legal regime
regarding the intangible property ought to account for this feedback loop as it parses
between the interests of creators the public. Still to understand what such a regime might
look like, one must understand the system in place. As such this section begins with a
presentation of the nature of creation.

A. Non-Economic Explanations of Creative Systems and the Interplay Between
Creator and Society

A key perspective in the evolution of the author centered view of copyright is
“that authors create something from nothing, that works owe their origin to the authors
who produce them” when in reality authors must rely on other sources to create.
Recent criticism of this view argues that this view of authorship in general is a
“construct” and overstates the matter. Instead the reader is taken to be the key force

261 See Kwall supra note 218 (presenting a view of inspiration-based creation).
263 See id. at 967; accord BOYLE, supra, note 23, at 57 (“[E]ven remarkable and ‘original’ works of
authorship are not crafted out of thin air. As Northrop Frye put it in 1957, … ‘Poetry can only be made out
of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature
to private enterprise.’”).
264 See Jaszi, supra note 23, at 455, 459, 471; see also Kwall supra note 218 (explaining a religious view of
the creative cycle).
in understanding literary texts; the author’s view is a separate matter.\textsuperscript{266} Although this Paper seeks to show how the author-centered approach takes hold in non-copyright contexts, Romantic author criticism seems to overstep insofar as it argues that authors are irrelevant.\textsuperscript{267} In contrast, Wilhem Dilthey’s historical theory offers a more realistic view of creation and the relationship between author and society.\textsuperscript{268}

According to Dilthey:

The course of a life consists of parts, of lived experiences that are inwardly connected with each other. Each lived experience relates to a self of which it is a part; it is structurally linked with other parts to form a nexus.\textsuperscript{269}

As two commentators explain “Human individuals are productive systems in that their lived experience apprehends what is of interest in the present relative to the past evaluations and future goals.”\textsuperscript{270} How then do these systems operate? For Dilthey, history has autobiographical and biographical components.\textsuperscript{271}

Autobiography is the way the individual “expresses what an individual knows about its own connectedness.”\textsuperscript{272} Here autobiography is literary authorship,\textsuperscript{273} but it is not the creating from nothing authorship. Rather it is an expression of being part of

\begin{footnotes}
\item[265] Accord Lastowka supra note 32, at 1215-1216 and at 1216 note 225 (noting “Theories regarding the intersection of romantic authorship, copyright, and literary theory enjoyed a heyday of sorts in the early 1990s.”).
\item[266] See id. at 1183 (“New Criticism, partaking in the broader formalistic rigor of modernism, isolated the text from the author. The inevitable result of this effort was, perhaps unsurprisingly, the collapse of the concept of any fixed meaning in texts and the publication of an essay (authored by Roland Barthes) where the author was proclaimed dead.”).
\item[267] See Lastowka, supra note 32, at 1184
\item[268] The following discussion of Dilthey is adapted from this Paper’s companion piece, Property, Persona, and Preservation. See Desai, supra note 2.
\item[270] See id. at 4.
\item[271] See id. notes 130 to 149 and accompanying text.
\item[272] Id. at 222.
\item[273] Id. (“Autobiography is merely the literary expression of the self-reflection of human beings on their life course,”); accord id. at 267 (“The literary expression of an individual’s reflection on his life-course is autobiography.”)
\end{footnotes}
something; of being connected to other’s stories as one strives to understand and write one’s story or autobiography.\textsuperscript{274} So to understand and express one’s life, one looks to another’s life and this is biography: “When this reflection is carried beyond one’s own life-course to understanding another’s life, biography originates as the literary form of understanding other lives.”\textsuperscript{275} To undertake biography requires that one “understand[] manifestations that indicate plans or an awareness of meaning.”\textsuperscript{276}

What are these manifestations that allow one to understand one’s “own connectedness”?\textsuperscript{277} Others’ lives and writings, because they reveal what an “individual finds to be of value in his situation; or … what he finds meaningful in particular parts of his past.”\textsuperscript{278} So when one looks at another’s literary expression to see what she found meaningful and then uses that to inform one’s own expression, one takes from someone to create. Of course others’ do the same with whatever one creates as well. So as Dilthey puts it one is a part of a productive nexus where the “the individual [is] a point of intersection that both experiences force and exerts it.”\textsuperscript{279}

