

## Copyright and the Tragedy of the Common

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### *Abstract*

*In his 1968 article “The Tragedy of the Commons,”<sup>1</sup> biologist Garrett Hardin first described his theory on the ecological unsustainability of collective human behavior, claiming that commonly held real property interests would not ultimately be supportable due to the competing individual interests of all who use the property. In the legal field, Hardin’s article is frequently cited to support various theories related to real property and environmental law issues such as ownership, redistribution of wealth, pollution, overpopulation, and global warming.<sup>2</sup> Most scholars claim that a tragedy of the commons does not exist in intellectual property-related goods due to the fact that such goods are non-rivalrous—i.e. they have the ability to be simultaneously enjoyed by unlimited agents without diminishment.<sup>3</sup> In*

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\* Professor of Law, University of Dayton School of Law. Copyright © Tracy Reilly 2014. All Rights Reserved. I am grateful to Dean Paul McGreal at the University of Dayton School of Law for his support of my research efforts within the Program of Law & Technology. As always, I thank my husband, Mark Budka, and my intellectual mentors, Kathleen Blazer and Cheryl Meier, for continuing to challenge me and keep me thinking. I am grateful to Mark Kipperman, professor of English at Northern Illinois University for instilling in me a passion for the awe-inspiring and *genius* works of the Romantic poets, to which I consistently return for inspiration in my own writing. My acknowledgements extend to Howard Tuttle, professor of Philosophy at the University of Utah for his articulate synthesis of existentialism and crowd theory. Thanks also to my excellent research assistant and skilled advocate, Samantha Brinker.

<sup>1</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

<sup>2</sup> See, e.g., Irma S. Russell, *A Common Tragedy: The Breach of Promises to Benefit the Public Commons and the Enforceability Problem*, 11 *TEX. WESLEYAN L. REV.* 557 (2005); Eleanor Weston Brown, *A Common Morality: Toward A Framework for Designing Fiscal Instruments to Respond to Global Climate Change*, 15 *WIDENER L. REV.* 391 (2010).

<sup>3</sup> Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197, 1233–234, 1236 (1996). See also Todd Davies, *A Behavioral Perspective on Technology Evolution and Domain Name Regulation*, 21 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 1, 14 (2008) (claiming that the tragedy of the commons justification does not apply to non-rivalrous goods); Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40

*this article, however, I will describe my related tragedy of the “common” theory in the context of copyright law doctrine. I will illustrate a broader moral and philosophical tragedy related to the manner in which contemporary copyright scholars are not only discouraging, but also dishonoring and demoralizing the traditional or “Romantic” conception of creative works of authorship while inspiring an alternative doctrinal approach—which they define by using subtle and elusive terms such as “collective ownership” and “collaborative cultural production.” This article examines copyright theory in a unique historical, literary, and philosophical context and contributes to the often contentious contemporary debate on the nature of creativity. It proposes that viewing the process of copyright authorship and ownership of its resultant works with a collectivist or collaborative lens—or with what Søren Kierkegaard labels a “crowd mentality”—instead of continuing to reward individual authors for their creative works will lead to the demoralization of the spirit of man. The inevitable result of this phenomenon is a culture in which common and regurgitated works will be produced rather than works of genius and individual originality, thus resulting in a decline of progress in contravention with Article I of the U.S. Constitution.*

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U.C. DAVIS L. REV. 855, 857–58 (2007) (arguing that the tragedy of the commons does not fit the “drama” of intellectual property).

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*“The crowd is untruth. Hence none has more contempt for what it is to be a man than they who make it their profession to lead the crowd.”*

**Søren Kierkegaard**<sup>4</sup>

### ***Introduction***

In 1968, biologist Garrett Hardin coined “the tragedy of the commons” as the phenomenon where, absent an enforceable private rights regime for real property, commonly held resources would be prone to complete depletion because individuals who have no ownership interest in land could not resist taking as much as possible without giving back and replenishing the commons.<sup>5</sup> Therefore, unacceptable overuse and underinvestment of resources inevitably would occur.<sup>6</sup> Many scholars posit that, unlike real property, intellectual property is not subject to a tragedy of the commons given that after an intellectual product is created, it “is a public good, capable of enjoyment by millions without incurring significant extra costs.”<sup>7</sup> It is, therefore, assumed that the non-rivalrous nature of intellectual

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<sup>4</sup> Søren Kierkegaard, *On Himself*, in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 94 (Walter Kaufmann ed., 1956) [hereinafter *EXISTENTIALISM*].

<sup>5</sup> See generally Hardin, *supra* note 1, at 1244.

<sup>6</sup> See generally *id.*

<sup>7</sup> See Sterk, *supra* note 3, at 1236.

products, particularly those protected by copyright law, prevents them from being subject to a tragedy of the commons in the manner in which Hardin portrayed such a phenomenon.<sup>8</sup>

Some commentators, on the other hand, recognize that although not depicted by population explosions, pollution, or other real property depletion problems, a different but very real tragedy is being played out in the information arena with respect to intangible goods proliferated in our online community.<sup>9</sup> This tragedy is neither primarily biological nor economic in nature as Hardin's tragedy of the commons; rather, when it is viewed through a broader philosophical lens, it exemplifies the social and moral dilemma of the contemporary debasement of individual effort, ingenuity, innovation, and pride—or, as Kierkegaard might say, the development of a mass or “herd” mentality.<sup>10</sup> I term this phenomenon, as it pertains specifically to

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<sup>8</sup> See Alina Ng, *Copyright's Empire: Why the Law Matters*, 11 MARQ. INTELL. PROP. L. REV. 337, 348 (2007) [hereinafter *Copyright's Empire*] (“The tragedy of the commons does not happen in the realm of copyright where the market is one for information goods, a pure public good that is nonexclusive and non-rivalrous”).

<sup>9</sup> Cf. Daniel McFadden, *The Tragedy of the Commons*, FORBES, Sept. 10, 2001, available at <http://www.forbes.com/asap/2001/0910/061.html> (“The problem with digital information is the mirror image of the original grazing commons: Information is costly to generate and organize, but its value to individual consumers is too dispersed and small to establish an effective market”).

<sup>10</sup> MEROLD WESTPHAL, *KIERKEGAARD'S CRITIQUE OF REASON AND SOCIETY* 39 (2010).

creative works and copyright law principles, the tragedy of the “common.”<sup>11</sup>

Throughout our history, various prominent philosophers have rationalized—in fact, overtly extolled—collectivist principles which have invariably led to the adulteration and demoralization of the individual human spirit. For example, among the most egregiously insistent upon a dubiety for individualism and personal accomplishment and, perhaps, the leader of this movement against the individual, is Plato.<sup>12</sup> As opposed to Aristotle’s insistence on the primacy of individuality, Plato’s base theory holds that the individual must relinquish his own interests in favor of the interests of the collective.<sup>13</sup> Influenced by Plato, philosophers such as Immanuel Kant, Friedrich Hegel, Karl Marx, and others heralded the belief that individuals are not sovereign beings or ends in themselves, but rather

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<sup>11</sup> See, e.g., Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 519 (2007) (discussing several scholarly pieces that employ the usage of Hardin’s insight to note the “realization that commons are almost everywhere we look”); Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 316–22 (1992) (examining the issue in the realm of patent law).

<sup>12</sup> See SIR ERNEST BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 142 (1906) (“Plato sought to eliminate the preaching that might was right”).

<sup>13</sup> KARL RAIMUND POPPER, ET AL., *THE OPEN SOCIETY AND ITS ENEMIES* 97 (2011).

they are means to the end of the collective.<sup>14</sup> Kant holds that a human action is “moral only if a person has no desire to perform it but performs it out of a sense of duty and receives no benefit from it of any kind.”<sup>15</sup> As such, a person is acting amorally whenever acting in order to attain his own values, and if that person shall receive a benefit of any kind out of his actions, or any sense of happiness, personal value, or accomplishment—according to Kant and other modern philosophers like John Rawls—the morality of such action is entirely stripped.<sup>16</sup>

An alarming majority of contemporary copyright scholars are impetuously attempting to infuse this collectivist, anti-individualistic rhetoric into intellectual property jurisprudence, intimating that

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<sup>14</sup> Edwin A. Locke, *Individualism and the Greater Good*, in FOR THE GREATER GOOD OF ALL: PERSPECTIVES ON INDIVIDUALISM, SOCIETY, AND LEADERSHIP 87–89 (Donelson R. Forsyth & Crystal L. Hoyt, eds., 2011). See also George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1507 (2002) (noting that liberal thinkers such as Adam Smith and Immanuel Kant “thought about individuals as created in much the same form” and considered them to be “at their best when they are the man in the street, one like the other”).

<sup>15</sup> Edward W. Younkins, *Immanuel Kant: Ayn Rand’s Intellectual Enemy*, REBIRTH OF REASON (March 12, 2014), [http://rebirthofreason.com/Articles/Younkins/Immanuel\\_Kant\\_Ayn\\_Rands\\_Intellectual\\_Enemy.shtml](http://rebirthofreason.com/Articles/Younkins/Immanuel_Kant_Ayn_Rands_Intellectual_Enemy.shtml).

<sup>16</sup> *Id.* See also H. J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT’S MORAL PHILOSOPHY 108 (1971) (noting that Kant’s “principle of goodness” is purely formal and follows universal law, in that “it leaves out reference to [one’s] desires and [one’s] needs as its prior condition”).

talented creators do not deserve to be rewarded for their talents.<sup>17</sup>

According to journalist Robert Levine in his refreshing book on the subject, *Free Ride*, copyright scholars and other reformers are “inspired by the marvels of online mass collaboration,” which represent a “new style” of open-source creativity where “today’s finished work becomes tomorrow’s raw material . . . Everyone works for the benefit of all, and individual rights mostly just get in the way.”<sup>18</sup> Copyright rights, because they are essentially individual rights, also seem to get in the way of this crowd-based mentality. Indeed, many copyright commentators today are generally loath to advocate that there are any merits left in the outdated and unnecessary regime of copyright law.<sup>19</sup> When examined closely, the war against individual rights in this particular legal arena is more emotionally than rationally-based, as all-out attacks on the expansions of copyright in recent decades by “left-leaning critics” have become—as one scholar

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<sup>17</sup> See Sterk, *supra* note 3, at 1198, 1237 (maintaining that “even when authors would benefit from expanded protection, it is far from clear why they deserve financial remuneration commensurate with their talents” and citing John Rawls’s philosophy that rewarding the talented in any given society is proper only to the extent that it would serve to improve the lot of the “least fortunate” in that society).

<sup>18</sup> ROBERT LEVINE, *FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK* 89 (2011).

<sup>19</sup> See, e.g., Brian Martin, *Against Intellectual Property*, 21 PHIL. & SOC. ACTION 7 (1995), available at <https://www.uow.edu.au/~bmartin/pubs/95psa.html> (proposing that an “obvious way to challenge intellectual property is simply to defy it by reproducing protected works” or to pirate it).



aptly notes—“visceral and intense.”<sup>20</sup> Professor Jane Ginsburg has colorfully claimed that “copyright is in bad odor these days” since recent measures designed to protect copyrighted works “have drawn academic scorn, and intolerance even from the popular press.”<sup>21</sup>

Academic assessment and treatment of the author of copyrighted works is particularly venomous as of late and appears to increase concurrently with surges of evidence of the economic achievements of such artists, as well as by numerous other secondary players in the entertainment industries. For example, in December 2013, the U.S. Bureau of Economic Analysis and the National Endowment for the Arts released for the first time “in-depth analysis of the arts and cultural sector's contributions to current-dollar gross domestic product.”<sup>22</sup> Using figures from Hollywood, the advertising

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<sup>20</sup> Alina Ng, *Literary Property and Copyright*, 10 NW. J. TECH. & INTELL. PROP. 531 (2012) [hereinafter *Literary Property and Copyright*]. See also Emily Hudson & Robert Burrell, *Abandonment, Copyright and Orphaned Works: What Does It Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?*, 35 MELB. U. L. REV. 971 (2011) (opining that “intellectual property has become a highly controversial and politicised [sic] topic, with recent expansions of its boundaries being met with fierce criticism”).

<sup>21</sup> Jane C. Ginsburg, *Essay-How Copyright Got A Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61 (2002).

<sup>22</sup> U.S. Bureau of Economic Analysis and National Endowment for the Arts Release *Preliminary Report on Impact of Arts and Culture on U.S. Economy*, NATIONAL ENDOWMENT FOR THE ARTS, [www.arts.gov/news/2013/us-bureau-economic-analysis-and-national-endowment-arts-release-preliminary-report-impact](http://www.arts.gov/news/2013/us-bureau-economic-analysis-and-national-endowment-arts-release-preliminary-report-impact) (last visited Oct. 30, 2014).

industry, cable television production, broadcasting, publishing, performing arts, and other creative sectors, the report estimated that as of 2011, creative industries accounted for about \$504 billion, or 3.2 percent of the U.S. Gross Domestic Product (GDP).<sup>23</sup> Two million Americans worked in the creative industries; the motion picture and video industry employed 310,000 workers and accounted for \$25 billion in compensation.<sup>24</sup> This long-awaited, government-endorsed research confirms what authors of creative works have known all along: that continued production of their intellectual products is not only personally and individually rewarding, but also financially beneficial to them *and* many other sectors of society, not to mention aesthetically enjoyed by society as a whole.<sup>25</sup> Sadly, however, researchers have also found that the arts suffered more than the overall economy during the recession of 2008—largely due to unremunerated acts of counterfeiting, piracy, and other unauthorized uses.<sup>26</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 6 (2011) (noting that although there is no definitive proof available to support the notion that social welfare would decline in the absence of intellectual property rights, “there are plenty of *indications*, plenty of data to support the notion that IP rights are overall a good thing for the economy” (emphasis in original)).

<sup>26</sup> See LEVINE, *supra* note 18, at 64.

Regardless of the foregoing facts, academia consistently and overtly fails to acknowledge that many authors continue to be incentivized by economic motivators and capitalistic incentives.<sup>27</sup>

There is no doubt that the spirit of the times in which we live in the U.S. today—the *mundo vigente*—is one that is moving away from a celebration of individual achievement and accomplishment backward into one of recognition of the perceived creative accomplishments of the collective masses.<sup>28</sup> Cultural historians rightly note that the U.S. is declining from a period of “Enlightenment” and heading toward one of “tribalism” or “groupthink,” a societal hallmark frighteningly

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<sup>27</sup> See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2012) (claiming that “[t]here is no broad necessity for incentives for intellectual labor” and that “creative activity will thrive without artificial support”). But see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 340 (1996) (claiming “there is no reason to assume that the creators of “sustained works of authorship”—books, articles, films, songs, and paintings, as opposed to simply conversations and bits of information—will generally make their work available over the Internet, or will create new cyberspace variations of such works, without some reasonable possibility of remuneration”). See also LEVINE, *supra* note 18, at 75 (“The idea that artists will give away their music assumes they’ll create it cheaply . . . . But making an album can take time and outside expertise”).

<sup>28</sup> The phrase *mundo vigente* as used by nineteenth century Spanish philosopher José Ortega y Gasset refers to what he conceived as “that world in force, that spirit of the times—with which and in the operation of which we live, in view of which we decide our simplest actions—[and which] is the variable element of human life.” JOSÉ ORTEGA Y GASSET, *MAN AND CRISIS* 50 (Mildred Adams trans., 1958). See also, AYN RAND, *RETURN OF THE PRIMITIVE* 130 (Peter Schwartz ed., 1970) [hereinafter *PRIMITIVE*] (“A culture, like an individual, has a sense of life—an emotional atmosphere created by its dominant philosophy, by its view of man and of existence. This emotional atmosphere represents a culture’s dominant values and serves as the leitmotif of a given age, setting its trends and its style”).

reminiscent of Western culture after the fall of Rome.<sup>29</sup> Worse yet, scholars are now not merely debating the proper ownership theories of copyright, but they have also largely created a climate in which they condone, even *encourage* illegal behavior.<sup>30</sup> And still more egregious than that, as I have argued in a previous article,<sup>31</sup> these academic reformers pardon and often embolden acts that clearly amount to copyright infringement by conveniently redefining them. For example, digital sampling is not *really* copying, it is merely “borrowing,” “alluding to,” or “paying homage” to seriously accomplished musicians.<sup>32</sup> The clear message to society becomes: What artist should have the desire, let alone the *right*, to complain

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<sup>29</sup> MORRIS BERMAN, *DARK AGES AMERICA: THE FINAL PHASE OF EMPIRE* 2–5 (2006). Ortega y Gasset also believed that the fall of the Roman Empire was attributable to an uprising of the masses similar to the one we are witnessing today. See JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 19 (1932).

<sup>30</sup> See, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT* 169 (2006) (stating that people do not comply with copyright laws because they “don’t make sense to them,” and “[i]f forty million people refuse to obey a law, then what the law says doesn’t matter”). See also Ginsburg, *supra* note 21, at 62 (“At least some of the general public senses as illegitimate any law, or more particularly, any enforcement that gets in the way of what people can do with their own equipment in their own homes (or dorm rooms)”). But see LEVINE, *supra* note 18, at 46–47 (claiming that people violate these laws not because they have a philosophical objection to them, but simply because they do not believe they will get caught).

<sup>31</sup> Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 *COLUM. J. OF LAW & THE ARTS* 365, 376–80 (2008).

<sup>32</sup> *Id.* at 376–77.

about such innocent uses of individual works of art by the collective society?<sup>33</sup>

The premise of this article is that there exists an unconscious (or, perhaps, conscious) philosophical “creeping effect” in contemporary copyright scholarship, which left unchecked will result in a return to the Dark Ages of the philosophy of the common, collective good, and against the rights and values of the individual or “genius” man. The term “common” is defined in the dictionary as “without special qualities, rank, or position; ordinary” and “occurring, found, or done often; not rare.”<sup>34</sup> As such, when creativity is celebrated as being achieved, owned, and used and reused not by individual authors but by the collective masses, it will inevitably—and tragically—become common.

This article will proceed in five sections. Drawing from philosophical principles ranging from the Sophists to the Existentialists to the Objectivists, Section I provides an historical explanation of the ethical and moral differences between a life philosophy that celebrates individual rights with one that extols mass

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<sup>33</sup> See Ginsburg, *supra* note 21, at 63 (claiming as long as we conveniently substitute the term “sharing” for unauthorized downloading, “it glows with the beneficent associations of the word in its original altruistic guise,” and therefore, “copyright owners’ attempts to stop it seem churlish and Scrooge-like”).

<sup>34</sup> THE OXFORD COMPACT ENGLISH DICTIONARY 214 (2d ed. 2003).

or collectivist principles. By briefly analyzing the major works of Søren Kierkegaard, José Ortega y Gasset, Friedrich Nietzsche, and Ayn Rand, I will reveal a common prophecy shared by all four philosophers in which they predict the coming of a collectivist cultural movement where individual effort, achievement, and excellence are supplanted by a general “mass” or crowd mentality. Section II specifically applies this philosophical discussion to copyright law, demonstrating how identity with and affinity toward the masses or the crowd over the personal rights of individuals has found its way into the majority of contemporary academic discussions about copyright theory, specifically by way of underrating and often deprecating the achievements and creatively authored works of individual authors. Section III discusses the consequences of this radical new disparagement of the author, and demonstrates that the goal of progress as contemplated by Article I of the U.S. Constitution will be impeded if creative individuals continue to be theoretically undermined by copyright academicians. In Section IV, I will explain how scholars’ attempts to infuse collectivist principles into the authorship and ownership provisions of the Copyright Act have largely failed, as judges and legislators have mostly not bought into the theories promulgated by academicians and other commentators in this

unprecedented movement to elevate the masses and deflate the individual and “uncommon” copyright author. I will also document the thoughts of various rogue commentators who continue to promote and celebrate the achievements of individual authors. Finally, Section V of this article will conclude by offering both a plea to scholars to reverse the diatribe of denigration of the individual, as well as a personal message of hope—as well as gratitude—to those authors who plug on and continue to create original works despite the current copyright climate that is so outwardly hostile to their individual interests and contributions.

