

# PROPERTY, PERSONA, AND PUBLICITY<sup>†</sup>

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## I. Introduction

Today as long as one can afford a computer and an Internet connection one can author a personal Web site, a blog, a YouTube video, and more. In short, Internet creation and authorship has exploded.<sup>1</sup> Indeed, *Time Magazine* looked at society and found that the 2006 person of the year was not one individual but rather individuals who use Wikipedia, You Tube, MySpace, and Facebook, to create like never before and spawn blogs, social network web pages, mash-ups, and so on.<sup>2</sup> Yocahi Benkler's *Wealth of Networks*<sup>3</sup> examines technology phenomena and describes the potential of the networked world, to which *Time Magazine* nods, to alter how markets and even democracy operate. And even as we see the growth of user-generated text and images, some predict that the somewhat grainy YouTube-style videos seen on the Web today will be replaced by television quality video with media companies changing the way they offer entertainment and an increased role for user-generated content in that offering.<sup>4</sup>

Although this growth of creation offers tremendous benefits<sup>5</sup> and generates many new debates,<sup>6</sup> this article focuses on a paradox latent within the nature of this creative

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<sup>1</sup> See e.g., Frank Pasquale, *The Law and Economics of Information Overload Externalities*, 60 VAND. L. REV. 135, 135-137 (noting proliferation and wide range of new online content and difficulties in sorting such information).

<sup>2</sup> See Lev Grossman, *Time's Person of the Year: You*, TIME MAGAZINE, Dec. 25, 2006, at 38.

<sup>3</sup> YOCAHI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

<sup>4</sup> See Martin LaMonica, *Experts: No Stopping the Flood of Web Video*, CNET NEWS.COM, February 7, 2007, [http://news.com.com/Experts+No+stopping+flood+of+Web+video/2100-1025\\_3-6157283.html](http://news.com.com/Experts+No+stopping+flood+of+Web+video/2100-1025_3-6157283.html).

<sup>5</sup> See generally, BENKLER, *supra* note 3; GLENN REYNOLDS, AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS (2006), Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006) (exploring the generative capacity of the Internet and its ability to foster individual creation and sharing of code but noting the potential "backlashes" from government and corporate interests).

phenomenon: the emails, blogs, social network pages, and videos that constitute the bulk of this creation fall within the intellectual property regime; yet, they are not under the creator's direct control. Thus, as opposed to the artifacts one creates in the analog world such as one's journal or artwork, digital creations are often mediated by others. For, besides using software to compose and arrange this information on one's personal computer, today many of these processes occur online and are stored online through the services of companies such as Blogger or TypePad (blog composition and host sites), Snapfish or Flickr (online photo albums), Yahoo!, MSN, AOL, Google etc. (Web-based email providers and/or Web site hosting services).

Thus second parties control access to the material and lock out those who do not have proper passwords but otherwise have rights in the property<sup>7</sup> or shut down Web sites based on mere allegations of impropriety such as a claim that a site is somehow breaching a privacy policy, is related to the distribution of spam email,<sup>8</sup> or violates a copyright.<sup>9</sup> As such the creators of this property may be surprised to find that they have lost access to their property or that it has been destroyed. In a sense, once the creator dies or an online host terminates service these sites are similar to gravesites to which

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<sup>6</sup> See generally Zittrain, *supra* note 5; see also DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2006) (detailing the rise of technology on the Internet and elsewhere that can have beneficial effects but also implicates questions of diminished if not eliminated individual privacy); Brett Frishmann and Barbara van Schewick, *Network Neutrality and The Economics of an Information Superhighway*, Jurimetrics (forthcoming, draft on file with the author) (examining the network neutrality debate that has arisen arguably as an outgrowth of the explosion of Internet usage); and Orin Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003) (exploring the way that perspective regarding the nature of virtual realities the Internet enables to exist can control questions of criminal law and procedure).

<sup>7</sup> See Jim Hu, *Yahoo Denies Family Access to Dead Marines E-mail*, CNET NEWS.COM, Dec. 21, 2004, [http://news.com.com/Yahoo+denies+family+access+to+dead+marines+e-mail/2100-1038\\_3-5500057.html](http://news.com.com/Yahoo+denies+family+access+to+dead+marines+e-mail/2100-1038_3-5500057.html).

<sup>8</sup> See Declan McCullaugh, *GoDaddy pulls security site after MySpace complaints*, CNET NEWS.COM, January 25, 2007, [http://news.com.com/2100-1025\\_3-6153607.html](http://news.com.com/2100-1025_3-6153607.html).

<sup>9</sup> See Greg Sandoval, *EFF takes Viacom to Task Over YouTube Takedown*, CNET NEWS.COM, February 15, 2007, <http://news.com.com/EFF+takes+Viacom+to+task+over+YouTube+takedown/2100-1026-6159548.html>.

descendents and society have no access.<sup>10</sup> In short, online creation and storage raise fundamental issues regarding the ownership of, access to, dominion over, and preservation of digital property.

Accordingly, this paper investigates and sets forth the theoretical foundations to explain why society should preserve this property and who should have control over it. Investigating these questions reveals, however, that three groups have an interest in these artifacts: the creator of the artifact, the potential inheritor of the artifact, and historians. In short, all three groups have claims to the importance and value of digital artifacts but for different reasons. Thus, it appears that when one looks at each group's specific interest and the arguments that support each position separately, the position is coherent. But because each group makes a different claim regarding digital artifacts, the positions clash and reveal incoherence.

First, the authors have claims to the artifacts as copyrightable material and as such as property. From that perspective one can appreciate that the author's heirs have a claim to the artifacts as property as well. From a purely pecuniary perspective, the artifacts of historically significant figures and celebrities can be worth large sums of money as evidenced by Martin Luther King's papers, John Lennon's letters, and even Joe DiMaggio's sandals have been the subject of major auctions with buyers paying thousands and up to millions of dollars for the material.<sup>11</sup> Furthermore, the share-with-the-world-for-free paradigm faces an alternative and perhaps more familiar paradigm:

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<sup>10</sup> Cf., Albert Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, (August 2005), University of Alabama Public Law Research Paper, available at SSRN: <http://ssrn.com/abstract=777747> (examining descendents' rights to access graves located on private property cemeteries, the theoretical justification for such rights, and the rights' implications for property theory).

<sup>11</sup> See e.g., Shalia Dewan, The Deal That Let Atlanta Retain Dr. King's Papers, THE NEW YORK TIMES, A11, June 27, 2006 (detailing the \$32 million the city of Atlanta paid for Dr. King's letters), *Lennon's Noteworthy Book Sale* AUSTRALIAN, World1, 8, April 21, 2006; John McGrath, *Where have DiMaggio's shower sandals gone?* GLOBE AND MAIL, R9, April 13, 2006.

Web sites have begun paying for user-generated content<sup>12</sup> and talent agencies have begun looking to this content to find the next star actor, director, writer, and so on.<sup>13</sup> These shifts indicate that for some, user-generated content can have a direct pecuniary return for their work.

In addition to the economic property aspect of these artifacts, however, a persona rationale supports the author's and her heirs' claim to the artifacts. Consider for example the recent problem a family had when they tried to access their dead son's Yahoo! email account. The son, a marine killed in Iraq, had used Yahoo! for his email while stationed abroad. When he died, the Marine Corps sent home all his possessions including received mail and letters about to be sent.<sup>14</sup> The father thus was given his son's property, the physical items. When, however, the father wanted access to his dead son's email, Yahoo!, in accordance with its privacy policy, refused to grant the father access to the artifacts until a court ordered Yahoo! to do so. The reason the father wanted the emails was not the economic value of the artifacts. Rather he wanted to see his son's emails "as one reminder of his son's life."<sup>15</sup> For the father the artifacts value lay in the way they were an extension or expression of his son's persona. In short these artifacts may also be seen as expressions of the author's persona. As author Zadie Smith has written, "A writer's personality is his manner of being in the world: his writing style is the unavoidable trace of that manner. ... [S]tyle [is] a personal necessity, [] the only possible expression of a particular human consciousness."<sup>16</sup>

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<sup>12</sup> See Scott Kirsner, *All the World's A Stage (That Includes the Internet)*, THE NEW YORK TIMES, C7, February 15, 2007.

<sup>13</sup> See David H. Halbfinger, *Talent Agency Is Aiming To Find Web Stars*, THE NEW YORK TIMES, C1 October 25, 2006.

<sup>14</sup> See Hu, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> Zadie Smith, *Fail Better*, THE GUARDIAN, 1-6, January 13, 2007.

In addition a persona type of rationale resonates with the other group having an interest in these artifacts: historians. For example, consider the social historical importance of letters, dairies, manuscripts, sketchbooks, and music notes found today for an important historical figure. These items become part of the corpus of material studied to understand the person, her work, and the society in which she lived. Furthermore, it is not just famous people's artifacts that social historians study. The letters and diaries from individuals who are not so famous allow historians to build a full sense of what certain members of society thought in a specific era.<sup>17</sup> And yet it is not a property rationale or a persona rationale as understood in privacy<sup>18</sup> and intellectual property discussions<sup>19</sup> that allows historians or society to demand access to these artifacts. Rather it is information theory and, as this paper argues, an understanding of the relationship between authorship and the community, that provides an explanation for granting access to these artifacts. In that sense, this Article argues that these creations are information infrastructure as

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<sup>17</sup> As set forth below Wilhem Dilthey's theory of history explicitly offers that autobiographical material is necessary to understand history. *See infra* notes \_\_ to \_\_; *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 131 (2003) (examining the nature of unpublished works market and acknowledging fame of an author is not necessary for the analysis as social historians examine works of non-famous people for their source material). For a study of the place and evolution of autobiography as it relates to notions of the self *see* Michael Mascuch, ORIGINS OF THE INDIVIDUALIST SELF (1996). For examples of using autobiographical material to understand history *see e.g.*, Marilyn Ferris Motz, *The Private Alibi: Literacy and Community in the Diaries of Two Nineteenth-Century American Women*, in INSCRIBING THE DAILY 191 (Suzanne L. Bunkers and Cynthia Anne Huff, eds.) (1996); Mary Beth Norton, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1996) (using letters, diaries, and other original sources to construct a picture of the way in women understood and partook in the American Revolution); Alfred L. Brophy, "The Law of the Descent of the Mind": Law, History, and Civilization in Antebellum Literary Address, U of Alabama Public Law Research Paper No. 07-17 (August 2005) available at <http://ssrn.com/abstract=777724> (examining orations delivered at the University of Alabama to trace the evolution of political theory and jurisprudence in the antebellum South).

<sup>18</sup> *See generally*, Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. 647 (1991).

<sup>19</sup> *See e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287 (1988), Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 517 (1996), Madhavi Sunder, *Property in Personhood*, in **RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE** (Martha M. Ertman & Joan C. Williams, eds. 2005).

Professor Brett Frischmann has developed the term<sup>20</sup> and generate what Professors Brett Frischmann and Mark Lemley call spillovers—“uncompensated benefits that one person's activity provides to another.”<sup>21</sup> In that sense these spillovers may be “necessary for human flourishing”<sup>22</sup> as Margaret Radin has deployed the phrase. Put simply, these creations involve information and ideas that are necessary to foster further productive creation and use of ideas.

Yet when historians and other members of the community seek access to these artifacts they face both persona and property arguments against allowing access to and use of these materials. A recent example illustrates the problem. Professor Carol Schloss, a James Joyce expert, has had to sue the estate of James Joyce (with the help of Professor Larry Lessig and the Stanford Law School Cyberlaw Clinic Center for Internet and Society) to protect her ability to use material for her scholarship.<sup>23</sup> The matter highlights many of the tensions between ownership of the artifacts on one hand and access to the artifacts on the other. The way in which Stephen James Joyce, James Joyce's only living heir,<sup>24</sup> has managed the estate demonstrates the problem for historians. Mr. Joyce has

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<sup>20</sup> See Brett Frischmann and Mark Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 279-281 (2007) [hereinafter Frischmann and Lemley, *Spillovers*] (explaining that “‘infrastructural’ resources [are] shareable resources capable of being widely used for productive purposes for which social demand for access and use generally exceeds private demand by a substantial margin. Examples of such goods include education and, significantly for our purposes, information” and that “Ideas themselves are a good example of infrastructure, because they are not merely passively consumed but frequently are reused for productive purposes.”); for a full discussion of Frischmann's theory see generally, Brett Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005) [hereinafter Frischmann, *An Economic Theory of Infrastructure*].

<sup>21</sup> See Frischmann and Lemley, *Spillovers* *supra* note 20, at 258.

<sup>22</sup> See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903-1915 (1987) (explaining the link between personhood and flourishing and arguing “that market-inalienability is grounded in noncommodification of things important to personhood.”).

<sup>23</sup> See *Fair Use Project and Cyberlaw Clinic at Stanford Law School Represent Scholar in Lawsuit Against the Estate of James Joyce* available at <http://cyberlaw.stanford.edu/Shloss%20v.%20Joyce%20Estate%20Press%20Release.pdf> (last visited July 11, 2006). A copy of the complaint is available at <http://cyberlaw.stanford.edu/Complaint%20Endorsed%20Filed%206-12-06.pdf> (last visited July 11, 2006).

<sup>24</sup> See D.T. Max, *The Injustice Collector*, THE NEW YORKER, June 19, 2006 at 34.

apparently threatened to and in fact destroyed correspondence,<sup>25</sup> tried to prevent readings of the book, sued to prevent a new edition of *Ulysses* from being published, “threatened the Irish government with a lawsuit if it staged any Bloomsday<sup>26</sup> readings; [after which] the readings were cancelled”<sup>27</sup>, and “rejects nearly every request to quote from unpublished letters.”<sup>28</sup>

Note, however, that the rationale behind these acts sounds in privacy and persona, not property: “[The goal] has been to put a halt to work that, in his view, either violates his family’s privacy or exceeds the bounds of scholarship.”<sup>29</sup> The Joyce estate is not alone in its perspective. The estates of T.S. Elliot and J.R.R. Tolkien have expressed similar displeasure at academics’ approach to the creator’s work.<sup>30</sup>

In short, today, the wealth of online writing and other online creations has many benefits for the authors of the creation, their heirs, and society at large; yet society lacks a clear normative foundation to explain the rights in and management of these creations. As such with much of our expression and identity constructed in the digital world, not paying attention to the administration of this information will result in valuable resources being lost to the vagaries of inconsistent service provider policies and whether each

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<sup>25</sup> *Id.* at 34-35.

<sup>26</sup> Bloomsday is June 16, the day chronicled in James Joyce’s *Ulysses*. See Max, *supra* note 24, at 34.

<sup>27</sup> *Id.* at 35.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Defs.’ Reply to Pl.’s Opp’n to Defs.’ Mot. to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss’s Am. Compl., Shloss v. Joyce, No. CV 06-3718 (N.D. Cal. 2007), 2007 WL 444886 (“Joyce objected to Shloss’s plan for a book about Lucia Joyce because it is an invasion of privacy.”, “While Defendants have alleged that a priority of the Estate is to protect the privacy of the Joyce family, it has not stated that copyright interests are used for this purpose. Instead, as can be seen from the correspondence, Joyce’s goals have been to protect family privacy (i.e., by not providing assistance with books on private family matters) *and* defend the integrity, spirit and letter of James Joyce’s works.”).

<sup>30</sup> See Max, *supra* note 24, at 36; see Ethan Gilsdorf, *Lord of the Gold Ring*, BOSTON GLOBE, 10, November 16, 2003.

person has the foresight to leave passwords and the like in their wills.<sup>31</sup> Furthermore, if the creator of the information does not want it shared, she may find that the law may permit access because the digital artifacts are property and, in the absence of the decedent's testament, part of the estate left to the descendants regardless of the author's desire to keep the information secret.<sup>32</sup>

As such, this Article addresses several problems stemming from the profusion of digital artifacts. At one level the creator must maintain access to and dominion over her creations if nothing else to preserve the information in the event of death or failure to pay for services. Thus part of this project seeks to examine and present the theoretical foundations that explain and address the questions surrounding the management and disposition of such creations. At another level, once these artifacts are preserved, the question of later generations' access to and control over the artifacts demands a further analysis of the interests and the normative foundations at issue as heirs and society lay claim to the artifacts.

Accordingly, the first section of this Article examines the way in which digital artifacts are created and mediated as it addresses the problem of access to and dominion over digital creations. The section begins by examining the interests of creators and their descendants in the works at issue and presents an argument for the creator's control over her work. Then drawing on the work of philosopher Wilhem Dilthey, the section provides

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<sup>31</sup> Note that one may not wish to put password in the will (unlikely but even if one did execute codicils to track all the passwords would be cumbersome given that today many have trouble tracking even a small set of passwords. Further security policy indicates that one should change passwords frequently indeed many information technology systems require it every 30 or 60 days). In addition when one dies the descendants automatically gain access to papers etc unless they are locked away. The image of going through offices, boxes, etc, discovering that someone was gay, a brilliant unpublished author, etc. is common. If one wished to hide the material then he would place it in a safety deposit box or the like (that often have mechanisms to allow the dead access to the material).

<sup>32</sup> See Susan Llewelyn Leach, *Who Gets To See the E-mail of the Deceased?*, CHRISTIAN SCIENCE MONITOR, May 2, 2005 at 12.

a theoretical explanation for the importance of digital artifacts to history and why they should be preserved. Last, based on the arguments showing the interests of all three groups, the section offers a way to ensure that digital artifacts are preserved rather than being subject to the whims of second party terms of service contracts or gaps in probate law.

Yet once the importance of preserving and controlling digital artifacts is understood, a problem familiar to many who write about intellectual property arises: to what extent should the creator of the property be able to exercise her dominion over the property or put differently what normative theory justifies the amount of control the creator or her heirs is given. As such, Part II turns to the inherent problems of property, persona, and publicity that the creation of digital, if not all, artifacts raises. To unravel this issue, Part II examines the case of Stephen Joyce and his claim to absolute dominion over James Joyce's work under both a copyright and a privacy rationale. In examining this claim, the section finds that digital or not, the claim to dominion over artifacts as an extension of persona has deep roots. Indeed, those very roots are the reason that claims such as Joyce's have some force.

But this Article argues that the draw of the persona rationale is overstated and at times mythological such that it leads to erroneous conclusions and law. By examining recent analyses of the right of publicity, this section demonstrates that the claim for dominion over digital artifacts during one's life has theoretical support, but when one considers the normative foundations of property law, the insights of Dilthey regarding the community, and the economic arguments of Professors Frischmann and Lemley, limits on this understanding arise. Specifically, despite strong arguments for the right of

publicity to attach to the property aspects of artifacts, this paper argues that upon death there is no basis for the right to persist. Furthermore the public's claim on creation mandates a return of the creation to the society from which it sprang.

In short, although one may find strong support from several theoretical views for the position that in life one has strong economic and non-economic claims for control over one's intangible creations, those theories also demonstrate that after one's dies those receiving such creations have less claim to such strong control. Indeed it appears that insofar as society provides the building blocks from which these creations arise and which fuels creation, the creations must at some point become part of the commons to enable others to generate new creations.

## *II. On the Importance and Orderly Disposition of Digital Artifacts*

This section begins by presenting what digital artifacts are at stake when considering their preservation and disposition. Part of that explanation shows that digital artifacts (and indeed artifacts in general) are important to three groups: the creator of the artifact, the potential inheritor of the artifact, and historians. In short, all three groups have claims to the importance and value of digital artifacts yet for different reasons. Thus, it appears that when one looks at each group's specific interest and the arguments that support their position separately, the position is coherent. But because each group makes a different claim regarding digital artifacts, the positions clash and reveal incoherence. To understand this phenomenon this section turns first to each group's position and the theories supporting it. Once each position is understood two points

become clear. First, all three groups agree that a system for managing digital artifacts is necessary. Second, once that system is in place, all three positions clash regarding the control, access, and use of artifacts such that further theoretical analysis is required to unravel the tensions among the groups. Addressing the second point is the task of the second part of this paper. The rest of this section addresses the first point.

#### A. Not So Virtual Property

Recent scholarship has examined digital property and found various phenomenon qualify as digital or virtual property.<sup>33</sup> Assuming for now that certain types of property may constitute part of one's persona or at least implicate it, one must understand what types of digital property should qualify as part of one's persona if at all. This Article focuses on those types of virtual property that behave like intellectual property as opposed to real property. In other words one can distinguish between virtual property that functions as real property and virtual property that functions as intellectual property.<sup>34</sup>

As one author has explained virtual property such as a uniform resource locator (URL),<sup>35</sup> an email account,<sup>36</sup> a Web site,<sup>37</sup> and even a chat room,<sup>38</sup> can all constitute virtual property because they share "three legally relevant characteristics with real world

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<sup>33</sup> See e.g., Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, (2003), Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005), Gregory Lastowka and Dan Hunter, *The Laws of the Virtual Worlds*, CAL. L. REV. 1, 4 (2004), Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1733 (2005).

<sup>34</sup> Cf. Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003) (examining the bundle of rights approach to property and finding that "an integrated theory of property" offers a more coherent way to understand both real and intellectual property) [hereinafter Mossoff, *What Is Property?*].

<sup>35</sup> See Fairfield, *supra* note 33, at 1055.

<sup>36</sup> *Id.* at 1055-1056.

<sup>37</sup> *Id.* at 1056.