At this point literary and historical theory demonstrate an intuitive point: creation requires inputs from others. But whether the author is dead to literary theorists and readers as some hold, authors seem to matter if nothing else because society still focuses on the author and her life.\textsuperscript{280} As such the historical view may capture the way in which creation entails authorship but authorship requires borrowing from others’ authorship

\textsuperscript{275} Dilthey, supra note 269, at 266.
\textsuperscript{276} Id. at 268.
\textsuperscript{277} Id. at 222.
\textsuperscript{278} Id. at 268.
\textsuperscript{279} Id. at 268.
\textsuperscript{280} See Lastowka, supra note 32, at 1184.
(and seeing how others’ authorship works) to be able to create in the first place. In this view the reader and the creator are of equal importance.

Here one can see the attention economy perspective. The author needs the reader to read. The reader in turn spreads the word about the reader which may entail using some of that creation. In turn the author gains more readers. But two things may trouble the author. First, insofar as the reader’s creation draws on the author’s, the author may feel and argue that she is entitled to some compensation. Second, the author may wish to control how the reader uses the author’s work in general because of the personal connection to the work and because of the reputation interests present in the use of the work. So far neither non-economic theory explored here appears to support these views. Still these positions may comport with certain economic views of creation. The next section looks to economic theory to show that it too does not support full control by an author.

B. Economic Explanations of Creative Systems and the Interplay Between Creator and Society

In economic terms the uses at issue here are spillovers, “uncompensated benefits that one person’s activity provides to another.” Many believe such externalities must be internalized, that is captured by property owners, because “if property owners are both fully encumbered with potential third-party costs and entitled to completely appropriate potential third-party benefits, their interests will align with the interests of society, and

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281 Frischmann and Lemley, Spillovers, supra note 26 at 258.
282 See id. at 264-265.
they will make efficient (social welfare-maximizing) decisions.” Yet in the attention economy the nature of incentives is less clear, and as Professors Brett Frischmann and Mark Lemley note despite many applying the internalization view to creation not all creation requires incentives. Nonetheless some hold that “only with complete internalization will an inventor be able to efficiently manage an innovation after it is created.” This approach seems to support the position of those who invoke non-copyright interests to exert control beyond the control copyright provides.

But when appreciates the way innovation spillovers operate, the idea of full internalization makes less sense. For one thing, if social maximization is the goal, a system that promotes innovation but does not try to capture all benefits from innovation leads to higher creation and innovation rates; not lower. Here one may think that such greater innovation is a way to hide theft or free riding but another way to understand the new innovations is as “part of a virtuous circle because they are in turn creating new

283 Id. at 265-266.
284 See e.g., Radin, supra note 82, at 515 (“Cultural norms can substitute for legal property rights as an incentive for production. In many situations, contrary to Benthamite reasoning, people produce without monetary benefit-internalization incentives. It could be that information will be abundantly produced in cyberspace even absent property rights. In the utopian vision, people create even if they cannot internalize a substantial portion of the social benefit to themselves.”); see also supra note 2 and discussion of non-monetary incentives to creation.
285 See id. at 266 (“The Demsetzian view is more or less the same in the context of innovation. If an inventor cannot capture the full social benefit of her innovation, the argument goes, she will not have enough incentive to engage in the research and development that will produce that innovation. If there are spillovers from innovation, they must be interfering with incentives to innovate, and we should find them and stamp them out.”).
286 See generally, Frischmann and Lemley, Spillovers, supra note 26.
287 Id.
288 Not everyone questions the idea of control. For example, Professor R. Polk Wagner argues idea that greater control over one’s creations may foster an increased public domain because some information, spillover producing information, of its nature will be free for all to use, See R. Polk Wagner, Information Wants To Be Free: Intellectual Property and Mythologies of Control, 103 Colum. L. Rev. 995, 1003-1005 (2003) (describing three types of information and offering that the third type is “‘open’ information, available for widespread use, as an inherent consequence of the creation of the underlying [first type of] information.” and that as Kenneth Arrow has described such work produces spillovers); accord Frischmann and Lemley, Spillovers, supra note 26, at 258.
289 Id. at 268 (“spillovers are good for society. There is no question that inventions create significant social benefits beyond those captured in a market transaction.”); see also id. at 268-269 (noting studies showing cities and industries with high spillover rates have greater innovation).
knowledge spillovers that support still more entrepreneurial activity.” So just as with the literary and historical views, one sees a view that recognizes the way in which inputs feed outputs which in turn become inputs for the next cycle of creation. Furthermore the material in question here is part of the creation spillover cycle which is different than real property understandings of spillovers. 290

