

The Copyright Moment

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I. INTRODUCTION

A trinational all-star team of curators was established. The object was how to ignite a Matisse-Picasso show, pairing works by the two artists, conveying to the audience the long obsession the two artists had for each other's works, focusing on instances where one artist surges and the other, consciously or not, responds. The difficult task was to collect works owned by Tate in London, Pushkin State Museum of Fine Arts in Moscow, the Columbus Museum of Art in Ohio, the Modern in Queens, and many other galleries and private collectors. The seduction began with a card game: "Artists Dueling, Curators Dealing." The game was played between Henry Matisse and Pablo Picasso collectors and curators. A curator would approach a collector with a deck of cards in hand. Each card showed a reproduction of a work either by Matisse or Picasso. The curator would lay the cards on a table, face up, presenting them to the collector. The curator would then match one card by Picasso, say "Nude with Raised Arms" or "Acrobat," and one by Matisse, say "Blue Nude" or "Acrobats," as if to mimic the rivalry the artists had in life and the dependence each had on the other's talent.

The curators' interest in the game was to stimulate interest for the trinational show in New York, London, and Paris, in which the two artists' works would face off on gallery walls. The curators were hoping to convince the collectors with the uniqueness and richness of the show by letting them juxtapose the cards in various ways. The curators had one aim: to convince collectors to part with their card—their art—for one calendar year. The game was successful. The show went on.¹ Indeed, the show left no room to question the artistic collaboration and rivalry between Picasso and Matisse.

Collaboration is an unavoidable character of the creative society. The Matisse-Picasso collaborative paradigm is just one example. Jeff

1. Sarah Boxer, *Artists Dueling, Curators Dealing*, N.Y. TIMES, Feb. 9, 2003, § 2, at 1.

Masten tells us that “collaboration was a prevalent mode of textual production in the sixteenth and seventeenth centuries, only eventually displaced by the mode of singular authorship with which we are more familiar.”² And Brian Vickers recently observed that collaborative authorship was a “standard practice in Elizabethan, Jacobean, and Caroline drama.”³ Does the fact that “collaborative authorship” preceded singular authorship mean that all subsequent authorial and artistic endeavours have a collaborative dimension? Collaborative in what sense? Is it only between authors in their individual capacity?

This Article is about the invention of a concept: the “copyright moment.” The “copyright moment” means recognition of the moment in which copyrighted entities are born. Defining this moment will not only allow us to reorganize the entitlement edifice in copyright, but will also mark the beginning of a debate on how copyright laws and policies should evolve in the future. It will necessitate recognition of unrewarded actors taking part in the copyright making process. Allocating rewards in the products resulting from the relationship between Picasso and Matisse will mirror the status quo: both artists won, and their relationship and collaboration made them better artists. In every incident of collaboration, however, there is one contributor that does not normally win—the public. Simply put by James Boyle: “Authors tend to win.”⁴

The collaboration between Picasso and Matisse was not isolated from the cultural and social context in which they created. Collaboration that reaches artistic fruition requires the consumption of collectively produced and owned social and cultural properties. The public serves as a platform from which social events and cultural processes emerge, are absorbed by individuals, and then embedded in expressions of human intellect. At the core of the present Article is the argument that if one makes an attempt to define the collaboration between Picasso and Matisse and value the creative results emerging from their collaboration, one is required to view this collaborative act as a three-party project between Picasso, Matisse, and the public. In what follows I intend to

2. JEFFREY MASTEN, *TEXTUAL INTERCOURSE: COLLABORATION, AUTHORSHIP, AND SEXUALITIES IN RENAISSANCE DRAMA* 4 (1997).

3. BRIAN VICKERS, *SHAKESPEARE, CO-AUTHOR: A HISTORICAL STUDY OF FIVE COLLABORATIVE PLAYS* 137 (2002).

4. JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 116 (1996); cf. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *TEX. L. REV.* 873 (1997) (book review) (questioning the power of the Romantic authorship idea to explain intellectual property law).

reject declarations supporting the view that copyright is authors' territory and argue that the interdependent nature of human intellectual creation means that its products represent the creative collectivity:

[G]iven the vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus, even if one assumes that the value of these products is entirely the result of human labor, this value is not entirely attributable to any particular laborer⁵

I shall attempt to answer the following question: If copyrighted entities are socially constructed—actual manifestations of the collective creativity—ought they be collectively owned? In one of her recent works, Wendy Gordon reminds us what copyright scholars argued for many years: that copyright norms in today's legal environment undervalue the "gift[] all artists receive, namely, a tradition and world they have not made."⁶ If Gordon is correct, and if authorial and artistic properties are created in a social setting which we own in common, should they, as Steven Wilf strongly advocates, be jointly owned between authors and the public?⁷

Parts II and III of this Article briefly present and discuss the classic principle of Romantic authorship from a social constructionist perspective. Part IV introduces into copyright discourse the principle of original appropriation familiar to discussions on traditional property such as land and chattels. This Part argues that the original appropriation principle has a special significance for copyright debates. Parts V and VI take the theory of social construction as their organizing principle and examine the public's authorial role. In these Parts, I defend the following proposition: in order to rethink the bundle of limits the law imposes on copyright holders we ought to realize the meaning behind the fact that authors and copyrighted entities are social constructs. Part VII applies the findings of the preceding Parts to works created by Shakespeare, Picasso, Mozart, Dada artists, and photographers. Before the concluding Part, Parts VIII and IX define the "copyright moment" concept and claim that solitary authorship, the principle dominating the evolution of modern copyright, is misleading and requires a radical conceptual change. I shall argue that the "copyright moment," if properly defined, has much to offer contemporary copyright affairs.

5. Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 38 (1989).

6. Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 77 (2004).

7. Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999).

II. AUTHORIAL CONSTRUCTIONISM

Scholarship developing social approaches to copyright criticises the Romantic notion of the author and questions the property constituent in copyright from a social perspective. Martha Woodmansee and Peter Jaszi are the pioneers who initiated the present stream of scholarship on social approaches to copyright.⁸ They convincingly argue that the author is deconstructed into a vessel through which many influences and experiences are poured. Developing this ideal further, Boyle criticises the idea of Romantic authorship and its effect on the scope of copyright in modern times.⁹ He reminds us that authorial entities are “socially constructed and historically contingent.”¹⁰

Many scholars support, albeit sometimes not explicitly, the idea behind authorial constructionism: that authorial and artistic entities do not stand alone, and their realization requires social interaction and cultural exchange. For example, Zechariah Chafee remarks that “[t]he world goes ahead because each of us builds on the work of our predecessors.”¹¹ Jessica Litman argues that there is no ultimate originality.¹² Rosemary Coombe criticises the propertization of shared symbols and cultural elements.¹³ Alfred Yen remarks that “[a]ny frank appraisal of authorship must conclude that each author’s work contains both the author’s original creations and material drawn from other authors. . . .”¹⁴ Carys Craig contends that intellectual works are necessarily the products of collective labour and so ought to be owned collectively.¹⁵ More recently, Julie Cohen reminded us of the collective dimension in copyright. She emphasizes the “lack of a clear connection between the

8. THE CONSTRUCTION OF AUTHORSHIP 1, 9 (Martha Woodmansee & Peter Jaszi eds., 1994).

9. See generally BOYLE, *supra* note 4.

10. *Id.* at 114.

11. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945).

12. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). Litman views the creative act as an act dependent on the works of others, and concludes that “this is the essence of authorship.” *Id.* at 967.

13. See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 99 (1998); see also Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

14. Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 8, at 159, 166.

15. Carys J. Craig, *Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEENS L.J. 1, 36 (2002).

behavior of the individual user and copyright's overarching goal of fostering collective 'progress,'" and remarks that before we rethink modern copyright we "must take into account the mutually constitutive relationships between and among the self, community, and culture."¹⁶

These examples demonstrate the fact that contemporary scholarship on copyright recognises the wrongs inherent in Romantic notions of authorship and the need to examine copyright in a social context. Therefore, if, as Susan Scafidi asserts, as members of a cultural unit we "already share the same culture and jointly 'own' its cultural products,"¹⁷ should we not recognise the "unit"—in other words, the collective—as a contributor to the process of creating cultural products? Antiromantic approaches to authorship, as Alan Durham puts it, attempt to define authorship as "less a manifestation of the author's personal vision, created *ex nihilo*" but rather as a "synthesis of prior texts and cultural influences."¹⁸

Although copyright scholars recognise the social construction of authorship, they still retain dominant stereotypes of authorship and authors. Pamela Samuelson writes on Boyle's approach: "Boyle does not oppose authors' rights except to the extent that Romantic notions about authorship lead to inefficient or unjust legal outcomes, as sometimes occur when we fail to appreciate fully the sources from which authors draw or the contributions of audiences."¹⁹ Indeed, Boyle asserts that allocation of property rights to authors has "a clear element of existential truth—our experience of authors, inventors, and artists who *do* transform their fields and our world, together with the belief . . . that the ability to remake the conditions of individual life and collective existence is to be cherished and rewarded."²⁰ Boyle's argument is at the heart of the present Article. I will not reject the idea behind authors' rights, but claim that we have to fully translate the rejection of Romantic notions of authorship into a paradigm of ownership that takes into account the right of unrewarded sources, namely, the public.

In this Article I present a model for public authorship, emphasizing the sociality of copyright. I agree with Durham that "no theory of authorship can account for everything, or be consistent with all that

16. Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 372 (2005).

17. Susan Scafidi, *Intellectual Property and Cultural Products*, 81 *B.U. L. REV.* 793, 810 (2001).

18. Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 *WM. & MARY L. REV.* 569, 616 (2002).

19. Pamela Samuelson, *The Quest for Enabling Metaphors for Law and Lawyering in the Information Age*, 94 *MICH. L. REV.* 2029, 2055-56 (1996) (book review surveying BOYLE, *supra* note 4, and M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995)).

20. BOYLE, *supra* note 4, at 60 (emphasis omitted).

courts have said or lawmakers intended.”²¹ Also, I fully recognise the limits of every social approach to authorship and copyright. At the same time, there is a fundamental need to constantly rethink contemporary systems allocating property rights for authors and artists, in order to maintain stable social and cultural realities. This, as I shall argue, does not mean withholding rewards to authors in the form of property rights. As Jane Ginsburg remarks:

[W]hether one sees copyright as a personality right conferring on the author the ownership of the fruits of her labor, or as an economic incentive scheme to promote the production of works of authorship, or as a public works program designed to fill the public domain (or, most accurately, as a combination of the three), giving credit where it is due is fully compatible with both the author-regarding and the public-regarding aspects of these goals.²²

The public authorship model I introduce and defend in this Article combines arguments postulated, amongst others, by Woodmansee, Jaszi, Boyle, Coombe, and Durham. As a right-based approach, it defines the scope of authors’ rights and the rights of the public in copyrighted materials and argues for a public property right in every copyrighted entity. The views expressed by scholars who examine authorial constructionism contribute immensely to the understanding of the sociality of the creative act and inspired my vision of what copyright *should* be. However, while the majority of scholars examine the “construction of authorship,” I emphasise the “*social* construction of authorship.” For example, as opposed to Woodmansee and Jaszi who define the “copyright moment” as collaborative in nature but emphasize the collaboration between authors in their individual capacity, I examine the vital and unavoidable collaboration between authors and the public in the collective sense, and highlight their mutual role in the formation of copyrighted entities. This role renders every copyrighted entity a social construct and requires us to take account of the public’s role when we think of how to structure the bundle of entitlements copyright law secures for authors.

Social constructionism, I argue, is a unique definitional tool. My analysis is designed to lay the foundations for a coherent copyright balance which rewards all actors involved in the making of authorial and artistic properties. It is designed to explore the interconnection between

21. Durham, *supra* note 18, at 642.

22. Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 306-07 (2004).

copyright's formal structure and the informal structures of social life. I shall focus on copyright as a process—on the creative act as a social activity. Michael Madison most poignantly puts it:

[L]ike all law, copyright has to work out the relationship between its own formal structures, on the one hand, and the informal structures of social life, on the other, and it has to do so both in its day-to-day application and in its formal framing. One way to do that is to focus, as copyright conventionally has done, on “authors” and “works” and markets. I suggest that in many respects copyright is better understood in terms of practices and processes, that is, in terms of how creative things are produced as well as in terms of who does the producing and what is produced.²³

III. WHO AUTHORS COPYRIGHTED MATERIALS?

Although it is not entirely wrong to argue that “[o]ur lives are in every respect dominated by an intuitive sense of property and belonging,”²⁴ when intellectual properties are at stake, ownership and control should not be defined under exclusive terms. Intellectual property rights in general, and copyright in particular, are different from rights in traditional properties. The difference between intellectual property and other physical property can be defined by means of two main arguments which explain the social nature of copyrighted entities. First, since a copyright work is a form of expression, there is a clear and decisive public role—more than in any other form of property—in shaping methods of expression like languages, and musical and artistic styles. Second, in general, copyrighted works such as literature, music, and films are the defining components of our culture and social reality. Treating them as private property essentially means that our culture and social reality can be owned with the perquisites of buying, selling, transferring, and excluding. Not only do the expressions of our culture and social environment define our society as a whole, they are also part of what defines our individual personalities and aspirations. Subjecting such elements to private property will limit the things we are exposed to and will have a directly detrimental effect on the development of our society and its members.

The creation of a copyright work is social. It depends on the author's exposure to his culture and to other elements of the external reality that make him capable of realizing his innate creative ability and of interpreting and embodying the substance and significance of these elements in copyright endeavours. These external elements are initially

23. Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 392 (2005).

24. Kevin Gray, *Equitable Property*, in 47 CURRENT LEGAL PROBLEMS pt. 2, at 157, 158 (M.D.A Freeman & R. Halson eds., 1994).

created in the public domain, they constitute an integral part of it, and they are the property of the public. In this Article I claim that since every copyright work consists of ideas and “materials” that are the property of the public, authors cannot claim, and in fact are not entitled to, any *exclusive* ownership rights of the products of their creative labour: both society and its members labored on each creation. While the individual author invests money, his subjective interpretation of the external reality, and his talent, the public invests the social and cultural capital which enables him to realize and translate his talent into the language of creation. Thus, as I shall argue, both the public and the author deserve property rights in every copyright work. For both, the principle “as you sow, so shall you reap” applies.²⁵

This interpretation contradicts the general message behind our copyright law. It rejects the view that only an individual author is a labourer. The primary justification for United States copyright law is encouraging the creation and dissemination of expressive works that benefit the public. The constitutional provision that authorizes copyright and patent law explains its purpose as “promot[ing] 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.”²⁶ The U.S. Supreme Court added that the main purpose of copyright is to “secure a fair return for an ‘author’s’ creative labor” and by creating this incentive “to stimulate artistic creativity for the general public good.”²⁷ I argue that the public, in the collective sense, is a labourer that adds labour to every copyright creation. Viewing the

25. In the historic case of *Millar v. Taylor*, the court advocated an author-oriented approach:

[B]ecause it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide

Millar v. Taylor, (1769) 98 Eng. Rep. 201, 252 (K.B.). The court’s decision in *Millar* was reversed by the House of Lords in *Donaldson v. Beckett*, where it was held that there is no place for natural law in copyright jurisprudence. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) (appeal taken from K.B.); see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 78-85 (1993).

26. U.S. CONST. art. I, § 8, cl. 8.

27. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

public role as such begs the question—should the public be granted similar authorial rights that are granted to individual creators?

Social approaches to copyright exist. However, the significance of the public as copyright creator for ownership questions has rarely been practically recognised. The public, we are told, should be satisfied with the fair use doctrine or with the availability of ideas. Three main problems affect the legitimacy of this view. First, the fair use doctrine, “the most troublesome in the whole law of copyright,”²⁸ is limited in scope²⁹ and views the public as secondary in importance. Second, the distinction between ideas and expressions is blurred and extremely subjective.³⁰ Third, treating the public as an entity having an *interest*, rather than a *right*, in copyrighted entities is misleading and devalues the collective contribution to the copyright making process. I argue that copyrighted entities are manifestations of the collective creativity; they are socially and culturally constructed. So we may ask, if works of art and authorship are collectively produced, ought they be collectively owned? Admittedly, as Underkuffler remarks with regard to conventional property, property is a legal conclusion, but the idea that property rights “are presumptively free from collective claims has been decisively abandoned, if ever it was true.”³¹ I largely base my arguments on the claim that every copyrighted entity is a collective enterprise, socially constructed and historically contingent. This claim, I argue, raises serious doubts regarding declarations such as “I own the copyright” or “this is my copyright.”

A starting point for the understanding of copyright from a social constructionist perspective is the role of collaboration in copyright creation and its place as a key characteristic of the creative society. Jaszi tells us that in recent times works of art and authorship are increasingly becoming “collective, corporate, and collaborative.”³² And Greg Lastowka

28. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

29. 17 U.S.C. § 107 (2000); see, e.g., Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1565-67 (2005).

30. Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 231 (1990); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'*, 38 EMORY L.J. 393, 397 (1989).

31. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY* 2 (2003); see also Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

32. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP*, supra note 8, at 29, 38. Bradford also recently remarked that “[n]etworked communication raises the potential for collaboration and decentralized production and thus active engagement in the cultural sphere.” Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 724 (2005).

writes: “many, perhaps most, entertainment products for sale today are produced by . . . collaborative authorship.”³³ As argued above, in the relationship between collaborators, whether artists, musicians, choreographers, or architects, both artists win: their relationship and collaboration make them better individual artists. Copyright laws acknowledge this and reward them with an exclusive right. However, in every creative collaborative incident there is one contributor who does not win—the public. In other words, collaboration that reaches artistic fruition is *always* dependent on collectively produced and owned social and cultural properties. This Article rejects Romantic notions of creativity and authorship which stress the subjective experience of the author in order to perpetuate patterns of social denial and further diminish the rights of the general public.³⁴ Tom Palmer most poignantly remarks: If rights are to be recognised in works of art and authorship anywhere, “they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not the artist.”³⁵ Similarly, Ian Hacking, writing on social constructionism, remarks: “none of the examples is my own. I deliberately take historical case studies made by other people.”³⁶ And in the preface to that book he writes: “Collectively my audiences were participating in the making of this book.”³⁷

On this account, authors cannot claim, and in fact are not entitled to, any *exclusive* ownership rights of the products of their creative labour. After all, both the public and its members labored on each creation. While the individual author invests qualities from his original makeup, his subjective interpretation of the external reality, his talent, and financial resources, the public invests the social and cultural capital,

33. Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1229 (2005).

34. Lord Macaulay does not deny the good in a copyright system. However, the right is equivalent to a monopoly right and a monopoly is an evil: “For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.” Lord Macaulay, A Speech Delivered in the House of Commons (Feb. 5, 1841), in *THE WORKS OF LORD MACAULAY* 195, 199 (Lady Trevelyan ed., 1879).

35. Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL’Y 817, 848 (1990).

36. IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* 172 (1999) [hereinafter *SOCIAL CONSTRUCTION*].

37. *Id.* at xi.

necessary to transform an individual into an “author” and make him realize and translate his talent into the language of authorial creation. In reality, we would all agree that the public invests the social and cultural capital; we would probably not reject the proclamation, “copyright is social.” The problem, as William Cornish observes, is that many would:

[R]evive the old cry that the creator derives as much, if not more, from the culture in which she was born and bred as she gives back in her work, and so deserves no property entitlement. So far, however, these counterclaims appear to have had no more than marginal impact upon the copyright position that has built up over two centuries.³⁸

Denying the social and cultural dependence of authors on the collective is the direct result of inherited and unmodified conceptions of ownership.³⁹

Every argument on collaboration in copyright must also take account of the fact that every copyrighted work is limited *ab initio* due to the dependency on the contribution of the public. The copyright bargain must reflect the fact that each copyright work is dependent on the public’s social and cultural input, and each work owes much to its predecessors while each informs its successors. The question, “who authors copyrighted materials?” is not idle. “We have met the author,” Wilf asserts, “and it is us.” Although Wilf examines the paradigm of public authorship from a trademark perspective, his conclusion reflects the very idea behind the process of making copyrighted materials. Despite the fact that we all recognise the social nature of authorial and artistic commodities, contemporary literature on intellectual property seems to perpetuate individualistic approaches to copyright, including when the theme is human cognitive ability.⁴⁰ The next Part examines one of the main reasons why we have to ask “who authors copyrighted materials?”: our nonnegotiable insistence on sanctifying misleading conceptions of originality when we talk copyright.

38. WILLIAM CORNISH, *INTELLECTUAL PROPERTY* 50 (2004).

39. However, since the institution of private property is both natural and human created, “[i]t is something that our culture can change when the day comes that we finally see how increasingly destructive and insensitive our existing ownership norms have become.” Eric T. Freyfogle, *The Construction of Ownership*, U. ILL. L. REV. 173, 177 (1996). Similarly, Warren and Brandeis argue, “the individual shall have full protection in person and in property . . . but it has been found necessary from time to time to define anew the exact nature and extent of such protection.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

40. See generally Bradford, *supra* note 32.

IV. ORIGINAL APPROPRIATION: A DEFINITIONAL EXERCISE

Copyright laws treat the individual author as an original proprietor of a newly created entity of social wealth.⁴¹ Originality in copyright, Justice O'Connor remarks, "means only that the work was independently created by the author (as opposed to copied from other works)."⁴² Can we ever independently create? The principle of original appropriation (OA) is a good point of departure from which to begin exploring the inequity in treating copyright works as works of original content rather than as manifestations of collective efforts. I will not enter into an elaborate examination of that principle. My aim here is rather modest: to draw benefits from a principle that is a key conceptual component in the skeletal definition of copyright.

OA is the appropriation of resources that are not already appropriated by someone else. It applies to things that are *nullius in bonis* (nobody's private property). OA theories hold that "[b]y hypothesis, there are no previous owners"⁴³ and "[a]n illegitimate original acquisition would similarly infect all subsequent transfers."⁴⁴ OA is a term that comes to define a moment from which a given unowned resource has become the property of a given acquirer. Copyright scholars do not explicitly refer to OA *per se*, but indirectly challenge its applicability to copyright. In a seminal article, Litman argues that works of authorship can never be labelled totally "original." Because the act of authorial creation is "more akin to translation and recombination," an author cannot be the original proprietor of an entire resource.⁴⁵ In Litman's words:

To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined. But the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience . . . lawyers transform old arguments to fit new facts;

41. 17 U.S.C. § 102(a) (2000). See generally Alan L. Durham, *Speaking of the World: Fact, Opinion, and the Originality Standard of Copyright*, 33 ARIZ. ST. L.J. 791 (2001).

42. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

43. David Schmitz, *When is Original Appropriation Required*, 73 MONIST 504, 506 (1990).

44. John Arthur, *Resource Acquisition and Harm*, 17 CAN. J. PHIL. 337, 338 (1987).

45. Litman, *supra* note 12, at 966.

cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already “out there” in some form.⁴⁶

Scholarship on property often refers to the principle of OA.⁴⁷ James Harris and Jeremy Waldron refer to “first occupancy.” According to Harris, the tendency is to “clothe the law’s reliance on first occupancy as a root of title with the dress of natural right.”⁴⁸ Yet, the legal and social dimensions of the right “must stipulate both what conduct is sufficient to constitute first occupancy” if at all, and “also what perimeter of trespassory rules in respect of the thing occupied, going beyond” should be allowed.⁴⁹ In other words, while I might have a natural right in object *O*, it is a natural wrong for someone else to interfere with my right.⁵⁰

For Waldron the concept of first occupancy relates to the relations between the first possessor of a resource and subsequent rightholders: “[T]he *first* person to take possession of a resource does so, *ex hypothesi*, without pushing others aside, and, unless he voluntarily relinquishes that possession, he is the one that must be pushed aside by second and subsequent occupiers.”⁵¹ Similarly, James Penner refers to the term “first appropriation”⁵² and states that OA:

[E]ssentially concerns the kind of advantages any individual may get by his own actions, by appropriating unowned things without the consent of others. . . . A right of *first* appropriation in these contexts is a notional right the exercise of

46. *Id.* (citations omitted).

47. Benson, for example, argues that this principle is the *only* way to justify private acquisition. Peter Benson, *Philosophy of Property Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 752, 760 (Jules Coleman & Scott Shapiro eds., 2002); see also Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1228 (1979).

48. J.W. HARRIS, PROPERTY AND JUSTICE 214 (1996).

49. *Id.*

50. Interestingly, Harris distinguishes between first occupancy in respect of individuals and first occupancy in respect of communities. He views a community identity as stronger for a claim of first occupancy on the basis of natural law. He writes:

It may be argued that artefacts closely identified with the cultural identity of a particular community, which were taken from it in the past, ought now to be restored and vested in some agency representing the community, on the ground that, whether or not the taking was warranted by positive law, it constituted a natural wrong to the community.

Id. at 216. For a discussion on the tension between group authorship and the current intellectual property system, see Scafidi, *supra* note 17.

51. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 285-86 (1988). Waldron rejects the principle of first occupancy because in the end, it means something like the following statement: “the first person who *acts as though he is the owner* of a resource gets to *be* its owner,” and such a view can only work “if private property has already been argued for.” *Id.* at 286-87.

52. J.E. PENNER, THE IDEA OF PROPERTY IN LAW 80-82 (1997).

which in a parable about the justice of property rights inevitably leads to, i.e., *creates*, the property system.⁵³

The conditions under which one can remove items that have no individual owner from the common, that is, are collectively owned, without the consent of the other commoners, is a core feature in John Locke's theory on property⁵⁴ and authors' rights.⁵⁵ Locke argues that a person becomes an original owner of a commonly owned object by virtue of expending either manual labour or intellectual labour.⁵⁶ However, the right is not unlimited. With respect to tangible properties, the right is subject to several social conditions, of which the central one is that unless the person leaves in the common of all "enough and as good" resources for latecomers, he cannot appropriate.⁵⁷ And, with respect to intangible properties, Locke imposes limits on the right and its duration in order to encourage education and disseminate knowledge.⁵⁸ For example, he asserts that copies should be available "[f]or the use of public libraries and . . . universities,"⁵⁹ and for the advancement of education.⁶⁰ And, with respect to the duration of authors' rights, Locke writes:

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning. And for those who purchase copies from authors that now live and write it may be reasonable to

53. *Id.* at 81 (emphasis added).

54. On Lockean approaches to copyright, see PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 41-72 (1996); Craig, *supra* note 15; Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179 (2003); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988).

55. See John Locke, *Liberty of the Press*, in LOCKE: POLITICAL ESSAYS 329, 329-39 (Mark Goldie ed., 1997) (1694); see also LORD PETER KING, THE LIFE AND LETTERS OF JOHN LOCKE 202-09 (photo. reprint 1984) (1884); 5 THE CORRESPONDENCE OF JOHN LOCKE 785-95 (E.S. De Beer ed., 1979). See generally Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 33 LIBR. 296, 309 (5th ed. 1978); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 154-55 (Stephen R. Munzer ed., 2001).

56. John Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 115, 127-28 (Mark Goldie ed., 2000). For Locke's discussion on manual and intellectual labour generally, see John Locke, *Labour*, in LOCKE: POLITICAL ESSAYS, *supra* note 55, at 326-28.

57. Locke, *The Second Treatise of Government*, *supra* note 56, at 128.

58. Locke, *Liberty of the Press*, *supra* note 55, at 329-39.

59. *Id.* at 338.

60. *Id.*

limit their property to a certain number of years after the death of the author or the first printing of the book as suppose 50 or 70 years. This I am sure, 'tis very absurd and ridiculous that anyone now living should pretend to have a property in or a power to dispose of the property of any copies or writings of authors who lived before printing was known and used in Europe.⁶¹

Locke's aim in his property theory is to "show how it is morally possible for private property in external things to arise . . . from a condition in which there is no such property at all."⁶² Locke's approach towards original appropriation is well ingrained in copyright policy and law. For originality to be established, an author is required to employ certain intellectual effort. It must not lack the modicum of creativity necessary to transform mere selection into copyrightable expression.⁶³ Once the work has qualified as an original work, the author is treated as an original appropriator of something new that never existed and had no previous owner.

Although our copyright system tries to provide mechanisms in the spirit of Locke's restrictions on the spectrum of the right, it treats the author as a sole creator of a new substance, thereby embracing a strict variation of the OA principle. True, in the course of preparing a creative work, an author is allowed to copy ideas and concepts⁶⁴ and nonsubstantial parts from others' works. This, in fact, proves that legislatures are not unaware of the fact that copyrighted creations are a merger between what is known and what is unknown and that new creations cannot be examined in isolation from already existing works. However, under

61. *Id.* at 337; see also Raymond Astbury, *supra* note 55, at 296-97.

62. A. John Simmons, *Original-Acquisition Justifications of Private Property*, SOC. PHIL. POL'Y, Summer 1994, at 63, 72. The question is whether a given justification is "a morally permissible (or morally possible) arrangement, even without any demonstration of its moral optimality." *Id.* at 70. With regards to OA, justification should be interpreted as concerning not "the first brute takings by human beings, but rather the first creations of property by persons . . ." *Id.* at 76. For further criticism of Locke's approach to OA, see Gerald F. Gaus & Loren E. Lomasky, *Are Property Rights Problematic?*, 73 MONIST 483, 496-98 (1990); and Thomas Mautner, *Locke on Original Appropriation*, 19 AM. PHIL. Q. 259 (1982).

63. In comparative terms, the concept of originality has gone through many changes in recent years. While U.S. courts require a modicum of creativity, their English counterparts remain steadfast on the original condition of skill, labour, and judgment. Furthermore, the Canadian Supreme Court made an attempt to provide a mid-way solution—labour and skill that is neither trivial nor mechanical in nature. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362-63 (1991); *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339; see also *Telstra Corp. v. Desktop Mktg. Sys. Pty. Ltd.* (2001) F.C.A. 612 (Austl.). For a comparative discussion of *Feist*, see Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949 (2002); Guy Pessach, *The Legacy of Feist Revisited: A Critical Analysis of the Creativity Requirement*, 36 ISR. L. REV. 19 (2002); Russ VerSteeg, *Sparks in the Tinderbox: Feist, "Creativity," and the Legislative History of the 1976 Copyright Act*, 56 U. PITT. L. REV. 549 (1995).

64. 17 U.S.C. § 102 (2000).

copyright laws authorial and artistic entities are treated as original acquisitions of a given creator for the work originated in him and is his exclusive property, including parts produced by others or collectively owned by society.

OA theories were challenged on two main grounds. First, for Grunebaum, OA theories aim at justifying benefits associated with *private* ownership, and therefore fail to acknowledge other, nonprivate, forms of acquisition, although they carry similar benefits for collective and social appropriations. Thus, OA arguments can only partially justify private property and do not adequately address the central dilemma.⁶⁵ They “specify the conditions for taking unowned goods; but ‘unowned’ can mean many things, depending on which conception of ownership is being assumed. OA theorists mean by ‘unowned,’ not ‘*privately* owned.’ And this simply begs the question against alternative possible forms of ownership.”⁶⁶ Second, Waldron argues that OA imposes unilateral obligations on people. For this reason, we should be wary and suspicious of this principle.⁶⁷ OA in copyright presupposes no ownership of the created work and imposes unilateral obligations on the collective. It regards copyright as almost equivalent to creation *ex nihilo*. It establishes a rigid dichotomy between privately owned materials and unowned elements. It does not recognise a mid-way—one which would adequately compensate loss of collective contributions. As such, it refuses to acknowledge nonprivate ownership alternatives such as collective ownership of cultural properties. OA deliberately imposes obligations to respect the newly created private property on the public and allows, without the latter’s consent, private enclosures of sources integral to its collective identity.

Public international law does recognise the inapplicability of OA to certain natural resources and regards them a part of mankind’s collective property—as “the common heritage of mankind.”⁶⁸ I accept arguments

65. James O. Grunebaum, *Ownership as Theft*, 73 *MONIST* 544, 545-46.

66. Simmons, *supra* note 62, at 80 (referring to JAMES O. GRUNEBaum, PRIVATE OWNERSHIP 53, 74, 80-81, 84-85 (1987)).

67. WALDRON, *supra* note 51, at 265-71; Simmons, *supra* note 62, at 81-84.

68. For example, the 1979 Moon Treaty and the 1970 U.N. Declaration of Principles Governing the Sea-bed and Ocean Floors stipulate that certain natural resources cannot be subject to national appropriation. Agreement Governing the Activities on the Moon and Other Celestial Bodies art. ii, Dec. 5, 1979, 1984 U.N.T.S. 22; Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749 (XXV), ¶ 1, U.N. Doc. A/Res/2749 (Dec. 17, 1970), *reiterated in* U.N. Convention on the Law

that copyright does recognise certain nonproprietary elements as part of “the common heritage of mankind” such as ideas, facts, and expressions to which protection has expired.⁶⁹ But this is hampered by possible appropriation of ideas due to a lack of a coherent distinction between ideas and expressions,⁷⁰ and the duration of the right,⁷¹ thereby allowing disproportionate private enclosures of traditions and other collective properties. That is, our prevalent copyright system remotely qualifies for the so-called “common heritage” principle.

If authorship cannot be examined in isolation from what is already in existence, can a copyrighted work ever represent an original manifestation of one (or more) individual’s creative input? I want to push the argument one step further. In the next Part, I examine the meaning behind the agreement we share that copyrighted works are socially constructed and historically contingent. This is not an empty agreement, and through the social construction theory I show that copyright works represent the creative collectivity and can only be original creations in the collective sense. That is to say, their defining features inevitably have a prior owner—the public.

V. SUBJECTS OF COPYRIGHT AND SOCIAL CONSTRUCTION

A. *The Social Construction of “Whats”*

1. *The Argument*

A statement like “copyright is a social construction” sounds trivial or banal.⁷² No one would possibly deny that the institution of copyright is

of the Sea art. 136-37, Dec. 10, 1982, 1833 U.N.T.S. 397. For a brief overview, see MALCOLM N. SHAW, *INTERNATIONAL LAW* 453-55 (5th ed. 2003).

69. It is arguable that the international community also recognises the common heritage principle via the increased recognition of rights in traditional knowledge. See e.g., Rosemary J. Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001).

70. See *supra* note 30 and accompanying text.

71. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303-304 (2000)); see also *Eldred v. Ashcroft*, 537 U.S. 183 (2003); European Council Directive 93/98/EEC, Harmonising the Term of Protection of Copyright and Certain Related Rights, art. 1, secs. 1, 2, 1993 O.J. (L 290) 9; Berne Convention for the Protection of Literary and Artistic Works art. 7, *opened for signature* Sept. 9, 1886, 25 U.S.T. 1341, 832 U.N.T.S. 221 (entered into force July 10, 1974). On the term protection generally, see Michael Jones, *Eldred v. Ashcroft: The Constitutionality of the Copyright Term Extension Act*, 19 BERKELEY TECH. L.J. 85 (2004); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003); and Catherine Seville, *Copyright’s Bargain—Defining Our Terms*, 2003 INTELL. PROP. Q. 312 (Eng.).

72. Social constructionism is defined as: “Analysis of ‘knowledge’ or ‘reality’ or both as contingent upon social relations, and as made out of continuing human practices,

premised on centuries of legal, social, and historical events, as well as artistic attitudes, cultural traditions, and conflicting economic aspirations.⁷³ If indeed all agree on the social and historical construction of the institution of copyright, is there any reason to discuss this statement? An answer to this question depends on the way it is interpreted.

True, no copyright scholar would deny that copyright, as a legal institution, is a creature of historical events and social and cultural processes. However, some would deny that the subjects of copyright⁷⁴ are social constructs. When we refer to the Romantic vision of copyright, we refer precisely to this kind of denial: “I am the author. I created something new, almost equivalent to *ex nihilo* creation; independent of social conditions, and I therefore deserve an exclusive right to control the whole product created.” I have already argued that it is not enough to recognise the sociality of the copyright creation act. Mere recognition amounts to rejection of the many implications of copyright’s social nature. The danger inherent in this tendency dominates our copyright landscape.

Social constructionists hold that items we had thought were inevitable are social products. Because of its many admirers, the social construction talk is open to scepticism and criticism.⁷⁵ Social construction was once

by process such as reification, sedimentation, habitualization.” THE OXFORD COMPANION TO PHILOSOPHY 829 (Ted Honerich ed., 1995).

73. The history of copyright law has now amassed a considerable literature. This approves the conclusion that there is agreement that the institution of copyright is socially constructed and historically situated. See, e.g., RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY (2004); ROSE, *supra* note 25, at 35-84; BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW (1999); NOAH WEBSTER, *Origin of the Copy-Right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY, AND MORAL SUBJECTS 173, 175 (photo. reprint 1968) (1843); Daniel Burkitt, *Copyrighting Culture—The History and Cultural Specificity of the Western Model of Copyright*, 2001 INTELL. PROP. Q. 146 (Eng.); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003); Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, in OF AUTHORS AND ORIGINS 23, 23-55 (Brad Sherman & Alain Strowel eds., 1994).

74. Examples of the subjects of copyright include authors as a species of person, original works of authorship, and the artist as a classification of entities.

