

Exposing Professionalism in United States Copyright Law: The Disenfranchised Lay Public in a Semiotic Democracy

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Introduction

THE LEGAL STATUS OF AUTHORSHIP has become increasingly easier to acquire under the U.S. copyright regime. For example, case law establishes a low threshold for originality, previously-mandated formality requirements are extinguished, and the pervasive spread of information and communication technologies (ICTs)¹ makes fixation² in a tangible medium of expression a condition that is easily

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1. For example, the Internet, wireless networks, cell phones, and other communication technologies that provide access to information through telecommunications. *ICT*, TECHTERMS.COM, <http://www.techterms.com/definition/ict> (last visited June 14, 2014).

2. *See infra* Part I.

fulfilled even by mundane communicative expressions.³ Indeed, some scholars note that copyright law has expanded in a way that may do disservice to its underlying purpose to “promote the Progress of Science and [the] useful Arts.”⁴ By granting copyright too easily and too widely, the current regime is inadequate as (1) it rewards pedestrian works that do little to promote useful arts and sciences;⁵ (2) it fails to increase the number of works produced despite the pecuniary incentive that copyright protection provides;⁶ and (3) it increases the cost for the production of future works.⁷ By opening additional channels of distribution, ICTs also weaken the role of traditional publishers.⁸ Individuals with basic technological knowledge can bypass traditional media and forums, such as journals, newspapers, and magazines, to express themselves and connect with one another.⁹ Among those who make their works available on the Internet, some take a step further to adopt a private ordering strategy,¹⁰ which can bring together mem-

3. See Joseph Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 458 (2009).

4. U.S. CONST. art. I, § 8, cl. 8. See JESSICA LITMAN, DIGITAL COPYRIGHT 77-78 (2001); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 856 (2004); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCKDOWN CULTURE AND CONTROL CREATIVITY 131, 249-50 (2004).

5. See Miller, *supra* note 3, at 463-64.

6. See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 4-5, 96-98 (2006) (discussing non-market motivations for actors producing information and knowledge).

7. See Ann Bartow, *Copyrights and Creative Copying*, 1 U. OTTAWA L. & TECH. J. 75, 89-90 (2004) (suggesting that the fear of copyright infringement lawsuits discourages potential authors from building upon existing copyrighted works); LAWRENCE LESSIG, THE FUTURE OF IDEAS 199-217 (2001) (arguing that intellectual property law is an artificial system designed to promote innovation, but too much protection stifles progress and allows the interests of those who benefit from more protection to dictate the development of the law and drive new competitors out of the field).

8. See Andrew Richard Albanese, *PW Select December 2012: Miami Advice*, PUBLISHERS WEEKLY (Dec. 21, 2012), <http://www.publishersweekly.com/pw/by-topic/authors/pw-select/article/55226-pw-select-december-2012-miami-advice.html> (stating that self-publishing has been widely accepted by readers and would-be-authors); Clay Shirky, *Newspaper and Thinking the Unthinkable*, CLAY SHIRKY BLOG (Mar. 13, 2009), <http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable/> (discussing the hardships the Internet created for traditional print newspapers, and arguing that while our society still needs journalism, newspapers should not be the only distribution model); Mary Ann Kennan, *The Economic Implications of Alternative Publishing Models: Views from a Non-economist*, 28 PROMETHEUS 85, 86-87 (2010).

9. See Michael Keren, *Blogging and Mass Politics*, 33 BIOGRAPHY: AN INTERDISCIPLINARY QUARTERLY 110, 110 (2010).

10. *Compulsory Terms and Private Ordering*, THE BRIDGE, <http://cyber.law.harvard.edu/bridge/LegalProcess/compulsory.htm> (last visited June 7, 2014) (explaining that private orders are regulations voluntarily initiated and implemented by private, non-government parties).

bers of the public to contribute to a collaborative work.¹¹ Armed with the legal status of authors and copyright owners, such producers still permit the public to access and use their copyrighted works in various ways.¹² These strategies are intended to encourage wide distribution and discussion, such as blogging and citizen journalism,¹³ as well as to enable larger collaborative projects like free software development and Wikipedia.¹⁴

Although the expansion of social media and peer-production models may have led to an unprecedented decentralization of knowledge and information production,¹⁵ it does not guarantee that those who publish through non-traditional channels are heard or appreciated. One's societal authority and impact as an author cannot be obtained merely by receiving authorship status under copyright law.¹⁶ Though it is easy to acquire the legal status of an author and the accompanying property rights, symbolic resources such as one's reputation, prestige, credibility, and authority in the field are not.¹⁷

11. See *infra* Part IV.B.

12. See Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 391-92 (2005) (discussing GNU General Public Licenses, other free software licenses, and Creative Commons' licenses authors can obtain to permit public access and use of their copyrighted works).

13. See, e.g., *What is Global Voices?*, GLOBAL VOICES, <http://globalvoicesonline.org/about/> (last visited July 15, 2014). To encourage wide distribution, Global Voices publishes under a Creative Commons Attribution-Only license. *Attribution Policy*, GLOBAL VOICES, <http://globalvoicesonline.org/about/global-voices-attribution-policy/> (last visited Jan. 15, 2014).

14. See *Wikipedia: Copyrights*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:Copyrights> (last modified Oct. 30, 2014).

15. See Sharon Meraz, *Is There an Elite Hold? Traditional Media to Social Media Agenda Setting Influence in Blog Networks*, 14 *J. COMPUTER-MEDIATED COMM.* 682, 684 (2009), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.2009.01458.x/full>. "The independent blog platform is redistributing power between traditional media and citizen media. . . . Unlike traditional media platforms, independent blog networks are utilizing the blog tool to allow citizens more influence and power in setting news agendas." *Id.* at 701.

16. See *id.* at 701 ("[T]hough traditional media's agenda setting power is no longer the sole influence, its influence still remains a driving, 'A-list' force in the creation of blog agendas.").

17. See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 291 (Richard Nice trans., 1984). Pierre Bourdieu used the concept of "symbolic capital" to discuss class and status. *Id.* According to Bourdieu, one's symbolic capital—reputation for competence, image of respectability and honourability, can be easily converted into one's political position to make one notable. *Id.* In Bourdieu's discussion of cultural resources, he argues that an artist's capital is symbolic capital of recognition—a condition of being perceived—which assumes the belief of social agents engaged in the field. PIERRE BOURDIEU, *PRACTICAL REASON: ON THE THEORY OF ACTION* 102 (1998). These social agents' "modes of thought are constituted in such a way that they know and recognize what is proposed to them, and that they believe in it." *Id.* at 104. Bourdieu regards symbolic capital as a "theory of belief or . . . a theory of the production of belief, of the

This Article stresses the prominence of copyright law's role, alongside its property allocation function, in the distribution of symbolic resources. This is because professionalism—the idea that authors are professionals or experts in their respective fields—is ingrained into the copyright system. This connection is seen throughout the legislative history of copyright law, as well as in case law, and is particularly apparent in joint work disputes involving collaborators having various backgrounds and training.¹⁸

Existing literature about the joint work doctrine¹⁹ notes that courts prefer sole ownership of copyrights and recognize joint authors only grudgingly.²⁰ Some scholars argue that the image of the “romantic author”—a genius who works in solitude and is the only source from which the resulting work originates, hence deserving sole ownership over a work—is so strong that it overshadows the value contributed by collaborators.²¹ Others assert that courts are mainly concerned with economic efficiency.²² Efficiency is promoted when

work of socialization necessary to produce agents endowed with the schemes of perception and appreciation that will permit them to perceive” and submit to the rules of the respective social space. *Id.* at 103.

