THE PERSONALITY INTEREST OF ARTISTS AND INVENTORS IN INTELLECTUAL PROPERTY*

JUSTIN HUGHES**

I. INTRODUCTION

Like all social institutions, property rights are justified by the benefits they bring to individuals in society. The dominant understanding of this justification for all types of property has been an economic formula: property rights are the most efficient means to produce social wealth. Judges and commentators considering intellectual property have historically remained true to this formula; copyrights and patents are viewed as an *ex ante* incentive structure to produce the most social wealth at the least cost.

The same general justification—benefits brought to individuals in society—has given rise to discussions of the non-economic benefits of intellectual property. Property rights, it was observed, are a means to protect the personality interest or "personhood" of individuals; this seemed especially true with intellectual property rights that are draped over creations of the human mind. Along these lines, personhood proponents could understandably be found in the vanguard of "moral rights" for authors, "reverse shop rights" for inventors, and "rights of publicity" for everyone.

While personhood theory challenged economics' prior monopoly on explanations of property, the "pro-property" personhood theory was itself met with a deconstructionist reply specific to intellectual property: that creators' rights to control intellectual property should be limited to permit non-owners to manipulate the communicative messages, shape their own messages, and, thereby, increase the personhood benefits that intellectual creations bring to those non-owners. This argument is akin to the consumer benefit side of economic analysis. It repeats the established formula with only slightly different formulation: the creator's personality interest in her work must be balanced against the

* In addition to those mentioned in footnote 12, this article has benefitted from the helpful comments of George Fisher, Owen Jones, Lance Liebman and George Shepherd. The author is counsel in the International and Legislative Office of the U.S. Patent and Trademark Office ("PTO"), Department of Commerce. This article was written substantially prior to the author joining the Department of Commerce; the views expressed are neither those of the Department nor the PTO.

** B.A., Oberlin, 1982; J.D., Harvard, 1986; Henry Luce Scholar, 1988; Mellon Fellow in the Humanities, 1989.

personality interest of consumers—who will be further creators—using her work in their own acts of creation/expression. Along these lines it is argued that authors need greater liberty to quote existing texts, minority groups need greater liberty to manipulate existing cultural symbols (like celebrity images), and performing artists need more liberty to interpret theatrical works.

The interesting arguments in this area have obscured a deeper problem: we do not have a good grip on what constitutes the "personality" or "personhood" interests that may be present in a particular piece of intellectual property. We know that we can think about the "personhood interest" being held by one person, a few people (as in joint works), or, in the deconstructionist critique, in the multitude who are users, consumers, or the audience. We know that the personality interest may lead us into a highly subjective world, in which some proclaimed personality interests may strike us as illegitimate or unhealthy.[1]

Beyond this, there has not been much mapping of the possible constitutive elements of the "personhood" interest in intellectual property. This article explores some of the interests which might live under the personhood tent. Drawing on a variety of problems, this article describes three identifiably separate personhood interests in an intellectual property *res*:[2] (1) creativity; (2) intentionality; and (3) identification as the source of the *res*. Without claiming that these three strands of personhood are exhaustive, I will explore areas of the law where these interests seem to influence and other areas where they do not, but perhaps should, hold weight.

Part I describes the background for the search for "personhood" interests in property and then explores how much "creativity"—a fundamental notion in our copyright law—is a core personhood interest, that blurs the notions of originality and personal expression. But this does not mean that creativity occupies the same conceptual space as the idea of the *individual* "author"—an apparent assumption of some recent commentators. In fact, the notion of creativity comfortably co-exists with the idea of collaborative or co-created works. This article's discussion of creativity concludes by suggesting that the linkage of creativity to personal

---

[1] Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968-70 (1982); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 335 (1988).

[2] Res is everything that may form an object of rights and includes an object, subject-matter, or status. BLACK'S LAW DICTIONARY 1304 (6th ed. 1990) (quoting *In re* Riggles Will, 205 N.Y.S.2d 19, 21, 22 (N.Y. App. Div. 1960).

expression creates a generally unrecognized dilemma—one the legal system might solve by what I will call a "moral shop right."

At the same time, one of the basic propositions of this article is that the notion of creativity, despite this complexity, does not explain all the personhood interests in an intellectual property *res* that may be worthy of protection. Indeed, too much attention on "creativity" has pushed other personhood interests into the background. The result is *ad hoc* reasoning by courts, catch-all phrases in statutes,[3] or efforts to shoehorn or redefine those interests into paradigms called, sometimes derisively, the "Romantic genius" and the "inventor-hero."[4] A personhood theory of intellectual property needs to provide for the inventor-hero's creativity. However, it can also provide for the inventor who identifies with his improved widget only in the same way that his neighbor takes pride in a recently purchased sports car. This article proposes that we might improve on such phrases with two additional concepts for personhood interests: "intentionality" and "sourcehood." Part II discusses "intentionality," a significant personality interest, and arguably more important than creativity. Part II's discussion shows how the concept of intentionality can help us understand copyright's "made-for-hire" doctrine as well as the personhood interest of inventors, photo-journalists, and "inadvertent" creators—problems that have always seemed ill at ease with a creativity-based property justification.

Finally, Part III considers whether merely being the source of a *res* creates legitimate personhood interests that justify protection of some sort. For example, I propose that personhood interests can arise from simply being the human source of an intellectual property *res*. Examples might be true "eureka" discoveries or profoundly accidental intellectual products. That personhood interests may arise in such settings is not surprising, particularly to the extent that we believe, as David Gauthier suggests, that "each person identifies with those capacities, physical and mental, to which he had direct access, and we see that this identification affords each person a normative sense of self . . . ."[5] An individual's per-

---

[3] For example, one country's law grants copyrights to anthologies only if "they are distinguishable by their originality, or their coordination *or by any other personal effort justifying protection.*" Egyptian Copyright Law, Part I, Article 4(3), Law No. 354, June 24, 1954, as amended by Law No. 34, 6/17/75, art. 4 (emphasis added).

[4] For descriptions of the inventor-hero and use of this phrase, *see* ANNE L. MACDONALD, FEMININE INGENUITY: WOMEN AND INVENTION IN AMERICA (1994); Steven Cherensky, *A Penny for Their Thoughts: Employee-Inventors, Preinvention, Assignment Agreements, Property, and Personhood*, 81 CAL. L. REV. 595 (1993).

[5] DAVID GAUTHIER, MORALS BY AGREEMENT 210 (1986).

sonal identification with all of her physical and mental capacities could give rise to personal identification with the intellectual products of those capacities—without any reference to what we would call "creativity."[6] If an individual has a "sense of self" from her capacities, we should explore if and when the use of those capacities for intellectual production should lead to protectable personhood interests.[7] This "sourcehood" helps explain the personhood interests of inventors and suggests that in 1990 plaintiff Moore may have had a better case for rights over cells generated from his spleen than the California Supreme Court was willing to recognize in *Moore v. University of California.*[8]

This discussion of creativity, intentionality, and sourcehood is a descriptive framework for better understanding the sentiments of creators and the educated classes from which they largely come and for whom they (partially) create. The question remains whether we *should* protect such interests. It may be wrong for people to (1) identify with their capacities; and then, (2) identify with the intellectual products of those capacities. Taking a cue from Rawls, we might believe that an individual does not have any particular entitlement to her talents,[9] jeopardizing any justification based on personality interests. Or we may question whether (2) is a legitimate move. To transpose Robert Nozick's classic query, why should we think putting our personality out into the world gives us rights to the things we create? Why should we not assume that

---

[6] Actually, we should imagine an intermediary step. If a person identifies with his or her own mental capacities, this may cause that person to identify, first, with the *process* of using those capacities and, second, with the *products* of those processes. It is conceivable that someone would identify with the *process* without identifying (as strongly) with the *product.*

[7] Are personhood justifications compatible with the Copyright and Patent Clauses of the Constitution? The wording of Article I, Section 8, Clause 8 ("to promote the progress of science and the useful arts") expresses an instrumental view of intellectual property law, a goal of "stimulat[ing] original investigation whether in literature, science, or art, for the betterment of the people that they might be instructed and improved with respect to those subjects." Ansehl v. Puritan Pharm. Co., 61 F.2d 131, 133-34 (8th Cir. 1932). But this incentive structure may just as easily encompass, for example, moral rights as economic rights. Acknowledgment as an author or an inventor may be a critical incentive for lots of people.

[8] 793 P.2d 479 (Cal. 1990).

[9] Assume that individuals identify with (1) their capacities; and, thereby (2) the processes of using those capacities; and, thereby, (3) the intellectual products of these processes. We might conclude, as John Rawls suggests, that step (1) is wrong, that the individual does not have any particular entitlement to identify with the talents with which she is endowed. Professor Rawls considers even the ability to expend effort to be determined by factors outside a person's control and hence a morally impermissible criterion for distribution. *See* JOHN RAWLS, A THEORY OF JUSTICE 104 (1971) ("The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit."); *id.* at 312.

when we mix our personality with the world, we lose part of our personality instead of gaining part of the world?[10] At another level, the discussion that follows is a mix of both descriptive and normative accounts of our legal system. For example, the proposal that intentionality helps explain the work-for-hire doctrine is: (1) a proposal that (descriptively) the concept is already at work in the thinking of courts and parties; and (2) a proposal that (normatively) we should bring the concept into the light of day to help make our conscious framework better fit our case law. This transiting between experience and logic, "being and meaning," is a regular process of legal thinking.[11] Perhaps the transiting is so regular that we too often forget when we are trying to describe how the world is and when we are prescribing how the world should be.

Throughout this article, the discussion has benefited from the thoughts and impressions of a variety of creators. While not at all the kind of empirical work that is needed in legal scholarship on property,[12] the ideas of these people have helped shape the expressions in this article.[13]

II. PERSONHOOD INTERESTS FROM CREATIVITY, ORIGINALITY, AND PERSONAL EXPRESSION

In her classic analysis of "personhood" in property, Margaret Jane Radin drew upon familiar material objects—a wedding ring, a portrait, a family home. When Radin describes how these objects become "bound up with personhood,"[14] we intuitively understand

---

[10] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 174-75 (1974) (questioning why Locke thought "mixing" one's labor with the world gave that person property rights, instead of causing the person to lose the value of their labor).

[11] As Professor Leff wrote, the law's life is "an attempt to create and maintain a coherent species of 'logic' that would not too ridiculously fail to reflect, or even refract, experience. It has been, in short, an attempt to construct a legal system that accommodates the equally exigent demands of being and meaning, and to do so in a universe in which what a thing does is only one of the things that it means, everything that it means is something else that it does." Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978).

[12] George Priest's observation about patent scholarship is generally true of all intellectual property scholarship, *i.e.*, that "the ratio of empirical demonstration to assumption in this literature must be very close to zero." George Priest, *What Economists can Tell Lawyers about Intellectual Property*, 8 RES. L. & ECON. 19 (1986). Priest concludes that there is, at present, an "inability of economists to resolve the question of whether activity stimulated by the patent system or other forms of protection of intellectual property enhances or diminishes social welfare . . ." *id.* at 21, and that without empirical research "economic analysis" in this area is akin to "applied moral philosophy." *Id.* at 22.

[13] I am grateful for discussions with a variety of creators, ranging from a four-time Emmy-winning screenwriter to the "first scientists in the world to express a human protein in bacteria" ((Stephen Hall, *Invisible Frontiers*): actors Shelley Hack, William Sadler; visual artist Brigitte Palmerl; inventors Arthur Riggs, Keiichi Itakura; writers Mark Saltzman, April Smith; cinematographer Arnold Glassman; and researcher Rob Lempert).

[14] Radin, *supra* note 1, at 959.

what she means. The individual probably had no role in the material object's design or creation; most of us neither designed nor constructed the houses, furniture, and clothes we live with. Nonetheless, we come to identify with these objects and they come to be imbued with our "personhood."

With a wedding ring, an individual's personality seems to *move into* an existing object. Years ago, a husband and wife could have chosen a completely different set of rings but now the rings have great sentimental significance. In fact, our "personhood" may often be wrapped up in external objects we consider imperfect, inconvenient, or even ugly. The table inherited from Aunt May has an honored place in the home not because it is pretty, but because it is imbued with family history.[15] The same kind of identification can happen with intellectual property: a poem learned while young can become particularly important to the individual, a piece of music first heard on an important occasion can become imbued with personal meaning.

Professor Radin gave us examples of situations where "commodification," treating a physical *res* as fungible property, disrupts a personhood interest. For instance, a tenant may lose an apartment for market reasons—like increasing rent or a decision to redevelop the property—even though that tenant has greater personal identification with the apartment than the landlord. However, commodification of intellectual property does not engender the same disruptive separation of person from (personhood embodying) *res*. Intellectual creations are "public goods" in the economic sense.[16] They are "non-excludable"[17] in that once one has had some access to the intellectual property *res*, one can-

---

[15] Another possibility in the case of existing objects is that the personality does not "move into" the object so much as the object "moves into" the personality. Consider some of Milan Kundera's thoughts on personal development:

> There are two methods of cultivating the uniqueness of the self: the method of *addition* and the method of *subtraction*. [One character] subtracts from herself everything that is exterior and borrowed . . . [another character], she keeps adding to it more and more attributes and she attempts to identify herself with them . . . . Th[is] method of addition is quite charming if it involves adding to the self such things as a cat, a dog, roast pork, love of the sea or of cold showers. But the matter becomes less idyllic if a person decides to add love for communism, for the homeland, for Mussolini, for Catholicism or atheism, for fascism or antifascism.

MILAN KUNDERA, IMMORTALITY 100-01 (Peter Kussi trans., 1991).

[16] A "public good" is a good for which "it is possible at no cost for additional persons to enjoy the same unit." Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 295 (1970). Put another way, the public good is subject to "non-rivalrous consumption." Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J. L. & PUB. POL'Y 99, 102 (1990). The sweep of a lighthouse beam is a public good that can be enjoyed by any and all ships along the coast; a clock atop city hall offers a public good— accurate information on the time—to all who pass nearby. The subjects of intellectual property are the prototyp-

not be completely separated from it. If a person were deprived of all his music and books, he would have a great sense of personal loss, but yet would still know Satie's "Gymnopedies" by heart, would still remember much of Faulkner, and could still go to the library to read or listen to these favorites.[18]

Of course, commodification of intellectual property may, as with commodification of physical property, systemically prevent *prospective* personhood interests from *developing*. When Mr. Potter's ownership of all the buildings in town prevents Emily & Geoff from buying an affordable house in Pottersville, prospective personhood interests are frustrated. Similarly, when the high royalties demanded by authors keeps Curt from buying books (and curtails the library's acquisitions), Curt's prospective personhood interests are frustrated. He cannot identify with a book to which he is denied access.

So far this has been a discussion of personhood interests commonly linked to sentimental attachment or opportunity for personal growth. Intellectual property also brings to mind an intuitively different set of personhood interests. When we first encounter a *res* of intellectual property, instead of noting that an individual's personality has moved *into* an existing object, we may note that an individual's personality caused the object to come into existence. The object comes into the world already an embodiment or reflection of some particular individual.[19] So Delacroix called paintings "a bridge linking the painter's mind with that of the viewer," Solzhenitsyn said that literature "transmits incontrovertible condensed experience," and Thomas Jefferson called in-

---

ical public good; indeed, the lighthouse and the city hall clock are not far from intellectual property since the commonly shared public good is *information*.

17 Carter, *supra* note 16, at 102.

18 A distinction should be clear here: the difference between the intellectual property *res* and the particular, physical manifestation of that *res*. The copy of *Lady Chatterly's Lover* on my shelf belonged to my grandmother; it is that *copy*, not the novel, which has personal significance for me. Personhood interests in a physical object, whether a book or a wedding ring, were the subject of Radin's initial inquiries. While the intellectual property *res* is distinct from the object, it is also true that access to a poem, symphony, or fictional story is made much easier by owning physical objects. On that account, it might be noted, for example, that the bankruptcy laws of most states allow a bankrupt person to retain their home (often the greatest repository of personhood interests) and a dollar amount of personal effects; within that amount, the individual can choose the optimal personhood-preserving mix of family heirlooms, library, etc.

19 Many physical objects also come into the world imbued with someone's personality, like a hand-built cabin or a hand-made Christmas wreath. But if we continue this line of thinking, the distinction between material property and intellectual property starts to blur because the material objects that most obviously come into the world imbued with personhood interests are also more likely to be objects of intellectual property laws, i.e., paintings or art pottery.

ventions "the fugitive fermentation of an individual brain."[20] Armed with this belief about the nexus between the individual person and the intellectual product, we believe that rights to these intellectual products are desirable because "they strengthen our sense of individuality."[21]

But what does this have to do with our individuality? What is at stake? For example, "creativity" is a characteristic we cultivate in our children, linking it intimately with their development as autonomous individuals. We look at nearly indistinguishable finger paintings, praise them as original, make posters of them, and imagine that one of these children will be a new Pollock. Throughout our culture, we link, if not blur, our notions of creativity, originality, and personal expression. This linkage occurs whether we are turning our attention to kindergarten finger-painting or Carnegie Hall performances; whether our critical faculty is focused on intensely original work—like Picasso's *Les Desmoiselles d'Avignon* when it was first viewed[22]—or on works whose subtle variations are appreciated only by a few. In some situations, a work's origin may cry out to the whole world. It does not take much familiarity with modern painting to recognize most of Picasso's work as Picasso or most of Miro's work as Miro. However, the identification of some specific work with some specific individual occurs with subtler expression, similar to a particular defensive play in a chess tournament, a solution to a computer programming problem, the juxtaposition of a certain painting with another at an exhibition, a particular style of lighting scenes in a film,[23] or even the layout of sand traps and

---

[20] Letter from Thomas Jefferson to Isaac McPherson, *in* THE WRITINGS OF THOMAS JEFFERSON 333 (Saul K. Padover ed., 1967). *See also,* WILLIAM KINGSTON, INNOVATION, CREATIVITY, AND LAW 89 (1990) ("Legal protection of disembodied information thenceforward reflected the view that the work of writers and inventors is an extension of their personalities, and consequently in some sense, 'theirs.'"); JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 145 (2d ed. 1987) ("The primary justification for the protection of moral rights is the idea that the work of art is the extension of the artist's personality, an expression of his most innermost being. To mistreat the work of art is to mistreat the artist . . . to impair his personality.").

[21] Lynn S. Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger,* 20 PHILA. & PUB. AFF. 247, 252 (1991).

[22] Discussing this painting one commentator said, "[t]he consequences of one individual act of perception were and remain incalculable . . . . This individual act of perception is recorded in a painting by Picasso, now called *Les Demoiselles d'Avignon.*" HERBERT READ, A CONCISE HISTORY OF MODERN PAINTING 67 (1974). The painting was "recognized instantly" as a "summit of achievement." PIERRE DAIX, PICASSO LIFE AND ART 65-78 (Olivia Emmett trans., Harper Collins 1993).

[23] In discussing the development of a few leading cinematographers from the Hollywood studio system of the 1930s, John Bailey said: "[C]oming out of that [studio system were] some really stellar people . . . who had such strength and such individual voice that they kind of transcended whatever studio they happened to be working for. Today you can look back and very easily recognize their films from the look irrespective of the director." VISIONS OF LIGHT (Arnold Glassman, director, 1994).

greens on a golf course.[24] A few years ago, a foreign affairs article appeared in a scholarly journal attributed to "Z". The speculation about the author included numerous people claiming it read like Ambassador Jean J. Kirkpatrick or Zbigniew Braezinski.[25] In these latter, subtle cases, we may search for some new terminology like "critical judgment" or "intellectual insight." However, it is hard to deny that some sense of personal style is what lurks behind the terminology and, in turn, that this notion of "style" is some alloy of creativity and personal expression.[26]

So it should be no surprise that the three ideas—creativity, originality, and personal expression—are so thoroughly alloyed in American case law that there may be no principled way to disentangle them, despite efforts by some courts and commentators to keep originality and creativity conceptually asunder. In the 1991 *Feist* decision,[27] the U.S. Supreme Court made it clear that "originality" as used in copyright law should be defined, in part, by means of creativity:

> Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low, even a slight amount will suffice.[28]

This "linkage" of creative-original-personal expression produces a complex or "multivalent" concept of creativity. One question is whether this linkage is inevitable or merely the result of historical accident; if the law developed at a time when these notions were culturally linked, although the cultural linkage might break down

---

24 For example, the Southern California courses designed by George C. Thomas (including the Riviera Country Club) show his particular style of fairway and green architecture. Steve Springer, *The L.A. Open Not The Retiring Kind: George Clifford Thomas Jr. Thought He Was Through Designing Golf Courses Before the L.A. Athletic Club Persuaded Him to Build Riviera in Santa Monica Canyon*, L.A. TIMES, Feb. 22, 1993, at 3.

25 Z, *To the Stalin Mausoleum*, 119 DAEDALUS, Winter 1990, at 295. *See also* David Warsh, *Was It Daedalus or Icarus? Mystery Essay May Prove to be a Jape Gone Awry; The "Z" Affair*, BOSTON GLOBE, Feb. 18, 1990, at A25; *The Mysterious Mr.-or Ms.- Z*, TIME, Jan. 15, 1990, at 33 (speculating on author's identity because of stilted prose).

26 This remains true whether one adopts a "modern" or "post-modern" view of personality. For an interesting discussion of this problem with photographic images, *see* Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779 (1997). Malkan observes that "style" is a matter of what's "on the inside" and quotes Cocteau's observation that "[d]ecorative style has never existed. . . . Style is the soul . . . ." *Id.* at 833.

27 Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

28 *Id.* at 345. In the statutory grant that "[c]opyright protection subsists . . . in original works of authorship," 17 U.S.C. § 102(a) (1988 & Supp. IV 1992), "original" is interpreted as having "originality" or meeting the "requirement of originality . . . ." *See* Key Publications v. Chinatown Today Publications, 945 F.2d 509, 512 (1991).

over time, the conceptual linkage in jurisprudence might continue.

This is the spirit of the deconstructionist's observations about the single "author" and the immutable "text." The deconstructionists reason that the solitary author-genius is a creation of Romanticism that became embedded in American jurisprudence in the nineteenth century. Now, the argument continues, in a world of high technology and collaborative creative work, this construct needs to be replaced. There is much that is interesting, but also much that is dissatisfying about these deconstructionist observations. Assuming the "author" reflects the creative process of another time, the deconstructionists give us little real evidence of how our creative process is different. The evidence the deconstructionists do marshal is as much evidence of a benign, complex notion of creativity as it is evidence that the "author" lurks beneath intellectual property decisions. Instead of being a historical accident, there is good reason to think that the linkage between creativity, originality, and personal expression is both historically rooted and, at a deeper level, inevitable. That linkage, in turn, raises the issue of what I will tentatively call the "moral shop right."

A. *The Romantic Author-Genius and the Place of Creativity*

In recent years, critical legal studies imported the deconstructionist attack against "authors" and "texts" from French literary criticism. This wave of law review articles[29] has explored how copyright law developed with, and came to rely on the Romantic notion of creative authorship, "an extreme assertion of the self and the value of the individual experience . . . together with the infinite

---

[29] *See, e.g.*, Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1007 (1990); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 41 DUKE L.J. 455 (1991) [hereinafter Jaszi, *Theory of Copyright*]; Martha Woodmansee, *On The Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L. J. 293 (1992) [hereinafter Jaszi, *Author Effect*]; Andrea A. Lunsford & Lisa Ede, *Collaborative Authorship and the Teaching of Writing*, 10 CARDOZO ARTS & ENT. L.J. 681 (1992); Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recording Rights,"* 68 CHI.-KENT L. REV. 805 (1993) [hereinafter Aoki, *Adrift*]; Keith Aoki, *Foreword: Innovation and the Information Environment: Interrogating the Entrepreneur*, 75 OR. L. REV. 1 (1996) [hereinafter Aoki, *Foreword*]; Keith Aoki, *Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996) [hereinafter Aoki, *Sovereignty*]; Margaret Chon, *Symposium: Innovation and the Information Environment: New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 265 (1996) ("The binary structure of copyright law, dependent as it is on a strict division between author and reader, or original artist and copyist, is being corroded by networked digital information.").

and the transcendental."[30] The "author" is seen as a historically contingent social construct that arose to capture the creative process in the nineteenth century and did not exist before that time.[31] In general, the deconstructionists view "the persistent judicial reliance on author-reasoning as a method of resolving ambiguity and suppressing the complexity of the world."[32] In a tempered, wide-ranging presentation, Professor James Boyle has even argued that the author construct gets used in economic analyses of legal controls on information.[33]

For the deconstructionists, the problem is that the author construct is unsuitable to an increasingly complex world of group, corporate, and collaborative creativity.[34] Sometimes, the deconstructionists present the "death of authorship" as a *fait accompli*, in both literary theory and writers' practices; it only remains for jurists to sign off on the death certificate. Other times, sometimes breathlessly in the same article, the deconstructionist sees a resurgence of the individualistic Romantic author construct with destructive consequences for less typical sources of intellectual production. There is valuable work in this deconstructionist jurisprudence, but there are questions about both its picture of how the world is and its vision of how the world should be.[35]

---

[30] Jaszi, *Theory of Copyright*, *supra* note 29, at 455 (quoting THE OXFORD COMPANION TO ENGLISH LITERATURE 842 (M. Drabble ed., 5th ed., 1985)).

[31] Boyle, *supra* note 29, at 1526 ("[T]he idea of [the] author[ship] is socially constructed and historically contingent."). Woodmansee, for example, quotes a 1753 German text to show us that "[t]he scholar and the writer" were held on a par with "the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book-binder." Woodmansee, *supra* note 29, at 280. But, the book she draws this inference from is an "economic dictionary" and all these professionals are held on a par as to their respective *economic* effect on "this branch of manufacture." *Id.* This does not address the social place of "the scholar and the writer." This would be the same as taking, as evidence of their similar social station today, a statement like "book publishing is an *X* billion dollar business, providing jobs for authors, editors, graphics technicians, book store clerks, and lumberjacks." Would such a statement make you believe that we treat authors and lumberjacks on a par?

[32] Aoki, *Adrift*, *supra* note 29, at 816.

[33] "The values of romantic authorship seem to seep—consciously or unconsciously—into economic analysis. And because in most conflicts the paradigm of authorship tends to fit one side better than the other, this romantic grounding provides economic analysis with at least the illusion of certainty. Authors tend to win." Boyle, *supra* note 29, at 1527. Professor Boyle has expanded this argument in JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

[34] *See, e.g.*, Aoki, *Foreword*, *supra* note 29; Boyle, *supra* note 29; Jaszi, *Author Effect*, *supra* note 29; Jaszi, *Theory of Copyright*, *supra* note 29; and Woodmansee, *supra* note 29. The focus on the author "drive[s us] to confer property rights in information on those who come closest to the image of the romantic author . . . . This is a bad thing for reasons of both efficiency and justice." Aoki, *Foreword*, *supra* note 29, at 6.

[35] Some deconstructionists also see the development of the "work" as a construct used to disempower authors. But the increasingly broad property protection engendered by the "work" construct is a mixed, often valuable, gift for authors. In early copyright cases, any concept of "work" was limited to the exact physical embodiment of the author's copy.

It is hard to disagree with this proposition. Even if one believes in the possibility of private language, most ideas remain social constructs. If the point is that the individual author "construct" is out of synch with the times—for which we need a more collectivist paradigm of creative output—then three observations are in order.

First, the case for this new descriptive account of the world has not been made (and it will be difficult to make). It is difficult to measure how much more collective and collaborative the creative process has become compared to the past. The evidence mustered seems about as convincing as Bertolt Brecht having himself photographed in the 1930s "writing poetry in the midst of a crowd of workers to emphasize that the days of romantic political individualism were dead and poetry was now a collective proletarian activity."[36] On this point, the evidence assembled focuses on writing—particularly books, lectures, stories—without reference to closely related arts and activities.[37] For example, plays—collaborative efforts of playwrights, actors, set designers, and musicians[38]—have been a continuously vibrant part of both western and Japanese cultures for centuries. Renaissance frescoes were often collaborative works among similarly stationed individuals—as was the Brancacci Chapel in Florence by the painters Masaccio and Masolino.[39] There are also old literary traditions, western and eastern, of col-

---

This resulted in authors losing value at the hands of less creative market players. *See, e.g.*, Stowe v. Thomas, 23 F. Cas. 201 (E.D. Pa. 1853) (holding that copyright of *Uncle Tom's Cabin* is not infringed by non-English translation); White-Smith Music Publ'g v. Apollo Co., 209 U.S. 1 (1908) (copyright in printed sheet not infringed by the making of player piano roll for such music). *See also* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 334-47 (1989).

[36] PAUL JOHNSON, INTELLECTUALS 178 (1988). The authors often overstate the situation. For example, Professor Margaret Chon in a thoughtful discussion of "chain art" and other collaborative projects on the Internet, recently commented that "[w]hether the work is an e-mail conversation or a serialized document, the individual-based notion of 'work' does not describe what is actually occurring in this new medium." Chon, *supra* note 29, at 271. But an "e-mail conversation" is not fundamentally different from a regular correspondence—a genre of historic publication that has flourished in the world of the "author" and "work."

[37] This is even true of many articles focusing on the Internet. *See, e.g.*, Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997). However, there is also a growing literature about "collaborative" images on the Net. *See, e.g.*, Chon, *supra* note 29; Raphael Winick, *Intellectual Property, Defamation and the Digital Alteration of Images*, 21 COLUM.-VLA J.L. & ARTS 143 (1997).

[38] For example, songwriting, in all its subgenres, had often been a collaborative venture, including the works of Elton John and Brian Tauper, David Bowie and Brian Eno, Tim Rice and Andrew Lloyd Webber, and Jay Livingston and Ray Evans (winners of three Academy Awards and authors of compositions like *Mona Lisa*, *Que Sera Sera*, and *Silver Bells*). *See* Rachel Fischer, *Piano Men*, L.A. TIMES, Aug. 18, 1996 (Westside Weekly Supp.), at 1; *See e.g.*, Patricia T. Perkens, *"Hey! What's the Score?" Copyright in the Orchestration of Broadway Musicals*, 16 COLUM.-VLA J.L. & ARTS 475 (1992).

