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Copyright and a Synergistic Society

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Tracy Reilly*

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*Art is individualism, and individualism is a disturbing and
disintegrating force.*

*There lies its immense value. For what it seeks to disturb is monotony
of type, slavery of custom, tyranny of habit, and the reduction of man to the
level of a machine.*

Oscar Wilde¹

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* NCR Distinguished Professor of Law & Technology, Director of the Program in Law & Technology, University of Dayton School of Law. This article is dedicated to the memory of my father, Col. Robert G. Reilly, for always striving to live a synergistic life—the good life—the Life of Reilly. Thanks to Professor Joe Bogdan, Business & Entrepreneurship Department at Columbia College, Chicago, for his insightful comments and edits, and to Dr. Marin Smilov, Professor of Philosophy at Santa Fe College, for contributing his expertise to the thesis of this article and generally striving to keep alive the spirit of Ayn Rand in the classroom.

INTRODUCTION

The term *synergy* is contemporarily used—some may say annoyingly overused—to explain a phenomenon in which the skills, efforts, and unique personality traits of two or more individuals are combined, resulting in a situation that is more beneficial than it would have otherwise been had the individuals not connected.² Whereas synergistic connections necessarily, then, entail a *collective* human approach, it is often forgotten that when stripped to their core components, they are composed first and foremost by the *individual* elements that underlie and energize them. In other words, without the individual—albeit in a plural form—there cannot exist any collection, or synergy, of beneficial human traits.

It necessarily follows, then, that the favorable traits of each individual comprising the synergistic sum model must somehow *first* be cultivated, nurtured, and refined before the individual is able to connect with and positively contribute to the differently beneficial traits of various others. It is the primary business of philosophers, psychologists, and other behavioral science experts to study and analyze human value systems that engender the most optimal forces which must exist and coalesce in society in order to cultivate the most positive—and, thus, synergistic—life experiences for the most individuals as possible.

In his article, *Individualism and Interdependence*, Alan S. Waterman debunks the common critique held by numerous contemporary psychologists that a value system founded upon principles of individualism leads to unscrupulous competition, atomistic self-containment, and alienation.³ Indeed, as will be discussed herein in greater detail, the subject of whether a societal model distinctly based on the doctrine of individualism will beget human behavior which is both productive and satisfying to individuals, as well as to society as a whole, has

1. BRUCE BASHFORD, OSCAR WILDE: THE CRITIC AS HUMANIST 143 (1999).

2. See, e.g., *Synergy*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/synergy> (last visited Jan. 24, 2017).

3. See Alan S. Waterman, *Individualism and Interdependence*, 36 AM. PSYCHOLOGIST 762 (1981) [hereinafter Waterman, *Interdependence*].

been in rigorous debate as far back as the Gilded Age of the late nineteenth century.⁴

In his later book on the subject, *The Psychology of Individualism*, Waterman analyzes the then-existing body of research which examined various personality traits universally attributed to individualism for the purpose of determining whether it represents “optimal psychological functioning” or whether its critics are correct that it is “a contributor to personal and social disorganization.”⁵ The results of the detailed and meticulous empirical studies he embarks upon overwhelmingly support Waterman’s thesis that “the individualistic qualities of a sense of personal identity, self-actualization, an internal locus of control, and principled moral reasoning were shown to be associated with benefits to the person and to society.”⁶

Waterman, thus, proceeds by offering his thesis that a “synergistic societal ideal” can emerge by embracing these four fundamental characteristics of individualism because they ultimately result in a “compatible incorporation” of *both* the interests of the individual and the mutual, collective well-being of society.⁷ By providing a detailed account to his readers of what he perceives as very strong support that such a societal ideal will have the greatest chance of being achieved if all persons were encouraged to apply the four characteristics of psychological individualism, Waterman concludes with a hope that his findings will spur future authors to further examine the issue and provide “a more serious consideration of the potential for individualism to contribute to the human good,” in order that they should assist in moderating the contemporary negative “rhetorical tone of the critiques.”⁸

In this article, I will enthusiastically embrace Waterman’s endorsement of psychological individualism in the specific

4. See generally CLASS IN AMERICA: AN ENCYCLOPEDIA 376–77 (Robert E. Weir ed., 2007) (“One can say . . . that American society continues to grapple with how to best meet the needs of its citizenry—through relying on individual initiative and personal accountability or through viewing individuals as members of a collective whole within an economic and political society charged with promoting the general welfare.”).

5. ALAN S. WATERMAN, THE PSYCHOLOGY OF INDIVIDUALISM 85 (1984) [hereinafter WATERMAN, PSYCHOLOGY].

6. *Id.* at 169.

7. *Id.* at 167.

8. *Id.* at 169.

context of copyright ownership. I will demonstrate that a rational and ethically moral system of copyright authorship and ownership can only be achieved by preserving the individual rights of copyright owners, primarily because “natural individual rights are a more basic foundation for normative judgment than social codes could be, and . . . social structures can be defended as legitimate only insofar as they serve the interests and protect the rights of individuals.”⁹ I will show, as Objectivist philosopher Ayn Rand poignantly warned over fifty years ago in her novel, *Atlas Shrugged*, that a society which shuns the individualistic efforts of creators, inventors, and industrialists, “returns to a pre-nineteenth century level of existence. Human life shortens in span—death comes more quickly for all [as] the result of the mind on strike.”¹⁰

In the face of zealous academic opposition to the above propositions among the vast majority of intellectual property law scholars, I will nonetheless continue to bellow from the ivory towers of the university with Zarathustra-like vigor—along with a lone few of my colleagues—that copyright laws, albeit imperfect, insanely complicated, and in many respects in dire need of a modern recasting, “still serve a useful purpose that advances the common good.”¹¹ I shall take up the charge of one of these legal mavericks, Professor Robert Merges, who in his well-reasoned and refreshingly *well-researched* treatise, *Justifying Intellectual Property*, calls for a multi-disciplinary examination of the contemporary conundrum of IP ownership in the wake of the digital age.¹² Professor Merges encourages the development of “a set of ideas, a vocabulary, that transcends and ties together multiple foundational conceptions” in order to ultimately preserve the individualistic foundations of intellectual property ownership while simultaneously seeking a just and balanced integration of larger societal needs.¹³ That is what this article will attempt to achieve in the context of copyright law, specifically arguing

9. JOHN WATT, *INDIVIDUALISM AND EDUCATIONAL THEORY* 57 (1989).

10. Debi Ghate, *The Businessman's Crucial Role*, in *ESSAYS ON AYN RAND'S ATLAS SHRUGGED* 315 (Robert Mayhew ed., 2009).

11. Richard A. Spinello, *Beyond Copyright: A Moral Investigation of Intellectual Property Protection in Cyberspace*, in *THE IMPACT OF THE INTERNET ON OUR MORAL LIVES* 29 (Robert J. Cavalier ed., 2005).

12. ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* xi (2011).

13. *Id.*

that a synergy of both individual and collective benefits—of the type promulgated by Waterman and a few other psychologists—is already built into the existing scheme of copyright ownership.

This article shall proceed in four parts. Focusing primarily on the works of behavioral psychologists, Part I will begin with a discussion of the vast differences between a human behavioral model that aspires to embolden and empower the individual, from one that encourages the individual to bow submissively to what it perceives to be the higher and more important needs of the collective or mass society. This part will also demonstrate that the vast majority of psychologists today continue to fight against the individualistic principles which have historically shaped our government and legal system, favoring instead a model of personality based on collectivist canons. In Part II, I will show that copyright law—also historically a doctrine which fosters individual efforts of creativity—is similarly under attack by legal scholars who wish to infuse collectivist precepts into the laws regulating the production of works of authorship and their resultant ownership. In the third Part, I will respond to the claims for communitarian copyright by revealing that the true reason why individual copyright ownership and the notion of the genius author are under attack is due to what I term “copyright envy,” or a pervasive desire to eviscerate all of those creative traits which make up an individual author, ironically for the very reason that the traits *are* good and *serve* good. In Part IV, I will apply the four principles of individualism outlined by Waterman to copyright ownership, and conclude that continuing to foster a regime of rights that are exclusively held and controlled by individual authors will ultimately result in not only more and better works, but also will contribute to a synergistic and happier society overall. Finally, I will conclude this article, as I often do, with an appeal to my copyright colleagues in the academy to seriously reconsider their borderline obsessive fascination with their dream of communitarian copyright ownership.

I. THE COMPETING PHILOSOPHIES OF INDIVIDUALISM AND COLLECTIVISM

Individualism and collectivism have been defined as “a set of shared beliefs and values of a people concerning the relationship of an individual to aggregates or groups or

individuals. It represents the way individuals relate to others in their society, and it reflects their emotional and cognitive attachments to particular networks of individuals.”¹⁴ An individualistic model results in the consequence of autonomous work that is designed around the individual rather than group work or participative decision-making.¹⁵ On the other side of the coin, a collective societal model focuses primarily on societal development as a whole before encouraging the refinement of intrapersonal skills.¹⁶

Viewed within the complex context of economics, individualism is often associated with capitalism, which represents the antithesis of collectivism in the form of communism or socialism.¹⁷ From an intrapersonal lens, it “has come to acquire several different meanings: an ability to exercise a degree of control over one’s life, the ability to cope with one’s problems, an ability to change for the better, reliance upon oneself, being responsible for one’s actions, self-fulfillment and self-realization of one’s internal resources.”¹⁸

In the realm of politics, individualism is frequently viewed as promoting smaller government, less welfare spending, fewer taxes, and deregulation of business whereas the counter political bent of collectivism is that government regulation is “needed to address social problems, nurture community, provide equal opportunity, and protect society from selfishness, greed, and the power of privilege.”¹⁹ From a literary

14. MIRIAM EREZ & P. CHRISTOPHER EARLEY, *CULTURE, SELF-IDENTITY AND WORK* 95 (1993).

15. *Id.* at 96.

16. Michael L. Hecht & YoungJu Shin, *Culture and Social and Emotional Competencies*, in *HANDBOOK OF SOCIAL AND EMOTIONAL LEARNING: RESEARCH AND PRACTICE* 50 (Joseph A. Durlak et al. eds., 2015).

17. CLASS IN AMERICA: AN ENCYCLOPEDIA, *supra* note 4, at 375; *see also* Donald Billings & Lawrence W. Reed, *The Moral Case for Competitive Capitalism, Revisited*, *FOUND. FOR ECON. EDUC.* (May 13, 2016), <https://fee.org/articles/the-moral-case-for-competitive-capitalism-revisited/> (noting that capitalism, more than any other force, is responsible for the universal acknowledgement of individuality, the freedom of choice, the sanctity of contract and property rights and, ultimately, “the desirable characteristics of a truly just and moral order”).

18. YUEH-TING LEE ET AL., *PERSONALITY AND PERSON PERCEPTION ACROSS CULTURES* 194–95 (2013).

19. CLASS IN AMERICA: AN ENCYCLOPEDIA, *supra* note 4, at 376 (providing examples of the intricacies of the political debate over collectivism and individualism, and claiming that the lines between liberalism and conservatism cannot be easily drawn within such debate).

perspective, the reigning values of individualism are self-reliance, self-ownership, freedom of contract, and autonomy—traits overwhelmingly acclaimed by, and entrancingly woven into the tales of, many of America’s most prolific and influential early writers such as Emerson, Thoreau, Hawthorne, Melville, and Twain.²⁰ Even in the area of mythological studies, prominent authors such as Joseph Campbell eloquently note that “[f]ormerly—but in archaic cultures still—the way was to subordinate all individual judgment, will, and capacities absolutely to the social order: the principle of ego . . . was to be suppressed”; however, today, the “humanistic individual has released powers of creativity that have brought about in a mere two centuries changes in the weal and woe of man such as no two millenniums before had ever worked.”²¹

Regardless of the particular frame of reference from which the contentious debate over individualism and collectivism is recognized, it cannot be denied that a vast and seemingly insuperable divide exists among the proponents of each diverse theory, evincing a philosophical schism of overwhelming proportions.²² On the one hand, many writers have argued that espousing the philosophy of individualism will lead to a denigration of the common good, a societal divisiveness and, ultimately, to the alienation from one’s fellow human beings.²³ On the far end of that spectrum, proponents of individualistic convictions insist that such beliefs further “an aspiration toward a self and a society that stand for something good and that may even enhance existence.”²⁴

It is also without doubt that—at least in academia—the collectivist camp is today the clear winner in this debate, as the tenets of individualism are “under the most severe attack in many intellectual circles.”²⁵ Indeed, “individualism has been

20. JUSTYNA FRUZIŃSKA, EMERSON GOES TO THE MOVIES: INDIVIDUALISM IN WALT DISNEY COMPANY’S POST-1989 ANIMATED FILMS 26–27 (2014).

21. JOSEPH CAMPBELL, THE MASKS OF GOD: OCCIDENTAL MYTHOLOGY 521–22 (1964).

22. LEE ET AL., *supra* note 18, at 195; *see also* GEORGE KATEB, EMERSON AND SELF-RELIANCE x (2002) [hereinafter KATEB, SELF-RELIANCE] (describing the dispute in terms of having “a history of deadlocked criticism”).

23. LEE ET AL., *supra* note 18, at 195.

24. GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND A DEMOCRATIC CULTURE ix (1992).

25. Tibor R. Machan, *The Fear of Individualism*, FOUND. FOR ECON. EDUC. (July 1, 1993), <https://fee.org/articles/the-fear-of-individualism>

the object of sustained criticism and contestation. During the past two centuries, very few important philosophers and social theorists and the schools of thought that formed around their teachings have abstained from taking individualism to task in whole or part.”²⁶ Legal academicians, too, are among those leading the charge on a heightened attack against individualism.²⁷

Despite the deep chasm that separates the staunch advocates of individualism on the one hand and collectivism on the other, some authors astutely note that the debate will never be resolved by a continued pitting of these two philosophies against one another.²⁸ Within the context of organizational psychology and behavioral studies, Professors Erez and Earley have maintained that

[p]erhaps the most reasonable conclusion is that *all* individuals have self- and group interests; culture influences which of these interests will manifest themselves in a particular setting. Throughout childhood and adolescence the collectivist is reinforced and rewarded for cooperative actions with group-focused outcomes, whereas the individualist is rewarded for engaging in actions that have positive personal outcomes. Rather than viewing self- and group interests as opposing motives, we can view them as separately linked to knowledge structures that are evoked in a culturally prescribed fashion.²⁹

The authors maintain that a “simple categorization” of these groups of thought “can overlook numerous subtleties of

[hereinafter Machan, *Fear of Individualism*] (observing that, according to the critics, individualism “is supposed to foster disloyalty to family, friends, and country. It is supposedly hedonistic and instills antisocial sentiments in people. It is allegedly purely materialistic, lacking any spiritual and cultural values”); see also Tibor R. Machan, *Individualism: The Collectivists’ Nemesis*, ALT.COM (May 2, 2014), <http://www.alt-market.com/articles/2119-individualism-the-collectivists-nemesis> [hereinafter Machan, *Collectivists’ Nemesis*] (“Today some of America’s most powerful mainstream politicians have gone on record denouncing individualism and they are joined by a great many academicians, even some scientists, in trying to besmirch the idea.”).

