Rights, Privileges and Access to Information

Alina Ng
Mississippi College School of Law
December 7, 2009

Abstract

Protecting property rights in creative works represent a classic institutional approach to a specific economic problem 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 the purposes of learning. 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 new technologies emerge to provide users of creative works with greater access to informational goods. As a result of expanding property rights in literary and artistic works, society's access to, and use of, information has, however, been severely restricted by increasing access costs despite the development of enabling technologies to facilitate greater access. This Article examines the general social claim to a right of access to information for the purposes of furthering the constitutional goals of promoting progress, and proposes that the question of access to information is a question of sustainable resource use that should not evoke the exclusionary rights of a strict property rule. The rights under copyright laws protect economic privileges in information and govern society's use of informational resources. They do not provide copyright owners with a general right to exclude socially beneficial uses of informational works, 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 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.

RIGHTS, PRIVILEGES AND ACCESS TO INFORMATION

ALINA NG
MISSISSIPPI COLLEGE SCHOOL OF LAW
DECEMBER 7, 2009

PAGE

I. INTRODUCTION: RIGHTS IN INFORMATION 3

II. DEFINING THE RIGHTS-ACCESS DEBATE 10

I. *MARKET ECONOMICS* 11
II. *PEER PRODUCTION AND SOCIAL NETWORKS* 15
III. *THE UNEASY PATH OF RIGHTS EXPANSION* 20

III. PROPERTY RIGHTS AND ECONOMIC PRIVILEGES 22

I. *AS A MATTER OF HISTORY* 28
II. *AS A THEORY OF ECONOMICS* 29
III. *AS A PRINCIPLE OF LAW* 30

IV. RIGHTS AND PRIVILEGES IN INFORMATION: WHAT THIS MEANS 32

I. *THE INCENTIVE TO PRODUCE AND DISSEMINATE* 34
II. *PUBLIC ACCESS TO INFORMATION* 34
III. *THE AUTHOR'S RIGHT TO EXCLUDE* 34

V. A NORMATIVE PROPOSAL 34

VI. CONCLUSION: LESSONS FROM THE LIGHTHOUSE 36

PROPERTY RIGHTS, ECONOMIC PRIVILEGES AND ACCESS TO INFORMATION

ALINA NG
MISSISSIPPI COLLEGE SCHOOL OF LAW
NOVEMBER 16, 2009

I. INTRODUCTION: RIGHTS IN INFORMATION

The question of access to information in copyright is inextricable from the question of rights in literary and artistic works. In conventional copyright talk, we seem to have couched the question of rights in creative works within property-type metaphors. We speak of the right to "exclude others" from using intellectual works[1], analogize information to land[2], and think of copyright infringement as "trespass" on the copyright owner's "exclusive domain".[3] Yet, there is still doubt about whether information can accurately be thought of as property.[4] When we think about property, we think of a finite and scarce resource such as land, chattels, securities, financial instruments and even creative works and inventions. Unlike these resources however, information contained in intellectual property, like light from a lighthouse, is non-rival and non-excludable in consumption.[5] The fact that 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 excludable from enjoying the narrative of the novel just because one person has read it, means that creative works are, like lighthouses, public goods. Once made publicly available, such goods may be consumed by society at zero marginal cost. It is this public good nature of literary and artistic works, which requires production

---

[1] *See, e.g.*, White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908); Fox Film v. Doyal, 286 U.S. 123 (1932); Commissioner of Internal Revenue v. Wodehouse, 337 U.S. 369 (1949)

[2] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain,* 66 LAW & CONTEMP. PROBS. 33 (2003) (likening the expansion of intellectual property rights to the enclosure of common land in England) [hereinafter Boyle, *The Second Enclosure Movement*]; Mark Rose, *Copyright and Its Metaphors,* 50 UCLA L. REV. 1 (2002) (describing literary works as being equivalent to real estate); Michael Carrier, *Cabining Intellectual Property Through a Property Paradigm,* 54 DUKE L. J. (2004) (applying property law limitations to intellectual property)

[3] *See e.g.*, Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417 (1984). For the duty to refrain from copyright infringement and the duty to stay away from another person's land, see Wendy Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory,* 41 STAN. L. REV. 1343, 1366 (1989)

[4] *See* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information,* 116 YALE L. J. 1742 (2007) ("At the core of controversies over the correct scope of intellectual property lie grave doubts about whether intellectual property *is* property.") [hereinafter Smith, *IP as Property*]

[5] Economists generally consider light houses to be the quintessential public good, the services for which can only be provided by the government by taxing the public. *See* R. H. Coase, *The Lighthouse in Economics,* 17 J. L. & ECON. 357 (1974) ("the 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."). [hereinafter Coase, *The Lighthouse*]

incentives in the form of state-granted property rights to create the scarcity necessary to provide commercial value to such goods. The law and economics school of thought justify these rights 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 property rights. Achieving this balance 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, however, remains elusive.

Arguably, this balance between rights and access will remain elusive because the property metaphors we use to conceptualize copyright and the boundaries we imagine around informational resources mischaracterizes the nature of information as the subject matter of exclusive rights. Information is infinite and boundless. Information is not akin to finite and limited resources that are usually the subject matter of exclusive legal rights such as land, water, minerals, cattle or lobsters, where exclusive property rights will aid in their conservation.[6] Information need not be conserved – 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.[7] Property rights granted over information encourage their production 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 scarce through consumption or overuse. 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.[8] However, for infinite and unlimited resources such as information, property rights serve to stimulate and foster productivity by providing the incentives to produce and provide 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, they provide a legally enforceable mean of receiving payment for the provision of a socially valuable good or service, which cannot be physically limited.

---

[6] Empirical studies suggest that with finite resources, property rights help to conserve the resource. *See* JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE 142-144 (1998)

[7] *See* International News Service v. Associated Press, 248 U.S. 215 (1918) (Brandeis, J., dissenting) ("information is 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 (1999) (that information should be free to allow for free expression)

[8] *See* Robert C. Ellickson, *Property in Land,* 102 YALE L. J. 1316 (1992) (describing how the right to exclude is employed in private and communal land ownership to reward labor and prevent overuse) [hereinafter Ellickson, *Property in Land*]

The parallels between light and information production are exemplary of this point. In *The Lighthouse in Economics,* Ronald Coase challenged the conventional economic assumption that lighthouses, being the quintessential public good, could only be provided by the government by taxing the public.[9] Coase asserts that lighthouses may be privately produced and provided, as long as there are state established and enforced property rights that would allow the light house owner to collect levies from vessels benefitting 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.[10] Unlike land, light cannot be parcelized to achieve the exclusivity necessary to receive payment for use.[11] 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.[12] 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.

Public access to informational goods have in recent times become a social concern as private incentives to recover financial investments from public uses of literary and artistic works appear to prevail over the welfare of those relying on information produced. Progress and advancement in the sciences and useful arts require incremental changes towards a better or improved state, and are essentially contingent on the

---

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

[10] *See* Coase, *The Lighthouse, supra* note 5, at 375.

[11] *See* Ellickson, *Property in Land, supra* note 8, at 1328-1330 (explaining how technologies for marking boundaries lead to increased parcelization of land)

[12] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law,* 18 J. LEGAL STUD. 325, 328 (1989) (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.") [hereinafter Landes & Posner, *An Economic Analysis of Copyright Law*]; *see also* Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright,* 56 AM. ECON. REV. 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.").

availability of knowledge and information to guide those changes.[13] Having reliable and valuable information available to society for learning is, however, is just a preliminary step in advancing the sciences and arts. The other necessary component in promoting progress is providing society with the freedom to use information to develop new forms of knowledge and information. Information access costs, which include transaction costs in the transfer of property rights, cannot be prohibitively high to deter efficient public use of information to garner useful social knowledge.[14] 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.[15] The early disclosure of research findings have allowed scientists to benefit from the research work of other scientists.[16] As research indicate that lighthouses services in England in the seventeenth and eighteenth centuries were poor in quality for a variety of reasons, and one of these reasons was the private individual's drive to maximize profits from the provision of light and lack of quality control by the state[17], there is a need in present times to ensure that the maximization of private profits through the copyright laws system does not undermine society's ability to use the information for learning. Lighthouse service dues imposed by private individuals were high because part of it was paid to the King, whose favor was constantly courted by private individuals seeking a

---

[13] *See* David W. Opderbeck, *Deconstructing Jefferson's Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy,* 49 JURIMETRICS J. 203, 235 (2004) (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.").