[39] *See* PERRI LEE ROBERTS, MASOLINO DA PANICALE 53-83 (Oxford Univ. Press 1994).

laborative writing, like the Japanese renga.[40]

Consider the role of the "studio." At the close of this century, leading architects like I.M. Pei and Antoine Predock have studios staffed with junior partners and assistants who do much of the work on the building commissions given to the named architect.[41] Arguably the most striking feature of Louis Kahn's greatest work—the Salk Institute in San Diego—was not originally Kahn's idea.[42] The deconstructionists are correct to note that even when learned critics focus on the works coming out of such studios, the analysis is intensely individualistic, e.g., "what was Predock trying to achieve?" or "what did Kahn mean?" But this does not mean an old way of thinking is being imposed on a new way of producing intellectual works. Scores of understudies in the studios of Michelangelo and Leonardo worked on the masters' projects. The point is not that the "old" way was individualistic *or* collective; the point is that the "new" way has not been shown to be *more* collective.

Second, even if this descriptive account of present-day intellectual production is correct, this new nature of the process might not "diffuse and diminish emotions of original discovery and exclusive ownership."[43] It is possible, for example, that even as the process of intellectual production becomes more collaborative, personal *feelings* become more individualized and atomized.[44] A general, increasing individualism in western society has been noted by many

---

[40] In Japanese literature, there is the "renga," a traditional form of poetry in which several poets author one poem together. The poets "write successively stanzas of three and of two lines, without rhyme, but with a fixed syllabic measure." OCTAVIO PAZ & CHARLES TOMLINSON, AIRBORN/HIJOS DEL AIRE 5 (1981). Inspired by the renga, Octavio Paz and Charles Tomlinson later took to writing sonnets together by correspondence. *Id.* at 5-7.

[41] In the 1980s and 1990s, Predock, for example, employed between 15 and 40 people in his architecture studio. *See* David Dillon, *Antoine Predock: American Visionary*, ARCHITECTURE, Mar. 1, 1995, at 55.

[42] When Louis Kahn asked Luis Barragin how he would landscape the area between the two buildings at the Salk Institute, "the Mexican architect walked over to one building, touched its concrete, and corrected Kahn's question at its premise. The space should not be a garden at all, Barragin concluded . . . but a plaza paved in stone cut by a channel of water. . . . The rest is architectural history: a square surfaced in travertine with a rivulet channeled straight down the middle to the Pacific." Joseph Giovannini, *The Salk Addition*, ARCHITECTURE, Mar. 1, 1996, at 75.

[43] BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 117 (1967) (Kaplan expressed this hope in this seminal work).

[44] As Professor Chon has observed:

> [E]ven in intensely collaborative environments, individual feelings of ownership (or perhaps possessiveness) emerge . . . . Whatever the futureoligists predict, the Internet has not yet erased the vestiges of earlier historical views of authorship and works - views reinforced by cultural practices that persist despite successive waves of different kinds of "mechanical reproduction," appropriation art, post-structuralist theory and critical thinking in the law.

Chon, *supra* note 29, at 274 (noting that students participating in a "chain art" project on the Internet were often upset when someone changed the joint image in a way they were unhappy with).

authors.[45] Architects and filmmakers, working in a *historically* collaborative, studio-oriented milieu appear as or more intensely individualistic as novelists who work alone.[46] Scientists and engineers working in research teams have, as courts have noted, a tendency to remember their own work on the team in a magnified form.[47] Academics and entertainers both effusively thank their "collaborators" (in footnotes and award acceptance speeches, respectively) without sharing the billing or too much of the spotlight. There was just a touch of irony when two of the leading proponents of the "collective process" wrote back-to-back articles in one journal. Each article was entitled *Author Effect* and each author thanked the other author in the first footnote. But the articles were not co-written; each retained *individual* authorship of *one* article.[48] Apparently, their own works have not become *that* "polyvocal." Of the people who write about the contemporary collaborative writing

---

[45] *See, e.g.*, JEAN BETHKE ELSHTAIN, DEMOCRACY ON TRIAL 15-57, 129 (1993) (arguing that the civic notion of "rights" has been replaced by rights as the entitlements of individuals freed from "any and all ties of reciprocal obligations and mutual interdependence"); CHRISTOPHER LASCH, THE REVOLT OF THE ELITES: AND THE BETRAYAL OF DEMOCRACY (1995) (noting that elite classes have abandoned their civic role for individual mobility and choice). But this same observation about the civic-minded liberty of the ancients versus the modern liberty of the individual to develop his capacities without hindrance even from his community was made by Benjamin Constant in the late eighteenth and nineteenth centuries. *See* BENJAMIN CONSTANT, POLITICAL WRITINGS 309-28 (Biancamaria Fontana trans., 1988); Biancamaria Fontana, *Introduction* to Political Writings, *id*, at 18-28.

[46] For example, Louis Kahn proudly recounted the following tale from his childhood:

> One day as a small boy I was copying the portrait of Napoleon. His left eye was giving me trouble. Already I had erased the drawing of it several times. My father leaned over and lovingly corrected my work. I threw the paper and pencil across the room saying, "Now it is your drawing, not mine." Two cannot make a single drawing. I am sure the most skillful imitation can be detected by the originator.

LOUIS KAHN, THE NOTEBOOKS AND DRAWINGS OF LOUIS KAHN, (Foreword) (1974). And it is hard to fathom Walt Disney's motives when it came to attribution in Disney films. The classic Walt Disney movies from the "golden age" of animation—Snow White, Fantasia, Jungle Book, Bambi—were created by the "Nine Old Men" of Disney, including Frank Thomas and Ollie Johnston, but Walt Disney—whose singular name is identified with that treasure trove—"would not allow any animator to take sole credit for a character in a film." Scott Collins, *Frank, Ollie Ride Again*, L.A. TIMES, Oct. 19, 1995, at F1.

[47] For example, one court recounted the following:

> At trial, however, Green testified that the anvil groove was his basic idea, and that he was the prime mover in getting it done. At the time of the development of the [patented invention], the engineers at Van Dyck worked in groups, the members of which regularly met, interacted, and exchanged ideas. The three patentees regularly interacted in this setting in an effort to solve the problem of proper staple firing and formation. Given this scenario, and after reviewing the testimony of Green, it is clear that although Green felt the idea for the anvil groove was "his," it really was the product of the work of all three.

United States Surgical Corp. v. Hospital Prod. Int'l Party Ltd., 701 F. Supp. 314, 340 (D. Conn. 1988). As another court commented, there is the "temptation for honest witnesses, who have worked years with a patentee to implement his ideas, to forget whose ideas they were." Acme Highway Prod. Corp. v. D.S. Brown, 431 F.2d 1074, 1083 (6th Cir. 1970).

[48] *See* Woodmansee, *supra* note 29; Jaszi, *Author Effect*, *supra* note 29, at 293.

process, Andrea Lumsford and Lisa Ede seem to be rare exceptions who put their pens—and their empirical research—where their theories are.[49] Their work has not yet gone far enough to prove increasing feelings of a non-individualistic, collaborative process.[50] And what would we do if we concluded that intellectual production had become more collaborative, while that identification with intellectual products remained intensely individualistic?

Third and finally, if both the creative process and sentiments arising from intellectual production are more collaborative, we still do not have much idea of how and how much a system of legal rights should protect all contributors to a given work. There are good arguments that the basic system should remain the same.[51] A scheme for attribution rights would probably not be difficult to sort out. Artists seem generally amenable to such attribution. Our popular culture already thrives on recognizably collective, albeit extremely hierarchical creativity. It is "Bruce Springsteen and the E Street Band," "Prince and the New Power Generation," or "Huey Lewis and the News." Still, one wonders how far such a scheme must go. In her 1990 album *Attainable Love*, folksinger Christine Lavin went so far as to thank one person for "the E chord" in a song and another colleague for suggesting *one* word for the lyrics of a different track.[52]

---

[49] Lunsford & Ede, *supra* note 29; Lisa Ede & Andrea A. Lunsford, *Why . . . Write Together?*, 1 RHETORIC REV. 150 (1983).

[50] An exception to this—so rare as to prove the individualism of artists in collaborative enterprises—was Julie Andrews' 1996 refusal to be nominated for a Tony Award for her role in the Broadway production of *Victor/Victoria*. After the 318th standing ovation—which followed the 318th performance of the show—Andrews announced her decision to decline the nomination saying, "I have searched my conscience and my heart and find that I cannot accept this nomination and prefer to stand instead with the egregiously overlooked . . . members of the *Victor/Victoria* family." Andrews specifically named 12 people to whom she attributed the success of the show, including the lighting and costume designers. *See* Joseph Steuer, *Andrews' Bomb: "No" to Tony Nom*, HOLLYWOOD REP., May 9, 1996, at 1.

[51] For example, Andre Lucas, of the University of Nantes, has observed:

> I do not think that interactivity . . . fundamentally changes the facts of the matter. True, in making the "consumer" play a more active role, it takes away from the "aura" surrounding the act of creation. Nonetheless, the fact remains that, no matter what people say, there is indeed an "imaginer" and this suffices to restore the traditional basis. This does not mean that the new technologies do not complicate matters. For example, it may be difficult to separate the contributions of the computer programmer and the artist, or that of the provider of the basic scenario and that of the "adopter." However, this is basically a classic problem.

Jean-Loup Tournier, *Author's Rights and New Modes of Exploitation*, 16 COLUM.-VLA J.L. & ARTS 441, 458 (1992).

[52] CHRISTINE LAVIN, ATTAINABLE LOVE (1990) (Liner notes read "All songs written by Christine Lavin except *Sensitive New Age Guys* co-written with John Gorka; the E chord in *Kind of Love* suggested by Bill Kollar; the word 'luminescent' in *Venus* contributed by Noah Adams.")

Beyond attribution, what rights belong to whom? One option would be to extend the present system, effectively giving each contributor rights to prevent any particular use (license, novelization, broadcast, etc.). This would produce a "veto" system which would surely diminish society's access to jointly written works. In such a system, pressures would be strong to create a background hierarchy of contributors so that not every contributor could prevent release of the work. Such a system could produce elaborate differentiation rights for different contributors.[53]

While questions remain about what is happening in the production of intellectual works and how law *could* address such changes, the reality is that the single author idea remains powerful in our legal system. As Professor Keith Aoki has noted, it is ironic that while some scholars have been marshaling European literary criticism against "authors," other scholars and lawmakers have been importing European notions of "moral rights"—legal privileges which elevate the importance of the individual who produces intellectual works.[54] Declaring the end of the romantic "author" and thoughtfully calling for programs to reshape the law without this nuisance concept seems just a little out of touch. We must first consider a dozen legislatures who have already passed moral rights laws for visual artists, and Congress which has grudgingly embraced the moral rights requirements of the Berne Convention.[55] If these laws are any indicia, then it may be, as James Boyle believes, that "the romantic vision of authorship is more important today than it was to Fichte and Krause, Pope and Macaulay."[56]

Other things, however, could be at work. First, the rise of the

---

[53] The European Community's "Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Rights . . ." distinguishes between producers, directors, and actors with possible inclusion of script writers and authors of underlying works as "co-authors" of films but enjoying different rights. *See* Said Mosteshar, *Surprises in Store: Future Mandatory Rental Rights*, 22 INT'L BUS. L. 37 (1994).

[54] Aoki, *Adrift*, *supra* note 29, at 816-21. As Aoki has more recently noted on intellectual property laws in the brave new world of the Net, "[c]opyright law does not seem to be on the verge of consignment to the dustbin of history anytime in the near future, prophesies of eminent cyberpundits aside." Aoki, *Sovereignty*, *supra* note 29, at 1308.

[55] In 1990, Congress enacted the Visual Artists' Rights Act, 17 U.S.C. § 106A (1988 & Supp. IV 1992), which provides limited attribution and integrity rights for artists who create graphic, sculptural, or photographic works, either in original or limited editions. In addition, several states have moral rights of varying strength for visual artists. *See* California Art Preservation Act, CAL. CIV. CODE §§ 980-89 (West Supp. 1993); CONN. GEN. STAT. ANN. §§ 42-116s to 42-116t (West 1992); Artists' Authorship Rights Act, LA. REV. STAT. ANN. §§ 51:2151 to 51:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, §§ 2102-2110 (West Supp. 1992); R.I. GEN. LAWS §§ 5-62-2 to -6 (1987).

[56] Boyle, *supra* note 29. Rights are "but one example of how the Romantic conception of 'authorship' is displaying a literally unprecedented measure of ideological autonomy in legal context." Jaszi, *Author Effect*, *supra* note 29, at 299.

"author" in eighteenth and nineteenth century cultural norms and its migration about that time into jurisprudence does not tell us that the word "author" in present-day court opinions has either the same content or the same influence it may once have had. We cannot condemn a social construct purely on its pedigree without reference to its present uses.[57] If the history of ideas teaches us anything, it is that ideas are not stable. The question is not whether the concept is historically contingent, but *how* contingent it is. The concept of a "republic" is also historically contingent, but that does not mean it lacks utility or applicability.[58] No doubt "romantic author" is a more historically contingent construct than "author"—just as "federal republic" would be a more historically contingent construct than "republic." If the point is to show us that "author" in American jurisprudence always carries "romantic author" imbedded in it, then there is a great deal yet to prove.

Second, while the phenomenon being studied may be a word whose meaning has migrated, the student of the phenomenon must make sure her concepts are clear, limited, and do not migrate. Sometimes, it appears that in order to find "author-reasoning" in a variety of places, the deconstructionists often morph their concept of author. They began with a "romantic author" and move through "romantic author-geniuses,"[59] to "master mind,"[60] and then, a romanticized, Faustian vision of "entrepreneurship."[61]

Studying a historically evolved concept may call for such leeway,[62] but the result may be that symptoms of "author-reasoning" can be found everywhere. If one began searching for iridium in geological samples, then started subtracting or adding electrons

---

57 If we did, we would, for example, have to attack the notion of "diversity" in college admissions. It appears that "diversity" became an issue at Harvard College in the early nineteenth century as a call for greater geographic diversity—thereby giving Harvard officials a fig leaf to admit more "WASPs" from the Midwest and fewer first generation immigrant Jews from the East coast. *See* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 386-400 (1979).

58 *See generally* PAUL A. RAHE, REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION (1992); CLAUDE NICOLET, L'IDÉA RÉPUBICAINE EN FRANCE (1982); Philippe Raynaud, *Destin de l'idéologie républicaine*, ESPRIT (Dec., 1983); LE SIÉCLE DE L'AVÉNEMENT RÉPUBLICAIN (Francois Furet & Mona Ozouf eds., 1993).

59 Aoki, *Adrift*, *supra* note 29, at 820.

60 Jaszi, *Theory of Copyright*, *supra* note 29, at 487.

61 Boyle, *supra* note 29, at 1508 (linking romantic images of innovative entrepreneur to romantic images of authors).

62 This terminological "drift" also makes for more comfortable reading; ironically, it follows in the tradition of intellectual property case law which has been attacked for the same kind of imprecision. For example, in the 1884 *Burrow-Giles Lithographic Co. v. Sarony* case, Justice Miller used almost a score of different phrases to describe what was protectable by copyright, ranging from "original intellectual conceptions" to "originality of thought" to "intellectual production." 111 U.S. 53, 58-61 (1884).

and protons as to what molecules would count as iridium, it would not take long to find "iridium" all around us. Because concepts in the social sciences lack the precision of atomic element descriptions, we must be cautious that "drift" in our concepts does not cause us to overexpand, and thereby undercut, our observations.

After exploring the notion of creativity, the discussion below will sketch out how the deconstructionists' observations about "author reasoning" can just as well be diagnosed as the law's sometimes uncritical reliance on the notion of "creativity."

B. *The Multivalent Notion of Creativity*

From the deconstructionist perspective, copyright law "is grounded on an uncritical belief in the existence of a distinct and privileged category of activity"[63] called authorship. However fascinating the historical account of romantic author-genius' arrival into Anglo American law may be, our courts, like our art professors and theater critics, are more concerned with creativity than authorship.

Yet understanding "creativity" is no easy task. To psychologists and psychiatrists, "[t]he more one studies the subject of creativity, the more complex and bewildering it seems."[64] Freud himself reluctantly concluded that "before the problem of the creative artist, analysis must, alas, lay down its arms."[65] And to many artists "the most important element" of their works remains completely "inexplicable."[66] We do not even know what kind of relationship it has with other constructs of human activity, such as labor.[67] This is

---

[63] Jaszi, *Theory of Copyright, supra* note 29, at 466.

[64] As Leon Berman elaborates:

> Attempts to define the creative process have focused on . . . regression in the service of the ego; and such diverse affects as awe, wonderment, loneliness, inspiration, and ecstasy. Significant life experiences have been considered as well as innate endowments. Traumatogenic theories of creativity have implicated childhood abuse, loss, illness, and congenital deformity.
>
> In the midst of all this attention, the character of the poor artist has been idealized, diagnosed, and defamed. He has been associated with the infant, the child, and the adolescent; the dreamer, the prophet, and the rebel; the neurotic, the impostor, the sociopath, the pervert, the criminal, and the psychotic.

Leon Berman, *An Artist Destroys His Work: Comments on Creativity and Destructiveness, in* CREATIVITY AND MADNESS: PSYCHOLOGICAL STUDIES IN ART AND ARTISTS 59 (Panter et al. eds., 1995). Berman adds, "it must be concluded that we know a great deal more about madness than we do about creativity." *Id.* at 61.

[65] SIGMUND FREUD, DOSTOYEVSKI AND PATRICIDE 177 (Standard ed., 1928).

[66] "I have never known one great painter—not one!—who hasn't told me in some way or other that the most important element in his best works, as in the masterpieces of other painters, was inexplicable—no matter whether that implied mystery or clarity." ANDRE MALRAUX, PICASSO'S MASK 235 (June Guicharnaud trans., 1976).

[67] There is a very ambiguous relationship between creative work as "work" and as pleasure. For example, watching the young Renoir paint, the critic Charles Gleyre asked him,

serious baggage for someone arguing that creativity better explains judicial reasoning than the "romantic author." To meet that burden, the discussion that follows explores the popular notion of creativity and how its constituent elements provide a personality justification for intellectual property rights. Although creativity bears some aspects of "a distinct and privileged category of activity," it has over the decades actually required dilution of the romantic notion of creative *genius* and, in its place, put increasing emphasis on *originality* and *personal expression.*

1. The Melding of Originality and Creativity

In *Feist* a unanimous Supreme Court defined originality by reference to creativity.[68] But it is important to remember the path to this conclusion. The Copyright Act limits property rights to "original works of authorship."[69] The adjective "original" has led courts to create a threshold issue in copyright disputes of whether a work shows "originality." The Supreme Court packed the notion of creativity into the notion of originality in the context of using "originality" as a requirement for copyright protection. This is decidedly different from a social scientist's effort to unpack the notion of creativity; the Court was considering a judicial construct versus a social scientist exploring a social convention. Still, *Feist* is a starting point because the Court concludes that everything juridically *original* is also juridically *creative.* That logically entails the proposition that decided *Feist*: if something is not juridically *creative,* it cannot be juridically *original.* ("*If j-original, then j-creative.*")[70]

This equation (*if j-original, then j-creative*) was in reaction to a long line of case law that had supported the view that the requirement of originality was "little more than a prohibition of actual copying."[71] This juridical notion of originality, like the popular no-

"No doubt, it is to amuse yourself that you are dabbing in paint?" To which Renoir is supposed to have replied, "Why, of course, and if it did not amuse me, I beg you to believe that I would not do it." OTTO FRIEDRICH, OLYMPIA: PARIS IN THE AGE OF MANET 242 (1992). Aristotle was probably the first to observe that the "sciences which do not aim at giving pleasure or at the necessities of life were discovered, . . . first in the places where men first began to have leisure. This is why mathematical arts were founded in Egypt; for there the priestly caste was allowed to be at leisure." ARISTOTLE, 1 METAPHYSICS, 690-91 (Random House ed. 1941). Thus started the quandary of how an experience of leisure could be a process of labor. *See* Hughes, *supra* note 1, at 302-05.

68 Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

69 17 U.S.C. § 102(a) (1988 & Supp. IV 1992).

70 "Juridically original" (*j-original*) and "juridically creative" (*j-creative*) should be distinguished as legal concepts from general social conventions. For those familiar with symbolic logic, let's summarize the *Feist* decision as saying: *if j-original, then j-creative,* which is logically equivalent to *if not j-creative, then not j-original* (*~j-creative→~j-original*).

71 Alfred Bell & Co., v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951). This is a view unquestioned by scholars writing prior to *Feist. See, e.g.,* Litman, *supra* note 29, at 999

tion of originality, owes its currency to the idea of something's "origin": if a song owes its origin to Leslie, it must be *original* to Leslie. This measure of "originality" dates back to Justice Story's early nineteenth century opinions[72] and gave us a fairly bright line test: if the work was the independent creation of someone, it was "original" to that person.[73] (As described earlier, this minimalist sense of "original"—owing its origin to someone—is what we will explore below as the notion of "sourcehood." If the song owes its origin to Leslie, Leslie is the source of the song; if the cell line owes it origin to a skin sample taken from Tim's wrist, then Tim is the source of the cell line).

This pedigree of "originality" leads to a problem: originality meant that something could be juridically "original" in the sense that it was not copied, but the thing still might not be considered creative in the popular sense. Because American law makes originality the gate keeper of copyright protection, the *Feist* Court backed away from this narrow sense of "original." Instead, the Court embraced a formula tying originality with creativity. The Second Circuit and Professor Nimmer were among those who had already explicitly linked originality to creativity[74] while many copyright decisions had already required "creativity" for copyright protection—meaning that it was either embedded in the notion of "originality" or it stood as a separate requirement.[75]

The program in *Feist* adopts the formula "*if j-original, then j-creative*" because this provides the more important rule, "*if not j-creative, then not j-original.*" Embedding creativity in originality certainly makes the originality test more complicated than it would be as a mere test of sourcehood.[76] But beyond that where are we led?

("Copyright's threshold requirement of originality . . . requires neither newness nor creativity, but merely creation without copying."); Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works,* 81 COLUM. L. REV. 516, 520-21 (1981).

72 Gray v. Russell, 10 F.Cas. 1035 (D. Mass. 1839) (Story, J); Emerson v. Davies, 8 F.Cas. (D. Mass. 1845) (Story, J.).

73 *See* Russ VerSteeg, *Rethinking Originality,* 34 WM. & MARY L. REV. 801, 806 (1993) (calling this "Type I originality"); Dale P. Olson, *Copyright Originality,* 48 MO. L. REV. 29, 36 (1983).

74 L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (en banc); 1 MELVILLE B. NIMMER, THE LAW OF COPYRIGHT § 10.2 (1975). Prior to the *Feist* decision, Professor Litman also suggested that the "symbolic power" of originality was rooted in the "romantic model of authorship." Litman, *supra* note 29, at 1007. While not subscribing to the scholarship of the "romantic author" construct, I take Litman to have recognized that the legal notion of "originality" always required creativity.

75 The ambiguous place of the creativity requirement goes back at least to Justice Miller's formulation in *Trade-Mark Cases* that copyright protection applies to works "only such as are original, and are founded in the creative powers of the mind." *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).

76 Prompting one commentator to, perhaps inadvertently, enter the deconstructionist's

What counts as creative in the juridical sense? What counts as creative in the popular sense? In *Feist*, the court tells us only that creativity is *not* variations that are "mechanical," "entirely typical," or "garden variety." Intellectual products that result from choices about composition that are obvious, inevitable, or "age old practice(s)" do not count as minimally creative.

There is nothing objectionable in any of these pronouncements or the fact that the Court would not say more. Supreme Court opinions are understandably restrained by fear that legions of lawyers will try to shoehorn a wide range of future human activity into choice phrases from opinions. But if judicial creativity is the same as the popular notion of creativity, we have a problem because the popular notion of creativity turns back to and depends on the popular notion of originality.

As Russ VerSteeg has pointed out, "creativity" traces its etymological roots to the Latin verb *creo*, meaning "to beget" or "to give birth to."[77] The Latin root also means "to make" or "to produce" and is related to the verb *cresco* meaning "to grow up" or "to spring forth."[78] In short, the words' roots do nothing to help distinguish "creating" from "originating," or being the source of something.

A better starting point is that the idea of *being the source of* something, of *originating* something, and of *creating* something all rely on the idea of transforming existing materials into something that is identifiably different. Imagine that Patty purchases ten pounds of red clay from Adam, who dug the clay from a hillside on his farm. Patty uses five pounds of the clay to make a vase; she gives this vase to Kevin. She also gives the five remaining pounds of clay to Kevin (perhaps with a note about the pleasures of the potter's wheel). It is non-controversial that if someone asked you, knowing all this, "what is the origin of the vase?" you would probably say "Patty" and that the same reply would hold true if you substituted "source," i.e. "what is the source of the vase?" If you rephrased the question into "who created the vase?" you would again get "Patty" as the answer.

Now consider if someone asked about the clay, i.e., "what is the origin of the clay?" or "what is the source of the clay?" This is more difficult. If you understood this question to be "how did the clay get here?" you might answer "Patty," but it seems more likely that you would treat this as a question about the clay's provenance,

---

fray by recently suggesting that creativity be cordoned off in a separate requirement of "authorship" or a "work." *See* VerSteeg, *supra* note 73, at 813-14.

77 *Id.* at 826 (quoting OXFORD LATIN DICTIONARY 456 (P.G.W. Glare ed., 1982)).

78 CASSELL'S LATIN DICTIONARY 142 (Marchant et al. eds., 1948).

i.e. "where did it come from?" In that case, if someone asked you "what is the origin of the clay?" you would probably say "Adam" or "Adam's farm." Again, the same answer would come if "source" was substituted for "origin." The probable answer would be "Adam" or "Adam's farm."

But what if someone asked who *created* the clay? The question might evoke "God," "Nature," or some explanation that Adam dug it up, but didn't "create" it. I believe that this question gets a different answer because Adam does not seem to have transformed the materials available to him when he dug them up. But this still does not evince a great difference between the popular ideas of "creating" and "originating." In fact, we could arrange a hierarchy of questions which, to increasing degrees, evoke the question of when an object first appears in the world (or first appears in the world in the form it now has):

> "What is the provenance of *X*?"
> "Where/who did *X* come from?"
> "What is the source of *X*?"
> "What is the origin of *X*?"
> "Who/what created *X*?"

Substitute Patty's vase or Adam's clay for *X* in this series of questions—the questions initially can be met with an intermediary answer ("the delivery truck," "the back seat of Patty's car," etc.). However, as you go down the list, what is increasingly demanded is an answer about when *X* first appears in the world identifiable as *X*. This would hold true if you ran through this list replacing *X* with a commercial jetliner, an antique chest, or a manuscript, anonymous because the title page has been torn off. Point to a commercial jet at an airport and ask where did it come from; its last stop—Boston, Cincinnati, Denver—will be a fine answer. But point to the same aircraft and ask who created it; nothing but "Boeing" will do as an answer. The moment when something first appeared in the world in its present form is synonymous with the moment when other things were transformed to the new thing.

The point of the hierarchy of questions is that it shows that both creativity and originality are rooted in the transformative process.[79] But there are many details that need attention. First, there

[79] The view that transformation or novelty is fundamental to creativity is also put forward in ROBERT WEISBERG, CREATIVITY: BEYOND THE MYTH OF GENIUS 4-5, 247-48 (1993), a book that came to my attention after this article was written. Weisberg provides a thoughtful survey of psychological efforts to explore creativity, particularly how it differs from regular thinking—an issue that this discussion does not address.

is the issue of whether the transformative process of "creating" or "originating" focuses on the materials actually at the disposal of the person *or* the total world of materials or elements possibly available. Notions, especially populist notions, of both creativity and originality are context-specific; they measure transformation by what the person actually had available. For example, discussing "creativity," Robert Nozick writes,

> Whether or not there really is anything new under the sun, a creative act produces something new or novel in comparison to what the creator had encountered and known previously. If unbeknownst to the creator someone else had produced something similar or identical . . . still the creator's act would have been an act of creation. All that matters is that the effects of this earlier discovery have not seeped through and become known to the new discoverer in a way that makes his act less novel. Calling an act "creative" characterizes it only in relation to the materials it actually arose from, the earlier experiences and knowledge of the creator, not in relation to everything that has preceded it in the history of the universe.[80]

On this approach, if Ted, the chess novice, hits upon the Evans gambit in a chess game today, as his opponent, I may call his moves "creative" or "original" even though his moves are exactly how Captain W. D. Evans executed the game in the 1820s.

But others would apply a more demanding measure. In considering Rembrandt and the master forger, Mihaly Csikszentmihaly reasons that only "Rembrandt's work is creative because he introduced some variations in the domain of painting at a certain point in history, when those variations were novel . . . . The very same variations a few years later were no longer creative, because then they simply reproduced existing forms."[81] Csikszentmihaly's definition of creative differs from Nozick's not in the test—which remains a test of identifiable difference—but in the reference set used for the test. Whereas Nozick refers to what the *creator* had encountered and known previously, Csikszentmihaly compares to all that has come before.

Whether the benchmark is an identifiable difference from what the creator had encountered or from *all* of what was known previously, the popular measure for the "original" or the "creative" still seems to be whether the thing seems identifiably different to

---

80 ROBERT NOZICK, THE EXAMINED LIFE 35 (1989).

81 Mihaly Csikszentmihaly, *Society, Culture, and Person: A Systems View of Creativity*, *in* NATURE OF CREATIVITY (Robert J. Stermberg ed., 1988).

us, not the creator. This is a problem we sometimes encounter with children: the child piles up sand in her sand box and asks us to look at what she has "made." We feign interest, but it does not look like anything has been "made" at all. No transformation is apparent to us; nothing in the sand box looks much different than the pre-existing conditions.

