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## THE INTELLECTUAL PROPERTY LAW REVIEW

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## Taking the “Hype” Out of Hyper-Linking: Linking Online Content Not Grounds for U.S. Copyright Infringement

Katherine E. Beyer<sup>1</sup>

Some have called it “stupid, stupid, stupid”<sup>2</sup> and a “horrendous idea,”<sup>3</sup> while others have deemed it “born out of ignorance”<sup>4</sup> and worry that it will ruin the Internet as we know it.<sup>5</sup> The idea that hyper-linking, or providing a link to a copyrighted webpage, could give rise to liability for copyright infringement has created a veritable explosion of speculation, worry, and outrage on the Internet.<sup>6</sup> These extreme reactions have grown out of the “making available” right adopted in European countries, developed over decades, and that is now on the forefront of United States law.<sup>7</sup>

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<sup>2</sup> Veraxus, Comment to *Should Copyright Law Also Cover Hyperlinks?*, GIZMODO (Apr. 10, 2014, 10:33 AM), <http://gizmodo.com/should-copyright-law-also-cover-hyperlinks-1561724057/all>.

<sup>3</sup> DennyCraneDennyCraneDennyCrane, Comment to *Should Copyright Law Also Cover Hyperlinks?*, GIZMODO (Apr. 10, 2014, 1:00 PM), <http://gizmodo.com/should-copyright-law-also-cover-hyperlinks-1561724057/all>.

<sup>4</sup> raz-O, Comment to *Should Copyright Law Also Cover Hyperlinks?*, GIZMODO (Apr. 10, 2014, 12:55 PM), <http://gizmodo.com/should-copyright-law-also-cover-hyperlinks-1561724057/all>.

<sup>5</sup> See Adam Clark Estes, *Should Copyright Law Also Cover Hyperlinks?*, GIZMODO (Apr. 10, 2014, 10:25 AM), <http://gizmodo.com/should-copyright-law-also-cover-hyperlinks-1561724057/all>.

<sup>6</sup> *Id.* See *Frequently Asked Questions (and Answers) about Linking*, CHILLING EFFECTS.ORG (last visited Sept. 24, 2014), <http://www.chillingeffects.org/linking/faq.cgi>. See also Dan Cohen, *On the Right to Link: Building the DLPA*, DIGITAL PUBLIC LIBRARY OF AMERICA (Apr. 4, 2014), <http://dp.la/info/2014/04/04/on-the-right-to-link/>.

<sup>7</sup> See World Intellectual Property Organization: Copyright Treaty, art. 8, Dec. 20, 1996, S. Treaty Doc. No. 105–17 [hereinafter WCT] (providing for the right of authors to make their content available); WIPO Performances and Phonograms Treaty, arts. 10, 14, Dec. 20, 1996, S. Treaty Doc. No. 105–17 (1997) [hereinafter WPPT] (additionally giving authors the right to make their works available).

The Berne Convention for the Protection of Literary and Artistic Works first encouraged the international adoption of uniform rights for copyright holders.<sup>8</sup> From there, the World Intellectual Property Organization (WIPO) created two treaties that codified the exclusive right of copyright owners to “make available” their works.<sup>9</sup> While these treaties specifically enumerate this right for copyright holders, the United States has not officially codified this right under the Copyright Act.<sup>10</sup> Specifically, the right of “making available” is not included within the distribution right.<sup>11</sup> This lack of specific language within the statute itself has caused what some observers deem to be confusion within the courts and a seemingly disparate application of the distribution right.<sup>12</sup> Some courts have established a copyright owner’s right of making work available to the public, while others have not; some courts require actual distribution of copies while others do not.<sup>13</sup> The issue now is the “making available” right in the digital environment and the potential impacts it could have on linking copyrighted content from one web source to another.<sup>14</sup> The United States Copyright Office has recently accepted comments on this “making available” right, and this move seems to be the root of the conjecture and uncertainty; causing many to believe that the adoption of this right is imminent.<sup>15</sup> The commentators seem to have largely taken one side or another in favor of or against the right; both sides

<sup>8</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99–27 (1986), available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698).

<sup>9</sup> WCT, *supra* note 7, at art. 8; WPPT, *supra* note 7, at arts. 10, 14.

<sup>10</sup> 17 U.S.C. § 106 (2012).

<sup>11</sup> *Id.* § 106(3).

<sup>12</sup> See U.S. Copyright Office, *Making Available Study*, COPYRIGHT.GOV, [http://www.copyright.gov/docs/making\\_available/](http://www.copyright.gov/docs/making_available/) (last visited Sept. 26, 2014) [hereinafter U.S. Copyright Office].

<sup>13</sup> Study on Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571, 10,572 (Feb. 25, 2014).

<sup>14</sup> U.S. Copyright Office, *supra* note 12.

<sup>15</sup> *Id.* See also Estes, *supra* note 5.

make valid points.<sup>16</sup> Ultimately, the codification of a “making available” right will not change the legal landscape for infringement and redress.

This Article will argue that the distribution right can, in certain circumstances, include the right to make available as interpreted by the courts. However, if Congress explicitly codifies this “making available” right within the Copyright Act, the rights of copyright holders and their ability to recover will not change in the context of linking content on the Internet. This new “right” would not afford copyright owners any further redress or protection based on how both U.S. and European courts have interpreted this “making available” right for hyperlinks. Part I of this Article will address background information regarding the current controversy, the purpose behind the right, and the existing commentary. Part II will tackle the most up-to-date U.S. case law on the right of “making available,” and will illustrate how courts discern the applicability of this right. Part III will discuss the European case law, demonstrating that this right does not extend past the current right in the U.S. Finally, Part IV will conclude by noting that both U.S. and European courts have so limited this right that it will not cause the end of the Internet as most commentators have speculated.

## **I. Predicting Problems and Solutions—Spiraling out of Control Too Soon**

### **a. The Current Controversy**

Many commentators in the technology world are preparing for a worst-case scenario when it comes to this new “making available” right.<sup>17</sup> The most popular conception of what will happen if this right were to be adopted can be simply stated as “it could soon be illegal to simply link certain content.”<sup>18</sup> While that has yet to be seen, the theory spirals from there. A hypothetical scenario might go something like this:

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<sup>16</sup> Estes, *supra* note 5.

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

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

You find ... [a] YouTube video. You don't know it's an illegal copy. After all, HOW COULD YOU? There is no way of determining that it does or doesn't have the necessary rights to be up. So you link to it.

And suddenly, you're on the hook too?

But wait, there's more!

So, your blog post has the obligatory 'Share on [T]witter/[F]acebook/[G]oogle [P]lus...' buttons. Everybody who clicked on those would be linking to your post, which infringed because it linked to a video. So THEY'RE on the hook, too!

But wait! There's more! Somebody famous turns out to read your blog, and shared it on [T]witter and [F]acebook, because whatever you were talking about interested them. . . . Said famous person is now on the hook too!

And because it's a famous person on [T]witter, it gets hundreds, thousands, maybe tens of thousands of re-tweets! They're all on the hook too! And the Facebook post gets liked, which publishes it to a timeline, so Facebook people are on the hook too!

And this NEVER ENDS.<sup>19</sup>

Needless to say, this type of commentary easily can stir up confusion, worry, and misinformation. The public perception of the "making available" is not positive, and many have noted that it would "do more harm than good."<sup>20</sup> The Digital Public Library of America (DPLA) has commented that this right would make accessing their collections more difficult, could impose a great threat of liability, and could cause a potential "chilling effect" on delivering content, as

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<sup>19</sup> DennyCraneDennyCraneDennyCrane, *supra* note 3.

<sup>20</sup> Cohen, *supra* note 6.

assessing copyright status of each link is nearly an impossible feat.<sup>21</sup> The DPLA further argues this right would effectively eliminate any fair use defenses as well.<sup>22</sup> Such is the impression that congressmen would have to combat and overcome to eventually pass new legislation codifying the “making available” right. Clearly it would be an uphill battle, but, in the end, one that Congress may not want to fight. This Article will continue to show how this right has been appropriately applied within the courts, and any new codification would not change current infringement or cause these devastating effects that commentators foresee. Those concerned about this problem might, after all, be worrying about crossing the bridge before they come to it.

### **b. The Purpose Behind the Right**

After considering why this right could be a problem, perhaps it is best to examine why the drafters of the right thought it should exist in the first place. In 1996, the drafters of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty seemed to hold the following as the main goal of the treaties:

for authors, performers, and ‘phonogram producers’ to authorise [sic] or prohibit the dissemination of their works and other protected material through interactive networks such as the [I]nternet.<sup>23</sup>

Much of the motivation for enacting this right through these international treaties came from record producers in attempts to protect their phonograms within the increasingly popular and unregulated Internet.<sup>24</sup> This was particularly important to record companies because the presence of their recordings on the Internet opened the door to a huge group of potential infringers and a huge loss of revenue

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<sup>21</sup> *Id.*

<sup>22</sup> *See id.*

<sup>23</sup> *The WIPO Treaties: ‘Making Available’ Right*, IFPI.ORG 1 (March 2003), available at <http://www.ifpi.org/content/library/wipo-treaties-making-available-right.pdf> [hereinafter *The WIPO Treaties*].

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

from lost sales due to “unauthorised [sic] exploitation.”<sup>25</sup> Moreover, granting this protective right was truly the only way that the record companies would feel free to develop “electronic commerce” and “new business models” for their music on the web.<sup>26</sup>

Essentially, it seems that adopting this “making available” right was originally motivated by the desire to protect record companies from pirates and unauthorized sharing.<sup>27</sup> Since its inception, the Internet has greatly expanded, and this right has the potential to implicate more than just music.<sup>28</sup> However, it seems that the accessibility to the protected work was the key issue, and protecting the copyrighted work from unauthorized downloading and distribution was the main concern.<sup>29</sup> Based on basic principles of free speech and the Internet, linking to content is an important way to disseminate data and information.<sup>30</sup> In *Reno v. ACLU*,<sup>31</sup>

the [Supreme] Court declared the Internet to be a free speech zone, deserving of at least as much First Amendment protection as that afforded to books, newspapers and magazines.<sup>32</sup>

Therefore, limiting linking could prove to be quite a hassle when it comes to copyright infringement, but also when dealing with free speech.

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<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1.

<sup>28</sup> *See id.* (noting that the right to make content available broadly covers many types of exploitation—both of musical and other works).

<sup>29</sup> The WIPO Treaties, *supra* note 23, at 2.

<sup>30</sup> Cohen, *supra* note 6.

<sup>31</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>32</sup> *Technology and Liberty: Internet Free Speech*, ACLU.ORG (Jan. 1, 2004), <https://www.aclu.org/technology-and-liberty/technology-and-liberty-internet-free-speech>.

Even without a “making available” right, the current case law in the United States seems to both address the key motivation of copyright protection on the Internet and relieve the main concern of unauthorized dissemination.<sup>33</sup> Because of the competing interests and the fact that the making available right has not been codified, the courts have dealt with unauthorized distribution and have found it to constitute infringement regardless of whether the right to “make available” was found to exist or not.<sup>34</sup>

### **b. Conflicting Comments Provide Insight into the Two Camps**

Those calling for this “making available” right find support within the legislative history of the Copyright Act, whereas those denouncing the right find support in damaging practical consequences. Advocates of the “making available” right find support in Professor Melville B. Nimmer’s famous copyright treatise, *Nimmer on Copyright*,<sup>35</sup> and Professor Peter Menell’s article, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*.<sup>36</sup> Menell’s article discusses several undiscovered pieces of legislative history that provide insight into the distribution right within the 1976 Copyright Act.<sup>37</sup> He found that in the 1950’s, when Congress first set out to revise the Copyright Act of 1909, “the right to ‘publish’ was understood to encompass the offering of copyrighted works to the public,” as “[n]o court recognized a requirement to prove actual distribution of copies.”<sup>38</sup> The 1909 Act’s rights to “publish” and to “vend” were meant to be included under the distribution right within

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<sup>33</sup> See *infra* Part II.

<sup>34</sup> See *id.*

<sup>35</sup> 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.11 (Matthew Bender, rev. ed. 2014).

<sup>36</sup> Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC’Y U.S.A. 1 (2011).

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

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

the 1976 Act.<sup>39</sup> As such, these offers and attempts to sell copies are “the functional equivalent” to this broad “making available” right.<sup>40</sup> From this legislative history, Nimmer adopted the belief that the “making available” right is part of a copyright owner’s bundle of exclusive rights.<sup>41</sup>

Supporters also look to the treaty’s text itself and seek to apply the agreed upon international law to the American statutory framework.<sup>42</sup> The WCT and the WPPT both explicitly enumerate the right of making available, and some commentators feel it best that U.S. law conforms with international treaties to follow through with “international obligations.”<sup>43</sup> Article 8 of the WCT states:

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any *communication to the public* of their works, by wire or wireless means, including the *making available to the public* of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.<sup>44</sup>

Additionally, Article 10 of the WPPT reads:

Performers shall enjoy the exclusive right of authorizing the *making available to the public* of their performances fixed in

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<sup>39</sup> *Id.* at 38–41. See also Rick Sanders, *Comment for the Right of Making Available*, U.S. COPYRIGHT OFFICE 2 (2014), available at [http://www.copyright.gov/docs/making\\_available/comments/docket2014\\_2/Aaron\\_Sanders.pdf](http://www.copyright.gov/docs/making_available/comments/docket2014_2/Aaron_Sanders.pdf).

<sup>40</sup> Sanders, *supra* note 39, at 3.

<sup>41</sup> NIMMER & NIMMER, *supra* note 35.

<sup>42</sup> Terry Hart & Sofia Castillo, *Comments of the Copyright Alliance*, COPYRIGHT ALLIANCE 4 (2014), available at [http://www.copyright.gov/docs/making\\_available/comments/docket2014\\_2/Copyright\\_Alliance.pdf](http://www.copyright.gov/docs/making_available/comments/docket2014_2/Copyright_Alliance.pdf).

<sup>43</sup> Hart & Castillo, *supra* note 42.

<sup>44</sup> WCT, *supra* note 9 (emphasis added).

phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.<sup>45</sup>

Article 14 of the WPPT continues:

Producers of phonograms shall enjoy the exclusive right of authorizing the *making available to the public* of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.<sup>46</sup>

These treaties clearly spell out that copyright owners have a right to make their works available, and the right is one that can be infringed if the works are made available by others. Because the U.S. joined these treaties in 1997, supporters call for this right to be included within the bundle.<sup>47</sup>

Menell’s legislative history argument—combined with Nimmer’s adoption of the “making available” right and the U.S.’s international obligations—largely fueled supporters’ reasoning when advocating for the adoption of the “making available” right.<sup>48</sup> Some call for this right to be specifically enumerated, while others, like the Copyright Alliance, find that this right is implicit within the distribution right.<sup>49</sup> The critics of the right find fault in its many contours.

Critics, largely proponents of free speech, take issue with the right in three major ways. First, they attack the legislative history of the right.<sup>50</sup> These critics point out that the legislative history uncovered by

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<sup>45</sup> WPPT, *supra* note 9 (emphasis added).

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> Hart & Castillo, *supra* note 42, at 3–4.

<sup>48</sup> *Id.* at 3. See also Michael O’Leary & Victoria Sheckler, *Comments of the Motion Picture Association of America, Inc. and the Recording Industry of America, Inc.* 10 (Apr. 4, 2014), available at [http://www.copyright.gov/docs/making\\_available/comments/docket2014\\_2/MPAA.pdf](http://www.copyright.gov/docs/making_available/comments/docket2014_2/MPAA.pdf).

<sup>49</sup> Hart & Castillo, *supra* note 42, at 3.

<sup>50</sup> Sanders, *supra* note 39, at 5.

Menell was not legislative history at all, but rather a drafting history of the 1976 Act.<sup>51</sup> The “legislative materials” of the Act were created by “sixty-two government officials, industry representatives, and copyright scholars” during a meeting in 1963 that did not include any members of Congress.<sup>52</sup> These materials thus show the intent of non-legislative actors, not the intent of Congress itself. Further, these materials were generated over ten years before Congress enacted the 1976 Act, so even if these meeting participants shared their intent with congressmen, the intent would have been the same in 1963, but perhaps not in 1976, since that exact same Congress did not pass the final 1976 Act.<sup>53</sup> These critics go on to point out that the courts in the 1950’s, to which Menell referred, did not directly address the issue of the “making available” right, but in fact found “that offers for sale did *not* constitute an exercise of the exclusive rights to publish or vend.”<sup>54</sup> These commentators attack both Menell’s legislative and judicial history arguments, proving his “Lost Ark” may not have been found after all.

Still other critics find fault within the text of the distribution right itself.<sup>55</sup> Many of them note that distribution should take the plain meaning and mean the “physical movement of objects” under the Copyright Act.<sup>56</sup> Section 106(3) provides the scope of the distribution right, limiting it to “copies or phonorecords of the copyrighted work.”<sup>57</sup> Both copies and phonorecords are further defined in their respective sections under Section 101 as “material objects.”<sup>58</sup> Under a strict reading of the statute, for example, if Wal-Mart transmits a work

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 5–6.

<sup>54</sup> *Id.* at 6 (emphasis added) (citing *Greenbie v. Noble*, 151 F. Supp. 45, 49, 62–64 (S.D.N.Y. 1957)).

<sup>55</sup> Sanders, *supra* note 45, at 5.

<sup>56</sup> *Id.*

<sup>57</sup> 17 U.S.C. § 106(3) (2012).

<sup>58</sup> *Id.* § 101.

by “download or by stream,” then it does not distribute a copy because it is not a material object.<sup>59</sup> Moreover, because there is no distribution of a material object, there can be no transaction under Section 106(3) that requires a “sale or other transfer of ownership, or by rental, lease, or lending.”<sup>60</sup> Therefore, under this reasoning, the distribution right should not apply to Internet and electronic media sharing cases because no material objects are actually exchanged under the statute.<sup>61</sup>

Third, critics have pointed out the practical consequences of the right if enacted. The immediate consequence to an explicit “making available” right would likely be the exponential increase in “alleged violations—both civil and criminal—that a single user could face for a single action.”<sup>62</sup> Licensing would then also become a challenge due to overlapping rights of performance, display, and “making available.”<sup>63</sup> And, most importantly to this Article, it could “criminalize the fundamental building blocks of the Internet” through linking websites to other pages or content.<sup>64</sup> It could then give rise to many primary users and others in a long, linked chain of Internet activity.<sup>65</sup>

Overall, each critique displays strengths and weaknesses, and the final arbiters (the courts) have struggled with these compelling justifications and complex issues as well. Ultimately, it seems the right would neither give the supporters the redress they desire nor cause the devastating consequences the critics predict.

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<sup>59</sup> Andrew P. Bridges, *Response of Andrew P. Bridges to the Request for Comments for the Study on the Right of “Making Available”* 4 (2014), available at [http://www.copyright.gov/docs/making\\_available/comments/docket2014\\_2/Andrew\\_Bridges.pdf](http://www.copyright.gov/docs/making_available/comments/docket2014_2/Andrew_Bridges.pdf).

<sup>60</sup> 17 U.S.C. § 106(3) (2012). *See also* Bridges, *supra* note 59, at 5.

<sup>61</sup> Bridges, *supra* note 59, at 7–8.

<sup>62</sup> *Id.* at 10.

<sup>63</sup> *Id.* at 12.

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *See* Estes, *supra* note 6.

## II. “Making Available” in U.S. Case Law: A Proof Problem

Current case law in the U.S. is divided regarding the “making available” right. The common theme among these cases seems to stem from a proof problem. These cases mostly arise from peer-to-peer music sharing networks. Certain courts are not willing to recognize a claim for infringement of the distribution right unless there is proof of an actual distribution and a subsequent infringement, while others merely find infringement because the defendant placed the work in a public space for others to access.

### a. Courts Declining to Recognize the “Making Available” Right Require Hard Proof

Courts that do not recognize the “making available” right tend not to find infringement when there is no concrete proof that an unauthorized distribution has occurred. These courts rely heavily on the traditional theories of copyright liability: primary and secondary infringement. Primary or direct infringement occurs when the plaintiff has a valid copyright and the defendant infringes on one of the plaintiff’s exclusive rights under Section 106 of the Copyright Act.<sup>66</sup> On the other hand, secondary infringement in the form of contributory liability occurs when

one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.<sup>67</sup>

Additionally, secondary or vicarious infringement requires the defendant to have “the right and ability to supervise the infringing activity and also [have] a direct financial interest in such activities.”<sup>68</sup> Therefore, in order to find a defendant liable for copyright infringement, these courts mandate a true showing of subsequent

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<sup>66</sup> See *Diversey v. Schmidly*, 738 F.3d 1196, 1204 (10th Cir. 2013).

<sup>67</sup> *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971) (footnote omitted).

<sup>68</sup> *Id.*

infringement by a direct infringer in order for the defendant who made the content available to be liable as a secondary infringer.<sup>69</sup> Two cases, *Capitol Records Inc. v. Thomas*<sup>70</sup> and *Atlantic Recording Corp. v. Howell*<sup>71</sup> clearly illustrate this reluctance.

In *Capitol Records*, Capitol sued Thomas, a user of Kazaa, a peer-to-peer file-sharing network, for infringing its copyright in musical works by way of unauthorized reproduction and distribution.<sup>72</sup> The court found that *actual* unauthorized distribution of the sound recordings was necessary in order for the defendant to be liable for infringement of the plaintiff’s distribution right.<sup>73</sup> If a defendant makes a work available and no member of the public actually accesses the work, the defendant cannot be liable—actual distribution and subsequent reproduction or downloading is necessary to prove unlawful distribution.<sup>74</sup>

Similarly, the court in *Atlantic Recording* found that a “[plaintiff] must still prove that a third-party actually obtained an unauthorized copy of the work to impose liability on [the defendant].”<sup>75</sup> The court was reluctant to expand the distribution right any further than what was found in precedent cases and in the Copyright Act up to that point.<sup>76</sup> Despite new technological innovations and the difficulties copyright owners experience in enforcing their copyrights in peer-to-peer file sharing, the court required hard proof that actual distribution occurred.<sup>77</sup> The reasoning behind requiring hard proof is that in order for a defendant to be guilty of contributory liability, a direct

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<sup>69</sup> *Id.*

<sup>70</sup> *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

<sup>71</sup> *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008).

<sup>72</sup> *Capitol Records*, 579 F. Supp. 2d at 1212–213.

<sup>73</sup> *Id.* at 1221.

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

<sup>75</sup> *Atl. Recording*, 554 F. Supp. 2d at 987.

<sup>76</sup> *Id.*

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

infringement must have occurred.<sup>78</sup> In effect, providing hard proof is extremely important when one makes content available for another to access or download because without a direct infringement (e.g., subsequent downloading), no contributory infringement can be found. While the *Capitol Records* and *Atlantic Recording* courts did not recognize infringement when there was no evidence of direct infringement, it seems as though some courts have relaxed the proof requirement and have opted to allow for an inference of direct infringement.

In *London-Sire Records, Inc. v. Doe 1*, the court took the view that in order to violate a plaintiff's distribution right, the defendant must not only have authorized the subsequent access to the work, but a distribution must have actually occurred.<sup>79</sup> The court found that the plaintiffs proved a prima facie case of infringement, despite proffering no concrete evidence of later distribution or subsequent infringement (i.e. direct infringement).<sup>80</sup> Instead, the court determined that the evidence the defendants set forth—making files available on a peer-to-peer file-sharing network to share them—was “sufficient to allow a statistically reasonable inference that at least one copyrighted work was downloaded at least once,” and, therefore, the plaintiff's exclusive distribution right had been infringed.<sup>81</sup> Because of this statistical probability, the court found that direct infringement was likely, and therefore, the plaintiffs met their burden of establishing a prima facie case against the defendant for violating the distribution right.<sup>82</sup>

Overall, many—though not all—courts require proof of an actual distribution and an actual receipt of the work by a third party in order to establish a violation of copyright holders' distribution rights. Courts have not recognized the right to “make available” and instead require actual distribution to prove contributory liability, as primary infringement is conditioned upon contributory or secondary liability. Yet many courts are relaxing that view when distribution more than

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<sup>78</sup> *Cable/Home Commc'n Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990).

<sup>79</sup> *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 166 (D. Mass. 2008).

<sup>80</sup> *Id.* at 176.

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

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

likely occurred and these courts have fallen more in line with those that do not require concrete proof. Perhaps the courts are reaching somewhat of a consensus after all.

**b. Courts Adopting the “Making Available” Right Find Fault with No Proof**

The proliferation of the “making available” right stemmed from one non-technologically- related case from 1997. In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*,<sup>83</sup> the court found that because the defendant made an unauthorized copy of the work in question available to the public through its library, the library infringed the plaintiff’s exclusive distribution right.<sup>84</sup> By offering the work to the public for viewing and use, the library took steps to distribute the work to the public, and in effect, had “distributed” the work under Section 106(3) of the Copyright Act.<sup>85</sup> Because anybody could subsequently access, use, or copy the work from the library, “the library would unjustly profit”<sup>86</sup> if the court did not hold the library liable.

Similarly, in *Diversey v. Schmidly*,<sup>87</sup> the University of New Mexico made available a graduate student’s unpublished dissertation in two of the University’s libraries without the student’s permission.<sup>88</sup> Because the library had made his work available “to the borrowing or browsing public,” the library had infringed the student’s exclusive right to distribution.<sup>89</sup> Neither the *Hotaling* court nor the *Diversey* court required proof of actual distribution to the public, public access, or actual copying of the works. Rather, these courts simply found that

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<sup>83</sup> *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

<sup>84</sup> *Id.* at 203.

<sup>85</sup> *Id.*

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

<sup>87</sup> *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013).

<sup>88</sup> *Id.* at 1199.

<sup>89</sup> *Id.* at 1203 (citing *Hotaling*, 118 F.3d at 203).

because the works were made available to the public at large, the distribution right had been infringed. Clearly these courts required a different level of proof than that required by the aforementioned courts that did not recognize the “making available” right.

Many courts have continued to follow the *Hotaling* example in technology-related cases. For instance, in *Arista Records v. Greubel*, Arista brought suit against Greubel for using “an online media distribution system” to download, distribute, and make available for others copyrighted sound recordings.<sup>90</sup> To survive a motion to dismiss on a claim of violating the distribution right, the court concluded that Arista did not need to specifically enumerate every single act of infringement, nor provide specific proof of infringement.<sup>91</sup> Similarly, no proof of subsequent infringement was required to show secondary infringement.<sup>92</sup> Greubel consistently made these recordings available and Arista proffered a partial list of songs Greubel offered.<sup>93</sup> These facts were enough to allege a violation because Greubel made Arista’s copyrighted works available in an unauthorized manner.<sup>94</sup>

The court in *Interscope Records v. Duty*<sup>95</sup> also found the right of distribution to be “synonymous with the right of publication.”<sup>96</sup> Since publication is “the offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display,”<sup>97</sup> “the mere presence of copyrighted sound recordings in Duty’s share file” was enough to constitute a violation of Interscope’s distribution right.<sup>98</sup> The court required no

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<sup>90</sup> *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 963 (N.D. Tex. 2006).

<sup>91</sup> *Id.* at 970

<sup>92</sup> *Id.* at 971.

<sup>93</sup> *Id.* at 965.

<sup>94</sup> *Id.* at 965–67.

<sup>95</sup> *Interscope Records v. Duty*, No. 05CV3744, 2006 WL 988086, at \*2 (D. Ariz. Apr. 14, 2006).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing 17 U.S.C. § 101 (2012)) (emphasis in original).

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

actual proof of subsequent access or distribution to another.<sup>99</sup> The fact that Duty made Interscope’s content available was enough to impose liability.<sup>100</sup>

Overall, courts have assumed that because copyrighted content was made available to the public, a distribution to the public occurred, regardless of whether users actually accessed and copied the material or not. This type of unauthorized distribution requires little proof under the traditional theories of primary and secondary liability, which seemingly creates an exclusive right of owners of “making available” their work to the public. It follows then that anyone else who makes that work available can be liable under the distribution right.

### c. A Middle Ground

Despite the fact that courts disagree as to whether proof is required to prove liability under the distribution right, one court took a moderate view, combining both approaches. In *In re Napster, Inc. Copyright Litigation*,<sup>101</sup> the court determined that infringing the distribution right can take two forms: either the defendant:

- (1) actually disseminated one or more copies of the work to members of the public; or (2) offered to distribute copies of that work for purposes of further distribution, public performance, or public display.<sup>102</sup>

This approach gives the court flexibility. If a court applied this test and did not find actual distribution, it would not be required to find liability for the offers of distribution; it would have to find that the “making available” of the work was for the purpose of actual later distribution.<sup>103</sup> This assertion assumes that the infringer intended to violate the distribution right as a contributory infringer. In the above cases, where no infringement was found based on the fact that there

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796 (N.D. Cal. 2005).

<sup>102</sup> *Id.* at 805.

<sup>103</sup> *See generally id.*

was no actual distribution, the court could similarly rule that the intent of the alleged distribution was not for the purpose of later distribution and would not be bound by this test to always find a violation. Perhaps this is a model worth considering as it is flexible and allows room for interpretation.

While this middle ground is by no means perfect, it does show both a willingness to compromise (on behalf of at least one court) and a willingness to incorporate the “making available” right into current case law without disrupting well-settled principles of copyright law. Because of this trend towards increased acceptance of the “making available” right within the distribution right, the Copyright Office has been asked to conduct a study specifically regarding the addition of a “making available” right to the Copyright Act in order to finally remedy the inconsistent application of the distribution right and to codify its breadth and limits.<sup>104</sup>

#### **d. Relationship of the “Making Available” Right to Hyper-Linking**

With the introduction of the “making available” right into case law and an increasing willingness to find infringement based on its application, scholars and commentators have noted this could create huge headaches when it comes to linking content.<sup>105</sup> If the right were to apply to linking, the possibilities of infringement would be endless. As previously noted, commentators believe linking a copyrighted website to a Facebook page without the author’s permission would presumably lead to liability, as the author himself did not make the page available—the user who linked the page did.<sup>106</sup> Though one may expect this result when superficially examining the “making available” right as the courts have interpreted it, this is not really how the right has been interpreted or applied per the case law examined above. These fears and theories are just as unwarranted as they are outlandish.

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<sup>104</sup> U.S. Copyright Office, *supra* note 12.

<sup>105</sup> *See supra* Part I. *See also* Estes, *supra* note 5; Sanders, *supra* note 39.

<sup>106</sup> *Id.*

### III. European Case Law Shows No Need to Worry About the “Making Available” Right and Linking

The Berne Convention focused on and codified many moral rights associated with copyright, as the European nations who originally joined the Convention generally sought protection of the “making available” right for copyright owners.<sup>107</sup> These European nations greatly value moral rights<sup>108</sup> and find them to be the basis of copyright protection, granting owners a wide scope of protection.<sup>109</sup> The U.S. has never truly recognized moral rights of copyright or given as broad of protection to owners.<sup>110</sup> Generally, because the European nations give more protection to copyright holders, logically, their enforcement of copyrights should be more strict and sweeping.

However, in the context of hyperlinks and linking content, the European Union (EU) courts have not enforced a “making available” right and have shown that under the most liberally administered laws, the “making available” right does not protect copyright owners of generally available copyrighted websites.<sup>111</sup> The Information Society Directive, a recent agreement among EU nations harmonizing all aspects of copyright law throughout the continent, includes a right of communication to the public, which covers any retransmissions of protected works.<sup>112</sup>

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<sup>107</sup> Joseph B. Valentine, *Copyright: Moral Right—A Proposal*, 43 *FORDHAM L. REV.* 793, 798–99 (1975).

<sup>108</sup> See *Moral Rights and OSS*, SOFTWARE+PLURALISM, <http://www.law.washington.edu/ta/swp/law/moralrights.html> (last visited Nov. 1, 2014) (noting that strong moral rights attach to copyrighted works in many European nations).

<sup>109</sup> Valentine, *supra* note 107, at 799–800.

<sup>110</sup> *Id.* at 801–02.

<sup>111</sup> See Jeremy De Beer & Mira Burri, *Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada* 23 (Swiss Nat’l Centre of Competence in Research, Working Paper No. 2013/22, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2327005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327005).

<sup>112</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 16, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN>.

