

## Rights, Privileges, and Access to Information

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*Protecting property rights in creative works represents a classic institutional approach to the specific economic problems of non-rivalness and non-excludability of information. By providing the copyright owner with an enforceable right against non-paying members of society, copyright laws encourage the production and dissemination of literary and artistic works to society for educational purposes. Implicit in the grant of property rights is the assumption that commercial incentives foster creative activity and productivity. In recent years, literary and artistic works have increasingly become the subject matter of exclusive property rights and control, particularly as emerging technologies provide users of creative works with greater access to informational goods. Despite the development of technologies that enable broad access, the result of expanding property rights in literary and artistic works has been higher access costs, which severely restrict society's ability to access and use the information. This Article examines society's claim to a right of access to information in order to further the constitutional goal of promoting progress, and proposes that the question of access to information is one of sustainable resource use that should not evoke the exclusionary rights of a strict property rule. Copyright laws protect economic privileges in information and govern society's use of informational resources; however, they do not provide copyright owners with a general right to exclude socially beneficial uses of informational works. These laws are specifically tailored to increase social welfare, and must be distinguished from a property right to exclude others from use of a thing. Exclusionary property rights in creative works arise, if at all, to protect an author's creative integrity, validate the importance of authentic authorship, and provide personal*

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*and moral incentives for authors to produce creative works of social value. Property rights and economic privileges, this Article proposes, encourage the production of informational goods and are necessary to ensure the advancement of science and the useful arts in accordance with the constitutional goals of the copyright system.*

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## I. INTRODUCTION: RIGHTS IN INFORMATION

Ronald H. Coase's *The Nature of the Firm*<sup>1</sup> and *The Problem of Social Cost*<sup>2</sup> are two pieces of work that have had a profound impact on legal scholarship.<sup>3</sup> The Royal Swedish Academy of Sciences heralded Coase's theories as "among the most dynamic forces behind research in economic science and jurisprudence," when they awarded Coase the Nobel Prize in 1991.<sup>4</sup> Coase's contribution was significant because he demonstrated in these two articles the role transaction costs play in both the emergence of firms and institutional arrangements in the legal system. In the first instance, firms exist because transaction costs—the costs of negotiating contracts to their conclusion—make it cheaper for an entrepreneur to organize various factors of production within a firm than to form multiple contracts with each production unit and enter into open-ended contracts that leave room for details to be agreed upon after the general contract terms are concluded.<sup>5</sup> In the second instance, institutional arrangements in legal systems become necessary to allocate resources when transaction costs prohibit market transactions from occurring and achieving the optimal arrangement of rights.<sup>6</sup> Instead, the rights and duties of private individuals must be set by governmental institutions when the cost of bringing about a contractual arrangement on the market exceeds the value of production after the rearrangement.<sup>7</sup> In his acceptance speech for the Nobel Prize, Coase emphasized this pivotal point: the role of legal systems within an economy with positive transaction costs is to determine individual rights and obligations so that entitlements to perform legally permissible actions may be traded on the market.<sup>8</sup>

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1. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) [hereinafter Coase, *Nature of the Firm*].

2. Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960) [hereinafter Coase, *Social Cost*].

3. Stewart J. Schwab, *Coase's Twin Towers: The Relation Between The Nature of the Firm and The Problem of Social Cost*, 18 *J. CORP. L.* 359, 359 (1993) ("Much ink has been spilled over [both] article[s]. Both are justly famous, and together they make Coase a richly deserving recipient of the Nobel Prize in Economics.").

4. Press Release, Royal Swedish Acad. of Sci., The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1991 (Oct. 15, 1991), [http://nobelprize.org/nobel\\_prizes/economics/laureates/1991/press.html](http://nobelprize.org/nobel_prizes/economics/laureates/1991/press.html).

5. Coase, *Nature of the Firm*, *supra* note 1, at 390–92.

6. Coase, *Social Cost*, *supra* note 2, at 16.

7. *Id.* at 15–17.

8. Ronald H. Coase, *Prize Lecture: The Institutional Structure of Production*, NOBEL PRIZE (Dec. 9, 1991), [http://nobelprize.org/nobel\\_prizes/economics/laureates/1991/coase-lecture.html](http://nobelprize.org/nobel_prizes/economics/laureates/1991/coase-lecture.html).

The importance of these articles to the field of economics is in their demonstration that legal rights—whether they arise via contract or as private property—define an individual’s entitlement to use a production resource without necessarily recognizing an inherent right in the resource itself. A less well-known piece by Coase expands his ideas on the role of institutional governance and property rights in encouraging production of public goods and sheds light on the issue raised in this Article: whether private property rights in literary and artistic works protected by copyright laws allow right-holders to prevent society from accessing information for uses that will promote progress in science and the arts. Coase’s *The Lighthouse in Economics*,<sup>9</sup> published in 1974 by the *Journal of Law and Economics*, sought to demonstrate that contrary to conventional economic thinking at the time,<sup>10</sup> government intervention was not necessary to procure the production of public goods if there are sufficiently well-defined property rights that allow a private producer of a public good to recover or internalize positive externalities generated by the production activity.<sup>11</sup> The point Coase makes in this article is important to the question here, because it demonstrates that a state-granted property right over a given public resource, such as information in creative works, serves to encourage the private production of a public good. It allows private entities to recover payment for the resource’s use without necessarily entitling the right-holder to control the resource as private property with an exclusionary property right.

The question of access to information in copyright is often inextricable from the question of rights in literary and artistic works, because society’s ability to use information to engage in civic discourse, research, and social dialogue depends heavily on whether rights over information can be used by right-holders to restrict access. When the question of rights is couched within property-type metaphors in conventional copyright talk, a right-holder appears entitled to prevent access to information through an exclusionary right.<sup>12</sup> By speaking of

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9. Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974) [hereinafter Coase, *The Lighthouse*].

10. Coase departed from traditional economic thinking at the time, which held that government intervention in the form of a tax was necessary to reduce negative externalities, i.e., spillovers that are not accounted for in the price of the good produced, and which affect parties external to the production of the good. Coase argued that to impose a tax upon the producer of the externality would result in a reduction in the value of production. Coase, *Social Cost*, *supra* note 2, at 42.

11. Coase, *The Lighthouse*, *supra* note 9, at 375.

12. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

the right to “exclude others” from using intellectual works,<sup>13</sup> analogizing information to land,<sup>14</sup> and thinking of copyright infringement as “trespass” on the copyright owner’s “exclusive domain,”<sup>15</sup> property rights in information seem to entail an exclusive possessory right to information that entitles the right-holder to exclude the rest of the world from the information. Yet, it remains unclear whether information can accurately be thought of as property.<sup>16</sup> Property, in its conventional sense, is a finite and scarce resource, and land, chattels, as well as personal items would fall within this traditional understanding of property. Unlike finite and scarce resources, information contained in literary and artistic works, like light from a lighthouse, is non-rival (where use of the resource does not deplete it) and non-excludable (where use of the resource cannot be limited once made available to society) in consumption.<sup>17</sup> One person’s reading of Victor Hugo’s *Les Misérables* does not diminish another person’s ability to read the novel and understand its story line, nor is anyone else excluded from enjoying the narrative of the novel just because one person has read it. This means that information contained in creative works is, like light from a lighthouse, a public good—once made publicly available, it may be consumed by society at zero marginal

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13. See, e.g., *Comm’r v. Wodehouse*, 337 U.S. 369, 419 (1949) (Frankfurter, J., dissenting) (explicating that the right to exclude in copyright law is not directed to an object in possession, but is in vacuo); *Fox Film v. Doyal*, 286 U.S. 123, 127 (1932) (explaining that an owner of a copyright may refrain from vending of licensing and may simply exclude others from using his property); *White-Smith*, 209 U.S. at 18 (holding that music rolls were not copies within the meaning of the Copyright Act).

14. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37–40 (2003) (likening the expansion of intellectual property rights to the enclosure of common land in England); Michael Carrier, *Cabining Intellectual Property through a Property Paradigm*, 54 DUKE L.J. 1, 4–8 (2004) (applying property law limitations to intellectual property); Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 6–8 (2002) (equating literary works to real estate).

15. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (noting that anyone who trespasses on the exclusive domain of the copyright owner, as defined in the statute, is a copyright infringer); see also Wendy Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1366 (1989) (discussing the duty to refrain from copyright infringement and the duty to stay away from another person’s land).

16. Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (2007) (“At the core of controversies over the correct scope of intellectual property lie grave doubts about whether intellectual property is property.”).

17. Economists generally consider lighthouses to be the quintessential public good: a service which can only be provided by the government by taxing the public. See Coase, *The Lighthouse*, supra note 9, at 357 (“[T]he impossibility of securing payment from the owners of the ships that benefit from the existence of the lighthouse makes it unprofitable for any private individual or firm to build and maintain a lighthouse.”).

cost.<sup>18</sup> It is the public nature of literary and artistic goods that requires production incentives in the form of state-granted property rights to create the scarcity necessary to provide commercial value to such goods, and in turn, their private production.<sup>19</sup> For without rights over public goods, producers of public goods will lose their incentive to make goods available to society if there is no way of recovering the investment made in producing the good.<sup>20</sup> Economic analyses of the law justify property rights in literary and artistic works on the premise that social benefits accruing from increased incentives to create (i.e., greater contribution to the collective pool of knowledge for progress) outweigh the administrative and social burdens of protecting and enforcing private property rights in creative works.<sup>21</sup> However, achieving a level of economic efficiency between providing the right amount of incentives to maximize the production of informational works, and ensuring that the level of legal protection does not raise the cost of using information to a level where access is barred, remains elusive.<sup>22</sup>

This Article argues that the balance between rights in and access to information will remain elusive because the property metaphors we use to conceptualize copyright and the boundaries we imagine around informational resources mischaracterize the nature of information as the subject matter of exclusive rights. As the subject matter of a property right, information—being infinite, abundant, and boundless—does not have to be protected from overuse. Unlike other forms of finite and limited resources that are usually the subject matter of exclusive legal rights (e.g., land, water, minerals, cattle or lobsters) where the recognition of exclusive property rights aids in their conservation and preservation,<sup>23</sup> information need not be conserved or preserved from

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18. Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 955 (1998).

19. Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain* (pt. 1), 18 COLUM.-VLA J.L. & ARTS 1, 19–20 (1993) (“[I]ntellectual property law tries exorcising the specter of information underproduction by granting exclusive property rights to producers as incentives and rewards (producers can now charge for access to their commodity), in exchange for anticipated social benefits arising from disclosure and widespread access to such newly created information (justifying the property grant).”).

20. Daniel A. Farber, *Free Speech without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 563 (1991) (arguing that political speech has to be protected as a public good, or else political information, like other forms of information, will be under-produced).

21. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

22. *Id.* (“Striking the correct balance between access and incentives is the central problem in copyright law.”).

23. See JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* 142–44 (1998) (stating that

overuse; being a public good, use of information as a resource does not deplete it. Information bears greater similarity to air or light, the use of which is a matter of experience rather than consumption, and is therefore free to all.<sup>24</sup> Property rights granted over information encourage producers to create an abundance of informational resources for social benefit, and are essentially different from property rights in finite resources, which are granted to protect an abundant resource from being depleted and becoming scarce from unregulated consumption or overuse. For resources that exist in infinite forms, property rights serve one specific purpose: to allow producers of the resource to recover their investment in producing it. The economic value of property rights and customary norms regulating use of finite and limited resources is in their protection against the depletion or abuse of the resource. In that situation, it makes perfect sense to employ a “right to exclude” approach as a means of protecting a scarce resource that is susceptible to exhaustion by excluding those who will lessen the value of the resource.<sup>25</sup> However, for infinite and unlimited resources such as information, property rights serve to stimulate and foster productivity by providing an incentive to produce and distribute the resource to society. In this latter situation, any rights of exclusion are more limited in application. Rather than define boundaries of ownership to prevent socially wasteful conduct through exclusion, property rights in this context provide a legally enforceable means of receiving payment for the provision of a socially valuable good or service. Exercising a property right in the case of informational goods, this Article suggests, only allows the assertion of an entitlement to be paid for the provision of a good and does not entail a possessory right to exclude society from use of that resource.

The parallels between light and information production are significant in this case. In *The Lighthouse in Economics*, Coase’s challenge to conventional economic assumption that lighthouses, being the quintessential public good, could only be provided by taxing the

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empirical studies suggest that with finite resources, property rights help to conserve the resource).

24. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”); see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 354–60 (1999) (arguing that information should be free to allow for free expression).

25. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362–71 (1992) (describing how the right to exclude is employed in private and communal land ownership to reward labor and prevent overuse).

public,<sup>26</sup> suggests that public goods may be efficiently provided by private enterprises as long as there are legally enforceable means of recovering payment for their use from the public. Coase asserted that lighthouses may be privately produced and provided, as long as there are state-established and enforced property rights that would allow the lighthouse owner to collect levies from vessels benefiting from the lighthouse at the port without the lighthouse owner having to undertake individual negotiations with vessels, or switch off the lighthouse when a non-paying ship approaches its range, to achieve the excludability necessary to make the provision of lighthouse services profitable.<sup>27</sup> Unlike land, light cannot be parceled out to achieve the exclusivity necessary to receive payment for use.<sup>28</sup> Economists similarly reason that the provision of information requires laws to establish and enforce property rights to sustain creative productivity by authors. As information in literary and artistic works is limitless and infinite, authors require state-established and enforced property rights to allow them to prevent non-paying members of the public from free riding on the provision of such works to paying members of society.<sup>29</sup> Copyright legislation establishes the creator's exclusive rights in informational goods and facilitates the private production of informational materials by temporarily limiting public access to works.

But, when the recovery of financial investments for providing the public with literary and artistic works is through the exercise of a possessory right that entails a general right to exclude society from using information, and which appears to take precedence over the welfare of those relying on information produced, public access to

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26. See also David E. Van Zandt, *The Lessons of the Lighthouse: "Government" or "Private" Provision of Goods*, 22 J. LEGAL STUD. 47, 48 (1993) (arguing that history shows that institutions providing lighthouse services relied more upon governmental assistance than other services and goods); cf. Elodie Bertrand, *The Coasean Analysis of Lighthouse Financing: Myths and Realities*, 30 CAMBRIDGE J. ECON. 389, 399–400 (2006) (arguing that Coase underestimated the role of government in making the provision of lighthouse services profitable).