<sup>38</sup> *Id.* at 1056-1057.

property: rivalrousness, persistence, and interconnectivity.” In other words only one person “owns and controls” the property (rivalrous), like a pen the property exists unless destroyed (persistence), and the property can be experienced by more than two people at the same time (interconnected).<sup>39</sup> Another has focused on domain names as an example of a “new artifact” that might constitute property but may be better considered as part of a global commons resource.<sup>40</sup> Yet other scholars have looked to virtual worlds such as Blazing Falls, a city within the Sims Online game,<sup>41</sup> and found “Participants in virtual worlds clearly see their creations [within the virtual world] as property”<sup>42</sup> and indeed these worlds have deployed “real property systems [] that mostly conform to the norms of modern private property systems with the alienation of property, transfers based on the local currency and so forth.”<sup>43</sup> Thus everything from one’s avatar, the image that represents one presence in a virtual world, to a virtual pizza parlor to a helmet to a dog to a castle and beyond may be created, bought, and sold as virtual property within a virtual world.<sup>44</sup> Still another scholar has argued that online identity itself is unique but can be best understood as a reputation interest that tracks a branch of intellectual property, namely trademark.<sup>45</sup> Although all of these aspects of virtual property are interesting and merit study, they do not address a more simple part of digital property: the writings, images, recordings, and videos that constitute most of the content on the Internet.

As such for the purposes of this Article, the virtual property at issue is that which is created by the user and falls squarely within what also is considered intellectual

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<sup>39</sup> *Id.* at 1053-1054.

<sup>40</sup> See Chander, *supra* note 33, at 756.

<sup>41</sup> See Lastowka and Hunter, *supra* note 33, at 4.

<sup>42</sup> *Id.* at 37.

<sup>43</sup> *Id.* at 32

<sup>44</sup> See generally *id.* at 30-40 (tracing the history of virtual property and its behavior).

<sup>45</sup> See generally Noveck, *supra* note 33.

property which “protects the creative interest in non-rivalrous resources.”<sup>46</sup> Specifically emails, blogs, and other writings; pictures, videos, and other graphical material; and any other creation that is copyrightable are the virtual property on which this Article focuses. In other words this property is nonrivalrous: that is like an idea it need only be created once and has an infinite capacity in that once it is created there is no additional marginal cost in allowing others to use it.<sup>47</sup> Furthermore because this property is nonrivalrous and governed by intellectual property law, the Article investigates the theoretical justifications for the intellectual property rights at issue with digital property to discern the contours of that interest.

## B. The Importance of Artifacts

Artifacts can have great value from several perspectives. As physical things they have value as items to be sold. As expressions of someone’s thoughts, artifacts have value as extensions of one’s persona. As chronicles of someone’s views, artifacts have value as the tools which historians and sociologists use to understand society. Thus to understand the value of artifacts one must first be clear as to who lays claim to an artifact, the value to the person making the claim, and on what basis that claim is made.

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<sup>46</sup> Cf. Fairfield, *supra* note 33, at 1049 (addressing types of virtual property that is rivalrous, persistent and interconnected and thus functions closer to real property); but see Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 39-40 (2005) [hereinafter Mossoff, *Is Copyright Property?*] (noting the economic concept that intellectual is a public good and nonrivalrous and arguing that physical property understandings do apply to intangible property but the same degree to which they apply varies based on the nature of the property in question).

<sup>47</sup> See e.g., Frischmann, *An Economic Theory of Infrastructure*, *supra* note 20, at 946 (“An idea only needs to be created once to satisfy consumer demand while an apple must be produced for each consumer. Essentially, this means that the marginal costs of allowing an additional person to use an idea are zero. Most economists accept that it is efficient to maximize access to, and consequently consumption of, an existing nonrival good because generally there is only an upside; additional private benefits come at no additional cost. Ideas, like other nonrival goods, have infinite capacity.”).

## 1. Creators' Interests

To reiterate, this Article focuses on the digital intellectual property that constitutes a large part of the content on the Internet (i.e., writings, images, and video content). The interests and motivations at work from the creators' view range from traditional law and economic understandings to issues of the economics of attention to persona interests. This section sets forth these varying interests and shows how all perspectives explain the creator's claim to her work and the need to preserve access to and dominion over her work.

### a. Monetary Economic Incentives

Traditional law and economics doctrine offers that creators own the creation as property and the intellectual property protection afforded to such creations provides incentives to create.<sup>48</sup> And although one may doubt whether the proliferation of online creations are of the same nature as the entertainment industry's products (i.e., films,

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<sup>48</sup> Under copyright law authors own their creations and have the right to control them. The font of this right is Article I, section 8 of The Constitution which states that "Congress shall have the Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Supreme Court has explained the Copyright Clause as a "limited grant ... by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *See also* *Fairfield*, *supra* note 33, at 1049; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031, 1031 (2005); *but see* *LANDES & POSNER*, *supra* note 17 at 11, 213-214 (expressly stating that incentive interests must be balanced against administrative and access costs).

television programs, and music), the industry has taken notice of the creations and offered monetary compensation for some online creations.<sup>49</sup>

In some cases the business model has changed from a free-for-all where users simply want to be seen online and share their work to one where certain Web sites pay creators of so-called user-generated content for the right to display the work.<sup>50</sup> Certain Web sites pay users on an almost pure incentive model in that users are paid per view of their work, others pay the creator when a user clicks on an advertisement, and still others pay up front fees for videos.<sup>51</sup> In addition one of the creators of You-Tube is “exploring similar ways to “reward creativity””<sup>52</sup> and one major Hollywood talent agency “has created an online unit devoted to scouting out up-and-coming creators of Internet content —particularly video—and finding work for them in Web-based advertising and entertainment, as well as in the older media.”<sup>53</sup>

Thus even if one were to argue that the law economics model does not apply to user-generated content because the monetary incentive model does not apply for much of the content currently online, shifts in online business models indicate that although the monetary economic incentive model may not have been in obvious force at the beginning of YouTube and MySpace’s existence, monetary economic interests and incentives are coming in to force now. As such creator’s have genuine economic interests in their online digital property and denying them access to their work denies them access to something

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<sup>49</sup> See Martin LaMonica, *Experts: No Stopping the Flood of Web Video*, CNET NEWS.COM, February 7, 2007, [http://news.com.com/Experts+No+stopping+flood+of+Web+video/2100-1025\\_3-6157283.html](http://news.com.com/Experts+No+stopping+flood+of+Web+video/2100-1025_3-6157283.html); Kirsner, *supra* note 12.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.* (noting the growth of payment for inclusion of user generated content on social network Web sites and the payments from \$13,000 to one performer, \$35,000 to another and the growth in bookings and notice from agents for these previously unknown performers).

<sup>52</sup> *See id.*

<sup>53</sup> See Halbfinger, *supra* note 13.

of potential value. Furthermore, even if one holds that these monetary returns are small and will in the end be anomalies, recent examinations of the implications of digital creation offer compelling arguments for the creator's interest in and the value of these artifacts.

#### b. Attention Economics

In 1991 some folks in Cambridge University's computer department set up the world's first webcam.<sup>54</sup> The camera allowed people within the department to see whether a coffee pot was full rather than having to go up and down flights of stairs only to find no coffee in the pot.<sup>55</sup> Yet as the number of people with access to the Internet grew and the desire to see new things on the Internet grew, the site had millions of visitors curious to see the coffee pot.<sup>56</sup> The Internet has of course come a long way in just 16 years. Whereas it took graduate-level Cambridge computer scientists rigging a video camera, writing a server program, and a client program to allow one to "display[] an icon-sized image of the pot in the corner of the screen [that] was only updated about three times a minute,"<sup>57</sup> today a user can go to a range of Web sites and create rather elaborate blogs, personal Web sites, and ecommerce stores without much if any computer science

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<sup>54</sup> See *Web Coffee Pot Goes off the Boil*, CNN.COM, March 7, 2001 available at <http://archives.cnn.com/2001/TECH/internet/03/07/coffee.pot/>.

<sup>55</sup> *Id.*

<sup>56</sup> See Leila Jacinto, *Plug Pulled on Web's Historic Coffee Pot*, March 7, 2001, ABCNEWS INTERNATIONAL, <http://abcnews.go.com/International/story?id=81417&page=1> (noting the activity was tantamount to watching "grass grow" and that its popularity may have been due in part to less "rac[y]" material such as dormitory Wecasts).

<sup>57</sup> See Quentin Stafford-Fraser, *The Trojan Room Coffee Pot, A (non-technical) Biography*, <http://www.cl.cam.ac.uk/coffee/qsf/coffee.html> (detailing the origins of the coffee pot as presented by one of those involved with its creation).

knowledge at all.<sup>58</sup> Yet what motivates these acts? In many cases the monetary incentive cannot be easily found if at all. Nonetheless one may perceive that with banner and other advertising revenue, economic value is generated because the content draws users to the sites. The content is key here; but there may be something different in the digital realm.

As rhetorician and theorist Richard Lanham has asked “What’s new about the digital expressive space and what’s not?”<sup>59</sup> That question led him to “a larger one: What’s new in the ‘new economy’ and what’s not?”<sup>60</sup> For Lanham the attention economy is the new and leads to intellectual property because the key assets in the attention economy are part of the cultural conversation and intellectual property is the way our society manages such assets.<sup>61</sup>

To understand this point, one must see the steps by which Lanham arrives at this conclusion. First, Lanham offers that we now must:

[W]onder whether “information economy” is the right name for where we find ourselves. Economics, in the classic definition, is the “study of how human beings allocate scarce resources to produce various commodities and how those commodities are distributed for consumption among the people in society.” In an information economy, what’s the scarce resource? Information obviously.<sup>62</sup>

Yet as he and others have pointed out, the proliferation of information is the world we face with one study finding that each year’s information output “would require roughly

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<sup>58</sup> See e.g., Stefanie Olsen, *A Social Site Where Webcams Rule*, CNET NEWS.COM, February 23, 2007, [http://news.com.com/A+social+site+where+Webcams+rule/2100-1026\\_3-6161505.html](http://news.com.com/A+social+site+where+Webcams+rule/2100-1026_3-6161505.html) (noting growth of new social network site with 400,000 registered users that offers consistent webcam and instant chat services via “Stickam, a so-called ‘widget’ that people can plug into other social networks to enable live video.”).

<sup>59</sup> RICHARD LANHAM, THE ECONOMICS OF ATTENTION 1 (2006).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 259. Although Lanham develops the idea of the Attention economy, the question of the ownership of information has received analysis by others. See e.g., Wendy Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 150-157 (1992) (noting the shift from narrow intellectual property rights to broader rights in intangibles and connecting the shift to the change from a manufacturing based economy to service based economy in which intangibles play a larger role in wealth).

<sup>62</sup> LANHAM at 6.

1.5 billion gigabytes of storage” or “the equivalent of 250 megabytes per person” in the world.<sup>63</sup> For Lanham, the question thus becomes “What then is the new scarcity that economics seeks to describe?” and the answer is “It can only be the human attention needed to make sense of information.”<sup>64</sup>

Lanham asks next “What, in an attention economy constitutes capital?”<sup>65</sup> He offers that this capital may be “the literary and artistic imagination, … [the capacity to] spin new patterns for how we live and to think about how we live. Capital in this view lies in the cultural conversation.”<sup>66</sup> And here one can see the connection to the Internet and the expansion of creations on it. Indeed, Lanham comes to a point familiar to intellectual property theorists: the information economy is concerned with “a public good that is effortlessly duplicated and distributed,” in other words the information economy concerns nonrivalrous goods which necessarily leads to intellectual property not real property.<sup>67</sup> As Margaret Radin has put it “Cultural norms can substitute for legal property rights as incentives for production.”<sup>68</sup> Thus the cultural assets or norms that make up the attention economy become part of the property system. Given that these items are intangible, they are part of the intellectual property system.

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<sup>63</sup> *Id.* at 7; *cf.* Pasquale, *supra* note 1, at 140 (arguing that “Copyright law should adjust the rights of content creators in order to compensate for the ways they reduce the usefulness of the information environment as a whole. Every new work created contributes to the store of expression, but also makes it more difficult to find whatever work one wants.”).

<sup>64</sup> LANHAM at 7.

<sup>65</sup> *Id.* at 8.

<sup>66</sup> *Id.*

<sup>67</sup> See LANHAM at 12, 259 (noting the difference between use of a car as opposed to an idea or its expression).

<sup>68</sup> See Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 517 (1996); *see also id.* (noting the possibility of “monetary metering of our attention.”).

In addition, Lanham offers that attention economists are those who guide attention from visual artists who challenge how we see,<sup>69</sup> to Web interface designers who help drive the Internet and the capture of “eyeballs,”<sup>70</sup> to car designers who focus on designing and branding the car but allow others to make it, to universities which “exist to ‘uncover, capture, produce, and preserve’ information” and use curricula and courses of study to focus the attention of students.<sup>71</sup> Put more generally attention economists are those who help filter and categorize information.<sup>72</sup>

These ideas may seem foreign to intellectual property but they should not.<sup>73</sup> Another way to understand attention economists is to consider them as those who reduce search costs.<sup>74</sup> And here another distinct connection to intellectual property can be seen. Although for Lanham literary and artistic capital constitutes much of the material which makes up the attention economy, his explanation of who attention economists are leads to trademark and brand theory as well. As explained elsewhere:

A company’s marketing goal is to build brand dominance to the point of ubiquity, so that the brand is the first thing on a consumer’s mind when considering a purchase of a particular type of good. Further, the brand identifies the company and/or its products for the consumer, and ideally conveys (hopefully positive) information as well. Put differently, the trademark holder’s goal is to build and maintain consumer awareness of the trademark so that consumers come to see the trademark as a sign of “consistent source and quality.” Indeed, one of the touchstones of trademark law is the idea that “[t]he value of a trademark is the

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<sup>69</sup> See LANHAM at 15.

<sup>70</sup> *Id.* at 17.

<sup>71</sup> *See id.* at 13-14.

<sup>72</sup> *See id.* at 13-14.

<sup>73</sup> See e.g., Pasquale, *supra* note 1, at 140 (explaining the connection between copyright law and “search cost” theory of information economics).

<sup>74</sup> As Carl Shapiro and Hal R. Varian have noted the idea of information overload traces some of its history to Nobel Prize Laureate, Herbert A. Simon who stated that “a wealth of information creates a poverty of attention.” CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 6 (1999). The need to sort such information is a search cost.

saving in search costs made possible by the information or reputation that the trademark conveys or embodies about the brand. . . .”<sup>75</sup>

Thus one could sum up this part of brand and trademark theory as one builds a brand so that consumers search less and information is better communicated; in Lanham’s words, brand builders capture attention.<sup>76</sup>

As such, one can see two ways that the attention economy explains the creator’s interest in her works. First, the substance of the work itself is vital to the attention economy. For in the attention economy capital consists of “the literary and artistic imagination, . . . [the capacity to] spin new patterns for how we live and to think about how we live. Capital in this view lies in the “cultural conversation.”<sup>77</sup> This capital in the cultural conversation can be understood more concretely as that which falls under copyright—writings, videos, etc. In addition, attention economists have capital as those who build a brand, reduce search costs, and capture one’s attention by those efforts.<sup>78</sup>

Here then is the subtle problem within this issue. Just as one focuses on the copyright side of the issue for the material itself, one can also express a trademark and personal brand interest in one’s creations.<sup>79</sup> For once one builds a name based on one’s creations one also has a personal connection to that material and brand value beyond the

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<sup>75</sup> See Deven R. Desai and Sandra L. Rierson, *The Genericism Conundrum*, 28 Card. L. Rev. 1789 (2007) (citation omitted).

<sup>76</sup> LANHAM, *supra* note 59, at 18 (“Firms are beginning to outsource the actual manufacture of their products as tangential to their real essence, which brand development and recognition”); *see also* Laura Heyman, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1377 (2005) (arguing that the copyright creation of material aspect of authorship should be considered separate from the authonym or trademark function of assigning a name of an author to a work and asserting that such a choice of name, either the author’s true or pseudonymous, “are essentially branding choices . . . and therefore the ‘author function’ is really a ‘trademark function.’”)

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

<sup>78</sup> For an explanation of the relationship between visual artists and brand building for both commercial products and the artists’ individual brand, *see* Jonathan E. Schroeder, *The Artist and the Brand*, 39 EUROPEAN JOURNAL OF MARKETING, 1291, available at SSRN: <http://ssrn.com/abstract=690270>.

<sup>79</sup> *Accord* Heyman, *supra* note 76, at 1379.

creation itself.<sup>80</sup> This rationale leads to the creator's possible persona interest in her creation.

### c. The Persona Interest

Although artifacts are physical and in that sense items separate from their creator, they may also be seen as aspects of the creator's persona. As stated above the economic property interest is somewhat clear in that the creator of an artifact has a recognized property right under the Copyright Act and the law and economics view of creation. In addition to those rationales, personal artifacts, both digital and analog, arguably have another quality—persona.<sup>81</sup> As author Zadie Smith has written, “A writer's personality is his manner of being in the world: his writing style is the unavoidable trace of that manner. ... [S]tyle [is] a personal necessity, [] the only possible expression of a particular human consciousness.”<sup>82</sup>

This perspective manifests in intellectual property law under the idea of moral rights.<sup>83</sup> Professor Roberta Kwall in examining the European understanding of moral rights has noted the doctrine traces its roots to Immanuel Kant and Georg Hegel and explained that “According to Kant, authors’ literary works represent a complete

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<sup>80</sup> See *id.* at 4 (“Successful artists can be thought of as brand managers, actively engaged in developing, nurturing, and promoting themselves as recognizable “products” in the competitive cultural sphere.”).

<sup>81</sup> See Hughes, *supra* note 19, at 289-90.

<sup>82</sup> Zadie Smith, *Fail Better*, THE GUARDIAN, January 13, 2007.

<sup>83</sup> See e.g., Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1976-1984 (2006) (comparing moral rights doctrine in Europe to moral rights doctrine in the United States). In contrast Professor Peter Drahos notes that although Hegel did state “property is the *embodiment* of personality,” the reliance on this idea by those wishing to assert that artistic creations are extensions of personality misunderstand Hegel insofar as they assert “a special rights for artists and other creators” and that Hegel’s concept properly understood “offers the possibility of a potent critique of authors’ rights systems.” See PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 79-80 (1996) (citations omitted).

embodiment of the internal self.”<sup>84</sup> And, although United States law is ostensibly somewhat hostile to moral rights doctrine,<sup>85</sup> as this paper argues the rhetoric of one’s creation being an extension of one’s persona can be found throughout U.S. law. For example in 1841 Justice Story wrote regarding President Washington’s letters, “That the original work is of very great, and, I may almost say, of inestimable value, as the repository of the thoughts and opinions of that great man, no one pretends to doubt”<sup>86</sup> and “they consist of the thoughts and language of the writer reduced to written characters, and show his style and his mode of constructing sentences, and his habits of composition.”<sup>87</sup>

As discussed below, whether the theoretical justifications for this perspective support its position is to be seen. Here though, the issue is that the perspective exists and animates the way a creator and others view her work. Indeed, at this point one can at least appreciate that the assertion and idea that certain creations—be they writings, artwork, videos, and so on—have some deep connection to the creator and manifest an aspect of the creator is real and perhaps compelling.

Another way to grasp the persona perspective can be seen in the attachment the public places on items that have a connection to the person in question. For example, many items such as letters, a shirt, even sandals can have great economic value *as items*. That is, there may be value as intellectual property in a letter, but when the letter is treated as an artifact, its value is not the expression alone but the fact of the authorship

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<sup>84</sup> *Id.* at 1977.

<sup>85</sup> See e.g., Natalie C. Suhl, Note: *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203 (2002) (noting the conflict in U.S. utilitarian-based approach to intellectual property and moral rights and questioning whether U.S. law actually conforms to moral rights provisions required under article 6 bis of the Berne Convention for the Protection of Literary and Artistic Works).

<sup>86</sup> 9 F. Cas. 342, 345 (No. 4,901) (C.C.D. Mass. 1841).

<sup>87</sup> 9 F. Cas. 342, 346 (No. 4,901) (C.C.D. Mass. 1841).

itself.<sup>88</sup> For example, in the past year a letter from Beatrix Potter sold for 8,200 pounds,<sup>89</sup> everything from Joe DiMaggio's shower sandals to a letter from Marilyn Monroe to Joltin' Joe were auctioned with an expected return of \$4 million (the Monroe letter's minimum bid was for \$20,000),<sup>90</sup> and an early notebook of John Lennon's "thoughts, drawings, and poems" sold for \$304,340.<sup>91</sup> In one instance, the King family intended to use Sotheby's to auction Dr. Martin Luther King's papers until the city of Atlanta raised and paid the King family \$32 million to prevent the sale and secure the rights to the papers for Morehouse College, Dr. King's alma mater.<sup>92</sup>

Returning to the digital world, one can see that the emails, blog entries, web pages, are the modern analog to the letters, lovers' notes, and scrap books of the past.<sup>93</sup> As such these artifacts have the potential to be worth thousands if not millions of dollars. An email from Bill Clinton to Monica Lewinsky or from George W. Bush to Karl Rove may have no substance to it, but as an artifact with a connection to a major figure, it will have some extra economic value.<sup>94</sup> And yet what about these remnants makes them

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<sup>88</sup> See e.g., Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171 (2005) (arguing that authorship marks have value and function similar to trademarks such that consumers should be protected from misattribution of authorship).

<sup>89</sup> Pounds 8,200 for Beatrix Potter letter Mail on Sunday 12, March 19, 2006, 2006 WLNR 4563815

<sup>90</sup> John McGrath, *Where have DiMaggio's shower sandals gone?* Globe and Mail R9 April 13, 2006, 2006 WLNR 6211931

<sup>91</sup> *Lennon's Noteworthy Book Sale* Australian, World 1 April 21, 2006 2006 WLNR 6611588

<sup>92</sup> Shalia Dewan, *The Deal That Let Atlanta Retain Dr. King's Papers*, THE NEW YORK TIMES, A11, June 27, 2006.

<sup>93</sup> See e.g., Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 813-815 (2005) (noting the similarity between email and personal documents (e.g., letters or diaries) and the way in which the ability or lack of ability to destroy either affects the incentive or disincentive to create them); on the general growth of sports memorabilia industry and the importance of unique items connected to individual players see Michael Pastrick, Note: *When a Day at the Ballpark Turns a "Can of Corn" into a Can of Worms: Popov v. Hayahsi*, 51 BUFF. L. REV. 905, 912-914 (2003) (noting the value of "one of a kind items similar to the record setting home run ball").