75. The social construction debate is applied to many different fields: from race and ethnic identity to scientific facts, from oral history to reality and Zulu nationalism, knowledge, statistics, serial homicide, satellite systems, and authorship. See, e.g., JEFF COULTER, THE SOCIAL CONSTRUCTION OF MIND (1979); JOAN FERRANTE & PRINCE BROWN, JR., THE SOCIAL CONSTRUCTION OF RACE AND ETHNICITY IN THE UNITED STATES

considered a “liberating idea”—almost a “code”;⁷⁶ but it has become a banal statement of social conditions and obvious facts.⁷⁷ This has become the norm in discussions of copyright and authorship: accepting, without qualification, that our institution of copyright is the product of historical events and social processes. So, what could possibly account for the excitement in contending that copyright is socially constructed? This is the answer. Because intellectual property laws control our social and cultural realities, an examination of the interrelationships between intellectual properties and the social environment is a way of approaching questions about the scope of property in works protected under intellectual property laws and exploring the influence of those laws upon the social environment which they control.⁷⁸

In copyright, as in any other legal institution, there are many elements that can be said to be socially constructed. In fact, there can be almost an endless list of entities to which the question “what is socially constructed” may apply. As Hacking puts it: “[T]he social construction of what?” need not have a single answer. That causes a lot of problems in constructionist debates. People talk at cross purposes because they have different ‘whats’ in mind. Yet it is precisely the interaction between different ‘whats’ that makes the topic interesting. And confusing”⁷⁹ The “whats” I examine are two: the author as a kind of a person and original works of authorship and art as a classification of entities.

A preliminary question is whether universal social constructionism is coherent. Sally Haslanger notes that one occasionally encounters the claim that everything is socially constructed “all the way down.”⁸⁰ In that respect Hacking observes that most constructionism is not universal: “The authors who contributed books for my alphabetical list of topics, from authorship to Zulu nationalism, were making specific and local claims. What would be the point of arguing that danger, or the woman

(1998); DAPHNA GOLAN, *INVENTING SHAKA: USING HISTORY IN THE CONSTRUCTION OF ZULU NATIONALISM* (1994); *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 8; FRANKE WILMER, *SOCIAL CONSTRUCTION OF MAN, THE STATE AND WAR* (2002).

76. HACKING, *SOCIAL CONSTRUCTION*, *supra* note 36, at vii.

77. *Id.* at 35 (“The metaphor of social construction once had excellent shock value, but it has become tired.”). Hacking concludes that he is not in favor of the language of social construction. *Id.* at 122.

78. Social construction, if interpreted and viewed properly, can add to our armoury against the current state of affairs in copyright. Indeed, as Hacking writes: “One of the attractions of ‘construction’ has been the association with radical political attitudes, stretching from bemused irony and angry unmasking up to reform, rebellion, and revolution. The use of the word declares what side one is on.” *Id.* at 35.

79. *Id.* at 27-28. Yet “what is confused is sometimes more useful than what has been clarified.” *Id.* at 29.

80. Sally Haslanger, *Ontology and Social Construction*, PHIL. TOPICS, Fall 1995, at 95, 96, *citing* NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* 3, 59-60 (1989).

refugee, is socially constructed, if you thought that everything is socially constructed?”⁸¹ That is the spirit in which we should interpret social constructionism in copyright, for instance, among those who find it important enough to *explicitly* reiterate that copyright is “socially constructed and historically contingent,”⁸² or that the law “like a novel or a poem, has an author and hence is just a social construction.”⁸³

Social constructionism, I shall show, is an invaluable explanatory tool in copyright’s present state of affairs because prevailing theories and approaches to intellectual property do not yet fully address how and why the role of the authorial collectivity is consistently denied in the copyright realm. Here my attempt is to posit the ramifications and consequences of the sociality of copyright within the matrix of the social construction debate.

2. *Hacking’s Formula*

In *The Social Construction of What?*, Hacking examines when and why we should refer to social constructionism.⁸⁴ He offers a schema for evaluating different social constructionist claims. Socially constructed entities are products of historical events, social forces, and ideology.⁸⁵

Hence by *constructionism* (or social constructionism if we need, on occasion, to emphasize the social) I shall mean various sociological, historical, and philosophical projects that aim at displaying or analyzing actual, historically situated, social interactions or casual routes that led to, or were involved in, the coming into being or establishing of some present entity or fact.⁸⁶

In general, the social constructionist attempts to criticise the status quo. He may examine “the social construction of idea *X*, of *X*, of the experience of being *X*, and so on, and how these interact with each

81. HACKING, SOCIAL CONSTRUCTION, *supra* note 36, at 24. Hacking rejects universal constructionism in many different junctures of his book. He also writes, “An all-encompassing constructionist approach has become rather dull—in both senses of that word, boring and blunted.” *Id.* at 36. Similarly, Gergen and Gergen contend that the “anything goes” argument in social constructionism is wrong and based on “misunderstanding or ignorance of constructionist ideas.” Mary Gergen & Kenneth J. Gergen, *Introduction to Constructionism in Question*, in SOCIAL CONSTRUCTION 228, 228 (Mary Gergen & Kenneth J. Gergen eds., 2003).

82. BOYLE, *supra* note 4, at 114.

83. Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653, 656 (2004).

84. HACKING, SOCIAL CONSTRUCTION, *supra* note 36.

85. *Id.* at 2.

86. *Id.* at 48.

other.”⁸⁷ Hacking’s test of social constructionism is composed of four steps: one precondition and three primary conditions. The precondition stipulates that “[p]eople begin to argue that *X* is socially constructed precisely when they find that: (0) In the present state of affairs, *X* is taken for granted; *X* appears to be inevitable.”⁸⁸ According to Hacking, precondition (0) would not hold for the institution of copyright, because “institutions are the result of historical events and social processes.”⁸⁹ It is obvious that our prevalent copyright regime was *not* inevitable: it is the contingent upshot of historical events and social processes. On this account, copyright—the legal institution—fails to satisfy precondition (0). The precondition, however, does hold for certain ideas of *subjects* of copyright, such as authors and original works of art and authorship, since ideas, Hacking argues, “with many of their connotations, seem inevitable.”⁹⁰ From court decisions to academic writings and daily practice, authors and original works are taken for granted. They appear to be inevitable, when in fact they are not. Once these ideas are found to be taken as inevitable the social constructionist can move to examine the three primary conditions. These conditions explain the very essence of Hacking’s formula:

Social construction work is critical of the status quo. Social constructionists about *X* tend to hold that:

1. *X* need not have existed, or need not be at all as it is. *X*, or *X* as it is at present, is not determined by the nature of things; it is not inevitable.

Very often constructionists go further, and urge that:

1. *X* is quite bad as it is.

2. We would be much better off if *X* were done away with, or at least radically transformed.

A thesis of type (1) is the starting point: the existence or character of *X* is not determined by the nature of things. *X* is not inevitable. *X* was brought into existence or shaped by social events, forces, history, all of which could well have been different. Many social construction theses at once advance to (2) and (3), but they need not do so. One may realize that something, which seems inevitable in the present state of things, was not inevitable, and yet is not thereby a bad thing. But most people who use the social construction idea enthusiastically want to criticize, change, or destroy some *X* that they dislike in the established order of things.⁹¹

87. *Id.* at 123.

88. *Id.* at 12.

89. *Id.*

90. *Id.* at 14.

91. *Id.* at 6-7.

For Hacking, *X* ranges over many different kinds of things. In order to avoid confusion he suggests that we distinguish between *ideas* (for example, concepts, beliefs, theories, and classifications)⁹² and *objects* (for example, people (children), states (childhood), institutions, fundamental particles (quarks) and child viewers (of television)).⁹³ Common to all these items is that the *X* need not have been “at all as it is.”⁹⁴ *X* is a creature of causation, and social and historical processes. After all, as Hacking remarks, “[c]onstruction stories are histories.”⁹⁵

In order to assess the reason for applying a social constructionist approach to *X*, it is crucial to ask how obvious is the claim that “*X* is a social construct.” Hacking says that if it is utterly obvious to everyone that *X* satisfies proposition (1), then we should not bother using the language of social construction. On this account, battered women, for example, are considered social constructions. When *X* = battered women, steps (1), (2), and (3) are utterly obvious: they are the result of social forces such as domestic violence and a weak legal system; they are not determined by the nature of things. No one, except maybe ancient barbarian societies, would deny that a battered woman is a “bad thing.” Society would be better off if violence against women was totally outlawed and abandoned. Similarly, when *X* = authors, we can see that *X* satisfies proposition (1). Authors are not determined by the nature of things—when *X* = authors, *X* need not have been “at all as it is.” Social constructionists would argue that authors are wrongly perceived as almighty creators, and *X* has to be redefined and transformed.

The same argument holds for institutions. For example, when *X* = the institution of copyright, propositions (1), (2), and (3) are painfully obvious. I doubt anyone would reject the argument that copyright is highly contingent: a “bad thing” as it stands today (either from the point of view of authors and entertainment industries (“we want more control”) or from the perspective of the public interest (“copyright went too far”)).⁹⁶ And it should, as many argue, not be abolished, but

92. *Id.* at 22.

93. *Id.* at 21-22.

94. *Id.* at 6-7.

95. *Id.* at 37.

96. Here I should be more careful and accept the fact that some people may agree with proposition (2) claiming, for example, that the existing copyright system provides a coherent balance between the rights of authors and the public interest. They may point to the fact that we do not have perpetual copyright or an open-ended list of exclusive rights. However, I was hard put to find committed partisans of the status quo. Why does

radically transformed. If it is utterly obvious that authors and the institution of copyright are socially constructed—that they are “the contingent upshot of social arrangements”⁹⁷—what is the added value in discussing the social construction of authors or copyright? Hacking’s reply to this question is that we ought to be attentive to the context.⁹⁸ According to his account, it is not the author or the institution of copyright that are socially constructed, but rather the classifications of what copyright, the system, protects. Then, *X* in copyright (for purposes of the present analysis) = (1) *authors* as a specific *kind* of a person; and (2) *original works of art and authorship*; or as Hacking might say, the *ideas* of (1) and (2).⁹⁹

Hacking asserts that “[w]hat is socially constructed is not, in the first instance, the individual people,”¹⁰⁰ for example, authors. Rather, what is socially constructed is the *classification* “authors”: “the classification itself, and the matrix within which the classification works.”¹⁰¹ An author, as a specific *kind* of person, is what matters for social construction discourse. We should not understand *X* to mean every individual, but the individual falling under the idea—individual qua “author” of a work is a social construction. Classifying a given work as original, or a person as an author, is a product of social events and historical processes, cultural traditions and conflicts, artistic revolutions, and legislative developments that have and continue to shape the nature of art, authorship, and their makers. The *X* in copyright—authors and original works—is changed by being so classified. Without this *X*, copyright would have become an empty statement—a meaningless legal principle. That is, we have to know what we want to ask:

Think what the category of genius did to those Romantics who saw themselves as geniuses, and what their behavior did in turn to the category of genius itself. . . . If someone talks about the social construction of genius . . . they are likely talking about the idea, the individuals falling under the idea, the interaction between the idea and the people, and the manifold of social practices and institutions that these interactions involve: the matrix, in short.¹⁰²

copyright attract so much academic interest? Why does almost every layman have a take on copyright? The reason is that we do not agree on proposition (2): the majority of us would agree that it is a bad thing, whether from the perspective of the author and the industry or the general public interest.

97. HACKING, SOCIAL CONSTRUCTION, *supra* note 36, at 12.

98. *Id.* at 9 (discussing social construction in the context of women refugees).

99. *Id.* at 10-11. Hacking uses authorship as an item relevant to the social construction talk and refers to authors as kinds of people. *Id.* at 33-34, 58.

100. *Id.* at 10.

101. *Id.* at 11.

102. *Id.* at 34.

Hacking contends that we can incorporate social construction talk into our daily discourse on a variety of issues, but not wholesale.¹⁰³ It would be banal to write a book entitled “The Social Construction of the Office of the U.S. Trade Representative and the 2005 Special 301 Report.” It would also be banal to write a book on “The Social Construction of the European Trade Mark Office in Alicante” which is an institution developed from social and political changes in Europe, from the growing commercial sentiment to brand names and sources, and from developments in consumer preferences, and recently changed due to the enlargement of the Union. This title would not satisfy precondition (0). But we can imagine a startling title on “The Social Construction of Trade Marks” addressing the question “who authors trademarks?” emphasizing that trademarks are linguistic inventions produced in the marketplace by consumers, and examining the consumer as a kind of person.

Hacking distinguishes between idea-construction and object-construction. Although any such distinction between ideas and objects seems vague, it may help determine when we should use the language of social construction.¹⁰⁴ Some objects, on Hacking’s account, are socially constructed, while others are not. In particular, Hacking is concerned with certain kinds, for example, women refugees and the child viewer. A main feature in his argument is the concept of “interactive kinds.”¹⁰⁵ An author is an interactive kind. An author interacts with similar kinds, for example, authors and artists, with individuals falling under other

103. A good example of Hacking’s application of social constructionism pertains to science. He argues that on the one hand, the “constructionist holds that explanations for the stability of scientific belief involve, at least in part, elements that are external to the professed content of the science. These elements typically include social factors, interests, networks, or however they be described.” *Id.* at 92. On the other hand, “[o]pponents hold that whatever be the context of discovery, the explanation of stability is internal to the science itself.” *Id.* The latter regards scientists as a special social stratum; as discoverers and proprietors of ultimate truths; as “the deep probers of the inner constitution of things.” *Id.* at 95.

104. *Id.* at 102. “When someone speaks of the social construction of *X*, you have to ask, *X* = what? A first move is to distinguish between objects, ideas, and the items named by elevator words such as ‘fact,’ ‘truth,’ and ‘reality.’” *Id.* at 68; *see also id.* at 10-11, 14, 21-22, 28-30. “Elevator words” are words such as “fact,” “truth,” “reality,” and “knowledge.” “These words are used to say something about the world, or about what we say or think about the world.” *Id.* at 22-23. Following his rejection of universal social constructionism Hacking criticises discussions on the social construction of “elevator words.” For example, regarding reality he remarks that the social construction of reality “sounds like the social construction of everything.” *Id.* at 24.

105. *Id.* at 32, 102-05.

categories and within the different categories themselves.¹⁰⁶ Hacking gives as an example the difference between quarks and children. The former is an indifferent kind.¹⁰⁷ Quarks are the building blocks of the universe: “Quarks are not aware that they are quarks and are not altered simply by being classified as quarks.”¹⁰⁸ An interactive kind is aware of its classification and through this awareness it maintains its identity as a member of this classification. This awareness “may be personal, but more commonly is an awareness shared and developed within a group of people, embedded in practices and institutions to which they are assigned in virtue of the way in which they are classified.”¹⁰⁹ It is an awareness that operates within a “larger matrix of institutions and practices surrounding this classification.”¹¹⁰ So, the classification or idea of “authors” takes place within a matrix of social institutions that shape and control the future evolution of individual authors and artists. In this way, the author, as a certain kind of person, is socially constructed.¹¹¹ Hacking takes the example of authorship and argues that it is built around kinds of people, such as authors:

People of these kinds can become aware that they are classified as such. They can make tacit or even explicit choices, adapt or adopt ways of living so as to fit or get away from the very classification that may be applied to them. These very choices, adaptations or adoptions have consequences for the very group, for the kind of people that is invoked. The result may be particularly strong interactions. What is known about people of a kind may become false because

106. Hacking terms this the “looping effect.” It occurs when people, such as authors and artists, interact with the systems of classification they fall under. In Hacking’s words, “People classified in a certain way tend to conform to or grow into the ways that they are described; but they also evolve in their own ways, so that the classifications and descriptions have to be constantly revised.” IAN HACKING, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* 21 (1995); see also Ian Hacking, *The Looping Effects of Human Kinds*, in *CAUSAL COGNITION* 351, 351-94 (Dan Sperber et al. eds., 1995). In this way Hacking explains the social evolution of knowledge of human kinds. He writes that looping effects mark “a cardinal difference between the traditional natural and social sciences” because “[t]he targets of natural sciences are stationary” while “the targets of the social sciences are on the move.” HACKING, *SOCIAL CONSTRUCTION*, *supra* note 36, at 108.

107. HACKING, *SOCIAL CONSTRUCTION*, *supra* note 36, at 104-06.

108. *Id.* at 32. Can quarks be socially constructed? Hacking asserts that:

Perhaps it is the idea of quarks, rather than quarks, which is the social construction. Both the process of discovering quarks and the product, the concept of the quark and its physical applications, interest historians of science. . . . All these ideas have histories, as does any idea, and they have different types of history, including social histories. But quarks, the objects themselves, are not constructs, are not social, and are not historical.

Id. at 30; see also *id.* at 68-70.

109. *Id.* at 104.

110. *Id.* at 103.

111. *Id.* at 11.

people of that kind have changed in virtue of what they believe about themselves.¹¹²

Authors and artists may become aware that they are classified as such. They work and create within a matrix of social and political institutions that affect the very essence of the classification. They make artistic choices, and copyright law accommodates these choices. These artistic choices have consequences for the very group. Strong interactions between people of this kind are inevitable. Artistic and authorial activities are dependent on interaction. Despite her criticism of the limited applicability of Hacking's formula, Haslanger writes that "ideas and objects interact in complex ways and transform each other over time. Broadly speaking, social construction is about this complex interaction. . . . [I]t may appear that social construction is all about causation. . . ."¹¹³

Copyright is a prime example of an institution in which the very existence of its subjects—authors and original works—is dependent on complex interaction and causation. The role of the authorial collectivity reaffirms that interaction between authors, artists, and the influences of the matrix in which they create, define the creative act, and determine the success of its results. Copyright law embraces concepts like originality and creativity, which were and still are created via false beliefs about what authors and artists can really do. Authors, supported by the courts and policy makers, believe they create in a social vacuum, without the contribution of the public. They do not acknowledge the matrix. In this way, false beliefs about authorship are nurtured and eventually find their way into our copyright culture. If we want to see a change in copyright we have to understand the classification of authors and artists and what it consists of.

The institution of copyright fails precondition (0). No one would possibly deny that it is not inevitable. However, contemporary classifications and ideas of the author and the original works he creates will not arise but for the existence of certain objects, including the institution. So, can we claim that because the object is an obvious social construct, the ideas it generates are ipso facto obvious social constructs and thus fail precondition (0)? Would that not negate the applicability of Hacking's formula to copyright in general? Would anyone deny that we build on

112. *Id.* at 34.

113. Sally Haslanger, *Social Construction: The "Debunking" Project*, in *SOCIALIZING METAPHYSICS* 301, 305 (Frederick F. Schmitt ed., 2003).

works of our predecessors, that we live in a social context which affects our sense of aesthetics and taste, that we paint because painting is accepted as an artistic activity invented by social and cultural developments? Despite my doubts that anyone would deny that authors and the ideal of solitary authorship are *obvious* social constructs, many, at the same time, forcefully adhere to these Romantic ideals, and treat them as inevitable when they need not be so. We may at least agree that authors and ideas of original works are *constructs* of some sort; they are not born from thin air. But if not *socially* constructed, how else?¹¹⁴

Even if we all agree that the institution of copyright is socially constructed we may not, and often still do not, understand the full implications of this. We perpetuate conceptions of the lone author and his entitlement to exclusive property rights in his creations. We accept the public interest as a guiding principle to determine how much property we should give authors. But, at the same time, the public interest is not sufficiently reflected in our copyright regime and authors' rights are constantly strengthened. Perhaps a universal agreement that *X* is socially constructed may debunk the lore behind the social construction talk. But this argument, I think, is not compelling enough to seep into every legal institution. When the thesis is present, but at the same time ignored, it nurtures ill-defined conceptions and principles. An obvious case of social construction should not always be a reason to dismiss the need for social construction dialogue. To equate copyright to other traditional institutions is to miss the point. Copyright is a mechanism for control of intangibles—of commodities with distinct social content that are collectively produced and should be jointly owned by public and authors. It is not the Office of the U.S. Trade Representative, the European Trademark Office, the Federal Bank, the Ministry of Education, nor the Monarchy.