27. Coase, *The Lighthouse*, *supra* note 9, at 375.

28. See Ellickson, *supra* note 25, at 1328–30 (explaining how technologies for marking boundaries lead to increased parcelization of land).

29. See Landes & Posner, *supra* note 21, at 328 (“[Without copyright protection,] anyone can buy a copy of the book when it first appears and make and sell copies of it. The market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work.”); see also Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 421 (1966) (“A copyright is a grant of the aid of state coercion to the creators of certain ‘intellectual products’ to prevent for a period of years the ‘copying’ of these products.”).

informational goods becomes a social concern.<sup>30</sup> Progress and advancement in the sciences and useful arts require incremental changes towards a better or improved state, and are essentially contingent on the availability of knowledge and information to guide those changes.<sup>31</sup> Having reliable and valuable information available to society for learning is, however, only a preliminary step in advancing the sciences and arts.<sup>32</sup> The other necessary component in promoting progress is providing society with the freedom to use information to develop new forms of knowledge and information.<sup>33</sup> When information access costs, which include transaction costs in the transfer of property rights, become prohibitively high and deter efficient public use of information to garner useful social knowledge,<sup>34</sup> use of information for the purposes of generating new research and producing new knowledge is hampered. Established research norms in the scientific community, for example, require the sharing of knowledge as a matter of professional conduct to make scientific knowledge accessible to achieve progress in the field. These norms encourage scientists to test the veracity of claimed observations and “contribute to the same body of certified knowledge,” treat scientific findings as “a product of social collaboration . . . dedicated to the scientific community,” thirst for truth rather than pursue self-interests, and verify all scientific claims before accepting them as fact.<sup>35</sup> The early disclosure of research findings has allowed

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30. See Boyle, *supra* note 14, at 37–40 (calling the expansion of property rights over intellectual works “the second enclosure movement”).

31. See David W. Opperbeck, *Deconstructing Jefferson’s Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy*, 49 JURIMETRICS J. 203, 235 (2009) (presenting a critical realist perspective that information has an ethical social dimension that should be reflected in a robust information policy to ensure that the grant or restraint of access to information will encourage the development of communities contributing towards “human flourishing”).

32. Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy*, 75 WASH. U. L.Q. 1029, 1058 (1997) (“The value of scientific information . . . lies in its reliability.”).

33. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1007–12 (1990) (arguing that authors need access to a repository of knowledge to create new works of authorship).

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

35. See Rebecca Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177, 182–83 (1987) (describing sociologist Robert Merton’s observation of four interrelated behavioral norms of universalism, communism, disinterestedness, and organized skepticism within the scientific community).

scientists to benefit from the research work of other scientists.<sup>36</sup> As research indicates that lighthouse services in England in the seventeenth and eighteenth centuries were poor in quality for a variety of reasons—two important reasons being the private individual’s drive to maximize profits from the provision of light and the lack of quality control by the state<sup>37</sup>—there is a need in present times to ensure that the maximization of private profits through the copyright system does not undermine society’s ability to use information for learning. Lighthouse service dues imposed by private individuals were high because part of the dues were paid to the King, whose favor was constantly courted by private individuals seeking a lighthouse patent.<sup>38</sup> While producers of literary and artistic works need no longer court the Crown or society’s nobility to support their work,<sup>39</sup> the financial gains from the market, as the new patron for commissioning the production of creative works, may subjugate the public’s interest in accessing accurate and unbiased informational content, as producers of information seek to maximize their profits from the commercialization of their works on the market.<sup>40</sup>

This Article argues that it is imperative to define the legal entitlements that the copyright owner and society have over informational goods to determine the extent to which copyright owners may exclude society from using literary and artistic works for research, civic discourse, and social dialogue to achieve progress in the sciences and useful arts. The question of access is, arguably, most accurately analyzed by characterizing information as a resource for learning and knowledge development that is the subject matter of various use privileges rather than of an exclusive right of ownership. Property

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36. See, e.g., *id.* at 226–28 (describing the communication and sharing of biological materials between the National Cancer Institute, Bethesda, Maryland and the Pasteur Institute, Paris, which eventually led to the discovery of the AIDS virus and the development of an AIDS antibody test kit).

37. See Bertrand, *supra* note 26, at 398–400 (detailing the circumstances that contributed to the poor maintenance of lighthouses). Contributing factors to poor lighthouse services include a lack of technical control of the quality of lighthouse buildings, the lack of regulations requiring inspection of lighthouse construction and maintenance, and the need to obtain the Crown’s favor before building a lighthouse. *Id.* at 399.

38. It is noted that James I, for example, granted lighthouse patents to private enterprises to “increase his own fortune.” *Id.* at 400.

39. See Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMICA* 167, 170 (1934) (“The belief has been widely held that professional authorship depends for its continued existence upon this copyright monopoly; or upon an alternative which is considered worse viz. patronage.”).

40. See Boyle, *supra* note 14, at 50–52 (explaining the need for creators of information to exert greater control over consumers in the aftermarket and describing the effect on access to information).

rights in information, as commonly understood, encourage both its creation and public dissemination<sup>41</sup> and do not aid in its conservation from depletion through overuse because of the naturally abundant nature of information as a quintessential public good. Protecting a property right in unlimited resources, such as information, serves a completely different purpose from protecting a property right in scarce resources. Therefore, the need to acknowledge property rights as serving a production—rather than conservation—function when it comes to informational resources is great. One of the most problematic consequences of treating rights in information as serving a conservation function, rather than a production function, is the creation of competing exclusionary claims that authors, copyright owners, and users of literary and artistic works may assert over information resulting in the excessive fragmentation of ownership rights and the under-use of informational resources as raw materials for progress of the sciences and useful arts.<sup>42</sup>

Part II of this Article examines the rights-access debate and argues that the tension between the grant of copyright and the need for public access is attributable to the influence of law and economics and American legal realism in copyright jurisprudence, both of which downplay the *in rem* nature of property rights by emphasizing economic efficiency and political influence in the creation of rights, and undermine the rights of the author as the creator and owner of literary and artistic works. The effect of these schools of thought on copyright law is the emergence of a narrow and specific conception of property rights in literary and artistic works that views rights in literary and artistic works as a bundle of positive use rights in informational resources that resonates with *in personam* rights governing specific legal relationships and activities in society. Due to the specific origins of statutory copyright in economic analysis and utilitarian thinking, the rights-access debate over entitlements in literary and artistic works would, therefore, be more accurately couched as a question of use privileges over a resource that is shared between the owner of a

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41. Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain* (pt. 2), 18 COLUM.-VLA J.L. & ARTS 191, 192 (1993–1994) (“[C]opyright laws . . . grant property rights to creators in order to encourage disclosure and dissemination of new creations for aggregate social benefit.”).

42. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 677 (1998) (arguing that when many private individuals are able to exercise a right of exclusion over the use of a scarce resource, the tragedy of the anticommons, i.e., that rational individuals acting separately may waste a resource by under-consuming it, may occur).

copyright and society rather than the extent to which private property rights over creative works entitle the denial of access to information.

Part III of this Article explains that the question of ownership rights in a particular “thing,” which imposes a general impersonal duty of abstention on society, is separate and distinct from the use privileges inadvertently brought to the forefront of copyright jurisprudence by law and economics and American legal realism. The distinction between the in rem right in creative works and the in personam use privileges over informational resources is, this Article suggests, observable as a matter of historical fact from the earliest conception of copyright as solely a right to print; of economic theory from the perspective of controlling and reducing information costs in the protection of literary and artistic works; and of legal principle from the distinctions the law draws between protectable expressions and non-protectable ideas, and between illegal copying and fair uses of creative works. Part IV of this Article explores how an explicit acknowledgment of this distinction between in rem rights and in personam privileges changes the rights-access debate in copyright law by protecting and conserving the author’s creative personality to encourage creative productivity, and facilitating production and dissemination of information for use in scientific and artistic progress.

Part V presents a normative proposal: that the author’s rights to his literary and artistic creation must be protected with a right to exclude society from using a “thing” if society’s use of it adversely affects the author’s creative personality. If copyright law is serious about encouraging the progress of society through the copyright system, the law must acknowledge the pivotal role of the author in creating works that promote the progress and advancement of society. Part VI concludes by revisiting the analogy of information as a lighthouse to highlight that information contained in literary and artistic works, like light from a lighthouse, may be costly to produce. High production costs require “property rights” in these situations to protect an economic privilege to recover payment for the provision of a public good. But these privileges are not property rights of the in rem kind, which serve to conserve and protect scarce resources from depletion, and must be clearly distinguished from them.

## II. DEFINING THE RIGHTS-ACCESS DEBATE

Defining the central problem in copyright law is a useful starting point to begin thinking about information as a resource for progress and development that is subjected to various use privileges rather than exclusive possessory rights. By granting exclusive rights in literary and

artistic works to copyright owners, the law has inadvertently reduced society's ability to use information freely.<sup>43</sup> British poet, historian, and politician, Sir Thomas Babington Macaulay, resisted the expansion of the copyright term in England in 1841 and referred to copyright as a "tax on readers for the purpose of giving a bounty to writers," but acknowledged the necessity of "giving a bounty to genius and learning" and "willingly submit[ted] to this severe and burdensome tax."<sup>44</sup> Three hundred years after the first copyright act was passed, rights continue to expand despite increasing pushback from society against the encroachment of rights into the sphere containing free information for general use in the public domain.<sup>45</sup> This continuous expansion of rights suggests that there is an inherent economic value in literary and artistic works, which copyright owners try to capture from society by asserting exclusive possessory rights against all members of society.<sup>46</sup> Information creates wealth because it gives its owner advantage and power over others by providing the necessary intelligence to outperform competitors in the market, guide strategic decision making, and direct economic growth.<sup>47</sup> When exclusive rights are granted in information, they provide the owner with exclusive control over who is permitted to use the information, when the information may be used, and how the information is used.<sup>48</sup>

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43. See William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 6–7 (2000) (identifying access cost as one of the costs of copyright protection, the other being the administrative and enforcement cost of the system).

44. Thomas Babington Macaulay, *A Speech Delivered in the House of Commons on the 5th of February, 1841*, in FOUNDATIONS OF INTELLECTUAL PROPERTY 309, 311 (Robert P. Merges & Jane C. Ginsburg eds., 2004).

45. See Litman, *supra* note 33, at 970–84 (detailing the history of copyright law); see also Boyle, *supra* note 14, at 37 (explaining that copyright law signifies the second enclosure movement despite opponents' assertions that knowledge is for everyone, and the consequences of privatizing knowledge are dreadful).

46. See Mark A. Lemley, *Property, Intellectual Property and Free Riding*, 83 TEX. L. REV. 1031, 1033–46 (2005) (arguing that copyright does not allow creators of literary and artistic works to capture the full social value of their work, and that free riding on the social benefits of literary and artistic works is not inherently wrong).

47. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 496 (1980) (stating that a person's wealth includes information and that "[i]f we prohibit someone from exploiting potentially valuable information or skills (for example, the skill of deception) we thereby decrease his wealth just as surely as if we were to take some money from his bank account and burn it or transfer it into a common fund").

48. Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 144 (2004) ("[I]f we gave only one person control over a particular type of information, that person would restrict the flow of information, raise its price, and make more money than providers do in a competitive market.").

In a knowledge-based economy, however, economic growth is dependent not only on the production and dissemination of information to society but also on society's ability to generate new wealth from existing forms of information.<sup>49</sup> Information, after all, represents new wealth that individuals acquire through resourceful thinking and creativity. The growth of private equity financing in the form of venture capital to fund early stage, high-potential start-up companies with the intention of generating a return on investment through an initial public offering, or by way of eventual acquisition by a larger company, for example, is evidence of the investment value of technological know-how and knowledge as a source of wealth.<sup>50</sup> But as information becomes an increasingly valuable resource in the knowledge economy, producers of information seek greater rights to control society's use of information.<sup>51</sup>

Control of information as "property" creates concentrated power for the "owner" of information as the rest of society is prevented from using information as a necessary resource for development and progress.<sup>52</sup> The arguments used to justify these rights in information, whether efficiency,<sup>53</sup> reward,<sup>54</sup> or incentive based,<sup>55</sup> emphasize the

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49. Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257, 314 (2006) ("Development must entail not only economic growth, but also a life that is culturally fulfilling. . . . The United Nations' conception of a 'Knowledge Society' articulates this understanding of development. As a U.N. report puts it, 'at its best, the Knowledge Society involves all members of a community in knowledge creation and utilization.' Hence, 'the Knowledge Society is not only about technological innovations, but also about human beings, their personal growth, and their individual creativity, experience and participation.'").

50. Olufunmilayo B. Arewa, *Securities Regulation of Private Offerings in the Cyberspace Era: Legal Translation, Advertising and Business Context*, 37 U. TOL. L. REV. 331, 338 (2006) (stating that venture capital financing supports start-up companies by providing seed and start-up funds that grow the company and assist in the development of their technology).

51. Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 475-76 (2001).

52. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 380-81 (1999) (arguing that the power to control informational resources through "state enforce[d] property rules that give . . . a veto power, backed by a credible threat of state force over their use," will undermine political discourse).

53. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1699-717 (1988) (using economic efficiency as a method of economic analysis to analyze the fair use doctrine); Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 21, at 325 (questioning the extent to which copyright may be explained as a means for "promoting efficient allocation of resources"); Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045, 1058-61 (1989) (analyzing legal protection for computer application programs as an efficient allocation of resources where markets fail).

54. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual

right of the owner to exert control over social uses of information.<sup>56</sup> The emphasis on owner rights control, however, creates a conflict between competing legal values as the ability to control social uses of information contradicts society's ideals of freedom and liberty to use a free resource for development and creative production.<sup>57</sup>

Protecting entitlements in information as "property" allows possessory rights to expand as new markets develop with technological innovation because the physical limitations of a scarce and finite resource, such as land, do not exist for an infinite and boundless resource such as information. For example, property rights over Blackacre cannot expand because they are necessarily limited by the physicality of the land, but rights over information may be expanded as and when the owner of a copyright convinces lawmakers that there is a need to capture positive externalities from the market because there are no physical limitations to the extent rights may exist.<sup>58</sup> When copyright owners claim a possessory right to control use of information by excluding society in a manner that should only be applied to scarce and limited resources, they assert a general right of exclusion that prevents the emergence of new markets; as new technologies create new ways to access and use information,<sup>59</sup> the rights-access debate has now become

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effort by personal gain is the best way to advance public welfare . . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."), *superseded by statute*, 37 C.F.R. 202.10(c) (1959); *see also* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997) ("Intellectual Property is fundamentally about incentives to invent and create.").

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

56. Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1887-909 (2000) (describing how corporate entities strategically manage content portfolios to stifle uses of their content and skew public discourse).

57. *See* Sunder, *supra* note 49, at 315 ("Intellectual property rights . . . were foundationally understood as limited exclusive rights, and offered by the state not to reward private persons but to promote the public interest in art and science.").

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

59. Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 976 (2008) (describing how commercial media incumbents enforce rights against new technology media resulting in a number of new media, such as MP3.com, peer-to-peer file trading systems and user-generated video sites, being enjoined from infringing copyright and driven out of business when the incumbent refuses to license their rights).

a critical legal problem in the copyright system. A more nuanced view of property rights—one that separates the governance of free resources for the purposes of encouraging production from an exclusionary right to preserve or conserve a limited and finite resource—must form the core of the debate.<sup>60</sup> By extrapolating these nuances in property law from copyright jurisprudence it may be demonstrated that the statutory rights in the copyright system are in personam rights, or privileges, to use literary and artistic works, which are separate and distinct entitlements from an in rem right, grounded in the work itself, to exclude society from using property. The dominance of two schools of thought—law and economics and American legal realism—in copyright jurisprudence have minimized the in rem nature of property rights in literary and artistic works by emphasizing economic efficiency and political influence in the creation and protection of rights, thereby undermining the author as the creator and first owner of property in literary and artistic works, and overlooking the notion of authorship as a central component of progress of the sciences and useful arts in the copyright system.

The legal distinction between possessory rights of exclusion (used to conserve scarce resources) and economic privileges to use and control resources (used to govern various use rights and encourage the production and dissemination of a non-rival and non-exclusive resource) has yet to be drawn in copyright jurisprudence.<sup>61</sup> The failure to recognize this distinction has immense implications for the copyright system because the statutorily granted rights are specifically designed and carefully laid out to ensure that the copyright owner recovers payment for uses of the work. The rights provided for under the Copyright Act do not include a possessory right in rem that would allow copyright owners to deny society access to information contained in literary and artistic works because the rights provided for by the copyright system are in personam in nature, which protect a personal claim for payment against a person who uses the work. The entitlements created by the Copyright Act provide copyright owners with economic privileges to use and control informational resources in a

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60. Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1817–21 (2007) (discussing intellectual property and the use of a mix of exclusion and governance strategies for defining property boundaries, and arguing that there should be a presumption of an exclusion strategy where information costs necessitates bright-line delineation of rights).

61. See 17 U.S.C.A. § 106(a) (West 2010) (protecting the right of the author to claim authorship of her visual work, the right to prevent use of her name for a work she did not create, and the right to prevent the work from being intentionally destroyed, mutilated, or modified).

specific way to encourage creativity and public dissemination of works, which is consistent with economic dogma that the market will provide the greatest reward for creativity. Specifically granted rights to use information do not invoke a general property right to exclude society from accessing and using informational resources for progress because they are granted to deal with a specific problem: encouraging investment in producing creative resources that, once made available to the public, cannot be controlled except through legal means. The right to make reproductions of copyrighted works, for example, allows for more specific arrangements and efficient use of informational resources to be made through contractual negotiations<sup>62</sup> and must be conceptualized as a form of statutory privilege complementing a more general possessory right to exclude that imposes a negative duty on society to refrain from using the work. The right to exclude applies in a uniform manner to everyone in society by clear boundaries, delineated to mark ownership of the work and to communicate behavioral expectations about the work in a socially functional way.<sup>63</sup> As the right to exclude is intended to delineate boundaries around a specific object subject to ownership rights, this right should belong only to the author or creator of the work as a form of property right to protect the integrity of the work as a manifestation of the author's personality and communicate behavioral expectations or normative standards on the production and use of the work.

Couching the problem at the core of the rights-access debate in copyright law as a jurisprudential oversight of the legal distinction between a possessory property right of exclusion, which protects scarce resources to conserve them, and economic privileges, which govern uses of information to encourage their creation, offers greater clarity for analyzing the question of access to information. A jurisprudential slip, which treats both rights in information and privileges to use information as the same thing, will cause practical difficulties in determining how informational resources may be used by society for progress, development, and creative production. Appropriate social access to information, for the purpose of advancing science and useful arts, depends on recognizing that property rights in information should only

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62. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 797 (2001) ("Allowing *in rem* property rights to be supplemented by *in personam* contract rights, in particular, introduces an enormously larger set of options for the use and control of resources than would be possible using exclusion alone.").

63. *Id.* at 795 ("Exclusion rules represent a simple and universal 'organizing idea' that allows a multitude of individuals with a small amount of information to interact in mutually beneficial ways that would be impossible in a world that has only governance rules.").

exclude society when public use of creative works affects an author's creative personality adversely, in which case a general right to exclude may legitimately be used.<sup>64</sup> Uses of informational resources for progress would be, arguably, uses that are generally allowed by in personam privileges as long as payment is made to the provider of the information for producing and disseminating the work, or if permission to use without making the necessary payment is obtained from the copyright owner. As copyright markets tend towards failure,<sup>65</sup> which in turn generates legislative responses to correct that failure in the form of "rights,"<sup>66</sup> and as new technologies increase society's access to literary and artistic works to enable greater participation in civil dialogue, political discourse, and creative production, the need for a more precise articulation of entitlements to resolve the question of rights and access to information has become urgent.

### A. Market Economics

The expansion of rights over literary and artistic works is propagated, to a large extent, by the economics of the copyright market. As markets for copyrighted materials usually fail because creative works are considered public goods<sup>67</sup> that are non-excludable and non-rival in consumption,<sup>68</sup> an accurate correlation between production costs and

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64. This involves a discussion on the moral rights of authors, which have limited explicit recognition under copyright laws in the United States, save for § 106A, which protects the moral rights of attribution and integrity for works of visual arts. See 17 U.S.C.A. § 106A (2010) (protecting an author of visual work from adverse consequences).

65. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1607–08 (1982) (noting markets fail for three reasons: (1) costs and benefits are not internal to the transaction that generated them; (2) there is imperfect knowledge; and (3) the presence of transaction costs). Because the production of literary and artistic works will always produce benefits external to the production process, it is often difficult to have perfect knowledge about a copyrighted work. Orphan works, for example, lack pertinent information about the creation of the work, and transaction costs will always exist in negotiating use rights. Thus, there is a tendency for the copyright market to fail because of these characteristics.

66. *Id.* at 1612 (proposing that state-created property rights correct market failure by allowing the market to function and providing a means to exclude non-purchasers).

67. Scholars have explored the idea that literary and artistic works are not pure public goods because they do not exhibit a systematic bias towards underproduction and are not bounded away from providing efficient level of utilization. See, e.g., Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 675–77 (2007) (explaining the theory of impure public goods after noting that classifying goods as purely private or public misses the point that goods often fall somewhere in between the two polar extremes). This Article assumes that literary and artistic works are public goods that are non-rival and non-exclusive in consumption and does not make the more specific distinctions between pure and impure public goods.

68. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer*

market price cannot be achieved because of the indeterminacy of consumer demand caused by externalities.<sup>69</sup> Once creative works are publicly disseminated, non-paying members of the public cannot be excluded from use of the work and the work, even if used by a wide segment of the public, will not deplete through overuse. Rights, as neoclassical economists argue, provide the mechanism by which the social value for literary and artistic works may be appropriated through a market-set price, which would off-set the fixed and marginal costs incurred in production and dissemination.<sup>70</sup> United States copyright jurisprudence has generally accepted neoclassical economics as the predominant theoretical approach to allocating entitlements in literary and artistic works<sup>71</sup> by granting first property rights to the author, as the creator or producer of literary and artistic works.<sup>72</sup> Thereafter, the law allows and facilitates negotiations and bargaining for use of the work to take place through the free market at a price and under terms set by, and agreed upon, the author and subsequent owners of the work.<sup>73</sup>

However, because the production of public goods will always produce externalities, and as the idea of unrecovered spillover benefits from the production and dissemination of creative works is considered objectionable to many copyright owners,<sup>74</sup> the owners seek to expand

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*File Sharing*, 17 HARV. J.L. & TECH. 1, 24 (2003) (stating that copyright laws aim to solve a systematic market failure, which is the under supply of creative expressions that have the characteristics of a public good).

69. Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQ. L. 387, 417 (2001) (discussing market pricing for public goods in the securities industry).

70. See Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connection Between Land and Copyright*, 83 WASH. U. L.Q. 417, 426 (2005) (describing the views of neoclassical economists).

71. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 311–12 (1996) (“Neoclassicism has ascended to prominence during the last three decades—a period of marked intellectual property expansion—with the Chicago school’s application of economic analysis to legal institutions. Neoclassical economics views a system of universally applied and clearly defined property rights as a cornerstone of market efficiency. As we shall see, it is the neoclassical sense of allocative efficiency, with its reification of claims to market potential, its emphasis on universal, concentrated, exclusive, and exchangeable property rights, and its subordination of law to market ideals that helps to spur copyright’s untoward expansion.”).

72. 17 U.S.C.A. § 201(a) (West 2010).

73. *Id.* § 201(d).

74. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 267 (2007) (“The obvious implication of the property rights theory is that spillovers are bad, since they drive a wedge between private and social value and prevent the perfectly informed inventor from making optimal decisions. From the supply side, spillovers are uncaptured benefits that could be captured to increase incentives to invest, and from the demand side, spillovers reflect unobserved, lost signals of consumer demand that fail to guide investment and management decisions.”).

rights to capture portions of the market where there are unrecovered benefits and thereby prevent non-paying members of society from “free riding” on the investment the author or copyright owner made.<sup>75</sup> Additionally, courts have consistently held that the temporary cost of the monopoly right, regardless of how long the right lasts,<sup>76</sup> justifies the social end the law seeks to achieve, namely the promotion of progress in the sciences and useful arts.<sup>77</sup> But, the creation and dissemination of a work only benefit society and advance progress when the costs of negotiating for use of a work are not prohibitively high and do not preclude the work’s creator from engaging in negotiations that will produce the socially optimal behavior with respect to the intellectual work. Harold Demsetz’s *Toward a Theory of Property Rights* theorizes that the development of property rights in communal resources will allow the owner of the resource to economize on social uses of that resource by exercising the right to exclude others from using the resource.<sup>78</sup> While economists’ primary rationale for protecting intellectual property as an integral part of the property right system may find basis in Demsetz’s article,<sup>79</sup> the link drawn between Demsetz’s article on property rights and intellectual property may be tenuous.<sup>80</sup> Demsetz reasons that unless a resource owner has the right to exclude others from using the particular resource, he is unlikely to be able to evaluate the effect of the use of his resource, in terms of the social costs

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75. Lemley, *supra* note 46, at 1043–45 (describing how the general objection to free riding has caused intellectual property laws to expand to cover all social uses of intellectual property).

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

77. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

78. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–59 (1967).

79. Lemley, *supra* note 46, at 1037–38 (explaining the use of private ownership as an economic solution to the tragedy of the commons and citing Demsetz’s work as establishing property rights as being valuable to society because they limit the presence of uncompensated externalities).

80. The link is tenuous because intellectual property does not present the same problem of conserving scarce resources with which Demsetz’s work was concerned. Intellectual property laws create the scarcity to give market value to an innovation or creative work. *See* Lemley, *supra* note 46, at 1055 (“If property law is the creation of barriers to entry, as Demsetz suggests, the question is whether those barriers are properly scaled to the problem. But solving the ‘problem’ of intellectual property does not require complete internalization of externalities.”).

and benefits (or externalities) the particular use imposes or brings, upon the rights of other members of the community to undertake the development of the resource.<sup>81</sup> The grant of a general right to exclude by way of property law is, using this economic reasoning, an ideal way of encouraging the production and dissemination of literary and artistic works to the public by providing exclusive personal and economic gains to authors and inventors who undertake creative and innovative activities to advance public welfare in the form of an ability to control general social uses of the work.<sup>82</sup>

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

[D]iscourse about property has fragmented into a set of discontinuous usages. The more fruitful and useful of these usages are those stipulated by theorists; but these depart drastically from each other and from common speech. Conversely, meanings of “property” in law that cling to their origin in the thing-ownership conception are integrated least successfully into the general doctrinal framework of law, legal theory, and economics. It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economics could easily

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81. Demsetz, *supra* note 78, at 356 (“[P]rivate ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.”).