This Article uses the more general term, “resources,” in place of “capital” to discuss the prestige and power that comes with a recognized status in the production of copyrightable works.

18. See *infra* Part III.D.

19. The joint work doctrine grants co-ownership in copyrighted works prepared by two or more authors if they “intended that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 102(a) (2012).

20. Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 54 (1997); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUALIST APPROPRIATION IN LAW AND LITERATURE* 29, 51 (Woodmansee & Jaszi eds. 1994).

21. See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 291-92 (1992).

[T]he law has yet to be affected by the “critique of authorship” initiated by Foucault and carried forward in the rich variety of post-structuralist research that has characterized literary studies. . . . Indeed . . . it would seem that as creative production becomes more corporate, collective, and collaborative, the law invokes the Romantic author all the more insistently. There would thus seem to exist both considerable potential and a pressing need to reestablish communication between the two disciplines.

Id. at 292.

22. See Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 893-94 (1997) (book review). Mark Lemley challenges James Boyle's view that romantic authorship is fundamental in shaping intellectual property laws, which he found unconvincing. *Id.* Instead, he argues that the central analytical framework for the development of modern trends in intellectual property law is a property-based economic theory. *Id.* at 874.

The rise of property rhetoric in intellectual property is closely identified . . . with a particular economic view of property rights This view, which emerge[d] from the Chicago School law-and-economics movement, emphasizes the impor-

authors are owners (“owner-authors”), and the copyright system prefers concentrated ownership to a distributed one.²³ Both views provide important insights, but neither yields an adequate framework for explaining how U.S. courts rule in joint work cases. The notion of the romantic author could have an impact on judges, but judges are aware some works have multiple contributors and consciously make policy choices when allocating property interests.²⁴ The owner-author view also does little to explain why judges prefer certain types of contributors. This Article argues that aside from romantic authors and the owner-authors, there exists a third image of authors as expert professional practitioners. The image of the “expert author” is a tool for better understanding the outcomes of joint work cases.

As professionals are more likely to be rewarded with the exclusive control of copyrighted materials, they in turn also obtain more interpretive authority.²⁵ Copyright law treats exclusive control as a reward for an author’s contribution to the promotion of the progress of science and useful arts. Under this rationale, professional practitioners, endorsed as expert authors, recursively gain more prestige in society. By pointing to the conception of expert authors, this Article argues that the institution of copyright law does not merely allocate material resources, but also impacts the allocation of symbolic resources, such as prestige, authority, and power in the production of knowledge.²⁶

tance of private ownership as the solution to . . . the “tragedy of the commons.” The central idea is that joint or public ownership of a piece of property is inefficient because nonowners who use the property have no incentive to take care of it.

Id. at 897.

23. See LESSIG, *supra* note 4, at 161-68.

24. See *infra* Part III.C-D.

25. Amongst the exclusive rights granted by copyright law, authors often exercise the right to prepare derivative works and the right to publically perform their works to prevent unwanted interpretations and associations with particular social contexts. See Deidre A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 512 (2012); David Hesmondhalgh, *Digital Sampling and Cultural Inequality*, 15 SOC. & LEGAL STUD. 53, 55-57 (2006) (discussing representational politics—how copyright protects or fails to protect musicians from less powerful social groups).

26. Michel Foucault explains the connection between symbolic resources and power by describing how a web of normative values influences judges’ modern disciplinary power. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 304 (Alan Sheridan trans., Vantage Books 2d ed. 1995) (1977). This power shapes individuals, as knowing subjects, and normalizes their behavior through continuous local struggles. MICHAEL FOUCAULT, *POWER/KNOWLEDGE* 125-33 (Colin Gordon eds., 1980). While preserving the local struggles and the bodily discipline, Pierre Bourdieu is more sensitive to the domination between social classes. BOURDIEU, *PRACTICAL REASON: ON THEORY OF ACTION*, *supra* note 17, at 102-03. Symbolic power disguises the arbitrariness of social categorizations by representing them as legitimate and natural. Individuals adhere to an unreflective view that ensures dominance is

With unprecedented opportunities to access and exchange cultural works, several copyright scholars aspire to achieve a semiotic democracy,²⁷ meaning that audiences and consumers are empowered to interpret cultural symbols differently from the meanings provided by the authors.²⁸ Nevertheless, without symbolic resources, many views from individuals or groups are still barred from the meaning-making process in society.²⁹ This Article seeks to explain how the institution of copyright affects the distribution of symbolic resources. Recognizing the image of expert author and the professionalism ingrained in copyright law is an important step in reconsidering the relationship between knowledge and power in society. This comprehension makes room for the general public to participate more meaningfully, furthering the achievement of a robust semiotic democracy.

While it is true that U.S. copyright law sets a low originality standard and easily recognizes one's legal status as an author, Part I of this Article argues that professionalism is still an integral part of U.S. copyright law, and can affect courts' decisions regarding authorship and ownership. Part I supports this argument by examining legislative his-

taken as accepted. Cairan Cronin, *Bourdieu and Foucault on Power and Modernity*, 22 PHIL. & SOC. CRITICISM 55, 66 (1996).

In the context of knowledge production, individuals are disciplined to recognize certain information as more reliable or valuable than others when it is produced in a way endorsed by society. Adhering to the norm appears to save individuals effort in examining the substance of the information. However, blind adherence to this system also prevents us from appreciating the knowledge produced by subscribing to an alternative method. This Article regards professionalism as one of the symbolic powers in the knowledge production system that U.S. copyright law has uncritically incorporated.

27. See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 491 (2006).

28. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 30-31 (2004); BENKLER, *supra* note 6, at 15; Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334-35 (2004).