I believe social constructionism may be illuminating even with respect to institutions and objects that are obviously social constructions. Scholars mention the construction of authorship and the idea of copyright, but they do not take any radical steps to truly realize the implications of copyright's social construction. I agree with Hacking's formula. If we all think of the institution of copyright as a social construct, it is instructive to deal with the ideas, objects and classifications comprising it. Not only that, the formula is also valuable in reminding us to seek more clarity when we use the vernacular of copyright and social construction. However, as Hacking remarks, "Talk of construction tends to undermine the authority of knowledge and categorization. It challenges complacent assumptions about the inevitability of what we have found out or present

114. HACKING, *supra* note 36, at 39-40.

ways of doing things”¹¹⁵ Hence, we have to be careful not to restrict the use we make of social constructionism. If “[c]onstructionists are greatly concerned with questions of power and control,”¹¹⁶ restricting social constructionism, something that might be suitable for certain facts of the world and discoveries (but not their ideas), runs the risk of leaving great parts of the present copyright system as they are today. In copyright, that is, social constructionism should apply to the institution, authors as a specific kind of person, and original works of art and authorship.

B. Constructing Stages and Assembling

Hacking remarks that causal routes lead to and are involved in “the coming into being or establishing of some present entity or fact”¹¹⁷ and he argues that we take more seriously the idea that a construction is a kind of “building, or assembling from parts.”¹¹⁸ How should we define the act of composing from different parts a copyrighted entity? This question is closely related to my criticism of solitary authorship. It has other parallels in philosophers’ articulations of the relation between the social environment and who we are. For example, social relations and causality are not absent from John Locke’s philosophy of knowledge and his insistence on the role of experience, and our ability to assemble (rather than create) is well ingrained in his “workmanship model.” Locke argues that individuals are not makers or creators of products *ex nihilo*. For the most part, they tend to mix their labour with commonly owned objects.¹¹⁹

Whether viewed from the standpoint of interaction, social relations, social dependence, or causality,¹²⁰ copyright creation is, in other words,

115. *Id.* at 58.

116. *Id.*

117. *Id.* at 48.

118. *Id.* at 49.

119. See, e.g., GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY 37-41, 47-92 (1995); JAMES TULLY, A DISCOURSE ON PROPERTY 35-50 (1980); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 198-201, 213 (1988); A. John Simmons, *Makers’ Rights*, 2 J. ETHICS 197 (1998).

120. Interaction depends on social relations. It creates causal relations. It creates derivatives. We are dependent on interaction if we, for example, want to understand the world around us; to understand different approaches to art or modern adaptations of Baroque music. In *The Social Construction of Reality*, Berger and Luckmann provide a sociological analysis of everyday life and knowledge that guides conduct in everyday life. They do not claim that everything is socially constructed nor do they advocate

a process of putting together—“building or assembling from parts.”¹²¹ Hacking advocates a definition of building which should be followed by all social constructionists. Hacking notes, “Buildings are always more than the sum of their parts.”¹²² For Hacking, “Anything worth calling a construction was or is constructed in quite definite stages, where the later stages are built upon, or out of, the product of earlier stages. Anything worth calling a construction has a history. But not just any history. It has to be a history of building.”¹²³ We cannot claim to have created something that has no history and no causal relations to existing templates. “This is because there is something of a historical step-by-step building of specific techniques, institutions, and problems, each using previous steps, and assembled to form a further stage in the production of later techniques, institutions, and problems.”¹²⁴

An original copyright work is an example of a socially constructed entity that has “a history of building.” The same is true for authors. Copyrighted works and authors represent the authorial collectivity and are dependent on predecessors’ efforts and works. At the same time, a copyright work is not merely the sum of these efforts; it generates some unique added value which makes it worthy of protection. An author, a socially constructed kind of a person, can only be said to build copyrighted entities; not to create. Authors and artists assemble different entities. But they do not merely connect “the dots to complete a picture. They had to put in the dots.”¹²⁵ In this way, they take already existing works and templates in new directions and make their efforts eligible for copyright protection. Copyright creation is a continuous activity: a process of absorbing, assembling, translating, adding, and then expressing.¹²⁶

universal constructionism. They begin with the reality of everyday life and argue that it is premised on social relations and material objects. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 19-34 (1966). They claim that a person’s “natural attitude to this world corresponds to the natural attitude of others.” *Id.* at 22. Every person is a member of society and participates in its dialectic, internalises its social elements, and uses them in his daily reality. *Id.* at 129. Participation and interaction renders the products of these activities derivative. Berger and Luckmann also argue that social reality has both objective and subjective dimensions. *Id.* at 47-183. This is another way of explaining why copyrighted entities are neither ultimately public nor private, but a joint enterprise that takes authors and artists *beyond* what is already known.

121. HACKING, *supra* note 36, at 50.

122. *Id.*

123. *Id.*

124. *Id.* at 53.

125. *Id.* at 76.

126. To explain this process, Robert Weisberg uses the terms *continuity* and *discontinuity*. See ROBERT W. WEISBERG, *CREATIVITY* 201 (1993).

C. Defending Radical Constructionism

Copyright is neither a natural resource nor a fact the world comes wrapped up with.¹²⁷ Its equivalent is not the DNA double helix or the Second Law of Thermodynamics. If one thinks normal science progresses in an inevitable way, one has to realize that copyright is not scientific. If copyright were to be science, an anticonstructionist philosopher would claim that it is *false* to think that “people in pursuit of certain ends could, in their interactions with the world, have gone more than one way.”¹²⁸ Then he would argue that existing patterns dominating the institution of copyright—the Romantic vision of authorship and originality, the limited scope of fair dealing exceptions, and the seemingly constant extension of the duration to almost perpetuity—when combined, define the only way to go. It would be wrong to restrict the understanding of copyright’s evolution on the basis of certain patterns. Interactions, social reliance, and causality dominate the landscape of copyright creation. The danger in copyright is that once one insists on only one way, one is able to transform that way into an almost irresistible factual ingredient of our social reality.

When it comes to copyright, radical constructionism is plausible, for almost everything in copyright is socially constructed all the way down, including both the institution and subjects of copyright. How radical this view is can be assessed with a test Hacking proposes involving three

127. Yet, that does not mean that scientific discoveries are not social. In the sciences we tend to cling to the myth of sudden illuminations that engender life-changing inventions. For example, Newton’s well known formulation of the universal law of gravity was a synthesis of ideas proposed by thinkers such as Ptolemy, Copernicus, Kepler, Galileo, and Hooke. The Wright Brothers’ invention of the first airplane was not created in isolation from earlier attempts, like, for instance, Lilienthal’s invention of the flying glider. On Watt’s model of a steam engine it was said that it is about time to reject “the still current popular fallacy that James Watt ‘invented’ the steam engine.” L.T.C. ROLT & J.S. ALLEN, *THE STEAM ENGINE OF THOMAS NEWCOMEN* 12 (1977).

Watson and Crick’s discovery of the structure of the DNA double helix is not different. Watson and Crick were not working in a vacuum—neither an intellectual nor a social vacuum. In the words of Longino, “the work of producing a structural description of the DNA molecule was social, both collaborative and competitive.” HELEN E. LONGINO, *THE FATE OF KNOWLEDGE* 194 (2002). Crick himself remarks that a few days following his arrival to the laboratory he “knew what to do: imitate Linus Pauling and beat him at his own game.” JAMES D. WATSON, *THE DOUBLE HELIX* 48 (1968). I should state that I am not interested in finding the ancestors of the first creative work or the steam engine but rather to show how creativity, whether in sciences or the arts, cannot be conceived or produced without relying on the public.

128. HACKING, *supra* note 36, at 98.

“sticking points”: contingency, nominalism, and external explanations of stability.¹²⁹ On this account: (1) there is no indication that one ought to have gone the way one did, and (2) entity *X* has no inherent structure. For the nominalist, the world is not bundled with facts. Facts are akin to consequences of the different ways in which we represent the world. The nominalist aims “to be true to experience and interaction”,¹³⁰ and (3) that the ultimate explanation for the stability of scientific beliefs to some extent, depends on their relations to external factors. That is, the answer to the question of whether the origin of idea *X* is based on how the world is, is no. While opponents of constructionism would argue that the world has an inherent structure, the constructionist would argue that there can be no predetermination of the results of *X*—it cannot be determined “by how the world is.”¹³¹ We and the social relations governing history are dependent on interaction which produces these relations.

The approach I present in this Article is “a species of nominalism.”¹³² In copyright, there is a key role for interaction, social dependence, and causal relations: they define authorship and make ideals of the author possible. In Hacking’s test one can score fifteen points maximum: five for each of the three sticking points.¹³³ What one can score on contingency must be examined in light of the authorial collectivity. The next Part lends further support to the argument that social constructionism is not a mere definitional tool. I examine whether the public role within the social construction paradigm means that its contribution is of authorial value. In particular, I argue that an author comes wired with some innate endowment. That is, the claim that in copyright nothing determines that one ought to go the way one did, is partly inaccurate. Probably, no one would object to the argument that our original constitution has an impact on what we favor or the paths we choose to follow, unless of course, one argues against innateness altogether or that every segment of our original constitution is only social construction. However, innate capacity bereft of collective contribution will never develop into a real ability that an author can utilize in the creative process.

129. *Id.* at 63-99.

130. *Id.* at 84. The nominalist believes that “[t]he world does not come tidily sorted into facts. People constitute facts in a social process of interaction with the world and intervening in its affairs.” *Id.* at 174.

131. *Id.* at 73.

132. *Id.* at 33.

133. *Id.* at 99.

VI. THE AUTHORIAL ROLE OF THE PUBLIC

A. The Question Posed

I began this Article with the observation that the Romantic vision of the author is a fiction, which falsely embraces OA theories as its justificatory baseline. I raised objections to this fiction and argued that copyright creation is a process to which contribution is received from sources other than the individual author. I believe that understanding the origin and role of creative knowledge may well resolve some subtle questions in copyright policy.¹³⁴ The difficulty is that in the copyright discourse we tend to ignore issues such as the origin of authorial and artistic knowledge. In the words of Michael Madison: “How do ‘creative’ works of authorship come about? We care about the copyright system because we care about the answers to these questions, yet the questions are rarely asked in a formal way in connection with copyright debates.”¹³⁵ Madison’s remark is closely related to the basic argument of this Article: creative works come about when authors and the public collaborate.

That authorial manifestations and artistic endeavours are social items is axiomatic. They represent individuals’ experiences of the external reality through socially shared categories and “a set of public standards to which community members appeal in critical discursive interactions.”¹³⁶ The larger community owns and nurtures these shared categories and standards without which the creative act would be stunted. I argue that the sociality of copyright creations imposes on us a duty to reward sources that contribute to the realization of the creative ability. Although no one is likely to deny that copyrighted works are social entities, this Part is the beginning of a riposte to those who would doubt whether the public’s social contribution amounts to a de facto contribution, and entitle the public to a similar right to that of the individual author.

B. Wallas’s Four-Step Test

A test offered by Wallas best illustrates the ongoing reliance of authors on the public and the external environment while engaging in

134. On this issue, see Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3 (2001).

135. Michael J. Madison, Comment, *Where Does Creativity Come From? And Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747, 759-60 (2003).

136. LONGINO, *supra* note 127, at 148.

creative activities. The test shows the public's crucial place in the creative process. Wallas is recognised as the first to clearly formulate the demarcation of the cognitive steps involved in the production of novelty.¹³⁷ He argues for a cumulative test, composed of four complementary stages, common to all creative activity: preparation, incubation, illumination, and verification. The first stage, preparation, involves a long period of intense conscious work, without any obvious milestones. During that period, after ideas are generated and considered, the issue is put aside and not consciously dwelt upon. At this time the second stage, incubation, commences. In the incubation stage the ideas on which the creator thought consciously take new shape and meaning, as they are combined in new ways in the unconscious. Once conceptual incubation is completed, illumination, the third step, comes into play. Illumination does not provide the creator with the ultimate answer or solution but rather a glimmer of what it is likely to be, while the solution often comes with the final fourth stage, verification.¹³⁸

This four-step test demonstrates the social dependence and causal relation between each segment of the chain of creative activity. Each step builds and relies on preceding steps and each in turn feeds the steps ahead. In fact, Robert Weisberg tells us, "Most of the artists and poets reported that Wallas's four-stage process . . . described their work. They said that an idea for a painting or a poem was not worked on immediately, but was first 'carried around' for a period of time."¹³⁹

C. The Test in Reality

1. Collective Authorship and Social Dependence

Copyright law considers authorial and artistic works as independent original creations, not an advance over prior art. The social nature of knowledge production and knowledge accumulation plays no significant role in copyright debates—a role, given the many social approaches to copyright, one would expect it play. However, in the present copyright system, there are principles that attest to the reliance on the public. For

137. GRAHAM WALLAS, *THE ART OF THOUGHT* (abr. ed. 1949); see also WEISBERG, *supra* note 126, at 47-48 (referring to Wallas's test).

138. Another step of "intuition" was claimed to be a relevant hidden link in Wallas's four-step test. It is a step that could come between incubation and illumination since creative intuition concerns "vague anticipatory perception that orients creative work in a promising direction." Emma Policastro, *Creative Intuition: An Integrated Review*, 8 *CREATIVITY RES. J.* 99, 99 (1995); see also WEISBERG, *supra* note 126, at 27-68; Jan E. Eindhoven & W. Edgar Vinacke, *Creative Processes in Painting*, 47 *J. GEN. PSYCHOL.* 139, 139-140 (1952).

139. WEISBERG, *supra* note 126, at 47.

example, the fact that, within copyright law, nonsubstantial parts can be copied indicates that the law recognises reliance on the public domain. The idea-expression dichotomy also shows that an individual is in need of publicly owned raw materials such as ideas, concepts, and facts. There is nothing, however, in our copyright law that recognises the dependence of ideas on publicly shared and produced concepts and other cultural properties *for matters of ownership*.

Copyright laws do not only disproportionately reward the author. The rules they embrace for the sake of the public interest are ill defined. If one refers to raw materials as common property or common knowledge, in copyright the vague distinction between ideas and expressions guarantees that common can become private and that enclosure of portions of the public domain is not too difficult. In addition, copyright permits protection to last over a century.¹⁴⁰

An author's ability to translate common knowledge into copyrighted entities is not innate but certainly influenced by many factors such as creative ability, and visions of taste and aesthetics. Research on creativity is burdened with the question whether the creative act is a creature of social dependence and interaction or not.¹⁴¹ Copyright laws recognise the role of interaction and social dependence in, for example, debates on the scope of copyright ownership, the notions of improvement on existing works, parodies, transformative authorship and transformative uses (certain uses that add new material in a way that reflects critically on the original work), fair dealing, and the rights of second generation creators.¹⁴² They allow creators "to utilize raw material without incurring liability for infringement."¹⁴³ In this way, copyright laws hope to strike a balance between the rights of first and second generation

140. See *supra* note 71 for examples of the various copyright laws in force in the United States and Europe.

141. See *generally* TERESA M. AMABILE, *CREATIVITY IN CONTEXT* (1996); MARGARET A. BODEN, *THE CREATIVE MIND: MYTHS AND MECHANISMS* (Routledge 2d ed. 2004) (1990); MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996); WEISBERG, *supra* note 126; *THE CREATIVE COGNITION APPROACH* (Steven M. Smith et al. eds., 1995); *CREATIVITY* (P.E. Vernon ed., 1970); *CREATIVITY: A DISCUSSION AT THE NOBEL CONFERENCE* (John D. Roslansky ed., 1970); *DIMENSIONS OF CREATIVITY* (Margaret A. Boden ed., 1994); *THE NATURE OF CREATIVITY: CONTEMPORARY PSYCHOLOGICAL PERSPECTIVES* (Robert J. Sternberg ed., 1987).

142. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 *TEX. L. REV.* 989, 1027-29 (1997).

143. Maureen A. O'Rourke, *Property Rights and Competition on the Internet*, 16 *BERKELEY TECH. L.J.* 561, 584 (2001).

creators. As O'Rourke remarks, "copyright law does not extend protection to factual information because such information is the core raw material that others need to use to further progress."¹⁴⁴

Many factors interact in the process of copyright creation. The interdependence between art, culture, and society renders social dependence, interaction, and causality key features in the creation of copyrightable material. In general, inputs can be divided into two categories: factors that depend on past experiences, on social and cultural traditions, and on the availability of collective properties; and factors that form part of a person's innate endowment. Neither of these categories alone is sufficient for generating creative activity. Copyright generation and its expressive entities are realized through the interaction of these two categories.

Rosemary Coombe introduces the concept "recoding" into copyright theory and argues that the creative process is a complex one that requires the availability of publicly accessible symbols.¹⁴⁵ The interaction between collective production of these symbols and individual consumption make the creative act possible. She writes that "the consumption of commodified representational forms is productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas."¹⁴⁶ Meaning-making is not an internal process. People are *engaged* in meaning-making, they do not create from nothing and the availability of external objects, which the individual absorbs and modifies, determines the success of the creative act. Similar to Coombe, Steven Wilf and Tom Palmer argue that meaning-making is an activity determined and shaped by many factors—an activity shared between authors and consumers.¹⁴⁷

The interpretive role of the public should not, however, become the baseline on which to legitimize new limits to copyright ownership. I argue that authorial and artistic properties are limited *ab initio* due to the dependency on the contribution of the public. The creative act combines the contribution of the collective and that of the individual authors.

Take the thinking process as an example. Thinking is a preliminary step and a core factor in the making process of copyright works. It is considered an "internal process which brings the organization laid down *in past learning* to bear upon responses to current situations, and which

144. *Id.*

145. Coombe, *Objects of Property and Subjects of Politics*, *supra* note 13, at 1863.

146. *Id.*

147. *See* Palmer, *supra* note 35; Wilf, *supra* note 7.

shapes those responses in keeping with inner needs.”¹⁴⁸ Thought is dependent on external objects. It is fueled by consumption of shared symbols, images and other structured relations, social processes, and cultural events. In other words, the human mind and its creative functioning depend on past experiences and, to a great extent, on the chance occurrence of certain events. Thought is a process of conceptualization whereby man’s world is symbolized or schematized. Copyrighted works reduce the abstract conceptualisation to the way an author associates his ideas with existing objects, identifies, and “tangibly” expresses his ideal reflection of the world.