### **I. The Individual vs. the Crowd in Philosophy**

Most modern philosophical traditions can be described as fitting into one or another opposing camps of thought regarding the nature of the human condition—collectivism versus individualism.<sup>35</sup> On the one hand, collectivists view society as a “homogenous [sic] collective that attempts to ensure equality for all;” they basically denote humans not with respect to their individual merit but according

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<sup>35</sup> UICHOL KIM, *INDIVIDUALISM AND COLLECTIVISM: A PSYCHOLOGICAL, CULTURAL AND ECOLOGICAL ANALYSIS* 41 (1995). *See also* ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* 112 (1997) (suggesting that “beneath the presentations of abstract right, morality, and ethical life, there is a systematic issue, namely, the relation, mediation, and/or reconciliation between modern views of individual subjectivity and freedom, on the one hand, and the objective collectivism of classical philosophy, namely, Plato and Aristotle, the founders of the natural law tradition, on the other”).

to the collective or subcollective in which each human categorically fits.<sup>36</sup> Each person becomes, in effect, an “interchangeable cell within the social collective”<sup>37</sup> in which society is an actual entity or a being in and of itself with its own needs and a very real existence.<sup>38</sup> The credo of collectivism states that the group or society as a whole is “the basic unit of moral concern,” relegating the individual to have value “only insofar as he serves [the good of the greater] group.”<sup>39</sup>

Diametrically opposed to collectivist ideals, others believe that individuals have the inalienable right and freedom to make life choices according to their own desires, wants, and needs; to keep and use the product of their own labors and creations; and to pursue the values of their choosing.<sup>40</sup> The fifth century Greek philosophers known as the Sophists were essentially the first camp to extol the virtues of

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<sup>36</sup> BRIAN STROBEL, AMERICA'S DÉNOUEMENT: THE DECLINE OF MORALITY, GROWTH OF GOVERNMENT AND IMPACT OF MODERN LIBERALISM 119 (2005) (positing that the approach is “fundamentally flawed, violates the very identity of the individual, and ultimately ends up infringing upon one’s guaranteed personal liberties”).

<sup>37</sup> *Id.* at 120.

<sup>38</sup> Clarence B. Carson, *Individual Liberty In The Crucible Of History: 4. A Collectivist Curvature of the Mind*, THE FREEMAN (Aug. 1, 1962), available at [http://www.fee.org/the\\_freeman/detail/individual-liberty-in-the-crucible-of-history-4-a-collectivist-curvature-of-the-mind](http://www.fee.org/the_freeman/detail/individual-liberty-in-the-crucible-of-history-4-a-collectivist-curvature-of-the-mind).

<sup>39</sup> Craig Biddle, *Individualism vs. Collectivism: Our Future, Our Choice*, THE OBJECTIVE STANDARD (2012), [www.theobjectivestandard.com/issues/2012-spring/individualism-collectivism/](http://www.theobjectivestandard.com/issues/2012-spring/individualism-collectivism/) [hereinafter *Individualism*].

<sup>40</sup> *Id.*



individualism as a formal theory of living, claiming that the individual should be free to act as he sees fit for himself without concern for conforming to group mentalities or practices.<sup>41</sup> The Sophists believed that “any means to [individual] success was ‘good,’” and most were financially successful, making it their stated mission to teach their pupils valuable skills so that they, too, would achieve their own success.<sup>42</sup> As Section II will demonstrate, authors and creators in the Romantic era in England and Europe who form the focal point for contemporary copyright scholars, placed great emphasis upon individual freedom and personal fulfillment and effort, as “[p]ersons were encouraged to strive to create not only that which was original but also that which was novel and unique;” stressing “imagination as a critical authority.”<sup>43</sup>

The early American settlers and patriots, including Founding Fathers Thomas Jefferson, Thomas Paine, and Benjamin Franklin,

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<sup>41</sup> See HARRY CHARALAMBOS TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* 20 (2005).

<sup>42</sup> *Id.* at 21 (showing that the Sophist practice of helping others become successful and *rich* was reviled by many contemporary philosophers like Plato and Socrates, who believed many of the Sophist practices were immoral).

<sup>43</sup> Geoffrey R. Scott, *A Comparative View of Copyright As Cultural Property in Japan and the United States*, 20 *TEMP. INT'L & COMP. L.J.* 283, 355 (2006).

were “intensely individualistic.”<sup>44</sup> Jefferson regarded our governmental principle of the pursuit of happiness as the right to be let alone so long as the individual did not interfere with others’ pursuit of happiness.<sup>45</sup> Within the philosophy of individualism, there also exists “an intrinsic connection between individuality and property,” according to which “man could not develop a self without conquering and cultivating a domain of his own,” pursuant to his own power of free will and reason.<sup>46</sup> While volumes could be written on the Sophist and early American traditions of individualism, the remainder of Section I of this article will further discuss the philosophical differences between collectivism and individualism, specifically within the disciplines of existentialism and objectivism in the nineteenth and twentieth centuries, respectively.

#### **A. The Existentialist Philosophers and the Concept of the “Masses”**

Many authors are loath to label the existentialist movement of the nineteenth century in philosophy, yet most will agree that one

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<sup>44</sup> See CHARLES WILLIAM ELIOT, *THE CONFLICT BETWEEN INDIVIDUALISM AND COLLECTIVISM IN A DEMOCRACY: THREE LECTURES* 6 (1912).

<sup>45</sup> *Id.* at 6–7 (revealing that “[t]he eighteenth century, through its public events and through its commonest private experiences, was very favorable in this country to the development of individualistic theory and practice”).

<sup>46</sup> Herbert Marcuse, *Social Implications of Technology*, in *READINGS IN THE PHILOSOPHY OF TECHNOLOGY* 77 (David M. Kaplan ed., 2004).

common feature among existentialist writers “is their perfervid individualism.”<sup>47</sup> Instead of attempting to pen a strict definition of the term “existentialism,” author Thomas Flynn has amply provided five basic themes that seem to permeate the writings of the existentialist writers in one form or another, as follows:

1. *Existence precedes essence.* What you are (your essence) is the result of your choices (your existence) rather than the reverse. Essence is not destiny. You are what you make yourself to be.

2. *Time is of the essence.* We are fundamentally time-bound beings. Unlike measurable, ‘clock’ time, lived time is qualitative: the ‘not yet,’ the ‘already,’ and the ‘present’ differ among themselves in meaning and value.

3. *Humanism.* Existentialism is a person-centered philosophy. Though not anti-science, its focus is on the human individual’s pursuit of identity and meaning amidst the social and economic pressures of mass society for superficiality and conformism.

4. *Freedom/responsibility.* Existentialism is a philosophy of freedom. Its basis is the fact that we can stand back from our lives and reflect on what we have been doing. In this sense, we are always ‘more’ than ourselves. But we are as responsible as we are free.

5. *Ethical considerations are paramount.* Though each existentialist understands the ethical ‘freedom’ in his or

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<sup>47</sup> Kaufmann, in *EXISTENTIALISM*, *supra* note 4, at 11. See also MICK COOPER, *EXISTENTIAL THERAPIES* 6 (2003) (noting that although existentialism is widely understood in relation to the writings of twentieth century European philosophers, many existential concepts, ideas, and methods of understanding the meaning of life can be observed in teachings of notable figures such as Socrates, Buddha, and Jesus, as well as ancient philosophical systems such as Stoicism).

her own way, the underlying concern is to invite us to examine the authenticity of our personal lives and of our society.<sup>48</sup>

A major feature of existentialism centers around the argument that what is particular or individual is important, as opposed to the classical, Neoplatonic argument that what is general or universal is important.<sup>49</sup> Existentialism, thus, departs from Plato's theory of an "intelligible system of essences" that ultimately results in individuality as a "defect."<sup>50</sup> In the modern sense, existentialism "opposes all those one-sided movements which want to exploit man in the interest of society or group by considering his individuality secondary."<sup>51</sup> The practice of living an authentic versus inauthentic life is a major theme that runs through the writings of the existentialist authors; the inauthentic man of modern day is "indifferent, tranquilized, unable to

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<sup>48</sup> THOMAS FLYNN, *EXISTENTIALISM* 11 (2009) (emphasis in original).

<sup>49</sup> Nino Langiulli, *Introduction*, in *EUROPEAN EXISTENTIALISM* 5 (Nino Langiulli ed., 1997). See also RUKHSANA AKHTER, *EXISTENTIALISM AND ITS RELEVANCE TO THE CONTEMPORARY SYSTEM OF EDUCATION IN INDIA: EXISTENTIALISM AND PRESENT EDUCATIONAL SCENARIO* 6 (2014) (describing existentialism as "one of the most important schools of philosophy, developed as a result of opposition to the methods of traditional western philosophy," and claiming that existentialism "is very much near to the individual life of man" since it extols the individuality of man as "supreme").

<sup>50</sup> See Langiulli, *supra* note 49, at 5.

<sup>51</sup> AKHTER, *supra* note 49, at 6.

make a personal decision of his own.”<sup>52</sup> In contrast, the authentic man is “one who freely commits himself to the realization of a project, an idea, a truth, a value; he is one who does not hide himself in the anonymity of the crowd but signs himself to what he manifests.”<sup>53</sup>

Several existentialist philosophers during the nineteenth and twentieth centuries both reiterated and further developed these themes of individualism and anti-crowd/anti-mass mentality in their writings. Spanish philosopher José Ortega y Gasset warned of the post-industrialist phenomenon of the “coming of the masses,” or invasion of mass culture in which man, as previously defined in individual terms, ultimately becomes “undifferentiated from other men.”<sup>54</sup> Ortega y Gasset was not the only existentialist philosopher who lamented this global rise of the masses; many of his contemporaries, including Søren Kierkegaard<sup>55</sup> and Friedrich Nietzsche<sup>56</sup> all portended

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<sup>52</sup> MANUEL B. DY, JR., *PHILOSOPHY OF MAN: SELECTED READINGS* 34 (2001).

<sup>53</sup> *Id.*

<sup>54</sup> ORTEGA Y GASSET, *supra* note 29, at 11–13 (1932). Ortega y Gasset was born in Madrid in 1883 to an aristocratic family. He was educated by the Jesuits and attended Universidad Central in Madrid, where he obtained a degree in philosophy in 1904. See Langiulli, *supra* note 49, at 249.

<sup>55</sup> Langiulli, *supra* note 49, at 31–32 (recounting Kierkegaard’s life history, from his birth in Copenhagen in 1813 to an initially impoverished father, to his success in attending the University of Copenhagen where he was awarded a degree in philosophy in 1841).

the sociological and philosophical despair witnessed by the inevitable conformity of the individual in the wake of an overtly mass-minded society.<sup>57</sup> According to this mindset,

the crowd is ‘untruth’ because it convinces us of our personal unfreedom and relative unimportance. It convinces us that we are only significant to the extent that we share in the status of a crowd.<sup>58</sup>

By studying the common themes that run throughout their major works—Kierkegaard’s *Two Ages*, Ortega y Gasset’s *Revolt of the Masses*, and Nietzsche’s *Thus Spoke Zarathustra*—it can be observed how the existentialist philosophers broke free from the traditional notions that eighteenth century philosophers like Jean Jacques Rousseau had promulgated; that man is essentially a social creature whose ideal nature, progress, and salvation are situated in, and

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<sup>56</sup> Charles B. Guignon, *Introduction*, in *THE EXISTENTIALISTS: CRITICAL ESSAYS ON KIERKEGAARD, NIETZSCHE, HEIDEGGER, AND SARTRE* 5–6 (Charles B. Guignon ed., 2004) (recounting Nietzsche’s life history, from his birth in Prussia in 1844, to his life at the Universities of Bonn and Leipzig, to later becoming a professor of philosophy at the young age of twenty-four. The author also discusses Nietzsche’s constant struggle with poor health and his mental collapse at age forty-four, from which he never fully recovered until his death in 1900). In this article, I shall refer collectively to Kierkegaard, Nietzsche, and Ortega y Gasset as the “existentialist philosophers.”

<sup>57</sup> HOWARD NELSON TUTTLE, *THE CROWD IS UNTRUTH: THE EXISTENTIAL CRITIQUE OF MASS SOCIETY IN THE THOUGHT OF KIERKEGAARD, NIETZSCHE, HEIDEGGER AND JOSÉ ORTEGA Y GASSET* xi–xiii (2005).

<sup>58</sup> *Id.* at xiii.

defined by, the group.<sup>59</sup> In his book, *The Crowd is Untruth*, Professor Howard Tuttle provides a useful “symmetrical” definition of the mass that encompasses the ideologies of all three existentialist philosophers:

[T]he mass is the individual when he or she becomes a collective ‘other’ in such a manner that his or her possibilities and concerns are assumed, at least temporarily, by that ‘other.’ The cost of this transference is our freedom of self-creation.<sup>60</sup>

As will be further examined, the works of the existentialist philosophers provide an invaluable framework within which to assess the merit of original works of authorship in a manner that will encourage and support the freedom of the individual to create estimable (instead of common) works of individual ownership under the rubric of the Copyright Act.

## 1. Kierkegaard and *Two Ages*

*“If you want to be loathsome to God, just run with the herd.”*  
Søren Kierkegaard<sup>61</sup>

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<sup>59</sup> *Id.* at 17. See also TRIANDIS, *supra* note 41, at 20 (introducing eighteenth century philosopher Jean Jacques Rousseau’s argument from his famous work, *The Social Contract*, that the individual can only become free by abnegating his own needs and succumbing to the “general will”).

<sup>60</sup> TUTTLE, *supra* note 57, at 162.

<sup>61</sup> SØREN KIERKEGAARD, PROVOCATIONS: SPIRITUAL WRITINGS OF KIERKEGAARD 244 (Charles E. Moore ed., 2004).

Kierkegaard was the first philosopher who attempted to introduce the concept of the “individual” as an actual category in our thinking.<sup>62</sup> He did so largely with his metaphor of the “crowd” and the distinction between the crowd-based or “mass” thought and individual thought.<sup>63</sup> Professor Tuttle explains that the concept of the “mass” is differentiated from the historical societal notion of the “multitudes,” the “majority,” or what Socrates referred to as the “many.”<sup>64</sup> The mass, according to Professor Tuttle, is “an advent of the mid-nineteenth century” and is a “purely philosophical notion” that was first conceptualized by Kierkegaard, particularly in his 1846 work, *Two Ages*.<sup>65</sup> Kierkegaard’s analysis of the “crowd” is not a critique of any specific social group (e.g. rich versus poor or secular versus religious); it is “an abstract possibility of all contemporary individuals” that occurs any time *any* individual relegates his or her autonomy, thus assigning his or her identity to a numerical status or an

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<sup>62</sup> Kaufmann, *Existentialism from Dostoevsky to Sartre*, in *EXISTENTIALISM*, *supra* note 4, at 16.

<sup>63</sup> *Id.* at 94–95.

<sup>64</sup> TUTTLE, *supra* note 57, at xii.

<sup>65</sup> *Id.* See also, generally, SØREN KIERKEGAARD, *TWO AGES: THE AGE OF REVOLUTION AND THE PRESENT AGE*, A LITERARY REVIEW (Howard V. Hong & Edna H. Hong eds. & trans., 1978).



abstract, collective existence.<sup>66</sup> Any individual who flees into the crowd in order to find refuge invariably “flees in cowardice from being an individual . . . such a man contributes his share of cowardliness to the cowardliness which we know as the ‘crowd.’”<sup>67</sup>

According to Kierkegaard, the nineteenth century was one without passion, as he believed that “[t]he age of great and good actions is past; the present age is the age of anticipation.”<sup>68</sup> An age without passion “possesses no assets; everything becomes, as it were, transactions in *paper money*.”<sup>69</sup> When this occurs,

[c]ertain phrases and observations circulate among the people, partly true and sensible, yet devoid of vitality, but there is no hero, no lover, no thinker, no knight of faith, no great humanitarian, no person in despair to vouch for their validity by having primitively experienced them.<sup>70</sup>

In such an age, “*envy* becomes the *negatively unifying principle*” which stifles, impedes, and degrades excellence, as diametrically

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<sup>66</sup> TUTTLE, *supra* note 57, at 33–34.

<sup>67</sup> Kierkegaard, *On Himself*, in EXISTENTIALISM, *supra* note 4, at 95.

<sup>68</sup> KIERKEGAARD, *supra* note 65, at 71.

<sup>69</sup> *Id.* at 74 (emphasis in original).

<sup>70</sup> *Id.* at 74–75.

opposed to an age of passion, which “*accelerates, raises up and overthrows, elevates and debases.*”<sup>71</sup>

As will be discussed more fully in Section II, the pandemic envy that occurs in a passionless age inexorably leads to what Kierkegaard termed, “leveling,” or the victory of abstraction over the individual in which a false sense of “mathematical equality” of the masses is achieved.<sup>72</sup> The “great individual” or the man of excellence that was distinguished from the crowd of general individuals in antiquity will give way to the phenomenon in which all classes “make one individual,” and “in all consistency we compute numbers (we call it joining together, but that is a euphemism) in connection with the most trivial things.”<sup>73</sup> Leveling represents a quiet coercion by the crowd and demonstrates its tendency to obscure the fact that the ultimate help and salvation for humanity comes not from the crowd, “but from individual faith and commitment.”<sup>74</sup>

## **2. Ortega y Gasset and The Revolt of the Masses**

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<sup>71</sup> *Id.* at 84 (emphasis in original).

<sup>72</sup> *Id.* at 84–85.

<sup>73</sup> *Id.*

<sup>74</sup> TUTTLE, *supra* note 57, at 43.

“When the mass acts on its own,  
it does so only in one way,  
for it has no other: it lynches.”  
José Ortega y Gasset<sup>75</sup>

In perhaps his most well-known book, *The Revolt of the Masses*, penned in 1930, Ortega y Gasset defines the mass as

all that which sets no value on itself—good or ill—based on specific grounds, but which feels itself ‘just like everybody,’ and nevertheless is not concerned about it; is, in fact, quite happy to feel itself one with everybody else.<sup>76</sup>

The author warns that the coming of the masses would be characterized by the attempted crushing of

everything that is different, everything that is excellent, individual, qualified and select. Anybody . . . who does not think like everybody, runs the risk of being eliminated.<sup>77</sup>

Like Kierkegaard, it was important to Ortega y Gasset that his audience understood that dividing the mass from the minority, or the individual, is decidedly *not* a division into social classes and, therefore, does not coincide with the typical hierarchies of “upper”

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<sup>75</sup> ORTEGA Y GASSET, *supra* note 29, at 116.

<sup>76</sup> *Id.* at 14–15. See also, CHILTON WILLIAMSON, *THE CONSERVATIVE BOOKSHELF: ESSENTIAL WORKS THAT IMPACT TODAY’S CONSERVATIVE THINKERS* (explaining that the mass, for Ortega y Gasset “is simply the average man as a collective” and noting that the mass-minded man “has no aspirations” nor “makes no demands on himself”).