The law rarely needs to worry about the sensitivities of infants, but the problem returns in the case of faithful reproductions and derivative works. The master copier example makes clear that the question of "transformation" from pre-existing materials is a question of mental or intellectual materials, not physical materials. Consider a case where the master copier reproduced *Pineapple Bud*, not on a canvas but in a different medium—a holographic image of *Pineapple Bud*, a tile mural of *Pineapple Bud*, etc. Professor Nimmer reasonably took the position that "mere reproduction of a work of art in a different medium should not constitute the required originality"; Nimmer reasoned that "no one can claim to have independently evolved any particular medium."[82] But while the result seems right, the reasoning is suspect. The real reason must be because expression of the *same* image in a known medium, while an identifiably different object, is not an identifiably different image.

That reproduction in another medium does not constitute transformation was emphasized by the Second Circuit in the 1995 *American Geophysical Union v. Texaco Inc.* case.[83] In *American Geophysical*, publishers of scientific journals brought suit against Texaco for Texaco's extensive copying of scholarly articles for researchers in its laboratories. The battle was engaged over the question of whether Texaco's copying constituted a fair use and, on that basis, both the trial court and the appellate court looked at a sample of Texaco's activities against the four factor test set out in 17 U.S.C. §107(1)-(4). As to the first factor of whether the copying was a "transformative (or productive)"[84] use of the original, Texaco argued that its use of the articles was "transformative" because: "photocopying the article separated it from a bulky journal, made it more amenable to markings, and provided a document that could be readily replaced if damaged in a laboratory, all of which 'transformed' the original article into a form that better served [the sci-

---

82 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08(c)(2) (1995).

83 60 F.3d 913 (2d Cir. 1994).

84 A question recognized as central to analysis under the first factor. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.").

entist's] research needs."[85]

Both the district court and the Second Circuit soundly rejected this argument on the grounds that "Texaco's photocopying merely transforms the material object embodying the intangible article that is copyrighted work."[86] Texaco's activities were found to fall on the side of "untransformed duplication," which made no "contribution of new intellectual value"; instead, being "little or nothing more than the value that inheres in the original."[87] On that basis, the first factor weighed against a finding of fair use.

The *American Geophysical* opinion equates "transformative" as producing new "value," but then implicitly recognizes that "new" value can always be found. So some distinction is necessary between value that "inheres" in the work and "new" value. In an intellectual culture steeped in law and economics, we can understand a court trying to objectify its analysis in terms of "value." But beyond this conceptual dressing, it is clear that the distinction between inherent value and new value really *relies* on a judgment about transformation and not vice versa. New value depends on transformation and transformation depends on identifiable differences from what has come before.

Does transformation—and thus a judgment of originality or creativity—depend on anything more than *identifiable* difference? Does it depend on *significant* differences or *important* differences or *extensive* differences? Some quantum of difference—either quantitative or qualitative? One author broadly identified creativity as: "(1) originality—new or unusual elements must be involved, and (2) adaptation to reality—outcomes must be meaningful to others rather than random or idiosyncratic."[88] Here the popular notion of creativity is being defined in terms of originality, which is not at all surprising given our discussion. "New or unusual elements" adds little to this. What is more interesting is the "non-random" requirement.

There are a few ways we could understand this. One prospect is that if "non-randomness" is a requirement for something to be creative, it is because random organization of existing elements are not identifiably different from what occurs (has occurred or could occur) in the background world.[89] The child's arrangement of

---

85 *American Geophysical*, 60 F.3d at 920.

86 *Id.* at 923.

87 *Id.*

88 Ruth Richards et al., *Assessing Everyday Creativity: Characteristics of the Lifetime Creativity Scales and Validation with Three Large Samples*, 54 J. PERSONALITY & SOC. PSYCHOL. 476 (1988); *see generally*, FRANK X. BARRON, CREATIVE PERSON AND CREATIVE PROCESS (1969).

89 There is no question that the showing of some random choice defeats creativity in

blocks does not seem "creative" if it looks no more than random. Another prospect is that what is "non-random" is non-random because it is meaningful. Both these interpretations can be read from Aristotle's discussion of the concept of art. "Art" for Aristotle was that which owed its origin to a person and did *not* have its existence in the background world:

> [A]rt is identical with a state of capacity to make, involving a true course of reasoning. All art is considered with coming into being, i.e., with contriving and considering how something may come into being which is capable of either being or not being, and *whose origin is in the maker and not in the thing made; for art is concerned neither with things that are or come into being by necessity nor with things that do so in accordance with nature (since these have their origin in themselves).*[90]

In other words, creativity/originality requires a transformation not arising from the background order, whether that order is considered random or deterministic. But whatever the ontology, the candidate to whom we always turn to explain the transformation separate from the background world is the person—personal *expression,* personal *intention, reflections* of the person.

2. The Connection between Creativity and the Personal

It is said that Diego Rivera's affair with his wife's sister, Christina, was discovered because of the way he painted Christina's image into a mural at the Mexican National Palace—in an "ecstasy pose,"[91] while the extraordinary paintings of his wife, Frida Kahlo, reflected her own experiences—spinal injuries from a car accident,

---

the eyes of some judges. Toro v. R&R Prods., 787 F.2d 1208, 1213 (10th Cir. 1986). As the court said in *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (10th Cir. 1997):

> Mitel's arbitrary selection of a combination of three or four numbers required de minimis creative effort, Mitel's own witness testified to the arbitrariness of the command codes . . . . [A] Mitel marketer who selected some of the "registers" and "descriptions" testified that he selected the numbers arbitrarily, without any attempt to place his mark on them. . . . We agree with the district court that the random and arbitrary use of numbers in the public domain does not evince enough originality to distinguish authorship.

Id. at 1373-74.

90 ARISTOTLE, NICOMACHEAN ETHICS, Book VI, Ch. 4 (Terence Irwin trans., 1985) (emphasis added). Aristotle distinguished art as concerned with the "variable" versus scientific knowledge which is concerned with the "invariable" and the universal. But both art and science are "states by virtue of which the soul possesses truth by way of affirmation or denial." *Id.* at Book III. But Aristotle later has a more difficult time identifying the "truth" of art than of scientific knowledge. He says, "wisdom in the arts we ascribe to their most finished exponents, e.g. to Phidias as a sculptor . . . and here we mean nothing by wisdom except excellence in art." *Id.* at Book VII.

91 Joan F. DiGiovanni and Ronald R. Lee, *The Art and Suffering of Frida Kahlo, in* CREATIVITY AND MADNESS, *supra* note 64, at 81, 85.

a miscarriage, and struggles with Catholicism.[92] Edward Munch's first major work, *The Sick Child*, recalls the death of his sister Sophie from tuberculosis. It was a scene he would repaint six times in his life.[93] Julian Green acknowledges that several of his characters "inherited" his own fascination "for long, adventurous walks" through the streets of Paris[94] while Eudora Welty sees the emphasis in her stories on weather, schoolteachers, and parades all stemming from childhood memories.[95] Ibsen was even more direct in transforming personal experiences into literature. He was known to abruptly start inviting individuals to dinner parties, then just as unceremoniously drop them from his social list, once he had enough of their manners, speech, and attitudes to create a character.[96] Even animators draw upon their experiences with humans to draw memorable characters and creatures.[97] We could fill an encyclopedia with such examples of "art" based on the artist's experiences.[98] As Bono, lead singer of "U2" remarked, "musicians, painters, whatever, they have no choice but to describe where they live."[99]

From such examples, we know that there is a connection between creativity and personal experience. The connection could be one of practicality and prudence, the most successful creators staying close to what they know. Kahlo herself explained that many of her paintings were self-portraits "[b]ecause I am the subject I know best."[100] In giving advice to a young writer, Jane Austen suggested "[L]et [your characters] go to Ireland, but as you know nothing of the Manners there, you had better not go with them. You will be in danger of giving false representations . . . ."[101] But it

---

92 *Id.* at 88-95. *See also* HAYDEN HERRERA, FRIDA: A BIOGRAPHY OF FRIDA KAHLO (1983).

93 Lawrence Warick & Elaine Warick, *Edvard Munch: A Study of Loss, Grief and Creativity*, *in* CREATIVITY AND MADNESS, *supra* note 64, at 177-78 (discussing repeated paintings of his mother and paintings of three characters when he was involved with a married woman).

94 JULIAN GREEN, PARIS 129 (1991).

95 EUDORA WELTY, ONE WRITER'S BEGINNING 4-37 (1984). Miss Welty also describes how her college experience reading Yeats in the library stacks while it was snowing outside became a scene in a story she wrote, *id.* at 81, and how the poem *The Song of Wandering Aegus* runs through the stories in her collection, *The Golden Apples*. *Id.*

96 JOHNSON, *supra* note 36, at 102 (describing the character Kaja Folsi in *The Master Builder* as "an act of human larceny."). Johnson also details how Ibsen developed characters from his father, *id.* at 84, Emilie Bardach, an Austrian girl with whom he corresponded, *id.* at 101-02, and his friend Bjornson, *id.* at 95-96.

97 Betsy Sharkey, *The Heart and Soul of a New Animator*, N.Y. TIMES, May 19, 1996, at B1 (describing how animator Andreas Deja relies on his own personal experiences "to make a character real").

98 For an example of art discussing how art is derived from experience, *see* YASUNARI KAWABATA, BEAUTY AND SADNESS 31-33 (First Vintage Int'l ed., 1996) (One of the main characters, Oki, is a novelist whose greatest work was a fictionalized account of his true life affair with a 16 year old, Otoko.). *See generally*, Weisberg, *supra* note 79 at 233.

99 Jon Pareles, *Searching for a Sound to Bridge the Decades*, N.Y. TIMES, Feb. 9, 1997, at B34.

100 Warick & Warick, *supra* note 93, at 178.

101 Letter from Jane Austen to Anna (Aug. 10, 1814). Jane Austen also displayed her

appears to be something more than creativity conveniently married to personal memories. Many of us—perhaps most of us—move uncritically from a belief that intellectual works *reflect* personal *experiences* to a belief that intellectual works are personal *expressions.* This is worth exploring. It is important to consider how personal expression may be something different from repeating or reproducing personal experiences.

a. Weak and Strong Views of Creativity-as-Reflection

Faithfully reconstructing a situation from one's personal past—memory regurgitation—would be an act of personal reflection. It would reflect personal experiences as though the person was a passive, if imperfect, mirror of extra-person reality. But let's consider two distinct strands of the view that intellectual works reflect the personal experiences of those that produce them.

First, it is certainly easy to believe that an intellectual work is a *personal reflection* of the individual—a reflection of their infancy, their childhood, their recent experiences, or what they had for lunch today. As Welty writes, "any writer is in part all of his characters. How otherwise would they be known to him, occur to him, become what they are?"[102] Liam Hudson and Bernadine Jacot believe, for example, that the broad choice of what field academics and professionals enter is a reflection of parent/child relations in infancy.[103] At a more refined level, Hudson and Jacot believe that the research projects undertaken by many eminent social scientists reflect neither random choices nor strategic career opportunities nor influential teachers, but "the mind helping make the raw edges of personal experience smooth."[104] Their examples include both

---

lack of personal experience when writing to Clarke, the Prince Regent's librarian, about a novel featuring a clergyman much like the Reverend Clarke:

> I am quite honoured by your thinking me capable of drawing such a clergyman . . . . But I assure you I am not. The comic part I might be equal to, but not the good, the enthusiastic, the literary. Such a man's conversations must at times be on subjects of science and philosophy, of which I know nothing; or at least be occasionally abundant in quotations and allusions which a woman who, like me, knows only her mother tongue, and has read very little in that, would be totally without the power of giving.

Letter from Jane Austen to James Stanier Clarke (Dec. 11, 1815), *in* JANE AUSTEN'S LETTERS 442 (R.W. Chapman ed., 2d ed. 1979).

102 WELTY, *supra* note 95, at 101.

103 LIAN HUDSON & BERNADINE JACOT, THE WAY MEN THINK 81-82 (1991). Hudson and Jacot believe that the "science and technology, far from requiring an extension or distortion of imaginative processes that are properly personal, provide the 'male' imagination with venues within which it can be deployed in its most fluent and spontaneous form." They also believe that male artists turn their imagination away from this "natural home" by refocusing on the "female body from which it initially took flight." *Id.* at 172.

104 *Id.* at 15.

Sigmund Freud and Alfred Kinsey pushed to their respective works in sexuality—the former highly normative, the latter dispassionately descriptive—by their own homosexual experiences.[105]

In these last cases, personal experiences *reflect* in intellectual works because they are deep causes in the course of events that produce the works. But the "reflection" theory has a much more explicit side. The possibility is that personal reflection, personal expression, and creativity should all collapse on one another, i.e., that "creativity" is only a fancy covering for observation—the direct reproduction of things we have experienced.[106] The Athenian Greeks were the first to conclude that art was an act of reproduction or imitation,[107] a view that was reflected in Aristotle's reference to fine arts as "imitative arts" and "modes of imitation." In this spirit, Emily Dickinson described the eminent painter as "[o]ne who could repeat the Summer day" and "reproduce the Sun."[108] Dickens modeled a character in *Bleak House,* Harold Skimpole, so precisely after Leigh Hunt that Dickens noted to a friend that his fictional character was "[T]he most exact portrait that was ever painted in words . . . . It is an absolute reproduction of the real man."[109] Kundera tells us that "Hemingway's work is but a coded form of Hemingway's life."[110] Perhaps even sometimes an individual's personality is most manifest in a *res* as a negative inference: I recognize that the emotions or the vision in the intellectual work come from some human experience, but I know that it could *not* come from my experience.[111]

---

105 *Id.* at 2-12. *See also* Weisberg, *supra* note 79 at 233.

106 As in the New Englander who thought Thoreau got his ideas from conversations with one of Emerson's relatives: "He did set them [Bulkey Emerson's views] down, but he didn't give Bulkey the credit. . . . I think Thoreau was nothing more than an early new journalist. He was an excellent reporter, but he was nonobjective and he was very bad about his sources." JOHN MANSON MITCHELL, CEREMONIAL TIME 141 (1984). In considering "creativity" as an act of our experiences, we should not underestimate how much the process of building memories may itself be at least individual physiology, if not individual personality. Neurological researchers are only beginning to establish the exact chemistry involved in real-time selection and sorting data for short term memory and long-term memory. David Brown, *Substance Resembling a Marijuana Component Helps Brain Sort, Store Information,* WASH. POST, Aug. 21, 1997, at A15.

107 JOHN DEWEY, ART AS EXPERIENCE 7 (1932).

108 EMILY DICKINSON, Poem 307, *in* THE COMPLETE POEMS OF EMILY DICKINSON 145 (Thomas H. Johnson ed., 1960).

109 ANN BLAINEY, IMMORTAL BOY: A PORTRAIT OF LEIGH HUNT 189 (1985).

110 KUNDERA, *supra* note 15, at 336. In Eudora Welty's words, "[m]y imagination takes its strength and guides its direction from what I see and hear and learn and feel and remember of my living world." WELTY, *supra* note 95, at 76. Or as one reviewer wrote of Edmund White's novel *The Farewell Symphony,* "Edmund White is writing his autobiography the old-fashioned way: He's disguising it as fiction." David Streitfeld, *Who's Who,* WASH. POST, Oct. 12, 1997, at 15 (book review).

111 In describing the emotional power of a fictional singer, Peter Hoeg writes:

> I still have [his] record. It's still an unforgettable recording. I've sometimes

Indeed, the label "impressionism" came from a very imitative, passive interpretation of what the impressionist painters were doing. Jules Antoine Castagnary characterized them as "impressionists in the sense that they render not the landscape, but the sensation produced by the landscape."[112] Other critics considered the impressionist as direct, immediate representation of *light*, rather than *objects* seen "indirectly" by the play of light they produce.[113]

But while the "weak" view of creativity-as-reflection is beyond cavil, the "strong" reflection view does not make sense. Indeed, in ancient Greece, there was already a sense that pure representation was not a complete explanation[114] and, as Dewey observed, "imitation" to the Greeks may not have meant a "literal copying of objects" as much as an effort to reproduce "the emotions and ideas that [were] associated with the chief institutions of social life." Thus Aristotle viewed music as the *most* imitative of all the arts, not because it captured "the twittering of birds [and] the gurgling of brooks [but because it] reproduces by means of sounds the affections, the emotional impressions, that are produced by martial, sad, triumphant, sexually orgasmic, objects and scenes."[115]

The initial explanation of impressionist painting gave way to a difficult effort among critics to reconcile the notions that the "impression" (and the resulting painting) was both "an 'accurate' view of nature and an individualized or an 'original' sensation belonging to a particular artist."[116] In the aesthetic theory of many late nineteenth century French thinkers, the "impression" of nature born on a tableau carried the unique temperament of the artist.[117] Posner terms this vision of artistic production "the older idea of creativity as imitation with enrichment."[118] Given the enormous

---

> thought that the body, our very physical existence, puts a limit of how much pain a mind can bear. And that [he], on that record, reaches that limit. So that afterward the rest of us can listen and make that journey without going there ourselves.

PETER HOEG, SMILLA'S SENSE OF SNOW 215 (1993).

112 Jules Antoine Castagnary, *L'Exposition du Boulevard des Capucines: Les Impressionnistes*, LE SIÈCLE, 29 April 1874, *reprinted in* Hélène Aclhémar, *L'Exposition de 1874 chez Nadar*, CENTENAIRE DE L'IMPRESSIONNISME 265 (Paris 1974).

113 *See* John Rewald, The History of Impressionism 330-38 (1961).

114 As S.H. Butcher says, "[t]he idea of imitation is connected in our minds with a literal or servile copying; and the word as transmitted from Plato to Aristotle, was already tinged by some such disparaging associations." S.H. BUTCHER, ARISTOTLE'S THEORY OF POETRY AND FINE ART 121 (1951).

115 DEWEY, *supra* note 107, at 252.

116 RICHARD SHIFF, CEZANNE AND THE END OF IMPRESSIONISM 18 (1984).

117 *Id.* at 27-38 (discussing views of Eugène Veron, Eugène Delacroix, and Émile Zola).

118 RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP 348-49 (1988) (discussing T.S. Eliot).

break between classic painting on the one hand and Manet and the impressionists on the other, what may be surprising to us is that critics of the time did not put more emphasis on the "temperament" of the new wave of artists. What was the "enrichment" added by the artist? The next section addresses that hanging question with what we might call the "robust" view of creativity-as-expression.

b. Simple and Robust Views of Creativity-as-Expression

Today, as Barthes notes, "it is impossible to write without labeling oneself,"[119] but this was not always true. The connection between intellectual works and personal expression has not been universal across time. As Andre Malraux observed: "our civilization [has not] relinquished *expression.* That an artist wants to express something—even himself, especially at a time when individualism reigns supreme—goes without saying . . . [but f]or four or five thousand years works of art—whether expressions of the artist or of the sacred—were, like contemplation, anonymous."[120] We may never know for sure what gave rise to the current social convention that artists unanonymously *express* themselves. One possibility is that the Industrial Revolution freed (or removed) the artist from the role of *artisan,* a producer of objects used in daily life. John Dewey believed that this isolation of the artist from the regular flow of social services and the productive activities of daily life gave rise to the individualist impulse in modern times.[121]

However, once it becomes a social convention that creative works are expressions, this social norm could easily become self-sustaining. Creators may decide to express themselves because, regardless of what they really want to do, audiences will take their creations as personal statements. Some artists might conclude, on the strength of social convention, that committing themselves to "express" some message in their works is the way to be creative.

---

119 ROLAND BARTHES, WRITING DEGREE ZERO 1 (Annette Lavers and Colin Smith trans., 1968).

120 MALRAUX, *supra* note 66, at 221. Barthes describes pre-classical literature as a time when "[m]en are still engaged in the task of getting to know nature, and not yet in that of giving expression to man's existence." BARTHES, *supra* note 119, at 55.

121 Because of changes in industrial conditions, the artist has been pushed to one side from the main streams of active interests. . . . He is less integrated than formerly in the normal flow of social services. A particular esthetic "individualism" results. Artists find it incumbent upon themselves to betake themselves to their work as an isolated means of "self-expression." In order not to cater to the trend of economic forces they often feel obliged to exaggerate their separateness to the point of eccentricity. Consequently artistic products take on to a still greater degree the air of something independent and esoteric.

DEWEY, *supra* note 107, at 9-10.

The notion that an artistic work makes some clear statement from the artist could be called the simple view of creativity-as-expression.

At the same time, many creators, such as Picasso, Borges, Stravinsky, and Graham Greene, strived against this view of creativity, often saying that they are not making personal expressions in their works.[122] The simple view of creativity-as-expression also seems ill fitting with the repeated observation that artists fail when they are too directly or self-consciously expressive. Octavio Paz, Parra Nicanor, and Milan Kundera have all criticized efforts of their colleagues to write poetry with political messages.[123] John Dewey—to whose theories we will return—put part of the case against direct expression this way: "indifference to response of the immediate audience is a necessary trait of all artists who have something new to say."[124]

But this places before us two questions. First, if many of our greatest artists do not believe that their works are personal expressions, what general proposition can we put forward that creativity involves expression? Second, whatever creativity is, we know that it relies on—uses as fuel—the personal experiences of the creator. Something *more* than those experiences must be produced for us to say that the individual has been *creative.* That is why creativity and originality are so intertwined. But what about the "more"—how and in what sense is it expression of the individual? Let us con-

---

122 *See* JORGE L. BORGES, Borges and I, in LABYRINTHS 246 (James E. Irvy trans., 1964), *quoted in* Hughes, *supra* note 1, at 366 n.241. Picasso repeatedly expressed the feeling to Andre Malraux that he was compelled to paint, indeed taken over by painting. He told Malraux that "[p]ainting makes me do just what it wants me to." MALRAUX, *supra* note 66, at 17, 188. "I can talk about Van Gogh maybe," he told Malraux, "But not about painting. [Painting] makes me do what it wants me to: to press on, to press on further and further, to press on even further than that . . . ." *Id.* at 118. Later in life, Malraux, himself an accomplished writer, agreed with Picasso's distance from his work: "I was of the same mind as Picasso when it came to his exhibitions: all that's about a guy who has the same name as mine." *Id.* at 145. More radically, Igor Stravinsky believed that "music [wa]s . . . powerless to *express* anything at all, whether a feeling, an attitude of mind, a psychological mood." IGOR STRAVINKSY, AN AUTOBIOGRAPHY 83, 256, 274-76 (1936). Even Che Guevara, editing the diaries of a trip he took around South America in his mid-twenties, wrote, "[t]he person who wrote these notes died the day he stepped back on Argentine soil. The person who is reorganizing them and polishing them, me, is no longer me, at least I'm not the me I was." ERNESTO CHE GUEVARA, THE MOTORCYCLE DIARIES 12 (Ann Wright trans., 1995). Critical acclaim for Beck's song *Loser* was similarly misguided: "[e]veryone assumed I was the song," Beck told one reporter, "It was a bad case of mistaken identity." Robert Hilburn, *The Freewheelin' Beck,* L.A. TIMES, Feb. 26, 1997, at F1.

123 Octavio Paz commented on his inability to write poetry about too political, too propagandistic subjects. *See* SELDEN RODMAN, TONGUES OF FALLEN ANGELS 158 (1974). Parra Nicanor, in discussing Pablo Neruda, also commented on the "metaphysical impossibility" of writing a "political poem." *Id.* at 83.

124 DEWEY, *supra* note 107, at 104. Dewey also attacked Samuel Johnson's "[p]hilistine's sturdy preference for reproduction of the familiar" with true art. *Id.* at 79.

sider some possible refinements of our notion of creativity that may provide some insight into these questions.

The non-mechanical and non-necessary. One of Robert Nozick's suggestions is that "for a product to be creative it must not only differ from what came before but also stand in no specific obvious relationship to its predecessors."[125] Professor Nozick initially proposes that when a new object is derivable from predecessors by "mechanical application of a clear rule" it stands in a kind of "specific obvious relationship" to that predecessor and it is not creative. This harkens back to Aristotle's observation that the artistic is not determined by nature. Things at T_2 which owe their origin to "necessity" or to "nature," are things which arise from mechanical application of rules to the background situation at T_1. If you know there are so many seeds in a particular type of soil, with particular amounts of water, and sun at T_1, then you can be pretty certain that at T_2 you will have plants which are the "mechanical" result of biological rules. If you are looking through a kaleidoscope at T_1, you know how a kaleidoscope works, and you turn the kaleidoscope, then the new pattern at T_2 is the result of the mechanical, albeit elaborate, application of rules about how kaleidoscopes work and the initial pattern of glass in your kaleidoscope.

This advances us some.[126] The discussion of creativity and originality had concluded that both require a transformative process so something identifiably new is produced—something that did not exist before. To this we can add Nozick's suggestion that no matter how transformed the new result is—no matter how many turns of the kaleidoscope—it will not be creative unless it does *not* come from the application of mechanical rules.

In the discussion of creativity and originality, we also held out the possibility that the new result needed to be non-random in order to be "original." I suggested that a random result would be a result of the background situation—the sand in the sandbox having whatever shape the winds and local fauna last gave it. A non-random result would be a result apparently *not* from the background situation—and this again would fit with Aristotle identifying "nature" or "necessity" as places that art does not come from.

---

125 NOZICK, *supra* note 80, at 36.

126 Many psychological descriptive accounts of creativity could still reduce creativity to a "mechanical" activity—at least for a sufficiently large mind. For example, if creativity is the combination of "remotely associated" ideas—a view put forward by Keith Simonton—then one only needs to mechanically combine more and more remote ideas to get something creative; if it involves "lateral thinking"—the view of Edward deBono—then one needs only keep recombining patterns laterally to get something creative. *See* WEISBERG, *supra* note 79, at 56-67.

The point is that the background situation can be treated as deterministic or random (or with elements of both—as with the kaleidoscope example). Something will be considered "creative" only when it appears to come from neither a purely mechanical process, nor a purely random one. We identify this process that navigates between determinism and randomness—this process that produces the "non-mechanical new"—as something that goes on inside the individual person.[127] But this still may not provide any strong evidence that the process is "expressive" of those individual persons.

Self-restoration. Another possibility is that creativity is, as Graham Greene said, "a form of therapy."[128] This could explain why so many artists describe their work as critical to their psychological well-being—"a physical and spiritual necessity," as Sam Francis said.[129] Nozick has also recognized that:

> The creative work and product come to stands, sometimes unconsciously, for herself or for a missing piece or part, or for a defective one, or for part of a better self. The work is a surrogate for the creator, analog of her, a little voodoo doll to tinker with and transform and remake in something analogous to the way she herself, or a part, needs to be transformed, remade, or healed. . . . Important and needed work on the self is modeled in the process of artistic creation and symbolized there.[130]

But viewing creativity as a therapeutic process, a surrogate reworking of part of the self, does not mean that the work is an "expression" in the sense of an act of communication. Perhaps we could solve this problem by saying that the process of producing intellectual works should be likened to therapy in which one *expresses* problems to a therapist. An artist's work may be her statement to an unknown audience and, like the confessional, there may be some candor-inducing comfort in at least the veneer of audience anonymity. What is said may be frank or opaque, just as one may

---

127 For an example of how a creator can fail to navigate these two extremes, see *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (10th Cir. 1997), in which, on the one hand the plaintiff's command codes were found to be unprotected because they were the result of "random" and "arbitrary" number selection, *id.* at 1373-74, while, on the other hand, the plaintiff's command "values" were found to be "unprotectable . . . because they were dictated by external functionality and compatibility requirements . . . ." *Id.* at 1376.

128 "Art is a form of therapy. Sometimes I wonder how all those who do not write, compose, or paint can escape the madness, the melancholia, the panic-fear inherent in the human situation." CREATIVITY AND MADNESS, supra note 64, at 137 (quoting Graham Greene).

129 In addition to describing his painting as "a physical and spiritual necessity" Francis said "[w]hen I'm disturbed, upset in my life, it all comes up to the surface boiling." Sam Francis Exhibition, Jeu de Paume Museum, Paris (Jan. 1996).

130 NOZICK, supra note 80, at 39.

tell a therapist things directly or obliquely, candidly or metaphorically.

Creativity as generalization. Another aspect of creativity that finds favor in some descriptive accounts is the idea that creativity involves generalization from personal experiences, i.e., creativity as the successful quest for universal truths. Edmund Wilson lavished praise on Edna St. Vincent Millay in just these terms:

> In giving supreme expression to profoundly personal experiences, she was able to identify herself with more general human experiences and stand forth as a spokesman for the human spirit, announcing its predicaments, its vicissitudes, but as a master of human expression, by the splendour of expression itself, putting herself beyond common embarrassments, common oppressions, and panics.[131]

In less majestic terms Garrison Keillor has noted that "experience" only becomes literature when it moves beyond what actually happened to the author, "when it no longer matters to the reader whether the story is true or not."[132]

But describing creativity this way seems to exacerbate our search for personal expression in creativity. The uncovering of universal themes in personal experiences sounds a bit like a spirit—alien, foreign, different—descending on the person: the Muse seizing them and their experiences for the purpose of a universal statement, not a personal statement. Producers of intellectual property—both artists and inventors—often speak this way. However, if their comments were accurate descriptions of these cases, it is possible that the only personality justification to link the intellectual work to the individual would be, what I will call below, a "sourcehood" interest. The more *deux ex machina* arrival of some universal insight, the less that process of intellectual creation seems to be a form of personal expression.