[14] *See* Niva Elkin-Koren, *Copyrights in Cyberspace – Rights Without Laws?,* 73 CHI.-KENT L. REV. 1155, 1197 (1998) ("Acquiring licenses to use particular information may involve prohibitively high transaction cost 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.").

[15] *See* Rebecca Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research,* 97 YALE L. J. 177, 182-183 (1987) (describing sociologist Robert Merton's observation of four interrelated behavioral norms of universalism, communism, disinterestedness, and organized skepticism within the scientific community)

[16] *Id.* at 226-228 (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)

[17] 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. *See* Bertrand, *The Coasean Analysis of Lighthouse Financing, supra* note 9, at 398-340

lighthouse patent.[18] While producers of literary and artistic works need no longer court the favor of the Crown or society's nobility to support their work[19], the financial gains from the market, as the new patron for commissioning the production of creative works, may subjugate the public's interest to access accurate and unbiased informational content as producers of information seek to maximize their profits from the commercialization of their works on the market.[20]

The question of social access to information must be accurately defined to determine the extent of the public right to information against the copyright owner's right to control uses of literary and artistic works as granted by the Copyright Act. This article argues that the question of access is most accurately analyzed by characterizing information as a resource for learning and development that is the subject matter of various use rights rather than of an exclusive right of ownership. Property rights in information, as we commonly understand, encourage both its creation and public dissemination. But, unlike the protection of a property right in scarce resources, such as land or a car, the protection of a property right in unlimited resources, such as information, serve a completely different purpose. There is a need to acknowledge property rights as serving a production, rather than conservation, function, when it comes to informational resources. The inevitable consequence of treating rights in information as serving a conservation function, rather than a production function, would be the multiple claims that authors, copyright owners, and individual members of society make over a right to exclude others from using information, which would eventually result in the excessive fragmentation of ownership rights that follows a regime where too many people claim an unsanctioned right to exclude various uses of information. The resulting effect of an excessive fragmentation of ownership rights is the under-use of informational resources as raw materials for progress of the sciences and useful arts.[21]

The rights-access dilemma in copyright law may be attributable to a jurisprudential oversight, at least among law-and-economics and intellectual property scholars, of this precise legal distinction between rights in a thing, which is used to

---

[18] It is noted that James I, for example, granted lighthouse patents to private enterprises to "increase his own fortune." *Id.* at 400

[19] *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.").

[20] *See* Boyle, *The Second Enclosure Movement, supra* note 2, at 50-52 (explaining the need for creators of information to exert greater control over consumers in the aftermarket and describing its effect on access to information)

[21] Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,* 111 HARV. L. REV. 621 (1998) [hereinafter Heller, *The Tragedy of the Anticommons*] (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)

conserve something scarce, and privileges to use and control a resource, which is used to govern various use rights and encourage the production and dissemination of something abundant. Legally, a distinction between in rem and in personam rights, separating the simple and cheaply administered right to exclude of property law from the more costly and carefully calibrated positive use rights of tort and contract laws, exists.[22] But, this distinction exists also as a matter of historical fact in the copyright system and as a consequence of theoretical thinking in law and economics and critical legal studies. This Article argues that society's access to information cannot be generally excluded by copyright owners with an in rem right because the rights provided for by the copyright system are in personam in nature, which are statutorily granted rights to ensure that the copyright owner recovers payment for uses of the work. Copyright laws provide owners of literary and artistic works with specifically enumerated use rights with respect to information under §106. This Article suggests that these entitlements created by copyright laws provide copyright owners with economic privileges to use and control informational resources in a specific way to encourage creativity and public dissemination of works. These positive rights to use information should not, as a normative proposition, invoke a general property right to exclude society from accessing and using informational resources for the progress of science and the useful arts because a general property right to exclude society will entitle copyright owners to exclude legitimate social uses of literary and artistic works. The right to make reproductions of copyrighted works, for example, is a specific privilege the copyright owner has over the work, tailored to provide economic incentives to produce and disseminate informational works in a decentralized way through contractual negotiations on the market.[23] This allows for more specific arrangements and efficient use of informational resources to be made.[24] Positive use rights supplement a more general property right to exclude, which would allow a restriction of access to information in the form of a negative duty of society to restrain 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 with respect to the work in a socially functional way.[25]

This Article suggest that scholars struggle with the rights-access question in intellectual property because economic privileges, which govern uses of information as a

---

[22] *See* Smith, *IP as Property, supra* note 4, at 1752-1754

[23] 17 U.S.C.A.§106(a)

[24] 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."). [hereinafter Merrill & Smith, *Property/Contract Interface*]

[25] *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.").

resource for progress and allow producers of information to receive payment for the creation and dissemination of a work to society, have been treated as a property right to exclude society from use of information as a "thing." A jurisprudential slip, which treats both rights in information and privileges to use information as the same thing, may cause practical difficulties in determining how informational resources may be used by society for the purposes of progress, development, and creative production. The normative distinction between an in rem exclusion right to exclude society from using informational works to protect an author's creative personality, and an in personam governance privilege to use content contained in creative works in specific ways, explains why we think plagiarism to be morally wrong and use of information for the purposes of news reporting to be fair. Social access to information for the purposes of progress of science and the useful arts depends on recognizing that property rights in information of the in rem kind exists only to exclude society when public uses of creative works affect an author's creative personality adversely, for which a general right to exclude may be used. All other uses of informational resources for the progress of science and the useful arts is, arguably, a use that is generally allowed by in personam privileges as long as payment is made to the provider for producing and disseminating the work, or if permission to use is obtained.

Part II of this Article redefines the rights-access debate by demonstrating that the dominance of law and economics and critical legal studies in copyright scholarship and jurisprudence had played a significant role in minimizing the in rem nature of property rights, emphasizing economic efficiency and political influence in the creation of rights, and undermining the role of the author as the creator and owner of literary and artistic works. The resulting effect of these movements on copyright law is the emergence of a narrow and specific conception of property rights in literary and artistic works, which 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. This view of property rights has resulted in the claim for greater rights to control society's use of literary and artistic works as new technologies create new markets and society's push-back against the expansion of rights limiting use of information as a resource for creative production. What this demonstrates is that the rights-access debate is a question of use privileges in respect to a particular resource shared between the owner of a copyright and society. Part III of this Article explains that the question of ownership rights in a particular "thing," imposing 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 critical legal studies. The distinction between the in rem right in creative works and the in personam use privileges of informational resources is observable as a matter of historical fact from the earliest conception of copyright as a right to print, economic theory from the perspective of controlling and reducing information-costs when protecting literary and artistic works, and legal principle from the distinctions we draw 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 acknowledgement 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 as a right to exclude society from using a "thing" if society's use of a work adversely affects the author's creative personality. If we are serious about encouraging progress of society through the copyright system, we must acknowledge the role of the author is creating works that promote progress and advancement of society. Part VI concludes by revisiting the lighthouse analogy to information to highlight that information, 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. These privileges are not property rights of the in rem kind, which serves to conserve and protect scarce resources from depletion.