<sup>94</sup> See e.g., Steven Semeraro, *An Essay on Property Rights in Milestone Home Run Baseballs*, 56 SMU L. REV. 2281, 2882 n.4, (2003) (noting Mark McGwire's 70th home run ball sold for more than \$3 million); Melanie Skehar, Comment: *Who Really Owns the Zapruder Film After the JFK Act: The Sixteen Million Dollar Question*, 34 SW. U. L. REV. 325, 340 (noting valuations of President John F. Kennedy assassin Lee Harvey Oswald's memorabilia artifacts—"a wallet, letters, a diary, photographs, and a marriage license"—

valuable? Although the papers and letters of Dr. King may reveal some insight as to his views, the notes from lovers or random thoughts of songwriters have value in a way similar to that of shower sandals. It is not that they are valuable as items of utility. Rather they are memorabilia.<sup>95</sup> They are seen as extensions of the person to whom they were connected.<sup>96</sup> Thus even the public maintains the perspective that a creator's property is the manifestation of a part of the creator's persona.

## 2. The Heirs' Interest

Heirs' interest in the artifacts track the creator's interests but with slightly different explanations and perspectives behind those interests. Beginning with monetary economic incentives, one can see that insofar as the artifacts in question are capable of generating income, as with any piece of intellectual property the heir will have an interest in inheriting that property to continue to derive that revenue. Likewise, if the artifacts are part of capturing attention, the heirs will want to have the artifacts for that purpose. Both of these interests have an economic component. The non-economic, persona component is present for heirs as well.

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ranging from \$70,000 to \$90,000); *cf.* Serena Morones, *Exclusive Autograph Deals: What Value to the Athlete and Their Fans?*, 22 ENT. & SPORTS LAW 10 (2004) (noting \$1 billion a year sports memorabilia industry and examining autograph and sports memorabilia market and finding that an unworn jersey signed by a player may lose half its value at time of resale).

<sup>95</sup> See e.g. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 817, n. 144 (2005) (noting the value of Babe Ruth's jersey as memorabilia); *see also* Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 915-916 (2003) (noting and quoting the California Supreme Court's argument in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) that parody works "do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect.")

<sup>96</sup> See e.g., Randall T.E. Coyne, *Toward a Modified Fair Use Defense In Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 801 (1988) ("The success of the product is determined not by the strength or content of its message, but rather by the popularity of the person portrayed."), Steven Semeraro, *An Essay on Property Rights in Milestone Home Run Baseballs*, 56 SMU L. REV. 2281, 2295 (2003) (arguing "By hitting the baseball, the batter creates a connection between the baseball and his reputation; without the connection the ball would not be nearly so valuable.")

Consider for example the recent problem a family had when they tried to access their dead son's Yahoo! email account. The son, a marine killed in Iraq, had used Yahoo! for his email while stationed abroad. When he died, the Marine Corps sent home all his possessions including letters about to be sent and received mail.<sup>97</sup> The father thus was given his son's property, the physical items. When, however, the father wanted access to his dead son's email, Yahoo!, in accordance with its privacy policy, refused to grant the father access to the artifacts until a court ordered Yahoo! to do so.<sup>98</sup> The reason the father wanted the emails was not the economic value of the artifacts. Rather he wanted to see his son's emails "as one reminder of his son's life."<sup>99</sup> For the father the artifacts value lay in the way they were an extension or expression of his son's persona.

### 3. History and Society's Interests: Artifacts as Historical Record

Historians require access to primary sources to gain insight into how society has evolved.<sup>100</sup> Furthermore as historians continue to present more developed pictures of how a society functioned, primary sources offer information that histories written at or just after a period in question may lack.<sup>101</sup> Whereas historians studying ancient Egypt or even the more recent Colonial Era are fortunate to have one or two scrolls or journals as

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<sup>97</sup> See Hu, *supra* note 7.

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

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

<sup>100</sup> See e.g., Alfred L. Brophy, "*The Law of the Descent of the Mind*": Law, History, and Civilization in Antebellum Literary Address, U of Alabama Public Law Research Paper No. 07-17 (August 2005) available at <http://ssrn.com/abstract=777724> (examining orations delivered at the University of Alabama to trace the evolution of political theory and jurisprudence in the antebellum South).

<sup>101</sup> For one example of such pioneering work see MARY BETH NORTON'S LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1996).

sources, today and in the near future historians may face an inverse problem of too many sources. With the number of emails, blogs, social networking, and personal Web pages available on the Internet, society has likely hit a high point in the sheer volume of individuals chronicling almost any aspect of life one can imagine.<sup>102</sup> In simplest terms society is engaging the perhaps the largest creation of autobiographical material ever.

The importance of these chronicles can be underestimated. After all, why would historians or society in general care about the ramblings of random bloggers or the video chronicles of teenagers and college students? Even the thoughts of professors, CEOs, doctors, lawyers, or any other member of society may not rise to the level of material worth studying.<sup>103</sup> Still, one commentator has argued that such autobiographical speech merits increased constitutional protection.<sup>104</sup> And another has argued that the development of modern biography necessitates that the law of biography must account for the biographer's need to access personal materials in writing biographies.<sup>105</sup> As such it appears that two interests—autobiographical and biographical—may be served in protecting and preserving digital artifacts.

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<sup>102</sup> See e.g., Associated Press (Boston), *Tech Researchers Calculate Digital Info*, March 6, 2007 (noting studies indicating “for the first time, there's not enough storage space to hold” all the information humans generate).

<sup>103</sup> Cf. LANDES & POSNER, *supra* note 17 at 131 (acknowledging social historians' study of non-famous people and using their works as part of that study).

<sup>104</sup> See Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, University of Georgia Legal Studies Research Paper No. 06-009 Available at SSRN: <http://ssrn.com/abstract=921637>

<sup>105</sup> See generally, Mary Sarah Bilder, *The Shrinking Back: The Law of Biography* 43 STAN. L. REV. 299, 325 (1991). Although the law at the time Professor Bilder wrote her article failed to apply fair use for unpublished works and the Copyright Act was amended more recently to include unpublished works under fair use, as explored below it is the position of this Article that the growth of the persona and publicity views of artifacts threatens historical access and use of these artifacts.

One theorist, Wilhem Dilthey, provides a cogent explanation as to why we should care about both of these interests.<sup>106</sup> Lived experience is of central importance to Dilthey's conception of history:

The course of a life consists of parts, of lived experiences that are inwardly connected with each other. Each lived experience relates to a self of which it is a part; it is structurally linked with other parts to form a nexus.<sup>107</sup>

Professors Rudolf Makreel and Frithjof Rodi explain that for Dilthey "Human individuals are productive systems in that their lived experience apprehends what is of interest in the present relative to the past evaluations and future goals."<sup>108</sup> This focus on life systems points to Dilthey's hermeneutics.<sup>109</sup> Dilthey's theory posits that it is life that must be understood. Specifically, one must see that each part of life relates to the whole and that the whole in turn "determines the significance of each part."<sup>110</sup>

From this point we can see why Dilthey asserts, "In autobiography we encounter the highest and most instructive form of the understanding of life. Here a life-course stands as an external phenomenon from which understanding seeks to discover what produced it within a particular environment. The person who created it is the same as the one who created it."<sup>111</sup> In other words, if we accept that life has discrete parts where each part stands on its own but is also part of a larger whole, we see that an individual life is a discrete, productive part that has connection to the whole. The question becomes how to understand that discrete part. The autobiographer has a special place in this process

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<sup>106</sup> See WILHELM DILTHEY, SELECTED WORKS VOLUME III THE FORMATION OF THE HISTORICAL WORLD IN THE HUMAN SCIENCES (Rudolf A. Makreel and Frithjof Rodi trans.) (2002) [hereinafter DILTHEY].

Although a full investigation of the importance of Dilthey to history and hermeneutics is well-beyond the scope of this article, his articulation of the relationship between autobiography, biography, and history can still inform why we must preserve digital artifacts.

<sup>107</sup> *Id.* at 217.

<sup>108</sup> See *id.* at 4.

<sup>109</sup> See CHARLES BAMBACH, HEIDEGGER, DILTHEY, AND THE CRISIS OF HISTORICISM, 164 n. 122 (1995).

<sup>110</sup> *Id.* at 164.

<sup>111</sup> See DILTHEY at 267.

because she is simultaneously the nexus and the reflection on the meaning of the nexus.<sup>112</sup>

For Dilthey autobiography chooses the significant events of life experience and “expresses what an individual knows about its own connectedness.”<sup>113</sup> In short “Autobiography is merely the literary expression of the self-reflection of human beings on their life course.”<sup>114</sup> As Professor Makkreel explains, “No matter how much the individual needs to be understood in terms of his communal and historical context, his own Erlebnisse and deeds possess an inner coherence. These relations cannot, however, be articulated into a definite meaning framework as long as his life history is incomplete.”<sup>115</sup> In short autobiography is limited by the fact that the story is not complete until the life is over.<sup>116</sup> This point leads to the importance of biography.<sup>117</sup>

In Dilthey’s theory autobiography is “an individual’s reflection on his life-course” and “When this reflection is carried beyond one’s own life-course to understanding another’s life, biography originates as the literary form of understanding other lives.”<sup>118</sup> To undertake biography requires that one “understand[] manifestations that indicate plans or an awareness of meaning.”<sup>119</sup> What then are these manifestations? Dilthey offers letters because they “can show what this individual finds to be of value in his situation; or

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<sup>112</sup> DILTHEY 221-222; *accord* H.A. HODGES, THE PHILOSOPHY OF WILHEM DILTHEY, 274 (1952) (“For the autobiographer has himself already lived the life which he now portrays, and in living it has reflected upon its meaning”) [hereinafter HODGES].

<sup>113</sup> DILTHEY at 222.

<sup>114</sup> *Id.*; *accord id.* at 267 (“The literary expression of an individual’s reflection on his life-course is autobiography.”)

<sup>115</sup> *See id.* at 379.

<sup>116</sup> H.P. RICKMAN, DILTHEY TODAY: A CRITICAL APPRAISAL OF THE CONTEMPORARY RELEVENCE OF HIS WORK 29 (1988) [hereinafter RICKMAN].

<sup>117</sup> *See* DILTHEY at 268; RUDOLF A. MAKKREEL, DILTHEY: PHILOSOPHER OF THE HUMAN STUDIES 379 (1993); *accord* HODGES at 281-282.

<sup>118</sup> DILTHEY at 266.

<sup>119</sup> DILTHEY, 268.

they can indicate what he finds meaningful in particular parts of his past.”<sup>120</sup> By examining texts from the person we can discern the forces at work on a person and thus see where the person fits in the productive nexus. Indeed, “These documents show the individual to be a point of intersection that both experiences force and exerts it.”<sup>121</sup> Although for Dilthey the most important biographies are of “the historical individual who has produced lasting effects,”<sup>122</sup> Dilthey does not dismiss the value of other biographies. As he puts it:

Every life can be described, the insignificant, as well as the powerful, the everyday as well as the out of the ordinary. Interest in doing so can stem from a variety of perspectives. A family retains its memories. Theorists of criminal law want to record the life of a thief, psychopathologists the life of an abnormal person. Everything human becomes a document for us that actualizes the infinite possibilities of our existence.<sup>123</sup>

And here we return to emails, blogs, and digital artifacts in general. It is not that these artifacts are necessarily self-reflective. But insofar as they have the potential to reveal the autobiographical moments of the individual, they have great importance and must be preserved so that biographers and in Dilthey’s sense historians may have access to these artifacts as evidence the relationship between the whole and the parts—the relationship between the forces acting upon a person and the person’s effect on the forces of which the person is a part.

As Professor Rickman puts it biographers try to offer “a meaningful story about a person’s life” and “Where, as in most cases, no autobiography exists, he looks for autobiographical remarks in letters, diaries, or conversations recorded by contemporaries, which indicated what worried a person, what his viewpoint was, and what he was seeking

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<sup>120</sup> DILTHEY 268.

<sup>121</sup> DILTHEY, 268.

<sup>122</sup> DILTHEY, 266; *accord* HODGES at 283; RICKMAN, at 31.

<sup>123</sup> DILTHEY at 266.

to achieve.”<sup>124</sup> Thus failing to preserve these artifacts may lose information important to society and historians. In addition, failing to provide society and historians with access to that information cuts them off from the very building blocks required to understand arguably everything from family histories to the flow of history itself.

#### 4. Summary of Interests

As such one can see that online artifacts have importance from three perspectives. The artifacts may hold a pecuniary value to the creator and her heirs from an economic, property interest and they may hold a persona interest. In addition, society and historians have an interest in these artifacts as core material to understand an era. Thus, although as Part II of this Article explores, historians’ access to these materials may be limited by heirs’ claims to ownership and control over the artifacts, before one can argue about the nature of such dominion as it affects historians and society in general, the artifacts must be preserved.

#### C. The Orderly Disposition of Digital Artifacts

Recall that the artifacts in question are mediated by second parties. That is online service providers of email, Web site hosting companies, blog hosts, social networking sites, and the like exercise control over the artifacts because these service companies provide the hardware and software to allow the individual to create, use, distribute, store, and destroy her creations. The apparent solution to this problem is to afford the creator

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<sup>124</sup> RICKMAN at 29.

better control over the creation in question. Yet, the method for this better control must be set forth. For although one might accept that the artifacts are property, the way in which the property is managed is not so simple.

When the problem of Yahoo! and the dead soldier's email arose, commentators noted that Yahoo! only adhered to its terms of service which explicitly stated at the time,<sup>125</sup> and currently still do state, that the email account is non-transferable and there is no survivorship:

*No Right of Survivorship and Non-Transferability.* You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.<sup>126</sup>

Thus when one has a Yahoo! account one agrees to its terms which state that under certain circumstances one's creations and property will be destroyed. In addition, as one commentator has noted Yahoo!'s not complying with its privacy policy might have resulted in Yahoo! facing a Federal Trade Commission or state's Attorney General action against it.<sup>127</sup> Yahoo!'s policy taken at face value puts great emphasis on the individual's privacy although as one commentator has noted and is discussed more fully below, privacy interests usually extinguish at death.<sup>128</sup>

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<sup>125</sup> See Email from Peter Swire to Declan McCullagh, *Fallen Soldier, Yahoo!'s Privacy Policy, and What To Do*, December 22, 2004, available at <http://seclists.org/politech/2004/Dec/0011.html> last visited March 3, 2007.

<sup>126</sup> Yahoo! Terms of Service, Section 27, General Information, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> last visited March 3, 2007.

<sup>127</sup> See Email from Peter Swire to Declan McCullagh, *Fallen Soldier, Yahoo!'s Privacy Policy, and What To Do*, December 22, 2004, available at <http://seclists.org/politech/2004/Dec/0011.html>

<sup>128</sup> As discussed infra whether privacy is the correct way to think about interests after death is suspect. See Elinor Mills, *Taking Passwords to the Grave*, CNET NEWS.COM, September 22, 2004, [http://news.com.com/Taking+passwords+to+the+grave/2100-1025\\_3-6118314.html](http://news.com.com/Taking+passwords+to+the+grave/2100-1025_3-6118314.html) (quoting Marc Rotenberg, Executive Director of The Electronic Information Privacy Center on the difference between privacy and property interests ““The so-called “Tort of Privacy” expires upon death, but property interests don't ... Private e-mails are a new category. It's not immediately clear how to treat them, but it's a form of digital property.””).

In contrast AOL, Earthlink, Microsoft's Hotmail, and Google "have provisions for transferring accounts upon proof of death and identity as next of kin."<sup>129</sup> This option, however, neglects a different interest: the creator's ability to exert her control over the artifact. In short one may not wish for the creations to be handed over to the next-of-kin. As the father of the dead solider offered, emails are a remnant of the deceased's thoughts and person. Yet as one commentator has noted emails may contain information about an affair or confidential information that one did not want to go to the next of kin or to become public.<sup>130</sup> This idea has caused some to lament the way their emails are treated after their death as they wish to have more control over their writings.<sup>131</sup>

Both Yahoo!'s position and the other service providers' position point to the question of what interest does the creator have in destroying her works? Professor Lior Strahilevitz's recent article, *The Right To Destroy*,<sup>132</sup> provides insight on this question. In investigating the right to destroy and the law's tendency to thwart a testator's command to destroy despite otherwise striving to honor the deceased's wishes,<sup>133</sup> Strahilevitz notes

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<sup>129</sup> See Anick Jesdanun, *Debates Rise Over What Happens To E-belongings After Owners Die*, Associated Press, December 24, 2004, available online at [http://www.usatoday.com/tech/news/techpolicy/ethics/2004-12-24-data-after-death\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/ethics/2004-12-24-data-after-death_x.htm) last visited March 3, 2007; Elinor Mills, *Taking Passwords to the Grave*, CNET NEWS.COM, September 22, 2004, [http://news.com.com/Taking+passwords+to+the+grave/2100-1025\\_3-6118314.html](http://news.com.com/Taking+passwords+to+the+grave/2100-1025_3-6118314.html) (noting Yahoo!'s reluctance to discuss anything beyond adhering to court orders requiring the transfer of an email account; Google's spokeswoman statement that Google "will provide access to a deceased Gmail user's account if the person seeking it provides a copy of the death certificate and a copy of a document giving the person power of attorney over the e-mail account;" and an AOL spokesman claim that AOL follows the same procedure as Google).

<sup>130</sup> See Susan Llewelyn Leach, *Who Gets To See the E-mail of the Deceased?*, CHRISTIAN SCIENCE MONITOR, May 2, 2005 at 12 (quoting Professor Henry Perritt).

<sup>131</sup> See *id.* (quoting online discussions expressing unhappiness at finding that "that after our death, a family member could possibly wrangle access to [our] personal space" and arguing that a writer would have copied or blind copied those who were intended to have access.)

<sup>132</sup> Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781 (2005).

<sup>133</sup> See *id.* at 838-839 (arguing "the law's resistance to dead hand destruction pushes against the grain of American trusts and estates law, which is for the most part relatively deferential to the wishes of testators and settlors regarding the disposition of their property.").

that several interests militate in favor of honoring the testator's choice to destroy.<sup>134</sup> First, Strahilevitz notes that destructive acts have expressive force such that burning a flag or draft card, destroying a prison, tearing down a statue, and other acts are often seen as and afforded First Amendment protection as expressive speech but that discerning between an expressive act as opposed to a disfavored, spiteful act of destruction is difficult.<sup>135</sup>

Next he turns to an example that closely tracks the present question regarding digital artifacts: the destruction of something one has made. Strahilevitz presents the idea that Presidents faced with the preservation of all documents absent authorization to destroy a document might tend to under produce documents.<sup>136</sup> In the writer context Strahilevitz notes the somewhat famous case of Franz Kafka asking his executor to destroy all Kafka's writings and that the executor did not do so thus preserving *The Castle* and *The Trial* which had not yet been published.<sup>137</sup> Sometimes creators succeed in destroying their work through testamentary instruction and sometimes not, but while alive it appears that some have destroyed their paintings, writings, and photographs.<sup>138</sup>

Turning to a current question, Strahilevitz argues that faced with Kafka's destruction request today, the request should be honored.<sup>139</sup> He offers four reasons to support his position. First, he offers the ex ante argument mention above—authors may be more likely to take risks and express only partially developed ideas if they know that

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<sup>134</sup> See *id.* at 823-838, 838-848 (examining “the expressive characteristics of property destruction” and questioning the prevention of waste rationale often offered to support ignoring instructions to destroy).

<sup>135</sup> See *id.* at 824-830.

<sup>136</sup> See *id.* at 813-815.

<sup>137</sup> See *id.* at 830-832.

<sup>138</sup> See *id.* at 831-832 (noting Jacqueline Susann's executor destroyed her diary later valued at \$3.8 million, Virgil's desire to have the Aeneid destroyed, Jasper Johns destruction of his early work, and Brett Weston's destruction of his negatives on his eightieth birthday) (citations omitted).

<sup>139</sup> See *id.* at 834.

unfinished works will be destroyed.<sup>140</sup> Next he offers that an economic perspective supports the right to destroy as the author arguably is in the best position to know which works will benefit his heirs “assuring that the value of his published works is not diminished by the conceivably inferior quality of the unpublished works.”<sup>141</sup> Third, Strahilevitz reasserts the expressive component of the destructive act: “By destroying his unfinished works, K may wish to send a message to the public that he is not the type of artist who will tolerate, let alone publish, inferior works.”<sup>142</sup> Last he argues that another aspect of expression, that of forced speech, is implicated even though standing for such a claim would be lacking.<sup>143</sup> To support this position Strahilevitz holds that if an author were working on “a controversial or envelope-pushing work” she may have only wished to have it published when she was present to defend the work.<sup>144</sup>

Thus one can see that the right to destroy and the interest in preserving artifacts track similar arguments regarding the justifications for both. As for preservation, the creator can have both a property, economic interest and a persona interest. Examining Professor Strahilevitz’s rationales supporting the right to destroy, one sees parallel if not the same justifications at work. Strahilevitz’s economic arguments assume a property approach to artifacts. His *ex ante* analysis’s focus on the possible negative affect of not being to destroy an item can be seen as the inverse of the incentive rationale offered to support the creation of an artifact. Likewise the view that the creator knows best how to manage her property on its face is a property approach to the artifacts with the ability to dispose of property being a fundamental part of property. Strahilevitz’s expressive

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<sup>140</sup> See *id.* at 832.

<sup>141</sup> See *id.* at 833.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.* at 833-834.

<sup>144</sup> See *id.* at 834-835.

arguments offer a persona approach to the right to destroy: The idea that one's work somehow speaks and that one would wish to be sure that one's work did not speak erroneously when one was unable to defend the work have a persona logic.