<sup>77</sup> *Id.* at 18.

versus “lower” classes.<sup>78</sup> He suggests that there are two classes of humans:

[T]hose who make great demands on themselves, piling up difficulties and duties; and those who demand nothing special of themselves, but for whom to live is to be every moment what they already are.<sup>79</sup>

He referred to the former class as the “select minorities” and the latter class as the masses; he pointed out that one’s membership in the modern club of the masses is not necessarily reflective of social classes or stations in life.<sup>80</sup> Very often, members of the “intellectual” or “nobility” classes have succumbed to the “pseudo-intellectual, unqualified, unqualifiable, and, by their very mental texture, disqualified.”<sup>81</sup> Ortega y Gasset similarly notes that “it is not rare to find to-day amongst working men, who before might be taken as the best example of what we are calling ‘mass,’ nobly disciplined minds.”<sup>82</sup>

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<sup>78</sup> *Id.* at 15.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 16.

<sup>81</sup> ORTEGA Y GASSET, *supra* note 29, at 16.

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

When coming of the masses occurs on a large scale, the mob will begin to behave like a child and throw off the yoke of its rule; “feeling himself ‘common,’ he proclaims the right to be common, and refuses to accept any order superior to himself.”<sup>83</sup> As Professor Tuttle explains, this transpires when

the unqualified, unselect, aspire to all vocations and ranks, supplanting the qualified minority—yet they do not cease to be a mass. In the coming of the masses, we experience the victory of what Ortega called ‘hyperdemocracy,’ the belief of the commonplace mind that in such matters as art, intellect, or politics it has the right to impose itself where it will.”<sup>84</sup>

### 3. Nietzsche and *Thus Spoke Zarathustra*

*“I love him who lives to know, and who wants to know so that the overman may live some day.”*  
Friedrich Nietzsche<sup>85</sup>

Nietzsche is perhaps the most vibrant and, therefore, academically controversial of all the existentialist philosophers with respect to his notions of the “overman,” the individual genius who outshines the “nihilism of the inert and superfluous mass.”<sup>86</sup> A

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<sup>83</sup> *Id.* at 133.

<sup>84</sup> TUTTLE, *supra* note 57, at 147.

<sup>85</sup> Walter Kaufmann, *Editor’s Preface to Thus Spoke the Zarathustra*, in THE PORTABLE NIETZSCHE 127 (Walter Kaufmann ed. & tran., 1982) [hereinafter NIETZSCHE].

<sup>86</sup> TUTTLE, *supra* note 57, at xiv.

recurring motif in Nietzsche’s work, similar to Kierkegaard’s notion of the crowd and Ortega y Gasset’s notion of the masses, is the “conformity or tyranny of the Crowd, whereby the individual loses sight of his or her possibilities or worth, freedom or responsibility, actuality or authenticity.”<sup>87</sup> The overman is a metaphor used by Nietzsche to guide our modern race out of its nihilistic notion of the herd mentality, which is characterized as an inverted human state wherein “master values become evil and the values of the weak become good.”<sup>88</sup> This attempt of the weak to nullify the virtues and values of the strong was a phenomenon Nietzsche termed “ressentiment” or resentment,<sup>89</sup> which Professor Tuttle defines as “the presupposition that weakness is a virtue.”<sup>90</sup> On the contrary,

[t]he strong do not need to sanctify the conventions of society as the ground of their values, but they instead realize themselves through creativity and the will to power.<sup>91</sup>

Like Kierkegaard and Ortega y Gasset, Nietzsche understood the vast importance of the individual quest to improve his or her worth and

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<sup>87</sup> *Id.* at 109–10.

<sup>88</sup> *Id.* at 161.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 89.

<sup>91</sup> *Id.* at 87.

called for the emergence of a “higher humanity,” or class of humans who “have the courage to become self-creators, not simply creatures of the mass.”<sup>92</sup> Just as Ortega y Gasset saw the distinction between the “select minorities” and the “masses,” Nietzsche urged for the calling out of the “master” class from the “herd,” or the majority of weak individuals who devalue the exceptional person and believe him to be evil while ironically believing itself to “be the highest type of humanity.”<sup>93</sup>

Nietzsche wrote his most popular book, *Thus Spoke Zarathustra: A Book for All and None*, in four parts.<sup>94</sup> Zarathustra, the hero of the novel, is a hermit who retreats to gain wisdom in the mountains where “he enjoyed his spirit and his solitude” for ten years. He then returns to civilization to share his insights with his fellow man, specifically to teach him the concept of the overman as distinguished from the herd or masses of common men.<sup>95</sup> In the chapter, “On the Higher Men,” Zarathustra exclaims:

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<sup>92</sup> TUTTLE, *supra* note 57, at 92.

<sup>93</sup> *Id.* at 90.

<sup>94</sup> NIETZSCHE, *supra* note 85, at 103.

<sup>95</sup> Friedrich Wilhelm Nietzsche, *Thus Spoke the Zarathustra: First Part*, in EXISTENTIALISM, *supra* note 4, at 121–25.

You higher men, learn this from me: in the market place nobody believes in higher men. And if you want to speak there, very well! But the mob blinks: ‘We are all equal.’

‘You higher men’—thus blinks the mob—‘there are no higher men, we are all equal, man is man; before God we are all equal.’

Before God! But now this god has died. And before the mob we do not want to be equal. You higher men, go away from the market place!<sup>96</sup>

In *Beyond Good and Evil*, Nietzsche continues his thoughts on the world of modern ideas, lamenting specifically that a war was being waged on all things unique, individual, and rare in favor of the common and collective:

Today . . . only the herd animal is honored and dispenses honors in Europe, and . . . ‘equality of rights’ could all too easily be converted into an equality in violating rights—by that I mean, into a common war on all that is rare, strange, or privileged, on the higher man, the higher soul, the higher duty, the higher responsibility, and on the wealth of creative power and mastery.<sup>97</sup>

### **B. Objectivism: Ayn Rand and *The Fountainhead***

*“Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life. The man who produces while others dispose of his product, is a slave.”*

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<sup>96</sup> Nietzsche, *Thus Spoke the Zarathustra: Fourth Part*, in NIETZSCHE, *supra* note 85, at 398.

<sup>97</sup> Nietzsche, *Twilight of the Idols*, in EXISTENTIALISM, *supra* note 4, at 446.



Ayn Rand<sup>98</sup>

Like the existentialist philosophers writing before her, objectivist philosopher Ayn Rand also predicts that mankind is reverting to a “moral collapse” back into the Dark Ages of a preindustrial or primitive, collectivist society.<sup>99</sup> Objectivism is a philosophy of rational individualism founded by twentieth century writer and philosopher Ayn Rand, who was born in Russia in 1905 and had a “passionate love of independent, creative Man, and a hatred for all forms of collectivism that would enslave him—*or her*.”<sup>100</sup> Having been raised by a bourgeois Jewish family in Russia, she fled to the U.S. in 1926 after experiencing the “tumultuous years of the Bolshevik revolution.”<sup>101</sup> According to Rand, the *individual* human mind is the fountain of all creation and, therefore, “there is no such thing as a

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<sup>98</sup> AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 322 (1966) [hereinafter CAPITALISM].

<sup>99</sup> AYN RAND, THE VIRTUE OF SELFISHNESS 123–24 (1961) [hereinafter SELFISHNESS].

<sup>100</sup> RONALD E. MERRILL, AYN RAND EXPLAINED: FROM TYRANNY TO TEA PARTY 19 (2013) (emphasis in original).

<sup>101</sup> LOUIS TORRES & MICHELLE MARDER KAMHI, WHAT ART IS: THE ESTHETIC THEORY OF AYN RAND 17 (2000). MERRILL, *supra* note 100, at 19 (noting how Rand witnessed firsthand the “inexorable crushing of all free thought as Russia was enslaved by the Communists;” when she was a young child, the family business was expropriated to the state and she and her family were left to live in “grinding poverty”).

collective mind.”<sup>102</sup> Thus, any group that does not recognize that “the principle of individual rights is the only moral base of all groups or associations,” is “a doctrine of mob rule or legalized lynching.”<sup>103</sup> The notion of “collective rights,” or that rights belong to groups and not individuals, inevitably means that rights belong to *some* individuals and not others.<sup>104</sup>

According to Rand, today’s “multiculturalists” want everyone to believe that membership in the collective is what provides man with his whole sense of identity; the edicts of the tribe, thus, become “his unquestioned absolutes, and the tribe’s welfare becomes his fundamental value.”<sup>105</sup> Rand’s vision, to the contrary, was one of “life as a heroic journey;” one in which man lives for the pursuit of excellence and achievement of his goals; one in which persons “treat others as equals—traders giving value for value, never master or

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<sup>102</sup> DONNA GREINER & THEODORE KINNI, *AYN RAND AND BUSINESS* 139 (2001). *See also* Biddle, *Individualism*, *supra* note 39 (“[T]he fact remains that the individual, not the community, has a mind; the individual, not the group, does the thinking; the individual, not society, produces knowledge; and the individual, not society, shares that knowledge with others who, in turn, must use their individual minds if they are to grasp it. Any individual who chooses to observe the facts of reality can see that this is so. The fact that certain “philosophers” . . . deny it has no bearing on the truth of the matter”).

<sup>103</sup> SELFISHNESS, *supra* note 99, at 120.

<sup>104</sup> *Id.*

<sup>105</sup> RAND, *PRIMITIVE*, *supra* note 28, at ix.

slave.”<sup>106</sup> She urges that a cultural movement, which must be led by a small minority of “new” intellectuals and would offer a “radical intellectual shift away from the dominant trend of the anti-mind, anti-man, anti-life culture,”<sup>107</sup> must take place in order to obviate the collectivist and statist policy towards which America is heading.<sup>108</sup>

In the spirit of John Stuart Mill’s *On Liberty*, Rand’s fiction and non-fiction works demonstrate a fight against the “collectivist siren song,” or the lure and seduction of collectivist leaders who are the product of

a long legacy of ideas, stretching back to the seventeenth century, attacking the human capacity to know reality and to reason efficaciously, disparaging the value of human life itself, and urging a renunciation of self for the sake of others.<sup>109</sup>

As Mill elucidates, “whatever crushes individuality is despotism, by whatever name it may be called,”<sup>110</sup> and “it is only the cultivation of individuality which produces, or can produce, well-developed human

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<sup>106</sup> MERRILL, *supra* note 100, at 17.

<sup>107</sup> CHRIS MATTHEW SCIABARRA, AYN RAND: THE RUSSIAN RADICAL 366 (2010).

<sup>108</sup> *Id.*

<sup>109</sup> MERRILL, *supra* note 100, at 17–18.

<sup>110</sup> JOHN STUART MILL, ON LIBERTY 122, 123 (1863).

beings.”<sup>111</sup> As tragically epitomized by Rand’s fictional heroes, she distinguishes the mass-minded man, which she terms a “second-hander,” from her idealized man of intellect, or the “man as man should be”—the “noble soul” or individualist who transcends dualism and lives first hand, from the dictates of his own conscience.<sup>112</sup>

According to Objectivist Craig Biddle,

[t]here are essentially two kinds of people in the world: independent thinkers and second-handers. The first faces reality and thinks for himself; the second faces other people and expects them to think for him.<sup>113</sup>

Perhaps no other work of Rand’s exemplifies the dichotomy between the individual and the second-hander more than her 1943 work of fiction, *The Fountainhead*, in which the protagonist Howard Roark depicts the “ideal man.”<sup>114</sup> A theme in this book and most of Rand’s other works is to prognosticate the eventual demise of a society in which the collectivist goal of ensuring “fairness” is accomplished by forcibly taking the intellectual products and creations of first-handers

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

<sup>112</sup> SCIABARRA, *supra* note 108, at 108.

<sup>113</sup> CRAIG BIDDLE, INDEPENDENCE VS. SECOND-HANDEDNESS 93 (2002) [hereinafter INDEPENDENCE].

<sup>114</sup> DONALD L. LUSKIN & ANDREW GRETA, I AM JOHN GALT: TODAY’S HEROIC INNOVATORS BUILDING THE WORLD AND THE VILLAINOUS PARASITES DESTROYING IT 6 (2011).

and redistributing them to second-handers; or those who use such products without giving any thought to the source of the creation or its economic value to the producer.<sup>115</sup> Roark is a brilliant architect “who desperately seeks to thrive in a society that rewards mediocrity while stifling creativity.”<sup>116</sup> Such a society is exemplified by one of the antagonists of the novel, Ellsworth Toohey, who “sees the reward of mediocrity and the stifling of the fountainhead of creative genius as the sole means of achieving control and power over the masses,”<sup>117</sup> and who “fears creative genius and the stimulation of free market competition.”<sup>118</sup> Rand sets out in the novel to deliver Roark, the creative genius, from such stifling and control.<sup>119</sup> Roark’s genius and individualism is ultimately rewarded by his withdrawal from the moral code that has victimized him and other creators throughout the centuries.<sup>120</sup>

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<sup>115</sup> *Id.* at 10–11.

<sup>116</sup> *Id.*

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

<sup>118</sup> Simone A. Rose, *Patent "Monopolyphobia": A Means of Extinguishing the Fountainhead?*, 49 CASE W. RES. L. REV. 509, 510–11 (1999).

<sup>119</sup> E.W. YOUNKINS, *AYN RAND'S ATLAS SHRUGGED: A PHILOSOPHICAL AND LITERARY COMPANION* 134–35 (2012).

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

As keenly elucidated in *Two Ages*, *The Revolt of the Masses*, *Thus Spoke Zarathustra*, and *The Fountainhead*, the existentialist and objectivist writers of these works extolled and sought to both protect and engender societal practices which encouraged and spurred the proliferation of creativity and original thinking. Cumulatively, they also somberly warn against the inevitable dilution of the products achieved by the genius of civilized man that would occur if a prevailing attitude of altruism persisted that preached for taking such products by force, rather than according to a just legal code that promotes authorial ownership of created assets and their free and voluntary trading.<sup>121</sup> Regardless of such warnings, Professor Robert Merges observes in *Justifying Intellectual Property*, his comprehensive work on the subject of contemporary intellectual property theory in the digital age, that “[t]he long tradition of strong [intellectual property] protection for creative works is under heavy fire these days in academic literature.”<sup>122</sup> In his book, Professor Merges attacks the underlying elements pervading such literature that claim intellectual

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<sup>121</sup> See LUSKIN & GRETA, *supra* note 114, at 9 (noting that “any time people come together in a civilization, there are those who seek to profit by taking the production of others rather than by freely and voluntarily trading the products of their own efforts with others in fair exchange”).

<sup>122</sup> MERGES, *supra* note 25, at 238.

assets should operate under new rules in the digital age in which “individuals are less important; networks and collectivities” become the central unit of analysis.<sup>123</sup> Perhaps nowhere can this ubiquitous syndrome be observed more than in the current body of scholarship that renounces the historic role that the author has customarily played in the creation of original and creative works protected by copyright.

## II. The Metaphoric Assault of the Copyright Author

Section 102(a) of the Copyright Act of 1976 (“the Act”) provides copyright protection for “original works of authorship.”<sup>124</sup> Ownership of a copyright “vests initially in the author or authors of the work.”<sup>125</sup> Authorship only requires that the creation “owe its origin” to the maker of the copyrighted work.<sup>126</sup> Generally, the author actually creates the work; meaning, she is “the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”<sup>127</sup>

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<sup>123</sup> *Id.* at 242.

<sup>124</sup> 17 U.S.C. § 102(a) (2000).

<sup>125</sup> *Id.* § 201(a).

<sup>126</sup> *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884)).

<sup>127</sup> *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (citing 17 U.S.C. § 102 (1994)). *See also* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (“An author . . . is ‘he to whom anything owes its origin; originator; maker’”).

The Constitution authorizes Congress to afford authors exclusive rights to their works, such as the right to reproduce, adapt, distribute, display, and perform the works.<sup>128</sup> Our Founding Fathers recognized that the long-term economic prosperity and advancement [of our country’s cultural assets] was dependent on promoting ‘the progress of science and useful arts,’ which necessitates securing exclusive rights to authors who create original works.<sup>129</sup> As such, the author has historically been treated as the hero of the U.S. copyright saga, contributing to our vast collective of creative works and being rewarded and incentivized to continue in this noble quest.

Despite the foregoing, as discussed in Section I, existentialist philosophers such as Nietzsche predicted today’s prevailing *Weltanschauung* of an increasing “disbelief in the existence of great men.”<sup>130</sup> John Stuart Mill similarly claimed that “[o]riginality is the

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<sup>128</sup> U.S. CONST. art. I, § 8, cl. 8 (affording Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries) (emphasis added). *See generally* 17 U.S.C. §§ 101–122 (2006); DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY § 4B (1992); Michael S. Young, Note, *Heavy Metal Alloys: Unsigned Rock Bands and Joint Work*, 86 CHI.-KENT L. REV. 951, 956 (2011).

<sup>129</sup> Young, *supra* note 128, at 956 (citing U.S. CONST. art. I, § 8, cl. 8).

<sup>130</sup> TUTTLE, *supra* note 57, at 94.



one thing which unoriginal minds cannot feel the use of.”<sup>131</sup> Indeed, these men foresaw a shadow that was to mar the future of progress, as today there is no doubt that the concept of the creative individual and the notion of authorship and originality are lambasted in contemporary copyright scholarship.<sup>132</sup> Rarely is written today a copyright article or treatise that does not question the continued worthiness of affording exclusive protection to the creative author. Most go so far as to disparage and even mock the sanctity of the individual creative process and degrade the qualities of innovation and genius-ness.<sup>133</sup> Scholars from several intellectual callings have contributed to the academic dilution of the historical and cultural contributions of the individual author, and most openly trace their research to the writings of twentieth century philosopher and historian Michel Foucault and his

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<sup>131</sup> MILL, *supra* note 111, at 126.

<sup>132</sup> Doris Estelle Long, *Dissonant Harmonization: Limitations on "Cash N' Carry" Creativity*, 70 ALB. L. REV. 1163, 1167 (2007) (claiming that “in the latter decades of the twentieth century and first decade of the twenty-first century, authorship and its correlative creativity have ‘taken it on the chin,’ so to speak. The importance of authorship has been questioned; creativity has been largely disconnected from it”).

<sup>133</sup> See, e.g., Christopher Ledford, Comment, *The Dream That Never Dies: Eldred v. Ashcroft, the Author, and the Search for Perpetual Copyright*, 84 OR. L. REV. 655, 658–59 (2005) (claiming that “[t]he evolution of the ‘author’ as a specially valorized individual occurred as part of an effort by eighteenth century writers to ensure their livelihood by asserting the unique value derived from their contributions” and also asserting that “the paradigm of the genius in the garret is easily attacked as having little purchase on reality”).

work, *What is an Author?*, as well as Professors Martha Woodmansee and Peter Jaszi, who promote the death of the author specifically within the context of the Copyright Act.<sup>134</sup> Section II(A) of this article will trace the evolution of this anti-author history. By providing a more fulsome and thorough account of the historical transitions that occurred from the Medieval to Renaissance to Romantic traditions of writing, I will reveal several incongruities in two of the scholars' major premises: first, that the Copyright Act as currently penned and legislated does not allow for the contemporary reality of "collective" creativity; and second, that it somehow has acted to "marginalize" women and other minority groups since the Romantic Age and continues to do so today. In Section II(B), I will show how, despite such inconsistencies, copyright scholars blindly continue to accept Woodmansee's and Jaszi's theories as proven tenants, yet do not provide any convincing proof as to their veracity, nor offer any real-

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<sup>134</sup> See, e.g., Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 586–91 (2006) (discussing "sacralization" and how it "and the vision of authorship inherent in discussions of musical composition misrepresent the processes by which music has actually been produced historically. Sacralization replaces actual production methods with an idealized view of sacred works reflecting the operation of individual composers, some of whom demonstrate genius but most of whom operate autonomously and individually in the creation of musical works. This idealized view presents a highly distorted and incomplete picture of actual musical practice").

world alternatives to the schematic they deem so unjust to collective creative collaboration.