II. DEFINING THE RIGHTS-ACCESS DEBATE

A useful starting point to begin thinking about information as a resource for social progress and development is to define the central problem in copyright law, i.e., that by granting exclusive private rights in literary and artistic works to copyright owners, the law inadvertently lessens society's ability to use information freely. Sir Thomas Babington Macaulay recognized the tax society pays for this monopoly when he resisted the expansion of copyright duration in the early formulation of statutory copyright in England. But, rights continue to expand today, 300 years later, despite increasing push-back from society against the encroachment of rights into the sphere containing free information for general use, known as the public domain. This continuous expansion of rights suggests that there is an inherent economic value in literary and artistic works, which private rights allow the copyright owner to capture from society. Information creates wealth because it gives its owner advantage and power over others by providing the necessary intelligence to out-perform competitors in the market, guide strategic decision-making, and direct economic growth. Private rights over information provide the owner with exclusive control over who gets to use the information and when and how the information is used. However, in a knowledge-based economy, economic growth is dependent not only on the production and dissemination of information to society but also in society's ability to generate new wealth from existing forms of information, and the notion that access to information is essential for a healthy social, cultural and economic development is generally accepted in today's knowledge-driven economy. 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, is evidence of the investment value of technological

know-how and knowledge as a source of wealth. But, as information becomes increasingly valuable as a resource, producers of information seek greater rights to control society's use of information.

I argue that control of information as "property" creates concentrated power for the "owner" of information as the rest of society is prevented from the use of information as a necessary resource for development and progress. The arguments used to justify these rights in information, whether efficiency or incentive based, emphasize the rights of the owner to exert control over social uses of information. The emphasis on control however, raises a conflict of competing values as the claim to control social uses of information contradicts our ideals of freedom and liberty to use a free resource for development and production. Protecting entitlements in information as "property" allows 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 as information. As copyright owners claim a right of control that should only be applied to scarce resources, and assert a general right of exclusion in a way that prevents the emergence of new markets and social norms as new technologies facilitate greater social access to information, the rights-access debate reaches new heights. But, at the core of the debate is a view of property rights that should rightfully apply to the governance of resources for the purposes of encouraging production and not an exclusionary right to preserve or conserve a limited and finite resource. This Article extrapolates this view of property rights from copyright jurisprudence to demonstrate that the statutory rights in the copyright system are in personam rights to use property, which are separate and distinct rights from an in rem right to exclude society from using property. This part of the Article argues that the dominance of two schools of thought – law and economics and critical legal studies – in copyright thinking and jurisprudence has significantly 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, undermining the role of the author as the creator and original owner of literary and artistic works, and overlooking the idea of authorship as a central component of progress of the sciences and useful arts in the copyright system. In the following paragraphs of this Article, I explain how market economics and the emergence of peer-to-peer and social networks have led us to a point where the expansion of rights treads an uneasy path into the future.

I. *MARKET ECONOMICS*

The market based approach towards rights in literary and artistic works is premised on the persistent market failures, which occur from the commercialization of literary and artistic works. Markets for copyrighted materials constantly fail for one reason: creative works are, for the most part, public goods, which are neither excludable nor rivalrous in consumption. Public goods prevent an accurate correlation between production costs and market price because of the indeterminacy of consumer demand

caused by externalities. Once creative works are publicly disseminated, non-paying members of the public cannot be excluded from use of the work and that the work, even when used by as wide a segment of the public as possible, will not deplete through overuse. Copyright owners, who see their rights as an entitlement to exclude public use of their works, argue for stronger rights to ensure recovery of the costs of producing and disseminating the work to the public. 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. Copyright law, especially in the United States, generally accepts neoclassical economics as the right approach to allocating entitlements in literary and artistic works by granting rights first to the author, as the creator or producer of literary and artistic works. Thereafter, the law allows, and facilitates, negotiations and bargaining for use of the work to then take place through the free market and at a price and under terms set by, and agreed upon, by the author and subsequent owners of the work.[26]

In a system that is primarily utilitarian, copyright protects the private rights of the copyright owner against "free-riding" by non-paying members of society upon the investment of the author or copyright owner. External social benefits, which are not accounted for in the production cost of developing intellectual property, is the primary justification for the recognition rights in literary and artistic works, at least in the United States[27], where the grant of intellectual property rights is primarily based on the utilitarian principle that these rights are necessary to reward inventors and authors for their investments and production of works, which will the ultimately benefit society. The temporary cost of the monopoly right justifies the social end the law seeks to achieve, which is the promotion of progress in the sciences and useful arts. The creation and dissemination of a work, however, will only benefit society when the costs of negotiating for use of a work by members of society will not be prohibitively high, and does not preclude the inventor or creator of a work from engaging in negotiations that will bring about the most socially optimal behavior with respect to the intellectual work. In Harold Demsetz's piece, *Towards a Theory of Property Rights,* where he theorizes that the development of property rights in communal resources will allow the owner of the resource to economize on social use of that resource by exercising the right to exclude is the economist's primary rationale for protecting intellectual property as an integral part of the property right system. Unless a resource owner has the right to exclude others from using the particular resource, he is unlikely to able to evaluate the effect of the use of his resource, in terms of the social costs and benefits a particular use imposes or brings, upon the rights of other members of the community to undertake the development of the

[26] Coase theorem

[27] Continental countries, such as France and Germany, premise their protection of intellectual property on other grounds, such as the natural rights of the creator

resource.[28] The grant of a general right to exclude by way of property law is, to the economist, 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.[29]

This economist's view of property rights just described eliminates a necessary connection between the owner of a right to exclude and a "thing" owned, and focuses primarily on property rights as a collective bundle of use and enjoyment rights in a particular resource vis-à-vis the right owner's relationship with other members of society. The right to sell or give something away is a right one may have that will necessarily define a relationship of seller-buyer, which we will identify positively as a contract, or donor-donee, which we will identify positively as a bequest. But, these relationships determine behavioral and legal norms among people without necessarily making a 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:

> "discourse[s] 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 successful 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 do without the 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."[30]

The emergence of property rights as a bundle of economic entitlements and the disconnection between ownership rights and property rights in a thing owned that has arisen from the conception of property rights as a collective bundle of rights, has

[28] Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 13 (1967)

[29] See Justice Reed's decision in Mazer v. Stein, 347 U.S. 201, 219 (1954)

[30] Tom Grey, The Disintegration of Property, in Liberty, Property and the Law (Richard Eipstein ed.)

facilitated the expansion of rights in literary and artistic works together with technological development 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. It is this economic conception of property as a loose bundle-of-rights, which provide copyright owners with the doctrinal 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. 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.

Expanding rights over new uses of creative works provide a market benefit to the copyright owner because these rights facilitate the attainment of an efficient outcome with respect to various commercial uses of literary and artistic works, assuming 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 that is free of transaction costs. 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. These rights, as Ronald Coase theorized, secure optimal outcomes in a perfect market as rational actors will naturally negotiate to transfer the entitlements to the party who values it most regardless of the initial allocation of the entitlement.[31] If the most efficient outcome may be achieved through the market, regardless of how the rights are initially allocated, then it does not matter very much if 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 to purchase the 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, at least 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. This may be attributable to the increasing liberties, which the Internet and digital technologies afford users of literary and artistic works. Users of literary and artistic works, with digital technology and new

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

media reproduction programs, seem to no longer be mere passive consumers but active creators and reproducers of works they use.[32] As the autonomy of individual members of society grows with respect various uses of creative works beyond the control of the copyright owner, Coasean bargains become less likely. The socially optimal outcome intended by the grant of legal rights in literary and artistic works to the copyright owner may itself be hampered by the legal structure of entitlements in literary and artistic works because transaction costs incurred in the negotiations of rights may become prohibitively high. Where markets fail to facilitate the transfer of entitlement from the copyright owner to the user of the work, the Court may be required to artificially create an efficient market by forcing a transfer of entitlements.[33] In this situation, the economic entitlement of the copyright owner is protected by a liability, rather than a property, rule, where the courts will attach an objective value to the work and require the infringer of copyright to pay the copyright owner damages for unauthorized uses of the work.[34] As the law allocates the entitlement 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.

