

## TOWARDS A COPYRIGHT LAW THAT ENCOURAGES CREATIVITY

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### ABSTRACT

*This article puts forward the contention that copyright law's principal objective is the encouragement of creativity. This is supported by a review of its history and foundation in the United Kingdom and the United States. Yet, whereas the inducement of creative endeavors is copyright's key aim, it has failed to adequately do so owing to its "capture" by economic influences. This sway is seen in how copyright understands and considers creativity. Creativity is an incremental process that builds on existing ideas; copyright, however, rewards a version of creativity that is extempore. Copyright law's extolment of the author-genius has been a stalking horse for the furtherance of economic concerns that have been more concealed than revealed. This viewpoint carries through in the modern entertainment industries—for instance, regarding peer-to-peer technology as deliberated by the United States Supreme Court in the case of *MGM Studios, Inc v. Grokster Ltd.* The court upheld the recording industry's invocation of the noble and deserving author as "painter alone in the attic" in inhibiting online file sharing.*

*It is contended that copyright law would be better structured to obtain its principal objective if it were to have a better appreciation of the nature of creativity as a derivative process as opposed to an extemporaneous one. To this end, it is proposed that John Locke's "theory of knowledge" may provide an appropriate theoretical*

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*foundation for copyright. In this theory, Locke recognizes that creativity is derivative and that ideas are the building blocks of creativity. He posits that new knowledge, that is, creativity, arises when “simple ideas” are combined to form “complex ideas.”*

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## INTRODUCTION

Copyright law seeks the encouragement of creativity as its primary objective.<sup>1</sup> It has, however, not been able to adequately obtain this aim as it is dominated and guided by economic considerations instead of focusing on the creative process itself.

Copyright law valorizes the Romantic “author-genius,” a rhetoric which has been a stalking horse for the furtherance of economic interests.<sup>2</sup> Martha Woodmansee contends that the dominant structures of copyright law emerged around the same time as the Romantic conception

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<sup>1</sup> GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 14–16 (2d ed. 2002); see Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007); see also Omri Rachum-Twaig, *Recreating Copyright: The Cognitive Process of Creation and Copyright Law*, 27 FORDHAM IP, MEDIA & ENT. L.J. 287, 288 (2017).

<sup>2</sup> Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH CENT. STUD. 425, 426 (1984); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 2 DUKE L.J. 455, 500 (1991).

of authorship at the end of the eighteenth century.<sup>3</sup> Peter Jaszi endorses Woodmansee's thesis and asserts that it was not by coincidence that the Romantic period saw the emergence of many doctrinal structures that dominate copyright today.<sup>4</sup>

The author was a creation of writers who sought to establish the economic viability of their "profession" in an era where there were no safeguards for their labor which are today codified in copyright laws.<sup>5</sup> According to the Romantic author-genius ethic, an author creates works extempore using her creative genius thus, leading to the production of utterly new and unique expressions.<sup>6</sup> Creativity, however, is a more equivocal process than what the Romantic conceptualization contends. Creativity is derivative, drawing on existing ideas and concepts.

Carys Craig observes that the current structure of copyright is based upon "the political and ontological [notions] of traditional legal liberalism, and the normative assumptions of possessive individualism."<sup>7</sup> This substruction guides courts' interpretation and application of copyright principles such that copyright law fails to realistically represent cultural creativity.<sup>8</sup>

My first aim in this article is to review how copyright law panders to economic considerations and how

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<sup>3</sup> Woodmansee, *supra* note 2.

<sup>4</sup> Jaszi, *supra* note 2.

<sup>5</sup> Woodmansee, *supra* note 2.

<sup>6</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965–66, 1008–09 (1990); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOKLYN L. REV. 1213, 1254 (1997).

<sup>7</sup> CARYS J. CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* 4 (2011).

<sup>8</sup> *Id.*; Keith Aoki, *Adrift in the Intertext: Authorship and Audience Recoding Rights*, 68 CHI.-KENT L. REV. 805, 813–14 (1993). See, e.g., *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992); *Cariou v. Prince*, 784 F. Supp. 2d 337, 346–48 (S.D.N.Y. 2011).

this has been detrimental to it adequately obtaining its principal aim of encouraging creativity. My second aim is to suggest a theoretical framework that would guide copyright law in encouraging creativity.

This proposed theoretical framework is based on John Locke's "theory of knowledge."<sup>9</sup> Locke articulated the view that ideas are the building blocks of creativity and that complex ideas, that is, new knowledge or creativity, arise from the combination of simple ideas.<sup>10</sup> I argue that this theory may act as an edifice through which creativity and copyright law would be freed from the controlling machinations of economic factors. In this regard, the theory of knowledge directs copyright law to consider how creativity arises in its own precepts and to allow creative endeavors to carry on without direction or control.

This article thus proceeds as follows. Part I seeks to explain and understand creativity; the questions of "what is creativity?" and "how does creativity arise?" are interrogated. Part II puts forward and defends the assertion that the principal aim of copyright law is the encouragement of creativity. Part III elaborates on how economic factors have dominated copyright law from its inception to the present day. Finally, Part IV proposes the theory of knowledge as a base for copyright law to enable it to adequately obtain its primary objective.

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<sup>9</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. ii §§ 1–2 (Jonathan Bennett ed., 2017) (1689).

<sup>10</sup> *Id.* at bk. II, ch. ii, § 2.

## I. EXPLAINING AND UNDERSTANDING CREATIVITY

### A. *What is Creativity?*

Modern society has become geared to the constant production and reception of the culturally new.<sup>11</sup> This applies to the arts, lifestyle, the media, the economy, urban development and even the self.<sup>12</sup> We are witnessing the crystallization of what has been termed a “creativity dispositif”<sup>13</sup> whereby contemporary society has seen an unparalleled rise in both the demand and the desire to be creative.<sup>14</sup> Creativity, once the reserve of artistic sub-cultures, has today become a universal model for culture and an imperative in many parts of society.<sup>15</sup>

Yet, in order to explain and understand creativity, it is first necessary to define what it is. The term creativity is used in diverse contexts, including in art, psychology, philosophy, education, business, marketing and advertising, among others.<sup>16</sup> Therefore, considering its wide application, it is already apparent why the question, “what is creativity?” is a difficult one to answer. Indeed, it has been suggested that it might not be possible to define or

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<sup>11</sup> ANDREAS RECKWITZ & STEVEN BLACK, *THE INVENTION OF CREATIVITY: MODERN SOCIETY AND THE CULTURE OF THE NEW* 11 (2017).

<sup>12</sup> See, e.g., *HANDBOOK OF RESEARCH ON CREATIVITY* 4–8 (Kerry Thomas & Janet Chan eds., 2013).

<sup>13</sup> RECKWITZ & BLACK, *supra* note 11, at 14 (adopting French philosopher Michel Foucault’s term *dispositif*. The term *dispositif* has been interpreted and translated as meaning “apparatus” or “device.”). DAVID M. HALPERIN, *SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* 188–89 (1995).

<sup>14</sup> RECKWITZ & BLACK, *supra* note 11.

<sup>15</sup> *Id.*

<sup>16</sup> ANDREAS RAHMATIAN, *COPYRIGHT AND CREATIVITY: THE MAKING OF PROPERTY RIGHTS IN CREATIVE WORKS* 182 (2011).

describe the term.<sup>17</sup> Nevertheless, compelling definitions, descriptions and conceptualizations have in fact been offered.<sup>18</sup>

This article focuses its study on creativity, primarily, on the theory of knowledge put forward by the philosopher John Locke.<sup>19</sup> By this theory, Locke contended that creativity arises by exerting work over what he termed “simple ideas,” the basic unit of creativity.<sup>20</sup> Locke’s ideas on creativity are compelling, and his theory of knowledge was latent in the very early American and British copyright cases, like *Millar v. Taylor*,<sup>21</sup> *Donaldson v. Beckett*,<sup>22</sup> and *Baker v. Selden*.<sup>23</sup> These cases have had a significant influence in shaping copyright law as we now know it.<sup>24</sup>

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<sup>17</sup> JAMES GRIFFIN, *THE STATE OF CREATIVITY: THE FUTURE OF 3D PRINTING, 4D PRINTING AND AUGMENTED REALITY* 160 (2019).

<sup>18</sup> See, e.g., *HANDBOOK OF RESEARCH ON CREATIVITY*, *supra* note 12 (considering creativity within a wide array of subjects including cultural studies, creative industries, art history and theory, experimental music and performance studies, digital and new media studies, engineering, economics, sociology, psychology and social psychology, management studies, and education).

<sup>19</sup> LOCKE, *supra* note 9.

<sup>20</sup> *Id.* at bk. II, ch. ii §§ 1–2, bk. IV, ch. ii, § 11.

<sup>21</sup> *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 220 (citing LOCKE, *supra* note 9, at bk. II, ch. xxv, §§ 27, 31).

<sup>22</sup> See *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837; see also *Burnett v. Chetwood* (1721) 35 Eng. Rep. 1008; *Hawkesworth v Newbery* (1774) 1 Lofft 775.

<sup>23</sup> See *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>24</sup> See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 168–179 (1968); BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 14–15, 33–35 (2008).

## 1. Creativity under Locke's Theory of Knowledge

Locke did not outrightly define creativity.<sup>25</sup> However, a conceptualization of the term can be gleaned from his views on knowledge put forward in his treatise, *An Essay Concerning Human Understanding*. Locke was an empiricist.<sup>26</sup> The central claim of empiricism is that knowledge derives solely from experience.<sup>27</sup> For Locke, such experience arises from one of two sources—sensation or reflection.<sup>28</sup> Locke opposed the view that knowledge is innate, as had been put forward by Plato<sup>29</sup> and Descartes<sup>30</sup> among other proponents of innatism who argued that knowledge is inborn, belonging to the mind from its birth.<sup>31</sup> Locke, the most influential of the empiricists,<sup>32</sup>

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<sup>25</sup> See LOCKE, *supra* note 9, at bk. II, ch. I (Jonathan Bennett ed. 2017).

<sup>26</sup> Keith Thomas, *Foreword* to JOHN DUNN ET AL., *THE BRITISH EMPIRICISTS*, at v (1992). Locke is normally regarded as the father of British empiricism and was followed in his views by George Berkeley and David Hume. *Id.* It has been noted that empiricism is a loose term which may mean several things. However, when the term is utilized, particularly regarding British empiricism, the general disposition is that it refers to the argument that human beings can have no knowledge of the world other than what they derive from experience. *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> LOCKE, *supra* note 9, at bk. II, ch. i, §§ 3–4.

<sup>29</sup> See Graham Rogers, *Locke, Plato and Platonism*, in *PLATONISM AT THE ORIGINS OF MODERNITY: STUDIES ON PLATONISM AND EARLY MODERN PHILOSOPHY* 193 (Douglas Hedley & Sarah Hutton eds., reprinted 2010) (2008).

<sup>30</sup> See Rene Descartes, *Meditations on First Philosophy: Third Meditation*, in *DESCARTES: SELECTED PHILOSOPHICAL WRITINGS* 89–90 (John Cottingham ed., John Cottingham et al. trans., Cambridge Univ. Press 1988) (1641).

<sup>31</sup> J. RADFORD THOMSON, *A DICTIONARY OF PHILOSOPHY: IN THE WORDS OF PHILOSOPHERS* 102 (1887).

