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

Alina Ng*

ABSTRACT

This Article explores what authorship and creative production mean in the digital age. Notions of the author as the creator of the work have, since the passage of the Statute of Anne in 1710, provided a point of reference for recognizing ownership rights in literary and artistic works in conventional copyright jurisprudence. The role of the author as both the creator and the producer of a work has been seen as distinct and separate from that of the publisher and user. Copyright laws and customary norms protect the author's rights in his creation, and provide the incentive to create. They also allow him to appropriate the social value that his creativity generates as recognition of his contribution towards society. By initially protecting the rights of authors in literary and artistic works as a property right, copyright laws have facilitated market transfers of private rights and directed use of these works toward the most socially beneficial uses. This Article proposes that in the digital age, when users of literary and artistic works are increasingly becoming authors themselves, the notion of authorship provides a mark of identification to connect the original author with the work in a market characterized by an abundance of derivative works and remixes of original content. The notion of authorship in the digital age attributes individual and collaborative contributions to the collective pool of information back to their respective authors. This Article proposes that the networked economy

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may be sustained in a world where digital technologies facilitate the free flow of information if good works of authorship are rewarded by attributing the original author, and authentic works of authorship by responsible authors become an expected norm. Recognizing authorship and protecting ownership rights in the digital age, where open platform technologies and peer production create a plethora, rather than a paucity, of literary and artistic works, are simple and cost-effective ways for the law to address this question of sustainability. The notion of authorship as a right of ownership in literary and artistic works acknowledges the moral and ethical components of communal and collaborative production. This Article suggests that recognizing authorship and protecting ownership rights in literary and artistic works in the digital age promotes, rather than restrains, creative activity.

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The Internet network design commonly known today as Web 2.0 facilitates online collaboration, information sharing, and the interoperability of different standards.¹ A culture of consuming and remixing data has grown around an architecture supporting web-based communities, social networking sites, blogs, wikis, and collaborative projects.² Such a culture has created a plethora of

1. Richard Paul & Lisa Hird Chung, *Brave New Cyberworld: The Employer's Guide to the Interactive Internet*, 24 *Lab. Law* 109 (2008) ("The phrase "Web 2.0" was coined to describe this latest generation of Web-based inter-activity, relationship-building, and user-generated content. Web 2.0 refers to Web software that is continually and collaboratively updated by Internet users. This includes Web sites, Web applications, or Web services that allow users to create content, control content, or interact and collaborate with one another.")

2. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User Generated Rights*, 11 *VAND. J. ENT. & TECH. L.* 921, 929 (2009) ("In the past, it was far more difficult to see the creativity of thousands, if not millions, of people. The social networking

creative content from an untold variety of sources, as users of creative content engage in remixing and reproducing creative works.³ As communal collaboration and collective ownership of creative production increase because of the networks that the Internet has created,⁴ there is increasing commentary and scholarship on the users of such content.⁵ The shift from more conventional scholarship on the place of the autonomous author in the copyright system to the user is an interesting one.⁶ As web applications allow for collaborative and interactive remix and reproduction of creative works in a decentralized fashion, users of creative works are no longer passive consumers of content. Instead, they have become producers of creative works themselves, a role that is, in the analog world, solely that of the author. The copyright system in the analog world serves to

platforms at the heart of the Web 2.0 revolution have changed this. Web 2.0 technologies brought broader visibility to the creative self-expression of the average person, and in doing so reproduced already-existing forms of everyday cultural creation.”)

3. Marco Iansiti & Greg Richards, *Six Years Later: The Impact of Evolution of the IT Ecosystem*, 75 ANTITRUST L. J. 705, 708 (2009) (“Web 2.0 applications have enabled the formation of online communities of end users that produce and manage enormous amounts of shared, user-generated content. More than just providing a substitute way of creating and delivering traditional software applications, such as email and calendaring, Web 2.0 transforms the way we use computers to produce, share, and consume information through Internet-hosted, collaborative applications”).

4. Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together and the Forces Tearing It Apart*, 42 U.C. DAVIS L. REV. 343 (2008) (analyzing the Internet through network formation theory and arguing for the continued integration of networks and systems into an interoperable Internet).

5. See, e.g., Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 561-62 (2000) (“Technology now makes possible the attainment of decentralization and democratization by enabling small groups of constituents and individuals to become users—participants in the production of their environment—rather than by lightly regulating concentrated commercial mass media to make them better serve individuals conceived as passive consumers.”); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 348 (2005) (stating that while copyright is a law of authors’ rights, “[a] theory of authors’ rights must be informed by the theory of the user” as a recipient of copyrighted works and as a new author); Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1242-43 (2008) (describing “digital determinism” as a scholarly trend for IP policy that protects “network friendly policies for a network-dominated world,” of which one focus is the “viewers and consumers of works” as “users”).

6. For literature addressing the notion of authorship, see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET* (1994); Lionel Bently, *R. v The Author: From Death Penalty to Community Service 20th Annual Horace S. Manges Lecture, Tuesday April 10, 2007*, 32 COLUM. J.L. & ARTS 1 (2008) (arguing that the author is rightly placed at the center of the copyright system); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008) (arguing that authorship is an ideology from which society constructs reality); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992).

connect authors with their readers through the market.⁷ It also allows authors to recover payment for the provision of literary and artistic works to the reading public.⁸ This Article suggests that, in the digital world, the copyright system serves a different function—to ensure that the integrity of the original creator of the work is protected and respected in a world where content can be easily reproduced without the consent or approval of the original author. In order for authors to continue to produce works for society to enjoy, the conditions necessary to encourage authorship must be protected.⁹ This is particularly so in the digital environment where unauthorized uses of works undermine authorial rights in literary and artistic works and could therefore threaten the conditions that sustain creative authorship.¹⁰

Copyright laws protect creative works as property of the copyright owner as a carefully calibrated set of exclusive rights. Section 106 of the Copyright Act spells out these exclusive rights as

7. Paul Goldstein, *Copyright and Legislation: The Kastenmeier Years*, LAW & CONTEMP. PROBS., Spring 1992, at 80 (1992) (“Copyright, in a word, is about authorship By ‘authorship’ I mean authors communicating as directly as circumstance allows with their intended audiences. Copyright sustains the very heart and essence of authorship by enabling this communication, this connection. It is copyright that makes it possible for audiences—markets—to form for an author’s work, and it is copyright that makes it possible for publishers to bring these works to market.”).

8. *Id.*

9. *Id.* (“Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft out of thin air, and intense, devouring labor, an Appalachian Spring, a Sun Also Rises, a Citizen Kane. Authorship . . . implies not just an author, but an audience, not just words spoken, but individuals spoken to.”).

10. The conditions that sustain creative authorship should extend beyond the protection of pure economic interests. In non-moral rights jurisdictions, such as the United States, the rights of the author in the work he creates are essentially economic rights to make reproductions, derivatives, distribute, publicly perform and display, and digitally transmit in the case of sound recordings (although there is protection of moral rights in specific situations in the U.S.—the Visual Artists Rights Act, embodied as §106A in the U.S. Copyright Act, recognizes and protects the moral rights of integrity and attribution of authors of a work of visual art) . See *Wheaton v. Peters*, 33 U.S. 591 (1834) (holding that the rights an author has in the work is provided for solely by statute). However, conceiving of the author’s rights as solely originating from the Copyright Act undermines an important idea about the production of creative works: that of authorship and the expression of creative individuality contained in each work. For commentary on this issue, see Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) (explaining how creativity may be characterized by spiritual or inspirational motivations rather than purely commercial incentives); Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413 (2009) (suggesting that emphasizing market rewards as the primary incentive for creativity in copyright jurisprudence may undermine the author’s intrinsic need for authentic expression); Michelle Brownlee, Note, *Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157 (1993) (arguing that the copyright system should protect the visual artist’s “style”).

the rights to reproduce the work, prepare derivatives of the work, distribute the work, publicly perform the work (by way of digital audio transmission in the case of sound recordings), and publicly display the work.¹¹ The exclusivity that these rights provide serves as a commercial incentive to produce and as an economic reward for creativity.¹² Exclusive rights provide copyright owners with a clear baseline right to exclude non-paying members of society from using the work in ways that the Copyright Act specifically sets out.¹³ These statutorily enumerated rights facilitate consensual transfers of clearly defined entitlements in literary and artistic works for payment.¹⁴ The entitlements are transferred to the party who values the right most, in the form of a Coasean bargain, to allow market transactions to occur.¹⁵ The idea behind statutorily-recognized property rights in literary and artistic works is a manifestation of classical law and economic thought on cost-benefit forms of legal analysis—in order to encourage authorship and increase public welfare, authors must be paid with exclusive rights for their work.¹⁶ This payment encourages authors to create and commercialize their works on the market.¹⁷ The

11. 17 U.S.C. § 106 (2006).