Overall, the U.S. has traditionally given less protection to copyright owners than European nations,<sup>113</sup> and courts have been hesitant to grant a “making available” right to copyright owners.<sup>114</sup> Therefore, if the U.S. were to adopt either the *In re Napster* infringement test<sup>115</sup> or actually codify the “making available” right, it follows that courts would not enforce a “making available” right against Internet users who simply link content. Due to the potential chilling effects linking infringement could cause, U.S. courts are unlikely—and probably unwilling—to push the boundaries of protection by going against common law and international opinion.<sup>116</sup>

### a. Interpretation of the “Making Available Right”

When confronted with the issue, European nations have not extended the “making available” right to linking content in a few key cases. In the German *Paperboy*<sup>117</sup> case, the highest federal court found linking to not infringe copyright.<sup>118</sup> The search engine, Paperboy, could “search online newspaper articles free of charge” and would return results that bypassed the newspaper’s home page, and provided links to the exact article for which the user searched.<sup>119</sup> The German court found that this search engine did not infringe the copyright of the newspaper for three reasons: 1) the articles were freely available to the public; 2) the search engine did not circumvent any protective technological barriers; and 3) the results simply produced the

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<sup>113</sup> Valentine, *supra* note 107, at 801–02.

<sup>114</sup> *See supra* Part II.

<sup>115</sup> *In re Napster, Inc.*, 377 F. Supp. 2d at 805.

<sup>116</sup> *See supra* Part I.

<sup>117</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 17, 2003, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3406, 2003 (Ger.), available at [http://www.cgerli.org/fileadmin/user\\_upload/interne\\_Dokumente/Judgments/bghizr25900.htm](http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Judgments/bghizr25900.htm).

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

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

hyperlinks—not the text of the article—which facilitated access to the articles.<sup>120</sup> Providing these links to searchers did not infringe the newspaper’s copyrights.<sup>121</sup>

Similarly, in the *Norwegian Napster*<sup>122</sup> case, decided by the Supreme Court of Norway, a software application generated a website where searchers could locate links to MP3 files available to download free of charge.<sup>123</sup> The website provided users with links to content that was uploaded illegally, which could then be downloaded unlawfully.<sup>124</sup> Despite these facts, the links themselves were not held to make the files available to the public in an infringing manner.<sup>125</sup> The links were not generated by the software; they were already available on the Internet and the software simply provided access to the links.<sup>126</sup> The court further explained that increasing accessibility through linking does not create liability, as “[t]here is no causality between the linking and the uploading of the music.”<sup>127</sup>

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

<sup>121</sup> *Id.* See also De Beer & Burri, *supra* note 88, at 23.

<sup>122</sup> Tono v. Bruvik, [Supreme Court] Jan. 27, 2005, NORSK RETTSTIDENDE [RT.] Rt-2005-41, 2005 (Nor.), translated in Spang-Hanssen & Henrik Stakemann, *Translation of ("Norwegian Napster") Case: Tono et. al v. Frank Allan Bruvik d/b/a Napster, Hr-2005-00133-A, Rt-2005-41 (Supreme Court of Norway, 27 January 2005 - Docket No. 2004/822) (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1107112](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107112).*

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

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

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

<sup>126</sup> *Id.* See also Jeremy De Beer & Mira Burri, *Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada* 23 (Swiss Nat’l Centre of Competence in Research, Working Paper No. 2013/22, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2327005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327005) (noting that the Supreme Court of Norway “held that posting hyperlinks, which led to unlawfully uploaded MP3 files did not constitute an act of making the files available to the public,” and that the court stated that simply making a website address known does not constitute making it publicly available).

<sup>127</sup> Tono v. Bruvik, [Supreme Court] Jan. 27, 2005, NORSK RETTSTIDENDE [RT.] Rt-2005-41, 2005 (Nor.), translated in Spang-Hanssen & Henrik Stakemann, *Translation of ("Norwegian Napster") Case: Tono et. al v. Frank Allan Bruvik d/b/a*

A Dutch court of appeals followed suit in *Sanoma and Playboy v. GS Media*,<sup>128</sup> finding that even though the material made available by hyper-linking was illegally made available to begin with, the website offering the link could not be liable because the illegal material had already been published.<sup>129</sup> The hyperlink was merely a pointer to the already available content.<sup>130</sup> The defendant only facilitated access to the content and did not provide a new channel of access to something otherwise unavailable.<sup>131</sup> Regardless of whether the content is legally or illegally available, these courts still do not find linkers liable when the content is freely accessible from the outset.

Canadian courts have also adopted this reasoning.<sup>132</sup> The court follows the holdings in *Paperboy* and *Norwegian Napster*, noting that “[c]ommunicating something is very different from merely communicating that something exists or where it exists.”<sup>133</sup> *Cookes* is a defamation case in which the defendant provided a link to the source of the defamation to improve accessibility.<sup>134</sup> Hyperlinks neither

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*Napster, Hr-2005-00133-A, Rt-2005-41 (Supreme Court of Norway, 27 January 2005 - Docket No. 2004/822) (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1107112](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107112) (citing the German *Paperboy* case discussed above). See also De Beer & Burri, *supra* note 126.*

<sup>128</sup> Hof 's-Amsterdam 19 november 2013, RvdW 2013, 39 (Sanoma Media Netherlands B.V., Playboy Enterprises Int'l, Inc./GS Media B.V.) (Neth.), *available at* <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2013:4019>.

<sup>129</sup> *Case C-466/12, Svensson–Hyperlinks and Communicating Works to the Public*, EU LAW RADAR (Jan. 20, 2013), <http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/> [hereinafter EU LAW RADAR].

<sup>130</sup> Hof 's-Amsterdam 19 november 2013, RvdW 2013, 39 (Sanoma Media Netherlands B.V., Playboy Enterprises Int'l, Inc./GS Media B.V.) (Neth.), *available at* <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2013:4019>. *See also id.*

<sup>131</sup> EU LAW RADAR, *supra* note 129.

<sup>132</sup> *Crookes v. Newton*, [2011] 3 S.C.R. 269 (Can.), *available at* <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7963/index.do>.

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

<sup>134</sup> *Id.*

communicate content nor show control over the content; they simply make content accessible to others.<sup>135</sup> For this reason, the linker is “merely ancillary to that of the initial publisher.”<sup>136</sup> By refusing to find infringement, the Supreme Court of Canada chose to steer clear of a “potential chill” that could be “devastating” to Internet functions.<sup>137</sup> A contrary holding that found linkers liable could “seriously restrict the flow of information on the Internet,” restrict “freedom of expression,” and “risk impairing [the Internet’s] whole function[.]”<sup>138</sup>

Most recently, in *Svensson*,<sup>139</sup> on appeal from Sweden, the European Court of Justice (ECJ) announced that linking freely available copyrighted content on the Internet without the consent of the copyright owner does not constitute copyright infringement.<sup>140</sup> Much like Paperboy, Retriever is a software program that provides users with “clickable Internet links to articles published by other websites” that are “freely accessible” online.<sup>141</sup> Because the links simply make the already accessible works accessible in a different way, and because the content was not previously limited to a specific group of users, the authorization of the copyright holder is not required.<sup>142</sup> In the case at hand, Retriever did not infringe any distribution rights or “making available” rights because the author had

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Crookes v. Newton*, [2011] 3 S.C.R. 269 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7963/index.do>. See also Barry Sookman, *When Hyperlinks Infringe Copyright: Svensson v. Retriever Sverige* (Feb. 13, 2014), <http://www.barrysookman.com/2014/02/13/when-hyperlinks-infringe-copyright-svensson-v-retriever-sverige/>.

<sup>139</sup> Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 EUR-lex CELEX LEXIS (not yet published), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0466&qid=1415902735934>

<sup>140</sup> *Id.* ¶ 32.

<sup>141</sup> *Id.* ¶ 14.

<sup>142</sup> *Id.* ¶ 28.

already placed the content online—free for all Internet users to access—and Retriever simply pointed to where the content could be located.<sup>143</sup>

The highest court on matters of European law refused to adopt a broad “making available” right that would apply to freely accessible content, which then limited the “making available” right’s reach and avoided potential chilling effects on the Internet’s function. In effect, the *Svensson* decision aligns both European and Canadian law. The Canadian Federal Court of Appeal stated that a

hyperlink [is] not an infringement of copyright because [the] communication [is] not an unauthorized communication; it was made with the implied authorization of the copyright owner who put the content online in the first place.<sup>144</sup>

So it seems that “once content is made freely accessible to the public,” an author or publisher can no longer prevent linking to that content when the link simply improves accessibility.<sup>145</sup>

For the U.S., under current case law and the European interpretation of the “making available” right, copyright holders do not have a copyright cause of action against Internet users who provide links to their freely available content.<sup>146</sup> Since the EU has codified this “making available” right within the Information Society Directive and has not enforced it against linkers of content, it is unlikely that the U.S. would enforce the right because it has not yet been codified, and courts have proven hesitant to recognize the right within the distribution right.<sup>147</sup> European and Canadian case law should aid in putting the

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<sup>143</sup> *Id.* ¶ 30, 32.

<sup>144</sup> *Warman v. Fournier*, 2012 F.C. 803 (Can.), *available at* <http://www.canlii.org/en/ca/fct/doc/2012/2012fc803/2012fc803.html>. *De Beer & Burri*, *supra* note 88, at 14.

<sup>145</sup> Laura Mazzola, *Svensson—Hyperlinks and Communication to a “New Public,”* LEXOLOGY (Mar. 20, 2014), <http://www.lexology.com/library/detail.aspx?g=5e872b03-10b3-4017-9042-3815a1e65f83>.

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

<sup>147</sup> *See supra* Part III.

skeptics and commentators at ease when considering the future of linking and the Internet.

**b. Liability Could Exist in Extremely Limited Circumstances in Accordance with U.S. Law**

Although it has been shown that simply linking freely available content should not give rise to liability under U.S. law, European case law does leave some room for enforcing entrenched modes of infringement and theories of liability. The “making available” right, while it does not protect copyright holders from unauthorized users linking their content and referring to the work that can subsequently be accessed, it does not completely preclude other avenues for redress, including secondary liability for linking to content that is not freely available or liability for circumventing protective measures.<sup>148</sup> Since the underlying work can either be legally or illegally available,<sup>149</sup> it seems the only way that a linker could be liable for linking content would be if the linked content was not otherwise available and the hyperlink somehow provided access to works.

Under the theory of contributory or vicarious liability within secondary infringement, a linker could perhaps be held liable under current U.S. case law. Because, as previously discussed in Part II, courts have found that “making available” certain content can give rise to liability, hyper-linking could be implicated, but in a very limited manner. U.S. courts have interpreted this right to “making available” in limited contexts, namely in peer-to-peer file sharing and in public library cases.<sup>150</sup> In all of these cases, the defendant actually communicated the content of the copyrighted works either through a peer-to-peer network or through a library, thus providing users with copyrighted works that would otherwise be unavailable.<sup>151</sup> The

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<sup>148</sup> ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE, REPORT AND OPINION ON THE MAKING AVAILABLE AND COMMUNICATION TO THE PUBLIC IN THE INTERNET ENVIRONMENT—FOCUS ON LINKING TECHNIQUES ON THE INTERNET 1 (2013), available at <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf>.

<sup>149</sup> EU LAW RADAR, *supra* note 129.

<sup>150</sup> *See supra* Part II.

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

Canadian court in *Crookes* makes clear that hyperlinks “do not, by themselves, communicate [their] content.”<sup>152</sup> Instead, links act like “footnotes since they only refer to another source without repeating it” and the linker has no control over the content connected to the link.<sup>153</sup> In a peer-to-peer network, the network itself has control over the content and allows the repeating of the actual content from one user to another.<sup>154</sup> Even though the content does not get indexed in a central server, it still repeats the content.<sup>155</sup> In libraries, the actual hard-copy is controlled by the library and the content is directly delivered to the viewer.<sup>156</sup> A hyperlink is “content-neutral” and communicates nothing, other than the location of a source.<sup>157</sup>

Courts would likely agree with the above interpretation based on the decision in *Perfect 10 v. Google*.<sup>158</sup> In this case, the court found that links do not violate the distribution right because they do not “transfer [] a file from one computer to another,” and Google, who provides the links, does not actually transfer the infringing work from one computer to another; it simply points to where the content was located.<sup>159</sup> Further, Google never distributed any infringing work because it was not involved in the transfer of an infringing file and had no control over the infringing work; it neither communicated content nor provided content.<sup>160</sup> This result seems to perfectly align with the

<sup>152</sup> *Crookes v. Newton*, [2011] 3 S.C.R. 269 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7963/index.do>.

<sup>153</sup> *Id.*

<sup>154</sup> See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001), as amended (Apr. 3, 2001), *aff'd sub nom.* *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002), *aff'd sub nom.*

<sup>155</sup> *Id.* at 1012.

<sup>156</sup> See generally *id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 858 (C.D. Ca. 2006) (*aff'd in part and rev'd in part on other grounds*).

<sup>159</sup> *Id.* at 844–45.

<sup>160</sup> *Id.* at 844–45, 856–58.

reasoning in *Crookes*. Under *Svensson*, the authorization of the copyright owner is not required in linking previously available content, so it seems that the author’s rights are not implicated.<sup>161</sup> Moreover, in order for one to be held liable as a contributory or vicarious infringer, there would need to be transfer of content and the infringer would need to somehow facilitate that process—likely through peer-to-peer sharing or library circulation, not mere linking.

If the infringer did have control over the content and was able to transmit copies to others, over the Internet or otherwise, then the court would face the proof problem discussed in Part II—that is, does liability require actual dissemination? The link would have to actually provide content that was otherwise not freely accessible by the public in order to give rise to secondary liability by way of contributory or vicarious infringement. Because the issue of actual dissemination as part of the distribution right is of no importance in ordinary linking situations, the uniform adoption of “making available” right would only clear up the proof issue in circumstances of contributory or vicarious liability; both of which require an ability to actually transmit content, a trait which commonplace links do not possess.

Additionally, a linker could be held liable for linking if the link somehow circumvents a protective measure that precludes general accessibility to content.<sup>162</sup> If the link can somehow “bypass technical measures restricting access to a site on which a copyrighted work appears,” the link would then be infringing because the work would not be considered “freely accessible” as the *Svensson* court required.<sup>163</sup> Liability for this type of circumvention linking would likely fall under the Digital Millennium Copyright Act’s (DMCA) anti-circumvention provisions.<sup>164</sup> Under the DMCA, it is illegal to “circumvent a

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<sup>161</sup> Radboud Ribbert & Nina Witt, *European Court Decision: Copyright Owner Consent Not Required to Hyperlink or Embed Links on Websites*, LEXOLOGY (Apr. 9, 2014), <http://www.lexology.com/library/detail.aspx?g=ef79c664-b575-4060-88ee-22c09e04f369>.

<sup>162</sup> William Fry, *Court Confirms Not Copyright Infringement to Link to Freely Available Copyrighted Works*, LEXOLOGY (Apr. 4, 2014), <http://www.lexology.com/library/detail.aspx?g=99b4e141-91a7-4bf5-97b3-02bdd8666c08>; Mazzola, *supra* note 145.

<sup>163</sup> *Id.*

<sup>164</sup> 17 U.S.C. § 1201 (2012).

technological measure that effectively controls access to a work protected under [the Copyright Act].”<sup>165</sup> Any linking that accomplishes this feat and successfully outmaneuvers a copyright protection device, like password protection,<sup>166</sup> would likely fall under this statute and copyright owners could seek redress under these anti-circumvention provisions.<sup>167</sup> Circumvention linking would most likely be accomplished by deep-linking, or linking to a page that bypasses the homepage,<sup>168</sup> which would allow access that would otherwise only be accessible through the home page. For example, if a linker somehow generated a link that bypassed the homepage, which required a password to view further pages, this would likely qualify as a circumvention under the DMCA, as circumventing password protections are violations of the DMCA. Therefore, copyright owners could easily seek redress in this manner under the DMCA’s anti-circumvention statute.

A Canadian bill has already attempted to take on the task of solving the problem of unfair linking by requiring licensing deals for hyperlinks to digital copies of educational materials.<sup>169</sup> The bill’s aim is to provide some redress for educational institutions whose content is freely available online and whose original works have been substantially adversely affected.<sup>170</sup> While this bill is still on the floor, Professor Geist, a law professor at the University of Ottawa and the Canada Research Chair in Internet and E-commerce Law, notes that in light of the *Crookes* decision and European case law, there is really no merit to the bill’s requirements and the bill goes against the clear path

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<sup>165</sup> *Id.* § 1201(a)(1).

<sup>166</sup> *U.S. v. Reichert*, 747 F.3d 445, 457 (6th Cir. 2014); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001).

<sup>167</sup> *See* 17 U.S.C. § 1201 (2012).

<sup>168</sup> Margaret Rouse, *Deep Link*, TECHTARGET (Apr. 2005), <http://searchsoa.techtarget.com/definition/deep-link>.

<sup>169</sup> Michael Geist, *Something for Nothing: The Non-Existent Benefit of Linking in the Access Copyright Deal* (May 4, 2012), <http://www.michaelgeist.ca/content/view/6458/125/>.

<sup>170</sup> *Id.*

the courts have drawn.<sup>171</sup> It seems that situations in which linking is potentially infringing occur in limited circumstances, especially when links communicate otherwise unavailable content or if links circumvent protective barriers.

#### IV. Conclusion

Overall, the worry and speculation regarding a “making available” right and its effects on the Internet is unwarranted and overblown. It seems that adopting or codifying the “making available” right and determining whether distribution is actually required or can be inferred only solves problems associated with infringers who actually provide content, not linkers. In simple linking cases, even if the “making available” right was expressly codified in U.S. law, it would make little to no difference. Since links have been found to neither communicate content nor control content, linkers cannot be found to infringe a copyright holder’s distribution rights under European, Canadian, or U.S. case law. While adopting a uniform stance with regard to the “making available” right will help clarify other facets of copyright law, it will not cause the Internet as we know it to crumble.

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



## **Development, Farmers' Rights, and the Ley Monsanto: The Struggle Over the Ratification of UPOV 91 in Chile**

David J. Jefferson<sup>1</sup>

### *Abstract*<sup>2</sup>

*The debate over the appropriate level of intellectual property (IP) protections over plant genetic material has been unfolding worldwide for decades, but has recently taken on new urgency in Chile. The heart of the issue is techno-legal, largely obfuscated, publicly misunderstood, and veiled in political rhetoric. Yet the implications of the debate are profound, affecting anyone who produces or consumes food in Chile—that is, everyone. Furthermore, the current situation in South America's Southern Cone is but one manifestation of a worldwide contest, with impacts ranging from the international development agenda, to the maintenance of biodiversity, to global food security. The discussion over intellectual property rights in plant material in large and populous countries, such as India, may overshadow news from places like Chile. However, there are reasons to pay attention to this tiny country “at the end of the world,” as I will demonstrate.*

### **I. Overview of IP Rights in New Plant Varieties: The UPOV Framework**

Intellectual property rights (IPRs) in plant material may be protected through multifarious mechanisms, depending on the type of material implicated and the country in which protection is sought.<sup>3</sup>

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<sup>2</sup> Note: many of the sources cited in this Article are only available in their original language: Spanish. All of the translations are the author's own.

<sup>3</sup> A range of plant variety protection regimes exist internationally, including the International Convention for the Protection of New Varieties of Plants (UPOV), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Convention on Biological Diversity (CBD), and the International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty). Michael Blakeney, *Plant Variety Protection, International Agricultural Research, and Exchange of*

For instance, in the United States alone, several forms of protection exist, including plant patents,<sup>4</sup> utility patents,<sup>5</sup> and Plant Variety Protections (PVPs).<sup>6</sup> Meanwhile, the international scope of IPRs in plant varieties is primarily defined through the various conventions held by the International Union for the Protection of New Varieties of Plants (UPOV).<sup>7</sup>

UPOV is an intergovernmental organization based in Geneva, Switzerland, established by the first International Convention for the Protection of New Varieties of Plants in 1961.<sup>8</sup> Since then, the UPOV convention has been revised three times: in 1972 (UPOV 72), 1978 (UPOV 78), and 1991 (UPOV 91).<sup>9</sup> Today, UPOV has seventy-two members, all of whom adhere to either the 1978 or 1991 versions of

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*Germplasm: Legal Aspects of Sui Generis and Patent Regimes, in* INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES (A. Krattinger, R.T. Mahoney, L. Nelsen, et al., eds.) (2007), available at <http://www.iphandbook.org/handbook/ch04/p07/>.

<sup>4</sup> 35 U.S.C. §§ 161–64 (1959) (providing protection for any distinct and new variety of asexually-produced plant).

<sup>5</sup> See 35 U.S.C. § 101 (1952). See also *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l., Inc.*, 534 U.S. 124 (2001) (confirming that seeds and seed grown plants are patentable subject matter under the patent statute, notwithstanding protections available to plants under the Townsend-Purnell Plant Patent Act and the Plant Variety Protection Act).

<sup>6</sup> See 7 U.S.C. § 2402 (1996) (outlining the scope of the plant variety protection and the varieties of plants protectable).

<sup>7</sup> Graham Dutfield, Food, *Biological Diversity and Intellectual Property: The Role of the International Union for the Protection of New Varieties of Plants (UPOV)*, 9 GLOBAL ECONOMIC ISSUE PUBLICATIONS, INTELLECTUAL PROPERTY ISSUE PAPER NUMBER 3 (2011), available at [http://www.planttreaty.org/sites/default/files/role\\_UPOV.pdf](http://www.planttreaty.org/sites/default/files/role_UPOV.pdf) (noting that the International Union for the Protection of New Varieties of Plants (UPOV) is the sole international agency concerned with intellectual property protection of new plant varieties).

<sup>8</sup> International Union for the Protection of New Varieties of Plants (UPOV), available at <http://www.upov.int/portal/index.html.en> [hereinafter INTERNATIONAL UNION].

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

the Convention.<sup>10</sup> As a condition for membership in UPOV, ratifying states must enact national legislation providing UPOV-compliant “plant breeders’ rights,” (PBRs) to seed developers.<sup>11</sup> As of 2014, fifty states and two organizations<sup>12</sup> (72% of membership) were bound by UPOV 91, while nineteen states (27% of membership) adhered to UPOV 78.<sup>13</sup> The stated mission of all versions of UPOV is “to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.”<sup>14</sup>

Despite the superficial uniformity of this mission, the differences between UPOV 78 and UPOV 91 are substantial and significant, as I will demonstrate later in this article. The essence of the divergence

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<sup>10</sup> *UPOV Convention (Total Contracting Parties: 72)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=27&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=27&group_id=22) [hereinafter *UPOV Convention*].

<sup>11</sup> *See Guidance for Members of UPOV on How to Ratify, or Accede to, the 1991 Act of the UPOV Convention*, INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV) (Oct. 22, 2009), available at [http://www.upov.int/edocs/infdocs/en/upov\\_inf\\_14\\_1.pdf](http://www.upov.int/edocs/infdocs/en/upov_inf_14_1.pdf) (providing that “[w]hen depositing its instrument of ratification, acceptance or approval of or accession to this Convention, as the case may be, any State or intergovernmental organization shall notify the Secretary-General [of UPOV] of (i) its legislation governing breeder’s rights”).

<sup>12</sup> *Members of the International Union for the Protection of New Varieties of Plants*, INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV), Publication No. 423 (June 10, 2014), available at <http://www.upov.int/export/sites/upov/members/en/pdf/pub423.pdf> [hereinafter *UPOV Membership*] (noting that the organization members of UPOV are the European Union (EU), which became a party to the 1991 Act on July 29, 2005, and the African Intellectual Property Organization (OAPI), which became a party to the 1991 Act on July 10, 2014).

<sup>13</sup> *Id.* Note that Belgium has only officially adhered to the 1961/1972 UPOV Act, as it joined the Convention on December 5, 1976. However, given its status as a member of the EU, Belgium’s national legislation for plant variety protections follows UPOV 91. *See Law on the Protection of New Varieties of Plants*, 2011/11026 (Jan. 10, 2011), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=262037](http://www.wipo.int/wipolex/en/text.jsp?file_id=262037).

<sup>14</sup> INTERNATIONAL UNION, *supra* note 8.

between the relevant versions of UPOV is the allocation of rights over plant genetic material.<sup>15</sup> Simply stated, UPOV 78 tends to recognize a more balanced allocation of rights between plant breeders and producers (e.g., farmers), while UPOV 91 shifts the balance significantly in favor of breeders.<sup>16</sup> This valuation is evidenced by the fact that UPOV 91 eliminates the “farmers’ exemption” or “farmers’ privilege,” which is the UPOV 78 provision that “provide[d], by implication, the ability of a farmer to save seeds for personal uses, but not for subsequent resale.”<sup>17</sup> Furthermore, under the 1978 Act, farmers who also engaged in plant breeding benefitted from a broad “research exemption” under Article 5(1), which states that the authorization of the right-holder is not required if the protected variety is used by a plant breeder as an initial source for the creation of new varieties.<sup>18</sup>

The most recent version of the UPOV Act, UPOV 91, “significantly restricts the availability of these exemptions.”<sup>19</sup> Specifically, UPOV 91 eliminates the general farmers’ privilege to save part of their harvest to provide seeds for planting in the following season.<sup>20</sup> Instead, it grants discretion to national governments to decide whether seed saving should be permitted.<sup>21</sup> Additionally, the

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<sup>15</sup> See Lawrence R. Helfer, *Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments*, FAO LEGISLATIVE STUDY 21–29 (2004), available at <ftp://ftp.fao.org/docrep/fao/007/y5714e/y5714e00.pdf>.

<sup>16</sup> See *id.* at 31–32, Table 1.

<sup>17</sup> A. Bryan Endres & Carly E. Giffin, *Necessity is the Mother, But Protection May Not Be the Father of Invention: The Limited Effect of Intellectual Property Regimes on Agricultural Innovation*, 14 COLUM. SCI. & TECH. L. REV. 203, 213–14 (2012). See also International Convention for the Protection of New Varieties of Plants art. 5(1), Oct. 23, 1978, 33 U.S.T. 2703 [hereinafter UPOV 78].

<sup>18</sup> See *id.* at art. 5(1, 3) (noting that the authorization of the right holder must be obtained if the protected variety must be used each time the breeder seeks to reproduce the new variety). See also Endres & Giffin, *supra* note 17, at 213.

<sup>19</sup> Endres & Giffin, *supra* note 17, at 214.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See also International Convention for the Protection of New Varieties of Plants ch. V, art. 15(2), Mar. 19, 1991, S. Treaty Doc. No. 104-17, available at <http://www.upov.int/upovlex/en/conventions/1991/act1991.html> [hereinafter UPOV 91] (providing that the restriction on the production of seeds for personal use (farmers’ privilege) may be restored by domestic legislation).

research exemption under UPOV 91 requires that researchers and other plant breeders obtain permission from the PVP right-holder, while the 1978 Act does not require such permission.<sup>22</sup>

Notably, the retention of an “optional exception” that would restore the farmers’ privilege via national legislation under UPOV 91 has been attributed to a lack of consensus among UPOV members.<sup>23</sup> As some scholars have noted, the 1991 revision to the UPOV Convention was motivated at least in part by “growing privatization of plant breeding research on the one hand, and the increasing size of farm holdings on the other, in industrialized countries.”<sup>24</sup> These trends were coupled with increased demand on the part of these countries for eliminating the breeders’ exemption and the farmers’ privilege between the late 1970s and early 1990s.<sup>25</sup> Thus, it has been alleged that UPOV primarily serves the needs of large-scale breeding companies, and that the drive for increasingly strong PVP protections was impelled by the World Bank’s structural adjustment policies in developing countries in the 1980s, and by World Trade Organization (WTO) trade liberalization requirements during the 1990s.<sup>26</sup>

In addition to the debate over the motivations underlying UPOV, criticisms have been launched against the UPOV Convention’s overall scheme for allocating IPRs in new plant varieties.<sup>27</sup> For instance, critics have alleged that the UPOV framework is: obsolete;<sup>28</sup> that the

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<sup>22</sup> Compare UPOV 78, *supra* note 17, at art. 5(3), with UPOV 91, *supra* note 21, at ch. V, art. 15.

<sup>23</sup> ROBIN PISTORIUS, *SCIENTISTS, PLANTS AND POLITICS: A HISTORY OF THE PLANT GENETIC RESOURCES MOVEMENT* 92 (1997).

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

<sup>25</sup> *Id.*

<sup>26</sup> *Some Basics About the UPOV Convention*, ASSOCIATION FOR PLANT BREEDING FOR THE BENEFIT OF SOCIETY, available at <http://www.apbrebes.org/content/upov-convention>.

<sup>27</sup> See Jay Sanderson, *Why UPOV is Relevant, Transparent and Looking to the Future: A Conversation with Peter Button*, 8 J. INT. PROP. L. & PRACT. 615, 615–18 (2013).

<sup>28</sup> See, e.g., Mark D. Janis & Stephen Smith, *Technological Change and the Design of Plant Variety Protection Regimes*, 82 CHI.-KENT L. REV. 1557, 1560–561 (arguing that “dramatic technological advances in plant breeding... have brought the threat of obsolescence to existing PVP systems,” and constructing an alternative model for

Convention is managed in such a way as to hamper transparency, democratic accountability, and public debate;<sup>29</sup> and that a “one-size-fits-all solution” for allocating IPRs is inappropriate to meet the needs of developing countries.<sup>30</sup> Finally, it has been suggested that UPOV promotes commercially profitable varieties, and in so doing reduces agricultural diversity, which adversely affects varieties that are socially valuable.<sup>31</sup> These criticisms, among others, provide the underlying rationale for why so many countries have chosen to adhere to UPOV 78 rather than UPOV 91, even though they joined the Convention *after* 1991.<sup>32</sup>

## **II. Chile: Political History and the Debate Over UPOV 91**

In Chile, the contemporary debate over the appropriate mechanism for the recognition of IPRs in new plant varieties began twenty years ago, with the passage of Law No. 19.342 on November 3, 1994.<sup>33</sup> This law—the Regulation of the Rights of Breeders of New Plant Varieties—largely tracks UPOV 78, although Chile did not actually join UPOV until more than one year later, on January 5, 1996.<sup>34</sup> The

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plant IP protection that “conceives of plants as datasets and employs unfair competition principles to allocate liability”).

<sup>29</sup> Dutfield, *supra* note 7, at 12–14.

<sup>30</sup> See B. (Bram) De Jonge, *Plant Variety Protection in Sub-Saharan Africa: Balancing Commercial and Smallholder Farmers’ Interests*, 7 J. POL. & L. 100, 104 (2014).

<sup>31</sup> Srividhya Ragavan & Jamie Mayer O’Shields, *Has India Addressed Its Farmers’ Woes? A Story of Plant Protection Issues*, 20 GEO. INT’L ENVTL. L. REV. 97, 109 (2007).

<sup>32</sup> *UPOV Convention*, *supra* note 10 (listing the following countries and the dates which they joined UPOV 78: Argentina: Dec. 25, 1994; Bolivia: May 21, 1999; Brazil: May 23, 1999; Canada: Mar. 4, 1991; Chile: Jan. 5, 1996; Colombia: Sept. 13, 1996; Ecuador: Aug. 8, 1997; Nicaragua: Sept. 6, 2001; Paraguay: Feb. 8, 1997; Trinidad and Tobago: Jan. 30, 1998; and Uruguay: Nov. 13, 1994).

<sup>33</sup> Law No. 19.342, Octubre 17, 1994, Biblioteca del Congreso Nacional de Chile [B.C.N.] (Chile), *available in English at* <http://www.wipo.int/wipolex/en/details.jsp?id=807> [hereinafter Law No. 19.342].

<sup>34</sup> UPOV Membership, *supra* note 12.

parameters of the IPR in new plant varieties outlined in Law 19.342 are similar to those outlined in UPOV 78.<sup>35</sup> The law contains a broad farmers' exemption, providing that breeders' rights are not violated by a farmers' utilization of the protected variety for their own use.<sup>36</sup> Furthermore, the same research exemption as outlined in UPOV 78 is allowed in Law 19.342.<sup>37</sup> Finally, the requirements for PVP protection<sup>38</sup> and the term of protection<sup>39</sup> in the Chilean law mirror those outlined in UPOV 78.<sup>40</sup>

However, when Chile began to enter into free trade agreements (FTAs) in the early 2000s, the longevity of Law 19.342 was called into question.<sup>41</sup> First, Chile and the European Union (EU) instituted an agreement that came into force in 2003.<sup>42</sup> This treaty required that Chile adhere to multiple international IP agreements, including the Agreement on Trade Related Aspects of Intellectual Property

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<sup>35</sup> Compare Law No. 19.342, *supra* note 33, at arts. 3, 8–11, with UPOV 78, *supra* note 17, at arts. 5–6, 8.

<sup>36</sup> Law No. 19.342, *supra* note 33, at art. 3.

<sup>37</sup> *Id.* at art. 5.

<sup>38</sup> *Id.* at art. 8 (stating that a new variety must meet the criteria of (1) distinctiveness; (2) homogeneity; and (3) stability to be eligible for PVP protection).

<sup>39</sup> *Id.* at art. 11 (setting the term of PVP protection to 18 years for trees and grapevines and 15 years for all other species).

<sup>40</sup> Law No. 19.342, *supra* note 33, at arts. 3, 8–11. UPOV 78, *supra* note 17, at arts. 5–6, 8.