Specifically, innovations have three special qualities. First, innovations are nonrivalrous, public goods which means that all can use them without depriving another of their use. 291 Second, spillovers in the creative realm usually produce a new creation for others rather than passively consuming the spillover. 292 “Third, innovation spillovers are different because the legal rules that define an IP right and determine when transactions must occur lack the clarity of traditional property rights. It is difficult--and in many cases impossible--to know whether one is ‘trespassing’ upon another’s IP right.” 293

These three views fit with the concerns of this Paper: intangible property and control over its use. To appreciate how spillovers matter for this Paper, remember the early copyright battles, the Joyce estate’s approach to the use of Joyce’s writings, 294 and the Dastar case. All of these situations revolve around intangible property which is nonrivalrous and like “Ideas can be freely copied by others in the absence of a legal rule restricting that copying without depriving their creators of the use of the ideas.” 295 Yet either when the copyright has expired or when the use in question offended the copyright

290 Id. at 272.
291 Id.
292 Id. at 273.
293 Id. at 274.
294 The estate has sued to prevent a new edition of Ulysses from being published, “threatened the Irish government with a lawsuit if it staged any Bloomsday readings; [after which] the readings were cancelled”, and “rejects nearly every request to quote from unpublished letters.” See Max, supra note 12 at 35-36. Other estates have followed similar patterns of restricted control. Id. at 36.
295 Frischmann and Lemley, Spillovers, supra note 26, at 272-273.
holder, the strategy was to invoke non-copyright claims to extend control over the material.

The second aspect of innovation spillovers is they way in which they produce more for society. Efforts to exert control beyond copyright terms and by using trademark-styled attribution, right of publicity, or privacy claims to stop others from using ideas and the expression of those ideas in new work explicitly cuts off the ability to generate new public goods and destroy the virtuous circle of creation. This use of non-copyright doctrines demonstrates precisely the sort of extreme control that defeats the potential benefits from spillovers. And as Professor Boyle has explained the invocation of moral rights can be a type of private censorship. This potential for private control points to the third aspect of innovation spillovers: the law governing the use of ideas.

Copyright and its sub-doctrines already provide enough specters of lawsuits to chill potential users of spillovers from creating goods upon which others would also build. One of the Joyce estate’s stated motivations is “to put a halt to work that, in [the estate’s] view, either violates family privacy or exceeds the bounds of scholarship.”

Remember that other estates including the estates of T.S. Elliot, J.R.R. Tolkien, J.M. Barrie, J.D. Salinger, Sylvia Plath, Samuel Beckett, and Bertolt Brecht have expressed

296 See Boyle, supra, note 4, 148-150 (detailing a fight over a fictionalized account of Sir Stephen Spender’s life in which the novel was withdrawn from publication and stating ironically “Authors aren’t censors. It’s a matter of perspective). Boyle also notes that trademark rights as they relate to language have this potential as well. Id. at 145-148. For an examination of this impact trademarks can have on expression see generally Desai and Rierian, supra note 87, (examining the genericism doctrine as a hindrance to expressive use of trademarks).