<sup>32</sup> Whereas Locke's formulation of the theory of knowledge is the most prominent and influential and is the focal point in this



conceptualized knowledge within the terms of his famous *tabula rasa* (blank slate) argument according to which at birth the mind is a *tabula rasa*, a perfectly blank surface, on to which sensations are projected.<sup>33</sup> He contended:

Let us then suppose the mind to be, as we say, white paper, void of all characters, without any ideas; how comes it to be furnished? Whence comes it by that vast store which the busy and boundless fancy of man has painted on it, with an almost endless variety? . . . To this I answer in one word, from experience. In that all our knowledge is founded; and from that it ultimately derives itself. Our observation employed either, about external sensible objects, or about internal operations of our minds, perceived and reflected on by ourselves, is that which supplies our understandings with all the materials of thinking. These two are the fountains of knowledge, from whence all the ideas we have, or can naturally have, do spring.<sup>34</sup>

Therefore, according to Locke, one is born without any ideas in one's mind and develops knowledge from one's experiences, that is, her sensation or reflection.<sup>35</sup> Locke defined an idea as:

that term which, I think, serves best to stand for whatsoever is the object of the understanding when a man thinks, I have used it to express whatever is

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discussion, other important theorists also advanced theses regarding knowledge. *See generally* GEORGE BERKELEY, *THE PRINCIPLES OF HUMAN KNOWLEDGE* (Collins 1962) (1710); ÉTIENNE CONDILLAC, *ESSAY ON THE ORIGIN OF HUMAN KNOWLEDGE* (Hans Aarsleff trans., Cambridge Univ. Press 2001) (1746); DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* (Hackett 1993) (1748).

<sup>33</sup> FREDERICK RYLAND, *A STUDENT'S HANDBOOK OF PSYCHOLOGY AND ETHICS* 98 (London, W. Swan Sonnenschein Allen 1880).

<sup>34</sup> LOCKE, *supra* note 9, at bk. II, ch. i, § 2.

<sup>35</sup> RYLAND, *supra* note 33.

meant by phantasm, notion, species, or whatever it is which the mind can be employed about in thinking; and I could not avoid frequently using it.<sup>36</sup>

Locke proceeded to identify two sub-sets of ideas that he called “simple” and “complex.”<sup>37</sup> A simple idea “contains in it nothing but one uniform appearance, or conception in the mind, and is not distinguishable into different ideas.”<sup>38</sup> The mind is passive in the reception of these ideas and can neither make one on its own nor have any idea which does not consist of a simple idea.<sup>39</sup> Locke stated:

The mind can neither make nor destroy them. The simple ideas, the materials of all our knowledge, are suggested and furnished to the mind only by those two ways above mentioned, viz. sensation and reflection. When the understanding is once stored with these simple ideas, it has the power to repeat, compare, and unite them, even to an almost infinite variety, and so can make at pleasure new complex ideas.<sup>40</sup>

Complex ideas arise when the mind “exerts its powers over simple ideas” by combining, comparing or abstracting.<sup>41</sup> Locke aptly summarized:

Since the mind in all its thoughts and reasonings, hath no other immediate object, but its own ideas, which it alone does or can contemplate, it is evident that our knowledge is only conversant about them. Knowledge then seems to me to be nothing but “the

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<sup>36</sup> LOCKE, *supra* note 9, at bk. I, ch. i, § 8.

<sup>37</sup> *Id.* at bk. II, ch. ii, § 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at bk. IV, ch. xii, § 1.

<sup>40</sup> *Id.* at bk. II, ch. ii, § 2.

<sup>41</sup> *Id.* at bk. II, ch. xii, § 2.

perception of the [connection] and agreement, or disagreement and repugnancy, of any of our ideas.”<sup>42</sup>

Therefore, new knowledge arises in the same way as complex ideas. It is my contention that what Locke referred to as new knowledge—that is, complex ideas—is equivalent to creativity. When the mind exerts its power on simple ideas, which are “the basic raw material for all of its compositions,”<sup>43</sup> what results is knowledge, which is “narrower than our ideas.”<sup>44</sup> The result is therefore greater than the sum of its parts. I argue that the process by which this knowledge arises may be described as creativity.

## ***B. How Does Creativity Occur?***

### **1. Locke’s Approach**

As noted, Locke identified two sub-groups of ideas, simple and complex.<sup>45</sup> A simple idea is the basic unit of knowledge.<sup>46</sup> Complex ideas arise when the mind “exerts its powers over simple ideas.”<sup>47</sup> That is to say, when the mind performs “mental labor” over simple ideas. Thus, simple ideas are the building blocks of complex ideas and new knowledge.

It is therefore contended that the process of coming up with complex ideas is the same as that of deriving new knowledge, and these two processes are equivalent to the act of creativity. Hence, the act of creativity arises when the mind performs labor over simple ideas. This process of creativity occurs in the following way:

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<sup>42</sup> LOCKE, *supra* note 9 at bk. IV, ch. i, § 1–2.

<sup>43</sup> *Id.* at bk. II, ch. xii, § 2.

<sup>44</sup> *Id.* at bk. IV, ch. iii, § 6.

<sup>45</sup> *Id.* at bk. II, ch. ii, § 1.

<sup>46</sup> *Id.* at bk. II, ch. ii, § 2.

<sup>47</sup> *Id.* at bk. II, ch. xii § 2.

The acts of the mind wherein it exerts its power over its simple ideas, are chiefly these three: 1. Combining several simple ideas into one compound one, and thus all complex ideas are made. 2. The second is bringing two ideas. Whether simple or complex, together; and setting them by one another, so as to take a view of them at once, without uniting them into one by which it gets all ideas or relations. 3. The third is separating them from all other ideas that accompany them in their real existence this is called abstraction and thus all its general ideas are made.<sup>48</sup>

Therefore, creativity primarily arises when two or more simple ideas are combined. Further, by comparing both simple and complex ideas as well as through abstraction creativity can also occur. Locke's theory of knowledge can be encapsulated as new knowledge, which is creativity, arises when simple ideas—the basic units of thought—are combined together. Locke therefore viewed creativity as an incremental and derivative process.<sup>49</sup>

## II. THE ENCOURAGEMENT OF CREATIVITY— COPYRIGHT LAW'S PRINCIPAL OBJECTIVE

It is argued that the principal objective of copyright law is to encourage creativity.<sup>50</sup> As very well encapsulated by the U.S. Supreme Court in *Twentieth Century Music Corp. v. Aiken*, “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>51</sup>

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<sup>48</sup> LOCKE, *supra* note 9, at bk. II, ch. xii, § 1.

<sup>49</sup> *Id.*

<sup>50</sup> DAVIES, *supra* note 1; *see* Cohen, *supra* note 1; *see also* Rachum-Twaig, *supra* note 1.

<sup>51</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

It is appreciated that an opposing view argues that copyright is not required to facilitate creativity; rather it is an impediment to the free and open exchanges of knowledge, culture and technology that form the core of creative modalities.<sup>52</sup> Furthermore, in addition to acting as a stimulus for creativity, there are other significant underlying principles governing copyright legislation. These principles can be described under three main headings: the natural rights of the author, just reward for labor, and social requirements.<sup>53</sup>

Moreover, the history of the development of copyright law cannot be gainsaid. In this regard, it is noted that the conditions necessary for the birth of copyright were brought about by the introduction of printing.<sup>54</sup> The Crown in the U.K., engendered by a desire to censor the material made available to the reading public through the print medium, granted printing monopolies.<sup>55</sup> This brought about the idea of exclusive rights to issue copies of particular works to the public, introducing the idea of literary property which later came to be known as copyright.<sup>56</sup> In a similar vein, it has been argued that the statutory copyright which came into effect in 1710 following the enactment of the Statute of Anne was in reality a publisher's copyright and not an author's copyright.<sup>57</sup>

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<sup>52</sup> See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 188–204 (2004).

<sup>53</sup> See NICHOLAS CADDICK et al., COPINGER AND SKONE JAMES ON COPYRIGHT ¶¶ 2–28 (17th ed. 2020).

<sup>54</sup> PATTERSON, *supra* note 24, at 20.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 21; see RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 4 (2006).

<sup>57</sup> PATTERSON, *supra* note 24, at 144.

The copyright laws currently in operation in the U.S.<sup>58</sup> and the U.K.<sup>59</sup> do not outrightly state their objective. The objective of encouraging creativity may, however, be gleaned from the history of copyright legislation, explicated below.<sup>60</sup> A fair and unbiased consideration of the foundations of U.S. and U.K. copyright law leads one to conclude that they both laid emphasis on the role of copyright protection in the stimulation of creativity.

An examination of the Statute of Anne, the first statute to provide for copyright regulated by government and courts, reveals this point.<sup>61</sup> The Statute of Anne is the foundation upon which the modern concept of copyright in the Western world was built.<sup>62</sup> The Act was formally titled “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned.”<sup>63</sup> Part of its stated aim was “the Encouragement of Learned Men to Compose and Write useful Books.”<sup>64</sup>

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<sup>58</sup> United States Copyright Act, 17 U.S.C. §§ 101–1511 (2022).

<sup>59</sup> Copyright, Designs and Patents Act 1988, c. 48 (U.K.).

<sup>60</sup> Ronan Deazley, *Commentary on the Statute of Anne 1710*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), (Lionel Bently & Martin Kretschmer eds., 2008), [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary\\_uk\\_1710](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1710) [<https://perma.cc/SHU7-RMLV>]; PATTERSON, *supra* note 24, at 186.

<sup>61</sup> DAVIES, *supra* note 1, at 9–10.

<sup>62</sup> *Id.* at 9.

<sup>63</sup> L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 917 (2003).

<sup>64</sup> Statute of Anne 1710, 8 Ann. c. 19, pmb. (Gr. Brit.); see Anne Winkel, *The Contextual Role of a Preamble in Statutory Interpretation*, 23 MELB. UNIV. L. REV. 184, 185 (1999) (discussing the important roles statute preambles play in clarifying and offering meaning to statutes).

The Statute of Anne provided for literary copyright only, more specifically copyright in books.<sup>65</sup> However, soon thereafter, it influenced the enactment of a motley of other statutes which protected various works, leading to the Copyright Act 1911.<sup>66</sup> These Acts, no fewer than twenty-two, were passed at different times between 1735 and 1906.<sup>67</sup> The first of these to be passed, the Engravers' Copyright Act 1735 was, "An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned."<sup>68</sup> Similarly, the Sculpture Act 1814 was enacted for, "the encouraging the art of making new models and cafts and bufts, and other things therein mentioned; and for giving further encouragement to such arts."<sup>69</sup>

Thus, from its inception, the stated objective of U.K. copyright law was clearly the encouragement of creativity. Deazley summarizes this viewpoint succinctly thus:

[T]his Act was primarily concerned with the continued production of books. Regardless of the fact that the booksellers might have made much of the rights and deserving nature of the author in their arguments for protection, Parliament focused upon the social contribution the author could make in the encouragement and advancement of learning. It made good sense to make some provision for writers,

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<sup>65</sup> PATTERSON, *supra* note 24, at 143.

<sup>66</sup> BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760–1911*, at 128 (2003) (discussing how the Copyright Act of 1911 is recognized as the first modern copyright law and provided, for the first time, for the protection of the "work" in homogeneous terms).

<sup>67</sup> *Id.* at 128 n.119.

<sup>68</sup> Engravers' Copyright Act 1735, 8 Geo. 2 c. 13 (Gr. Brit.).

<sup>69</sup> Sculpture Copyright Act 1814, 54 Geo. 3 c. 56 (U.K.).

and inevitably book-sellers, to ensure a continued production of intelligible literature.<sup>70</sup>

On its part, the U.S. Constitution's intellectual property (IP) clause provides that the U.S. Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>71</sup>

The IP clause, also known as the "copyright clause," has likewise been referred to as the "creativity clause."<sup>72</sup> The U.S. copyright system is derived from the creativity clause.<sup>73</sup> Pursuant to the constitutional authority proffered by the creativity clause, the First Congress passed the first federal copyright statute, the Copyright Act of 1790.<sup>74</sup> The Act was entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."<sup>75</sup>

This Act's provisions were modelled on the Statute of Anne and set the tone for future statutes.<sup>76</sup> Both the history of the Act's legislation and its specific content clearly indicate that there was no significant break with familiar English concepts and practices.<sup>77</sup> Since then, when construing the Copyright Acts, the U.S. Supreme Court has noted that the primary objective of the Acts is inducing the

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<sup>70</sup> Deazley, *supra* note 60.