**A. Foucault and the First Wave of Anti-Author Rhetoric**

Social historian Martha Woodmansee, Professor of English at Case Western Reserve University, has influenced copyright scholarship and largely led a radical charge advocating against the rights of the author with her theory that the modern notion of author is a recent invention that does not closely reflect collective, contemporary writing practices.<sup>135</sup> Since the early 1990s, and often in collaboration with Professor Woodmansee, copyright scholar Professor Peter Jaszi has written extensively on what he describes as the myth of the “Romantic notion of ‘author,’” particularly opining that the “persistence of the notion of ‘authorship’ in American copyright law makes it difficult for any new legal synthesis, which would focus on the reality of collective creativity, to emerge.”<sup>136</sup> According to Professor Jaszi, during the eighteenth century, the notion of “authorship” grew in accordance with the Romantic author

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<sup>135</sup> See generally Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L. J. 279 (1992) [hereinafter *Recovering Collectivity*].

<sup>136</sup> Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 295 (1992) [hereinafter *Contemporary Copyright and Collective Creativity*].

movement in literature and art, which expressed an “extreme assertion of the self and the value of individual experience.”<sup>137</sup> It is indeed true

that Romantics are core individualists who

cultivate the individual as a source of value. The unique feelings of the poet, the private vision of the painter, the existentialist quandary of the theologian—these are elevated in Romantic thought to ultimate points of reference. Genius is celebrated as the supreme virtue.<sup>138</sup>

This developing notion that an author was “special” is what led to the concepts of authorship and originality in both the British and American copyright regimes that persist today.<sup>139</sup> Such sentiments are supposedly a departure from Medieval and Renaissance conceptions of authorship in which the author was “just one of the numerous craftsmen involved in the production of a book—not superior to, but on a par with other craftsmen,” such as the papermaker, the typesetter, the book-binder, etc.<sup>140</sup> Woodmansee and Jaszi together claim that

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<sup>137</sup> Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 (1991) [hereinafter *Toward a Theory*]. See also Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 179 (2000) (claiming that during the Romantic period, “the value of the individual experience was heightened, as conceptions of self and ownership began to pervade the culture”).

<sup>138</sup> Fletcher, *supra* note 14, at 1507.

<sup>139</sup> Jaszi, *Toward a Theory*, *supra* note 137, at 456.

<sup>140</sup> Woodmansee, *Recovering Collectivity*, *supra* note 135, at 279, available at <http://cyber.law.harvard.edu/IPCoop/92wood.html>.

“[f]or the better part of human history this derivative aspect of new work was thought to contribute to, if not virtually to constitute, its value.”<sup>141</sup> According to the scholars,

[w]riters . . . considered their task to lie in the reworking of traditional materials according to principles and techniques preserved and handed down to them in rhetoric and poetics.<sup>142</sup>

The definition of author in the Romantic age, however, began to be “increasingly credited to the writer’s own genius,” transforming the writer “into a unique individual uniquely responsible for a unique product,” as opposed to “a (mere) vehicle of preordained truths.”<sup>143</sup>

Both professors attribute their approach on the modern notion of authorship to twentieth century writer Michel Foucault’s notorious work in the field of literary criticism, *What is an Author?*, in which he explains that

[W]e must entirely reverse the traditional idea of the author. We are accustomed, as we have seen earlier, to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages

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<sup>141</sup> Peter Jaszi and Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 SOUTH ATLANTIC QUARTERLY 947, 949 (1996) [hereinafter *Ethical Reaches*].

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

<sup>143</sup> Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH-CENTURY STUDIES 425, 428 (1984) [hereinafter *Genius*].

that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely.

The truth is quite the contrary: the author is not an indefinite source of significations that fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. When a historically given function is represented in a figure that inserts it, one has an ideological production. The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning.<sup>144</sup>

Although the bulk of the foregoing excerpt is difficult to decipher, particularly the last sentence, it is obvious that Foucault views the role of the individual author as ancillary to or, as he terms it, as a “functional principle,” which only acts to impede the more important collective objective of the subsequent free manipulation of his works by others who consume rather than produce them.<sup>145</sup>

Foucault was not a lawyer, but rather a major figure in French

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<sup>144</sup> Michel Foucault, Lecture, *What is an Author?* (1969), available at <https://wiki.brown.edu/confluence/download/attachments/74858352/FoucaultWhatIsAnAuthor.pdf>.

<sup>145</sup> *Id.*

structuralist and post-structuralist intellectual thought and criticism whose writings were multi-disciplinary, ranging across topics in history, sociology, psychology, and philosophy.<sup>146</sup> His antagonistic views of the author can be traced to a broader anti-intellectual movement beginning in the 1930s, during which time it became popular for literary critics to ignore the author of a work and focus solely on “the text itself,” thus, overtly disqualifying anything external to the actual work, including the creator of the work.<sup>147</sup> As one author notes, Foucault refused to believe that a single subject (like an author) infused a creative work with its meaning, but rather maintained that “authorship is an intertextual position, existing prior to the author’s utterances, in which a subject makes statements.”<sup>148</sup> Indeed,

Foucault’s conceptions of the author

are part of a wider campaign against faith in essential human subjectivity. It is the unity of the individual, the subject, that Foucault considers the most suspicious of the truths which we hold to be self-evident.<sup>149</sup>

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<sup>146</sup> See Michel Foucault, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (June 24, 2014), <http://www.iep.utm.edu/foucault/>.

<sup>147</sup> JACK STILLINGER, MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS 3 (1991).

<sup>148</sup> JONATHAN SIMONS, FOUCAULT AND THE POLITICAL 7 (2013).

<sup>149</sup> *Id.*

As will be discussed further in Section II, it is within this Foucauldian identification with collectivism and anti-individuation that the framework for the contemporary treatment of the author in copyright scholarship emanates.

Woodmansee and Jaszi assert:

In the view of poets from Herder and Goethe to Wordsworth and Coleridge, genuine authorship is *originary* in the sense that it results not in a variation, an imitation, or an adaptation, and certainly not in a mere reproduction, but in an utterly new, unique—in a word, ‘original’—work which, accordingly, may be said to be the property of its creator and to merit the law’s protection as such.<sup>150</sup>

The professors continue, claiming:

With its emphasis on originality and self-declaring creative genius, this [Romantic] notion of authorship has functioned to marginalize or deny the work of many creative people: women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative projects, to name but a few. Exposure of these exclusions—the recovery of marginalized creators and underappreciated forms of creative production—has been a central occupation of literary studies for several decades. But the same cannot be said for the law.<sup>151</sup>

One example of these so-called “underappreciated forms of creative production,” which has been purportedly ignored by the law

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<sup>150</sup> Jaszi & Woodmansee, *Ethical Reaches*, *supra* note 141, at 947 (emphasis in original).

<sup>151</sup> *Id.* at 948.



and is specifically cited by the authors in their joint article *The Ethical Reaches of Authorship*, is the supposed usurpation by poet William Wordsworth of his sister Dorothy Wordsworth's journal entries.<sup>152</sup> William's poem, "I Wandered Lonely as a Cloud," was written in 1807 to describe a walk that he and Dorothy took in the Lake District in England during which they encountered a field of daffodils.<sup>153</sup> It is well known by experts in Romantic poetry that Wordsworth's poem was intended by him not to be a trivial description of a walk in the woods, but rather a personal account of the experience of poetic creation itself, and also that he believed it to be one of his most important works.<sup>154</sup> Indeed, it is one of his most memorable poems and one of this author's most favorite.<sup>155</sup> Dorothy also memorialized the same walk in one of her journals, many of which were not intended to be published but were written for the enjoyment of the "family

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<sup>152</sup> *Id.* at 950.

<sup>153</sup> GEOFFREY DURRANT, WILLIAM WORDSWORTH 19 (1969).

<sup>154</sup> *Id.* at 19–24 (detailing a line-by-line interpretation of the beauty and meaning that underlies the simple lines of "I Wandered Lonely").

<sup>155</sup> See Richard Davies, *I Wandered Lonely as a Cloud: Imagery & Themes*, EDUCATION PORTAL, <http://education-portal.com/academy/lesson/i-wandered-lonely-as-a-cloud-imagery-themes.html>.

circle.”<sup>156</sup> While Dorothy’s depiction uses remarkably similar terms, themes, and tones to those that appear in “I Wandered Lonely,” her journal entry is written in prose, while William’s verse follows a strict iambic tetrameter pattern, which is a structured meter applied often by English poets that uses four six-line stanzas employing a quatrain-couplet rhyme scheme: ABABCC.<sup>157</sup>

In their article, Woodmansee and Jaszi cite portions of both Wordsworth pieces, claiming to prove that the example “exposes the element of collaboration at the heart of creative production generally even as it dramatizes the process by which such collaboration gets denied.”<sup>158</sup> The authors cite the following journal entry of Dorothy’s:

When we were in the woods beyond Gowbarrow Park we saw a few daffodils close to the water-side. We fancied that the lake had floated the seeds ashore, and that the little colony had so sprung up. But as we went along there were more and yet more; and at last, under the boughs of the trees, we saw that there was a long belt along the shore, about the breadth of a country turnpike road. I never saw daffodils so beautiful. They grew among the mossy stones about and about them; some rested their heads upon these stones as on a pillow for weariness; and the rest tossed and reeled and danced, and seemed as if they verily laughed with the wind, that blew upon

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<sup>156</sup> LUCY NEWLYN, WILLIAM AND DOROTHY WORDSWORTH: ‘ALL IN EACH OTHER’ xiii (2013).

<sup>157</sup> See Debbie Notari, *Iambic Pentameter: Definition, Examples & Quiz*, EDUCATION PORTAL, <http://education-portal.com/academy/lesson/iambic-pentameter-definition-examples-quiz.html>.

<sup>158</sup> Jaszi & Woodmansee, *Ethical Reaches*, *supra* note 141, at 951.

them over the lake; they looked so gay, ever glancing, ever changing. This wind blew directly over the lake to them. There was here and there a little know, and a few stragglers a few yards higher up; but they were so few as not to disturb the simplicity, unity, and life of that one busy highway.<sup>159</sup>

Jaszi and Woodmansee claim that “Dorothy’s substantial contribution... has been completely effaced” by William’s famous poem, which reads:

I wandered lonely as a cloud  
That floats on high o’er vales and hills,  
When all at once I saw a crowd,  
A host, of golden daffodils;  
Beside the lake, beneath the trees,  
Fluttering and dancing in the breeze.  
Continuous as the stars that shine  
And twinkle on the milky way,  
They stretched in never-ending line  
Along the margin of a bay:  
Ten thousand saw I at a glance,  
Tossing their heads in a sprightly dance.  
The waves beside them danced; but they  
Out-did the sparkling waves in glee:  
A poet could not be so gay,  
In such a jocund company;  
I gazed—and gazed—but little thought  
What wealth the show to me had brought:  
For oft, when on my couch I lie,  
In vacant or in pensive mood,  
They flash upon that inward eye,  
Which is the bliss of solitude;  
And then my heart with pleasure fills,  
And dances with the daffodils.<sup>160</sup>

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<sup>159</sup> *Id.*

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

In this situation, the laws of copyright have apparently denied to Dorothy her just contributions to this poem which should somehow (although the professors never propose how) be recognized differently by the law.<sup>161</sup> Entirely dismissive of the provisions for joint authorship in the Copyright Act, the authors claim that “this body of law tends to reward certain producers and their creative products while devaluing others” who have contributed to the creative process of the author in unidentifiable or “collaborative” ways.<sup>162</sup> This statement is only true if one ignores the longstanding concept of joint authorship endorsed by Judge Hand, who held that when authors agree to create something together they become joint authors of the work as a unitary whole.<sup>163</sup>

Since Judge Hand’s holding that authors must intend or agree to create a joint work in order for one to exist, there have been many cases that have explained the “intent test” of joint authorship, such as *Aalmuhammed v. Lee*.<sup>164</sup> As noted in the *Aalmuhammed* case, the Copyright Act defines what a joint work is in Section 101:

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<sup>161</sup> *Id.* at 951.

<sup>162</sup> *Id.* at 948.

<sup>163</sup> See *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915) (relying and extrapolating on a previous case, *Levy v. Rutly*, L.R. 6 C.P. 523).

<sup>164</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231–232 (9th Cir. 2000).

[a] ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.<sup>165</sup>

Furthermore, there are three requirements for a joint work to be established: (1) a copyrightable work must exist; (2) there must be two or more authors; and most importantly; (3) there must be an intent among the authors to merge the “inseparable and interdependent parts [into] a unitary whole.”<sup>166</sup> In the Second, Seventh, and Ninth Circuits, there must also be an independently copyrightable contribution from each alleged author;<sup>167</sup> however, the creation of a copyrightable contribution does not in and of itself make the contributor an author.<sup>168</sup>

Determining who is an author is a bit more difficult. The word “author” has traditionally been “used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the ‘Author of Nature.’”<sup>169</sup> Per the *Aalmuhammed* case, the word “author” has come to mean the one who “superintends” the work or who is the inventive “master mind” of the

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<sup>165</sup> *Id.* at 1231 (citing 17 U.S.C. § 101).

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

<sup>167</sup> *Id.* at 1231, 1233.

<sup>168</sup> *Id.* at 1232.

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

work.<sup>170</sup> Put another way, the author of a work is the one “who really represents, creates or gives effect to the idea, fancy, or imagination.”<sup>171</sup>

Once the legal determination of joint authorship is satisfied, Section 201(a) of the Act dictates that the joint authors will co-own the copyright in their resulting work.<sup>172</sup>

Paramount in the joint work context is that the “intent test” be satisfied—both authors must intend the other author to be a joint author—which can be ascertained from the circumstances surrounding the creation of the work.<sup>173</sup> There are several factors the courts will consider, such as:

- (1) who superintends the work;
- (2) what objective manifestations of shared intent to be coauthors exist; and
- (3) whether audience appeal turns on the contributions of both

authors, such that ‘the share of each in its success cannot be appraised.’<sup>174</sup> Ultimately, authors are going to consult with others in

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<sup>170</sup> *Aalmuhammed*, 202 F.3d at 1233 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884)).

<sup>171</sup> *Id.* at 1233.

<sup>172</sup> 17 U.S.C. § 201(a) (2006) (stating that “[i]nitial [o]wnership [of a copyrighted work] protected under this title vests initially in the author or authors of the work” and that “[t]he authors of a joint work are co-owners of copyright in the work”).

<sup>173</sup> *Aalmuhammed*, 202 F.3d at 1234–35.

<sup>174</sup> *Id.* at 1234.

creating their work, but “[p]rogress would be retarded rather than promoted,” contrary to the intent of the framers in implementing the Progress Clause, “if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work.”<sup>175</sup> Viewed in light of this long-established legal context, it is difficult to envision how exactly copyright law thwarts collaborative effort or otherwise makes such effort difficult to achieve.

Moreover, if the Wordsworth example was intended by Woodmansee and Jaszi to exemplify their earlier-stated premise that the Romantic concept of author served to marginalize women poets, such intimation can be readily countered. When considering the similarities between William’s poem and the journal entries of his sister, many experts in Romantic poetry certainly do not share the same vehemence against William as our copyright scholars do, nor do they believe that William either usurped or discounted the artistic creativity of his sister when publishing his poetry.<sup>176</sup> For example, in her book, *William and Dorothy Wordsworth: ‘All in Each Other,’* Lucy Newlyn claims that “serious misconceptions” about the actual relationship between the two siblings still prevail among literary

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<sup>175</sup> *Id.* at 1235.

<sup>176</sup> NEWLYN, *supra* note 156, at xii.

critics.<sup>177</sup> Newlyn believes that it is “bizarre” that so many commentators continue to claim that Dorothy maintained an exploited role in the Wordsworth household as William’s “handmaiden to poetic genius,” since throughout his life and writings, William continuously acknowledged her importance in his life as his co-writer, muse, and dearest friend.<sup>178</sup> If, indeed, the sibling authors intended their writings to be jointly copyrighted works, which is a requirement for co-ownership, copyright laws existing then and now provide ample opportunity for authors to lay claim to their work, or sue for infringement if appropriated.<sup>179</sup>

In addition, it can be readily observed that it was not only male Romantic authors who suggested that artistic solitude and isolation were the preferred formulae for engendering the originality contained

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at xii–xiii.

<sup>179</sup> LOUIS D. FROHLICH & CHARLES SCHWARTZ, *THE LAW OF MOTION PICTURES* 35–36 (1918) (discussing the requirements for co-authorship in twentieth century England and the U.S. and stating that the “pith of the joint authorship consists of the co-operation of a common design, and whether this co-operation takes place subsequently to the formation of the design by the one, and is varied in conformity with the suggestions or views of the other, it has equally the effect of creating a joint authorship as if the original design had been their joint conception”).



in their works.<sup>180</sup> Woodmansee and Jaszi seem to make the assumption that the Romantic notion of solitary authorship as espoused by William Wordsworth in his works somehow resulted in the marginalization of women. However, many female authors writing during the eighteenth century—such as Mary Wollstonecraft, writer, philosopher and, ironically, one of the first advocates of female rights—also emphasized their own creative originality.<sup>181</sup> In her book, *Revolutions in Taste*, Dr. Fiona Price claims that Wollstonecraft’s “complex formulations of the significance of original thought have important implications for our understanding of Romantic originality.”<sup>182</sup> Dr. Price acknowledges that many authors who reflect and write on the phenomenon of the Romantic notion of author erroneously claim “that the women writers of the period were far more awkwardly placed in relation to originality” and “less willing to ascribe to the male

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<sup>180</sup> FIONA PRICE, *REVOLUTIONS IN TASTE, 1773-1818: WOMEN WRITERS AND THE AESTHETICS OF ROMANTICISM* 48 (2013) (explaining Mary Wollstonecraft’s views of female intellectual and professional status). See *Mary Shelley – Biography*, THE EUROPEAN GRADUATE SCHOOL, <http://www.egs.edu/library/mary-shelley/biography/> (noting that Mary Wollstonecraft was the mother of Mary Shelley, author of *Frankenstein*).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

Romantics’ model of creativity.”<sup>183</sup> Dr. Price, however, states that Romantic female authors, as well as women who studied them, were as “equally concerned with mental independence, ‘imagination’ and ‘genius’” as their male artistic counterparts.<sup>184</sup>

Woodmansee’s and Jaszi’s attack against the Romantic notion of authorship is also problematic in that it vastly oversimplifies the historical and personal forces that surrounded and influenced the Romantic poets and shaped the gradual, but eventual, change from Renaissance to modern styles of writing in Europe.<sup>185</sup> The professors are correct to note that a large proportion of literature written during the Renaissance—perhaps as much as three-fourths of it—was almost entirely imitative.<sup>186</sup> The notion of autonomy or individuality in art did not exist, since the artist was merely a tool for those in power of the church and state—who commissioned the works—to help elevate their

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<sup>183</sup> *Id.* at 46.

<sup>184</sup> *Id.* at 48. *See also*, CAROL SHINER WILSON AND JOEL HAEFNER, RE-VISIONING ROMANTICISM: BRITISH WOMEN WRITERS, 1776-1837 37–40 (1995) (noting that Romantic poet and novelist Mary Robinson accepted the notion that genius-ness was a prerequisite to artistic success and, like many male and female authors of the period, stressed that education in the classics and other factors aided the creation of such).

<sup>185</sup> *See* ANDREAS RAHMATIAN, COPYRIGHT AND CREATIVITY, THE MAKING OF PROPERTY RIGHTS IN CREATIVE WORKS 159–64 (2011) (offering a similar observation and concluding that “the ‘Romantic Author’ construct the critics offer is an oversimplif[ied] exaggeration”).