<sup>41</sup> Indeed, after Chile signed FTAs with the United States and Japan, Law 19.342 was no longer sufficient to comply with these treaties' requirement that Chile adhere to a UPOV 91-compliant framework for PVPs. See, e.g., Pratibha Brahma & Vijaya Chaudhary, *Protection of Plant Varieties: Systems Across Countries*, in 9 PLANT GENETIC RESOURCES: CHARACTERIZATION AND UTILIZATION 392, 395 (2011) (indicating some areas in which the current Chilean legal framework does not comport with the requirements of UPOV 91).

<sup>42</sup> Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, November 18, 2002, 2002 O.J. (L352) 3, available at <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=879> [hereinafter EU-Chile FTA].

(TRIPS).<sup>43</sup> However, the EU–Chile FTA allowed for some flexibility with respect to PVPs, requiring that the parties adhere to either UPOV 91 or UPOV 78.<sup>44</sup>

Yet the accommodations under the EU–Chile FTA were short-lived, as a treaty with the U.S. was soon negotiated; entering into force on January 1, 2004.<sup>45</sup> The US–Chile FTA required that the parties give effect to a list of multilateral IP treaties, including UPOV 91, before January 1, 2009.<sup>46</sup> Subsequently, Chile entered into another FTA with Japan on March 27, 2007.<sup>47</sup> Mirroring the terms of the US–Chile agreement almost verbatim,<sup>48</sup> the Japan–Chile FTA required that each party adhere to UPOV 91 by January 1, 2009.<sup>49</sup>

Notwithstanding the obligations under the FTAs with the U.S. and Japan, by January 1, 2009, Chile had still failed to ratify UPOV 91.<sup>50</sup> In response to Chile’s non-compliance, on March 3, 2009, the administration of President Michelle Bachelet (then in her first term)<sup>51</sup> introduced legislation in the national Congress whose purpose was to implement UPOV 91 in Chile.<sup>52</sup> The initiative was officially entitled

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<sup>43</sup> *Id.* at art. 170(a)(i).

<sup>44</sup> *Id.* at art. 170(a)(v).

<sup>45</sup> United States–Chile Free Trade Agreement (FTA) (Jan. 1, 2004), *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> [hereinafter U.S.–Chile FTA].

<sup>46</sup> *Id.* at art. 17.1.3(a).

<sup>47</sup> *Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership*, Mar. 27, 2007, *available at* [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=225073](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=225073) [hereinafter Japan–Chile FTA].

<sup>48</sup> *Compare* Japan–Chile FTA, *supra* note 47, *with* U.S.–Chile FTA, *supra* note 45.

<sup>49</sup> *Id.* at ch. 13, art. 162.

<sup>50</sup> UPOV Membership, *supra* note 12 (reflecting that as of the last update, on June 10, 2014, Chile had only ratified UPOV 78).

<sup>51</sup> #ChileDeTodos, *Michelle Bachelet Biography*, MICHELLE 2 (2013), <http://michellebachelet.cl/pdf/biography.pdf>.

<sup>52</sup> *See* Message of the President of the Republic to Initiate a Project in Accordance with the Approval of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, Revised in Geneva through the Act of March 19, 1991 (Message No. 1435-356). *See also* House of Representatives of

“the Plant Breeders’ Law,” but was popularly dubbed the “*Ley Monsanto*,” or “Monsanto Law,”<sup>53</sup> a name which itself illustrates the polemic nature of UPOV 91 in Chile.<sup>54</sup> The extent to which Monsanto and other multinational seed companies actually influenced the legislative process is unclear.<sup>55</sup> However, the Chilean nonprofit association ChileBio—whose members include Monsanto, Pioneer, and Syngenta<sup>56</sup>—reportedly lobbied for the initiative that became the “Monsanto Law.”<sup>57</sup>

Within the legislature, the Plant Breeders’ Law passed the House of Representatives relatively quickly, in May 2009.<sup>58</sup> Two years later, on May 17, 2011, the Senate approved the bill.<sup>59</sup> However, this action merely began the political drama that continues to unfold nearly three

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Chile, Bulletin 6426-10 (March 31, 2009), *available at* [http://www.diputados.cl/pley/pley\\_detalle.aspx?prmID=6819](http://www.diputados.cl/pley/pley_detalle.aspx?prmID=6819).

<sup>53</sup> See Maria Elena Hurtado, *Farmers’ Rights at Stake in Chile’s Monsanto Law Bill*, SCIDEV.NET, (Sept. 11, 2013), <http://www.scidev.net/global/bioprospecting/news/farmers-rights-at-stake-in-chile-s-monsanto-law-bill.html>.

<sup>54</sup> *See id.*

<sup>55</sup> See, e.g., Lucía Sepúlveda Ruiz, *Senado Chileno Vendió a Monsanto la Semilla Campesina e Indígena*, EL CHILENO, *available at* <http://elchileno.cl/world/nacional/878-senado-chileno-vendio-a-monsanto-la-semilla-campesina-e-indigena.html> (alleging that Monsanto lobbied for the Plant Breeders’ Law).

<sup>56</sup> *Miembros*, CHILEBIO, [http://www.chilebio.cl/qs\\_miembros.php](http://www.chilebio.cl/qs_miembros.php) (last visited Sep. 13, 2014) (indicating that members of ChileBio include DuPont, Bayer, BASF, Dow, and Dow AgroSciences, and that ChileBio itself is a subsidiary organization of CropLife International).

<sup>57</sup> Lucía Sepúlveda Ruiz, *El Lobby de Monsanto en Chile*, EL CIUDADANO, May 25, 2013, *available at* <http://www.elciudadano.cl/2013/05/25/69271/el-lobby-de-monsanto-en-chile/>.

<sup>58</sup> House of Representatives of Chile, Bulletin 6426-10 (March 31, 2009), *available at* [http://www.diputados.cl/pley/pley\\_detalle.aspx?prmID=6819](http://www.diputados.cl/pley/pley_detalle.aspx?prmID=6819) [hereinafter Plant Breeders’ Law Project Report]. See also Ignacio Charme F. & Guillermo Ready S., No. 38 Boletín No. 6355-01, *available at* <http://www.institutolibertad.cl/no-38-boletin-no-6355-01/>.

<sup>59</sup> *Id.*

years later.<sup>60</sup> On May 20, 2011, seventeen senators presented a petition before the Constitutional Tribunal,<sup>61</sup> alleging that the Plant Breeders' Law was unconstitutional.<sup>62</sup> In June 2011, the Constitutional Tribunal—by a six to four vote—rejected the petition.<sup>63</sup> Yet the debate—both within the imposing towers of the National Congress in Valparaiso, and on the streets of Santiago—continued to unfold.<sup>64</sup>

Eventually, in May 2013, Congress approved the Plant Breeders' Law and thereby the text of UPOV 91.<sup>65</sup> The initiative was sent to then-President Sebastian Piñera for his signature.<sup>66</sup> Yet President Piñera never signed the bill into law.<sup>67</sup> The United States Department of Agriculture (USDA)—monitoring the debate from its Chilean field office—opined that

[d]ue to the sensitivity of the issue and due to the fact that this is an election year, FAS/Santiago does not see that there is political will to signing the legislation, despite it being a

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<sup>60</sup> See House of Representatives of Chile, Bulletin 6426-10, *supra* note 52.

<sup>61</sup> The Constitutional Tribunal of Chile is empowered to exercise final decisional authority over laws that interpret provisions of the Chilean Constitution, organic constitutional laws, and any treaty norms that cover themes related to constitutional provisions. This authority includes the ability to issue advisory opinions prior to the promulgation of such laws. Furthermore, the Constitutional Tribunal has authority to resolve all questions of constitutionality arising out of cases heard by the Supreme Court, the Appeals Court, and the Elections Qualifier Court, among other powers. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.], Cap. VII, art. 93.

<sup>62</sup> See Plant Breeders' Law Project Report, *supra* note 58.

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., Hurtado, *supra* note 53.

<sup>65</sup> Senate of Chile, Bulletin 6355-01 (July 7, 2013), available at [http://www.senado.cl/proyecto-que-regula-obtenciones-vegetales-surgen-dudas-en-materia-de-derechos-de-pequenos-agricultores/prontus\\_senado/2013-07-30/121930.html](http://www.senado.cl/proyecto-que-regula-obtenciones-vegetales-surgen-dudas-en-materia-de-derechos-de-pequenos-agricultores/prontus_senado/2013-07-30/121930.html).

<sup>66</sup> See, e.g., Lucía Sepúlveda Ruiz, *Piñera Chutea Ley Monsanto Devolviéndola a Bachelet*, PIENSACHILE.COM, Mar. 6, 2014, <http://piensachile.com/2014/03/pinera-chutea-ley-monsanto-devolviendola-bachelet/>.

<sup>67</sup> *Id.*

requirement in the United States – Chile Free Trade Agreement.<sup>68</sup>

The USDA was right; President Piñera never signed the bill.<sup>69</sup> He left office on March 11, 2014.<sup>70</sup>

Less than one week later on March 17, 2014, the administration of populist President Bachelet—fresh in her second term following four years of leadership under the conservative Piñera—withdrawed the legislative proposal that would have implemented UPOV 91 in Chile.<sup>71</sup> This move was highly ironic, given that President Bachelet had herself introduced the UPOV 91 legislation during her first term.<sup>72</sup> Yet, it was expected that Bachelet would act to withdraw the Plant Breeders' Law soon after taking office for the second time, since she had promised to do so during her campaign in 2013.<sup>73</sup> Some critics have taken the cynical view that Bachelet must not have read the Plant Breeders' Law when her administration proposed it during her first term.<sup>74</sup> Yet leaders of some of the thirty organizations that had released a public

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<sup>68</sup> *Agricultural Biotechnology Situation in Chile*, Agricultural Biotechnology Annual, USDA FOREIGN AGRICULTURAL SERVICE GAIN REPORT, No. CI1409 (Aug. 4, 2014), Section II, available at [http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual\\_Santiago\\_Chile\\_8-4-2014.pdf](http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Santiago_Chile_8-4-2014.pdf).

<sup>69</sup> Sepúlveda, *supra* note 66.

<sup>70</sup> *Michelle Bachelet Sworn in as Chile's President*, BBC NEWS (Mar. 11, 2014), available at <http://www.bbc.com/news/world-latin-america-26528923>.

<sup>71</sup> Paloma Diaz Abasolo, *The Unknowns Left by the Withdrawal of the Plant Breeders' Law*, EL MERCURIO, SANTIAGO, (Mar. 31, 2014), available at <http://www.litoralpress.cl/design3/lpi/mostrarrjpg.asp?id=29377458,29377463,29377468,29377473,29377475&idT=700982&ve=0>.

<sup>72</sup> *Id.*

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

<sup>74</sup> *Hard Defeat of Monsanto in Chile*, URGENTE24, (Mar. 18, 2014), available at [www.urgente24.com/224823-dura-derrota-de-monsanto-en-chile](http://www.urgente24.com/224823-dura-derrota-de-monsanto-en-chile).

declaration rebuffing the Plant Breeders' Law have praised President Bachelet's change of heart, noting that she has kept her word.<sup>75</sup>

According to the General Secretariat of the Presidency,<sup>76</sup> the decision to withdraw the Plant Breeders' Law from the legislative process was made in order to analyze the impact of the proposed law on agricultural communities in Chile, and on heirloom seeds native to the country.<sup>77</sup> It is unclear whether such analyses would yield different results from those already obtained.<sup>78</sup> During the five years that the bill spent bouncing around the legislative process, multiple committees in both houses of Congress discussed the bill.<sup>79</sup> For instance, on July 7, 2013, the Agricultural Commission of the Senate approved the initiative by a vote of three to two.<sup>80</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Misión del Ministerio Secretaria General de la Presidencia*, GOBIERNO DE CHILE, (Nov. 11, 2014), available at [http://www.msgp.gob.cl/nuestro\\_ministerio/](http://www.msgp.gob.cl/nuestro_ministerio/) (explaining that the General Secretariat of the Presidency is the state ministry charged with the function to advise the President of the Republic and the President's Ministers of State in governmental relations with the National Congress, in the elaboration of the legislative agenda, and surrounding the course of bills in the legislative process).

<sup>77</sup> *See Double Citizen Triumph: Monsanto Law and UPOV 91 Convention in Withdrawal*, EL CIUDADANO, (Mar. 18, 2014), available at <http://www.elciudadano.cl/2014/03/18/103121/doble-triunfo-ciudadano-ley-monsanto-y-convenio-upov-91-en-retirada-2/>.

<sup>78</sup> Informe de la Comisión de Recursos Naturales, Bienes Nacionales y Medio Ambiente Acerca del Proyecto de Ley que Regula Derechos sobre Obtenciones Vegetales y Deroga la Ley No. 19.342, Boletín 6355-01, available at <http://www.senado.cl/appsenado/index.php?mo=tramitacion&ac=getDocto&iddocto=12924&tipodoc=info> (noting that the Commission of Natural Resources, National Goods, and the Environment has already published an extensive study of the proposed Plant Breeders' Law).

<sup>79</sup> *See* House of Representatives Bulletin 6426-10, *supra* note 52.

<sup>80</sup> *Project Regulating Plant Breeding: Doubts Arise Surrounding the Rights of Small Farmers*, SENATE OF THE REPUBLIC OF CHILE, NEWS, (Jul. 30, 2013), available at [http://www.senado.cl/proyecto-que-regula-obtenciones-vegetales-surgen-dudas-en-materia-de-derechos-de-pequenos-agricultores/prontus\\_senado/2013-07-30/121930.html](http://www.senado.cl/proyecto-que-regula-obtenciones-vegetales-surgen-dudas-en-materia-de-derechos-de-pequenos-agricultores/prontus_senado/2013-07-30/121930.html) [hereinafter *Project Regulating Plant Breeding*].

During the Commission's July 2013 debate, some senators raised concerns about the economic impact that the implementation of UPOV 91 would have on smallholder farmers in Chile, and said that these trepidations were not adequately addressed in the Plant Breeders' legislation.<sup>81</sup> Among the opponents was Senator Ximena Rincon, who has since become President Bachelet's Minister of the General Secretariat of the Presidency.<sup>82</sup> Indeed, the act of designating the Plant Breeders' Law as the Monsanto Law is a political act, designed to garner popular support for opposition to the initiative.<sup>83</sup>

Partisan maneuvering is also evident in the fact that the ratification of UPOV 91 has been conflated with the introduction of genetically modified organisms (GMOs) into Chilean agricultural industries.<sup>84</sup> While it is true that increased biotechnological research activity—incited by the possibility of IP protections—may lead to the creation of GMOs, IPRs in new plant varieties and GMO research are in fact separate issues.<sup>85</sup> Thus, several countries have ratified UPOV 91 but maintain either partial or total bans on GMOs through independent legislation.<sup>86</sup> Of course, the issue is complicated. In

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

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

<sup>83</sup> Andrés Rojas M., *Qué es la Llamada "Ley Monsanto" que Retiró el Gobierno?*, COOPERATIVA.CL, (Mar. 18, 2014), available at <http://www.cooperativa.cl/noticias/economia/sectores-productivos/agricultura/que-es-la-llamada-ley-monsanto-que-votara-el-senado/2013-08-28/115234.html> (recounting that the civil society organizations that dubbed the Chilean Plant Breeders' Law the "Ley Monsanto" devised the moniker based on what they imputed the law's end to be; that is, privatization of seeds and concentrating agricultural intellectual property ownership in a few large seed companies).

<sup>84</sup> See, e.g., *Hard Defeat of Monsanto in Chile*, *supra* note 74.

<sup>85</sup> See, e.g., David J. Jefferson, Alex B. Camacho, & Cecilia Chi-Ham, *Towards a Balanced Regime of Intellectual Property Rights for Agricultural Innovations*, 19(6) J. INTELLECTUAL PROP. RIGHTS (forthcoming 2014).

<sup>86</sup> See UPOV 91, *supra* note 12 (reflecting that the following countries have ratified UPOV 91: Australia, Austria, Bulgaria, France, Germany, Hungary, Poland, and Russia). See also Walden Bello, *Twenty-Six Countries Ban GMOs—Why Won't the US?*, THE NATION, (Oct. 29, 2013), available at <http://www.thenation.com/blog/176863/twenty-six-countries-ban-gmos-why-wont-us#> (listing the countries that have banned GMOs through national legislation).

2006, another bill was proposed in the Chilean Senate that would permit the cultivation and commercialization of transgenic crops in the country.<sup>87</sup> This bill has been frozen in the legislative process since 2011,<sup>88</sup> and has become intertwined with the Plant Breeders' Law in the public debate.<sup>89</sup>

The democratic process in Chile could obviously function better if the public were in possession of more accurate information about legislative proposals and their potential impacts; and if elected officials were better informed about the nuances of the international system for IP protections in plant varieties.<sup>90</sup> Yet the fact that the prospective ratification of UPOV 91 has even entered into the popular consciousness in Chile is, in itself, somewhat unusual.<sup>91</sup> In the

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<sup>87</sup> Claudia Urquieta, *Bill Opens Debate Over Transgenic Crops in Chile*, LA TERCERA, (Apr. 17, 2011), available at <http://diario.latercera.com/2011/04/17/01/contenido/pais/31-66074-9-proyecto-de-ley-abre-debate-sobre-cultivos-transgenicos-en-chile.shtml>.

<sup>88</sup> *See Alimentos Genéticamente Modificados Serán Rotulados y Se Abre Debate Sobre una Regulación de Este Mercado*, SENADO DE CHILE, DEPARTAMENTO DE PRENSA, Boletín No. 3818-11, (July 6, 2011), available at [http://www.senado.cl/alimentos-geneticamente-modificados-seran-rotulados-y-se-abre-debate-sobre-una-regulacion-de-este-mercado/prontus\\_senado/2011-06-07/195508.html](http://www.senado.cl/alimentos-geneticamente-modificados-seran-rotulados-y-se-abre-debate-sobre-una-regulacion-de-este-mercado/prontus_senado/2011-06-07/195508.html) (stating that the most recent discussion surrounding this particular project in the Chilean Senate occurred in July of 2011).

<sup>89</sup> *See* Flavia Liberona, *Las Incógnitas que Deja el Retiro del Proyecto de Ley de Obtentores Vegetales*, FUNDACIÓN TERRAM, (Mar. 31, 2014), available at <http://www.terram.cl/2014/03/31/las-incognitas-que-deja-el-retiro-del-proyecto-de-ley-de-obtentores-vegetales/> (discussing the fact that, although some critics alleged that the Plant Breeders' Law would permit the cultivation of genetically modified organisms, the text of the bill does not contain any "article that would have any relation with the theme of transgenic [crops], as this is an independent legal matter") (author's translation).

<sup>90</sup> *See, e.g., La Confusión de la Ley Monsanto, Transgénicos, y la Propiedad de las Semillas en Chile*, CHILEBIO, (Jan. 29, 2014), available at <https://www.youtube.com/watch?v=oDqgo6re6Vo> (representing evidence of the confusion over the various bills, such as those related to the implementation of a UPOV 91-based PVP framework and to the cultivation of transgenic crops; civil society organizations such as ChileBio have attempted to clarify misconceptions via efforts such as this informative video).

<sup>91</sup> Catherine Saez, *UPOV Sprouts a New Public Face – As Farmers Protest*, INTELLECTUAL PROPERTY WATCH, (Oct. 20, 2011), available at <http://www.ip-watch.org/2011/10/20/upov-sprouts-a-new-public-face-as-farmers-protest/> (noting

landscape of global trends towards ever-stronger IP protections and the legal regimes that implement them, the debate is frequently obscured from public scrutiny.<sup>92</sup> Furthermore, there is concern that the mandates that ratchet up the domestic IP protections contained in many free trade agreements may obscure the democratic process in the developing world.<sup>93</sup>

### **III. Global Trends Towards Ever-Stronger IP Protections in “TRIPS plus” Bilateral Investment Treaties**

Before the advent and proliferation of bilateral investment treaties (BITs), there was TRIPS—the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>94</sup> TRIPS grew out of the Uruguay Round negotiations to revise the General Agreement on Tariffs and Trade (GATT), which ended an eight-year period of discussions culminating in 1994, and leading to the establishment of the WTO.<sup>95</sup> TRIPS requires WTO member states to provide IP protection for plant

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that the phenomenon alluded to is relatively new, despite there being increasing civil societal debate about the implications of a UPOV 91-based PVP framework).

<sup>92</sup> Catherine Saez, *UPOV Holds Weeklong Meetings as Civil Society Publishes Restricted Documents*, INTELLECTUAL PROPERTY WATCH, (Oct. 22, 2013), available at <http://www.ip-watch.org/2013/10/22/upov-holds-weeklong-meetings-as-civil-society-publishes-restricted-documents/> (discussing how in 2012, UPOV's Council approved new rules governing access to some UPOV documents, broadening public availability of these texts, but restricting access to many of the Consultative Committee's documents to certain parts of the UPOV website).

<sup>93</sup> See, e.g., Rachel Denae Thrasher & Kevin P. Gallagher, *21st Century Trade Agreements: Implications for Development Sovereignty*, 38 DENV. J. INT'L L. & POL'Y 313 (2010).

<sup>94</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm) [hereinafter TRIPS]. See *Free Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements> (exemplifying that many of the U.S.'s free trade agreements have been signed since the year 2000, several years after the conclusion of the TRIPS agreement).

<sup>95</sup> DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, MATERIALS 50–51 (2d ed., 2012).

varieties,<sup>96</sup> but also allows for some flexibility in the form that such protection takes.<sup>97</sup> Thus, under TRIPS, members “shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system, or by any combination thereof.”<sup>98</sup>

However, subsequent to the enactment of TRIPS, industrialized countries have sought to further strengthen the global regime for IP protections, effectively eliminating the flexibilities contained in Article 27(3).<sup>99</sup> This trend is most evident in the bilateral or regional trade agreements that contain “TRIPS-plus,” “TRIPS-extra,” and “TRIPS-restrictive” provisions.<sup>100</sup> Such provisions respectively mandate that: (1) developing countries increase domestic IP protections above the levels required by TRIPS; (2) developing countries add commitments that are not covered by TRIPS; and (3) flexibilities under TRIPS are taken away.<sup>101</sup> The BITs that Chile has entered into with relatively wealthier countries are replete with provisions that would increase the strength of IP protections under Chilean law, including the domestic implementation of UPOV 91.<sup>102</sup>

Chile is no stranger to requirements mandated by the terms of FTAs to strengthen its domestic IP laws. Since the early 1990s—when Chile transitioned from a dictatorship under General Pinochet back to democracy—it has been involved in free trade negotiations with several wealthy countries, including the U.S. and Canada.<sup>103</sup> These

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<sup>96</sup> Amy Nelson, *Is There an International Solution to Intellectual Property Protection for Plants?*, 37 GEO. WASH. INT’L L. REV. 997, 1008 (2005). *See also* TRIPS, *supra* note 94.

<sup>97</sup> TRIPS, *supra* note 94, at art. 27(3)(b) (requiring that members provide IP protections for new plant varieties either in the form of patents or by an “effective *sui generis* regime,” or by some combination of the two).

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

<sup>99</sup> Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 867 (2007).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 867–69.

<sup>102</sup> *See* U.S.-Chile FTA, *supra* note 45, at art. 17.1.3.a. *See also* Japan-Chile FTA, *supra* note 47, at art. 162.

<sup>103</sup> Kevin M. Jordan, *Intellectual Property Under NAFTA: Is Chile Up to the Challenge?*, 2 TULSA J. COMP. & INT’L L. 367–68 (1995).

bargains have not been entirely one-sided, as Chilean administrations throughout the 1990s and 2000s made clear that they intended to pursue an aggressively neoliberal<sup>104</sup> strategy for economic development.<sup>105</sup> Thus, Chile publicly declared its intention to join the North American Free Trade Agreement (NAFTA) in 1994.<sup>106</sup> Shortly thereafter, President Clinton and the leaders of Canada and Mexico agreed to admit Chile into NAFTA.<sup>107</sup> However, the U.S. Congress denied Clinton the necessary “fast track” authorization necessary to expand the agreement in 1997,<sup>108</sup> and Chile ultimately signed separate BITs with Canada, Mexico, and the U.S.<sup>109</sup>

Many leaders in Chile have fully endorsed neoliberal development theory, a value system that was first widely incorporated into the country’s national psyche with the technocratic economic policies implemented by the “Chicago Boys” under Dictator Pinochet.<sup>110</sup> Yet

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<sup>104</sup> Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2862–863 (2006) (arguing that neoliberalism is “characterized by certain policy recommendations, including, among other things, trade liberalization, foreign direct investment, and property rights. In the intellectual property world, this [neo]liberal emphasis on property rights resonates very deeply with the dominant rationale for exclusive rights conferred by copyrights and patents”).

<sup>105</sup> See generally RAUL CLARO H., *EL DESARROLLO: ENTRE EL SIMPLE CRECIMIENTO Y EL BUEN VIVIR* (2011).

<sup>106</sup> Jordan, *supra* note 103, at 368.

<sup>107</sup> David E. Sanger, *Chile is Admitted as North American Free Trade Partner*, N.Y. TIMES (Dec. 12, 1994), <http://www.nytimes.com/1994/12/12/world/chile-is-admitted-as-north-american-free-trade-partner.html>.

<sup>108</sup> See ‘Fast Track’ is Derailed, N.Y. TIMES (Nov. 11, 1997), <http://www.nytimes.com/1997/11/11/opinion/fast-track-is-derailed.html>.

<sup>109</sup> Canada-Chile Free Trade Agreement (FTA), (July 1997), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx?lang=eng> [hereinafter Canada-Chile FTA]. Chile-Mexico Free Trade Agreement (FTA), (April 1998), available at [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=196020](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=196020) [hereinafter Chile-Mexico FTA]. See also U.S.-Chile FTA, *supra* note 45.

<sup>110</sup> Patricio Silva, *Technocrats and Politics in Chile: From the Chicago Boys to the CIEPLAN Monks*, 23 J. LAT. AM. STUDIES 385, 390 (1991) (describing the “Chicago Boys” as a select group of 30 Chilean students who were offered the opportunity to pursue post-graduate studies in economics at the University of Chicago, who then subsequently returned to Chile in the late 1960s and early 1970s, and became leading

neoliberalism is not embraced by everyone, and some leading Chilean academics have strongly criticized its prescriptions for development.<sup>111</sup> Neoliberalism’s opponents have denounced the “*camino chileno*” (the “Chilean path”) to development as myopically focused on economic growth as measured through indices such as Gross Domestic Product (GDP), at the expense of the general wellbeing, industrialization, participation of the entire population, and sustainability.<sup>112</sup>

Such criticisms are consistent with those launched by some development scholars in the U.S., as will be discussed subsequently. For instance, FTAs have been indicted for their intrusions into developing nations’ sovereignty to determine the best solutions in overcoming obstacles to development that these nations face.<sup>113</sup> Thus, an

analysis of various types of trade agreements shows that the current global trade regime substantially curtails the ability of countries to maintain control over various policy tools that traditionally have been deployed as part of long run development paths.<sup>114</sup>

A possible solution to this threat to sovereignty is represented by “South-South” regional trade agreements, which provide for flexibilities in national-level development policies.<sup>115</sup>

In designing such policies, Chile and similarly situated countries could consider theories of development alternative to that propped under neoliberalism. For instance, the importance of “development as

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figures in the implementation of the neoliberal development model under the military government in 1975).

<sup>111</sup> See, e.g., RAUL CLARO H., *supra* note 105.

<sup>112</sup> *Id.* See also JOSE BENGUA, *LA COMUNIDAD FRAGMENTADA: NACION Y DESIGUALDAD EN CHILE* (2009).

<sup>113</sup> Thrasher & Gallagher, *supra* note 93.

<sup>114</sup> *Id.* at 348.

<sup>115</sup> *Id.* at 331, 347, 349. See also Darryl C. Wilson, *The Caribbean Intellectual Property Office (CARIPO): New, Useful, and Necessary*, 19 MICH. ST. J. INT’L L. 551 (2011) (advocating for the establishment of a Caribbean Intellectual Property Office as an important step toward regional self-governance).

freedom”<sup>116</sup> could be discussed, and the implications of such a framework could be integrated into other, existing strategies for economic development.<sup>117</sup> Designing policies through the guidance of a “development as freedom” theory would require the enhancement of five distinct types of freedom inherent to any new legal framework: (1) political freedoms; (2) economic facilities; (3) social opportunities; (4) transparency guarantees; and (5) protective security.<sup>118</sup> Under such a vision, Chile could analyze whether stronger protections for new plant varieties would be conducive to development as freedom, when considering whether and how to reform its domestic IP laws.<sup>119</sup>

#### **IV. Are Strong Intellectual Property Rights for Plants Good for Development?**

The debate over the appropriate level of strength of IPRs for economic development has been unfolding at least since the creation of TRIPS, which marked the first time that a uniform standard for intellectual property protection was imposed internationally.<sup>120</sup> Despite TRIPS’ demand for homogeneity, it has been argued that a one-size-fits-all solution to the question of the appropriate level of IP protection for development does not exist.<sup>121</sup> Economist Keith Maskus has identified four country types: (1) IP exporters; (2) high-income IP

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<sup>116</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999) (defining the phrase “development as freedom” by first defining “development” as “a process of expanding the real freedoms that people enjoy,” in contrast to “narrower views of development, such as identifying development with the growth of gross national product, with the rise in personal incomes, with industrialization, with technological advance, or with social modernization”) [hereinafter DEVELOPMENT AS FREEDOM].

<sup>117</sup> See, e.g., Des Gasper & Irene van Staveren, *Development as Freedom v – v And as What Else?*, 9 FEMINIST ECONOMICS 137 (2003) (positing that Sen’s theory could be integrated with feminist or other critical approaches to economic development).

<sup>118</sup> DEVELOPMENT AS FREEDOM, *supra* note 116, at 10.

<sup>119</sup> Chon, *supra* note 104 (providing a thorough discussion of Sen’s theory in the context of international intellectual property law frameworks).

<sup>120</sup> Nelson, *supra* note 96, at 1008.

<sup>121</sup> Keith Maskus, *Lessons from Studying the International Economics of Intellectual Property Rights*, 53 VAND. L. REV. 2219, 2221 (2000).

importers; (3) IP followers; and (4) low-income IP importers.<sup>122</sup> Based on the category into which a country falls, it might be best served by one set of IP policies over another.<sup>123</sup>

Moreover, Maskus notes that economies differ in important ways, such that their underlying policy regimes render strong IPRs more or less effective.<sup>124</sup> Thus, granting more stringent IP protections “cannot improve development prospects without appropriate collateral institutions.”<sup>125</sup> Some of the collateral policy reforms that Maskus recommends include: market liberalization and the removal of distribution monopolies; investment in education for the promotion of endogenous human capital; and application of appropriate competition (i.e. antitrust) policies.<sup>126</sup> While these lessons are important if development is conceived in fundamentally economic terms, other conceptualizations of development—such as development as freedom—may militate towards different policy choices.<sup>127</sup>

Political scientist Susan Sell has wondered whether IPRs should be treated as a public goods problem for which the remedy is commodification, or as a monopoly of information problem for which the remedy is unfettered competition.<sup>128</sup> Essentially, the argument advanced by Sell—and others, such as law professor James Boyle—is that the

granting of exclusive rights must be balanced against the economic effects of higher product and transaction costs and the potential exclusion from the market of competitors who

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<sup>122</sup> *Id.* at 2221–222.

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

<sup>124</sup> *Id.* at 2224.

<sup>125</sup> *Id.* at 2238.

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

<sup>127</sup> See DEVELOPMENT AS FREEDOM, *supra* § III.

<sup>128</sup> Susan K. Sell, *What Role for Humanitarian Intellectual Property? The Globalization of Intellectual Property Rights*, 6 MINN. J. L. SCI. TECH. 191, 192 (2004).

may be able to imitate or adapt the invention in such a way that social value is increased.<sup>129</sup>

If development is understood as economic and its sole measure is GDP growth, then strong IPRs—which tend to favor private sector seed companies, public corporations, and research institutions over resource-poor farmers—can superficially be said to be good for development.<sup>130</sup> But if development is understood as enhanced access to information, then different parties' interests are at stake, and different indexes must be used for evaluation.<sup>131</sup>

In fact, the dominant paradigm of agricultural development—which favors the strengthening of IPRs in order to promote and reward innovation by the private sector—may leave out the individuals in greatest need of the fruits of development.<sup>132</sup> The final report by Special Rapporteur on the Right to Food, Olivier De Schutter, to the UN Human Rights Council (UNHRC) recognized this potentially deleterious effect on farmers.<sup>133</sup> Thus, De Schutter has called for reforms to the current regime of IPRs in plant varieties “that can make

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<sup>129</sup> *Id.* (internal quotations and citations omitted).