26. KATEB, SELF-RELIANCE, *supra* note 22, at x.

27. See, e.g., Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 613 (2014) (hereinafter, Gordon, *The Core of Copyright*) (noting that a focus on authorial creation “is not very popular at the moment” among commentators writing on copyright theory).

28. See, e.g., LEE ET AL., *supra* note 18, at 195 (citing authors such as Sampson who “see no reason why the philosophy of individualism should not also nurture a spirit of cooperation and coexistence”).

29. EREZ & EARLEY, *supra* note 14, at 94 (emphasis in original).

behavior.”³⁰ Compounded with this propensity to simplify, the battle lines between the two camps are often rigidly drawn, as is often the case today in political discourse in the media.³¹ Weir regrettably notes that individualism “is easily confused with personal style and uniqueness, just as it is easily stereotyped by its opponents as a smokescreen for selfishness. Its fringe expressions—including radical capitalism, extreme libertarianism, oppositional subcultures, and utopian anarchism—also contribute to stereotyping.”³² Similarly, Erez and Earley observe that a common misconception about collectivism is that it “is synonymous with socialism and that all collectivists are harmonious and homogeneous.”³³

The debate among individualists and collectivists in the field of psychology is not moving forward because each side is deeply entrenched and, thus, unable to envision a more tempered theory which applies a median between the myopic extremes envisioned by each camp. Quite a similar chasm exists among copyright experts who are pro-owner’s rights versus those who believe that the rights of the public should reign supreme. As further discussed below, the underlying theme in this copyright-rights debate is also fundamentally one which pits principles of individualism against those of collectivism.

II. THE CALL FOR COLLECTIVISM IN COPYRIGHT LAW

Traditionally in the United States, intellectual property law generally—and copyright law in particular—has developed within a framework that embraces principles of individuality.³⁴

30. *Id.*

31. See, e.g., Richard Benedetto, *CNN Political Reporter Not Happy About Favorable Romney Coverage*, FOX NEWS (Oct. 29, 2012), <http://www.foxnews.com/opinion/2012/10/29/cnn-political-reporter-not-happy-about-favorable-romney-coverage/> (“There was a time when news reporters who covered politics were expected to keep their partisan leanings or preferences to themselves. That time is nearly gone.”).

32. CLASS IN AMERICA: AN ENCYCLOPEDIA, *supra* note 4, at 377.

33. EREZ & EARLEY, *supra* note 14, at 94–95.

34. Magnus Graner, *Opening Remarks to the 2010 ATRIP Congress*, in *INDIVIDUALISM AND COLLECTIVENESS IN INTELLECTUAL PROPERTY LAW* xv (Jan Rosén ed., 2012); see also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 2* (1995) (“Copyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors.”); Anne Sechin, *On Plagiarism, Originality, Textual Ownership and Textual Responsibility: The Case of Jacques le Fataliste*, in

The Progress Clause of the U.S. Constitution itself, which empowers Congress to enact copyright laws for the benefit of authors “explicitly recognizes that individual expression is valuable in itself, deserving encouragement.”³⁵ In fact, the notion that authors own property in their work because it “embodies their personal individuality predates even the earliest copyright statute.”³⁶ In one of the first copyright infringement cases, *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court held that an original work “is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”³⁷

Indeed, two of the major virtues of a philosophy of individualism as claimed by its proponents include creativity and originality.³⁸ Originality, it will be recalled, is also the legal standard by which copyright ownership is determined, as Section 102(a) of the Copyright Act of 1976 (the Act) provides copyright protection only for “original works of authorship.”³⁹ The legal determination of originality requires a mere “modicum” or “spark” of creativity; it is also notoriously *not* an assessment of the artistic or creative merits or societal worth of a work.⁴⁰

ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT 102 (Reginald McGinnis ed., 2009) (maintaining that the emergence of originality as an aesthetic category and the legal birth of intellectual property depend on the rise of individuality in the eighteenth century); Jisuk Woo, *Genius with Minimal Originality?: The Continuity and Transformation of the “Authorship” Construct in Copyright Case Law Regarding Computer Software*, 15 ALB. L.J. SCI. & TECH. 109, 112 (2004) (noting that “authors generally have been thought of as individuals who are solely responsible for creating unique works, a notion upon which the conceptual system of copyright relies heavily”).

35. U.S. CONST. art. I, § 8, cl. 8; Jacqueline Shapiro, *Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity*, 34 U. MIAMI L. REV. 1043, 1045 (1980).

36. Alina Ng, *Literary Property and Copyright*, 10 NW. J. TECH. & INTELL. PROP. 531, 539 (2012).

37. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

38. WATERMAN, PSYCHOLOGY, *supra* note 5, at 4–5.

39. See 17 U.S.C. § 102(a) (2012).

40. ZOHAR EFRONI, ACCESS-RIGHT: THE FUTURE OF DIGITAL COPYRIGHT LAW 35 (2011).

Delving deeper into “the construction of ‘authorship’ shows that the U.S. copyright law encompasses the notion of inherent rights of creators generated by their creative activity in many ways.”⁴¹ The “romantic” notion of copyright authorship—“that a work is the expression of an author’s genius and an extension of the author’s personality”—is the underlying assumption in copyright law that “allows an author to exercise authorial control to ensure the integrity of his self-expression.”⁴² Furthering this assumption, the basic structure of copyright law today rests on the notion “that to achieve the public good, the law should aim at private interest.”⁴³ Waterman has echoed this precept by observing that “the creations brought forth through the expression of unique individual potentials are not just for private use and appreciation, but may be to the benefit of all. Such creativity appears to be facilitated by social conditions that provide personal freedom and encourage the difficult task of individuation.”⁴⁴

41. Woo, *supra* note 34, at 110.

42. Shun-Ling Chen, *Collaborative Authorship: From Folklore to the Wikiborg*, 2011 U. ILL. J.L. TECH. & POL’Y 144, 144 (2011) (hereinafter Chen, *Collaborative Authorship*); see also Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064 (2003) (“Authors are the heart of copyright.”).

43. Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTEL. PROP. L.J. 3, 33 (2001).

44. Waterman, *Interdependence*, *supra* note 3, at 766; see also NATALIE F. VISHNYAKOVA, *THE ABCS OF CREATIVITY, TALENT, AND SPIRITUALITY* 79 (2011) (“The creative individuality is expressed in singularity, originality, and uniqueness, a creator’s personality and his ability creating new material and spiritual values not only for himself alone, but for society as well. The creative individuality manifests in originality, inventive power, brains and wit initiative, creative thinking, acumen and savvy, all of which testifies about talent of personality.”) (emphasis omitted). The complex Jungian process of individuation, while well beyond the scope of this work, is briefly described by one author as follows:

[O]ur psychological life’s work—becoming an integrated person, our ‘individuation’—is to learn how that principle of order manifests in us, to become more familiar with this Self that seems to influence our behavior. This principle or force has been known as the inner voice, a higher power, the dream-maker, the greater self, the mysterious ‘other’ in our personality, the divine spark, the beloved, or destiny; but whatever it is called, many people recognize that something within them beyond their ordinary plans for themselves influences their lives.

See DELDON ANNE MCNEELY, *BECOMING: AN INTRODUCTION TO JUNG’S CONCEPT OF INDIVIDUATION* 3 (2010).

Even though every new copyright author invariably “stands on the shoulders of giants” by relying on the accumulated creative ideas, accepted themes, and general knowledge of authors of the past,⁴⁵

[c]reativity is the art of the new, and it is the product of the individual mind. As new creativity takes form, that cognitive premise intersects with investigations into material culture and social practice, including arguments over whether people create for love or for money, whether and when creativity is cumulative, and whether and when creativity is collective.⁴⁶

It is, thus, hardly ever contested by contemporary legal scholars (including this author) that the foundations of western jurisprudence evident in the underlying constructs that form the basis of copyright law in the United States are imbued with individualist influence.⁴⁷ Incredibly, however, the mainstream of copyright academicians believe this fact to be an unfortunate byproduct of a bygone era in which the individual creations of authors were regrettably praised, admired, and vehemently protected by the legal regime without much question.⁴⁸ It can readily be observed that the bulk of contemporary intellectual

45. Birnhack, *supra* note 43, at 41–44.

46. Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 824–25 (2010); see also RICHARD A. SPINELLO & MARIA BOTTIS, A DEFENSE OF INTELLECTUAL PROPERTY RIGHTS 127 (2009) (“To some extent, authors re-construct and re-shape the ideas they have borrowed from others. But this fact does not deny the single author’s irreducible as a *creative catalyst*, the conscious origin and source of a fresh interpretation, a new work developed through hard labor that often entails considerable imaginative input and sometimes advances the frontiers of knowledge. In this creative process the author as human subject who acts with intentionality endows a work with a certain meaning and stamps his or her unique personality upon that particular work.”).

47. Chen, *Collective Authorship*, *supra* note 42, at 134 (noting that current U.S. copyright law “is based on an individualist property regime”); see also MERGES, *supra* note 12, at 3 (“Countless judges begin their IP decisions with one or another familiar ‘stage setter’ about how IP protection exists to serve the public interest, often intoning one of a few stock passages penned in a spare moment by Thomas Jefferson. But these utilitarian platitudes quickly give way to doctrinal details, which often show the unmistakable imprint of something more fundamental, something beyond utility—revealing at the end of the exercise, its real purpose and justification. That is, courts often wind up talking about IP rights as *rights*.”) (emphasis in original).

48. See, e.g., LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 2 (2007) (arguing that exclusively celebrating one individual copyright author is disingenuous because it fails to attribute the true development of intellectual property as a collective, societal construct that “depends on the consumption of cultural and social properties”).

property scholarship evidences a “general trend against supporting individual rights” in favor of more collectivist approaches, which are “predicated on a rejection of the idea that people are really autonomous.”⁴⁹ According to these authors, “[o]ur attachment to individual property rights is interpreted as symptomatic of the individualism at the core of Western society that needs reappraisal and deconstruction.”⁵⁰

Professor Margaret Chon has observed, for example, that many “influential” scholarly articles are today “in favor of collective authorship, including explicitly collaborative forms,” evincing a “vision [that] substitutes collective for individual genius as well as the individual cultural authority.”⁵¹ Professor Lior Zemer believes that the notion of the Romantic creator is a fiction because “creative works come about when authors and the public collaborate.”⁵² He claims that “[t]he larger community owns and nurtures these shared categories and standards without which the creative act would be stunted.”⁵³ Professor Carys Craig similarly claims that

it is a mistake to look to the relation between the author and her work as the basis on which to justify the copyright system. In so doing, we necessarily neglect the social and cultural goals of copyright, and so wrongly augment the scope of the rights conferred under copyright while failing to identify and draw appropriate limits.⁵⁴

Sadly, the students of these professors are now also carrying the collectivist torch by continuing to promulgate the absurd notion that the solo efforts known to be required in order to create a great work of authorship are merely a “myth” in that they represent an outdated eighteenth century ideology, under which “the production of cultural artifacts is imagined as an activity mainly accomplished by a single person—the romantic author, whose genius gives birth to a work and who is therefore rewarded with property rights to the work.”⁵⁵

49. See SPINELLO & BOTTIS, *supra* note 46, at 5.

50. *Id.*

51. Margaret Chon, *The Romantic Collective Author*, 14 VAND. J. ENT. & TECH. L. 829, 838 (2012).

52. Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 279 (2006).

53. *Id.*

54. CARYS J. CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* 67 (2011).

55. Chen, *Collective Authorship*, *supra* note 42, at 132.

Supposedly, this imagined state by which creativity flourished in times past has been adequately debunked by modern research, as “[e]xisting literature from various disciplines has shown that the idea of romantic authorship is a social/legal construct and does not reflect the actual practices in the production of cultural resources.”⁵⁶ The agenda behind this conspiratorial discourse appears to be a total obliteration of the exclusive rights of copyright authors in favor of mass “collaborative efforts in cultural activities” such as Wikipedia and the Free Software Movement, the sentiment being that “success of these projects further weakens the romantic construction of authorship and draws attention to collaborative efforts in cultural activities.”⁵⁷

In my last article, *Copyright and the Tragedy of the Common*, I critically examined several of the collectivist copyright regimes as concocted by professors to replace current law, specifically drawing attention to the fact that the bulk of their claims regarding authorship are specious, unprovable, and un-researched (at best) and largely incapable of comprehension (at worst).⁵⁸ For example, Professor Zemer has asserted that “the public’s social contribution amounts to a *de facto* contribution, and entitle[s] the public to a similar right to that of the individual author” and that “no one is likely to deny that copyrighted works are social entities”⁵⁹ I set out to objectively refute overreaching and untenable statements such as this and countless others made by scholars who claim to have proven beyond doubt that authorship is not an independent effort, but really a collective and social construction.⁶⁰ I did this by exposing the flaws and gaps in their predominantly theoretical and subjective credos. I also highlighted the fact that the alternate copyright regimes imagined by these scholars are impossible to define and codify

56. *Id.* at 133 (citing the works of Michel de Certeau, Jack Stillinger, Martha Woodmansee, Peter Jaszi, and Lior Zemer); see also Mario Biagioli, *Genius Against Copyright: Revisiting Fichte’s Proof of the Illegality of Reprinting*, 86 NOTRE DAME L. REV. 1847, 1848 (2011) (maintaining that genius is “a remarkably effective legal fiction rather than an accurate description of the process of literary or artistic production”).

57. Chen, *Collective Authorship*, *supra* note 42, at 133.

58. Tracy Reilly, *Copyright and the Tragedy of the Common*, 55 IDEA 105, 153–63 (2014).

59. Zemer, *supra* note 52, at 279 (emphasis added).

60. Reilly, *supra* note 58, at 153–63.

and, thus, enforce, let alone to justify under any rational legal system.⁶¹ In fact, the reality of the matter is that any legal structure which envisions that copyright is a social entity that may somehow be owned upon creation by the public-at-large is, in effect, not a copyright system at all; instead, it is one primed to implement a socialist agenda that espouses the eradication of individual property rights altogether.