12. For an account of the philosophy behind the incentive and reward paradigms of intellectual property, see Justin Hughes, *Copyright and Its Rewards, Foreseen and Unforeseen*, 122 HARV. L. REV. F. 81 (2009).

13. Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2123 (2009) (discussing baseline rights for exclusion for intellectual property and explaining that exclusive rights in intellectual property are “necessarily artificial” as intellectual property lacks the physicality of tangible property for the physical delineation of exclusivity: “[o]ne difference among land, chattels, and intangibles is that the exclusion strategy is easier to carry out for tangible property. The baseline is clearer: in the case of land, there is a physical bubble that corresponds to the module that the exclusion strategy provides. In intellectual property, by contrast, attempts at exclusion are necessarily artificial”).

14. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1612-13 (1982) (“[C]opyright law makes it easy to proceed through consensual market transfer. . . . The copyright statute . . . facilitates the functioning of the consensual market in four ways: it creates property rights, lowers transaction costs, provides valuable information, and contains mechanisms for enforcement.” (citations omitted)).

15. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590 (1988) (explaining that the preference for clearly defined legal rights, or “crystals,” among legal academics in the 1980s was attributable to the fact that “precise entitlements facilitate the efficient allocation of goods; they allow us to identify right-holders and to organize trades with them until all goods arrive in the hands of those who value them most”).

16. RICHARD WATT, *COPYRIGHT AND ECONOMIC THEORY* 11-15 (Edward Edgar Publ'g Ltd. 2000).

17. Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 16-23 (1995) (discussing the various aspects of commercialization and stating that “[t]he Copyright Act reserves these money-making activities to the copyright owner by granting the owner the right to prevent others from engaging in these acts. It is this potential to earn

assumption behind a law and economics approach to the copyright system is that an author will only decide to create a work when the author is assured that the expected market revenue from sale of the work exceeds his cost of expression.¹⁸

However, the incentive and reward were not intended to benefit the creator but rather to increase the availability of creative works and thereby enhance the public welfare.¹⁹ It was indeed a reflection of the law's conventional position on literary and artistic rights when Justice Reed remarked that

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.²⁰

The necessity of encouraging the creation and dissemination of literary and artistic works for the public has long been the cornerstone justifying the protection of creative works as private property of the copyright owner, a necessary "evil" that society, "for the sake of the [common] good," bears in order have a supply of "good books" for learning that are the products of "literary labor."²¹ The ability to recover the cost of production and dissemination of literary and artistic works was necessary for authors to continue to produce works for society, and it appears that writing for commercial remuneration drove many authors to write as professionals.²²

However, the diverse forms of content produced and disseminated today through the Internet demonstrate that non-economic factors may drive creators of literary and artistic works, factors that are independent of the commercial rewards from the sale of the work through a robust copyright market.²³ The proliferation of

income from the commercialization of new works that presumably motivates authors to put in the long hours necessary to create those works.").

18. For a discussion on the economics of the copyright system, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

19. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

20. *Id.*

21. Thomas Babington Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841), reprinted in FOUNDATIONS OF INTELLECTUAL PROPERTY 309 (Robert P. Merges & Jane C. Ginsburg eds., 2004).

22. For a description of the copyright market in 18th century Germany, see MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET* 35-55 (1994).

23. The copyright market is distinguishable from regular markets for physical or tangible commodities by the need for clear demarcation of exclusive rights due to the non-rival and non-exclusive nature of copyrighted works. However, expanding rights into all forms of creative expression will create market inefficiencies by the dead-weight losses that will result

community-based content with Web 2.0 shows that the production and dissemination of creative works may occur without the rights now considered necessary for revenue generation through what hopefully an efficient copyright market.

Scholars have often doubted the necessity of copyright in facilitating creative production. More than four decades ago, Professor Benjamin Kaplan, in his 1966 James Carpentier Lectures at Columbia University, suggested that the copyright system and the controls it imposes on creativity “will appear unneeded” to sectors of production where integrated systems would provide greater public access to creative works, and where “the law of the future would lose patience rather quickly with the mere idiosyncratic withholding of access.”²⁴ Copyright, to Professor Kaplan, was “likely to recede [and] lose relevance” in the production of works created through some form of public support.²⁵ Five years later, his former student, Stephen Breyer, expressed similar sentiments with respect to the copyright system.²⁶ Professor Breyer observed that the abolition of the copyright system would not have much of an impact on the production of most types of books.²⁷ It may instead benefit the public by reducing book prices, eliminating transaction costs of seeking permission to copy, and increasing the circulation of most books that would continue to be produced in the absence of copyright.²⁸ In his remark that “the case for copyright in books rests not upon proven need, but rather upon uncertainty as to what would happen if protection were removed,” Professor Breyer adopted the position of a copyright skeptic, doubting the necessity of a copyright system in encouraging creative production.²⁹

Scholars and students of the law should not lose faith in the copyright system as a system to encourage creativity just because technological development has made creative works more accessible to the general public. A copyright optimist ought to think that the copyright system will continue to be a vehicle to encourage authorship in the digital age. Scholars and students who study the copyright

due to society’s decreasing ability to access works. See, Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B. U. L. REV. 975, 995-996 (2002).

24. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 120-21 (1968).

25. *Id.* at 119-21.

26. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

27. *Id.* at 313 (“[A] moderate decline in publishers’ revenues would probably not produce a serious loss of production.”).

28. *Id.* at 313-320.

29. *Id.* at 321-322.

system have conventionally thought of the copyright system in the United States as providing economic incentives for authorship.³⁰ However, in the digital age, as users of creative content become increasingly empowered to make contributions towards the collective pool of information and human knowledge—whether through autonomous or collaborative creation, and whether expressed in original or remixed form—copyright scholars and students may start thinking of the copyright system from the perspective of authorial rights, rather than economic rights, and begin to think of the copyright system as necessary to provide personal, moral, or other non-economic incentives for authorship in the digital age. This is especially important because the ease of accessing and remixing creative works will require that a work's integrity be preserved and the author's personality be protected to allow society to verify and check upon the veracity of a work in an environment when the abundance of creative works to society necessitates the verifiability of a work's content and reliability. As the law shifts its focus from authors and publishers to users, and as conventional understanding of authorship changes, the way people think about property rights in creative works and the purposes they serve will have to change in the same direction, too.

Property rights in the analog world provide a simpler right of excluding non-paying members of society from using the work.³¹ The tangibility of analog works and the non-trivial costs of making copies of original content provide authors with greater and more exclusive control over how their works are used.³² In doing so, these property rights encourage authors to invest time and money to create and

30. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1281 (2003).

[T]he moral ambivalence towards copyrighted works may stem from a distrust of the basis for copyright protection. If the sole basis for protecting copyright is the economic incentive to create, then as soon as a work is minimally compensated, it should fall into the public domain. Emphasis on the incentive theory may weaken the legitimacy of copyright holders' claims.

Id.

31. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 792 (2001) (stating that rights of exclusion “provide a baseline against which parties can establish contracts that specify particular uses of resources”).

32. The “physical bubble,” which allows exclusion based on the physical attributes of the work, is more prevalent in works of analog form. For example, it would be more costly to reproduce a vinyl record or video cassette. Works in MP3 or JPEG formats are significantly less exclusive because of their digital nature. For a discussion on the right to exclude and the tangibility of the “thing” excluded, see Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2123 (2009).

produce works of authorship.³³ In the analog world, property rights serve to make abundant what was scarce. In the digital world, however, property rights in literary and artistic works serve an entirely different function. In the digital world, property rights may be needed not to exclude society, but instead to manage the use of creative resources. When the user is also the producer of new works of authorship, the market is not characterized by a paucity of literature and other forms of creative works, but by an abundance of works of diverse types.³⁴ Here, property rights are not needed to encourage the production of creative works, as users are continuously producing works.³⁵ But, property rights may be needed to sustain the continuous production of creative works by identifying owners of literary and artistic works, facilitating transfers of use rights between the original creator of a work and their users, and protecting the authorial integrity of authors.

The remaining discussion in this Article is divided into five parts. Part I explores the conventional notion of authorship in the analog world. Part II analyzes how that notion of authorship has changed in the digital world and the implications of that change upon the conception of rights in the networked economy.³⁶ Part III explores what it means to protect property rights in literary and artistic works and suggests that these rights may be important in achieving a balance between integrity in creativity and responsibility in the use of these works. Part IV argues that, while it is important for the law to ensure that social welfare is advanced through the grant of property rights in literary and artistic works, it is perhaps more important for the law to ensure that individual rights of authors are protected to

33. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

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

Id.

34. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 112 (2007) (stating that "[t]he amazing diversity of the Internet, with its abundance of user-generated content, would be impossible" if Internet intermediaries were made liable for posting infringing content on their sites).

35. Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 937 (2008) (describing how users are willing to generate content that online service providers harness as their business model).

36. The networked economy is the economic order that is built upon the connectivity of the Internet that allows phenomenon such as peer production and collaborative projects to occur. The culture of sharing and collaborating is described extensively by Professor Yochai Benkler in his book, *THE WEALTH OF NETWORKS*. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

ensure sustained production of creative works in the networked economy. Individual rights of authors should be curtailed only in exceptional circumstances. Part V of this Article defends the copyright system as a system designed to encourage authorship that extends beyond the production of literary and artistic works to sustaining individual creativity and authentic forms of authorship. The conclusion, Part VI, asserts a need to think about the copyright system differently. Copyright is less of a legal system restricting development in society and more of a legal system encouraging authorship in diverse forms. Conceiving the copyright system as protecting authorial integrity assures sustainability of creative endeavors in the digital age when users are also authors of literary and artistic works.

I. AUTHORSHIP IN THE ANALOG WORLD

In the analog world, creative expressions of an author endure in the form in which they were first created. Works produced are seldom alterable or manipulable, and if they are, any alteration or manipulation to a work of authorship will often require great skill, and be difficult or costly. The continuity in creative production from the moment of conception of the idea to its full and complete expression of authorship means that the cost of expression—the cost of creating the work in terms of the author's time and effort expended, rights clearance where necessary, and transactions costs in searching for and entering into a publishing contract with a publisher—is usually very high for the author, who invests a great deal of time and labor in creating a work of authorship in the expectation of recovering the investment.³⁷ Authorship is essentially an individualistic activity in that the creator of a work often created alone, or if not alone, with identifiable co-authors or co-creators. No doubt, authors in the analog world borrow from existing works, and allow other authors' works to shape their own work, but they often still retain their individual style and personality in their work.³⁸ William Shakespeare, for example, was influenced by Ovid, Geoffrey Chaucer and Christopher Marlowe

37. Landes & Posner, *supra* note 18, at 325, 327 (calling the author's time and effort in producing the work, and the publisher's cost of soliciting, editing and setting the manuscript in type, the "cost of expression" in any given work).

38. *PARADISE LOST* is a poem based on the fall of man and story of redemption in the Bible. Yet, John Milton's individuality as a blind poet facing a potential death sentence stands out despite the poem's source of inspiration. For the background to John Milton's work on *PARADISE LOST*, see the introduction to *JOHN MILTON, PARADISE LOST* xv-xxx (Gordon Teskey ed., 2005).

to a large degree, and he borrowed extensively from the Bible.³⁹ Nevertheless, as an individual author, Shakespeare still maintained a separate identity as the creator of his own unique works, distinct from authors of contemporaneous works.⁴⁰

Works of authorship in the analog world are usually personal expressions of the author and are often attributable to the original creator of the work, primarily because works in analog form are not easily altered.⁴¹ When a literary work in book form is made available to society, for example, its content is always easily attributable to the person named as the author because in analog form, a literary work, as it exists, is traceable to its producer and its content verifiable for reliability or veracity based on the information that is available about the author and the publisher of the work. Dissemination of works in analog form usually has to be done through a publisher, who bears the costs of printing, binding and distributing copies of the work.⁴² The production and dissemination of a work to society is usually costly⁴³ and any modification or alteration of the work is significantly reduced by the medium in which the work is distributed and made available to society—the integrity of an author’s work that is distributed in book form is better preserved and hence its content more easily verifiable than when a work is distributed to society in digital format. Due to the high costs of expression, production, and dissemination, a system of property rights in literary and artistic works may have been the most appropriate form of encouragement that the law can provide authors and producers to facilitate the production and creation of works for society’s benefit when the initial cost of production and distribution is high. But property rights only served as a mechanism to provide rights to exclude society from using the work without paying for it—property rights, in the analog world, were not needed to provide the vital information about the author and content of a work

39. HAROLD BLOOM, *GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS* 18-25 (2002).

40. HAROLD BLOOM, *SHAKESPEARE: THE INVENTION OF THE HUMAN* 6 (1998) (“It cannot be said that Shakespeare imitated Chaucer and the Bible in the sense that he imitated Marlowe and Ovid.”).

41. It is easier to manipulate data with digital works because technology facilitates changes to works of authorship. Digital works are likely to be considered less original and authentic than analog works without the personal mark of the author. See Laura N. Gasaway, *Libraries, Users, and the Problems of Authorship in the Digital Age*, 52 *DEPAUL L. REV.* 1193, 1223 (2003).

42. Landes & Posner, *supra* note 18, at 325-237.

43. The costs of production and dissemination would include the initial cost of expression, which is the cost of the author’s time and effort plus the cost of the publisher in soliciting and editing the manuscript and setting it in type, and the cost of printing, binding and distributing the work. *Id.*

to ensure that the content of works distributed to society are verifiable for their content, in terms of reliability, accuracy, and authenticity. Works were received by society for what they were because the medium in which works were distributed did not facilitate the production of new content generated by users of the original work. This is not so with authorship and the creation of literary and artistic works in the digital age.

II. AUTHORSHIP IN THE DIGITAL WORLD

In the digital world, the conventional modes of authorship and the self-contained medium in which content is distributed to society prevalent in the analog world appear to have changed drastically. With the Internet and digital media, where real world information is converted to binary numeric form in ones and zeros to form easily transferrable chunks of data over communication networks, works of authorship has become more readily alterable and manipulable with its content less verifiable for its veracity and accuracy simply because the content may have been altered and redistributed by many users of a single work. As a result, authorship in the digital world is characterized by a new culture that is eager to explore what they can do with the technology available to them, and to create new works, share them as well as remix original works of authorship that come to them because technology is available to cut and recombine original works of many different sorts so that the end product may not resemble any of the original work that was used. While costs of alteration and manipulation of original works of authorship are prohibitive in the analog world, that is not the case with digital technologies. At a fraction of the original cost of production,⁴⁴ users of original works may alter and manipulate portions of an original work that they choose to. Fan edits of popular motion pictures, such as Mike J. Nichols's edit of George Lucas's *Star Wars Episode I: The Phantom Menace* that came to be known as the "Phantom Edit,"⁴⁵ is just one example of how technology has enabled users to alter and manipulate the content of original works of authorship. As a result, authorship of literary and artistic works is characterized by significantly different qualities in the digital age. In the digital age, authorship is generally communal, in that an author usually creates a

44. J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 69 (1997) ("The second comer who purchases the originator's product . . . may electronically extract and recompile the data in question at a fraction of the originator's collection and distribution costs.")

45. See Fanedit.org: Home of the Fanedit, <http://fanedit.org/49/> (last visited April 2010).

work as part of a creative community with sometimes-unidentifiable contributors and supporters.⁴⁶ Authors readily share their works with each other and incorporate other works into their own as part of a remix culture.⁴⁷ Works of authorship are also sometimes large collaborative projects involving multiple contributions from many different authors—Wikipedia being the quintessential example of a collaborative project involving more than 91,000 active contributors working on more than 15 million articles in more than 270 languages.⁴⁸

Dissemination of works of authorship produced in the age of digital media is often accomplished through distribution of the work on the Internet by the creator of the work, and the need for a publisher or printer to print and distribute the work is substantially minimized due to the author's ability to digitally reproduce and distribute the work at its marginal cost of production, whether the work in its original form was in a physical or digital medium.⁴⁹ The resulting effect on digital technologies upon the environment for authorship is increased creativity and the production of diverse forms of literary and artistic works by users of creative works. There are concerns when users generate new content from original works and distribute them to society because unless sufficient information is provided about the new work to allow other users to verify the accuracy and reliability of the work—since the modified work may not necessarily represent the contents in its original form nor the expression of the original author—the veracity of literary and artistic works will be difficult to verify. In the digital world, therefore, property rights in literary and artistic works serve a different function from that in the analog world: property rights may not be needed to encourage the production of creative works because creators may not be driven by the possibility of commercial rewards. But, creators who create because they want to make a contribution to society, would want to be recognized for the work they have contributed, especially if

46. Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

47. See, e.g., LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

48. *Id.*

49. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1053.

Information is different from ordinary goods because the marginal cost of reproducing it is so low. . . . [T]he ratio of fixed to marginal costs is much higher for information than for other types of goods. That ratio is increasing as the internet makes the distribution of additional copies of many types of information virtually costless.