82. See *Mazer*, 347 U.S. at 219 (noting that the primary consideration of copyright law is to promote the general welfare, and the secondary consideration is to reward the author).

do without using the term “property” at all . . . [t]he development of a largely capitalist market economy toward industrialism objectively demand formulation of its emergent system of economic entitlements in something like the bundle-of-rights form, which in turn must lead to the decline of property as a central category of legal and political thought.<sup>83</sup>

This Article argues that the emergence of property rights as a bundle of economic entitlements and the disconnection between ownership rights and property rights in a thing owned, has facilitated the expansion of rights in literary and artistic works because the economist’s conception of “property rights” need no longer be tied to a thing with delineated bright-line boundaries, and may expand to cover new uses of creative resources as developing technologies open new markets to allow for greater social use of creative works. Unlike the conventional notion of property rights in a thing owned, which is generally limited to the physicality of the thing, the economic conception of property rights as a bundle of rights is flexible and expandable to allow for the capture of all forms of externalities arising from technological development.<sup>84</sup> It is this economic conception of property as a loose bundle-of-rights, which provides copyright owners with the philosophical basis to lobby for expanded rights in literary and artistic works as new markets emerge to provide users of creative works with new ways of using and sharing literary and artistic content.<sup>85</sup> As rights in the law and economics tradition are not tied to the physicality of the thing owned, there are no conceptual or philosophical restraints to prevent rights from expanding with emerging markets in literary and artistic works as a result of technological development. The benefit of expanding rights, for the copyright owner, is a greater control over markets for literary and artistic content without undertaking the responsibilities of developing works for the purposes of progress of science and arts.<sup>86</sup>

Allowing rights to expand over society’s use of creative works as new markets emerge provides an added advantage to the copyright owner. By allowing copyright to expand, the law has decided to put the

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83. Thomas C. Grey, *The Disintegration of Property*, in MODERN UNDERSTANDINGS OF LIBERTY AND PROPERTY 291, 294–95 (Richard A. Epstein ed., Garland Pub. 2000).

84. J.E. Penner, *The “Bundle-of-Rights” Picture of Property*, 43 UCLA L. REV. 711, 723–24 (1996) (noting that the concept of “property” as a bundle of rights is a “flexible one, without any necessary defining features”).

85. Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1459–60 (1996) (describing the expansion of copyright laws in tandem with technological change).

86. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 872–73 (2001).

initial entitlement in literary and artistic works in the hands of copyright owners and allowed the market to facilitate efficient outcomes in transferring user rights in literary and artistic works to the respective users interested in using the work. But this assumes that the party who values the right to use the work most is willing to pay the price for the particular right to use the work in a market where the absence of transaction costs makes transferring rights possible. The faith that the copyright system places on the market to effectively transfer rights is questionable because the market for literary and artistic works, as demonstrated, is susceptible to failure. Private rights provide an economic benefit to the copyright owner by establishing entitlements to use the work in the manner defined under the Copyright Act. But, as Ronald Coase theorized, these rights may only secure optimal outcomes in a perfect market as prohibitively high transaction costs will prevent rational actors from naturally negotiating transfers of entitlements to the party who values it most after the initial allocation of the entitlement has been made.<sup>87</sup> If the most efficient outcome may be achieved through the market, regardless of how the rights are initially allocated, then it does not matter how much rights expand with the development of new markets from new technologies because all parties with an interest in the right to use the work will naturally negotiate the purchase of that right. The initial allocation of the right to use the work in a particular way to the copyright owner as technology develops and new markets emerge does not matter to the economist, because the market will facilitate the transfer of the rights to use the work to paying members of society.

However, society's adverse reaction and push-back to the expansion of rights in literary and artistic works today seems to suggest that Coasean bargains may be failing in leading society to the most socially optimal outcomes.<sup>88</sup> This may be attributable to the increasing liberties that the Internet and digital technologies afford users of literary and artistic works. Users of literary and artistic works, with digital technology and new media reproduction programs, no longer seem to be mere passive consumers, but rather active creators and reproducers of the works they use.<sup>89</sup> As the autonomy of individual members of

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87. Coase, *Social Cost*, *supra* note 2, at 15–18 (arguing that many disputes are not addressed because of the high transactional costs associated with the resolution).

88. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 95–98 (1991) (describing circumstances when Coasean bargains fail).

89. Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 *FED. COMM. L.J.* 561, 579 (2000) (arguing that the legislature should make policy choices, which conceive users of creative works as also

society grows for various uses of creative works beyond the control of the copyright owner, Coasean bargains become less likely. The socially optimal outcome desired through the grant of legal rights in literary and artistic works to the copyright owner may be elusive, because the legal structure of entitlements in literary and artistic works creates prohibitively high transaction costs that cause negotiations to break down. Where markets fail to facilitate the transfer of entitlement from the copyright owner to the user of the work, the courts may be required to artificially create an efficient market by forcing a transfer of entitlements.<sup>90</sup> In this situation, the economic entitlement of the copyright owner will be protected by a liability rule, rather than a property rule, where the courts will attach an objective value to the work and require the copyright infringer to pay the copyright owner damages for unauthorized uses of the work.<sup>91</sup> But as long as the law allocates first entitlements in literary and artistic works to the copyright owner, rights will continue to expand as technology develops to protect the rights of the copyright owner against infringing uses.

### B. *Peer Production and Social Networks*

Scholars often attribute the emergence of early copyright laws to the printing press.<sup>92</sup> Ironically, the technology that allowed books to be printed cheaply and disseminated to a wide segment of society, thereby necessitating laws governing public use of information, is the very same technology that allowed education and learning to flourish through greater public access to information.<sup>93</sup> Technological development

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producers of content, participating as “peers” in a “robust, open social conversation”).

90. Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1336 (1986) (“When a court cannot avail itself of the Coasean market, it is left to imagine what the parties would have agreed to in a *hypothetical*-Coasean market. In this market, the right to use a resource would have been secured ultimately by that party who would have paid the most for it. The court then mimics the outcome of the idealized, but unrealized Coasean market by ‘auctioning’ entitlements to those who value them most—as judged by each litigant’s willingness to pay.”).

91. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–09 (1972).

92. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 3 (1993) (“[C]opyright—the practice of securing marketable rights in texts that are treated as commodities—is a specifically modern institution, the creature of the printing press, the individualization of authorship in the late Middle Ages and early Renaissance, and the development of the advanced marketplace society in the seventeenth and eighteenth centuries.”).

93. The intellectual community in Venice, for example, grew because of the printing industry. See JANE A. BERNSTEIN, *PRINT CULTURE AND MUSIC IN SIXTEENTH-CENTURY VENICE* 15 (2001) (“Printers and booksellers forged important alliances with members of the intellectual world of Venice. Their business distinguished them from other merchants by bringing them into contact with writers, artists, and musicians.”).

always provides reasons to reassess the effectiveness of incentives by encouraging the production of literary and artistic works because new technologies often offer greater public accessibility of creative works and heighten the free-rider problem of public goods, creating an urgent need for information producers to internalize the additional social benefits created through increased accessibility.<sup>94</sup> As producers of information seek to prevent the proliferation of new technologies by claiming that producers of new technologies are contributorily liable for copyright infringement because these technologies facilitate infringement of copyrighted works,<sup>95</sup> the legal system confronts a difficult question of law that remains unresolved: whether the rights provided to copyright owners under the Copyright Act may be used to prevent the public distribution of new technologies and protect markets when the economic justification for the grant of the right in the first place was to ensure the production of literary and artistic works for public benefit.

It is difficult to conceive that the statutory rights in the copyright system were intended to be so broad as to allow for right owners to exert rights and prevent the development of burgeoning technologies. To allow these exclusive rights, granted to fulfill a larger public goal of progress, to stifle development in any form would appear irrational. Yet the exercise of statutory rights has had the effect of dismantling developing technologies. The Grokster website today displays a message, which states: “[t]he United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners.” The site goes on to say, “[t]here are legal services for downloading music and movies. This service is not one of them”<sup>96</sup>—a result of the Supreme Court’s decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, where the Court decided that Grokster and StreamCast Networks, distributors of free file sharing programs on peer-to-peer networks that allowed personal computers to communicate directly with each other without a centralized server, were liable for contributory

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94. Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 415–27 (2002) (describing large-scale collaborative projects for information production that do not depend on markets or managerial hierarchy as a result of the availability of free software).

95. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 (1984) (stating that contributory infringement lies outside statutory copyright and is established by showing: (1) the “‘contributory’ infringer was in a position to control the use of copyrighted works by others”; and (2) “‘had authorized the use without permission from the copyright owner’”).

96. GROKSTER, <http://www.grokster.com> (last visited Oct. 26, 2010).

infringement for the infringing activities of the users of their software. Both companies, the Court held, went beyond mere distribution of the program to taking affirmative steps to encourage and foster copyright infringement by teaching their users how to play copyrighted content and actively urged their users to download copyrighted works.<sup>97</sup>

The *Grokster* decision has important implications because the balance between the exclusive rights of copyright owners against the equally legitimate public right to technological development the Court was required to make demonstrates that the protection of rights in literary and artistic works may abridge legitimate social expectations to use works as a resource for research, education, or, as in this case, entertainment. The rights of copyright owners were obviously affected by mass downloads and distribution of copyrighted content: a statistician employed by MGM showed that 90% of downloaded materials were copyrighted.<sup>98</sup> But, the active encouragement of technology developers to use their technology to infringe copyrighted content clearly is an inducement to infringement, which is a culpable act of contributory infringement. Both companies distributed their software with the intent of encouraging their recipients to download copyrighted content, took active steps to encourage infringement, and sought to appropriate displaced Napster users following Napster's shut down,<sup>99</sup> all of which indicated an illegal intent behind the public distribution of the software.

Justice Souter identified the precise query before the Court to be the tension between two separate values in copyright—that of encouraging creative pursuits by protecting creative works from being infringed and promoting innovation in new forms of communication technologies by limiting the circumstances in which copyright may be infringed.<sup>100</sup> Opening up developers of technology to potential copyright infringement actions would undoubtedly create a chilling effect on technological growth.<sup>101</sup> But, developing technologies, which sole purpose and intent was not to facilitate illegal downloads of copyrighted content, will find protection from liability within the safe harbors of the staple article of commerce exception enunciated in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>102</sup>

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97. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940–41 (2005).

98. *Id.* at 932.

99. *Id.* at 923–25.

100. *Id.* at 928.

101. Ann Bartow, *Arresting Technology: An Essay*, 1 *BUFF. INTELL. L.J.* 95, 100 (2001).

102. 464 U.S. 417 (1984).

While the *Grokster* decision may be correct on its specific fact pattern, there is an unstated assumption in the Court's decision that user downloads and sharing of copyrighted material are illegal acts. This assumption may lead to the erroneous conclusion that legitimate uses of information and knowledge contained in creative works do not include the downloading and sharing of information. Encouraging creativity and promoting innovation are legitimate goals of the copyright system; but creative and innovative activities depend to a certain degree on access to literary and artistic works, because social, economic, and cultural development is dependent on users of creative works having access to the materials embodied in literature, music, movies and other forms of creative content. Exchanging and sharing information among individuals need not necessarily be an infringement of copyright, and may instead be a valid, legitimate claim to reasonable access to information. It is important for the law to recognize reasonable access to information, for that reinforces the legitimate needs of society to have access to information for the progress of science and the useful arts. While the Supreme Court reemphasized conventional legal thought on the importance of balancing private rights and public interests in literary and artistic works through copyright laws, an express acknowledgment for legitimate social access to creative works as a resource for progress in an age when social networks have increased the potential for public participation in civil discourse, political dialogue, and collaborative research is highly warranted.

Contemporary criticisms leveled against the grant of property rights over intellectual works have been based on unreasonable restrictions on public access to intellectual works. The extension of the copyright term for an additional twenty years, for example, keeps copyrighted works from falling into the public domain for another twenty years, and prevents society from freely using works to which they are rightfully entitled.<sup>103</sup> Recognizing patent rights over business methods, as another example, denies society the freedom to use works that are essential, socially useful information, and knowledge of legitimate ways to conduct or operate a business, which ought to be free.<sup>104</sup> Critics of

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103. The Copyright Term Extension Act expanded the duration of copyright protection from fifty years to seventy years after the life of the author. Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 11 Stat. 2827 (codified as amended at 17 U.S.C. § 302(a)). In *Eldred v. Ashcroft*, 537 U.S. 186, 190–91 (2003), the Supreme Court decided by a majority of 7–2 that the Act was not unconstitutional.

104. Business method patents were first recognized in *State St. Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) and affirmed in *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999). The Supreme Court recently decided that

intellectual property rights argue that expanded copyright protection and patent rights will cripple society's ability to critically exchange ideas over an independent network, such as the Internet, which promotes the free and unrestrained exchange of information and knowledge over an open and commonly held cyberspace.<sup>105</sup> A healthy public domain comprising information, knowledge, and intellectual works commonly held by society and easily available for use in innovation and creativity is essential for social, cultural, and technological development.<sup>106</sup>

The critical commentary against expanding intellectual property rights tells of a deeper legal conundrum in addressing the question of rights and access to information. Legal systems that are essentially utilitarian in nature willingly bear various social costs to maximize overall utility.<sup>107</sup> In the copyright system, the social cost borne to achieve the greatest utility of progress of science and arts are exclusive rights in literary and artistic works. The central difficulty in the rights-access debate is the impossibility of calibrating the proper extent of private rights necessary to encourage private individuals to dedicate innovative and creative energies towards creating intellectual assets for society.<sup>108</sup> Recognizing private rights as a means of achieving general social utility, where creative works are made fully available to members of society willing to pay the price for access (which is generally greater than the marginal cost of producing the intellectual asset), would mean that a balance between private rights and social utility must be reached. The ensuing dilemma from the law's attempt to ensure the creation of intellectual works for the public, while at the same time secure sufficient public access to these works to encourage innovation and authorship, is a result of the tension between the right to exclude

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a process need not be tied to a machine or transform an article into something else. *See* *Bilski v. Kappos*, 130 S. Ct. 3218, 3255 (2010) ("The primary concern is that patents on business methods may prohibit a wide swath of legitimate competition and innovation.").

105. Lawrence Lessig, *The Death of Cyberspace*, 57 WASH. & LEE L. REV. 337, 345-47 (2000).

106. *See* Boyle, *supra* note 14 (arguing for an active construction of the public domain to avoid the "propertization" of informational resources); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1023 (1990) (emphasizing the need to ensure that a robust public domain, containing the resources for creativity, exists).

107. Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 508 (1986) ("Various versions of utilitarianism evaluate actions by the consequences of those actions to maximize happiness, the net of pleasure over pain, or the satisfaction of desires.").