29. For example, although Wikipedia is an encyclopedia that anyone can edit, indigenous communities may find it difficult to have their views included because Wikipedia prefers references to published literature in order to enhance reliability. *Research: Oral Citations*, WIKIMEDIA, https://meta.wikimedia.org/w/index.php?title=Research:Oral_Citations&oldid=3171583 (last modified Dec. 22, 2011). This preference for published material poses a challenge for communities with strong oral traditions to grow their language on Wikipedia. *Id.* Wikipedia applies this editorial policy generally and does not target on indigenous communities or colonized societies. *Id.* When celebrated author Philip Roth complained about a description about his work on Wikipedia, editors refused to include Roth's view because Wikipedia does not consider statements credible unless there is a reference to a secondary source. Phillip Roth, *An Open Letter to Wikipedia*, THE NEW YORKER (Sept. 7, 2012), <http://www.newyorker.com/online/blogs/books/2012/09/an-open-letter-to-wikipedia.html>. Within two weeks, Roth managed to have his view published in the New Yorker, which then met Wikipedia's reliable requirement. *Id.* However, not everyone who disputes Wikipedia contents will be able to have their own views published to gain reliability.

tory from events that took place during the two general copyright revisions—the 1909 and 1976 Copyright Acts. Additionally, Part I provides facts showing that various professional organizations advocated for the expansion of copyrightable subject matters. Typically, the organizations argued that (1) new technologies made their work easier to reproduce; (2) the societal contributions of their members are not inferior to those of the professional practitioners who produce copyrightable subject matters; and (3) professionals produce better quality products than amateurs, therefore needing copyright as an incentive to produce new works.

Part II demonstrates that the justifications professional organizations used to demand copyright protection for their works cause a recursive rhetorical divide between professional practitioners and the lay public. This rhetorical divide solidifies the assumption that professional practitioners further societal progress and disenfranchises the lay public in the politics of copyright. Part III analyzes major joint work cases involving various subject matters and different types of professional practitioners. In joint work cases some courts may show a bias for the party that is a professional practitioner.³⁰ This Article highlights such bias by analyzing the courts' reasoning, noting how the image of an expert author compels courts to privilege collaborators who are not only professionals, but whose practice has a stronger connection with the subject matter of the disputed work. Part IV discusses the return of the long-disenfranchised lay public to copyright politics. The lay public returns by both producing cultural works and engaging in public debates about copyright reform. However, the unequal distribution of symbolic resources continues to marginalize the contributions and the voices of the lay public.

The Article concludes that the notion of professionalism in copyright law provides a new analytical tool for examining the history of copyright authorship. The exposure of professionalism in U.S. copyright law calls for a serious reevaluation of the relationship between knowledge, symbolic power, and the role copyright plays in endorsing the credibility and authority of professional practitioners. Professionalism is especially important to recognize while examining the recent copyright politics, and is key to obtaining copyright reform that moves toward a more inclusive semiotic democracy.

30. Lape, *supra* note 20, at 63-64 (“Note that where one alleged co-author is a professional, this circumstance appears to bias some courts against joint authorship.”).

I. The Expansion of Copyrightable Subject Matter and the Lobbying by Professional Organizations in Congress

The Progress Clause of the U.S. Constitution states that Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³¹ The subject to which the Clause refers is the “author,” and the objects stated are his “writings.”³² However, the Constitution fails to define either “author” or “writings.” The scope of copyrightable subject matter continuously expanded as various types of professional practitioners sought to secure and exploit their economic interests through copyright.³³ Correspondingly, the concept of an author also expanded to include a variety of professional practitioners who could obtain exclusive control of their works.³⁴ The expansion of copyrightable subject matter often increases the hurdles and costs for professional practitioners in related fields.³⁵ Not surprisingly, the forces behind the legislative expansion of copyrightable subject matter typically involved various professional organizations, each lobbying for the interests of their own constituencies.

The Copyright Act of 1790 listed three types of subject matter: “maps, charts, [and] books.”³⁶ “[D]ramatic composition, designed or suited for public representation,” was added to the list in the Copyright Act Amendment of 1856,³⁷ and photography in the 1865 Amendment.³⁸ The International Copyright Act of 1891 introduced new protectable subjects such as “painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts.”³⁹ The 1909 Copyright Act reorganized all the previously protectable categories into subsections, and also added

31. U.S. CONST. art. I, § 8, cl. 8.

32. *Id.*

33. *See infra* Part I.

34. *See id.*

35. *See infra* text accompanying notes 50-53, 94-96.

36. Copyright Act of 1790, ch. 15, 1 Stat. 124 (“[T]he author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk’s office, as is herein after directed.”).

37. Copyright Act Amendment of 1856, ch. 169, 11 Stat. 138, 139.

38. Copyright Act Amendment of 1865, ch. 126, 13 Stat. 540.

39. International Copyright Act 1891, ch. 565, § 4952, 26 Stat. 1106, 1107.

“[I]ectures, sermons, addresses, prepared for oral delivery.”⁴⁰ Further, the 1971 Amendment included sound recordings,⁴¹ and the 1976 Act brought in pantomimes, choreographic works, motion pictures, and other audiovisual works.⁴² In 1980, computer software was granted federal copyright protection.⁴³ In 1990, architectural works became the latest addition to the long list of copyrightable subject matter.⁴⁴

The extensive legislative history of the two major copyright revisions, the 1909 Copyright Act and the 1976 Copyright Act, reveal the strong influence of professional organizations. Such organizations were invited to participate in preparatory meetings organized by the Copyright Office and contributed their opinions to the draft bills.⁴⁵ In

40. Copyright Act of 1909, § 5, 35 Stat. 1075, 1076. Copyright protection applied to the following classes of works: (a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations; (b) Periodicals, including newspapers; (c) Lectures, sermons, addresses, prepared for oral delivery; (d) Dramatic or dramatico-musical compositions; (e) Musical compositions; (f) Maps; (g) Works of art; models or designs for works of art; (h) Reproductions of a work of art; (i) Drawings or plastic works of a scientific or technical character; (j) Photographs; (k) Prints and pictorial illustrations. *Id.* at 1076-77. In 1912, two more subsections were added: “(l) Motion-picture photoplays; (m) Motion pictures other than photoplays.” Act of August 24, 1912, Pub. L. No. 62-303, 62d Cong., 2d Sess., 37 Stat. 488. In 1939, subsection (k) was revised as: “(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.” Act of July 31, 1939, Pub. L. No. 76-244, 76th Cong., 1st Sess., 53 Stat. 1142.

41. Copyright Limitations on Sound Recordings, Pub. L. No. 92-140, 85 Stat. 391 (1971).

42. 17 U.S.C. § 102 (2012).

43. Software Copyright Act of Dec. 12, 1980, 94 Stat. 3015, 3028.

44. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990).