Translated into the language of creation, Author *A* and Author *B* can create by employing two opposite modes of thought: *convergent* and *divergent*. The former involves “solving well-defined, rational problems that have one correct answer,”¹⁴⁹ and the latter is more akin to “originality in picking unusual associations of ideas.”¹⁵⁰ Authors would normally be recognised for their divergent thinking. The author, who possesses the ability to create copyrightable works, has a capacity to combine internal and external resources to create an unanticipated result—the ability to create ABZ from A and B. He asks “why” or “how”; interprets, defines, composes, and actualises existing elements; creates derivatives; merges diverse elements to one operative figure; and produces unique materials. He has a greater openness to experience. Weisberg adds to this list other characteristics shared by all creative individuals: broad interests, independence of judgement, self-confidence, intuition, and a firm sense of the self as a “creative” being.¹⁵¹ However, the degree to which authors possess these attributes varies between authors *A* and *B*. This is how we come to have Dostoyevsky’s tragedies; the story of Proteus who, in book IV of the *Odyssey*, turns into a lion and a snake, a panther and a boar, a stream and a great tree in leaf; Dickens’s “Great Expectations”; one who caricatures different events and political figures and another who poeticizes them.

148. WILLIAM VINACKE, *THE PSYCHOLOGY OF THINKING* 7 (1952) (emphasis added); see also GEORGE SHOUKSMITH, *INTELLIGENCE, CREATIVITY AND COGNITIVE STYLE* 22 (1970) (citing Vinacke’s work).

149. CSIKSZENTMIHALYI, *supra* note 141, at 60.

150. *Id.* On the distinction between convergence and divergence and their relation to creativity, see also L. Hudson, *The Question of Creativity*, in *CREATIVITY*, *supra* note 141, at 217-34.

151. WEISBERG, *supra* note 126, at 73.

Another example is imagination—a factor that is an integral part of the thinking process. Jed Rubenfeld claims that imagination makes people “go beyond” what they know to be present.¹⁵² He discusses the interplay between imagination and copyright and argues that the current interpretation of the 1976 Copyright Act conflicts with the human freedom of imagination enshrined in the First Amendment. He remarks:

Imagination ought to be free. This should be First Amendment bedrock: No one may be penalized for what he dares to imagine. What a person can imagine, he may imagine.

But what is imagination, and what is its relationship to speech?

....

Imagination comes in many forms: intellectual, visual, emotional, musical, and so on. There are probably as many forms of imagination as there are forms of apprehending the world. To define is to confine, and imagination resists confinement.

But if we want to unite the various forms of imagination under one heading, we might begin by saying that to imagine is to conceive *what isn't there*. To imagine is to form an idea that goes beyond—that *introduces something new* to—what the mind has heretofore seen, heard, thought, or otherwise sensed. Imagination is the faculty by which the mind presents to itself what isn't actually present and what has never been actually present to it.¹⁵³

I agree that imagination involves distinct mental and emotional processes unique to the individual. They take part in the creation of something that is not there—something new. But imagination alone cannot trigger creative expressions. If imagination and the thinking process are to be taken into account in the copyright making process, then they should not be distinguished from any other transformative quality. The capacities to think and imagine are perhaps innate, but their developed and actual expression, which transforms the capacity into an actual talent that takes part in the copyright making process, is a social creature that depends on collective cultural and social properties.

2. *The Limited Role of Innateness*

Innate endowment plays a role in my argument. However, this role is limited. Although I argue that copyrighted endeavours are a joint enterprise between authors and the public, I agree that the law should maintain a scheme of private rights in copyright due, *inter alia*, to the subjective contribution of authors, which represents their innate constitution and transformative abilities.

152. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *YALE L.J.* 1, 37 (2002).

153. *Id.* (emphasis added).

In his *Essay Concerning Human Understanding*, John Locke examines the nature of knowledge.¹⁵⁴ He forcefully dismisses the possibility of having innate ideas and principles from epistemology and the philosophy of mind.¹⁵⁵ A Lockean labourer cannot be said to create something *ex nihilo* or totally original, though he can be said to improve that which God gave us in common. Locke tells us that we are controlled by experience. Our brain at birth is a blank slate and it is only experience that transforms blank slates into actual brains capable of absorbing knowledge and using it in the creative process. In other words, “all we know about the world is what the world cares to tell us.”¹⁵⁶ In the words of Locke:

Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From *Experience*: In that all our Knowledge is founded; and from that it ultimately derives it self. Our Observation employ'd either about *external, sensible Objects; or about the internal Operations of our Minds, perceived and reflected on by our selves, is that, which supplies our Understanding with all the materials of thinking*. These two are the Fountains of Knowledge, from whence all the *Ideas* we have, or can naturally have, do spring.¹⁵⁷

We are, after all, as Locke says “sociable Creature[s].”¹⁵⁸ We can transform our innate constitution into real abilities only when we interact in society. In this way the public—the collective—joins the creative process, and contributes to authors’ capacity to internalize external social and cultural elements, then translate them to the language of copyright creation.

There are many transformative abilities that are necessary for the author to realize his creative talent. A good example is personality. The creative personality is a special creature. Creative individuals possess a unique set of characteristics. They infuse their internal code, composed of inborn and adaptive capacities, into an external object.¹⁵⁹ As the U.S.

154. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., 1975) (1690) [hereinafter *ESSAY*]. All subsequent references to the *ESSAY* are by book, chapter, and section (for example, *ESSAY*, bk. VI, ch. XVI, § 2).

155. *ESSAY*, bk. I.

156. *Empiricism*, in OXFORD COMPANION TO PHILOSOPHY, *supra* note 72, at 226.

157. *ESSAY*, *supra* note 154, bk. II, ch. I, § 2.

158. *Id.* at bk. III, ch. I, § 1.

159. This reminds me the words of Hegel, who claimed, “Attainments, erudition, talents and so forth, are, of course, owned by free mind and are something internal and

Supreme Court remarked in *Bleistein v. Donaldson Lithographing Company*, originality denotes the “personal reaction of the individual upon nature.”¹⁶⁰ If the way one expresses one’s personality is by a reaction to the environment, then personality is a transformative entity which needs the external environment for its realization. Expressions of personality represent the author’s ability to interact in society, style, flexibility of mind, willingness to consider unusual possibilities, willingness to respond to the collective’s invitation to consume its cultural and social capital, ability to attack greater or more difficult problems, dedication to a quest for ultimate meanings, and other related elements. Only exposure to social realities and absorption of collective properties promote attainment and actualization of these traits.

There are different creative personalities. Painters, for example, may have a great capacity to process and store visual information. They might not, however, possess the respective qualities necessary to design the future extension to the Guggenheim Museum or the London 2012 Olympic Village. That is, we consume and internalize collective properties in different ways; we transform collective properties by adding to them from our subjective abilities, personality, and judgment. In this way we create a work that reflects our contribution; we create an entity that presents our unique internal constitution.

I do not suggest that collective social dependence, the principle of social construction, or causal factors alone create copyright, and I am certainly not of the opinion that the public alone initiates the creative impulse and its eventual creative expressions. I believe that authorial knowledge and creativity are definable on two complementary grounds: collective and subjective. The latter includes the limited use of innate qualities, common sense and reaction, and making judgments and inferences concerning aspects of experience that matter to us. The former relates to the contribution from the public. Interaction between the collective and the subjective is what makes copyright production real. It is a game of managing contribution from two sources for the sake of control and power. However, in the current state of affairs in copyright, only one source—the author—realizes that sense of control and reward. This practice of denial dominates our copyright culture. It exposes the fallacy in establishing principles of copyright protection on the claim that what authors create is their “*own* intellectual creation”—a language

not external to it, but even so, by expressing them it may embody them in something external and alienate them. . . .” HEGEL’S PHILOSOPHY OF RIGHT 41 (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

160. *Bleistein v. Donaldson Litho. Co.*, 188 U.S. 239, 250 (1903).

favored in contemporary European copyright laws.¹⁶¹ Authors, artists, composers, dramatists, scientists, and intellectual property scholars, including historic path-breaking figures, are individuals whose expressive knowledge and creative labour depend on traditions and consumption of collectively produced and owned social and cultural properties vested in distinctive authorial and other representations. None can establish a claim for an exclusive property right based on the argument that he created something that represents his “own intellectual creation.”

Before examining particular incidents, it is useful to look at a related example that illustrates the collective role and the limits of innateness: celebrities’ rights. Arguments about celebrity magnetism vary from considering it to be public property and part of popular culture to an exclusive property of the persona. Justine Hughes argues, “Property rights in the persona give the individual the economic value derived most directly from one’s personality. As long as an individual identifies with his personal image, he will have a personality stake in that image.”¹⁶² Michael Madow rejects this view and contends:

A celebrity . . . does not make her public image, her *meaning for others*, in anything like the way a carpenter makes a chair from a block of wood. She is not the sole and sovereign “author” of what she means for others. . . . [A] celebrity like Madonna cannot say of her public image what the carpenter can say of his chair: “I made it.” And because she cannot say this of her public image, she cannot lay a convincing moral claim to the *exclusive* ownership or control of the economic values that attach to it.¹⁶³

Coombe takes this approach one step further and argues that the celebrity’s “successful image is frequently a form of cultural *bricolage* that improvises with a social history of symbolic forms.”¹⁶⁴ A “celebrity

161. This ideal has recently become a principle of contemporary European copyright protection and illustrates the inherent danger in adhering to it. Three European Community directives provide for a definition of originality as “the author’s own intellectual creation.” See Council Directive 91/250, On the Legal Protection of Computer Programs, art. 1, 1991 O.J. (L 122) 42, 44 (EC); Council Directive 93/98, Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 6, 1993 O.J. (L 290) 9, 12 (EC); Council Directive 96/9, On the Legal Protection of Databases, art. 3, 1996 O.J. (L 77) 20, 25 (EC).

162. Hughes, *supra* note 54, at 340-41.

163. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 195-96 (1993).

164. Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 370 (1991). On this issue generally, see Hazel Carty, *Advertising, Publicity Rights and English Law*, 3 INTELL. PROP. Q. 209 (2004).

is authored in a multiplicity of sites of discursive practice, and that in the process, unauthorized identities are produced, both for the celebrity and for her diverse authors.”¹⁶⁵ In another article Coombe asserts, “Publicity rights arguably enable celebrities, their assignees, and their estates to control the meaning of the celebrity image in a fashion that deprives us of access to our collective cultural heritage”¹⁶⁶ What this Article strives to defend is how copyrighted commodities are “authored in a multiplicity of sites of discursive practice” and represent “our collective cultural heritage.”

In the next Part I shall take several examples of key authors and artists who have had an undeniable impact on our culture. The examples I choose confirm the public authorial role and show the limits of authors’ abilities and the ubiquity of the public in the creative act. They also clarify who the public *is* for purposes of the public authorship model. I shall refer to “the public” as an entity comprising: (1) other individual contributors, *except* the principal author, who do not show *individual* intention to share the property in the work created and do not participate in the very creation of the particular copyrighted work, and (2) the general public via its collective authorial contribution and provision of social and cultural properties.

I will progress chronologically, and show that there is no difference between figures whose original works were not protected under copyright laws and others whose works represent living examples of the flaws in our copyright regime. I shall discuss Shakespeare, Mozart, Picasso, chance creations and indeterminate works of Dadaist artists and conclude that recognition of the public authorial contribution, if less relevant in pre-copyright law periods, will ensure equity in modern copyright and secure society’s social structure and collective cultural identity in today’s copyright regime. These examples will also show that the “copyright moment”—the moment in which copyrighted entities are born—is not the individual’s moment but the moment which marks the birth of work emerging from the collaboration between authors and the public.

VII. THE MYTH OF AUTHORSHIP, THE REALITY OF CONTINUITY

A. Shakespeare, the Co-Author

A title such as *Shakespeare, Co-Author*¹⁶⁷ almost says it all. In his book, Brian Vickers challenges the view that authorial and artistic

165. Coombe, *Author/izing the Celebrity*, *supra* note 164, at 365.

166. Coombe, *Objects of Property and Subjects of Politics*, *supra* note 13, at 1876.

167. VICKERS, *supra* note 3.

creativity is an expression of a solitary creative outburst. Shakespeare's works predate the Statute of Anne of 1709.¹⁶⁸ That means neither Shakespeare, nor his heirs, could have imagined the benefits of copyright protection. As David Vaver remarks: "Were Shakespeare still in copyright, his heirs could prevent the publication of Charles and Mary Lamb's *Tales from Shakespeare* (1807) for children, and other reductions such as the half-hour version of *Macbeth* mounted in 1994 by the Waterside Theatre Company of Stratford."¹⁶⁹ However, a "fresh translation of Shakespeare or Voltaire has full copyright protection for the translator's life plus 50 years whether the source work is that of a living author or not."¹⁷⁰

In *Shakespeare, Co-Author*, Vickers asks, "How much do we know about Shakespeare's collaborations with other dramatists?"¹⁷¹ He examines five plays and finds each to be co-authored with another person, including: Fletcher's substantial contributions to *Henry VIII* and *The Two Noble Kinsmen*, Peele's co-authorship of *Titus Andronicus*, and the evidence amassed for Middleton's unquestionably substantial share in *Timon of Athens*.¹⁷² The test Vickers employs is composed of several components including: the verse style, parallel passages, the vocabulary used, linguistic choices, and function words used to convey special meanings.¹⁷³ In *Titus Andronicus* Vickers finds "typical" authorial style

168. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3 (1968) (discussing the Statute of Anne, 1709, 8 Ann., c. 19). William Shakespeare lived from 1564 to 1616. See DENNIS KAY, WILLIAM SHAKESPEARE: HIS LIFE AND TIMES, at xvii-xviii (1995).

169. David Vaver, *Abridgements and Abstracts: Copyright Implications*, 17 EUR. INTELL. PROP. REV. 225, 232 (1995).

170. David Vaver, *Translation and Copyright: A Canadian Focus*, 16 EUR. INTELL. PROP. REV. 159, 160-61 (1994). However, the basic depiction of a character is not subject to copyright protection. This may be illustrated by Justice Learned Hand's decision in the case of *Nichols v. Universal Pictures* where he uses the example that if Shakespeare's *Twelfth Night* was subject to copyright, then the creation of a character who was "a riotous knight who kept wassail to the discomfort of the household" would not be enough to infringe copyright, and "the less developed the character, the less they can be copyrighted . . ." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

171. VICKERS, *supra* note 3, at vii. The fact that collaborative authorship was a standard practice in Elizabethan, Jacobean, and Caroline drama convinces Vickers that we can find clear traces of co-authorship in Shakespeare's plays. *Id.* at 137-47.

172. See discussions of *Henry VIII*, *id.* at 333; *The Two Noble Kinsmen*, *id.* at 402; *Titus Andronicus*, *id.* at 148; and *Timon of Athens*, *id.* at 244; see also *id.* at 291 (discussing *Pericles*).

173. *Id.* at 44-98; see also *id.* at 98-134 (discussing problems in identifying and monitoring co-authors).

by George Peele despite the fact that many Shakespearian scholars seem “to exclude acknowledging the presence of another author” in the play.¹⁷⁴ The play was entered in the Stationers’ Register in 1594 as “a book intituled a Nobel Roman Historye of Titus Andronicus.”¹⁷⁵

Scholars have found similarities between *Titus*, *Hamlet*, and *King Lear*, pointing to Shakespearean development in tragedy. In contrast, Vickers finds a strong case for co-authorship in *Titus* between Shakespeare and Peele. He examines three things: (1) comparison between *Titus* and a play by Peele of comparable subject matter, *The Battle of Alcazar*;¹⁷⁶ (2) the use of alliteration;¹⁷⁷ and (3) the number of vocatives.¹⁷⁸ He concludes that “Peele was no doubt a useful co-author for Shakespeare, with his longer theatrical experience and greater knowledge of the classical world . . .”¹⁷⁹ His contribution to *Titus* is “enough to gain Peele recognition as co-author.”¹⁸⁰ He reaches similar conclusions with regards to Wilkins’s contribution to *Pericles*¹⁸¹ and Fletcher’s contribution to *Henry VIII*¹⁸² and *The Two Noble Kinsmen*.¹⁸³ Concerning Shakespeare’s tragedy, *Timon of Athens*, Vickers takes his view on co-authorship even further and argues that all the methods employed to test the originality of the play “agree in assigning to Middleton a *substantial* part of *Timon*, and Shakespearians who continue to deny this point risk forfeiting their scholarly credibility.”¹⁸⁴

Shakespeare’s influence on the evolution of legal reasoning is an interesting phenomenon in itself. For example, one commentator complains about the limited use courts make of Shakespearean quotations.¹⁸⁵ Some references quote him as an authority supporting a certain activity of life and others go further and use him as an authority to establish the meaning of contemporary legal terms.¹⁸⁶ If we want to refer to Shakespeare

174. *Id.* at 162.

175. *Id.* at 148.

176. *Id.* at 219.

177. *Id.* at 220-26.

178. *Id.* at 226-29.

179. *Id.* at 243.

180. *Id.*

181. *Id.* at 316.

182. *Id.* at 336-47, 396, 402.

183. *Id.* at 428, 432.

184. *Id.* at 290 (emphasis added). Claims that William Shakespeare was not the author of the plays for which he is known as their author exist. See, e.g., John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992). The name “Shakespeare” itself is allegedly borrowed. *Id.* at 1375.

185. Jules Gleicher, *The Bard at Bar: Some Citations of Shakespeare by the United States Supreme Court*, 26 OKLA. CITY U. L. REV. 327 (2001).

186. *Id.* Moreover, Shakespeare, as one commentator argues, must have had sophisticated legal knowledge. Thomas Regnier, Comment, *Could Shakespeare Think Like a Lawyer? How Inheritance Law Issues in Hamlet May Shed Light on the*

in legal discourse, should we not learn a lesson from Shakespeare's mode of collaboration when we develop standards of copyright protection? Scholarship on copyright is attentive to the collaborative nature of Shakespeare's works. In a leading source on the evolution of copyright, Rose supports the criticism on the "unoriginal" nature of Shakespeare's plays and remarks:

As a member of the King's Men and a shareholder in the Globe Theatre, Shakespeare participated in a collaborative and traditional enterprise of cultural production. Almost none of Shakespeare's stories were original with him. . . . It would not be wholly inappropriate, I think, to characterize Shakespeare the playwright, though not Shakespeare the author of the sonnets and poems, in a quasi-medieval manner as a reteller of tales.¹⁸⁷

And Madison, questioning Shakespeare's originality in the context of authorship, writes:

In *Shakespeare in Love* the screenwriter Tom Stoppard (with collaborator Marc Norman) uses "Romeo and Ethel, the Pirate's Daughter" as the working title of the play that becomes "Romeo and Juliet," not only to mock the notion that Shakespeare composed his plays as a sole "romantic" author but to remind us of the sometimes messy, unplanned, accidental, idiosyncratic nature of creativity and creation. It has been long recognised that Shakespeare borrowed shamelessly, from contemporaries, fellow actors, Anglo-Saxon literature, and Roman historians and playwrights. What we do not know is how purposive or fortuitous this process was. Likewise, in connection with copyright, we do not often ask whether the notion of authorship matters. We know . . . that authorship shapes the character of copyright law. But does authorship shape what copyright law cares about—the creative work of authorship?¹⁸⁸

In the definition of "the public" I include both previous generations of creative geniuses, collaboration with other fellow artists except the principal creator, and the general public. That is, authors and artists do not create in a social vacuum. They are influenced by special circumstances, collective and personal, social and cultural experiences, and other endless untraceable processes. For example, Norwich examines the close relationship between Shakespeare's plays, societal events, and characters

Authorship Question, 57 U. MIAMI L. REV. 377, 427-28 (2003). Ironically, could it be that the person who wrote Shakespeare was a lawyer, and still demands "let's kill all the lawyers." WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH*, act 2, sc. 2.