I arduously chronicled the collective efforts (pun intended) of a vast and overwhelming majority of copyright professors to demolish the traditional notion of the creative author by infusing collectivist principles into the concept of authorship as defined in the Copyright Act.⁶² I showed that such a metaphorical killing of the individual copyright author is not only contrary to copyright jurisprudence as intended by the Progress Clause, but also that it would result in works that are less creative and more common.⁶³ In the following pages of this article, I will similarly demonstrate how adherence to the first principles of both authorship and individual ownership in copyright law will not only lead to the production of more and better works, but it will also lead to a society of psychologically happier people—or, a more “synergistic” society.

Interestingly, with respect to many tenets of intellectual property law doctrine, scholars seem to regurgitate without much question various so-called “uniform interpretation[s]” and assumptions without bothering to fully examine whether any underlying research actually exists to buttress their theories.⁶⁴

61. See, e.g., Enninya S. Nwauche, *The Emerging Right of Communal Intellectual Property*, 19 MARQ. INTELL. PROP. L. REV. 221, 226–27 (2015) (supporting “the right of communities over their products and processes that derives from their creativity and knowledge which is better described as a peoples’ right,” yet admitting that identifying the owners, the specific content of this right, and the limits defining the scope of this right are “difficult questions,” which are largely unresolved by this author and others writing on the same topic).

62. See Reilly, *supra* note 58, at 153–63.

63. *Id.* at 114 (“As such, when creativity is celebrated as being achieved, owned, and used and not by individual authors but by the collective masses, it will inevitably – and tragically – become common.”).

64. Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 B.Y.U. L. REV. 259, 267 (2013). For example, in examining the universally accepted modern understanding of “science” in the Progress Clause as “general knowledge or meaning,” Professor Ted Snow has recently demonstrated that

this meaning admits irregularities in the hermeneutics of constitutional interpretation, which ultimately call into question

This can most certainly be said of the popular notion of the death of the author, which has been accepted as “a basic tenet” by post-modern artists and post-structuralists “who believe that copyright law has no philosophical justification” and who “would probably like to do without copyright altogether.”⁶⁵ Although I could go to great lengths quoting the rampant examples of scholarly critiques of the Romantic notion of the author, Professor Zemer has catalogued several of these in a recent article in which he writes with self-assured confidence that “these examples demonstrate the *fact* that contemporary scholarship on copyright recognises the wrongs inherent in Romantic notions of authorship and the need to examine copyright in a social context.”⁶⁶ In a similar fashion, Professor Eric Johnson assuredly proclaims that “cherished beliefs about incentives and intellectual output can now be revealed as myth” and that “the general case for intellectual property rights, in so far as it is based on the idea that external incentives are needed to encourage art and invention, should no longer be accorded credibility in policy debates about intellectual property law.”⁶⁷

Just as Professor Snow has more critically examined the tenet of “science” in his recent copyright article on the use of that term in the Progress Clause,⁶⁸ I will also attempt here to comprehensively and holistically examine the meanings of both authorship and ownership consistent with how I believe our Framers intended those terms to serve in determining when copyright ownership societally advances the progress of science. Although it is today argued by many prominent scholars of law, psychology, and literature that individual authorship is “dead” and the traditional notion of authorship must be somehow

the accuracy of the meaning At first glance, the uniformity of this interpretation suggests its accuracy. If everyone has subscribed to the same view, it must be right. But on closer examination, the interpretation admits troubling irregularities. Taken together, these irregularities suggest problems with the uniform interpretation. They suggest a need for a comprehensive examination.

Id. at 265, 267.

65. Elton Fukumoto, *The Author Effect After the “Death of the Author”*: *Copyright in A Postmodern Age*, 72 WASH. L. REV. 904–05 (1997).

66. Zemer, *supra* note 52, at 252 (emphasis added).

67. Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 679 (2012).

68. See Snow, *supra* note 64.

modified to include collectivist, cultural ownership, I will not only continue to uncover the conceptual fallacies of such axioms, but I will also explain the underlying psychological dangers to creativity and innovation that shall ensue if such an anti-author mentality continues to pervade our culture.

III. RESPONDING TO THE COMMUNITARIAN COPYRIGHT CAMP

The zealous “dethronement-of-the-author” propagation takes its form in two major lines of thought. The first, and most common attack on the author is a byproduct of the seemingly un-defendable hype that big business is contributing to the demise of the public domain to the detriment of both the individual author and the collective.⁶⁹ This perpetuated and continually re-told copyright “story,” among others, has led to the second line of thought, which insists that any notion that a Romantic or “genius” individual author actually creates a copyrighted work must be eviscerated in order for copyright to be set right and function according to its founding principles.⁷⁰ In the following Sections, I will discuss these lines of thought in great detail, debunking their veracity, and explaining the real reason why they continue to pervade today in the bulk of scholarly articles discussing copyright authorship.

A. THE “BIG BAD ENTERTAINMENT COMPANY”

Copyright ownership has somehow through the modern years managed to become associated with corporate greed, materialism, and human selfishness.⁷¹ Undeniably, a

69. TRAJCE CVETKOVSKI, *COPYRIGHT AND POPULAR MEDIA: LIBERAL VILLAINS AND TECHNOLOGICAL CHANGE* 20 (2013) (“[I]ndividuals have accused corporate owners of popular media of displaying monopolistic and greedy tendencies.”).

70. See, e.g., Tonya M. Evans, *Reverse Engineering IP*, 17 MARQ. INTELL. PROP. L. REV. 61, 81–82 (2013) (claiming that the Romantic author concept “is a relatively recent phenomenon and is completely at odds with the ways by which much of literary and artistic productions are created”); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 184 (2000) (lamenting that the law “clings tenaciously to the old ideals” of Romantic authorship and has not been “challenged or swayed by [the] critique of the construct of authorship”).

71. See, e.g., Charlotte Waelde, *Copyright, Corporate Power and Human Rights: Reality and Rhetoric*, in 2 *NEW DIRECTIONS IN COPYRIGHT* 294 (Fiona Macmillan ed., 2006) (“[O]ne observer” has argued that “copyright is now

present-day theme that is commonly trickling through copyright scholarship is the tragedy of the Maltreated Musician who is so much of an ignoramus that he is at the mercy of the Big Bad Entertainment Company (BBEC), which magically and viciously winds up with ownership of his sound recordings.⁷² It is quite true that the majority of sound recordings are exclusively owned by the three remaining major record labels: Universal Music Group, Sony BMG, and Warner Music Group⁷³ by way of assignment clauses in artists' recording contracts.⁷⁴ Nor can it be refuted that the record industry has a rich and well-documented history of artist exploitation, and that some labels have unscrupulously held musicians to the terms of unconscionable, even illegal, contracts.⁷⁵

On the one hand, it is right to shed light on the illegal and immoral practices of record labels in the early days of the recording industry; however, this continual self-reinforcing banter insinuating that the modern musician continues to be a pitied fool who cannot manage an arms-length negotiation with

considered by public opinion as an illegitimate weapon in the hands of shameless industrialists" and is a "result of both corporate *and* consumer greed.") (emphasis in original); Jane C. Ginsburg, *Essay-How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61–62 (2002) ("I have a theory about how copyright got a bad name for itself, and I can summarize it in one word: Greed. Corporate greed and consumer greed. Copyright owners, generally perceived to be large, impersonal and unlovable corporations (the human creators and interpreters—authors and performers—albeit often initial copyright owners, tend to vanish from polemical view), have eyed enhanced prospects for global earnings in an increasingly international copyright market.").

72. Martin Skladany, *Alienation by Copyright: Abolishing Copyright to Spur Individual Creativity*, 55 J. COPYRIGHT SOC'Y U.S.A. 361, 363 (2008) (claiming that "scholars have rightfully averred that our current copyright system gives copyright holders, especially corporations, too much influence in shaping and limiting our political participation, economy, culture, beliefs, and desires").

73. There were six major record labels in the 1990s, but after several mergers, today there remain only three. See Zack O'Malley Greenburg, *Revenge of the Record Labels: How the Majors Renewed Their Grip on Music*, FORBES (April 15, 2015, 10:01 AM), <http://www.forbes.com/sites/zackomalleygreenburg/2015/04/15/revenge-of-the-record-labels-how-the-majors-renewed-their-grip-on-music/>.

74. W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 848 (2007).

75. See, e.g., Phillip W. Hall, Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 190 (2002) (noting that usage of standard recording contracts "has forced artists into a position that some have said amounts to professional slavery").

the record industry is not only insulting, but has also steadily escalated into a dangerous rhetoric recited *ad nauseam* by scholars in order to justify a loosening of copyright protection in all entertainment industries since most authors do not “control and profit from their own work” anyway.⁷⁶ It also fails to recognize the fact that, by and large, musicians who sign with major labels receive major benefits which they could not otherwise achieve on their own, including advances, usage of studio time, expert producers and music engineers, tour support, *etc.*, and that entertainment companies take on huge business risks and devote many resources and investment in order to ensure that content produced by artists is distributed to the public.⁷⁷ Alas, within all the scholarly articles that constantly parade the faults of the record labels in support of the BBEC talking point, one is hard pressed to find discussion of the fact that many labels pair novice artists with experienced professionals who help them find audiences, reinvent themselves, and otherwise “serve as creative partners” throughout a lucrative career.⁷⁸

Although this BBEC theme appears frequently in copyright scholarship stories, perhaps one of the most egregious examples is from Professor Joanna Demers in her book, *Steal This Music*.⁷⁹ In Chapter One, Professor Demers mentions an ad campaign recently launched by the Motion Picture Association of America (MPAA) to counteract the bootlegging and piracy of movies, particularly the production of a public service announcement aired prior to the start of films in most American movie theaters in which stuntmen and other “presumably working-class individual[s]” in the movie industry profess that the downloading of a movie is compared to stealing

76. JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 12 (2006).

77. See Helienne Lindvall, *Behind the Music: What do Record Labels Actually Do? You'd be Surprised*, THE GUARDIAN (Feb. 2, 2012), <https://www.theguardian.com/music/musicblog/2012/feb/02/behind-music-record-labels> (speaking to musician Ed Sheeran who explains how signing with a major record label allowed him to pay his living expenses while still writing music full time). See generally Saul Hansel, *Bits Debate: Is Copy Protection Needed or Futile?*, N.Y. TIMES (Jan. 14, 2008, 4:18 PM), <http://bits.blogs.nytimes.com/2008/01/14/bits-debate-is-copy-protection-needed-or-futile>.

78. ROBERT LEVINE, *FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK* 50 (2011).

79. See generally DEMERS, *supra* note 76.

a candy bar.⁸⁰ Professor Demers discusses how the strategy of the campaign “appeals to our sense of fairness” and maintains that

[w]hat this commercial doesn’t tell us, however, is that the copyrights to films are owned not by the stuntmen, or by actors, or even by directors or screenwriters. Instead, film production companies own them and distribute royalties among the various individuals involved in a movie’s creation. The MPAA did not undertake this campaign merely to protect the grips or stuntmen who earn a day-to-day living working on films. Production companies are panicking at revenue losses that threaten the salaries of CEOs who often do not participate at all in the creative process of making movies. The Respect Copyrights campaign is a recent example of a centuries-old strategy on the part of publishers to cast copyright as a *moral right*. According to their stance, copyright promotes creativity by ensuring that authors can control and profit from their own work. As we’ll see below, this argument brushes aside the fact that most authors do not own the copyrights to their work; they sell them to a publisher or record label in exchange for a share in the royalties and a guarantee that their work will be distributed commercially The true beneficiaries of recent [intellectual property] law changes are neither authors nor consumers, but rather corporate content providers.⁸¹

If we dissect this paragraph, it fails to make sense on several levels. On the most basic level, it ignores the obvious fact that the act of selling a copyright to a publisher or label is the very essence of exclusive control that every Copyright Act enacted in this country affords to authors, as mandated by the United States Constitution.⁸² Under the Copyright Act, an author automatically secures a copyright in a creation if it is an original work of authorship that is fixed in a tangible medium of expression.⁸³ Once so secured, the author alone is provided

80. *Id.* at 11.

81. *Id.* at 11–12 (emphasis in original). For a similar discussion of the MPAA’s ad campaign, see LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART AND OWNERSHIP 4–9 (2012).

82. Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries[.]” U.S. CONST. art. I, § 8, cl. 8. (emphasis added). Congress first codified exclusive rights to authors of works in the Copyright Act of 1790. See DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY § 4B, at 4-7–4-9 (1992). The Copyright Act of 1976, as amended, is the current law protecting the exclusive rights of original works to their authors. See 17 U.S.C. §§ 101–1332 (2012).

83. 17 U.S.C. § 102(a) (2012). A work “is fixed in a tangible medium of expression” when its “embodiment in a copy or phonorecord . . . is sufficiently

with various exclusive rights to that work that may (but need not) be exercised: the right to reproduce; the right to make derivative works; the right to distribute; the right to perform; and the right to transmit.⁸⁴ Moreover, whereas copyright rights—like rights in real property—are fully assignable and licensable, the Copyright Act does not affirmatively *require* the copyright owner to give or license away their works.⁸⁵

Professor Demers, however, insinuates that recent changes to intellectual property laws somehow place the authors of creative works in a copyright caboose while handing the engine keys to corporations whose profits line only the CEOs' pockets. To the contrary, this notion is actually refuted by Professor Demers herself when she acknowledges in the very same sentence that authors do, in fact, *sell* their rights to companies in *exchange* for *royalties* and a *guarantee* of distribution! Nobody puts a gun to the copyright owner's head and forces him to give up his copyright. At the end of the day, it is a choice made by the author, and the author alone. Sometimes the choice is a bad one, while frequently, it is a good one. Either way, the decision to assign copyright rights to a business entity is *solely* initially in the hands of each individual author.

Professor Demers' outburst claiming that the CEOs of the BBECs are only concerned with their own salaries is a juvenile attempt to divert attention from the corporate structural workings of the entertainment industry. Yes, it is true that CEOs who ultimately control large amounts of capital fund movie making—otherwise, the world would not be blessed with iconic and creatively inspirational works such as *Star Wars*, *Jaws*, and other high-production movies of value. But these BBECs *also* employ thousands of other folks besides the authors who are creating the original content, including the “working class” people whom Professor Demers pretends to extend sympathy.⁸⁶ Demers conveniently fails to play out the story she weaves to the final scene: as the BBEC folds up shop and the stuntmen, grips, make-up artists and all other

permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” H.R. REP. NO. 94-1476, at 53 (1976) (internal quotations omitted).

84. 17 U.S.C. § 106 (2012).