45. See STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE FIRST SESSION OF THE CONFERENCE ON COPYRIGHT (May 31-June 2, 1905), reprinted in 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. C, at XV (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter 1 LEGISLATIVE HISTORY]. Aside from the Librarian of Congress, the Register of Copyrights, and a representative from the U.S. Treasury Department, the following organizations were present at the Conference on Copyright, held in New York from May 31-June 2, 1905: The American (Authors’) Copyright League, The American Bar Association, The American Dramatists Club, The American Institute of Architects, The Library Association, The American Newspaper Publishers’ Association, The American Publishers’ Copyright League, The Architectural League of America, The Association of American Directory Publishers, The International Typographical Union, The Music Publishers Association, The National Academy of Design, The National Association of Photo Engravers, The National Educational Association, The National Institute of Arts and Letters, The National Sculpture Society, The Newspaper Artists’ Association, The Periodical Publishers’ Association, The Photographers’ Copyright League, The Print Publisher’s Association of America, The Society of American Artists, The Print Publishers’ Association of America, The Society of American Artists, The Sphinx Club and Association of Advertisers, The Association of Theater Managers of Greater New York, and The Manuscript Society. *Id.* The same group, with the addition of a few more organizations, appeared again at the Librarian of Congress’s Conference in November 1905. The participant lists were grouped

order to encourage participation by the organizations, the first meeting regarding draft bills for the 1909 Act took place in New York, where the major guilds and associations were located, instead of the home of the Copyright Office in Washington D.C. The guilds also attended congressional hearings to represent the interests of their constituencies.⁴⁶

During preparatory meetings and congressional hearings, the discussion about the definition of "author" transformed into a discussion about the categories of copyrightable subject matter.⁴⁷ In the 1905 meeting, legislative drafters proposed a definition of author that simply listed practitioners of various cultural works.⁴⁸ This proposal shows

according to professional categories and included: authors; dramatists and playwrights; artists: painters, sculptors, architects; composers; publishers; publishers of newspapers and magazines; publishers of artistic reproductions: lithographers, photographers; publishers of music; printers; educational institutions; public libraries; miscellaneous; and lawyers. STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE SECOND SESSION OF THE CONFERENCE ON COPYRIGHT (Nov. 1-4, 1905), *reprinted in* 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. D, at V-VI (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter 2 LEGISLATIVE HISTORY]. The participant lists of the third session, held in March 1906, followed the same grouping of copyright interests. STENOGRAPHIC REPORT OF THE PROCEEDINGS AT THE THIRD SESSION OF THE CONFERENCE ON COPYRIGHT (Mar. 13-16, 1906), *reprinted in* 3 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. E, at V-IX (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter 3 LEGISLATIVE HISTORY].

In 1961, when the Meeting on General Revision of the U.S. Copyright Law convened, various groups with interests in copyright law similarly gathered in Washington D.C. *See* HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1st Sess., COPYRIGHT LAW REVISION, PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION ON THE U.S. COPYRIGHT LAW 1 (Comm. Print 1963). New interest groups included several scientist organizations, and newly developed industries, such as motion pictures and national broadcasting. The participant representing libraries was with a special focus on fair use in photocopying. *Id.* at 1-2. Among the newly invited participants were more government agencies such as the National Science Foundation, National Aeronautics and Space Administration, U.S. Information Agency, Small Business Administration, Government Printing Office, Department of Health, Education, and Welfare, Department of Commerce, Bureau of Customs, Department of Justice, Department of State (International Business Practice Division), and Department of Defense (Naval Research). *Id.* at 1-4. There were also more lawyers in attendance, representing the American Bar Association, law firms, or other participating organizations. *Id.* at 1-4.

46. *See, e.g., Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess.* 1094, 1150, 1196, 1200 (1965) (testimonies of Don White, Executive Vice President, National Audio-Visual Association, Inc.; Robert F. Newman, President, Eye Gate Productions, Inc.; Ellsworth C. Dent, Senior Vice President, Coronet Instructional Films; Larston D. Farrar, Farrar Publishing Co.; S. A. Russell, President, Russell & Russell, Inc.; Hayward Cirker, President, Dover Publications, Inc.).

47. *See* 2 LEGISLATIVE HISTORY, *supra* note 45, pt. D, at 144-46.

48. *Id.* pt. D, at 144. Richard R. Bowker, representing the American (Authors') Copyright League, asked Thorvald Solberg, the Register of Copyrights, to read the detailed and lengthy definition:

that the definition of an author was often diverted to further discussions on the copyrightability of a particular type of professional practitioner's product.⁴⁹ Hence, whether a work counted as a copyrightable writing often led to long and contentious debates between different professional organizations.

For example, in the second session of the Conference on Copyright in 1905,⁵⁰ Beverly Smith, a representative of lithographers and the Reproductive Arts Copyright League, objected to the copyrightability of artistic works and insisted on limiting the interpretation of "writings" to its literal meaning.⁵¹ Smith was adamant in defending the lithographers' interests, which meant to keep their source material, pictorial works, freely exploitable.⁵² Smith's argument for a coherent interpretation of law that strictly abided by the literal meaning of the terminology was intended to serve the private interests of one particular group of practitioners. Smith's persistent objections during the meeting built up such a contention that the presiding Librarian of Congress, Herbert Putnam, intervened by reminding the participants

"Author" as used in this act means the writer of any literary work, the writer or speaker of any oration, lecture, or other spoken address, a dramatist or musical composer, a painter or sculptor or the artist of any other [original] work of art, including drawings, models and architectural designs, the maker of a photographic negative, engraving, or other secondary work of art involving original interpretation or distinctive artistic skill, a cartographer, the compiler of compilations or collections, the editor of a distinctive edition, the writer of annotations or additions, the maker of an abridgement, arrangement, dramatization, translation, or other version lawfully made, the conductors of a periodical, the joint authors of a collaborative work, a corporate body with respect to the publications of such corporation, and a person or persons at whose instance and expense a composite work is produced. In the case of an anonymous or pseudonymous work the publisher presenting the work for copyright entry, and whose imprint appears on the deposited copy, shall be deemed *prima facie* the assign of the author.

Id.

49. See 1 LEGISLATIVE HISTORY, *supra* note 45, pt. C, at 45 (statement of Herbert Putnam, the Librarian of Congress) ("Shall we pass to the question of the subject-matter of copyright . . . ? The Constitution, just as it provides for the class of persons in no way except by stating authors, so provides for the subject-matter in no way except by mentioning writings."). Similarly, the most frequently used definition of the nature of authorship by the courts regarded it as involving "originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph." SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, 86th Cong., 1st Sess., COPYRIGHT LAW REVISION STUDY NO. 3, at 86 (Comm. Print 1960) (quoting *Nottage v. Jackson*, 11 Q.B.D. 627, 635 (1883)).

50. 2 LEGISLATIVE HISTORY, *supra* note 45, pt. D. This round of conference was held in New York in order to be closer to the attendees, many of them representing professional groups and industry based in the region. *See id.*

51. *Id.* pt. D, at 197-98 ("instead of 'works', put 'literary productions'").

52. *See id.*

of the purpose of the discussion.⁵³ Aside from asking each interest group to be considerate of the other viewpoints represented in the room,⁵⁴ Putnam stressed that while users have a right to ask for the new provisions to be definite, “the bill must be approached from the point of view of the interest which is to be protected in the use of the material, and not primarily from point of view of the interest which seeks to appropriate . . . that subject matter.”⁵⁵ Putnam implied that the interest which copyright law intends to protect is that of those who produce writings and works, not of those who merely use them.