Id. (citations omitted).

the work makes a substantial contribution to the pool of collective knowledge. And society, in the interest of progress, would want works that are the most accurate and reliable, especially when there are an abundance of works and information to choose from. In this situation, exclusive property rights to the work serves an entirely different purpose not anticipated when works were produced and distributed in analog form. Rights, in the digital age, serve to sustain, and not encourage, authorship in the digital age. To sustain this new mode of creative production and dissemination in a digital medium, authors need a mechanism to identify themselves with their individual work and claim a work as theirs against other variations that may exist, and society requires a way to assess the veracity of works that are before them. Rather than serving to encourage creativity—to jump start an author's creative impulses—as in the analog world, property rights in the digital age serve to sustain creativity—to make an author continue to create for society—by connecting authors to their works and original expressions, informing society of the identity of the author of a work. The next section explains how property rights serve to sustain authorship in the digital age in greater detail.

III. PROPERTY RIGHTS IN THE NETWORKED ECONOMY

A. Sustaining Authorship Through Property Rights

Property rights in literary and artistic works within the copyright system conventionally mean the set of rights provided for under § 106 of the Copyright Act.⁵⁰ These rights “assure contributors to the store of knowledge a fair return for their labors.”⁵¹ The production and dissemination function of these rights in copyright law may not be as important in the networked economy because of the significantly lower costs of producing and disseminating the work. Where community norms, rather than market incentives, drive the creation and production of literary and artistic works, the exclusive rights under § 106 may have a lesser role to play in encouraging creative and artistic production in the digital age. As economic gains from the market become less of the reason why authors in the digital age invest time and money to bring a work to fruition, the exclusive rights to print, distribute, make derivative works, publicly perform and display, and digitally transmit lose their influence upon the creative process. Where creativity occurs for non-economic gains,

50. 17 U.S.C. § 106 (2006).

51. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985).

exclusive rights that assure authors and copyright owners commercial rewards from the market become “only one among a number of expedients for stimulating creativity.”⁵² Still, this does not mean that the foundational conceptualization of copyright laws as a property right in literary and artistic works completely loses its relevance in the networked economy. But, the purpose they serve in the copyright system must change—from one that encourages production to one that sustains creativity—as society and creative cultures change with technological development.

The creation of a market for literary and artistic works is still a product of the copyright system even if the connectivity within the networked economy appears to render copyright laws less effective.⁵³ Markets for literary and artistic works do not disappear just because technological development has brought about deep-rooted changes in the production functions of creative activities. In the analog world, the copyright system allows efficient market transfers of rights in literary and artistic works, thereby connecting authors with their audiences. In the digital world, authors become more connected with their audience when the audience recognizes its individual contribution, as authors, to the collective pool of knowledge by those who use works of authorship in their own work. Due to the abundance of works in the networked economy, a copyright system should protect literary and artistic works by providing a mark of authorial identification through baseline ownership rights in the work. This recognition of the author for contributions made to collective pool of creative works available to society for use assures authors of personal recognition for that contribution, which many non-economic driven creators seek when making contributions to their community of creative producers. By providing an ownership right as a mark of identification of original authorship, users and new authors of literary and artistic works are able to identify the original author of a work, obtain permission to incorporate an older work into a newer one, and provide recognition and attribution where it is due, helping to facilitate the free flow of information for sustained creativity and authentic authorship. Property rights will therefore provide a simple and cost effective way of addressing the sustainability of creative production by connecting the work with the author, allowing greater

52. KAPLAN, *supra* note 24, at 122.

53. The relevant market for copyright law is not defined extensively in the literature, but Professor Sara K. Stadler defines the copyright markets to exclude works that have been reused or “repurposed” to create works that are complementary, and which do not operate as substitutes for the original. Sara K. Stadler, *Relevant Market for Copyrighted Works*, 34 J. CORP. L. 1059, 1076 (2009).

authorial control over how the work may be used, and by providing society with the information it needs to more easily verify the veracity of a work distributed to many in digital form.

In the networked economy, there may be a shift to protect individual rights over the collective societal goals of learning and growth because of the author's changing motivation for creativity. If altruistic, rather than purely economic, reasons motivate authors in a networked economy to create works, then the protection of individual authors' rights is not going to lessen the contributions that these authors make towards social welfare. Instead, authors motivated by altruistic ideals, who make their works freely available to society, may need to have individual rights protected against modification and alteration of the work that could misrepresent the author's original expression or mislead society by providing digitally modified or altered works that contain inaccurate information. If sustained creativity is to continue in the networked economy. According to Professor Ronald Dworkin, individual rights are private rights that individuals hold when there are no collective goals that justify the denial of the rights or that justify imposition of losses or injury upon the individual person.⁵⁴ Based on Professor Dworkin's definition of what individual rights are, the rights under copyright law should have a strong anti-utilitarian flavor because the maximization of the public's interest for learning and education would be subordinate to the exercise of individual rights in literary and artistic works. The author's individual rights should not be undermined in the interest of society but must be upheld in most situations unless there is reason to abridge the rights of an individual. The effect of abridging individual rights may be more detrimental to a legal system than an inflation of such rights, especially when principles of equal concern and respect for the individual author justify granting individual rights. An abridgment of the author's individual rights under the copyright system undermines the very legal institution that provides ground rules for a society dependent on authorial creativity for progress and education. Thus, individual authorial rights should only be abridged in the interest of the public, when the social cost of an expansion is not necessary to protect the individual author's right.⁵⁵

Copyright law has conventionally aimed to provide enough economic incentive for authors to encourage the creation of literary

54. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 92 (1977) (discussing the nature of individual rights and distinguishing them from collective goals, stating that "[i]t follows from the definition of a right that it cannot be outweighed by all social goals").

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

and artistic works for public benefit.⁵⁶ The foundational assumption that authors are economically driven to create, however, may be challenged by the demonstrable proliferation of literary and artistic works on the Internet, which are motivated by the creator's interest in being able to participate and contribute to a growing network of communication and civic engagement that take the form of blogs, photograph and video sharing sites, and social networks.⁵⁷ Copyright laws recognize authors for the contributions they make through the production of literary and artistic works for society, and reward authors for engaging in these activities.⁵⁸ But these laws also create a temporary monopoly that restricts society's ability to use works.⁵⁹ The protection of the author's rights must therefore be balanced against the need to have building blocks of creativity available to society to use so that authors and artists have the creative raw materials necessary to build upon in creating something new.⁶⁰ These building blocks of creativity may be playwright characters, novel plots, software logic, legal arguments, or ideas that authors use to express themselves creatively in new ways.⁶¹ The requirements of originality⁶² and creative expression⁶³ in copyright law ensure that the original author allows these building blocks within the work to remain free and the courts have found that a system of ruled lines and headings used for book-keeping,⁶⁴ ideas and themes of plays,⁶⁵ and compilations

56. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

57. Edward Lee, *Warming Up to User Generated Content*, 2008 U. ILL. L. REV. 1459, 1500-1503 (2008) (discussing the "phenomenal growth" of user generated content).

58. *Id.*

59. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2002) ("[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the creative monopoly is a necessary condition to the full realization of such creative activities." (citations omitted)).

60. Raymond T. Nimmer & Patricia Ann Krauthaus, *Software Copyright: Sliding Scale and Abstracted Expression*, 32 HOUS. L. REV. 317, 322 (1995).

In copyright, while the law encourages the production and publication of creative works by giving authors rights in the works they produce, the balance lies in denying the author many important rights and in completely excluding some significant material and content from any exclusive control by the individual. The excluded material provides blocks of available and unprotected material for further creative work.

Id.

61. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990).

62. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 52 (2d Cir. 1936).

63. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1990); *Mazer*, 347 U.S. at 214; *Baker v. Selden*, 101 U.S. 99 (1880).

64. *Baker*, 101 U.S. at 100.

65. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d. Cir. 1930).

of factual information,⁶⁶ for example, do not within the scope of an author's protectable right. These building blocks for creativity that fall outside the scope of protectable expression limit the scope of the author's property right in literary and artistic works, and while non-protectable components of a work encourage authorship in the analog world by reducing the need to negotiate for rights to use the work, they also serve to sustain authorship in the digital world by allowing parts a work that are merely ancillary to the author's main expression to be used, remixed, and shared without the need to obtain permission from the original author. By recognizing that some parts of a work are non-protectable, a system of property rights provide original authors with a mechanism to protect their creative expressions and maintain the integrity and veracity of their work, while offering users of original work a chance to become authors and creators by using the building blocks of creativity necessary to generate new content.

B. Facilitating Authorship through the Fair Use Doctrine

The fair use doctrine is another important legal doctrine in the copyright system that grants authors the ability to use existing works to create new ones. At common law, the doctrine allowed courts to interpret the law in a way that would allow for creativity to occur, especially in situations where the strict application of the law would stifle creative efforts.⁶⁷ The fair use doctrine was statutorily codified with the 1979 Copyright Act,⁶⁸ and four non-exclusive statutory factors were introduced to assist the courts with the analysis of what may constitute a fair use of a creative work.⁶⁹

Courts have been generous with the application of the doctrine, and have based its application on equity or fairness without attempting to define its boundaries or limit the application of the doctrine.⁷⁰ The Supreme Court case of *Sony v. Universal City Studios*,⁷¹ for example, demonstrates the Court's reluctance to

66. *Feist Publ'ns*, 499 U.S. at 344.