In addition, when he asserts that an author may prevent a publication from entering the market because she “will [not] tolerate, let alone publish, inferior works,” and wants to “send [such a] message,” the link between the market interest (which he also couches in quality terms as he describes the interest as preventing the distribution of “inferior quality of the unpublished works”), the economics of attention, and persona is complete. The Attention Economy demands that one attract and maintain attention and as argued above this approach is similar to a trademark understanding. That understanding is quite focused on quality. Thus from the view point of preservation or destruction, there are several arguments supporting the creator's ability to control her work. The question then becomes how to meet these expectations.

The practical solution to this tension between the property interests and the privacy policies of online providers may be solved by using testamentary procedures and/or backing up one's files. For example, some have noted that if one wishes to have one's digital artifacts destroyed, one can have a trustee receive one's user id and password via a will and then instruct the trustee to destroy the email.<sup>145</sup> Regardless of whether one wishes the online material destroyed or preserved in an archive, this approach allows one to avoid Yahoo!'s contractual bias for destruction upon presentation

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<sup>145</sup> See Susan Llewelyn Leach, *Who Gets To See the E-mail of the Deceased?*, CHRISTIAN SCIENCE MONITOR, May 2, 2005 at 12 (quoting Professor Perritt). The question of destruction of digital artifacts is not the focus of this discussion although preservation implies the question. For the purposes of this Article the implications of such power are better discussed in the context of the theoretical justifications behind the exertion of control over artifacts discussed below. Nonetheless for a detailed investigation of the contours of the right to destroy see generally, Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781 (2005).

of a death certificate, because anyone with a user id and password could access the account, retrieve the property, and then administer it as instructed.<sup>146</sup> One flaw in this approach, however, is that the creator must maintain updated user id and password lists.

Alternatively, one may argue that the creator should back up files and then dispose of those files just as one would letters. Yet Yahoo! Mail offers one gigabyte of free online storage<sup>147</sup> Google's Gmail service "over 2.5 gigabytes of free space,"<sup>148</sup> and Microsoft one gigabyte of free storage.<sup>149</sup> The obvious reason for this expansion of free storage is that users wish to have the ability to store large amounts of data online and access it easily through the Web.<sup>150</sup> In addition, with the abundance of online storage, it is arguably inefficient to require users to create redundant backups of their files. Of course not doing so leaves the user open to possible technical errors and property destruction, but one could just as easily lose creations in a fire or flood. The key issue here is the claim that users who wish to preserve access to the information must backup their files so that others may access the information. That proposition is inefficient and unnecessary once a more coherent system for access and dominion over online artifacts is in place.

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<sup>146</sup> See James Edward Maule, *The Impact of Death on Web-Based Content*, January 13, 2005 ("As a practical matter, the ISP or provider won't know that it is the executor and not the now-deceased owner, who has accessed the site.")

[http://mauledagain.blogspot.com/2005\\_01\\_01\\_mauledagain\\_archive.html#110486775970538028](http://mauledagain.blogspot.com/2005_01_01_mauledagain_archive.html#110486775970538028); accord Susan B. Shor, *Digital Property and the Laws of Inheritance*, TECHNEWSWORLD, February 22, 2005, (quoting Professor Maule for same) <http://www.technewsworld.com/story/40578.html>. As Professor Maule notes the law does not traditionally honor instructions to destroy. See Maule; accord Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 784 (2005) ("Confronted with arguably hard cases and high stakes, many American courts have rejected the notion that an owner has the right to destroy that which is hers, particularly in the testamentary context.").

<sup>147</sup> See <http://mailplus.mail.yahoo.com/>. For \$19.99 per year the amount doubles to two gigabytes of storage. *Id.*

<sup>148</sup> See [http://mail.google.com/mail/help/about\\_whatsnew.html](http://mail.google.com/mail/help/about_whatsnew.html).

<sup>149</sup> See <http://www.hotmail.com>.

<sup>150</sup> See Jim Hu, *Yahoo Email Storage Reaches 1GB*, ZDNET.CO.UK, March 23, 2005 (quoting a Yahoo! spokesperson asserting that the expansion was Yahoo! "paying attention to what users are doing and how they're using their in-boxes" and noting that free email has changed from restricted storage space unless a user paid a fee to large email storage capacity for free email services).

<http://news.zdnet.co.uk/internet/0.100000097.39192436.00.htm>

In short, both options—creator foresight and creator backup—require that the creator take action. In both cases the actions requested are ones that many fail to perform. Backing up emails is not likely a concept let alone a skill that the broad range of online users (i.e., the non-technology oriented users who now make up the majority of people online) understand or embrace.<sup>151</sup> In addition, when one has abundant online storage, one has an invitation to store emails online so that one may easily access the email through Web interfaces and/or not to go through the process of downloading Web-based email via POP3 email software. Thus a better default option is required.

As one commentator has suggested:

[P]erhaps Yahoo and other providers can give users an option to select when opening an account, namely, "if and when you die, do you wish for us to provide your username and password to your executor or administrator?" accompanied by instructions on the identity and contact information for that person.<sup>152</sup>

This perspective comports with the understandings set forth above. Regardless of whether one characterizes the emails and other digital artifacts as property (which they are insofar as they are intellectual property) or extensions of one's persona, the creator should be able to exercise control over the work. There is little justification for the service provider not to allow such control.

Indeed, service providers routinely disavow control and/or ownership over content. Yahoo!'s Terms of Service states, "Yahoo! does not claim ownership of Content you submit or make available for inclusion on the Service." And Yahoo! acknowledges

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<sup>151</sup> See Jay P. Kesan and Rajiv C. Shah, *Setting Software Defaults: Perspectives From Law, Computer Science and Behavioral Economics*, 82 NOTRE DAME L. REV. 583, 585 (2006) (noting that two-thirds of computer users worried about cyber-security, "two of the four bestselling software titles in 2003 were system utilities and security products" yet "eighty-one percent of home computers lacked core security protections" because of "users' inability to properly configure security software despite their best efforts." and that default rules drive much of this phenomenon).

<sup>152</sup> See James Edward Maule, *News in the "Emails at Death" Case*, April 25, 2005, <http://mauledagain.blogspot.com/search?q=ellsworth>. On the nature of default rules including their power and an argument regarding how they work best see generally Kesan and Shah, *supra* note 151.

that the user generated content is the user's: “[W]ith respect to Content you submit or make available for inclusion on publicly accessible areas of the Service, you grant Yahoo! the following worldwide, royalty-free and non-exclusive license(s), as applicable.”<sup>153</sup> This language is the language of license which one would expect when addressing use of another's intellectual property as is the case with these artifacts. By disclaiming ownership and embracing licensing by the creator to Yahoo!, Yahoo!'s contract reveals that despite its claim of privacy, the issue here is property.

Google is primarily a search engine. Thus content issues for that service are limited, but as its business expands to include hosted or stored content, a given service's corresponding terms of service contains language similar to Yahoo!'s regarding content. For example the Gmail terms of service states “Your Intellectual Property Rights. Google does not claim any ownership in any of the content, including any text, data, information, images, photographs, music, sound, video, or other material, that you upload, transmit or store in your Gmail account. We will not use any of your content for any purpose except to provide you with the Service.”<sup>154</sup> Google's Groups service states that “all data, text, information, links and other content (collectively, “**Content**” [sic]), whether posted in public or restricted groups, is the sole responsibility of the person from which such Content originated. This means that you, and not Google, are entirely responsible for all Content that you publish, post, upload, distribute, disseminate or otherwise transmit (collectively, “**Post**” [sic]) via the Service” and Google.”<sup>155</sup>

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<sup>153</sup> Yahoo! Terms of Service, Section 27, General Information, <http://info.yahoo.com/legal/us/yahoo/utos-173.html> last visited March 3, 2007.

<sup>154</sup> See Gmail Terms of Use, [http://mail.google.com/mail/help/intl/en/terms\\_of\\_use.html](http://mail.google.com/mail/help/intl/en/terms_of_use.html).

<sup>155</sup> See Welcome to Google Groups, [http://groups.google.com/intl/en/googlegroups/terms\\_of\\_service3.html](http://groups.google.com/intl/en/googlegroups/terms_of_service3.html) (also disclaiming Google's exercise of control over user content: “*Google's Rights*. You acknowledge that Google does not pre-screen, control, edit or endorse Content made available through the Service and has no obligation to monitor the Content Posted via the Service.”)

In short, one can discern that with the advent and offering of large, free data storage, the disclaimer of ownership of user-generated content, and the emphasis on user responsibility for the nature and substance of content, online service providers are behaving and being used much as one might use a storage facility for one's furniture or other tangible possessions. But unlike a facility that stores tangible items where space is limited and failure to pay results in lost revenue because no one else can occupy the space until it is vacated, online storage is less of an issue. Service providers could argue that the cost of maintaining email and other accounts places an economic burden on them, but the plentiful, free storage offered by the major service providers belies such an argument. Put simply, the free service is not in the same position as the storage facility that recently auctioned Paris Hilton's personal items when she failed to pay the storage fee<sup>156</sup> precisely because the online service is free.

To be sure the service provider should be able to say that a certain period of inactivity or failure to pay maintenance fees allows the provider to terminate and delete the account. Yet that position still allows for the creator to have the option of choosing who should have access or choosing to forgo granting access and allowing the account to lapse and thus terminate and vanish.

Furthermore allowing the user to actively choose during sign-up what she wanted to do would reduce the questions faced by service providers when the law and practice regarding digital artifacts is unclear. The current use of service provider default rules over which the user has no control and little knowledge but which bind the user is a practice

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<sup>156</sup> See Marianne Garvey, *Paris' Secret Trasher Chest – Nudie Pix and Dopey Letters in Web Exxxpose*, THE NEW YORK POST, January 25, 2007 at 14.

disfavored by services known for protecting privacy.<sup>157</sup> Yet, service providers such as Yahoo! claim that the goal is privacy protection. This odd state of affairs is remedied by a more transparent system whereby the user chooses what to do with the artifacts in question.

In addition, this approach would allow the service provider to establish the default within its preferences (i.e., no access for heirs or access provided that certain procedures are followed) but allow the user to construct its relationship on a more personal level based on that default status by opting for the default or alternative status.<sup>158</sup> As two commentators have put it, “As a matter of policy, defaults are good for a number of reasons. First, defaults provide users with agency. Users have a choice in the matter: They can go with the default option or choose another setting. Second, a default setting guides the user by providing a recommendation.”<sup>159</sup> Indeed, given that online companies allow and honor user choices regarding marketing, it cannot be difficult to add a similar choice-based option regarding these important artifacts.<sup>160</sup>

Thus with the implementation of a check-box system to address the disposition of online artifacts, users and service providers would have a better understanding of what the creator wished to do with her property. Given the view of this Article that it is better to preserve these artifacts, the default setting for such check boxes and the law should be that the property is passed to the estate unless the creator chooses otherwise. But that

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<sup>157</sup> See David Goldman, *I Always Feel Like Someone Is Watching Me: A Technological Solution for Online Privacy*, 28 HASTINGS COMM. & ENT. L.J. 353, 379 (2006) (noting the debate between proponents of opt-in and opt-out privacy default rules and that “privacy advocates” prefer opt-in rules).

<sup>158</sup> See Kesan and Shah, *supra* note 151, at 596.

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

<sup>160</sup> Cf. *Id.* at 590-591 (noting the use of opt-in and opt-out check boxes and the impact the default setting of such boxes has on user behavior), William McGeeveran, *Programmed Privacy Promises: P3P and Web Privacy Law*, 76 N.Y.U. L. REV. 1812 (2001) (detailing the way in which a software/market solution combined with legislation would allow for consumer protection and choice regarding the amount of privacy protection the user wanted while still allowing for the free-flow of information).

default ought to be a clear opt-out (i.e., the user must affirmatively ask that the material be destroyed upon death). In addition, given both the property and persona interests in the preservation and/or the destruction of artifacts, this solution honors the creator's choice to preserve or destroy her artifacts, yet supports heirs' and society's interest in preserving the artifacts.

Now that the reasons for creator's having greater control over her artifacts have been set forth a new problem arises. After the creator dies the arguments that support her dominion over her artifacts are gone. The heirs and society are left to fight over whatever artifacts have not been destroyed and how they may be used. Although it may appear that heirs should be in much the same place and have the same rights as the creator, such is not the case. Rather, the current trend of asserting persona interests and the persona character of artifacts to vindicate heirs' interests clouds this area of the law such that important expressive and community interests are trampled. In that sense, the problem is part of a larger and older problem in intellectual property law: the temptation to import persona and privacy rationales into intellectual property. Part II of this Article seeks to explore the history of this problem and set forth a way to delineate between the property and persona interests at stake. Given that the right of publicity grew from privacy and persona interests but now has a property dimension, Part II also examines the nature of publicity interests to help parse the problem of property, persona, and publicity.

### *III. Justifying and Limiting Creators' and Heirs' Interest*

Now that the reasons for creator's having greater control over her artifacts have been set forth a familiar problem arises. To what extent does the estate inherit the position of the creator (and that position's rather broad control) and to what extent does society have claim regarding access to and use of the artifacts? In that sense the rest of this Paper offers an analysis of those competing interests, the grounds upon which those interests can assert their claims, and the potential limits that may be required to balance between the interests.

Put differently, although these artifacts appear to fall under a simple copyright analysis where fair use and public domain mechanisms would address the competing interests such a perspective fails to capture all the interests at stake when considering artifacts. For as discussed above within the property interests one may discern economic and persona rationales behind the property in question. In addition, once one appreciates that creators develop a brand-like interest in their name and their work, publicity interests necessarily enter the analysis. Furthermore, although publicity addresses the economic interests in play, as can be seen in the Joyce case, privacy and arguably identity interests exist in this realm as well. In addition, after one sees the array of interests an heir may have in the artifacts, society's possible claim to access and use the artifacts remains an open issue.

Thus this section seeks to probe the normative arguments that ground these perspectives so that one may have a clearer picture of the basis for these interests. From that understanding this section offers a way to mediate between heirs' interests in control over artifacts and society's interests in access to the artifacts.

### A. Intersecting Interests

To refresh, the creator's interest in the artifact can be understood several ways: As a creation of intellectual property the artifact may have value that the creator wishes to capture by selling copies or licensing such as when one writes a story or makes a film. In addition the creation is part of the attention economy. That is although direct pecuniary return may not be immediately evident (i.e., people create and share creations for free), some theorists argue that the new economy revolves around attention precisely because of the huge amounts of creation taking place. Thus when information is abundant, if not over-abundant, the ability to gain or order attention is where value is found. Those who sort and direct attention are valuable in two ways: the creation itself helps sort but the source of the creation helps sort as well. As such the creator herself becomes a brand. Last, these understandings lead one to see that there is a persona interest in the work. The work becomes an extension of the creator. This perspective shows itself when one sees the creation as a manifestation of the creator's thoughts and ideas and a part of "his manner of being in the world."<sup>161</sup> In addition, people put great value on items that have some connection to a famous person or to an intimate relation because of the persona aspect the item.

Next, an heir's interest in an artifact tracks closely to the creator's, but a few factors impact the nature of the interest and whether an heir can exercise that interest. First, the nature of the creation shows that a creator must consider two separate issues: the disposition of the item of creation as physical property in other words the disposition

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<sup>161</sup> Zadie Smith, *Fail Better*, January 13, 2007, available at <http://books.guardian.co.uk/review/story/0,,1988887,00.html>.

of the thing itself (the letter, film, etc.) and the disposition of the intellectual property (usually the copyright) in the item. Accordingly, an heir may control the physical property, the intellectual property, or both. Depending on which property an heir has, economic possibilities present themselves from selling a specific item for its value as an item to creating multiple copies for sale to licensing the work. In addition, an heir has an interest in the creation as an extension of a relative's persona.

Last society and history have an interest in an artifact not in the sense of possessing the intellectual property or the item. Rather the interest lies in the ability to access the item for its information and to use the information to generate new creations.

A problem arises, because although one might appreciate these perspectives the normative foundations for them is unclear. Indeed it may be that the normative arguments for one perspective contradict the ones for another. Thus the task now is to offer some precision regarding the interests at issue and the normative foundation for those interests. Nonetheless, it may be that once such a parsing is accomplished the best understanding will require a synthesis of rationales.

For, as Justin Hughes has noted, answering whether the Lockean labor or persona rationales serve as a basis for intellectual property goes to the heart of what intellectual property is and yet he offers the possibility that both understandings are needed to justify it.<sup>162</sup>

In addition, the privacy rationale offered by some estates complicates matters. As one commentator examined the “law of biography,” that is the law governing the ability to write biographies, she saw it as “Molded by copyright law and enlivened by privacy

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<sup>162</sup> See Hughes, *supra* note 19, at 289-90; see also DRAHOS, *supra* note 83.

law.”<sup>163</sup> In explaining this idea, she notes that “Although the copyright statute does not explicitly mention privacy, privacy concerns often inform copyright decisions.”<sup>164</sup> Thus, insofar as persona arguments relate to privacy, it seems that Hughes’s insight that both labor and persona interests animate intellectual property law in general applies. These distinctions matter because, if one treats the interest as labor-based property certain benefits flow and certain interests are not protected.<sup>165</sup> If one chooses a personality-based approach, the benefits gained and interests ceded almost invert.<sup>166</sup> The problem is that although persona arguments appear in the privacy context, Hughes’ point relates to ideas of property, not privacy. As discussed below, when one conflates or tries to treat privacy as property based on persona errors arise.

From the property perspective, we can see that one’s writings come from one’s efforts and, from Locke’s view of property, that labor justifies treating the items as one’s property with all the rights the law usually affords to things that are deemed property. But here we must be careful for, though some argue that there has been an over propertization of intellectual property and suggest that intellectual property is arguably a relatively recent term,<sup>167</sup> as Hughes has noted, the treatment of intellectual and especially literary work subject to copyright as property has persisted for a few hundred years.<sup>168</sup> Most

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<sup>163</sup> See Mary Sarah Bilder, *The Shrinking Back: The Law of Biography* 43 STAN. L. REV. 299, 300 (1991).

<sup>164</sup> *Id.* at 312.

<sup>165</sup> See Hughes, *supra* note 19, at 366.

<sup>166</sup> *Id.* at 366.

<sup>167</sup> See, e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 406-410 (1990) (tracing the shift to a pure property approach to trademark rights and noting the way in which this shift limits the potential for expressive use of trademarks); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005) (arguing that use of “[t]he rhetoric of real property, with its condemnation of ‘free riding’ by those who imitate or compete with intellectual property owners,” has resulted in “a legal regime for intellectual property. . . in which courts seek out and punish virtually any use of an intellectual property right by another”).

<sup>168</sup> See Justin Hughes, *Copyright and Incomplete Historiographies: Of Privacy, Propertization, and Thomas Jefferson*, 5 S. CAL. L. REV. 993, 1004-1005 (2006).

importantly, Hughes explains: “None of this historical material changes the fact that we should be vigilant in controlling and patrolling concepts like ‘piracy’ and ‘property.’ We can and should debate how the words should be used; if we generally agree on proper usages, we should insist on rigorous adherence to those uses.”<sup>169</sup>

This general problem of rigor arguably contradicts Hughes’s insights regarding the philosophical foundations for intellectual property. After all in that piece Professor Hughes draws clear distinctions between labor and personality theories supporting intellectual property as a system and yet states that “One of this article’s fundamental propositions is that property can be justified on either the labor or personality theories and that it should be justified with both.”<sup>170</sup> Thus one may ask where is the rigor of definition and adherence to uses? Still this apparent contradiction may come from moving too fast in one’s comparison.

When speaking of the foundations of intellectual property law, Hughes shows that depending on the interest and understanding involved one can see that both labor and personality offer strong explanations for intellectual property systems and what such systems seek to protect. He admits that both views have “their strengths and weaknesses” and offers “two reasons” for his endeavor.<sup>171</sup> First, he notes that labor and individuality have a certain populist appeal as compared to property and that both “have much more of a siren’s call than property rights.”<sup>172</sup> Second he explains his endeavor as “fac[ing] such

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<sup>169</sup> *Id.* at 1005.

<sup>170</sup> Hughes, *supra note* 19, at 290.

<sup>171</sup> *Id.* at 366.

<sup>172</sup> *Id.* at 366. Ironically with the advent of certain natural rights approaches to intellectual and real property the call of property as property may be the strongest siren call right now. See e.g., Mossoff, *Is Copyright Property?* *supra* note 46, and Mossoff, *What Is Property?* *supra* note 34. For an example of the popular position that property is the best way to understand intellectual property see Mark Helprin, *A Great Idea Lives Forever. Shouldn’t Its Copyright?* NY TIMES, Section 4, May 20, 2007.

generalizations squarely and assembl[ing] them consciously.”<sup>173</sup> In other words, insofar as these two strains are “sirens songs,” one must pay attention to what it is about both conceptions that entices us and offers support for key interests. This problem becomes acute, because the temptation is to conflate the interests and that error leads to the sort of confusion Hughes seeks to reduce if not eliminate in his exhortation that we exert rigor once “we generally agree on proper usages.”<sup>174</sup> As one commentator has noted, however, keeping these two sirens apart is not so easy. In addition when one turns to privacy, the temptation to conflate personality-based property ideas with personality-based privacy ideas such that even more errors occur beyond what Professor Hughes describes and with perhaps greater problems for the use of ideas. Nonetheless, the rest of this Article seeks to aid in part of the goal of keeping the usages separate and avoiding such potential problems. The project begins with natural rights and property.

## B. Natural Rights Based Property Interests

Adam Mossoff has recently argued that what he calls an integrated theory of property would help to understand exactly what is meant by the term property and better guide society regarding the nature of property both real and intellectual.<sup>175</sup> The integrated theory responds to the bundle theory of rights about which the integrated theory “maintains that there is ‘no essential core of those rights that naturally constitutes ownership.’ In the law, this bundle of duties and claims could be analytically dissected by

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<sup>173</sup> Hughes, *supra* note 19, at 366.

<sup>174</sup> Justin Hughes, *Copyright and Incomplete Historiographies: Of Privacy, Propertization, and Thomas Jefferson*, S. CAL. L. REV. 993, 1005 (2006).