108. William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 385 (1999) ("[C]alibrating the exact level of incentive protection required to bring collections of information to the market is an impossible task, one which, even theoretically, has proved vexing.").

unauthorized use of property and the expectation of reasonable access to creative works as building blocks for future innovation and creativity.

Arguably, the reason the law struggles with the question of rights and access is because we, as legal scholars, look for answers to the problem in the wrong places. We have tried to calibrate the optimum level of rights by relying on economics to provide answers to a legal problem. We have also framed the rights-access question as a matter of political clout, where the most politically influential party to the copyright bargain gets what it wants,<sup>109</sup> and to which social activism is the best response.<sup>110</sup> The utilitarian views statutory rights as a temporary price paid by society to achieve the long-term benefits of having literary and artistic works available in the public domain. Sir Thomas Babington Macaulay's Parliamentary Speech in 1841 exemplifies the utilitarian view that exclusive rights in creative works are a necessary evil that must be endured for the long term benefits of having creative works for public use. He said:

The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures. I admit, however, the necessity of giving a bounty to genius and learning. To give such a bounty, I willingly submit even to this severe and burdensome tax. Nay, I am ready to increase the tax, if it can be shown that by so doing I should proportionally increase the bounty . . . .<sup>111</sup>

But, as technological development creates new markets and copyright owners seek to expand rights, striking a perfect balance between rights and access seems impossible. Critical legal scholarship's response to the problem seeks to garner public support to push back against expanding rights as a form of social activism against political influence in copyright laws by large media conglomerates and publishing houses.<sup>112</sup> This social push back against expanding rights is possible

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109. JESSICA LITMAN, *DIGITAL COPYRIGHT* 122–45 (2001) (arguing that copyright laws are products of industrial interests represented at the negotiating table when laws are being drafted).

110. Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 387–88 (2005) [hereinafter Elkin-Koren, *What Contracts Cannot Do*] (“Creative Commons is a form of political activism and is best understood as a social movement seeking to bring about social change. It responds to proposals calling for political activism against the enclosure of intellectual property. Like its predecessors, the open source movement and free software, it seeks to change the social consequences of copyright law by instantiating an alternative.”).

111. Macaulay, *supra* note 44, at 311.

112. Elkin-Koren, *What Contracts Cannot Do*, *supra* note 110, at 375–76 (“The legislative

because the technology has developed to facilitate peer production of content and collaborative modes of creation through social networking sites.<sup>113</sup> The reason access to information has become a central issue in copyright policy debates is because existing technological platforms built upon the infrastructure of the Internet facilitate online discussion and actively gather a citizenry of the information society to uphold libertarian notions of freedom, autonomy, individual liberty, and human rights. This form of social activism is a result of influences from the critical or realist school of thought, which believes in the law's indeterminacy and advocates for solutions to legal problems through real-world social responses or activism.<sup>114</sup> The real world social response to the expansion of rights in literary and artistic works is to create an awareness of the inequities of lessening access to information and the impact of greater rights on individual autonomy. But, real world social responses to the problem do not provide a solution to the legal question of how the law may achieve a balance between protecting rights and granting access over informational resources.

### *C. The Uneasy Path of Rights Expansion*

Professor Ralph S. Brown, in a 1985 article, laid down three underlying principles in the copyright system, which Congress, other policy makers, or judges may adopt when deciding whether existing rights under the copyright system ought to be expanded to cover new

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process is captured by the content industries . . . . As public choice theorists have shown, small homogenous groups that have a lot to gain, such as the content industries, have persistently pressured for even stronger proprietary rights. Courts seem to be shorthanded, failing to set constitutional limits to extensive intellectual property rights. Finally, international pressure on national governments makes it difficult to rely on the global arena for remedying the deficiencies of intellectual property laws at the domestic level. Given this background, private ordering—self-regulation voluntarily undertaken by private parties—turns out to be an attractive option. It promises to allow individuals and communities to figure out, on their own, a way to bypass the increasingly protectionist global intellectual property regime.”)

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

114. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 698–99 (1930) (criticizing the realist’s rejection of former conceptions of legal understanding—actualities, rationalists, and positivists). Pound specifically criticized the realist’s view that “[r]eason is an illusion. Experience is not the unfolding of an idea. No ‘pure fact of law’ is to be found in rules since the existence of rules of law, as anything outside of the books is an illusion.” *Id.* at 699.

forms of creative works.<sup>115</sup> The first is a “morally principled approach [which] exalts authors . . . [as] the bearers and creators of our culture, both high and popular.”<sup>116</sup> Professor Brown calls this principle the “exaltation of authorship,”<sup>117</sup> which glorifies the author as the autonomous individual producing works of authorial or artistic genius for society.<sup>118</sup> Second, Professor Brown lays down a constitutional principle, which emphasizes that Congressional powers under the intellectual property clause were intended to promote the progress of science and the useful arts; and were not intended, as Professor Brown states, “to maximize the returns to authors and inventors.”<sup>119</sup> The rights of the author, therefore, are subservient to the public interest under the second principle. This requires Congress, in legislating, and judges, in deciding cases, to balance the public interest against the private rewards the law provides authors. The third principle identified by Professor Brown is based on the economics of the market place for the inherently public good nature of creative works.<sup>120</sup> As literary and artistic works, by their nature, cannot be depleted or extinguished by public uses, and are incapable of any form of exclusive control, which would allow authors to prevent non-paying members of the public from copying and distributing the work, the state must intervene and pass copyright laws to ensure that authors and creators are able to legally exclude others from copying or using the work without their permission.<sup>121</sup>

While these principles provide useful guidance when rights in literary and artistic works may be justifiably expanded, they do not provide a workable solution to the question of rights and access over informational resources in literary and artistic works. In the commercial market for literary and artistic works, the “exaltation of authorship” principle has less value in assisting Congress, and judges decide the extent of private rights premised solely on rewarding the creative genius of an author or artist. Under the Copyright Act, artistic worth in literary and artistic works is not a basis for granting rights. Utilitarian works, which perform purely instructional functions, such as computer

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115. Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 589–600 (1985).

116. *Id.* at 589.

117. *Id.*

118. Under this principle, authors are regarded as the “creator and bearer of our culture, both high and low” and ought to be rewarded for their creations. *See id.*

119. *Id.* at 592.

120. Public goods generally do not diminish by consumption and are not readily appropriable. *Id.* at 596.

121. *Id.*

programs, are regarded as literary works under § 101,<sup>122</sup> and the Supreme Court has, on separate occasions, held that: pictorial illustrations functioning as an advertisement are pictures subject to copyright protection;<sup>123</sup> an original selection, coordination, and arrangement of facts may merit copyright protection over the way those facts are presented;<sup>124</sup> and that a commercial design with an aesthetic value and utilitarian function, such as a statue used for a table lamp base, is eligible for copyright protection as a work of art.<sup>125</sup> Works of creative authorship may also be commissioned today under the “work-for-hire” doctrine,<sup>126</sup> making authorship an endeavor that is essentially commercial or market-driven, and less an expression of creative talents or artistic genius. As such, the first principle of exalted authorship will offer very little help on how private rights fare against the public interest. Compared to the exalted authorship principle, the second principle, based on the utilitarian model for rights, emphasizes progress as the ultimate goal for which rights serve. The third principle, which recognizes rights as serving an incentive function for the provision of public goods, relies on economics to justify the grant and expansion of rights. All of these principles are grounded in policy-oriented realism and highlight the need to recognize private rights in order to encourage the creation of information for society’s benefit. However, the latter two principles do not offer any normative guidance as to how the law in this area may be developed to ensure that rights serve the purposes of production and dissemination while allowing for public accessibility to information for the progress of science and the useful arts.

Rights expansion treads such an uneasy path because the exact extent of the statutory entitlement granted to copyright owners remains unresolved and answers to the question of rights and access remain forthcoming. The question of rights and access cannot be resolved by economic analysis nor social or political activism because the question of what the statutory rights entail is essentially a legal one. If statutory rights are property rights in the conventional sense that a right to

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122. Object codes containing instructions to a computer in binary code (e.g., “01101001,” instructing a computer to add two numbers and save the results) are literary works under copyright laws. See *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1248–49 (1983) (“[T]he definition of ‘computer program’ adopted by Congress in the 1980 amendments is ‘sets of statements or instructions to be used *directly or indirectly* in a computer in order to bring about a certain result.’”).

123. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251–52 (1903).

124. *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348, 361–64 (1991).

125. *Mazer v. Stein*, 347 U.S. 201, 213–14 (1954).

126. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 747–48, 752–53 (1989).

exclude attaches, then the question of access to information becomes a real concern, because the copyright owner is legally entitled to exclude society from using the information as the owner of informational resources. However, if the rights under the copyright statute are a lesser right than a property right of the *in rem* kind, and the copyright owner does not have a general right to exclude society from using the information, then the question of access is more readily resolvable because use of informational resources by both the copyright owner and society becomes an issue of resource management. If rights under the copyright statute are considered economic privileges that serve a production function and are intended to encourage use of information in ways that would promote progress, then the copyright owner has no real right to exclude society from having access to information that is grounded in ownership of the work as property. Because the Copyright Act was passed to encourage production of literary and artistic works by reward, the rights under the Copyright Act should only provide a personal right to recover payment for uses of the work. The statutory right provided under § 106 of the copyright statute is, arguably, an economic entitlement that is separate from the larger property right of the author. As statutory rights are economic privileges and protect a right to receive payment for use of a work, they should not be construed to entail a possessory right to exclude society from using informational resources.

### III. PROPERTY RIGHTS AND ECONOMIC PRIVILEGES

The distinction between a right that attaches to a thing and a personal right possessed by an individual suggests that rights in literary and artistic works may comprise a right to exclude use of creative expression and specifically enumerated rights to use literary and artistic works in ways Congress deems to be rewards for creative production. An owner of property has rights over that which he owns *in rem*, meaning that a property owner has an interest in the property or thing, which is good against the rest of the world.<sup>127</sup> Interests *in personam*, on

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127. For an elaborate treatment of the legal interaction between rights *in rem* and *in personam*, see WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 68–114 (1919). Hohfeld identifies four types of *in rem*/*in personam* classifications. First is the fundamental classification of primary rights into *in rem* and *in personam* rights; second, classification of judicial proceedings into *in rem* and *in personam*; third, judgments or decrees *in rem* or *in personam*; and fourth, enforcements *in rem* or *in personam*. *Id.* at 69. For the purposes of analysis in this Article, the use of the phrases “*in rem*” and “*in personam*” is specifically applied to the discussion on primary rights belonging to the author and copyright owner.

the other hand, are personal interests individuals possess that arise by virtue of a relationship with the property owner and which are personal to a person. They neither pertain to, nor convey, property ownership in a thing.<sup>128</sup> An owner of real property, for example, has rights in rem over the land he owns and is entitled to enforce a right to exclude all others from trespassing over his land. The rest of the world owes a specific duty to respect this right of the property owner to exclude others from encroaching upon the land.<sup>129</sup> The right the property owner exercises stems from ownership of the land and is metaphorically attached, or tied, to the land.<sup>130</sup> A lien over land as a security for the payment of a debt may provide a creditor with a temporary security interest over a property as an interest in rem, but creates an in personam right because the right arises by a personal interest that the creditor has to have the debt repaid by the borrower.<sup>131</sup> The lien holder's right is therefore a personal right, or a right in personam, which may be traced back to the creditor-debtor relationship existing between the lien holder and the property owner.<sup>132</sup>

This distinction between rights in rem and rights in personam offers insight into the private right–public domain discussion in copyright jurisprudence by distinguishing a right to exclude society from using the work and a right to recover payment from society for using the work. An author, by virtue of the property right in literary and artistic works, has a right in rem that is good against the rest of the world. The author's right in rem implies an ability to control social uses of the work because of the author's literary property. But, besides a property right in a work arising by virtue of an author's act of creation, which arguably entitles authors to exclude society from using the work to conserve creative integrity or preserve the authenticity of a work so that works be used only for the purposes of progress, the law also recognizes certain rights in authors to restrict the rest of the world from reproducing, distributing, making derivative works, and publicly performing and digitally transmitting the work through the Copyright Act.<sup>133</sup> Recognizing entitlements in literary and artistic works, while attached to the works as a right in rem, actually stems from a personal

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128. *Id.* at 72.

129. *Id.*

130. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160–61 (Wis. 1997).

131. *Merrill & Smith*, *supra* note 62, at 850 (“Security interests arise with an *in personam* agreement between a debtor and a creditor to make a transfer of the full bundle of *in rem* rights to the creditor upon the happening of a future contingent event, nonpayment of the debt.”).

132. *Id.*

133. 17 U.S.C.A. § 106 (West 2005).

contractual relationship, or an interest in personam between the copyright owner and the rest of society as represented by Congress to recover profits from market commercialization of the work as a reward for creative production. Protecting economic interests to encourage the reproduction and wide dissemination of the work to the public in order to fulfill the constitutional intent of promoting the progress of science and the useful arts,<sup>134</sup> arguably, should not entail an absolute right to exclude society from using the work. All the right entails is a right to recover payment for the use of the work. The quid pro quo between copyright owners and society are temporary rights as rewards for making creative works fully available for public use through market mechanisms so that society will have works to facilitate learning. Rights in personam, which copyright holders have by virtue of the copyright statute, are generally not an entitlement that an owner of real or other forms of personal property has by virtue of their ownership of land or a thing—they are contractual rights that are generally regarded to be in personam in nature.<sup>135</sup> This right in personam is particularly pertinent to literary and artistic works because of the peculiar constitutional recognition of literary and artistic property as a right given to encourage innovation and creativity to further the interests of the general public and that of society, and not as a right in itself pertaining to basic notions of human freedom, liberty, equality, and democracy underpinning the 5th and 14th Amendments of the U.S. Constitution. The copyright owner's right under the Copyright Act is therefore, arguably, a personal right which may be traced back to a constitutional agreement between the producer of literary and artistic work and the society in which he lives.<sup>136</sup>

These two distinct rights in literary and artistic works ensure that authors engage in creative production of literary and artistic works for society's benefit and the dissemination of these works to the public. While the right in rem generates authorial creativity and production of original works of authorship, the right in personam encourages the dissemination of these works to the public. The property right of an author in the work is a sovereign right of a property owner over the work, subject to a few legal and moral limitations (such as when a work

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134. U.S. CONST. art. I, § 8, cl. 8.

135. Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 509 (1924) (“‘Property’ rights are among the rights said to be ‘in rem’; contract rights among those ‘in personam.’”).

136. See Alina Ng, *The Social Contract and Authorship Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 423 (2009) (discussing the importance of a legal system that protects the development of creative works from outside influence, thus allowing society to benefit from those works).

is used for bona fide research purposes or used in a way that advances the general well-being of society), is an absolute right, good against the world, that allows an author to deny access to the work based on an absolute right to exclude. A property owner is under no obligation to grant another person access to the property, even for monetary exchange.<sup>137</sup> An economic right, however, does not carry with it the right to exclude in the same way a property right does, but rather takes the form of a contractual relationship between the author and society to make the work available or accessible for market value.<sup>138</sup> A copyright owner, unlike an owner of real or personal property, is under an obligation to allow access to use creative works for progress under a social agreement as long as uses of the work are paid for—the whole point of the statutory rights is to ultimately encourage creative production of a public good for social utility. An encroachment of the author's economic right (i.e., the right to commercial profits from the dissemination and sale of a work) does not therefore invoke an absolute right to exclude use of the work based on a property right, or a right in rem, against the use of the work by an injunction, but rather suggests a form of contractual breach, which remedies, if any, have to be sought in an action in personam against the person who has conducted an act to adversely affect the author's economic right. An author pursuing his or her economic interest by making a work commercially available on the market implicitly agrees to grant the public access to and reasonable uses of the work, and should, as a matter of law, not be entitled to later claim a superior right in rem over the work—unless the integrity of its contents is affected. The expression of in rem and in personam interests in creative works, therefore, provides some normative legal guidance that balances property rights of authors and economic privileges of copyright owners against the legitimate needs of society to have access, and offers an interpretation of property rights in literary and artistic works that is grounded in legal doctrine and a theory of property rights.

As this distinction between a property right and an economic privilege does not appear as a matter of doctrine in copyright jurisprudence, there is little normative guidance to provide answers to the question of how authors, copyright owners, and users of literary and artistic works should behave in the legal system. Statutory rights that recognize specific rights to use literary and artistic works are called

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137. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 154 (Wis. 1997).

138. Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL'Y 83, 87 (2006) (describing licensing agreements to give effect to a user's purchase of access and use rights rather than a purchase of the copyrighted work itself).

property rights, and this label gives rise to the assumption that these exclusive rights are in rem property rights that allow the copyright owner to generally exclude society from using literary and artistic works as a thing subject to a right to exclude. This assumption has a significant impact on the rights-access question because use rights, such as the right to print or create derivative works, recognizes competing uses of literary and artistic works for the purposes of progress through fair use principles and the idea/expression dichotomy.<sup>139</sup> The congressional grant of a right to print implicitly assumes that society will be able to use the work as long as the use does not unreasonably interfere with the copyright owner's right to receive payment for the production and dissemination of the work to society.<sup>140</sup> The exclusive right to print only serves the purpose of artificially creating boundaries in order to provide copyright owners with institutional support to produce and disseminate a good that is non-rival and non-excludable.<sup>141</sup> The positive right to print or reproduce literary and artistic works is, therefore, an in personam right, which the copyright owner has that does not create in rem rights to possess the work as property.

The claim that the statutory rights under § 106 of the Copyright Act are economic privileges and not property rights belonging to the author finds support in historical documentation of early copyright law, in the theory of economics on information cost, and in established legal principles that separate ideas from expression. Historical evidence seems to suggest that authors have always had a separate right in the work that was distinct from the publisher's right to print the manuscript. Economic theory also shows that there is a distinction between property rights and economic privileges in copyright law, as information cost theory explains differing consumer behavior in the use and consumption of literary and artistic works—consumers appear willing to expand greater information costs for the expressive component of creative works (that the law protects as with an in rem right) while they are less

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139. 17 U.S.C.A. § 107 (West 2005) (statutory codification of the fair use principles); *Baker v. Selden*, 101 U.S. 99, 103–04 (1879) (laying down the principle that expressions are protected and ideas are not).

140. Coase stated that public goods, such as light from a lighthouse, may be provided privately; thus, the role of government was

limited to the establishment and enforcement of property rights in the lighthouse . . . .

The problem of enforcement was no different for them than for other suppliers of goods and services to the shipowner. The property rights were unusual only in that they stipulated the price that could be charged.

Coase, *The Lighthouse*, *supra* note 9, at 375.

141. In the same way, the Crown supported the building of lighthouses by granting rights to private enterprises to build lighthouses and levying tolls against shipowners. *Id.* at 364.

willing to incur the same costs for works that are more generic (that should be protected by an in personam right). The distinction between property rights and economic privileges is also observable as a matter of legal principle in copyright law from the distinction the law draws between protectable expressions and non-protectable ideas.

#### A. *As a Matter of History*

Early publishing contracts in England show that authors retained what appears to be literary property after assigning the right to print to the printer. A publishing contract would include a clause requiring the author to refrain from selling the manuscript to another without the consent of the publisher and from interfering with the publication of the work once the manuscript was sold. The 1667 publication contract for *Paradise Lost*, for example, contained a clause requiring John Milton to refrain from publishing or printing the work. The inclusion of such a clause was, as Professor Lyman Patterson pointed out, unnecessary unless the publisher recognized a residual right that the author had in the manuscript which would allow him to interfere with the publication of the work.<sup>142</sup> This residual right indicated that the conveyance of the right to print the manuscript was not a complete conveyance of the author's rights but a mere assignment of a specific right to use the manuscript in a particular way (i.e., to print and publish the work). It would appear that the author still retained an absolute property right in the work over the more limited copyright that the publisher owned following an assignment. The way early publishing contracts were drafted provides an important piece of evidence which demonstrates that a property right in the manuscript belonging to the author and a more specific and limited right to use the work in a particular way (to print the manuscript) were two separate and distinct legal rights. The retention of a property right in the work would suggest that the publishing contract between the author and his publisher conveyed a mere right to use the work and not a complete sale of the work as a thing. Professor Patterson views an author's conveyance of a copyright as a negative covenant to refrain from exercising the full extent of his rights once the copyright has been sold. The publishing contract is not a sale of the entire work as a "thing" that was subject to a property right. As Professor Patterson explains:

[I]t points up the value of analyzing the author's conveyance in terms of a negative covenant rather than the sale of his work. The distinction is more than one of semantics, and it is helpful because we have here a

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142. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 74 (1968).

unique example of a chattel being conveyed not for its intrinsic value, but to enable the purchaser to exercise the right which is actually being conveyed. The manuscript is more than a symbol, of which a stock certificate is an example, but less than the object of purchase, of which a book itself is an example.<sup>143</sup>

The fact that early publishing contracts were not absolute transfers of ownership in the work, but rather assignments of a specific right to print and publish more similar to a personal license than an outright conveyance of property, supports the claim that the right to print a work is a mere economic privilege and not a property right. Even before the first legislation to expressly grant rights to print and publish books (the Statute of Anne was passed to establish rights in literary and artistic works as a statutory right in 1710), the author's rights and the publisher's rights as two separate and distinct rights seem to have been evident. But this distinction may have been lost in the trilogy of court cases interpreting the Statute of Anne and the U.S. Copyright Act of 1790. In 1769, the U.K.'s Queen's Bench Division, in *Millar v. Taylor*,<sup>144</sup> decided that the author had a perpetual property right in the work that was separate from the statutory right to print manuscripts for fourteen years granted to authors and publishers under the Statute of Anne. The Court decided that the author's literary property existed at common law outside the statutory rights provided by the Statute of Anne and was a separate and distinct legal right that entitled the author, as the creator and originator of the work, to control how the work was used and represented to the public once the manuscript was sold to the publisher.<sup>145</sup>

The House of Lords, the highest court in the United Kingdom, overruled the decision of *Millar v. Taylor* in 1774 in *Donaldson v.*

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143. *Id.* at 75.

144. [1769] 98 Eng. Rep. 201, 252 (H.L.) (“[I]t is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication.”).

145. Lord Mansfield, writing his decision for the Court last, traced the source of that common law to natural law principles, stating that the author's right had to survive the statutory right otherwise the author

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

*Id.*

*Beckett*,<sup>146</sup> deciding that the only rights in literary and artistic works were copyrights granted by statute, and that the author's common-law right in his or her literary creation, if they ever existed, had been abolished by the Statute of Anne.<sup>147</sup> The decision was intended to deny British booksellers a claim over books in perpetuity—a claim they previously had by virtue of the Crown Licensing Acts until they were repealed and replaced by the Statute of Anne, granting limited protection<sup>148</sup>—by asserting a common law copyright that was acquired from the author.<sup>149</sup> But the decision itself acknowledged the important contributions authors make to society through their works of authorship and hinted at the need for society to access works while encouraging authors to create.<sup>150</sup> What was objectionable to the Court was the potential control that publishers could have over literary and artistic works, and not the notion of a literary property owned by the author of the work.<sup>151</sup>

When the U.S. Supreme Court decided the issue of the author's common law copyright in 1834 in *Wheaton v. Peters*, the Court decided, as did the House of Lords in *Donaldson v. Beckett*,<sup>152</sup> that the only rights in literary and artistic works were statutorily granted, and that

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146. [1774] 1 Eng. Rep. 837 (H.L.).

147. *Id.* at 844 (“The Statute of Anne was not declaratory of the common law, but introductive of a new law, to give learned men a property which they had not before.”).

148. PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 32–34 (rev. ed., Stan. Univ. Press 2003).

149. *Id.* at 35.

150. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 41–42 (1991) (“It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy [of] such men to traffic with a dirty bookseller for so much [as] a sheet of letter press . . . what situation would the public be in with regard to literature, if there were no means for compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked upon the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.” (quoting Lord Camden, who, in rejecting the author's common law copyright, hailed the value of good works of authorship while condemning the monopolistic practices of the booksellers)).

151. *Id.* at 41 (“The arguments attempted to be maintained on the side of the Respondents, were found on patents, privileges, Star-chamber decrees, and the bye laws of the Stationers' Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom; and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises, in which it could not possibly have existence.” (quoting Lord Camden, who opposed perpetual copyright as put forward by the respondent bookseller)).

152. [1774] 1 Eng. Rep. 837 (H.L.).

common law property rights of the author did not exist.<sup>153</sup> Copyright in U.S. Supreme Court Reports existed by way of statute—not at common law—and required compliance with statutory formalities before the right could be enforced.<sup>154</sup> Yet underlying the decision in *Wheaton* was neither a question of whether an author had literary rights in the work nor whether the Copyright Act replaced rights that authors had in their work, if they did have literary rights at common law. Rather, the controversy in *Wheaton* was the conflict between state power to protect literary and artistic works against federal power to protect works under statutory copyright law.<sup>155</sup> *Wheaton* arguably addressed the constitutional issue between state and federal powers in terms of protecting literary and artistic works, but a lot remains to be said about the author’s literary property. While the courts rejected the author’s natural rights in their work and decided statutory rights were the only rights in creative works, the issue of the exact nature of entitlements in creative works remains unsettled because the author’s prepublication right—the right to make changes, maintain the integrity of the work, increase creative input—has to be larger than the statutorily granted rights to print and publish. As evidence exists to suggest that the author retained rights that were not completely assigned to the publisher when the manuscript was sold, and as the trilogy of cases on statutory rights were primarily concerned with the public’s ability to access creative works from the publisher (and not the author), the distinction between the rights of authors in their work that were both retained and never assigned and state-granted privileges of publishers to publish works for the public remains as two distinct legal concepts that were never specifically adjudicated.

### *B. As a Theory of Economics*

The distinction between property rights and economic privileges is also a natural legal response to economic theory on information costs. The economic theory of information costs posits that rational individuals will search for the best product or service until the marginal cost of searching for information about products or services on the

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153. 33 U.S. (8 Pet.) 591, 592–93 (1834).

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

155. GOLDSTEIN, *supra* note 148, at 44 (“However much it voiced the English discourse, *Wheaton v. Peters* was at bottom a distinctively American decision, representing a victory for federal power over state power.”).

market exceeds the marginal benefit of the search.<sup>156</sup> At times, users of literary and artistic works are willing to bear high search costs to find works whose individual expression will satisfy a specific purpose. A movie producer, for example, may incur considerable information costs searching for the perfect piece of music for the film's theme song. An author may incur high information costs searching for the perfect art piece to describe in his or her work. Researchers often spend countless hours searching for the perfect piece of evidence to support their hypotheses. In these situations, the creator of the new work will often incur considerable information costs searching for the right work to use for his or her own creation, and therefore, the value of the work to the user is incredibly high. Other users of literary and artistic works, such as a music listener or a moviegoer, may spend less time searching for the "best" product on the market because substitutes are readily available. A person may decide not to watch a particular movie or listen to a particular song if a substitutable product is available. The information costs a user is willing to incur depend on whether the work is used for its expressive component and whether the user is a creator of a new work or a consumer of content. A work is generally not substitutable when it is used for its specific expressive content.

The fact that creative works are substitutable for some users and not for others demonstrates that there is a discernible difference between the value users place on works depending on their intended use. Non-substitutable works have a higher user value and, therefore, rights should protect more than just the economic value of the work: they should protect the author's creative personality and authorial integrity against uses of the work in ways that may, without legitimate reason (such as pursuing research for progress), undermine the author's integrity and deter the creation of new works. In such cases, a property right allowing the author to exclude society would be justified because a property right in the work as a creative expression of authorship protects the work as a thing and protects the author and his or her authentic expression. The value of such protection is in the freedom a right to exclude gives authors, allowing them to continually create.