67. *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

68. 17 U.S.C. § 107 (2006).

69. Under the Copyright Act, these four factors are (1) the purpose and character of the work incorporating the original, (2) the nature of the original work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107(1)-(4) (2006).

70. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) ("The [fair use] doctrine is entirely equitable and is so flexible as virtually to defy definition.").

71. 464 U.S. 417 (1984).

interfere with private home uses of copyrighted materials. At a time when videocassette recorders (VCRs) were new on the market and private homeowners were using them to record televised broadcasts for viewing at another time (a technique called time-shifting), identification of allowable private uses of copyrighted content was a pertinent issue.⁷² The Court decided that to hold time-shifting of televised broadcasts in the home to be an infringement of copyright laws would allow the copyright owner to affect and control an individuals' use of copyrighted works within the privacy of their homes.⁷³ The Court went on to state that the use of VCRs to time-shift content was fair use under the law.⁷⁴ But, more importantly, the Court decided that, where the private uses of copyrighted content resulted in minimal economic harm,⁷⁵ the use was most likely fair.⁷⁶ The Court's decision demonstrated how the law would respond to an inefficient copyright market that does not effectively allocate rights in creative resources between owner and user. Thus, where the marketplace does not generate socially desirable outcomes, the Court is willing to assume the role of the efficient copyright market and allocate rights in the use of creative resources through the fair use doctrine.⁷⁷

However, in a networked economy, when users are increasingly authors themselves, the legal dynamics of the copyright system may have to change. Where the copyright system is primarily concerned with encouraging the production of literary and artistic works for public benefit in the analog world, in the digital world, the copyright system should be more concerned with sustaining creative authorship of works that will further the goals of the copyright system. Conventionally, the primary worry in granting rights in literary and artistic works has been a monopolistic control over creative works by authors and copyright holders in ways that may restrict public access. However, in the networked economy, the primary worry for the copyright system will not be the misuse of rights by authors or copyright owners. Rather, it is more worrisome that social disrespect for the process of authorial integrity and authentic works of authorship in the use and remix of existing works will deter authors

72. See Melville B. Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505 (1982).

73. *Sony*, 464 U.S. at 443-46.

74. *Id.* at 455.

75. In this case, the potential market for the copyrighted content, or its economic value, was not harmed by the private use of the work. *Id.* at 456.

76. *Id.* at 456.

77. See Gordon, *supra* note 14.

from fully expressing themselves through individual works of authorship. Additionally, instead of a concern that society will be able to benefit from the works of authors, the concern will be whether authors will have the personal motivation to continue producing new works if there are no safeguards to protect the author's integrity and personality contained in the work through various authorial rights, such as the right to be attributed or the right to protect the integrity of the work. In the networked economy, there may be a greater need not only to protect individual authors and their non-economic rights in literary and artistic works, but also to recognize the moral obligations that authors and their users owe each other. In the networked economy, there may be a greater need to achieve a better balance between those who create literary and artistic works and those who use the same works to create new ones. The balance that the law will seek to achieve in the networked economy will no longer be between incentives and access. Rather, the balance that the copyright system will aim to achieve in the digital age is between integrity in creation and responsibility in use of literary and artistic works.

IV. BALANCING PRIVATE RIGHTS AGAINST PUBLIC INTEREST

The fine line between protection and freedom, property and access, and integrity and responsibility is based on a legal demarcation between private rights and public property, or public domain. Conventional legal and economic literature builds upon the idea of copyright as a temporary monopoly over intellectual creation probably from the principle that authors, who labored over the production of manuscripts, were like farmers, who, having mixed their labor with the soil, were entitled to property over that which they labor.⁷⁸ This labor theory of property rights is perhaps most famously attributed to John Locke, who believed that a man who removes from nature that which was originally a part of nature, and who mixes his labor with it, makes the new thing his property.⁷⁹ The idea that the author had property in his creation by virtue of having labored in bringing it forth was so entrenched at common law that no one was entitled to take another's creative property without his or her

78. See ROSE, *supra* note 6, at 38; Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497, 504 (2004); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1540 (1989).

79. JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 20 (Charles L. Sherman ed., 1979).

permission.⁸⁰ The financial rewards for authorship through the recognition of property rights in literature also slowly gained acceptance with the Statute of Anne in 1710.⁸¹ The rights to print and distribute literature were awarded to encourage authorship, promote learning⁸² and allow public access to works that previously were inaccessible because of the perpetual control that booksellers had over the sale of books.⁸³

What began as an incentive for authorship to flourish later became a right to recover investments made to produce new works. The earliest rights to print and reproduce to encourage authorship continued to expand to include rights of display, adaptation, and performance, which attach economic value to works and allow authors to sell their works commercially to the public.⁸⁴ Authors took advantage of the economic benefit from public sale of works to recover their investments made in producing works.⁸⁵ As commercial value in works grows and as investments increase, the rights to economic exploitation of works become increasingly valuable to encourage authorship and protect media businesses.⁸⁶ The Copyright Term Extension Act,⁸⁷ the Digital Copyright Millennium Act,⁸⁸ and database protection laws, such as the European Database Directive,⁸⁹ are all laws that have been enacted to protect commercial, rather than individual authorial, interests. Advocates for increased rights over creative works have based their arguments on a property rights theory that a certain amount of control and exclusivity over property ensured its social value and encouraged continuous investment in maintaining

80. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 90 (The Penguin Press 2004).

81. HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710*, 105-106 (1956).

82. Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 409 (2004).

83. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 28-30 (1991).

84. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 298-305 (1996) (discussing the expansion of copyright in terms of duration, personal uses and transformative uses).

85. Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727 (2000).

86. LESSIG, *supra* note 80, at 9.

87. Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

88. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

89. Council Directive 96/9, arts. 47(2), 55, 95, 1996 O.J. (L 77) 20-28 (EC).

and improving upon existing works.⁹⁰ More modern theories within the realm of law and economics take the argument for private rights in creative works further by arguing that private property rights are necessary for preservation and maintenance of the value of the work.⁹¹ The public will overuse works that are free for all to use without the restraint of private rights, as many will use free resources without regard for the cost that the use imposes on others, namely the depletion of natural resources, as in the overgrazing of common pastures⁹². Garrett Hardin's 1968 article on the tragedy of the commons has been often used to justify protecting works of authorship from being part of the public domain. Even though the resource subject to possible depletion, if commonly held (in Hardin's article, land), may be protected under a property-type regime, the same argument has been extended to intellectual works.⁹³ For creative works that are non-rival and non-exclusive in nature and hence, unlikely to be depleted by overuse, the tragedy, it is argued, lies in the reduction of incentives to create and distribute works.⁹⁴

Advocacy for public interest rights of access to creative works, on the other hand, has always been based on the promotion of learning in society by ensuring the accessibility of creative works. At the heart of the public interest argument in favor of restricted copyright is the

90. This stems from a 1968 article written by economist Garrett Hardin suggesting that commonly held resources will be prone to depletion in a world where individuals acting, in their best interest, will take as much as possible from commonly held resources without building the commons. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); see also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 37 (describing the increased proprietization of information as the second enclosure of "the intellectual commons of the mind").

91. See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH. 4, 18-27 (2004) (describing the use of property rights to protect the value of information goods and transaction costs involved in the management and enforcement of the rights in these goods).

92. Lemley, *supra* note 49, at 1037.

The rise of property rhetoric in intellectual property cases is accordingly closely identified not with common law property rules in general, but with a particular view of property rights as the right to capture or internalize the full social value of property. This view draws analytic strength from a branch of law and economics scholarship that emphasizes the importance of private ownership as the solution to the economic problem known as the 'tragedy of the commons.'

Id.