187. ROSE, *supra* note 25, at 25-26. To this Rose mentions two exceptions: the epilogue to *2 Henry IV* and the epilogue to *Henry V*. *Id.* at 26; *see also id.* at 122-23.

188. Madison, *supra* note 135, at 760.

dominating his period.¹⁸⁹ Likewise, Vickers did not only refer to the individualistic contribution by Shakespeare's fellow dramatists but to the contribution from a community of dramatists and the public at large. He asserts that "language change has a social dimension. The key point is that linguistic innovations are mostly made by an educated class, responsive to *outside influences and to social change*."¹⁹⁰ And that examination of authorial collaboration "allows us to trace the development of knowledge, as each generation of scholars builds on their predecessors' work, correcting and extending it."¹⁹¹ There are two parts in this statement, attesting to the unavoidable interplay between the collective and subjective sublimines in copyright creation: first, every dramatist's knowledge is dependent on the contribution of other dramatists and the contribution of the *public* by virtue of being a member of a given social structure; second, the individual dramatist uses his innate endowment and acquired knowledge "correcting and extending" it in a way that makes *him* eligible to claim recognition of his own authorial contribution.

B. Compositional Ingenuity and Mozart

Contrary to the claim of the Romantic composers that their works suddenly sprung whole into consciousness, compositions only gradually take their final form, not without the aid of the collective. It was found that there is a significant correlation between optimal experience and the creative output of student compositions.¹⁹² Mozart was a student in many senses. He, who most of us would consider the ultimate example of a musical genius, was influenced by experiences, and his works owe much to other composers.¹⁹³

Mozart's musical "inventions" were influenced and triggered by many external factors. Besides his extensive travels and ordinary life experiences, masterpieces composed by Mozart are based on musical achievements of others. For example, his three E-flat concertos for the French horn were modeled on horn concertos by Antoni Rosetti; his early symphonies

189. JOHN JULIUS NORWICH, *SHAKESPEARE'S KINGS: THE GREAT PLAYS AND THE HISTORY OF ENGLAND IN THE MIDDLE AGES: 1337-1485* (1999).

190. VICKERS, *supra* note 3, at 119 (emphasis added).

191. *Id.* at 147.

192. Charles Byrne et al., *Assessing Creativity in Musical Compositions: Flow as an Assessment Tool*, 20 BRIT. J. MUSIC EDUC. 277 (2003). Optimal experience, or "flow" is the "the effortless involvement with everyday life and may occur when a person is engaged in absorbing and enjoyable activities." *Id.* at 279; see also Susan O'Neill, *Flow Theory and the Development of Musical Performance Skills*, 141 BULL. COUNCIL FOR RES. MUSIC EDUC. 129 (1999).

193. Erich Hertzmann, *Mozart's Creative Process*, in THE CREATIVE WORLD OF MOZART 17, 25-26 (Paul Henry Lang ed., 1991).

written in London (1764-65) mimic the style of Johann Christian Bach.¹⁹⁴ Objective evidence indicates that his compositions did not come to Mozart complete. The compositions are so unromantic, as we use the term in copyright discourse, to even bring musicologists who have studied “Mozart’s letter” to conclude that his compositional style is a forgery.¹⁹⁵

I do not intend to accuse Mozart of unoriginal compositional input, but I certainly believe that his dependence on other sources would prove ample enough to curtail copyright ownership even in today’s music industry. Although from a more individualistic approach, Lawrence Becker takes the example of Mozart and reaffirms that a creative musical composition is a mix of what is already known and resides in the public domain and the subjective contribution of the composer:

Think of trying to give a complete, transitive casual account of the composition of Mozart’s *Don Giovanni* that makes Mozart himself simply an intermediate link. Every note, voicing, key change, or tempo would have to be explained by events “outside” Mozart. We certainly cannot give such an explanation, and we commonly think none exists—while we can find evidence of influences, tendencies, exigencies outside the composer that are part of a full explanation, another substantial part simply begins with Mozart’s creative activity.¹⁹⁶

Artists, composers, and poets all possess the great mastery of artistic, musical, or poetic phraseology. They have in themselves the ability to create unique properties that represent elements from their original makeup, subjective experience and unique personality. This does not mean that artistic personalities are acquainted with such abilities from which complete originals are created. If a composer, for example, “continues to work exercises in imitation of his models he will be surprised to find that along with the thousand subtleties of technique he will absorb from his masters, he will discover the personal materials of

194. WEISBERG, *supra* note 126, at 225-26.

195. *Id.* at 46. The composer Bach is another good example that composition necessitates reliance on others’ works and resources. See NORMAN CARRELL, *BACH THE BORROWER* 227-364 (1967). Borrowing allows the making of variations on existing musical templates, and there are many examples for successful borrowing, such as Brahms’s *Variations on a Theme by Haydn* and Beethoven’s *Diabelli Variation*. WEISBERG, *supra* note 126, at 230.

196. Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 614 (1993).

his own art.”¹⁹⁷ As Mozart relates about himself in one of his letters, while rejecting the ideal of originality:

When I proceed to write down my ideas, I take out of the bag of my memory But why my productions take from my hand that particular form and style that makes them *Mozartish*, and different from the works of other composers, is probably owing to the same cause which renders my nose so or so large, so aquiline, or, in short, makes it Mozart’s, and different from those of other people. *For I really do not study or aim at any originality*¹⁹⁸

The same method of musical composition holds for different contemporary music styles. For example, composing blues music is complex and relies, to a large extent, on collectively produced social and cultural properties, tradition, and borrowing from others’ works. Siva Vaidhyanathan observes:

The blues compositional ethic is complex and synergistic, relying on simultaneously exploring and extending the common elements of the tradition. Blues artists are rewarded for punctuation within collaboration, distinction within a community, and an ability to touch a body of signs shared among all members of an audience.¹⁹⁹

C. Picasso’s *Les Demoiselles d’Avignon* and *Guernica*

Picasso’s works, as opposed to Shakespeare’s and Mozart’s, are protected under the 1976 Copyright Act and European legislation until 2043.²⁰⁰ Two of Picasso’s artistic achievements, the paintings *Les Demoiselles d’Avignon* and *Guernica*, are considered by the artistic community, art historians, and those who study the psychology of the creative act, to represent a radical departure in art and prime examples of the transcendence of creative thinking in the arts.

Picasso painted *Les Demoiselles d’Avignon* in 1907.²⁰¹ The grotesque appearance and sexual poses of the five women in the painting (originally part of seven—two men were omitted from the final version) are intended to repel the viewer and perhaps to provide him with some hidden insight into Picasso’s sexual life. The women are prostitutes and the setting is an Avignon Street brothel in Barcelona’s red-light district. The final painting, which looks totally original, was discovered to

197. Harold Shapero, *The Musical Mind*, in *THE CREATIVE PROCESS* 49, 52 (Brewster Ghiselin ed., 1952).

198. EDWARD HOLMES, *THE LIFE OF MOZART* 256 (Ernest Rhys ed., 1912) (second emphasis added).

199. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 121 (2001).

200. Pablo Picasso lived from 1881 to 1973. See sources cited *supra* note 71.

201. This case study is discussed in WEISBERG, *supra* note 126, at 193-209. See also PIERRE DAIX, *PICASSO* 11-36 (Dorothy S. Blair trans., Thames & Hudson Ltd. 1979); TIMOTHY HILTON, *PICASSO* 60-93 (1975).

embody existing artistic patterns and motifs. X-ray analysis of earlier sketches reveals that two cycles of painting were undertaken.

Picasso's work is still considered radical. The asymmetric faces and bodies of the women were new and unfamiliar to those equipped to evaluate beauty and culture in paintings. The inspiration for the women's oval-shaped faces, with large lozenge-shaped eyes, large scrolled ears, and flat noses came from an exhibition of antique Iberian reliefs held at the Louvre museum in Paris in the spring of 1906. This "had led him to a greater emancipation from objective appearances . . ." ²⁰² Two features that particularly struck the attention of the art community were the women's large ears and the flat noses of two demoiselles that stand in the center of the painting. The source of the ears is two antique statues that Picasso acquired in 1907. The nose, as Picasso himself tells us, was taken from a painting by Henri Matisse which he also obtained in 1907.

The Iberian phase of the painting was reflected in the first cycle. In the second cycle, Picasso modified his work extensively after his visit to an ethnographic museum that displayed works of primitive art. Picasso's *Les Femmes d'Alger (O.J.)* also incorporates features from other artists' paintings and African art and is conceived by art historians as a response to other styles evident at that time. ²⁰³ For example, a flat nose was already found in Matisse's *Portrait of Marquerite* and distorted bodies were found in works by Cézanne and Matisse. ²⁰⁴ A year prior to the completion of *Les Femmes d'Alger (O.J.)*, Matisse painted the *Le Bonheur de Vivre (The Joy of Life)*; the scene is not less sexual than Picasso's brothel. Some consider *Les Femmes d'Alger (O.J.)* to be a negative response to Matisse's painting, which portrayed a tranquil scene.

202. DAIX, *supra* note 201, at 30.

203. HILTON, *supra* note 201, at 60-62.

204. So influential were Cézanne and African art on Picasso that six or seven years after completing *Les Femmes d'Alger (O.J.)*, he concentrated on Cézanne and African art. DAIX, *supra* note 201, at 30.

Continuity and Discontinuity in *Les Demoiselles d'Avignon*²⁰⁵

<i>Element</i>	<i>Source(s)</i>
<i>Continuity</i>	
Overall theme and scene	Cézanne, Matisse, Derain
Style of preliminary work	Picasso's "Iberian" period
The two women seated at right	Cézanne
The two women seated at centre	Manet's <i>Olympia</i> ; Goya's <i>Naked Maja</i>
<i>Discontinuity</i>	
Change in orientation and number of characters; removal of men	Picasso's evaluation of painting
Non-Iberian flat noses	Matisse's <i>Portrait of Marguerite</i>
Non-Iberian scrolled ears	Sculpture
Distortions	Exposure to primitive art

Thirty years after painting *Les Demoiselles d'Avignon*, Picasso painted *Guernica*—"a cherished museum piece."²⁰⁶ The bombing of the Spanish City of Guernica during the Civil War in Spain was the trigger for the painting. This work has become a symbol of the suffering of the Spanish people under the former dictator, Francisco Franco. The symbolic importance of the work was enhanced by Picasso's decision to loan it to the Museum of Modern Art in New York until democracy was restored in Spain. *Guernica* was returned to Spain after forty years in exile and eight years after Picasso's death. The final *Guernica* embodies artistic methods and features from other artists of the time.²⁰⁷ It benefited

205. Adapted from a table in WEISBERG, *supra* note 126, at 201.

206. HERBERT MARCUSE, *TECHNOLOGY, WAR, AND FASCISM* 201 (Douglas Kellner ed., 1998). See generally WEISBERG, *supra* note 126, at 202-09.

207. As Blunt explains:

[W]e are told that Picasso changes his style so frequently and so rapidly that no one would realize that works of different periods were by the same artist. But what art historian—if he did not know the intervening stages—could guess that early and late works by Titian, Rembrandt, Poussin, or Cézanne were by the same hand? And if, with Picasso, one carries out the process of following through the intervening stages, it becomes apparent that, although the first and last productions of his imagination are widely separated—even fundamentally

from Picasso's experience of the war and was also influenced by the Spanish artist, Francisco de Goya. This influence is evident from examination of several preliminary sketches of the painting. Furthermore, research by Fisch affirms that Picasso, in 1937, used a woodcut by Hans Baldung Grien, *The Bewitched Stable-Lad*, as a model for *Guernica* which came to his attention from a catalogue on Fantastic Art Dada Surrealism from the Museum of Modern Art in New York.²⁰⁸

A key feature in the copyright making process is continuity between old and new ideas: "In order to be realistic, creative ideas need to be structured, and that structure needs to have evolved from previously established ideas and principles."²⁰⁹ Continuity in Picasso's *Guernica*, Ronald Finke observes, is a good example that "[e]ven when a new idea consists of extensive transformations of previous ideas, one should still be able to discover a connective path that links the structures."²¹⁰ The operation in two cycles of *Les Demoiselles d'Avignon* and the social history of painting *Guernica* reveal the limits of our innate abilities, the dependence on the contribution of the collective, and the causal connection between the contribution of the public and Picasso's contribution.

Rosemary Coombe also takes Picasso as an example and claims that his personality has been very much influenced by the collective. Coombe shows that collectively produced entities, such as cultural elements produced for social reasons, were borrowed by Picasso and found their way to his paintings and became part of his personality: "When a primitive statue, produced in a collectivity for social reasons, makes its way into a Picasso painting, the statue itself may still embody the identity of the culture from which it sprang, but any reproduction of

different—the change was brought about by a series of steps, each of which is intelligible and can be seen as following logically on the earlier moves, and each of which was arrived at by a process of experiment and thought . . .

ANTHONY BLUNT, *PICASSO'S 'GUERNICA' 2* (1969).

208. EBERHARD FISCH, *GUERNICA BY PICASSO* 103 (James Hotchkiss trans., Associated Univ. Press 1988).

209. Ronald A. Finke, *Creative Realism*, in *THE CREATIVE COGNITION APPROACH*, *supra* note 141, at 303, 304. Gifford, discussing movements in artistic development, writes: "Despite the evolution of artistic subject matter, the broad-based movements themselves are best understood as a continuous progression of developmental stages reflecting back on earlier periods." Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 *CARDOZO ARTS & ENT. L.J.* 569, 582 (2000).

210. Ronald A. Finke, *Creative Realism*, in *THE CREATIVE COGNITION APPROACH*, *supra* note 141, at 304.

it is legally recognised as the embodiment of Picasso's authorial personality."²¹¹ The copyright community continues to devalue the contribution of collective properties for the development of personality and their impact on the transformation of innate abilities necessary for the creation of art. This tendency borders on absurdity: the law isolates the person from the social and cultural context and rewards it for giving the world an original object.

There is a story about an interview of Picasso in his maturity during which he was asked why he spent so much time imitating the style of great masters of art. He replied, "If I had not imitated them I would have to spend the rest of my life imitating myself."²¹² In another interview he remarked, "At the beginning of each picture there is someone who works with me. Towards the *end* I have the impression of having worked without a collaborator."²¹³ Picasso undoubtedly ventured beyond the works of his predecessors "but even he recognised that without mastering the best achievements of a domain, one is left only with one's naked talents, having to reinvent the wheel without tools."²¹⁴

D. Dada Art and Chance Creations

A still open question is whether "chance creations" or randomly generated works are subject to the critique I presented above. Our artistic traditions are reflective of a broad spectrum of tastes and attitudes towards art and what it should be. Modern copyright laws do not embrace a rigid qualitative test for authorship and leave the question whether a given work constitutes art, or whether it is sufficiently creative to merit copyright protection, to the audience. It is beyond the scope of the present Article to discuss whether quantification of creative content should become a threshold for copyright protection, more than the mere requirement for a "modicum of creativity." However, an intriguing question that deserves some attention is whether anyone can claim an indeterminate work negates the social dependence argument and lacks significant causal connection to collectively produced and owned properties.

211. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES*, *supra* note 13, at 225.

212. Christian Zervos, *Conversation with Picasso*, in *THE CREATIVE PROCESS*, *supra* note 197, at 55, 57.

213. *Id.* (emphasis added).

214. CSIKSZENTMIHALYI, *supra* note 141, at 421-22.

Jean Arp and Marcel Duchamp are noted Dadaist artists.²¹⁵ Arp is known for collages arranged by the “law of chance.”²¹⁶ He attempts to create *without-sense*—a “flight into the Romantic or mystical model which functions as an alternative, as a utopia, promising a release from the unstable and unsatisfactory present.”²¹⁷ Being unsatisfied with his inability to produce a drawing to his liking, Arp tore paper into small pieces allowing them to fall onto canvas and attaching them where they fell. He then saw the composition he wanted to draw in the chance arrangement of the scraps. He also composed poems by the principle of chance. He randomly chose words and phrases mainly taken from newspapers. Duchamp, like Arp, is famous for his “chance operations.” Duchamp “use[s] the confusion of modernity as a way of sweeping away the old structures.”²¹⁸ In one instance he allowed dust to settle on a glass for several months, and after being photographed, was wiped off everywhere but the cone areas where it was affixed with glue and made part of the work.²¹⁹

Arp and Duchamp created collages by the principle of chance, which “allows itself to be easily combined with the Dada concern with everyday life and media, creating an art of chaotic juxtapositions.”²²⁰ Indubitably, the chaotic collages made by Arp and Duchamp went beyond what was already known. But, is there any noticeable role for collectively produced social and cultural properties in collages made by the principle of chance? Mark Pegrum observes that the Dada style is a postmodern reaction to modernity. Duchamp, for example, “challenges utilitarianism via his ready-mades such as the bicycle wheel, which represents a very old and very basic machine, now transposed into the aesthetic sphere and thus rendered completely useless in terms of its original purpose.”²²¹ Although it looks as if Dadaists are purely pro-chaos in the name of liberty, Arp “accept[s] chaos but as the locus of a higher order and

215. See generally FRANCIS M. NAUMANN & BETH VENN, *MAKING MISCHIEF: DADA INVADES NEW YORK* (1996); MARK A. PEGRUM, *CHALLENGING MODERNITY: DADA BETWEEN MODERN AND POSTMODERN* 245-49 (2000). For Pegrum’s brief definition of Dada art, see *id.* at 309-11. See also Durham, *supra* note 18, at 596-608.

216. PEGRUM, *supra* note 215, at 245-49; see also Jane Hancock, *Arp’s Chance Collages*, in *DADA/DIMENSIONS* (Stephen C. Foster ed., 1985), cited in Durham, *supra* note 18, at 597.

217. PEGRUM, *supra* note 215, at 39.

218. *Id.* at 100.

219. Durham, *supra* note 18, at 599; PEGRUM, *supra* note 215, at 246.

220. PEGRUM, *supra* note 215, at 246.

221. *Id.* at 98.

meaning, which effectively amounts to a rejection of the unstructured and meaningless nature of that chaos.”²²² That does not mean that the Dadaist reaction is created in isolation from the authorial collectivity.