Synthesis of the Old and the New. Each of these options—self-restoration, generalization, and non-mechanical newness—offers insights on creativity, but does not much advance our understanding of how the creative process could be fundamentally an expressive process. We are left with only a few options. One option is to

---

131 EDMUND WILSON, THE PORTABLE EDMUND WILSON 72 (1983).

132 Garrison Keillor, *The Poetry Judge*, ATLANTIC MONTHLY, Feb. 1996, at 93. In comparing Shakespeare's characters to those of the French dramatist Pierre Corneille, one author commented that "Shakespeare's Romans are Romans, while Corneille's characters are Normans," noting that "Corneille was unable to detach his own personality from the characters he created. He endowed them with his own attitudes. Shakespeare had the genius of dissociating the characters he was describing from his own personality." Leon R. Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 473 (1952).

admit that we are using "personal expression" as a bridge concept between an act of purely reflecting personal experiences and the production of the non-mechanical new. To the extent that an object appears to be anything more than a direct reflection of personal history, we label the "more" as personal expression and, therefore, creativity.

This still leaves creativity as an unknown, unknowable phenomena. It is a black box—or more properly, a set of black boxes, one inside each of us. Ignorant of their provenance and with no knowledge of their content, we tend to assume that all these black boxes have the same innards. This assumption is strengthened by the common vocabulary used by creators to speak about the process; a songwriter says her experiences "go through her imaginary brain" and "come out in an imaginary place";[133] a painter says his works come from a "state of hallucination"; and a fiction writer attributes her work to "all sorts of vision, dream, illusion, hallucination, obsession, and memory."[134] But the similarity of these descriptions may speak more to the poverty of our language than the actual sameness of the phenomena. When we say some creation is a "personal expression," what we mean is that we have located this sort of unknown phenomenon in one particular person—their little black box. "Expression," then, is just the *externalization* of something from the black box: the processes going on in a black hole *expressed* in effects on the surrounding space and time.

One of the century's most influential and rich accounts of the artistic process was John Dewey's William James lectures subsequently published as *Art as Experience.*[135] Although Dewey was dealing mainly with artistic production, he believed that much about artistic and inventive production was the same. Dewey's lectures explore the various ways in which creativity is the interaction of old personal experiences and the new environment. Some of his com-

---

133 [My characters] are made from the clay of people I know, but they go through my imaginary brain, they come out in an imaginary place. I never write about people really that I know. I can't do it. I can't write about myself. When I try to write about myself and something that really happened, I'm a really poor writer. I write like a twelve year old's diary. So I make it into a pretend palace where I can work it out.

Videotape: Conversation on Creativity at Santa Monica College (Rickie Lee Jones 1995) (on file with the Public Relations Office, Santa Monica College).

134 "[All] sorts of vision, dream, illusion, hallucination, obsession, and that most wonderful interior vision which is memory, have all gone to make up my stories . . . ." WELTY, *supra* note 95, at 89.

135 DEWEY, *supra* note 107.

ments could be taken as sympathetic of the self-restorative[136] or generalization views of creativity.[137] Others of his comments seem to endorse the view that creativity is a nexus of old and new experiences if only because, as Hudson and Jacot argue, our old experiences shape our personal interests which control our creative efforts:

> Because interest is the dynamic force in the selection and assemblage of materials, products of minds are marked by individuality, just as products of mechanism are marked by uniformity. No amount of technical skill and craftsmanship can take the place of vital interest; "inspiration" without it is fleeting and futile. A trivial and badly ordered mind accomplishes things like unto itself in art as elsewhere, because it lacks the push and the centralizing energy of interest.[138]

Thus, each of our respective creative agendas bears, through our interests, the imprint of our respective personal experiences. This can apply to both arts and sciences, but Dewey has a stronger view of creativity as synthesis in which both perception and imagination are the synthesis of old experiences stored in memory and new circumstances being experienced by the individual:

> [an] experience becomes conscious, a matter of perception, only when meanings enter it that are derived from prior experiences. Imagination is the only gateway through which these meanings can find their way into a present interaction; or rather . . . the conscious adjustment of the new and the old *is* imagination.[139]

Note that Dewey's view seems to be that consciousness itself, not just imagination, requires this synthesis: "experience is rendered conscious by means of that fusion of old meanings and new situations that transfigures both (a transformation that defines imagination)," he writes.[140] What makes for consciousness also seems to make for expression:

---

[136] For example:

> From the first manifestation by a child of an impulse to draw up to the creations of a Rembrandt, the self is created in the creation of objects, a creation that demands active adaptation to external materials, including a modification of the self so as to utilize and thereby overcome external necessities by incorporating them in an individual vision and expression.

Id. at 282.

[137] "The act is expressive only as there is in it a union of something stored from past experiences, *something therefore generalized*, with present conditions." *Id.* at 71.

[138] *Id.* at 266.

[139] *Id.* at 272.

[140] *Id.* at 275.

> The junction of the new and the old is not a mere composition of forces, but is a recreation in which the present impulsion gets form and solidity while the old, the "stored," material is literally revived, given new life and soul through having to meet the new situation. It is this double change that converts an activity into an act of expression. Things in the environment that would otherwise be mere smooth channels or else blind obstructions become means, media. At the same time, things retained from the past experience that would grow stale from routine or inert from lack of use, become coefficients in new adventures and put on a rainment of fresh meaning. Here are all the elements needed to define expression.[141]

Perhaps because he identifies creativity with consciousness, Dewey is able to dismiss the "eureka" theory—some ideas *seem* to hit us like lightning bolts only because the synthesis occurs below the "threshold of consciousness."[142] Dewey, it seems, would not need the sourcehood justification discussed below. His view is that both the subjects our minds engage and what we do with those subjects are the results of personal experience being reworked in the present tense. Because each of us is a unique experiential time line, whatever we produce constitutes personal expression.

This allows us to return to an interesting question about the relationship between creativity and the "non-mechanical." Robert Nozick has suggested that even if our neuro-scientists came to have a very mechanical, biochemical explanation of how a Beethoven or a Chopin generated musical ideas, we still might view it as a "creative" process: "[f]or when it is a person's brain that generates ideas, however 'mechanical' the explanation of how it does so turns out to be, we see those ideas as expressive and revelatory of something about the person."[143] Let us merge this thought with Dewey's view and the kaleidoscope metaphor used above. As kaleidoscopes share the same kind, color, and roughly the same size and shape of glass bits, we share many of the same kind and roughly the same details of human experiences. Each of us is a unique order of experiences and each new creation, like the results of a turn of the kaleidoscope, might somehow be predictable

---

141 *Id.* at 60-61.

142 Suddenness of emergence belongs to appearance of material above the threshold of consciousness, not to its generation. Could we trace any such manifestation to its roots and follow it through its history, we should find at the beginning an emotion comparatively gross and undefined. We should find that it assumed definite shape only as it worked itself through a series of changes in imagined material.
Id. at 75.

143 NOZICK, *supra* note 80, at 38.

and mechanical while staying beautiful and unique.[144]

C. *The Explanatory Power of the Author Construct Versus the Notion of Creativity*

The deconstructionist might say that the alloy of personal expression into creativity only reinforces the power of the "romantic author." But instead of seeing personal expression as manifesting the "romantic author," it is better to see the melding of personal expression into "creativity" as an egalitarian society's effort to move the "romantic author" off center stage.

Intellectual property protection in the western countries has now been extended widely, to what some might view as "the meanest levels of creative activity,"[145] and others as the subtlest forms of creative activity consistent with a workable system of copyright enforcement. It has been pointed out that this movement to a lower common denominator of creativity served the needs of capitalists investing in idea industries.[146] But it is also true that extending legal protection to the meanest levels of creative activity has been in keeping with the rise of liberalism and a society of autonomous, equal citizens. However much we love fingerpainting, we know that not all of our children will grow up to be artistic geniuses. A highly stratified society might accept that certain rights would pertain only to "romantic geniuses," a kind of "idea-ed gentry." But that is not our society. The author of a bland script about a love triangle has just as much right that it not be stolen by a major studio as does the author of a radically innovative who-done-it. That our democratic and egalitarian traditions have affected our conception of intellectual progress was not lost on Luigi Barzini, one of the twentieth century's most lucid observers. As Barzini wrote,

---

144 Despite that beauty, would it still be creative and personally expressive, if we could predict the results of that kaleidoscope turn? Nozick seems to believe so:

> Although we—on the outside—may have some mechanical explanation for how the creator generates her ideas, is it still "expression" if the generation of ideas feels—on the inside—like a mechanical process. Is it possible that Beethoven will feel the music is self-expressive or self-relevatory only if it does not feel mechanical? A mechanical process would be, after all, antithetical to a transformative process, a process of growth."

Id.

145 Jaszi, *Theory of Copyright*, *supra* note 29, at 483. Professor Peter Jaszi is one of those authors who both sees the "author" construct as powerful, while recognizing its modern dilution.

146 The deconstructionists interested in expurgating the "author" from the case law do not mention the large number of cases where the "author" already seems absent, but copyright is acknowledged. *See, e.g.*, Ansehl v. Puritan Pharm. Co., 61 F.2d 131 (8th Cir. 1932) (holding arrangement and elements in advertisement of cosmetics are to be protected without attributing advertisement to one author).

> Time, Americans thought . . . was a gentleman, did not cheat, and would eventually take care of everything; somewhere surely there always is a still unknown young man (or a team of them) making revolutionary inventions, discovering new miracle drugs, formulating a new scientific law, devising a machine, working out the answers. He did not always have to be a genius, like Leonardo da Vinci. More often he was just "one of us."
>
> Incidentally, this seems to be another constant trait. For some reason, Americans like to think that Great Men are like everybody else . . . . Deep emotions or high thoughts often are expressed in the form of weak jokes. The press always reports these quotations eagerly, to confirm the myth that "all men are more or less the same" and that practically anybody could write the Faulkner opus, discover the structure of DNA, or write a great symphony, if only he had the proper equipment and took the time.[147]

The sentiment Barzini observed about our culture has been picked up in our legal system. Copyright and patent law have large chunks of case law showing the rejection of "genius" as the foundation for intellectual property protection. In the realm of copyright, the case law on advertising has emphasized, over and over, that "creative genius"[148] is not necessary for copyright protection and that expressive elements are protectable even if they are "characterized as an advertising gimmick or 'Madison Avenue' kitsch."[149] In patent law there has been—as Barzini would have guessed—the express repudiation of the "spark of genius" requirement. All of this should make us doubtful of the "author" construct.

Yet to the deconstructionist, the individual "romantic author" is both the explanation for and the problem with recent decisions by American courts. Aoki argues, for example, that by applying a creativity test which denied copyright protection to the producers of the white pages, the *Feist* Court, "discounted the collaborative and collective nature of fact-gathering reflected in the assembly and composition of a white pages directory in favor of a particular vision of clearly individuated authorship and originality."[150] Jaszi

---

147 LUIGI BARZINI, MEMORIES OF MISTRESSES: REFLECTIONS FROM A LIFE 136-37 (1986) (an essay on Americans called *Loners in the World*).

148 Jacobs v. Robitaille, 406 F. Supp. 1145, 1149 (D.N.H. 1976).

149 Chuck Blore & Don Richman, Inc. v. 20/20 Adver., Inc., 674 F. Supp. 671, 677 n.5 (D. Minn. 1987).

150 Aoki, *Adrift, supra* note 29, at 812. Aoki also sees the *Feist* result implicitly reasoning that "because only clearly individuated authors can possess sufficient creative originality to justify copyright protection, the absence of such an authorial subject foreclosed copyright protection for the white pages." *Id.*

similarly sees the Second Circuit's *Rogers v. Koons*[151] decision as embodying copyright's continued preference for the single, creative individual author over alternative, collaborative efforts to produce art. In *Rogers*, photographer Art Rogers brought suit against sculptor Jeff Koons for literal copying of one of Koons' postcards, *Puppies*, into a three dimensional sculpture, *String of Puppies*. Koons' artistic approach was to produce sculptural collages in which he would juxtapose existing cultural images against one another. Having chosen the images, arrangement, and materials, Koons would employ artisans in workshops to do the actual fabrication and crafting of the three dimensional sculpture. In *Rogers*, the Second Circuit found that the Koons' artwork infringed Rogers' pre-existing copyright in his photographs. Jaszi views the *Rogers* case as showing the court's preference for the solo artist versus the collaborative fabrication of art by artisans in a workshop.[152]

These interpretations of *Feist* and *Rogers* unnecessarily conflate the notions of "creativity" and "individuated authorship." In *Feist*, two *organizations* (collaborative efforts at production) squared off against each another with no creativity to be seen. The Court said the plaintiff lost because there was no creativity in its work. Not only did the case lack a creative "individuated author," but it also lacked a creative collaborative group. *Feist's* emphasis on creativity means that the 150 Harvard students who set out each summer to write *Let's Go: Europe* know that their compendium of facts will have a degree of copyright protection that the *Feist* phone books do not.[153]

The *Rogers* case is more interesting because the individual artist—photographer Rogers—does triumph over the sculpture resulting from collaborative work under artist Koons' direction. But it is just as easy to see the *Rogers* court as being *solicitous* of collaborative efforts instead of being biased towards the individual artist. Part of Jeff Koons' negative ethos with the court may have been his failure to give artistic credit to the artisans who fabricated his sculptures. The court's dissatisfaction with Koons' hands-off attitude to-

---

151 960 F.2d 301 (2d Cir. 1992).

152 Jaszi, *Author Effect*, *supra* note 29, at 308.

153 Jaszi may point out, in contrast to *Feist*, the Second Circuit's subsequent decision in *Key Publications v. Chinatown Today Publishing Enterprises*, 945 F.2d 509 (2d Cir. 1991), in which copyright was recognized for a Chinese-American Yellow Pages for New York City when the Court attributed the yellow pages to Key's president, Lynn Wang, and repeatedly referred to her personal role in assembling the yellow pages. *Id.* at 513-14. But again *Feist* and *Key* can also be distinguished on the different amounts of creativity discussed by the respective opinions. And the *Key* court, while acknowledging copyright, was not so solicitous of Ms. Wang, the single author, since there was a finding that the defendant's phone book had not infringed the creative elements of Ms. Wang's phone book.

ward "his" art[154] may have been dissatisfaction with Koons' failure to give artistic credit to the collaborative group.[155]

Indeed, the evidence mustered by the deconstructionists to show the importance of "author-reasoning" can just as well be interpreted as courts searching for means to make workable a copyright system that has stretched the "creativity" tent far beyond the "romantic author." A good example of this is the separate copyrightability requirement for joint authors. In the 1991 *Childress v. Taylor*[156] case, the Second Circuit squarely confronted this problem. One issue in the case was whether, as some courts and the Register of Copyright had reasoned, each author in a joint work would have to make a *separately* copyrightable *contribution* to the work. What was refreshing about Judge Newman's opinion is that it correctly recognized that this requirement makes no sense, either as an element of the instrumental purpose of the Copyright Clause or the meaning of "author."[157] Nonetheless, Judge Newman's opinion embraced the separate copyrightability requirement on the policy grounds that it may "serve to prevent some spurious claims by those who might otherwise try to share the fruits of a sole author."[158] While one may disagree with this outcome, it is understandable as the result of a court explicitly trying to protect the legitimate claims of both sole authors and co-authors.[159]

The same issue—practical enforcement considerations—has arisen in cases considering when an arrangement of a song is a separate "derivative" work from the underlying song. While these courts have not stated the issues with the candor of the *Childress* panel, the reasoning of these derivative song cases is so unusual—and sounds so much more like patent than copyright doctrine—that it is apparent some special considerations must be at work.

In the 1994 case *Woods v. Bourne Co.*,[160] a New York district

---

154 "[Koons] gave the artisans one of Rogers' notecards and told them to copy it." *Rogers*, 960 F.2d at 305.

155 Another irony resulting from interpreting *Rogers* as a case about the classic artist as opposed to a new form of artistic endeavor is that Rogers was a photographer, one of the last kinds of artist to be accepted by the courts (and the artistic community) as "art" while Koons was a sculptor or, at least, a "producer" of sculptures—one of the classic art forms.

156 945 F.2d 500 (2d Cir. 1991).

157 If the focus is solely on the objective of copyright law to encourage the production of creative works, it is difficult to see why the contributions of all joint authors need be copyrightable . . . . The "author" of an uncopyrightable idea is nonetheless its author even though, for entirely valid reasons, the law denies him a copyright . . . .

Id. at 506.

158 *Id.* at 507.

159 *Id.* at 504.

160 841 F. Supp. 118 (S.D.N.Y. 1994), *rev'd in part*, 60 F.3d 978 (2d Cir. 1995).

court faced a copyright renewal situation bringing claims of derivative works to a head. In *Woods*, the heirs of the composer of *When the Red, Red Robin Comes Bob-Bob-Bobbin Along* were found to have the copyright to the song during its renewal period. But the song's original publisher, Bourne, contended that *every* version of the song it had published was a "derivative work" for which Bourne still had the copyright. Bourne reasoned that the composer had given Bourne only a "lead sheet" with nothing more than the melodic line, so that all the "musical arrangements" Bourne had published were separately copyrighted derivative works. Bourne relied on 17 U.S.C. §101 which states that derivative works include musical arrangements.

The court found it incredible that Bourne claimed that the first published piano and voice version was a "derivative work," if only because the composer "played the song for [the publisher] when he brought it into the firm."[161] But even assuming the publisher's people added something to the melodic line, the court held that this was not enough: "[i]n order to qualify as a musically 'derivative work,' there must be present more than mere cocktail pianist variations of the piece that are standard fare in the music trade by any competent musician."[162] The *Woods* court relied on earlier cases similarly finding that a derivative work could not arise from "the addition of certain inconsequential melodic and harmonic embellishments such as are frequently improvised by any competent musician,"[163] and that: "[i]n music it may be said that anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of copyright."[164] This language would be disconcerting to almost any other class of beneficiaries of copyright law. If we substituted "screenwriter" or "painter" in place of "musician," we would have opinions denying copyrights to works that are the "standard fare in the trade by any competent screenwriter," or "anything a fairly good painter c[ould] make." These phrases sound much more like the patent law standard for novelty than the post-*Bleistein* standard for copyright protection.[165]

---

161 *Id.* at 121.

162 *Id.*

163 McIntyre v. Double-A Music Corp., 166 F. Supp. 681 (D. Cal. 1958).

164 Cooper v. James, M.D., 213 F. 871, 872 (N.D. Ga. 1914).

165 In fact, the full quotation from the *Cooper v. James* case—a pre-*Bleistein* case—directly connected patents and copyrights in music: "[i]n patents, we say that any improvement which a good mechanic could make is not the subject of a patent, so in music it may be said that anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of a copyright." *Id.* at 872. But as the *Alfred Bell* court noted, "[A] multitude of books rest safely under copyright which show only ordinary skill

A deconstructionist who read these cases might see them as an ugly resurgence of the "romantic author" such that "artists who work from personal experience, in proximity to the natural raw materials of the creative process, are given a legal preference over those who merely rework prior art."[166] But the opposite is just as likely: the fact that this patentesque doctrine has existed for most of the century, when the concept of author was steadily becoming more egalitarian, suggests that the force giving discipline to the doctrine is not the "romantic author" at all.

Even if the "author" does not explain these cases, it still might explain the case law better than creativity. What is the difference between these two interpretations—one seeing the courts driven by the "author," and one seeing the courts moved by "creativity"? That may turn, in part, on our unspoken accounts of what goes on in a judge's mind. The deconstructionists' image might be a judge writing a copyright opinion while above his head there is a balloon-cloud with Shakespeare scrivening with a quill pen. Perhaps there is no such vivid image for the judge moved by "creativity." Yet a sentiment may serve instead. The judge whose opinions are driven by creativity calls up her own experiences. Indeed, the bench is filled with people, who in their younger days (if not now) dabbled in writing poetry, essays, and short stories, did some high school or college acting, or worked as a research assistant to a biology, philosophy, or law professor. Perhaps the judge mulling about creativity conjures up and relies upon feelings of that *process.*

Is this feeling of *process* any different than the judge seeing himself as an *author*? I believe it is. First, the decision-makers' creative experiences may come from collaborative efforts, particularly those in which he was a junior partner (research assistant, assistant editor of a student publication, acting, or lighting director for a play). This means that the judge's understanding of the creative process need not be encased in the "prerogatives of the autonomous individual"[167] which the deconstructionists perceive to be at the heart of the "author" construct. Second, most of us who dabbled in high school poetry and college drama do not have any preconceptions of our own "genius" in these fields. Let us assume the same is true with judges: if they are influenced by their own understanding of the creative process, it need not be encased in

---

and diligence in their preparation . . . ." Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) (quoting Henderson v. Tompkins, C.C., 60 F. 758, 764 (1st Cir. 1894)).

166 Jaszi, *Theory of Copyright, supra* note 29, at 495.

167 *Id.* at 502.

the vision of "genius" which again seems central to the deconstructionists' author construct.

In the end, the truth is probably some amalgam of these visions. In an excellent discussion, Boyle sees the author construct as sharing the stage with "originality": "[t]ogether, the *figure* of the romantic author, the *theme* of originality, and the *conceptual distinction* between idea and expression seem to offer one of the most convincing mediations of the tensions described earlier [in access to forms of information]."[168] Similarly, Professor Jessica Litman has written about the nurturing of "authorship" and the "enterprise of authorship" instead of reifying a process into the "author."[169] Focusing on the activity of "authoring" and insisting that it be viewed as a process of "translation and recombination"[170] moves the discourse about the "author" closer to a discourse about creativity. In the end, the reified figure of the "romantic author" is not much needed. If we had to choose between them, we would be better off—for both a descriptive account of the case law and a normative prescription for the legal system—to view courts as relying on a notion of the process of creativity.

D. *The Moral Shop Right*

One of the rare, but disconcerting aspects of our intellectual property law is that occasionally a creator can suffer some legal consequences because her recent creation is found to impinge upon the propertied region of one of her prior creations. These legal consequences could be either the inability to assert some intellectual property right[171] or, more commonly, having her own freedom limited by property rights now held by someone else.

Perhaps the most important example of this problem is the 1914 case of *Gross, et al. v. Seligman*,[172] in which the Second Circuit found that a photographer's new work had infringed a prior photograph he had taken. Seligman had taken a photograph of a young woman which he entitled *Grace of Youth*. He transferred his rights in that image to another party. Then, two years later, Selig-

168 Boyle, *supra* note 29, at 1510.
169 Litman, *supra* note 29, at 969, 991.
170 *Id.* at 966.
171 In the realm of patent, it is possible that a creator could suffer adverse consequences while holding all rights to both the prior and more recent creation. Imagine that Dr. Dale sues Hoth Corporation for infringing his 1992 patent; Hoth Corporation defends on the grounds that Dale's 1992 patent is preempted by a 1988 patent that Dr. Dale also holds. The 1992 patent may be found invalid for that reason. Although Dr. Dale may succeed in asserting the 1988 patent against Hoth Corporation, it may turn out that only claims in the 1992 patent—now invalid—could be asserted against Hoth.
172 212 F.930 (2d Cir. 1914).

man employed the same model and produced a new photograph. He was sued by the holder of the copyright on the *Grace of Youth* photograph. The court found that "the many close identities of pose, light, and shade, etc. indicate very strongly that the first picture was used to produce the second."[173] In finding infringement, the *Gross* court concluded: "[t]he one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original."[174]

This choice of language is interesting. Note that the court did not say that there was *no* exercise of artistic talent, but that artistic talent had been exercised for the purpose of copying. This is the sort of comment one might apply to a talented forger copying a Manet: artistic talent given over to being a human Xerox machine. The *artist*, a person who creates forms, had lowered himself to an *artisan*, a person who copies forms.[175]

While the *Seligman* case remains an oddity, the situation could arise again. In the *Koons* cases (which we have considered and will consider again) Second Circuit courts held that artist Jeff Koons could not use copyrighted images in his sculptures. In one of those cases, *United Features Syndicate, Inc. v. Koons*,[176] the copyright in the "Odie" character from the *Garfield* cartoon was owned by United Features Syndicate ("UFS"). In finding that Koons infringed the "Odie" image, the court inadvertently pointed to a *Seligman*-like problem:

> [T]he Court notes that the existence of even three of these sculptures would prejudice UFS's ability to exploit this potential market. For example, the creator of the "Garfield" comic strip, James Davis, is an accomplished artist and may, at some point, decide to create artistic sculptures of characters for commercial sale. . . . Moreover to the extent that UFS would sell the rights to produce such sculptures to another artist, the market for such sculptures has been reduced by the unauthorized use of the "Odie" character.[177]

Reading this passage, one must ask, what if James Davis wanted to do sculptures of the *Garfield* characters and UFS objected (perhaps, because it had already sold the right to do such sculptures to

---

[173] *Id.* at 931.
[174] *Id.*
[175] *See, e.g.*, MALRAUX, *supra* note 66, at 193 (asking whether particular pieces of African art are done by artists—intentionally changing the form—or artisans, copying the forms).
[176] 817 F. Supp. 370 (S.D.N.Y. 1993).
[177] *Id.* at 382.

"another artist")? What if, later in life, Davis becomes cynical of the world and he can find no better way to express "the cynical and empty nature of society" than by using his own characters in devastating sculptures? If UFS tried to stop him, whose side would the law take?

The *Gross* opinion is probably wrong on a factual analysis: it appears that Seligman's new photograph was visibly different from *Grace of Youth.* The Court recognized differences in the backgrounds of the photographs, the props, and the emotions visible on the model's face[178]—elements of the composition clearly under Seligman's control.[179]

But the *Gross* decision is more troubling for its analytic framework. If Seligman had been copying a Manet, perhaps the *Gross* analysis would be right. In copying a Manet, Seligman would have been engaging in an activity apparently devoid of his own personality; he would be an "artisan" instead of an artist. But that is the critical difference. Even if Seligman's second photograph were absolutely indistinguishable from his prior *Grace of Youth,* he could have been trying to *recapture* and *reconvey* his own personal expression; just as James Davis might want to re-express himself through his own idiom—the *Garfield* characters.

Consider some variations on this and the *Gross* situation. Imagine that Seligman had sold the rights to *Grace of Youth,* but then had decided to do a coffee table book of photographs of young women from different walks of life in the same graceful pose. Would these new photographs infringe the *Grace of Youth* copyright? This problem about a collection of photos leads us to the question of an artist's personal "style" and a curious, but little noted problem in the relationship of creativity, originality, and personal expression. There is no question that we place great value on creators having individual "styles," what is, for an author, a "marked writing characteristically the expression of a person's 'mind' or 'psyche.'" Faulkner and Hemingway wrote in such distinctive styles that there are now contests to mimic them. For visual

---

178 From some reports, it appears that the two photographs were not that similar. The *Grace of Youth* was a model in the nude. Two years later, the same model was used for *Cherry Ripe,* probably "in the identical pose" except that "the model wore a smile and held a cherry stem between her teeth . . . while in the first she was posed with her face in repose." Silvers v. Russell, 113 F. Supp. 119, 123-24 (S.D. Cal. 1953).

179 The Court also commented that "the young woman was two years older when the later photograph was taken, and some slight changes in the contours of her figure were discoverable." *Gross,* 212 F. at 931. In context, it sounds like the court does not consider this a meaningful change since the photographer had no control over the model's aging; on the other hand, Seligman did choose this same model while aware of her aging.

or auditory arts, there are those qualities, some gross, some subtle, that make a work identifiably Manet or Monet, Mozart or Mahler.

But that is the rub. If Miro's newest painting manifests so much "creativity," why is it so identifiably similar to his old paintings? If each Mozart concerto is so creative, how can a person who has heard several Mozart concerti recognize a concerto he has never heard before as Mozart? The very existence of a Miro or Mozart "style" speaks of collective sameness to a group of works.[180] It is sometimes asked jokingly whether Vivaldi wrote 400 concerti or the same concerto 400 times. Surely this means that subsequent works by the same author were not as creative as they could have been. This point has not been lost on artists and critics. "A painter's worst enemy is style," Picasso once said. He attacked artists conscious of their personal style who "make themselves a little cake mold; then they make cakes."[181] His friend Malraux was more blunt: "Continuity of style is hell," he said.[182] Roland Barthes traces one route of a writer's development in which style eradicates personal expression premised on freedom:

> [M]echanical habits are developed in the very place where freedom existed, a network of set forms hem in more and more the pristine freshness of discourse, a mode of writing appears afresh in lieu of an indefinite language. The writer taking his place as a "classic," becomes the slavish imitator of his original creation, society demotes his writing to a mere manner, and returns him a prisoner of his own formal myths.[183]

Along with Picasso and Barthes, we could go so far as to say that there may be a negative correlation between (1) the degree to which we can identify a work as manifesting a particular person's identity; and (2) creativity in its purest, most extreme sense of bringing something into existence which is different from anything that has existed before. If we can confidently say that *Escalier de la Nuit* is *clearly* the work of Miro, then that judgment is possible only because *Escalier de la Nuit* looks like other works by Miro. It is less "original" compared to these works than to all art by people other

---

180 *See, e.g.*, LEON PLANTINGA, ROMANTIC MUSIC 362-89 (1984) (characterizing the individual styles of several Russian composers).

181 After all, you can only work against something. Even if it's yourself. That's very important. Most painters make themselves a little cake mold; then they make cakes. Always the same cakes. And they're very pleased with themselves. A painter should never do what people expect of him. A painter's worst enemy is style.

MALRAUX, *supra* note 66, at 140.

182 *Id.* at 18.