The implementation of the 1909 Copyright Act did not settle the definition of “writings.” In 1956, when the Copyright Office was preparing for the second general revision of copyright law, it studied the meaning of “writings,” among other topics.⁵⁶ The Derenberg Study traced the development of U.S. copyright law, finding that while the constitutional language is unclear about whether protection was exclusively limited to writings,⁵⁷ the term can be broadly construed as anything that promotes the progress of science and the useful arts.⁵⁸

Aside from the progress the Constitution seeks to promote, another important factor contributing to the previous expansion of copyrightable subject matter was copyright law’s desire “to protect the *commercial value* of the productive effort of the individual’s mind.”⁵⁹ This view transforms the purpose of copyright from a general, idealist goal of progress, to the materialist notion that, regardless of the results of the amount of intellectual effort, all works receive property protection under copyright law simply because certain financial interests are at stake.⁶⁰ For example, photographs and negatives were protected by the 1865 Amendment, during a time when “the commercial

53. *Id.* pt. D, at 198-200 (“The project before us—the Copyright Office—is to draft a bill for the consideration of the legislative committee, and this project was in effect to attempt to get together the interests that were practically concerned with the improvement of the present law, and to get an agreement among them.”).

54. *Id.* pt. D, at 199 (“[E]ach interest has to consider that there are other interests represented here, and what is due to them. . . . It is with reference to the protection of certain interests that the copyright law, as we understand it, is to be drawn, and not primarily for the convenience of other interests that may be concerned to use the subject-matter.”).

55. *Id.* pt. D, at 200.

56. *Note*, 31 N.Y.U. L. Rev. 1263, 1263 (1956) [hereinafter *Derenberg Study*].

57. *Id.* at 1264-68.

58. *Id.* at 1269.

59. *Id.* (emphasis added).

60. *Id.* at 1273 (“[T]he thought was not whether the particular object could be constitutionally protected but whether it needed protection because of the progress of its commercial development.”).

value of photography[] [was discovered] through the famous civil war pictures taken by Mathew Brady.”⁶¹ This materialist view further expanded during the discussion of motion pictures, where large investments are required for production, yet the commercial value of the movies might be unpredictable.⁶² Protection for motion pictures was recommended because the money invested by the motion picture industry had become “so great and the property rights so valuable that . . . the . . . law ought . . . to give them distinct and definite recognition and protection.”⁶³

Similar arguments for broadening copyright protection were also successful in the courtroom. For example, in *Bleistein v. Donaldson*,⁶⁴ in order to recognize the financial interest in a pictorial advertisement of a circus, the U.S. Supreme Court further relaxed the standards for copyrightability.⁶⁵ Considering the background of the first copyright law in England, which also formed around the interests of commercial printers,⁶⁶ the development of U.S. copyright law arguably uncovers a more truthful motive towards profits of the copyright system rather than simply promoting progress.

Two issues that arise related to copyrightable subject matter are the manner in which a work is fixed, and the way an expression can be perceived, stored, and retrieved. The 1909 Act did not include phonorecords⁶⁷ as a protectable subject matter, and the Copyright Office refused to register copyrights for phonorecords because “all of the subjects enumerated convey intellectual conceptions *visually*.”⁶⁸ Conversely, proponents for allowing copyrights for phonorecords claimed

61. *Id.* at 1270.

62. *Id.* at 1274.

63. *Id.* (quoting H.R. REP. NO. 756, 62d Cong., 2d Sess. (1912)).

64. 188 U.S. 239 (1903).

65. *Id.* at 251-52.

Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs’ rights.

Id. at 252.

66. See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 139-40 (1968) (chapter 6); see also *infra* Part II.A.

67. 17 U.S.C. § 101 (2012) (“Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

68. *Derenberg Study*, *supra* note 56, at 1273 (emphasis added).

that sound recordings are not only important for documenting performances, but have the same value as “writings.”⁶⁹ Sound recordings serve as transcriptions for cultural practices such as the singing of folk songs, which are delivered predominantly orally.⁷⁰ They may preserve the unique subtleties of orally delivered works better than writing down lyrics. With the development of new technologies,⁷¹ it was suggested that “fixation” should be defined as containing the expression in a form that can be reproduced.⁷² Upon conclusion of the debates, § 102 of the 1976 Act adopted language that accounted for future technological developments: “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁷³ As long as a work can be retrieved, the statute does not require fixation to be in a particular form.⁷⁴

Protection for sound recordings codified by the 1976 Copyright Act⁷⁵ did not merely come as a response to technological develop-

69. See HOUSE COMM. ON THE JUDICIARY, 88th Cong., 2d Sess., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 73 (Comm. Print 1964) (statement of William Lichtenwanger, Library of Congress) (“[I]n addition to its value as a performance, a sound recording has value as a writing, under the constitutional meaning. In the case of folk songs, for instance, it may be the only writing that exists.”).

70. *Id.*

71. See *id.* at 47 (statement of John Schulman) (discussing the uncertainty surrounding the form in which information stored in electronic devices can be “visually or aurally perceived”).

72. *Id.* (statement of John Schulman) (“[W]hen a work is fixed, not necessarily in ‘tangible’ form—‘tangible’ indicates something material—but in a form from which it can be reproduced, we have the essential of a copyrightable work.”). Schulman also suggested that, in light of future technological developments, the definition should be broader. *Id.*

73. 17 U.S.C. § 102(a) (2012); see also HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISIONS OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 4 (Comm. Print 1965).

74. HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISIONS OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 4 (Comm. Print 1965) (“The manner or medium of fixation is irrelevant as long as it is tangible enough for the work to be perceived or made perceptible to the human senses, directly or with the aid of any machine or device ‘now known or later developed.’”).

75. 17 U.S.C. § 102(a)(7) (2012); HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISIONS OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 5 (Comm. Print 1965) (“Under the definition of ‘including’ . . . this listing is ‘illustrative and not limitive’ . . . [and] is intended . . . to add the new category of ‘sound recordings.’”).

ment and the potential for an increase in unauthorized duplications. Rather, responsibility for this addition is largely attributed to an extended campaign by performing artists and recording engineers—two groups of practitioners whom copyright law had previously not considered authors.⁷⁶

In 1965, the Copyright Office first introduced sound recordings as a copyrightable subject matter, but left open the question of whether the performers, record producers, or both, may claim authorship and ownership in a work.⁷⁷ Register Abraham Kaminstein, and his successor Barbara Ringer, two important figures in the second general copyright revision of the twentieth century, expressly supported the proposition that the contributions of the performing artists and record producers represented true authorship, and are just as entitled to copyright protection as motion picture producers and photographers.⁷⁸ The only differences seen between the types of authors are the basic materials and technologies each handle in order to make their respective works. During the congressional hearings for the Sound Recording Act of 1971 (“1971 Bill”), Ringer reiterated Kaminstein’s statement previously delivered at a congressional hearing in 1965, arguing that recorded performances are “‘writings of an author’ in the constitutional sense” and are copyrightable.⁷⁹ Ringer further stated that not only did the Copyright Office and the Library of Con-

76. See *infra* notes 94-125 (discussing the congressional debates where performing and recording artists argued for authorship status under copyright law for the protection of sound recordings).

77. HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISIONS OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 5 (Comm. Print 1965) (“[W]hile one of the major innovations of the bill is to make sound recordings copyrightable as works in themselves, the bill leaves open the question of whether the performers whose performance has been fixed on the recording, the record producer who fixed the sounds, or both of them, may claim authorship of the work and ownership of the copyright.”).