II. *PEER PRODUCTION AND SOCIAL NETWORKS*

The printing press is often charged as the first technology that gave rise to copyright laws. Ironically, this technology that allowed books to be printed cheaply and disseminated to a wider 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. Technological development is always a reason to reassess the effectiveness of incentives encouraging the production of literary and artistic works because the one effect of new technologies is the greater public accessibility of creative works, which heightens the free-rider problem of public goods and creates an urgent need for information producers to internalize the additional social benefits created through increased accessibility.[35] As producers of information seek to

---

[32] Yochai Benkler, *Viacom-CBS Merger: 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 conceives users of creative works as also producers of content participating as "peers" in a "robust, open social conversation")

[33] Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights,* 95 YALE L. J. 1335, 1336 (1986) (discussing Calebresi and Melamed's property rule and liability rule distinction and stating that "[w]hen 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.")

[34] Guido Calebresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089 (1972) [hereinafter, Calebresi & Melamed, *Property Rules*]

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

prevent the proliferation of new technologies by enforcing rights, granted by Congress to encourage the production of information, against producers of new technologies on the basis that these technologies allow for the infringement of copyrighted works to occur, we confront a question of law and not economic efficiency, or ethics and morality, or even politics.[36] The legal question we have to confront is whether the rights we provide copyright owners under the Copyright Act are broad enough to prevent the public distribution of new technologies, which may or may not facilitate copyright infringement. It is difficult to conceive the statutory rights in the copyright system as intending to be as 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 be an irrational act on the part of the legislature. But it appears that these rights have done exactly that. 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."[37] The Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*. decided that Grokster, Ltd. and StreamCast Networks, Inc., distributors of free file sharing programs on peer-to-peer networks allowing personal computers to communicate directly with each other without a centralized server, were liable for contributory 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.[38]

The *Grokster* decision is important one because the Court's handling of the balance between the exclusive rights of copyright owners against the equally legitimate public right to technological development will consequently affect the trajectory of copyright laws. The rights of copyright owners were obviously affected by the mass downloads and distribution of copyrighted content: a statistician employed by MGM showed that ninety percent of downloaded materials were copyrighted materials. On the other hand, deciding in the copyright owner's favor risked the setting of a precedent that will allow copyright owners to assert distribution rights in literary and artistic works and prevent the proliferation of technologies, which may or may not facilitate the infringement of copyrighted materials. The decision of the Supreme Court, founded on contributory infringement and a new theory of inducing infringement, is correct given the intent and purpose behind the distribution of the program. The Court was right to focus

---

[36] Jessica Litman, Digital Copyright (that the question of rights is a question of politics)

[37] www.grokster.com (last visited November 13, 2009)

[38] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)

on the culpability of both companies, rather than the effect of the program on the market for copyrighted content, for the companies' apparent acts undertaken to encourage infringement resulted in direct damage to the copyright owners. As Justice Breyer rightly pointed out, it is unlikely that the production of creative works will cease simply because peer-to-peer illegal file sharing exists[39] 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. Evidence that both companies sought to appropriate displaced Napster users following Napster's shut down, showed 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 i.e., 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.[40] Opening developers of technology to the potential of copyright infringement actions would undoubtedly create a chilling effect on technological growth. 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 v. Universal Pictures Studios*.[41] The decision of Grokster is right on its specific fact pattern but 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. The encouragement of creativity and promotion of 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. The exchange and sharing of information among individuals need not necessarily be an infringement of copyright, and may instead be a valid, legitimate claim to reasonable access to information. A claim to reasonable access to information, which reinforces the legitimate needs of society to have access to information for the progress of science and the useful arts, and facilitates learning as a general goal of the copyright system, limits the right of a copyright owner to exclusive control over public uses of the work, strengthens the public's interests in using works for

---

[39] Citing M. Madden, Pew Internet and American Life Project, Artists, Musicians and the Internet, and Yochai Benkler, *Sharing Nicely: On Sharable Goods and the Emergence of Sharing as a Modality of Economic Production,* 114 YALE L. J. 273 (2004)

[40] *Id.* at 928

[41] 464 U.S. 417 (1984)

learning, progress and education, and reemphasizes the importance of balancing private rights and public interests in literary and artistic works through the copyright system.

Contemporary criticisms leveled against the grant of property rights over intellectual works have been based on the unreasonable curtailment of 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 that they are rightfully entitled to.[42] The recognition of patent rights over business methodologies, as another example, denies society the freedom to use works that are essentially, socially useful information and knowledge over legitimate ways to conduct or operate a business, which ought to be free.[43] Critics of 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 design promotes free and unrestrained exchange of information and knowledge over an open and commonly held cyberspace.[44] A healthy public domain comprising information, knowledge and intellectual works that is commonly held by society and easily available for use in innovation and creativity is essential for social, cultural and technological development.[45]

These 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. In the copyright system, the social cost borne to achieve the greatest utility, which is progress of the sciences and the useful arts, are exclusive rights in literary and artistic works. The central difficulty in the right-access debate is the impossibility of calibrating the exact amount of private rights necessary to encourage private individuals to dedicate their innovative and creative energies towards creating intellectual assets for the ultimate benefit for society. To recognize private rights as a goal towards 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

---

[42] The Copyright Term Extension Act expanded the duration of copyright protection from 50 years to 70 years after the life of the author. The Supreme Court in Eldred v. Ashcroft, 537 U.S. 186 (2003), decided by a majority of 7-2 that the Act was not unconstitutional.

[43] Business method patents were first recognized in State Street Bank & Trust v. Signature Finance Group, Inc. and affirmed in AT&T Corp. v. Excel Communications, Inc. The Supreme Court decision on whether a process must be tied to a machine or transform an article into something else is pending in the case of Bilski v. Kappos.

[44] Lawrence Lessig, *The Death of Cyberspace,* 57 WASH. & LEE L. REV. 337. 345-347 (2000)

[45] *See* Jessica Litman, *The Public Domain,* 39 EMORY L. J. 965 (1990) (emphasizing the need to ensure that a robust public domain, containing the resources for creativity, exists) and James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain,* 66 SPG-LAW & CONTEMP. PROBS. 33 (2003) (arguing for an active construction of the public domain to avoid the "propertization" of informational resources)

marginal cost of producing the intellectual asset), would mean that a balance between private rights and social utility must be reached. The dilemma that ensues from the law's attempt to ensure that enough intellectual works are created for the public, while at the same time secure sufficient public access to these works to encourage newer forms of innovation and authorship, is a result of the tension between a right to exclude unauthorized use of property and reasonable access to creative works as building blocks for future innovation and creativity.

This Article argues that the reason we struggle with the question of rights and access is because we are looking for the answers to the problem in the wrong places. We have tried to calibrate the optimum level of rights to provide the incentive to create and leave everything else free for the public to use 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 they want[46] to which social activism is the best response. The utilitarian sees statutory rights as a temporary price, which society pays in order 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 these 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 says:

> "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. In order 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…"

But, as technological development creates new markets and copyright owners seek to expand rights, the balance between rights and access seems impossible. The second approach, which we have adopted and, which I will call the "critical legal scholars response," garners 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. This social push back against the expansion of rights is possible because of the technology, which has developed to facilitate peer production of content and collaborative modes of creation through social networking sites. The reason access to information has become a central issue in copyright policy debates is because existing technological platforms have been built upon the infrastructure of the Internet to facilitate online discussion and actively gather a citizenry for the information society, which

[46] JESSICA LITMAN, DIGITAL COPYRIGHT

uphold libertarian notions of freedom, autonomy, individual liberty, and human rights. This form of social activism, this Article argues, is a result of influences from the critical or realists school of thought, which believes in the indeterminacy of the law and advocates for solutions to legal problems through real-world social responses or activism. 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 of the impact of greater rights upon individual autonomy.