Pegrum observes that there is an unavoidable link between postmodernism and Romanticism and the former may even seem an extension of the Romantic cultural stream. If this is so, “Is postmodernism in effect a radicalised version of the Romantic assault on modernity? And what of Dada’s relation to Romanticism?”²²³ Pegrum, believes that the Dadaist is a “daffier version of the lonely [R]omantic rebel.”²²⁴ That is, the reaction to the external culture and social reality define the creative act in both streams. Arp does not negate the beauty of accidental art but remarks that even in the case of accidental art, the artist has still to be attentive to external influences: “Arp explained elsewhere that accidents alone could not produce art; art required the imprint of human aspirations.”²²⁵

Arp and Duchamp unquestionably express their personalities through their revolutionary works and display a high degree of imagination. That is, even if indeterminate works are created in a random fashion—the kind of works that the courts may seem most reluctant to consider original—they can never be created in isolation from the contribution of the collective. They react against certain attitudes of the public and as such the raw materials they use are but collectively produced symbols and characters and other cultural and social properties. Their creative abilities are transformative abilities; they are not, in any way, innate. The imprint of the public’s authorial role is evident in the method in which Dada artists express their artistic personality.

Weisberg makes a distinction between creativity and creative value. He offers a definition of creativity and asserts that, “for a product to be called creative, it must be the novel result of *goal-directed* activity; novelty brought about by accident would not qualify as creative, no matter how valuable the outcome.”²²⁶ In the post-Feist copyright era, creativity is about value. As opposed to the United States, English copyright law does not require creativity for copyright protection.²²⁷

222. *Id.* at 99.

223. *Id.* at 100.

224. *Id.* (citation omitted).

225. Durham, *supra* note 18, at 597 n.168, quoting Hancock, *supra* note 216, at 65. The Second Circuit already noted, in a case considering unplanned variations as a source of authorship, “Many great scientific discoveries have resulted from accidents . . .” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 n.25 (2d Cir. 1951).

226. WEISBERG, *supra* note 126, at 242-43. Weisberg then offers “assessment by members of the field” as indicative of the value. *Id.* at 246.

227. In the United Kingdom, courts remain steadfast to the formula of “skill, judgement and labour” as the basic condition for copyright protection. *See, e.g.*, *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 All E.R. 465; *Bookmakers Afternoon Greyhound Servs. Ltd. v. Wilf Gilbert (Staffordshire) Ltd.*

Both systems, however, allow accidental art to flourish and permit wide discretion in defining what art is, as long as the given work has authorial origins. Under English copyright law the works of Arp and Duchamp can be protected, irrespective of artistic quality, if each qualifies as, for example, a collage.²²⁸ The addition of “collage” to the 1988 U.K. Act, Paul Kearns asserts, “accommodates non-motion visual art that may contain *pre-created material* by another but is so *originally arranged* as to gain its own copyright protection.”²²⁹ I do not reject the argument that authors of collages do not “put their mark” on their creation²³⁰ or the claim that their works represent some aspects of their inner personality. As the *Bleistein* decision tells us: “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”²³¹ Arguably, if a chance creation resulted in a collage, which by any means is a complex artistic work, the work can be viewed as either more dependent on multiple, seemingly unrelated, sources, and thus more vulnerable to my arguments on the dependence on the authorial collectivity, or a truly extraordinary achievement. Either way, Dada works originate in an artist and probably involve creative skill and labour and infusion of personality. In fact, the many reproductions made of the works by Arp and Duchamp revive the truth in Justice Peterson’s maxim that “what is worth copying is *prima facie* worth protecting.”²³²

[1994] F.S.R. 723 (Ch.), *available at* <http://www.westlaw.com> (U.K. Case Law, Fleet Street Reports); *Reject Shop Plc. v. Manners* [1995] F.S.R. 870 (QB), *available at* <http://www.westlaw.com> (U.K. Case Law, Fleet Street Reports); *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd. (No 1)* [1995] F.S.R. 818 (Ch.), *available at* <http://www.westlaw.com> (U.K. Case Law, Fleet Street Reports); *Bowater Windows Ltd. v. Aspen Windows Ltd.* [1999] F.S.R. 759 (Ch.), *available at* <http://www.westlaw.com> (U.K. Case Law, Fleet Street Reports); *IPC Magazines Ltd. v. MGN Ltd.* [1998] F.S.R. 431 (Ch.), *available at* <http://www.westlaw.com> (U.K. Case Law, Fleet Street Reports); *Hi-Tech Autoparts Ltd. v. Towergate Two Ltd. (No. 1)* [2002] F.S.R. 15 (Patent County Ct.), *available at* <http://www.westlaw.com> (U.K. Case Law, Fleet Street Reports); *Beckingham v. Hodgins* [2002] EWHC 2143 Ch., [2003] F.S.R. 14; *Sawkins v. Hyperion Records Ltd.* [2005] EWCA (Civ) 565, [2005] 3 All E.R. 636.

228. Copyright, Designs, and Patents Act, 1988, c. 48, § 4(1)(a) (U.K.).

229. PAUL KEARNS, *THE LEGAL CONCEPT OF ART* 78 (1998) (emphasis added).

230. *Mitel, Inc. v. Inqtel, Inc.*, 124 F.3d 1366, 1374 (10th Cir. 1997).

231. *Bleistein v. Donaldson Litho. Co.*, 188 U.S. 239, 250 (1903).

232. *Univ. of London Press Ltd. v. Univ. Tutorial Press Ltd.*, (1916) 2 Ch. 601, 610 (U.K.). Durham holds the view that the works of Arp and Duchamp qualify for the post-*Feist* definition of originality—they represent a modicum of creativity. Durham, *supra* note 18, at 637-38.

E. Zapruder's Copyright

Chance creations may satisfy the conditions of originality and creativity, but how much can we stretch the conditions? Take the example of photographs taken by sheer happenstance, but which have an incredible historic and social value. Photographs taken by Zapruder of the assassination of the late President John F. Kennedy on November 22, 1963, and by Kampler of the late Prime Minister Rabin on November 4, 1995, at the peace demonstration prior to his assassination, are protectable under copyright laws. The former case was tested in *Time, Inc. v. Bernard Geis Associates*.²³³

Abraham Zapruder, a Dallas dress manufacturer and amateur photographer, was present by sheer happenstance at the scene of the assassination of President Kennedy, and filmed it with his camera. For the same reason that the photo of Oscar Wilde was found entirely representative of the photographer's "original mental conception,"²³⁴ Zapruder's work, one of the most important records of this horrific event, was granted copyright protection. Interestingly, one may raise an objection to copyright on the basis of the impossible application of the idea/expression dichotomy: Zapruder had no idea prior to filming the event. However, positioning the camera can be constructed as a "mental conception" just as randomly choosing materials for a collage or accidentally choosing keys on a music dice game.

The questions whether Zapruder's thirty second, eight millimeter strip of celluloid is a piece of art or a national treasure, or whether it should be protected under copyright law at all, are certainly interesting. For that and many other reasons Congress enacted the "JFK Act"—the John F. Kennedy Assassination Records Collection Act of 1992.²³⁵ However, should we wait three decades for Congress to listen to the public's need for authentic information on the assassination of President Kennedy? I assume Jessica Litman would respond to this question by raising the possibility of civil disobedience. In one of her leading sources on copyright, Litman chronicles the many weaknesses of copyright and concludes with the proclamation, "People don't obey laws that they

233. 293 F. Supp. 130 (S.D.N.Y. 1968); see also Melanie Skehar, *Who Really Owns the Zapruder Film After The JFK Act: The Sixteen Million Dollar Question*, 34 SW. U. L. REV. 325 (2004). See generally DAVID R. WRONE, *THE ZAPRUDER FILM: REFRAMING JFK'S ASSASSINATION* (2003).

234. *Burrow-Giles Litho. Co. v. Sarony*, 111 U.S. 53, 60 (1884).

235. President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (2000). The Act specifies that "all Government records concerning the assassination of President John F. Kennedy should carry a presumption of immediate disclosure, and all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination." *Id.* at § 2(a)(2).

don't believe in."²³⁶ She believes that public rejection of existing copyright policies will eventually persuade legislators to change the law. As opposed to Litman, I would leave civil disobedience as a last resort. Perhaps a better way to approach the massive expansion of copyright at the expense of the public interest is by bringing to the forefront of the public debate the role of the public in the creative process and its collective contribution to the creation of each and every copyrighted work—to tell the public: “you have a right to your authorial contribution.”

The case of Zapruder illustrates the role of the creative collectivity. For example, photographic skills are not innate. They are abilities that depend on experience, exposure to cultural and social realities, and consumption of collective properties. I should not press this example any further, but say that it is a dramatic example of copyright protection in the category of nonartistic and noncreative works that received protection. It illustrates that sometimes nothing, except minimal manual labour, is sufficient for copyright protection. Whether happenstance and serendipity, judgement of merits, or a quality based test such as a modicum of creativity, none negates the sociality of the copyright creation process or discredits its dependence on collectively produced cultural and social properties.

VIII. THE COPYRIGHT MOMENT

A. Contrasting “Moments”

What are the implications of the above discussion for the definition of copyright? The main implication is the transformation of the “copyright moment,” that is, the moment in which the copyright entity is born; the moment after which the author is entitled to claim a property right in a given creation. In the present state of affairs, the “copyright moment” is defined as the moment when one or more individuals collect ideas from the public domain and express them in a tangible medium. It is the union of collectively owned, but unprotected, entities and the author's personal contribution. The joint enterprise is not different from the famous assertion by William Landes and Richard Posner that “the original work (novel or article) is the joint output of two types of input,

236. JESSICA LITMAN, DIGITAL COPYRIGHT 195 (2001); *see also* Jessica Litman, *Ethical Disobedience*, 5 ETHICS & INFO. TECH. 217, 217 (2004).

only one of which is protected by copyright law.”²³⁷ The “copyright moment,” as presently interpreted, assumes the creation of an independently created new entity of social wealth and allows the individual to enclose the whole object and exclusively add it to his private dominion. This moment does not reflect reality and certainly does not accommodate fundamental social considerations. It posits the individual as the entity responsible for making copyrighted materials, isolating him from the social matrix in which he creates. It denies the collective contribution the public makes.

Every individual has the desire, and deserves, to obtain recognition for his creative expressions. However, being dependent on the contribution of the public means that one is unable to produce without this contribution. “Who owns this contribution?” is a question which I address in this Article. It is the public in its collective capacity that creates, nurtures, and maintains this contribution. Some form of ownership of this contribution is imperative for the preservation of peace and order. As Harris remarks, “Peace and order required that most things should be in someone’s ownership. . . .”²³⁸ But that does not entail that private ownership is the only preferred form. Collective ownership is also possible.

Understanding the combination of contribution from two sources, authors and the public, changes the essence of the “copyright moment”—the moment in which person *P* becomes the original owner of object *O*. There is no moment in which a wholly original copyright work can be declared. That is why OA theories are not applicable to copyright. Yet, there is a moment in which actual copyrighted works are born. It starts when the individual interacts in society with the intention to create authorial commodities; the moment when the collective contribution is assembled and merged with the individual’s contribution into an inseparable unitary whole, capable of ownership. It cannot be the sole moment of the public or the individual; it is either jointly constructed and realized or it does not exist at all. This moment is a moment of collaboration between authors and the public—a moment dependent on the public authorial role; a moment that reflects the nature of authors and original copyrighted entities as social constructions.

By defending this conclusion I do not mean to announce the “death of the author,” but emphasise how original appropriation theories have no relevance to discussions on copyright. Without the public domain, without collectively owned social and cultural properties, copyrighted works are impossible. The basic assumption can be formulated in the

237. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 349 (1989).

238. HARRIS, *supra* note 48, at 215.

negative: there is no support for the rule that copyright works are their creator's novel and sole expressions and hence they should not be treated as exclusive private property.

B. *Where is the Public Domain?*

The public domain is a basic ingredient in the formulation of the "copyright moment." It "is a subject that divides legislators, corporate and individual participants in creative endeavours, practicing lawyers, and intellectual property scholars in ways that, I suspect, would astonish their counterparts even twenty-five or fifty years ago."²³⁹ It has a place of honor in almost every discourse on copyright.²⁴⁰ Litman took up the great challenge of defining the public domain. She argues: "The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving raw material of authorship available for authors to use."²⁴¹ Similarly, Gordon defines the public domain as a source of rights that is "largely filled with creations whose period of protection has expired, works which have been abandoned, or works for which no protection existed ab initio."²⁴² In a later article she criticises the prevailing definition of the public domain and observes that:

239. Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 301 (2004).

240. The concept "public domain" differs from "public interest." Public domain secures public interests. Dreier recently remarked that these concepts are difficult to define:

[W]hile the term "public interest" is often cited, there is a certain vagueness inherent in it. Who is, who represents, the "public"? In some instances, the reference is to the "general" public, i.e. to society as a whole. In other instances, the reference is to the interest of a certain subgroup of society: for example, end-users, who are viewed as in opposition to the interests of rightholders. Furthermore, the label "public" is sometimes used to mask private—often commercial—interests; by the same token, denial of a "public interest" can be a mask for unfettered individualistic interests.

Thomas Dreier, *Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY* 295, 297 (Rochelle Cooper Dreyfuss et al. eds., 2001).

241. Litman, *supra* note 12, at 968.

242. Gordon, *supra* note 54, at 1559. On the public domain generally, see Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain: Part I*, 18 *COLUM. J.L. & ARTS* 1 (1994); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. REV.* 354 (1999); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 173

An artist's relationship to her tradition sometimes involves quotation and imitation in ways that implicate copyright law. That law insufficiently recognizes that, because predecessors also built on tradition, the claims that they can rightfully assert against the makers of later art should be limited. Current copyright law understates those limits, largely because the law conceives of the "public domain" as an area free of obligations. Under current law, anyone can copy from the public domain, and claim copyright in what he has added, regardless of whether doing so will impair others' use of the underlying domain that all inherited together.²⁴³

Across the chasm, defenders of a robust public domain advocate its importance for the workability and stability of the intellectual property regime. Securing authors a steady flow of raw materials in the public domain is a key feature in Litman's argument for a stronger domain. She argues that not only can authors and artists be said to create something that is totally original, but that they must not enclose raw materials that belong to the common. Viewing raw materials as belonging to the public domain, but then excluding the public from accessing them once fixed in a copyrighted entity, is simply to maintain the status quo of the denial of the authorial collectivity. To this one should add the difficulties in separating unprotectable raw materials, ideas and facts, for example, from protectable materials. Litman recognises the danger in failing to appreciate the true meaning of the public domain.

Because copyright's paradigm of authorship credits the author with bringing something wholly new into the world, it sometimes fails to account for the raw material that all authors use. This tendency can distort our understanding of the interaction between copyright law and authorship. Specifically, it can lead us to give short shrift to the public domain by failing to appreciate that the public domain is the law's primary safeguard of the raw material that makes authorship possible.²⁴⁴

Should we take raw materials as the essence of the public domain? Is the public domain, as Cohen perceives it, "a repository of old and archetypal content" which marks the "end of a cultural good's productive life" or an entity that "encompass[es] a rich and varied assortment of intellectual and cultural building blocks, and holds [those] resources . . . as important catalysts for creative ferment"?²⁴⁵ A crucial feature in my argument is the fundamental need to preserve not only raw materials but

(2003); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Cohen, *supra* note 16, at 367-70; David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004); A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L.J. 1 (2002); and Zimmerman, *supra* note 239.

243. Gordon, *supra* note 6, at 78.

244. Litman, *supra* note 12, at 967.

245. Cohen, *supra* note 16, at 367-68.

end products as well. The evolved social reality should be saved for other members of the public to consume and make use. It seems that for Litman, Gordon, and Cohen, raw materials might suffice. Litman mentions the term “raw material” ten times in her article and recognises that raw materials are value-laden, remarking that “when the author mines the raw material for her next work, significant portions of it will be the stuff of the outside world mediated by her experience. It is unsurprising, then, that parts of her work will echo the works of others.”²⁴⁶ Her argument supports my claim that copyright scholars, although not explicitly, are aware of the sociality of copyright, that subjects of copyright are dependent on the authorial collectivity and that they are social constructions; that every idea “that is debated, assessed, applied, and developed, is situated in a social setting,”²⁴⁷ and that the same holds for the object.

Litman’s assertion that “the term ‘public domain’ has fallen out of fashion” is “the public’s price for the grant of copyright” is a main cause for concern.²⁴⁸ Her definition of the public domain has had a pioneering effect, but her concentration on the availability of raw materials is misleading. In view of my examination of the role of the authorial collectivity and subjects of copyright as social constructs, we should reject the notion that the rights of the public pertain to the preservation of raw materials and unprotectable elements. By virtue of its authorial contribution, the public should have a *right* to have reasonable access, to enjoy and exploit its contribution.

Even a recent attempt to redefine the public domain leaves the status quo practically unchanged. Diane Zimmerman advocates a “mandatory public domain” in which the main theme is that “what goes into [the public domain] must stay there.”²⁴⁹ True, she highlights many of the greatest flaws in the current copyright reality and recognises the criticism that her view may generate:

Some will find the theory here an insufficiently radical view of the public domain because, although it captures much of our common sense intuition about how the free availability of speech goods intersects with our ability to communicate, it does not necessarily guarantee us a “perfect” public domain from their policy perspective. Others may find it radical because of the idea

246. Litman, *supra* note 12, at 1010-11.

247. HACKING, *supra* note 36, at 125.

248. Litman, *supra* note 12, at 995, 1013.

249. Zimmerman, *supra* note 239, at 372.

that there is an absolute limit on what can be subjected to intellectual property regimes.²⁵⁰

However, it seems that Zimmerman simply favors elevating the status of the term “public domain” to that of a constitutional guarantee²⁵¹ and does not address the wrong in treating the public as a graveyard for unprotectable materials, or a warehouse for unwanted goods.

Viewing the public domain as such conveys the feeling that that we, the copyright community, insist on nurturing a misconception about where the public domain is and what the public domain is. In this Article I attempt to refute this misconception. The public domain is us. It belongs to and is maintained by us—the collective. It takes part in the formation of *every* copyrighted entity. In fact, the entity is unattainable unless the public domain contributes to its formation. The public domain is the initiator of copyrighted endeavors. It is the treasury of elements, which together trigger the creative impulse. It is also a social construction, as it is constantly being reinvented and enhanced by historical events and social processes.

There is no public domain for copyright works only. It is a fiction to devise a domain in which only unusable or unprotectable copyrighted entities reside. The public domain in copyright cannot exist independent of the larger social domain. For the most part, it is definable as a subcategory within the larger social public domain, an entity that accommodates the specific needs of artists, authors, and the like. This view of the public domain does not deny authors’ and artists’ rights, but rather highlights the truth of the construction of authorship and copyright creation and the fundamental mistake in our constant denial of the public interest and its contribution.

Boyle suggests that we “need to *invent* the public domain in order to call into being the coalition that might protect it.”²⁵² The public domain as a concept and as an entity is already here. It is well ingrained in discourses on copyright. The coalition is us. Before we devise a way to reinvent the public domain, or make it mandatory,²⁵³ we have to modify our one-way attitude toward what an author is and how works of authorship and art are created. Only then can we understand the

250. *Id.* at 373.