297 Frischmann and Lemley, Spillovers supra note 26, at 274.

298 Max, supra note 12, at 36; see also Defs.’ Reply to Pl.’s Opp’n to Defs.’ Mot. to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss’s Am. Compl., Shloss v. Joyce, No. CV 06-3718 (N.D. Cal. 2007), 2007 WL 444886 (“Joyce objected to Shloss's plan for a book about Lucia Joyce because it is an invasion of privacy.”), “While Defendants have alleged that a priority of the Estate is to protect the privacy of the Joyce family, it has not stated that copyright interests are used for this purpose. Instead, as can be seen from the correspondence, Joyce's goals have been to protect family privacy (i.e., by not providing assistance with books on private family matters) and defend the integrity, spirit and letter of James Joyce's works.”).
similar views. Accordingly, the trademark, attribution, and integrity rights offered to expand control over these creations will increase the confusion of when one may be trespassing a right. These problems would then be in place in addition to the already difficult question of when one may be trespassing on another’s copyright. Furthermore, although some such as Kwall tie these rights to a life interest, others tie them to copyright term. Still others suggest they should persist as long as trademark which is a rather low threshold of as long as the mark is in use. Indeed one part of trademark doctrine recognizes the idea of residual goodwill and resists the idea that marks are abandoned such that others may use it. That view holds that even well after a trademark is out of use, its lingering goodwill requires stopping others from using a mark. Thus in some cases the problem of confusing a would-be beneficiary of the spillover could persist indefinitely.

How then does one balance between the creator and the public? Again the creator has real interests in her work. Yet given the nature of creation and creative systems, society has real interests in limiting creator control so that future creation may flourish.

The next section seeks to find the balance between these problems.

V. Creative Systems and The Future of Ideas

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299 See Max, supra note 12, at 36; see Gilsdorf, supra note 15.
300 Cf. Tushnet, supra note 16, at 792-796 (questioning whether attribution would be possible and what remedy would be appropriate for failure to attribute). Tushnet also concludes that although there are strong moral reasons for attribution interests, given the multiple issues regarding what attribution is including how it relates to integrity, customary practices resolve the issue better than a legal claim). Id. at 808.
301 See Frischmann and Lemley, Spillovers supra note 26, at 275 (noting that copyright’s strict liability, fair use, idea-expression, and other doctrines make copyright law difficult to navigate).
302 See e.g. Ferrari, S.P.A. Esercizio v. Roberts, 944 F.2d 1235 (6th Cir. 1991), cert. denied, 505 U.S. 1219 (1992) (holding that decades after car marker stopped making design in question, the design’s residual goodwill prevented others from copying the design).
At this point it is helpful to recall the problem at hand. Creation is expanding at a
tremendous rate. Individuals can use the Internet to be publishers. Intangibles continue to
grow in importance. This wealth of information fosters situations where the ability to
capture and focus attention becomes an asset. Reputation travels with creation as people
look to creations as proxies for quality and reasons to pay attention to future creations.
Creators thus wish to have their work shared, but they also wish to have control over their
work. Thus far, arguments for the creator’s ability to control the work offer ways to
understand the creator’s interests.

What has not been clear is the how these interests should be protected and what if
anything grounds such claims. Indeed, part of this Paper’s project has been to show that
quasi-intellectual property interests such as attribution, integrity, and the right of
publicity invoke and blend labor and persona arguments as attempts to further author
control without any real grounding and without the limits that those foundations contain.
This section explains what those limits are and should be such that author rights may be
coherent and that the public may have the ability to use the material in question.

A. Towards Bounded Claims

On one hand much of the force of arguments for attribution, integrity, and
publicity stem from copyright’s roots in labor and persona-based views of creative
property. Indeed, the arguments use the same language and logic that has appeared at
different stages of copyright fights. And given that especially in an attention economy,
these claims are tied to material that fall under copyright, one might think that the claims have similar bounds. But with quasi-intellectual property doctrines that is not the case.

Rather, as discussed above, the doctrines are incoherent. Furthermore, little suggests that once authors obtained such rights, they would be satisfied and limit their claims. Even with somewhat clearer doctrines such as copyright and trademark, intellectual property holders have always sought expansion beyond the status quo. The continual move towards perpetual or near perpetual copyright or the coordinate efforts regarding establishing and defending a federal dilution statute are examples of this behavior.

Yet, there is some balance in copyright and trademark. Investigating what those balances are demonstrates that adding more author centered rights would favor permission-based creation over unfettered creation such that creative potential is hindered rather than fostered by the intellectual property system.