85. Susan J. Latham, Newton v. Diamond: *Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003).

86. MERGES, *supra* note 12, at 221.

employees of the BBEC, are suddenly out of work. Moreover, as Professor Merges profoundly notes, if we dismantle the BBECs, “it will surely affect small and independent creators as well.”⁸⁷

Viewing the workings of the music industry with a derisive and myopic lens, most copyright law critics fail to ever recognize—even cursorily—that “[r]ecord labels undertake significant risk in signing artists and must recoup their expenses and earn a profit on the commercial success of a few” and that “labels then use such profits to invest in the next generation of artists.”⁸⁸ Additionally, “[i]n cases where the artist never achieves commercial success—as is the case with the majority of new artists—the label does not require the artist to repay its investment.”⁸⁹ Copyright practitioner Brian Day estimates that

[s]pecifically, record labels provide a typical new artist with over \$1,000,000 in capital to promote a new album, while providing more established artists with nearly \$5,000,000 in total funding. New artists generally receive a \$200,000 advance for personal expenses, which allows the artists to concentrate on their creative work, and an additional \$200,000 for recording costs. On average, the label pays another \$300,000 for artist promotion and marketing, \$200,000 for music videos, and \$100,000 to fund the artist’s first promotional tour.⁹⁰

Another author has noted that “[t]he music business is the only one where such giant corporations risk billions of dollars on untested musical acts, only 5% of which ultimately turn a profit.”⁹¹

Professor Demers’ pitch against the MPAA also neglects to mention that self-publishers cannot achieve nearly as much of an audience as traditional publishers do in distribution and dissemination of works. It is vogue to feign concern for authors who were raped of their copyrights (so the great story is told, and retold), but the flipside of the situation—when authors

87. *Id.* at 222.

88. Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 75 (2011).

89. *Id.*

90. *Id.* (citing DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 61–118 (7th ed. 2009), which provides a comprehensive and detailed overview of the many facets of the business model of the record company).

91. Connie Chang, *Can’t Record Labels and Recording Artists All Just Get Along?: The Debate over California Labor Code S 2855 and Its Impact on the Music Industry*, 12 DEPAUL-LCA J. ART & ENT. L. 13, 15 (2002).

hold onto their ownership rights at the expense of actually getting their product distributed to the folks—is usually not the best solution for the advancement of the author’s career, or the progress of society as a whole, for that matter.⁹²

Professor Demers is certainly not the only copyright scholar to begrudge the success of the BBECs.⁹³ Professor Mark Lemley believes laws regarding the ownership of copyrighted works “are heavily skewed to protect the interests of corporations, not individual authors”⁹⁴ To buttress his opinion, Professor Lemley cites the work-made-for-hire doctrine⁹⁵ and the doctrines of assignment and transfer of copyright rights⁹⁶ as examples of how copyrights “end up not in the hands of authors . . . but in the hands of corporate economic interests.”⁹⁷ Like Professor Demers, however, Professor Lemley conveniently fails to note that original copyright authors receive significant and meaningful benefits from BBECs when they *choose* to assign rights to their creative works.⁹⁸

The professorial escalation of the BBEC myth is dangerous because it contributes to public opinion—particularly among the younger generation and the students of these professors—that non-sanctioned acts like piracy and unauthorized downloading should not be illegal since the record companies make enough of a profit and are not harmed by such acts,

92. Max Dunbar, *The Great Underground Myth: Why Self-Publishing Doesn't Work*, 3:AM MAGAZINE (Nov. 29, 2009), <http://www.3ammagazine.com/3am/the-great-underground-myth-why-self-publishing-doesnt-work/>.

93. See, e.g., Note, *Not in Court 'Cause I Stole A Beat: The Digital Music Sampling Debate's Discourse on Race and Culture, and the Need for Test Case Litigation*, 2012 U. ILL. J.L. TECH. & POL'Y 141, 158 (2012) (“While the RIAA claims that illegal mixtape regulation takes money from rich musical pirates and compensates artists, the rights to original work are often held by corporations rather than the artists themselves. The truth is that digital sampling enables black artists, both DJs and otherwise, to produce their own cultural and economic capital in the face of a monopolistic music industry.”).

94. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)).

95. 17 U.S.C. § 201(b) (2012).

96. *Id.* § 201(d).

97. Lemley, *supra* note 94, at 883.

98. See LEVINE, *supra* note 78, at 50 (“[A]lthough some artists regret signing with labels, the choice is theirs . . .”).

anyway.⁹⁹ Scholars such as Professor Lessig are authors of best-selling books (which, ironically, are protected by the imprimatur of the 1976 Act, and *not* available for reuse on Creative Commons) that vastly undermine the loss of revenue that the record companies have experienced since Napster and other popular file-sharing websites have arrived on the online scene. Although the music industry today is gaining \$7.9 billion less in annual retail sales than it was a decade and a half ago,¹⁰⁰ Lessig consistently maintains that it is “hard to reckon” just how harmful file sharing has been to the industry.¹⁰¹

Such an anti-corporate stance also sadly perpetuates the notion of the scorned and abused recording artist who should be pitied and whom lawmakers should somehow assist by legislating amendments to contract and copyright law and other codes which purportedly even the playing field for artists who would be otherwise forced to sign a contract which is really nothing more than an “indentured servitude.”¹⁰² Instead of the desire to encourage artists to become more educated about the business in which they are engaged—or to hire someone who is—we instead as a society continue to repeat the self-serving clap-trap of the oppressed artist/victim who needs a legal handout or a new law in order to succeed at his craft.¹⁰³ Such a

99. Victoria R. McDonald, *Stirring the Waters: Whether the Pirate Bay Case and the Thomas-Rasset Case Will Impact File Sharing and Piracy in Sweden and the United States*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 563, 590 (2011). The author states that

many people feel that file sharing should not be illegal, as copyright laws are outdated with respect to new file sharing technology and there is a perceived lack of harm to the already profitable music industry. Some analysts say '[t]here is a Robin Hood effect' in which '[m]ost people perceive celebrities and studios to be rich already and as a result don't think of movie downloading as a big deal.'

Id.; see also Poll: *Americans Think Downloading No Big Deal*, MSNBC (Jan. 26, 2007, 4:26 PM), <http://www.msnbc.msn.com/id/16828408/>.

100. See Greenburg, *supra* note 73.

101. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 69 (2004).

102. Chang, *supra* note 91, at 13 (internal quotations omitted).

103. The existing laws are, in fact, all artists need. The Copyright Act contains sufficient protection. One example is 17 U.S.C. § 203 (2012), which provides that authors have the right to terminate transfers and reclaim ownership of their works of authorship during a five-year window of time starting on the thirty-fifth anniversary of the execution of any license or conveyance. It may be unfortunate that as of mid-2015, fewer than 300

victim mentality is fostered by law professors who continue to beat the BBEC drum, and is extremely dangerous because once one adopts this policy, one “will never be able to escape poverty” and mental attitudes will progressively shift to search for the perpetrator who caused such collective suffering, whether it be evil corporations or the government, and

if the number of people who believed this kind of doctrine were to increase, all positive activity in the world would cease, and jealousy would be justified. This doctrine would lead people to rationalize their feelings of envy and develop ideas about how to bring down those who are successful, accusing them of achieving their goals through wrongdoing. However, it is quite obvious that anyone who thinks in this way can never be successful.¹⁰⁴

Thanks in large part to the collectivist copyright movement proliferated by the professors discussed above and countless others, people today do not like big companies, they do not like the recording industry; however, they most certainly like “the idea that they can get something for free.”¹⁰⁵ But, as one author aptly noted, to reinterpret the *public* interest as a *personal* interest of individuals to receive copyrighted works without paying for them “is as much a perversion of the Constitutional copyright clause as is the anthropomorphically nonsensical, but infinitely self-serving, adage ‘Information wants to be free.’”¹⁰⁶

Indeed, as my father had instructed me throughout childhood that “there is no such thing as a free lunch,” in the following Sections of this article, I will show that collective copyright rights effectively beget *no* copyright rights which, in turn, will obviously result in the generation of less creative works.¹⁰⁷ I will return to the theme of the Big Bad

authors (of all disciplines, be they songwriters, book authors, recording artists, etc.) have recorded recapture termination notices, and that their reasons for having not done so range from ignorance of the law to procrastination to intentional delay for strategic advantage. That does not mean, though, that there is not an existing law that is sufficient to protect their rights. *See, e.g.,* Joe Bogdan, *The Little Law that Could (and Probably Will): Section 203 Copyright Recapture Terminations in America*, AM. J. ARTS MGMT. (Nov. 2015), at 1–3, 5.

104. RYUHO OKAWA, *THE PHILOSOPHY OF PROGRESS: HIGHER THINKING FOR DEVELOPING INFINITE PROSPERITY* 6–7 (2005).

105. LEVINE, *supra* note 78, at 61–62 (quoting Texas economics Professor Stan Liebowitz).

106. Ginsburg, *supra* note 71, at 62.

107. *See, e.g.,* SPINELLO & BOTTIS, *supra* note 46, at 5 (maintaining that when the premise of individual autonomy is denied by academicians, “legal regimes dedicated to preserving autonomy are destabilized”).

Entertainment Company in order to reestablish the founding notion that individual copyright rights lead to the creation and dissemination of more creative works, and I will demonstrate why and how applying the creed of ethical individualism to copyright jurisprudence ultimately assures a more productive, more educated, more creative, more original, and more *happy* society.

B. GENIUS HAS BECOME A FOUR-LETTER WORD

Another unintended (or, perhaps, intended?) consequence of the anti-author rhetoric is that the moniker of “genius” when ascribed to an author, creator, or innovator who has achieved an extraordinarily original or useful work of intellectual property has truly become a four-letter word in today’s academic community.¹⁰⁸ Before it became vogue in the ivory towers of law schools, the anti-author movement was initiated largely by French literary theorists in the twentieth century such as Roland Barthes, who challenged the “expressive theory” of the author in which the creator of a work was thought to pronounce his inner passions, humors, feelings, and impressions which make up his essence and sense of self, by famously claiming the “death of the author.”¹⁰⁹ According to Barthes, no longer should we speak of authors (and most certainly not of geniuses) but we must talk instead about a “functionary called the writer or sriptor” who originates nothing and who merely “imitates a gesture that is always anterior” and simply “translates a ready-formed dictionary.”¹¹⁰

In this spirit of the death of the author, Barthes sought to alter the image of literature that he believed was “tyrannically centered” on the author’s life and passions, which represent “the epitome and culmination of capitalist ideology, which has attached the greatest importance to the ‘person’ of the

108. Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 83 (1998) (describing recent efforts to redefine personhood interests of intangible creations “into paradigms called, sometimes derisively, the ‘Romantic genius’ and the ‘inventor-hero’”).

109. Andrew Bennett, *Expressivity: The Romantic Theory of Authorship*, in LITERARY THEORY AND CRITICISM: AN OXFORD GUIDE 48 (Patricia Waugh ed., 2006) (quoting Roland Barthes, *The Death of the Author*, in AUTHORSHIP: FROM PLATO TO THE POSTMODERN: A READER 128 (Sean Burke ed., 1995)).

110. *Id.*

author.”¹¹¹ As such, in Barthes’ scheme the “modern scriptor” would be a *writer* who authored *texts* as opposed to the outdated notion that he was an *author* who produced *books*.¹¹² The true hero according to Barthes is not the author, the writer, or even the modern scriptor: it is the reader who has a “constitutive role” in authorship and is “the true and only source of the otherwise mythical unity of the text.”¹¹³ Thus, the figure of the author has “turned from a ‘who’ into a ‘what’.”¹¹⁴ Barthes, overjoyed that we no longer have to “bend our ear to the supposedly personal voice of the named, individual author,” maintains instead that “we should attend to the anonymous murmuring of the collective *discours[e]*.”¹¹⁵

Another infamous literary theorist, Michel Foucault, echoes Barthes’ thoughts on Romantic authorship by declaring that “since the eighteenth century, the author has played the role of the regulator of the fictive, a role quite characteristic of our era of industrial and bourgeois society, of individualism and private property.”¹¹⁶ Like Barthes, Foucault’s mission was to obliterate the personal being and the individuality of the author-figure: in other words, to rape him of his very identity vis a vis his readership.¹¹⁷

The influence of this French circle of postmodern literary theorists, which includes Barthes, Foucault, and others, has been so pervasive that in the wake of their writings “authorial disappearance has been accepted by structuralist and poststructuralist critics almost as an article of faith.”¹¹⁸ Indeed, one contemporary literacy author who is the progeny of the French circle of deconstructionists has gone so far as to submit that the construct of the uber-heroic individual author

111. ROLAND BARTHES & STEPHEN HEATH, *IMAGE, MUSIC, TEXT* 143 (1978).

112. Adrian Wilson, *Foucault on the “Question of the Author”: A Critical Exegesis*, 99 *MOD. LANGUAGE REV.* 339, 341 (2004) (internal quotations omitted).

113. *Id.*

114. *Id.* at 342.

115. *Id.*

116. MICHEL FOUCAULT, *THE FOUCAULT READER* 119 (1984).

117. Wilson, *supra* note 112, at 359.

118. SEÁN BURKE, *THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT AND DERRIDA* 17 (1998).

may not have ever even existed in the first place.¹¹⁹ These invidious (and largely incoherent)¹²⁰ writer-as-anonymous-creator literary approaches serve to further the contemporary objective to welcome and hail a collectivist society in the wake of the final and dastardly destruction of the individual.

Enter stage the copyright academicians who have lecherously leaped upon such obscene premises and used them as a platform upon which to justify attack of the legal standard of authorship. I fully understand and share the contemporary frustration that copyright ownership has become too lengthy and as a result it impinges upon the public domain for far from limited times; however, the underlying message that these professors are animating has a much deeper and decidedly more philosophically dangerous interpretation if one reads between the lines. For example, Professor Alan Durham has stated that

the un-romantic, text-centered model seems more in tune with the social benefits rationale said to be at the heart of copyright. The satisfaction of public needs—including the need to “promote the progress” of knowledge—depends upon the content of the works available to the public. It does not depend, directly, on the circumstances of their creation. Whether a work took great effort or no effort to produce, whether it is personal or impersonal, whether it is the product of genius or incompetence is of little consequence to the consuming public, however important it might be to the author. Genius, personality, and effort may produce superior works, but it is the product that is important to society.¹²¹

Does the professor *really* not understand that his claim that the circumstances under which great works are created are meaningless leads to an inevitable conclusion that he is advocating what will ultimately serve to be the social demise of *any* great work? Personally, I do not wish to live in this myopic “un-romantic” dystopia that is urged by Professor Durham and his cohorts. I choose to continue to honor creative endeavors and recognize them for what they truly are: works of genius. Steven Pressfield has beautifully spoken of tapping into the creative “muse” in all of us:

When we conceive an enterprise and commit to it in the face of our fears, something wonderful happens. A crack appears in the

119. JONATHAN ALEXANDER, DIGITAL YOUTH: EMERGING LITERACIES ON THE WORLD WIDE WEB 43 (2006).

120. See, e.g., Wilson, *supra* note 112, at 359.

121. Alan L. Durham, *The Random Muse: Authorship and Determinacy*, 44 WM. & MARY L. REV. 569, 617–18 (2002).

membrane. Like the first craze when a chick pecks at the inside of its shell. Angel midwives congregate around us; they assist as we give birth to ourselves, to that person we are born to be, to the one whose destiny was encoded in our soul, our *daimon*, our *genius*.¹²²

The meaning of genius was a cultural form born out of the Enlightenment period in Europe as it witnessed the rapid growth of progress and innovation by non-secular persons of all walks of life, which had previously been reserved to priests and rulers who had the power to control and restrict innovation to select sources, usually in the form of revelations from God.¹²³ As such, it is important to point out to the young law students (and perhaps one or two others who may actually read this piece) that genius did not always confer the type of social negativity then as it does today; in fact, it was quite the opposite.¹²⁴ As the century of progress ensued, society became gifted with more creative and innovative works, and the “myth of genius was the vehicle for the public to recognize and reward the genius with adulation.”¹²⁵ Scottish Enlightenment thinkers went so far as believing that literary geniuses had an affirmative responsibility to imbue society with morality and improvement by “apply[ing] their artistic talent to the needs of contemporary readers.”¹²⁶

The tide began to turn as nineteenth century philosophers such as Jeremy Bentham and Karl Marx launched attacks against individualistic morals, claiming that rights to property and the ability to enjoy and dispose of one’s possessions as one sees fit is an egoistic and selfish attribute that leads to a separation of man from the larger community.¹²⁷ This movement eventually led to the post-structuralism claims made by Barthes, Foucault, and other progressives, that the independent, “atomistic” individual is merely a fictional

122. STEVEN PRESSFIELD, *THE WAR OF ART: BREAK THROUGH THE BLOCKS AND WIN YOUR INNER CREATIVE BATTLES* 123 (2002) (emphasis in original).