<sup>186</sup> JOHN HOWARD MASTERMAN, THE AGE OF MILTON xii (1919).

status in society.<sup>187</sup> They did this by purveying and reiterating various religious and political themes, as “Renaissance art contributed to the glory of the patrons and the community or nation it was created for.”<sup>188</sup> It is also true that during this period, books were created, bought, and sold merely as ordinary commodities, and authors did not consider themselves to have the intimate personal and authorial relationship with their works as they came to develop during the successive Romantic era.<sup>189</sup> However, whereas one interpretation of Woodmansee’s and Jaszi’s anti-Romantic author theory would appear to suggest that this eventual sacramental relation between book and author was a self-admiring and self-created outcome manifested solely by egomaniacal and sexist male literary authors, it will be further demonstrated below that such a simplified and myopic view is largely disingenuous in that it ignores a multitude of other factors that help to explain the story of originative works of copyright.

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<sup>187</sup> CLAUDIA MOSCOVICI, ROMANTICISM AND POSTROMANTICISM 59 (2007).

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

<sup>189</sup> Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3–5 (2002) [hereinafter *Metaphors*].

During the Renaissance and earlier periods, artistic works were primarily concerned with reiterating religious belief and tradition.<sup>190</sup> In France, for example, the doctrine of “divine revelation” carried over the Medieval charge that ideas were ordained from God and merely revealed by the writer, who could not own or sell them; however, the king as God’s earthly representative did have the authority to dictate what would be published by whom, and for how long.<sup>191</sup> In this manner, only certain works were widely published and only some authors held a legal privilege of copyright via the king’s selection, as only members of the royal guild were allowed to print and publish what was considered to be “God’s knowledge.”<sup>192</sup> Given these circumstances, it is not difficult to understand how authors were religiously limited in the subject matter of their writings, as well as authoritatively restricted in how they viewed themselves in relation to such works and in relation to society as a whole.

During this period, however, civilization was on the cusp of reaching a more advanced marketplace society that would more fully develop in the late seventeenth and eighteenth centuries, during which

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<sup>190</sup> See MASTERMAN, *supra* note 186, at xii.

<sup>191</sup> ROBERT POST, LAW AND THE ORDER OF CULTURE 111 (1990).

<sup>192</sup> *Id.*

copyright law would emerge concurrent with the spread of literacy and the vast increase of members of the public who were able to read.<sup>193</sup>

The nineteenth century would eventually realize a major upsurge in the number of novels and other literary works being produced and distributed (including political tomes), thus being hailed as one of the most extraordinarily successful and thriving ages for literature.<sup>194</sup>

Moreover, technological advancements that led to efficient printing meant that works were much more easily disseminated to a wider audience.<sup>195</sup> This broadening of distribution, as well as public education from the elite class to all social classes, led to a market economy which in turn created a shift in the attitude of writers who, for the first time, became professionals paid for their work.<sup>196</sup>

Indeed, the contrast between the human perception of self during this cultural period and that of the previous Middle Ages was a

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<sup>193</sup> See *Metaphors*, *supra* note 189, at 5.

<sup>194</sup> HELLE PORSDAM, COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSEN AND THE COMMODIFICATION OF CREATIVITY 41–42 (2006).

<sup>195</sup> *Id.* at 44 (noting that these same technological improvements also led to more copying and piracy of works).

<sup>196</sup> J. Rhodes, *Copyright, Authorship, and the Professional Writer: The Case of William Wordsworth*, 8 CORVEY: READING THE ROMANTIC TEXT 3 (June 2002), available at [http://www.cardiff.ac.uk/encap/journals/corvey/articles/cc08\\_n01.html](http://www.cardiff.ac.uk/encap/journals/corvey/articles/cc08_n01.html) (last visited on June 23, 2014). See also MOSCOVICI, *supra* note 187, at 61.

drastic one.<sup>197</sup> Whereas people during the Middle Ages were mainly aware of themselves as members of a group, it is during the Renaissance that man began to recognize himself as a spiritual individual.<sup>198</sup> Renaissance humanists were concerned with self-knowledge and the uniqueness of the individual, as well as the manner in which they presented themselves to others.<sup>199</sup> It is during the rise of travel, urbanization, city living, and the wide availability of printed material that occurred in the sixteenth century that the true sense of the individual developed.<sup>200</sup> Individual authors as early as Shakespeare began to be considered as objects of admiration and adulation, as magazine articles were written encouraging readers to “pilgrimage” to the author’s home in Stratford, England, and auctions were held for pieces of his property.<sup>201</sup> In other words, they were glorified as rock stars within an age that celebrated its slow emergence from—and

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<sup>197</sup> Peter Burke, *Representations of the Self from Petrarch to Descartes*, in *REWRITING THE SELF: HISTORIES FROM THE RENAISSANCE TO THE PRESENT* 17 (Roy Porter ed., 1997).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 19.

<sup>200</sup> *See id.*

<sup>201</sup> MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 123 (1993) [hereinafter *INVENTION OF COPYRIGHT*].

breaking the shackles of—religious oppression in cultural thought and consequent literary production.

In the eighteenth century, a book was “[n]o longer simply a mirror held up to nature,” or an objective commodity, but was beginning to be viewed both objectively *and subjectively*, as the personality or the “self” of the writer emerged in importance alongside what the words of the book conveyed.<sup>202</sup> Poetry took on a new meaning not only as the recording of the life of the poet, but also constructing his life and actually aiding in the production of his identity.<sup>203</sup> The authors’ primary motivations changed from writing primarily for “money, contemporary reputation, status, or pleasure;” instead, the value accorded to the theory and practice of writing was that the identity of the authors would survive for posterity.<sup>204</sup>

As the prestige of the artist increased, so did his independence from the political and religious patrons who formerly dictated the scope and meaning of his work.<sup>205</sup> This newfound artistic freedom was revered by authors who declared that individuality and originality

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<sup>202</sup> *Id.* at 121.

<sup>203</sup> ANDREW BENNETT, ROMANTIC POETS AND THE CULTURE OF POSTERITY 2 (1999).

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

<sup>205</sup> MOSCOVICI, *supra* note 187, at 59.

should be hailed as the supreme mark of “true art,” and encouraged others to find their own inner “creative genius.”<sup>206</sup> The traditional Christian doctrinal insistence that only God could create *ex nihilo* had finally begun to cede.<sup>207</sup> Thus, the transition from literary works as regurgitated religious tomes to individual works of originality had begun. Whereas art was still very much “bound to its social function,” poets like Wordsworth imagined and actually helped birth the futuristic writer.<sup>208</sup> Such a writer would have, through his unique aesthetic sensibility, imagination, discernment and talent, not only aesthetic pleasure but also a heightened and more empathetic moral and political consciousness.<sup>209</sup>

Wordsworth is often criticized for his efforts to reform the length of English copyright law to extend to the author’s life in order to preserve the economic viability of his own works.<sup>210</sup> In addition to being driven by economic incentives, “[Wordsworth] also viewed his works as a personal emanation, which was intimately linked to his

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

<sup>207</sup> RAHMATIAN, *supra* note 185, at 185.

<sup>208</sup> MOSCOVICI, *supra* note 187, at 59.

<sup>209</sup> *Id.*

<sup>210</sup> PORSDAM, *supra* note 194, at 43.



conception of self.”<sup>211</sup> Romantic writings, therefore, stressed that the work of art is “an expression of self uncontaminated by market forces, undiluted by appeals to the corrupt prejudices and desires of... readers” as well as religious tyrants.<sup>212</sup> Thus, the Romantic theory of recognition and posterity requires that:

the work finally be judged and discriminated from other, lesser work. Indeed, with the invention of the modern concept of the (English literary) canon in the mid-eighteenth century, the possibility of such discriminations becomes crucial to reading and to the new discipline of literary criticism. In order to discriminate the poet from the scribbler or hack, the poem from common, everyday verse, Romantic theories of poetry produce an absolute and non-negotiable opposition between writing which is original, new, revolutionary, writing which breaks with the past and appeals to the future, and writing which is conventional, derivative, a copy or simulation of earlier work, writing which has an immediate appeal and an in-built redundancy.<sup>213</sup>

Viewed in this broader social context, in this author’s opinion, it is difficult to understand the penchant of contemporary scholars to undermine this newfound individuality of the Romantic authors. For

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<sup>211</sup> *Id.* (stating that Wordsworth “sought protection of his literary creations, not only for financial reasons, but also because they were inextricably linked to his identity”) (alteration added).

<sup>212</sup> BENNETT, *supra* note 203, at 3 (noting that this “Romantic theory of artistic autonomy requires a new audience. The autonomy of the work of art allows no direct appeal to readers; the act of writing poetry becomes a self-governing and self-expressive practice”).

<sup>213</sup> *Id.*

the first time in human history, these Romantic authors were able to embark upon lucrative careers as creators as well as provide society with such a diverse and a vast deposit of literary creations; both of which are stated goals of the Progress Clause of the U.S.

Constitution.<sup>214</sup> Twentieth century cultural critic Neil Postman believes it was the time “when we achieved our release from our self-imposed tutelage” and when “the battle for free thought was begun and won.”<sup>215</sup> Yet, instead of celebrating works of solitary penmanship and protecting the individual author as proscribed by current copyright laws, contemporary copyright scholars like Professor Jaszi would welcome a legal regime that engages “the realities of contemporary polyvocal writing practice—which is increasingly collective, corporate, and collaborative.”<sup>216</sup> While he anticipates and calls for the “revision of copyright concepts to take fuller account of collaborative cultural production,”<sup>217</sup> Professor Jaszi never quite defines or

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<sup>214</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>215</sup> NEIL POSTMAN, *BUILDING A BRIDGE TO THE 18<sup>TH</sup> CENTURY* 18 (1999) (quoting Isaiah Berlin’s comments about the period: “The intellectual power, honesty, lucidity, courage and disinterested love of the truth of the most gifted thinkers of the eighteenth century remain to this day without parallel. Their age is one of the best and most hopeful episodes in the life of mankind”).

<sup>216</sup> See *Contemporary Copyright and Collective Creativity*, *supra* note 136, at 302.

<sup>217</sup> *Id.* at 319.

concretizes what exactly he means by the amorphous concepts of “cultural production” and “polyvocal” writing practices.<sup>218</sup> Further, he does not explain exactly *how* copyright laws should be redrafted to take such concepts into account.<sup>219</sup> Nonetheless, he and Professor Woodmansee boldly declare that they are “agitating for the development of more equitable models of intellectual property protection.”<sup>220</sup>

In his eloquent, if not lonely, critique of the Romantic author critics, Professor Andreas Rahmatian rightly observes that:

The result of dismissing the concept of authorship in favour [sic] of a seemingly generous recognition of collective creativity would be a complete dismissal of the concept of copyright as an individual property right. This would not be objectionable as such, but the critics do not come up with an alternative, not even in the form of a brief outline, as to how an authorless copyright system should look.<sup>221</sup>

Professor Justin Hughes notes that even after several years of anti-author scholarship, there are still many questions “about both its

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<sup>218</sup> *Id.* at 302.

<sup>219</sup> See RAHMATIAN, *supra* note 185, at 179–80 (claiming that “it is difficult to see where the concerns of the critics of the ‘Romantic’ author concept lie”).

<sup>220</sup> *Ethical Reaches*, *supra* note 141, at 949.

<sup>221</sup> RAHMATIAN, *supra* note 185, at 179.

picture of how the world is and its vision of how the world should be.”<sup>222</sup> He cohesively observes that:

There was just a touch of irony when two of the leading proponents of the ‘collective process’ wrote back-to-back articles in one journal. Each article was entitled Author Effect and each author thanked the other author in the first footnote. But the articles were not co-written; each retained individual authorship of one article. Apparently, their own works have not become ‘polyvocal.’<sup>223</sup>

### **B. The Contemporary Siren Call for Collective Authorship**

Irrespective of the obvious flaws and gaps in Woodmansee’s and Jaszi’s body of work on the subject, several legal scholars, whose works are examined in this section, have since—in similarly obtuse manners—cited, lauded, and reiterated these theories of authorship in their own works with the purpose of attacking the modern standard of authorship as defined in the Copyright Act, without bothering to explain exactly how or why collective creativity should trump individual origination either in the Copyright Act specifically, or in life, generally. For example, Professor Sonia Katyal takes issue with the requirements of originality and fixation in copyright law,

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<sup>222</sup> Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 91 (1998).

<sup>223</sup> *Id.* at 94.

maintaining that such doctrines lead to “an unspoken emphasis on the sovereignty of an artwork.”<sup>224</sup> Professor Katyal aspires to what Professor John Fiske termed a “semiotic democracy,” that would “empower individuals to add to the rich and expansive cultural fabric of a *true* public domain, where everyone participates equally in the ongoing process of cultural production.”<sup>225</sup> Noting that the term “semiotic democracy” is ubiquitous, utopian, and that it conflicts with traditional principles of exclusive copyright ownership, Professor Katyal nonetheless extols such a precept.<sup>226</sup> She explains Professor Fiske’s meaning of a semiotic democracy as giving preference to the consumer of works over the creator of such works, and is meant to

describe a world where audiences freely and widely engage in the use of cultural symbols in response to the forces of the media. A semiotic democracy enables the audience, to a varying degree, to ‘resist,’ ‘subvert,’ and ‘recode’ certain cultural symbols to express meanings that are different from the ones intended by their creators, thereby empowering consumers, rather than producers.<sup>227</sup>

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<sup>224</sup> Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH U. L. REV. 489, 536–37 (2006).

<sup>225</sup> *Id.* at 489–90 (emphasis added).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

Other professors have written about the virtues of public or collective ownership of copyrighted works, summarily proclaiming the now well-entrenched trill that authorship is a dangerous sham that cripples the proliferation of “culture” in some amorphous sense.

According to Professor Keith Aoki,

the ‘empire of the author’ is an artifact that prevents us from addressing the fact that our intellectual property laws are not merely private rights, but may be closely tied to such public concerns as human rights violations and other profoundly political questions of distributive justice involving access to economic and cultural resources.<sup>228</sup>

Further, Professor Mario Biagioli asserts that genius functions “as a remarkably effective legal fiction rather than an accurate description of the process of literary or artistic production” on account of the “inevitable borrowings, collaborations, and extensive labor that [go] into any form of cultural production.”<sup>229</sup> He further opines that the author myth “denies visibility to the many social dimensions of creativity by casting it an instantaneous and seemingly natural

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<sup>228</sup> Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward A Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1339 (1996) [hereinafter *Sovereignty*].

<sup>229</sup> Mario Biagioli, *Genius Against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting*, 86 NOTRE DAME L. REV. 1847, 1848 (2011).

process.”<sup>230</sup> Like many copyright scholars, he accepts this attestation without question; however, he declines to illustrate exactly how this circumstance operates to deny creativity by stating that such “critique has been articulated well and often already.”<sup>231</sup>

Professor James Boyle’s landmark book discusses the changing face of intellectual property rights in the wake of the information age.<sup>232</sup> He claims that our “unconscious use of the author paradigm” and the traditional model of conferring property-like rights to creators of intellectual products is a “bad thing for reasons of both efficiency and justice; it leads us to have *too many* intellectual property rights, to confer them on the *wrong people*, and dramatically to undervalue the interests of both the *sources of* and the *audiences for* the information we commodify.”<sup>233</sup> In an earlier article, Professor Boyle laments the popular conception of the “great writer” and longs for a harkening back to a more medieval European concept of authorship; one which

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* x–xi (1996) [hereinafter *SHAMANS*] (emphasis in original).

<sup>233</sup> *Id.*

“did not have the preeminent importance or the significance we accord to it today.”<sup>234</sup>

Professor Boyle goes on to describe what he perceives as the problem with the Romantic vision in that it “ascribes to the author a temperament, insight, and genius that put her outside of society.”<sup>235</sup>

He elaborates on this regrettable phenomenon:

The author is seen as the individual *par excellence*. The coming into being of the notion of ‘author’ constitutes the privileged moment of *individualization* in the history of ideas, knowledge, literature and the sciences. Society is supposed to allow the author more subjectivity than the average person. She may be eccentric or violate cultural norms. Her genius is seen as *individual* rather than being the product of a culture or a context. To understand the work we concentrate most of our attention on the author, rather than on the learning of the time, the gossip of the streets, the influences of the genre. The work comes from *inside* the author. At best, we may concede that this particular author is fitted by breeding and education to be its enunciator.<sup>236</sup>

Similarly, Professor Anne Barron writes that “copyright’s critics have been anxious to identify that realm of creative endeavour

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<sup>234</sup> James D. A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 631 (1988).

<sup>235</sup> *Id.* at 630.

<sup>236</sup> *Id.* (emphasis in original).



[sic] which is negated or denied by Romantic ideology.”<sup>237</sup> She provides a mocking critique of the individual author:

Romanticism, after all, is an ideology in which artists are held up as uniquely sensitive souls, valiantly transcending the prosaic routines and necessities of everyday life to express their genius in works of the imagination: it follows that a copyright system informed by Romanticism must be one which offers protection to these exceptional but fragile individuals.<sup>238</sup>

Professor Barron reiterates that “it should not surprise us to learn that [copyright] law tends to reward certain producers and their creative products while devaluing others.”<sup>239</sup> According to Professor Barron, the Romantic notion of authorship has led to copyright law’s current protection of “privileged” categories of works, e.g. “painting, drawing, sculpture, collage, engraving, architecture or even photography.”<sup>240</sup> As a result, there is an exclusion of more diverse categories of “contemporary” artistic works, e.g. installation art, video art, environmental art, body art, performance art, mixed media works, conceptual art, kinetic art, “and any art which involves the use of

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<sup>237</sup> Anne Barron, *Copyright Law and the Claims of Art*, 4 INTELL. PROP. Q. 368 (2002).

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

<sup>239</sup> *Id.* at 368–69 (citing Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 S. ATLANTIC Q. 947, 948 (1996) (alteration in original)).

<sup>240</sup> Barron, *supra* note 237, at 374.

organic or unstable components.”<sup>241</sup> Like Professor Boyle, Professor Barron argues for a

conception of art that could accommodate post-Modernist art practice, and a conception of cultural rights that could transcend the limits of copyrights considered as property rights.<sup>242</sup>

However, she never expounds upon the ambiguous concept of “cultural rights;” rather, she suggests that these rights are counter-definitional to property rights.<sup>243</sup> She does not define the elusive categories of post-Modernist art she claims should be protected; nor does she disclose exactly how and why such categories of works cannot receive protection under existing copyright provisions.<sup>244</sup>

Other scholars have attacked the role of the individual author in copyright law through feminist perspectives of intellectual property.<sup>245</sup>

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<sup>241</sup> *Id.* at 381.

<sup>242</sup> *Id.* at 399.

<sup>243</sup> *Id.*

<sup>244</sup> *See id.*

<sup>245</sup> Compare Long, *supra* note 132, at 1205, n.115 (claiming that “[s]cholars in the area have already noted the conflicting views regarding feminist goals and male power domains”), with Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 554 (2006) (stating reasons why copyright laws are gender biased and asserting that feminists should actively pursue a vision of copyright that is “low protectionism” since “important feminist principles are most harmonious with a ‘low barriers’ construction of copyright law”).

In his 2006 article, *Copyright and Feminism in Digital Media*, Professor Dan Burk laments that “feminism has contributed relatively little to discussions regarding intellectual property.”<sup>246</sup> He argues that the current copyright regime controls and suppresses various forms of feminine discourse in contemporary media, particularly writing on the internet.<sup>247</sup> These forms of discourse may lend themselves to “webs” of meaning that are “contextual, relational and personal” (which, according to the author, are female-oriented), rather than linear progressions of meaning that focus on “objectivity, individuality, and abstraction” (which, according to the author, are male-oriented).<sup>248</sup> According to Professor Burk, research has found that while men tend to communicate on the computer in “direct, terse, and even confrontative language,” women normally use rhetoric that is more polite, supportive, and personalized.<sup>249</sup> Professor Burk cites various studies that suggest computer technology is not gender-neutral and that

women might be systematically disadvantaged by either the design of the computer technology or by the social customs

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<sup>246</sup> Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519, 521 (2006).