<sup>71</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>72</sup> Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1459, 1460 (2013).

<sup>73</sup> PATTERSON, *supra* note 24, at 197.

<sup>74</sup> *Id.*

<sup>75</sup> Copyright Act of 1790, ch. 15, 1 Stat. 124.

<sup>76</sup> CRAIG JOYCE ET AL., COPYRIGHT LAW 258 (10th ed. 2016).

<sup>77</sup> *Id.* at 279.



production and dissemination of products of the intellect.<sup>78</sup> Lower courts have concurred.<sup>79</sup>

The underlying intention of encouraging creativity was also stated in many of the state copyright statutes which were in operation prior to the enactment of the federal copyright law in 1790. Patterson notes that these state statutes deserve special attention, because the preambles of eight of them state the “purpose” of copyright, the “reason” for it, and the legal “theory” upon which it was based.<sup>80</sup> Patterson posits that according to these preambles, “[t]he purpose of copyright . . . was to secure profits to the author; the reason for it was to encourage authors to produce and thus to improve learning; and the theory upon which it was based was that of the natural rights of the author.”<sup>81</sup>

Connecticut was the first state to pass a general copyright law in 1783.<sup>82</sup> This law was entitled, “An Act for the Encouragement of Genius and Literature.”<sup>83</sup> Its preamble provided:

Whereas it is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the Sale of his Works, and such Security may

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<sup>78</sup> See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932).

<sup>79</sup> See, e.g., *Hustler Mag. v. Moral Majority*, 796 F.2d 1148, 1151 (9th Cir. 1986).

<sup>80</sup> PATTERSON, *supra* note 24, at 186. These states are Connecticut, Georgia, New York, Massachusetts, New Jersey, New Hampshire, North Carolina, and Rhode Island. *Id.* at 186–87.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Connecticut Copyright Statute, Connecticut* (1783), PRIMARY SOURCES ON COPYRIGHT (1450–1900), [www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1783a](http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783a) [https://perma.cc/8EVZ-QPBP] (Lionel Bently & Martin Kretschmer eds., last visited June 30, 2022).

encourage Men of Learning and Genius to publish their Writings; which may do Honour to their Country, and Service to Mankind.<sup>84</sup>

The preambles to the Georgia and New York statutes were almost the same as the Connecticut statute.<sup>85</sup> The preambles of the other five state copyright statutes were clear in their encouragement of authors to produce useful works.<sup>86</sup>

These preambles “appear to be the only place where the purpose, reason, and legal theory of copyright were expressed in copyright statutes.”<sup>87</sup> The preambles contain ideas that are valuable in interpreting the underlying statutes, since these ideas can shed light on the perception of copyright held by their draftsmen.<sup>88</sup> Furthermore, since these statutes were enacted so close to the enactment of the first federal statute in 1790, they would invariably have had an influence on its tenor.<sup>89</sup>

Therefore, a review of these influential copyright regimes persuasively demonstrates that copyright law’s principal objective was, and abides as, the stimulation of creativity.

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<sup>84</sup> *Id.*

<sup>85</sup> PATTERSON, *supra* note 24, at 187.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 187–88 (pointing out that owing to their being supplanted by the federal statute, some of the state statutes never became operative in their own terms. Additionally, it seems fairly certain that no opportunity arose for courts to interpret them, and how the courts would have construed them remains a matter for conjecture.).

### III. THE INFLUENCE OF ECONOMIC CONSIDERATIONS ON COPYRIGHT LAW

#### A. *The Coupling of Copyright Law with the Global Trade Agenda*

The influence of economic factors over copyright law became settled following the entering into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on January 1, 1995.<sup>90</sup> However, even before TRIPS, there were clear signs of the impact of economic concerns on copyright law.

Prior to the enactment of the Statute of Anne, and the protection for authors that it offered, copyright was purely a right for entrepreneurs—bookbinders, printers and booksellers.<sup>91</sup> This was similarly the case under the printing privileges system, the licensing regime of the Stationers’ Company, and the “common-law copyright.”<sup>92</sup> However, despite the stated protection for authors provided by the Statute of Anne, it has been argued that the statute was merely a device of entrepreneurs. In this regard, Feather contends that the Statute of Anne was designed to ensure “the control of production by a few wealthy capitalists . . . [and] the continued dominance of English publishing by a few London firms.”<sup>93</sup> On his part, Patterson contends that the statute was “a trade-regulation statute directed to the problem of monopoly in various forms.”<sup>94</sup>

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<sup>90</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

<sup>91</sup> PATTERSON, *supra* note 24, at 42–43.

<sup>92</sup> *Id.*

<sup>93</sup> John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUB. HIST. 19, 37 (1980).

<sup>94</sup> PATTERSON, *supra* note 24, at 150.

Deazley rejects these views for being too reductionist.<sup>95</sup> He argues that, whereas many aspects of the Statute of Anne can be considered as addressing monopolies in the book trade, Feather's and Patterson's analyses overlook the central feature of the statute.<sup>96</sup> Deazley argues that "[t]he Act was not primarily concerned with securing the position of the booksellers, nor with guarding against their monopolistic control of the press . . . ."<sup>97</sup> Instead, as noted above, Deazley maintains that the Act "was primarily concerned with the continued production of books."<sup>98</sup>

These diverging views notwithstanding, what is clear is that the development of copyright law "has been a contested political process producing successive phases of settlement or institutionalization."<sup>99</sup> Whereas the influence of economic concerns could be seen as early as the Statute of Anne and subsequent Copyright Acts in both the U.K. and the U.S., it was not until the TRIPS Agreement that this economic structure became an overt international policy agenda.<sup>100</sup> It is in the post-TRIPS era that the outright dominance of economic considerations over copyright law is witnessed.

IP legislation, first at the national and then at the international level, has been subject to continued interest to

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<sup>95</sup> RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695-1775), at 45 (2004).

<sup>96</sup> *Id.* at 45–46.

<sup>97</sup> *Id.* at 46.

<sup>98</sup> *Id.*

<sup>99</sup> Susan Sell & Christopher May, *Moments in Law: Contestation and Settlement in the History of Intellectual Property*, 8 REV. INT'L POL. ECON. 467, 468 (2001).

<sup>100</sup> Fiona Macmillan, *Love is Blind and Lovers Cannot See: Resisting Copyright's Romance*, in 3 KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY 1, 6–10 (Hanns Ullrich et al. eds., 2018).

establish and reinforce advantageous IP regimes.<sup>101</sup> In 1994, the World Trade Organization (W.T.O.), during the Uruguay Round of trade negotiations, extended its jurisdiction to IP matters through TRIPS.<sup>102</sup> TRIPS makes the protection of intellectual goods a mandatory requirement for any country entering the W.T.O. multilateral trading system. TRIPS requires nations to comply with the substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), with the notable exception of the moral rights provisions.<sup>103</sup>

This aspect of TRIPS “succeeds in internationali[z]ing a model of copyright which promotes . . . commodification and economic autonomy . . . without the counterbalancing recognition of authorial rights.”<sup>104</sup> Overall, it has been noted that IP protection as codified and formalized in TRIPS is the result of a long struggle between various groups over the control of economically significant knowledge resources.<sup>105</sup>

As discussed above, it has been argued that from its inception, copyright law has been influenced by the pressures of economic and political systems, specifically the lobbying of rights holders and intermediaries, all the while neglecting the needs of the “creative system.”<sup>106</sup> The

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<sup>101</sup> Sell & May, *supra* note 99, at 469.

<sup>102</sup> *Id.* at 467.

<sup>103</sup> TRIPS, *supra* note 90, art. 9.1.

<sup>104</sup> Daniel Burkitt, *Copyrighting Culture—The History and Cultural Specificity of the Western Model of Copyright*, INTELL. PROP. Q. no. 2, 2001, at 146, 147.

<sup>105</sup> Sell & May, *supra* note 99, at 468.

<sup>106</sup> Katarzyna Gracz, *Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory*, 22 INT’L J.L. & INFO. TECH. 334, 341 (2014) (defining the creative system as the structures of society concerned with the creation, reproduction, distribution, and access to creative works *vis-à-vis* the economic system

argument continues that the origin of copyright law is effectively the regulation of competition between publishers, not authors.<sup>107</sup>

The printing privileges, the stationers' copyright, and the common-law copyright offered protection to entrepreneurs.<sup>108</sup> The printing privilege, or printing patent, was "a right to publish a work granted by the sovereign in the exercise of his royal prerogative."<sup>109</sup> The stationers' copyright, which derived from its progenitor the Stationers' Company, was a private affair of the company.<sup>110</sup> It was strictly regulated by company ordinances and was deemed to exist in perpetuity.<sup>111</sup> The common law copyright, that is, a copyright recognized by the common law courts, was defined by the House of Lords as the right of first publication in the *Donaldson* case.<sup>112</sup>

The role and the status of the author in all of this was minimal.<sup>113</sup> Copyrights resulted from printers and stationers attempting to secure their rights to publish without interference by competition.<sup>114</sup> Publishers were again the driving force behind the enactment of the copyright laws in the eighteenth century, "despite the insistence with which the natural rights of the author were invoked."<sup>115</sup> During the nineteenth century, the author's

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that is ruled by right holders and intermediaries in the market for creative works).

<sup>107</sup> Antoon Quaadvlieg, *Copyright's Orbit Round Private, Commercial and Economic Law—The Copyright System and The Place of the User*, 29 INT'L REV. INTELL. PROP. & COMPETITION L. 420, 427 (1998).

<sup>108</sup> PATTERSON, *supra* note 24, at 78.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 5.

<sup>111</sup> *Id.*

<sup>112</sup> *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837.

<sup>113</sup> Quaadvlieg, *supra* note 107 (citation omitted).

<sup>114</sup> Sell & May, *supra* note 99, at 481.

<sup>115</sup> Quaadvlieg, *supra* note 107.

emergence as copyright's central player did not change "the fact that the publishing industry was still there in the background, and that the rationales for the protection of that industry had not changed."<sup>116</sup>

Further eroding the creative system is the fact that publishers and producers today are increasingly involved in and directing the creative process itself.<sup>117</sup> Publishers and producers served as intermediary merchants by "buying the intellectual product as raw material with the author and selling it as a finished product . . ."<sup>118</sup> Publishers, formerly intermediaries, now fulfill many of the same roles as authors.<sup>119</sup> Publishers and producers increasingly take the initiative to select who will create the product and organize various aspects of production.<sup>120</sup> This is seen, for instance, in the book publishing industry, which has evolved from a business into a profession.<sup>121</sup> Today, book publishers are far more active in the creation of the literature that they publish.<sup>122</sup>

However, none of these observations should be surprising; copyright is, after all, a form of intellectual *property*. IP can be explained as the reward for the author's labor through a Lockean approach, or as the protection of the author's personality through a Kantian approach.<sup>123</sup> The author who wants to provide public access to his work must place it on the market.<sup>124</sup> He willingly subjects his work to a commercial transaction.<sup>125</sup> The primary actors in the market are the creative industries,

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<sup>116</sup> *Id.* at 427–28.

<sup>117</sup> *Id.* at 433.

<sup>118</sup> *Id.* at 432.

<sup>119</sup> *Id.* at 433.

<sup>120</sup> *Id.*

<sup>121</sup> Quaedvlieg, *supra* note 107, at 433 n.46.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 421.

<sup>124</sup> *Id.* at 423.