123. CARL PLETSCH, *YOUNG NIETZSCHE: BECOMING A GENIUS* 212 (1992) (describing the stereotypical view of the genius in the nineteenth century).

124. DARRIN MCMAHON, *DIVINE FURY: A HISTORY OF GENIUS* xvii (2013) (“Scholars have long recognized the genius’s emergence in this period as the highest human type, a new paragon of human excellence who was the focus of extensive contemporary comment and observation.”).

125. PLETSCH, *supra* note 123, at 212.

126. COREY E. ANDREWS, *THE GENIUS OF SCOTLAND: THE CULTURAL PRODUCTION OF ROBERT BURNS, 1785–1834*, at 56 (2015).

127. See TARA SMITH, *MORAL RIGHTS AND POLITICAL FREEDOM* 61 (1995).

construct which never really has existed in the first place.¹²⁸ Indeed, today we are witnessing a continued attack against individualism in the areas of literary criticism, law, and even politics, as our prominent national leaders make claims such as “you didn’t build that!” when proclaiming that government assistance, not individual effort, leads to the creation of a successful business.¹²⁹

Moreover, the hortatory purgation of the author that is urged by the progressive French writers—much like the contemporary push for the death of copyright discussed in Section II.A—is unreflectively accepted in literary and other circles as proven truth, despite the fact that many commentators innately perceive that the theory is somehow eschewed and, perhaps, downright “wrong.”¹³⁰ Despite the repeated academic attempts to give birth to some imaginary collective author/owner and eschew the concept of individual authorship and intellect,

the fact remains that the individual, not the community, has a mind; the individual, not the group, does the thinking; the individual, not society, produces knowledge; and the individual, not society, shares that knowledge with others who, in turn, must use their individual minds if they are to grasp it. Any individual who chooses to observe the facts of reality can see that this is so. The fact that certain “philosophers” (or “dialogic communities”) deny it has no bearing on the truth of the matter.¹³¹

As philosopher David Hume had warned, “[t]he richest genius, like the most fertile soil, when left uncultivated, shoots up into the rankest weeds.”¹³² More recently, a few lone academicians such as Professor Harold Bloom have noted that, regardless of the fact that contemporary scholars (or, as he terms them, “cultural levelers quite immune from awe”) have done their best to obliterate the notion of genius, it is a concept

128. *See id.*

129. *See* Aaron Blake, *Obama’s ‘You Didn’t Build That’ Problem*, WASH. POST (July 18, 2012), https://www.washingtonpost.com/blogs/the-fix/post/obamas-you-didnt-build-that-problem/2012/07/18/gJQAJxyotW_blog.html.

130. John M. Burke, *The Death and Return of the Author: Criticism and Subjectivity in Barthes, Foucault and Derrida* 12–13, (1989) (unpublished Ph.D. dissertation, University of Edinburgh), <https://www.era.lib.ed.ac.uk/handle/1842/7375>.

131. Craig Biddle, *Individualism vs. Collectivism: Our Future, Our Choice*, OBJECTIVE STANDARD, <https://www.theobjectivestandard.com/issues/2012-spring/individualism-collectivism/> (last visited Feb. 4, 2017).

132. ANDREWS, *supra* note 126, at 51 (quoting David Hume, *The Stoic* (1742), <http://www.econlib.org/library/LFBooks/Hume/hmMPL16.html>).

that is *needed* by humanity, “however envious or uncomfortable it makes many among us.”¹³³ Contrary, then, to the egalitarian, collectivist callings from Barthes and Foucault in the literary realm to Lemley and Lessig in copyright law circles, it is not the notion of copyright *author* that must be eviscerated, but the progressive, collective *envy* of the copyright author.

C. COPYRIGHT ENVY

When reflecting upon the intentions of many in society who would prefer to banish the historical notions of copyright authorship and originality, it appears that the only rational motivation for this change is a designed intent to abolish the privileges and benefits that accrue to those who create—especially those who create works that are considered “genius.”¹³⁴ Even more problematic, the continued universal degradation of the Romantic author and modern innovator can only be understood by looking through a pessimistic, nihilist, and primitive lens, which shuns the very greatest of man’s modern achievements.¹³⁵ While scholars claim that the anti-author trope is necessary to dispel the continued diminishment of the public domain,¹³⁶ I submit that this reason is smoke-and-mirrors for the true motivation behind the call for the death of the Romantic author: copyright envy.

The definition of envy has its roots in the Latin words “in” (upon) and “videre” (“to see”) and means “to look maliciously upon; to feel displeasure and ill-will at the superiority of

133. HAROLD BLOOM, *GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS* 7 (2002). Interestingly, Professor Bloom believes that the death-of-the-author trope witnessed in the last century has “become rubbish,” and that the “dead genius is more alive than we are.” *Id.* at 4.

134. Chris Dodd, *Copyright: Empowering Innovation and Creativity*, HUFFINGTON POST (June 10, 2013), http://www.huffingtonpost.com/chris-dodd/copyright-empowering-inno_b_3417472.html (“[T]he founders of our republic considered copyright so important to unlocking the creative and economic potential of this country that they explicitly called for its protection and promotion in our Constitution.”).

135. See Alan Pratt, *Nihilism*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/nihilism/> (last visited Feb. 15, 2017).

136. Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 501–02 (1991) (“[T]he overall incoherence of the law’s account of ‘authorship’ may be best understood as reflecting a continuing struggle between the economic forces that (at least in the abstract) would be best served by the further depersonalization of creative endeavor and the ideological persistence of an increasingly inefficient version of individualism.”).

(another person) in happiness, success, reputation, or the possession of anything desirable; to regard with discontent another's possessions or advantages."¹³⁷ Sadly, it has been well-documented by modern philosophers such as David Norton that "the common response to one man's advantage is resentment and envy by others."¹³⁸ When such feelings of individual envy are left unchecked and misunderstood, entire groups form in order to rationalize the collective evisceration of those excellent persons or beneficial situations which reflect the opposite traits in the group of those who are envious.¹³⁹

Kierkegaard believed that envy reigns in a society when a large majority of its members come together on the basis of what they are against rather than what they are for; and what they are against is "a person's being different" from, or better than, the masses.¹⁴⁰ This collective societal reaction to a perceived, chronic state of inequality in which some members rise in excellence over the herd of others eventually leads to a "moral resentment," or a "displaced, vengeful hostility," in which "the suffering person ultimately lashes out at a convenient target in an effort to 'level' enduring differences between the self and others enjoying advantages."¹⁴¹ Instead of taking measures to cultivate the traits or obtain the things that one is envious of in others,

the end point of the strong desiring of something (i.e., something envied) might lead to its opposite, a kind of 'sour grapes' writ large. *Ressentiment* can be seen as an extreme end state, almost dispositional, in which reactions to protracted feelings of inferiority and envy produces a toxic, embittered state of mind. This process, presumably, can operate at the individual and group levels.¹⁴²

Indeed, not even Kierkegaard *himself* could have imagined how true his predictions would be. In the age of the acceptance and glorification of all things internet-related, our society has mostly failed to acknowledge that the internet is filled with

137. LYNN S. MESKILL, BEN JONSON AND ENVY 17 (2009) (emphasis omitted) (internal citations omitted).

138. DAVID L. NORTON, PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM 10 (1976).

139. See, e.g., CHRISTOPHER B. BARNETT, KIERKEGAARD, PIETISM AND HOLINESS 151 (2013).

140. *Id.*

141. Zlatan Križan & Richard H. Smith, *When Comparisons Divide: Invidious Emotions and Their Social Control*, in COMMUNAL FUNCTIONS OF SOCIAL COMPARISON 74 (Zlatan Križan & Frederick X. Gibbons eds., 2014).

142. *Id.* at 75 (emphasis in original).

angry people making angry and resentful statements, and blaming whatever they may be angry about at any given moment on somebody else.¹⁴³

Rampant envy-based *ressentiment* has a natural consequence; a phenomenon that Kierkegaard termed “leveling,” or “abstraction’s victory over individuals,” which he likens to a “deathly stillness in which nothing can rise up, but everything sinks down into it, impotent.”¹⁴⁴ During the leveling process, all persons are equalized and “no one is better than anyone else.”¹⁴⁵ In other words, a leveling society is one that neither finds, nor seeks, heroes; one that justifies the obliteration of any semblance of the genius, the passionate and individual soul. In short, it is one in which the common in all is both revered and despised, at the same time.

According to Professor Howard Tuttle, Kierkegaard thought that even back in the nineteenth century during which he lived and wrote consisted of a loss of passion in which the age of heroic action was no longer expected.¹⁴⁶ Because of this lack of moral character, “the individual denigrates and even ridicules those who have distinguished themselves. It is not enough to admire and envy the other: one must tear him down. To be effective, leveling must be done in concert with others; it is essentially a collective phenomenon.”¹⁴⁷ Ayn Rand further describes this peculiarly upended tendency of prevalent societal envy as “an emotional mechanism set in reverse: a response of hatred, not toward human vices, but toward human virtues,” in which there persists a “hatred of the good for being the

143. Jon Henley, *The Great Internet Swindle: Ever Get the Feeling You’ve Been Swindled?*, THE GUARDIAN (Feb. 9, 2015), <https://www.theguardian.com/technology/2015/feb/09/andrew-keen-internet-not-answer-interview>.

144. BARNETT, *supra* note 139, at 151 (quoting Soren Kierkegaard) (citation omitted).

145. RICHARD STIVERS SHADES OF LONELINESS: PATHOLOGIES OF A TECHNOLOGICAL SOCIETY 15 (2004).

146. See, e.g., HOWARD NELSON TUTTLE, THE CROWD IS UNTRUTH: THE EXISTENTIAL CRITIQUE OF MASS SOCIETY IN THE THOUGHT OF KIERKEGAARD, NIETZSCHE, HEIDEGGER, AND ORTEGA Y GASSET 29 (1996) (“Any recognition of an actual hero or leader seems based on envy, not admiration. Heroic motives are assigned to everyone and no one; leadership seems to belong to everyone and no one; leaders seem to lack authority; and even political passion seems to be exhausted.”).

147. STIVERS, *supra* note 145, at 15.

good.”¹⁴⁸ In her poignant and, often chillingly prophetic piece penned in the 1960s entitled “The Age of Envy,” Ayn Rand described what she perceived as the prevalent modern societal attitude in which, oddly, there exists a hatred of the values that individuals regard as good by their own judgment or, more specifically, “hatred of a person for possessing a value or virtue one regards as desirable.”¹⁴⁹

And, lo and behold, as I pen these words in the summer of 2016, I stop to read a news article claiming that Yale undergraduate English majors have petitioned the department to ban a year-long introductory course on the subject because they “don’t want to study the greatest English writers” since reading about the works of dead white men “creates a culture that is especially hostile to students of color.”¹⁵⁰ The petition requests “that Major English Poets be abolished, and that the pre-1800/1900 requirements be refocused to deliberately include literatures relating to gender, race, sexuality, ableism, and ethnicity.”¹⁵¹ If I were to attempt to concoct a news story that best exemplified the type of hatred-of-the-good-for-being-good described decades ago by Rand, it could not be more manifest than this. Sadly, however, the article—and the envy and hatred that emanates from the students who have been so completely enculturated by the fear-mongering antics of their professors—is altogether too real, and too true. At least one journalist has seen through the veneer of Professor Lessig’s supposed campaign to champion the rights of authors by recognizing that his philosophy, when unpeeled from its “ill-defined cultural eden” and studied rationally is, in reality, the most manifest type of author-envy:

I believe that [Lessig] presents himself as friend of artists when he is actually a bitter, bitter foe He telegraphs his contempt towards those that create art in virtually all his essays and books. It often seems personal. Maybe it’s like the Saturday Night Live skit that “explains” Albert Goldman’s hatred of John Lennon. In the skit Goldman was The Beatles trombone player until Lennon fired him.

148. Ayn Rand, *The Age of Envy*, in *THE AYN RAND READER* 115 (Gary Hull & Leonard Peikoff eds., 1999).

149. *Id.*

150. Bradford Richardson, *Yale Students: Studying White, Male Writers Creates Culture ‘Hostile to Students of Color,’* WASH. TIMES (June 2, 2016), <http://www.washingtontimes.com/news/2016/jun/2/yale-students-white-male-writers-hostile-culture/>.

151. *Notable & Quotable: A Yale Petition*, WALL ST. J. (June 3, 2016), <http://www.wsj.com/articles/notable-quotable-a-yale-petition-1464992359>.

Was Lessig kicked out of a [band]? Did “hollywood” kick his ass in a couple court fights? Is that what all this is about?¹⁵²

Although envy may be a natural tendency in man, particularly in his primitive stages, “it has become clear that countries built on a philosophy that rationalizes envy have all become weak and poor.”¹⁵³ Indeed, if we are so fragile of a culture that we cannot bring ourselves to appreciate and—heaven forbid, enjoy and learn from—the canonical works of great Western literature merely due to an irrational fear that they are written by white men, there is not a chance in Haedes for any kind of individual or collective human success. When our students who hail from the best universities in the country are themselves demanding, not just diversification in the curriculum, but an outright abolishment of the canons in the spirit of “decolonization”—or basically rewriting history to quell the anxiety felt by the mass man for being common—our culture is on the brink of witnessing both the personal and social havoc that ensues when envy is not overthrown by greatness. When we fail to globally and intentionally emulate genius, as Professor Bloom describes, by deliberately invoking “the transcendental and the extraordinary” in ourselves,¹⁵⁴ that is when the purpose of the Progress Clause will have been entirely obfuscated.