III. *THE UNEASY PATH OF RIGHTS EXPANSION*

The expansion of copyright treads an uneasy path because of the adverse impact exclusive rights have upon accessibility of information. 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 making decisions on whether existing rights under the copyright system, ought to be expanded to cover new forms of creative works.[47] The first is a "morally principled approach [which] exalts authors … [as] the bearers and creators of our culture, both high and popular."[48] Professor Brown calls this principle the "exaltation of authorship"[49], which glorifies the author as the autonomous individual producing works of authorial or artistic genius for society.[50] The second principle Professor Brown lays down is the constitutional principle, which emphasizes that the Congressional powers under the intellectual property clause was intended to promote the progress of science and the useful arts, and was not intended, as Professor Brown states, "to maximize the returns to authors and inventors."[51] The rights of the author, therefore, are subservient to the public interest under the second principle, and 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 with respect to the inherently public good nature of creative works.[52] As literary and artistic works, by their nature, cannot be depleted nor extinguished by public uses, and are incapable of any form of exclusive control, which will allow authors to prevent non-paying members of the public from copying and distributing the work, the state must intervene and pass

---

[47] Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards,* 70 MINN. L. REV. 579 (1985)

[48] *Id.* at 589

[49] *Id.*

[50]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.*

[51] *Id.* at 592

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

copyright laws to ensure that authors and creators are able to legally exclude others from copying or using the work without their permission.[53]

While these principles provide useful guidance as to 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. 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 the grant of rights. Utilitarian works, which perform purely instructional functions, such as computer programs, are regarded as literary works under §101[54], and the Supreme Court has, on separate occasions, held that pictorial illustrations functioning as an advertisement are pictures subject to copyright protection[55], that an original selection, coordination and arrangement of facts may merit copyright protection over the way those facts are presented[56], and that commercial designs 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.[57] Works of creative authorship may also be commissioned today under the "work-for-hire" doctrine[58], 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, which is 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. Both these two principles are grounded in policy-oriented realism and highlight the need to recognize private rights in order to encourage the creation information for society's benefit. However, both 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, yet allow for public accessibility to information for the progress of science and the useful arts.

---

[53] *Id.*

[54] 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 (1983)

[55] Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903)

[56] Feist Publications, Inc. v. Rural Telephone Service, Co., 499 U.S. 340 (1991)

[57] Mazer v. Stein, 347 U.S. 201 (1954)

[58] Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)

This Article argues that the question of rights and access is a legal question, the answer for which is to be found in a deeper understanding of property rights. The question of rights and access cannot be resolved by economic analysis nor social or political activism because the question we are asking is essentially a legal question, which is the exact nature of statutory rights under the copyright act and what these rights entail. If they are property rights in the conventional sense to which a right to exclude applies, 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 the information. 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. If the rights under the copyright statute are merely economic privileges to use the information in such a way that would promote progress and serve a production function, then the copyright owner has no real right to exclude society from having access to information. This Article argues that the rights under the copyright act are economic privileges, which recognizes a right to use literary and artistic works for the purposes of encouraging production and dissemination the work to the public and to recover payment for social uses of the work from the public. The rights, which copyright owners have under §106 of the copyright statute is an economic entitlement, which rests upon the larger property right of the author.

III. PROPERTY RIGHTS AND ECONOMIC PRIVILEGES

In order to understand my approach to the question of rights and access, it is helpful to begin with the difference between a right that attaches to a thing and a right that is a personal right possessed by an individual. In legal terms, the 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. As opposed to an interest *in personam,* which are personal interests individuals possess that arises by virtue of a relationship with the property owner and, which are personal to a person and do not pertain to, nor convey property ownership in a thing, a right *in rem* is an interest, which reside in a property owner by virtue of his ownership of a thing. 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.[59] The right the property owner exercises stems from ownership of the land and is metaphorically, attached or tied to the land. On the other hand, a lien over land as a security for the payment of a debt, while providing a creditor with a temporary security interest over a property, does not convey any interest *in rem,*

[59] For an elaborate treatment of the legal interaction between rights and duties, see WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Yale University Press 1919)

which attaches to the property, as the right arises by way of a personal interest that the creditor has to have the debt repaid by the property owner. 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.

This distinction between a right *in rem* and *in personam* is an important distinction, which, I think, provides insight into the private right – public domain discussion in copyright jurisprudence. A copyright owner, 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. This right *in rem,* belonging to a copyright owner implies absolute dominion and control over the work, ownership in which is not dependent on any legally defined relationship with another person. The property right arises by virtue of an author's original creativity, and the resulting creative work that is produced entitles the author to exclude non paying members of society from having access to the work, and to protect this entitlement, the law recognizes certain rights in authors to restrict the rest of the world from reproducing, distributing, making derivative works, publicly performing and digitally transmitting the work.[60] The recognition of this entitlement in literary and artistic works however, includes an additional personal interest, or an interest *in personam,* to generate profits from market commercialization of the work. This right is an economic interest that is protected 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.[61] By making these works fully available for public use through market mechanisms, society will have literary and artistic works to facilitate learning. This right *in personam,* which copyright holders have by virtue of the copyright statute, is generally not present as an entitlement that an owner of real or other forms of personal property has by virtue of their ownership of land or a thing. 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 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.

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

---

[60] 17 U.S.C.A. §106

[61] Art. 1, §8, cl. 8 U.S. Constitution

in the work is a sovereign right of a property owner over the work, which subject to a few legal and moral limitations, is an absolute right good against the world that allows an author to deny access to the work based on a property owner's right to exclude. A property owner is under no obligation to grant another person access to the property, even for monetary exchange.[62] 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. 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 way of an injunction but rather suggests of 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 the 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. The expression of *in rem* and *in personam* interests in creative works, this Article argues, provides some normative legal guidance that balances property rights of copyright owners against the legitimate needs of society to have access, providing an interpretation of property rights in literary and artistic works that is grounded in legal doctrine and theories of property rights rather than economics analysis or critical realism.

The foremost right of a property owner is the particular right to exclude the rest of the world from actions that will affect that property. Rights in property bind the rest of the world and puts society under a duty with respect to the property or thing, which is irrespective of who the owner is. For example, for fear of trespass, I am under a duty to refrain from entering a house on my street without the permission of the owner, regardless of who the owner is. If the first owner sells the land to another, I am under the same duty with respect the property. The fact that there was a transaction between the former owner and another person does not change the duties that I have towards the property.[63] In the same fashion, the owner of a single property has a right to exclude others from the property, which comes from ownership of the property, and not from any personal right to exclude. As soon as the property is sold, the former owner loses the right to exclude others from entering the property he used to own. The former owner does not bring the right to exclude with him if he ceases to be the owner of the property because the right is a right *in rem,* which attaches to or connects with the property and not its owner. The new owner has the right to exclude, not by virtue of his individual person, but by virtue of his ownership of the property. This is true in every case, unless the right is an

---

[62] *See* Jacque v. Steenberg Homes, 563 N.W.2d 154 (1997)

[63] J.E. PENNER, THE IDEA OF PROPERTY (Oxford University Press 1997)

inalienable right, such as the creative rights arising from the author's creative expression through the act of authorship, which cannot be disposed of, assigned, or sold.

As the right to exclude is a right that attaches to property, and is not a personal right *in personam,* the property owner is of course restrained in what he can do with respect the right to exclude. The owner may exclude actions with respect to the property, which he has not consented to e.g. trespasses, unreasonable interferences and conversions of property. The owner may prevent certain actions that affect the property in a way, which has not been consented to. However, as the right to exclude is attached to the property, the owner cannot justify controlling the actions of others, whose actions do not affect the property. For example, an owner who plants beautiful flowers on his property cannot prevent his neighbor from receiving the pollen bees bring from his flowers onto his neighbor's land, which allows the same beautiful flowers to grow, by requesting that his property right be expanded to cover his neighbor's land, which now has flowers from his own flower's pollen. Neither the actions of the neighbor in allowing the bees to bring pollen to his land nor the benefit that the neighbor acquires from these beautiful flowers justify expanding property rights to allow one property owner to exclude the benefits another person gets from his property when the other person has not done anything to affect the use and enjoyment of the property in an unreasonable way. The right to exclude is therefore a unique negative right in the property to prevent uses of the property without the owner's consent, and this right imposes a duty on others to refrain from actions that will affect the rights of the property owner with respect to the property. The right to exclude is, by its nature, necessarily limited to the physicality of the thing owned.