<sup>125</sup> *Id.*

such as publishers and producers, rather than the individual creators.<sup>126</sup> In this regard, it is as if authors are guided by the “invisible hand” of capitalism, whereby individuals act together towards the development of a capitalist society without necessarily being aware of the larger capitalist picture.<sup>127</sup>

***B. How Copyright Law has Understood and Provided for Creativity—Authorship, Originality and the Work***

Copyright law’s understanding of and provisions regarding creativity have been guided by economic concerns. This is seen particularly in the devices of authorship, originality, and the copyrighted work.

Most accounts of copyright recognize creativity as central to copyright’s aim of promoting artistic and intellectual progress.<sup>128</sup> Without creativity, there would be nothing to which copyright’s incentives could attach. Indeed, copyright law has been formulated largely on the basis of the assumptions about what creativity is.<sup>129</sup> This takes the form of an oversimplified model of authorship.<sup>130</sup> The author is Anglo-American copyright law’s main character, and authorship is its foundational concept.<sup>131</sup> It is through authorship that a copyrightable work comes into

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<sup>126</sup> *Id.* at 426.

<sup>127</sup> 2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 35 (London, W. Strahan & T. Caddell 1776).

<sup>128</sup> JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* 63 (2012).

<sup>129</sup> See generally Keith Sawyer, *The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law*, 86 NOTRE DAME L. REV. 2027 (2011) (examining the Western cultural model of creativity and its implications for intellectual property).

<sup>130</sup> COHEN, *supra* note 128.

<sup>131</sup> Jaszi, *supra* note 2, at 455.



existence, a copyrightable interest is established, and a first owner of copyright is determined.<sup>132</sup>

The Western copyright law model is influenced and shaped by this concept of authorship. Thus, inquiring into the concept of authorship offers the opportunity to critically evaluate the shape and scope of copyright protection.<sup>133</sup> Michel Foucault, in his important essay *What is an Author?*, implored that “it would be worth examining how the author became individualized in a culture like ours . . . and how this fundamental category of ‘the-man-and-his-work criticism’ began.”<sup>134</sup> This challenge has since been taken up by literary theorists and copyright law scholars such as Martha Woodmansee and Peter Jaszi. Woodmansee and Jaszi have examined the manner in which the eighteenth-century development of the modern concept of authorship has impacted copyright law.<sup>135</sup> Their examinations demonstrate the great extent to which the concept of the author figure—an independent creator of an original work—shaped copyright law and literature.

The eighteenth century saw the emergence of the Romantic author-genius as a dominant figure in literature and legal narrative. This contention has been put forward by Woodmansee, Jaszi, and other members of the school of thought referred to as the “Romantic authorship discourse,” “the author-genius critique,” or the “author effect.”<sup>136</sup>

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<sup>132</sup> See LIONEL BENTLY ET AL., *INTELLECTUAL PROPERTY LAW* 125–27 (5th ed. 2018).

<sup>133</sup> See CRAIG, *supra* note 7, at 11.

<sup>134</sup> 2 MICHEL FOUCAULT, *What is an Author?*, in *AESTHETICS, METHODS AND EPISTEMOLOGY* 205, 205 (James D. Faubion ed., Robert Hurley et al. trans., 1998).

<sup>135</sup> See generally Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 *CARDOZO ARTS & ENT. L.J.* 279 (1992); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 *CARDOZO ARTS & ENT. L.J.* 293 (1992).

<sup>136</sup> See generally Woodmansee, *supra* note 135; Jaszi, *supra* note 135.

According to Woodmansee, the eighteenth century saw a shift from a poetics of imitation to a valorization of originality, and prior to the eighteenth century, imitation was the aesthetic norm.<sup>137</sup> This viewpoint colored Lord Camden's decision in 1774 in *Donaldson*, where the House of Lords repudiated the contention for perpetual common law copyright which had previously been endorsed by the Law Lords in *Millar*.<sup>138</sup> In *Donaldson*, Lord Camden elegantly put it thus:

Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? *Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius,* are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be [stingy] to the world, or hoard up for themselves the common stock.<sup>139</sup>

As discussed above, before the U.S.'s independence, there were Copyright Acts enacted in various states and colonies at the time. In its decision in *Wheaton v. Peters*, the first copyright case heard in the U.S. Supreme Court, the Supreme Court surveyed some of these Acts and paid particular heed to their preambles, some of which expressly provided that the Acts were enacted for "the encouragement of genius."<sup>140</sup> The court noted that in 1783, the state of Connecticut had "passed an act for the

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<sup>137</sup> Woodmansee, *supra* note 2.

<sup>138</sup> PATTERSON, *supra* note 24, at 172–75.

<sup>139</sup> HL Deb (1774) (17) col. 954 [hereinafter *Donaldson*] (emphasis added) (reporting *Donaldson v. Becket* (1774) 1 Eng. Rep. 837), [https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation\\_uk\\_1774](https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_uk_1774) [https://perma.cc/M985-PHSL] (last visited Jan. 21, 2023).

<sup>140</sup> *Wheaton v. Peters*, 33 U.S. 591, 683 (1834).

encouragement of literature and genius.”<sup>141</sup> Similarly, the Colony of New York in 1786 had passed a law to “encourage persons of learning and genius to publish their writings.”<sup>142</sup>

It was not until the tail-end of the Romantic era that the concept of the author as genius was seen explicitly in the U.S. Supreme Court decision *Baker v. Selden*.<sup>143</sup> *Baker* was a leading U.S. Supreme Court copyright case often cited as the genesis of the idea/expression dichotomy and the merger doctrine.<sup>144</sup> The court held that a copyright of a book did not give an author the right to exclude others from practicing what was described in the book; copyright only conferred the right to exclude reproduction of the material in the book.<sup>145</sup>

Specifically, the court noted that the copyright of a work on mathematical science cannot give to its author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them.<sup>146</sup> The court contrasted such works of mathematical science to ornamental designs or pictorial illustrations.<sup>147</sup> Regarding the latter types of works, the court stated that “their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Baker v. Selden*, 101 U.S. 99, 102–04 (1879).

<sup>144</sup> Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 326 (1989); Roberta Mongillo, *The Idea-Expression Dichotomy in the US and EU*, 38 EUR. INTEL. PROP. REV. 733, 733–34 (2016); Cao Xinglong, *Facets of the Expression/Idea Dichotomy*, 35 EUR. INTEL. PROP. REV. 597, 598 (2013).

<sup>145</sup> *Baker*, 101 U.S. at 102.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 103–04.

composition as are the lines of the poet or the historian's period."<sup>148</sup>

Frosio elaborates on the Romantic ethic of the author-genius. He notes that during the pre-copyright period, an epoch he terms the "first paradigm of creativity," borrowing, imitation and copying played a paramount role in the development of popular culture.<sup>149</sup> Beyond the West, imitation has been the prevailing paradigm of creativity in many cultures for many years, until perhaps only recently.<sup>150</sup>

For instance, in China, it has been put forward that the resistance to the adoption of Western copyright law is attributable in part to the absence of a Romantic tradition in Chinese culture.<sup>151</sup> While culture in Europe and the U.S. was being reshaped by Romanticism, Alford argues that China remained steeped in the Confucian tradition.<sup>152</sup> Confucianism included, among many other things, a radically different conception of art and creativity.<sup>153</sup> Confucianism emphasized the power of the past and its consequences for possession of the fruits of intellectual endeavor.<sup>154</sup> Similarly in Africa, where traditional culture and traditional cultural expressions are ubiquitous, it is often thought that the preservation of tradition and

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<sup>148</sup> *Id.*

<sup>149</sup> GIANCARLO FROSIO, RECONCILING COPYRIGHT WITH CUMULATIVE CREATIVITY: THE THIRD PARADIGM 15 (2018).

<sup>150</sup> See generally WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995).

<sup>151</sup> *Id.* at 19.

<sup>152</sup> *Id.* at 18–19.

<sup>153</sup> *Id.* at 19–20.

<sup>154</sup> *Id.*

traditional artefacts is only about imitation and reproduction.<sup>155</sup>

Returning to the Western mold of creativity, Frosio notes that Romanticism brought about the second paradigm of creativity “based on absolute originality that depicts individualism as the sole *Grundnorm* that should govern creativity.”<sup>156</sup> Central to the Romantic ideal is the sanctity of individual creativity.<sup>157</sup> “The distinction between imitation and originality is therefore intricately tied to the perceived nature of man, such that true authorship represents the essence of human individuality.”<sup>158</sup>

Craig explores, in significant detail, the impact of the Romantic ideal on copyright law.<sup>159</sup> She notes that “[t]he valoriz[ation] of the individual author and his originality, and the resulting denigration of imitation” within the Romantic era “is axiomatic in modern copyright law.”<sup>160</sup> Craig further states that “copyright’s subject is the author-as-originator.”<sup>161</sup> Craig explains that the author is defined by her original creation and derives her reward from it.<sup>162</sup> As such, copyright’s standard of originality is characterized by independent creation.<sup>163</sup>

It is true that copyright does not concern itself with questions of genius, quality, or creativity; instead, it offers protection to works that demonstrate the lowest “modicum

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<sup>155</sup> Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions: The Tunisia Example*, 7 J. WORLD INTELL. PROP. 229, 233 (2004).

<sup>156</sup> FROSIO, *supra* note 149, at 5.

<sup>157</sup> CRAIG, *supra* note 7, at 14.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 11, 14.

<sup>160</sup> *Id.* at 14.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> CRAIG, *supra* note 7, at 14; *see* Feist Publ’ns, Inc. v. Rural Tel. Servs., Inc., 499 U.S. 340, 353 (1991).

of creativity.”<sup>164</sup> These features suggest that the emphasis placed on the author under modern copyright law is far from the concept of individual genius emphasized in the Romantic era.<sup>165</sup> However, Craig notes that “this apparent disparity . . . reflects a divergence between copyright’s reality and its guiding rationale.”<sup>166</sup> The Romantic aesthetic of individual origination has nevertheless influenced the rationale underlying copyright laws and the conception of authorship in particular.<sup>167</sup>

The influence of economic concerns on copyright law is further seen in the treatment of creativity as property in these works. In copyright law, the work represents the crystallization of the author’s creative process as a form of independent, alienable personal property.<sup>168</sup> Craig contends that copyright presents “the ‘work’ as an autonomous object with immutable characteristics and a fixed textual meaning: a [conception] that clearly facilitates its property[z]ation as an essential adjunct to the individuali[z]ation of the ‘work’s author.”<sup>169</sup> The concept of the work as a discrete entity differs significantly from the understanding of “text” that existed through the Renaissance.<sup>170</sup> As Rose notes, “the dominant conception of literature was rhetorical. A text was conceived less as an object than as an intentional act, a way of doing something,

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<sup>164</sup> *Feist*, 499 U.S. at 362.

<sup>165</sup> CRAIG, *supra* note 7, at 14.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 15.

<sup>168</sup> *Id.* at 19.

<sup>169</sup> *Id.*

<sup>170</sup> Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 63 (1988); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 730 (1993).

of accomplishing some end such as ‘teaching and delighting.’”<sup>171</sup>

During this period, text was perceived as independent from the author’s own property. As a result, there was no movement to protect works of authorship at the time. As noted above, in the course of this era—Frosio’s first paradigm of creativity—”[c]opying, in the sense of imitating previous great poets and writers, was a laudable objective rather than an unethical or immoral act of theft.”<sup>172</sup> Works began to be viewed as autonomous objects, while copyright law developed around this same time period.<sup>173</sup> In the early modern era, many artists depended on the aristocracy or the church to purchase their art.<sup>174</sup> Because artists primarily aimed to improve the reputation of their patron, artists could give little claim to original genius.<sup>175</sup> As Rothstein explained:

The . . . conception of a text as autonomous ‘property’ began to develop only during the second half of the eighteenth century, with the breakdown of the patronage system and with the increased audience accompanying the rise of commercial printing. Because the author’s subsistence depended on sales of his or her printed work, the personal relationship that the author had with the audience—formerly, his or her patrons—no longer existed. From the late seventeenth century through the nineteenth century and the coming of the Romantic age, the text evolved into a commodity, a piece of property.<sup>176</sup>

Craig similarly explained:

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<sup>171</sup> Rose, *supra* note 170. However, it has been noted that the conception of the text as a mode of action and not a fixed object can be traced back to antiquity. Rotstein, *supra* note 170.