<sup>130</sup> *Id.* at 193.

<sup>131</sup> See, e.g., Gustav Ranis, Frances Stewart, & Emma Samman, *Human Development: Beyond the Human Development Index*, 7 J. HUMAN. DEV. 323 (2006) (suggesting that the concept of “human development” (understood as “a process of enlarging people’s choices”) is broader than as currently represented in the popularly-utilized Human Development Index, and proposing the adoption of an alternative index that would capture more detail in assessing human development).

<sup>132</sup> Chidi Oguamanam, *Intellectual Property Rights in Plant Genetic Resources: Farmers' Rights and Food Security of Indigenous and Local Communities*, 11 DRAKE J. AGRIC. L. 273 (2006); Olivier De Schutter, *The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity*, 33 HUM. RTS. Q. 304 (2011).

<sup>133</sup> See Report of the Special Rapporteur on the Right to Food, Final Report: The Transformative Potential of the Right to Food, ¶¶ 25–28, U.N. Doc. HRC/A/25/57/2014, (Jan. 24, 2014), available at [http://www.srfood.org/images/stories/pdf/officialreports/20140310\\_finalreport\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf) [hereinafter UNHRC Report].

commercially-bred varieties inaccessible to the poorest farmers in the developing world.”<sup>134</sup>

The final report proposes several policy reforms to ensure that “development” means more than profits for multinational seed companies.<sup>135</sup> Recommendations include: (a) implementing laws recognizing farmers’ rights; (b) not allowing patents on plants and establishing research exemptions to PBRs; (c) ensuring that seed certification schemes do not lead to an exclusion of farmers’ varieties; and (d) supporting and scaling up local seed exchange systems.<sup>136</sup> De Schutter’s proposed solutions implicitly recognize that if the definition of “development” is expanded beyond a narrow focus on economic growth, stronger plant IPRs are not necessarily desirable.<sup>137</sup> Indeed, in some instances, *weakening* existing protections might benefit important stakeholders all along the agricultural production chain.<sup>138</sup>

For instance, some have argued that loosening private property rights to vest ownership in rural communities via a “public trust” model could economically and politically empower the most vulnerable stakeholders in this chain, while also supporting efforts towards *in situ* conservation.<sup>139</sup> Clearly, such reforms would not

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<sup>134</sup> *Id.* See also *Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and the Philippines*, THE BERNE DECLARATION 7 (October 2014), available at [http://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014\\_07\\_10\\_Owning\\_Seed\\_-\\_Accessing\\_Food\\_report\\_def.pdf](http://www.bernedeclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf) (concluding that “UPOV 91 restrictions on the use, exchange and sale of farm-saved PVP seeds will make it harder for resource-poor farmers to access improved seeds” and making recommendations to policymakers and civil society organizations to ensure that the human rights of vulnerable communities are not adversely affected by UPOV 91-based frameworks for PVPs).

<sup>135</sup> UNHRC Report, *supra* note 133 ¶¶ 35–49.

<sup>136</sup> *Id.* at 22.

<sup>137</sup> *Cf. id.* at 21–22 (stating that “[i]n order to ensure that the development of the intellectual property rights regime and the implementation of seed policies at the national level are compatible with the right to food, States should [make reforms in the four key areas discussed herein]).

<sup>138</sup> *Id.*

<sup>139</sup> See ANDREW MUSHITA & CAROL B. THOMPSON, *BIOPIRACY OF BIODIVERSITY: GLOBAL EXCHANGE AS ENCLOSURE* 176–77 (2007).

benefit all stakeholders, much as the agrarian land reforms under Communist President Salvador Allende did not benefit the large Chilean landholders (*latifundistas*) in the 1960s.<sup>140</sup> However, just as there is no one-size-fits-all formula for the appropriate level of IP protections for the development of a country, a uniformly stronger or weaker IPR regime will not yield universal benefit or detriment.<sup>141</sup> Developing countries should consider what development means to their citizens and whose values should be prioritized in designing domestic IP policies.

Despite the lack of a clear, one-size-fits-all formula for IP protections for plant materials, it is likely that a balanced approach would be useful for many countries. Such a strategy would oscillate between competing interests, including the empowerment of poor farmers growing heirloom varieties and to incentivize agricultural innovation—both key components to development.<sup>142</sup> Thus, “a better balance between IP protection and sharing of genetic resources and knowledge will ultimately foster investment and stakeholder confidence in innovation.”<sup>143</sup> That is, a moderately strong system for IPRs in plants would “foster investment” by assuring parties who give time or money to innovative research are adequately compensated.<sup>144</sup> Meanwhile, such a system would also boost the “stakeholder confidence” of smallholder farmers, by assuaging concerns over exploitation or external control over agricultural inputs.<sup>145</sup>

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<sup>140</sup> MARTIN CORREA, RAUL MOLINA, & NANCY YAÑEZ, *LA REFORMA AGRARIA Y LAS TIERRAS MAPUCHES* 9 (2005) (noting that Chilean agrarian reform not only did not benefit the *latifundistas*, but that it also failed to acknowledge the rights of indigenous Mapuche communities).

<sup>141</sup> Maskus, *supra* note 121.

<sup>142</sup> Jefferson et al., *supra* note 85.

<sup>143</sup> Emily Marden & R. Nelson Godfrey, *Intellectual Property and Sharing Regimes in Agricultural Genomics: Finding the Right Balance for Innovation*, 17 *DRAKE J. AGRIC. L.* 369, 373 (2012).

<sup>144</sup> *Id.*

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

The need to strike a better balance in regimes for IP rights over plant varieties is not merely theoretical. Empirical investigation has frequently been unable to find meaningful correlations between strong IPRs and agricultural innovation.<sup>146</sup> A recent study concluded that

[c]ontrary to the widely assumed link between intellectual property rights and innovation, the authors' five-country regression analysis of data encompassing a twenty-year period from 1985 to 2005 in most cases failed to find a statistically significant correlation between intellectual property protection and agricultural innovation.<sup>147</sup>

The study contained an examination of IP protection policies and plant innovation in the world's five major soybean-producing nations: Argentina, Brazil, China, India, and the U.S.<sup>148</sup> Despite the substantial economic and political differences between these countries, it appeared that the relationship between IP protections, research and development (R&D), and improvement in crop yield was not as strong

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<sup>146</sup> See, e.g., Endres & Giffin, *supra* note 17, at 208. See also Julian M. Alston & Raymond J. Venner, *The Effects of the US Plant Variety Protection Act on Wheat Genetic Improvement*, 31 RES. POL'Y 527 (2002) (analyzing the U.S. Plant Variety Protection Act (PVPA) of 1970 and finding that the law may have stimulated public, but not private sector investment in wheat varietal improvement); C.S. Srinivasan, *Plant Variety Protection, Innovation, and Transferability: Some Empirical Evidence*, 26 APPL. ECON. PERSPECT. POL'Y 445 (2004) (analyzing UPOV's "innovation effect" and its "transferability effect" and finding that PVPs might be most relevant to fostering investment rather than trade); Robert Tripp, Niels Louwaars, & Derek Eaton, *Plant Variety Protection in Developing Countries: A Report from the Field*, 32 FOOD POL'Y 354, 369 (2007) (concluding that research on the impacts of PVPs in industrialized countries has shown mixed results with respect to the impact of strong IP rights on agricultural innovation, and that a "basic" PVP system would be able to balance the interests of breeders and farmers in developing countries).

<sup>147</sup> Endres & Giffin, *supra* note 146, at 208.

<sup>148</sup> *Id.* at 207.

as economic theorists expected, for any of the countries examined.<sup>149</sup> Instead, the only significant correlation found was between R&D expenditure and hectares planted, but not crop yield.<sup>150</sup> This finding illustrates the complexity of the modern agricultural industry—seed developers spending R&D dollars are “concerned with what makes them profit (e.g., increased acres planted associated with increased seed sales), not what makes their customers profit (increased yield).”<sup>151</sup> The interrelationship between the strength of IPRs and development is complicated—strong protections may benefit one group of stakeholders in the agricultural production chain while harming another group.<sup>152</sup>

In Chile, much of the disquiet over the potential implementation of a UPOV 91-based framework centers on the concern that officials are not considering this nuanced interrelationship, but rather, they are narrowly targeting GDP growth as a proxy for development.<sup>153</sup> An analysis of the history and context of the negotiation towards the initial passage of UPOV 91 legislation in Chile concluded that the policymakers' development model myopically focused on economic growth and privatization.<sup>154</sup> The authors noted that the framework for IPRs enshrined in UPOV 91 may be beneficial for an industrialized agricultural model.<sup>155</sup> However, small-scale agriculture still occupies a large proportion of the agricultural sector in Chile, with family farms

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<sup>149</sup> *Id.* at 209–10.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 210.

<sup>152</sup> See, e.g., De Jonge, *supra* note 30 (discussing, in the context of Sub-Saharan Africa, the differences between the interests of large-scale breeding companies and smallholder farmers, and exploring how a UPOV 91-based PVP system may hamper farming practices in developing countries).

<sup>153</sup> Eliana Barrera Miranda & Alejandra Donoso Caceres, *The Adoption of UPOV 91: Biodiversity as an Object of Intellectual Property: A Critical Analysis*, 5 REVISTA JUSTICIA AMBIENTAL 219 (2013).

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

<sup>155</sup> *Id.* at 231.

comprising 25% of total *production*.<sup>156</sup> Therefore, even in purely economic terms, UPOV 91 may be misguided policy for development in Chile. Furthermore, when non-economic issues are also considered—such as the protection of the country’s incredible biodiversity<sup>157</sup>—the wisdom of IPRs that do not consider the interests of multiple stakeholders are further questioned.<sup>158</sup>

## V. A Solution for Chile? Policy Recommendations to Solve the UPOV 91 Impasse

Mired in political wrangling in Congress and distorted by misinformation on the street, the impasse over UPOV 91 in Chile is unlikely to come to an easy conclusion. Yet, there are many potential ways to break the stalemate; some of which are radical, others relatively minor, and all potentially salutary, as will be demonstrated later in this article. However, whether any of these proposed solutions is actually considered in Chile is inconsequential. What matters is the initiation of a genuine discussion—about what development means to Chileans, and which priorities are of highest value in arriving at that end.

### 1. *Implement UPOV 91 while also enacting legislation guaranteeing the farmers’ privilege*

Unlike its predecessor, UPOV 91 does not provide for an explicit or implicit exemption for non-commercial, personal use of protected varieties by farmers, as shown in the Table at the end of this piece. However, under Article 15, UPOV members have the option of enacting national legislation that would restore the farmers’

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<sup>156</sup> *Id.*

<sup>157</sup> Cesar S. Ormazabal, *The Conservation of Biodiversity in Chile*, 66 REVISTA CHILENA DE HISTORIA NATURAL 383, 384 (1993) (characterizing Chile’s unique ecosystems as highly diverse “because of the extreme range of latitudes and altitudes found within the country”).

<sup>158</sup> See CHARLES R. MCMANIS, BIODIVERSITY AND THE LAW chs. 14–15 (2007) (providing an example of a national IP framework that would provide protections for agricultural innovations while incorporating protections related to the conservation of biodiversity).

privilege.<sup>159</sup> Thus, UPOV 91 contains an “opt-in” mechanism, allowing for some flexibility, which is in contrast to the otherwise universal strengthening of IP protections that UPOV 91 undertakes.<sup>160</sup> Few UPOV 91 jurisdictions have enacted a domestic farmers’ exemption, though precedents do exist.<sup>161</sup> For instance, the EU allows farmers to use patent protected seeds freely for their own use, stipulating that the resulting plant material is free from protection.<sup>162</sup>

Similarly, in some countries that are considering adhering to UPOV 91—such as China—discussions are underway about expanding the scope of the domestic farmers’ privilege.<sup>163</sup> Meanwhile, the federal government of Canada is considering legislation to make the country compliant with UPOV 91.<sup>164</sup> The Canadian proposal, enshrined in Bill C-18, would not require farmers to buy new seed each year.<sup>165</sup> Instead, the bill specifically includes a farmers’ privilege that would allow for growing, saving, storing, and cleaning seed for a farmer’s own use.<sup>166</sup> Chile could follow these examples and act as a pioneer in South America, simultaneously guaranteeing farmers’ rights and transitioning to UPOV 91. Such action would demonstrate the State’s simultaneous commitment to economic development and the preservation of the rights of its most vulnerable citizens.<sup>167</sup>

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<sup>159</sup> See UPOV 91, *supra* note 21, at ch. V, art. 15(2).

<sup>160</sup> *Id.* For a discussion of how UPOV 91 contains generally stronger protections than its predecessor, see Tripp, et al., *supra* note 146.

<sup>161</sup> See, e.g., Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, 1998 11 O.J. (L 213) 13–21.

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

<sup>163</sup> See De-xing Yang, *Farmers’ Privilege Under the Protection of New Plant Varieties*, 4 ASIAN AGRICULTURAL RESEARCH 86, 88 (2012) (arguing for the expansion of farmers’ privilege regulations in China in preparing to join UPOV 91).

<sup>164</sup> Mitchell Japp, *UPOV 91: What You Need to Know*, SASKATCHEWAN MINISTRY OF AGRICULTURE, AGREVIEW (2014), available at <http://www.agriculture.gov.sk.ca/agv1405-pg4>.

<sup>165</sup> *Id.*

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

<sup>167</sup> See DEVELOPMENT AS FREEDOM, *supra* § III.

## 2. *Negotiate amendments to the BITs with the U.S. and Japan*

Another possible solution for Chile would be to amend the free trade agreements it has forged with the U.S. and Japan, such that adherence to UPOV 91 would no longer be required. The language of these treaties could be made to mirror that contained in the EU–Chile FTA, allowing that the parties

shall continue to ensure an adequate and effective implementation of the obligations arising from...[the] International Convention for the Protection of New Varieties of Plants 1978 ('1978 UPOV Convention'), or the International Convention for the Protection of New Varieties of Plants 1991 ('1991 UPOV Convention').<sup>168</sup>

Although no specific provision is made for amendment of the U.S.–Chile FTA, Chapter 22 of the instrument sets forth procedures for dispute resolution, which include the “avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement.”<sup>169</sup> Furthermore, Annex 22.2 provides that

[i]f either Party considers that any benefit it could reasonably have expected to accrue to it under any provision of. . . (e) Chapter Seventeen (Intellectual Property Rights), is being nullified or impaired. . . the Party may have recourse to dispute settlement.<sup>170</sup>

Therefore, it may be possible for Chile to seek dispute resolution with the U.S. regarding its non-compliance with Art. 17.1.3(a) under the theory that implementation of UPOV 91 in the country would impair benefits that could be expected to accrue to it under an alternative regime for plant variety protections.

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<sup>168</sup> EU-Chile FTA, *supra* note 42, at art. 170(a)(v).

<sup>169</sup> U.S.-Chile FTA, *supra* note 45, at art. 22.2(a).

<sup>170</sup> *Id.* at Annex 22.2.

Similarly, Chapter 16 of the Japan–Chile FTA enumerates procedures for the settlement of disputes.<sup>171</sup> “Either Party may request in writing consultations with the other Party concerning any matter on the implementation, interpretation or operation of this Agreement.”<sup>172</sup> Importantly, Chile would need to “set out the reasons for the request, including identification of the measure at issue and an indication of the legal basis for the complaint.”<sup>173</sup> It is unclear what specific grounds Chile could invoke as a cause of action for a complaint.<sup>174</sup> Thus, the possibility that the FTAs could be amended might hinge largely on the willingness of the other party (i.e. Japan or the U.S.) to negotiate *a posteriori*.

As an alternative to amending the language of the BITs with the U.S. and Japan to eliminate the requirement of adherence to UPOV 91, Chile could simply continue in its current state of non-compliance. However, perpetuating this tenuous status quo could jeopardize relations between Chile and its trade partners.<sup>175</sup> It is notable that the U.S. placed Chile on its Special 301 List in 2012, along with only twelve other countries including China, India, Pakistan, Russia, Thailand, and Venezuela.<sup>176</sup> The Special 301 Report is an annual review of the state of IPR protection and enforcement with trading partners around the world, and identifies a range of concerns “including troubling ‘indigenous innovation’ policies that may unfairly

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<sup>171</sup> Japan-Chile FTA, *supra* note 47, at art. 175.

<sup>172</sup> *Id.* at art. 177(1).

<sup>173</sup> *Id.* at art. 177(2).

<sup>174</sup> *Id.* at art. 175, 177(2) (explaining that the scope of the dispute settlement mechanism is such that procedures “shall apply with respect to the avoidance or settlement of disputes between the Parties concerning the implementation, interpretation or operation of this Agreement”).

<sup>175</sup> See, e.g., *Schwab Announces Results of Chile IPR Review, Cites Deteriorating Performance*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT (Jan. 2007), available at <http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/january/schwab-announces-results-chile-ipr-review> (stating the concern that Chile is not protecting sufficiently its intellectual property and that it has a tremendous interest in improving its IPR track record).

<sup>176</sup> Ambassador Ronald Kirk, *2012 Special 301 Report*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (USTR) (Apr. 2012), at 6, available at <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>.

disadvantage U.S. rights holders.”<sup>177</sup> The 2012 Report acknowledged that Chile’s steps towards implementation of UPOV 91 were “welcome,” but identified several other concerns with Chile’s domestic IP framework.<sup>178</sup> If Chile continues to defy its obligations under the US–Chile FTA, rather than take affirmative steps towards modifying the terms of this agreement, then the U.S. will continue to have a legal basis for putting economic pressure on Chile.<sup>179</sup> Meanwhile, Chile’s cache for building alliances with other potential trade partners—such as those who prefer the UPOV 78-level of IPR strength—could be hampered by its *de jure* obligations towards the U.S. and Japan, as will be shown later. At some point in the near future, Chile may need to definitively take a side. Hopefully, it will do so in consideration of, and based upon, the interests of the widest swath of the Chilean population as possible.

3. *Seek to develop a regional partnership—join MERCOSUR or the CAN*

Regional trade agreements may represent a promising alternative to multilateral initiatives for the promotion of economic growth in the developing world.<sup>180</sup> Furthermore, when alliances are situated along a South-South axis—in comparison to agreements between North and South countries—developing countries may be able to retain a greater measure of sovereignty.<sup>181</sup> In North-South treaties, the developed country is often in a position to “demand that subjects of interest to it

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<sup>177</sup> *Id.* at 4.

<sup>178</sup> *Id.* at 26.

<sup>179</sup> *Enforcement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, available at <http://www.ustr.gov/trade-topics/enforcement> (stating that the Office “monitors and secures U.S. trade rights and benefits under international agreements using a variety of tools including consultations, negotiations, and litigation in formal dispute settlement proceedings”).

<sup>180</sup> See, e.g., C. O’Neal Taylor, *Regionalism: The Second-Best Option?*, 28 ST. LOUIS U. PUB. L. REV. 155 (2008).

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

are covered at levels or to standards it desires.”<sup>182</sup> Thus, developing countries “have little leverage regarding the type or content of the additional disciplines sought.”<sup>183</sup> In Chile, examples of the disparity in bargaining power are found in the intellectual property provisions of the U.S.–Chile FTA and the Japan–Chile FTAs, noted above.<sup>184</sup>

Even while South American nations continue to negotiate trade treaties with the global North,<sup>185</sup> several regional free trade agreements already exist. The largest, in economic terms, is the Southern Common Market, or *El Mercado Común del Sur*, (MERCOSUR)—an association created in 1991 between Argentina, Brazil, Paraguay, Uruguay, Venezuela, and Bolivia.<sup>186</sup> MERCOSUR was founded on values including: democracy and pluralism; defense of fundamental liberties; human rights; and the protection of the environment and sustainable development,<sup>187</sup> but the organization is primarily concerned with market liberalization.<sup>188</sup> Chile is currently an associate member of MERCOSUR, a position that entails tariff reductions but not voting rights or complete access to the markets of full members.<sup>189</sup>

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<sup>182</sup> *Id.* at 159.

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

<sup>184</sup> UPOV Membership, *supra* note 12. See also Taylor, *supra* note 180, at 175 (stating “[t]he United States only enters into free trade agreements that satisfy its model”).

<sup>185</sup> See, e.g., *The EU’s Bilateral Trade and Investment Agreements – Where Are We?*, EUROPEAN COMMISSION MEMO (Dec. 3, 2013), available at [http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc\\_150129.pdf](http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf) (stating that negotiations regarding an EU-Mercosur Association Agreement launched in 2000, were suspended in 2004 due to substantial differences, but were resumed in 2010; and are still ongoing as of the date of this writing).

<sup>186</sup> *Quienes Somos*, MERCOSUR, available at [http://www.mercosur.int/t\\_generic.jsp?contentid=3862&site=1&channel=secretaria](http://www.mercosur.int/t_generic.jsp?contentid=3862&site=1&channel=secretaria).

<sup>187</sup> *Id.*

<sup>188</sup> Joaquín Fernando Huerta, *De Una Inserción a Otra: Política Exterior de Chile, 1966-1991*, 24 ESTUDIOS INTERNACIONALES, UNIVERSIDAD DE CHILE 433, 450 (1991).

<sup>189</sup> Joanna Klonsky, Staphanie Hanson, & Brianna Lee, *Mercosur: South America’s Fractious Trade Bloc*, COUNCIL ON FOREIGN RELATIONS, (July 31, 2012), available at <http://www.cfr.org/trade/mercosur-south-americas-fractious-trade-bloc/p12762>.

Full membership in MERCOSUR could give Chile greater bargaining power in negotiations involving the appropriate levels of IP protections with countries in the global North.<sup>190</sup> MERCOSUR has approved protocols for harmonization of IP among its members in the areas of trademarks,<sup>191</sup> geographical indications,<sup>192</sup> and industrial designs.<sup>193</sup> However, full harmonization of IP norms—including forms of protection for plant IP—has not occurred within MERCOSUR.<sup>194</sup> This situation could provide Chile with the necessary flexibility to develop a *sui generis* form of plant variety protection, in accordance with article 27(3) of TRIPS.<sup>195</sup>

Unfortunately, the relationship between Chile and MERCOSUR is complicated.<sup>196</sup> The founding members of MERCOSUR invited Chile

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<sup>190</sup> See Jerry Harris, *Emerging Third World Powers: China, India, and Brazil*, 46 RACE CLASS 7, 24 (2005) (stating that “[t]he new South-South paradigm is designed to carve out a stronger position for Third World countries within the global system, with access to foreign direct investments, transnational capital, global production chains, cross-border mergers and acquisitions, and greater political recognition”).

<sup>191</sup> Protocol for Harmonization of Intellectual Property Norms in MERCOSUR, in Matters of Trademarks, Geographical Indications, and Denominations of Origin, MERCOSUR/CMC/DEC. No. 8/95, arts. 5–18, available at [http://www.mercosur.int/msweb/Normas/normas\\_web/Decisiones/ES/Dec\\_008\\_095\\_.PDF](http://www.mercosur.int/msweb/Normas/normas_web/Decisiones/ES/Dec_008_095_.PDF).

<sup>192</sup> *Id.* at arts. 19–20.

<sup>193</sup> Protocol for Harmonization of Norms in Matters of Industrial Designs, MERCOSUR/CMC/DEC. No. 16/98, available at [http://www.mercosur.int/msweb/Normas/normas\\_web/Decisiones/ES/Dec\\_016\\_098\\_Prot-Armonización\\_Normas\\_Mat-Diseños\\_Indust\\_Acta%202\\_98.PDF](http://www.mercosur.int/msweb/Normas/normas_web/Decisiones/ES/Dec_016_098_Prot-Armonización_Normas_Mat-Diseños_Indust_Acta%202_98.PDF).

<sup>194</sup> See Astrid Uzategui & Fernano Kinoshita, *Intellectual Property in the Framework of the MERCOSUR– European Union Agreement of 1995: Theoretical Observations for the Intercontinental Negotiations (1999-2002)*, 45 REVISTA SEQUENCIA 229 (2002).

<sup>195</sup> See Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT’L L. & POL’Y 769, 803 (1997) (noting that MERCOSUR requires member states to adhere to TRIPS).

<sup>196</sup> See Carolina Stefoni E. & Claudio Fuentes S., *Chile y MERCOSUR: Hasta Donde Queremos Integrarnos?*, GESTIÓN DE LAS TRANSFORMACIONES SOCIALES (MOST), Documentos de Debate No. 25, UNESCO SOCIAL & HUMAN SCIENCES, available at <http://www.unesco.org/most/fuentes.htm>.

to sign the Treaty of Asunción in 1991—the year that the organization was created.<sup>197</sup> Chile refused, arguing that the agreement would restrict freedom to act and opportunities to access other markets.<sup>198</sup> Subsequent negotiations over Chile's potential full membership in MERCOSUR were suspended as a result of the dialogues surrounding the U.S.–Chile FTA, beginning in 2002.<sup>199</sup> Thus, a renewed pursuit of full membership in MERCOSUR by Chile would clearly have political implications.<sup>200</sup> However, given the debate over the implementation of UPOV 91, perhaps a bold change in course surrounding development strategy would be viable. The new presidential administration under Michelle Bachelet has given signs that it is interested in regionalism, and has proposed the integration between MERCOSUR and the Pacific Alliance—another Latin American trade bloc whose members include Chile, Colombia, Peru, and Mexico.<sup>201</sup>

Alternatively, Chile could seek full membership in the Andean Community, or *Comunidad Andina* (CAN), a regional partnership between Bolivia, Colombia, Ecuador, and Peru.<sup>202</sup> Chile was in fact one of the founding nations of the CAN's predecessor bloc, the Andean Pact, but President Pinochet withdrew Chile from membership

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<sup>197</sup> *Id.*

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

<sup>199</sup> *Profile: Mercosur – Common Market of the South*, BBC NEWS, (Feb. 15, 2012), available at <http://news.bbc.co.uk/2/hi/americas/5195834.stm>.

<sup>200</sup> Klonsky et al., *supra* note 189 (noting that it may be difficult for Chile to reconcile the interests of the U.S. with those of MERCOSUR since other members of MERCOSUR have already encountered tensions from the organization when they attempted to engage in bilateral relations with the U.S., and stating that “signing a Free Trade Agreement (FTA) with the U.S. would violate MERCOSUR’s charter, which forbids bilateral agreements with nonmember countries”).

<sup>201</sup> *Chile Suggests an Integration Between Mercosur and the Pacific Alliance*, CLARIN.COM: MUNDO, Mar. 14, 2014, [http://www.clarin.com/mundo/Chile-integracion-Mercosur-Alianza-Pacifico\\_0\\_1101489913.html](http://www.clarin.com/mundo/Chile-integracion-Mercosur-Alianza-Pacifico_0_1101489913.html).

<sup>202</sup> *Who Are We?*, ANDEAN COMMUNITY, available at <http://www.comunidadandina.org/ingles/who.htm>.

in the Pact in 1976.<sup>203</sup> Santiago then rejoined the CAN as an associate member in 2006, under the leadership of President Bachelet, then in her first term.<sup>204</sup> Unlike MERCOSUR, the CAN has established a comprehensive, regionally harmonized framework for IP protections.<sup>205</sup> This framework contains four decisions: a decision pertaining generally to a common IP regime (Decision 486); access to genetic resources (Decision 391); copyright and neighboring rights (Decision 351), and the protection of the rights of breeders of new varieties of plants (Decision 345).<sup>206</sup> Decision 345 is most relevant to the debate over the implementation of UPOV 91 in Chile because it could provide an effective alternative to the framework for PVP protections outlined in UPOV 91.<sup>207</sup>

Decision 345 creates a *sui generis* form of plant variety protection—contained in a breeders’ certificate—recognizing the rights of breeders who create varieties that are new, uniform, distinct, and stable.<sup>208</sup> The scope of the right granted by the CAN’s breeders’ certificate is similar to that outlined in UPOV 78, conferring the ability to prevent third parties from producing, reproducing, multiplying, propagating, offering for sale or selling, and importing or exporting the protected variety.<sup>209</sup> Furthermore, the PVP contained in the breeders’

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<sup>203</sup> Andres Casas Casas & Maria Elvira Correa, *What is Wrong with the Andean Community?*, 12 PAP. POLIT. BOGOTA (COLOMBIA) 591, 595 (2007).

<sup>204</sup> *Id.* at 598.

<sup>205</sup> See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO/GRTKF/IC/1/11 (May 1, 2001).

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

<sup>207</sup> See CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 88 (2008) (stating that “[t]he Andean community’s regional Decision 345, for instance, provided a *sui generis* approach [to PVPs] that simultaneously met UPOV 78 requirements”).

<sup>208</sup> *Decision 345, Common Provisions on the Protection of the Rights of Breeders of New Plant Varieties*, ANDEAN COMMUNITY DECISIONS, ch. III, art. 4, available at <http://www.comunidadandina.org/ingles/normativa/D345e.htm> [hereinafter *Decision 345*].

<sup>209</sup> *Id.* at ch. V., art. 24.

certificate contains exceptions for third parties who use the protected variety: (1) in a private circle, for non-commercial purposes; (2) for experimental purposes; and (3) for the breeding and exploitation of a new variety, other than in the case of essentially derived varieties.<sup>210</sup> Finally, the breeders' right is not infringed by "[a]nyone who stores and sows for his own use, or sells as a raw material or food, the product of his cultivation of the protected variety."<sup>211</sup>

The breeders' certificate appears to strike a reasonable balance between a level of protection that would promote agricultural innovation, while also protecting the activities of smallholder farmers.<sup>212</sup> This *sui generis* form of PVP both satisfies TRIPS obligations under Article 27 and potentially assuages the concerns expressed by many Chileans over the impact that the implementation of UPOV 91 would have on the most vulnerable members of Chile's agricultural production chain.<sup>213</sup> Indeed, the CAN breeders' certificate is quite similar to the Register of Protected Varieties, the form of PVP currently used in Chile.<sup>214</sup> By becoming a full member of the CAN, Chile could participate in a regionally harmonized system of IP protections that might inspire confidence in Northern trading partners, even in the face of technical non-compliance with FTA obligations.<sup>215</sup>

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<sup>210</sup> *Id.* at ch. V., art. 25.

<sup>211</sup> *Id.* at ch. V., art. 26.

<sup>212</sup> Biswajit Dhar, *Sui Generis Systems for Plant Variety Protection: Options Under TRIPS*, QUAKER UNITED NATIONS OFFICE DISCUSSION PAPER 2 (2002), available at <http://homepages.3-c.coop/tansey/pdfs/sg-col1.pdf> (suggesting that "the developing world must evolve *sui generis* legislation which takes a balanced approach between farmers, formal plant breeders and giving rights to traditional communities on their genetic resources"). *Decision 345*, *supra* note 208, at ch. III, art. 4; ch. V, arts. 24–26 (appearing to strike this balance by conferring exclusive rights on breeders to prevent third parties from producing, reproducing, multiplying, propagating, offering for sale or selling, and importing or exporting the protected variety (ch. III, art. 4), while also containing exceptions for non-commercial use by smallholder farmers (ch. V, arts. 24–26)).

<sup>213</sup> *See, e.g., Project Regulating Plant Breeding*, *supra* note 80.

<sup>214</sup> *See Plant Varieties: How to Register in Chile*, INAPI: MINISTERIO DE ECONOMIA, FOMENTO Y TURISMO, available at <http://www.inapi.cl/portal/orientacion/602/w3-article-1831.html>.

<sup>215</sup> *Cf. Harris*, *supra* note 190.

This potential solution to the political impasse in Chile would advocate for leaving negotiations over UPOV 91 on the table, while initiating talks about full membership in the CAN.

4. *Implement UPOV 91, but also ratify other treaties that recognize protections for plant genetic resources*

An additional option would be for Chile to implement the UPOV 91 framework for IPRs in new plant varieties, while also seeking to become a party to other international agreements whose purpose is to afford protections for plant genetic resources. Chile has been a party to the Convention on Biological Diversity (CBD) since 1994.<sup>216</sup> The purpose of the CBD is manifold, but its essential mission includes “the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.”<sup>217</sup>

The objectives of the CBD are laudable from the perspective of conservation and equitable benefit sharing, and Chile has taken important steps to comply with its CBD obligations, through, for example, its National Biodiversity Strategy.<sup>218</sup> However, it has been noted that the Chilean definition of “genetic resource”—which tracks the definition articulated in the CBD—is conceptualized such that each species’ genetic material is considered to be that which is essential for the *preservation* of that species.<sup>219</sup> In contrast, varieties of plants developed by farmers diverge from the genetic profiles of their parents, and, as such, they are not protected under the current definition of “genetic resource.”<sup>220</sup> This is ironic, because the lack of genetic uniformity of farmer-developed varieties means that they are

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<sup>216</sup> *Chile – Country Profile*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/countries/default.shtml?country=cl>.