78. *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6928 Before Subcomm. No. 3 of the H. Comm. on Judiciary*, 92d Cong., 1st Sess. 11 (1971).

79. *Id.* at 13 (statement of Barbara Ringer, Assistant Register of Copyright).

Let me say plainly there is no doubt in my mind that recorded performances represent the “writings of an author” in the constitutional sense, and are as fully creative and worthy of copyright protection as translations, arrangements, or any other class of derivative works. I also believe that the contributions of the record producer to a great many sound recordings also represent true “authorship” and are just as entitled to protection as motion pictures and photographs. No one should be misled by the fact that in these cases the author expresses himself through sounds rather than words, pictures, or movements of the body. There is a great deal of case law in this field, and it is in full support of the principles embodied in section 112.

Id. at 11.

gress unconditionally endorse the 1971 Bill,⁸⁰ but several courts also supported granting copyright protection for sound recordings.⁸¹ Ringer suggested that the decision to confer copyrights for performers and record producers of sound recordings was not a legal issue, but rather the question should be decided as a matter of policy.⁸²

The congressional record is unclear whether “record producers” at this time referred to sound recording engineers or record companies. During the congressional hearing for the 1971 Bill, Ringer disputed that record producers were nonauthors.⁸³ She argued that these practitioners were placed in an “area where creative effort of a rather high level of a sophistication and value is going unprotected under the Federal law.”⁸⁴ Her position suggests that record producers included the sound engineers or technicians that possess the skills required to handle the relevant technologies and exercise high level of control in recording sounds. However, Ringer refers to record companies—the employers of the sound engineers—as record producers. She reasoned that the company’s interests should be protected because of their capital investments in the works.⁸⁵

Another commentator shared this idea and viewed preserving the economic health of the music industry as the main goal of the legislation.⁸⁶ Copyright protection would benefit the “legitimate record manufacturer” who “produces his records at considerable expense, including payments to performers, arrangers, engineers, technicians, and publishers, as well as promotional expenditures.”⁸⁷ The House Committee on the Judiciary (“the Committee”) Report recognized that authorship of sound recordings could be attributed to performers and record producers for “setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.”⁸⁸ On the other

80. *Id.* at 12.

81. *Id.* at 13.

82. *Id.* (“[I]f there are arguments, they are questions of policy and impact on the economy, rather than of basic legal eligibility.”).

83. *Id.* at 22.

84. *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6928 Before Subcomm. No. 3 of the H. Comm. on Judiciary*, 92d Cong., 1st Sess. 22 (1971).

85. *Id.* at 21 (statement of Barbara Ringer) (“Record producers finance the huge area of stuff they release that does not represent hits from the profits they get from the hit records. If people can come in and skim off these profits, the public is sure to suffer.”).

86. Melvin L Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High Seas?*, 40 GEO. WASH. L. REV. 964, 946-65 (1971).

87. *Id.* at 964.

88. *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6928 Before Subcomm. No. 3 of the H. Comm. on Judiciary*, 92d Cong., 1st Sess. 75 (1971).

hand, when addressing the reason behind the legislation, the Committee Report was concerned about the loss of income for performers and manufacturers.⁸⁹ Although sound recordings received limited protection,⁹⁰ the additions in the 1971 Sound Recording Copyright Act nevertheless expanded copyright authorship to cover new groups of professional practitioners associated with the new subject matter.⁹¹

It was not until the 1976 Copyright Act that sound recordings became fully recognized as a copyrightable subject matter, upon which performers and record producers could enjoy the full array of exclusive rights as authors protected under copyright law.⁹² The congressional debates leading to the passage of the 1976 Act are reminiscent of the lithographers' objections to the copyrightability of pictorial works in the beginning of the twentieth century.⁹³ Fundamentally, the dispute surrounded the distribution problems arising when property rights are granted to new categories of works. Prior to the 1976 Act, broadcasters and jukebox manufacturers advocated against the copyrightability of sound recordings.⁹⁴ They were concerned that protecting sound recordings would increase the cost of business if they were required to pay royalties for playing recorded music.⁹⁵ Defending their interests, they argued that writings, as referred to in the Constitution, could not be so broadly interpreted as to cover performances of sound recordings.⁹⁶ Performing artists and re-

89. H.R. REP. NO. 92-487, 92d Cong., 1st Sess. 2 (1971).

90. See Sound Recordings Act of 1971, Pub. L. No. 92-140, (a) 85 Stat. 391 (“[T]he exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.”).

91. See *id.*

92. See 17 U.S.C. § 102(a)(7) (2012).

93. See *supra* notes 51-52.

94. See *infra* notes 105-16.

95. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 414-15 (1976) (statement of Parry S. Patterson, Rock-Ola Manufacturing Corp., The Seeburg, Inc., and Rowe International, Inc.) (opposing the establishment of performing artists' royalties). “It must be noted that the jukebox industry has never before been subjected to copyright performance royalties. Thus, *any* new royalty will impact severely upon the industry, and will necessitate economic readjustments throughout the industry.” *Id.* at 420.

96. See *id.* at 1385 (statement of the National Broadcasting Co., Inc.) (“The Constitutional purpose of copyright is to protect the ‘writings’ of ‘Authors’. Requiring such payments to performers will neither encourage them to be ‘Authors’ nor result in their creating new ‘writings’. This is not what the Constitutional copyright mandate was intended to achieve.”).

The Committee [on the Judiciary] must work within the constraints imposed by the limited grant of authority conferred by Article I. Sec. 8, cl. 8 of the Constitution The language, purpose and history of this clause demonstrate that it is

cord manufactures legitimized the claim for protection by emphasizing their creative contributions to each recording.⁹⁷

A representative for the Recording Industry Association of America (RIAA) argued that a sound engineer's techniques largely determine the quality of work.⁹⁸ Additionally, a representative for a performing artists' organization characterized their claim for copyright protection as a struggle lasting for approximately four decades.⁹⁹ He claimed that prior attempts for protection failed on account of (1) the inability to crystallize thoughts on the subject matter; (2) there was no foreseen solution to reconcile the conflicting interests within the field; and (3) there were influential "concerted oppositions" to their position.¹⁰⁰ He differentiated the present situation from the prior failures by stating that the performing artists gradually resolved their earlier disagreement with the music industry¹⁰¹ and garnered support from various players including the Copyright Office,¹⁰² as well

not a license to confer copyright or patent monopolies on any group who might appear deserving of economic reward . . . [A]n attempt to grant such a monopoly to performers and record manufacturers poses very real constitutional problems.

Id. at 1389 (statement of Perry S. Patterson).

97. *See id.* at 1313 (statement of Stanley M. Gortikov, President, Recording Industry Association of America, Inc. (RIAA)) ("The performer's interpretation of a tune is crucial to its success, and is no less a contribution to the recorded product than is the composer's original lyrics and score.").