To combat the tendencies of envy and other primeval traits that exist in non-civilized humanity, a community must develop a set of values that are established in order to nurture successful relationships among human beings.¹⁵⁵ Without doubt, then, Waterman’s ideal synergistic society can certainly not be achieved in copyright law realms if the continued attack on the Romantic author pervades, leading to its necessary end evincing a weakened and standard-less system of ownership, as will be discussed further in the following Sections of this article.

152. David C. Lowery, *The Bad Science and Greed Behind the “Intellectual Property Inhibiting Innovation” Argument. Part 4*, THE TRICHORDIST (June 22, 2012), <https://thetrichordist.com/2012/06/22/the-bad-science-and-greed-behind-the-intellectual-property-inhibiting-innovation-argument-part-4/>.

153. OKAWA, *supra* note 104, at 7.

154. BLOOM, *supra* note 133, at 12.

155. RAND, *supra* note 148, at 118–19.

IV. ETHICAL INDIVIDUALISM AND COPYRIGHT LAW: THE MODEL FOR A SYNERGISTIC SOCIETY

According to Waterman, the philosophy of normative, or ethical individualism is a framework for personal behavior and social interaction, as well as a theory of optimal psychological functioning.¹⁵⁶ It is a contemporary mix of various themes owing their origins to a variety of historical figures ranging from "Socrates and Aristotle, Locke and Adam Smith, Thoreau and John Stuart Mill, and Kierkegaard and Nietzsche."¹⁵⁷ The three major psychological values which encompass the framework of ethical individualism are (a) eudemonism; (b) personal responsibility; and (c) ethical universality.¹⁵⁸ By first defining and then applying each of these values to the canons of authorship and originality in copyright, it will be demonstrated that the individualist underpinnings evident in the copyright code achieve not only the goal of the Progress Clause, but also Waterman's overall humanistic objective of attaining a synchronistic society.

A. EUDEMONISM

Eudemonism represents all those efforts made by one in order to know and live in accordance with one's "true self," or the Hellenistic concept of the *daimon*, which distinguishes each individual from all others.¹⁵⁹ Although eudemonism is named after the Greek word we translate as "happiness,"¹⁶⁰ it is better described by Waterman as "the pursuit of the best of which the person is capable."¹⁶¹ Because acting consistently with one's true potential requires a great deal of effort and discipline, the accompanying feelings of "rightness" and "strength of purpose" which are achieved by such acts certainly cannot be construed as "easy pleasures to achieve."¹⁶² Eudemonism can thus be said to embrace the "classic Greek virtues of wisdom (or prudence), self-control (or temperance), and . . . justice."¹⁶³ In its "pure form," the philosophy envisions "a self-interested kind of 'know-

156. WATERMAN, *PSYCHOLOGY*, *supra* note 5, at 29.

157. *Id.* at 15.

158. Waterman, *Interdependence*, *supra* note 3, at 764.

159. *Id.*

160. ROBERT J. O'CONNELL, *PLATO ON THE HUMAN PARADOX* 9 (1997).

161. WATERMAN, *PSYCHOLOGY*, *supra* note 5, at 16.

162. *Id.*

163. *Id.*

how” of the manner in which one’s “happiness can best be attained and secured.”¹⁶⁴

It is a common misperception that eudemonistic principles are “skewed in favor of the interests of the privileged;”¹⁶⁵ however, eudemonism in its proper, classical application is not characteristic of only “great” men and women, but, rather, it is a universal goal incumbent upon all humans to achieve in order to provide both purpose and meaning to their existence.¹⁶⁶ While the *daimon* is achieved when each person individually strives to enrich his own unique potentials that distinguish him from everyone else, it also includes “those potentials that are shared by all humans by virtue of their common specieshood.”¹⁶⁷

By examining the life and writings of recognized nineteenth century geniuses such as Friedrich Nietzsche, one can readily observe that the eudemonistic goal of “[t]he role of genius was a cultural category comprehensible to everyone, a role that could be learned, and a structure for the psychological integrity required of a radical innovator.”¹⁶⁸ Amazing opportunities for the common man became achievable for the first time in human history, as “across Europe and in America commoners were taking the place of privileged orders. Bourgeois intellectuals created new roles for themselves as they declared their independence from clerical careers and noble patrons, and claimed the right to reform society according to their own lights.”¹⁶⁹ Indeed, “[t]he ideology of genius encouraged creative heroes to follow their own natural paths of development, paths that most often ran against the grain of conventional bourgeois society.”¹⁷⁰

Eudemonism is also oft misinterpreted as mere hedonism or happiness measured by the totality of baser life indulgences

164. O’CONNELL, *supra* note 160, at 10.

165. Lisa Tessman, *Feminist Eudaimonism: Eudaimonism as Non-Ideal Theory*, in FEMINIST ETHICS AND SOCIAL AND POLITICAL PHILOSOPHY: THEORIZING THE NON-IDEAL 50 (Lisa Tessman ed., 2009).

166. Waterman, *Interdependence*, *supra* note 3, at 764; *see also* WATERMAN, PSYCHOLOGY, *supra* note 5, at 23 (“Every daimon is worthy of realization.”).

167. Waterman, *Interdependence*, *supra* note 3, at 764; *see also* WATERMAN, PSYCHOLOGY, *supra* note 5, at 23.

168. PLETSCH, *supra* note 123, at 211.

169. *Id.* at 1–2.

170. *Id.* at 7.

such as eating, drinking, and sex; however, it can be more accurately observed that

eudemonism means by happiness not merely the sum total of sensual pleasures but also—and rather—nonsensual pleasures, more refined, more noble, more lasting, and less fragile. In this sense it is neither mainly nor predominantly sensual and carnal, nor is it aimed at the passing moment only. It has a longer perspective of time in its evaluation of pleasure, and for this reason views happiness as a conscientious system of living and not a mere hunt for transient enjoyment.¹⁷¹

Similarly, eudemonia, also commonly referred to as the “good life,” has been described by one author as a “higher-order good” or a “regulatory ideal,” in that one can flourish best only when successfully striking a balance of all the pursuits that make life worthwhile and enjoying them in the right relation to each other.¹⁷² Invariably, then, if one focuses solely or even primarily on base pleasures to the exclusion of other attributes or virtues, one misses out on great portions of what the “good life” contemplates.¹⁷³ Moreover, pursuing eudemonia can be quite difficult and painful as it “is inextricably tied with the excellent transformation of the whole character or person,” yet is not dependent upon, or equivalent to, transient life-circumstances such as wealth, honor or pleasure.¹⁷⁴

Applying the principles of eudemonia specifically to the concept of creativity, one professor of philosophy has observed that “[t]he highest form of creative work involves the breaking of new ground in a subject, novelty that grows out of established knowledge and skills, but which transcends them. At best this may provide a radical new idea of the criteria for excellence in the matter at hand.”¹⁷⁵ If the definition of excellence is “the creative advance of humans,” or the “the

171. PITIRIM ALEKSANDROVIĆ SOROKIN, *SOCIAL AND CULTURAL DYNAMICS: A STUDY OF CHANGE IN MAJOR SYSTEMS OF ART, TRUTH, ETHICS, LAW AND SOCIAL RELATIONSHIPS* 416 (1962).

172. LAURA V. SIEGAL, *PHILOSOPHY AND ETHICS: NEW RESEARCH* 279–80 (2006).

173. *Id.*

174. BRENDAN COOK, *PURSUING EUDEMONIA: RE-APPROPRIATING THE GREEK PHILOSOPHICAL FOUNDATIONS OF THE CHRISTIAN APOPHATIC TRADITION* 25 (2013).

175. M.J. NEWBY, *EUDAIMONIA: HAPPINESS IS NOT ENOUGH* 82 (2011); *see also* R. Anthony Reese, *What Copyright Owes the Future*, 50 *HOUS. L. REV.* 287, 289 (2012) (“In the realm of artistic creation, when an author draws on what has come before, perhaps the author and the audience can not only see a little further, but understand and feel a little more deeply.”).

movement from what is already in existence,”¹⁷⁶ then Norton well describes the eudemonistic phenomenon as the “principle of the complementarity of excellences” in that it “affirms that every genuine excellence benefits by every other genuine excellence. It means that the best within every person calls upon and requires the best within every other person.”¹⁷⁷ Ironically, in contrast to the naysayers of individualist theory, this type of individual excellence unfailingly contributes to the collective good of the society because although the genius could be “recognized as a hero whose extraordinary journey carried him far away from the lives of ordinary people” this heroic journey also “permitted the genius to return to the community with the fruits of his creative mission.”¹⁷⁸

Norton is careful to distinguish the principle of *emulation*, which is the “adoption of an exemplified universal or principle,” from *imitation*, which is a “replication of particulars.”¹⁷⁹ Pure imitation, as such, will certainly not achieve the constitutional goals of progress, as would emulation, and the difference lies between the fact that “[t]o emulate a worthy man is not to relive his individual life, but to utilize the principle of worthy living, exemplified by him, toward the qualitative improvement of our individual life.”¹⁸⁰ He also recognizes the fact that the attainment of genuine excellence must necessarily proceed in a hierarchical manner when he claims that

[i]n the cardinal matter of attaining to his excellence the individual amid his fellows is positioned in a hierarchy, his level of attainment surpassing that of some persons but being surpassed by that of others. In this situation his task is twofold: he is to learn from the

176. NIMI WARIBOKO, *THE PRINCIPLE OF EXCELLENCE: A FRAMEWORK FOR SOCIAL ETHICS* 28 (2009).

177. NORTON, *supra* note 138, at 10.

178. PLETSCH, *supra* note 123, at 212.

179. NORTON, *supra* note 138, at 12.

180. *Id.* at 13; *see also* LUDWIG VON MISES, *THE ANTI-CAPITALISTIC MENTALITY* 78 (1956) (“Imitation of masterworks of the past is not art; it is routine. What gives value to a work is those features in which it differs from other works.”); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 212–13 (2007) (“At the heart of the Romantic ideal is the sanctity of individual creativity. The distinction between imitation and originality is therefore intricately tied to the perceived nature of man, such that true authorship represents the essence of human individuality. The human agent, as author, does not copy without sacrificing his authenticity and obscuring his intrinsic worth.”).

example of those above him, and at the same time he is by his own example to teach those beneath.¹⁸¹

Individual excellence also requires “accurate self-knowledge” and personal confidence, as “the individual who is confident of his own worth does not feel threatened by the worthiness of others but, on the contrary, acutely perceives such worthiness and generously acknowledges it.”¹⁸²

Moreover, the “complementary of excellences” in creative endeavors seems to be contagious and self-perpetuating, in that “the great pedagogical principle of the emulation of example is rooted in the fact that the manifestation of worth by any individual activates like inclinations (albeit of very different strengths) in those individuals who witness the manifestation and recognize the worth.”¹⁸³

In applying the principles of eudemonia and excellence to the concept of originality in copyright law, then, a welcomed, alternative interpretation of the “on the shoulders of giants” (OTSG) metaphor can be understood. Whereas OTSG is commonly utilized by copyright defendants as a justification for the unauthorized use—and oftentimes, mere *imitation*—of plaintiff’s copyrighted work by insisting that all authors borrow from past works in order to create and that no work is “strictly new and original throughout,”¹⁸⁴ a eudemonic and, thus, individualistic stance would alternatively recognize the multifarious new builders and praise and reward them for their unique and *original* contributions to works that had been authored in the past. Since no two individual authors can ever be exactly alike, this view of the OTSG metaphor would embrace the notion of copyright ownership, as long as the work is actually created by the author and is original. Not surprisingly, these are the two standards *already* employed to determine the legal requirements of copyright ownership.¹⁸⁵

Instead of bemoaning that the BBECs are economically benefiting to the detriment of members of the general public who are denied the ability to *copy* and regurgitate previous

181. NORTON, *supra* note 138, at 12.

182. *Id.* at 11.

183. *Id.* at 13.

184. *See, e.g., Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 77 (D. Mass. 1990).

185. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (“[O]riginality requires independent creation plus a modicum of creativity.”).

works, we can celebrate the fact that the BBECs have the proper infrastructure and resources that allow them to disseminate and provide *access to more works* to more of the public.¹⁸⁶ Most importantly, because copyright can never be secured for mere facts, ideas, and concepts, new authors are invariably required to imprint their own individual viewpoint upon all that material in which they claim ownership.¹⁸⁷

Professor Bloom characterizes this type of genius-creation as “fierce originality,” which, although similar to the OTSG metaphor, would never deny the originality implicit in new, great works of authorship.¹⁸⁸ Fierce originality recognizes that a new artist must “come[] to terms with [his] precursors,” by recognizing that his consciousness is “shaped by all the consciousnesses [*sic*] that he imagined,” yet it also beautifully acknowledges that “[g]enius, by necessity invokes the transcendental and the extraordinary, because it is fully conscious of them. Consciousness is what defines genius: Shakespeare, like his Hamlet, exceeds us in consciousness, goes beyond the highest order of consciousness that we are capable of knowing without him.”¹⁸⁹

Professor Bloom’s alternate—eudemonistic—definition of genius would return us as a society that, instead of depreciating or envying (and whole-cloth copying) those “exceptional individuals” who have come before us and created for us, we would appreciate them, with gratitude, and strive to be more like them. He elaborates:

By “appreciation,” I mean something more than “adequate esteem.” Need also enters into it, in the particular sense of turning to the genius of others in order to redress a lack in oneself, or finding in genius a stimulus to one’s own powers, whatever these may emerge as being. Appreciation may modulate into love, even as your consciousness of a dead genius augments consciousness itself. Your solitary self’s deepest desire is for survival, whether in the here and now, or transcendently elsewhere. To be augmented by the genius

186. Vineet Kaul, *New Media Part 1: Redfining Journalism*, COMPUTERS IN ENT. (2017), <https://cie.acm.org/articles/new-media-redefining-journalism/> (“TV and radio, the Internet is also a storehouse of knowledge providing access to huge pile of information.”).

187. See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) (“If . . . the expression of the idea necessarily follows from the idea to such an extent that the idea is capable of expression only in a more or less stereotyped form, it is not copyrightable.”).