B. Infrastructure and Semi-Commons

A key aspect of the author’s claim revolves around the creation itself. That creation falls under copyright. Copyright covers the expression of ideas. Although the law allows control over the expression, the ideas are considered separate and available for all to use. One explanation for this division is that ideas are infrastructure—“shareable resources capable of being widely used for productive purposes for which social demand
for access and use generally exceeds private demand by a substantial margin.\textsuperscript{303}

Furthermore, “Ideas themselves are a good example of infrastructure, because they are not merely passively consumed but frequently are reused for productive purposes.”\textsuperscript{304}

This description fits the material at issue here.

The problem is that markets are not well-equipped to address the way infrastructure resources operate because:

The market mechanism exhibits a bias for outputs that generate observable and appropriable benefits at the expense of outputs that generate positive externalities. … The problem with relying on [private property rights and] the market is that potential positive externalities may remain unrealized if they cannot be easily valued and appropriated by those that produce them, even though society as a whole may be better off if those potential externalities were actually produced.\textsuperscript{305}

Thus in the present issue, the private market approach to the ideas as expressed in writing is that it fails to appreciate that the benefits to creation in general that more open access would allow.

To be clear this Paper is not arguing that all aspects of copyright be abandoned. Rather it accepts the idea that creations at issue here are under copyright and copyright is “a semicommons arrangement--a complex mix of private rights and commons.”\textsuperscript{306} The private side “enables rightsholders to appropriate some of the surplus generated by their investments in creation, development, and dissemination.”\textsuperscript{307} The commons side “promotes spillovers. Through a variety of leaks and limitations on the private rights granted, copyright law sustains common access to and use of resources needed to

\textsuperscript{303} Id. at 279.
\textsuperscript{304} Id. at 281.
\textsuperscript{305} Id. at 280.
\textsuperscript{306} Id. at 284.
\textsuperscript{307} Id. at 285.
participate in a wide variety of intellectually productive activities.”

Key aspects of copyright law such as “limited duration” so that work enters the public domain, its “limited scope” including the exclusion of ideas from copyright, and defenses such as fair use facilitate the semi-commons. But the picture is not perfect.

For example, the contours of one’s ability to discern what is or is not fair use is not always clear in copyright. Indeed, the multiple ways that copyright facilitate semi-commons poses a problem because “Users may know that a particular work is copyrighted, but that knowledge gives them little sense of whether a particular use of the work is legal or not, because the idea-expression dichotomy, the filtration of facts and scenes-a-faire, the merger doctrine, and the fair use doctrine make it hard to tell whether a surprisingly wide range of uses are permissible.”

Trademark and quasi-intellectual property claims such as attribution, integrity, and publicity present larger problems. Unlike copyright they do not foster the semi-commons as they lack “leaks and limitations on the private rights granted.” This lack poses a threat to the spillover use of ideas. For example trademark’s temporal restraint is thin as trademark rights persist as long as the mark is in use. The right of publicity is a state doctrine with inconsistent rules regarding the length of its term. As the Joyce case shows integrity claims may be asserted well after death of author.

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308 Id.
309 Id.
310 Id. at 285-286.
311 Id. at 286-287.
312 See id. at 274-275.
313 Id. at 275.
314 Id.
315 See e.g., McKenna supra note 179 at 271, n. 203 (discussing varying degrees of protection and duration for right of publicity claims depending on which state law governs the claim); see also Edward H. Rosenthal, Rights of Publicity and Entertainment Licensing, 879 PLI/Pat 273, 283-284 (2006) (detailing 17
Furthermore, the quasi-intellectual property claims currently lack theoretical grounding that might offer limits. As McKenna has shown the right of publicity is rather incoherent and seems to reduce to the idea of a right of autonomous self-definition. That analysis may be accurate, yet it explicitly leaves issue such as the First Amendment and other conflicts for others to “resolve.” Attribution’s incoherence runs from debates regarding whether it belongs under copyright or trademark to whether it is a separate right to what should shape the right in general. Integrity rights suffer from the same problems. This foundational incoherence and lack of temporal limits demonstrates that the quasi-intellectual property rights threaten intellectual property’s balance precisely because of the way they can be used to extend copyright control where it is no longer present.