98. *Id.* at 1315 (statement of Stanley M. Gortikov (RIAA)) ("A recording company makes a two-fold contribution to a recording: the technical manner in which it records a piece of music, and the financial risk it undertakes in producing the recording. The quality of a recording and its appeal to listeners is very much affected by the way the recording was made: the type of recording equipment and studio facilities used, the electronic effects and recording techniques employed, and the character of the song arrangement and background music selected. As recording techniques have become more sophisticated and as experimentation with electronic effects has grown, the creative contribution of recording companies to their products has increased dramatically, beyond simply the fidelity of a recording.").

99. *Id.* at 1301 (statement of Sanford Wolff, chief executive of the American Federation of Television and Radio Artists ("AFL-CIO")) (recounting the history of this struggle starting in 1940 and taking place in both Congress and the Copyright Office).

100. *Id.*

101. *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 1301 (1976) (statement of Sanford Wolff, chief executive of the AFL-CIO) ("[W]e now have total agreement between the performing artists and the recording industry.").

102. *Id.*

I should say on this point that I believe very strongly that sound recordings and the performances incorporated in them are creative works, that they are the writings of an author, and that they are subject to copyright protection under the Constitution. There is no doubt about this in my mind and I believe that your action in passing legislation that recognizes sound recordings as copyrightable

as the National Endowment for the Arts—a federal agency that gives monetary grants to artists.¹⁰³ The performing artists, through union representation, solved potential conflicts within the music industry by agreeing on a scheme that divided the royalties evenly among the performers.¹⁰⁴

The performing artists assessed that the remaining opposition mainly came from broadcasters—“a powerful combination of commercial entrepreneurs enjoying public gifts of air-wave monopolies and prospering enormously on the uncompensated talents of our members.”¹⁰⁵ Performing artists characterized the broadcasters’ practice as exploitative because broadcasters previously employed musicians and singers as full-time staff to produce programs, but since had fired those people and used recorded music without paying royalties.¹⁰⁶ The music industry, represented by the RIAA, criticized the broadcasters for having a double standard; pursuing payments from cable television for the use of broadcasters’ copyrighted programs, while simultaneously opposing performing artists’ claims to performance rights.¹⁰⁷

Performing artists and the music industry stressed that because Congress has interpreted writings liberally,¹⁰⁸ sound recordings should be considered protectable subject matter, and both the per-

and protects them against piracy is consistent with that view. It is not whether they should be protected but how they should be protected, whether protection should go beyond piracy to include the payment of royalty for performances by various media. In principle, I support that, too.

Id. at 113 (statement of Barbara Ringer).

103. *Id.* at 1301.

Undoubtedly, it is a performing artist’s personal rendition that brings to “life” the work of music composers and lyricists; and, a record producer’s ability to creatively capture, electronically process, compile, and edit sounds that enables broadcasters to utilize recording artists’ unique performances again and again to fill their commercially available time.

Id. at 1382 (statement of the National Endowment for the Arts).

104. *Id.* at 1302 (“To put the phony argument to rest, I am pleased to advise you that the two performing unions have reached a firm agreement under which all performers will share equally in the royalties.”).

105. *Id.* at 1299.

106. *Id.* at 1302. “Many vocalists and musicians are not sustained by royalties from record sales, and their opportunities for live performances have been sharply curtailed by the use of pre-recorded music by broadcasters.” *Id.* at 1313.

107. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 1305 (1976) (statement of Stanley M. Gortikov, President, RIAA) (“When it is in their economic interest, the broadcasters support the principle of rewarding creators. When it is not in their economic interest, the broadcasters oppose it.”).

108. *Id.* at 1310.

formers and record producers should be regarded as authors who make “original intellectual creations.”¹⁰⁹ Barbara Ringer, then the Register of Copyrights, compared performing artists’ contributions to those of a translator of a book, and record producers’ contributions to motion picture producers’ adaptations of a play or novel into a movie.¹¹⁰ While the performance of a work may contribute more directly to the commercial success of a recording, only the composers, not the performers, benefit from the performance royalties paid by broadcasters.¹¹¹ Also, in various music genres such as jazz, classical, and popular music, musicians and singers constantly make original interpretations and do not always stick to the scores of the musical composition.¹¹² Some opponents did not refute that sound recordings

Copyright protection has never been limited to the “Writings” of “Authors” in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such “Writings” as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.

Id.

109. *Id.* at 1318.

“Records are ‘writings’ and performers can be regarded as ‘authors’ since their contributions amount to original intellectual creations. The committee, likewise, finds that record manufacturers may be regarded as ‘authors’ since their contribution to the making of a record constitutes original intellectual creations. The committee endorses the conclusion of the Copyright Office that sound recordings ‘are just as entitled to protection as motion pictures and photographs.’”

Id. (quoting S. REP. NO. 93-983, at 140 (1974)).

110. *Id.*

Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the ‘writings of an author’ in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of ‘derivative works’ accorded protection under the Federal copyright statute.

Id. (quoting Barbara Ringer).

111. *Id.* at 1314 (“[I]ronically, the performer who makes a composer’s tune into a hit, and earns that composer much compensation in the form of mechanical royalties and performance royalties, shares in none of the performance royalties himself.”).

112. *Id.* at 1313 (statement of Stanley Gortikov, President, RIAA) (“The highly talented jazz musician’s original interpretation of a musical composition is often far removed from the original tune set down in lines of notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece. As the Director of the Boston Symphony Orchestra stated, ‘Improvisation is one of the earmarks of the performer in music. . . . You’re engaged in a creative act whenever you interpret a score. If the performer and the artists were not important, then one recording of Beethoven’s Ninth would be sufficient for everyone for all time. . . .’ The role of the artist can be even greater

were writings, but claimed that the 1971 Sound Recording Act provided adequate protection for the performers' integrity, and that performers and record producers were already compensated through indirect means.¹¹³

The jukebox industry asserted a narrow interpretation of author and writings. They rejected the record producers' claims for lack of aesthetic contribution, and objected to the performers' claims not because their contributions lacked originality, but because the constitutional Copyright Clause meant to exclude performers as a category.¹¹⁴ A representative for the jukebox manufacturers acknowledged that the constitutional language could be adapted to "concepts of authorship and creativity that did not exist when the Constitution was drafted."¹¹⁵ But the representative noted that performers existed at the time of the Constitution, thus the decision to leave performers unprotected was intentional.¹¹⁶

Theodore Bikel, President of the Actors' Equity Association, stated that although performers existed during the drafting of the Constitution, new technologies changed the nature of the performing business.¹¹⁷ Previously, a performer's "art, because it could not, then, be reduced to a tangible form, could not be stolen, abused, distorted, or exploited by others."¹¹⁸ But now the nature of "the performer's creation is no longer ephemeral; it has become something tangible and durable and it may be repeated exactly as originally rendered over and over again and can even outlive the performer who

with popular music. Here it is often the artist's performance as much as—or more than—the composer's tune that makes the recording attractive to both record buyers and radio audiences.").

113. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 1364 (1976) (statement of Vincent T. Wasilewski, President, National Association of Broadcasters).