<sup>175</sup> See Mossoff, *Is Copyright Property?* *supra* note 46, at 29.

scholars and adjudicated by the courts without any need for reference to ‘property’ at all.”<sup>176</sup> As part of his project, Mossoff acknowledges that the focus on exclusionary rights in property begins to address the short comings of the bundle approach, but he argues that it fails to reach the core of property rights which stem from Grotius, Pufendorf, and Locke property theories and those such as Blackstone who informed their insights on the law with ideas from these earlier thinkers.<sup>177</sup> As such Mossoff details that exclusionary rights play a large role in the property theory of Grotius and Locke but do not capture the rights “sufficient” to explain property. Instead:

[T]he integrated theory of property reveals that the substance of the concept of property is the possessory rights: the right to acquire, use and dispose of one's possessions. The right to exclude enters the picture, so to speak, at the point at which one identifies one's property entitlements in the context of creating and applying explicit legal protections within civil society. The property-holder rightly seeks to exclude people from the various uses of one's property, and society creates legal institutions to define and protect these essential entitlements. Exclusion therefore represents only a formal claim between people once civil and political society is created, and it has meaning only by reference to the more fundamental possessory rights that logically predate it.

In short “the more fundamental rights of acquiring, using, and disposing of one's possessions,” possessory rights, explain property better for one cannot exclude until one has possessed.<sup>178</sup>

Mossoff argues that possessory rights stem from a few key points. First, with Grotius use of a thing is key to property and later for Locke it is labor that makes the thing one's property but in both cases the property stems from the rivalrous nature of

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<sup>176</sup> See Mossoff, *What Is Property?*, supra note 34, at 374 (citation omitted).

<sup>177</sup> *Id.* at 378.

<sup>178</sup> *Id.* at 393-395.

consumption of physical things.<sup>179</sup> Mossoff demonstrates that according to his reading of both Grotius and Locke, this fact of use or occupation is part of what is “own’s own” which begins with one’s “life, limbs, and liberty.”<sup>180</sup> From that understanding one finds:

It is one’s right to life that justifies the liberty required for him to take the actions necessary to support this life (suum), which temporally and logically results in the development of property (dominion). Thus, writes Grotius, “property ownership was introduced for the purpose . . . that each should have his own.” It is “one’s own” that is the fundamental right; property is the derivative right. It is this analytical structure that beget the “traditional” triad of political rights--the rights to life, liberty and property. For, as Grotius explains, “liberty in regard to actions is equivalent to dominion in material things.”<sup>181</sup>

Thus to have life and exercise liberty one must be able to support that life which in turn leads to being able to exercise liberty and to have property to support one’s life which results in a familiar triumvirate: life, liberty, and property.<sup>182</sup>

Accordingly as far tangible items are concerned, the integrated theory of property offers much. Recall that this Article focuses on artifacts such as writings, videos, and photographs.<sup>183</sup> These creations as a things have value. For example, a letter is a thing. When one writes a letter, the copyright remains with the author but the recipient owns the letter itself.<sup>184</sup> This division of the rights to the item as opposed to the underlying copyright grows from the distinction between giving (or selling) someone the physical

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<sup>179</sup> *Id.* at 381 (“First, Grotius maintains that occupation or use is the ultimate source for the development of private property rights. (This idea is a progenitor of Locke’s labor argument for property.) Regardless of the philosophical justification for this claim, this argument identifies a basic intuition, i.e., a use-right logically creates a private right insofar as something is consumed or depleted in the process of using it. A piece of meat can be eaten only once, for instance, and, in the process of building a shelter, a tree can be cut down only once.”).

<sup>180</sup> *Id.* at 383-384.

<sup>181</sup> *Id.* at 383-384.

<sup>182</sup> *Id.* at 381, 384.

<sup>183</sup> See supra notes \_\_ and discussion.

<sup>184</sup> See e.g., *Salinger v. Random House, Inc.* 811 F.2d 90, 94 (2<sup>nd</sup> Cir. 1987) (citing *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir.), cert. denied, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1977); *Folsom v. Marsh*, 2 Story 100, 9 F.Cas. 342, 346 (C.C.D.Mass.1841) (No. 4,901)); *Ipswich Mills v. William Dillon*, 260 Mass. 453 (Mass. S. Ct. 1927) (“The original letters from the plaintiff to the defendants belong to the defendants. They were the recipients, and therefore owned them.”)

representation of the expression but not ceding the copyright.<sup>185</sup> Thus if I own a physical writing or other copyrightable work, absent some contractual limit placed on the thing, I may sell it at my pleasure. As noted above, people often sell famous people's copyrighted artifacts for large sums of money.<sup>186</sup> The author cannot prevent that sale.

Thus as things, these items are rivalrous and fit under a use right because of “a basic intuition, i.e., a use-right logically creates a private right insofar as something is consumed or depleted in the process of using it. A piece of meat can be eaten only once, for instance, and, in the process of building a shelter, a tree can be cut down only once.”<sup>187</sup> Accordingly, as far as one’s creations manifest themselves in a physical, fixable thing, real property understandings can guide the way in which the law addresses the rights in those items rather easily.

So the solution set forth above regarding the emails, videos, and other artifacts at issue comports with the basic intuition. One who creates an item has possessory rights. One can “acquire, use and dispose” of the possessions in question. As such the creator acquires a creation through labor or other means, uses it as she sees fit (e.g., posts it online, sends it as an email, etc.), and then may choose to dispose of it as she sees fit by destroying it or giving it someone who then will have the same possessory rights over *the thing*. Indeed the premise above is that the rights over the creations as things belongs to

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<sup>185</sup> See Ned Snow, *The Copyright Conundrum*, 55 UNIVERSITY OF KANSAS L. REV. 501, 526 (2007) (“Once delivery occurs, the letter recipient receives by gift property rights to possess the physical components of the letter: the physical paper, the envelope, the ink, and the postage stamp. So while copyright secures an author property rights in the letter’s expression, property law secures the recipient property rights to the physical components of the letter.”) (citations omitted); *accord* DRAHOS, *supra* note 83, at 17.

<sup>186</sup> See *supra* notes \_\_\_\_ to \_\_\_\_.

<sup>187</sup> See Mossoff, *What Is Property?*, *supra* note 34, at 381. This statement is informed by Mossoff’s reading of Grotius as can be seen when Mossoff quotes Grotius “For the essential characteristic of private property is the fact that it belongs to a given individual in such a way as to be incapable of belonging to another individual” which is the core of the idea of a rivalrous good.

the creator and that online intermediaries failure to respect those rights is a harm to be remedied.

Yet, this understanding of property does not seem to work well with intangible property.<sup>188</sup> Although Mossoff argues that copyright fits well under the integrated theory because the Copyright Act of 1976 details exclusive rights regarding uses of a work and that “exclusion is a formal right that only has meaning by reference to the more fundamental, substantive possessory rights,”<sup>189</sup> the rubric regarding “a basic intuition, i.e., a use-right logically creates a private right insofar as something is consumed or depleted in the process of using it” appears to be lost. To be fair, it is Locke’s notion of labor that allows this jump; yet that jump is not as easy as it might seem.

Mossoff points to Locke’s labor ideal—that one has property in that which one mixes one’s labor—to show the connection between transforming something from the commons into one’s own—the key idea again is that insofar as something is part of one’s own, it is part of life, liberty, and property: “The essence of Locke’s ‘mixing labor’ argument is that an individual exclusively owns his life and his labor—such things are, in the Latin used by Grotius and Pufendorf, an individual’s suum—and that labor extends this moral ownership over things appropriated from the commons.”<sup>190</sup> Yet immediately thereafter Mossoff returns to the tangible and the example of taking an acorn from a tree moves the acorn from the commons by labor and thus makes the one who exerts that

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<sup>188</sup> See DRAHOS *supra* note 83, at 32-33 (analyzing natural right justifications for property and finding that they do not fit for abstract objects or intellectual property).

<sup>189</sup> See Mossoff, *What Is Property?*, *supra* note 34, at 425.

<sup>190</sup> *Id.* at 388.

labor the owner of the acorn.<sup>191</sup> Where then is the intangible in this view? It can only hide within labor; the basic notion that rivalrous items are key is now gone.

Thus the expanded idea is that labor allows Mossoff to argue that property is about both the tangible and intangible such that James Madison wrote that property “embraces everything to which a man may attach a value and have a right”,<sup>192</sup> and that the law recognizes harms to property without loss of the physical item.<sup>193</sup> The argument has evolved from the need for tangibility to the idea that once one’s labor has created in a general sense, property theory recognizes the creator’s ability “to use, control, or dispose of the values one has created.”<sup>194</sup> Note that the discussion has shifted to anything that has “value.” As Peter Drahos has observed this focus on labor to justify property rights in abstract objects places this concept of property in a “strong form” such that “Very few abstract objects, if any, would escape individual ownership.”<sup>195</sup>

To be clear the limits of integrated property theory are not lost on Mossoff. He offers “It is important, though, for integrated theorists not to overstate their claims. The integrated theory does much for the property scholar, but it does not do everything.”<sup>196</sup> Important for this Paper, he acknowledges: “An integrated theorist, for example, would be hard pressed to deduce from the possessory rights the optimal term limit for a copyright or patent. The integrated theorist maintains that there should be legal protection as such for intellectual property, but important details of this protection are not deducible from the integrated theory.”

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<sup>191</sup> *Id.* at 389.

<sup>192</sup> *Id.* at 401. *Cf.* Vandevelde

<sup>193</sup> See Mossoff, *Is Copyright Property?*, *supra* note 46, at 41-42.

<sup>194</sup> *Id.* at 42.

<sup>195</sup> DRAHOS *supra* note 83, at 48.

<sup>196</sup> See Mossoff, *What Is Property?*, *supra* note 34, at 441.

Protection for intellectual property is a concern of this Paper; yet one point must be made here. Although this paper seeks to establish boundaries regarding rights in artifacts, it is not arguing that all must be free for the sake of culture.<sup>197</sup> Rather as Peter Drahos has argued it appears that “the concept of community and the metaphysical scheme upon which that concept of community is dependent” that are “the silent drivers of the debate.”<sup>198</sup> Where then is the community here? Part of the answer comes from another concern of this Paper: optimal terms for intellectual property protection. Put differently, the integrated theory of property hints at the issue but is not explicit regarding the question latent within copyright term limits and that informs the theory itself: when does property return to the commons? After all the question that motivates the integrated theorists is how does one justify moving from the commons to private ownership?<sup>199</sup> The inverse of that question is when, if ever, does property revert to the commons? Depending on how one understands the interest at stake—i.e., if the interest is something other than copyright such as a trademark like interest or if creation spawns more than one interest such as a copyright and a trademark-like interest simultaneously—the answer to these questions would likely change.

### C. Persona Based Property Interest

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<sup>197</sup> See Mossoff, *Is Copyright Property?* *supra* note 46, at 42 (describing the strong form of “Internet exceptionalists” as those who argue that intellectual property law is purely policy issue that threatens common culture); *cf.* Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., 2005) (noting that commodification and use of property rights can have beneficial effects for those seeking to exert control over cultural identity).

<sup>198</sup> DRAHOS, *supra* note 83, at 33.

<sup>199</sup> See *id.* at 381, 385, 386.

In *Property in Personhood*, Margaret Radin “attempts to clarify a [] strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of ‘things.’ This ‘personhood perspective’ corresponds to, or is the dominant premise of, the so-called personality theory of property.”<sup>200</sup> Returning to the dead son’s email and the father’s explanation of his interest in it, “as one reminder of his son’s life”<sup>201</sup> one can see that the thing, the email, had value as a part of the creator’s life. The father’s perspective comports with what Radin calls the intuitive view of personhood:

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.<sup>202</sup>

Under this view the more one cannot replace the external thing with another thing; the more the thing is “part of oneself.”<sup>203</sup> So it is possible under this theory to have an external thing bound up with one’s personhood and yet have that same thing not be part of someone else’s personhood: “For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so.”<sup>204</sup> Radin describes this phenomenon as the continuum between personal property (highly connected to personhood and practically irreplaceable) at one end and fungible property (completely separate and replaceable by even unlike items such as money for an item) at the other end.<sup>205</sup> Accordingly, one’s creations—

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<sup>200</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982).

<sup>201</sup> See Hu, *supra* note 7.

<sup>202</sup> Radin, *supra* note 200, at 959.

<sup>203</sup> See *id.* at 959-960.

<sup>204</sup> *Id.* at 959.

<sup>205</sup> See *id.* at 959-960.

especially for a writer who holds the view that “A writer's personality is his manner of being in the world: his writing style is the unavoidable trace of that manner. ... [S]tyle [is] a personal necessity, [] the only possible expression of a particular human consciousness,”<sup>206</sup>—reside on the personal end of the spectrum.

Thus far the theory addresses things. One creates *or acquires* a thing, and insofar as one is “bound up with the thing,” one’s property interest is found. As Radin explains, this approach:

focuses on the person with whom it ends up—on an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing. The same claim can change from fungible to personal depending on who holds it. The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan’s own labor. Conversely, the same item can change from fungible to personal over time without changing hands. People and things become intertwined gradually.<sup>207</sup>

Accordingly, one may write a short story and it may well be personal property in Radin’s sense of the term. Still that same story may be a commissioned story and one may write it simply as ordered. Or that story may never be published, be left to an heir, and that heir may find attachment to the property to be personal. Although Radin acknowledges the subjective aspect of the theory, that nature causes problems. For example, under her own example of the artisan ring maker, one could easily understand that the artisan is bound up with her creation *and* in Radin’s example the wearer of the ring may be bound up with it too. Knowing where the property is on the continuum is difficult to parse if not impossible in many cases.

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<sup>206</sup> Zadie Smith, *Fail Better*, January 13, 2007, available at <http://books.guardian.co.uk/review/story/0,,1988887,00.html>.

<sup>207</sup> Radin, *supra* note 200, at 987-988.

To be clear it is not that Radin denies a “personhood interest [] in fungible property.”<sup>208</sup> That is the point of describing the nature of the interest as being on a continuum. For Radin place on the continuum matters because the closer to personal property the thing is, the stronger interest or entitlement one has in preserving that property.<sup>209</sup> Thus some items may be so close to personhood that no compensation would suffice and other items may so fungible that “the justification for protecting them as specially related to persons disappears.”<sup>210</sup>

In addition, Radin offers a limit on the personal perspective by denying personal property status to those attachments that are fetishistic.<sup>211</sup> Thus “a ‘thing’ that someone claims to be bound up with nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is an objective moral consensus that to be bound up with that category of ‘thing’ is inconsistent with personhood or healthy self-constitution.”<sup>212</sup> Despite this idea of healthy self-constitution appearing within the issue of personal property, it points to Radin's shift from property to a more broad notion of the importance and power of personhood.

This shift is seen when Radin asserts that “some personhood interests not embodied in property will take precedence over claims to fungible property.”<sup>213</sup> Here the theory moves beyond personal property to other interests. For when Radin turns to the

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<sup>208</sup> *Id.* at 1008, *see also id.* at 986-989 (detailing the contours of the personal to fungible property continuum and explaining “Since the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum.”).

<sup>209</sup> *See id.* at 987 (“Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”) and at 1005-1006 (explaining that some items are so close to personhood that no compensation would suffice and others

<sup>210</sup> *See id.* at 1005-1006.

<sup>211</sup> *See id.* at 968-969.

<sup>212</sup> *Id.* at 969.

<sup>213</sup> *Id.* at 1008.

question of using someone else's property (e.g., a mall) for speech interests, she argues that the speech interests trump based on personhood interests:

[A] separate argument to be made on behalf of the speech claimants [is that] [s]hopping center property is not likely to be bound up with the personhood of the shopping center owner, while public speech, especially if considered political, is likely to be tied to the personhood of the speaker. The situation invites balancing, either of the strength of moral rights based on personhood or, to translate into utilitarian terms, of the likely effects on individual and aggregate welfare if speech rights are granted or denied.<sup>214</sup>

The reason the private owner loses in this calculus is that she lacks a high level of personal property interest in the mall (and perhaps at some point such a claim would rise to the level of fetish). But that fact does not lead to the personhood *in property* interest outweighing the mall owner interest. Rather, it is the necessity of the individual or public accessing the non or less personal property so they can have “opportunities to develop and express personhood” that drives this result.<sup>215</sup> The emphasis here is on *personhood* not *property*. Radin later explained and developed this idea as human flourishing<sup>216</sup> though it can be seen when she writes of the possible need of “private enclaves … for personhood to develop and flourish.”<sup>217</sup> She summarizes that one’s claim to access another’s fungible property “is strongest where without the claimed personhood interest, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.”<sup>218</sup>

Accordingly personhood offers a way to understand a creator’s and an heir’s claim to an artifact. Intuitively some things are bound with one’s persona such that from

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<sup>214</sup> *Id.* at 1009.

<sup>215</sup> *Id.* at 1010.

<sup>216</sup> See generally Radin, *supra* note 22, at 1903-1915 (explaining the link between personhood and flourishing and arguing “that market-inalienability is grounded in noncommodification of things important to personhood.”).

<sup>217</sup> Radin, *supra* note 200, at 1001.

<sup>218</sup> *Id.* at 1015.

the individual's subjective view no thing can replace the value of the personal thing.<sup>219</sup>

This perspective is subjective in that it is the holder of the thing's view that determines whether the property is personal or not.<sup>220</sup> Although it is difficult to determine when one's attachment to a thing is unhealthy and a fetish, when the attachment runs contrary to human flourishing that attachment is less respected if not ignored.<sup>221</sup> Furthermore although the exact contours of human flourishing are unclear,<sup>222</sup> the move to human flourishing reveals that the issue is not property for the sake of property but rather the way in which personal property enables one to "become fully developed persons in the context of our society would be destroyed or significantly lessened."<sup>223</sup>

Yet personhood in abstract property or non things is unclear here. One may see that the personhood presentation offers another way to understand the interest in one's letters, emails, pictures, videos and so on. But what happens when the interest claimed is in nonrivalrous goods? In other words, under personhood theory one could credibly claim that the expression of one's ideas is on the personal property end of the spectrum and thus to be highly protected. Yet what happens when someone else wishes to uses these ideas or expressions to form their personhood? Regarding tangible property Radin offers that in competing claims between two groups one should see which interest is "more clearly necessary to their being able to constitute themselves as a group and hence as persons within that group."<sup>224</sup> The same approach would fit for competing individual claims. But

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<sup>219</sup> See *id.* at 961 ("It intuitively appears that there is such a thing as property for personhood because people become bound up with 'things.'").

<sup>220</sup> See *id.* at 987-988.

<sup>221</sup> See *supra* notes \_\_\_\_ to \_\_\_\_ and accompanying text.

<sup>222</sup> See *supra* notes \_\_\_\_ to \_\_\_\_ and accompanying text; *see also* Radin, *supra* note 22 at 1904 n. 208 ("I do not assert either that there is potentially or in the long run one best concept of human flourishing, or that there is not.").

<sup>223</sup> See Radin *supra* note 200, at 1015.

<sup>224</sup> *Id.* at 1013.

with intangible property, the issue is not one of occupation and use. Again both can have the idea and the expression to use as they see fit.

The question again shifts here. Now the question is can one assert personhood and claim that another's use of the intangible property somehow diminishes one's dignity and persona even though one can still make use of the expressions? For if a writing or expression is highly personal property would not letting another make use of it as she sees fit harm one's persona? Furthermore, would not that use put part of oneself to work without one's consent? Last are there not circumstances under which others may lay claim to those expression's of another's self because those expressions are necessary not for individual flourishing but for society's flourishing as well? The next section begins to address these questions.

#### D. Persona, Privacy, and Publicity

The discussion of common law copyright and the right of publicity that follows allows one to see the way in which the rhetoric of persona and privacy animates intellectual property law. In addition, this investigation shows that the motivation may be summed up as control. Indeed as is shown below those discussions fail to offer justifications regarding the duration of control and fail to appreciate that the grounds on which control is premised do not support infinite duration. Put differently, once one sees the way in which a creator is constituted, one may see that the creator owes a duty back to the community from which she sprang. In other words, a metric of human flourishing seems to include under what circumstances can one flourish? A partial answer seems to

lie in access to fundamentals necessary for both a natural rights and a personhood conception of property. As such after showing the shortcomings of common law and publicity rationales, the discussion offers that Brett Frischmann's concept of infrastructure and his work with Mark Lemley on spillovers coupled with an understanding of what it is to have the potential for development as an individual or a society offers a partial explanation as to the limits the law should place on persona claims.

## 1. The Intertwined Sirens: Property and Persona in Copyright

As Professor Tony Reese has explained although many have argued the public domain has been under attack, the current iteration of the Copyright Act has a somewhat novel approach to unpublished works in that “every unpublished work ever created by any author who died before 1933 entered the public domain.”<sup>225</sup> The material affected by this shift covers material similar the material at issue in this Paper, “Much of the material is primarily of educational or historical interest, but some of it has commercial value as well, so archives, museums, scholars, students, publishers, film studios, and others will be affected.”<sup>226</sup> Thus it seems that much of the material will be readily available to society. Yet, as discussed above whoever has power over the physical copy of the work may wish to assert control to extract economic returns or to keep the information secret.<sup>227</sup> Furthermore, these avenues and desires for control may be followed even when

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<sup>225</sup> See R. Anthony Reese, The New Unpublished Public Domain, 85 Tex. L. Rev. 585, 586 (2007).