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

<sup>248</sup> *Id.* at 523–24.

<sup>249</sup> *Id.* at 525.

attending its use, if indeed women tend to communicate differently.<sup>250</sup>

These studies argue that without “the cues of gesture, facial expression, and vocal tonal quality, women may be hampered in their preferred contextual communicative mode.”<sup>251</sup>

Citing to several feminist authors, including the controversial Carol Gilligan, Professor Burk claims:

A variety of feminist commentators have proposed that, in order to counteract patriarchal dominance, it is desirable to develop discursive approaches that emphasize interconnectedness or relational thinking. At least some commentators suggest that feminist thinking entails understanding the self in relation to, rather than in opposition to, others and the world. Under this approach, it is frequently suggested that the feminine biology of procreation, gestation, and childbearing gives rise to a sense of self that is physically, mentally, and emotionally connected to others. Thus, feminine experience may lend itself to collective and collaborative understanding, rather than to the individual and confrontational understanding that characterizes patriarchy.<sup>252</sup>

Professor Burk suggests that, in the context of digital media, the “false dichotomy” between the author of a creative work and his or her

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

<sup>251</sup> *Id.*

<sup>252</sup> Burk, *supra* note 246, at 523–24.

readers is collapsed.<sup>253</sup> The author and reader are placed “on an equal footing in a creative environment,” which, “in turn seems to nullify the dominance of authorial control in favor of shared textual interpretation, tending toward the collaborative and collective modes of understanding so important to relational feminist theory.”<sup>254</sup> Similar to previously cited scholars in this section, Professor Burk claims that the Romantic vision of the author has led to statutory provisions in the Copyright Act.<sup>255</sup> Such provisions sought a paternalistic ownership of works that were “begotten” by male authors and which “were closely tied to the notion of the heroic author.”<sup>256</sup> Professor Burk continues:

Moreover, the myth of singular paternity ignores the contributions of other, often invisible contributors to the work and raises the image of the author to iconic status. The author is thus envisioned as a discrete and solitary individual, separate from both the community that consumes the work and from the relational network of shared understandings and cultural images within which the work arises.<sup>257</sup>

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<sup>253</sup> *Id.* at 527.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 546.

<sup>256</sup> *Id.* at 545–46.

<sup>257</sup> *Id.* at 546.

In his book, *The Idea of Authorship in Copyright*, Professor Lior Zemer advocates a radical theory, even for most anti-Romantic copyright scholars: the public has the right to *every* copyrighted work.<sup>258</sup> In the preface to Professor Zemer’s book, he rationalizes his reasons for this theory:

In a world of intellectual achievers whose creations are safeguarded by robust regimes of rights of exclusion, the public is collectively isolated from and deprived of recognition of its social and cultural contribution to the process of creating intellectual properties... I argue that copyright entities represent the authorial collectivity. I advocate the authorial role of the public in the process of copyright creation. This role has been largely ignored and taken for granted.<sup>259</sup>

Professor Zemer recounts our now familiar scholarly rant against any virtues of the Romantic author, claiming that originality in copyright law is an unfounded and unwarranted concept because it views authors as “almighty creators” and denies “the contributions of external sources and the rights and interests of the general public.”<sup>260</sup> Like the copyright scholars mentioned throughout this article, Professor Zemer is similarly hostile to what he calls the well-

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<sup>258</sup> LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* vii (2007).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 73.

established practice of treating authors as idealized creators who are wise and autonomous persons

whose works are characterised [sic] as embodiments of personal qualities, rich subjectivity and distinct originality, a construct of the eighteenth century who creates original works, an original thinker.<sup>261</sup>

The book's main premise is that copyright law stands in the way of the collective contributions that supposedly exist in each manifestation of a copyrighted work, and restricts the ability of the public to secure collective interests.<sup>262</sup>

The common theme that seems to weave its way into these scholarly assertions against the Romantic notion of author is that of an elusive concept: that copyright rights, which had previously been granted through the ages to individual authors, should somehow now be conferred to the “public” (Zemer) or “other, often invisible contributors to the work” (Burk). Such credit would further elevate certain unspecific goals of achieving “the ability of the public to secure collective interests” (Zemer), or “cultural rights” (Barron), or “the many social dimensions of creativity” (Biagioli), “collaborative cultural production” and “writing” (Jaszi), and preventing “such public

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<sup>261</sup> *Id.* at 74.

<sup>262</sup> *Id.* at 78–79.

concerns as human rights violations” (Aoki). It is quite modish today for a copyright theorist to bloviate about how the modern author is killing copyright for the masses and wax sentimental about the “good old Medieval days” when the author was a common copyist himself. Yet, no scholar seems ever to seriously question any of these tenants originally proffered by Foucault and his prodigy, particularly, Foucault’s conception that the author is “a certain functional principle by which . . . one impedes the free circulation . . . and recomposition of fiction” and “the ideological figure by which one marks the manner in which we fear the proliferation of meaning.”<sup>263</sup> As Professor Seán Burke, a critic of the post-structuralist movement against the author has noted, those who ascribe to Foucault’s “dictates have been accepted unreflectively” and almost “never held up to any critical scrutiny.”<sup>264</sup> He continues, stating, “[e]ven when the question of the author is addressed somewhat more directly, when specific contentions are tendered as to why we should no longer regard the author as a

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<sup>263</sup> See Foucault, *supra* note 144.

<sup>264</sup> SEÁN BURKE, THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT AND DERRIDA 21 (1992).



relevant category of modern thought, anti-authorial positions founder on unwarrantable suppositions and fake antinomies.”<sup>265</sup>

Yet, if one is to seriously read Foucault’s works with a critical eye, I believe the most disturbing notion found in his anti-author theory is that the writings of great authors would exist without the authors themselves. One obscene application of Foucault’s work by Juan Galis-Menendez argues:

The intelligence and subtle humor emerging from the plays and poetry associated with the name ‘Shakespeare’ continue to exist, even if we decide to call that organizing intelligence by another name, ‘Elvis’ perhaps. This is because the value in the experience of the great works that we think of as ‘Shakespeare’s plays’ is not altered at all, and neither is the meeting with the genius to be found ‘in’ them, by such a change in attribution.<sup>266</sup>

In Foucault’s Marxist utopia, all associations with the author would be removed from their works and the reader would thus become empowered in the following manner:

We would no longer hear the questions that have been rehashed for so long: Who really spoke? Is it really he and not someone else? With what authenticity or originality? And what part of his deepest self did he express in his discourse? Instead there would be other

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<sup>265</sup> *Id.* at 173 (alteration added).

<sup>266</sup> Juan Galis-Menendez, *Michel Foucault and the Authorship Question*, CRITICAL VISION (July 1, 2010, 2:24 PM), <http://www.criticalvision.blogspot.com/2010/07/michel-foucault-and-authorship-question.html>.

questions, like these: What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject functions? And behind all these questions, we would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking?<sup>267</sup>

As demonstrated in the preceding analysis, there are far more scholars who engage in rhetoric that support both an anti-author and “control-criticism” attitude toward copyright law than the few who believe that ownership and control by authors leads to an atmosphere of progress.<sup>268</sup> While most of those who assert that an author’s control still matters generally concede that *limitless* control is not conducive to progress—particularly with respect to transaction costs and coordination problems<sup>269</sup>—an appreciative number of the “control-criticism” professors have bought into the more extreme Foucauldian “death of the author” mantra. This mantra would completely obliterate any form of exclusive rights to authors, thus invariably upsetting the delicate balance of rights between the author and public as dictated by the Progress Clause of the Constitution, as more particularly set forth

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<sup>267</sup> Foucault, *supra* note 144.

<sup>268</sup> R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 995 n.2, 997 n.8 (2003).

<sup>269</sup> *Id.* at 1034.

in Section III.<sup>270</sup> If our predominant worldview continues to foster this sacrifice of freedom of self-creation, it will confine us within an atmosphere in which the creation of original works of art—as contemplated by every iteration of the U.S. Copyright Act—can also no longer continue to thrive.

### III. The Societal Consequences of the Death-of-the Author Mentality

Professor Doris Estelle Long summarizes the prevalent “control-criticism” attitude as it relates to the author’s role in creativity, and illuminates the ultimate tipping of the balance:

Thus, under post-structural analysis, literature is not the result (if it ever was) of an author's individuated originality. Instead, it is the result of intertextuality—of a collaboration between author and reader that goes beyond the reader merely reading the words selected by another. The centrality of the reader’s role in the creative process, as the interpreter of textual meaning, has the potential to tip the balance between author and the public almost exclusively in favor of the public interest. Since the role of authorial consciousness is diminished under a post-structuralist view of creativity, the need for a putative author’s ability to control the economic exploitation of her work through the property rights of copyright appears similarly diminished. If all creativity, therefore, involves appropriation, then *a fortiori* appropriation is creative. Following this construct to its logical conclusion, if every appropriation is creative, then nothing is ‘not creative.’

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<sup>270</sup> LEVINE, *supra* note 18, at 25 (noting there is a “powerful strain of Silicon Valley libertarianism that rejects any form of Internet regulation—except, in most cases, when it happens to help the technology business itself”).

Ultimately, creativity itself becomes a meaningless construct.<sup>271</sup>

Indeed, the natural end result of this collective mindset toward the creative process is remarkably reminiscent of the nihilistic society predicted by Kierkegaard which is characterized by

characterless envy [that] does not understand that excellence is excellence, does not understand that it is itself a negative acknowledgement of excellence but wants to degrade it, minimize it, until it actually is no longer excellence.<sup>272</sup>

In my supposition, such an unfortunate and sad society would have the individual author abnegated to the needs of the specific reader and the general public, and appropriation would be celebrated over originality. When prominent intellectual property professors make statements such as

public domain scholars . . . such as Professors Lawrence Lessig . . . and others have shown in a variety of ways the appropriation of preexisting knowledge and works may, more often than not, serve as the foundation or components for more creative intellectual products,<sup>273</sup>

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<sup>271</sup> Long, *supra* note 132, at 1189, 1193 (stating in the latter page that “[g]iven the personal nature of many creative acts, any diminution in authorial control must be carefully circumscribed and must include recognition of the personality rights of the artist to assure that creation is not discouraged”).

<sup>272</sup> See KIERKEGAARD, *supra* note 65, at 83–84.

<sup>273</sup> Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 732–33 (2007) [hereinafter *Distributive and Syncretic Motives*].

we can rest assured that the collectivist siren song is drowning any individual voice of the author concept that remains in copyright scholarship.

Notwithstanding the contemporary atmosphere of group affection that has left copyright scholars so committed to killing off the individual author, there exist some skeptics of the free information movement who have observed that removing all obstacles of use and hindering rights of authors leads to a culture that tolerates mass piracy and endangers the very creation of the raw materials needed for the extolled “remix culture” of Professor Lessig’s dreams.<sup>274</sup> When the public domain, serving as a created “commons,” is “ultimately championed as a source of creative endeavor whose protection is nearly more important than those of the original author,”<sup>275</sup> and when amateurism is celebrated over experience, then we know we are about to embark upon a dystopian society that will “foretell the death of culture.”<sup>276</sup> This dystopia would be similar to the one in which Howard Roark and other creative innovators in Ayn Rand’s *The Fountainhead* are besmirched and eventually done away with, leaving

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<sup>274</sup> See LEVINE, *supra* note 18, at 92–93.

<sup>275</sup> Long, *supra* note 132, at 1185–186.

<sup>276</sup> ANDREW KEEN, *THE CULT OF THE AMATEUR* 57 (2007).

nothing but the products of the past to be commonly recycled.<sup>277</sup>

Professor Katyal and others glorify “the creative impulse that inspires the appropriation and reuse of various works,”<sup>278</sup> (in other words, acts of copyright infringement). Further, she panegyricizes ideologies insisting that

the genius of appropriation art lies . . . in its critique of the very notion of originality itself. . . . [It] acts as a transgressive force that destabilizes the very pillars of copyright, originality, and romantic authorship, and leaves nothing—no underlying ideology—in its stead.<sup>279</sup>

Such conceptions will result in the death of hundreds of years of copyright jurisprudence, much like the death of Nietzsche’s “god” in *Thus Spoke Zarathustra*. Our world will neither be wiser, more evolved, nor advanced. In other words, the metaphoric “death of the author” inevitably means the death of progress, as exemplified by the re-creation and regurgitation of works that will invariably become “common.” It will not matter whether we cloak such acts with catchy and modish phrases, such as “appropriation art,” whatever that elusive term is supposed to mean.

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<sup>277</sup> See LUSKIN & GRETA, *supra* note 114, at 17–18.

<sup>278</sup> Katyal, *supra* note 224, at 538.

<sup>279</sup> *Id.* at 544.

Professor Tuttle explains that Ortega y Gasset perceived this phenomenon as the development of a standardless culture of barbarism, characterized by a shutting down of the “thinking aspect of the self-creation of human life” in which “the mass is shut up within itself and rests content with the stock of ideas it already possesses.”<sup>280</sup>

While the mass is under a self-idealized notion that it possesses “ideas,” such ideas are not genuine.<sup>281</sup> Professor Tuttle continues:

There can be neither ideas nor culture where standards are absent. All intellectual and scientific issues must in principle be referred to tribunals of some sort. The lack of such qualified agencies Ortega designated as barbarism in a culture.<sup>282</sup>

In this culture, reason is abandoned for public opinion; judgment and discrimination are replaced with action and group desires.<sup>283</sup> A “hurricane of farcicality” rages, and “[h]ardly anyone offers any resistance to the superficial whirlwinds that arise in art, in ideas, in politics, or in social usages,” resulting in a faulty “flourishing of

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<sup>280</sup> TUTTLE, *supra* note 57, at 154.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

rhetoric” that is not questioned, reasoned, or examined.<sup>284</sup> As a result, many copyright scholars advocate that non-owners of intellectual products will engage in lawlessness, thus “exposing existing [intellectual property] entitlements to a degree of instability” in which these “expected entitlements of an owner can be tested against other nonowner interests,”<sup>285</sup> eventually leading to a copyright-less society, or at the very least, one in which many scholars dream there will be increased government-sponsored redistribution of property interests.<sup>286</sup>

Peter Schwartz, in the introduction to *PRIMITIVE* by Ayn Rand, refers to this phenomenon as a desire in which the “multiculturalists” wish to return to “primitive” concepts of membership in a collective society in which the “tribe’s edicts thus become [society’s] unquestioned absolutes, and the tribe’s welfare becomes [society’s] fundamental value.”<sup>287</sup> In this state of anti-industrialist affairs, there

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<sup>284</sup> ORTEGA Y GASSET, *supra* note 29, at 105 (alteration added).

<sup>285</sup> EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 45 (2010).

<sup>286</sup> *See id.* at 147 (stating that “increased governmental redistribution will tend to reduce the need for reliance on forced transfers and on expensive and unreliable procedural mechanisms for weighing the justifications for such transfers after the fact”).

<sup>287</sup> Peter Schwartz, *Introduction* to RAND, *PRIMITIVE*, *supra* note 28, at viii–ix (alteration added).



exists “an ongoing assault on the rational mind and its products.”<sup>288</sup>

Rand notes that the right to property, however, is the only proper implementation of man’s right to life since, and “[w]ithout property rights, no other rights are possible.”<sup>289</sup> Rand understood that the “right” to property is not an entitlement to the *object* in which that property sits; it is not “a guarantee that a man *will* earn any property, but only a guarantee that he will own it if he earns it.”<sup>290</sup> In other words, “[i]t is the right to gain, to keep, to use and to dispose of material values.”<sup>291</sup>

Professor Tuttle asserts that, years earlier, Kierkegaard generally explained a similar experience as the “leveling tendency,” or the process by which the masses eventually destroy social cohesion and individual identity, replacing passion, leadership, and heroic self-action with a society that “rejects any individual responsibility or goals apart from group ideas.”<sup>292</sup> Kierkegaard attributed the genesis of this crowd mentality to philosopher Georg Wilhelm Freidrich Hegel (1770-

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<sup>288</sup> *Id.* at viii.

<sup>289</sup> See SELFISHNESS, *supra* note 99, at 194.

<sup>290</sup> *Id.* (emphasis in original).

<sup>291</sup> *Id.*

<sup>292</sup> TUTTLE, *supra* note 57, at 28–30 (discussing *Two Ages* by Søren Kierkegaard).

1831).<sup>293</sup> Hegel’s writings revealed his conviction that humans are social beings whose deepest nature is found not in their individualism or autonomy, but in their relation to others and their need to conform to and associate with the state.<sup>294</sup> Throughout his life and writings, although Kierkegaard admired Hegel in many respects, he nonetheless found many grounds for his “distrust” of various Hegelian principles, most specifically the notion that romantic individualism must be replaced with “social usage” and “identification with the state.”<sup>295</sup> According to Professor Tuttle, Kierkegaard defined leveling as “the person’s despair over the attainment of individuality, the loss of passion and inwardness, and the devaluation of the human personality through abstract equality.”<sup>296</sup> These factors pull the individual down to the “neutral and criterion-less station of the crowd,” which Professor Tuttle asserts results in nihilism and despair because “nobody is of a higher or lower station than one another.”<sup>297</sup> Eerily prophetic, Kierkegaard predicted that pervasive nihilism—that would inevitably

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<sup>293</sup> *Id.* at 17.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 18.

<sup>296</sup> *Id.* at 35.

<sup>297</sup> *Id.*

result from leveling—would occur when, as Professor Tuttle states, “the crowd pretends to take on individual characteristics” by drawing the individual into “public ‘chatter’ which obscures the difference between public and private, social and individual.”<sup>298</sup>

Ortega y Gasset similarly portends that the state of mind of the masses will be marked by a decisive “ignoring all obligations, and in feeling itself, without the slightest notion why, possessed of unlimited rights.”<sup>299</sup> A revolution-minded atmosphere will prevail which identifies with “apparent enthusiasm for the manual worker, for the afflicted and for social justice,” all of which *actually* serve as a “mask to facilitate the refusal of all obligations, such as courtesy, truthfulness and, above all, respect or esteem for superior individuals.”<sup>300</sup> Modern groups that adhere to such a lack of any moral code

win for themselves the right to despise intelligence and to avoid paying it any tribute . . . they flatter the mass-man, by

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<sup>298</sup> TUTTLE, *supra* note 57, at 34. See also KEEN, *supra* note 276, at 3 (describing the current social media craze with similar disdain and characterizing it as a “monkey experiment,” in which “[w]e are blogging with monkeylike shamelessness about our private lives, our sex lives, our dream lives, our lack of lives, our Second Lives” all of which has the effect of “collectively corrupting and confusing popular opinion about everything from politics, to commerce, to arts and culture”).

<sup>299</sup> ORTEGA Y GASSET, *supra* note 29, at 188.

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

trampling on everything that appeared to be above the common level.<sup>301</sup>

With somber prescience, Ortega y Gasset contends that the modern industrial era has converted the man of science and novelty into a “social pariah” or vertical invader—one who only takes from the public domain of materials authored by those before him without extending his gratitude for the instruments or the authors who make the materials possible in the first place.<sup>302</sup> This “self-satisfied” man finds himself in a civilized age of plentitude, surrounded by beautiful art, marvelous instruments of science, and other “comfortable privileges,” which have been created by *others*.<sup>303</sup> Nonetheless, he believes he is entitled to such privileges, can behave as he wishes, and can do what he jolly well likes with those privileges.<sup>304</sup> This “spoiled child . . . behaves exclusively as a mere heir” of civilization and is entirely “ignorant of how difficult it is to invent those medicines and those instruments and to assure their production in the future.”<sup>305</sup> This

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<sup>301</sup> *Id.*

<sup>302</sup> *See id.* at 86–87.