<sup>172</sup> Rotstein, *supra* note 170, at 732.

<sup>173</sup> *Id.*

<sup>174</sup> RECKWITZ & BLACK, *supra* note 11, at 48.

<sup>175</sup> *Id.*

<sup>176</sup> Rotstein, *supra* note 170, at 732–33.

The property[z]ation of literary creativity demanded this [understanding] of the text as a stable object capable of commodification; [an understanding] that paired easily with the Romantic understanding of originality and author-genius. Indeed, our continued attachment to the notion of the sole author and the solitary genius, in spite of the disaggregationist impulse of our post-modern age, could be regarded as a testament to the powerful vision of text as just another form of private property in our capitalist society.<sup>177</sup>

At its inception, copyright protected specific artifacts only; for instance, the Statute of Anne protected books.<sup>178</sup> Then, the range of works protectable by copyright expanded under “artefact-specific” Acts.<sup>179</sup> The Copyright Act of 1911 repealed and codified these artefact-specific regimes, protecting certain works in general.<sup>180</sup> Since then, copyright protection confers a property right, protecting the intangible intellectual property embodied in the work.<sup>181</sup> Today, the totality of copyright protection extends to “an immaterial, malleable essence.”<sup>182</sup> The underlying economic value of the intangible elements of substantive work has driven this expansion.<sup>183</sup> A good example of this is copyright protection of fictional

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<sup>177</sup> CRAIG, *supra* note 7, at 19.

<sup>178</sup> Jonathan Griffiths, *Dematerialization, Pragmatism and the European Copyright Revolution*, 33 OXF. J. LEG. STUD. 767, 768–69 (2013).

<sup>179</sup> CRAIG, *supra* note 7, at 19; *see also* Engravers’ Copyright Act 1735, 8 Geo. 2 c. 13 (Gr. Brit.).

<sup>180</sup> Griffiths, *supra* note 178.

<sup>181</sup> James Griffin, *Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright*, INTELL. PROP. Q., no. 1, 2013, at 69, 69–70.

<sup>182</sup> Griffiths, *supra* note 178, at 767.

<sup>183</sup> *See* Bashayer Al-Mukhaizeem, *Copyright Protection of Fictional Characters in Films: UK and US Perspectives*, 5 LEGAL ISSUES J., Jan. 2017, at 1, 2.



characters in movies<sup>184</sup> and books,<sup>185</sup> which, though not strictly falling under a category of work, are usually of high commercial value.<sup>186</sup> As Craig additionally notes:

The extent to which modern copyright [carries forward] a Romantic ideology remains a subject for discussion . . . there is little doubt that copyright law reinforces an exclusionary ideal of the individual author that reflects a particular ideology and a particular locus in history. While copyright readily extends protection to . . . commonplace . . . works that are undoubtedly far from the level of [R]omantic aspiration—the label of ‘author’ and its concomitant romanticisation ensure that these uninspired works are nevertheless over-protected, and that such ‘original authorship’ is disproportionately valued against excluded forms of cultural expression. Indeed, the less copyright’s subject-matter looks like the creation of a Romantic author, the more powerful is the role of Romantic ideology in maintaining the moral divide between author and copier.<sup>187</sup>

Yet, Craig notes that “the moral divide between author and copier, between origination and imitation, is as untenable in today’s ‘post-modernity’”<sup>188</sup> as in the first paradigm. It captures and reifies a period in the evolution of authorship, but that period has passed.<sup>189</sup> Craig also notes that “[i]n 1967, Roland Barthes famously declared

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<sup>184</sup> See, e.g., *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at \*7–8 (C.D. Cal. Apr. 25, 1989) (finding that the famous “Rocky Balboa” movie character was entitled to protection).

<sup>185</sup> See, e.g., *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 503 (7th Cir. 2014).

<sup>186</sup> See *Al-Mukhaizeem*, *supra* note 183, at 6 (noting that the protection of fictional characters is recognized under both U.K. and U.S. copyright law, albeit with specific nuances).

<sup>187</sup> CRAIG, *supra* note 7, at 17.

<sup>188</sup> *Id.* at 16.

<sup>189</sup> *Id.*

the death of the author.”<sup>190</sup> As opposed to signaling the death of the author concept *per se*, Barthes pointed to the demise of its romanticism.<sup>191</sup> Frosio calls this post-Romantic era the third paradigm of creativity.<sup>192</sup> The third paradigm represents post-modern society wherein creativity occurs as a derivative process largely propelled by digital technologies and the internet.<sup>193</sup> Here, the “Web 2.0”<sup>194</sup> cultural movement, open access, mass collaboration, remixing, and user-generated creativity take center stage. However, copyright law’s insistence on an outdated and overlaid Romantic rhetoric and the law’s domination by economic considerations hinder the growth and potential of open, decentralized, and collaborative creativity.

**C. *The Romantic Aesthetic of the “Author-Genius” Abides—the Modern Creative Industries***

The discussion above highlighting the author-genius’ impact on copyright law and how this norm has itself been influenced and dominated by economic concerns may appear unduly abstract. However, it has genuine consequences for modern copyright law’s interpretation, operation, and application.

Whereas post-modernism and post-structuralism directly challenge many of the ideas central to the current system of copyright, the concept of the individual, original author remains at the forefront of our current interpretation of copyright laws and their underlying policies.<sup>195</sup> The

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<sup>190</sup> CRAIG, *supra* note 7, at 16; see ROLAND BARTHES, *The Death of the Author*, in IMAGE MUSIC TEXT 142, 148 (Stephen Heath trans., 1977).

<sup>191</sup> CRAIG, *supra* note 7, at 16.

<sup>192</sup> See FROSIO, *supra* note 149, at 5.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 303.

<sup>195</sup> CRAIG, *supra* note 7, at 21.

creative industries have adopted the concept of the Romantic author.<sup>196</sup> The creative economy “is at the vanguard of contemporary capitalism,” and “the solitary artist, a figment of Romantic thought, [has] become the creative entrepreneur of twenty-first century economic imagining[.]”<sup>197</sup>

Today, the creative industries have become a representation of the pervading post-modernism in society:

Post[-]modernism rejects the objectivity of knowledge and the certainty of meaning. Instead[,] it posits a system of creation based on continual transformation and ongoing dialogue. In particular[,] it emphasises the symbiotic tensions between [creators] and [users], each of whom constitutes a defining part of the process of progress [of the useful arts].<sup>198</sup>

The line between creators and users has continued to thin through the internet and digital technologies, enabling users to become creators themselves and distribute their creations almost instantaneously more readily.

A good example of the intersection between post-modernism culture and digital technologies is to be found in the sub-culture of fandom and specifically through the device of fan fiction. In this context, a “fan” is someone who has a strong interest in or admiration for a particular thing, or works set in a specific context or about a particular character or set of characters within such context,

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<sup>196</sup> JANE C. GINSBURG, COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 67 (Ruth L. Okediji ed. 2017).

<sup>197</sup> BARBARA TOWNLEY ET AL., CREATING ECONOMY: ENTERPRISE, INTELLECTUAL PROPERTY AND THE VALUATION OF GOODS 1 (2019).

<sup>198</sup> Paul Ganley, *Digital Copyright and the New Creative Dynamics*, 12 INT. J.L. INFO. TECH. 282, 305 (2004).

thing, or work.<sup>199</sup> An aggregate of fans of a particular thing are known as a “fandom.”<sup>200</sup> A “fan work” is a work created by someone other than the original author that is set in the author’s original context or in a context supposed by a fan.<sup>201</sup> These works may exist in any medium and may be fiction or nonfiction.<sup>202</sup> When these works are fictional, they are known as “fan fiction.”<sup>203</sup> Fan fiction includes all works created by fans and their derivative works, regardless of whether the fan received permission by the author or copyright holder in the original work.<sup>204</sup> Some fan fiction has been commercially published.<sup>205</sup> However, most fan fiction is published only online (or in “fanzines” before the internet) for an audience of fellow fans and without the express permission of the author or copyright owner.<sup>206</sup>

The ethos of post-modernism is that “almost all possible themes seem to have been already produced, [therefore] reworking may be the only creative act still available.”<sup>207</sup> However, despite this practical reality, the convention of the author-genius continues to influence the perceived social and economic value of works of secondary authorship, such as fan fiction, remixes, and mashups in the eyes of courts and legislators.<sup>208</sup>

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<sup>199</sup> AARON SCHWABACH, FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION 8 (2016).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> SCHWABACH, *supra* note 199.

<sup>206</sup> *Id.*

<sup>207</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 658 (1997).

<sup>208</sup> 6 NEIL W. NETANEL, *NEW DIRECTIONS IN COPYRIGHT LAW* 24 (Fiona MacMillan ed., 2017).

The U.S. Court of Appeals for the Second Circuit illustrates the idea's pervasiveness in its ruling in *Rogers v. Koons*.<sup>209</sup> The brief facts in this case were that Art Rogers, a professional photographer, took a black and white photo of a man and a woman with their arms full of puppies.<sup>210</sup> He entitled the photograph "Puppies" and used it on greeting cards and other generic merchandise.<sup>211</sup> Jeff Koons, an internationally known artist, found the picture on a postcard and wanted to make a sculpture based on the photograph for an art exhibition entitled the "Banality Show" at the Sonnabend Gallery, whose theme was the banality of everyday items.<sup>212</sup> After removing the copyright label from the postcard, he gave it to his artisans with instructions on how to model the sculpture.<sup>213</sup> He stressed that he wanted Puppies copied faithfully in the sculpture, though the puppies were to be made blue, their noses exaggerated, and flowers added to the hair of the man and woman.<sup>214</sup>

The sculpture, entitled "String of Puppies," became a success, and Koons sold three of them for a total of \$367,000.<sup>215</sup> Upon discovering that his picture had been copied, Rogers sued Koons and the Sonnabend Gallery for copyright infringement.<sup>216</sup> Koons admitted to having copied the image intentionally but attempted to claim fair use by parody.<sup>217</sup> Koons argued that the sculpture was a satire of society that critiqued modern consumer culture by incorporating objects and media images drawn from

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<sup>209</sup> See generally *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

<sup>210</sup> *Id.* at 304

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 304–05.

<sup>214</sup> *Id.* at 305.

<sup>215</sup> *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 307, 309.

consumerism.<sup>218</sup> Nonetheless, Rogers was successful in his copyright infringement suit against Koons, whose work was found to be intentionally exploitative for lack of parody and thus failed in his fair use defense.<sup>219</sup>

Whereas the Second Circuit gave its judgment in this case several years ago, its relevance today cannot be gainsaid. As Craig notes, “*Rogers v. Koons* offers a concrete example of the troublesome nature of author-based reasoning.”<sup>220</sup> Aoki elaborates:

From the outset, the Second Circuit’s opinion casts the parties into a set of polarities defined by a particular vision of creativity as exemplified by the Romantic author . . . ‘pure’ artist/photographer [versus] conniving and cynical art world rook . . . solo production of photographs [versus] fabrication to specification by different workshops of skilled labourers . . . and . . . photo from life [versus] parodistic treatment of pre-existing cultural material.<sup>221</sup>

Koons lost on his fair use defense largely because he failed, or refused, to conform to the stereotype of the serious, dedicated creator around which our copyright law increasingly came to be organized upon from the early nineteenth century on.<sup>222</sup> By contrast, artist-photographer Rogers was portrayed as an earnest artist who justly deserved his rights in his works.<sup>223</sup> In the words of the court, “Koons’ claim that his infringement of Rogers’ work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus

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<sup>218</sup> *Id.* at 305, 309.