<sup>217</sup> *History of the Convention*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/history/>.

<sup>218</sup> *National Biodiversity Strategy of the Republic of Chile*, COMISION NACIONAL DE MEDIO AMBIENTE, (Dec. 2003), <http://www.cbd.int/doc/world/cl/cl-nbsap-01-en.pdf>.

<sup>219</sup> Miranda & Caceres, *supra* note 154, at 232.

<sup>220</sup> *Id.*

better able to respond to adverse environmental conditions, thereby enriching the country's biological diversity.<sup>221</sup>

Given the ecological importance of farmer-developed varieties—as well as their significance in the global food chain<sup>222</sup>—Chile should take affirmative steps to recognize, through adherence to international protocols, protections for seeds. This could be done through a variety of specific actions. First, Chile could ratify the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (“Nagoya Protocol”).<sup>223</sup> The Nagoya Protocol is a supplementary agreement to the CBD, providing a transparent legal framework for the effective implementation of fair and equitable sharing of benefits arising out of the utilization of genetic resources.<sup>224</sup>

Some critics have expressed concern that the Nagoya Protocol could stifle academic research through the limitations on sharing of genetic resources.<sup>225</sup> However, such worry is outweighed by the fact that the Nagoya framework of benefit sharing would begin to disrupt the current trend of capital for IP flowing primarily to innovators in the industrialized world, and not to the agriculturalists who provide the source material for such innovation.<sup>226</sup> Thus, the Nagoya Protocol and

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<sup>221</sup> *Id.*

<sup>222</sup> See, e.g., Meghan Marrinan Feliciano, *We Are What We Eat: Securing Our Food Supply By Amending Intellectual Property Rights for Plant Genetic Resources*, 8 U. ST. THOMAS L. J. 546, 548 (2011) (noting that “‘a devastating time bomb is ticking away in the fields of farmers all over the world.’ This time bomb is the rapid loss of agricultural genetic diversity”) (internal citations omitted).

<sup>223</sup> *The Nagoya Protocol on Access and Benefit-Sharing*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/abs/>.

<sup>224</sup> *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/abs/about/>.

<sup>225</sup> Jennifer Long, *Global Food Security and Intellectual Property Rights*, 21 MICH. ST. INT'L L. REV. 115, 119–20 (2013).

<sup>226</sup> Valerie Boisvert & Franck-Dominique Viven, *Towards a Political Economy Approach to the Convention on Biological Diversity*, 36 CAMBRIDGE J. ECON. 1163, 1167 (2012) (internal citations omitted) (showing that the approach under the CBD is “based on the belief that once the property rights of various stakeholders involved in biodiversity conservation or use are recognized, they can negotiate directly, in a decentralized way, and fix in bilateral agreements... [the] conditions of access to

similar treaties could promote open innovation in plant genetic resources for food and agriculture, which could in turn begin to heal the “hurtful dichotomization of breeders and farmers” created by the UPOV framework.<sup>227</sup> The Nagoya Protocol has yet to enter into force; currently, 29 states have ratified the treaty, with 50 ratifications needed for the protocol to come into effect.<sup>228</sup> Nevertheless, many states party to the Nagoya Protocol have already begun to implement its provisions through domestic legislation.<sup>229</sup>

A second action that Chile could take to begin to recognize more equitable protections for agricultural genetic resources would be to ratify the International Treaty on Plant Genetic Resources for Food and Agriculture (“Plant Treaty”).<sup>230</sup> The objectives of the Plant Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.<sup>231</sup>

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genetic resources and of sharing of the benefits arising from their utilization,” and that such efforts should be “pursued by a partnership of developing and developed nations, in such fashion that the financial benefits flow in fair measure to all participants”).

<sup>227</sup> Chidi Oguamanam, *Open Innovation in Plant Genetic Resources for Food and Agriculture*, 13 CHI.-KENT J. INTELL. PROP. 11, 22 (2013).

<sup>228</sup> *Status of Signature, and Ratification, Acceptance, Approval or Accession*, NAGOYA PROTOCOL, CONVENTION ON BIOLOGICAL DIVERSITY, available at <http://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>.

<sup>229</sup> *Progress Towards Ratification*, NAGOYA PROTOCOL, available at <http://www.cbd.int/abs/progress/default.shtml> (listing countries and regions that have either passed or are considering legislation to implement the Nagoya Protocol: Colombia, Denmark, the EU, French Polynesia, Nicaragua, and Switzerland).

<sup>230</sup> *The International Treaty on Plant Genetic Resources for Food and Agriculture*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, available at <http://planttreaty.org>.

<sup>231</sup> *Overview of The International Treaty on Plant Genetic Resources for Food and Agriculture*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, available at <http://planttreaty.org/content/overview>.

The Plant Treaty entered into force in June 2004.<sup>232</sup> Presently, Chile has signed the Plant Treaty, but it remains to be ratified.<sup>233</sup> Thus, Chile is still not a party to the agreement.<sup>234</sup>

Implementation of the Plant Treaty's framework in Chile could provide an equitable counterbalance to the UPOV 91 structure of IPRs in new varieties of plants. The Plant Treaty endeavors to establish concrete and detailed mechanisms to both "facilitate access to plant genetic resources for food and agriculture, and to share the benefits arising from the utilization of these resources"—such as through research and development of new crop varieties—on a "complementary and mutually reinforcing basis."<sup>235</sup> Thus, a national legal system that adheres to both UPOV 91 and the Plant Treaty could promote innovative activity by ensuring that breeders have adequate incentives for investment in research and development, while also recognizing communitarian protections and the need for benefits to accrue to farmers who are in many cases the stewards of the source material for the development of new plant varieties. Is such a balance the ideal solution for Chile? In order to find out, the current stalemate surrounding the implementation of a UPOV 91-based framework for PVPs must be overcome.

## VI. Extra-National Impact

Any action that Chile decides to undertake surrounding its national system of IP protections in new varieties of plants will likely have substantial impact within the country.<sup>236</sup> Furthermore, the effects are

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<sup>232</sup> *History: Evolution of the Treaty*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, available at <http://www.planttreaty.org/content/history-evolution-treaty>.

<sup>233</sup> *The International Treaty on Plant Genetic Resources for Food and Agriculture: List of Members*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, available at [http://planttreaty.org/list\\_of\\_countries](http://planttreaty.org/list_of_countries).

<sup>234</sup> *Id.*

<sup>235</sup> Oguamanam, *supra* note 227, at 112 (internal quotations omitted).

<sup>236</sup> Julio A. Berdegúe & Ricardo Fuentealba, *Latin America: The State of Smallholders in Agriculture*, CONFERENCE ON NEW DIRECTIONS FOR SMALLHOLDER AGRICULTURE 16, (Jan. 24–25, 2011), available at <http://193.194.138.127/events/agriculture/doc/papers/berdegue.pdf> (noting that

not likely to be confined to the southern corridor of the Andes.<sup>237</sup> Instead, ramifications would likely be felt throughout the Latin American region, and could possibly transcend the boundaries of the continent to touch other nations in similar stages of development.<sup>238</sup>

Initially, it should be recognized that no country in South America, aside from Peru, has ratified UPOV 91.<sup>239</sup> However, the debate over the relative strength of systems for IPR protections has touched many countries in the region, as will be shown later. For instance, in

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imposing a farmers' restriction on using protected varieties for non-commercial purposes would impose a noticeable impact on traditional farming practices in Chile).

<sup>237</sup> UPOV Membership, *supra* note 12 (reflecting that at the time of writing Peru was the only South American country that has adhered to UPOV 91). *See also Productos Orgánicos: Exportación e Importación 2012-2013*, OFICINA DE ESTUDIOS Y POLÍTICAS AGRARIAS (Sept. 2013), available at [http://www.prochile.gob.cl/int/america-central-y-el-caribe/wp-content/blogs.dir/37/files\\_mf/1392138811ProductosorganicoschilenosExpeImp20122013.pdf](http://www.prochile.gob.cl/int/america-central-y-el-caribe/wp-content/blogs.dir/37/files_mf/1392138811ProductosorganicoschilenosExpeImp20122013.pdf) (reflecting the importance of Chile's agricultural export sector to the national economy, and demonstrating the regional importance of these exports, which would likely be affected by the adoption of a UPOV 91-based PVP framework).

<sup>238</sup> *See African Intellectual Property Organization (OAPI) Becomes Second Intergovernmental Organization to Join UPOV*, UPOV PRESS RELEASE 97, (June 10, 2014), available at <http://www.upov.int/export/sites/upov/news/en/pressroom/pdf/pr97.pdf> (noting that OAPI is the most recent member of UPOV). *See also UPOV Membership, supra* note 12; *UPOV Council Holds its Thirty-First Extraordinary Session*, UPOV PRESS RELEASE 96, (Apr. 11, 2014), available at <http://www.upov.int/export/sites/upov/news/en/pressroom/pdf/pr96.pdf> (stating that the UPOV Council "took a positive decision on the conformity of the [ARIPO] Draft Protocol for the Protection of New Varieties of Plants with the provisions of [UPOV 91]"); *UPOV Council Holds its Forty-Eighth Ordinary Session*, UPOV PRESS RELEASE 98, (Oct. 16, 2014), available at <http://www.upov.int/export/sites/upov/news/en/pressroom/pdf/pr98.pdf> (noting that Tanzania's new national PVP law is UPOV 91-compliant); and Bosnia and Herzegovina, and Ghana; *UPOV Council Holds its Forty-Seventh Ordinary Session*, UPOV PRESS RELEASE 95, (Oct. 24, 2013), available at <http://www.upov.int/export/sites/upov/news/en/pressroom/pdf/pr95.pdf> (discussing the fact that new legislation passed in Bosnia and Herzegovina and in Ghana is compliant with UPOV 91).

<sup>239</sup> *See UPOV Membership, supra* note 12.

Ecuador, negotiations surrounding a potential FTA with the EU have been underway since 2007.<sup>240</sup> However, the parties have been unable to reach an agreement to date, due at least in part to Ecuador's refusal to submit to the EU's IP mandates.<sup>241</sup> In January 2014, Ecuadorian President Rafael Correa suspended negotiations, based largely on a disagreement over intellectual property rights.<sup>242</sup> Yet negotiations restarted in March 2014, with Ecuador apparently hopeful that the EU would not cross the "red lines" it had traced around certain IP concerns.<sup>243</sup> The parties could reach some kind of a commercial agreement, without actually forming a FTA.<sup>244</sup> Nevertheless, some commentators have argued that Ecuador should not sign a trade treaty with the EU, no matter what form it takes.<sup>245</sup> For instance, some argue that Europe grants "a special importance of its IP to have a dominant position in technology and knowledge" and that this perspective is "absolutely incompatible with the current social knowledge in the Ecuador," which aspires to democratize knowledge.<sup>246</sup>

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<sup>240</sup> See Michel Levi Coral, *Ecuador-Unión Europea: Lógicas de Una Negociación Inconclusa*, FRIEDRICH, EBERT, STIFTUNG FOUNDATION, (Sept. 2013), available at <http://library.fes.de/pdf-files/bueros/quito/10376.pdf>.

<sup>241</sup> Rafael Correa: *Ecuador no Firmará un Tratado de Libre Comercio con la Unión Europea*, LIBRE RED, Jan. 22, 2014, <http://www.librered.net/?p=31786>.

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

<sup>243</sup> *Ecuador y la UE Retoman Negociación con Expectativas en Propiedad Intelectual, Contratación Pública y Aranceles*, AGENCIA PUBLICA DE NOTICIAS DEL ECUADOR Y SURAMÉRICA, (Mar. 24, 2014), available at <http://www.andes.info.ec/es/noticias/ecuador-ue-retoman-negociacion-expectativas-propiedad-intelectual-contratacion-publica>.

<sup>244</sup> *Ecuador Va Rumbo a Un Acuerdo Comercial con la UE, No Un TLC*, EL TELÉGRAFO, (Apr. 24, 2013), available at <http://www.telegrafo.com.ec/economia/item/ecuador-va-rumbo-a-un-acuerdo-comercial-con-la-ue-no-un-tlc.html>.

<sup>245</sup> See, e.g., Alfredo Serrano Mancilla, *Por Que Ecuador No Debe Firmar Un Acuerdo Comercial Con la UE?*, TELESUR, (Jan. 20, 2014), available at <http://www.telesurtv.net/articulos/2014/01/20/por-que-ecuador-no-debe-firmar-un-acuerdo-comercial-con-la-ue-5311.html>.

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

Meanwhile, authorities in Ecuador have revealed that the country’s current IP law is going to be redesigned in the near future.<sup>247</sup> Indeed, the Secretary of Superior Education, Science, and Technology recently announced that there would soon be a “complete restructuring” of the IP Law and the Ecuadorian Institute of Intellectual Property.<sup>248</sup> Essentially, the concern is that Ecuador’s current policy environment has had

a ‘hyperprivatist’ perspective of knowledge, when what we need is the diffusion of knowledge, and the technological disaggregation that would permit the national industry to develop products that, with little effort, other countries are already doing.<sup>249</sup>

Given that the state of the law is currently in flux, it is probable that Ecuadorian officials are watching the changes to IP codes in neighboring countries with close scrutiny.

One could speculate that Ecuador, a developing country on the cusp of changing its national IP laws, might look to a neighboring country such as Chile, if that neighbor decided to update its own IP framework. However, the decisions that Chile makes regarding UPOV 91 are also likely to be scrutinized throughout the Latin American region. For instance, Colombia had passed its own legislation that would have implemented UPOV 91,<sup>250</sup> pursuant to a FTA it had signed with the United States in 2006.<sup>251</sup> However, the

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<sup>247</sup> Rene Ramírez, *La Ley de Propiedad Intelectual Se Va a Derogar*, MONITOREO DE MEDIOS DE COMUNICACIÓN, SECRETARIA DE EDUCACIÓN SUPERIOR, CIENCIA Y TECNOLOGÍA, (Dec. 18, 2013), *available at* <http://intranet.senescyt.gob.ec/phocadownloadpap/Monitoreos/informe%20544%20mircoles%2018%20de%20diciembre%202013.pdf>.

<sup>248</sup> *Id.*

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

<sup>250</sup> *Ley No. 1518*, EL CONGRESO DE LA REPUBLICA DE COLOMBIA, (Apr. 13, 2012), *available at* <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/ley151813042012.pdf>.

<sup>251</sup> *See Colombia FTA Final Text, Chapter 16, Art. 16.1(3)(c)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>.

Constitutional Court of Colombia struck down the law as unconstitutional, on the basis that the indigenous communities and tribes had the fundamental right to be previously consulted about legislative or administrative measures that would affect them directly, which was breached in the passage of the UPOV 91 legislation.<sup>252</sup> Such consultation should be “real and effective,” and should come before any adherence to an international instrument on the part of the Colombian President or Congress.<sup>253</sup> Furthermore, the Court noted that “the imposition of restrictions similar to those of a patent over new plant varieties, like that which UPOV 91 would effect, could limit the natural development of biodiversity, which is the product of the ethnic, cultural, and ecosystemic conditions of these indigenous communities.”<sup>254</sup> It is still unclear how Colombia will reconcile its treaty obligations with the United States and the decision of the Constitutional Court.<sup>255</sup> It is likely that Colombia will be observing as the situation continues to unfold in Chile.

Meanwhile, the debate over the implementation of UPOV 91 in countries beyond Latin America will likely continue to surge.<sup>256</sup> Chile's actions could prove informative, both for other emerging economies, as well as for relatively more advanced, wealthy economies.<sup>257</sup> For instance, the ongoing negotiations between the EU and Thailand surrounding a prospective FTA have provoked massive

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<sup>252</sup> *Comunicado No. 50*, CORTE CONSTITUCIONAL DE LA REPÚBLICA DE COLOMBIA, (Dec. 5–6, 2012), available at <http://www.corteconstitucional.gov.co/comunicados/No.%2050%20comunicado%2005%20y%2006%20de%20diciembre%20de%202012.php>.

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

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

<sup>255</sup> Andres Rincon, *Colombia's PBR System Faces Unsolved Problems*, CIOPORA CHRONICLE, (Apr. 2013), available at <http://olartemoure.com/om/wp-content/uploads/2013/07/CIOPORA-magazine.pdf>.

<sup>256</sup> See UPOV PRESS RELEASES, *supra* note 238.

<sup>257</sup> See, e.g., *Debate over Bill C-18, the Agricultural Growth Act: An Act to Amend Certain Acts Relating to Agriculture and Agri-Food*, OPENPARLIAMENT.CA, June 17, 2014, <http://openparliament.ca/bills/41-2/C-18/> (showing that there has been much recent debate in Canada surrounding whether that country should implement a UPOV 91-compliant framework for PVPs).

protests over the EU’s demand that Thailand ratify UPOV 91.<sup>258</sup> Even more recently, demonstrations were held in Ghana against the introduction in the national legislature of a Plant Breeders Bill modeled on UPOV 91.<sup>259</sup> In parallel, many Canadians continue to express concerns over the potential implementation of UPOV 91 in their country.<sup>260</sup> Clearly, Chile’s controversy will not remain confined to the sidewalks of Santiago.

## VII. Conclusion

Although the saga surrounding the prospective implementation of a relatively obscure treaty in a small country “at the end of the world” may seem inconsequential, the implications of this debate are enormous, as demonstrated above. The controversy surrounding UPOV 91 in Chile is but one manifestation of a global trend towards ever-stronger IP protections, a trend which shows no sign of abating.<sup>261</sup> While high standards for IP protections may be important to incentivize important research and development activities, there are many reasons to question whether strong IPRs are universally good for development, especially when development is conceived more broadly than in solely economic terms.<sup>262</sup> Furthermore, many global justice issues are at stake, including food security, the conservation of

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<sup>258</sup> Petchanet Pratuangkrai & Pongphon Sarnsamak, *Activists Warn of EU FTA Dangers*, THE NATION, (Sept. 19, 2013), available at <http://www.nationmultimedia.com/business/Activists-warn-of-EU-FTA-dangers-30215135.html>.

<sup>259</sup> Lawrence Lamptey, *Huge Row Over GMOs As Thousands Protest In Accra*, MODERN GHANA, Jan. 30, 2014, <http://www.modernghana.com/news/519054/1/huge-row-over-gmos-as-thousands-protest-in-accra.html>.

<sup>260</sup> Marc Montgomery, *Canadian Farmers Campaign Against Increasing Seed-Patent Control*, RADIO CANADA INT’L, (Apr. 28, 2014), <http://www.rcinet.ca/en/2014/04/28/canadian-farmers-campaign-against-increasing-seed-patent-control/>.

<sup>261</sup> See *Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter*, WIKILEAKS, (Nov. 13, 2013), <http://wikileaks.org/tpp/> (suggesting that the “global North” will continue to attempt to “ratchet up” IPRs for the foreseeable future).

<sup>262</sup> See Chon, *supra* note 119.

biodiversity, and the rights of poor farmers.<sup>263</sup> The task facing Chile is formidable, but at minimum, a conversation about these issues is possible. It is my hope that the humble solutions proposed in this Article—in addition to other creative initiatives—might be considered as talking points in this critical dialogue.

Table 1: Comparison Between UPOV 78 & UPOV 91<sup>264</sup>

Topic	UPOV 78	UPOV 91
<b>Conditions required for protection (i.e. a variety needs to be):</b>	Distinct Homogenous (Uniform) Stable New	Distinct Homogenous (Uniform) Stable New (eliminates “common knowledge” language of UPOV 78)
<b>Scope of Protection Breeder’s prior authorization required for:</b>	(1) production for purposes of commercial marketing; (2) offering for sale; and (3) marketing of the reproductive or vegetative propagating material of the variety	(1) production or reproduction; (2) conditioning for the purpose of propagation; (3) offering for sale; (4) selling or other marketing; (5) exporting; (6) importing; and (7) stocking of all propagating material of the protected variety

<sup>263</sup> See generally CHARLES LAWSON & JAY SANDERSON (EDS.), THE INTELLECTUAL PROPERTY AND FOOD PROJECT: FROM REWARDING INNOVATION AND CREATION TO FEEDING THE WORLD (2013).

<sup>264</sup> See Act of 1991 International Convention for the Protection of New Varieties of Plants, available at <http://www.upov.int/en/publications/conventions/1991/act1991.htm>; Act of 1978 International Convention for the Protection of New Varieties of Plants, available at <http://www.upov.int/export/sites/upov/upovlex/en/conventions/1978/pdf/act1978.pdf>

<b>Genuses and species that are subject to protection</b>	Initially (upon becoming a Member of UPOV), 5 species, and 24 after the passage of 8 years following accession	Progressively all genuses and species (over a period of 5-10 years after accession)
<b>Restriction on the production of seeds for personal use (i.e., farmer's privilege)</b>	No such restriction exists	Yes (although this privilege may be restored by domestic legislation under Article 15(2))
<b>Breeder's right over acts in respect to harvested material</b>	No such right exists	Acts in respect to harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety require the authorization of the breeder
<b>Essentially Derived Varieties</b>	Not protected	Afforded the same protections as the protected variety itself
<b>Period of minimum protection</b>	18 years for trees and vines; 15 years for other varieties (measured from the date of filing)	25 years for trees and vines; 20 years for other varieties (measured from the date of filing)
<b>Prohibition on dual protection (i.e., UPOV protection + patent under national law)</b>	Yes, for varieties of the same genus and species.	No

**The Beijing Treaty on  
Audiovisual Performances –  
The Return of the North?**

Guy Pessach\*

***Abstract***

*This article analyzes the Beijing Treaty on Audiovisual Performances with the purpose of unveiling the contradictions between the treaty's proclaimed distributive goals and its de facto proprietary corporate lean. I argue that it is doubtful whether the treaty is likely to provide audiovisual performers with cross border remuneration and increase audiovisual performers' share in the revenues and financial proceeds of audiovisual works. Under the treaty's mixture of a broad national treatment requirement, a limited reciprocity requirement, and an indefinite transfer of rights regime, regressive scenarios seem no less probable. The more likely scenario is that it is audiovisual producers from specific countries (e.g., the U.S.) that would benefit from a second layer of cross-border overlapping rights. These would come in addition to their copyrights in audiovisual works, thus undermining the revenues of domestic audiovisual performers.*

*The contradictions between the treaty's proclaimed distributive goals and its de facto corporate lean do not derive solely from the treaty's explicit legal ordering. Rather, these contradictions derive also from the interface and correspondence between the Beijing Treaty and the particulars of domestic legal regimes, including norms that are located beyond formal intellectual property ("IP") law. Gaps and arbitrages in the legal formulation of protecting audiovisual performers' rights—such as the acknowledgment of exclusive, yet transferable, rights versus protection through a right to equitable remuneration—may impact effective reciprocity in the*

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*capacities of audiovisual performers from different countries to enforce their rights elsewhere.*

*It is for this reason that international IP lawmaking should assess the forecasted impact of an international treaty through the lens of its future implementation under certain particular domestic conditions, which may go beyond the treaty's formal imperatives. As the Beijing Treaty demonstrates, without such an assessment, the practical outcomes of a treaty may contradict its proclaimed goals.*

## I. Introduction

On June 24, 2012, at the Beijing Diplomatic Conference of the World Intellectual Property Organization (WIPO), WIPO adopted the Beijing Treaty on Audiovisual Performances.<sup>1</sup> Even though initiatives to enact an international treaty for the protection of audiovisual performers began in 1996—during the proprietary age of WIPO<sup>2</sup>—the WIPO Audiovisual Performances Treaty was the first international treaty to be finalized and enacted after the General Assembly of WIPO adopted the Development Agenda in September 2007.<sup>3</sup> The WIPO Audiovisual Performances Treaty provides a unique opportunity to examine whether and how international copyright law follows and corresponds with the Development Agenda. The Development Agenda’s purported transformation was from a relatively constricted focus on the proprietary interests of rights’ owners to a broader holistic multidimensional approach, which considers counter-interests, such as access to creative resources, users’ rights, and the unique dimension of securing originating creators’ rights against counter economic stakeholders.<sup>4</sup> The purpose of this article is to analyze the WIPO Audiovisual Performances Treaty and the purported departure of international copyright law from an IP-centric proprietary corporate approach to a broader public-centric approach. I argue that upon closer inspection, the Audiovisual Performances Treaty signifies a partial return to the traditional proprietary and corporate-centric

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<sup>1</sup> See World Intellectual Property Organization [WIPO], *Beijing Treaty on Audiovisual Performances*, WIPO Doc. AVP/DC/20 (June 24, 2012) [hereinafter *WIPO Audiovisual Performances Treaty* or *The Beijing Treaty*].

<sup>2</sup> See generally Neil Weinstock Netanel, *The WIPO Development Agenda and Its Development Policy Context*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* (Neil Weinstock Netanel ed., 2009) (providing a survey of the Development Agenda and its distinction from WIPO’s proprietary corporate-centric focus until 1996).

<sup>3</sup> For WIPO’s Development Agenda, see WIPO, *Assemblies of the Member States of WIPO Forty-Third series of Meetings Geneva, September 24 to October 3, 2007*, Doc. A/43/16 Annex (Nov. 12, 2007) (showing the 45 proposals adopted as the Development Agenda).

<sup>4</sup> See generally Netanel, *supra* note 4 (surveying the purposes and goals of the Development Agenda).

approach of international copyright law. The direct impacts of the Audiovisual Performances Treaty may be relatively narrow and limited. Nevertheless, uncovering the strategies and potential outcomes of the Audiovisual Performances Treaty may assist in assessing the potential impact of future developments in international copyright law.

Part II of the article discusses the underlying goals of the WIPO Audiovisual Performances Treaty and the treaty's legal framework. It then critically examines whether the treaty is likely to accomplish the goals of enforcing audiovisual performers' rights and of providing audiovisual performers with cross-border remuneration. I argue that under the audiovisual performances treaty, U.S. film producers—as opposed to audiovisual performers—are likely to benefit from certain overlapping remuneration in European markets and elsewhere. In contrast, this might not be the state of affairs regarding the ability of foreign audiovisual performers to enforce their rights in the U.S.

Additionally, the treaty's treatment of audiovisual performers' moral rights and obligations concerning technological protection measures also signifies the proprietary and corporate lean of the treaty.<sup>5</sup> Contracting parties' obligations as to audiovisual performers' moral rights are in the form of soft, unbinding law.<sup>6</sup> With regard to prohibitions against the circumvention of technological protection measures, the Beijing Treaty imposes general prohibitions that go far beyond the unique particular aspect of protecting audiovisual performers.<sup>7</sup> These prohibitions protect the interests of audiovisual producers through the appearance of protecting audiovisual performers.<sup>8</sup> For these reasons, the Beijing Treaty may signify the partial return of the North under the guise of protecting audiovisual performers' rights.

Part III concludes by focusing on the manner in which countries may bypass their reciprocal international obligations under the Beijing Treaty through domestic legal regimes that shift copyright-like

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<sup>5</sup> See *infra* Part II(D).

<sup>6</sup> *Id.*

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

<sup>8</sup> *Id.*

remuneration to external mechanisms, such as collective, labor-based agreements with certain creative sectors (e.g., audiovisual performers). Similarly, gaps in the legal forms of protecting audiovisual performers' rights—such as the acknowledgment of exclusive yet transferable rights, versus protection through a right to equitable remuneration—may also impact effective reciprocity for audiovisual performers, from different countries, to enforce their rights elsewhere.

Before commencing, one caveat should be stated. On June 27, 2013, WIPO successfully concluded the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled.<sup>9</sup> The Marrakesh Treaty signifies a different direction in international copyright lawmaking by following the contours of the Development Agenda.<sup>10</sup> In this sense, the Beijing Treaty, on the one hand, and the Marrakesh Treaty, on the other hand, represent two different—and to some degree, contradicting—directions of international copyright law. The comparison and discussion of these conflicting directions are beyond the scope of this article and are left for a future article.

## II. The Beijing Treaty on Audiovisual Performances— Hidden Objects

### (A) Background

Audiovisual works have long been protected under international copyright law.<sup>11</sup> The general legal structure of protecting audiovisual works is such that copyright is granted to the originating authors of the work.<sup>12</sup> There are different structures under domestic law which

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<sup>9</sup> See generally WIPO, *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, VIP/DC/8 Rev. (June 27, 2013) [hereinafter *The Marrakesh Treaty*].

<sup>10</sup> See *The Beijing Treaty*, *supra* note 1, Preamble (declaring and stating that the purpose of the Treaty is based on various premises, including recalling the importance of the Development Agenda recommendations, among others).

<sup>11</sup> See 1 SAM RICKETSON & JANE GINSBURG, *INTERNATIONAL COPYRIGHT LAW AND NEIGHBOURING RIGHTS* 426–36 (2d ed. 2006).

<sup>12</sup> See F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 *UCLA L. REV.* 225, 267–97 (2001) (surveying the U.S. legal regime in this regard); PASCAL KAMINA, *FILM COPYRIGHT IN*

acknowledge a presumption of the transfer of rights from the originating author(s) to the producer of the audiovisual work.<sup>13</sup> In some countries, mostly in Europe, there is a concurrent requirement of equitable remuneration to the originating authors.<sup>14</sup> In other countries, like the U.S., under doctrines such as the work made for hire doctrine, the producer may even be acknowledged as the originating author (and copyright owner) of the audiovisual work.<sup>15</sup>

With this background, it seems that an additional international treaty, which protects the rights of audiovisual performers (as opposed to the rights of authors of the audiovisual work), may rest upon two complementary goals. The first goal is that of establishing an international regime of reciprocal cross-border protection enabling audiovisual performers, *as a unique and distinct category of beneficiaries/right holders*, to enforce their rights and obtain remuneration outside of their originating country of protection. The second, more constitutive goal is the goal of establishing an international regime; obliging countries to acknowledge audiovisual performers' rights, and ensuring that the unique category of audiovisual performers obtains a just and fair remuneration for their creative contribution. Both goals are associated with a distributive objective, which is aimed at ensuring that audiovisual performers, as a unique and distinct category of creative contributors, obtain a fair share of an audiovisual work's economic proceeds. Otherwise phrased, an international treaty for audiovisual performers is not intended to provide audiovisual producers with a second layer of overlapping rights that would surmount producers' copyrights in an audiovisual work; double-dipping is not the purpose of an audiovisual performers' treaty. On the contrary, presuming that the demand curve of users/consumers (their willingness to pay for audiovisual works) is

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THE EUROPEAN UNION 72 130 (2002) (surveying the legal regime in European countries and the United Kingdom (UK)).

<sup>13</sup> See generally MARJUT SALOKANNEL, OWNERSHIP OF RIGHTS IN AUDIOVISUAL PRODUCTIONS: A COMPARATIVE STUDY (1997) (offering a comparative survey of domestic regimes and of international treaties).

<sup>14</sup> See KAMINA, *supra* note 12, at 195–207 (2002).

<sup>15</sup> See 17 U.S.C. § 101 (1994 & Supp. V 1999)). See generally Dougherty, *supra* note 12 at 225 (discussing and surveying the doctrine in the context of audiovisual work).

not implicated by the number of contributors/beneficiaries of an audiovisual work, at least to some degree, acknowledging audiovisual performers' rights is expected to decrease the producers' share in favor of redistribution toward audiovisual performers.

**(B) The WIPO Audiovisual Performances Treaty—Hidden Objects**

On its surface, the WIPO Audiovisual Performances Treaty seems to follow these underlying goals. Articles 6 through 11 of the treaty acknowledge audiovisual performers' bundle of economic rights, including the rights of reproduction, distribution, rental, making available to the public, broadcasting, and communication to the public.<sup>16</sup> Article 4 of the treaty acknowledges a general national treatment principle with regard to performers' exclusive rights, with two partial exceptions.<sup>17</sup> The first exception, found in Article 11(2), enables a contracting party to establish a right to equitable remuneration for direct or indirect use of fixed performances (in audiovisual works) and for broadcasting and communication to the public (instead of acknowledging an exclusive proprietary right in this regard).<sup>18</sup> The second exception, found in Article 11(3), enables contracting parties to entirely limit the application of the broadcasting and communication rights to the public.<sup>19</sup> With respect to the rights acknowledged in Article 11 (and only with regard to these rights), Article 4 authorizes contracting countries to limit their national treatment obligation to the rights that its own nationals enjoy in another contracting country.<sup>20</sup>

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<sup>16</sup> See WIPO, *supra* note 1, at arts. 6–11.

<sup>17</sup> See The Beijing Treaty, *supra* note 1, at art. 4 (stating that “[e]ach [c]ontracting [p]arty shall accord to nationals of other [c]ontracting [p]arties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty”).

<sup>18</sup> See *id.* at art. 11(2).

<sup>19</sup> See *id.* at art. 11(3).

<sup>20</sup> See *id.* at art. 4.