<sup>226</sup> *Id.*

<sup>227</sup> *Accord*, *Id.* at 618-621 (detailing economic and privacy claims as possible motivations to exert control over a work unprotected by copyright).

copyright covers the work in question.<sup>228</sup> Indeed at least one commentator has argued that common law copyright's privacy protection is not preempted by the Copyright Act.<sup>229</sup> Thus, in theory and in practice when control over the physical thing and/or the intangible intellectual property is possible, whoever has that control has ways to prevent others from using it. The focus of this Paper is the arguments that support these motivations and maneuvers. In short, persona-based property and related privacy arguments may entice us to offer control where no control should be had. This section examines the rhetoric of persona and privacy within copyright law to show its origins and to provide a way to see where those interests operate best and where they ought not be allowed to operate.

a. Common Law Copyright: Economic and Persona Interests Travel Together

The case of *Folsom v. Marsh*,<sup>230</sup> though often cited as the source of the doctrine of fair use,<sup>231</sup> is important too as one of the key American cases to set forth the principle that an author retains her copyright in unpublished letters. In that case, President Washington had bequeathed his private letters to his nephew, Justice Washington. Then Chief Justice Marshall and a Mr. Sparks obtained the “the interest therein.” They in turn published the *Writings of President Washington* in 12 volumes, 11 volumes of which and

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<sup>228</sup> *Id.* at 619 (noting the Joyce controversy and stating “While the estate can currently use the copyright in James Joyce's unpublished works to refuse their publication, there is little reason to think that Stephen's interest in controlling those works will change once their copyrights expire.”).

<sup>229</sup> See generally Snow *supra* note 185, at 540 (arguing that “the common-law right of first publication furthers only an author's privacy interest; that this common-law right which protects private email expression falls outside the preemptive scope of the [Copyright] Act; and that the centuries-old common-law doctrines that have protected private letters today protect private emails.”).

<sup>230</sup> *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).

<sup>231</sup> See e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.* 471 U.S. 539, 550 (1985).

included President Washington's letters both private and public letters. As Justice Story put it:

[T]he work itself has been accomplished at great expense and labor, and after great intellectual efforts, and very patient and comprehensive researches, both at home and abroad. The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington, as private and most valuable property.<sup>232</sup>

The defendant had inserted full copies of President Washington's previously unpublished letters in his *Life of Washington*.<sup>233</sup> In addressing that the letters had been intended for public use, Justice Story wrote “Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author, either to the public, or to some private person, I hold, that the author has a property therein, and that the copyright thereof exclusively belongs to him.”<sup>234</sup>

These two passages show the siren’s call of which Hughes wrote. The language “accomplished at great expense and labor,” “great intellectual efforts,” and “patient and comprehensive researches” explicitly and implicitly call to the reader’s sense of fairness in retaining the fruits of one’s labor. The claim is an economic one as well in that the reference to Congress having spent money heightens the sense of injustice and that a “piracy”<sup>235</sup> has occurred. To be clear, this rhetorical move is not applied to the letters but to the person or persons who toil to bring the letters to light. Justice Story reserves the persona argument for the letters themselves. He begins this move when he instructs that

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<sup>232</sup> *Folsom*, 9 F. Cas. at 345.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 345-346.

<sup>235</sup> The term piracy is used throughout the case to describe the taking that was alleged.

only the “most unequivocal dedication of private letters and papers by the author” places the letters in the public.

The more full expression of the persona perspective is found earlier in the case when Justice Story offers “That the original work is of very great, and, I may almost say, of inestimable value, as the repository of the thoughts and opinions of that great man, no one pretends to doubt”<sup>236</sup> and then again when Justice Story explains that in a sense all letters are literary “for they consist of the thoughts and language of the writer reduced to written characters, and show his style and his mode of constructing sentences, and his habits of composition.”<sup>237</sup> Although Justice Story is not deciding the case on these grounds, the phrases “repository of the thoughts and opinions,” “thoughts and language of the writer,” “show his style and his mode of constructing sentences,” and “his habits of composition” give the letters a sense of person, a sense that they are embodiments of the author. In short, by imbuing the letters with parts of the author, Justice Story conflates the author with the letters to support his presentation of why they are important.

b. Common Law Copyright Ends but Economic and Persona  
Interests Remain

*Folsom* involved common law copyright. Common law copyright drew a distinction between unpublished and published works. As one author has succinctly put it “State ‘common law’ copyright, as it was called, usually covered a work from the time of its creation and protected the owner against unauthorized initial publication of the

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<sup>236</sup> *Folsom*, 9 F. Cas. at 345.

<sup>237</sup> *Id.* at 346.

work.”<sup>238</sup> In essence, under common law copyright protection lasted as long a given work remained unpublished; in other words, it could last forever.<sup>239</sup> As Professor Anthony Reese has noted “The 1976 Copyright Act ended this division of labor between state law protecting unpublished works and federal law protecting primarily published works.”<sup>240</sup> Under the 1976 Copyright Act (the “Copyright Act”), copyright vests in any work created “on or after January 1, 1978.”<sup>241</sup> Creation occurs upon fixation “in a copy or phonorecord for the first time.”<sup>242</sup> As such it may appear that the first publication interest would have been removed as well. That, however, is not the case.

In *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*,<sup>243</sup> as was the case in *Folsom*, a President’s writings were at issue. In *Nation* a magazine published direct quotes from President Ford’s memoirs and the publisher of the memoirs sued for copyright infringement.<sup>244</sup> Part of the Court’s analysis found that the Copyright Act “recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works.”<sup>245</sup>

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<sup>238</sup> Reese, *supra* note 225, at 588 (noting that in the common law copyright context the term common law refers to either state statutory or decision-based law).

<sup>239</sup> See e.g., Mary Sarah Bilder, The Shrinking Back: The Law of Biography 43 STAN. L. REV. 299, 325 (1991) (noting “perpetual copyright granted unpublished materials under common law copyright”); *accord* Reese at 588.

<sup>240</sup> Reese at 589; *accord* *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.* 471 U.S. 539, 552 (1985) (“Among its other innovations, [the Copyright Act] eliminated publication ‘as a dividing line between common law and statutory protection,’”) (citations omitted); *but see* Snow, *supra* note 185, at 540 (arguing that “the common-law right of first publication furthers only an author’s privacy interest” and that interest is not preempted by the Copyright Act).

<sup>241</sup> 17 U.S.C. § 302(a); *accord* *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.* 471 U.S. 539, 552 (1985) (declaring “The Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine,” and noting the “exten[sion] [of] statutory protection to all works from the time of their creation.”).

<sup>242</sup> 17 U.S.C. § 101.

<sup>243</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. 539 (1985).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 552.

Here, unlike the previous persona interest seen in *Folsom*, the Court changed the focus to an economic or property one: “the commercial value of the right [of first publication] lies primarily in exclusivity.”<sup>246</sup> The Court acknowledges that privacy interests may come into play when one has no intention of publishing a work, “It is true that common-law copyright was often enlisted in the service of personal privacy” but distinguishes between the first publication issue in that sense and in its “commercial guise” when an author intends to publish the work and requires control over the manner of publication.<sup>247</sup> Again we see the tension between the property interest—seen when an author wishes to publish the work—and the persona interest, seen when an author does not wish to publish the work. These distinctions lead to the question of when is a work published? That question reintroduces the persona and privacy perspective.

In *Lish v. Harper’s Magazine Foundation*, a writer who was known for a particular writing style and whose private writing classes had an almost cult-like following had sent a letter to his students that contained some of the author’s famous rhetorical style.<sup>248</sup> *Harper’s Magazine* obtained a copy of the letter and published an edited version of the letter.<sup>249</sup> The magazine asserted a fair use defense but when the court examined the second of the four fair use factors—the amount and nature of the use—it found that despite the author’s distribution of the letter to 48 students, the letter was not a publication within the Copyright Act.<sup>250</sup> As the court noted the Act refers to publication as “distribution of copies … of a work to the public” and although the Act does not define publication, the House Report provides that public means “persons ‘under

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<sup>246</sup> *Id.* at 553.

<sup>247</sup> *Id.* at 554-555.

<sup>248</sup> *Lish v. Harper’s Magazine Foundation*, 807 F. Supp. 1090, 1093 (S.D.N.Y. 1992).

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

<sup>250</sup> *Id.* at 1101-1102.

no explicit or implicit restrictions with respect to disclosure of its contents.”<sup>251</sup> The letter at issue in *Lish* had explicit statements regarding the confidential nature of the class which the court took to encompass the letter.<sup>252</sup> Thus, the court concluded that explicit restrictions were in place such that the work was unpublished.

Yet, one of the cases the *Lish* court relies on, *Wright v. Warner Books, Inc.*,<sup>253</sup> reveals that when the restriction is not explicit, the logic seems to be one of intent to disclose and that a privacy logic is at work.<sup>254</sup> As the district court in *Wright* noted regarding the Second Circuit’s opinion in *Salinger v. Random House, Inc.*,<sup>255</sup> “what motivated the Court of Appeals in *Salinger*, at least in part, was concern over J.D. Salinger’s right to privacy.”<sup>256</sup> In *Salinger* a biographer quoted from Salinger’s unpublished letters and Salinger sued to prevent the publication of that material. The *Wright* court is correct; the Second Circuit did mention Salinger’s private nature— “[Salinger] has not published since 1965 and has chosen to shun all publicity and inquiry concerning his private life.”—in the opinion’s statement of facts.<sup>257</sup> But when Chief Judge Oakes mentioned this point in *New Era Publications International, APS v. Henry Holt & Co.*,<sup>258</sup> he did so in a dissenting opinion and stated:

While I do not completely agree with Judge Leval’s fair use analysis [in *New Era Publications International, APS v. Henry Holt & Co.*,<sup>259</sup>], it seems to me the majority unnecessarily goes out of its way to take issue with Judge Leval’s opinion. Doing so,

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<sup>251</sup> *Id.* at 1102.

<sup>252</sup> *Id.* at 1102.

<sup>253</sup> *Wright v. Warner Books, Inc.*, 748 F.Supp. 105 (S.D.N.Y. 1990).

<sup>254</sup> *Id.* at 111.

<sup>255</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir.), petition for reh’g denied, 818 F.2d 252, cert. denied, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987).

<sup>256</sup> *Wright*, 748 F.Supp. at 111.

<sup>257</sup> *Salinger*, 811 F.2d at 92.

<sup>258</sup> *New Era Publications International, APS v. Henry Holt & Co.*, 884 F.2d 659, 661 (2d Cir.1989) (Miner, J., concurring), denying reh’g of, 873 F.2d 576 (2d Cir.1989), cert. denied, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1071 (1990) (“New Era I ”).

<sup>259</sup> *New Era Publications International, APS v. Henry Holt & Co.*, 695 F.Supp. 1493 (S.D.N.Y.1988).

even by way of dictum, tends to cast in concrete *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987). *Salinger* is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications not present here by virtue of Hubbard's death.<sup>260</sup>

In short, Chief Judge Oakes sought to limit *Salinger* to its facts and found that the death of the claimant in *New Era* curtailed any privacy claims that might have justified the outcome in *Salinger*. Indeed, that is precisely what Judge Leval held in his opinion in *New Era*.

*New Era* involved the publication of biography of L. Ron Hubbard that criticized Mr. Hubbard and quoted extensively from the works of the deceased person about whom the book was written.<sup>261</sup> In that sense the case parallels *Folsom*, but unlike *Folsom*, the work in *New Era* involved passages that had never been published.<sup>262</sup> At the district level in that case, the plaintiffs argued "that the private nature of some of the Hubbard documents, particularly diaries and personal letters, should favor a finding of infringement."<sup>263</sup> Judge Leval rejected this position "It is universally recognized, however, that the protection of privacy is not the function of our copyright law."<sup>264</sup> As Judge Leval explained some confusion may arise because of common law copyright which was aimed at privacy.<sup>265</sup>

Thus common law copyright appears to track the same interests one may offer regarding a creator's interest in artifacts as described above: economic and persona based interests. In this arena from the economic side, one has the right to control the first

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<sup>260</sup> *New Era Publications International, APS v. Henry Holt & Co.*, 873 F.2d 576, 585 (2<sup>nd</sup> Cir. 1989) (citations omitted).

<sup>261</sup> *New Era Publications International*, 695 F.Supp. at 1497.

<sup>262</sup> *Id.* at 1498.

<sup>263</sup> *Id.* at 1504.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* (citing Warren and Brandeis); *accord* *Salinger v. Random House, Inc.* 811 F.2d 90, 94 (2<sup>nd</sup> Cir. 1987).

economic exploitation of a work and from the persona side, one has the right to control when private works are published. Yet the lines are not so clear anymore. For although common law copyright articulates an economic interest in the work, the persona interest appears as a privacy interest. These two interests, property and privacy, parallel the interests involved in the right of publicity. As many have discussed, that right was born in privacy and it evolved to encompass an economic interest.

In addition, if one recalls the economics of attention and the personhood ideal offered above, one can see that an author who creates public works such a novel may well have reason to assert that her private letters and emails should be protected from a privacy standpoint *and* from a property standpoint. For once one has built an individual brand name through the creation of works of personal expression, one can command interest, focus attention, and garner more acclaim. Put differently one might assert that from a public or private perspective one should be able to control one's identity.<sup>266</sup> Indeed as one commentator has noted, the right of publicity may be understood as protecting the ability to define oneself autonomously.<sup>267</sup> Put differently, these arguments point to non-copyright ways to exert control over creations.<sup>268</sup> As such the next section turns to questions regarding the nature of authorship, personal branding, and the right of publicity to reassess the interests at stake in artifacts to be able to clarify where the boundaries between creators', heirs', and society's interests.

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<sup>266</sup> Cf. Madhavi Sunder, *IP3* (developing a theory of identity and intellectual property); Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., 2005) (noting that commodification and use of property rights can have beneficial effects for those seeking to exert control over cultural identity).

<sup>267</sup> See generally Mark McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITTS. L. REV. 225 (2005).

<sup>268</sup> See Reese *supra* note 225, at 617.

## 2. Non-Copyright Interests

The artifacts at issue are core intellectual property such as writings, videos, and photographs.<sup>269</sup> Thus this Article concerns works that are almost axiomatically copyrightable: original creations.<sup>270</sup> Although this Article seeks to further the basic point that a copyrighted work—digital or otherwise—is property, it acknowledges that the rationales explaining this premise vary and present conflicts towards a coherent system of copyright.<sup>271</sup> Indeed, recent arguments and understandings from copyright about the

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<sup>269</sup> See supra notes \_\_\_ and discussion.

<sup>270</sup> Under copyright law authors own their creations and have the right to control them. The font of this right is Article I, section 8 of The Constitution which states that “Congress shall have the Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The Supreme Court has explained the Copyright Clause as a “limited grant ... by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>271</sup> According to law and economics this provision should be understood as providing authors with the incentive to create and enhance information available to the public by establishing property rights in the work. This argument holds that once the author creates the work, the marginal cost of copying it is essentially zero and without the ability to control such copying the author would be unable to generate income for her work and as such lack motivation to create. *See e.g.*, *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.* 471 U.S. 539, 547 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors). More generally as Keith Aoki has summarized, “U.S. IP laws are premised on four justifications. The first and predominant justification is instrumental and derives from Jeremy Bentham’s utilitarianism, seeking to set the baseline rules to maximize utility for the greatest number of people — what level of IP in the aggregate will induce the optimal production of intellectual works. The second is subsidiary but nonetheless influential, deriving from John Locke’s labor-desert theory — ‘I made it, it’s mine.’ On this view, IP rights are a just desert for the labor and creativity expended. The third justification is more furtive but derives from Hegelian ‘personality’ theory — we produce the creative product because we respect the personhood of the creator. This may be seen in European *droit de suite* moral rights laws. Finally, the fourth is the most elusive — that is the protection of ‘custom’ as articulated by Scottish Enlightenment philosophers. We protect IP because it has been the ‘custom’ of the relevant community to do so. Examples of this strand are extremely rare, although one could say the ambiguity regarding works made for hire and joint works is evidence of the desire to look to ‘custom.’” *See* Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 734 n. 47 (2007). In addition some have argued that the rationales offered in support of the author’s right to control her work go too far by overstating the nature of authorship and the motives behind an author choosing to create. *See e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*”, 1991 DUKE L. J. 455 (1991); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

nature of authorship and the overemphasis on the romantic author of necessity inform this Paper.

In that sense, part of this paper's project seeks to explore and reveal the limits of the rationales offered to support interests which may look like and perhaps even be considered intellectual property in general as they impact future rights.<sup>272</sup> For as the next sections show, although the nature of authorship may indeed be best understood as a system of give and take between authors and society, where the idea of the author as sole creator is not accepted, recent discussions of the trademark aspects of authorship seem to reintroduce the romantic author image and its attendant problems for the broad use of information. This new move to offer authors a trademark interest in their name calls the right of publicity to mind, but as discussed below although that doctrine has recently been examined to offer a more coherent understanding of its operation, it does not resolve the tension between the author and society. Another way to understand this phenomenon is that when one with an interest in a work finds that copyright does not offer a way to exert control over something she values, she will likely turn to other sources of the law to exert and maintain that control<sup>273</sup> as was arguably the case in *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>274</sup> where trademark claims were asserted to vindicate copyright interests according to the Supreme Court.

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<sup>272</sup> In that sense this paper draws on the insights of Keith Aoki, Anupam Chander, Margaret Chon, and Madhavi Sunder, regarding distributive justice issues and intellectual property. See Aoki *supra* note 271; Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1339 (2004); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARD. L. REV. 2821 (2006). In addition this Article seeks to pursue Peter Drahos's implicit invitation to "construct[] interdisciplinary approaches and theories of intellectual property law." See DRAHOS, *supra* note 83, at 33.

<sup>273</sup> Cf. Reese, *supra* note 225, at 613 ("Copyright law no longer provides a copyright owner with the right to control the use of older unpublished works. Those who own copies of such works, however, may well want to continue to exercise such control.").

<sup>274</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

Although an economic interest may be found in these non-copyright claims, they arise in part because of the persona and ultimately the privacy rationales that animate intellectual property. This section examines those non-copyright rationales to see their origins and limits so that upon returning to the question of society's interest in access to the artifacts one can see where an heir's interest ceases and society's commences.

#### a. Authorship and Brands

The Supreme Court's recent decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>275</sup> has garnered much attention.<sup>276</sup> Its greatest impact for this Paper is the argument *Dastar* neglected the importance of a right of attribution and that such a right is necessary.<sup>277</sup> Even before *Dastar*, Professor Roberta Kwall has argued that such a right is necessary.<sup>278</sup> The arguments for such a right vary. Professor Kwall explicitly grounds the call for an attribution right in “the dignity and personality interests of the author, and the ability of the author to command her reputational due.”<sup>279</sup> Two recent calls for a right of

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<sup>275</sup> *Id.*

<sup>276</sup> See e.g., Tom W. Bell, *Misunderestimating Dastar: How The Supreme Court Unwittingly Revolutionized Copyright Preemption* 65 MD. L. REV. 206 (2006) (arguing that the way in which the decision has been interpreted by lower courts has impacted unfair competition and copyright law in ways well beyond the matter the decision addressed); Mary LaFrance, *When You Wish Upon a Dastar: Creative Provenance and the Lanham Act*, 23 CARDOZO ARTS & ENT. L.J. 197 (2005) (arguing that “The ultimate holding of the case - that section 43(a) cannot be used to create a quasi-copyright claim in works with respect to which the statutory copyright has expired - is consistent with the overall federal intellectual property regime, and is arguably consistent with the current language of section 43(a)” but that the decision’s failure to address reverse passing off and offers a solution recognizing authors “the right to prevent others from using an author’s name and reputation as a marketing tool to attract customers for works to which the author did not in fact contribute”; Heyman, *supra* note 76; and Lastowka, *supra* note 88.

<sup>277</sup> See generally Heymann; Lastowka.

<sup>278</sup> See Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WAS. L. REV. 985 (2002) (calling for a federal right of attribution for copyrightable works because copyright and trademark law fail to address personality or other non-monetary interests with which an attribution interest is concerned).

<sup>279</sup> *Id.* at 996.

attribution have looked to trademark law to explain the right as a way to fulfill the traditional explanation for trademark law: reducing consumer search costs and protecting the good will of the producer of the goods.<sup>280</sup> One such call offers a limited trademark approach<sup>281</sup> while the other offers an unlimited and dangerous trademark approach.<sup>282</sup>

As one commentator has offered under a limited trademark approach, attribution acts as an incentive because authors will gain more for their work as they increase their reputation and that will lead to greater economic gains.<sup>283</sup> In addition, that commentator argues that non-economic interests such as fame and a desire to control the quality of the body of work even if that required destroying otherwise valuable creations but of inferior quality from the author's view are furthered by attribution as the creator will allow only the works she deems worthy to be offered to the public.<sup>284</sup> Thus attribution seems to further incentives to create and respects a creator's choice regarding what will bear her name. Furthermore, attribution may operate to reduce consumer confusion.<sup>285</sup> As such the author argues that trademark law should offer a limited right of attribution and only apply when attribution marks "meet three criteria: 1) they should be prominently placed (or deserve to be placed) on the exterior of the work; 2) they should be placed (or deserve to be placed) there with the hope of establishing goodwill and driving sales of the product; and 3) they should serve to designate creative authorship to readers who would care about

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<sup>280</sup> See Heymann at 1383; Lastowka at 1188; but see Mark McKenna, *Schechter's Triumph? The Real Shift in Trademark Law's Normative Foundation*, 82 NOTRE DAME L. REV. 1839 (2007) (examining the history of trademark doctrine and finding that its roots begin in a natural rights understanding of property and that the modern, search costs approach to trademarks cannot claim to draw on trademark law's origins for legitimacy but rather must be evaluated on its own terms).

<sup>281</sup> See generally Lastowka.

<sup>282</sup> See generally Heymann.