For example, in the Joyce case a professor first stripped the book of references the Joyce estate found objectionable because the estate asserted that the publication would violate copyright and privacy law. But remember that the estate explained its action as part of its desire to protect the integrity of the work and stop commentary of which it did not approve. Once published, the reviews indicated that more support would have helped the book make its case. It was after these responses that the professor chose to publish a supplement with the material to which Joyce’s estate objected and that required

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316 See McKenna, supra note 179, at 293 (noting that “other interests” including First Amendment ones may “outweigh the individual’s autonomy interest” and “leav[ing] to others the job of determining how to resolve the conflicts.”)

317 See Amended Complaint for Declaratory Judgment and Injunctive Relief at ¶¶47-66 (detailing the efforts of the Joyce estate to prevent the publication of Schloss’ work and the changes to the work based on the threats of litigation), at ¶¶ 80-88 (detailing the Joyce estate’s use of litigation and to stop arguably fair uses), and at ¶¶93-96 (showing the way in which the estate invokes copyright to further non-copyright interests such as privacy).

318 See supra note 13.
her to gain the help of Stanford’s law clinic. Although the Joyce case has settled, many who would use information spillovers to generate new ideas are not in the position to have a law school legal clinic agree to handle the case.

So, copyright and trademark have flaws as semi-commons. Potential users of copyrighted material must parse fact-specific and inconsistent rules regarding what use does or does not infringe. Thus copyright allows an aggressive copyright holder many ways to overstate the level of control the law affords them. Copyright is not alone with this problem. Like copyright doctrines, trademark doctrines such as genericism\(^{319}\) and nominative fair use create a situation where one has “little sense of whether a particular use of the work is legal or not.”\(^{320}\) Still these doctrines have long histories and theoretical foundations. The quasi-intellectual property claims, however, lack even the difficulties that may of necessity travel with intellectual property systems that operate as a semi-commons. And of their nature, these other claims offer only the author as their theoretical foundation. That position has even less room for the give and take a semi-commons or creative system in general requires. In short, adding more author centered rights increases the potential for mischief by authors and others who hold the copyright to a work.\(^{321}\)

C. Information Log Jams

\(^{319}\) See generally Desai and Rierson, supra note 87.
\(^{320}\) Frischmann and Lemley, Spillovers supra note 26, at 275.
\(^{321}\) As the Chilling Effects Web site details, trademark, the right of publicity, integrity, and attribution, are often invoked as plaintiffs claim that spillover uses are potentially infringing. See generally, www.chillingeffects.org
Literary, historical, and economic theory show that information is vital to creative systems. A problem occurs when the law fosters information log jams that interrupt the flow of information. Although each theory has a different project and offers different views of creativity, all point to creative systems functioning as a feedback loop. Intellectual property law then is supposed to mediate between the inputs and outputs and/or the access or denial of access within creative systems. Nonetheless, shifts in the way creators have used intellectual property law now threaten the functioning of the creative system.

Intellectual property law offers much to support creative systems as it offers creators protection for and power over creative works including how others may use them. Yet, this same protection and power can establish a system where the creators who benefited from access to and use of previous creations, now prevent others from drawing on the well of information. Although much of the creations at issue are seen as governed by copyright, as their value becomes more apparent, creators seek to exert control beyond that offered by copyright. These other avenues of control such as the right of publicity, attribution, and integrity lack the, albeit thin, restrictions the copyright system places on control. In short these new arguments allow a creator, and her heirs or assigns, to create information log jams that stop the flow of information to those who often make productive use of such information.

Although this Paper questions whether claims for attribution, integrity, and/or publicity are founded or necessary, the fact remains that many see these interests as vital. In addition, in an attention economy the lines between copyright, trademark, and trademark-styled interests blur if not collapse. As value is found and based on reputation
and attention one would expect those deriving such value to seek legal status and protection for such value. Thus not only will intellectual property holders seek to expand their right within a doctrine such as copyright but they will seek to expand control over creations through whatever claims will provide such control. That behavior is not likely to change. Nonetheless there appears to be a way to provide some measure of balance for these quasi-intellectual property claims. The key to this solution is time.