93. *Id.*

94. Deborah Tussey, *IPods and Prairie Fires: Designing Legal Regimes for Complex Intellectual Property Systems*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 105, 115 (2007) ("[T]he tragedy of the intellectual commons does not take the form of overexploitation but rather of reduced incentives for creation or distribution."). *Contra* Lemley, *supra* note 49, at 1037-46 ("Precisely because its consumption is nonrivalrous, information does not present any risk of the tragedy of the commons. . . . The notion that information will be depleted by overuse simply ignores basic economics.").

need to have access to information, knowledge, and creative works for civil discourse to take place within a civil democratic society.⁹⁵ Many public interest groups and international organizations have recognized the important role that information, knowledge, and creative works play in a community or nation, and have advanced strong arguments for increased access as a basic human right to development and growth.⁹⁶ The health of the public domain, or the commons, is the central theme at the heart of public interest advocacy.⁹⁷ The public domain—that space containing raw materials for authors to use without incurring liability for infringement—guarantees that contents may be used by the public for free without the control of private ownership.⁹⁸ The public domain however, may be in danger of being eroded by private property rights.⁹⁹ Laws and rules enclosing knowledge, information, and content in the interest of a few private owners may reduce the amount of raw resources for authorship in the public domain, and exclude the rest of society from enjoying a free and healthy commons. The movement to privatize content that is free for the public to use may threaten the health of the commons, even though free public use is necessary to encourage authorship.¹⁰⁰ The movement to enclose private property may further disrupt the creative processes taking place among authors and may ultimately destroy the ecology of the public domain.¹⁰¹

95. See Netanel, *supra* note 84 (developing a theoretical framework emphasizing copyright as a state measure to use market institutions to enhance the democratic nature of a civil society).

96. See Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775 (2009) (arguing for copyright law to adopt a normative framework encompassing social and cultural norms on access to knowledge, development policy, and human rights).

97. Litman, *supra* note 61, at 968.

To characterize the public domain as a quid pro quo for copyright or as the sphere of insignificant contributions, however, is to neglect its central importance in promoting the enterprise of authorship. The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.

Id.

98. *Id.*

99. See Boyle, *supra* note 90, at 37-39.

100. The commons has been identified as that area where resources are free, not necessarily without cost but if there is a cost, it is neutrally or equally imposed. Lawrence Lessig, Lecture, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1788 (2002).

101. See Boyle, *supra* note 90, at 37-39.

A. *The Commons as a Shared Resource*

In recent years, there has been increased focus on a much wider issue that goes beyond merely recognizing the importance of a public domain. A lot of work is currently being done on developing the commons as a shared resource for society.¹⁰² Common property, such as libraries, playgrounds, and parks are available for everyone's use in whichever way one chooses. Likewise, common resources, including the Internet, spectrum airwaves for broadcasting and wireless communication, and common knowledge about science, culture, and our environment should be made freely available to all. The premise for this argument is that property and resources that are publicly inherited, jointly developed, and shared must be available to all.¹⁰³ They also must be actively protected and managed so that the benefits of these resources are used for the good of all.¹⁰⁴ The expression of the need to manage the commons for society's collective benefit is eloquently explained in a weblog, OnTheCommons.org, that is dedicated to building a movement to manage the commons fairly and sustainably:

A commons-based society refers to a shift in values and policies away from the market-based system that dominates modern society, especially over the past 30 years. The foundation of the market is narrowly focused on private wealth, while the commons is built upon what we all share—air, water, public spaces, public health, public services, the Internet, cultural endowments and much more. One of the most compelling ideas being raised today is the possibility of evolving from a market-based society to a commons-based society. The commons has always been an element of human civilization. But its central role in sustaining all societies has recently been rediscovered, inspiring new lines of thinking in fields ranging from high technology to public health to business. A commons-based society is one that values and protects commons assets, managing them for the benefit of everyone. Market-based solutions would be valuable tools in a commons-based society, as long as they do not undermine the workings of the commons itself.¹⁰⁵

102. Some projects to build and develop the commons include the Science Commons, <http://www.sciencecommons.org> (last visited April 2010), Creative Commons, <http://www.creativecommons.org> (last visited April 2010), Open Courseware Project, <http://ocw.mit.edu>, Open Media Commons (last visited April 2010), <http://www.openmedia.org> (last visited April 2010), and Data Commons Project, <http://www.geo.coop/node/29> (last visited April 2010).

103. Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005) (using economic theory to support the commons as an open resource that should be made freely available to society).

104. *Id.* at 918-919 ("For some classes of important resources, there are strong economic arguments for managing and sustaining the resources in an openly accessible manner . . . [to] generate value for consumers").

105. On the Commons, What is a Commons-based society?, <http://www.onthecommons.org/content.php?id=2522> (last visited Apr. 12, 2010).

These different sides of the private property/public access argument cannot be ignored. All present very compelling reasons for ensuring a healthy and proper environment for authorship and creativity to flourish. Much more work has to be done, however, to specifically address the question of authorship and the non-economic motivation for creativity in the user-author of the networked economy. There is an undeniable need for at least some rights to encourage authorship. But, at the same time, these rights cannot restrict the larger societal need to use works of authorship in the production of new works. There is indeed a very narrow space between private rights and public interests—that narrow space between “zero and one,”¹⁰⁶ which requires consideration for the developments that have taken place within the realm of copyright.

B. The Ideals of the Copyright System

Current copyright debates in international, national, and regional forums reveal a pressing need to restore balance within the copyright system.¹⁰⁷ One way to achieve a balance between private and public interests in the digital age is to see the copyright system as a legal institution designed to encourage creative authorship by protecting the author's integrity. While it is natural, given the utilitarian slant of the copyright system, to debate the rhetoric of rights expansion—to encourage innovation and rights reduction in order to ensure the development of a healthy environment for creativity and authorship—that debate may offer minimal guidance as to where the ideals of the copyright system lie. In the heat of this debate between rights expansion and reduction, scholars, judges, and policymakers may lose sight of what the law is and the ideals that the law strives to achieve. Rights under copyright law protect authors as rights holders in literary and artistic works, and these rights have

106. LESSIG, *supra* note 80, at 169.

107. Edward L. Carter, *Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe about Fair Use and Free Expression*, 30 U. LA VERNE L. REV. 312, 317 (2001) (“Contemporary copyright law... must balance the public interest in fostering societal progress and learning, including ‘education, research and access to information[.]’ with other powerful public interests.”); Brett Lunceford & Shane Lunceford, *Meh. The Irrelevance of Copyright in the Public Mind*, 7 Nw. J. Tech. & Intell. Prop. 33, 48 (2008) (“The answers to the questions surrounding copyright do not lie in more draconian legislation that protects copyright holders. Rather, there must be a reconsideration of the balance between the public policy issues of protecting private interests and maintaining a robust public sphere.”); Christopher Sprigman, *Copyright and The Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317, 319 (2009) (“[C]opyright law must seek a balance between private incentives to create new works, and public access to the works created.”).

been granted to create an atmosphere where authorship flourishes.¹⁰⁸ The initial cost to society when these rights were granted to authors in early copyright statutes was the social cost of a temporary monopoly over the printing and distribution,¹⁰⁹ a consequence of exclusive rights that the U.S. government clearly recognized.¹¹⁰ The rights nonetheless ultimately served a larger social goal, for the monopoly rights contributed to the production of new works by authors, which then increased public knowledge as new books and creative works were produced.¹¹¹

As private commercial rights expand, greater cost is imposed upon society because society has less access to creative works. However, increased social cost due to the exercise of rights by copyright companies to protect commercial interests should not be a reason for curtailing the rights of authors under the copyright system simply because access to works has become more costly as industrial practices of copyright owners restrict access to works and increase costs to obtain user rights. The effect of not expanding rights, however, has a more adverse effect on the copyright system because it would suggest that rights in literary and artistic works are of little

108. According to Professor Kaplan,

[C]opyright tends also to serve the material expectations and psychological cravings of the individual creative worker: it gives him an opportunity (though by no means the certainty) of reward for his efforts; conventional recognition for the feat of creating a work; a means (though not a very good one) of preserving the artistic integrity of the work through controlling its exploitation.

KAPLAN, *supra* note 24, at 75.

109. *But see* Stan. J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh In on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 441 (2005) ("Though it is not ideal, a copyright provision that results in a monopoly output level still is likely to produce a positive value for society compared to no production at all. If copyright induces creation of works, society benefits from the production of copies of this title . . .").

110. *See, e.g.*, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.'

Id. (citation omitted).

111. Barbara Ringer, U.S. Register of Copyrights, *Bowker Memorial Lecture: The Demonology of Copyright* (Oct. 24, 1974), *reprinted in* MODERN COPYRIGHT FUNDAMENTALS 24-25 (Ben H. Weil & Barbara Friedman Polansky eds. 1985).

I believe it is society's duty to go as far as it can possibly go in nurturing the atmosphere in which authors and other creative artists can flourish. I agree that the copyright law should encourage widespread dissemination of works of the mind. But it seems to me that, in the long pull, it is more important for a particular generation to produce a handful of great creative works than to shower its school children with unauthorized photocopies or to hold the cost of a jukebox play down to a dime, if that is what it is these days.

Id.

value to an author—they can be easily overridden and ignored, especially when more general economic claims for social efficiency or increased social welfare are made. There must be a very compelling reason to curtail rights as technological and social environments change, and the reason must be a great social cost that is unwarranted, unnecessary, and goes beyond the cost of the original rights that early copyright laws anticipated.