<sup>303</sup> *See id.* at 98–102.

<sup>304</sup> *Id.* at 102.

<sup>305</sup> ORTEGA Y GASSET, *supra* note 28, at 98–102.

state of mind in which man “is content to use his motor-car or buy his tube of aspirin—without the slightest intimate solidarity with the future of science, of civilization,” terrified Ortega y Gasset in the sense that it inevitably would lead to an “emergent barbarism.”<sup>306</sup> Professor Tuttle eloquently summarized Ortega y Gasset’s notion of “emergent barbarism:”

[T]he perfections of scientific industrialism and liberal democracy caused the masses to believe that their system was not organized and maintained by human excellence, but as a ‘natural system,’ free as the air. This has led to a contradictory situation, for the masses are always concerned with their material well-being, but at the same time they remain alien to or ignorant of the causes of that well-being. The level of civilization that they enjoy can be maintained only by effort and excellence. But the masses have come to believe that their authentic role is simply to demand the benefits of the nineteenth and twentieth centuries as though they were natural rights. In this sense, the masses remain in contradiction to the conditions which allowed them to come into being. To the masses, everything seems now permitted, even demandable. . . . Everything seems to serve them as a right of consumption, without requirements or duties on the part of the recipients.<sup>307</sup>

How is this “emergent barbarism,” or leveling, accomplished?

Kierkegaard explains that individuals and small groups may contribute to the leveling process but, by and large, “leveling is an abstract power

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<sup>306</sup> *Id.* at 87.

<sup>307</sup> TUTTLE, *supra* note 57, at 149.

and its abstraction’s victory over individuals” in which the ultimate goal is “mathematical equality” and the individual is stifled, impeded, and debased.<sup>308</sup> Leveling occurs when ideas are so fragmented and abstractly defined, and when there is continued “reflective opposition” by those observing reality who merely repeat observations, insisting that they know what needs to be done, yet taking no understandable or concrete action to achieve results.<sup>309</sup> Ortega y Gasset claims that it is not that the masses wish to overthrow an antiqued set of moral or legal codes in exchange for a new and better one, but that the man of the masses aspires “to live without conforming to any moral code.”<sup>310</sup>

With respect to copyright law, we have observed how contemporary commentators are infusing collectivist, mass-minded ideologies into scholarly pieces that advocate the overthrow of moral codes that govern concepts such as individual originality and authorship. Instead, these authors advocate an amorphous, ill-defined, group-based creativity that would replace the solitary, individuated creative process that has resulted in some of the most creative and

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<sup>308</sup> KIERKEGAARD, *supra* note 65, at 84–85.

<sup>309</sup> *Id.* at 73–74. Leveling is characterized by a lack of passionate relation of ideas leading to a “negative unity [which] creates a reflective opposition that toys for a moment with the unreal prospect and then resorts to the brilliant equivocation that the smartest thing has been done, after all, by doing nothing.” *Id.* at 69.

<sup>310</sup> ORTEGA Y GASSET, *supra* note 29, at 187.

meaningful works that have ever been penned by mankind. However, never do they seem to proffer rational reasons why collective creation is better and, even more importantly, exactly how our current system impedes creativity and progress. Ortega y Gasset and Nietzsche predicted this doomed result of the coming of the masses and the rise of nihilism and “ressentiment”<sup>311</sup> when the mass will demand all rights to all things and bellow that there are no laws or moral codes to deal with circumstances that threaten it, “even up to the point of dismantling the socio-economic order in which it resides.”<sup>312</sup> “Ressentiment,” according to Rand, is the chilling reality when the masses eventually succumb to “envy with no ambition to do better, just the desire to tear down.”<sup>313</sup> In *Return of the Primitive*, Rand brilliantly distinguishes between *individual* civil disobedience and *mass* disobedience:

Civil disobedience may be justifiable, in some cases, when and if an individual disobeys a law in order to bring an issue to court, as a test case. Such an action involves respect for legality and a protest directed only at a particular law which the individual seeks an opportunity to prove to be unjust. . . .

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<sup>311</sup> See TUTTLE, *supra* note 57, at 161.

<sup>312</sup> *Id.* at 152.

<sup>313</sup> MERRILL, *supra* note 100, at 26.

But there is no justification, in a civilized society, for the kind of mass civil disobedience that involves the violation of the rights of others—regardless of whether the demonstrators’ goal is good or evil. The end does *not* justify the means. No one’s rights can be secured by the violation of the rights of others. Mass disobedience is an assault on the concept of rights: it is a mob’s defiance of legality as such.

The forcible occupation of another man’s property . . . is so blatant a violation of rights that an attempt to justify it becomes an abrogation of morality.<sup>314</sup>

Such mass disobedience and mob-mindedness is reflected today by the manner in which copyrightable works are treated as free objects of trade, particularly when they are disseminated and available on the Internet free of charge. Famous essayist and cartoonist Tim Kreider recently lamented in a *New York Times* article how modern technology has created a social atmosphere in which the economic value of authors’ products has diminished practically to nothing.<sup>315</sup> While the bulk of the article is a humorous plea to upcoming artists to avoid the temptation to give their work away for free despite the ever-elusive promise of the “valuable currency of exposure,” the following excerpt captures a doleful commentary of the modern-day author blues:

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<sup>314</sup> PRIMITIVE, *supra* note 28, at 26 (emphasis in original).

<sup>315</sup> See Tim Kreider, *Slaves of the Internet, Unite!*, N.Y. TIMES (Oct. 26, 2013), [http://www.nytimes.com/2013/10/27/opinion/sunday/slaves-of-the-internet-unite.html?pagewanted=1&\\_r=3](http://www.nytimes.com/2013/10/27/opinion/sunday/slaves-of-the-internet-unite.html?pagewanted=1&_r=3).



I now contribute to some of the most prestigious online publications in the English-speaking world, for which I am paid the same amount as, if not less than, I was paid by my local alternative weekly when I sold my first piece of writing for print in 1989. More recently, I had the essay equivalent of a hit single—endlessly linked to, forwarded and reposted. A friend of mine joked, wistfully, ‘If you had a dime for every time someone posted that . . .’ Calculating the theoretical sum of those dimes, it didn’t seem all that funny.

. . .

Practicalities aside, money is also how our culture defines value, and being told that what you do is of no (\$0.00) value to the society you live in is, frankly, demoralizing. Even sort of insulting. And of course when you live in a culture that treats your work as frivolous you can’t help but internalize some of that devaluation and think of yourself as something less than a bona fide grown-up.<sup>316</sup>

Although we are routinely presented with figures that denote the vast economic losses, which authors and owners of copyrights have sustained in the wake of the digital age, this passage bluntly captures the psychological effects of author denigration. The article assures readers that the tempestuousness society predicted by existentialist philosophers has made its way into our innermost societal thoughts about what it means to be an author.

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

Almost a decade ago, Professor Long predicted both the continued devaluation of creative works and the disparagement of the role of author.<sup>317</sup> She claimed that:

Over time, copyright in the Digital Age has become the villain of free speech, whose only value may be a limited compensation right designed to free creative works from the shackles of authorial control. The reproductive culture of the Digital Age has both profited from, and fueled, this spiraling descent.<sup>318</sup>

Indeed, as Levine duly notes, “[i]t’s never been easier to distribute creative work. At the same time, it’s never been harder to get paid for it.”<sup>319</sup> Ayn Rand well understood that this type of altruistic, second-handed notion would ultimately lead to the erosion of all truly creative works:

Men have been taught that the highest virtue is not to achieve, but to give. Yet one cannot give that which has not yet been created. Creation comes before distribution—or there will be nothing to distribute. The need of the creator comes before the need of any possible beneficiary. Yet we are taught to admire the second-hander who dispenses gifts he has not produced above the man who made the gifts possible. We praise an act of charity. We shrug at an act of achievement.<sup>320</sup>

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<sup>317</sup> Long, *supra* note 132, at 1186.

<sup>318</sup> *Id.*

<sup>319</sup> LEVINE, *supra* note 18, at 252.

<sup>320</sup> AYN RAND, FOR THE NEW INTELLECTUAL 80 (1961) [hereinafter INTELLECTUAL].

Professor David Kelley provides a summary of Rand’s view of “productive achievement” and the core of her ethic:

Since achievement is the product of reason, rationality is a virtue. Since reason is a faculty of the individual, it requires independence. Since achievement is the creation of value, it requires a valuer whose primary purpose lies in the world, not in other people. And if we value what is created, then we must accord equal value to the creator. We must honor the self—the thing in us that thinks and values and makes decisions, the Prime Mover within us, the fountainhead of our actions—as a thing never to be sacrificed or subordinated.<sup>321</sup>

Although the present-day lure of the “New Groupthink, ” which will be discussed below, has held its sway over many authors who openly praise the crowd over the individual, as will be discussed in the next section, there is hope in a minority of authors who still adhere to principles of individual achievement.

#### **IV. Breathing Life Back into the Author**

A few lone contemporary social critics have, like Rand and the existentialist philosophers, recognized the danger of the unchallenged praise of the crowd in today’s digital world. In his book, *The Cult of*

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<sup>321</sup> David Kelley, *The Code of the Creator*, THE ATLAS SOCIETY, available at <http://www.atlassociety.org/sites/default/files/codeofcreator.pdf>.

*the Amateur*, Andrew Keen terms the phenomenon the “myopia of the digital mob,” which he claims is

misinforming our young people, corroding our tradition of physical civic participation, endangering our individual rights to privacy, and corrupting our sense of personal responsibility and accountability.<sup>322</sup>

However, Keen believes, like certain existentialist philosophers, that the crowd is very often “not wise.”<sup>323</sup> He also understands that the democratization of the Internet threatens not just copyright laws but also the very ideas of authorship and intellectual property.<sup>324</sup> Keen laments the change in societal attitude about authorship, noting that the “audience and the author are increasingly indistinguishable,”<sup>325</sup> as

[t]he value once placed on a book by a great author is being challenged by the dream of a collective hyperlinked community of authors who endlessly annotate and revise it, forever conversing with each other in a never-ending loop of self-references.<sup>326</sup>

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<sup>322</sup> KEEN, *supra* note 276, at xiv–xv.

<sup>323</sup> Michiko Kakutani, *The Cult of the Amateur*, N. Y. TIMES (Jun. 29, 2007), [http://www.nytimes.com/2007/06/29/books/29book.html?\\_r=0](http://www.nytimes.com/2007/06/29/books/29book.html?_r=0).

<sup>324</sup> KEEN, *supra* note 276, at 25 (observing the very premise of this article that “the idea of original authorship and intellectual property has been seriously compromised” and “has resulted in a troubling new permissiveness about intellectual property”).

<sup>325</sup> *Id.* at 23.

He notes that the frightening result of this phenomenon is the inevitable “decline of the quality and reliability of the information we receive.”<sup>327</sup> According to Keen, the killing of the author and the intellectual property as promulgated by copyright academicians “foretells the death of culture.”<sup>328</sup>

Likewise, Donald L. Luskin and Andrew Greta recently authored the book, *I Am John Galt: Today’s Heroic Innovators Building the World and the Villainous Parasites Destroying It*, in which they dedicate entire chapters to modern heroic innovators and creators, such as Steve Jobs, Bill Gates, and John Allison, and compare them to heroic characters in Ayn Rand’s literature.<sup>329</sup> By celebrating the characters in Rand’s various novels as “individualists, innovators, and iconoclasts” who “are achievers—in business, in the arts, and in love,” the aim of Luskin and Greta is to share with the courageous reader—who in today’s world, strives to emulate such rare traits, as portrayed by such characters—a philosophy that “greatness is

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<sup>326</sup> *Id.* at 25 (specifically referring to *New York Times* reporter Kevin Kelly who envisions “an infinitely interconnected media in which all the world’s books are digitally scanned and linked together,” which he terms as a “liquid version,” so that it is continually edited and annotated by amateurs).

<sup>327</sup> *Id.* at 27.

<sup>328</sup> *Id.* at 57.

<sup>329</sup> See generally LUSKIN & GRETA, *supra* note 114.

to be celebrated, not feared.”<sup>330</sup> Noting that “[a]ll value distills down to the individual,” Luskin and Greta also dedicate chapters to modern-day collectivists including Paul Krugman, Barney Frank, and Angelo Mozilo, who mirror traits of Randian villains for the purpose of showing that

any time people come together in a civilization, there are those who seek to profit by taking the production of others rather than by freely and voluntarily trading the products of their own efforts with others in fair exchange.<sup>331</sup>

The raging tide against the lone creator and solo author, thankfully, is beginning to turn, if not so readily in the legal academic field, then in other disciplines. *New York Times* author and former Wall Street lawyer Susan Cain bemoaned recently that our culture is enthralled with a notion she terms as the “New Groupthink,” which insists that the best creations and achievements are borne from working in teams or groups, to the point where “[I]one geniuses are out . . . Collaboration is in.”<sup>332</sup> In this article, Cain discusses the ironic duality of human nature—“we love and need one another, yet we crave

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<sup>330</sup> *Id.* at 2–3.

<sup>331</sup> *Id.* at viii, 9.

<sup>332</sup> Susan Cain, *The Rise of the New Groupthink*, N.Y. TIMES (Jan. 13, 2012), [http://www.nytimes.com/2012/01/15/opinion/sunday/the-rise-of-the-new-groupthink.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/15/opinion/sunday/the-rise-of-the-new-groupthink.html?pagewanted=all&_r=0).

privacy and autonomy.”<sup>333</sup> Citing the research and findings of prominent psychologists such as Mihaly Csikszentmihalyi, Gregory Feist, and Hans Eysenck, Cain posits that, contrary to the New Groupthink, those who work in solitude and privacy are much more creative and innovative, and are more able to tap into the “quiet part of the creative process.”<sup>334</sup> In her thoughtful and well-researched book, *Quiet: The Power of Introverts in a World That Can’t Stop Talking*, she discusses various advocates of the New Groupthink, most notably author Warren Bennis who “heralds the rise of the ‘Great Group’ and ‘The End of the Great Man.’”<sup>335</sup>

Nietzsche trumpets a proclamation similar to Cain’s that

[w]here solitude ceases the market place begins; and where the market place begins the noise of the great actors and the buzzing of the poisonous flies begins too.<sup>336</sup>

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.* See also GEOFF COLVIN, TALENT IS OVERRATED: WHAT REALLY SEPARATES WORLD-CLASS PERFORMERS FROM EVERYBODY ELSE 58 (2008) (citing a study in which groups of violinists were asked to rate the importance of various music and non-music related activities to their progress in making them better musicians; “solitary practice was rated number one with a bullet”).

<sup>335</sup> SUSAN CAIN, QUIET: THE POWER OF INTROVERTS IN A WORLD THAT CAN’T STOP TALKING 75 (2012) (referencing Warren G. Bennis and Patricia Ward Biederman, ORGANIZING GENIUS: THE SECRETS OF CREATIVE COLLABORATION 1–2 (1997) (claiming “[d]espite the evidence to the contrary, we still tend to think of achievement in terms of the Great Man or Great Woman, instead of the Great Group”).

<sup>336</sup> KAUFMANN, *supra* note 94, at 163.

Kierkegaard similarly postulates that in order to ameliorate the incessant, meaningless public “chattering” that is attendant to the process of leveling, individuals must be “turned inward in quiet contentment, in inner satisfaction.”<sup>337</sup> Ortega y Gasset would surely agree, as he believed that autonomy is defined as an “inward sense of life.”<sup>338</sup> So, too, would Mary Wallstonecraft, a true pioneer of her day, suggest, that “isolation is the only way of generating originality,” even while many of her contemporary female writers question such a notion.<sup>339</sup> Even in the legal field, there remains a handful of copyright academicians who understand that “[t]he creative act must be respected and the author's relationship to her work honored in order to encourage creative people to engage in creative acts.”<sup>340</sup>

While it is true that corporate entities own and control works on a grand scale in today's society, the process of creation—as

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<sup>337</sup> SØREN KIERKEGAARD, *THE ESSENTIAL KIERKEGAARD* 265 (2000).

<sup>338</sup> PEDRO BLAS GONZALEZ, *ORTEGA'S THE REVOLT OF THE MASSES AND THE TRIUMPH OF THE NEW MAN* 4 (2007). See also JOSÉ ORTEGA Y GASSET, *MAN AND PEOPLE* 16 (1963) (claiming “[a]lmost all the world is in tumult, is beside itself, and when man is beside himself he loses his most essential attribute: the possibility of meditating, or withdrawing into himself in order to come to terms with himself and define what it is that he believes, what he truly esteems and what he truly detests. Being beside himself bemuses him, blinds him, forces him to act mechanically in a frenetic somnambulism”).

<sup>339</sup> PRICE, *supra* note 180, at 49.

<sup>340</sup> Long, *supra* note 132, at 1184.



envisioned by the Founding Fathers—remains an extremely individual, private, and solitary endeavor on the part of the author, the effects of which have both personal and social significance.<sup>341</sup> Yet this alternate and very important view is, at best, increasingly left out of copyright scholarship and, at worst, reviled and laughed at. French philosopher and social theorist Roland Barthes has contributed to the disparagement of the author in several of his works, including *Death of the Author*, in which he claims that to give a text to its author would pose a limit on it by not appropriately focusing on the reader; a text's unity, therefore, lies not in its origin but in its destination, or with the reader.<sup>342</sup> Barthes believes that:

We are now beginning to be the dupes no longer of such antiphrases, by which our society proudly champions precisely what it dismisses, ignores, smothers or destroys; we know that to restore to writing its future, we must reverse its myth: the birth of the reader must be ransomed by the death of the Author.<sup>343</sup>

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<sup>341</sup> Michael Brandon Lopez, *Creating the National Wealth: Authorship, Copyright, and Literary Contracts*, 88 N.D. L. REV. 161, 178–79 (2012) (asserting that “the process by which poets and writers arrive at their literary creations is an arduous task, requiring the author to go into himself and recover from the depths of his psyche the mappings of a novel, poem, or play that examines, mirrors, and questions the contours of society” and also citing Coleridge as an example of a poet who has instilled national pride and worldly influence through the dissemination of his works, claiming that “[t]he author stands as an individual in relation to the entire community, and through the creative process is able to distill and unfold the spectrum of society, its errors, failings, pathos, and possibilities”).

<sup>342</sup> ROLAND BARTHES, *DEATH OF THE AUTHOR* 6 (Richard Howard trans., 1968), available at [http://www.tbook.constantvzw.org/wp-content/death\\_authorbarthes.pdf](http://www.tbook.constantvzw.org/wp-content/death_authorbarthes.pdf).