This general framework seemingly follows the underlying goals of acknowledging and enhancing audiovisual performers' entitlement to obtain a fair share of the return on contemporary and future utilization of their creative contributions, both in the originating country of protection and elsewhere. This observation, however, seems less forceful when considering Article 12 of the treaty, which deals with the transfer of rights.<sup>21</sup>

Since 1996, the matter of the transfer of rights, as well as the issue of initial ownership of audiovisual performers' rights, have been two of the main obstacles in accomplishing a WIPO treaty on audiovisual performances.<sup>22</sup> Prior to that, due primarily to the influence of the U.S. film industry, Article 19 of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations explicitly excluded protection from audiovisual performers who agreed to incorporate their performances into a visual or audiovisual fixed medium.<sup>23</sup> The conflict between the U.S. and other countries, mainly in Europe, was straightforward: the U.S. favored an approach aimed at concentrating the rights (and economic benefits) in the hands of corporate media (producers), while the Europeans favored an approach aimed at integrating economic efficiency and audiovisual performers' welfare.<sup>24</sup>

The proclaimed compromise of Article 12 of the Beijing Treaty was to enable each contracting country to decide upon the relationship between its audiovisual performers and film producers, including the initial allocation of audiovisual performers' entitlements.<sup>25</sup> Articles 12(1) and 12(2) authorize contracting countries to determine whether performers' rights, in consented audiovisual fixations, shall be initially

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<sup>21</sup> *Id.* at art. 12.

<sup>22</sup> See generally Silke von Lewinski, *The Beijing Treaty on Audiovisual Performances*, 6 AUTEURS & MEDIA, 539, 539–43 (2012) [hereinafter *The Beijing Treaty on Audiovisual Performance*].

<sup>23</sup> See *id.* See also SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY, 497 (2008) (noting that eventually, the U.S. did not sign or join the Rome Convention).

<sup>24</sup> See *id.* at 498–501 (describing the conflict between the U.S. and European Countries).

<sup>25</sup> *The Beijing Treaty on Audiovisual Performance*, *supra* note 22, at 542–44 (2012) (describing the compromise behind Article 12 of the Beijing Treaty).

owned by the producer.<sup>26</sup> As for the transfer of audiovisual performers' exclusive rights to producers, Article 12(3) declares that contracting countries may add an additional layer of protection, which provides audiovisual performers with equitable remuneration for the making available to the public, broadcasting, and communication to the public of their audiovisual performance.<sup>27</sup>

At first blush, Article 12 may be perceived as a compromise resulting from the coexistence of different, and at times conflicting, legal traditions; specifically the European authors'-centric tradition and the U.S.'s corporate-centric tradition. A closer inspection, however, reveals that Article 12 practically structures an international regime that might contradict the purported goals of an international treaty for the protection of audiovisual performers. As mentioned above, the purpose of an international instrument for the protection of audiovisual performers is distributive. It is intended to secure audiovisual performers' ability to obtain a fair share of an audiovisual work's value and economic returns. Other than that, there is no need or justification for an international instrument that comes on top of current international copyright law's regulation of audiovisual works. Yet, by authorizing contracting countries to acknowledge producers as initial owners of audiovisual performers' exclusive rights, Article 12 practically enables contracting countries to entirely ignore and invalidate the whole distributive aspect of audiovisual performers' rights.

Moreover, the effective meaning of Article 12 is that through strategic domestic legislation, audiovisual producers may obtain cross-border international overlapping rights in audiovisual works through copyrights and the audiovisual performers' rights—which would be subordinated to a legislative transfer of rights to audiovisual producers. Thus, under the work made for hire doctrine in the U.S.,<sup>28</sup> audiovisual producers would now be able to acquire both authors' initial copyrights and audiovisual performers' exclusive rights in the final fixed audiovisual work. It is worth noting that immediately after signing the final act of the Beijing Treaty, the United States Patent and

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<sup>26</sup> See WIPO, *supra* note 1, at art. 12.

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

<sup>28</sup> 17 U.S.C. § 101 (1976). See generally Dougherty, *supra* note 15.

Trademark Office (USPTO) issued a formal declaration claiming that under current U.S. law, actors and musicians are already considered to be “authors” of their performances and, therefore, possess copyright in their audiovisual performance.<sup>29</sup> The USPTO’s position was that U.S. law was already compatible with the Beijing Treaty.<sup>30</sup> Accordingly, the U.S. work made for hire doctrine, as a statutory mechanism for the transfer of rights, would also apply to U.S. audiovisual performers’ copyrights; thus, providing U.S. film producers with initial ownership over both authors’ rights and audiovisual performers’ rights. Practically speaking, U.S. film producers—and not U.S. audiovisual performers—are those that benefit from the Beijing Treaty’s national treatment for audiovisual performers’ rights.

From a distributive perspective regarding international cross-border dimensions, Article 12 of the Beijing Treaty might bear regressive implications. If in a certain contracting country local audiovisual performers would now be bound to share their performers’ cut of the revenues together with foreign producers (as transferees of audiovisual performers’ rights in their originating countries), then presumably, the share of domestic audiovisual performers should be expected to decrease, at least to some degree. The market value of utilizing an audiovisual work is mostly dependent upon the demand for it; not upon the number or diversity of rights holders who claim their share in its market value. Hence, putting foreign producers in the shoes of foreign audiovisual performers might have a negative impact on the revenue share of local audiovisual performers, at least in circumstances in which the local audiovisual performers are not likely to increase their cross-border revenues.

One illustrative example in this context is U.S. audiovisual producers’ share in audiovisual performers’ “foreign” (i.e. European) levy funds. In European countries, statutory copyright exemptions, for private and personal copying, are accompanied by statutory levy schemes.<sup>31</sup> Levies are imposed on blank media that are capable of and

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<sup>29</sup> See U.S. Patent and Trademark Office, *Background and Summary of the 2012 WIPO Audiovisual Performances Treaty*, (June 2012), [http://www.uspto.gov/nwes/WIPO\\_AVP\\_TREATY\\_FACT\\_SHEET.pdf](http://www.uspto.gov/nwes/WIPO_AVP_TREATY_FACT_SHEET.pdf).

<sup>30</sup> *Id.*

<sup>31</sup> See STAVROULA KARAPAPA, PRIVATE COPYING: THE SCOPE OF USER FREEDOM IN EU DIGITAL COPYRIGHT 118–37 (2012).

are used for reproduction of copyrighted works.<sup>32</sup> The collected funds are then allocated down the stream to authors and performers through collecting societies.<sup>33</sup> Even before the Beijing Treaty was enacted, U.S. film producers managed to obtain significant portions of the share of U.S. audiovisual works within European Countries' levy funds that were allocated to authors and performers of U.S. films.<sup>34</sup> The reason for this was an agreement between authors and performers of U.S. audiovisual works and the producers of such works: the major U.S. motion pictures studios.<sup>35</sup> According to the agreement, fifty percent of performers' royalties from foreign copyright levies (e.g., video levies, video rental levies, and private copying/blank tape levies), and from cable retransmission statutory equitable remuneration were to be paid to the motion pictures studios.<sup>36</sup> The ability of U.S. producers to bargain and obtain fifty percent of U.S. performers' royalties—in addition to the producers' share of royalties as copyright owners—was based on the argument that, under the work made for hire doctrine, the producers are the “authors” and are the initial owners of the rights in the audiovisual performance. The final outcome was that U.S. producers could double-dip and obtain part of performers' share of the private copying levies in other (European) countries.

The example of private copying levies also demonstrates the distributive gaps that might be created between countries that acknowledge only exclusive rights in creative works and countries that—in circumstances like private copying—may soften such exclusive rights and acknowledge an exemption along with a statutory remuneration scheme (e.g., a private copying levies scheme). Although both schemes are likely to be formally compatible with

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Adriane Porcin, *Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry*, 35 HASTINGS COMM. & ENT. L.J. 1, 20 (2012). See also, Sharon Waxman, *Secrets at SAG: Where's the Money?*, THE HUFFINGTON POST ENTERTAINMENT (Mar. 25, 2011), [http://www.huffingtonpost.com/sharon-waxman/secrets-at-sag-wheres-the\\_b\\_92665.html](http://www.huffingtonpost.com/sharon-waxman/secrets-at-sag-wheres-the_b_92665.html).

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

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

international copyright law as well as with a reciprocity requirement,<sup>37</sup> countries that acknowledge only exclusive rights, with no exemptions conditioned upon statutory remuneration schemes, are left better off. Rights' owners from such countries may claim participation in other countries' statutory remuneration schemes without effective reciprocity in this regard. The fact that all countries acknowledge similar originating exclusive rights, such as the right of reproduction, does not help much in scenarios like that of private copying, which lacks effective means of enforcement. I will return to this point in part III.

My analysis, thus far, is somewhat abstract; yet, when examining the consequences of Article 12 of the Beijing Treaty, one cannot ignore the export-import balance of audiovisual works. As a matter of fact, the demand for U.S. audiovisual works in Europe and elsewhere is significantly higher than the demand for foreign audiovisual works in the U.S.<sup>38</sup> As a result, Article 12 may in effect provide the U.S. film industry with overlapping remuneration at the expense of domestic audiovisual performers in countries outside of the U.S.; all under the guise of reciprocity and national treatment for audiovisual performers. As further demonstrated in the following subsection, this contradiction becomes more salient due to the fact that under the particulars of the U.S. regime, foreign audiovisual performers are very likely to confront significant, if not absolute, barriers when attempting to enforce their reciprocal rights under the Beijing Treaty in the U.S.

### (C) Counter Dimensions

There are two counter dimensions that seemingly weaken the above-mentioned argument. The first dimension is of reciprocity. Arguably, audiovisual producers from other countries may follow similar patterns of conduct that also benefit them, given a presumption of the transfer of (audiovisual performers') rights.<sup>39</sup> Put another way,

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<sup>37</sup> See generally KARAPAPA, *supra* note 31, at 99–117.

<sup>38</sup> See generally GORDON H. HANSON, *International Trade in Motion Picture Services*, in *INTERNATIONAL TRADE IN SERVICES AND INTANGIBLES IN THE ERA OF GLOBALIZATION 203*, 203–25 (Marshall Reinsdorf & Matthew Slaughter eds., 2009).

<sup>39</sup> See generally KAMINA, *supra* note 14, at 338–60 (surveying the legal regime in European countries where it is common to include in legislation a presumption of the transfer of performers' economic exclusive property rights

the potential of providing audiovisual producers with overlapping rights is equally distributed to—and operational by—all contracting countries that apply statutory presumptions of the transfer of rights from audiovisual performers to audiovisual producers. Thus, just like U.S. audiovisual producers who rely on the work made for hire doctrine to enforce their (transferred) performers' rights elsewhere, so too could European audiovisual producers from European countries. France or Germany, for example, could both benefit from this scheme, since they both acknowledge a presumption of transfer of rights from audiovisual performers to the producer of a fixed audiovisual work, which was made with the consent of its participating performers.<sup>40</sup> It is doubtful, however, whether this type of reciprocity mitigates the above-mentioned consequences of Article 12 of the Beijing Treaty.<sup>41</sup>

To begin with, even if audiovisual producers from different contracting countries would benefit from reciprocity, in terms of their ability to obtain and enjoy audiovisual performers' rights, this fact does not mitigate the contradiction with the proclaimed goals of an international treaty for the protection of audiovisual performers. It only means that the anomalies of the Beijing Treaty would now cross borders, causing audiovisual performers in different contracting countries to “reciprocally” lose parts of their incomes in favor of audiovisual producers.

Secondly, it also seems mistaken to presume producers from different countries can enforce their rights in the same way elsewhere as transferees of performers' rights. If one takes the U.S. example, then, according to the USPTO declaration, audiovisual performers' rights are protected via a copyright in the performance (as an original work of authorship), rather than as independent distinct performers' rights. As a result, foreign audiovisual producers (e.g., European audiovisual producers) who are transferees of distinct performers'

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to the producer of the audiovisual work, at many times, conditioned upon the payment of separate remuneration for each exclusive use right to which the presumption applies). For a similar, already validated statutory mechanism, see Council Directive 92/100, On Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, art. 2, 1992 O.J. (L 346) 61, 63 (EC).

<sup>40</sup> See KAMINA, *supra* note 14, at 357–59 (surveying Article L 212–4 of the French Intellectual Property Code and Article 92 of the German Copyright Act).

<sup>41</sup> See *supra* Part II(B).

rights, may be left with no practical legal vessel through which they may enforce audiovisual performers' exclusive rights in the U.S. The only available legal vessel would be copyright. This option however, raises several complications.

As opposed to U.S. film producers, who may now benefit elsewhere from two distinct rights (both copyrights in the audiovisual work and performers' rights that were transferred to them), foreign audiovisual producers would, in the U.S., benefit only from one layer of copyright protection; which also, presumably, covers audiovisual performers' original work of authorship. Practically, however, this structure prevents non-U.S. audiovisual producers from having the same overlapping, or double-dipping, that U.S. audiovisual producers may benefit from elsewhere. It also seems questionable whether the national treatment requirement, under Article 4 of the Beijing Treaty (which is restricted to the "exclusive rights specifically granted in this Treaty")<sup>42</sup> would also apply to the proclaimed copyright protection that audiovisual producers, standing in the shoes of audiovisual performers, may benefit from in the U.S. Indeed, audiovisual producers may still claim reciprocal copyright protection through the Berne Convention for the Protection of Literary and Artistic Works,<sup>43</sup> but here, it is questionable whether such protection would extend to the distinct layer of performances in an audiovisual work.<sup>44</sup> Additionally, one must also consider Article 14*bis*(b) of the Berne Convention.<sup>45</sup> Article 14*bis*(b) of the Berne Convention sets a default according to whether or not performers are to be considered as co-authors of an audiovisual work, absent explicit "contrary or special stipulation[s]."<sup>46</sup> Moreover,

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<sup>42</sup> WIPO, *supra* note 1, at art. 4.

<sup>43</sup> WIPO, *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature Sept. 9, 1886, 828 U.N.T.S. 221, S. Treaty Doc. No. 99-27 (1986) (revised at Paris July 24, 1979) [hereinafter *The Berne Convention*].

<sup>44</sup> See David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions Part One*, 17 *Int'l Rev. Indus. Prop. & Copyright L.* 577, 590–97 (1986) (stating that "[o]lder and more modern authorities have taken opposing views" on the question of whether a State broaden or narrow the definitions of Convention terms).

<sup>45</sup> *The Berne Convention*, *supra* note 43, at art. 14*bis*.

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

performers may not object to “the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.”<sup>47</sup> This default significantly narrows the practical ability of audiovisual performers to rely upon the layer of copyright protection and the Berne convention, unless there is a specific particular acknowledgment and protection of audiovisual performers’ exclusive copyrights in the audiovisual work.<sup>48</sup>

The second dimension deals with the potential rights of audiovisual performers themselves. Here, the argument is that by enabling each country to decide upon its transfer of rights policy, Article 12 of the Beijing Treaty does not by itself prevent audiovisual performers from enforcing their rights in other contracting countries, which acknowledge a presumption of transfer of rights to the producers of an audiovisual work. This argument, however, bears certain caveats. First, audiovisual performers who are subordinated to a presumption of the transfer of rights in their home country have no ability to enforce their rights elsewhere, since their rights were transferred to the producer. Second, as already mentioned, in the U.S.—where audiovisual performers’ rights are supposedly cabined as copyright protection—foreign audiovisual performers are likely to lack protection through the Beijing Treaty or the Berne Convention.<sup>49</sup> At the end of the day, foreign audiovisual performers are seemingly denied access to reciprocal remuneration, whereas, under certain conditions, audiovisual producers, standing in the shoes of audiovisual performers, may obtain an additional layer of remuneration in other contracting states at the expense of local audiovisual performers.

Indeed, these are all complex issues which cannot be fully analyzed without reference to the particulars of specific contracting

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<sup>47</sup> *Id.*

<sup>48</sup> *See id.* (noting that “in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work”).

<sup>49</sup> *See supra* Part(C).

countries and their legal regimes. Nevertheless, the overall impact of Article 12 of the Beijing Treaty remains. Article 12 stimulates overlapping rights in audiovisual works to the benefit of producers while undermining the rights of audiovisual performers. Moreover, the national treatment scheme of Article 4 of the Beijing Treaty authorizes reservations based on a lack of reciprocal protection, but only with regard to the rights granted in Article 11(1) and 11(2): broadcasting; communication to the public; and the alternative of replacing these rights with a right to equitable remuneration.<sup>50</sup> Consequently, with regard to all other transferable performers' rights under the Beijing Treaty (i.e. the rights of reproduction, distribution, rental, and making available to the public), producers, standing in the shoes of audiovisual performers, have no reciprocal limitations in their attempts to enforce performers' rights in other countries.<sup>51</sup> Moreover, it remains open whether a contracting country would be authorized to make a reservation when its own national audiovisual performers benefit from reciprocal rights elsewhere. Yet, these rights remain undermined by mechanisms such as a presumption of the transfer of rights either in an author's home country or elsewhere. I will return to this last point in Part III.

#### **(D) Moral Rights and Technological Protection Measures**

There are two additional elements in the Beijing Treaty that may signify the treaty's lean toward audiovisual producers and proprietary rights owners. The first element refers to audiovisual performers' moral rights. Article 5 of the Beijing Treaty contains the contracting parties' obligation to acknowledge audiovisual performers' moral rights of attribution and integrity.<sup>52</sup> Article 5 seems to adopt a lenient concept of moral rights that takes into account the unique and complex nature of audiovisual works. According to Article 5(1)(ii), the scope of the moral right of integrity should "tak[e] due account of the nature of audiovisual fixations"<sup>53</sup> and according to Article 5(1)(i), audiovisual

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<sup>50</sup> WIPO, *supra* note 1, at arts. 4, 11.

<sup>51</sup> *See id.*

<sup>52</sup> WIPO, *supra* note 1, at art. 5.

<sup>53</sup> *Id.* at art. 5(1)(ii).

performers' moral right of attribution does not apply "where omission is dictated by the manner of the use of the performance."<sup>54</sup> Additionally, audiovisual performers' moral rights are limited by two reservations. Article 5(3) states that the means of redress of safeguarding audiovisual performers' moral rights shall be governed by the legislation of the contracting parties.<sup>55</sup> The second reservation is in the agreed statement concerning Article 5 of the treaty.<sup>56</sup> This agreed statement declares that:

[C]onsidering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way.<sup>57</sup>

This tendency toward a narrow structuring of moral rights in audiovisual works has origins and rationales that derive from the unique and complex nature of audiovisual works.<sup>58</sup> The production of audiovisual works requires a large investment of financial resources and multiple contributions of creative resources.<sup>59</sup> This, in turn, justifies certain flexibility in the structuring and enforcement of moral

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at art. 5(3).

<sup>56</sup> *Id.* at art. 5.

<sup>57</sup> *Id.* at note 5.

<sup>58</sup> See Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law – A Comparative Approach*, 25 IIC 177, 184 (1994).

<sup>59</sup> *Id.*

rights, which is reflected in domestic legislation.<sup>60</sup> Thus, for example, Section 93 of the German Copyright Act of 1965 states that performers in a cinematographic work may only prohibit “gross distortions” or “gross mutilations” of the work.<sup>61</sup> At the same time, it seems that the cumulative impact of Article 5 of the Beijing Treaty, and its agreed statement, go beyond a mere understanding that moral rights should be balanced and scrutinized against the unique and complex nature of audiovisual works.

Article 5(3) practically allows contracting countries to comply with the moral rights requirement without explicit legislation acknowledging audiovisual performers’ moral rights. This pattern is parallel to Article 6*bis*(3) of the Berne Convention for the Protection of Literary and Artistic Works, yet it is still illustrative of the lean toward proprietary interests.<sup>62</sup> The second element is in the agreed statement concerning Article 5(3), which effectively limits audiovisual performers’ right of integrity.<sup>63</sup> The Article 5 approach may be justified, yet it still signifies that under the Beijing Treaty (at least to some degree), producers’ economic and proprietary interests outweigh audiovisual performers’ personal interests. This inclination is further demonstrated by Article 15 of the Beijing Treaty, which deals with obligations concerning technological measures of protection. Formally, Article 15 does nothing more than implement obligations concerning technological measures, which are similar to the ones that were adopted in the WIPO Copyright Treaty of 1996 and the WIPO Performances and Phonograms Treaty of 1996.<sup>64</sup> The practical implications of Article 15, however, seem more far-reaching.

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<sup>60</sup> See Guy Pessach, *The Author’s Moral Right of Integrity in Cyberspace - A Preliminary Normative Framework*, 34 IIC, 250, 255–60 (2003).

<sup>61</sup> Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 3714, § 93 (Ger.).

<sup>62</sup> The Berne Convention, *supra* note 43, at art. 6*bis*(3) (stating that “[t]he means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed”).

<sup>63</sup> See *infra*.

<sup>64</sup> Compare WIPO, *Copyright Treaty*, Article 11, *opened for signature* Dec. 20, 1996, WIPO Doc. CRNR/DC/94, and WIPO, *Performances and Phonograms Treaty*, Article 18, *opened for signature* Dec. 20 1996, WIPO Doc. CRNR/DC/95, with WIPO, *supra* note 1, at art. 15.

Since the technological protection of the audiovisual performance cannot be separated and distinguished from the technological protection of the copyrighted audiovisual work as a whole, Article 15 practically protects the proprietary interests of audiovisual producers who rely upon technological protection measures and aim at prohibiting their circumvention. Not surprisingly, the agreed statement on Article 15 declares that:

the expression ‘technological measures used by performers’ should . . . be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.<sup>65</sup>

Consequently, in countries that did not join the WIPO Internet Treaties but will join the Beijing Treaty, audiovisual producers will be able to leverage Article 15 as a mechanism to enforce domestic norms that prohibit the circumvention of technological protection measures on audiovisual works. Article 15 practically expands countries’ obligations concerning technological measures beyond what is included in multilateral obligations that explicitly deal with copyright protection of audiovisual works. This expansion serves and advances the interests of the motion pictures industry, particularly for countries that are inclined to join the Beijing Treaty as a means to advance the interests of audiovisual performers, and a disincentive for them to join WIPO’s Internet Treaties. Regardless of one’s view on the proper scope of legal obligations concerning technological measures, Article 15 sets another example of how an international instrument for the protection of audiovisual performers was successfully leveraged to advance the proprietary interests of audiovisual producers. The entire issue of technological protection measures is mostly a business issue, which is less relevant to the unique distributive context of promoting audiovisual performers’ share in the financial proceeds of audiovisual works. Thus, Article 15 serves mostly as an additional tier in securing the motion picture industry’s stakes regarding the international norm that expands legal protection against the circumvention of technological protection measures.

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<sup>65</sup> WIPO, *supra* note 1, at art. 15, note 10.

### III. Reformulating the Norms & Practices of International Copyright Law – Beyond Legal Formalism

My discussion in Part II demonstrated the contradictions within the Beijing Treaty and the dissonance between its proclaimed distributive goals and its de facto proprietary corporate lean. This dissonance does not only derive from the Beijing Treaty's explicit legal ordering, but also from the interface and correspondence between the Beijing Treaty and the particulars of domestic legal regimes; including norms that are located beyond formal IP law.

My purpose in this part of the article is to further demonstrate such dynamics while arguing that they should have been considered and implicated on the enactment and particulars of the Beijing Treaty. My conclusion and recommendation is that international IP lawmaking should take into account such dynamics. It is essential to assess the forecasted impact of an international treaty through the lens of its future implementation under certain particular domestic conditions that may go beyond the treaty's formal imperatives. As the Beijing Treaty demonstrates, without such an assessment, the practical outcomes of a treaty may contradict its proclaimed goals.

Specifically, there are several elements that may exemplify the gaps and arbitrages between the Beijing Treaty's formal obligations and countries' de facto commitment to reciprocity in remunerating audiovisual performers. The first element refers to the role collective bargaining contracts and labor union agreements have within domestic remuneration schemes for audiovisual performers.

Collective bargaining contracts and labor union agreements are a common practice in the context of remuneration schemes for audiovisual performers. In the U.S., the Screen Actors Guild Association (SAG) and American Federation of Television and Radio Artists (AFTRA) have a collective agreement with the Alliance of Motion Picture and Television Producers (AMPTP), which, among other issues, covers the payment of residuals for utilization of audiovisual works (e.g., television broadcasts).<sup>66</sup> This scheme also

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<sup>66</sup> See Jane Ginsburg & Andre Lucas, *Study on the Transfer of the Rights of Performers to Producers of Audiovisual Fixations-Multilateral Instruments; United States of America; France*, in AD HOC INFORMAL MEETING ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES, 14–17 (WIPO 2003), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=18348](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=18348).

determines that audiovisual performers grant producers any right whatsoever that they may have in the audiovisual performance, if such rights are not covered by the work made for hire doctrine.<sup>67</sup> The U.S. scheme is unique given that the obligation to pay residuals is a contractual obligation that is imposed on the producers of audiovisual works, rather than on third parties who utilize audiovisual works, such as television broadcasters and cable networks. As a practical matter, such third parties are under no obligation to obtain authorization from, or pay royalties to, audiovisual performers. The agreement between audiovisual producers and audiovisual performers is drafted in broad terms that provide audiovisual producers with “any rights” that audiovisual performers may possess, without explicitly mentioning or acknowledging such rights. For these reasons, the U.S. scheme does not include any collecting societies or collective rights’ management operating on behalf of audiovisual performers vis-à-vis users (such as broadcasters). The entire payment scheme of residuals are handled on a contractual basis between audiovisual producers and audiovisual performers.<sup>68</sup> Third parties that utilize audiovisual works (e.g., broadcasters) are not part of such schemes and have no direct relationship with audiovisual performers.<sup>69</sup>

Other countries, such as France, Germany, and Spain, also base audiovisual performers’ compensation on collective bargaining contracts and labor union agreements.<sup>70</sup> These countries’ structures, nevertheless, differ significantly from the U.S. structure. In France and Germany, there is an explicit statutory acknowledgment in audiovisual performers’ rights.<sup>71</sup> Some of the rights are in the form of a right to equitable remuneration. For example, Section 78 of the German Law on Copyright and Neighboring Rights acknowledges an

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<sup>67</sup> *See id.* at 28–29.

<sup>68</sup> *See generally id.*

<sup>69</sup> *See generally id.*

<sup>70</sup> *See* MARJUT SALOKANNEL, *STUDY ON AUDIOVISUAL PERFORMERS’ CONTRACTS AND REMUNERATION PRACTICES IN FRANCE AND GERMANY* 11–24, 34–38 (2003), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16756](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16756)

<sup>71</sup> *Id.* at 3–10, 26–34.

unwaivable right of equitable remuneration for the broadcasting or communication to the public of an audiovisual performance.<sup>72</sup> Another example is Article 108 of the Spanish Copyright Law, which acknowledges an audiovisual performer's right to equitable remuneration for the communication to the public of audiovisual performances (exercised through a collecting society).<sup>73</sup> Other performers' rights in European countries are structured as exclusive rights accompanied by a presumption of the transfer of rights to the producers.<sup>74</sup> Such a presumption is conditioned upon specific and distinct agreements on remuneration regarding each mode of exploitation of the audiovisual product.<sup>75</sup> Additionally, as a derivative of this structure, such legal systems are characterized by collecting societies, which represent audiovisual performers' rights and that may operate vis-à-vis third parties who utilize the audiovisual work; including the fixed performance it embodies.<sup>76</sup>

This practical distinction is likely to be reflected in the ability of U.S. audiovisual producers to claim royalties (“in the shoes” of U.S. audiovisual performers) in Europe and the lacking ability of European audiovisual performers to claim royalties in the U.S. Although both regions and regimes respect and enforce domestic audiovisual performers' claims for long-term residual remuneration, the strength and explicitness of their reliance on a direct regime of audiovisual performers' rights differs. European regimes explicitly acknowledge audiovisual performers' rights.<sup>77</sup> This means that under a national treatment requirement, foreign audiovisual performers, and foreign

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<sup>72</sup> UrhG, *supra* note 61, § 78.

<sup>73</sup> See WIPO, *Consolidated text of the Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions*, WIPO Lex. No. ES177 (2011) (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and last amended by Royal Decree No. 20/2011 of December 30, 2011), available at <http://www.wipo.int/wipolex/en/details.jsp?id=14311> [hereinafter *Consolidated text of the Law on Intellectual Property*].

<sup>74</sup> See generally *supra* note 12.

<sup>75</sup> See HANSON, *supra* note 38, at 203–25.

<sup>76</sup> See SALOKANNEL, *supra* note 70.

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

producers standing in their shoes, would benefit from this bundle of exclusive rights in Europe. In contrast, U.S. law has no clear and explicit legal vessel through which foreign audiovisual performers are able to enforce their reciprocal rights.<sup>78</sup>

An additional parameter of distinction involves the disparities in reliance on schemes of equitable remuneration for the broadcasting or communication to the public of audiovisual performances. In some European countries, such as Germany and Spain, there are statutory schemes that provide audiovisual performers with a right of equitable remuneration for the broadcasting or communication to the public of audiovisual performers.<sup>79</sup> Such a right does not exist in other countries like the U.S. The practical implication of such disparities, together with the prominence of presumptions of the transfer of rights to producers, is relatively straightforward. Effective cross-border protection of audiovisual performers is likely to take place mostly in countries with statutory equitable remuneration schemes, which provide clear and concrete paths to enforcement of audiovisual performers' rights. Disparities in the availability of equitable remuneration schemes are likely to generate disparities in effective cross-border reciprocity.

To this point, one must add the fact that the Beijing Treaty's national treatment requirement is accompanied by a very limited reciprocity requirement.<sup>80</sup> The reciprocity requirement applies only with regard to the rights of broadcasting and communication to the public.<sup>81</sup> Only with respect to these rights does Article 4 limit a contracting country's national treatment obligation to the rights that its own nationals enjoy in another contracting country.<sup>82</sup> In this context, however, a contracting party that acknowledges an exclusive right of broadcasting and communication to the public—accompanied by a

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<sup>78</sup> See *supra* Part II(B).

<sup>79</sup> See KAMINA, *supra* note 12, at 195–207. See also UrhG, *supra* note 61, § 78 (acknowledging an unwaivable right of equitable remuneration for the broadcasting or communication to the public of an audiovisual performance). See *Consolidated text of the Law on Intellectual Property*, *supra* note 73.

<sup>80</sup> The Beijing Treaty, *supra* note 1, at art. 4(2).

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

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

presumption of the transfer of rights to the producer of the audiovisual work—would qualify as complying with Article 11, and thus, may comply with the reciprocity requirement. Effectively, therefore, only countries with an equitable remuneration scheme would have to share their audiovisual performers’ revenues (from equitable remuneration) with other contracting countries (including audiovisual producers standing in the shoes of audiovisual performers from their respective originating countries).

Consider, for example, the relationship between Israel and the U.S. in a scenario in which both countries ratify the Beijing Treaty. Article 3A of Israel’s Performers’ and Broadcasters’ Rights Law acknowledges an audiovisual performers’ right of equitable remuneration for the broadcasting and communication to the public of their fixed performances.<sup>83</sup> The remuneration is paid to a collecting society that represents the largest number of performers.<sup>84</sup> Based on Article 3A, Israeli multichannel television operators, television broadcasters, and other content providers (e.g., mobile content providers) pay royalties for their utilization of audiovisual performances.<sup>85</sup> If Israel and the U.S. ratified the Beijing Treaty, the following scenario would be likely to occur: under the national treatment requirement of Article 4 of the Beijing Treaty, royalties, which are paid under Israel’s Article 3A, would have to be allocated to U.S. audiovisual producers. However, under U.S. practice, audiovisual producers are transferees of any rights that U.S. audiovisual performers may possess under copyright law.<sup>86</sup> U.S. law, however, does not include an explicit, distinct acknowledgement of audiovisual performers’ rights. U.S. law also does not include a parallel right of equitable remuneration to audiovisual performers. Together, these two facts are very likely to prevent Israeli audiovisual performers from receiving royalties under U.S. law. This is

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<sup>83</sup> Performers’ and Broadcasters’ Rights Law, 5744–1984, § 3A (consolidated version 1996) (Isr.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128073](http://www.wipo.int/wipolex/en/text.jsp?file_id=128073).

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

<sup>85</sup> See M. Nimmer & P. Geller, INTERNATIONAL COPYRIGHT LAW AND PRACTICE, “Israel” § 9[1][a] (1992).