183 BARTHES, *supra* note 118, at 78.

than Miro.[184]

To think of it another way, would *Escalier de la Nuit* be *more* innovative if no other works of Miro existed? This is a peculiar question, so peculiar that no answer is obvious. If only *one* Miro work existed in all the world, it would not have the *economic* value that it does as part of the oeuvre of Miro. It might be ignored, or kept as a trinket by someone who thought it sad that there was no chance to see what else this artist might have produced. But would it be perceived as equally or *more* creative? An affirmative answer is suggested by cases where an artist changes style radically. Dali's *The Great Masturbator*[185] and Mondrian's *Still Life with Ginger Jar* paintings[186] were great breaks with their works up to that time; if they had stopped at that point we would have still considered these final works very creative. On the other hand, we might get a negative answer from the case of Stravinsky. It seems that appreciation of Stravinsky's music suffered because he drew from such a wide range of idioms from the whole history of music. One critic wrote that his "incredible diversity of stylistic procedures . . . amount[ed] to an absence of style," but more importantly it appears that this lack of an identifiable style pervading his music fueled detractors to accuse him of "a lack of originality, a failure of invention."[187]

When a work of art is judged "creative," it is usually judged so against two benchmarks to which we apply different standards: (1) the rest of the world except for other works from the same source; and (2) other works from the same source. It is not that Miro's other works don't count to judge *Escalier de la Nuit*; they just count differently. If nothing else, the difference expected between same-source works is smaller. When a painter has an exhibition of new works, the audience judges the individual works against one an-

184 The only possibility—a kind of maximum creativity possibility—was attributed to Picasso's works by Malraux: "Those particular works resembled one another by the very fact of their not bearing any resemblance to the others." MALRAUX, *supra* note 66, at 32. Could this be possible? For a bunch of one artist's works to "resemble" one another simply by being equally distant from works that had existed before, while each of those artist's works was similarly distant from the artist's other works? *See also* Weisberg, supra *note* 79 at 202-208 (discussing how even a powerfully new Picasso painting like *Guernica* had clear antecedents in his prior work, including a lithograph called *Minotauromachy*).

185 MEREDITH ETHERINGTON-SMITH, THE PERSISTENCE OF MEMORY: A BIOGRAPHY OF DALI 14-15 (1992).

186 Mondrian's move to Paris and his two paintings *Still Life with Ginger Jar I* (1911-12) and *Still Life with Ginger Jar II* (1912) marked his embracing of cubism—which would evolve over time into what is popularly known now as the "Mondrian" style. *Still Life with Ginger Jar II* is, to the untrained eye, more purely cubist, but both paintings are regarded as a break with his work up until that time. Indeed, the artist may have sensed a new period in his life, as these are the first paintings signed "Mondrian" instead of "Mondriaan." *See generally* JOHN MILNER, MONDRIAN 90-92 (1992).

187 MILAN KUNDERA, TESTAMENTS BETRAYED 76 (1995).

other ("I prefer this one in the corner") and the new collections against prior works ("I prefer his use of color now to what he was doing in the 1980s.") Works may be condemned for being too similar to the artist's prior achievements, particularly in a field like architecture where the specific needs of a particular commission offer strong reasons to vary from prior work.[188] We enjoy making such judgments. There is no question that we enjoy "placing" a work, not just among all novels or buildings or symphonies, but among those of the particular creator.[189]

Of course, few souls are as inventive as a Picasso or a Stravinsky.[190] Most of us, if we create at all, find a few idioms, a few "signatures" in which we are both comfortable and successful. Thus, Richard Meier's architecture is distinguishable by its use of white enamel panels and similar materials; I.M. Pei's work by its emphasis on triangular forms and particular combinations of concrete, glass, and tubular steel. In her characteristic modesty, Eudora Welty commented: "I had been writing a number of stories, more or less one after the other, before it belatedly dawned on me that some of the characters in one story were, and had been all the time, the same characters who had already appeared in another story."[191] Academics, it is often said, hit upon a few ideas and themes in their early career which they spend subsequent decades spinning out and elaborating.

Conscious of these limitations, many artists take up intentional self-reference. Self-reference may take many forms. New works of art may consciously and obviously refer to prior works. David

---

188 LAWRENCE J. VALE, POWER, ARCHITECTURE, AND NATIONAL IDENTITY 244-47 (1992) (criticizing Louis Kahn's Parliament Building in Bangladesh as "curiously similar" to his Exeter Library design, particularly considering the different needs at the two sites).

189 This understanding, however, might not be focused on the *creativity* of the latest piece; it might be focused on understanding the artist or the artist's intent. As Dewey writes,

> [T]he discrimination of a critic has to be assisted by a knowledge of the development of an artist, as that is manifested in the succession of his works. Only rarely can an artist be criticized by a single specimen of his activity. The inability is not merely because Homer sometimes nods, but because understanding of the logic of the development of an artist is necessary to discrimination of his intent in any single work.

DEWEY, *supra* note 107, at 312.

190 Unless one takes a strong version of the "post-modern" view of personality, i.e., "[i]f we bargain away one personality there is nothing to stop us from generating a new one." Malkan, *supra* note 26, at 783.

191 WELTY, *supra* note 95, at 98. Welty's comment is a real-life example of the humorous plot in Vargas Llosa's *Aunt Julia and the Scriptwriter* in which the radio soap opera scriptwriter is writing several plotlines simultaneously, but the hero is suspiciously similar in all of them and, over time (and to the desperation of an enraptured radio audience), characters literally start to bleed from one soap opera into other soap operas. MARIO VARGAS LLOSA, LA TÍA JULIA Y EL ESCRIBIDOR (5th ed. 1983).

Bowie's *Ashes to Ashes* explicitly makes use of the "Major Tom" character created in his 1972 *Space Oddity.* When a middle-aged John Travolta hesitatingly danced the jitterbug in the 1994 film *Pulp Fiction,* it could not help but be a playful reference to his more youthful role in *Saturday Night Fever.* An artist's performance of her established repertoire may intentionally poke fun or criticize a former "self" either explicitly[192] or with accentuated mannerisms.[193]

The point of all this is that artistic style could be sharply curtailed if an infringing copy was one "which comes so near the original as to give every person seeing it the idea created by the original."[194] It is precisely the fact that works by the same artist "come near" one another which creates the familial sameness of an artist's "style." This suggests that we might want the law to use a double standard, by which the creator of a copyrighted work is permitted to use much more of the "look and feel" of the copyrighted work than other non-owners.

Let us call this idea a "moral shop right" because (1) it has a similarity to the "moral rights" granted artists under continental legal systems; and (2) it is akin to the "shop right" which permits an employer to use an invention invented on his premises even though the employee has title to the invention and has all other rights to assign, license, or otherwise exploit the invention. At the onset, be clear that the use of "rights" talk does not mean I am advocating the establishment of a new "right" in the strong Constitutional or civil rights sense. What is suggested here is an equitable doctrine to fortify the position of intellectual producers; this doctrine—if it was ultimately found desirable—could be developed by legislative history, by courts explicitly, or by courts implicitly. The reasons for this "moral shop right" are twofold. First, it would protect personhood interests of the individual creator. Second, it

---

192 For example, in her 1987 concerts at Carnegie Hall, Liza Minelli sang the 1966 Kander and Ebb classic *Cabaret,* which she originally sang for the film of the same name. In the original version, a vivacious Sally Bowles refers to her prostitute-roommate dying of "too much pills and liquor." In response to the neighbors coming to "snicker," Sally Bowles sings "she was the happiest corpse I had ever seen . . . . and as for me, I made my mind up back in Chelsea, and when I go, I'm going like Elsie." JOHN KANDER & FRED EBB, Cabaret, on Cabaret (1972). In the Carnegie Hall recordings of a soberer late 1980's, Minelli changes the words to "And as for me, I made my mind up back in Chelsea, and when I go, I'm *not* going like Elsie." JOHN KANDER & FRED EBB, Cabaret, on Liza Minnelli at Carnegie Hall (Telarc Digital 1987).

193 Stephen Holden, *Self-Parody as a Part of the Pop Singer's Art,* N.Y. TIMES, Oct. 22, 1989, at B32 (In a positive review of a Bob Dylan concert, Holden wrote "[h]ow could a star, who is now 48, carry off the role of the hippest, most arrogant adolescent ever born, I wondered? It had to be partly at least a self-parody. Not even Christopher Guest's savage Dylan caricatures . . . were as exaggerated as the mannerisms Mr. Dylan flaunted at the [concert].").

194 West v. Francis, 106 Eng. Rep. 1361 (K.B. 1822).

probably would serve the public's interests. Assuming most producers of intellectual works are not as innovative and ground-breaking as Picasso, a moral right would ensure that these people could "exhaust" their own idiom.

It is worth noting that this idea may already be implicit in the reasoning of a few cases. For example, in the 1954 case *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*,[195] Warner Brothers, as the owner of the rights to Dashiell Hammett's *Maltese Falcon*, tried to stop Hammett's use of "Sam Spade" and other characters from *Maltese Falcon* in subsequent radio broadcasts called *The Adventures of Sam Spade*. The Ninth Circuit's opinion was blurry on several issues, but we are concerned more with the spirit of the case than the precise reasoning.

The court looked at the contract between Hammett and Warner, noting that it transferred rights to the *Maltese Falcon* story and that title, but was silent on any transfer of rights to the characters. Interpreting the contracts against Warner Brothers, who prepared them and was "a large, experienced movie picture producer,"[196] the court concluded that "since the use of characters and character names are nowhere specifically mentioned in the agreements . . . the character rights with the names cannot be held to be within the grants . . . [and] the contract, properly construed, does not deprive Hammett of their use."[197]

All of this reasoning is compatible with the premise that Hammett's characters were copyrightable, but when the court considered this issue, it seemed to conclude that Congress did not intend to include characters as protectable work under the Copyright Clause. The *Warner Bros.* opinion is most famous for its now discredited conclusion on protection of characters. But the court did not say that characters were uncopyrightable because of something about characters; rather the court tried to glean congressional intent, reasoning that since "[t]he practice of writers to compose sequels to stories is old," congressional silence on the question of character protection was incompatible with Congress intending "that the sale of the right to publish a copyrighted story would foreclose the author's use of its characters in subsequent works."[198] Thus, both general principles of contract interpretation and the background copyright law favored Hammett retaining the right to use his characters. This reasoning was not about the inherent un-

195 216 F.2d 945 (9th Cir. 1954).
196 *Id.* at 949.
197 *Id.*
198 *Id.* at 950.

copyrightability of characters—which would have allowed use of Sam Spade, but rather it was about the practices of creators. The court was also clear in its motives: "[t]he characters of an author's imagination and the art of his descriptive talent, like a painter's or like a person with his penmanship, are always limited and always fall into limited patterns."[199] The court even went so far as to quote Oliver Wendell Holmes on how much intelligent people repeat themselves.[200]

In other words, the driving force of the *Warner Bros.* case was not that "Sam Spade" could not be copyrighted. Indeed, the Court made it clear that Warner Brothers had a protectable interest in the character Sam Spade.[201] In a parallel declaratory action brought in New York (but later dismissed in favor of the California case), the Second Circuit similarly thought that "[t]o use Sam Spade is to use a valuable part of the Maltese Falcon."[202] Despite these protectable interests, Warner Brothers could not stop Hammett from using characters of his own creation. In other words, the driving force in this case is something akin to a moral shop right.

The moral shop right can be thought of in several ways: (1) as analogous to the "shop right" under patent law; (2) as a kind of special fair use doctrine; and (3) as a complement to common views on non-competition clauses in employment contracts. For example, the "shop right" is an equitable doctrine developed by the common law to give the employer a non-exclusive license to any invention an employee makes on the employer's premises. This provision of the common law is largely forgotten now that most employment contracts deal with intellectual property ownership, but the doctrine was intended to recognize the employer's contribution to the employee's work. By the same token, this "moral shop right" might, in a sense, give the creator a very limited, non-exclusive reverse license.

The moral shop right could also be thought of as a kind of special fair use doctrine for creators. Consider the *Harper &*

---

199 *Id.* at 949.

200 The court found that ruling that an author transferred the rights to the characters in a work when he transferred the work would be contrary to the copyright law's purpose in "encourag[ing] the production of the arts." *Id.*

201 In considering the unfair competition claim Warner brought, the court said, "[i]t is patent that the characters of the *Maltese Falcon* could not fairly be used in such a manner as to cause the Falcon to be materially lessened in it's commercial worth. . . ." *Id.* at 951. Such a comment was possible because Hammett's new stories were seen as enriching or, at least, not detracting from the "Falcon." But what if Hammett was the one cheapening the characters?

202 Hammett v. Warner Bros. Pictures, Inc., 176 F.2d 145, 147 (2d Cir. 1949).

Row[203] case. Imagine that the contract between President Ford and Harper & Row had transferred copyright to Harper & Row, but did not impose any contractual duties on President Ford in terms of book promotion or publicity. Now, consider if President Ford had done some interviews with news magazines near the book's debut in which he reported—pretty much verbatim—the same language that the *New Republic* excerpted from his book. Let's also assume this made Harper & Row a little unhappy. Would we find that the author infringed the copyright of the book as readily as we would find that the *New Republic* infringed? The answer may be no for several reasons, i.e., Ford's interviews could increase sales of the book. But one of those possible reasons may be that we willingly give creators more leeway to reuse elements of their creations than we give non-creators to *use* elements of those creations.[204]

Finally, one could think of the "moral shop right" as an extension of common law on non-competition clauses. The case-law in most jurisdictions subjects covenants not-to-compete to a reasonableness test. Frequently, part of that reasonableness test is whether the covenant still permits the restricted individual to earn a living: restrictive covenants "which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law,"[205] because, there are "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood."[206] In refusing to uphold a non-competition clause that covered the entirety of the United States and Canada, the Indiana Supreme Court in 1955 noted: "our courts will zealously guard every individual against even his own commitments which would limit or thwart *the greatest constructive employment and enjoyment of his faculties from this moment forward* unless the manner of his living would contravene public policy . . . ."[207] In this spirit, the idea of a "moral shop right" is to safeguard the full constructive employment of an individual's intellectual abilities, to ensure that a person who

---

203 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589 (1985).

204 Admittedly, even if President Ford were virtually repeating verbatim passages from his book, we might treat this as drawing from his memories, not his copyrighted *memoirs*.

205 Columbia Ribbon v. A-1-A Corp., 369 N.E.2d 4, 6 (N.Y. 1977) (refusing to uphold broad non-competition clause against departing employee).

206 Purchasing Assoc., Inc. v. Weitz, 196 N.E.2d 245, 247 (N.Y. 1963); see also Arthur Young & Co. v. Black, 466 N.Y.S.2d 10, 12 (N.Y. App. Div. 1983) (court refused to enforce non-competition agreement against departing accounting firm partner to the extent that it would strip him of clients he brought to the firm, because "[t]o deny defendant the right to service those clients who had been developed over many years by his father and himself is to inflict on him a grievous personal injury.").

207 Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 240 (Ind. 1955) (emphasis added).

is talented, but not as innovative as a Picasso, could fully enjoy their creative faculties.

About any potential new right, we should ask whether reasonable limits to the right are possible. In the case of the "moral shop right," the issue would be just how *close* the artist may come to his previous, now-alienated work. Would it pertain only to "style," or would it extend to more specific copyrighted items, such as individual fictional characters? Would it extend to *whole* works, such as an entire symphony, or only to elements of transferred works? Consider three situations. In the first, a composer writes the score for a musical with a dozen songs, an overture, and incidental music; a librettist pens the "book" for the musical. In the second, a computer programmer writes a program for a video game involving thousands of subroutines and images. In the third, a chef and a photographer collaborate on a recipe book with a few dozen recipes and photos of both the dishes and luscious settings for dinner.

In all these cases, let's assume that the individuals conveyed copyright to a third party, but continue to work in that field. Assume that the contracts by which copyright was conveyed expressly include rights to put the whole work in a different medium, i.e., the stage musical may be adapted for the screen, the video program may be adapted to CD-ROM, and perhaps, the cookbook may be turned into a video. These transfers are not at issue. But I believe that the intuitive pull of a "moral shop right" increases dramatically when we focus on elements, parts, or themes of each work. Should the composer be free to use sections of the melodic line of the musical score for a symphony?[208] Should the programmer be free to use subroutines she wrote in another program? May the chef include several slight variants of the recipes from the book in his new collection? In these situations, we could imagine cases where we might want to give the creator more leeway to recycle, reuse, and reform the materials found in the transferred work. Recall Eudora Welty's comments about how much her work involves similar characters and how much artists like Kahlo and Munch repainted similar themes.

The problem of drawing these boundaries remains. Gene Roddenberry, the creator of *Star Trek*, transferred the rights of *Star Trek* to Paramount. What if he became dissatisfied with how the studio exploited the franchise? What if Stan Lee, creator of nu-

[208] As when Grieg wrote incidental music for Brecht's 1876 *Peer Gynt* and later orchestrated that music as the *Peer Gynt Suite #1, opus 46* (1888) and the *Peer Gynt Suite #2, opus 55* (1891).

merous comic book characters, was disturbed with the plot of *Spiderman* comics or cartoons? First, the extra leeway of the "moral shop right" should only come into play for the creator's continuing expression of herself, and not to "correct" the course of the work that has been alienated. Such "correction" is the province of standard moral rights and involves us in thorny questions of an artist's relationship to his existing works. The "moral shop right" concerns the artist's subsequent expression—how much subsequent expression may "play off" or appear to derive from certain existing works. Admittedly, this distinction—in a sense between proactive and creative behavior by the creator—would be very hard to police. Is Roddenberry feeling the need to write a new intergalactic, starship-driven science fiction series because he can only express himself through this kind of vehicle or does he feel the need to express himself because of what he thinks Paramount has done with *Star Trek*? Would we prevent Stan Lee from doing a *Spiderman* book, but allow him to create a troubled, but responsible young man superhero, *The Arachnid*? The questions remain vexing.

Those vexing questions lead us to the odd relationship between a "moral shop right" and other moral rights. A "moral shop right" might diminish the importance we attach to other moral rights. If an artist has the right to continue in a particular style and produce fraternal works, then the artist's need to prevent destruction or mutilation of a pre-existing work may not be as great. (In fact, we could quell some controversy over artists' rights by granting a "special moral shop right": where the owner of a *res* destroys or irreparably and substantially damages a work, the artist might be given the "moral shop right" to *recreate* the work.)

Free marketeers may resist any thought of a "moral shop right" on the grounds that, like all moral rights, it abridges free economic activity. Although patents abridge free economic activity, few people propose abolishing patents. We could however, try to get by without them, relying on a trade secrets system providing economic rents for innovation recovered only in the period until competitors learn to duplicate one's technology. The difference is that moral rights—like child labor laws—*bar*, not shape, certain economic activity. Like child labor laws, they say a certain type of transfer may tend to happen because of economic disparity and that it should not happen.[209] At first blush, a "moral shop right"

[209] We should also note that moral rights come to American jurisprudence from a less "rights oriented" legal culture. Just as, as a practical matter, rights in America are often sculpted around the exigencies of society, moral rights can be "trumped" by public policy. *See, e.g.*, Foujita v. SARL Art Conception Realisation, Fleet Street Reports 523 (1988)

does not have the same corrosive effect on chattel property rights that makes other moral rights so unnerving to studio executives, art gallery owners, and conservative jurists. Stephen Carter, for example, has called moral rights an "elitist and despotic doctrine," because it deprives property owners of the "right to do with their possessions as they wish."[210] (Never mind that on economic indicators, it is usually the property owner—the art collector, the studio mogul—who is more "elite" than the creator who would have the moral rights.) Carter objects to an artist having the power to stop the owner of a painting from putting a moustache on it; he objects to the idea that a film director could stop a studio from colorizing that film.

These criticisms might not stick to a "moral shop right." A "moral shop right" need not interrupt the relationship between object and owner, it would not give the artist any power to frustrate the owner's whims and predilections. What it would do is alter the potential value of the owned object; the photographer's retention of the right to do a photo in the same style may diminish the value of the *res* owned by the holder of the photograph's copyright. But the linkage between the value of a piece of art and the subsequent activities of its creator already exists. Just an artist staying alive affects an object's value. In fact, this linkage between value and lineage occurs in all kinds of areas. A computer's value is certainly linked to whether or not it is part of a successful line of computers; a house may be more marketable if the builder enjoys a continuing reputation in the area for quality home construction; a piece of art deco pottery will have its value determined by the kiln having a successful (but preferably limited) lifetime. In keeping with these examples, the effect of a "moral shop right" would be both indirect and uncertain. In fact, the artist's right to continue in a particular style might increase the value of earlier works in that style. (But so too might the artist's timely intervention to prevent a moustache from being painted onto the portrait.)

Situations in which Libby's paintings are purchased to hang in one's living room and Libby continues painting similar scenes are not particularly worrisome. But transfers of copyright are often motivated by the intent of the transferee to invest a substantial amount of money—substantially more than available to the trans-

(Court of Appeals, Versailles, 1987) (exercise of moral right by widow of artist Leonard Foujita to prevent publication of book on Foujita and his works was unreasonable and an abuse of moral rights considering quality of proposed book, artist's publicity policy during his lifetime, and lack of materials on his work published in French).

210 Carter, *supra* note 16, at 100-01.

feror—to exploit the work. This investment usually entails the creation of new, derivative works in other media. If the creator of "Batman" or "Jessica Fletcher" or "Winnie the Pooh" had the inalienable right to reuse these characters, the investment in downstream derivative works would be much more precarious.

One suggestion is to take a cue from patent law's "shop right" doctrine. Under the "shop right" doctrine, when an employee invents something in his employer's shop, the employer has a right to use the patented invention in his own "shop," but does not have the right to further license the invention—that right is held by the inventor. So too, the individual who produces an intellectual work and then transfers that work could retain a "moral shop right" to use elements of the work in her own creations without having the right to license those protected elements to others for *their* creation of derivative works. In other words, a novelist who wrote a novel with several characters and contracted away the development rights to that first novel could have the "moral shop right" to use a character from the first novel in a new novel, but not to license that character (as it appears in the new novel) for use in a feature film based on the new novel.

A "moral shop right" might be needed for patent law as well, since an inventor can sign away even her own right to use the invention. As one commentator has rightly noted, "[a]n inventor's individuation is threatened when an employer can preclude an inventor from continuing to work with her creation even after she leaves the employment relationship. Some degree of inventive continuity is required to make possible, and protect, the constituting of individuating personhood in inventive work."[211] This is an interesting problem. Patent law already has a safeguard in a patent equivalent of "fair use" doctrine: there is no patent infringement where the patented process is used purely for research. Just as patent law has drawn limits on what counts as "research" for the inventor's use of her alienated invention, copyright law could develop limits to a "moral shop right" to ensure that, while artists and writers are not stymied from self-expression, those who invest in derivative works based on artistic creations are guaranteed just returns from those investments.

III. Personhood Interests from Intentionality[212]

Modern western philosophy has devoted considerable energy

---

211 Cherensky, *supra* note 4, at 648.

212 "Intentionality" is used here as a counterpart to "creativity" and as a constituent of

to the idea of "intention" and what it means to *intend* something, particularly in areas like just war theory and medical ethics. While we all seem to have a rough idea of what an "intention" is, philosophers have grappled with different ways to characterize the process of forming and having intentions. It is generally agreed, for example, that intentions are "parasitic" on beliefs, i.e., I cannot *intend* to jog tomorrow morning when the sun rises unless I *believe* that the sun will rise and that I will be physically able, at that time, to jog. Intentions seem related to, but different from, predictions, i.e., I cannot *intend* to jog tomorrow morning unless I am willing to *predict* that I will jog in the morning;[213] as Wilfrid Sellars suggested, *intending* is more than, but includes, thinking that something will be the case.[214]

Philosophers have tried different formulations of the relationship between intention and other concepts for mental states ranging from describing an intention as a "decision" or a "resolution" of a question about actions[215] to proposing that "desire" be understood as an "intentional" state of mind.[216] One of the most important writers in this area, G.E.M. Anscombe, sought to distinguish "intention" or "purpose" from "motives" or "causes"; she saw "[a] man's intention [as] *what* he aims at or chooses," in contrast to a "motive," which more amorphously determines his intention.[217] Anscombe suggested that this difference between "intention" and "motive" in philosophers' parlance reflects a difference in popular usage—that a motive, i.e., doing it out of love or pity, is expressive of the "spirit" in which some action is undertaken, while an inten-

---

"personality." In other words, "intentionality" is used in the sense in which Bentham introduced the word to distinguish between acts that are intended and those that are unintended. "Intentionality" is not used in the Husserlian sense. *See* EDMUND HUSSERL, IDEEN ZU EINER REINEN PHENOMEMOLOGIE UND PHANOMENOLOGISCHEN PHILOSOPHIE (1913), *translated in* IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (William R. Boyce Gibson trans., 1931).

213 HECTOR-NESI CASTANEDA, THINKING AND DOING 41-42 (1975).

214 Wilfrid Sellars, *Thought and Action, in* FREEDOM AND DETERMINISM 126 (Keith Lehrer ed., 1966); *see also* Hector-Nesi Castaneda, *Some Reflections on Wilfrid Sellars' Theory of Intentions, in* ACTION, KNOWLEDGE AND REALITY: CRITICAL STUDIES IN HONOR OF WILFRID SELLARS 30 (1975).

215 CASTANEDA, *supra* note 213, at 170 (In discussing the grammatical similarity of "intending" to go to a place and "deciding" to go to that same place, Castaneda offers a "theoretical thesis" that "the very same thought content that is a decision, or resolution, is also an intention. Whether an intention is a decision or not, then, depends solely on whether a psychological process of deciding or deliberating has the intention as its ending element.").

216 Charles Taylor, *Action as Expression, in* INTENTION AND INTENTIONALITY: ESSAYS IN HONOUR OF G.E.M. ANSCOMBE 85 (C. Diamond & J. Teichman eds., 1979).

217 G.E.M. Anscombe, *Intention*, 57 PROCEEDINGS ARISTOTELIAN SOC'Y 321-32 (1956-57), *reprinted in* 2 THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE, METAPHYSICS AND THE PHILOSOPHY OF MIND 77 (1981).

tion is descriptive of the end being sought.[218]

Anscombe's dichotomy agrees with the emphasis other writers have put on the focus—both temporal and conceptual—of an intention. Sellars proposed that an intention is a volition—a thought, to the effect that one shall do some action *now*,[219] while Castaneda has suggested that "[a]n intention is a possible first-person answer to the question 'Shall I do that?' or the question 'What shall I do?,' understanding that answers of the sort like 'I don't know' cannot be included."[220] Castaneda has suggested that it may also be helpful to think of an intention as a first person analog of ordering, entreating, or advising someone to do something.[221]

A common theme in philosophical discussions of intentions is a sense of their "nowness"—that an intention is a desire or decision being put into action. Aristotle's passing remarks on the problem seem to suggest that he viewed the mental state of intending as focused on the means to achieve a given goal.[222] Modern writers strike a similar chord. Castaneda writes: "[i]ntending to do something is to be already in the process of doing it, even if merely by having undergone a re-arrangement of the causal powers within oneself in the direction of the action one intends to do,"[223] while Charles Taylor has suggested that any "awareness of [an] intention incorporates, and may be nothing more than, our awareness of what we are doing intentionally."[224]

While an intentional state usually includes awareness of both goal and means to that goal (the actions we will or *are* undertaking), there may not be a full understanding of the goal—Wittgenstein, for example, noticed that when a chess novice "intends" to play a game of chess, it is unlikely that "intention" includes an understanding of all the rules of chess. The same problem can (and perhaps should) trouble public policy experts. When the Federal Reserve Board lowers interest rates, they no doubt "intend" to increase borrowing. They probably also intend to increase new

---

218 *Id.* at 78-79.

219 WILFRID SELLARS, SCIENCE AND METAPHYSICS 177 (1967). *See also* Sellars, *supra* note 214, at 109.

220 CASTANEDA, *supra* note 213, at 41.

221 *Id.* at 172 ("We could use the word 'intention' and 'decision' to refer to first-person contents of acts of deciding or intending conceived as analogous to ordering, entreating, advising, requesting, and commanding.").

222 "We deliberate not about ends, but about means. For a doctor does not deliberate about whether he shall heal, nor an orator whether he shall persuade . . . they assume the end and consider how and by what means it is to be obtained." ARISTOTLE, supra note 90, at Book III, ch. 3.

223 CASTANEDA, *supra* note 213, at 41.

224 Taylor, *supra* note 216, at 87.

home construction—an element of the economy well known to be sensitive to interest rate changes. But, for example, was it their "intent" to cause the 1993 national lumber shortage that resulted from a rapid increase in housing starts?

To the degree that an intention is separate from the "spirit" of an action, this might help us distinguish intention from the creative impetus behind a project. While Taylor may be correct that desire is an intentional state, the important difference for our purposes between a "desire" and an "intention" is that the latter is *operational*; you can "desire" some end without doing anything to achieve that end, but "intending" something connotes making a plan and putting it into action. An intention includes an awareness of a personal goal, awareness of a means to achieve that goal, and a commitment to pursue that means with personal actions.

There is no question that artistic works that seem imbued with creativity also seem imbued with the artist's intention or purpose. In his seminal work on theory of art, Dewey remarked that: "[n]o matter how imaginative the material for a work of art, it issues from the state of reverie to become the matter of a work of art only when it is ordered and organized, and this effect is produced only when *purpose* controls selection and development of material."[225]

In our common discourse about art, exploration of the artist's expression quickly moves into exploration of his intentions, i.e., "what was he trying to express?" easily becomes "what was his intention?" To John Dewey, purpose was as keenly connected to one's personality as creativity:

> Purpose implicates in the most organic way an individual self. It is the purpose he entertains and acts upon that an individual most completely exhibits and realizes his most intimate selfhood. Control of material by a "self" is control by more than just "mind": it is control by the personality that has mind incorporated within it.[226]

For Dewey intent was a requirement of art; Dewey likened a bird building a nest and a beaver building a dam to the work of artisans transforming materials, but recognized that "[w]e may hesitate to apply the word 'art' since we doubt the presence of directive intent."[227]

One question, however, is whether only certain types of intent

---

225 DEWEY, *supra* note 107, at 276.

226 *Id.* at 277.

227 *Id.* at 24; *see also* Daniel Dennett, *The Interpretation of Text, People, and other Artifacts*, 50 PHIL. & PHENOMENOLOGICAL RES. 177-94 (1990) (reasoning that people view other minds as having an "intentional stance" and artifacts as having a parallel "design stance.")

are associated with intellectual products. While Dewey recognized that artisans transformed materials, Malraux, like many, distinguished artisans from *artists* on the grounds that the former copy, while only the latter *intend* to produce previously non-existent images and forms. While the artisan might reproduce images, taking wood blocks and recreating a known mask or idol shape, "what is important is that [the artist] altered the previous work intentionally."[228] We may conclude that just any *intent* is not enough for a personhood interest in intellectual products; perhaps the individual must *intend* to produce some form or shape that does not yet exist.