<sup>283</sup> See Lastowka at 1176.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1179-1180.

this authorship.”<sup>286</sup> This approach distances itself from the moral rights, persona approach to attribution and takes a utilitarian approach<sup>287</sup> that “focus[es] on the manner in which authorial attribution practices benefit society, [so that] we can move beyond” the “zero-sum game in which authors and artists must find some foothold (ethical, legal, or rhetorical) by which to obtain entitlements from society that are currently lacking.”<sup>288</sup>

Another commentator argues, however, for an unlimited trademark approach where attribution recognizes the creator’s choice in affixing her name to a work or choosing to use a pseudonym or perhaps creating under several different names.<sup>289</sup> But that commentator explicitly denies the connection with the author *per se*. Instead, the idea is that authorship has a copyright component addressing the fact of the creation of the work (“where the question is who holds the rights to exploit the text, to what degree, and for how long”)<sup>290</sup> and a trademark one, the branding choice regarding what name is affixed to the creation.<sup>291</sup> It is the trademark component that justifies attribution, as under this view the author is “dead” and secondary to the reader;<sup>292</sup> the author is reduced to a non-being and is merely a mark affixed to a work so that the reader knows what she has chosen to read.<sup>293</sup>

In addition the trademark approach appears to avoid the romantic authorship view that arguably steered copyright law into overemphasizing the author as sole creator of a

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<sup>286</sup> *Id.* at 1233.

<sup>287</sup> *Id.* at 1180.

<sup>288</sup> *Id.* at 1175-1176.

<sup>289</sup> See Heymann *supra* note 76, at 1394-1412; (“A writer can write under her own name or under a pseudonym; if she chooses a pseudonym, she can choose one that is plain or exotic, gender neutral or gender suggestive.” *Id.* at 1396.).

<sup>290</sup> *Id.* at 1379.

<sup>291</sup> See *id.* at 1379-1380.

<sup>292</sup> See *id.* at 1389-1391.

<sup>293</sup> See *id.* at 1414-1432 (presenting trademark law and arguing that an author’s name functions just as a trademark does with source not being an issue).

text.<sup>294</sup> Yet when one examines the grounds for the author as trademark argument, one finds that the romantic author has returned with similar problems that it presented in copyright law imported to trademark law.

### b. The Return of the Romantic Author

The unlimited trademark approach claims to draw on a post modernist understanding of the nature of authorship to justify its position that the choice of name is best seen as an arbitrary branding one:<sup>295</sup> “In the postmodernists' view, the primacy given to the author's interpretation (via biography or otherwise) was misplaced: Each reader brings his or her own meaning to a text, and each of those meanings is as equally valid as the author's, if not more so.”<sup>296</sup> In addition, there is a relationship between the author and her readers in that the author has necessarily been a reader of others and imports that experience in her writing which in turn is interpreted by her readers.<sup>297</sup> This understanding comports with Dilthey's understanding of the nature of autobiography and biography wherein one's life is informed by others' lives and thus one's life informs others' lives as well.<sup>298</sup>

Yet, by asserting that the choice of name is a branding one that must be honored so that the public can understand the name affixed to the work in the way in which the *one who choose the name wishes*, the unlimited approach does nothing more than shift the

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<sup>294</sup> See *id.* at 1145-1146 (explicitly denying that her approach is a call for moral rights and connecting moral rights to the Romantic author perspective).

<sup>295</sup> *Id.* at 1380 (“[T]his choice of an author's name for each created work is a branding choice.”).

<sup>296</sup> *Id.* at 1388.

<sup>297</sup> *Id.* at 1389 (citing and quoting Terry Eagleton, LITERARY THEORY: AN INTRODUCTION 74 (1983)).

<sup>298</sup> See notes \_\_\_ to \_\_\_ and accompanying text *supra*.

place of the Romantic author view. For under that view, deference is given to the author as sole arbiter and decision maker regarding how the text is to be understood and interpreted<sup>299</sup> which the post modernist view seeks to stop by illuminating by revealing the relationship between the creator, the reader, and that upon which the creator draws to create in the first place. So by holding that attribution choices must be honored as trademarks, the unlimited approach requires that the creator's choice, regardless of that creator being an individual or corporate entity,<sup>300</sup> controls and that the law "ensure[s] that the original attribution survives republication."<sup>301</sup> In short the view that ensures an original intent sounds in Romantic authorship.<sup>302</sup>

Indeed if one accepts that the author's identity is irrelevant and one should focus on the text not the "identity or persona of the author"<sup>303</sup> and that all authorship is pseudonymous,<sup>304</sup> exactly why one must honor "the integrity of the organizational system"<sup>305</sup> to reduce consumer confusion is unclear. After all, the identity tells the reader nothing and the reader will bring whatever interpretations she wishes to the text,<sup>306</sup> so stripping the name from the text harms little other than some possible increase in search

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<sup>299</sup> See Heymann at 1393-1394.

<sup>300</sup> See *id.* and at 1415-1418 (noting the way in which corporations choose various trademarks and then arguing that author naming choices are much the same), at 1419-1420 (arguing that the author name choice functions as a trademark).

<sup>301</sup> *Id.* at 1447.

<sup>302</sup> Cf. Jaszi *supra* note 271, at 497-498 (arguing that moral rights approaches embrace a Romantic author perspective).

<sup>303</sup> See Heymann at 1391, 1449.

<sup>304</sup> *Id.* at 1449.

<sup>305</sup> *Id.* at 1442.

<sup>306</sup> *Id.* at 1392 ("We (and I am including lower courts in this) do not formally inquire of the authoring judge to determine his intentions in writing a particular opinion or even conduct research into the judge's personal background or history or extrajudicial writings to give meaning to the words in the opinion. Rather, we focus solely on the words of the opinion, pondering the turns in the language and attempting to come up with our interpretation of its meaning. The occurrence of circuit splits and the proliferation of law review articles only attest to the truth of the theory: that of multiplicity of meaning, depending on the reader.").

cost when a reader looks for a new text. Yet if upon reading the identity is not important, how search costs matter in the long run is hard to see.

In contrast, the limited approach examines the same idea that the Romantic view of authorship fails to appreciate the nature of authorship but acknowledges that despite the academic criticism of such a view,<sup>307</sup> society cares about the actual identity of the creator at times because of the connection between the creator and a thing,<sup>308</sup> and that society wishes to “explor[e] the personalities and lives of those who have created socially prominent works.”<sup>309</sup> In addition the limited approach disavows equating authorship to trademark<sup>310</sup> in part because of the problems of obtaining a trademark in a personal name but also because of a sensitivity to extending the right of attribution to cases where the name is used to denote works *not* created by the author such as with ghost written or licensed creations.<sup>311</sup> Furthermore the limited approach distinguishes “between collaborative and individual authorship”<sup>312</sup> because society has a greater interest in knowing whether an individual creation is from a particular writer rather than a creation such as a film where society knows that several if not hundreds of people were part of the creation.<sup>313</sup> In other words, an attribution right that required communicating each and every source for a large, collaborative work makes less sense than for a smaller work

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<sup>307</sup> See Lastowka *supra* note 88, at 1183-1184.

<sup>308</sup> *Id.* at 1180-1181.

<sup>309</sup> *Id.* at 1182.

<sup>310</sup> *Id.* at 1194 (“My argument thus far may suggest that we can and should equate author names with traditional trademarks. Yet we can’t and we shouldn’t.”).

<sup>311</sup> *Id.* at 1227 (noting that authors such as Tom Clancy and V.C. Andrews use their names in much the same way as the unlimited approach embraces, i.e., as brands, and that such use allows for deception of society regarding the authorship).

<sup>312</sup> *Id.* at 1232.

<sup>313</sup> See *id.* at 1229 to 1231.

where one expects that the creator will be the same as the last time one purchased a creation with that creator's name on it.<sup>314</sup>

Nonetheless the requirements that attribution marks "meet three criteria: 1) they should be prominently placed (or deserve to be placed) on the exterior of the work; 2) they should be placed (or deserve to be placed) there with the hope of establishing goodwill and driving sales of the product; and 3) they should serve to designate creative authorship to readers who would care about this authorship"<sup>315</sup> implicitly raise the concern that a full trademark approach will take hold under the guise of a right of attribution. For even with a limited application of the right that seeks to eliminate deception,<sup>316</sup> the right still functions within trademark rationales and offers creators a way to exert a right over society's use even when society would otherwise not be required to do so. Moreover by looking to goodwill an attribution right would allow an author or her heirs to claim that attribution must be policed and curtailed when such attribution would harm the brand.

Put differently, the issue will come again to one of control. To understand how the logic of control dominates the analysis, an examination of the right of publicity is needed.

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<sup>314</sup> *Id.* at 1230 ("In the case of written works, if the public purchases a book it believes to be authored by Tom Clancy or V.C. Andrews, we can say that the public has been deceived if Tom Clancy or V.C. Andrews did not, in fact, make a substantial authorial contribution to the authorship of the purchased book. If the public purchases a "Steven Spielberg" movie, however, the public will not be deceived if it finds out that Spielberg did not personally write the script, create the costumes, compose the music, and act all the parts. The public is aware that Spielberg instead supervised, partially controlled and had some auteur influence over various aspects of the movie.")

<sup>315</sup> *Id.* at 1233.

<sup>316</sup> See *id.* at 1221 ("Until and unless we look to trademark's anti-deception theories to fix the result of *Dastar*, awarding new attribution 'rights' will simply introduce a new stripe of property-like protection to an already crowded (arguably overcrowded, overcomplicated, and under-theorized) field of law.").

### 3. Economics and Persona: The Trademark and Publicity Connection

The right of publicity is often stated as the “right to control the use of [one’s] name and likeness[] for commercial purposes.”<sup>317</sup> Although this formulation seems coherent, recent articles have examined the doctrine and found that it lacks a theoretical foundation.<sup>318</sup> This incoherence arguably stems from the way in the doctrine tracks the economic property and non-economic persona tension present in intellectual property law.<sup>319</sup> An examination of the history of the doctrine shows how it opened the door to the claims of economic and non-economic rights that pose problems for a coherent intellectual property system.

A quick survey of the literature about the right of publicity shows that the doctrine traces its roots to one article, *The Right to Privacy*, by Samuel Warren and Louis Brandies.<sup>320</sup> As some have described, Warren and Brandeis had a personal motivation in writing the article: they were tired of the press hounding their families and publishing private facts or photographs a.k.a. personal artifacts.<sup>321</sup> To be fair Warren and Brandeis at least claimed a higher purpose for their endeavor than simply protecting their private lives: they argued that technology and the press had reduced public discourse to trivial interests and gossip and that their solution was necessary to prevent further decline if not

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<sup>317</sup> See Stacey Dogan and Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161, 1162 (2006); accord McKenna, *supra* note 267, at 228.

<sup>318</sup> See Dogan and Lemley at 1162 (noting two distinct problems: claims regarding the merchandising of one’s persona and claims regarding harms to one’s reputation and offering “One root of the problems with these cases lies in the elusiveness of a theoretical justification for the right of publicity”); McKenna at 230 (noting several explanations for the right of publicity and finding “the right of publicity is anything but coherent.”)

<sup>319</sup> See Post *supra* note 18, at 659; McKenna at 235.

<sup>320</sup> Accord McKenna at 228.

<sup>321</sup> Accord McKenna at 228, Post at 649.

save the press from prurient pursuits.<sup>322</sup> The law of the time, however, did not provide a clear recourse for this problem, and as good attorneys, the authors drew on existing legal doctrine such as “breach of trust [and] common law copyright” to make their case that personality interests should be protected.<sup>323</sup> In essence, the article argued for a claim to protect affronts to personal, private information from being placed into the public realm.<sup>324</sup> Thus, personal artifacts such as journals, pictures, letters, and the like that would be subject to common-law copyright were also to be protected insofar as they were purely private. Under their articulation, one would be able to protect one’s “private life, habits, acts, and relations” insofar as they had “no legitimate connection” with one’s public life.<sup>325</sup>

Thus one sees a narrow and distinct interest in protecting one’s persona. And, similar to the logic of common law copyright, as long as one kept the material private, or in a sense unpublished, the public would not be allowed to have access to the information. The interests here are non-economic. As Professors Dogan and Lemley explain:

[T]he cases involving well-known individuals tended to involve blatant misrepresentations that could harm their reputations in the community. The cause of action, in other words, remained deeply rooted in offense to person, to acts that caused “pain and mental stress” by stripping celebrities of control over their reputations and associational choices.<sup>326</sup>

Yet, just as common-law copyright offered a language of control over commercial exploitation of the works and protection from misappropriation of the author’s work, the

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<sup>322</sup> See Dogan and Lemley at 1168-1169.

<sup>323</sup> Accord McKenna at 234.

<sup>324</sup> See Dogan and Lemley at 1168-1169.

<sup>325</sup> Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 216 (1890); accord Dogan and Lemley, 1168 (citing and explaining same).

<sup>326</sup> See Dogan and Lemley at 1169-1170 (citing and explaining same).

publicity cases often contained “property-like” language regarding the right and soon the right of publicity embraced the interest in preventing the misappropriation of the author’s name or likeness—a purely commercial, economic interest—in short a property interest.<sup>327</sup>

Professor McKenna’s examination of the doctrine elucidates the short coming of the various explanations for the right of publicity which run the gamut from economic to non-economic arguments to support it. In his investigation of the logic behind the various normative arguments offered to support the right of publicity, he argues that the doctrine is best understood as protecting the ability to define oneself autonomously.<sup>328</sup> According to McKenna, self-definition interests lie at the heart of the right of publicity and allows an individual to prevent the unwanted use of one’s persona to endorse someone or something regardless of whether the individual has chosen to be public or not.<sup>329</sup> Under this approach when another uses one’s persona, for example in an advertisement, both the private person (i.e., non-celebrity and in a sense unpublished person) and the celebrity have an interest in controlling the use of his or her persona.<sup>330</sup> The privacy and the economic concerns are present, but they do not fully explain the rights the law provides under the right of publicity. Autonomous self-definition thus seeks to provide a foundation for both the economic and non-economic property interests at stake in publicity cases.

Others have argued that copyright offers a way to understand the right of publicity. In contrast, Professors Dogan and Lemley have argued, applying copyright

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<sup>327</sup> See Dogan and Lemley at 1169-1170 (citing and explaining same).

<sup>328</sup> See generally McKenna, *supra* note 267.

<sup>329</sup> See McKenna at 279-285 (explaining that celebrities and non-celebrities have the same interest in control over how they are seen by the public).

<sup>330</sup> *Id.*

doctrine to the right of publicity makes little sense because the two doctrines are not analogous in subject matter or in normative goals.<sup>331</sup> Instead they offer trademark law as the better source for understanding publicity doctrine.<sup>332</sup> Nonetheless drawing on trademark law appears to re-introduce the problems seen with the right of attribution concepts discussed above.

Specifically, as McKenna admits his approach does not address where the autonomous self-definition must give way to speech interests<sup>333</sup> and in that sense what the limits a doctrine grounded in autonomous self-definition may require. In addition a trademark approach of its nature lacks the temporal restriction that one finds in copyright. To be sure the one can argue about copyright's optimal term or that copyright's term runs too long,<sup>334</sup> but for the purposes of this Paper the key point is that copyright does expire at some point in time thus opening the ability of society to use previously restricted material freely. In contrast insofar as the right of publicity is descendible or becomes a trademark right, it lacks such a limit.

Indeed, from the Lockean perspective, the formula—if value, then property—reveals that anyone who sees value will logically try to exert control over whatever offers value as property. As such when copyright no longer offers a way to exert a property interest, it should come a little surprise that non-copyright claims such as the right of publicity and/or trademark will be rallied to exert a property interest in that which offers

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<sup>331</sup> See Dogan and Lemley, at 1164 (arguing that if the law wishes to draw on intellectual property to ground the right publicity, trademark law rather than copyright offers a better analogue for such an endeavor).

<sup>332</sup> See *id.*

<sup>333</sup> See McKenna at 293 (noting that “other interests” including First Amendment ones may “outweigh the individual’s autonomy interest” and “leav[ing] to others the job of determining how to resolve the conflicts.”).

<sup>334</sup> For a discussion of the nuances of these questions see *e.g.*, Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187 (2006).

value.<sup>335</sup> Furthermore, as discussed above, although the economic and non-economic normative arguments for the creator's control over her creations operate well during her life, these non-copyright claims are not so clearly aligned when one considers an heir trying to exert them. In addition, when one considers the need for history and society to access these materials, descendants' ability to exert unending control over the work in the guise of non-copyright and privacy claims becomes pernicious.

#### E. Intergenerational Equity

To be clear, an heir's ability to control access to the physical expression of ideas will persist under the law. The concern is that once the copyright term has expired or in the face of otherwise fair use claims an heir will offer non-copyright rationales such as trademark and privacy to maintain control over ideas that should be free for all to use. One possibility as to why such claims gain traction is that the notions of ownership and control at the heart of the claims have received a fair amount of theoretical attention such as the natural right and persona presentations of property discussed above. In addition, recent scholarship has looked to trademark to vindicate the author's interests in reputation and attribution. In contrast, less has been developed regarding the case for limited control over artifacts in light of future generations' need for access to such artifacts. This section presents such a case by investigating the nature of artifacts' creation including the role

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<sup>335</sup> See Reese *supra* note 225, at 619 (noting the Joyce controversy and stating "While the estate can currently use the copyright in James Joyce's unpublished works to refuse their publication, there is little reason to think that Stephen's interest in controlling those works will change once their copyrights expire.").

society and history play in such creation in the first place and offering some normative arguments regarding society and history's claim for access to the artifacts.

The key point rests in the nature of the claimed interest—here the claim to control the intangible property in question and which the artifact contains. Again, the normative claims for control over tangible and intangible interests by creators do not support the claim that heirs should exert similar control. A better understanding of the way the nature of creation operates elucidates this point. As such, this section draws on the insights of copyright theorists such as James Boyle and others who have questioned the primacy of the Romantic author view of creation and suggests that this view reveals part of the flaws regarding claims to exclusive control. In addition returning to Dilthey's work regarding history, the section examines the relationship between the individual, society, and history both to offer a related but different view of the creation process and to offer normative arguments for access and use of the expressions within those artifacts. Furthermore, although those normative accounts might appear antithetical to economic arguments regarding access and control over the expressions, this section argues that economics also supports limited control over them. Indeed, as Professor Brett Frischmann's work regarding infrastructure, spillovers, and intellectual property indicates, it is the intangibility of the ideas within the artifacts that undercut a claim for exclusive control over the intangible property. Thus, this Paper concludes that both historical and economic theory find that the nature of the creative system, i.e. the relationship between intangible inputs and outputs in a creative system, show that claims regarding creation without the need for inputs are dubious and that claims for later exclusive control are unfounded.

In short, creation requires an individual's effort and perhaps even inspiration to fashion something new. Yet that process itself requires that the individual be part of a system from the individual draws to create. Without the system's offering of inputs for the creator's use, creation would not be possible. Accordingly, a coherent legal regime regarding the intangible property ought to account for this feedback loop as it parses among the interests of creators, heirs, and society. Still to understand what such a regime might look like, one must understand the system in place. As such this section begins with a presentation of the nature of creation.

## 1. Literary and Historical Theory and Creative Systems

Literary theory indicates that “the idea of ‘authorship’—individual control over the created environment”<sup>336</sup> is a “construct”<sup>337</sup> of the Romantic period’s view of authorship.<sup>338</sup> As discussed above, much has been written regarding the claim that this construct of the Romantic author is to be viewed as suspect.<sup>339</sup> In essence the claim is that the author (or creator) and the text are separate such that the text has meaning entirely distinct from the author.<sup>340</sup> Part of this critique notes that the presentation of the process of creation holds “that authors create something from nothing, that works owe their origin

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<sup>336</sup> See Jaszi, *supra* note 271, at 471.

<sup>337</sup> *Id.* at 459.

<sup>338</sup> *Id.* at 455.

<sup>339</sup> See *supra* notes \_\_\_\_ to \_\_\_\_ and accompanying text; accord Lastowka *supra* note 88, at 1215-1216 and at 1216 note 225 (noting “Theories regarding the intersection of romantic authorship, copyright, and literary theory enjoyed a heyday of sorts in the early 1990s.”).

<sup>340</sup> See *id.* at 1183 (“New Criticism, partaking in the broader formalistic rigor of modernism, isolated the text from the author. The inevitable result of this effort was, perhaps unsurprisingly, the collapse of the concept of any fixed meaning in texts and the publication of an essay (authored by Roland Barthes) where the author was proclaimed dead.”).

to the authors who produce them”<sup>341</sup> when in reality authors must rely on other sources to create.<sup>342</sup> This perspective may be found in a perhaps more subtle way in Dilthey’s presentation of history.

To refresh, Dilthey offers an account of history that comes from the autobiographical and biographical.<sup>343</sup> In this understanding,

The course of a life consists of parts, of lived experiences that are inwardly connected with each other. Each lived experience relates to a self of which it is a part; it is structurally linked with other parts to form a nexus.<sup>344</sup>

Thus when Professors Rudolf Makreel and Frithjof Rodi explain that for Dilthey “Human individuals are productive systems in that their lived experience apprehends what is of interest in the present relative to the past evaluations and future goals,”<sup>345</sup> one might discern an understanding that parallels the argument against the Romantic author who seemingly creates out of nothing. For in both cases the claim is that the individual draws on her environment as part of creating.

In short, Dilthey posits that understanding life is the goal and that one must see that each part of life relates to the whole and that the whole in turn “determines the significance of each part.”<sup>346</sup> Autobiography is the way the individual “expresses what an individual knows about its own connectedness.”<sup>347</sup> Autobiography is a type of authorship: “Autobiography is merely the literary expression of the self-reflection of human beings

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<sup>341</sup> Jessica Litman, *The Public Domain*, 39 EMORY L. JOURNAL 965, 965 (1990).

<sup>342</sup> See *id.* at 967; accord JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 57 (1996) (“[E]ven [] remarkable and ‘original’ works of authorship are *not* crafted out of thin air. As Northrop Frye put it in 1957, ... ‘Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise.’”).

<sup>343</sup> See notes \_\_\_ to \_\_\_ *supra*.

<sup>344</sup> See DILTHEY *supra* note 106 at 217.

<sup>345</sup> See *id.* at 4.

<sup>346</sup> *Id.* at 164.