<sup>219</sup> *Id.* at 309–11.

<sup>220</sup> CRAIG, *supra* note 7, at 23.

<sup>221</sup> Aoki, *supra* note 8, at 813–14.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

cannot be accepted. The rule's function is to ensure that *credit is given where credit is due.*<sup>224</sup>

Commenting on this case and similar cases, one artist has discussed the relationship between appropriating authors and the authors they appropriate from.<sup>225</sup> He notes:

As in *Rogers*, there was a tendency in *Cariou v. Prince* for the defense to draw the distinction between an "artistic" author and a "mass" author, with the former, because of his stature in the contemporary art world, entitled to a creative license that superseded the authorial agency of the latter.<sup>226</sup>

Fandom has been greatly enabled by peer-to-peer ("P2P") software.<sup>227</sup> In essence, P2P technology allows for information exchange through "peer" machines which are linked across a network instead of a central server.<sup>228</sup> The main copyright issue surrounding P2P networks is whether P2P service providers can be liable for copyright infringement taking place over their networks.<sup>229</sup> This is a

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<sup>224</sup> *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (emphasis added).

<sup>225</sup> Nate Harrison, *Authoring Contradictions: Modern Appropriation Art and Postmodern Copyright Law in Cariou v. Prince*, in *ARTIST, AUTHORSHIP & LEGACY: A READER* 83, 88 (Daniel McClean ed., 2018).

<sup>226</sup> *Id.*; see also *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013). On appeal, the Second Circuit overturned the District Court's decision, holding that Prince's appropriation art were transformative fair uses of Cariou's photographs. Harrison argues that the Second Circuit's decision represents a "postmodern turn" in copyright law. Harrison, *supra* note 225, at 92.

<sup>227</sup> See Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *HARV. J.L. & TECH.* 1, 38 (2003).

<sup>228</sup> Alain Strowel, *Introduction: Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, in *PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW* 1, 1 (Alain Strowel ed., 2009).

<sup>229</sup> *Id.*

controversial issue that culminated in 2005 with the highly anticipated Supreme Court case *MGM Studios Inc. v. Grokster Ltd.*<sup>230</sup> In this decision, the Supreme Court found that Grokster and Streamcast, two popular P2P service providers, had secondary liability for copyright infringement by “actively inducing” their users to commit infringement.<sup>231</sup>

The concept of the author-figure has been revived by recording industry stakeholders who wish to use the “noble and deserving artist” as a reason to crack down on file sharing over P2P networks.<sup>232</sup> The plaintiffs in *Grokster* were Metro-Goldwyn-Mayer (MGM) studios along with twenty-eight of the largest entertainment companies.<sup>233</sup> Notably, *Grokster* presented many of the same issues as the “Betamax Case,” *Sony Corp. v. Universal City Studios*, which held that V.C.R. manufacturers were not liable for contributory infringement by home users.<sup>234</sup> Whereas the Supreme Court appeared reluctant to change what had been previously decided in the Betamax Case, in finding for the plaintiffs, the language of Justice Ginsburg, joined by Chief Justice Rehnquist and Justice Kennedy, concurring, was colored with influence from the Romantic ethic of the author-genius:

To say this is not to doubt the basic need to protect copyrighted material from infringement. The Constitution itself stresses the vital role that copyright plays in advancing the useful Arts. No one disputes that reward to the author or artist serves to

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<sup>230</sup> *Id.*; see generally *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>231</sup> *Grokster*, 545 U.S. at 940–41; Strowel, *supra* note 227.

<sup>232</sup> CRAIG, *supra* note 7, at 21–22.

<sup>233</sup> See *Grokster*, 545 U.S. at 920.

<sup>234</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).



induce release to the public of the products of his creative genius.<sup>235</sup>

As can be gleaned from the above, in the debate on P2P networks, it is in the best interest of corporate actors to regulate and commercialize the sharing and downloading of music. Similarly, regarding computer software, appeals to authorship tend to diverge from the policy concerns posed by copyright protection of software while serving the interests of corporate actors.<sup>236</sup> As Craig notes, “[t]he irony, of course, lies in the extent to which the Romantic notion of ‘authorship’ has served the commercial interests of publishers, employers and distributors, often at the expense of the people whose role in the ‘creative’ process was most similar to that of the Romantic author figure.”<sup>237</sup>

The exploitation of the author is paradoxically accentuated in the “works made for hire” concept in the U.S. and the related “works created by employees” concept in the U.K. and other common law jurisdictions.<sup>238</sup> Under these concepts, the copyright in works created by an employee in the course of employment automatically belongs to the employer.<sup>239</sup> The ability of employers to claim direct ownership over their employees’ works has been “rationalised in terms of a bizarre inversion of the ‘authorship’ concept.”<sup>240</sup> Under the works made for hire doctrine, the employer’s rights do not come from an implied grant or assignment by the employee.<sup>241</sup> Instead, as Craig explains, “the employers’ claims are rationalized

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<sup>235</sup> *Grokster*, 545 U.S. at 960–61 (Ginsburg, J., concurring) (citations omitted) (quotations omitted).

<sup>236</sup> CRAIG, *supra* note 7, at 22.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> 17 U.S.C. §§ 101, 201(b); BENTLY ET AL., *supra* note 132, at 133–36.

<sup>240</sup> CRAIG, *supra* note 7, at 22.

<sup>241</sup> *Id.*

in terms of the Romantic conception of ‘authorship’ with its concomitant values of ‘originality’ and ‘inspiration.’”<sup>242</sup>

#### ***D. A Moment of Recollection***

The tension between copyright law’s model of creativity and how creativity actually arises in society today calls for a moment of recollection. Indeed, if we were to take a critical look at society, we would not expect modern capitalism to promote creativity.<sup>243</sup> Sociologist Max Weber offered an insightful critique of society in his seminal *Economy and Society*.<sup>244</sup>

According to Weber, the primary foundational element of capitalism is regularity and standardization, rather than the mobilization of innovation and creativity.<sup>245</sup> He views Western capitalism’s mode of goods production in the early twentieth century as an example of “formal, bureaucratic or technical rationality.”<sup>246</sup> For Weber, the modern economy is “enterprise capitalism” that is focused on maximizing economic efficiency through the use of rational-purposive rules for organizing production and labor.<sup>247</sup>

Enterprise capitalism is thus distinct from the capitalism of pre-modern societies, which was much more unpredictable.<sup>248</sup> In contrast, “in enterprise capitalism, the enterprise introduces the division of labour, hierarchic direction and planning, and a calculable interaction among

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<sup>242</sup> Jaszi, *supra* note 2, at 486.

<sup>243</sup> RECKWITZ & BLACK, *supra* note 11, at 96.

<sup>244</sup> MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978).

<sup>245</sup> *Id.* at 65.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> RECKWITZ & BLACK, *supra* note 11, at 96.

people and between people and things.”<sup>249</sup> In this model, the modern economy resembles an objective, streamlined machine.<sup>250</sup>

The common law copyright model places an emphasis on economic rights, including the right to produce copies.<sup>251</sup> In contrast, as the name suggests, the civil law *droit d’auteur* [author’s rights] model is more focused on the author’s rights in their creations.<sup>252</sup> A key problem with the economic treatment of cultural goods is that the economic analysis is indeterminate.

Scholars in economics and law disagree on whether copyright law’s economically oriented model actually encourages the creation of cultural goods, which is what copyright law ought to be all about. For instance, economists Landes and Posner contend in their article on the economics of copyright that overly strong copyright inhibits creativity because it imposes higher costs on later generations of creators.<sup>253</sup> Copyright law scholar Lessig argues in similar vein.<sup>254</sup> He maintains that copyright has been used to stifle the free and open exchanges of knowledge, culture, and technology that form the core of creative modalities.<sup>255</sup> On the other hand, Goldstein argues that copyright provides incentives for creativity by securing rewards, economic revenue streams, and related benefits to the respective authors and creators.<sup>256</sup> This viewpoint underscores the flexibility and public interest concerns

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> BENTLY ET AL., *supra* note 132, at 36.

<sup>252</sup> *Id.*

<sup>253</sup> See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 341–44 (1989).

<sup>254</sup> See LESSIG, *supra* note 52, at 199.

<sup>255</sup> *Id.* at 140–44.

<sup>256</sup> Paul Goldstein, *Copyright Law and Policy*, in 2 NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY 71–72 (Paula R. Newberg ed., 1989).

which copyright embodies for a limited time, including the fact that only expressions—and not ideas—are copyrightable.<sup>257</sup>

Despite this contestation, as copyright law's principal objective is the encouragement of creativity, it is argued that there must be a model of copyright that adequately achieves this goal. There has to be a formula that would acknowledge that creativity relies on previous work yet would encourage and maximize creative expression in multiple media and forms.

As seen above, policymakers and legislators have deliberately tied in copyright law with economic concerns, particularly with the advent of TRIPS.<sup>258</sup> It is thus neither too late nor impossible to re-calibrate copyright law. This article proposes a roadmap towards such reform. It is argued that copyright law can adequately encourage creativity if it is freed from economic concerns and if it were to understand and provide for creativity in accordance with its true nature as a derivative process, in line with Locke's theory of knowledge.

#### **IV. TOWARDS A THEORY OF COPYRIGHT LAW THAT ENCOURAGES CREATIVITY**

If copyright law were to consider creativity within the precepts of Locke's theory of knowledge, then it would be better styled to achieve its stated aim of encouraging creativity. As noted, Locke's theory of knowledge posits that knowledge arises when simple ideas, the material elements of knowledge, are combined together.<sup>259</sup> It is urged that this process of producing knowledge can be equated with the process of creativity. Thus, the central

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<sup>257</sup> *Id.*; 17 U.S.C. § 102(b).

<sup>258</sup> See MACMILLAN, *supra* note 100.

<sup>259</sup> LOCKE, *supra* note 9, at bk. II, ch. ii §§ 1–2, bk. IV, ch. ii, §

premise of Locke's theory of knowledge is that creativity is an incremental and derivative process.

It is argued that by adopting a format which considers creativity in line with Locke's theory of knowledge, whereby creativity arises when simple ideas are combined together, copyright law would be better structured to obtain its principal objective. To this end, ideas, the building blocks of creativity, are to be readily and freely available for use by potential creators.

A copyright law that is adequately styled for the encouragement of creativity ought to be based on an underlying theory that is geared towards this end. The current theories said to underlie copyright law, as elaborated below, make no reference to copyright law's primary objective.

#### **A. *A Shift Away from the Existing Theories of Copyright***

The legitimacy and scope of copyright protection has been an ongoing subject of debate by various scholars.<sup>260</sup> In this regard, the initial question typically asked is why copyright should be granted.<sup>261</sup> For scholars, the answer to this question is important in society's choice as to whether to grant copyright or not.<sup>262</sup> The answer is also important because society's decision to grant copyright influences the manner in which people interact with and use cultural objects.<sup>263</sup> Further, arguments that justify granting private property rights in tangible property often depend on the scarcity or limited supply of tangible resources.<sup>264</sup> Granting exclusive rights over intangible

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<sup>260</sup> BENTLY ET AL., *supra* note 132, at 4.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 4–5, 39.