As strong as the scholarly voices are that echo and re-echo the chant against rights and protections for creative authors, most lawyers, legislators, and judges in copyright decisions have, for the most part not (yet) joined the anti-author bluster.<sup>344</sup> For example, in *Nash v.*

*CBS*,<sup>345</sup> the Seventh Circuit held:

[T]o deny authors all reward for the value their labors contribute to the works of others *also* will lead to inefficiently little writing, just as surely as excessively broad rights will do. The prospect of reward is an important stimulus for thinking and writing, especially for persons such as Nash who are full-time authors.<sup>346</sup>

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<sup>343</sup> *Id.*

<sup>344</sup> *Contemporary Copyright and Collective Creativity*, *supra* note 136, at 299–302 (lamenting the fact that “even as scholars in literary studies elaborate a far-reaching critique of the received Romantic concept of ‘authorship,’” recent copyright decisions continue to embrace the rights of authors). *See also* MARTHA WOODMANSEE, *Introduction to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 9 (Martha Woodmansee & Peter Jaszi eds., 1994) (explaining that questions of authorship originally posed by Michel Foucault and carried forward by copyright scholars “have gone largely unattended by theorists of copyright law, to say nothing of practitioners or, most critically, judges and legislators”). *See* Hughes, *supra* note 222, at 96 (relying on assertions made by Aoki and further positing that “it is ironic that while some scholars have been marshaling European literary criticism against ‘authors,’ other scholars and lawmakers have been importing European notions of ‘moral rights’—legal privileges which elevate the importance of the individual who produces intellectual works. Declaring the end of the romantic ‘author’ and thoughtfully calling for programs to reshape the law without this nuisance concept seems just a little out of touch”). *See also* Timothy B. McCormick, *Copyright Infringement, the Free Press and “Defending” the American Constitution*, SEATTLE PI (May 23, 2011), <http://blog.seattlepi.com/timothymccormack/2011/05/23/copyright-infringement-the-free-press-and-%E2%80%9Cdefending%E2%80%9D-the-american-constitution/> (acknowledging that “[w]hen we don’t protect the labor of our reporters, our artists, and even our doctors and our lawyers, we erode the foundations of our society”).

<sup>345</sup> 899 F.2d 1537 (7th Cir. 1990) (emphasis in original).

<sup>346</sup> *Id.* at 1541.

In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>347</sup> the

Supreme Court held:

[T]he limited grant [in the Progress Clause] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.<sup>348</sup>

The following year, in *Harper & Row Publishers, Inc. v. Nation*

*Enterprises*,<sup>349</sup> it also claimed that

copyright assures those who write and publish . . . that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment.<sup>350</sup>

In earlier cases, the Supreme Court seemed to acknowledge that the benefits provided to the public were ancillary byproducts that were

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<sup>347</sup> 464 U.S. 417 (1984).

<sup>348</sup> *Id.* at 429.

<sup>349</sup> 471 U.S. 539 (1985).

<sup>350</sup> *Id.* at 556–57.

bestowed *from* the primary work of the authors.<sup>351</sup> For example, in

*Fox Film Corp. v. Doyal*,<sup>352</sup> Chief Justice Hughes wrote:

The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public *from* the labors of authors. A copyright, like a patent, is ‘at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.’<sup>353</sup>

A few years later, the Court reiterated this sentiment in *Washington*

*Publ’g Co. v. Pearson*.<sup>354</sup>

The [Copyright] Act of 1909 . . . was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; ‘to afford greater encouragement to the production of literary works of lasting benefit to the world.’<sup>355</sup>

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<sup>351</sup> See *Washington Publ’g Co. v. Pearson*, 306 U.S. 30 (1939); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932).

<sup>352</sup> 286 U.S. 123 (1932).

<sup>353</sup> *Id.* at 127–28 (quoting *Kendall v. Winsor*, 62 U.S. 322, 328 (1858)) (emphasis added).

<sup>354</sup> 306 U.S. 30 (1939).

<sup>355</sup> *Id.* at 36. *But see* *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (summarily stating “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration”). Though the court never cited to legislative authority or case precedent, this statement has been quoted and adopted in future cases to the point where it is no longer questioned. See generally Samsung Shi, *The Place of Creativity in Copyright Law* 13–14 (2008), available at <http://eprints.qut.edu.au/15326/1/15326.pdf> (noting that “[i]t has been reiterated for centuries in many cases and laws” that the primary purpose of copyright lies in conferring benefits of the works to the public).

Likewise, a small minority of legal academicians see value in the author effect and understand that removing control of works that are created by authors may very well lead to a propensity not to create at all.<sup>356</sup> Professor Long claims that

[g]iven the personal nature of many creative acts, any diminution in authorial control must be carefully circumscribed and must include recognition of the personality rights of the artist to assure that creation is not discouraged.<sup>357</sup>

Professor Merges laments that most copyright scholars today do not view individual authorial freedom and ownership as the primary purpose of copyright and other intellectual property law; instead, it is “strictly instrumental, a means to the ultimate end of net social welfare or the like.”<sup>358</sup> He claims that, while the current body of evidence is “maddeningly inconclusive” as to whether society needs or benefits from intellectual property laws, it nevertheless supports “a fairly solid case in favor of IP protection.”<sup>359</sup> Professor Ginsburg notes that, in spite of all the criticisms of copyright laws that proliferate, “[t]he System still Works,” opining that

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<sup>356</sup> See Long, *supra* note 132, at 1192 (citing the example of Bruce Connor, a well-known collage artist, who decided to stop creating his art “because he feared loss of control over his work and identity”).

<sup>357</sup> *Id.*

<sup>358</sup> MERGES, *supra* note 25, at 17.

<sup>359</sup> *Id.* at 3.

over the last several years, copyright law has often appropriately reached out to address new problems, many of them prompted by new technologies, in a way that sensitively endeavors to balance multiple interests.<sup>360</sup>

Luckily, the writings of non-legal commentators on this subject have likewise not caught on terribly well in their fields. For instance, Barthes’s *Death of the Author* “has seldom provoked more than derisory dismissal from its opponents.”<sup>361</sup> Indeed, many readers have been convinced that—even taken on the level of its own premises—‘The Death of the Author’ is quite *wrong* and yet have been stymied by their inability to say quite why.<sup>362</sup>

## V. Conclusion

Like it or not, “[a]ll men are not created equal in talent.”<sup>363</sup>

Whereas the Copyright Act will protect any potential author whose work meets the standards of originality, “there is no question that not all creative works are equal.”<sup>364</sup> As such, “[o]ne has to realise [sic] that there are some people who were or are infinitely better at doing

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<sup>360</sup> Ginsburg, *supra* note 21, at 67.

<sup>361</sup> BURKE, *supra* note 264, at 21.

<sup>362</sup> *Id.* at 21–22. See also *Recovering Collectivity*, *supra* note 135, at 291.

<sup>363</sup> Sterk, *supra* note 3, at 1236.

<sup>364</sup> Long, *supra* note 132, at 1181.

something than oneself, and these people will continue to exist.”<sup>365</sup>

While social commentators like Mill, and even renowned psychologists like Abraham Maslow and Carl Jung, have been able to make such obvious pronouncements in the past,<sup>366</sup> today those who blow the trumpet of individuality and praise true talent are accused of being “elitist” when they say things such as “[t]alent always has been, and will always be, scarce.”<sup>367</sup> Merrill believes that one of the reasons why Ayn Rand’s philosophy is so despised, particularly in academia, is due to the articulate manner in which Rand so unabashedly “shows that the extraordinary achievements of a few make our lives better,” which is discomforting to people who “don’t like the idea that others are better than they are, nor, that they owe such a debt.”<sup>368</sup>

Recognizing that his views on this issue are at vast odds with the

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<sup>365</sup> See RAHMATIAN, *supra* note 185, at 199.

<sup>366</sup> See MILL, *supra* note 111, at 111 (positing that “[p]ersons of genius, it is tru[e], are, and are always likely to be, a small minority”). See also ABRAHAM H. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* 89 (1971) (claiming that when humans who create are psychologically “healthy” they are able to “gracefully” synthesize what he terms “primary” (or logical) and “secondary” (or emotional) processes of the conscious and unconscious mind and admitting that while it is certainly *possible* for all humans to so create, “it is not very common”). See also ANTHONY STORR, *THE ESSENTIAL JUNG* 20 (1983) (synthesizing Jung’s beliefs that only “exceptional individuals” are able to reach the “peaks of individual development,” and that they only can hit the peak of “individuation,” or “parting company with the crowd,” when “they are impelled by their inner nature to seek their own path”).

<sup>367</sup> KEEN, *supra* note 276, at xiii.

<sup>368</sup> MERRILL, *supra* note 100, at 26.

“democratization” trend, Professor Merges nonetheless bravely touts his belief that some works are simply “more original than others” when he states:

I have implied strongly that there is such a thing as a ‘creative professional,’ that the care and feeding of this class of people is an essential—maybe *the* essential—function of the IP system, and that perhaps not everyone who wants to work creatively can attain membership in this class. Bound up with my discussion of extrinsic motivation, or the incentive effects of IP, in other words, is a sense of hierarchy, the notion of a creative elite. In short, I do believe that some creative works really do reflect higher quality than others.<sup>369</sup>

According to Professor Tuttle, Kierkegaard believed that all human beings are inherently *unequal*, and the most negative feature of the modern phenomenon of societal leveling is that a false “crowd of ‘equals’” is created “where nobody is of a higher or lower station than one another.”<sup>370</sup> On a moral and existential level, the result of the substitution of the crowd for the individual leads to the unfortunate situation wherein man is left “seeking salvation through social or political means.”<sup>371</sup> On an intellectual level, it means that fewer great

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<sup>369</sup> MERGES, *supra* note 25, at 247.

<sup>370</sup> TUTTLE, *supra* note 57, at 35.

<sup>371</sup> *Id.*



works are produced and more common ones are created in their place.

As authors, such as McFadden, pointed out over a decade ago,

the Internet tends to fill with low-value information: The products that have high commercial value are marketed through revenue-producing channels, and the Internet becomes inundated with products that cannot command these values. Self-published books and music are cases in point.<sup>372</sup>

Releasing a copyrighted work in the Creative Commons or in other similar fora that exemplify little or no authorial control “will often be a clear signal by the owner about the quality or nature of the good” since we invariably think differently about these products.<sup>373</sup> And, as Keen remarks, the more such content “gets dumped onto the Internet, the harder it becomes to distinguish the good from the bad—and to make money on any of it.”<sup>374</sup>

Yet, as has been demonstrated in this article, a majority of copyright professors continue to entertain a borderline obsessive fascination with—and insistence on—the continued philosophical demonization of individual creativity to the point where “genius” has somehow taken on an undesirable moniker; whilst the collective or

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<sup>372</sup> McFadden, *supra* note 9.

<sup>373</sup> R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1014–15 (2003).

<sup>374</sup> KEEN, *supra* note 276, at 31.

common collaborator, who altruistically gives his work product away, is revered and deserving of accolades. How are such culturally barbaric acts accomplished? It is a slow burn of scholar upon scholar in the process rewriting history and overlooking the facts or, at the very best, subverting the truth of things by contorting them and placing them into compartments that are at once convenient for one social group, then at other times, re-contorted to fit into the next popular social movement. Professor Rahmatian is one scholar who has astutely observed the anti-author effect that has occurred within academia for the last fifteen years, and is as perplexed—as this author—as to why so many otherwise intelligent folks take this obviously and seriously flawed theory for granted.<sup>375</sup> We should always question and insist upon rational answers to scholarly theories before blindly accepting them and recasting them into our own thought and scholarship. Ayn Rand noted correctly that:

The uncontested absurdities of today are the accepted slogans of tomorrow. They come to be accepted by degrees, by precedent, by implication, by erosion, by default, by dint of constant pressure on one side and constant retreat on the other—until the day when they are suddenly declared to be the country’s official ideology.<sup>376</sup>

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<sup>375</sup> RAHMATIAN, *supra* note 185, at 150.

<sup>376</sup> PRIMITIVE, *supra* note 28, at 36.

As lawyers, lawmakers, judges, and particularly law professors, we should distinguish ideological thinking from rational, fact-based thinking. In *Suicide of the West*, James Burnham claims:

An ideologue—one who thinks ideologically—can't lose. He can't lose because his answer, his interpretation and his attitude have been determined in advance of the particular experience or observation. They are derived from the ideology, and are not subject to the facts. There is no possible argument, observation or experiment that could disprove a firm ideological belief for the very simple reason that an ideologue will not accept any argument, observation or experiment as constituting disproof.<sup>377</sup>

It is important what, and exactly *how* professors speak and teach about what it means to create a copyrighted product. Mark Rose, an English professor who has written prolific articles on the intersection between literature and copyright, warns intellectual property scholars of the implications of the “unconscious” ways that copyright is discussed and reminds us that “[m]etaphors are not just ornamental; they structure the way we think about matters and they have consequences.”<sup>378</sup> While Professor Rose claims that various copyright metaphors that have been ingrained through the years have fostered a mindset in which we think about works of authorship as

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<sup>377</sup> JAMES BURNHAM, *SUICIDE OF THE WEST* 103–04 (1985).

<sup>378</sup> *Metaphors*, *supra* note 189, at 3.

“permanent and absolute property rights,”<sup>379</sup> it is just as important to note that the new copyright trope of the evil Romantic author, which has been designed to counteract such notion is as problematic and has just as many, if not more, negative legal and societal consequences.

There is no doubt that we are social animals and that individualism pushed too far to the other side of the spectrum is similarly as loathsome as a predominantly collectivist attitude. Indeed, most philosophers would agree that

it is clear that individualism, pushed to its limits, is incompatible with the needs of the collective to have some mutual basis upon which to evaluate the worth of the individual.<sup>380</sup>

Neither pure collectivism nor pure individualism is the correct formulation for a workable human construct.<sup>381</sup> Yet, humans can still retain their individuality while at the same time committing themselves to societal betterment and growth.<sup>382</sup> This will best be accomplished by a striving towards, and recognition of, excellence, originality, and, even genius.

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<sup>379</sup> *Id.* at 15.

<sup>380</sup> DANIEL SHANAHAN, TOWARD A GENEALOGY OF INDIVIDUALISM 99–100 (1992).

<sup>381</sup> TRIANDIS, *supra* note 41, at 20.

<sup>382</sup> SHANAHAN, *supra* note 380, at 100.

I, personally, continue to be primarily inspired not by Groupthink or collective authorship, but instead by “[t]he Romantic conception of the individual as an expandable source of spirit,”<sup>383</sup> as well as by the words in which Kierkegaard himself described the way in which he thoughtfully and appreciatively read books:

When I read a book, what gratifies me is not so much what the book is itself as the infinite possibilities there must have been in every passage, the complicated history, rooted in the author’s personality, studies, etc., which every phrase must have had and still must have for the author.<sup>384</sup>

I remain inspired by the Romantic credo as stated by Professor Scott:

Discover yourself—express yourself, cried the Romantic artist. Play your own music, write your own drama, paint your own personal vision, live, love and suffer in your own way. So instead of the motto, ‘Sapere aude,’ ‘Dare to know!’ the Romantics took up the battle cry, ‘Dare to be!’ The Romantics were rebels and they knew it. They dared to march to the tune of a different drummer—their own.<sup>385</sup>

As John Stuart Mill reminds us, “all good things which exist are the fruits of originality.”<sup>386</sup> If innovation and creative works are to

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<sup>383</sup> Fletcher, *supra* note 14, at 1507.

<sup>384</sup> Howard V. Hong & Edna H. Hong, *Introduction to KIERKEGAARD*, *supra* note 61, at xii (quoting Kierkegaard).

<sup>385</sup> Scott, *supra* note 43, at 355.

<sup>386</sup> MILL, *supra* note 111, at 126.

thrive in today's economy, in which there is pronounced competition on a worldwide level, then we should heed the sage advice of Mill when he writes that, in order to have persons of genius, "it is necessary to preserve the soil in which they grow" because "they can only breathe freely in an atmosphere of freedom."<sup>387</sup>

While today it is common copyright rhetoric that intellectual goods carry with them no danger of a traditional "tragedy of the commons" or scarcity in the economic sense,<sup>388</sup> this article has demonstrated that, left unchecked, the continued metaphoric assault on the Romantic author and undermining of the importance and dignity of individual creativity will result not only in a scarcity of *quality* intellectual products, but an eventual moral downslide of our culture. It is frightening to witness such an erosion unfold as influential and highly respected copyright professors like Jessica Litman make repeated claims that our copyright system is flawed because it is premised on the "charming notion" that "works owe their origin to the authors who produce them" rather than by the method she perceives authors to "engage in the process of adapting, transforming, and

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<sup>387</sup> *Id.* at 125.

<sup>388</sup> *See, e.g.,* PEÑALVER & KATYAL, *supra* note 285, at 38.

recombining what is already ‘out there’ in some other form.”<sup>389</sup>

Professor Litman believes that

originality is an apparition; it does not, and cannot, provide a basis for deciding copyright cases. The vision of authorship on which it is based—portraying authorship as ineffable creation from nothing—is both flawed and misleading, disserving the authors it seeks to extol.<sup>390</sup>

Professors like Litman fail to account for the reality that copyright doctrines are drafted and carefully adjudicated to ensure that only works with a modicum of creativity and proper authorship are protected.<sup>391</sup> Further, comments like Litman’s fly in the face of how most would agree that copyrighted works are created. In his eighteenth century pamphlet *An Argument in Defence of Literary Property*, Francis Hargrave, counsel in the famous copyright case *Becket v. Donaldson*, wrote:

Every man has a mode of combining and expressing his ideas peculiar to himself. The same doctrines, the same

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<sup>389</sup> Litman, *The Public Domain*, 39 EMORY L.J. 965, 965–67 (1990).

<sup>390</sup> *Id.* at 1023.

<sup>391</sup> See, e.g., *Feist Publ’n, Inc.*, 499 U.S. 340 (citing “[a]rticle I, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection. The constitutional requirement necessitates independent creation plus a modicum of creativity. Since facts do not owe their origin to an act of authorship, they are not original and, thus, are not copyrightable. Although a compilation of facts may possess the requisite originality because the author typically chooses which facts to include, in what order to place them, and how to arrange the data so that readers may use them effectively, copyright protection extends only to those components of the work that are original to the author, not to the facts themselves. This fact/expression dichotomy severely limits the scope of protection in fact-based works”).

opinions, never come from two persons, or even from the same person at different times, clothed wholly in the same language. A strong resemblance of style, of sentiment, of plan and disposition, will be frequently found; but there is such an infinite variety in the modes of thinking and writing as well in the extent and connection of ideas, as in the use and arrangement of words, that a literary work *really* original, like the human face, will always have some singularities, some lines, some features, to characterize it, and to fix and establish its identity; and to assert the contrary with respect to either, would be justly deemed equally opposite to reason and universal experience.<sup>392</sup>

While it is undoubtedly true that all authors essentially “stand on the shoulders of giants” and are influenced by the *ideas*, themes, and techniques employed by their predecessors from previous ages, each new author adds unique *expression* in which he stamps his individual personality, as well as the personality of the age in which he lives.<sup>393</sup>

As copyright scholars, do we really want to dissuade such a process by identifying with Foucault and his scions in the psychological tearing down of the author? Luckily, as Professor Burke reminds us, despite the “blind-spot” in the rhetoric of the death of the author, as

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<sup>392</sup> FRANCIS HARGRAVE, AN ARGUMENT IN DEFENCE OF LITERARY PROPERTY 6–7 (2d ed. 1774) (alterations omitted; to aid the reader, passage uses modern spellings).

<sup>393</sup> JOSEPH ANTHONY WITTEICH, THE ROMANTICS ON MILTON 17–18 (1970) (demonstrating that although Milton’s religious ideals, as portrayed in his poetry, were quite different from the Romantic poets’ general conception of religion, the Romantic poets nonetheless admired the independence of mind that Milton exemplified and showing that the Romantic theory of poetry contains several of Milton’s ideas, but the Romantic poets “go beyond Milton in their conception of the imagination as the agent of reason and source of its vitality”).



promulgated by Foucault and friends, “the author lives on within and without theory” and, gratefully, “[e]verywhere, under the auspices of its absence, the concept of the author remains active.”<sup>394</sup> Thankfully, as Professor Burke celebrates in the prologue of his book, “the concept of the author is never more alive than when pronounced dead.”<sup>395</sup>

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<sup>394</sup> BURKE, *supra* note 264, at 172 (explaining further that “[t]he death of the author emerges as a blind-spot in the work of Barthes, Foucault and Derrida, an absence they seek to create and explore, but one which is already filled with the idea of the author”).

<sup>395</sup> *Id.* at 7.