188. BLOOM, *supra* note 133, at 11.

189. *Id.* at 11–12.

of others is to enhance the possibilities of survival, at least in the present and the near future.¹⁹⁰

Undoubtedly utilizing the principle of eudemonism, the Framers intended that our society would so ingratiate our genius-authors by providing them with the incentive of exclusive ownership to the fruits of their creation, the thought being that such control would beget more and more creative works for the enjoyment and edification of the society as a whole.¹⁹¹ Most critics of the doctrine of exclusive copyright ownership focus solely on deconstructing the *economic* benefits of that mechanism;¹⁹² however, as will be further discussed in the next Section, I submit that the Framers also acknowledged the important *psychological* benefit of personal responsibility and control over one's life that inures to owners who are allowed to govern their creations in the manner in which they see most fit.

B. PERSONAL RESPONSIBILITY

Eudemonistic feelings can only be achieved when one's life outcomes are significantly perceived as being under one's personal control.¹⁹³ One must be able to make choices particularly regarding the goals constituting the central organizing principles of one's life.¹⁹⁴ The more that individuals are responsibly able to choose their own circumstances, the more they are able to feel self-determined and self-confident, which invariably leads to "success in eudemonistic undertakings."¹⁹⁵ Contrarily, if the events occurring in one's life are perceived as largely beyond one's control or influence, a sense of personal responsibility for either positive or negative outcomes will not be present.¹⁹⁶ Under such circumstances,

190. BLOOM, *supra* note 133, at 5.

191. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

192. Jodie Griffin, *The Economic Benefits of Copyright*, PUB. KNOWLEDGE, <https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf> (last visited Feb. 6, 2017) ("Increasing copyright enforcement and protection does not always lead to economic benefits.").

193. WATERMAN, PSYCHOLOGY, *supra* note 5, at 21.

194. *Id.* at 22.

195. *Id.*

196. *Id.*

“self-attribution of credit and blame do not make sense”¹⁹⁷ and “feelings of helplessness, apathy, depression, or resignation are likely consequences.”¹⁹⁸

According to the Greeks, real happiness is truly a subjective matter of personal choice;¹⁹⁹ however, a moral, virtuous and, thus, eudemonic life can only be led when one employs one’s sense of both reason and personal responsibility.²⁰⁰ Eudemonistic teachings were concerned with studying the good and bad traits present in human character, and using reason as a tool as opposed to appealing to “religion, authority, or tradition.”²⁰¹ Indeed, an impersonal and collective government simply does not have the ability to effectuate the rational and private outcomes intended by each individual creator in the process of his production.

Applying the eudemonistic principle of personal responsibility to copyright, it is apparent that a synergistic society that consists of “happy” and, therefore, more productive authors will be ensured when they are able to control and influence the products of their creation, thus leading to healthy competition and the innate, inner drive to create more resources.²⁰² Application of this economically driven incentive of ownership has the attendant psychological benefits of both personal satisfaction and ultimate cooperation among the collective. As one group of contemporary economists further explain,

[w]ell-defined property rights tie people to the way assets are used. Ownership is an important factor in making people responsible for the outcome of their action or inaction. Furthermore, private ownership ensures in a way like nothing else can that people bear the costs of their actions. People who own their assets—their intellectual skills or their land—will themselves have to bear the cost of their behavior in terms of the reduced value and productivity of their assets.²⁰³

197. WATERMAN, *PSYCHOLOGY*, *supra* note 5, at 21.

198. Waterman, *Interdependence*, *supra* note 3, at 765.

199. SMITH, *supra* note 127, at 202–03 (“Remember that *eudaimonia* must be self-generated. This entails that no amount of third-party engineering could ‘rig’ its achievement for anyone.”) (emphasis in original).

200. Richa Yadav, *Virtue Ethics*, in *ETHICS: A UNIVERSITY GUIDE* 289–90 (Richard H. Corrigan & Mary E. Farrell eds., 2010).

201. *Id.* at 290.

202. JAMES A. DORN ET AL., *THE REVOLUTION IN DEVELOPMENT ECONOMICS* 120 (1998).

203. *Id.* at 119.

On the other hand, if intellectual ownership is displaced to an amorphous and loosely defined collective, we will have lost a great deal with such erosion of the concept of a natural property right since “[w]ith no personal ownership there is little personal responsibility for what happens, and even less incentive to cooperate with others for mutual benefit.”²⁰⁴

Is it reasonable, then, to advocate a copyright system in which all works that are invariably authored by an individual are afterwards snatched from them by the government and owned by the collective? Of course not. The call for open sharing and common ownership of cultural products that is today the trend of academicians “in which no one in particular owns anything and somehow we all will own everything and share it equally”²⁰⁵ is a non-rational delusion with profound psychological repercussions.²⁰⁶ When it comes to the intellectual products that result from creations subject to copyright law, they are owned by either the individual author who created them, or by somebody else who takes them by force; there is, indeed “no middle ground, no ‘third way’ in which ownership is somehow avoided.”²⁰⁷ If either the government, or some other nebulous collective is deemed to own and control these personal products, personal responsibility in and to them is lost, and the less free and the less productive the authors in such a society will be.²⁰⁸

To the contrary, if we continue to promulgate our existing copyright system in which works are owned by the individual author who created them, such authors will have a stake in, and a personal responsibility for, their works.²⁰⁹ They will singularly be allowed to profit—whatever personal meaning that term has for them—in the manner they see fit. Applying the eudemonistic principle of personal responsibility to copyright authorship, then, will ensure the connection to and tenure in the original work created by each individual author.

204. *Id.*

205. Lawrence W. Reed, *Ownership Must Be Tempered by Sharing*, in *EXCUSE ME, PROFESSOR: CHALLENGING THE MYTHS OF PROGRESSIVISM* 65 (Lawrence W. Reed ed., 2015)

206. *Id.* at 66–69.

207. *Id.* at 66.

208. *Id.*

209. *See id.* at 66 (stating that “ownership is both a virtue and a necessity. What is yours, you tend to husband”).

C. ETHICAL UNIVERSALITY

Eudemonism necessarily entails the ability of the individual to live in harmony, not only with himself, but also with his entire community.²¹⁰ Ethical universality can thus be viewed as the limiting principle of applying eudemonistic qualities to individual pursuits in that it denotes three sub-principles which actually serve to limit personal behavior in certain ways: (i) freedom of choice; (ii) justice as equity; and (iii) respect for the integrity of others.²¹¹

1. Freedom of Choice

Although ethical individualism advocates eudemonistic choice which is universal to all individuals, it nonetheless implies a recognition that such rights are not unlimited and must recognize the freedom of others to achieve their own personal goals and aspirations.²¹² The action characteristic for this synergistic behavior is voluntary association and exchange with no elements of fraud or force.²¹³ If, during a human exchange, there exists an outcome that is not in proportion to the nature and extent of its respective input, an “unequal relative gain[]” will result, leading to a “subjective discomfort” and increased feelings that one is being manipulated by others.²¹⁴ Here, Adam Smith’s capitalistic notion of the marketplace as having an “invisible hand” can be realized to the greatest extent whenever each person works to his own end, invariably “working for the interests of all.”²¹⁵ Ayn Rand’s thinking can be similarly described, she believed that

[f]or Objectivists wealth is not a fixed pool but a dynamic inventory achieved by producers in proportion to the creative value they deliver into the economy. The producers who contribute value should have a right to the value of their own production. How can that be

210. Yadav, *supra* note 200, at 290.

211. WATERMAN, *PSYCHOLOGY*, *supra* note 5, at 23.

212. *Id.*

213. *Id.* at 24.

214. Waterman, *Interdependence*, *supra* note 3, at 766.

215. *Id.* For a concise explanation of Adam Smith’s ideology of the “invisible hand,” see Tim Kasser, *Capitalism and Autonomy*, in *HUMAN AUTONOMY IN CROSS-CULTURAL CONTEXT: PERSPECTIVES ON THE PSYCHOLOGY OF AGENCY, FREEDOM, AND WELL-BEING* 191, 191–206 (Valery I. Chirkov et al. eds., 2010) (analyzing capitalism’s “psychological claim that freedom is maximized when people are encouraged to pursue their own self-interest and when social actors compete with each other with minimal governmental restraint”).

unfair when, after all, any value is assigned in a free market only by the voluntary choice of customers who deal—or not—with a producer?²¹⁶

If the fruits of copyright are owned by the collective, invariably no voluntary exchange can exist.²¹⁷ Collective ownership will arise by force once any work is fixed in a tangible medium of expression and the author of the work will be bereft of control and, more importantly, bereft of spirit. Indeed, if there exists “no personal ownership there is little personal responsibility for what happens, and even less incentive to cooperate with others for mutual benefit.”²¹⁸ Such a collective climate then, necessarily breeds the type of malicious and dangerous envy over the property interests of others, as discussed in detail in Part IV of this article. But as President Abraham Lincoln eloquently admonished, when this envy is left unchecked, it will flourish and, ironically, the envious will become the envied in a never-ending cycle of psychological regression which will lead to a further lack of freedom of choice:

Property is the fruit of labor—property is desirable—is a positive good in the world. That some should be rich, shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another; but let him labor diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.²¹⁹

Although President Lincoln’s statement relates to real property ownership, the same psychological underpinnings apply to ownership in intellectual property goods which, when snatched by the envious from their creator, will inevitably lead to a broken sense of individual pride, achievement, and spirit.

216. DONALD L. LUSKIN & ANDREW GRETA, I AM JOHN GALT: TODAY’S HEROIC INNOVATORS BUILDING THE WORLD AND THE VILLAINOUS PARASITES DESTROYING IT 11 (2011) (“Risks are borne by those who take them; players don’t gamble with other peoples’ chips and expect someone else to pay for their losses; nor do they take someone else’s winnings. Benefits accrue to those who practice clean dealings and meet true market needs with value-added products or services.”).

217. See REED, *supra* note 205, at 68.

218. DORN ET AL., *supra* note 202, at 119–20.

219. HENRY JARVIS RAYMOND & FRANCIS BICKNELL CARPENTER, THE LIFE AND PUBLIC SERVICES OF ABRAHAM LINCOLN . . . : TOGETHER WITH HIS STATE PAPERS, INCLUDING HIS SPEECHES, ADDRESSES, MESSAGES LETTERS, AND PROCLAMATION, AND THE CLOSING SCENES CONNECTED WITH HIS LIFE AND DEATH 500 (1865).

To the contrary, a “unity of purpose” is present with individual ownership of intellectual assets driven by both self-purpose and profit motivation that simply does not exist in a collective ownership model.²²⁰ When creators are provided with ownership of their works and the ability to consciously trade them in the market according to their freedom of choice, it also imbues in them the ability to provide for themselves as opposed to being reliant on the collective; and, importantly, it “means living with the consequences of our actions—reaping the gain from favorable outcomes while shouldering the loss from downside risks.”²²¹ When viewed from this lens, it is difficult to begrudge the great successes and resultant riches of businesses such as the BBECs, who also eat the losses for those intellectual products that do not find merit in the marketplace.²²² If some sort of ephemeral collective were to own the copyright in the *Star Wars* story, would there be any incentive for any writer, producer, director, toy maker, movie star, etc. to engage in the risky business of bringing such a creative enterprise to market?

2. Justice as Equity

This concept dovetails nicely with the Freedom of Choice principle in that, in order for ethical individualism to thrive, there must exist a concept of justice that is defined as equity, in which the outcomes to the participants are proportional to the nature and extent of their respective inputs.²²³ The behavioral system must be adjusted so that when one feels that the benefits derived from a joint venture are incommensurately distributed, one may opt out of participation in such exchange.²²⁴ Indeed, any social arrangement which advocates for the distribution of justice, wealth, or collective, unearned

220. DORN ET AL., *supra* note 202, at 120.

221. LUSKIN & GRETA, *supra* note 216, at 10.

222. See DORN ET AL., *supra* note 202, at 114 (“Unless property rights are transferable we cannot shift resources from lower-to higher-valued uses. Property rights should be partitionable; it should be possible to divide up the collection of rights that goes with any particular element of property. In this way property may be used economically for a wide range of different purposes under differing circumstances.”).

223. WATERMAN, PSYCHOLOGY, *supra* note 5, at 24–25.

224. *Id.* at 25.

benefits is “incompatible with each of the universalizable [*sic*] principles associated with ethical individualism.”²²⁵

Despite the obviousness of this principle, we are told over and again by prominent authors and academicians that the tenets of copyright law that allow for exclusive ownership in the products of original and ingenious works of art by those individuals who create them will inevitably lead to an upsetting of “social justice” and “equality.”²²⁶ Vague terms such as these—and particularly usage of the term “distributive justice” when discussing the purpose of copyright in modern society—while quite catchy and attractive to those who populate our progressive, multiculturalist academy,²²⁷ seem never to be defined by the professors who use them in order to support their claims.

The meaning of “equality” from the perspective of ethical universalism, on the other hand, is readily defined as derived from the original interpretation as intended by the Framers, and is not meant to be used as a convenient way to justify socialistic practices of wealth and property redistribution:

Equality means having an equal starting point or an equal chance; it does not mean that the outcome will be equal. Interpreting equality as equal outcome creates a lot of trouble. If those who worked hard and those who did not were to receive equal treatment, as communism insists they should, in the end it would be only natural for no one to want to work hard any more. If, after accumulating wealth through hard work, you were criticized for wrongdoing, for instance, accused of cheating to make a profit, you would lose all enthusiasm and stop making an effort.²²⁸

When copyright critics accuse BBEC’s over and again of copyright greed or corporate injustice when, in actuality, they are perfectly following the Copyright code, it seems apparent that eventually they, like the individual authors themselves,

225. *Id.*

226. See, e.g., CRISTINA FLESHER FOMINAYA, SOCIAL MOVEMENTS AND GLOBALIZATION: HOW PROTESTS, OCCUPATIONS AND UPRISINGS ARE CHANGING THE WORLD 135–37 (2014) (quoting a manifesto written by Aaron Swartz which states, in part, “[t]he world’s entire scientific and cultural heritage, published over centuries in books and journals, is increasingly being digitized and locked up by a handful of private corporations”).

227. Daniel Benoliel, *Copyright Distributive Injustice*, 10 YALE J.L. & TECH. 45, 47–48 (2007) (“An examination of the academic literature and copyright litigation reveals that distributive justice arguments are appearing with greater frequency and receiving greater deference in copyright jurisprudence.”).

228. OKAWA, *supra* note 104, at 28.

will tire of the universal castigation and opt out. Again, who is it that will ensure that the masses can sit in an air-conditioned theater eating popcorn and enjoying the next *Star Wars* movie? Will George Lucas himself have to distribute and market his own work? Would not his time be better spent creating the next-to-the-next *Star Wars* movie?