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156. George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 214 (1961) (discussing the consumer's search for a commodity with the best market price considering the differences in the terms of sale, for example, performance of more services or larger range of varieties in stock); *id.* ("Any buyer seeking the commodity would pay whatever price is asked by the seller whom he happened to canvass, if he were content to buy from the first seller. But, if the dispersion of price quotations of sellers is at all large (relative to the cost of search), it will pay, on average, to canvass several sellers.").

On the other hand, the value users place on substitutable works is largely an economic value that does not correlate with the expressive content of the work. A work that is only passively consumed by society need only be protected by an economic privilege that entitles the right-holder to receive payment for the work. An absolute right to exclude society cannot be justified when the value users place on a work is purely economic and not expressive. The statutory rights under § 106 of the Copyright Act would protect the right of the copyright owner to receive payment for uses of works that are consumptive in nature—as long as the user uses the work in the ways laid out in § 106, the copyright owner is entitled to receive payment—and should not be applied as a general exclusionary right of ownership in the work against society as a whole. In this situation, economic privileges protecting the right to use the work in a particular way assure the copyright owner of payment for these uses. The right to exclude society from using a substitutable work is not necessary or desirable when a user is not willing to incur tremendous information search costs because the user is likely using the work as a consumer of goods, and must only pay for his use.<sup>157</sup> Only when a work is used specifically for its expressive content would the exercise of a right to exclude be justifiable to protect the integrity of a work of authorship.<sup>158</sup> Economic privileges protect commercial interests in recovering payment, while exclusionary rights ensure that an author's personal interest in undertaking the production of a creative work is protected in a situation where the author's integrity and creative personality may be threatened by the use of his or her expression.<sup>159</sup>

A user who uses the work as a creator for its expressive content, and a consumer who uses a work for its commercial content, use different aspects of a work and are willing to expend considerably varying information search costs. Because these aspects are valued differently, this indicates that there are distinguishable components to a work and the distinction between property rights and economic privileges becomes more pronounced from a behavioral economics perspective. Thus, the legal system's response to the question of rights and access by

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157. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 402 (2003).

158. Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 53 (2001) (analyzing the Court's reasoning in *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 326–30 (S.D.N.Y. 2000)).

159. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 113–14 (1997) (discussing the use of copyright divisibility to protect an author from misuse of the work).

separating in rem and in personam rights is apt. The creator uses portions of a work that, at common law, were thought of as being the literary property of an author because of the very act of creation and authorship.<sup>160</sup> In searching for, and using, another author's specific form of expression, the second author is not using the work for the information it contains as a resource but rather for the first author's creativity and authentic expression protectable as an in rem right, which evokes a right to exclude.<sup>161</sup> Conversely, when a consumer uses a work as a resource, whether for entertainment or education purposes, he or she is not as concerned about the expressive content of the work as much as the information it conveys. There is no necessity for the law to protect a work with a property right to exclude use when the use of the work does not affect the personality of the creator contained in the work and involves uses that compete with other use rights that are granted specifically under the Copyright Act. Here, the primary concern of a copyright owner is not the protection of a work's integrity, but rather the payment of fees for the use of a work, for which there is no need for an exclusionary control over the work—a personal right to compel the consumer to pay for using the work will suffice. Information cost theory posits that a consumer would willingly incur search costs to find goods they desire when the benefit of the search outweighs its cost. The theory indicates that the more costly the search, the more likely a portion of a work would be protected by an exclusionary property right rather than a personal privilege for the recovery of investment in production and dissemination of a work.

### C. As a Principle of Law

The third observable distinction between property rights and economic privileges in copyright is a subtle distinction in how the common law protects the core expression of works from being taken and used and the management or governance<sup>162</sup> of various rights to use works through statute. Common law protection of core creative expressions can be observed in how the law makes ideas and facts

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160. *Millar v. Taylor*, [1769] 98 Eng. Rep. 201, 253 (H.L.) (“If the copy belongs to an author, after publication; it certainly belonged to him, before.”).

161. See Smith, *supra* note 16, at 1807–08 (“Historically, in English Law, a statutory limited-term exclusive right over publishing and selling competed with a more robust common law right that gave property in the work itself. In our terms, common law copyright is more based on the exclusion strategy.”).

162. See generally Henry E. Smith, *Exclusion vs. Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002) (discussing the exclusion and governance theories of property rights in flushing out how such rights are defined and enforced).

underlying works of authorship free for society<sup>163</sup> to expand upon<sup>164</sup> while ensuring that original expressions are not pirated.<sup>165</sup> Judge Hand's decision in *Sheldon v. Metro-Goldwyn Pictures Corp.*, for example, was not based on the economic losses the copyright owner suffered from a motion picture pirating a play, but on the copying of a specific series of plots from the play that represented the expression of authorship.<sup>166</sup> And in *Nichols v. Universal Picture Corp.*, Judge Hand considered the same issue—whether the core expression of a playwright had been pirated—and came to the conclusion that it was not given the generality of the theme used in the second work.<sup>167</sup> But, in many other instances, the content of the law does not see to the protection of expression as “literary property,”<sup>168</sup> and instead protects the commercial potential of the work to encourage its production and dissemination to society. Protecting rights to distribute,<sup>169</sup> perform<sup>170</sup> and display publicly,<sup>171</sup> and public performance by means of digital audio transmission,<sup>172</sup> ensure the recovery of market profits and minimally relate to any form of literary property of the author. Compulsory licensing provisions for nondramatic musical works,<sup>173</sup> noncommercial

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163. *Baker v. Selden*, 101 U.S. 99, 102 (1879), *superseded by statute*, Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5133–34, *as recognized in* *Richmond Homes Mgmt., Inc. v. Raintree, Inc.*, 862 F. Supp. 1517, 1524 (W.D. Va. 1994), *aff'd in part, rev'd in part*, 66 F.3d 316 (4th Cir. 1995); *see also* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (discussing how an author's property interest in his ideas extends only so far as their expression, thus not entitling him to prevent all use of his ideas).

164. *Hoehling v. Universal City Studios*, 618 F.2d 972, 980 (2d Cir. 1980) (“Knowledge is expanded . . . by granting new authors of historical works a relatively free hand to build upon the work of their predecessors.”).

165. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55 (2d Cir. 1936) (“We have often decided that a play may be pirated without using the dialogue.”).

166. *Id.* at 55–56 (“The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning. That as it appears to us is exactly what the defendants have done here; the dramatic significance of the scenes we have recited is the same, almost to the letter.”).

167. *Nichols*, 45 F.2d at 121 (“In the two plays at bar we think both as to incident and character, the defendant took no more—assuming that it took anything at all—than the law allowed. The stories are quite different.”).

168. *Id.* (“It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial violations.”).

169. 17 U.S.C.A. § 106(3) (West 2005).

170. *Id.* § 106(4).

171. *Id.* § 106(5).

172. *Id.* § 106(6) (only for sound recordings).

173. *Id.* § 115 (West 2005 & Supp. 2010).

broadcasting,<sup>174</sup> secondary transmissions by cable systems,<sup>175</sup> and the public performance of a sound recording by means of a subscription digital audio transmission<sup>176</sup> also ensure transfer of the work to society in return for paying a fee for using the work that indicates an in personam right to receive payment for use of the work rather than an in rem right in the work itself.

The Digital Millennium Copyright Act also manages the various uses of informational resources to ensure that the copyright owner recovers payment for use of their work by making it an offense to circumvent technological measures that effectively control access to a work.<sup>177</sup> The Act controls the use of informational resources for which a copyright owner may claim payment by setting up “fences” to exclude non-paying members of society.<sup>178</sup> Arguably, a user who willingly pays should be allowed to use the protected information, unless the author’s creative expression is used in a way that undermines the integrity of the work and detracts from scientific and artistic progress. This subtle legal distinction between the rights of the author and the privileges of the copyright owner may explain why society regards student plagiarism to be wrong even when no commercial harm is done to the copyright owner: because what has been taken is the original author’s tangible personality, or literary property, as expressed in a work and represented as one’s own. This distinction also explains why the law requires a copy of a work to be substantially similar to the original to find a copyright infringement: because appropriating the essence of another’s original expression represents taking a core protectable interest in the work itself.<sup>179</sup> The separation of the author’s right and the copyright owner’s privilege also explains why the law protects the author of a commissioned work as a joint-author with an equal and undivided interest in the work, even when the work is clearly intended to belong to the commissioner of the work.<sup>180</sup>

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174. *Id.* § 118.

175. *Id.* § 111(c).

176. *Id.* § 114(d)(2).

177. *Id.* § 1201.

178. Smith, *supra* note 16, at 1809 (“[T]he Digital Millennium Copyright Act (DMCA) of 1988 prohibits an activity—namely, circumventing ‘a technological measure that controls access to a [copyrighted] work.’”).

179. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55–56 (2d Cir. 1936) (discussing how the “dramatic significance” of the work was infringed upon).

180. *See* Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff’d*, 490 U.S. 730 (1989) (“Joint authors co-owning copyright in a work ‘are deemed to be tenants in common,’ with ‘each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.’”).

#### IV. RIGHTS AND PRIVILEGES IN INFORMATION: WHAT THIS MEANS

The claim that there are separate property rights and economic incentives in literary and artistic works has significant meaning for copyright law. Real property and intellectual property include the same right to exclude the rest of the world from using property as a resource. For literary and artistic works, the right to exclude others from using a work is treated as the “property” right of the copyright owner.<sup>181</sup>

The significant differences in physical nature between real and intellectual property, coupled with the constitutional goal of granting intellectual property rights in the first place, renders a possessory right to exclude informational resources from society through copyright laws unfit for an institution designed to promote progress of science and the useful arts. The administrative costs of protecting copyright are also significantly higher for real property given the intangibility of literary and artistic works.<sup>182</sup> For real property, there will always be an identifiable number of infringers on the possessory right of exclusion, and it is generally easier to numerically identify the times when the right to exclude is affected. For literary and artistic works, which are generally non-excludable and non-rival, protecting exclusion rights may be impossible because the copyright owner cannot always trace infringement. The public nature of literary and artistic works make the right to exclude a difficult, if not impossible, right to protect, even where the copyright owner is entitled to the right. A copyright owner may be able to prevent the reading of a physical copy of the work or refuse to permit the reading of a copy of a manuscript or the listening to a musical composition while the work is in his or her sole possession. However, as soon as the work is disseminated, the right to exclude becomes obsolete because it is virtually impossible to prevent access to the story line in the novel or sheet notes of a musical composition. Once a literary and artistic work has been put on the market, the right to exclude loses its meaning; even if technology was employed to exclude others from reading the novel or listening to the composition, the essence of a work is never completely protected by the right to exclude. The difficulty of enforcing a right is not a reason to not protect it. But,

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181. *Fox Film Corp. v. Doyle*, 286 U.S. 123, 127 (1932) (noting a copyright owner’s “right to exclude others from using his property”).

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

when a right belongs solely to the author, and not the copyright owner, refusal to enforce an exclusionary entitlement is well-justified, because the essence of what is protected is not an entitlement or interest in recovering payment for the use of a work, but rather a tangible and well-defined “thing”: the author’s creative personality and authorial integrity.

Another significant difference between real property and literary and artistic works is that there may be a different level of personal connection between a creator and his or her literary and artistic work versus an owner of real property. Land, a finite resource, may have special meaning to its owner. A landowner who inherited land and lived and raised a family on it may have sentimental value in the land that would not be represented in the market price.<sup>183</sup> In fact, the market may severely undercut the landowner’s accumulated value in a piece of land, considering an owner’s non-economic value.<sup>184</sup> Many landowners refuse to sell land where they have substantial emotional investment.<sup>185</sup> In the same way, an author of literary and artistic works may have a personal and sentimental connection to the product of his personality, and may be reluctant to see the public use the work in a way contrary to his original intent or personality. Authors often consider their work the “precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life,”<sup>186</sup> and a book has often been likened to a

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183. *See* *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980) (noting that the courts have been unwilling to sell co-owned land to achieve a partition if one co-owner has been “in actual and exclusive possession of a portion of the property for a substantial period of time[,] . . . has made her home on the property; and . . . derive[d] her livelihood from the operation of a business on . . . the property, as her family before her has for many years”).

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

185. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (involving landowners in an eminent domain action who had lived on the land at issue for over sixty years). *But see* MO. ANN. STAT. §§ 523.253, 523.256 (West 2006); *Planned Indus. Expansion Auth. of Kansas City v. Ivanhoe Neighborhood Council*, No. WD 70655, 2010 WL 1656817, at \*8 (Mo. Ct. App. Apr. 27, 2010) (emphasizing the need for good faith negotiations in an eminent domain action to ensure proper compensation).

186. JOHN MILTON, *Areopagitica*, in JOHN MILTON, *PARADISE LOST* 339, 342 (Gordon Teskey ed., W. W. Norton & Co. 2005) (1667).

progeny of its author.<sup>187</sup> But the connection between authors and their work is, arguably, stronger than the lifelong landowner, because a literary work is produced by creative labor and represents the author's creative personality. In this sense, property rights, similar in effect to the moral rights of authors in continental Europe, offer the author assurance that the public will not use the work in a way that adversely affects the author's artistic creativity and authentic personality.<sup>188</sup> Rather, they create an added responsibility on society to use works in ways that contribute towards, or at minimum do not harm, the progress of science and the useful arts.<sup>189</sup>

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

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187. ROSE, *supra* note 92, at 38.

188. Roberta Rosenthal Kwall, "Author-Stories:" *Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 24 (2001) ("The essence of a moral rights injury lies in its assault upon the author's personality, as that personality is embodied in the fruits of her creation. In other words, because an author's works 'continue to embody the author's personality, acts done to them that impair their ability accurately to reflect the author's personality should be actionable.'" (quoting Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988))).