A. *Intentionality as the Personhood Interest in Research and Exploration Programs*

Earlier, I noted that Jefferson called inventions the "fermentation of an individual brain";[229] in his turn, Lincoln praised the incentive structure of the patent system as adding fuel to "the fire of genius."[230] But once we are beyond the flowery language, there is something deeply dissatisfying about trying to shoehorn scientific invention into the same "personhood" justification as painting and composing music. We have only a couple of options to resolve this apparent discontinuity. In the first, all our talk of creativity and personal expression simply misunderstands the artistic process. Instead, artistic creativity and scientific discovery are actually as W.V.O. Quine puts it, "all of a piece."[231] If the photographer feels only that he "captures" a vista that already exists, and if the sculptor thinks that "he chips away bits to expose a shape that was inside the stone all along,"[232] then they are explorers cut of the same cloth as the great "discoverers" of the fifteenth and sixteenth centuries. The Muses carry away the artist just as the trade winds carried away explorers. This notion of creativity-as-discovery also finds comfort in a Platonic metaphysics. As Quine writes, "[i]f the fantasy of the *UNIVERSAL LIBRARY* were realized, literary creativity would likewise reduce to discovery: the author's book would await him on the shelf."[233]

From what has been discussed above, I do not subscribe to this

---

228 MALRAUX, *supra* note 66, at 194.

229 *See supra* note 21.

230 Abraham Lincoln, Lecture on Discoveries and Inventions (Feb. 11, 1859), *in* THE POLITICAL THOUGHT OF ABRAHAM LINCOLN 112, 121 (Richard N. Current ed., 1967).

231 W.V. QUINE, QUIDDITIES 39 (1987).

232 *Id.* at 38.

233 *Id.* at 39.

creativity-as-discovery paradigm. We treat art and science (convincingly) differently. When Mary Cassatt exhibited some paintings or Walt Whitman wrote a poem, they might be questioned about the "meaning" of their work. When Dennis Gabor discovered the principles of holography or when Barbara McClintock hypothesized that genes move from one chromosomal site to another, the questions about what he or she "meant" by this discovery were probably few. On those occasions when a Gabor or McClintock is asked about the "meaning" of their new discoveries, the question is actually about the future effects of the discovery: "What does this mean to society?" is actually "What is the likely impact on society?" Admittedly, this also happens to the artist: questions about the "meaning" of their new works can be questions about the future effect, i.e., "Mr. Bernstein, what does *West Side Story* mean for the future of American musical theater?" But usually the "meaning" question directed at the artist is about symbolism, embedded messages, and communication. The poem, dance, or film is thought to have an internal meaning that does not involve its prospective effect on other facts or events. This internal meaning is assumed not to exist with scientific discovery.[234]

But if the inventor's personhood interest seems further removed from personal expression, there still seems to be a strong personhood interest of some sort. It is this that we should try to explain. One explanation is that the inventor's insight is the direct product of that unknowable "raw creativity" discussed above; this would jibe with the frequent accounts of inventors who say that they may have been working on a problem for some time, and then the breakthrough idea just occurred to them on a particular day, at a particular place, without explanation. We will turn to this possibility in the next section's discussion of "sourcehood."

Another possibility is that the personhood interest we perceive derives from intentionality. For while the breakthrough idea may

---

234 Scientific advances have at least one other kind of "meaning"—how the discovery leads to other conclusions and revisions about the world. These are often inferences about history, not projections about the future. Edwin Powell Hubble's discovery in the 1920s that the Andromeda nebula contains short period variable stars led to the conclusion that the Andromeda nebula is a separate galaxy from the Milky Way. Back on Earth, the reconceptualization in the 1970s of the Burgess Shale fossil record by Harry Whittington, Derek Briggs, and Simon Conway Morris led to new conclusions about evolution. Hubble's discovery of short-period variable stars *meant* star clusters distinct from the Milky Way existed. The reconstruction of the Burgess Shale *meant* evolution followed a previously unaccepted course of diversification and decimation. *See* STEPHEN J. GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY (1989). Instead of an effect on future events, this "meaning" is an effect on the probability of the truth of other historic events. This "external" meaning is still very different from the "internal" meaning of poetry, music, dance, and visual arts.

be a bolt from the blue that strikes randomly, its effects may not be random. Of the people taking fireside naps in Ghent on a night in 1865, perhaps only one, Friedrich Auguste Kekulé, had been pondering the possible structure of the benzene molecule.[235] When Kekulé dreamt of the circular snake biting its own tail, he awoke, and immediately decided to test the hypothesis that the molecule had a ring shape—a hypothesis that proved true. It does not matter much whether you view Kekulé's dream as a freak occurrence or his unconscious brain continuing to explore possible options to his problem. In either case, the breakthrough was the result of Kekulé's intent to pursue a particular research program, itself a manifestation of a more general intent to reach a goal—understanding benzene.

This is clearly so if the self-consuming snake was the work of a mind continuing to explore possible theories in the subconscious language of metaphor. But it is also true if the dream was a total random occurrence—if *X* number of people over *Y* days will have *Z* dreams of self-consuming snakes. If such a random event happens to a physicist contemplating space/time, it might inspire him to try some new hypothesis about wormholes. Most of us who enjoy dozing in the morning never have "Eureka-like" solutions to problems of chemistry or genetic engineering. At a minimum, that is because most of us do not put ourselves on a path to solve problems of chemistry or genetic engineering. The intentional dedication to a particular research program empowers one to take advantage of particular random occurrences. As Louis Pasteur said, "chance favors only those minds which are prepared."[236]

There is also the intentionality aspect, that one must not only be empowered to take advantage of random occurrences, but one must take advantage of them: as Kekulé himself said, "[l]et us learn to dream, gentlemen, but let us also beware of publishing our dreams until they have been examined by the wakened mind."[237] Even if Kekulé's dream was a "Eureka act," it required

---

235 *See* WILLIAM H. BROCK, THE NORTON HISTORY OF CHEMISTRY 265 (1992). Later in life, Kekulé, one of the great figures of nineteenth century chemistry, also said that one of his earlier advances, the conception of the carbon chain, came to him while he was drowsing one summer afternoon in 1854 on the upper deck of a London omnibus. *Id.* at 252. Dreams continue to be known as major inspiration to inventors. In 1997, Bertram V. Burke received patent #5,621,640 on a change-depositing system inspired by a dream he had about coins rolling off his dresser, down the hall, and out to a neighborhood drain. *See* Teresa Riordan, *Patents: Funneling Change to Useful Pursuits*, N.Y. TIMES, June 9, 1997, at D2. Mr. Burke, ironically, is a psychoanalyst.

236 LOUIS PASTEUR, A TREASURY OF THE WORLD'S GREAT SPEECHES 473 (Houston Peterson ed., 1954).

237 BROCK, *supra* note 235, at 265. Brock adds:

confirming laboratory work. Interestingly, John Dewey made roughly the same observation about painting:

> Even if we were to suppose that the image first presented itself in a dream, it would still be true that its material had to be organized in terms of objective material and operations that moved consistently and without a break to consummation in the public that is a public object in a common world.[238]

When it comes to science, unlike art, there is a greater sense of inevitability. But this need not disrupt the intentionality interest.

For example, even if Kekulé thought, as it appears that he may have, that the discovery of the structure of benzene was inevitable given not just his own research program, but the research program of his colleagues,[239] nonetheless, from Kekulé's perspective, his personality interest might arise from being the source of the directed labor. This is similar to the runner who is intent on crossing the finish line first even though several other athletes are running in the same direction. The scientists who made an important discovery from the hypothalamus gland characterized their work in much the same terms of highly directed labor: "[n]obody before had to process millions of hypothalami. . . . The key factor is not the money, it's the will . . . the brutal force of putting in 60 hours a week for a year." They likened the experience to "fighting Hitler . . . you have cut him down."[240]

It is worthwhile to consider the parallel between inventors of the twentieth century and explorers in the Age of Discovery. On the whole, we probably do not consider particular voyages or land discoveries to be "creative" acts. Perhaps Columbus' initial insistence on sailing west to reach the East was a creative idea. But once it was known that land could be reached by sailing west, were the voyages of Cabot, Balboa, Ponce de Leon, and Cartier *creative*

> While historians of science are happy to concede that the well-springs of scientific innovation are often to be found outside the culture of science, and there is no particularly strong reason to doubt Kekulé's account of the hypothetico-deductive method in action, others have argued to the contrary that Kekulé invented the story to ensure his priority over other possible hexagon claimants. Whatever the truth of the matter, the consequences of any subconscious creation of the ring concept had to be honed and perfected at the laboratory bench.
>
> *Id.*

238 DEWEY, *supra* note 107, at 277.

239 "Kekulé was undoubtably right to note deprecatingly that the hexagon was bound to have occurred to anyone who tinkered long enough with the structure theory. 'What else,' he asked, could a chemist 'have done with the two valences' left over on benzene other than form a ring with them?" BROCK, *supra* note 235, at 265.

240 BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS 118 (1986).

acts? These missions were imbued with intention and purpose, but they do not seem to manifest creativity. Once the gross generalities of the geography were known, the French and English explorations of the Great Lakes or the Portuguese penetration along the African coast seem like research programs, not creative acts.

The inventor, like an explorer, usually deals with an area where some general facts are known but much is uncertain. The inventor and the explorer work with general hypotheses. Other individuals are exploring the same area. There is often a sense of competition as to who will pick the research approach that will succeed—as with the explorer's sense of who has the best intuitive guess on trade winds and where the elusive goal—the northwest passage, the fountain of youth—might be found. Just as scientific researchers are not asked what they "mean" by a discovery, explorers were not asked what they "meant" by new cartographic discoveries. Whether we refer to the discovery of tau neutrinos by CERN researchers or the discovery of Hudson Bay, any discussion of meaning is a discussion of the likely effects on future developments (or inferences about the past). The similarities between the process of geographic exploration and scientific invention were not lost on our juridical ancestors. In fact, in the early days of American patent law, inventors were sometimes referred to as "discoverers."[241]

The parallels between the two processes may not be complete. Robert Nozick, for example, draws a distinction between exploration and experimentation.[242] He suggests that exploration, while a directed activity, "does not have the structure of a well designed experiment . . . fixed observation along well-defined alternatives."[243] Certainly the voyages of a Christopher Columbus (or a Jean-Luc Picard) seem less controlled than the experiments of a modern medical lab, but this may be an issue of comparative scale or our own technological moment. At other times, scientific experiments may have been less structured and well-defined. Benjamin Franklin's holding a kite during a thunderstorm seemed to open him up to some not so "well-defined alternatives." The same could be said of Madame Curie's more technologically advanced experiments—those experiments killed her by unexpected "alternatives" as surely as Magellan's fatal and (we guess) unexpected encounter

---

241 *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 101 n.7 (2d Cir. 1951).

242 To be accurate, Nozick was discussing "intellectual explorations," not the great geographic explorations of the late fifteenth to the early nineteenth centuries.

243 NOZICK, *supra* note 80, at 44.

with Filipino natives in 1521.[244]

Programs of discovery—scientific or geographic—may have varying degrees of clarity about the expected goal. Or they may have clarity about the desired goal with varying degrees of certainty about the probabilities of other outcomes. When scientists designed and deployed NASA's Cosmic Background Explorer ("COBE") satellite they knew precisely what they were looking for: fluctuations in background microwave radiation levels that would support the hypothesis that uneven distribution of matter in the early ages of the universe led to the formation of galaxies. Variations were detected, although perhaps smaller than anticipated.[245] So too with geographic programs of exploration, Lewis and Clark sought a better commercial route to the Pacific, hoping to find that the Missouri was navigable much further than then known and that only a short portage would connect it to the headwaters of the Columbia. The climate and topography they found was far less hospitable to commercial transportation than they had hoped.[246] The *result* of the research program may be unanticipated in the sense that there are details in the result that were not expected when the individual settled on the particular goal and particular program. This fits with the philosophical problem of what is included in an intention; Wittgenstein's novice chess player may have had no idea that the intention to play a game of chess included the intention to castle or to take a pawn *en passant*, or to permit her opponent to exploit these lesser known details of the game.

This might appear to push us towards the position that the person's intentionality is intention in the *process* which led to creation of the *res*, not intention in the *res* itself. But we can (and do) still speak about the inventor's intentions *vis-à-vis* the final product. Patent infringement actions have, for example, aspects akin to literary interpretation symposia. When a product or process is scrutinized for alleged infringement of a patent, it is *not* compared to the actual real world product or process of the patentee. Instead, the alleged infringing product or process is compared to the *claims* the inventor made in the patent.

---

244 Professor Nozick does not elaborate on the concept of "experimentation" or his exploration/experimentation dichotomy. He considers "exploration" to be a process of accumulating "directed observations" in which "you explore in a place or direction you think is likely to be fruitful, and you allow things to roll in upon you, prepared to notice within general categories and to pursue interesting facts or possibilities." *Id.*

245 JOHN D. BARROW ET AL., THE LEFTHAND OF CREATION: THE ORIGIN AND EVOLUTION OF THE EXPANDING UNIVERSE 75-79 (1983).

246 STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST (1996); MERIWETHER LEWIS, THE LEWIS AND CLARK EXPEDITION (1814 ed., J.P. Lippencott Co., 1961).

The inquiry into the "scope" of the patent claims becomes a search for the intent of the inventor reminiscent to the search for a writer's intentions in his novel.[247] But while literary criticism can tolerate the subconscious or subliminal meaning of an author, the inventor needs to have some awareness that he intended this or that in the wording of the patent claims. And just as an author's personal correspondence contemporaneous with a novel can show the motives and factors shaping the fiction, a scientist's correspondence and notes can show what was the conscious goal of her invention.[248]

B. *Intentionality and the Research Program of Journalists*

Intentionality may also provide an improved perspective on what is happening in some film and videotaping cases. In *Time, Inc. v. Bernard Geis Assocs.*, a copyright was recognized for an amateur photographer's raw footage of the Kennedy assassination on the grounds that selection of the type of camera, film, lens, time, and position of camera were all sufficiently "original" to merit protection.[249] More recently, in *Los Angeles News Service v. Tullo*, the Ninth Circuit held that raw videotape of a train accident by Los Angeles News Service ("LANS") was similarly protected because of the creator's decisions about "the newsworthiness of the events and how to best tell the stories . . . the selection of camera lenses, angles and exposures; the choices of the heights and directions from which to tape and what portion of the events to film and for how long."[250] Indeed, in finding the LANS videotapes had sufficient originality to warrant protection, Judge Browing went so far as to quote one of LANS' camera people "describ[ing] herself as 'an artist. I use a paint brush. I use the camera to tell a story.'"[251]

Whatever gloss witnesses and jurists give to these cases, it is a stretch to pour the making of the Zapruder film and the LANS videotapes into the mold of creative acts. My suggestion here is that we would do better to recognize the personhood interest in these works as arising from intentionality, not creativity. Like the explorer or the scientist, the journalist goes to work with a program to capture "bolts from the blue." Someone like Mr. Zapruder is at

---

247 *See generally* Tandon Corp. v. United States Int'l Trade Comm'n, 831 F.2d 1017, 1023-24 (5th Cir. 1987).

248 Autogiro Co. of Am. v. United States, 384 F.2d 391, 397 (Ct. Cl. 1967).

249 293 F. Supp. 130, 142-43 (S.D.N.Y. 1968).

250 973 F.2d 791 (9th Cir. 1992).

251 *Id.* at 794. (It is unclear whether she meant she uses a paint brush at home—to show she was an artist generally—or whether she meant the camera was her paintbrush.).

the right place at a tragically correct time, but it is rarely by complete coincidence. The photo-journalist's plan is like the explorer's plan: we could characterize the photo-journalist's goal as being to "record the afternoon air show and whatever happens,"[252] just as we could characterize the explorer's intention as being to "map the northern coast and whatever is found there."

As a personhood interest, intentionality may still point to a different result between, on the one hand, the LANS videotapes and the videotape of the Rodney King beating—the latter taken by a citizen from his balcony who had been awoken by the din of police brutality, and perhaps deserving less or no copyright protection. On the other hand, amateur videographer George Holliday had the general intention to capture things on video—he had just bought a video camera—and a specific intention that night to make as complete and as clear a record of what he was seeing.[253]

C. *Intentionality, the Work-For-Hire Doctrine, and the Common Law of Employer-Owned Inventions*

Intentionality also may give us some insights into copyright's "work for hire"[254] doctrine. The "work for hire" regime runs counter to most copyright law by permitting creators to transfer their copyright *before* creation of the *res*. Under the 1909 Copyright Act, a work was a "work for hire" if an "employer" hired another to make the work, absent an agreement to the contrary.[255] The 1909 law did not define an "employer". Under the case law, "employer" was limited to the traditional employer/employee relationship until the mid-1960s when the Second and Ninth Circuits expanded "employers" to include those who hire independent contractors

---

252 As Kundera writes:

> A burning plane had crashed into a crowd of onlookers. The photographs were large, each one a full page. They showed terrified people fleeing in all directions, charred clothing, burned skin, flames rising from bodies. Agnes could not help staring at the pictures, and she thought of the wild joy of the photographer who had been bored watching the banal spectacle and suddenly saw that luck was falling his way from the sky in the shape of a burning airplane.

Kundera, *supra* note 15, at 30.

253 *See* Beth Shuster, *Man Who Taped King Beating Defends LAPD*, L.A. TIMES, Mar. 10, 1996, at B1 ("Holliday, who had given the video camera to his first wife for Valentine's Day, had been playing with it earlier in the evening, trying to figure out the focusing mechanism, among others things.").

254 Following Justice Marshall's acute sense of English, this section "use[s] the phrase 'work for hire' interchangeably with the more cumbersome statutory phrase 'work made for hire,'" found in 17 U.S.C. § 101 (1988 & Supp. IV 1992). Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 n.3 (1989).

255 Section 62 of the 1909 Copyright Act was 17 U.S.C. § 26 (1976) which provided that "the word 'author' shall include an employer in the case of works made for hire." Tobani v. Carl Fischer, Inc., 98 F.2d 57, 59-60 (2d Cir. 1938).

where the work was made at the "instance and expense" of the hiring party.[256] Over the next decade, courts, particularly the Second Circuit, filled out the "instance and expense" test finding different occasions when a hiring party was an "employer" and, therefore, the produced work was a "work-for-hire." Tests included whether the hiring party was "the motivating factor in producing the work"[257] and whether the hiring party had the right "to direct and supervise the manner in which the writer perform[ed] his work."[258]

The 1976 Copyright Act offered the prospect of sweeping this framework away by statutorily elaborating specific conditions for works-for-hire. According to the 1976 Copyright Act, a "work for hire" is:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[259]

The statute specifically recognizes only nine types of works which can be subject to the subsection (2) "ordered or commissioned" provision.

It might be tempting to think that both the 1909 and 1976 work-for-hire doctrines are statutory recognition of the power of capital. The only test in 1909 and the first test set out in the present statute is whether or not the creator(s) are employee(s) of the entity claiming copyright; the second test under the 1976 law might also favor capital—artists and writers doing work on order or commission are rarely successful enough to be in a position to turn down projects because those financing the project propose a written contract which transfers copyright.

What has happened since the 1976 Copyright Act became law is more interesting. Because § 101(2) requires a "written instrument" acknowledging that a work was "made for hire," court cases under this provision confront judges with little more than interpretations of ambiguous contractual provisions.[260] Instead, § 101(1)'s

---

256 Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965); Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 567-68 (2d Cir. 1966).

257 Seigel v. National Periodical Publications, 508 F.2d 909, 914 (2d Cir. 1974).

258 Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213, 1216 (2d Cir. 1972); Scherr v. Universal Match Corp., 417 F.2d 497, 500 (2d Cir. 1969).

259 17 U.S.C. § 101 (1988 & Supp. IV 1992).

260 An interesting problem is raised by the fact that § 101(2) enumerates nine types of works potentially subject to a copyright-transferring "made for hire" contract: what if the

"employee within the scope of . . . employment" provision has remained the battleground for work-for- hire disputes—so much so that 1909 law and 1976 law cases look much the same.[261]

After the 1976 Copyright Act introduced the § 101(1) and (2) dichotomy between "employment" works and "commissioned" works there was a split among the courts concerning "employment." Forced into a renewed analysis of "employment," the Second Circuit required *actual* control over the work's creation to be exercised by the hiring party.[262] This was a higher requirement than the *right to control* doctrine which the Second Circuit had earlier championed, and which continued to hold sway in some courts.[263] About the same time, the Ninth Circuit interpreted § 101(1) "employment" most narrowly, requiring it to be formal, salaried employment.[264]

In *Community for Creative Non-Violence v. Reid*,[265] the Supreme Court resolved these differences in favor of, de facto, the old *right to control* standard. In *Reid*, the Community for Creative Non-Violence ("CCNV") had commissioned Reid, a Baltimore sculptor, to prepare the figures for a sculpture depicting the plight of the homeless in Washington, D.C., through the metaphor of the modern nativity scene. CCNV prepared the base of the sculpture, which was an integral part of the work. CCNV also worked with Reid in providing him with human models for the sculpture, rejected some of Reid's proposals for elements of the sculpture, and may have reviewed sketches to approve stages of the work's development. Not falling within a § 101(2) "commission" category, the ownership dispute that eventually broke out took the form of whether Reid was an "employee" of CCNV. The Supreme Court

---

parties executed a clear "made for hire" contract covering a type of work not set out in § 101(2)? For example, the Supreme Court has recognized both that "sculpture does not fit within any of the nine categories" and that "no written agreement between the parties established [the sculpture] as a work for hire." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 738 (1989). But what if the written agreement had made clear it was a work for hire, although it was not one of the enumerated nine categories?

261 *See* Philadelphia Orchestra Ass'n v. Walt Disney Co., 821 F. Supp. 341 (E.D. Pa. 1993) (soundtrack to "Fantasia" was work-for-hire owned by Disney because Orchestra members had signed agreements acknowledging that they had been "employed" by Disney); Respect Inc. v. Committee on Status of Women, 815 F. Supp. 1112, 1117-18 (N.D. Ill. 1993) (workbook was not work-for-hire because writer was not an employee of the Committee); Playboy Enters., Inc. v. Dumas, 831 F. Supp. 295 (S.D.N.Y. 1993), *rev'd in part*, 53 F.3d 549 (2d Cir. 1995) (copyright in Patrick Nagel's artwork belonged to Nagel's widow because Nagel was not a *Playboy* employee); Forward v. Thorogood, 985 F.2d 604 (1st Cir. 1993) (Thorogood's music recordings not work for hire).

262 Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984).

263 *See, e.g*, Peregrine v. Lauren Corp., 601 F. Supp. 828, 829 (Colo. 1985).

264 Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989).

265 490 U.S. 730 (1989).

adopted the Fifth Circuit's view that "the term 'employee' within § 101(1) carries its common-law agency meaning."[266] However, the Court then found that in order to have a uniform nationwide law, it would be necessary to use "the general common law of agency, rather than the law of any particular State."[267]

The Court then held that "[i]n determining whether a hired party is an employee under the general common law of agency, [one] consider[s] the hiring party's right to control the manner and means by which the product is accomplished."[268] That test, in turn, would be settled by considering a variety of factors drawn from the *Restatement of Agency*, "[n]o one of these factors being determinative."[269] These factors include the location of the work, ownership of the "instrumentalities and tools," the right to assign additional projects, provision of employee benefits, and the hired party's role in hiring assistants. In short, the *Reid* opinion set the stage for gestalt consideration of the relationship between hiring and hired; almost nothing is ruled out.

Because of all the *possible* factors bearing on an agency question, issues of raw economic power can have a weakened role.[270] Jaszi has noted that work-for-hire cases under § 101(1) typically de-emphasize the capital investment of the employer and emphasize the employer's creative contribution. To Jaszi, "[i]ronically, the employer's claims are rationalized in terms of the Romantic conception of 'authorship' with its concomitant values of 'originality' and 'inspiration.'"[271] Jaszi is correct on the de-emphasis on capital. For example, if economic underwriting was the pure measure of a § 101(1) work-for-hire, then the First Circuit's *Forward v. Thorogood*[272] case should have come out differently. Forward arranged and paid for the recording sessions of various songs by George Thorogood and the Destroyers at a time when Thorogood had no means to do so himself. On a *but-for* economic test, one might conclude that these recordings would not have happened without Forward. But a First Circuit panel held that this was not enough because Forward provided no direction and exercised no control over the recordings as a project: "[f]orward was a fan and

266 *Id.* at 739 (citing Easter Seal Soc'y for Crippled Children, et al. v. Playboy Enters., 815 F.2d 323 (5th Cir. 1987)).
267 *Id.* at 740.
268 *Id.* at 750-51.
269 *Id.* at 752.
270 *See, e.g.*, Hi-Tech Video Prods. v. Capital Cities/ABC, Inc., 58 F.3d 1093 (6th Cir. 1995) (although company exercised actual control over video's production, other factors established that hired parties were not employees for purposes of § 101(1)).
271 Jaszi, *Theory of Copyright, supra* note 29, at 486-88.
272 985 F.2d 604 (1st Cir. 1993).

friend who financed this effort, not the Archbishop of Salzburg commissioning works by Mozart."[273] The reference to the Archbishop of Salzburg, a great patron of the arts, is telling.

Although we are exploring the §101(1) criteria for when someone is an employee and *not* the § 101(2) question of a commissioned work, the characteristics of a work being "commissioned" suddenly can become central to the analysis. In *Philadelphia Orchestra,* the *Fantasia* soundtrack was found to be a work-for-hire owned by Disney in part because Disney had selected the music, provided the instruments and recording facilities, and controlled the recording process.[274] Harkening back to the Medicis reviewing Leonardo's handiwork, the court noted, approvingly, "Walt Disney himself attended the recording."[275]

Of course, "commission" language can be put in purely economic terms: discussion of whether an entity has "commissioned" a work frequently appears hand-in-hand with discussion of whether the entity undertook *all* the *financial risk* that the project would have no value. For example, in the *Fantasia* case, Disney undertook all the risk that the Philadelphia Orchestra's recordings would be worthless, while in *Playboy Enterprises v. Dumas* the trial court reasoned that the artwork of Patrick Nagel was not work-for-hire because, in part, "Nagel was the one who bore the risk because there was no commitment on the part of Playboy to purchase the works . . . ."[276] Looking to the allocation of financial risk makes sense in work-for-hire cases because that allocation reasonably reflects people's expectations. When a person knows his work has been specially *ordered* by someone, he usually does not expect to own it. When a patron commissions a work by an artist, the artist does not expect that tableau to be sitting around her studio years after it is done. The statutory test just reflects our usual expectations in a wider array of special orders; whether it is a tailored suit, a specially ordered automobile, or the advance purchase of a farmer's hay crop.

---

273 *Id.* at 606.

274 Philadelphia Orchestra Ass'n v. Walt Disney Co., 821 F. Supp. 341, 348 (E.D. Pa. 1993); *see also* Playboy Enters., Inc. v. Dumas, 831 F. Supp 295 (S.D.N.Y. 1993), *rev'd in part,* 53 F.3d 549 (2d Cir. 1995) (*Playboy* held not to be the owner of art works because it did not specially order or commission them).

275 *Philadelphia Orchestra,* 821 F. Supp. at 348.

276 *Playboy Enters.,* 831 F. Supp. at 299 ("In producing these [art]works, Nagel used his own equipment, tools, and materials; he worked in his own studio, on days and at times of his own choosing . . . ."). This finding was later reversed by the Circuit Court. *See also* Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 567 (2d Cir. 1966) (establishing a presumption that a *res* is a work made for hire when the *res* is "produced at the instance and expense of the employer").

Despite this economic explanation for the notion of "commission" percolating into questions about employment, I would offer another possibility. There is much to suggest that the "commission" test reflects intentionality and if "employment" is sometimes measured by tests that sound like commissioning, this is partly because intentionality, and hence personhood, interests are at work. When a patron commissions a specific work, it is intended to fulfill a pre-established need. This need may be very general—as in a particular size tableau to fill an unusually shaped wall—or it may be very specific. The classic commission was specific at least as to theme: a statute or portrait to depict a particular individual with known physical features in a particular fashion (serious, formal, intelligent, at home, at battle, at leisure). A commission typically includes the power to reject a work. All this put tremendous control over the artistic program in the hands of the "patron." This extensive control over the artistic expression continues in modern life where, for corporations, commissioned art can have an important public relations impact. On this reasoning the "commission" test is not a financial measure, but a measure of whether the patron's intentions imbue and control the artistic endeavor. The case law reflects this in two ways.

First, courts frequently conclude that a work-for-hire is made when the "motivating factor in producing the work was the [patron] who induced the creation . . . ."[277] In *Playboy Enterprises*, the Second Circuit affirmed that a necessary condition for a § 101(1) work-for-hire is that it was made at the "instance" of the entity claiming ownership.[278] The *Thorogood* case discussed above provides an even better example of the "motivating factor" test. George Thorogood and the Destroyers were inspired to make music—in fact, to make the particular songs they were practicing and intent on recording—with or without Forward. The Thorogood artistic program was already settled when Forward provided the financing. Another way to think of this is that while Forward's money might have been the *but for* cause of the recordings being made, Forward was not a *sufficient* cause of the artistic program. Similarly, in a recent case in Illinois, *Respect v. Committee on Women*,[279] the court found that Mast, the author of sexual educational books on abstinence, was the author of the books in question, not

277 Siegel v. National Periodical Publications, 508 F.2d 909, 914 (2d Cir. 1974); *Philadelphia Orchestra*, 821 F. Supp at 348; Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213 (2d Cir. 1972).

278 *Playboy Enters.*, 53 F.3d at 553-56.