This Article proposes that a curtailment of rights under copyright laws would be acceptable only when three conditions are met. First, the ideals identified under the original recognition of rights, i.e. to encourage authorship and the creation of literary and artistic works, would be at stake if rights were expanded. Second, a competing right (and not a social goal) would be abridged if the right were to be expanded. Third, there would be a cost to society that would go far beyond the cost paid to grant the original rights under copyright if the rights were to be expanded. This three-tenet test stresses the importance of rights and the need to take copyright seriously. Where the rights under copyright can be undermined and ignored easily, authorship will be affected because the original rights that authors had over their works would appear to be a sham, which in turn results in disrespect for original works of authorship.

V. DEFENDING THE COPYRIGHT SYSTEM

This Article recognizes that the role that copyright law has in encouraging the creation of literary and artistic works ultimately contributes to the larger social goal of encouraging education, research, and access to information. The convergence and development of information and communication technologies has a significant impact on how literary and artistic works are created and used. From these developments, there is a recognized need to maintain the rights of authors and creators of creative works while ensuring that the public's need for access to these works is met.¹¹²

112. For an article emphasizing the public's need to access works of authorship, see Litman, *supra* note 61, at 966.

[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already 'out there' in some other form. This is not parasitism: it is the essence of authorship.

However, lawmakers must not lose sight of the individual author's rights under copyright law, which should trump social or utilitarian goals if the law is to be taken seriously as an institution designed to promote progress of science and arts through works of authorship. An author should have the right to exercise his individual rights under law even if it affects social welfare by increasing access cost: if the author's integrity in the work as an original work of authorship is to be preserved in order to protect the author's creative expression and society's ability to verify the veracity of a work, the author's individual right must prevail over social welfare. Undermining the rights of authors in favor of the public interest will destroy the copyright system as an institution designed to encourage authorship. As rights expand simultaneously with the development of new information and communication technologies, society bears a cost as the maximization of collective welfare through the copyright system is compromised. However, as the three-tenet test for the curtailment of the author's rights demonstrates, the loss to society from an expansion of individual author's rights will be, at most, imaginary and marginal.¹¹³ This is because the costs of a temporary monopoly over works remain the same even as rights expand.¹¹⁴ That portion of the copyright equation does not change. Transaction costs decrease as technologies converge to narrow the gap between author and user.¹¹⁵ Additionally, when the individual author's rights expand together with the development of new technologies in the networked economy, the cost to society from the expansion of those rights remains low. Thus, it would be a grave mistake on the part of the legal system to abridge rights under copyright as technology develops based on the premise

Id.; see also Dean Ellinson & Eliezer Symonds, *Australian Legislative Protection of Copyright Authors' Honour*, 25 MELB. U. L. REV. 623 (2001) (examining the concept of the author's "honour" within the context of Australian moral rights legislation); Dawn C. Nunziato, *Justice Between Authors*, 9 J. INTELL. PROP. L. 219 (2002).

113. See *infra* Part VI.

114. The anticipated social cost when the Statute of Anne granted a copyright to authors for 14 years to print books—the reduced access to content in books for the duration of the copyright—remains the same 300 years later. The social cost resulting from the increase of rights to cover the right to print, distribute, make derivatives, etc. for seventy years after the life of the author is still reduced social access to content for the duration of the copyright. The cost of the grant of exclusive rights has not become greater: they remain the same because society bears the same costs for negotiating access rights to use works in ways protected by the statute. The expansion of rights has not created costs that were not anticipated by the decision to grant rights over works.

115. Alina Ng, *Copyright's Empire: Why the Law Matters*, 11 MARQ. INTELL. PROP. L. REV. 337, 366-69 (2007) (discussing the role of technologies in correcting market failures facilitating greater connection between authors and the users of their works).

that there will be an increased cost upon society from an expansion of those rights.

This Article aims to bring attention back to the basic ideologies of copyright despite the raging debates on the far-reaching effects of private rights in the networked economy.¹¹⁶ To not lose sight of what the copyright system aims to achieve, which is the creation of an environment where authorship can flourish so that literary and artistic works can be produced for public benefit,¹¹⁷ is important in the digital age. Ultimately, the public benefits from the availability of literary and artistic works in a robust copyright system because the system itself provides the necessary balance between competing rights of individual authors, who at times create for non-economic reasons, and their audiences, which include users of their works and new authors seeking inspiration and ideas. By adopting the copyright system, as an institution designed to facilitate original authorship, society implicitly trusts the law to take its hopes for the future and aspirations for a better world into account. Society also trusts the law to recognize and protect the various communities that have built up around the legal system. Any change in copyright law will be in the right direction if this is acknowledged by those who make and design the laws. The law should not be as interested in recognizing commercial interests in content and creative works, protecting infrastructure that carry those works, or enclosing information and knowledge in the public in the narrow sense.¹¹⁸ The law should be more interested in ensuring that certain conditions exist to encourage authorship, one of which is the author's individual right to control how

116. James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 342-343.

The Clinton Administration also supported a "Database Treaty," which would have introduced into American law a quasi-property right over facts. In the face of intense resistance, much of it focusing on the devastating effect such a regime could have on research, debate, and public discourse, the treaty proposal was dropped but a domestic bill was immediately introduced in its place. The examples go on and on, ranging from the PTO's support for far-reaching, anti-dilution trademark legislation that could reduce parody and criticism of famous companies, to the regulation of domain names on the Internet, to the attack on fair use and first sale in the digital context, or the extension of the copyright term.

Id.

117. Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC'Y U.S.A. 109 (1991), reprinted in FOUNDATIONS OF INTELLECTUAL PROPERTY, *supra* note 21, at 302 ("Copyright in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to carve out of thin air and devouring labor, an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*.").

118. *Id.* ("[C]opyright is not about protecting authors of publishers, nor is copyright singularly about securing authors' welfare or consumers' welfare. Copyright is not about bolstering international trade balances, nor is it about protecting art, high or low.").

the public uses his work to preserve authorial integrity.¹¹⁹ The law must also have regard for the number of communities and communal interests that share and build upon commonly held content in the networked economy. Individual authorial rights under the law should not be expanded where the social cost for new authors to use existing works as inspiration to create new works will exceed the original cost that the legislature anticipated when first granting the right. How far a right expands must ultimately depend on the cost that society bears for the expansion.

Professor Dworkin, in *Law's Empire*, emphasizes that law is not merely about rules, principles, and judge-made law, but rather about society's attitude toward the law and its interpretation of, and belief in, the legal system.¹²⁰ Individual rights under copyright law cannot be abridged simply because society feels an increased invasion of the collective welfare of having access to literary works. To abridge rights so easily suggests that the initial recognition of the right was not genuine and that the legislature gave the right as a matter of convenience. The unfortunate effect of an abridgment of rights will be public disregard of and disrespect for the copyright system as an institution to create the conditions needed for original authorship to occur and protect the process of creative production by individual authors. Professor Dworkin explains:

Law's empire is defined by attitude, not territory or power or process It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his public commitments to principle are, and what these circumstances require in new circumstances. The protestant character of law is confirmed, and the creative role of private decisions acknowledged, by the backward-looking, judgmental nature of judicial decisions, and also by the regulative assumption that though judges must have the last word, their word is not for that reason the best word. Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith in the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.¹²¹

Perhaps there is a need for society to understand copyright laws in the same light. As an institution that aims to provide the best route to the future, copyright laws must ensure that the proper conditions for authorship exist so that society's welfare is maximized through the creation of diverse forms of literary and artistic works. It is true that the creative community is united in spirit to ensure that

119. *Id.*

120. RONALD DWORKIN, *LAW'S EMPIRE* 408-409 (1986).

121. *Id.* at 413.

the best conditions for authorship exist, even if it is divided on the best way to achieve this. When society recognizes and understands that the rights that the law gives authors are important to encourage authentic and original authorship, and truly lie at the heart of the social goal of maximizing collective welfare, the answer to the present debate about rights in the networked economy when users are also authors of literary and artistic works becomes clear. The debate of balancing private rights against public interests misses the point, which is that the proper conditions for authorship must exist before literary and artistic works can be created for the public. This can only happen when society takes copyright law as an institution designed to facilitate original authorship seriously.