<sup>264</sup> *Id.*

property must be justified in a different manner since such property can be shared or replicated without diminishing the availability of the resource for others.<sup>265</sup>

Indeed, some commentators doubt that copyright is justified.<sup>266</sup> Particularly since the advent of the information age, many think that copyright unduly limits the public domain. Others argue that “while some aspects of copyright are justified, others are not. Typically, the argument is that copyright law has gone too far.”<sup>267</sup>

In response to this criticism, various theories have often been employed in support of copyright. Currently, there are many theories used to justify copyright protection.<sup>268</sup> However, these theories can be sorted into two categories. First, commentators in support of copyright protection often call upon deontological arguments to justify copyright.<sup>269</sup> These justifications view copyright as a matter of rights or duty; copyright is justified on the basis that it is morally right to have copyright.<sup>270</sup> For example, this argument may claim that “copyright is justified because the law recognizes authors’ natural and human rights over the products of their labour.”<sup>271</sup> On the other hand, instrumental justifications seek to justify copyright on the basis that copyright “induces or encourages desirable activities.”<sup>272</sup> For example, copyright is a necessary way of incentivizing the creation of new creative works.

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<sup>265</sup> *Id.* at 4–5.

<sup>266</sup> BENTLY ET AL., *supra* note 132, at 5; see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 323–51 (1970).

<sup>267</sup> BENTLY ET AL., *supra* note 132, at 39.

<sup>268</sup> *Id.* at 36.

<sup>269</sup> *Id.* at 5.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

Under the umbrellas of these two large groups, one may indeed find many approaches to copyright theory. It has also been put forward that copyright can be approximated into four main theories. In his influential writings on intellectual property theory, Professor Fisher argues that the four main theories of copyright are the labor theory, welfare theory, personality theory, and cultural theory.<sup>273</sup>

### ***B. The Labor Theory***

Under the labor theory, a person who labors upon unowned or common resources has a natural property right to the fruits of their labor, and the state is obligated to respect and enforce this natural right.<sup>274</sup> These ideas are widely thought to be especially applicable to copyright, where the raw materials, ideas, seemingly are “held in common” and where labor contributes so importantly to the value of finished products.<sup>275</sup>

Owing to his enormous influence on the discourse of property, it is justified to consider Locke’s thesis in some detail. Locke’s labor theory unites two basic

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<sup>273</sup> William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169–72 (Stephen Munzer ed., 2001) [hereinafter Fisher, *Theories*]; see also William Fisher, *COPYRIGHTX LECTURES*, (Jan. 23, 2020) <http://copyx.org/lectures/> [<https://perma.cc/XBJ2-ADBU>] [hereinafter Fisher, *COPYRIGHTX LECTURES*]. See, e.g., Lior Zemer, *On the Value of Copyright Theory*, *INTELL. PROP. Q.*, no. 1, 2006, at 55, 57 (arguing that “traditional proprietorism” and “authorial constructionism” are two other theories of copyright law, in addition to Fisher’s four theories); Peter S. Menell, *Intellectual Property: General Theories*, in *2 ENCYCLOPEDIA OF LAW & ECONOMICS* 129, 158, 163 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) (including “ecological theory,” “unjust enrichment,” and “radical/socialist theory” on the list of copyright theories).

<sup>274</sup> Fisher, *Theories*, *supra* note 273, at 170.

<sup>275</sup> *Id.*

propositions. The first is that everyone has a natural property right in their body and in the labor they produce. The second is that property rights are limited by specific norms.<sup>276</sup>

Locke noted:

Though the earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.<sup>277</sup>

Although some have asserted that the labor theory is premised on physical labor;<sup>278</sup> it can as well be applied to mental labor, justifying copyright as property over the production of mental labor.<sup>279</sup> As Hughes notes, “indeed, the Lockean explanation of intellectual property has immediate, intuitive appeal: it seems as though people *do* work to produce ideas and that the value of these ideas—

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<sup>276</sup> Zemer, *supra* note 273, at 64.

<sup>277</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111–12 (Ian Shapiro ed., Yale Univ. Press, 2003) (1690).

<sup>278</sup> See, e.g., PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 56 (1996).

<sup>279</sup> Deming Liu, *Copyright and the Pursuit of Justice: A Rawlsian Analysis*, 32 LEGAL STUD. 600, 604 (2012). Locke himself did not expressly rule out mental labor from his conceptualization of labor. See LOCKE, *supra* note 277.



especially since there is no physical component—depends solely upon the individual’s mental ‘work.’”<sup>280</sup>

In fact, it has even been argued that Locke’s labor theory appears to apply more readily to IP, specifically copyright, than to real property.<sup>281</sup> Altogether, the premise of the labor theory, which Fisher also terms the “fairness theory,” is that people who engage in creative labor are fairly rewarded.<sup>282</sup>

In this regard, there appears to be congruence between Locke’s labor theory and his theory of knowledge. As discussed, per the labor theory, Locke contended that labor is the basis for private property.<sup>283</sup> A form of labor is the act of the mind exerting its powers over simple ideas, which under the theory of knowledge leads to creativity.<sup>284</sup> The consonance between the theory of knowledge and the labor theory strengthens the appeal of the theory of knowledge as a theory that can influence copyright law given that copyright is a form of private property.

Turning back to the labor theory, Zemer notes:

Locke [contends] that in the state of nature men share a common right in all things. Thus, justifying the individual’s right to property is . . . difficult: once one takes a particular [thing] from the common, one violates the right of other commoners, to whom this particular item also belongs. Locke resolves this seeming contradiction by introducing the idea of expenditure of labour. Labour justifies the [personal

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<sup>280</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 300 (1988).

<sup>281</sup> ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 32 (2011).

<sup>282</sup> See Fisher, COPYRIGHTX LECTURES, *supra* note 273, Lecture 2.2, Fairness and Personality Theories: Fairness.

<sup>283</sup> LOCKE, *supra* note 277.

<sup>284</sup> See Hughes, *supra* note 280, at 294, 300–01.

ownership] of a [particular] object . . . [a] labourer's right, however, is not unconditional.<sup>285</sup>

Locke's theory is subject to two key limitations, commonly known as provisos. The first is known as the "sufficiency proviso." According to Locke, the acquisition of natural property rights only occurs if one has left as much and as good for others. The second proviso is known as the "no spoilage proviso." Its precept is that "nothing was made by God for man to spoil or destroy."<sup>286</sup>

Proponents of the labor theory "are mainly attracted by Locke's attempt to reconcile the tension between private acquisition and public interest: the right of the labourer, the good of the public, and the conservation of the public domain."<sup>287</sup> However, some have questioned Locke's labor theory as a justification for property rights. Craig wonders whether "Lockean property theory can be re-imagined to shape a copyright system that furthers . . . maximum creation and dissemination of intellectual works."<sup>288</sup>

Craig is concerned with the social and cultural aspects of our copyright regime and whether they can be

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<sup>285</sup> Zemer, *supra* note 273, at 62–63.

<sup>286</sup> LOCKE, *supra* note 277, at 112. It has been put forward that a third proviso, less clearly recognized in *The Second Treatise* but implicit in other portions of Locke's work, particularly *The First Treatise*, is sometimes referred to as the duty of charity. See Wendy Gordon, *Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1542–43 (1993). This restriction, emphasized by Wendy Gordon in a pathbreaking article, entails an obligation to let others share one's property in times of great need, so long as one's own survival is not threatened. *Id.*

<sup>287</sup> Zemer, *supra* note 273, at 63.

<sup>288</sup> Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEENS L.J. 1, 54 (2002) (proposing a relational theory of copyright, whose basis is a dialogic account of authorship and is guided by the public interest in a vibrant, participatory culture).

accommodated in a copyright law drafted close to a robust property rights system.<sup>289</sup> It seems that Locke’s property theory cannot meet these challenges alone. As noted by Craig and Zemer, “the main difficulty in Lockean approaches to copyright based on the *Second Treatise* . . . is that Locke’s property theory ‘carries the same threat of copyright expansionism.’”<sup>290</sup>

Similarly, in an influential article, Professor Shiffrin challenges the traditional Lockean views on IP that emphasize a natural right.<sup>291</sup> Instead, Shiffrin argues that the conditions of effective use of common property together with the right of subsistence—not labor—initially justify some appropriation of the common stock.<sup>292</sup>

### C. *The Welfare Theory*

The welfare theory of copyright law employs a utilitarian guideline when shaping property rights, for the maximization of net social welfare.<sup>293</sup> It is directed by the ideas of Jeremy Bentham and John Stuart Mill, who put forward a distinctive conceptualization of political thought and economics in the late eighteenth century.<sup>294</sup> The primary notion of utilitarianism is that government, and law in particular, should be organized so as to promote the

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<sup>289</sup> *Id.* at 1.

<sup>290</sup> Zemer, *supra* note 273, at 62–63 (citing Craig, *supra* note 288, at 55).

<sup>291</sup> See Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 141 (Stephen R. Munzer ed., Cambridge University Press 2001).

<sup>292</sup> *Id.* at 143.

<sup>293</sup> Fisher, *Theories*, *supra* note 273, at 169.

<sup>294</sup> See generally *THE CLASSICAL UTILITARIANS: BENTHAM AND MILL*, at vii–xxviii (John Troyer ed., Hackett Publishing 2003).

greatest happiness for the greatest number of people.<sup>295</sup> More specifically, law should be organized to induce people to behave in ways that contribute to the benefit of the public at large, primarily by creating combinations of incentives and penalties to direct people towards socially beneficial behavior.<sup>296</sup>

The way this notion is brought to bear on IP is through the concept of “public goods.” “Public goods” is a phrase common in economics, although the phrase is less familiar outside the field of economics.<sup>297</sup> A public good, economists tell us, is a good that has two related features: it is non-rivalrous and non-excludable.<sup>298</sup> Non-rivalrous means that one consumer’s use or enjoyment of a good has no appreciable effect on another consumer’s opportunity to use and enjoy the good.<sup>299</sup> Non-excludable means that the owner of a good finds it extremely difficult to prevent its use by others.<sup>300</sup>

Public goods, such as lighthouses, streetlights and poems are special in a couple of ways.<sup>301</sup> First, usually, though not invariably, they have especially large social benefits.<sup>302</sup> Second, they are likely to be underproduced.<sup>303</sup> In other words, it is probable that they will be generated at

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<sup>295</sup> Bhikhu Parekh, *Bentham’s Theory of Equality*, in 3 JEREMY BENTHAM: CRITICAL ASSESSMENTS 648–49 (Bhikhu Parekh ed., 1993).

<sup>296</sup> *See id.*

<sup>297</sup> Fisher, COPYRIGHTX LECTURES, *supra* note 273, Lecture 4.1, Welfare Theory: The Utilitarian Framework.

<sup>298</sup> JOHN BLACK ET AL., OXFORD DICTIONARY OF ECONOMICS 422 (5th ed., 2017).

<sup>299</sup> Tyler Cowen, *Public Goods and Externalities: Old and New Perspectives*, in PUBLIC GOODS AND MARKET FAILURES: A CRITICAL EXAMINATION 4 (Tyler Cowen ed., 1999).

<sup>300</sup> *Id.* at 3.

<sup>301</sup> *See id.*

<sup>302</sup> BLACK ET AL., *supra* note 298, at 422 (“Public goods are not necessarily desirable; undesirable ones are sometimes called ‘public bads,’ e.g. polluted air.”).

<sup>303</sup> Cowen, *supra* note 299, at 3.

socially suboptimal levels, leading to market failure, market distortions, or market imperfections.<sup>304</sup> When free markets do not provide the most optimal allocation of resources, they are said to fail.<sup>305</sup>

The initial costs of producing non-rivalrous and non-excludable products are very high; for instance, the initial cost of publishing and marketing a book includes writing, editing, printing, and advertising costs.<sup>306</sup> However, the marginal or subsequent cost of producing an extra unit of such products is very limited.<sup>307</sup> Copying is cheap, and often causes the author and publisher to lose out after having spent a lot of skill, judgment, time, and money in producing the original unit. This is sometimes called the “free rider” problem, the symmetry of the “fair follower” phenomenon.<sup>308</sup> Free riders normally undermine the creator’s or legitimate trader’s market by competing unfairly; they are free loaders.<sup>309</sup> Fair followers, on the other hand, pay to use the intellectual products such as music and books.<sup>310</sup>

If lawmakers wish to prevent the unfortunate outcome of a distorted or a failed market, they must act in some way; they must provide a special stimulus for the creation of public goods. In this regard, it is argued that IP laws exist to solve the public goods problem.<sup>311</sup> As Schultz notes, “[c]opyright law addresses the public goods

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<sup>304</sup> *Id.* at 3–4.