279 815 F. Supp. 1112 (N.D. Ill. 1993).

the Committee that funded her. The court's description makes it clear that Mast's "program" was already in place before the Committee funded her and that the Committee did not greatly affect that program;

> Well before Committee came onto the scene, Mast was an experienced teacher who was at the forefront of abstinence education. When she entered into discussions with Committee she continued to act as an entrepreneur. . . . Though Committee did have a limited kind of input to the books - for example, by suggesting revisions . . . [i]t was Mast and not Committee who was responsible for the books' content and flavor.[280]

Contrast these examples with the *Philadelphia Orchestra* case. In that case, it is clear that the Disney Studios were intent on making an animated vehicle for Mickey Mouse and, later, intent on including that project as part of an animated feature film set to classical music. From what we know about the facts, it appears that Disney would have made the project with or without the Philadelphia Orchestra.[281] It is Disney who had put a "program" in place and filled it with the Orchestra. The archetype of a commission is one where a specific development—such as the painting of the Sistine Chapel ceiling—is going to happen whether or not this particular artist is chosen. One screenwriter, who had just completed her first novel, when asked about the difference between working as a studio screenwriter and writing a novel, felt that the insignificance of a screenwriter comes from the fact that the script is going to get written with or without you. In this sense, the patron is a *sufficient* cause for some development to happen.[282]

Second, in these types of work-for-hire cases, courts inquire as to how much control the patron had over the artistic program. As

---

280 *Id.* at 1118. Note, however, that the case has language suggesting that the Department of Health and Human Services ("HHS"), which funded the Committee, actually had greater theoretical control on the work: "HHS conditioned its grant in part on the submission, for suggestion and pre-approved, of drafts and final versions of all printed materials developed with grant funds." *Id.* at 1115. But HHS did not claim to hold copyright in these books.

281 In fact, the recording of *The Sorcerer's Apprentice* used in *Fantasia* was *not* done by the Philadelphia Orchestra, but by an orchestra that Disney assembled and Leopold Stokowski conducted. *Philadelphia Orchestra*, 821 F. Supp. at 343. In an earlier contract dealing with the project, Disney had contracted for Stokowski to "select and employ a complete symphony orchestra," *id.* at 348, underscoring that the project would have gone forward with or without the Philadelphia Orchestra.

282 This may also parallel the modern distinction between a "commission" on the one hand and a "grant" or "fellowship" on the other. A grant or fellowship is given to a person to allow them to pursue a research agenda or artistic endeavor of *their own* selection versus one selected by the granting authority. The granting authority may provide the money to make the research or art possible, but if some other granting authority had provided the money, the researcher or artist would have pursued the same course.

the Supreme Court has said, the party who commissions a work "by definition has a right to specify the characteristics of the product desired . . . ."[283] In the *Thorogood* case, "the trial judge noted that Forward did request that certain songs be played [for the demo tape]" but "the band then played those songs in precisely the same manner that it always played them."[284] To the court, this was evidence that Forward made no artistic contribution to the tapes. But it is also evidence that Forward exercised no control; without his presence, the songs would have been exactly what they were. In *Picture Music v. Bourne Inc.*,[285] the court held the *res* was a work-for-hire where a motion picture producer had control over the original song, engaged the creator to adapt the song, and remained free to accept, reject, or modify the work. The Second Circuit remains firm that a work must be (1) at the patron's expense; (2) at the patron's instance; and (3) the patron must have had "the right to control and supervise."[286]

As much as the patron intervenes—or can intervene—in the process of intellectual production, the artist may feel that *less* of their personalities are involved in the creation. One visual artist I interviewed works mainly in her studio, but had recently completed a mural on commission. Without hesitation she characterized the two experiences as "completely different" and said that although her patron had given her great "creative leeway," she could not put her "heart and soul" into the work. Perhaps the relationship between the artist's creativity and patron's intentionality is or is often close to a zero sum game.[287] In many cases, we will never

---

283 Community for Creative Non-Violence v. Reid, 490 U.S. 730, 741 (1989). In *Reid*, the Supreme Court also set indicia for judging when someone is an employee (versus an independent contractor). *Id.* at 751-52. Interestingly, those indicia do not focus on *control* of the project.

284 Forward v. Thorogood, 985 F.2d 604, 607 (1st Cir. 1993).

285 457 F.2d 1213 (2d Cir. 1972).

286 Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 555 (2d Cir. 1995). *See* ALAN LATMAN, ET AL., COPYRIGHT FOR THE NINETIES 309 (3rd ed., 1989); *Philadelphia Orchestra*, 821 F. Supp. at 348 ("[T]he test for actual control by the commissioning party slackened in the sixties to become a mere right to control (even if not exercised) standard."). Ironically, while the "employer" test under § 101(1) seems to have all the elements of a classic commission relationship—expense, instance, and right of artistic control—the Second Circuit has opined that under the § 101(2) test for a commissioned work, "the hiring party need not possess or exercise artistic control over the product." *Playboy Enters.*, 53 F.3d at 561. It's not clear whether this was a rejection of the *actual* control test—which would accord with *Aldon Accessories*—or a rejection of the *right* of control—which would make the § 101(2) standard less demanding than the § 101(1) standard.

287 This is suggested by at least one court's reasoning that "[the hiring party's] control of the video production thus weighs in favor of finding an employer-employee relationship, but not significantly, in light of the skill required of the assistants, as well as the assistant's artistic contributions to the product." Hi-Tech Video Prods. v. Capital Cities/ABC, Inc., 58 F.3d 1093, 1097 (6th Cir. 1995); *see also* Marco v. Accent Publ'g, 969 F.2d 1547, 1552 (3d Cir. 1992).

know the score in that game because "the interplay of ideas within such designer/client partnerships cannot usually be clearly charted or differentiated."[288] The degree to which the commission imposes a "pre-existent matrix" on the art is the degree from which it detracts from the artist's originality.[289] On the other hand, it would be depressing indeed to think that Michelangelo's work, the Sistine Chapel, does not embody the "heart and soul" of the artist. A large chunk of civilization's masterpieces were commissions. How can we reconcile this fact with a theory that trades off artist's creativity and patron's intentionality? Two possibilities come to mind.

First, why are the patron's demands not viewed by the artists as simple obstacles in the creative program, no more diminishing the artist's creativity than flaws in the block of marble from which Michelangelo sculpted the *David*, or the practical constraint on a director that his film should run under two hours? One answer is that the artist knows that the constraint of the patron is the result of another person's *will*. Unlike the flaws in the stone, the available pigments of painting, or the impersonal facts of audience attention span that rule all performing arts, the patron's intention is the product of a human mind. It may be that a great artist overcomes this difference, coming to view his patron's intentions as no more than troublesome random constraints.[290] Louis Kahn, for example, seemed obsessed with buildings as they appear as ruins, writing that ruins "reveal . . . the spirit" of a building because the building is then "freed from use"—a rhapsodized prose that seems to put the client's intentions, the occupants of the building, and the needs for which it was built all on a par as constraints.[291]

But there is another explanation for soulful commissioned

---

288 VALE, *supra* note 188, at 7 (discussing efforts to trace the different "meanings" or "intentions" of architects and politicians in national capital building projects).

289 For example, Milan Kundera credits Beethoven with being the first to change the structure of the compositions, so that the framework of each piece was "radically individual." He sees Beethoven as the first to understand that the "composition (the architectural organization of a work) should not be seen as some pre-existent matrix, loaned to an author for him to fill out with his invention; the composition should itself be an invention, an invention that engages all the author's originality." KUNDERA, supra note 187, at 172.

290 But the opposite is possible; it is easy to imagine the stereotypical prima donna anthropomorphizing every constraint as people conspiring against her art. This might happen when economic constraints demand that a commissioned work be changed. Are economic considerations akin to physical flaws in the marble to be sculpted or do they manifest weakness of will on the part of the patron (who may be, for example, unwilling to move monies from the welfare budget to the arts)? *See, e.g.*, Adele Freedman, *A Mall, Not a City Hall*, ARCHITECTURE, Jan. 1, 1995, at 43. (Architect Moshe Safdie threatened to sue the City of Ottawa when the city removed plans for a 56-foot high tower from Safdie's design for the new Ottawa City Hall to cut costs.)

291 ALEXANDRA TYNG, KAHN'S PHILOSOPHY OF ARCHITECTURE 166 (1984) (quoting letter from Kahn to Harriet Pattison).

works—one which respects the idea of a zero sum game between artist creativity and patron intentionality. Commissioned work and "artist-originated" work are just extreme characterizations. In the world of commissioned works, the amount of control (intention) exercised by the patron depends greatly on the stature of the artist. As screenwriter Mark Saltzman put it:

> [W]hen Spielberg did a movie in the 1980's, he was technically working for Universal but no one questioned that he got to do whatever he wanted. A recent USC grad might sign the same directing contract and there will be 20 Universal executives looking through the lens on each shot.[292]

The artist of sufficient stature may turn the tables on his patron, demanding resources or leeway beyond anything the patron intended.[293]

The choice of the word "patron" in this discussion was done partly with this point in mind. If we consider the classic "patron," he was not the sort of foil that would easily become—to a deconstructionist—a "construct" explaining the work-for-hire cases. A patron invested in an artist's career, giving the artist freer and freer rein as confidence in the artist's creative powers grew.

The recent *Playboy Enterprises* opinion shows the courts wrestling with a truer "patron" situation—facts somewhere between the *Philadelphia Orchestra* and the *Thorogood* situations. In *Playboy Enterprises*, Patrick Nagel began producing artwork for *Playboy* in 1974 and continued to provide monthly contributions until 1984.[294] The relationship between magazine and artist had the hallmarks of an increasingly relaxed patron/artist relationship: "Nagel accepted some specific assignments, at least until 1976. However, as time went on, he was given greater freedom to submit the paintings he wanted, which apparently matched what Playboy was interested in publishing."[295]

The court received evidence about specific assignments Nagel received, such as illustrations for a story on Lillian Hellman and an article on sex with aliens.[296] But these works were not at issue. What was at issue were five artworks done after August 1978 which *Playboy* had reproduced and marketed as the *Playboy Collection by Patrick Nagel.* These works came from a time when an independent

---

292 Interview with Mark Saltzman in Los Angeles, Cal. (Feb. 2, 1998).

293 Safdie prevailed in having a tower gridwork erected, giving his overall design the originally intended shape. *See* Freedman, *supra* note 290.

294 *Playboy Enter.*, 53 F.3d at 552.

295 Playboy Enters., Inc. v. Dumas, 831 F. Supp. 295, 300 (S.D.N.Y. 1993).

296 *Id.* at 310.

market for Nagel's works was already developing[297] and the parties had settled into a loose, but consistent relationship:

> Sometime after January 1977, but before August 1978, Nagel and Playboy fell into a course of conduct whereby Nagel would produce a few works for Playboy expecting them to be published; Playboy, in turn, expected to publish a few of Nagel's works . . . . Neither party appears to have tested the boundaries of the other.[298]

This fact pattern falls into a grey zone between the various measures we have been discussing. Although both parties knew that "there were subjects which would not have been accepted by Playboy . . . apparently no Nagel work was ever rejected outright."[299] Hugh Hefner himself provided some key evidence, but unlike Disney's presence at the recording session, Hefner went on record saying that *Playboy* gave up trying to direct Nagel's art.[300] The freedom given to Nagel, the apparent right Nagel would have to use any art *Playboy* would reject, the fact that Nagel was developing similar art independently—all suggest that the correct result was reached as to the "intentionality" at issue in the case.

It is useful to compare the statutory work-for-hire doctrine in copyright law with the common law's allocation of patent rights between employers and employee-inventors in the absence of a written assignment agreement. The common law doctrine of an employer's right to an employee's inventions bears the same mark of concern for "intentionality." The common law recognizes three distinct kinds of employees who could be inventors:

(1) employees who do not have inventive activities as part of their job description. Examples of this first category would be someone hired to be the accountant for a jet engine company or the receptionist for a biotechnology research lab.

(2) persons in "general" inventive employment, i.e. research, design or development. An example of this second category might be a technician hired to join the biotech lab.

(3) persons employed for the specific purpose of creating employer-specified inventions. An example of this third cate-

---

297 *Id.* at 313.
298 *Id.* at 310-11.
299 *Id.* at 310.
300 "At first we asked [Nagel] to illustrate a particular [subject] . . . but soon it was clear that trying to funnel such a large talent so narrowly was like telling Irwin Shaw or Ray Bradbury what to write about." Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 562 (2d Cir. 1995).

> gory might be an engineer hired to solve a particular problem of airflow in a type of jet engine.

Of course, it's easy to imagine borderline situations between these categories.[301]

The common law draws a distinction among these categories as to the rights enjoyed by the employer. In general, all inventions are the property of employee-inventors who fall in (1) and (2). However, in cases where the employee used the employer's "time, facilities, and materials to attain a concrete result," equity entitles the employer to a non-exclusive "shop right" to practice the invention.[302]

The one exception to ownership by the employee-inventor is category (3): the employer has title to an invention when the employee-inventor made an *employer-specified* invention,[303] i.e., the inventor was employed to invent the super-widget and actually invented the super-widget. Fitting with our discussion of intentionality, in this tripartite classification of the common law, the employer-specified invention program is most analogous to the classic artistic commission. Both impose specific demands on the creator; in both cases, the patron is imbuing the creative process with her own intention.[304] There is a program already set upon—to make the engine run cooler or to fill the blank wall with a seascape. This kind of inventive work is employer-driven (or patron-driven) versus inventor-driven (or artist-driven). Thus, in the *Dubilier* case, the Supreme Court found that the patents belonged to Dunmore and

---

301 For example, what if the lab technician is hired to do general work in the lab, but receives written project assignments which transfer her from "team" to "team," each with a particular, explicitly stated inventive goal. Would she then fall in category (1) or (2)? Because preinvention assignment agreements are so prevalent in research organizations, this sort of question may not reach the courts.

302 United States v. Dubilier Condeser Corp., 289 U.S. 178 (1933), *amended by* 289 U.S. 706 (1933); Cherensky, *supra* note 4, at 616-27. In *Dubilier*, the Supreme Court found that the common law gave the inventor title to the invention even when the employee was working in a research lab because employment "to design or to construct or to devise methods of manufacture is not the same thing as employment to invent." *Dubilier*, 289 U.S. at 178. Justice Stone provided a reasonable, common-sense dissent from this result, finding that the distinction between employment to work in a research lab and employment to invent was too fine a distinction: "They were not, of course, engaged to invent, in the sense in which a carpenter is employed to build a chest, but they were employed to conduct scientific investigations in a laboratory devoted principally to applied rather than pure science, with full knowledge and expectation of all concerned that their investigations might normally lead, as they did, to inventions." *Id.* at 211.

303 *Dublilier*, 289 U.S. at 188; Cherensky, *supra* note 4, at 616-27.

304 To be fair, as in the case of artistic commissions, we could explain the common law of invention ownership by reference to expectations. If an inventor was paid to invent the super-widget, he should reasonably expect that any resulting super-widget will belong to the person who paid him. As the Court said in *Dubilier*, "[a] term of the [employment] agreement necessarily is that what he is paid to produce belongs to his paymaster." 289 U.S. at 187.

Lowell, the employees, because they were self-motivated in their inventive work: "Dunmore was wrestling, in his own mind, impelled thereto solely by his own scientific curiosity, with the subject of substituting house lighting alternating current for direct battery current in radio apparatus . . . . [The project] was independent of their work and voluntarily assumed."[305]

Steven Cherensky advocates a form of "corporate inventorship" that would allow corporate entities to be listed as the "inventor" of patented innovations just as corporations can be the "authors" of copyrighted works under the work-for-hire doctrine. It is interesting to note *when* Cherensky would consider "corporate inventorship" appropriate. After considering and rejecting different possible standards for when "corporate inventorship" should be invoked, Cherensky settles on a test rich in intentionality: "[a] better definition of corporate inventions would . . . [be] limit[ing] a corporate invention to *an anticipated result of corporate direction* that was conceived and reduced to practice using significant corporate resources."[306] This formula certainly has parallels to elements of the work-for-hire doctrine; Cherensky believes an invention is the "corporation's" when "corporate direction" determined the inventive quest—the same intent and purpose which can place a copyrighted intellectual work in the hands of someone who did not actually produce the work.

D. *Intentionality and the Artisan's Unforeseen Results*

Recognizing personhood interest through the intentionality in a plan of action also gives us a different perspective on another vexing doctrine of copyright law, the problem of mistakes. Pioneer animators Frank Thomas and Ollie Johnston of the Disney studios "recall stumbling upon many of their best discoveries almost by accident"[307] and Alfred Stieglitz's grand-niece is convinced that many of the great photographers' works turned out differently than he intended, but that he explained away these unintended effects.[308] Copyright law protects variations that are unplanned or inadvertent. As Jerome Frank said in an often quoted passage of *Alfred Bell*: "[a] copyist's bad eyesight or defective musculature or a shock

---

305 *Id.* at 184-85.

306 Cherensky, *supra* note 4, at 656-57 (emphasis added).

307 Scott Collins, *supra* note 46, at F1.

308 Hunter Drohojowska-Philp, *Stieglitz in Sharp Focus*, L.A. TIMES, Oct. 19, 1995, at F1 (Stieglitz's niece, Sue Davidson Lowe, believed that the making of any of Stieglitz's cloud photographs was a "pasttime" and "once it was in print, it was frozen. He was not good at saying he'd made a mistake, so his instinct was to embellish it.").

caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation, the 'author' may adopt it as his and copyright it."[309]

Some commentators have interpreted Frank as "declar[ing] that 'intent' was not an element of originality" and that "an author's lack of intent cannot negate originality."[310] Judge Frank, however, seemed less certain. Indeed, in an earlier opinion he noted that lack of intention might prevent copyrightability, commenting, "[i]f one made an unintentional error in copying which he perceived to add distinctiveness to the product, he might perhaps obtain a valid copyright on his copy, although the question would then arise whether originality is precluded by lack of intention."[311]

It would be an understatement to say that protection of inadvertent originality is a nettlesome problem for the personal expression paradigm. If the artist did not *intend* to badly distort the woman's nose, how can such distortion be his *personal expression*? If the variation was the reaction to "shock caused by a clap of thunder," we do not even have the fig-leaf of explanation offered by the artist's unconscious. As Nozick has commented, "[i]t won't count as creative if it simply happens by accident."[312]

At one time, this may have been a pretty limited problem, but twentieth century painting, musical composition, playwrighting, and filmaking have broadened the issue. For the issue is no longer the quirky result of "defective eyesight" or a muscular twitch—at least these could be explained by reference to the artist's body. Now, there are artists for whom a major "technique" is capturing random occurrences or the spontaneous reaction of others—an entire artistic approach that seems to rob us of our comfortable notion that the artist "means" something or "expresses" something.

We have already explored the problems embedded in the notion of personal expression, but we should note that one commentator has suggested that the "transformative" process of creativity is actually closer to the inadvertent mistake than we would like to admit. Litman has noted that the "imperfect eyesight [and] flawed execution" of Judge Frank's opinions "can serve as a metaphor for authorship in general."[313] Recognizing how our minds record experiences, Litman insightfully (and admiringly) characterizes au-

309 Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951).
310 VerSteeg, *supra* note 73, at 845.
311 Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945).
312 NOZICK, supra note 80, at 35.
313 Litman, *supra* note 29, at 1010.

thorship as a "combination of absorption, astigmatism, and amnesia." This is an interesting thought—that "creativity" is the result of an inability to process the world of experience with the accuracy we now demand of our high technology. (In placing our creativity in our shortcomings, Litman is not too far from a more familiar view that creativity springs from the individual's psychological inability to cope with the world.) Litman's suggestion gives us the problem of inadvertent mistake or Jackson Pollack splashes writ large: it robs us wholesale of the idea of "meaning" and "expression."

Intentionality offers us a prospective answer. The artist intended to splatter certain paints on the canvas; the playwright or director intended to assemble actors of a particular sort and give them general directions of a particular sort. But what are the limits of this explanation—does it apply to so many circumstances that it applies to none? Consider an example the *Alfred Bell* court drew from Plutarch: "[a] painter, enraged because he could not depict the foam that filled a horse's mouth from champing at the bit, threw a sponge at his painting; the sponge splashed against the wall—and achieved the desired result."[314] I think this is beyond the extreme of inclusion in an "intentional program." Unlike Pollock spilling paint across a canvas, Plutarch's painter seems to be stepping outside his "intentional program" to vent his anger. Throwing the sponge was not part of a plan to achieve a desired result; in fact, at the moment he threw the sponge, the artist may have expected that, if anything, the impact of the sponge would move him away from the desired result by damaging part of the painting.

Along the same lines, we might conclude that a genetic mutation would be so far beyond the pale of intention (or creativity) that these could not justify personality interests in valuable cell-lines—a topic considered in a few lines.

IV. Personhood Interests in Being the Source of the *Res*; The Desire for Social Place

Aside from creativity and intentionality, there may be a simpler, starker personality interest: identification as the source of the *res*. The idea of "sourcehood" takes two forms. The first is the purely private self-identification with the *res*. This is a private belief that one is the source of the *res*. A ghost-writer or the author of an anonymous *Economist* story can have a private sense of pride in her

314 *Alfred Bell*, 191 F.2d at 105 n.23.

work.[315] Contrast this with the desire for the attention of others, recognition, or *social place*, a person who wants others to identify her and might try to achieve this recognition by "marking" things as her own.[316] There are those so desperate for social recognition that they identify things as their own when they have no other connection to the things they have "marked" other than that they mark them. Perhaps some cases of graffiti fall into this sort of behavior.[317]

Self-identification and the desire for recognition from others are conceptually distinct. One can imagine creative people who identify with their work and do *not* want social recognition. In fact, a well-known reason to avoid social recognition is to maintain greater creative freedom.[318] But these two notions—self-identification as the source of a *res* and desire for social recognition through the *res*—are rarely disentangled. More often, they are combined on an assumption that the person seeks social identification for those things with which she already self-identifies. I call this a "sourcehood" interest and suggest that this simple interest, in being identified as the source of some intellectual work, may be a personality justification. Even for one commentator who finds intellectual property rights generally problematic, there remains a belief that "[a]n author's or inventor's sense of worth and dignity requires public acknowledgment by those who use the writing or discovery. . . ."[319] Indeed, the personhood interest in intellectual property is most often protected with a guarantee of social recognition: the right of attribution. This protection takes the form of social mores as much as laws. For example, there is the convention in the scientific community that newly discovered species or geographic features may be christened by their discoverers. Among academics, at least, the social opprobrium of plagiarism is distinct from the legal liability of copyright infringement.

Although attribution rights protect sourcehood interests, in America those rights are much more inchoate than in continental

---

315 The ghostwriter is used only as an example of private pride; obviously the writer may have a creativity interest, not just the raw sourcehood interest being described here.

316 *See generally* Hegel's Philosophy of Right ¶ ¶ 54-58 (T.M. Knox trans., 1967).

317 *See* Victor Pelevin, *Assertive,* N.Y. TIMES SUN. MAG., June 9. 1997, 65 ("The American Teen-ager . . . in tracing his esoteric, indecipherable signature, is an image-maker adding his own logo to the cluttered symbols around him. When he traces a mysterious zigzag on . . . a bridge, he is already beginning to carve out his niche in life.").

318 Jane Austen sensibly expressed this concern: "I am gratified by her having pleasure in what I wrote—but I wish the knowledge of my being exposed to her discerning criticism, may not hurt my style, by inducing too great a solicitude." Letter from Jane Austin, *in* JANE AUSTEN'S LETTERS (Jan. 24, 1809).

319 Edwin C. Hettinger, *Justifying Intellectual Property,* 18 PHIL. & PUB. AFF. 31, 45 (1989).

legal systems. The default assumption of our copyright system is that a source of an intellectual property *res* does not have a right of attribution.[320] American patent law works better to protect this personality interest than does copyright law, requiring that the named inventor(s) on a patent application—and any patent issued—be natural persons who actually invented the invention.[321] Compare this with copyright law which permits someone who did not create the copyrighted work (an employer) to be treated as the "author" of that work.[322]

If the right of attribution has only a toehold in our mores and laws, even more problematic is the extension of any other rights (i.e. to control the intellectual property *res*) on the slender reed that someone self-identifies with that *res*. This section explores (1) some of the situations in which self-identification might arise from "sourcehood"; (2) the descriptive question of how intellectual property law has responded to such situations; and (3) the normative question of whether intellectual property law should respond to such interests.

We are concerned here with situations in which a person is the source of some valuable intellectual property but something about the situation seems to deny us the instruments explored above—creativity or intentionality. One could be the "Eureka" situation, a useful thought that just pops into a person's head or a totally unintended, undirected discovery: Scott's golf ball flies off course, lands at the entrance of an undiscovered cave, and with one step inside he finds the fossils of a previously unknown species. A sourcehood interest could also arise through labor or effort, even though that effort has not led to anything apparently creative. A common example of this sort might be cases of painstaking repro-

320 *See, e.g.*, Cleary v. News Corp., 30 F.3d 1255, 1259-60 (9th Cir. 1994); Vargas v. Esquire, Inc., 164 F.2d 522, 524-27 (7th Cir. 1947) (holding that an artist could not claim a right of attribution against a magazine where the artist granted the magazine all rights to his drawings in exchange for monthly compensation); Nelson v. Radio Corp. of Am., 148 F. Supp. 1 (S.D. Fla. 1957) (denying a singer a right of attribution in the context of a master/servant relationship between recording company and singer and absent agreement to provide label credit).

321 *See* 35 U.S.C. §115 (1988) (requiring that the "applicant shall make oath that he believes himself to be the original and first inventor of the [invention] for which he solicits a patent"); 6 DONALD S. CHISUM, PATENTS: A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY, AND INFRINGEMENT § 22.01 (1992). Steven Cherensky is one of those to recognize, "[t]his non-transferable, non-assignable, market-inalienable inventorship identification is a form of protection of a personhood interest—the association of the person with her invention." Cherensky, *supra* note 4, at 653.

322 17 U.S.C. §§ 101, 201(b) (1988 & Supp. III 1991). *See also* The Semiconductor Chip Protection Act of 1984, which provides that "authorship" of a new chip mask design may belong to the entity financing the design. 17 U.S.C. §§ 901(6), 902 (1988 & Supp. IV 1992).

duction; we must consider whether intentionality still provides an explanation of the personality interest in these situations. A sourcehood interest could also come from being the passive source of valuable genetic information; this is the *Moore v. University of California*[323] problem. In all these situations, however, the legal system does not grant protection—and therefore does not seem to recognize a personhood interest—unless other elements are present. This point has been noted frequently by deconstructionists espousing the "romantic genius" role in our legal system. But, again, the juxtaposition does not have to be unprotected "sources" from protected "geniuses"; the undervaluing of "sources" may be rooted in the idea of human agency (of the sort described in the above discussions of creativity and intentionality) as the ingredient that removes something from the Lockean commons.[324]

A. *The "Eureka" Problem*

The "Eureka" situation happens when a new and important thought just springs into the head of a person or someone stumbles upon a completely unintended discovery, i.e., a hiker who finds an extraordinary fossil. The "Eureka" situation could prove vexing in extreme cases. Imagine Allen wakes up one morning with a complex mathematical formula pounding in his head. He writes it down simply to lessen the pounding in his head, finding his work is impaired by this formula's presence in his head, and, finally asks a physicist friend what the formula might mean. Instead of telling him that he is uncontrollably recalling a formula from a "physics for poets" college course, the physicist tells Allen "he" has quite possibly solved a problem about warping space with gravity fields. At first, Allen says "Not me." Yet as the formula gains notoriety, so does he. Indeed, after a time he comes to enjoy attending physics symposia and, imitating Chauncy in *Being There*, speaking in poetic metaphors about astrophysics. His sole claim to the formula is that it afflicted his consciousness; if it was "in the air," he was the person it happened to alight upon.

As fanciful as this tale is, there are many cases where the individual knows he is the "source" of an idea, but he feels disconnected from it—it has no relation to his person or personality. Richard Evans, source of the 1994 book *The Christmas Box* repeatedly said in interviews that he did not feel like the author of that

---

323 793 P.2d 479 (Cal. 1990).

324 *See* Holmes v. Hurst, 174 U.S. 82, 86 (1899); Jefferys v. Boosey, 10 Eng. Rep. 681, 702 (H.L. 1854) (describing words as "elements of matter").

story as much as the "messenger" who simply told it. Picasso was known to say he could not control his paintings.[325] Miro said his paintings were "always born in a state of hallucination induced by shock, objective or subjective, for which I am not personally responsible."[326]

This sentiment is at least as common in the sciences and philosophy as it is in the arts. Nietzsche loudly opposed the Cartesian formula "I think," noting that "a thought comes when 'it' wants to and not when 'I' want it to . . . [and that a philosopher's thoughts come] from outside, from above or below, like events or thunderbolts heading for him."[327] In the sciences, Eureka-esque stories occur again and again. Kepler was drawing at the board in a mathematics class he was teaching one day when he was struck with an idea so forceful, that he believed he had stumbled onto the secret of creation: it was the basis to justify a heliocentric solar system that would eventually topple Ptolemaic astronomy. "The delight I took in my discovery," he exclaimed, "I shall never be able to describe in words."[328] Arthur Koestler once said, "[t]he more original a discovery, the more obvious it seems afterwards." And the more obvious something seems, the less it may seem like one person's mind.

In all these cases, the "Eureka" feeling and the sense of internal disassociation with the work may not be shared by external observers.[329] External observers may see creativity or intentionality at

---

325 When he looked at some of his early works, he commented to Malraux, "It's not me who chooses now." MALRAUX, *supra* note 66, at 79.

326 Attributed to Miro at the exhibit Miro: Spirit of the Orient, Hong Kong Museum of Art, (Sept. 1995 to Oct. 1995). *See supra* note 122.