Being a negative right, the exercise of the right to exclude by a property owner requires a defined property or identifiable thing to exclude others from. There must be a requirement that a thing be appropriated to the owner's self and capable of exclusive possession by its owner before a right to exclude others from a property can be maintained, and for the right to be of practical legal value to its owner.[64] The imposition of a duty upon the rest of the world to respect a property owner's right to exclude others from the property carries with it a requirement that the property owner conveys the intention to appropriate the property from the common area, which available to the rest of the world, is out of the parameters of claimed property that the property owner carves out from society for himself. In *Pierson v. Post,*[65] the fox hunting case of first possession that sets the rules establishing new roots of title, and as a result initial property rights in an animal pursued over common ground, the court held that the mere pursuit of an animal, without appropriating the animal and bringing it within the control of the hunter did not establish a new root of title by way of first possession. It is only when the hunter, in the words of Tompkins J., "manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his

---

[64] *See* Hinman v. Pacific Air Transport, 84 F.2d 755 (1936)

[65] 3 Cai. R. 175, 2 Am. Dec. 264 (1805)

certain control" that first possession, establishing a new property right, may be found. The right to exclude is therefore premised on an unequivocal act by the property owner to possess the property within defined parameters, setting the property aside from commonly held property, which will permit the property owner to control use of the property, and exercise exclusive dominion and possession of the property against the rest world.

Aside from the right to exclude at the core of the property system, there are other rights that a property owner has that are not a right in a thing but an abstract collection of interests in abstract things, which are intangible such as literary and artistic works.[66] In these cases, such rights cannot attach to a thing and must necessarily attach itself to the owner of the thing in his personal capacity. In these cases, the rights exist not as a property right in itself but as a right that arises by way of a personal relationship, a right *in personam*, which the property owner has with another person or legal entity – with a bank in the case of bank accounts, a corporation for commercial papers and bonds, and an insurance company in the case of insurances. For literary and artistic works, this *in personam* right arises in the form of an economic interest, statutorily provided for under the copyright act by way of congressional mandate through Art. 1, §8, cl. 8 of the Constitution.[67] As *in personam* rights define legal relationships and are specific to a particular person, they are usually a contractual right, a license, or a tort award against a particular defendant. They do not define the owner's ownership in a particular thing and are not limited, as with an *in rem* property right, by the physicality of the thing owned.

The distinction between a property right and an economic privilege does not appear as a matter of doctrine in copyright jurisprudence. The statutory rights recognizing specific rights to use literary and artistic works are called property rights and this label gives rise to the assumption that these exclusive rights are property rights of the *in rem* type, which 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 right-access question because positive 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. 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. The exclusive right to print only serves the purposes of artificially creating boundaries in order to provide copyright owners with institutional support to produce and disseminate a good, which is non-rival and non-excludable. The positive right to print or reproduce literary and artistic works is an *in personam* right,

---

[66] Tom Grey, *The Disintegration of Property,* in NOMOS XXII: PROPERTY 69-71 (J. Pennock & J. Chapman eds., 1980)

[67] 17 U.S.C.A. §106

which the copyright owner has. The statutory rights do not create an *in rem* right in the work.

The effect this distinction on the statutory rights of the copyright owner is in how the law protects the entitlement. A property right of the in rem kind would mean the law protects a work as belonging to the owner. Any uses of the work without the owner's authorization would amount to a theft of the work or a trespass upon the owner's property. A property right protects an individual's ownership of a thing. A property right in literary and artistic works protects the author's ownership of a work as a thing, which belongs to a person. However, when we acknowledge statutory rights as being economic privileges to use literary and artistic works in a particular way, the law protects that entitlement differently. The law may protect that entitlement to use literary and artistic works as a property rule, as a liability rule, or the law may make the entitlement inalienable on policy grounds.[68] Protecting an entitlement as a property rule however, does not mean that that the right protected is a property right. In Calebresi and Melamed's Article, the right protected by a property rule is a contractual right. Protecting an entitlement as a property rule only means that an injunction may be granted when the entitlement is infringed. An example would be the protection of the right to quiet enjoyment of land as a property rule. The creation of a nuisance that unreasonably interferes with that right may be enjoined by an injunction. But, it does not necessarily mean that the person who has a right to quiet enjoyment in the land has ownership of the land. A mortgagee or a lessee may have rights over land but not ownership of the land. Protecting a right as a property rule creates a baseline right for which transfers of the entitlements may be negotiated in a Coasean fashion. When transaction costs for market negotiations are prohibitively high or impossible, such as when there are holdouts, then the law may protect an entitlement as a liability rule and effectively transfer the entitlement to the other party for an objectively set price. Usually, this is done by an administrative body, such as the courts, for the payment of monetary damages to the holder of the entitlement. When we see the protection of economic privileges or entitlements as separate from the protection of property rights, it becomes clear that the statutory rights under §106 are specific entitlements in literary and artistic works that may be protected through a property or liability rule. What this means for the question of access to information is that the copyright owner does not have, as a matter of law, a general right to exclude society from using the work unless the use of the work amounts to an unreasonable interference with the copyright owner's right to receive payment for the production and dissemination of the work. This would mean that proving infringement of one of the statutory rights is not sufficient to establish liability on the user of the work. The copyright owner must also show that there is an unreasonable

[68] Calebresi & Melamed, *Property Rules* (In this Article, an entitlement protected by a property rule is not a property right of the in rem kind but an in personam right that allow contractual negotiations to occur for the transfer of a right. Entitlements protected by property or liability rules are classic in personam rights, which take the form of personal rights that allow contracts to form to facilitate the transfer of rights on the market or compensation to be recovered for tortious conduct.)

interference with the use and enjoyment of the economic privilege. The practical implication of this analysis is that access to literary and artistic works and the freedom to use and enjoy the creative products of the copyright system is presumed as of right and can only be enjoined when the use amounts to a tort of unreasonable interference.

The claim that the statutory rights under §106 are economic privileges and not property rights, which belong to the author of the work, finds support in the history of copyright law, the economic theory of information cost, and as matter of established legal principle. Historical evidence seems to suggest that authors had always had a separate right in the work, which was separate and distinct from the publisher's right to print the manuscript. Economic theory also suggests of a distinction between property rights and economic privileges from the perspective of controlling and reducing information-costs when protecting literary and artistic works. This same distinction between property rights and economic privileges is also observable as a matter of legal principle in copyright law from the distinctions the law draws between protectable expressions and non-protectable ideas as well as between illegal copying and fair uses of creative works, and as a broader legal principle of the intersection between property/contract rights and criminal/tort actions. I discuss my observations as support for the claim that statutory copyright is an economic privilege rather than a property right in the following three paragraphs.