251. Zimmerman writes: “If a constitutional basis for recognizing some form of ‘mandatory public domain,’ particularly one that reaches both federal and state activity, is plausible, its recognition would bring order to sprawl in intellectual property rights, and stabilize the balance between incentives and access along more intelligible lines.” *Id.* at 311-12.

252. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 113 (1997).

253. Zimmerman, *supra* note 239, at 370-74.

implications of the dependence on the authorial collectivity and the social construction paradigm, and form the coalition that will truly protect the public domain. Moreover, if “every viable society must develop procedures of reality-maintenance,”²⁵⁴ then our copyright law ought to promote a robust public domain and preserve the collective nature of its properties.

C. Authors as Collaborators

1. The Conceptual Wrong in Individualistic Collaboration

In *The Construction of Authorship*, Woodmansee and Jaszi invite readers to realize the true meaning of authorial creation. They argue that “[m]ost writing today—in business, government, industry, the law, the sciences and social sciences—is collaborative, yet it is still being taught as if it were a solitary, originary activity.”²⁵⁵ While Woodmansee examines the evolution of “authorship” as a concept,²⁵⁶ Jaszi argues that as the authorial creative process becomes increasingly collaborative and collective, traditional copyright laws become ineffective because they deny copyright’s social objectives. In particular, conceptions of Romantic authorship become more insistent.²⁵⁷ This is where Woodmansee and Jaszi and I agree. Their attempt to reconstruct authors and authorship is imperative for every discussion on copyright. As already argued, it is, however, somewhat individualistic, as it deals with collaboration between individuals and not between individuals and the public at large.²⁵⁸ Collaborative authorship can be viewed as either individualistic or collective but in copyright they operate simultaneously.

254. BERGER & LUCKMANN, *supra* note 120, at 147.

255. *Introduction*, *supra* note 8, at 9; *see also* Jaszi, *supra* note 32, at 25.

256. *See* Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 8, at 15-28; *see also* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 *EIGHTEENTH-CENTURY STUD.* 425 (1984).

257. *See* Jaszi, *supra* note 32, at 29, 56; *see also* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 *DUKE L.J.* 455. On the deconstruction of the Romantic author, *see* Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293 (1996); and Ryan Littrell, Note, *Toward a Stricter Originality Standard for Copyright Law*, 43 *B.C. L. REV.* 193 (2001).

258. Kaplan also remarks that much “intellectual work including the distinctively imaginative is now being done by teams, a practice apt to continue and grow” and that “may diffuse and diminish emotions of original discovery and exclusive ownership.” BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 117 (1967).

Although Woodmansee and Jaszi successfully explain the anatomy of authorship and consider fundamental limits to authorial rights for a stronger public domain, they still place individual authors at the vanguard. They consider collaboration to be the paradigm of relations between an author and other fellow authors or partners in their individual capacity. They embrace the argument that “[a]ny frank appraisal of authorship must conclude that each author’s work contains both the author’s original creations and material drawn from other authors.”²⁵⁹ But what about the reliance on the public? Is the “copyright moment” the moment of individuals only? Is it not a moment which signifies the sociality of copyright—the collaboration between authors and the general public? It would be wrong to say that Woodmansee and Jaszi ignored the sociality of copyright or neglected the role of the public domain in the copyright creation process. However, their emphasis on collaboration between individuals is misleading. In other words, while they enquire into the construction of authorship and authorial works, I argue that we ought to examine the *social* construction as well.

2. *Believing in the Author*

Woodmansee informs us that the definition of the author and of authorship has been the subject of transformation and synthesis for centuries. For example, in the thirteenth century there were four ways of making a book, none of which correspond to any notion of sole authorship. “In the Renaissance . . . the ‘author’ was an unstable marriage of two distinct concepts. He was first and foremost a craftsman,” and was also inspired by the muses or God.²⁶⁰ Woodmansee claims that the idea that “the writer is a special participant in the production process—the only one worthy of attention—is of recent provenience. It is a by-product of the Romantic notion that significant writers break altogether with tradition to create something utterly new, unique—in a word, ‘original.’”²⁶¹ Similarly, Rose examines the idea of the author and originality in its historical context and writes that

copyright—the practice of securing marketable rights in texts that are treated as commodities—is a specifically modern institution, the creature of the printing press, the individualization of authorship in the late Middle Ages and early

259. Yen, *supra* note 14, at 166; *see also* Litman, *supra* note 12, at 1010-11.

260. MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET* 36 (1994). *See generally id.* at 34-56.

261. Woodmansee, *supra* note 256, at 16.

Renaissance, and the development of the advanced marketplace society in the seventeenth and eighteenth centuries.²⁶²

What Woodmansee and Rose implicitly tell us is that they would accept Hacking's argument that the author as a kind of person is a social construction—a contingent upshot of historical events and social processes. Like many others, however, they do not explain how to make use of this insight to change existing ownership patterns in copyright and they still consider collaboration an activity between individuals. My intention in this Article is to highlight the inherent paradox in arguments supporting the sociality of copyright but at the same time examining it from an individualistic perspective.

Although a social construction, an author exercises subjective judgment and breathes life into new ideas embedded in eventual products.²⁶³ He applies Wallas's four-step test while creating copyrighted materials.²⁶⁴ He shares with the world his exclusive property in elements that constitute his original makeup—elements without which the authorial act would not have existed. The individual is essentially the proprietor of his own person and innate capacities and he therefore has a valid claim for ownership over authorial products he creates. The author uses his qualities and capacities to comprehend, then translate and modify collectively owned cultural and social properties. If authorial products were premised on the author's contribution or subjective experiences only "it would be impossible either to have a direct intercourse with the work or to know it."²⁶⁵

Michel Foucault's answer to the question, "What is an author?" supports the social construction argument.²⁶⁶ He informs us that an author is an

262. ROSE, *supra* note 25, at 3; *see also* 1 ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979).

263. For Jane Ginsburg, an author "succeeds in exercising *minimal* personal autonomy in her fashioning of the work." Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1092 (2003) (emphasis added). The act of authorial creation is a process in which no player can act alone. Products resulting from this activity signify exercise of "*minimal* personal autonomy" only. The law does not consider the level of autonomy exercised for matters of copyright entitlement. In fact, the law substitutes "minimal" with "optimal" and considers authors as creators of wholly new substances.

264. *See supra* note 137 and accompanying text.

265. ROMAN INGARDEN, *THE COGNITION OF THE LITERARY WORK OF ART* 13-14 (Ruth Ann Crowley & Kenneth R. Olson trans., Northwestern Univ. Press 1973) (1968), *cited in* Palmer, *supra* note 35, at 845.

266. Michel Foucault, *What is an Author?* (Josué V. Harari trans., 1979), *in* THE FOUCAULT READER 101 (Paul Rabinow ed., 1984); *cf.* SEÁN BURKE, *THE DEATH AND*

ideological figure and that it is “worth examining how the author became individualized in a culture like ours.”²⁶⁷ Foucault erodes the concept of the individual writer by referring to “the author function” and claims this is a historical variable. He then denies that the author is the originator of a text having its own meaning and value and considers the author to be a social construct: “this author function does not develop spontaneously as the attribution of a discourse to an individual. It is, rather, the result of a complex operation which constructs a certain rational being that we call ‘author.’”²⁶⁸ The author—“this intelligible being”²⁶⁹—gets its realistic form from *us*:

[T]hese aspects of an individual which *we* designate as making him an author are only a projection, in more or less psychologizing terms, of the operations that *we* force texts to undergo, the connections that *we* make, the traits that *we* establish as pertinent, the continuities that *we* recognize, or the exclusions that *we* practice.²⁷⁰

And although terms change and conceptions take different directions at different times, “we can find through the ages certain constants in the rules of author construction.”²⁷¹

Roland Barthes announces the “Death of the Author” and, like Foucault, rips from the author certain powers and identity. Romantic authorship stipulates that a literary work or a work of art has a single true interpretation that its author conveys. Barthes challenges this idea: “We now know that a text is not a line of words releasing a single ‘theological’ meaning . . . but a multi-dimensional space in which a variety of writings, none of them original, blend and clash.”²⁷² Although many copyright scholars would support similar views, there is still a need for a wider understanding of Foucault, or similar approaches. As Woodmansee and Jaszi assert:

However enthusiastically legal scholars may have thrown themselves into “deconstructing” other bodies of legal doctrine, copyright has remained untouched by the implications of the Derridean proposition that the inherent instability of meaning derives not from authorial subjectivity but from intertextuality. Above all, the questions posed by Michel Foucault in “What Is an Author?” about the causes and consequences of the persistent, overdetermined power of the author construct—with their immediate significance for law—have

RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT AND DERRIDA 93 (Edinburgh Univ. Press 2d ed. 1998).

267. Foucault, *supra* note 266.

268. *Id.* at 110.

269. *Id.*

270. *Id.* (emphasis added).

271. *Id.*

272. ROLAND BARTHES, *The Death of the Author*, in IMAGE MUSIC TEXT 142, 146 (Stephen Heath trans., Noonday Press ed. 1988) (1977).

gone largely unattended by theorists of copyright law, to say nothing of practitioners or, most critically, judges and legislators.²⁷³

I distance my approach from Foucault and Barthes, and position myself somewhere between their approaches and that of the scholars I criticise in this Article. For the former, the copyright moment is a fiction; for the latter it should be modified but not necessarily in a radical manner. Neither side portrays the conception of authorship that I envision. I fully support applying social constructionism to authors and their creative expressions, but I do not strip them of their contribution. For the same reasons that a copyrighted work cannot be created without the public's contribution, it cannot be realized without the individual's input. This is why we should endorse reconstruction of the "copyright moment," a moment in which the public and author join together and create an enterprise of social wealth for which both deserve a reward.

IX. "REVISION" AS A LABEL

The above discussion on the role of the authorial collectivity and the social construction of authors and their creations stipulates that many terms might be possible candidates for a more suitable label to characterize the "copyright moment": for example, "imitation" or "repetition."²⁷⁴ St. Bonaventura, writing in the thirteenth century, identifies four different ways to "make" a book: as a "scriptor," "compiler," "commentator," and as an "auctor":

A man might write the works of others, adding and changing nothing, in which case he is simply called a 'scribe' (*scriptor*). Another writes the works of others with additions which are not his own; and he is called 'compiler' (*compilator*). Another writes both others' work and his own, but with others' work in principal place, adding his own for purposes of explanation; and he is called 'commentator' (*commentator*). . . . Another writes both his own work and others'

273. *Introduction*, *supra* note 8, at 8-9.

274. One repeats his predecessors, but in a way that adds a new dimension and hence results in a new work. In his criticism on the notion of creativity, Osborne remarks that works of art involve repetition.

Not repetition of the same object or specific theme necessarily, but repetition of the same activity, repetition in the name not just of seeking an answer to something but of locating, deepening, embellishing a *problem*: in painting, Chardin's repeated focusing on a few grapes, Giorgio Morandi's endless little bottles arranged and re-arranged on a shelf . . .

Thomas Osborne, 'Against Creativity': *A Philistine Rant*, 32 *ECON. & SOC'Y* 507, 520 (2003).

but with his own work in principal place adding others' for purposes of confirmation; and such a man should be called an 'author' (*auctor*).²⁷⁵

In this definition there is one word that is mentioned four times: "other." Even the most elevated entity in the hierarchy—"author"—produces only in a collaborative manner. To St. Bonaventura's four possibilities I should add the terms: "translator," "communicator," and "selector." For Durham, authorship is about communication. It is first "an act of selection from an array of alternatives . . ." ²⁷⁶ He offers a model of authorship based on information theory and contends that in the information society, just as the principles of information theory stipulates all forms of communication, "works of authorship are, by and large, communicative . . ." ²⁷⁷

Another possible label for the "copyright moment" is "revision." In *Revision and Romantic Authorship*, Zachary Leader rejects the Romantic notions of authors and poets as solitary geniuses.²⁷⁸ Leader takes the revision rather than the original drafting of authorial works as the organising principle of his work. He claims that

the writing of the Romantic period (*as of all periods*) is the product of a network of literary and social relations, one in which the nominal author's contribution and authority are dominant but not exclusive. Even when fiercely professing independence, the author typically draws on a range of personal and institutional collaborators, including family, friends, publishers, reviewers, and readers.²⁷⁹

Although Leader does not take the initial creative process as the paradigm of his analysis, he rejects any Romantic understanding of subsequent revisions as a solitary artistic expression and questions the credibility of the Romantic view of poetry as the result of a spontaneous and illogical process. In defense of his argument, Leader uses examples of prose and poetry by Wordsworth, Byron, and Coleridge, Shelley's novel *Frankenstein*, and John Clare's poems revised by his publisher John Taylor, the poet Keats, and others.

Leader does not randomly choose Coleridge as a case study. Coleridge had a clear conception of authorship, which excludes external

275. EINSTEIN, *supra* note 262, at 121-22, cited in Woodmansee, *On the Author Effect: Recovering Collectivity*, *supra* note 256, at 17.

276. Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of "Authorship,"* 2004 B.Y.U. L. REV. 69, 73.

277. *Id.* at 72. He remarks: "In important respects, an unromantic, selection-based model of authorship would parallel contemporary literary theory. It would focus attention on the work rather than the author. Originality would be characteristic of the text—or, more precisely, of the text in context of the available alternatives—just as information is a characteristic of a message, not of the message sender." *Id.* at 119.

278. ZACHARY LEADER, *REVISION AND ROMANTIC AUTHORSHIP* (1996).

279. *Id.* at 15 (citation omitted) (emphasis added).

stimuli or social contributions. Many contemporary authors would identify themselves with this view and get the support of copyright law in enforcing it. Sonia Hofkosh observes that Coleridge held a decidedly subjective view of authorship and authorial rights: “the rationale regarding the author’s natural right to own and to profit from his literary labour registers the stake the writer has in choosing “‘what an author means’ ‘for himself.’”²⁸⁰ Hofkosh continues and remarks that

Authorship in Coleridge’s ideal description enacts a self-fulfilling economy, an organic circulation, in which value accrues to individuality within a naturally closed system without substantial change or exchange: no risk, no excess, nothing for which the author cannot himself account.

Literary property is in this way crucially distinguished from “all other property,” and the author from “ribbon-weavers, calico-printers, cabinet-makers, and china-manufacturers” insofar as *what the author produces is the inalienable stuff of his own subjectivity*.²⁸¹

For Leader “the prose method itself implies the impossibility of ever controlling one’s words, or freeing oneself from others’ words, an impossibility that helps to account for Coleridge’s obsessive revisions”²⁸² He observes a “distinction between internally imposed revisions, whether a product of unconscious compulsions or matters of conscious conviction, and revisions of external origin, involving the writer’s personal and institutional affiliations. . . . Wordsworth and Coleridge revised in *response to external as well as internal pressures*, as did Keats and Clare.”²⁸³ Elsewhere in the work, he forcefully asserts that Coleridge’s poems “directly question the autonomy of the self, language, ‘possession’ (that is, the ‘owning’ or authorship of one’s writing).”²⁸⁴

Leader’s study reveals the flaws inherent in contemporary approaches to copyright that sanctify the individual author. The author, even when revising his work, does not create alone; he does not simply use his innate abilities, creative personality, and talent and creates something new that did not exist before. Indeed, Leader closes his work with this

280. SONIA HOFKOSH, *SEXUAL POLITICS AND THE ROMANTIC AUTHOR* 15 (1998).

281. *Id.* (citation omitted) (emphasis added). Leader argues that Coleridge’s concept of a stable text by his continuous revising suggests that “the perfect poem was a chimera and that authority itself was therefore a fiction. He may, that is to say, have been . . . a deconstructionist.” LEADER, *supra* note 278, at 113; *see also* WEISBERG, *supra* note 126, at 46.

282. LEADER, *supra* note 278, at 136.

283. *Id.* at 16 (emphasis added).

284. *Id.* at 137.

revealing statement: “What studying such revision reveals is the inadequacy or incompleteness of the Romantic view: none of the writers discussed in this book fits the stereotype most of them helped construct. The spontaneous, extemporizing, otherworldly, autonomous author, the Romantic author, is a fiction much in need of revision”²⁸⁵ Throughout his study he never devalues the fact that a vital source of poetic inspiration is external stimuli, social and cultural ideals and collectively created and owned properties, and reminds us that even authorial revision is not a solitary activity. It “derives in part from external sources, is a ‘collaborative’ enterprise involving not only friends and publishers. . . but the *public* itself. . . .”²⁸⁶

X. CONCLUSION

In her introduction to the 2005 edition of *The Best American Essays*, Susan Orlean reminded me of the reason why I wrote this Article—the reason why we need talk more about the social nature of copyright. She tries to define “what an essay *is*—what makes up the essential parts and structure of the form.”²⁸⁷ It seems as if she is having a conversation with Foucault, explaining to him why his definition of who is an author is incomplete, for it does not consider the significance of the subjectivity of the author. For Orlean, essays are conversations, and can “range in content, tone, structure, and approach. It’s a loose construct,” and what moves her most “is an essay in which the writer turns something over and over in his or her head, and in examining it finds a bit of truth about human nature and life and the experience of inhabiting this planet.”²⁸⁸ I agree with this statement. However, in order for an author to turn something over and over in his head, he needs the collective; he needs the contribution the public makes to the copyright making process; he has no choice but to collaborate with the public because his innate abilities are limited. They need to be transformed. That is why the “copyright moment” is not the moment of the lone author.

Scholarship on copyright strives to find the appropriate balance between private rights and public interest in copyright. Any attempt to redefine copyright in order to secure a stable intellectual culture will mature and have a real impact on the evolution of copyright only if we, the copyright community, will be willing to accept that the “copyright moment” is the moment in which we all share responsibility; it is a

285. *Id.* at 315.

286. *Id.* at 263 (emphasis added).

287. Susan Orlean, *Introduction*, in *THE BEST AMERICAN ESSAYS 2005*, at xv, xvi (Susan Orlean ed., 2005).

288. *Id.* at xvi-xvii.

moment in which one or more individuals collaborate with the collective. We are, after all, Lockean “sociable Creature[s].”²⁸⁹

I believe that theoretical inquiries into how to redefine copyright necessitate express, rather than silent, agreements: First, that authors and their creative works are social constructions; and second, that the main implication emanating from this agreement is that copyrighted entities are collective properties. Allocation of rights to enjoy and exploit and duties to respect will only then become meaningful and lasting for both authors and public.

This Article shows that our contemporary concept of copyright incorporates a fantasy. It is a fantasy about authors and their unlimited creative abilities. It is a fantasy that legal systems embrace and cherish. Copyright laws act increasingly as laws of exclusion. They allow certain individuals to possess economic power and knowledge over what are in fact collective products. The “copyright moment” suggests that, if copyright means anything, it means a principle that defines the mutual commitment authors and the public have undertaken, namely, to preserve and jointly enrich our social domain and dialogic culture. It is a principle that regulates ownership and control of cultural and social resources resulting from the collaboration between authors and public in the course of this commitment.

289. ESSAY, *supra* note 154, bk. III, ch. I, § 1.