327 The role of the "I" of thinking has been a subject of much Western philosophy. Although Leibniz sought, in the seventeenth century, to distance himself from Cartesianism, he expressed a view akin to Nietzsche's, but arguably compatible with Dewey's: that although we do not "form" our ideas, the ideas "form themselves through us, not in consequence of our will, but in accordance with our nature and that of things." GOTTFRIED W. LEIBNIZ, THEODICY: ESSAYS ON THE GOODNESS OF GOD, THE FREEDOM OF MAN, AND THE ORIGIN OF EVIL § 403, at 364 (E.M. Huggard trans., 1985).

328 ARTHUR KOESTLER, THE SLEEPWALKERS: A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE 247 (1959); *see also* HUDSON & JACOT, *supra* note 103, at 111

> [I]t is perfectly normal for a scientist to be seized with an idea that seems to him unchallengeable, a bolt from the blue so dramatic as to arrive as a revelation; and normal too, for a life's work to be built around such dazzling insight. It is also commonplace for such insights to be false.

Id.

329 Among those doubtful of such claims is Steven Pinker.

> Unfortunately, creative people are at their most creative when writing their autobiographies. Historians have scrutinized their diaries, notebooks, manuscripts, and correspondence looking for signs of the temperamental seer periodically struck by bolts from the unconscious. Alas, they have found that the creative genius is more Salieri than Amadeus.

STEVEN PINKER, HOW THE MIND WORKS 361 (1997). Similarly, Weisberg discusses, but does

work. If one embraces the broad explication of potential intentionality interests in the videotape and inadvertent artist discussions above, there may be little room for pure sourcehood. If Columbus' intention was to reach the Far East, then he got nowhere; if his intention was to reach land by sailing west, then his intention program was largely achieved. With almost any scientific or research program, a personhood interest could be rooted in the purposeful direction of the individual's mental life; even if the scientists claims it came to him "out of the blue," we may see it as the result of years of education, or some other personal factor. The same applies to exploratory artistic programs. The Eureka idea comes to the artist or inventor because he has been setting traps to catch it.

But the point is that for the most extreme Eureka situations—such as Allen the reluctant physicist—Radin's original explication of personhood interests is still good. While much of this article has focused on the *personal* which becomes an *expression*, in the sourcehood situation there may be *expressions* which become the *personal*. In the story above, Allen comes to identify with the physics formula that came to him. The legal system has not handled cases like this, but if it did, we might feel that some protectable interest should be recognized. This becomes clearer in a case that did come to the courts: the dispute between John Moore and the University of California over rights to genetic information from his cells.

B. *Being the Source of Bodily Information*

When viewed in the historic sweep of Anglo-American political thought, one of the most strangely reasoned opinions of the late twentieth century may be the majority opinion in *Moore v. Regents of University of California*.[330] Doctors at UCLA Medical Center had removed Moore's spleen in the course of cancer treatment, and then used Moore's cells to create a patented cell-line. In *Moore*, the California Supreme Court held that the doctors may have breached their fiduciary duty to Moore, but that Moore had no property interest in his own body's cells.

The *Moore* majority was not concerned with the moral dimension of extending property rights over living tissue—an issue apparently settled in America but still hotly debated in Europe.[331] The

not believe this "messenger" view of creativity. *See* Weisberg, *supra* note 79 at 215, 231 (analyzing such claims by William Blake, Dostoyevski, and others).

[330] 793 P.2d 479 (Cal. 1990.

[331] See Andrew Kimbrell, *Life for Sale*, UTNE READER, July/Aug. 1995, at 24 (discussing

Moore court did not question the propriety of the patents issued to the physicians who had cultured Moore's spleen cells. Instead, the majority opinion, authored by Justice Panelli, called Moore's own claim to have a property interest in the biological materials derived from his own body "novel" and "problematical at best."[332] Justice Panelli's opinion on why a person's biological material is not his own property gives one the distinct impression that John Locke was not on the judge's shelf. It is Locke's 300-year-old claim that people own their own arms and legs—very much biological material—which provides the first step in a labor theory of property which has influenced American law since the Founding Fathers.[333] This is not to say that Locke's initial premise cannot be questioned,[334] but if that was Panelli's intent, he might have done more than label Moore's claim "novel" and "problematic." One irony of the *Moore* case is that the conventions of the scientific community did a better job of recognizing Moore's contribution than the legal system did: as issued, the patent covers the "Mo cell line."

The *Moore* majority opinion has been criticized by many writers for different reasons. James Boyle has accurately critiqued the *Moore* opinion for its inexplicable discussion of uniqueness as a requisite for a property right in human cells.[335] The *Moore* court focused on the genetic code for production of lymphokines, finding that this tiny part of Moore's gene code could not be different from anyone else's.[336] The proper focus of analysis, however, was not the gene code, but the cells (or whatever aspect of the cells—possibly including code) that were responsible for Moore's higher than normal level of lymphokines production. Even if the court had done a tighter factual analysis, there would be no justification for the court's uniqueness requirement on Moore's property claim. Uniqueness is a requirement only of patent law; it is not required for most other property regimes and certainly not for rights to one's own labor—one's own bodily toil.

European Parliament's rejection of patenting scheme for life forms); Chester Bisbee, *Defeat of European Draft Directive Clouds Animal Patenting Issue*, GENETIC ENGINEERING NEWS, Apr. 15, 1995, at 1.

[332] *Moore*, 793 P.2d at 493.

[333] JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett rev. ed., Cambridge Univ. Press 1963).

[334] As Moritz Schlick, one of the Vienna Positivists noted: "[t]he grammar of the word 'owner' is similar to that of the word 'my': it makes sense only where it is logically possible for a thing to change its owner, *i.e.*, where the relation between the owner and the owned object is empirical, not logical." Moritz Schlick, *Meaning and Justification*, 45 PHIL. REV. 339, 366 (1936). If a particular gene code could not change its "owner," perhaps it has no "owner" at all.

[335] Boyle, *supra* note 29, at 1516-18.

[336] *Moore*, 793 P.2d at 490.

To Boyle, *Moore* is also another case in which "sources" of new intellectual property are undervalued while the manipulators who use source material are aggrandized by the "author" construct,[337] a point reinforced by dissenting Justice Mosk's comment that "no one can question Moore's crucial contribution to the invention."[338] The *Moore* court emphasized the patented work of the UCLA researchers in producing a *cell line* from Moore's cells, opining that "adaptation and growth of human tissues and cells in culture is difficult—often considered an art" and that the patent granted to the cell line applied to the results of this "inventive effort . . . not the *discovery of naturally occurring* raw materials."[339] Again, this part of the opinion's reasoning is not relevant to Moore's claim of body-snatching. Simply put, the patent rights of the UCLA researchers do not bear directly on property rights to the *source material*; Charles Allen's process for extracting alumina from bauxite did not confer on him ownership of the bauxite he used to produce the first batch of alumina. The amount of art Rodin put into the *Kiss* would not alter property rights to the original bronze or marble; Rodin might own the copyrightable image of the *Kiss* and still be liable for stealing marble. The issue that should have been directly confronted is whether Moore had a property right to his cells—does Locke's theory of self-ownership extend to the cellular level or does "ownership" simply make no sense when applied to body parts? The majority opinion fails to get to the root questions of cell ownership.

The *Moore* case does not, however, offer us a platform to explore some other fundamental issues. While we might be pre-disposed to recognize that Moore had a property right in his biological cells, would we have said the same thing if the issue was only his property right to the genetic *information* in whatever gene in his code prompts zealous lymphokine production? Imagine that instead of taking his cells—removing physical material—in surgery, in the course of treating Moore, the UCLA physicians had been able to scan and "read" the sequence of amino acids in his DNA and had discovered which portion of it was responsible for heightened lymphokine production. In one sense, this would be like a news reporter who had permission to be in your study opening a drawer, reading and memorizing a portion of your unpublished

337 Boyle believes that in the *Moore* opinion "the issue is once again being restated, whether consciously or unconsciously, in terms of the ideology of authorship." Boyle, *supra* note 29, at 1516.

338 *Moore*, 793 P.2d at 511.

339 *Id.* at 492 (emphasis added).

manuscript, and using verbatim quotations from it in his own articles. In both cases, although there was permission given, there is still invasion of privacy. In both cases, there is no physical taking, just a taking of information and expression.[340] The great difference, however, is that people have no conscious personal experience, creativity, or intentionality embedded in their genetic codes. Does a personhood interest in this information arise nonetheless because you are the source of the information? The *Moore* court drifted toward a negative answer without fully appreciating the depths of the waters they skirted.

In truth, Moore's experience was not far from that of Bela Lugosi's heirs at the hands of the same court a few years earlier—another troubling page in any account of "sourcehood" recognition. In *Lugosi v. Universal Pictures*,[341] a majority of the California Supreme Court held that Lugosi's heirs could not prevent Universal Studios from licensing an image of "Dracula" that clearly included Lugosi's likeness. Lugosi had granted Universal a right to use his likeness in promoting specific *Dracula* films, but Universal had discovered, as Disney had with Mickey Mouse, that the "Dracula" character—particularly Lugosi's rendition of it—was a valuable property separate from any films in which it appeared. Universal widely licensed the Lugosi-Dracula character for merchandise unconnected to any re-release or promotion of the films. Lugosi's heirs argued that Lugosi's grant to Universal did not extend to such uses.

The majority found that Lugosi's right to control his name and likeness was personal, and, therefore, nondescendible. This left Universal free to exploit the Lugosi-Dracula image after Lugosi's death. The majority concluded that "neither society's interests in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served" by recognizing the right to descend to Lugosi's heirs.[342] The court also justified their nondescendibility ruling by "the difficulty in judicially selecting an ap-

340 Ironically, in biochemistry, "expression" is used to refer to duplication of an amino acid code.

341 603 P.2d 425 (Cal. 1979). The connection between genetic information and persona has not gone unnoticed. *See* Stephen Ashley Mortinger, Comment, *Spleen for Sale;* Moore v. Regents of University of California *and the Right to Sell Parts of Your Body,* 51 OHIO ST. L.J. 499, 514 (1990) (holding that "a cause of action for appropriation of the commercial value of a person's genetic structure [is not] far removed from the Court's current recognition of the right of a person to claim appropriation of his unique likeness or persona.") *But see* Thomas P. Dillon, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why A Source Should not Share in the Profits,* 64 NOTRE DAME L. REV. 628 (1989) (not recognizing any personality interests).

342 *Lugosi,* 603 P.2d at 431.

propriate durational limitation" if heirs were allowed to inherit a property right in a likeness.[343] Justice Mosk provided a concurrence which touched on different issues, but was principally driven by his belief that "[m]erely playing a role" creates no property interest in that dramatic role.

The *Lugosi* case is not easily analyzed as a "source" versus "romantic author" battle. In *Lugosi*, the original author plays no part because the character created by the author, Bram Stoker, had already entered the public domain. On one hand, the case centered on a popular *artiste's* battle against an anonymous collaborative institution. On the other hand, that artist, Lugosi, was clearly using someone else's material. The only hint of Mr. Lugosi being an underappreciated "source" may have been Justice Mosk saying that Lugosi "was a talented actor [b]ut . . . he was not a playwright, an innovator, a creator or an entrepreneur."[344]

Still, the prevailing arguments in *Lugosi* bear scrutiny. The court's reasoning that the "artist's right to the fruits of his labor" would not be served by descendible rights certainly seems at odds with Congress' conclusion that laboring artists are well served by permitting copyrights to descend to heirs. Justice Mosk similarly seemed to misstep when he reasoned that Lugosi's "performance gave him no more claim on Dracula than that of countless actors of Hamlet who have portrayed the Dane in a unique manner."[345] That comment misses the point. The issue was not whether Lugosi's heirs had rights over the *Dracula role*, but whether Lugosi's heirs had rights over the Lugosi-Dracula *image*: as Justice Bird pointed out, when Universal granted licenses, it "specifically authorized the use of Lugosi's likeness from his portrayal of Count Dracula."[346] Universal did this even though other actors had played the *Dracula* role in other Universal films.

Justice Bird provided the sole dissent[347] and the only recognition that the right of publicity could have justifications separate from privacy and similar to that of other intellectual property. She was correct that this was a case about an image; at our present level of technology, we can understand that image as a compendium of information. It could be digital information used to create the image on a computer; it could also be genetic information which largely (although not completely) constituted Lugosi's physiog-

343 *Id.* at 431 n.8.
344 *Id.* at 432.
345 *Id.* at 432.
346 *Id.* at 435 (Bird, J., dissenting).
347 *Id.* at 434.

nomy coupled with some information on make-up. It might be said that this oversimplifies the case because the Lugosi-Dracula image was rooted in an intentional, dramatic performance. But the simplification is justified by the widespread use of the image separate from the films and the fact that many consumers of the image—particularly young people—have no experience with Lugosi's dramatic performance as Dracula. This is what arguably makes any personhood justification for protecting the Lugosi-Dracula image so different from protection for the images of Madonna, Prince, Humphrey Bogart or a Hollywood starlet. In those cases the individual's image and overall persona is a product imbued with intention and purpose. But the rise of the image of Lugosi-Dracula, an image sold to teenagers who do not know who Bela Lugosi was, seems comparatively accidental. Separated from Lugosi's dramatic performances, Lugosi's vampirial likeness becomes a possible sourcehood example, one in which we might want to recognize a personhood interest even where no creativity or intentionality is at play.

This is not to say that the wrong result was reached in *Lugosi.* Both the *Moore* and *Lugosi* cases share a strong concern about policy considerations, particularly the duration of property rights and their impact on future users. The *Lugosi* court felt that the practical question of the proper duration of a descendible right of publicity weighed against recognizing such a right.[348] Justice Bird proposed solving this problem by adopting a copyright standard of a certain number of years after the image owner's death. Justice Bird's proposal has much to recommend it—to a legislature, if not to a court. One of the most laudable aspects of intellectual property rights is that they are of limited duration; once those rights expire, the protected art or technology becomes part of the public domain—a true "common" of information, images, and expressions available to anyone for free. It would be inconsistent to create perpetual property rights for being the source of some biologically-based information—whether a cell line or a famous face—while we put a sunset on rights arising more from the life of the mind. I believe

348 As discussed above, the *Lugosi* court's conclusion that a descendible right of publicity would not serve the society's interests seems at odds with Congress's conclusion in this respect about other intellectual property rights—but if an "image" developed without international efforts—if it was the result of accident and the person's only claim to it was the result of accident and the person's only claim to it was one of "sourcehood," then it would make some sense to say that the same inventive structure does not exist. In 1988, California enacted a descendibility statute for rights of publicity. *See* CAL CIV. CODE § 990 (West 1998).

that those states that have rights of publicity in perpetuity err on this count.

Duration issues also vexed the *Moore* court which repeatedly expressed concern for future researchers who might have to trace title to cell-lines. This problem may have been overblown. If property rights had been recognized, the medical system would have undoubtedly responded with written waivers by which a patient surrendered property rights in their cells in exchange—we hope—not just for surgery, but for some interest in any patent that would result from research in her cells.

C. *The Problem of Labor*

Beyond examples like the *Moore* case, a final area of case law *may* offer some insights into the sourcehood justification of personality interests. Intellectual property law is rich in cases holding that *mere* labor or effort does not lead to intellectual property protection. Justice Brennan cautioned against seeing protectable interests arising from labor in the 1985 case brought against the *Nation* for printing excerpts of former President Ford's memoirs:

> Limiting the inquiry to the propriety of a subsequent author's use of the copyright owner's literary form is not easy in the case of a work of history. Protection against only substantial appropriation of literary form does not ensure historians a return commensurate with the full value of their labors. The literary form contained in works like "A Time to Heal" reflects only a part of the labor that goes into the book. It is the labor of collecting, sifting, organizing, and reflecting that predominates in the creation of works of history such as this one. The value this labor produces lies primarily in the information and ideas revealed, and not in the particular collection of words through which the information and ideas are expressed. Copyright thus does not protect that which is often of most value in a work of history, and courts must resist the tendency to reject the fair use defense on the basis of their feeling that an author of history has been deprived of the full value of his or her labor. A subsequent author's taking of information and ideas is in no sense pirating because copyright law simply does not create any property interest in information and ideas.[349]

The "tendency" against which Brennan warns might be couched as the "labor" problem — whether protectable (personality) interests

---

[349] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589 (1985).

can arise from seemingly non-creative labor that produces valuable works.

The "collecting, sifting, and organizing" that constitutes such a large part of some works is a kind of activity which does not seem to be creative. Yet many of us believe that such researchers are justified in feeling deep personality interests in their own work. Unlike the *Moore* case, the research labor situation may involve intentionality; clearly, the "collecting, sifting, and organizing" is a goal-directed, conscious activity. But the intentionality—the will behind the research—may belong to someone else. If the purpose, approach, and design of the research is completely determined by an employer *and* the research activity is not judged creative, does the researcher have any personhood interest in the results just from being the source of the labor?

Patent law does not do anything to positively embrace this possible "sourcehood" interest, but it does leave open the possibility for such recognition. Following the 1984 amendments to the patent law, 35 U.S.C. § 166 provides that: "Inventors may apply for a patent jointly even though (1) they did not physically work together or at the same time; (2) each did not make the same type or amount of contribution; or (3) each did not make a contribution to the subject matter of every claim of the patent." The 1984 amendments codified case law recognizing that there may be a hierarchy of contributions by these different individuals. In *Monsanto Co. v. Kamp*,[350] the court held that a joint invention must be the result of "collaboration of the inventive endeavors of two or more persons working toward the same end . . ." but recognized that the nature of the contributions to the collaboration could vary:

> Each needs to perform but a part of the task if an invention emerges from all of the steps taken together. . . . One may take a step at one time, the other an approach at different times. One may do more of the experimental work while the other makes suggestions from time to time. The fact that each of the inventors plays a different role and that the contribution of one may not be as great as that of another does not detract from the fact that the invention is joint if each makes some original contribution, though partial, to the final solution of the problem.[351]

The *Monsanto* opinion recognized that the level of contribution to the invention by different individuals may be quite disparate,

350 269 F. Supp. 818, 824 (D.D.C. 1967).
351 *Id.* at 824.

although it continued to call on "original" contribution from each. More recently, in *Lert v. A.C. Nielsen Co.*,[352] the court refused to grant summary judgment to a defendant attacking a patent with an invalidity charge based on misjoinder of inventors. The evidence most favorable to the plaintiffs/patent holders showed relatively minor contributions by the second and third named inventors. The third named inventor, John Cornelius, had worked on the prototype and "conceived and designed the method of detecting network logos as cue signals,"[353] while the second inventor—primary inventor John Lert's brother—appears to have only worked on the prototype with John and "noted problems with some of John's ideas and caused John to think through those problems and arrive at solutions."[354] Nonetheless, this was viewed as an arguably sufficient contribution. Cases like the *Lert* case suggest that non-creative labor under someone else's direction may receive attribution and other intellectual property rights under patent law. If patent law tolerates the naming of such members of research teams as inventors, then the decision whether such non-creative labor is rewarded falls to the mores of that particular scientific community, that particular institution, and even that particular laboratory.

Another area of arguably non-creative, non-intentional labor is painstaking reproduction. When such painstaking reproduction takes nature as its subject, there was no problem distinguishing the *res* from its underlying inspiration—no matter how realistic, a painting is distinguishable from the meadow or fruit bowl it portrays. But when these skills of painstaking reproduction are focused on an object which is already the subject of intellectual property rights, problems arise. How can we grant property rights to painting *X*, a painstaking reproduction of painting *Y*, without compromising the intellectual property rights to *Y*? If an artist creates art by painstakingly reproducing something—a known artistic image like Mickey Mouse or Manet's Olympe—she will be denied copyright protection on the grounds that there is no meaningful variation from the prior art.

This was the result in *Gracen v. Bradford Exchange*, in which an artist who had faithfully recreated Dorothy from *The Wizard of Oz* on collector's plates was unable to prevent her image from being pirated.[355] Bradford had sponsored a contest to create a collector's plate image of Dorothy; the arguably schizophrenic contest instruc-

---

352 33 U.S.P.Q.2d (B.N.A.) 1026, 1029 (N.D. Ill. 1994).
353 *Id.*
354 *Id.*
355 698 F.2d 300 (7th Cir. 1983).

tions stated that Bradford sought the artist's "interpretation" of Dorothy but that this interpretation of "Judy/Dorothy must be very recognizable as everybody's Judy/Dorothy."[356] Gracen had initially won the contest, but when Grace and Bradford could not agree on the price for Gracen's work, Bradford hired another artist to copy Gracen's work. Gracen sued, claiming that the second artist had, at Bradford's direction, pirated her copyrighted image of Dorothy. Gracen lost on summary judgment—later affirmed by Judge Posner—on the basis that Gracen's image had insufficient variation from the Dorothy images in the film. In John Shepherd Wiley's words, "[t]he prize for faithful accuracy doomed Gracen's copyright suit . . . . The court condemned Grace for achieving precisely her creative goal."[357] Wiley argues that Gracen should have had some copyright recognized and that, in general, copyright should be rewarded where the artist has painstakingly reproduced something.

It is instructive that faithful reproduction like Gracen's work are often shoehorned into the "creativity" model. Bradford had originally praised Gracen's painting of the *Wizard of Oz*, saying that it "was the one painting that conveyed the essence of Judy's character in the film . . . ."[358] The idea of "conveying" or "capturing" the "essence" of something is very much in the romantic spirit. The difference between a northern European Renaissance painter and Gracen is that the romantic painter was usually capturing the "essence" of some aspect of nature or human activity,[359] whereas Gracen was capturing the essence of prior, protected art.

It is possible that the practical problem of sorting out rights between the original and derivative work compels the *Gracen* conclusion. It is also possible that Gracen's case was not compelling because we feel there is little or no personality interest in her work, that the use of the word "creative" is just misplaced. No one would ask Gracen what her Dorothy "meant" because it was an image so undistinguishable from the Dorothy of the movies that no one would have thought it to be a different creation.

As long as high fidelity copying could only be done by humans—and a very few, dedicated humans—it was easy to believe that some very subtle but nonetheless unique work went into "cap-

---

356 *Id.* at 301 (emphasis omitted).

357 John S. Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 136-37 (1991).

358 *Gracen*, 698 F.2d at 301 (emphasis omitted).

359 E.H. GOMBRICH, THE STORY OF ART 167-82 (14th ed., 1984) (discussing highly representational art of that period).

turing" the "essence" of the image. In describing the modern advent of the "author" construct, Boyle thinks that "the most cursory historical study reveals that '[m]edieval church writers actively disapproved of the elements of originality and creativity;'"[360] and he quotes Ernst Goldschmidt's conclusions that medieval theologians

> [V]alued extant old books more highly than any recent lucubrations and they put the work of the scribe and the copyist above that of the author. The real task of the scholars [was] . . . a discovery of great old books, their multiplication and the placing of copies where they would be accessible to future generations of readers.[361]

The point about the value of the "author" is well taken.[362] But Goldschmidt's conclusion about the relative position of scribes and authors speaks to something more than the lower station occupied by authors in pre-modern times; his comment must be read against the technological level of medieval times. Prior to the printing press, the accurate scribe or copying provided a very valuable, uniquely human skill.

To a medieval pair of eyes, the scribe's work seemed far less "mechanical" than it does to us. To return to one of Nozick's ideas—the juxtaposition of the creative and the mechanical—if scribe copying seemed less mechanical back then, it probably seemed more "creative" back then. What is the proper analogy? Perhaps in medieval times, the scribe's skills appeared like the airline pilot's skills appear to us: we know what the pilot does, we know that pilots do the same thing again and again, but we also think that each time they land a plane they employ skill, finesse, and intuitive judgments unavailable to most of us and not yet reduced to mechanical algorithms. Scribes were, in the medieval context, understandably special.[363]

---

360 Boyle, *supra* note 29, at 1463.

361 ERNST P. GOLDSCHMIDT, MEDIEVAL TEXTS AND THEIR FIRST APPEARANCE IN PRINT 112 (Biblo-Moser eds., 1969).

362 Of course, "medieval church writers" probably "actively disapproved" of elements of democracy, liberty, and most human rights. To many, the fact that medieval church writers disapprove of something more or less recommends it.

363 Prior to mechanical copying, copyists were also more important because of the power that they wielded. This is a point made by A.C. Milner in the context of Malay rulers of the sixteenth to eighteenth centuries controlling access to copies of historical accounts of each dynasty:

> as a mid-nineteenth century traveler noted in Kedah, for instance, a [written tale] might be "quoted over and over again" even by opposing factions "to support their jarring interests and theories." In such circumstances, the *author or copyist* was a man of consequence; he might further the claims of one party or another by the way he portrayed events. It has been noted that rulers jealously guarded texts, allowing them to be heard but not copied.

Technology foiled this equation. It is no accident that realism in painting ebbed as photography flowed. It has become harder to see "personality" in painstaking reproductions of images or sounds. What personal meaning can be conveyed in doing what a machine can do? And as our machines have become more clever and adept, the problem has become more severe.

Reproduction remains, however, a means by which we can see the sourcehood interest in very non-creative labor and where the legal system does not permit rights to flow from that interest. Gracen had an understandable attachment to her work—something Judge Posner may have implicitly recognized in permitting her to continue to use her Dorothy image in her own portfolio. At the margins, we might find that the fair use doctrine, for example, gives some breathing space to sourcehood interests in reproductions—but not much.

V. CONCLUSION

Patents owe their origin to Renaissance Venice, and copyright protection of a sort dates back to ancient Rome, but it is in the United States where intellectual property law has found its most fertile ground for development. To some cultures, America may seem obsessed with intellectual property protection.[364]

For some, this is a recent obsession related to our competitive position in a world economy—disadvantaged in areas like manual labor costs but still with great advantages in knowledge, information, and technology.[365] At a deeper level, our society emphasizes the rights of the individual to act alone or in groups of her choice and this emphasis increases the importance of a network of rights to make private actions easier, more secure, and more successful. Regardless of our international economic position, extensive intellectual property rights may be a natural outgrowth of a culture with

---

A.C. MILNER, KERAJAAN: MALAY POLITICAL CULTURE ON THE EVE OF COLONIAL RULE 65 (Univ. of Ariz., 1982).

[364] If one considers the American government's view on the intellectual property protection offered by our trading partners, one gets the clear impression that no one takes intellectual property rights as seriously as the United States. In mid-1994, for example, the U.S. Trade Representative's Office had placed the following countries on various "watch" lists for their shortcomings in protecting our intellectual property: Argentina, Australia, Brazil, Canada, Chile, China, Colombia, Cyprus, Egypt, El Salvador, the European Union (including Belgium, France, Germany, Greece, Holland, Italy, Portugal, Spain, and the U.K.), Guatemala, Honduras, India, Indonesia, Israel, Japan, Korea, Pakistan, Panama, Paraguay, Peru, the Philippines, Poland, Russia, Saudi Arabia, Singapore, Taiwan, Thailand, Turkey, the United Arab Emirates, and Venezuela. *See* 195 COPYRIGHT LAW REPORTS at 1 (June 20, 1994). Who among our trading partners was not named?

[365] Paula Dwyer, et al., *The Battle Raging Over 'Intellectual Property,'* BUS. WK., May 22, 1989, at 80.

such emphasis on "private" activities. Then there is the pleasant, if silly, thought that perhaps Americans emphasize extensive intellectual property rights because we are "the most idea-based civilization in history."[366]

Property rights are traditionally justified in terms of economic efficiency, but in the realm of intellectual property such justifications, however persuasive, do not have a strong empirical basis. "Personhood" interests can also be used to justify property rights or, in some cases, rules bending or mitigating the effect of property rights. Behind the shield of property rights, personhood flourishes in our homes, automobiles, clothes, gardens, and the things we collect—be it art, baseball cards, books, toys, music, pottery, model ships, or sport trophies. In the world of artistic and scientific creations, personhood interests take a different turn. It often seems that an individual's personality is already "expressed" in an intellectual property *res.* Courts have recognized the "personal expression," "creativity," "genius," and "intellectual labor" of intellectual property—all intimating that protection of the creator's personhood interests is at issue.

But beyond saying that someone's personality is expressed in an intellectual work, is there anything more we can say about the personhood interests? This article has argued that creativity or personal "expression," personal "intention," and "sourcehood" are three candidate conditions for personhood interests, with varying degrees of protection possible for each. Along the way, creativity has been presented as a complex notion that serves as an equally good explanatory device for recent copyright cases which deconstructionist scholars have criticized as relying unduly on the "romantic author" construct. I have proposed that the concept of intentionality may explain personality interests in research programs and photojournalism. This sort of personality interest may help explain occasions when we grant property protection as well as occasions when courts deny rights, but we feel a tug of regret that we cannot grant those rights.

Law's on-going exploration of the concepts it uses is no different than that in any other structured system of thinking. Such thinking is, as Susan Sontag put it, "an insatiable project, endlessly producing and consuming 'systems,' metaphor-haunted classifications of an ultimately opaque reality."[367] The concepts of "originality" and "creativity" are explicit elements of law's classificatory

---

366 NEWT GINGRICH, TO RENEW AMERICA 30 (1995).

367 Susan Sontag, *Introduction to* BARTHES, *supra* note 118, at xx.

scheme; "personhood," "romantic author," and "intentionality" are all explanatory devices by which we try to shore up, tear down, or induce mutation in the classificatory system. One of Sontag's comments on art criticism is largely applicable to legal scholarship:

> Someday perhaps a demystification of the myth of "art" (as an absolute activity) will be possible and will take place, but it seems far from that moment now. At this stage, only new myths can subdue—even for the brief time to permit contemplation—the old myths which move convulsively about us.[368]

This article has explored a set of myths that are sturdy and highly serviceable to make the intellectual property system respond to the opaque, but nonetheless very real personhood interests of creators.

In the end, the process of intellectual exploration—whether it is modern painting, Darwin's voyages, or a video journalist looking for a new angle on a Latin American election—may be much the same. Whether we call it a profession or a preoccupation, when we return to the same activity again and again, what we learn in the exploratory process transforms us. In this spiral of activity we explore, digest, create, transform ourselves, and explore again.

---

368 *Id.* at xxi.