I. *AS A MATTER OF HISTORY*

Early publishing contracts in England show a remarkable thing. A publishing contract for the publication of a book would include a clause requiring the author to refrain from selling the manuscript to someone else without the consent of the publisher and from interfering with the publication of the work once the manuscript was sold. The 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 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.[69] This residual right indicates 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. The way early publishing contracts were drafted provides an important piece of evidence to demonstrate 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 were two separate and distinct 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

[69] LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 74 (Vanderbilt University Press 1968)

thing. Professor Patterson sees 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 subject to a property right. As Professor Patterson explains:

> "…it 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 semantics, and it is helpful because we have here a 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."[70]

The fact that early publishing contracts were not absolute transfers of ownership in the work but were rather assignments of a specific right to print and publish, which were 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 passing of the Statute of Anne establishing copyright as a statutory right, the author's rights and the publisher's rights as two separate and distinct rights seem to have been evident. This distinction may have been lost in the trilogy of cases interpreting the Statute of Anne and the U.S. Copyright Act of 1790 in the United Kingdom and United States. The Queen's Bench Division in Millar v. Taylor decided that the author has a perpetual property right in the work that was separate from the statutory right to print manuscripts for 14 years granted to authors and publishers under the Statute of Anne. The House of Lords overruled the decision of Millar v. Taylor and decided that the only rights in literary and artistic works were granted through the statute. The U.S. Supreme Court in Wheaton v. Peters decided that the only rights in literary and artistic works were statutorily granted and common law property rights of the author did not exist.

II. *As a Theory of Economics*

The distinction between property rights and economic privileges is also observable in the economic theory of information costs. The economic theory of information costs posits that rational individuals will search for the best product or service on the market until the marginal cost of searching for information about products or services on the market exceeds the marginal benefit of the search. Users of literary and artistic works will be willing to undertake high costs of information search in order to find a work, which individual expression will satisfy the purpose for which it is sought. A movie producer, for example, may expand considerable information cost searching for

---

[70] *Id.* at 75

the perfect piece of music to serve as the film's theme song. An author may also expand high information costs to search for the perfect art piece to describe in their work. In such cases, where existing works are used as part of a new piece of art, literature, or creative work, the creator of the work will often expand considerable information cost searching for a work of expression, which will fit into their own creative work. Other users of literary and artistic works, such as a music listener or movie goers, spend less time searching for the "best" product on the market because the work searched for is substitutable. A person may decide not to watch a particular movie or listen to a particular song if a substitutable product is available. The amount of information cost a user is willing to incur depends on whether the work is used for its expressive component. A work is generally not substitutable when used for its expressive content.

The fact that some users treat creative works as substitutable while others do not demonstrate that there is a discernable difference between the value users place on works depending on its intended use. For works that are non-substitutable, for which users place a higher value, rights protect more than just the economic value of the work. They protect the author's creative personality and authorial integrity against unauthorized uses of the work in a way that may go against the author's wishes. In such cases, a property right allowing the author to exclude society seems justified because a property right in the work as a creative expression of authorship protects the work as a thing, which belongs to the author. On the other hand, the value of substitutable works for society is largely an economic value that is not dependent on the expressive content of the work. The use of a work for which society consumes the work as more passive users need only protected as a right to receive payment for the work. The statutory rights under §106 of the Copyright Act protects the right of the copyright owner to receive payment for these uses of works, which do not involve uses of the author's creative expression but rather uses that are consumptive in nature. In this situation, economic privileges protecting the right to use the work in a particular way assure the copyright owner of a recovery of payment for these uses. The right to exclude society from use of the work is not necessary or desirable for uses of literary and artistic works that society is not willing to expand tremendous information search costs because in cases where works are substitutable, exclusive rights protect a commercial interest in recovering payment, rather than an author's personal interest in protecting authorial integrity and creative personality.

III. *As a Principle of Law*

The third observable distinction between property rights and economic privileges is in legal principles embodied within copyright law and the larger body of property law. One of the most fundamental legal principles in copyright jurisprudence is that ideas and facts are not protectable while original expressions are.[71] The reason for making mere

[71] Baker v. Selden, Nichols, Sheldon v. MGM

ideas free is to allow society to benefit from the production and dissemination of creative works. Copyright laws exist precisely to encourage the production and dissemination of creative works, by protecting the right to print, create derivatives, distribute, etc. so that society may benefit from the ideas contained in these works after they have been produced and disseminated by the copyright owner. When society buys a work, they buy a right to listen to a song, read a book, or watch a movie. The rights under §106 provide society with access these works by encouraging their production and dissemination. But, original expressions are protected, not because it is something society generally needs for the purposes of progress of the sciences and useful arts, but because original expressions of the creator of the work are those parts of the work, which society willingly pays for to experience or use. With expressions of the author, society pays for the "thing" protected, which is the creative personality of the author. Hence, social uses of protectable expressions require the user to obtain authorization the copyright owner for use of the work in a manner which encompasses the use of the author's personality, such as the use of a storyline in a movie or the reproduction of a work of art. Compensation for use of the work is not sufficient. The author must authorize the use. Protecting the author's personality as a property right, separate from the economic privileges under the Copyright Act, means that there can be no compulsory transfers of rights to use the creative personality of the author as the thing protected by the law under a liability rule or that there is an entitlement over the personality of the author, which may be subjected to market transfers through negotiations at a price set by the author, and which is protected by a property rule. The property right of the author, which protects his creative personality and authorial integrity, is an inalienable right that cannot be sold on the market because it protects a thing which is inherently part of the author's being. The reason why we think plagiarism is wrong is because there is something inherently immoral about claiming someone else's creative personality and authorial integrity as one's own.

This distinction between the rights of the author and the privileges of the publisher explains why we regard plagiarism by students 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 as expressed in a work of authorship. This distinction is also why we require that a copy of a work be substantially similar to the original for there to be an infringement of copyright: because the appropriation of the essence of another's original expression represents the taking of a core protectable interest in the work itself, such as the detailed plots of a play.[72] The separate right of the author and privilege of the copyright owner 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.[73]

---

[72] Sheldon v. Metro-Goldwyn Pictures Corp. 81 F.2d 49 (1936)

[73] Community for Creative Non-Violence v. Reid, 846 F.2d. 1485 (1988) aff'd 490 U.S. 730

The legal distinction between in rem and in personam rights has also been made in the works of Wesley Hohfeld, in the commentaries of William Blackstone on property law, and more recently by Thomas Merrill and Henry Smith in their enumeration of exclusionary and governance rules.[74] These works do not specifically relate to the rights of authors and publishers under copyright law, but, they do highlight the important distinction between real rights and personal rights, and inform the questions with face with respect the grant of exclusive rights to fulfill a public purpose by demonstrating that the law itself makes such a distinction between real rights defining ownership of a thing owned and personal rights defining legal relationships between or among individuals in a legal system.

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 use of the property. For literary and artistic works, the right to exclude others from use of a work constitutes the property right of the copyright owner.[75] There are significant differences between real and intellectual property. Transaction costs for protecting copyright is significantly higher that real property. For real property, there is always an identifiable number of people who infringe the right, and it is generally easier to identify numerically the times in which the right to exclude is affected. For literary and artistic works, which are, as a general rule, non excludable and non rival, protecting the right to exclude may be impossible because the right can be infringed an infinite number of times without the copyright owner realizing it, or being able to keep track of each infringement. The public good nature of literary and artistic works makes the right to exclude a difficult, if not impossible, right to protect. As a copyright owner, I may be able to prevent you from reading a physical copy of my work. I may exclude you by refusing to let you read a copy of my manuscript or listen to my musical composition. However, once I have disseminated the work, the right to exclude then becomes obsolete. It is virtually impossible to prevent others from having access to the story, which makes up my novel, or the notes, which together makes up my musical composition. Once a literary and artistic work has been put on the market, the right to exclude loses its meaning. Even if the copyright owner is able to design a technology to exclude others from reading the novel or listening to the composition, the essence of a work is never completely protected

---

[74] See for example,

Smith, Henry E. "Exclusion versus Governance: Two Strategies for Delineating Property Rights," 31 Journal of Legal Studies S453 (2002)

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

by the right to exclude. The difficulty of enforcing a right is not a reason to not protect it. But, when a right belongs solely to the author, and not the copyright owner, a refusal to enforce an exclusionary entitlement is well justified because the essence of what is protected is not an entitlement or interest but 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 is less of a connection between the personality of the owner and the thing owned. Land, a finite resource, may have special meaning to its owner. A land owner, who raised a family on the land and lived there for fifty years, would undoubtedly have sentimental value in the land that would not be quantifiable through the market. In fact, the market may severely undercut the landowner's accumulated value in a piece of land when the owner's non-economic value is taken into account. Many land owners refuse to sell land on which they have spent their lives. In the same way, an author of literary and artistic works may have personal and sentimental connection to the product of his personality, and maybe reluctant to see the public use the work in a way, which is contrary to his original intent or personality. But the connection between authors and their work is, in some sense, stronger than the land owner who has lived on the land for his whole life because a work is the creation of the author that is produced as a result of authorship and creative production. In this sense, property rights that are similar in effect to moral rights protection of continental European countries offer the author assurance in that the public will not use the work in a way that adversely affects the author's artistic creativity and authentic personality. For this reason, property rights in literary and artistic works should be inalienable.