<sup>347</sup> *Id.* at 222.

on their life course,”<sup>348</sup> but it is not the creating from nothing authorship. Rather it is an expression of being part of something; of being connected.

To understand this connectedness fully one requires biography. While alive, one’s narrative is incomplete and cannot fully comprehend its relationship the world around it.<sup>349</sup> Yet in understanding one’s place, one may look to another’s life and this is biography: “When this reflection is carried beyond one’s own life-course to understanding another’s life, biography originates as the literary form of understanding other lives.”<sup>350</sup> To undertake biography requires that one “understand[] manifestations that indicate plans or an awareness of meaning.”<sup>351</sup>

Thus as part of one’s process of understanding one’s “own connectedness,”<sup>352</sup> one looks to another’s life and/or her writings that detail what an “individual finds to be of value in his situation; or … what he finds meaningful in particular parts of his past.”<sup>353</sup> Yet insofar as one is in the process of reflecting on and writing about what one “finds to be of value in his situation; or … finds meaningful in particular parts of his past,”<sup>354</sup> one of course is taking from another as part of one’s autobiography which “is merely the literary expression of the self-reflection of human beings on their life course.”<sup>355</sup> In other words, one is both a taker and creator in this process; one is a part of a productive nexus

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<sup>348</sup> *Id.*; *accord id.* at 267 (“The literary expression of an individual’s reflection on his life-course is autobiography.”)

<sup>349</sup> See MAKREEL, *supra* note 117, at 379.

<sup>350</sup> DILTHEY at 266.

<sup>351</sup> *Id.* at 268.

<sup>352</sup> *Id.* at 222.

<sup>353</sup> *Id.* at 268.

<sup>354</sup> *Id.* at 268.

<sup>355</sup> *Id.* at 222; *accord id.* at 267 (“The literary expression of an individual’s reflection on his life-course is autobiography.”)

where the “the individual [is] a point of intersection that both experiences force and exerts it.”<sup>356</sup>

As such both the literary and historical theories examined here indicate that creation involves use of material outside of the creator. But whereas the literary theory questions whether who creates matters and suggests that creation may not exist at all, the historical presentation seems to capture the way in which each person’s creation fuels another’s. For, as Lastowka acknowledges, whatever death of authorship theory may be posited, many still focus on the author and her life.<sup>357</sup> Thus the focus on an author’s life comports with Dilthey’s presentation of history wherein one’s creation is special as one’s interpretation and understanding of another’s creations and as such is unique, but the creator is not to be seen as disconnected to the system on which it draws to create in the first place. Both the reader and the creator are important but neither is supreme over the other.

Put differently, both views offer that creation is a system where inputs feed a creator who in turn generates outputs that become inputs for another’s creation. So if one could not gain access to and use inputs, one’s ability to engage in a process of creation that offers material for others’ creations would be limited. In addition, one who claimed that her creation somehow ought to be exempt from use by others appears to miss the point that her creation by its nature drew on others’ creations. To better understand this point, the discussion may benefit from economic theory. Specifically the theory of infrastructure and spillovers investigates inputs and outputs in a productive system. As such the next section looks to that aspect of economics to see how it comports with the

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<sup>356</sup> *Id.* at 268.

<sup>357</sup> See Lastowka *supra* note 88, at 1184.

discussion thus far. From that understanding the Paper returns to the question of access and control over artifacts and how the law should understand and address the nature of creative systems.

## 2. Infrastructure and Spillovers

Although one can appreciate that incentives provide levers to foster action, it is not the case that all creation requires incentives.<sup>358</sup> As Professors Brett Frischmann and Mark Lemley have explained “uncompensated benefits that one person's activity provides to another [] are everywhere.”<sup>359</sup> Such benefits are called spillovers.<sup>360</sup> Spillovers are externalities which can be either positive or negative. As Frischmann and Lemley explain, “[P]ositive (or negative) externalities are benefits (costs) realized by one person as a result of another person's activity without payment (compensation).”<sup>361</sup> Many believe must be internalized, that is captured by property owners:<sup>362</sup>

The basic idea behind "internalizing externalities" is that if property owners are both fully encumbered with potential third-party costs and entitled to completely appropriate potential third-party benefits, their interests will align with the interests of society, and they will make efficient (social welfare-maximizing) decisions. For example, if land owners are forced to internalize the costs polluting the air or water might have on neighbors, they will pollute efficiently--that is, only to the extent that the total social benefits of doing so exceed the total social costs. They must also internalize benefits in order to have the proper incentive to invest in maintaining and improving their property. According to the Demsetzian theory, internalization is the silver bullet that magically aligns private and social welfare.<sup>363</sup>

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<sup>358</sup> See generally, Frischmann and Lemley, *Spillovers* *supra* note 20.

<sup>359</sup> *Id.* at 258.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 262.

<sup>362</sup> See *id.* at 264-265.

<sup>363</sup> *Id.* at 265-266.

This view has been taken to apply to innovative, (what this Paper has termed creative) endeavors<sup>364</sup> such that some argue that “only with complete internalization will an inventor be able to efficiently manage an innovation after it is created.”<sup>365</sup> Thus one must be able to prevent others from using one’s creations or loss will occur. In that sense, this logic appears to support the position of those who invoke non-copyright interests to exert control beyond the control copyright provides.

In contrast to this view, Frischmann and Lemley detail that “spillovers are good for society. There is no question that inventions create significant social benefits beyond those captured in a market transaction.”<sup>366</sup> Indeed, studies show that industries and cities with high spillover rates generate more innovation.<sup>367</sup> Yet, these greater innovations are not because of some sort of theft or free-riding; “rather, they are part of a virtuous circle because they are in turn creating new knowledge spillovers that support still more entrepreneurial activity.” And here one must stop, for this description comports with one might expect from literary and historical theory: a creator will draw on others’ creations to understand and create more and those creations in turn will feed other creators as part of “a virtuous circle.”

In setting forth their theory, Frischmann and Lemley detail that certain spillovers, innovation spillovers, behave differently than spillovers from real property.<sup>368</sup> Specifically, innovations have three special qualities. First, innovations are nonrivalrous,

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<sup>364</sup> See *id.* at 266 (“The Demsetzian view is more or less the same in the context of innovation. If an inventor cannot capture the full social benefit of her innovation, the argument goes, she will not have enough incentive to engage in the research and development that will produce that innovation. If there are spillovers from innovation, they must be interfering with incentives to innovate, and we should find them and stamp them out.”).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 268.

<sup>367</sup> *Id.* at 268-269.

<sup>368</sup> *Id.* at 272.

public goods which means that all can use them without depriving another of their use.<sup>369</sup>

Second, spillovers in the creative realm usually produce a new creation for others rather than passively consuming the spillover.<sup>370</sup> “Third, innovation spillovers are different because the legal rules that define an IP right and determine when transactions must occur lack the clarity of traditional property rights. It is difficult--and in many cases impossible--to know whether one is ‘trespassing’ upon another’s IP right.”<sup>371</sup>

These three views fit with the concerns of this Paper: intangible property and control over its use. To appreciate how spillovers matter for this Paper, remember the Joyce case and its approach to the use of Joyce’s writings. The copyright has expired and the writings at issue are intangible property. As discussed above and of concern to spillover theory this intangible property is nonrivalrous<sup>372</sup> and like “Ideas can be freely copied by others in the absence of a legal rule restricting that copying without depriving their creators of the use of the ideas.”<sup>373</sup> Yet the estate has sought to stop readings of *Ulysses*, sued to prevent a new edition of *Ulysses* from being published, “threatened the Irish government with a lawsuit if it staged any Bloomsday<sup>374</sup> readings; [after which] the readings were cancelled”<sup>375</sup>, and “rejects nearly every request to quote from unpublished letters.”<sup>376</sup> Other estates have followed similar patterns of restricted control.<sup>377</sup>

The second aspect of innovation spillovers is the way in which they produce more for society. Estates that seek to exert control beyond copyright by using trademark-

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<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 273.

<sup>371</sup> *Id.* at 274.

<sup>372</sup> See note 47 *supra* and accompanying text.

<sup>373</sup> *Id.* at 272-273.

<sup>374</sup> Bloomsday is June 16, the day chronicled in James Joyce’s *Ulysses*. See Max, *supra* note 24, at 34.

<sup>375</sup> *Id.* at 35.

<sup>376</sup> *Id.*

<sup>377</sup> See Max, *supra* note 24, at 36; see Gilsdorf, *supra* note 30.

styled attribution, right of publicity, or privacy claims to stop others from using ideas and the expression of those ideas in new work explicitly cut off the ability to generate new public goods and destroy the virtuous circle of creation. This use of non-copyright doctrines demonstrates precisely the sort of extreme control that defeats the potential benefits from spillovers. It also points to the third aspect of innovation spillovers: the law governing the use of ideas.

As Frischmann and Lemley note, and the Joyce case illustrates, copyright and its sub-doctrines already provide enough specters of lawsuits to chill potential users of spillovers from creating goods upon which others would also build.<sup>378</sup> In addition to potential copyright claims, the stated motivation of the Joyce estate is “to put a halt to work that, in [the estate’s] view, either violates family privacy or exceeds the bounds of scholarship.”<sup>379</sup> The Joyce estate is not alone in its perspective. The estates of T.S. Elliot and J.R.R. Tolkien have expressed similar displeasure at academics’ approach to the creator’s work.<sup>380</sup> Accordingly, the trademark, privacy, and other rights offered to expand control over these creations will increase the confusion of when one may be trespassing on the already difficult question of when one may be trespassing on another’s copyright<sup>381</sup> not to mention those claims lack a temporal restraint which serves only to perpetuate indefinitely the problem of confusing a would-be beneficiary of the spillover.

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<sup>378</sup> Frischmann and Lemley, *Spillovers* *supra* note 20, at 274.

<sup>379</sup> Max, *supra* note 24, at 36; *see also* Defs.’ Reply to Pl.’s Opp’n to Defs.’ Mot. to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss’s Am. Compl., Shloss v. Joyce, No. CV 06-3718 (N.D. Cal. 2007), 2007 WL 444886 (“Joyce objected to Shloss’s plan for a book about Lucia Joyce because it is an invasion of privacy.”, “While Defendants have alleged that a priority of the Estate is to protect the privacy of the Joyce family, it has not stated that copyright interests are used for this purpose. Instead, as can be seen from the correspondence, Joyce’s goals have been to protect family privacy (i.e., by not providing assistance with books on private family matters) *and* defend the integrity, spirit and letter of James Joyce’s works.”).

<sup>380</sup> See Max, *supra* note 24, at 36; *see* Gilsdorf, *supra* note 30.

<sup>381</sup> See Frischmann and Lemley, *Spillovers* *supra* note 20, at 275 (noting that copyright’s strict liability, fair use, idea-expression, and other doctrines make copyright law difficult to navigate).

### 3. Infrastructure for the Future of Ideas

At this point it is helpful to recall the problem at hand. Experience is being documented like never before. Both the quantity of writing and the way people write have changed. The advent of software tools such word processors, blogs, and most importantly email has allowed everyone with a computer and an Internet connection to author and create in vast quantities. The question becomes at what point does the author retain the interest in the work and when does society have unfettered access to the work? Thus far, arguments for the creator's ability to control the work offer some compelling ways to understand the creator's interests and why the law may protect those interests. What has not been clear is why heirs should be able to assert the same interests. Indeed heirs have little to offer for their claim especially when seen against the way in which creation occurs and the potential benefits to the rest of society.

To begin, copyright addresses most if not all the claims one might rally to suggest that heirs should be able to exert some sort of control over a work. As noted already, copyright's term may be suboptimal and there may be little to justify its extension to 70 years beyond the life of the author. Nonetheless that is the case and as such copyright law addresses the arguments that the creator and her heirs must be able to retain control over the work for incentive and fairness reasons. Given the length of a copyright term the creator and her heirs have ample time to generate income from the creation.

Recall that the idea is that a creator needs incentives to create nonrivalrous intangible goods lest after creation others copy at will and no remuneration is had.

Copyright's term offers creators and their heirs a large window of opportunity to exploit whatever economic value they can from the work. If successful, they can take that wealth and invest it to generate other wealth; nothing necessitates that an ever-flowing source of income be granted under copyright. Furthermore, creations by their nature draw on the creations of others so any claim that limits others' ability to use the creations must account for the fact that without access to other creations, the creation that demands payment or denies access had less chance to exist in the first place. In economic terms these creations are infrastructure and denying others' ability to use them has negative effects.

As Frischmann has explained “‘infrastructural’ resources [are] shareable resources capable of being widely used for productive purposes for which social demand for access and use generally exceeds private demand by a substantial margin. Examples of such goods include education and, significantly for our purposes, information.”<sup>382</sup> Furthermore, “Ideas themselves are a good example of infrastructure, because they are not merely passively consumed but frequently are reused for productive purposes.”<sup>383</sup> This description fits the material at issue here. The problem is that markets are not well-equipped to address the way infrastructure resources operate because:

The market mechanism exhibits a bias for outputs that generate observable and appropriable benefits at the expense of outputs that generate positive externalities. ... The problem with relying on [private property rights and] the market is that potential positive externalities may remain unrealized if they cannot be easily valued and appropriated by those that produce them, even though society as a whole may be better off if those potential externalities were actually produced.<sup>384</sup>

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<sup>382</sup> *Id.* at 279.

<sup>383</sup> *Id.* at 281.

<sup>384</sup> *Id.* at 280.

Thus in the present issue, the private market approach to the ideas as expressed in writing is that it fails to appreciate that the benefits to creation in general that more open access would allow.

To be clear this Paper is not arguing that all aspects of copyright be abandoned. Rather it accepts the idea that “IP is a mixed system of private rights and commons--a semicommons--designed to generate both incentives and externalities.”<sup>385</sup> The goal is to allow creators “to capture some of the benefits” of creation but as Lemley has argued the system does not require that all benefits be captured as that will lead to a reduction of creation rather than promoting the balance between incentives and externalities that a semi-commons seeks.<sup>386</sup>

As stated previously, the artifacts at issue in this Paper fall under copyright, which “creates a semicommons arrangement--a complex mix of private rights and commons.”<sup>387</sup> The private side “enables rightsholders to appropriate some of the surplus generated by their investments in creation, development, and dissemination.”<sup>388</sup> The commons side “promotes spillovers. Through a variety of leaks and limitations on the private rights granted, copyright law sustains common access to and use of resources needed to participate in a wide variety of intellectually productive activities.”<sup>389</sup> As Frischmann and Lemley detail, key aspects of copyright law such as “limited duration” so that work enters the public domain,<sup>390</sup> its “limited scope” including the exclusion of ideas from

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<sup>385</sup> *Id.* at 282.

<sup>386</sup> *Id.* at 283.

<sup>387</sup> *Id.* at 284.

<sup>388</sup> *Id.* at 285.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

copyright,<sup>391</sup> and defenses such as fair use<sup>392</sup> facilitate the semi-commons. But the picture is not perfect.

The contours of one's ability to discern what is or is not fair use is not always clear in copyright.<sup>393</sup> As Frischmann and Lemley point out the multiple ways that copyright facilitate semi-commons poses a problem because “Users may know that a particular work is copyrighted, but that knowledge gives them little sense of whether a particular use of the work is legal or not, because the idea-expression dichotomy, the filtration of facts and scenes-a-faire, the merger doctrine, and the fair use doctrine make it hard to tell whether a surprisingly wide range of uses are permissible.”<sup>394</sup>

Trademark, the right of publicity, and privacy present larger problems. They are unlike copyright in that they do not foster the semi-commons as they lack “leaks and limitations on the private rights granted.”<sup>395</sup> This lack poses a threat to the spillover use of ideas. For example trademark lacks a temporal restraint as it persists as long as the mark is in use. The right of publicity is a state doctrine with inconsistent rules regarding the length of its term.<sup>396</sup> And as the Joyce case shows privacy claims may be asserted well after death of the person’s privacy at issue.

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<sup>391</sup> *Id.* at 285-286.

<sup>392</sup> *Id.* at 286-287.

<sup>393</sup> *See id.* at 274-275.

<sup>394</sup> *Id.* at 275.

<sup>395</sup> *Id.*

<sup>396</sup> *See e.g.*, McKenna *supra* note 267 at 271, n. 203 (discussing varying degrees of protection and duration for right of publicity claims depending on which state law governs the claim); *see also* Edward H. Rosenthal, *Rights of Publicity and Entertainment Licensing*, 879 PLI/Pat 273, 283-284 (2006) (detailing 17 states recognize a descendible right of publicity and that the terms are set by either common law or statute and range from 10 years to potentially unlimited with use).

Indeed, in the Joyce case the author first stripped the book of references the Joyce estate found objectionable based on threats of copyright and privacy based suits.<sup>397</sup> Once published, the reviews indicated that more support would have helped the book make its case. It was after these responses that Professor Schloss chose to publish a supplement with the material to which Joyce's estate objected and that required her to gain the help of Stanford's law clinic. Although the Joyce case has settled, many academics or others who would use information spillovers to generate new ideas are not in the position to have a law school legal clinic agree to handle the case. Copyright is not alone in affording plaintiffs a way to overstate the level of control the law affords them. As the Chilling Effects Web site details,<sup>398</sup> trademark and the right of publicity is often invoked as plaintiffs claim that spillover uses are potentially infringing. And, like copyright doctrines, trademark doctrines such as genericism<sup>399</sup> and nominative fair use create a situation where one has "little sense of whether a particular use of the work is legal or not."<sup>400</sup>

#### 4. Information Log Jams

Literary, historical, and economic theory show that information is vital to creative systems. A problem occurs when the law fosters information log jams that interrupt the

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<sup>397</sup> See Amended Complaint for Declaratory Judgment and Injunctive Relief at ¶¶47-66 (detailing the efforts of the Joyce estate to prevent the publication of Schloss' work and the changes to the work based on the threats of litigation), at ¶¶ 80-88 (detailing the Joyce estate's use of litigation and to stop arguably fair uses), and at ¶¶93-96 (showing the way in which the estate invokes copyright to further non-copyright interests such as privacy).

<sup>398</sup> [www.chillingeffects.org](http://www.chillingeffects.org)

<sup>399</sup> See generally Desai and Rierson, *supra* note 75.

<sup>400</sup> Frischmann and Lemley, *Spillovers* *supra* note 20, at 275.

flow of information. Literary theory demonstrates that creators draw on other works to generate new works which in turn start another cycle of creation. Historical theory shows that individuals draw on other's autobiographies and biographies to generate their own autobiographies and biographies which in turn start another cycle of historical expression. Economics shows that creators generate information itself by drawing on other's creations and offering of information to create and then others take that new creation to inform their work.<sup>401</sup> These theories offer different yet structurally similar accounts of a feedback loop in creative systems. Intellectual property law then is supposed to mediate between the inputs and outputs and/or the access or denial of access within creative systems. Nonetheless, shifts in the way creators have used intellectual property law now threaten the functioning of the creative systems.

Intellectual property law offers much to support creative systems as it offers creators protection for and power over creative works including how others may use them. Yet, this same protection and power can establish a system where the creators who benefited from access to and use of previous creations, now prevent others from drawing on the well of information. Although much of the creations at issue are seen as governed by copyright, as their value becomes more apparent, creators seek to exert control beyond that offered by copyright. These other avenues of control such as trademark, the right of publicity, and privacy lack the albeit thin restrictions the copyright system places on control. In short these new arguments allow a creator and her heirs to create information log jams that stop the flow of information those who often make productive use of such information.

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<sup>401</sup> *Id.* at 268-269, 279.

Although theoretical justifications for the creator's control over the material at issue indicate that such control (though one may debate the level of such control) fosters creativity, these justifications offer little to support heirs' ability to extract rent for the last generations' work. Unlike tangible property, the intellectual property at issue is sharable and possession does not dictate the contours of the control needed to protect the property at issue. Heirs neither participate in the work's creation nor are as likely to manage it well. To understand this point one must appreciate that markets are not well-suited to managing the positive externalities that information is likely to generate and private individuals will overvalue their control at the cost of lost production within the otherwise open creative system.<sup>402</sup>

When such control is exerted through intellectual property or other legal doctrines (such as trademark, right of publicity and/or privacy) with unlimited and/or uncertain term limits not to mention unclear boundaries as to what acts lead to liability under those doctrines, the virtuous circle of creativity that the law ought to foster as part of intellectual property law is broken. This shortsighted focus on individual interests neglects the interest of society in having access to information needed for further creation. Indeed, as shown above, three theoretical approaches to the information in question indicate it ignores the very way in which information is created. As such recognizing these non-copyright interests for expressions already protected under copyright offers too much protection such that creation itself is threatened. The law should not foster such a result.

## F. Conclusion

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<sup>402</sup> *Id.* at 280.

Not all property online is virtual. Much of it falls under what the law recognizes as intellectual property. Once intellectual property law applies to a creation, one must consider which part of the law applies. Copyright with its long term before expiration and complex rules regarding fair use seeks to manage much of this material. Yet, with more and more creation occurring online, creators find that control over their work is mediated if not ceded to other parties such as email providers and web hosting services. On one hand the theoretical justifications for allowing a creator better control over her work offer much to support such control during her lifetime. Once the creator dies, however, these justifications offer little to support an heirs' claim to the work. Indeed, once one appreciates the nature of creativity which requires that a creator draw on what others create to offer her own creation, one sees that little justifies lengthy or unlimited control by an heir who did not participate in the creation in the first place. In addition, when one considers the potential benefits of allowing open access to creations during a creator's life and certainly after copyright expires, granting heirs further control via non-copyright doctrines undermines the creative systems that creators and society desire in the first place. Thus although a creator may have strong arguments for non-copyright based, economic and non-economic perspectives for her control during her lifetime, the same or other justifications do not support extending such control to heirs. Insofar as heirs seek to assert such non-copyright claims and the law recognizes them, the balance between access to creative inputs and the generation of creative outputs will tilt away from creative production in a manner that the law ought not recognize or foster.