VI. CONCLUSION

This Article has suggested that the copyright system has a larger role to play in the networked economy than in the analog world. The copyright system serves the important function of connecting authors with their audiences through the market. This function in the analog world serves to allow efficient transfers of rights in literary and artistic works to take place. In the digital world, the function of the copyright system of connecting authors with their audiences serves to recognize original authorship and protect ownership rights in literary and artistic works, especially when communal and collaborative uses of works raise moral and ethical concerns about the social uses of particular works of authorship or art.¹²² The sustainability of the networked economy, when users increasingly become authors, is heavily dependent on a strong and robust copyright system that protects the individual rights of the author. Yet, there is no denying the tension between private rights and public interests that lie at the heart of copyright jurisprudence. As authors and users of creative works have become more empowered through new technologies, the Internet being a prime example, monopoly rights over the use of intellectual and creative works have extended globally to include transmission rights, public communication rights, and broadcasting

122. While social uses of works of visual arts are subject to the moral rights of the author, the Visual Artists Rights Act applies only to paintings, drawings, prints, and sculptures in a limited edition of 200 copies or less that are signed and consecutively numbered by the author. 17 U.S.C. §§ 101, 106A (2006). Ideally, a copyright system should protect all creative works through the rights of attribution and integrity to ensure that an author's creative expression is not modified or altered in a way that is objectionable to the author, and which contain the author's identification to provide society with the ability to verify the veracity of information.

rights.¹²³ Rights expand as legal responses to social, cultural, and market changes brought about by converging information and communications technologies. Similarly, there is an increasing need to identify the proper allocation of entitlements in literary and artistic works among authors, publishers, and the public at large, particularly as these entitlements affect the ability of society to have access to information for education, research, and general development.

As society has greater access to and use of creative materials in novel ways through new communication and digital technologies, there is a need to rethink the fundamental purposes of the copyright system, evaluate the legal implications of rights expansion, and consider if the best response to rights expansion is to abridge rights in literary and artistic works. This Article suggests that there is a need to recognize that individual rights, protected through copyright laws, serve to encourage diverse forms of authorship. Furthermore, it is more important to allow these rights to expand under law and not abridge them to protect a social goal or public interest. The reason for this is that the recognition of authorial rights under copyright laws promotes respect for original authorship and sustains the production of creative works for society. Individual rights should not be undermined until and unless the expansion of the right imposes a cost to collective social welfare that goes beyond the cost that society originally paid in the grant of rights to authors under copyright laws.

The right balance within copyright law is a difficult question. The balance that copyright law strives to achieve is often missed for the larger socio-economic and developmental goals that advocates of social justice and the development agenda put forth, or product investment goals that copyright owners defending economic investments in the production of creative works advocated. Both arguments present valid points of view. On the one hand, anyone who has invested time and money in producing new works wants to be able to prevent others from unfairly profiting from their effort. Creative works pose a classic public good problem, where non-paying members may easily free-ride on the provision of the goods to paying members of society.¹²⁴ Free riding will continue to exist with the creation of

123. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 152, 36 I.L.M. 65, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

124. Lemley, *supra* note 49, at 1050-1051.

Information is what economists call a pure 'public good,' which means both that its consumption is nonrivalrous—my use of an idea does not impose any direct cost on you—and that it is not something from which others can easily be excluded. Precisely because its consumption is nonrivalrous, information does not present any risk of the tragedy of the commons. It simply cannot be 'used up.' . . . we should not therefore be

creative works unless laws are passed to allow owners of copyrighted works to prevent members of society from using the goods without paying for it. On the other hand, the public requires access to works for learning, education, and use as building blocks of creativity to develop new works of authorship and art. Here, advocates of the public domain resist rights expansion in literary and artistic works because of the restrictions that exclusive rights place on the freedom to use content for the purposes of progress.¹²⁵

This Article acknowledges the validity and legitimacy of the arguments, and recognizes that there are specific rights and interests that private right holders and public interest groups strive to protect. However, this Article suggests that the copyright system provides the freedom that is necessary for the public to have access to creative works. It also suggests that a true understanding of copyright law removes the necessity to debate the boundaries between private rights and public goals, even as new technologies appear to change the balance between private and public interests. The information age and the networked economy provide an opportunity for us to reexamine the fundamental purposes of copyright law and demonstrate that the balance between rights and access exists within the law.

At the heart of copyright jurisprudence is the idea that, when authors are encouraged to produce original, authentic works of authorship, the availability of diverse forms of literary and artistic works for society's use in the creation of new works to promote progress of the sciences and useful arts increases social welfare. The pursuit of an answer to the balance between authors' rights and users' interests in copyright law cannot be isolated from political philosophy about individual and collective rights, duties, and obligations. The inextricable link between copyright law and the larger moral questions on rights and responsibilities stems from the conception of copyright as an institutional and legal right that is given to authors of literary and artistic works to produce works of authorship to meet a social need.

The rights of authors in works, however, do not compete, and should not be seen as competing, with larger social goals, as is

particularly worried about free riding in information goods. It is not that free riding won't occur with information goods; to the contrary, it is ubiquitous. Everyone can use $E=mc^2$, the words of Shakespeare, or the idea of the tragedy of the commons without compensating their creators.

Id.

125. *Supra* notes 62-65.

assumed in present copyright debates and discourses.¹²⁶ The present situation is not a question of balancing private interests and social goals because there is no real balance to achieve between a private property right belonging to the author of a work and a public goal to further the progress of science and the useful arts. These are not conflicting rights but rather complementary institutional goals of the copyright legal system. Society should refrain from asking whether rights have been inflated to the extent that the public right to access works is restricted because a balance cannot be readily drawn between private rights and social goals. Individual rights and social goals are not in actual conflict. Instead, the discussion should focus on achieving a balance between different rights when a policy choice must be made between two equally legitimate and competing rights, e.g., a user-author's property right in his literary and artistic creation against a copyright owner's statutory right to reproduce the work or make derivatives. When society's rights as a whole are involved for the progress of science and the useful arts, for example, the question is not where the proper balance between two competing interests lies but how private institutionalized interests further this public goal. Society must recognize that there is a clear difference between collective goals and private interests, and between society's rights and the rights of members of society.

Hopefully, the various parts of this Article have demonstrated that, when users of literary and artistic works are also authors of new works, the law must acknowledge that protecting the individual rights of the author is paramount in sustaining a creative culture in the networked economy. Otherwise, authors in the digital age, writing for non-economic reasons, may lose the incentive to collaborate and create works for the community in which they belong. The idea/expression dichotomy and fair use doctrine demonstrate that non-protectable ideas, as well as protectable portions of expressive content, may be

126. Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 208 (2007).

The theoretical framework of intellectual property law, and copyright law in particular, is premised upon liberal and neo-liberal assumptions. At the core of copyright's functionality are the concepts of private rights, property, ownership, exclusion, and individualism. At the core of copyright's justifications are the concepts of individual entitlement or desert, on one hand, and economic rationality and self-interest on the other. Within this model, authors are individuated, proprietary personalities with a claim to ownership of their intellectual works; these works are the original, stable, and propertizable results of the authors' independent efforts. Far from a situated, communicative act, the authorial activity presupposed by intellectual property is an individual act that produces a commodifiable thing and, of course, a right against all others in relation to that thing.

Id.

used within legally defined boundaries as building blocks for new forms of creativity. These are illustrations that there are, within the law itself, mechanisms to encourage creative activity and diverse forms of authorship.

Where the expansion of private rights appears to undermine public or social goals, a three-tenet test is proposed to determine when extension of rights under copyright is not acceptable. This test is especially appropriate when the effect on the public's rights to access creative works for learning and education is a significantly higher cost than the cost anticipated by the legislature when the rights were first given to authors. Finally, this Article defends the copyright system as being effective in achieving the balance between private rights and public interests. The copyright system provides the legal solution to many of the economic, political, and social questions that face society as technology develops and society changes. Technological development and social change is not the root cause of the problems encountered in the copyright system. The social, economic, and political issues that arise from the changing environment as technology develops, new markets emerge, and Internet usage grows may not be the consequence of expanding rights in literary and artistic works but rather a misunderstanding of the nature of the law and the ideals it strives to achieve. This Article concludes by offering a different perspective to the discussions taking place today by highlighting the need to have property rights to protect the creative expression of the author and provide information about the work to society, and suggesting that many of the questions we ask today about the copyright system are answerable through a reference to the ideals of copyright law as an institution designed to promote progress. We may be surprised by the ability of the copyright system to provide a fair system where authorship and creativity flourish to the benefit of society when we look toward the history of the legal system as well as cultural forces surrounding the law's development for the answers to the questions posed today. In the digital world, where users of creative works are also authors of new works, the law must do two things: protect the creative expressions of the author from unwanted modification and alteration of the work and ensure that society has sufficient information to make an assessment as to the veracity of the work. The future of the digital age is exciting as more individuals are empowered to be engaged with civic discourses taking place on Internet networks and communication technologies. For copyright law, this means that authors—whether the original creator of the work or a user interested in generating content—must

be protected before social welfare. It is only then that sustained authorship can become an impetus for progress.