189. For a discussion on the relational aspect of property generally, see generally Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). Alexander contends that introducing property rights of authors to control use of their work brings into the copyright system a normative standard for conduct in relation to the production and use of creative works based on the relational aspects of property rights that goes beyond protecting the author as an individual creator towards the imposition of a moral responsibility to produce and disseminate works that will promote progress of science and arts. *Id.*

with the constitutional intent for progress of science and arts will be protected against the exercises of a possessory right to exclude that which denies access and prevents technological development. Third, the property right of the author is a specific right that protects the author's autonomy or individuality and entitles the author to exclude society from using the work when the use adversely affects his or her creative personality. The protection of the author's personality is important for encouraging creation of works that benefit society, because the right protects authorial freedom to create authentic works of authorship without fear of the author's integrity being undermined or disparaged.

*A. The Incentive to Produce and Disseminate*

Separating the author's property right from the copyright owner's economic privileges allows for a clearer analysis of the incentives provided for by statute, as well as what these entitlements entail. The incentive to produce and disseminate creative works takes the form of exclusive privileges to use information in the ways specified in § 106 of the Copyright Act. But these rights allow exclusive uses of information, which does not include a possessory right. While possessory rights—with a general right to exclude and use rights with specifically enumerated entitlements—may belong to an owner of property, both are conceptually and legally distinct concepts that serve different purposes. Possessory rights in property allow the property owner to conserve and preserve resources that are scarce and prone to depletion from overuse. Use rights, on the other hand, aim to put resources to their optimal use, and thus take the form of governance or management of resources that are not necessarily extinguishable through overuse. Because literary and artistic works are not extinguishable in the same way most natural resources are, the rights serve to govern their uses and ensure that a resource necessary to fulfill the public's need to progress science and the useful arts remains available for society's use.<sup>190</sup> It defeats the law's purpose—encouraging production and dissemination of creative works—if the rights granted by statute entail possessory rights that copyright owners may use to exclude society from using works that have been published and distributed to the public.

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190. See Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 458–66 (2008) (discussing how use rights apply more appropriately when a resource is needed by society for various reasons, such as water, and should be subjected to more specific governance rules).

Protecting the copyright owner's interest—as an economic privilege to use creative works in specifically enumerated ways—fulfills the law's intent of achieving progress in science and arts through the creation of literary and artistic works more precisely because society is able to use works in ways that will advance progress as long as they fulfill the constitutional bargain and pay for using works produced and disseminated by the copyright owner. Producing creative works, like building a lighthouse, involves using scarce resources such as labor, expenses, and time. Coupled with the fact that literary and artistic works are non-rival and non-excludable once distributed to the public, the need to provide incentives to private individuals to undertake creative production is great. Economic privileges under the Copyright Act serve to encourage production and dissemination of creative works by ensuring that creative investments are recoverable from the market and are balanced against society's interest in using the work. Privileges to use creative works exclusively provide copyright producers with legally enforceable rights necessary to collect payment for public uses of a non-rival and non-excludable good in the same way property rights allow lighthouse owners to collect levies from ships in their path. These privileges provide a resource for society and require the copyright owner to exercise personal contractual-type rights as a provider of goods against users of their work. Economic privileges do not provide copyright owners with possessory rights over the work consistent with ownership of property, and therefore—so long as use of the work is paid for—do not entail control over how society uses the work.

### *B. Public Access to Information*

The separation of property rights from economic privileges will also ensure greater public access to information because the general public will be entitled to use informational resources as long as they pay for uses that fall within the statutorily enumerated rights of the copyright owner. The grant of economic privileges rather than possessory rights of exclusion requires copyright owners to monitor uses of their works and, where necessary, protect their works through technology requiring payment before works are released to the public for use. Conceptualizing the copyright owner's right as a privilege distances the law from the application of the doctrine of contributory infringement against burgeoning technology that may increase society's access to and use of informational resources and puts the burden of monitoring works for recovering their investment on the copyright owner rather than the legal system. Furthermore, because economic privileges are not necessarily connected to the physicality of a "thing" owned, they are

malleable to social needs for accessing informational resources for progress in the science and useful arts. The public cannot be excluded from using the work just because new markets emerge from new technologies, and in situations where access is increased by developing new technologies, economic privileges may be changed to accommodate changing social culture through a more comprehensive and flexible system of compulsory licenses.<sup>191</sup> Treating entitlements granted to copyright owners as privileges rather than rights also provides the legal system with greater flexibility when balancing the entitlement to recover investments from the market with the entitlement to access and use works for progress through fair use principles. While fair use is an affirmative defense to a copyright infringement suit,<sup>192</sup> treating copyright entitlements as privileges granted specifically to reward creativity for society's benefit will allow the law to regard uses of works for science, art, research, and education as consistent with the Constitution's goal—and therefore presumptively fair—shifting the burden upon the copyright owner to prove that the use was not within society's entitlement to use the work for advancement. Conceivably, the only way society's entitlement to advancing science and useful arts may be properly realized is for the copyright system to treat rights that were previously considered "property" as specifically enumerated state-granted privileges to use literary and artistic works instead.

### *C. The Author's Right to Exclude*

The final area of entitlements over literary and artistic works that have received very little attention—perhaps because of the treatment by courts and scholars of the common law right in literary and artistic works—is the author's right in his or her creation. Because the copyright system does not explicitly protect a specific literary property as a separate property right belonging exclusively to the author, recognizing and protecting such a right appears necessary if the institutional goals of the copyright system are to be achieved. This Article argued that the law should recognize a separate author's

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191. Berne Convention for the Protection of Literary & Artistic Works, Sept. 9, 1886, as rev. at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27, art. 11<sup>bis</sup>(2), 13 (1986), available at [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf) (setting international copyright standards, but providing only for compulsory licenses under Articles 11<sup>bis</sup>(2) (for broadcasts and public communications by wireless means, including when the communication is made by another organization for rebroadcasting a work) and 13 (for musical works and the words contained in them)).

192. 17 U.S.C.A. § 107 (West 2005) ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.").

property right to protect the creative personality of the author and provide authors with the freedom to produce authentic works of authorship without fear that the work may be undermined or disparaged once published and distributed. Assuming that great authors create great works for the benefit of society without the lure of commercial success, as Lord Camden candidly recognized,<sup>193</sup> protecting a personal right for authors will not hamper, but rather will contribute to progress, because great works of authorship can be produced free from the fear of what society may do with the work. Property rights in literary and artistic work entitle the author to exercise a possessory right over the work and thereby exclude uses that adversely affect his or her creative personality in ways that are not conducive to promoting progress. This is arguably the most important right in the copyright system for facilitating the production of authentic works of authorship that convey both reliability and integrity in content to further society's progress. Producing works of authentic authorship will likely evade the copyright system until and unless authors are encouraged to produce works that make positive contributions to science and the arts by a legal regime that recognizes literary property in creative works and protects the core component of genuine creativity that makes the production of such works possible.

#### V. A NORMATIVE PROPOSAL

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

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193. *Millar v. Taylor*, [1769] 98 Eng. Rep. 201, 223 (H.L.) (“Now, without publication, ‘tis useless to the owner; because without profit: and property, without the power of use and disposal, is an empty sound. In that state, ‘tis lost to the society, in point of improvement; as well as to the author, in point of interest.”).

Act is to create exclusive rights that enable copyright owners to recover payment for uses of their works, which once published and disseminated, are non-rival and non-excludable. Economic privileges under the Copyright Act fulfill two goals: first, investment in producing works that are public goods, and second, the publication and dissemination of the work. But statutory rights are not the only rights that exist in literary and artistic works. By virtue of being the work's creator, the author has a property right in the work that the law ought to protect if promoting progress in science and the useful arts remains the goal of the copyright system. Recognizing the author's ownership of the work as a product of his creative personality will encourage authentic authorship as a productive activity. When the law protects the author's personality, the law expresses intent to protect a work as a thing owned by the person who created it—giving its creator the liberty and freedom to create works with greater authenticity, integrity, and reliability.

The effect of the distinction between property and privilege on legal analyses of copyright questions is significant. Protecting an entitlement to use the work as a privilege to use allows for consideration of reasonableness in determining whether the conflicting use amounts to an infringement of the entitlement—a conflicting use must be an unreasonable interference with the use and enjoyment of the entitlement before the use may be enjoined. The law on land use nuisance demonstrates the requirement for reasonableness in the use of a resource. An injunction may be granted for a nuisance that is a substantial, intentional, and unreasonable interference with the use of another's land, or if the substantial interference is the unintentional result of negligence, recklessness, or abnormally dangerous activity,<sup>194</sup> and courts are inclined to balance two competing use rights in deciding whether to enjoin a use that causes substantial harm.<sup>195</sup>

Treating statutory copyright as an economic privilege with several use rights—rather than a property with a possessory right to exclude—shifts the law's focus from infringement of copyright with every use that is contrary to the rights under § 106 to a consideration of how informational resources may be put to their best use considering the

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194. RESTATEMENT (SECOND) OF TORTS § 826 (1977).

195. See *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 684–85 (N.C. 1953) (involving interests of an oil refinery and neighboring private landowners), *abrogated by* *Boldridge v. Crowder Constr. Co.*, 108 S.E.2d 215 (N.C. 1959); see also *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217, 219 (Tex. Ct. App. 1973) (“[E]ven though a jury finds facts constituting a nuisance . . . there should be a balancing of equities in order to determine if an injunction should be granted.”).

need to provide incentives and allow access. Incorporating this form of analysis into the copyright system creates a presumption that social uses of literary and artistic works are, as a matter of law, legitimate uses of the work that must be balanced against a competing use to recover investments in production and distribution of the resource. The fair use doctrine, arguably, will no longer be an affirmative defense because all social uses of the work would be presumptively fair, putting on the copyright owner, as the plaintiff, a burden of showing an unreasonable interference with their entitlement. An injunction will not necessarily be granted for every use by the public that the law deems unreasonable—where the equities require that damages be granted instead of an injunction, the law may do so.<sup>196</sup> As a general rule, copyright owners cannot exercise a right to exclude under the entitlements granted to them under the Copyright Act.

This normative proposal also carves out a separate property right for the author in the work that is protected as a matter of natural right. The authentic expression of authors plays a significant role in promoting the progress of science and the arts because authentic works of integrity communicate reliability of content for the purposes of learning, study, and research—activities that direct the growth and progress of society. By protecting literary property, the law sets a standard of conduct for the production and use of literary and artistic works that requires the creation of works making positive contributions towards the betterment of society in ways that do not undermine or disparage the integrity of the work so that producing authentic works of authorship is reduced. Protecting literary property, while recognizing the author's personality in a work, is a related but separate issue from moral rights, which protect the personal interest and integrity of the author. With literary property, however, rights provide the legal system with tools to shape social conduct and guide the production and use of literary and artistic works towards progress of the sciences and arts. Authors are encouraged to contribute in positive ways towards progress by protecting their creative personality. Society is able to refer to norms of social conduct in the use of literary and artistic works with the aim of progress in science and the arts as a collective goal. The protection of literary property must be regarded as a step towards establishing social norms of conduct that generate creative activities geared towards

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196. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970) (“[T]o grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties.”).

society's advancement rather than an expanding system of possessory rights to restrict access to works.

#### VI. CONCLUSION: LESSONS FROM THE LIGHTHOUSE

It is difficult, if not impossible, to calibrate the optimal balance between protecting private rights in literary and artistic works and granting access to information needed by society. Economic theory suggests that the public nature of literary and artistic works justify expansion of rights because externalities generated by producing creative works should be internalized to prevent uncompensated uses of creative works. American legal realism, on the other hand, resists expanding property rights as an encroachment into the public domain by industrial interest groups and a limitation of society's right to use creative works for innovation and development. The tension between private and public entitlements in literary and artistic works highlights the need for a balance between private rights and public interest that the legal system has yet to achieve. These conflicting approaches to the copyright dilemma bring attention to the tension created by granting temporary monopolies over literary and artistic works, and yet existing approaches to the dilemma have offered limited normative guidance on the treatment of the issues involved.

A doctrinal and institutional approach involving a deeper analysis of our understanding of property law principles may provide a viable solution to the copyright dilemma by suggesting that rights in literary and artistic works are really two-fold: a right in rem based on an author's property right in the work by virtue of the author's original authorship that is good against the world, and an economic right in personam to recover profits from the commercialization of the work which stems from the statutory rights granted by Congress under the present Copyright Act. The doctrinal and institutional approach to the property rights-public interest dilemma described in this Article arguably puts copyright jurisprudence on a more stable foundation by allowing the law to evolve through legally accepted principles of property law independent of the social, technological, and cultural changes which constantly shift the delicate private rights-public interest balance with ease. Analyzing the copyright dilemma through conventional property law doctrines yields better solutions to a legal system tasked with managing competing use rights in literary and artistic works as a resource for progress.

Light from a lighthouse provides immeasurable guidance to vessels traveling and maneuvering the seas at night. The provision of light is a much needed service, which must be encouraged, because light, while

abundant in the day, is such an immensely scarce and invaluable resource to seamen and vessels during the night. If lighthouse services are privately provided, property rights become a necessary state-provided mechanism allowing private lighthouse builders to recover their investment and maintenance costs incurred in providing lighthouse services. Yet these “property” rights are enforceable only for recovering levies from vessels and do not entail a possessory right to exclude vessels from using light from the lighthouse as a navigational tool. It would be, first, physically impossible to exclude vessels from using the light by any means other than turning the light off; and second, even if turning the lighthouse off was an option to exercising a right to exclude, it would be inherently immoral to do so when vessels depend solely on lighthouses to navigate them towards safe land. These state granted rights do not entail a possessory right in light but provide an enforceable mechanism for recovering payment. Similarly, rights provided under the Copyright Act to encourage producing literary and artistic works allow only for the recovery of payment for use of the information entail neither a possessory right in the information itself nor a right to exclude society from having access to information. These entitlements—economic privileges that are not confined to the physical work protected—are tools that the law has to manage competing claims to information. They do not preclude society from using the work and lend legitimacy to society’s claim to access information for progress. Information, like light, provides the necessary guidance to those using it and should not be protected with an absolute right to exclude. The absolute right to exclude is only a right the author has as recognition of personal autonomy and individuality, and is necessary to protect the author’s personality and integrity to ensure that works of authentic authorship continue to be produced.