3. Respect for the Integrity of Others

The principle of respect for the integrity of others implies one's ability to treat each person as an end and not a means, and "viewing others as possessing a dignity comparable to one's own."²²⁹ As the philosopher Isaiah Berlin wrote in 1958, "But to manipulate men, to propel them toward goals which you—the social reformers—see, but they may not, is to deny their human essence, to treat them as objects without wills of their own, and therefore to degrade them."²³⁰ Treating others, especially authors, with dignity invariably necessitates an acknowledgement of the vast diversity among humans regarding the ethical forms in which such dignity may be expressed, and a realization that one does not live in a vacuum.²³¹ In this respect, universality does not necessarily mean uniformity, since no two persons wish to be treated identically the same.²³² The ability to have respect for the autonomy of another requires "the psychological process of empathy or social role taking" and a keen ability to place oneself in the position of others, and "within their phenomenal frame of reference."²³³ Moreover, respecting the rights of others does not necessitate giving up one's own rights, as "[a] person cannot sacrifice what is not hers. Since rights protect the freedom that a person is entitled to, respecting rights exacts no loss from those who do so."²³⁴

In this manner, it is easy to understand that abiding by the eudemonistic principle of respecting others' rights is ultimately in the interests of all persons, since their rights will

229. WATERMAN, *PSYCHOLOGY*, *supra* note 5, at 24.

230. Lawrence W. Reed, *Humanity Can Be Best Understood in a Collective Context*, in EXCUSE ME, PROFESSOR: CHALLENGING THE MYTHS OF PROGRESSIVISM, *supra* note 205, at 80.

231. WATERMAN, *PSYCHOLOGY*, *supra* note 5, at 24.

232. *Id.*

233. *Id.*

234. SMITH, *supra* note 127, at 70.

reciprocally be respected, and nobody's rights will be sacrificed for the sake of others.²³⁵ To the contrary, when there exists a movement in society which serves to degrade and demoralize the individual human spirit, and "occurs systematically and is intended to cause humiliation and denigration, the violation of human dignity is particularly grave."²³⁶ When such virulent propaganda is left unchecked, and persons continue to be treated as objects or as mere means to an end that primarily serves the needs of others, the eudemonistic principle of dignity is misappropriated, and it "not only violates the dignity of those under attack but also the dignity of those it seeks to influence."²³⁷ When this process consists of systematic persecution, "the human dignity of those under attack is violated in an irreversible, most fundamental and final way," and is particularly the case where it is supported by state institutions or "similarly powerful group[s]."²³⁸

Applying this concept to copyright authorship, then, it is apparent that the dignity with which authors should be treated is drastically compromised by the charges of academicians that Romantic authorship is dead and there are no geniuses. Whereas most European copyright laws recognize the personal and individual integrity of authors who create original works by providing them with a moral right, or *droit moral*, in the products of their creation, the U.S. Copyright Act, in large part, has no counterpart.²³⁹ The recognition of moral rights in copyrighted works goes beyond the basic protection of economic rights and is grounded in a natural rights theory that authors deserve protection not only for the economic value of the product of their work that can be bought and sold in the

235. *Id.* at 70–71.

236. WIBKE K. TIMMERMANN, INCITEMENT IN INTERNATIONAL LAW 47–48 (2014).

237. *Id.* at 49.

238. *Id.* at 52–53.

239. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 410–14 (2009). The moral rights doctrine was recognized in Europe in 1928 by the Berne Convention. Article 6bis of the Berne Convention states,

[i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Id.

marketplace, but also for the personality, identity, and “creative soul” that invariably exists within the intellectual works they create.²⁴⁰ Although the notion of moral rights has support in the United States, to the anti-Romantic-authorship scholars like Professor Lessig, the concept “represents yet another way of extending and expanding copyright law to protect authors and creators in a way in which the law was never intended to operate.”²⁴¹

Regardless of whether one believes that full legal moral rights should be extended to American authors, the more problematic issue is the denial of the underlying philosophical rights that are represented by the doctrine. When a society does not metaphysically respect the dignity and autonomy of authors and their right to make a living from their trade in the same manner that it assumes that lawyers, scientists, teachers, and workers in virtually every profession should be paid for their services, it becomes a system that will not synergistically encourage people to work in the creative field. If we accept that respect for the integrity of others is a tenet that needs to be followed in order for the members of society to flourish, then we certainly would not claim that the economic fruits of intellectual creation be denied to authors while we gladly pay professionals in other fields for the fruits of their labor. But that, indeed, is what anti-author proponents suggest when they attempt to prove over and over again by largely nebulous and unsupported research that authors would continue to pursue their artistic careers in a world where copyright law did not exist or where creators were rewarded in non-monetary ways.²⁴²

240. *Id.* at 410.

241. Christopher Madden, *Hold on Tighter/let Go Sooner: A Review of Free Culture and an Argument for the Synthesis of Public Domain Preservation and Moral Rights Adoption*, 15 DEPAUL-LCA J. ART & ENT. L. 99, 102 (2004).

242. See, e.g., Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM. J.L. & ARTS 467, 533 (2015) (“[T]he majority of musicians appear to create music simply for music’s sake”); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 546, 538–39 (2009) (“Creators speak of compulsion, joy, and other emotions and impulses that have little to do with monetary incentives. . . . Instead of monetary rewards or even artistic control of how works are transmitted to others as our highest value, we should aim for policies that maximize participation—even when that changes the mix of economic winners and losers.”); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 54

In fact, if one reads professorial accounts such as these closely, one can also detect the perfidious underlying presence of “copyright envy” as analyzed in Part II of this article. For example, Professor Diane Leenheer Zimmerman explains a recent article of hers as: “an investigation of the assumption in the United States that the law of copyright, by dangling monetary and other economic ‘carrots’ before people already endowed by virtue of their backgrounds and innate ability to be creative (however we define that word), is what induces them to actualize their potential.”²⁴³ Translation: Because these great artists grew up in an environment where they were educated and disciplined enough to hone in on their abilities to be creative, this is quite *enough* for them, already! But on top of all this, they actually expect to be *paid* for these services to society? Phhhhhish!

Following suit, Professor Jiarui Liu, while acknowledging that “the merits of this proposed copyright-free world vis-à-vis the current copyright regime have yet to be seriously examined from an empirical perspective,”²⁴⁴ nonetheless proclaims that her research “focusing on real-world artists”²⁴⁵ shows that

musicians typically do not make their decisions on whether to continue creating music based upon the availability and scope of copyright protection. It appears that the majority of the musicians do not make a conscious effort to pursue the economic benefits provided by copyright. Their music creations are mostly motivated by the emotional benefits including self-expression, communication, peer respect and popularity.²⁴⁶

Professor Liu, thus, concludes that “a world without copyright law could actually benefit the public as a whole. Consumers would have greater access to low-price intellectual products and artists would continue to create for intrinsic motivations such as self-expression, communication and reputation.”²⁴⁷

Translation: Artists will create this great stuff for us because their intrinsic human spirit compels them to express themselves, and the rest of society, by reinforcing this notion,

(2011) (“Truly creative people respond most strongly to some innate drive to solve problems or to produce art and are unlikely to be encouraged to make a greater effort by the promise of profit if their work is successful.”).

243. Zimmerman, *supra* note 242, at 30.

244. Liu, *supra* note 242, at 471.

245. *Id.*

246. *Id.* at 533.

247. *Id.* at 470–71

can free-ride and benefit from their works. Since we lawyers, in our infinite wisdom, have non-empirically determined that artists will create for loosely interpreted non-economic reasons, why bother to compensate them when we can get it all for free or, at least, at a very low price?

These accounts represent a small sampling of the arrogant and ill-researched propaganda that is being proliferated by our copyright academy, and accepted over and over again without criticism or translation. To the contrary, I would submit that, even if one day a definitive, empirical study proves without an iota of doubt that artists are primarily motivated by non-monetary incentives, they should nonetheless be compensated for the product of their work, which is a commodity used and valued by others. If we respect the dignity of authors, why would we not want to compensate them for products they create and we enjoy?

Copyright law is intended to protect the authors of original works, but

beyond protecting the author's exclusive rights to the work (and the resulting economic benefits that may accrue), [copyright law] may also be the manner in which that author gains a stable sense of self and an identity that he or she can corroborate by identifying and claiming ownership to an authored text(s).²⁴⁸

Sadly, if the anti-author stories that fail to recognize this important human necessity of self-identity and self-ownership continue to persist in our society—if the dignity of the individual authorial process is consistently debased and sacrificed for the sake of the “public as a whole”—we will have lost a major component of what Waterman and other behavioral psychologists consider essential in a synergistic society.

CONCLUSION

*“Everyone who enjoys supposes that the tree was concerned with the fruit,
but it was really concerned with the seed.”*

248. Linda Rolin Danil, *Deconstructing Copyright*, CRITICAL LEGAL THINKING (Apr. 8, 2013), <http://criticallegalthinking.com/2013/04/08/deconstructing-copyright>.

In this lies the difference between all those who create and those who enjoy.” Friedrich Nietzsche²⁴⁹

Although “[e]very age, and every culture, has its heroes of the mind,”²⁵⁰ we are fast embarking upon a future age in which the Romantic author-hero is universally nonexistent. Although we enjoy being entertained and educated by the works of our great author-heroes, we are becoming desensitized and unable to both comprehend and appreciate the vast amounts of labor, risk, and heart and soul that is necessary in order to create such works for our ultimate enjoyment. Regardless of the fact that most copyright professors would laud this paradigmatic sea-change that serves to both legally and philosophically disengage the author from his work, I believe that a true synergistic copyright regime necessitates the type of individual ownership as originally conceived by our first copyright laws, and which continues to persist today.

I have attempted in this article to provide a construct within which to argue that viewing copyright ownership with a collective lens, with all of its resultant anti-authorship trope, amounts to a nihilistic society that is less creatively inspired, less enriched and, ultimately if not ironically, less *collectively* happy. This is due primarily to the fact that

anti-individualism or communitarianism . . . comes to no more than the special privilege of certain individuals to run the lives of other individuals, to live off the lives of others who may very well have perfectly justified goals of their own that could be supported with their lives if they were left free to decide about such matters.²⁵¹

Although some of the precepts of a collectivist society may look attractive on paper, many economists agree that a collectivist system in which the government dictates the morals, opinions, ownership interests, wealth distributions, and trade practices has been tried and tested, and has utterly failed:

Which countries contain the most peaceful, the most moral, and the happiest people? Those people are found in the countries where the law least interferes with private affairs; where the government is least felt; where the individual has the greatest scope, and free

249. *Quotations from Friedrich Nietzsche*, POEMHUNTER.COM, <http://www.poemhunter.com/quotations/famous.asp?people=friedrich%20nietzsche&p=60> (last visited Mar. 10, 2017).

250. MCMAHON, *supra* note 124, at 1.

251. Machan, *Collectivists' Nemesis*, *supra* note 25.

opinion the greatest influence; where the administrative powers are fewest and simplest; where taxes are lightest and most nearly equal; . . . where individuals and groups most actively assume their responsibilities, and, consequently, where the morals of . . . human beings are constantly improving; where trade, assemblies, and associations are the least restricted; . . . where mankind most nearly follows its own natural inclinations; in short, the happiest, more moral, and the most peaceful people are those who most nearly follow this principle: although mankind is not perfect, still, all hope rests upon the free and voluntary actions of persons within the limits of right; law or force is to be used for nothing except the administration of universal justice.²⁵²

The irony is that when one is left to nurture, craft, and own one's unique creative endeavors, a synergy among individuals and the group emerges; as the individual demonstrates and shares his talents with the group, he is honored and recognized by the group for them, and a mutually beneficial cycle of creation occurs, leading to a happier, more synergistic society.²⁵³ Rising from this synergy emerges a vibrant social order where not only is individual expression protected *and respected*, but also the collective public is served by being able to make informed decisions after having been exposed to a broad and rich depository of original works of authorship.²⁵⁴

At least a small handful of scholars are brave enough to openly recognize that "some of the arguments offered in opposition to traditional notions of authorship and originality defy sound philosophical reasoning,"²⁵⁵ and that "[e]very intellectual object such as a book or poem must have an efficient cause—it could not come into existence on its own. When a product originates through a human agent's intellectual labor, its efficient cause is that agent."²⁵⁶ Professor Merges claims proudly that "individual creators are for me the genuine impetus behind IP law."²⁵⁷ Well aware of the fact that he is among the few in the academy who defend traditional copyright precepts, he nonetheless states

252. See Billings & Reed, *supra* note 17 (quoting nineteenth-century French economist Frederic Bastiat).

253. Sechin, *supra* note 34, at 118 ("The more one asserts one's individuality, the more it disappears; and the more one asserts one's function in the group, the more one's individuality emerges.").

254. See, e.g., Shapiro, *supra* note 35, at 1047.

255. See SPINELLO & BOTTIS, *supra* note 46, at 127

256. *Id.* at 129.

257. MERGES, *supra* note 12, at 71.

I *also* believe that IP policy has a special obligation to promote and encourage creatives. Without the efforts of people devoted full-time to developing and expressing their considerable creative talents, and the large-scale organizations often needed to assemble their individual contributions into sophisticated, refined, and polished form, I believe our collective culture would suffer enormously.²⁵⁸

Professor Jane Ginsburg has similarly stated that the bulk of copyright law only makes sense when the centrality of the human creator—the author—is recognized.²⁵⁹ Others have rightly observed that, despite the fact that the death of the author motif, as originally proffered by literary critics, has made its way into the articles of copyright scholars, “there is plenty of evidence that copyright law continues to employ the rhetoric and conceptual underpinnings of authorship, in both the judicial and legislative arena.”²⁶⁰

Professor Wendy Gordon has aptly noted that, with respect to copyright law, “the U.S. Constitution speaks not only of a goal—Progress—but also of a means: grants of exclusive rights to authors and inventors. The burden of persuasion rests on those who would dislodge copyright from its explicit and traditional focus.”²⁶¹

Teetering on the lone fringes of this premise, well outside the comfortable circle in which stand most of my academic colleagues who proclaim that collectivity and cultural collaboration are the new norms of copyright authorship that eventually will, and should, replace the exclusive rights of authors, I myself have not been so persuaded. Thus, too, am I far from convinced that the Romantic author is or should be dead. As Professor Bloom gloriously acclaims, “the dead genius is more alive than we are We read in search of more life, and only genius can make that available to use.”²⁶² Read on, my friends!

258. *Id.* at 223 (emphasis in original).

259. Ginsburg, *supra* note 42, at 1068.

260. Lionel Bentley, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973, 977 (1994).

261. Gordon, *The Core of Copyright*, *supra* note 27, at 677; *see also* Shapiro, *supra* note 35, at 1045 (“Even when balanced with conflicting social interests, the goals of the Constitution are best served by encouraging, not suppressing, individual expression.”).

262. BLOOM, *supra* note 133, at 4.