<sup>86</sup> See Ginsburg & Lucas, *supra* note 66.

particularly due to the fact that the U.S.'s proclaimed approach is that its compliance with the Beijing Treaty is through the classification of audiovisual performances as creative works of authorship, which are protected under U.S. copyright law.<sup>87</sup> At the same time, the U.S. would be formally compatible with Article 11 the Beijing Treaty, and therefore entitled to national treatment in Israel, including under Article 11's reciprocity requirement.<sup>88</sup>

As this example demonstrates, the effective, rather than the formal, capacities of audiovisual performers to benefit from cross-border reciprocity does not derive merely from formal compliance with the Beijing Treaty, but primarily from the particulars of domestic law structure and remuneration schemes. Regarding treaties with a distributive goal, such as the Beijing Treaty, these particulars are highly important because they signal and reflect the effective *de facto* capacities of audiovisual performers to obtain a fair share of the revenues that audiovisual works may generate. As a practical matter, in an international regime that authorizes statutory presumptions of the transfer of rights to audiovisual producers, gaps in the implementation of equitable remuneration schemes may disrupt effective reciprocity between countries, particularly regarding the domestic share of audiovisual performers in countries that do adopt schemes of equitable remuneration.

#### **IV. Conclusion**

My purpose in writing this article was to unveil the contradictions between the proprietary corporate lean of the Beijing Treaty and its proclaimed distributive goals. It is doubtful whether the treaty is likely to provide audiovisual performers with cross-border remuneration and increase audiovisual performers' share in the revenues and financial proceeds of audiovisual works. On the contrary, under the Beijing Treaty's mixture of a broad national treatment requirement, a limited reciprocity requirement, and an indefinite transfer of rights regime, regressive scenarios seem no less probable. Thus, it is predictable that U.S. film producers (as opposed to audiovisual performers) are likely to benefit from certain overlapping remuneration in European markets

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<sup>87</sup> See U.S. Patent and Trademark Office, *supra* note 29.

<sup>88</sup> See *id.*

and elsewhere. This, however, might not be the state of affairs regarding the ability of foreign audiovisual performers to enforce their rights in the U.S., however. Consequently, by enabling foreign producers (standing in the shoes of foreign audiovisual performers) to claim cross-border remuneration, the Beijing Treaty, might have a negative impact on the revenue share of local audiovisual performers, at least in circumstances under which these local audiovisual performers are not likely to reciprocally enforce their rights elsewhere.

These contradictions within the Beijing Treaty and the dissonance between its proclaimed distributive goals and its de facto proprietary corporate lean do not derive solely from the treaty's explicit legal ordering. Rather, these contradictions derive also from the interface and correspondence between the Beijing Treaty and the particulars of domestic legal regimes, including norms that are located beyond formal IP law. Gaps in the legal formulation of protecting audiovisual performers' rights (e.g., the acknowledgment of exclusive yet transferable rights versus protection through a right to equitable remuneration) may impact effective reciprocity in the capacities of audiovisual performers from different countries to enforce their rights elsewhere.

It is for this reason that international IP lawmaking should assess the forecasted impact of an international treaty through the lens of its future implementation under certain particular domestic conditions that may go beyond the treaty's formal imperatives. As the Beijing Treaty demonstrates, without such an assessment, the practical outcomes of a treaty may contradict its proclaimed goals.

## Copyright and the Tragedy of the Common

Tracy Reilly\*

### *Abstract*

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

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

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

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

<sup>3</sup> Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197, 1233–234, 1236 (1996). See also Todd Davies, *A Behavioral Perspective on Technology Evolution and Domain Name Regulation*, 21 *PAC. MCGEORGE GLOBAL*

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

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BUS. & DEV. L.J. 1, 14 (2008) (claiming that the tragedy of the commons justification does not apply to non-rivalrous goods); Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 U.C. DAVIS L. REV. 855, 857–58 (2007) (arguing that the tragedy of the commons does not fit the “drama” of intellectual property).

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*“The crowd is untruth. Hence none has  
more contempt for what it is to be a man  
than they who make it their  
profession to lead the crowd.”*  
**Søren Kierkegaard**<sup>4</sup>

### *Introduction*

In 1968, biologist Garrett Hardin coined “the tragedy of the commons” as the phenomenon where, absent an enforceable private rights regime for real property, commonly held resources would be prone to complete depletion because individuals who have no ownership interest in land could not resist taking as much as possible without giving back and replenishing the commons.<sup>5</sup> Therefore, unacceptable overuse and underinvestment of resources inevitably would occur.<sup>6</sup> Many scholars posit that, unlike real property, intellectual property is not subject to a tragedy of the commons given that after an intellectual product is created, it “is a public good, capable of enjoyment by millions without incurring significant extra costs.”<sup>7</sup> It is, therefore, assumed that the non-rivalrous nature of intellectual products, particularly those protected by copyright law, prevents them from being subject to a tragedy of the commons in the manner in which Hardin portrayed such a phenomenon.<sup>8</sup>

Some commentators, on the other hand, recognize that although not depicted by population explosions, pollution, or other real property depletion problems, a different but very real tragedy is being played out in the information arena with respect to intangible goods

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

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

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

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

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

proliferated in our online community.<sup>9</sup> This tragedy is neither primarily biological nor economic in nature as Hardin’s tragedy of the commons; rather, when it is viewed through a broader philosophical lens, it exemplifies the social and moral dilemma of the contemporary debasement of individual effort, ingenuity, innovation, and pride—or, as Kierkegaard might say, the development of a mass or “herd” mentality.<sup>10</sup> I term this phenomenon, as it pertains specifically to creative works and copyright law principles, the tragedy of the “common.”<sup>11</sup>

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

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

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

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

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

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

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

An alarming majority of contemporary copyright scholars are impetuously attempting to infuse this collectivist, anti-individualistic rhetoric into intellectual property jurisprudence, intimating that talented creators do not deserve to be rewarded for their talents.<sup>17</sup> According to journalist Robert Levine in his refreshing book on the subject, *Free Ride*, copyright scholars and other reformers are “inspired by the marvels of online mass collaboration,” which represent a “new style” of open-source creativity where “today’s finished work becomes tomorrow’s raw material . . . Everyone works

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

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

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

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

for the benefit of all, and individual rights mostly just get in the way.”<sup>18</sup> Copyright rights, because they are essentially individual rights, also seem to get in the way of this crowd-based mentality. Indeed, many copyright commentators today are generally loath to advocate that there are any merits left in the outdated and unnecessary regime of copyright law.<sup>19</sup> When examined closely, the war against individual rights in this particular legal arena is more emotionally than rationally-based, as all-out attacks on the expansions of copyright in recent decades by “left-leaning critics” have become—as one scholar aptly notes—“visceral and intense.”<sup>20</sup> Professor Jane Ginsburg has colorfully claimed that “copyright is in bad odor these days” since recent measures designed to protect copyrighted works “have drawn academic scorn, and intolerance even from the popular press.”<sup>21</sup>

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

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

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

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

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

<sup>22</sup> U.S. Bureau of Economic Analysis and National Endowment for the Arts Release *Preliminary Report on Impact of Arts and Culture on U.S. Economy*, NATIONAL

cable television production, broadcasting, publishing, performing arts, and other creative sectors, the report estimated that as of 2011, creative industries accounted for about \$504 billion, or 3.2 percent of the U.S. Gross Domestic Product (GDP).<sup>23</sup> Two million Americans worked in the creative industries; the motion picture and video industry employed 310,000 workers and accounted for \$25 billion in compensation.<sup>24</sup> This long-awaited, government-endorsed research confirms what authors of creative works have known all along: that continued production of their intellectual products is not only personally and individually rewarding, but also financially beneficial to them *and* many other sectors of society, not to mention aesthetically enjoyed by society as a whole.<sup>25</sup> Sadly, however, researchers have also found that the arts suffered more than the overall economy during the recession of 2008—largely due to unremunerated acts of counterfeiting, piracy, and other unauthorized uses.<sup>26</sup> Regardless of the foregoing facts, academia consistently and overtly fails to acknowledge that many authors continue to be incentivized by economic motivators and capitalistic incentives.<sup>27</sup>

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ENDOWMENT FOR THE ARTS, [www.arts.gov/news/2013/us-bureau-economic-analysis-and-national-endowment-arts-release-preliminary-report-impact](http://www.arts.gov/news/2013/us-bureau-economic-analysis-and-national-endowment-arts-release-preliminary-report-impact) (last visited Oct. 30, 2014).

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

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

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

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

<sup>27</sup> See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2012) (claiming that “[t]here is no broad necessity for incentives for intellectual labor” and that “creative activity will thrive without artificial support”). *But see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 340 (1996) (claiming “there is no reason to assume that the creators of “sustained works of authorship”—books, articles, films, songs, and paintings, as opposed to simply conversations and bits of information—will generally make their work available over the Internet, or will create new cyberspace variations of such works, without some reasonable possibility of remuneration”).

There is no doubt that the spirit of the times in which we live in the U.S. today—the *mundo vigente*—is one that is moving away from a celebration of individual achievement and accomplishment backward into one of recognition of the perceived creative accomplishments of the collective masses.<sup>28</sup> Cultural historians rightly note that the U.S. is declining from a period of “Enlightenment” and heading toward one of “tribalism” or “grouptink,” a societal hallmark frighteningly reminiscent of Western culture after the fall of Rome.<sup>29</sup> Worse yet, scholars are now not merely debating the proper ownership theories of copyright, but they have also largely created a climate in which they condone, even *encourage* illegal behavior.<sup>30</sup> And still more egregious than that, as I have argued in a previous article,<sup>31</sup> these academic

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*See also* LEVINE, *supra* note 18, at 75 (“The idea that artists will give away their music assumes they’ll create it cheaply . . . But making an album can take time and outside expertise”).

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

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

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

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

reformers pardon and often embolden acts that clearly amount to copyright infringement by conveniently redefining them. For example, digital sampling is not *really* copying, it is merely “borrowing,” “alluding to,” or “paying homage” to seriously accomplished musicians.<sup>32</sup> The clear message to society becomes: What artist should have the desire, let alone the *right*, to complain about such innocent uses of individual works of art by the collective society?<sup>33</sup>

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

This article will proceed in five sections. Drawing from philosophical principles ranging from the Sophists to the Existentialists to the Objectivists, Section I provides an historical explanation of the ethical and moral differences between a life philosophy that celebrates individual rights with one that extols mass or collectivist principles. By briefly analyzing the major works of Søren Kierkegaard, José Ortega y Gasset, Friedrich Nietzsche, and Ayn Rand, I will reveal a common prophecy shared by all four philosophers in which they predict the coming of a collectivist cultural movement where individual effort, achievement, and excellence are supplanted by a general “mass” or crowd mentality. Section II specifically applies this philosophical discussion to copyright law, demonstrating how identity with and affinity toward the masses or the crowd over the personal rights of individuals has found its way into the

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<sup>32</sup> *Id.* at 376–77.

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

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

majority of contemporary academic discussions about copyright theory, specifically by way of underrating and often deprecating the achievements and creatively authored works of individual authors. Section III discusses the consequences of this radical new disparagement of the author, and demonstrates that the goal of progress as contemplated by Article I of the U.S. Constitution will be impeded if creative individuals continue to be theoretically undermined by copyright academicians. In Section IV, I will explain how scholars' attempts to infuse collectivist principles into the authorship and ownership provisions of the Copyright Act have largely failed, as judges and legislators have mostly not bought into the theories promulgated by academicians and other commentators in this unprecedented movement to elevate the masses and deflate the individual and "uncommon" copyright author. I will also document the thoughts of various rogue commentators who continue to promote and celebrate the achievements of individual authors. Finally, Section V of this article will conclude by offering both a plea to scholars to reverse the diatribe of denigration of the individual, as well as a personal message of hope—as well as gratitude—to those authors who plug on and continue to create original works despite the current copyright climate that is so outwardly hostile to their individual interests and contributions.

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

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

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

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

Diametrically opposed to collectivist ideals, others believe that individuals have the inalienable right and freedom to make life choices according to their own desires, wants, and needs; to keep and use the product of their own labors and creations; and to pursue the values of their choosing.<sup>40</sup> The fifth century Greek philosophers known as the Sophists were essentially the first camp to extol the virtues of individualism as a formal theory of living, claiming that the individual should be free to act as he sees fit for himself without concern for conforming to group mentalities or practices.<sup>41</sup> The Sophists believed that “any means to [individual] success was ‘good,’” and most were financially successful, making it their stated mission to teach their pupils valuable skills so that they, too, would achieve their own

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

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

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

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

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

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

success.<sup>42</sup> As Section II will demonstrate, authors and creators in the Romantic era in England and Europe who form the focal point for contemporary copyright scholars, placed great emphasis upon individual freedom and personal fulfillment and effort, as “[p]ersons were encouraged to strive to create not only that which was original but also that which was novel and unique;” stressing “imagination as a critical authority.”<sup>43</sup>

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

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

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

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

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

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

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

Many authors are loath to label the existentialist movement of the nineteenth century in philosophy, yet most will agree that one common feature among existentialist writers “is their perfervid individualism.”<sup>47</sup> Instead of attempting to pen a strict definition of the term “existentialism,” author Thomas Flynn has amply provided five basic themes that seem to permeate the writings of the existentialist writers in one form or another, as follows:

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

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

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

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

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

5. *Ethical considerations are paramount.* Though each existentialist understands the ethical ‘freedom’ in his or her own way, the underlying concern is to invite us to examine the authenticity of our personal lives and of our society.<sup>48</sup>

A major feature of existentialism centers around the argument that what is particular or individual is important, as opposed to the classical, Neoplatonic argument that what is general or universal is important.<sup>49</sup> Existentialism, thus, departs from Plato’s theory of an “intelligible system of essences” that ultimately results in individuality as a “defect.”<sup>50</sup> In the modern sense, existentialism “opposes all those one-sided movements which want to exploit man in the interest of society or group by considering his individuality secondary.”<sup>51</sup> The practice of living an authentic versus inauthentic life is a major theme that runs through the writings of the existentialist authors; the inauthentic man of modern day is “indifferent, tranquilized, unable to make a personal decision of his own.”<sup>52</sup> In contrast, the authentic man is “one who freely commits himself to the realization of a project, an idea, a truth, a value; he is one who does not hide himself in the anonymity of the crowd but signs himself to what he manifests.”<sup>53</sup>

Several existentialist philosophers during the nineteenth and twentieth centuries both reiterated and further developed these themes

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

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

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

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

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

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

of individualism and anti-crowd/anti-mass mentality in their writings. Spanish philosopher José Ortega y Gasset warned of the post-industrialist phenomenon of the “coming of the masses,” or invasion of mass culture in which man, as previously defined in individual terms, ultimately becomes “undifferentiated from other men.”<sup>54</sup> Ortega y Gasset was not the only existentialist philosopher who lamented this global rise of the masses; many of his contemporaries, including Søren Kierkegaard<sup>55</sup> and Friedrich Nietzsche<sup>56</sup> all portended the sociological and philosophical despair witnessed by the inevitable conformity of the individual in the wake of an overtly mass-minded society.<sup>57</sup> According to this mindset,

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

By studying the common themes that run throughout their major works—Kierkegaard’s *Two Ages*, Ortega y Gasset’s *Revolt of the*

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

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

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

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

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

*Masses*, and Nietzsche's *Thus Spoke Zarathustra*—it can be observed how the existentialist philosophers broke free from the traditional notions that eighteenth century philosophers like Jean Jacques Rousseau had promulgated; that man is essentially a social creature whose ideal nature, progress, and salvation are situated in, and defined by, the group.<sup>59</sup> In his book, *The Crowd is Untruth*, Professor Howard Tuttle provides a useful “symmetrical” definition of the mass that encompasses the ideologies of all three existentialist philosophers:

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

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

### 1. **Kierkegaard and *Two Ages***

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

Kierkegaard was the first philosopher who attempted to introduce the concept of the “individual” as an actual category in our thinking.<sup>62</sup> He did so largely with his metaphor of the “crowd” and the distinction

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

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

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

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

between the crowd-based or “mass” thought and individual thought.<sup>63</sup> Professor Tuttle explains that the concept of the “mass” is differentiated from the historical societal notion of the “multitudes,” the “majority,” or what Socrates referred to as the “many.”<sup>64</sup> The mass, according to Professor Tuttle, is “an advent of the mid-nineteenth century” and is a “purely philosophical notion” that was first conceptualized by Kierkegaard, particularly in his 1846 work, *Two Ages*.<sup>65</sup> Kierkegaard’s analysis of the “crowd” is not a critique of any specific social group (e.g., rich versus poor or secular versus religious); it is “an abstract possibility of all contemporary individuals” that occurs any time *any* individual relegates his or her autonomy, thus assigning his or her identity to a numerical status or an abstract, collective existence.<sup>66</sup> Any individual who flees into the crowd in order to find refuge invariably “flees in cowardice from being an individual . . . such a man contributes his share of cowardliness to the cowardliness which we know as the ‘crowd.’”<sup>67</sup>

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

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

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<sup>63</sup> *Id.* at 94–95.

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

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

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

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

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

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

<sup>70</sup> *Id.* at 74–75.

In such an age, “envy becomes the *negatively unifying principle*” which stifles, impedes, and degrades excellence, as diametrically opposed to an age of passion, which “*accelerates, raises up and overthrows, elevates and debases.*”<sup>71</sup>

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

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

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

In perhaps his most well-known book, *The Revolt of the Masses*, penned in 1930, Ortega y Gasset defines the mass as  
all that which sets no value on itself—good or ill—based on specific grounds, but which feels itself ‘just like everybody,’

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

<sup>72</sup> *Id.* at 84–85.

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

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

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

and nevertheless is not concerned about it; is, in fact, quite happy to feel itself one with everybody else.<sup>76</sup>

The author warns that the coming of the masses would be characterized by the attempted crushing of everything that is different, everything that is excellent, individual, qualified and select. Anybody . . . who does not think like everybody, runs the risk of being eliminated.<sup>77</sup>

Like Kierkegaard, it was important to Ortega y Gasset that his audience understood that dividing the mass from the minority, or the individual, is decidedly *not* a division into social classes and, therefore, does not coincide with the typical hierarchies of “upper” versus “lower” classes.<sup>78</sup> He suggests that there are two classes of humans:

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

He referred to the former class as the “select minorities” and the latter class as the masses; he pointed out that one’s membership in the modern club of the masses is not necessarily reflective of social classes or stations in life.<sup>80</sup> Very often, members of the “intellectual” or “nobility” classes have succumbed to the “pseudo-intellectual, unqualified, unqualifiable, and, by their very mental texture, disqualified.”<sup>81</sup> Ortega y Gasset similarly notes that “it is not rare to

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

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

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

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

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

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

find to-day amongst working men, who before might be taken as the best example of what we are calling ‘mass,’ nobly disciplined minds.”<sup>82</sup>

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

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

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

*“I love him who lives to know, and who wants to know so that the overman may live some day.”*

Friedrich Nietzsche<sup>85</sup>

Nietzsche is perhaps the most vibrant and, therefore, academically controversial of all the existentialist philosophers with respect to his notions of the “overman,” the individual genius who outshines the “nihilism of the inert and superfluous mass.”<sup>86</sup> A recurring motif in Nietzsche’s work, similar to Kierkegaard’s notion of the crowd and Ortega y Gasset’s notion of the masses, is the “conformity or tyranny

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

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

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

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

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

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

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

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

Nietzsche wrote his most popular book, *Thus Spoke Zarathustra: A Book for All and None*, in four parts.<sup>94</sup> Zarathustra, the hero of the

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<sup>87</sup> *Id.* at 109–10.

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

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

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

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

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

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

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

novel, is a hermit who retreats to gain wisdom in the mountains where “he enjoyed his spirit and his solitude” for ten years. He then returns to civilization to share his insights with his fellow man, specifically to teach him the concept of the overman as distinguished from the herd or masses of common men.<sup>95</sup> In the chapter, “On the Higher Men,” Zarathustra exclaims:

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

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

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

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

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

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

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

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

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

“Since man has to sustain his life by his own effort,  
the man who has no right to the product of his  
effort has no means to sustain his life. The man  
who produces while others dispose of  
his product, is a slave.”  
Ayn Rand<sup>98</sup>

Like the existentialist philosophers writing before her, objectivist philosopher Ayn Rand also predicts that mankind is reverting to a “moral collapse” back into the Dark Ages of a preindustrial or primitive, collectivist society.<sup>99</sup> Objectivism is a philosophy of rational individualism founded by twentieth century writer and philosopher Ayn Rand, who was born in Russia in 1905 and had a “passionate love of independent, creative Man, and a hatred for all forms of collectivism that would enslave him—or her.”<sup>100</sup> Having been raised by a bourgeois Jewish family in Russia, she fled to the U.S. in 1926 after experiencing the “tumultuous years of the Bolshevik revolution.”<sup>101</sup> According to Rand, the *individual* human mind is the fountain of all creation and, therefore, “there is no such thing as a collective mind.”<sup>102</sup> Thus, any group that does not recognize that “the

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

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

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

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

<sup>102</sup> DONNA GREINER & THEODORE KINNI, AYN RAND AND BUSINESS 139 (2001). *See also* Biddle, *Individualism*, *supra* note 39 (“[T]he fact remains that the individual, not the community, has a mind; the individual, not the group, does the thinking; the individual, not society, produces knowledge; and the individual, not society, shares that knowledge with others who, in turn, must use their individual minds if they are to grasp it. Any individual who chooses to observe the facts of reality can see that

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

According to Rand, today’s “multiculturalists” want everyone to believe that membership in the collective is what provides man with his whole sense of identity; the edicts of the tribe, thus, become “his unquestioned absolutes, and the tribe’s welfare becomes his fundamental value.”<sup>105</sup> Rand’s vision, to the contrary, was one of “life as a heroic journey;” one in which man lives for the pursuit of excellence and achievement of his goals; one in which persons “treat others as equals—traders giving value for value, never master or slave.”<sup>106</sup> She urges that a cultural movement, which must be led by a small minority of “new” intellectuals and would offer a “radical intellectual shift away from the dominant trend of the anti-mind, anti-man, anti-life culture,”<sup>107</sup> must take place in order to obviate the collectivist and statist policy towards which America is heading.<sup>108</sup>

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

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

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this is so. The fact that certain “philosophers” . . . deny it has no bearing on the truth of the matter”).

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

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

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

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

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

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

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

As Mill elucidates, “whatever crushes individuality is despotism, by whatever name it may be called,”<sup>110</sup> and “it is only the cultivation of individuality which produces, or can produce, well-developed human beings.”<sup>111</sup> As tragically epitomized by Rand’s fictional heroes, she distinguishes the mass-minded man, which she terms a “second-hander,” from her idealized man of intellect, or the “man as man should be”—the “noble soul” or individualist who transcends dualism and lives first hand, from the dictates of his own conscience.<sup>112</sup>

According to Objectivist Craig Biddle,

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

Perhaps no other work of Rand’s exemplifies the dichotomy between the individual and the second-hander more than her 1943 work of fiction, *The Fountainhead*, in which the protagonist Howard Roark depicts the “ideal man.”<sup>114</sup> A theme in this book and most of Rand’s other works is to prognosticate the eventual demise of a society in which the collectivist goal of ensuring “fairness” is accomplished by forcibly taking the intellectual products and creations of first-handers and redistributing them to second-handers; or those who use such products without giving any thought to the source of the creation or its economic value to the producer.<sup>115</sup> Roark is a brilliant architect “who desperately seeks to thrive in a society that rewards mediocrity while

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

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

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

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

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

<sup>115</sup> *Id.* at 10–11.

stifling creativity.”<sup>116</sup> Such a society is exemplified by one of the antagonists of the novel, Ellsworth Toohey, who “sees the reward of mediocrity and the stifling of the fountainhead of creative genius as the sole means of achieving control and power over the masses,”<sup>117</sup> and who “fears creative genius and the stimulation of free market competition.”<sup>118</sup> Rand sets out in the novel to deliver Roark, the creative genius, from such stifling and control.<sup>119</sup> Roark’s genius and individualism is ultimately rewarded by his withdrawal from the moral code that has victimized him and other creators throughout the centuries.<sup>120</sup>

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

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

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

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

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

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

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

academic literature.”<sup>122</sup> In his book, Professor Merges attacks the underlying elements pervading such literature that claim intellectual assets should operate under new rules in the digital age in which “individuals are less important; networks and collectivities” become the central unit of analysis.<sup>123</sup> Perhaps nowhere can this ubiquitous syndrome be observed more than in the current body of scholarship that renounces the historic role that the author has customarily played in the creation of original and creative works protected by copyright.

## II. The Metaphoric Assault of the Copyright Author

Section 102(a) of the Copyright Act of 1976 (“the Act”) provides copyright protection for “original works of authorship.”<sup>124</sup> Ownership of a copyright “vests initially in the author or authors of the work.”<sup>125</sup> Authorship only requires that the creation “owe its origin” to the maker of the copyrighted work.<sup>126</sup> Generally, the author actually creates the work; meaning, she is “the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”<sup>127</sup> The Constitution authorizes Congress to afford authors exclusive rights to their works, such as the right to reproduce, adapt, distribute, display, and perform the works.<sup>128</sup> Our Founding Fathers recognized

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

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

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

<sup>125</sup> *Id.* § 201(a).

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

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

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

that the long-term economic prosperity and advancement [of our country's cultural assets] was dependent on promoting 'the progress of science and useful arts,' which necessitates securing exclusive rights to authors who create original works.<sup>129</sup> As such, the author has historically been treated as the hero of the U.S. copyright saga, contributing to our vast collective of creative works and being rewarded and incentivized to continue in this noble quest.

Despite the foregoing, as discussed in Section I, existentialist philosophers such as Nietzsche predicted today's prevailing *Weltanschauung* of an increasing "disbelief in the existence of great men."<sup>130</sup> John Stuart Mill similarly claimed that "[o]riginality is the one thing which unoriginal minds cannot feel the use of."<sup>131</sup> Indeed, these men foresaw a shadow that was to mar the future of progress, as today there is no doubt that the concept of the creative individual and the notion of authorship and originality are lambasted in contemporary copyright scholarship.<sup>132</sup> Rarely is written today a copyright article or treatise that does not question the continued worthiness of affording exclusive protection to the creative author. Most go so far as to disparage and even mock the sanctity of the individual creative process and degrade the qualities of innovation and genius-ness.<sup>133</sup> Scholars from several intellectual callings have contributed to the academic dilution of the historical and cultural contributions of the individual

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

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

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

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

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

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

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

Social historian Martha Woodmansee, Professor of English at Case Western Reserve University, has influenced copyright scholarship and largely led a radical charge advocating against the rights of the author with her theory that the modern notion of author is a recent invention that does not closely reflect collective, contemporary writing practices.<sup>135</sup> Since the early 1990s, and often in collaboration with

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

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

Professor Woodmansee, copyright scholar Professor Peter Jaszi has written extensively on what he describes as the myth of the “Romantic notion of ‘author,’” particularly opining that the “persistence of the notion of ‘authorship’ in American copyright law makes it difficult for any new legal synthesis, which would focus on the reality of collective creativity, to emerge.”<sup>136</sup> According to Professor Jaszi, during the eighteenth century, the notion of “authorship” grew in accordance with the Romantic author movement in literature and art, which expressed an “extreme assertion of the self and the value of individual experience.”<sup>137</sup> It is indeed true that Romantics are core individualists who

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

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

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

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

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

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

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

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

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

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

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

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

The truth is quite the contrary: the author is not an indefinite source of significations that fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of

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

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

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

fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. When a historically given function is represented in a figure that inserts it, one has an ideological production. The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning.<sup>144</sup>

Although the bulk of the foregoing excerpt is difficult to decipher, particularly the last sentence, it is obvious that Foucault views the role of the individual author as ancillary to or, as he terms it, as a “functional principle,” which only acts to impede the more important collective objective of the subsequent free manipulation of his works by others who consume rather than produce them.<sup>145</sup> Foucault was not a lawyer, but rather a major figure in French structuralist and post-structuralist intellectual thought and criticism whose writings were multi-disciplinary, ranging across topics in history, sociology, psychology, and philosophy.<sup>146</sup> His antagonistic views of the author can be traced to a broader anti-intellectual movement beginning in the 1930s, during which time it became popular for literary critics to ignore the author of a work and focus solely on “the text itself,” thus, overtly disqualifying anything external to the actual work, including the creator of the work.<sup>147</sup> As one author notes, Foucault refused to believe that a single subject (like an author) infused a creative work with its meaning, but rather maintained that “authorship is an

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

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

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

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

intertextual position, existing prior to the author’s utterances, in which a subject makes statements.”<sup>148</sup> Indeed, Foucault’s conceptions of the author

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

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

Woodmansee and Jaszi assert:

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

The professors continue, claiming:

With its emphasis on originality and self-declaring creative genius, this [Romantic] notion of authorship has functioned to marginalize or deny the work of many creative people: women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative projects, to name but a few. Exposure of these exclusions—the recovery of marginalized creators and underappreciated forms of creative production—has been a central occupation of

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

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

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

literary studies for several decades. But the same cannot be said for the law.<sup>151</sup>

One example of these so-called “underappreciated forms of creative production,” which has been purportedly ignored by the law and is specifically cited by the authors in their joint article *The Ethical Reaches of Authorship*, is the supposed usurpation by poet William Wordsworth of his sister Dorothy Wordsworth’s journal entries.<sup>152</sup> William’s poem, “I Wandered Lonely as a Cloud,” was written in 1807 to describe a walk that he and Dorothy took in the Lake District in England during which they encountered a field of daffodils.<sup>153</sup> It is well known by experts in Romantic poetry that Wordsworth’s poem was intended by him not to be a trivial description of a walk in the woods, but rather a personal account of the experience of poetic creation itself, and also that he believed it to be one of his most important works.<sup>154</sup> Indeed, it is one of his most memorable poems and one of this author’s most favorite.<sup>155</sup> Dorothy also memorialized the same walk in one of her journals, many of which were not intended to be published but were written for the enjoyment of the “family circle.”<sup>156</sup> While Dorothy’s depiction uses remarkably similar terms, themes, and tones to those that appear in “I Wandered Lonely,” her journal entry is written in prose, while William’s verse follows a strict iambic tetrameter pattern, which is a structured meter applied often by

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

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

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

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

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

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

English poets that uses four six-line stanzas employing a quatrain-couplet rhyme scheme: ABABCC.<sup>157</sup>

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

When we were in the woods beyond Gowbarrow Park we saw a few daffodils close to the water-side. We fancied that the lake had floated the seeds ashore, and that the little colony had so sprung up. But as we went along there were more and yet more; and at last, under the boughs of the trees, we saw that there was a long belt along the shore, about the breadth of a country turnpike road. I never saw daffodils so beautiful. They grew among the mossy stones about and about them; some rested their heads upon these stones as on a pillow for weariness; and the rest tossed and reeled and danced, and seemed as if they verily laughed with the wind, that blew upon them over the lake; they looked so gay, ever glancing, ever changing. This wind blew directly over the lake to them. There was here and there a little knoll, and a few stragglers a few yards higher up; but they were so few as not to disturb the simplicity, unity, and life of that one busy highway.<sup>159</sup>

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

I wandered lonely as a cloud  
That floats on high o’er vales and hills,  
When all at once I saw a crowd,  
A host, of golden daffodils;  
Beside the lake, beneath the trees,

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

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

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

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

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

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

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

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

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

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

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

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

Determining who is an author is a bit more difficult. The word “author” has traditionally been “used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the ‘Author of Nature.’”<sup>169</sup> Per the *Aalmuhammed* case, the word “author” has come to mean the one who “superintends” the work or who is the inventive “master mind” of the work.<sup>170</sup> Put another way, the author of a work is the one “who really represents, creates or gives effect to the idea, fancy, or imagination.”<sup>171</sup>

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

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

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

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

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

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

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

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

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

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

- (1) who superintends the work;
- (2) what objective manifestations of shared intent to be coauthors exist; and

(3) whether audience appeal turns on the contributions of both authors, such that ‘the share of each in its success cannot be appraised.’<sup>174</sup> Ultimately, authors are going to consult with others in creating their work, but “[p]rogress would be retarded rather than promoted,” contrary to the intent of the framers in implementing the Progress Clause, “if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work.”<sup>175</sup> Viewed in light of this long-established legal context, it is difficult to envision how exactly copyright law thwarts collaborative effort or otherwise makes such effort difficult to achieve.

Moreover, if the Wordsworth example was intended by Woodmansee and Jaszi to exemplify their earlier-stated premise that the Romantic concept of author served to marginalize women poets, such intimation can be readily countered. When considering the similarities between William’s poem and the journal entries of his sister, many experts in Romantic poetry certainly do not share the same vehemence against William as our copyright scholars do, nor do they believe that William either usurped or discounted the artistic creativity of his sister when publishing his poetry.<sup>176</sup> For example, in

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

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

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

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

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

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

In addition, it can be readily observed that it was not only male Romantic authors who suggested that artistic solitude and isolation were the preferred formulae for engendering the originality contained in their works.<sup>180</sup> Woodmansee and Jaszi seem to make the assumption that the Romantic notion of solitary authorship as espoused by William Wordsworth in his works somehow resulted in the marginalization of women. However, many female authors writing during the eighteenth century—such as Mary Wollstonecraft, writer, philosopher and, ironically, one of the first advocates of female rights—also

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

<sup>178</sup> *Id.* at xii–xiii.