Consider that a creator may have reason to control her image and assert publicity, attribution, and integrity rights while alive. From a labor perspective one works to support one’s life and may need property rights to protect that which sustains one’s life. From a persona perspective, one has a connection to one’s creations as an expression of one’s person. Although the extent of the control one should have in life still requires balance against the public’s interests in creations, a simple point arises here. The theoretical justifications for a creator’s control over the material at issue indicate that whatever level of property interest one may assert, that interest is individual and tied to the creator. Little, however, supports heirs’ or assigns’ ability claims for attribution, integrity, or publicity. Neither labors on the work. Neither has a personal connection to the work. Indeed, even if one accepts the personal view, neither an author, heir, nor assign can make a claim that all creations have a persistent and immutable meaning that must be protected. Such a position flies in the face of reason and is fetishistic. In economic terms, allowing others to assert these rights extends and expands control over creations such that rent is extracted for the last generations’ work or censorship ensues.

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322 See Desai, supra note 2.
323 See Kwall, supra note 51, at 2003 (arguing that moral rights including integrity and attribution belong to an individual and relate to her life such that they extinguish at death).
324 Cf. Desai and Rierson, supra note 87 (arguing that trademark law’s approach to policing marks in the genericism context requires the view that all meaning is static as opposed to contextual and dynamic).
Worse, regardless of the persona-based or economic views behind an heir or assign’s management of a creation, they will likely overvalue their control at the cost of lost production within the otherwise open creative system that is spillover rich. Again the instances of publishers and heirs trying to use copyright or quasi-intellectual property claims demonstrate the point. These groups favor their control over the balance that places creations into the unfettered category.

When such control is exerted through quasi-intellectual property (such as right of publicity, attribution, and/or integrity claims) with unlimited or uncertain term lengths not to mention unclear boundaries as to what acts lead to liability under those doctrines, the virtuous circle of creativity that the law ought to foster as part of intellectual property law is broken. This shortsighted focus on individual interests neglects the interest of society in having access to information needed for further creation. Indeed, as shown above, three theoretical approaches to the information in question indicate it ignores the very way in which creative systems operate. As such recognizing these non-copyright interests for expressions already protected under copyright offers too much protection such that creation itself is threatened. The law should not foster such a result. And, if such quasi-intellectual property claims are to be recognized at all, their duration must be limited to the life of the author. That requirement at least has some theoretical foundation. In addition, by ending the interests at life, others would have a clear sense that use of the work would not run afoul of these rather unclear rights. Of course one would still have to navigate the copyright problems, but an examination of that problem is best left to another paper.

\[325\] Id. at 280.
Conclusion

Authors and publishers, indeed anyone who holds an intellectual property interest, will always seek to expand and/or extend their rights. In some cases these claims have merit. In many they are simply a desire to change the balance between what is available as unfettered access to creations and what is permission-based. Despite recent scholarship demonstrating how a Romantic author view that favors author’s interests over all else has taken over the intellectual property, these views persist. Authors, publishers, and even much of society are moved by visions of labor and persona-based creation where the creator is placed above all others. So when business models change and modes of production shift, one should not be surprised that new arguments about what legal claims must be vindicated arise. Still those arguments inescapably return to labor and persona to justify their claims even when such claims do not match the theories to which they appeal. And they will draw on the Romantic author notion precisely because of its appeal. That being said, one cannot deny that new modes of generating value exist and what constitutes value has shifted as well. The question is whether the law can or should enter and recognize these claims.

This Paper has argued that in fact the rhetorical structures of these new claims mirror the ones made in copyright. They simply resurrect the author-centered view of creation. That view fails to strike a balance between creator’s interests and the public interests. Thus this Paper offers that a well-functioning intellectual property system mirrors most understandings of creative or productive systems: it fosters the creation of outputs but acknowledges that those outputs must be available as inputs to spur further
creation and productivity. Given the incoherent and unbounded nature of claims seeking
to increase author centered control over creation it is likely that such claims should be
rejected. If, however, the attention economy grows and indicates that neither copyright
nor trademark captures the way in which creation functions and that new reputation and
attribution rights are necessary, then those new rights must be limited. The theoretical
bases offered for such claims show that the claims are individual in that they relate
directly to the creator. Thus they should extinguish upon the death of the author. This
solution protects authors while opening space for others to draw on others’ creations to
perpetuate the creative and productive cycle.