This part of this Article explains the legal consequences of making a distinction between property rights and economic incentives. First, from the publisher's point of view, the rights under the Copyright Act serve only as an incentive to produce and disseminate information. They provide an exclusive right which assures publishers, who invests in making the work available to society has a right to be remunerated for social uses of the work. Publishers do not have rights in the work and are not entitled to exercise a general right to exclude society from using the work for the purposes of promoting the progress of science and the useful arts. But, they do have the right to receive payment. The right to exclude others from using the work that a copyright owner has in its limited form serves only to enforce a contractual right to receive payment from society. Second, the public is entitled to use the information contained in literary and artistic works for the purposes for which the copyright system exists to further progress in the science and useful arts unless the use of the work amounts to an unreasonable interference with the copyright owner's ability to receive payment for the work or if the use adversely affects the original author's creative personality and authorial integrity. 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 creative personality. The protection of the author's personality is important in

encouraging the creation of works for the benefit of society and must be a serious consideration in the copyright system.

I. *The Incentive to Produce and Disseminate*

Economic privileges protect the publisher's investment in producing and disseminating creative works to the public. The reason why economic incentives are necessary is that the production of creative works, like the building of a lighthouse, is time consuming and involves the use of scarce resources. Coupled with the fact that literary and artistic works are not rival or excludable, there is a need to protect economic investments in the production and dissemination of these works through the law. The law protects these entitlements in creative works by making certain uses of the work exclusive. The Copyright Act protects these rights as use rights, which entitle the copyright owner to receive payment for uses of the work.

II. *Public Access to Information*

The separation of property rights from economic privileges means that the general public is entitled to use the information contained in literary and artistic works for the purposes for which the copyright system exists to further progress in the science and useful arts. The public cannot be excluded from using the work just because new markets emerge from the development of new technologies. The only time society may be excluded from using the work is when the use of the work amounts to an unreasonable interference with the copyright owner's ability to receive payment for the work. When a tort occurs, the entitlement of the copyright owner can be legally protected through a property rule or liability rule.

III. *The Author's Right to Exclude*

The author's right has not been explicitly protected within the copyright system as a separate property right. This Article argues that the law should recognize a separate author's rights, which is the property right protecting the creative personality of the author. This right entitles the author to exclude society from using the work when the use adversely affects his creative personality. The protection of the author's personality, this Article argues, is important in encouraging the creation of works for the benefit of society and must be a serious consideration in the copyright system.

V. A Normative Proposal

This paper presents a normative proposal that we treat statutory rights and property rights as two separate rights. The economic privilege to use works in a particular way rewards investments in the production and distribution of works to society. The essential goal of the Copyright Act is to create exclusive rights, which will enable

copyright owners to recover payment for uses of their works. But, statutory rights are not the only rights, which exist in literary and artistic works. By virtue of being the creator of a work, the author has a property right in the work as the creative expression of the author's personality, which the law ought to protect if promoting progress of science and the useful arts through works of authorship 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 an intent to protect a work as a thing owned by the person who created it.

The effect of this distinction on legal analysis of copyright questions is significant. Protecting an entitlement to use the work with a property rule is different from protecting the work with a property right. When the law protects an entitlement, there is a consideration of reasonableness in the determination of whether the conflicting use amounts to an infringement of the entitlement. The conflicting use must be an unreasonable interference with the the use and enjoyment of the entitlement before the use may be enjoined. The law of nuisance demonstrates this point. An injunction may be granted if a conflicting land use use is a substantial, intentional and unreasonable interference or a substantial interference that is the unintentional result of negligence, recklessness or abnormally dangerous activity. (see 2nd restatement of torts). Thinking of statutory copyright as an economic privilege rather than a property rights allows the incorporation of this form of analysis into the question of infringement, which will allow social uses of literary and artistic works to be used freely and creates a presumption that social uses of literary and artistic works are, as a matter of law, legitimate uses of the work. Fair use will no longer be an affirmative defense, all social uses of the work is presumptively fair and the copyright owner, as the Plaintiff of an infringement suit must then show that there is an unreasonable interference with the entitlement to recover payment for social uses of the work to establish a case. If the entitlement is protected by a liability rule, then damages may be paid in lieu of an injunction. But, as a general rule, the copyright owner cannot exercise a right to exclude under the Copyright Act.

This normative proposal carves out a separate property right for the author in the work, which arises through the authentic expression of the author's personality. It is a right that is inalienable because the law is not protecting an economic interest, the law is protecting an expression. There is something inherently immoral about selling expression on the free market as a commodity. If we accept that there is something inherently immoral about selling expression, we can also suggest that there is an ethics about authorship and what authors write. Part of my work argues for this idea of ethical and authentic authorship.

VI. CONCLUSION: LESSONS FROM THE LIGHTHOUSE

The calibration of private rights in literary and artistic works by identifying the most efficient allocation of private property rights to maximize the creation of works without incurring additional social costs is difficult, if not impossible. Utilitarian arguments in favor of the public's legitimate needs for and rights to access, on the other hand, resist expanding property rights as an encroachment into the public domain and the right of society to use these works for innovation and creativity highlights again the need for balance between private rights and public interest in copyrighted works. These conflicting approaches to the copyright dilemma, brings attention to the tension created by the grant of temporary monopolies over literary and artistic works to encourage the creation of these works to benefit the public, and yet both the law and economics, and legal realists, approaches to the dilemma offer 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 and creative production good against the world, and an economic right *in personam* to recover profits from the commercialization of the work, which stems from the author's rights under the present copyright system. The doctrinal and institutional approach to the property rights-public interest conundrum that I have described in this Article, I believe, puts copyright jurisprudence on a more stable foundation allowing the law to evolve through legally accepted principles of property law independent of the social, technological and cultural changes, which, up to this day, have constantly shifted the delicate private rights – public interest balance with ease. A solution steeped in doctrinal analysis and institutional framework will provide greater stability to the legal system, instill greater confidence in the law and promote social respect for rights, duties, entitlements and obligations arising from the use of literary and artistic works.

Light from a light house provide 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 freely appropriable and is in abundant during the day, is such an immensely scarce, and invaluable, resource when light does not exist. If property rights are necessary to allow private light house builders to recover their investment made in providing light house services to vessels at night through levies, these rights should be enforceable only for the purposes of recovering levies from vessels. These rights do not entail a property right in light but merely provide a mechanism for recovering payment. Similarly, a right provided under statute to encourage the production of literary and artistic works allow only for the recovery of payment for use of the information and do not entail a right in the information itself, nor a right to exclude society from having access to the information. While these rights, being mere entitlements that are not confined to the physicality of a thing protected, they may expand

with developing markets but they should only be enforced when society's use of the work amounts to an unreasonable interference with the right to recover payment. Otherwise, access to information is presumed to be an entitlement society has. Information, like light, is absolutely necessary to provide guidance to those using it for the purposes of promoting the progress of science and useful arts, and society should not be excluded from using information because a copyright owner chooses to exercise an absolute right to exclude. The absolute right to exclude is only a right the author has as a 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. Creative personality, unlike light, is a tangible definable that may be owned by a single person: the author of a work.