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

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

emphasized their own creative originality.<sup>181</sup> In her book, *Revolutions in Taste*, Dr. Fiona Price claims that Wollstonecraft’s “complex formulations of the significance of original thought have important implications for our understanding of Romantic originality.”<sup>182</sup> Dr. Price acknowledges that many authors who reflect and write on the phenomenon of the Romantic notion of author erroneously claim “that the women writers of the period were far more awkwardly placed in relation to originality” and “less willing to ascribe to the male Romantics’ model of creativity.”<sup>183</sup> Dr. Price, however, states that Romantic female authors, as well as women who studied them, were as “equally concerned with mental independence, ‘imagination’ and ‘genius’” as their male artistic counterparts.<sup>184</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

authoritatively restricted in how they viewed themselves in relation to such works and in relation to society as a whole.

During this period, however, civilization was on the cusp of reaching a more advanced marketplace society that would more fully develop in the late seventeenth and eighteenth centuries, during which copyright law would emerge concurrent with the spread of literacy and the vast increase of members of the public who were able to read.<sup>193</sup> The nineteenth century would eventually realize a major upsurge in the number of novels and other literary works being produced and distributed (including political tomes), thus being hailed as one of the most extraordinarily successful and thriving ages for literature.<sup>194</sup> Moreover, technological advancements that led to efficient printing meant that works were much more easily disseminated to a wider audience.<sup>195</sup> This broadening of distribution, as well as public education from the elite class to all social classes, led to a market economy which in turn created a shift in the attitude of writers who, for the first time, became professionals paid for their work.<sup>196</sup>

Indeed, the contrast between the human perception of self during this cultural period and that of the previous Middle Ages was a drastic one.<sup>197</sup> Whereas people during the Middle Ages were mainly aware of themselves as members of a group, it is during the Renaissance that man began to recognize himself as a spiritual individual.<sup>198</sup> Renaissance humanists were concerned with self-knowledge and the uniqueness of the individual, as well as the manner in which they

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

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

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

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

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

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

presented themselves to others.<sup>199</sup> It is during the rise of travel, urbanization, city living, and the wide availability of printed material that occurred in the sixteenth century that the true sense of the individual developed.<sup>200</sup> Individual authors as early as Shakespeare began to be considered as objects of admiration and adulation, as magazine articles were written encouraging readers to “pilgrimage” to the author’s home in Stratford, England, and auctions were held for pieces of his property.<sup>201</sup> In other words, they were glorified as rock stars within an age that celebrated its slow emergence from—and breaking the shackles of—religious oppression in cultural thought and consequent literary production.

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

As the prestige of the artist increased, so did his independence from the political and religious patrons who formerly dictated the scope and meaning of his work.<sup>205</sup> This newfound artistic freedom was revered by authors who declared that individuality and originality should be hailed as the supreme mark of “true art,” and encouraged

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

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

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

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

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

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

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

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

Wordsworth is often criticized for his efforts to reform the length of English copyright law to extend to the author’s life in order to preserve the economic viability of his own works.<sup>210</sup> In addition to being driven by economic incentives, “[Wordsworth] also viewed his works as a personal emanation, which was intimately linked to his conception of self.”<sup>211</sup> Romantic writings, therefore, stressed that the work of art is “an expression of self uncontaminated by market forces, undiluted by appeals to the corrupt prejudices and desires of... readers” as well as religious tyrants.<sup>212</sup> Thus, the Romantic theory of recognition and posterity requires that:

the work finally be judged and discriminated from other, lesser work. Indeed, with the invention of the modern concept of the (English literary) canon in the

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

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

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

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

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

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

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

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

Viewed in this broader social context, in this author’s opinion, it is difficult to understand the penchant of contemporary scholars to undermine this newfound individuality of the Romantic authors. For the first time in human history, these Romantic authors were able to embark upon lucrative careers as creators as well as provide society with such a diverse and a vast deposit of literary creations; both of which are stated goals of the Progress Clause of the U.S. Constitution.<sup>214</sup> Twentieth century cultural critic Neil Postman believes it was the time “when we achieved our release from our self-imposed tutelage” and when “the battle for free thought was begun and won.”<sup>215</sup> Yet, instead of celebrating works of solitary penmanship and protecting the individual author as proscribed by current copyright laws, contemporary copyright scholars like Professor Jaszi would welcome a legal regime that engages “the realities of contemporary polyvocal writing practice—which is increasingly collective, corporate, and collaborative.”<sup>216</sup> While he anticipates and calls for the

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

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

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

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

“revision of copyright concepts to take fuller account of collaborative cultural production,”<sup>217</sup> Professor Jaszi never quite defines or concretizes what exactly he means by the amorphous concepts of “cultural production” and “polyvocal” writing practices.<sup>218</sup> Further, he does not explain exactly *how* copyright laws should be redrafted to take such concepts into account.<sup>219</sup> Nonetheless, he and Professor Woodmansee boldly declare that they are “agitating for the development of more equitable models of intellectual property protection.”<sup>220</sup>

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

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

Professor Justin Hughes notes that even after several years of anti-author scholarship, there are still many questions “about both its picture of how the world is and its vision of how the world should be.”<sup>222</sup> He cohesively observes that:

There was just a touch of irony when two of the leading proponents of the ‘collective process’ wrote back-to-back articles in one journal. Each article was entitled

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

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

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

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

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

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

Author Effect and each author thanked the other author in the first footnote. But the articles were not co-written; each retained individual authorship of one article. Apparently, their own works have not become ‘polyvocal.’<sup>223</sup>

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

Irrespective of the obvious flaws and gaps in Woodmansee’s and Jaszi’s body of work on the subject, several legal scholars, whose works are examined in this section, have since—in similarly obtuse manners—cited, lauded, and reiterated these theories of authorship in their own works with the purpose of attacking the modern standard of authorship as defined in the Copyright Act, without bothering to explain exactly how or why collective creativity should trump individual origination either in the Copyright Act specifically, or in life, generally. For example, Professor Sonia Katyal takes issue with the requirements of originality and fixation in copyright law, maintaining that such doctrines lead to “an unspoken emphasis on the sovereignty of an artwork.”<sup>224</sup> Professor Katyal aspires to what Professor John Fiske termed a “semiotic democracy,” that would “empower individuals to add to the rich and expansive cultural fabric of a *true* public domain, where everyone participates equally in the ongoing process of cultural production.”<sup>225</sup> Noting that the term “semiotic democracy” is ubiquitous, utopian, and that it conflicts with traditional principles of exclusive copyright ownership, Professor Katyal nonetheless extols such a precept.<sup>226</sup> She explains Professor Fiske’s meaning of a semiotic democracy as giving preference to the consumer of works over the creator of such works, and is meant to

describe a world where audiences freely and widely engage in the use of cultural symbols in response to the

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

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

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

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

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

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

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

Further, Professor Mario Biagioli asserts that genius functions “as a remarkably effective legal fiction rather than an accurate description of the process of literary or artistic production” on account of the “inevitable borrowings, collaborations, and extensive labor that [go] into any form of cultural production.”<sup>229</sup> He further opines that the author myth “denies visibility to the many social dimensions of creativity by casting it an instantaneous and seemingly natural process.”<sup>230</sup> Like many copyright scholars, he accepts this attestation without question; however, he declines to illustrate exactly how this

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

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

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

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

circumstance operates to deny creativity by stating that such “critique has been articulated well and often already.”<sup>231</sup>

Professor James Boyle’s landmark book discusses the changing face of intellectual property rights in the wake of the information age.<sup>232</sup> He claims that our “unconscious use of the author paradigm” and the traditional model of conferring property-like rights to creators of intellectual products is a “bad thing for reasons of both efficiency and justice; it leads us to have *too many* intellectual property rights, to confer them on the *wrong people*, and dramatically to undervalue the interests of both the *sources of* and the *audiences for* the information we commodify.”<sup>233</sup> In an earlier article, Professor Boyle laments the popular conception of the “great writer” and longs for a harkening back to a more medieval European concept of authorship; one which “did not have the preeminent importance or the significance we accord to it today.”<sup>234</sup>

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

The author is seen as the individual *par excellence*. The coming into being of the notion of ‘author’ constitutes the privileged moment of *individualization* in the history of ideas, knowledge, literature and the sciences. Society is supposed to allow the author more subjectivity than the average person. She may be eccentric or violate cultural norms. Her genius is seen as *individual* rather than being the product of a culture or a context. To understand the work we concentrate

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

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

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

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

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

most of our attention on the author, rather than on the learning of the time, the gossip of the streets, the influences of the genre. The work comes from *inside* the author. At best, we may concede that this particular author is fitted by breeding and education to be its enunciator.<sup>236</sup>

Similarly, Professor Anne Barron writes that “copyright’s critics have been anxious to identify that realm of creative endeavour [sic] which is negated or denied by Romantic ideology.”<sup>237</sup> She provides a mocking critique of the individual author:

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

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

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

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

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

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

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

organic or unstable components.”<sup>241</sup> Like Professor Boyle, Professor Barron argues for a conception of art that could accommodate post-Modernist art practice, and a conception of cultural rights that could transcend the limits of copyrights considered as property rights.<sup>242</sup>

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

Other scholars have attacked the role of the individual author in copyright law through feminist perspectives of intellectual property.<sup>245</sup> In his 2006 article, *Copyright and Feminism in Digital Media*, Professor Dan Burk laments that “feminism has contributed relatively little to discussions regarding intellectual property.”<sup>246</sup> He argues that the current copyright regime controls and suppresses various forms of feminine discourse in contemporary media, particularly writing on the internet.<sup>247</sup> These forms of discourse may lend themselves to “webs” of meaning that are “contextual, relational and personal” (which,

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

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

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

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

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

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

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

according to the author, are female-oriented), rather than linear progressions of meaning that focus on “objectivity, individuality, and abstraction” (which, according to the author, are male-oriented).<sup>248</sup> According to Professor Burk, research has found that while men tend to communicate on the computer in “direct, terse, and even confrontative language,” women normally use rhetoric that is more polite, supportive, and personalized.<sup>249</sup> Professor Burk cites various studies that suggest computer technology is not gender-neutral and that women might be systematically disadvantaged by either the design of the computer technology or by the social customs attending its use, if indeed women tend to communicate differently.<sup>250</sup>

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

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

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

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<sup>248</sup> *Id.* at 523–24.

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

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

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

to the individual and confrontational understanding that characterizes patriarchy.<sup>252</sup>

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

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

In his book, *The Idea of Authorship in Copyright*, Professor Lior Zemer advocates a radical theory, even for most anti-Romantic copyright scholars: the public has the right to *every* copyrighted

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

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

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

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

<sup>256</sup> *Id.* at 545–46.

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

work.<sup>258</sup> In the preface to Professor Zemer's book, he rationalizes his reasons for this theory:

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

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

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

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

The common theme that seems to weave its way into these scholarly assertions against the Romantic notion of author is that of an

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

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

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

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

<sup>262</sup> *Id.* at 78–79.

elusive concept: that copyright rights, which had previously been granted through the ages to individual authors, should somehow now be conferred to the “public” (Zemer) or “other, often invisible contributors to the work” (Burk). Such credit would further elevate certain unspecific goals of achieving “the ability of the public to secure collective interests” (Zemer), or “cultural rights” (Barron), or “the many social dimensions of creativity” (Biagioli), “collaborative cultural production” and “writing” (Jaszi), and preventing “such public concerns as human rights violations” (Aoki). It is quite modish today for a copyright theorist to bloviate about how the modern author is killing copyright for the masses and wax sentimental about the “good old Medieval days” when the author was a common copyist himself. Yet, no scholar seems ever to seriously question any of these tenants originally proffered by Foucault and his prodigy, particularly, Foucault’s conception that the author is “a certain functional principle by which . . . one impedes the free circulation . . . and recomposition of fiction” and “the ideological figure by which one marks the manner in which we fear the proliferation of meaning.”<sup>263</sup> As Professor Seán Burke, a critic of the post-structuralist movement against the author has noted, those who ascribe to Foucault’s “dictates have been accepted unreflectively” and almost “never held up to any critical scrutiny.”<sup>264</sup> He continues, stating, “[e]ven when the question of the author is addressed somewhat more directly, when specific contentions are tendered as to why we should no longer regard the author as a relevant category of modern thought, anti-authorial positions founder on unwarrantable suppositions and fake antinomies.”<sup>265</sup>

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

The intelligence and subtle humor emerging from the plays and poetry associated with the name

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

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

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

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

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

We would no longer hear the questions that have been rehashed for so long: Who really spoke? Is it really he and not someone else? With what authenticity or originality? And what part of his deepest self did he express in his discourse? Instead there would be other questions, like these: What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject functions? And behind all these questions, we would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking?<sup>267</sup>

As demonstrated in the preceding analysis, there are far more scholars who engage in rhetoric that support both an anti-author and “control-criticism” attitude toward copyright law than the few who believe that ownership and control by authors leads to an atmosphere of progress.<sup>268</sup> While most of those who assert that an author’s control still matters generally concede that *limitless* control is not conducive to

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

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

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

progress—particularly with respect to transaction costs and coordination problems<sup>269</sup> an appreciative number of the “control-criticism” professors have bought into the more extreme Foucauldian “death of the author” mantra. This mantra would completely obliterate any form of exclusive rights to authors, thus invariably upsetting the delicate balance of rights between the author and public as dictated by the Progress Clause of the Constitution, as more particularly set forth in Section III.<sup>270</sup> If our predominant worldview continues to foster this sacrifice of freedom of self-creation, it will confine us within an atmosphere in which the creation of original works of art—as contemplated by every iteration of the U.S. Copyright Act—can also no longer continue to thrive.

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

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

Thus, under post-structural analysis, literature is not the result (if it ever was) of an author's individuated originality. Instead, it is the result of intertextuality—of a collaboration between author and reader that goes beyond the reader merely reading the words selected by another. The centrality of the reader’s role in the creative process, as the interpreter of textual meaning, has the potential to tip the balance between author and the public almost exclusively in favor of the public interest. Since the role of authorial consciousness is diminished under a post-structuralist view of creativity, the need for a putative author’s ability to control the economic exploitation of her work through the property rights of copyright appears similarly diminished. If all creativity, therefore, involves appropriation, then *a fortiori* appropriation is creative. Following this

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

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

construct to its logical conclusion, if every appropriation is creative, then nothing is ‘not creative.’ Ultimately, creativity itself becomes a meaningless construct.<sup>271</sup>

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

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

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

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

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

Notwithstanding the contemporary atmosphere of group affection that has left copyright scholars so committed to killing off the individual author, there exist some skeptics of the free information movement who have observed that removing all obstacles of use and

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

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

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

hindering rights of authors leads to a culture that tolerates mass piracy and endangers the very creation of the raw materials needed for the extolled “remix culture” of Professor Lessig’s dreams.<sup>274</sup> When the public domain, serving as a created “commons,” is “ultimately championed as a source of creative endeavor whose protection is nearly more important than those of the original author,”<sup>275</sup> and when amateurism is celebrated over experience, then we know we are about to embark upon a dystopian society that will “foretell the death of culture.”<sup>276</sup> This dystopia would be similar to the one in which Howard Roark and other creative innovators in Ayn Rand’s *The Fountainhead* are besmirched and eventually done away with, leaving nothing but the products of the past to be commonly recycled.<sup>277</sup> Professor Katyal and others glorify “the creative impulse that inspires the appropriation and reuse of various works,”<sup>278</sup> (in other words, acts of copyright infringement). Further, she panegyricizes ideologies insisting that

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

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

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

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

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

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

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

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

Professor Tuttle explains that Ortega y Gasset perceived this phenomenon as the development of a standardless culture of barbarism, characterized by a shutting down of the “thinking aspect of the self-creation of human life” in which “the mass is shut up within itself and rests content with the stock of ideas it already possesses.”<sup>280</sup> While the mass is under a self-idealized notion that it possesses “ideas,” such ideas are not genuine.<sup>281</sup> Professor Tuttle continues:

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

In this culture, reason is abandoned for public opinion; judgment and discrimination are replaced with action and group desires.<sup>283</sup> A “hurricane of farcicality” rages, and “[h]ardly anyone offers any resistance to the superficial whirlwinds that arise in art, in ideas, in politics, or in social usages,” resulting in a faulty “flourishing of rhetoric” that is not questioned, reasoned, or examined.<sup>284</sup> As a result, many copyright scholars advocate that non-owners of intellectual products will engage in lawlessness, thus “exposing existing [intellectual property] entitlements to a degree of instability” in which these “expected entitlements of an owner can be tested against other nonowner interests,”<sup>285</sup> eventually leading to a copyright-less society, or at the very least, one in which many scholars dream there will be increased government-sponsored redistribution of property interests.<sup>286</sup>

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

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

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

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

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

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

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

Peter Schwartz, in the introduction to *PRIMITIVE* by Ayn Rand, refers to this phenomenon as a desire in which the “multiculturalists” wish to return to “primitive” concepts of membership in a collective society in which the “tribe’s edicts thus become [society’s] unquestioned absolutes, and the tribe’s welfare becomes [society’s] fundamental value.”<sup>287</sup> In this state of anti-industrialist affairs, there exists “an ongoing assault on the rational mind and its products.”<sup>288</sup> Rand notes that the right to property, however, is the only proper implementation of man’s right to life since, and “[w]ithout property rights, no other rights are possible.”<sup>289</sup> Rand understood that the “right” to property is not an entitlement to the *object* in which that property sits; it is not “a guarantee that a man *will* earn any property, but only a guarantee that he will own it if he earns it.”<sup>290</sup> In other words, “[i]t is the right to gain, to keep, to use and to dispose of material values.”<sup>291</sup>

Professor Tuttle asserts that, years earlier, Kierkegaard generally explained a similar experience as the “leveling tendency,” or the process by which the masses eventually destroy social cohesion and individual identity, replacing passion, leadership, and heroic self-action with a society that “rejects any individual responsibility or goals apart from group ideas.”<sup>292</sup> Kierkegaard attributed the genesis of this crowd mentality to philosopher Georg Wilhelm Freidrich Hegel (1770-1831).<sup>293</sup> Hegel’s writings revealed his conviction that humans are social beings whose deepest nature is found not in their individualism or autonomy, but in their relation to others and their need to conform to and associate with the state.<sup>294</sup> Throughout his life and writings,

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

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

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

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

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

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

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

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

although Kierkegaard admired Hegel in many respects, he nonetheless found many grounds for his “distrust” of various Hegelian principles, most specifically the notion that romantic individualism must be replaced with “social usage” and “identification with the state.”<sup>295</sup> According to Professor Tuttle, Kierkegaard defined leveling as “the person’s despair over the attainment of individuality, the loss of passion and inwardness, and the devaluation of the human personality through abstract equality.”<sup>296</sup> These factors pull the individual down to the “neutral and criterion-less station of the crowd,” which Professor Tuttle asserts results in nihilism and despair because “nobody is of a higher or lower station than one another.”<sup>297</sup> Eerily prophetic, Kierkegaard predicted that pervasive nihilism—that would inevitably result from leveling—would occur when, as Professor Tuttle states, “the crowd pretends to take on individual characteristics” by drawing the individual into “public ‘chatter’ which obscures the difference between public and private, social and individual.”<sup>298</sup>

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

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

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

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

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

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

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

win for themselves the right to despise intelligence and to avoid paying it any tribute . . . they flatter the mass-man, by trampling on everything that appeared to be above the common level.<sup>301</sup>

With somber prescience, Ortega y Gasset contends that the modern industrial era has converted the man of science and novelty into a “social pariah” or vertical invader—one who only takes from the public domain of materials authored by those before him without extending his gratitude for the instruments or the authors who make the materials possible in the first place.<sup>302</sup> This “self-satisfied” man finds himself in a civilized age of plentitude, surrounded by beautiful art, marvelous instruments of science, and other “comfortable privileges,” which have been created by *others*.<sup>303</sup> Nonetheless, he believes he is entitled to such privileges, can behave as he wishes, and can do what he jolly well likes with those privileges.<sup>304</sup> This “spoiled child . . . behaves exclusively as a mere heir” of civilization and is entirely “ignorant of how difficult it is to invent those medicines and those instruments and to assure their production in the future.”<sup>305</sup> This state of mind in which man “is content to use his motor-car or buy his tube of aspirin—without the slightest intimate solidarity with the future of science, of civilization,” terrified Ortega y Gasset in the sense that it inevitably would lead to an “emergent barbarism.”<sup>306</sup> Professor Tuttle eloquently summarized Ortega y Gasset’s notion of “emergent barbarism:”

[T]he perfections of scientific industrialism and liberal democracy caused the masses to believe that their system was not organized and maintained by human excellence, but as a ‘natural system,’ free as the air.

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

<sup>302</sup> *See id.* at 86–87.

<sup>303</sup> *See id.* at 98–102.

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

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

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

This has led to a contradictory situation, for the masses are always concerned with their material well-being, but at the same time they remain alien to or ignorant of the causes of that well-being. The level of civilization that they enjoy can be maintained only by effort and excellence. But the masses have come to believe that their authentic role is simply to demand the benefits of the nineteenth and twentieth centuries as though they were natural rights. In this sense, the masses remain in contradiction to the conditions which allowed them to come into being. To the masses, everything seems now permitted, even demandable. . . . Everything seems to serve them as a right of consumption, without requirements or duties on the part of the recipients.<sup>307</sup>

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

With respect to copyright law, we have observed how contemporary commentators are infusing collectivist, mass-minded ideologies into scholarly pieces that advocate the overthrow of moral

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

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

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

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

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

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

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

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

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

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

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

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

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

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Practicalities aside, money is also how our culture defines value, and being told that what you do is of no (\$0.00) value to the society you live in is, frankly, demoralizing. Even sort of insulting. And of course when you live in a culture that treats your work as frivolous you can't help but internalize some of that

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

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

devaluation and think of yourself as something less than a bona fide grown-up.<sup>316</sup>

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

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

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

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

Men have been taught that the highest virtue is not to achieve, but to give. Yet one cannot give that which has not yet been created. Creation comes before distribution—or there will be nothing to distribute. The need of the creator comes before the need of any possible beneficiary. Yet we are taught to admire the second-hander who dispenses gifts he has not produced

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

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

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

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

above the man who made the gifts possible. We praise an act of charity. We shrug at an act of achievement.<sup>320</sup>

Professor David Kelley provides a summary of Rand's view of "productive achievement" and the core of her ethic:

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

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

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

A few lone contemporary social critics have, like Rand and the existentialist philosophers, recognized the danger of the unchallenged praise of the crowd in today's digital world. In his book, *The Cult of the Amateur*, Andrew Keen terms the phenomenon the "myopia of the digital mob," which he claims is

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

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

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

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

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

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

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

Likewise, Donald L. Luskin and Andrew Greta recently authored the book, *I Am John Galt: Today’s Heroic Innovators Building the World and the Villainous Parasites Destroying It*, in which they dedicate entire chapters to modern heroic innovators and creators, such as Steve Jobs, Bill Gates, and John Allison, and compare them to

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

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

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

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

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

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

heroic characters in Ayn Rand’s literature.<sup>329</sup> By celebrating the characters in Rand’s various novels as “individualists, innovators, and iconoclasts” who “are achievers—in business, in the arts, and in love,” the aim of *Luskin and Greta* is to share with the courageous reader—who in today’s world, strives to emulate such rare traits, as portrayed by such characters—a philosophy that “greatness is to be celebrated, not feared.”<sup>330</sup> Noting that “[a]ll value distills down to the individual,” *Luskin and Greta* also dedicate chapters to modern-day collectivists including Paul Krugman, Barney Frank, and Angelo Mozilo, who mirror traits of Randian villains for the purpose of showing that

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

The raging tide against the lone creator and solo author, thankfully, is beginning to turn, if not so readily in the legal academic field, then in other disciplines. *New York Times* author and former Wall Street lawyer Susan Cain bemoaned recently that our culture is enthralled with a notion she terms as the “New Groupthink,” which insists that the best creations and achievements are borne from working in teams or groups, to the point where “[I]one geniuses are out . . . Collaboration is in.”<sup>332</sup> In this article, Cain discusses the ironic duality of human nature—“we love and need one another, yet we crave privacy and autonomy.”<sup>333</sup> Citing the research and findings of prominent psychologists such as Mihaly Csikszentmihalyi, Gregory Feist, and Hans Eysenck, Cain posits that, contrary to the New Groupthink, those who work in solitude and privacy are much more creative and innovative, and are more able to tap into the “quiet part of

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

<sup>330</sup> *Id.* at 2–3.

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

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

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

the creative process.”<sup>334</sup> In her thoughtful and well-researched book, *Quiet: The Power of Introverts in a World That Can’t Stop Talking*, she discusses various advocates of the New Groupthink, most notably author Warren Bennis who “heralds the rise of the ‘Great Group’ and ‘The End of the Great Man.’”<sup>335</sup>

Nietzsche trumpets a proclamation similar to Cain’s that [w]here solitude ceases the market place begins; and where the market place begins the noise of the great actors and the buzzing of the poisonous flies begins too.<sup>336</sup>

Kierkegaard similarly postulates that in order to ameliorate the incessant, meaningless public “chattering” that is attendant to the process of leveling, individuals must be “turned inward in quiet contentment, in inner satisfaction.”<sup>337</sup> Ortega y Gasset would surely agree, as he believed that autonomy is defined as an “inward sense of life.”<sup>338</sup> So, too, would Mary Wallstonecraft, a true pioneer of her day, suggest, that “isolation is the only way of generating originality,” even

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

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

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

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

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

while many of her contemporary female writers question such a notion.<sup>339</sup> Even in the legal field, there remains a handful of copyright academicians who understand that “[t]he creative act must be respected and the author's relationship to her work honored in order to encourage creative people to engage in creative acts.”<sup>340</sup>

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

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

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

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

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

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

As strong as the scholarly voices are that echo and re-echo the chant against rights and protections for creative authors, most lawyers, legislators, and judges in copyright decisions have, for the most part not (yet) joined the anti-author bluster.<sup>344</sup> For example, in *Nash v. CBS*,<sup>345</sup> the Seventh Circuit held:

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

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

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

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

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

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

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

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

The following year, in *Harper & Row Publishers, Inc. v. Nation Enterprises*,<sup>349</sup> it also claimed that

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

In earlier cases, the Supreme Court seemed to acknowledge that the benefits provided to the public were ancillary byproducts that were bestowed *from* the primary work of the authors.<sup>351</sup> For example, in *Fox Film Corp. v. Doyal*,<sup>352</sup> Chief Justice Hughes wrote:

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

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

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

<sup>350</sup> *Id.* at 556–57.

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

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

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

A few years later, the Court reiterated this sentiment in *Washington Publ'g Co. v. Pearson*:<sup>354</sup>

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

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

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

Professor Merges laments that most copyright scholars today do not view individual authorial freedom and ownership as the primary purpose of copyright and other intellectual property law; instead, it is “strictly instrumental, a means to the ultimate end of net social welfare or the like.”<sup>358</sup> He claims that, while the current body of evidence is

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

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

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

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

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

“maddeningly inconclusive” as to whether society needs or benefits from intellectual property laws, it nevertheless supports “a fairly solid case in favor of IP protection.”<sup>359</sup> Professor Ginsburg notes that, in spite of all the criticisms of copyright laws that proliferate, “[t]he System still Works,” opining that

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

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

## V. Conclusion

Like it or not, “[a]ll men are not created equal in talent.”<sup>363</sup> Whereas the Copyright Act will protect any potential author whose work meets the standards of originality, “there is no question that not all creative works are equal.”<sup>364</sup> As such, “[o]ne has to realise [sic] that there are some people who were or are infinitely better at doing something than oneself, and these people will continue to exist.”<sup>365</sup> While social commentators like Mill, and even renowned

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

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

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

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

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

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

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

psychologists like Abraham Maslow and Carl Jung, have been able to make such obvious pronouncements in the past,<sup>366</sup> today those who blow the trumpet of individuality and praise true talent are accused of being “elitist” when they say things such as “[t]alent always has been, and will always be, scarce.”<sup>367</sup> Merrill believes that one of the reasons why Ayn Rand’s philosophy is so despised, particularly in academia, is due to the articulate manner in which Rand so unabashedly “shows that the extraordinary achievements of a few make our lives better,” which is discomfoting to people who “don’t like the idea that others are better than they are, nor, that they owe such a debt.”<sup>368</sup> Recognizing that his views on this issue are at vast odds with the “democratization” trend, Professor Merges nonetheless bravely touts his belief that some works are simply “more original than others” when he states:

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

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

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

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

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

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

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

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

Yet, as has been demonstrated in this article, a majority of copyright professors continue to entertain a borderline obsessive fascination with—and insistence on—the continued philosophical demonization of individual creativity to the point where “genius” has somehow taken on an undesirable moniker; whilst the collective or common collaborator, who altruistically gives his work product away, is revered and deserving of accolades. How are such culturally barbaric acts accomplished? It is a slow burn of scholar upon scholar in the process rewriting history and overlooking the facts or, at the

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

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

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

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

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

very best, subverting the truth of things by contorting them and placing them into compartments that are at once convenient for one social group, then at other times, re-contorted to fit into the next popular social movement. Professor Rahmatian is one scholar who has astutely observed the anti-author effect that has occurred within academia for the last fifteen years, and is as perplexed—as this author—as to why so many otherwise intelligent folks take this obviously and seriously flawed theory for granted.<sup>375</sup> We should always question and insist upon rational answers to scholarly theories before blindly accepting them and recasting them into our own thought and scholarship. Ayn Rand noted correctly that:

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

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

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

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

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

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

It is important what, and exactly *how* professors speak and teach about what it means to create a copyrighted product. Mark Rose, an English professor who has written prolific articles on the intersection between literature and copyright, warns intellectual property scholars of the implications of the “unconscious” ways that copyright is discussed and reminds us that “[m]etaphors are not just ornamental; they structure the way we think about matters and they have consequences.”<sup>378</sup> While Professor Rose claims that various copyright metaphors that have been ingrained through the years have fostered a mindset in which we think about works of authorship as “permanent and absolute property rights,”<sup>379</sup> it is just as important to note that the new copyright trope of the evil Romantic author, which has been designed to counteract such notion is as problematic and has just as many, if not more, negative legal and societal consequences.

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

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

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

I, personally, continue to be primarily inspired not by Groupthink or collective authorship, but instead by “[t]he Romantic conception of

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

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

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

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

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

the individual as an expandable source of spirit,”<sup>383</sup> as well as by the words in which Kierkegaard himself described the way in which he thoughtfully and appreciatively read books:

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

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

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

As John Stuart Mill reminds us, “all good things which exist are the fruits of originality.”<sup>386</sup> If innovation and creative works are to thrive in today’s economy, in which there is pronounced competition on a worldwide level, then we should heed the sage advice of Mill when he writes that, in order to have persons of genius, “it is necessary to preserve the soil in which they grow” because “they can only breathe freely in an atmosphere of freedom.”<sup>387</sup>

While today it is common copyright rhetoric that intellectual goods carry with them no danger of a traditional “tragedy of the

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

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

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

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

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

commons” or scarcity in the economic sense,<sup>388</sup> this article has demonstrated that, left unchecked, the continued metaphoric assault on the Romantic author and undermining of the importance and dignity of individual creativity will result not only in a scarcity of *quality* intellectual products, but an eventual moral downslide of our culture. It is frightening to witness such an erosion unfold as influential and highly respected copyright professors like Jessica Litman make repeated claims that our copyright system is flawed because it is premised on the “charming notion” that “works owe their origin to the authors who produce them” rather than by the method she perceives authors to “engage in the process of adapting, transforming, and recombining what is already ‘out there’ in some other form.”<sup>389</sup> Professor Litman believes that

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

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

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

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

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

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

*Property*, Francis Hargrave, counsel in the famous copyright case *Becket v. Donaldson*, wrote:

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

While it is undoubtedly true that all authors essentially “stand on the shoulders of giants” and are influenced by the *ideas*, themes, and techniques employed by their predecessors from previous ages, each new author adds unique *expression* in which he stamps his individual personality, as well as the personality of the age in which he lives.<sup>393</sup> As copyright scholars, do we really want to dissuade such a process by identifying with Foucault and his scions in the psychological tearing down of the author? Luckily, as Professor Burke reminds us, despite the “blind-spot” in the rhetoric of the death of the author, as promulgated by Foucault and friends, “the author lives on within and without theory” and, gratefully, “[e]verywhere, under the auspices of

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

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

its absence, the concept of the author remains active.”<sup>394</sup> Thankfully, as Professor Burke celebrates in the prologue of his book, “the concept of the author is never more alive than when pronounced dead.”<sup>395</sup>

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

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



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