<sup>305</sup> STEPHEN MUNDAY, *MARKETS AND MARKET FAILURE* 29 (2000).

<sup>306</sup> *See Cowen, supra* note 299, at 3.

<sup>307</sup> *Id.* at 4.

<sup>308</sup> *Id.* at 3; *see also* Jerome H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT’L L. & POL. 11, 50, 53 (1996).

<sup>309</sup> *See Cowen, supra* note 299, at 3.

<sup>310</sup> *See Reichman, supra* note 308.

<sup>311</sup> Glynn S. Lunney Jr., *Copyright, Private Copying, and Discrete Public Goods*, 12 TUL. J. TECH. & INTELL. PROP. 1, 3 (2009).

problem by granting the creator of an expressive work the legal right to prohibit what they could not otherwise practically prevent: the unauthorized copying, distribution, public display, and/or public performance of their work.”<sup>312</sup> As a result of copyright law, a creator can get paid for their work and recover their investment in making it. Therefore, the creator has an incentive to produce it.<sup>313</sup>

#### ***D. The Personality Theory***

The premise of the personality theory, derived from the writings of Kant and Hegel, is that private property rights are crucial to the satisfaction of some fundamental human needs including dignity, personal expression, recognition as an individual person, and self-actualization.<sup>314</sup> This theory posits that policymakers should strive to create and allocate rights to resources in the manner most conducive to satisfying these needs.<sup>315</sup> From this viewpoint, copyright is thought to be justified on two main grounds. First, it will shield artefacts through which authors and artists have expressed their “wills,” an activity which is thought to be central to “personhood,” from appropriation or modification.<sup>316</sup> Second, it will create

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<sup>312</sup> Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 218 (Peter K. Yu ed., 2007).

<sup>313</sup> *Id.* For an in-depth discussion on the public goods problem, particularly regarding circumstances that may mitigate market failure and alternative government solutions to market failure, including prizes and subsidies, see Fisher, COPYRIGHTX LECTURES, *supra* note 273, Lecture 4.1, Welfare Theory: The Utilitarian Framework.

<sup>314</sup> Hughes, *supra* note 280, at 330.

<sup>315</sup> Fisher, *Theories*, *supra* note 273, at 171.

<sup>316</sup> *Id.*

economic and social conditions “conductive to creative intellectual activity” and human flourishing.<sup>317</sup>

### *E. The Cultural Theory*

The cultural theory of copyright is based on the premise that copyright “can and should be shaped to help foster the achievement of a just and attractive culture.”<sup>318</sup> In such a society, all persons would have some degree of financial independence and responsibility in shaping their local communities and economies.<sup>319</sup>

Copyright law can aid in advancing this society in two main ways. First, copyright incentivizes creative expression of various aesthetic, social, and political issues, therefore reinforcing democratic culture and civic association.<sup>320</sup> Second, copyright supports creative and communicative activity that does not stem from cultural hierarchy, elite patronage, and state subsidy.<sup>321</sup>

Scholars who put forward these proposals generally draw inspiration from a wide-ranging collection of legal and political theorists, including Jefferson, Marx, the legal realists, and the more contemporary arguments of Amartya Sen and Martha Nussbaum.<sup>322</sup> The cultural theory is comparable to the welfare theory in its teleological approach; however, the cultural theory envisions a

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 172; Fisher, COPYRIGHTX LECTURES, *supra* note 273, Lecture 10.1, Cultural Theory: Premises.

<sup>319</sup> Fisher, *Theories*, *supra* note 273, at 172.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011) (noting that the cultural theory derives from the views of various and diverse thinkers, including the ones of those cited, which lend support to the perspective).

desirable society that is dissimilar from and richer than the conceptions of social welfare touted by utilitarians.<sup>323</sup>

**F. Locke's Theory of Knowledge in Copyright Law**

Although many cases do not explicitly cite Locke, indeed, even when propounding his more famous labor theory, Locke's theory of knowledge was latent in the very early copyright cases. These cases include the well-known U.K. cases *Millar*<sup>324</sup> and *Donaldson*<sup>325</sup> and the U.S. Supreme Court case *Baker*.<sup>326</sup> These cases were highly influential in the formation of copyright law as we now know it.<sup>327</sup>

In *Millar*, the Court of King's Bench infamously held that there was a perpetual common law copyright.<sup>328</sup> Here, Justice Yates, dissenting, noted that, "[i]deas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion."<sup>329</sup> Justice Yates argued that once the author has set his "birds" (ideas) at liberty, he cannot prevent another from claiming them.<sup>330</sup>

Similarly, Lord Camden's decision in *Donaldson* built on Locke's theory of knowledge.<sup>331</sup> In this case, the House of Lords essentially repudiated the contention for perpetual common law copyright which had previously

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<sup>323</sup> Fisher, *Theories*, *supra* note 273, at 172.

<sup>324</sup> See generally *Millar v. Taylor* (1769) 98 Eng. Rep. 201.

<sup>325</sup> *Donaldson*, *supra* note 139, col. 954.

<sup>326</sup> See generally *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>327</sup> See PATTERSON, *supra* note 24; KAPLAN, *supra* note 24.

<sup>328</sup> *Millar*, 98 Eng. Rep. at 228–29.

<sup>329</sup> *Id.* at 249.

<sup>330</sup> *Id.*

<sup>331</sup> *Donaldson*, *supra* note 139, col. 999.



been endorsed in *Millar*.<sup>332</sup> Lord Camden, the first of the Law Lords to speak, delivered a long and passionate speech that had a considerable effect on the final vote.<sup>333</sup> Lord Camden went through the principal legal issues, arguing that there was no precedent for an interminable property and that ideas could not be treated as such.<sup>334</sup> According to him, if there was anything in the world that ought to be free and general, it was knowledge and science.<sup>335</sup> He felt that men of genius did not write for money:

Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. *'Scire tuum nihil est, nisi te scire hoc sciat alter.'* [Your knowledge is nothing when no one else knows you know it]. Glory is the reward of science, and those who deserve it, scorn all meaner views.<sup>336</sup>

Lord Camden was of the opinion that the justification for copyright was the propagation of knowledge “for the common welfare of the species.”<sup>337</sup> To elaborate, Lord Camden noted:

But what says the common law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books; nor were I to admit ideas to be ever so distinguishable and definable, should I infer they must be matters of private property, and objects of the common law?<sup>338</sup>

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<sup>332</sup> *Id.* col. 992.

<sup>333</sup> Rose, *supra* note 170, at 68.

<sup>334</sup> Donaldson, *supra* note 139, col. 971.

<sup>335</sup> *Id.* col. 999–1000.

<sup>336</sup> *Id.* col. 1000.

<sup>337</sup> *Id.* col. 999.

<sup>338</sup> *Id.* col. 997.

A hundred years after *Donaldson*, the U.S. Supreme Court in *Baker* held that a copyright in a book did not give an author the right to exclude others from practicing the concepts, notions and ideas described in the book.<sup>339</sup> The copyright only conferred the right to exclude reproduction of the material in the book.<sup>340</sup>

Thus, to enable the creation and dissemination of knowledge, according to Justice Yates, Lord Camden, and Justice Bradley in *Baker*, the importance of ideas cannot be disputed. Ideas ought not to be matters of private property but instead free for use—men should not be allowed to “be [stingy] to the world, or hoard up for themselves the common stock.”<sup>341</sup>

These viewpoints are consistent with Locke’s theory of knowledge. According to this theory, knowledge, which is creativity, arises when simple ideas are combined together. Simple ideas are the “materials of all our knowledge” and thus the building blocks of creativity.<sup>342</sup> Locke argued that knowledge derives solely from experience.<sup>343</sup> Thus, within the empiricist framework, one would come to have simple ideas in one’s mind by experiencing them.<sup>344</sup> For one to be able to experience these ideas, they would have to be free and readily available for use as mandated by the judges above.

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<sup>339</sup> *Baker v. Selden*, 101 U.S. 99, 105–06 (1879).

<sup>340</sup> *Id.*

<sup>341</sup> *Donaldson*, *supra* note 139, col. 999.

<sup>342</sup> LOCKE, *supra* note 9, at bk. II, ch. xii, § 2.

<sup>343</sup> *Id.* at bk. II, ch. i, §§ 3–5.

<sup>344</sup> *Id.* at bk. II, ch. i, § 2.

**G.     *Assessing the Merits of Structuring  
Copyright Law Based on Locke’s Theory of  
Knowledge***

Structuring copyright law based on the theory of knowledge would lead to the harmonization of copyright law’s underlying premise and its key objective, the encouragement of creativity. As discussed above, the primary argument put forward for the proposition that copyright law’s key objective is the encouragement of creativity is the fact that the foundations of U.K. and U.S. copyright law emphasized this role.<sup>345</sup> However, it has been noted that these foundational statements were not very clear in their own right.<sup>346</sup> Indeed, the reason for copyright’s existence has often been argued as being uncertain.<sup>347</sup>

This uncertainty led Judge Hopkinson in the lower court opinion in *Wheaton* to query “[w]hat is its history?—Its judicial history? It is wrapped in obscurity and uncertainty.”<sup>348</sup> Similarly, concerning the U.S. Constitution’s IP clause, Patterson cautions that its wording, “[t]o promote the progress of science and useful arts” is so general that it is not possible to infer any one theory of copyright alone from the language.<sup>349</sup> It is argued that a strong advantage of structuring copyright law in line with the theory of knowledge would be the clarification of these positions.

It is vital that the law recognizes the rights of copyright users’ rights together with those of the rights of

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<sup>345</sup> Deazley, *supra* note 60, PATTERSON, *supra* note 24, at 186–89.

<sup>346</sup> BENTLY ET AL., *supra* note 132, at 195.

<sup>347</sup> *Id.*

<sup>348</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 29 F. Cas. 862, 871 (C.C.E.D. Pa. 1832) (No. 17,486).

<sup>349</sup> PATTERSON, *supra* note 24, at 195.

copyright owners and has a mechanism that encourages the key role that creators play within copyright enforcement. This proposed outlook would not limit the rights of copyright owners but would be advantageous to achieving the balance between the public use of copyrighted works and copyright owners' rights.

## CONCLUSION

Following the enactment of TRIPS, the dominance of economic concerns over copyright law is clearly witnessed through an overt policy agenda that ties in IP matters with global trade objectives. However, economic influences over copyright law are visible as early as the Statute of Anne. The Romantic aesthetic of author-genius informed copyright legislation from that early stage in 1710 and continues to do so in the present-day. Romantic authorship is merely a stalking horse for economic interests that have been, as a tactical matter, better concealed than revealed. The case is the same with the copyright devices of originality and the copyrighted work.

This article has considered copyright law's understanding and provision of creativity. It provided evidence that copyright law maintains a view of creativity as an action that is carried out by a creative genius, even regarding modern digital technologies such as P2P and computer software. However, this article argues that the true nature of creativity is that it is a derivative process that draws on existing ideas and concepts. The concept of the author-genius is a device of economic considerations. Thus, even in its "purest" form, copyright law has been dominated by economic factors. It is argued that copyright law's failure to understand and provide for the true nature of creativity has led it to fail in obtaining achieving its key objective, which is the encouragement of creativity. To enable copyright law to better encourage creativity, a

conceptualization of creativity based on Locke's theory of knowledge is urged.

It is recognized that the true nature of creativity is that it is a derivative process which borrows from existing ideas and concepts. Therefore, ideas, the building blocks of creativity, ought to be readily and freely availed for use by potential creators.