114. *Id.* at 1389-90.

115. *Id.* at 1390.

116. *Id.*

It will be argued that changing times have created concepts of authorship and creativity that did not exist when the Constitution was drafted, and that the Constitution must be interpreted to reflect that fact. Admittedly, a capacity for growth must be read into the Copyright Clause. In many instances this argument may have merit, but not in the case of performers as defined in the Scott Amendment There were plenty of performers, i.e., actors, musicians, singers, etc., around at the time the Constitution was adopted and it is not conceivable they were regarded as authors in the constitutional sense.

Id. (statement of Perry S. Patterson, representing jukebox manufacturers).

117. *Id.* at 1352 (statement of Theo Bikel, President, Actors' Equity Association).

118. *Id.*

originated it.”¹¹⁹ Thus, if performers could not take control of recordings, the development of new technologies only makes their position more vulnerable within the industry.

Congress eventually expanded the meaning of “writings of an author” to cover sound recordings in the 1976 Copyright Act.¹²⁰ The author of sound recordings, Congress held, can be the performers and the record producer.¹²¹ But where the record producer’s contribution is minimal, only the performers will be regarded as authors.¹²² If the recording involves no performers, such as recording sounds from nature, only the record producers’ contribution is copyrightable.¹²³ Under the 1976 Act, the author of a sound recording has the exclusive rights to reproduce the sound recording in copies or phonorecords, prepare derivative works based on the copyrighted sound recording, and distribute copies or phonorecords of the sound recording to the public.¹²⁴ However, authors of sound recordings do not have public performance rights and cannot collect royalties when the recordings are broadcast.¹²⁵

While sound recordings became a separate category of subject matter, a conceptual distinction was made to reinforce the difference between a sound recording and the underlying musical composition.¹²⁶ Although improvisation is an important part of performance, and performing artists can deviate from the tunes set in a music com-

119. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 1352 (1976).

120. 17 U.S.C. § 102(a)(7) (2012).

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

17 U.S.C. § 101 (2012).

121. H.R. REP. NO. 94-1476, at 56 (1976).

122. *Id.*

123. *Id.*

124. *Id.* at 15.

125. See Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233, 234 (2007); see also 17 U.S.C. §§ 106(4), 106(6) (2012) (granting a full public performance right for authors of “musical works” but only a partial public performance right for authors of “sound recordings”); 17 U.S.C. § 114(a) (2012) (“The exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance under § 106(4).”).

126. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 113 (1976) (statement of Barbara Ringer) (“I draw a distinction at this point between the music on the record and the recording itself.”).

position, the law treats composers and performers as two different categories of professional practitioners by strictly distinguishing the copyright of a sound recording from the copyright of the underlying musical composition; each practitioner has corresponding works of authorship.¹²⁷

The history of subject matter expansion since the early twentieth century highlights the heavy involvement of professional organizations in the legislative process. The professional organizations that lobbied for the inclusion of new subject matters typically argued that their members made valuable contributions to society by offering products of high quality that lay people were unable or unlikely to achieve, yet desire to consume.¹²⁸ To support the inclusion of a new subject matter, analogies were made between the practitioners of a newly purported subject matter and those that were already included in the copyright system.¹²⁹ In the past, technological limitations or restrictive market environments may have impeded broad dissemination of authors' works. As such conditions ceased to exist, professional practitioners demanded that their contributions to societal progress could not continue to be undervalued.¹³⁰ They claimed the need for copyright protection in order to prevent exploitation, and to ensure an environment where quality works continue to be produced.¹³¹ Interests of various professional organizations may conflict when a new copyright subject matter is proposed. However, regardless of the side taken on a particular subject matter, all groups tend to assert that pro-

127. See Anne Barron, *Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice*, 15 SOC. & LEGAL STUD. 25, 36 (2006).

128. See *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1092 (1965) (distinguishing amateur performances from the professionally produced).

129. See *supra* text accompanying note 110.

130. See *Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong., 1st Sess. 821-22 (1967) (testimony of Erich Leinsdorf, Music Director, Boston Symphony Orchestra) (explaining the artistic contribution of performers, how they were harmed by radio stations which exploited their recordings without compensation and by consumers who were able to record performances broadcast via airwave, and urging Congress to grant royalty rights to performers).

131. See *id.* at 840 (testimony of Don White, National Audiovisual Association Inc.) (pleading against exemptions for educational uses, or the sincere but shortsighted requests from educators would result in shortage of quality teaching materials); *id.* at 510-12 (statement of Norman Rocusin, Vice President and General Manager RCA Victor Record Division of Radio Corp. of America) (asking Congress to grant copyright to sound recordings, or the record companies would curtail the investment in record production and the consumers would suffer).

professionals produce higher quality work than lay people, and therefore are more deserving of copyright protection.¹³²

While understanding that different groups of practitioners can have conflicting interests, the Copyright Office responded to a market-oriented concept of property rights when faced with demands to include new copyrightable subject matters. The Copyright Office liberally construes the definition of copyrightable subject matter, and generally supports its expansion.¹³³

The definition of author and writings developed during the past legislative processes was the result of political negotiation and persuasion between the colliding interests of professional organizations. These professional groups claimed to speak on behalf of the public and aimed to advance the public interest,¹³⁴ but, in reality, the voice of the public was largely missing. Attempts to include a new subject matter in a new bill are likely to fail if it would cause the "displeasure of various interest groups."¹³⁵ This notion is affirmed by the legislative history of the sound recordings copyright, where conflicting interests previously squashed the performing artists' plea, and the repeated rejections were attributed to the committee's failure to crystallize its

132. See, e.g., *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1092 (1965) (testimony of Ellsworth C. Dent, senior vice president, Coronet Instructional Films) (emphasizing that their films were professionally produced and participated in by members of the actors guild, and that full copyright protection is important for the industry to continue similar business practices and to ensure the supply of quality education films); *id.* at 1195 (testimony of George Frost, representing the Professional Photographers of America, underlining the artistic value of works by professional photographers) (noting that formalities requirements in the 1909 Act caused difficulties for photographers to obtain copyright).

133. See *supra* text accompanying notes 36-44 (stating the numerous occasions on which the definition of copyrightable subject matter was expanded).

134. See, e.g., *Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong., 1st Sess. 503-04 (1967) (statement of Alan W. Livingston, Capitol Records) (arguing that granting record companies and performers the right to collect royalties would increase public interests, because it would make it financially viable for these practitioners to continue producing quality recordings to be aired); *id.* at 541-42 (statement of Stan Kenton, National Chairman, National Committee For the Recording Arts) (noting that without the right to collect royalties performers are deprived of a fundamental economic right, and the performance right is not only fair compensation for recording artists, but would also increase the variety of music products); *id.* at 868-71 (statement of the National Broadcasting Co., Inc.) (arguing that granting performers the right to collect royalties would hurt the public interest because it would curtail broadcasters' ability to bring the recorded performance to the public).

135. SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, 86th Cong., 1st Sess., COPYRIGHT LAW REVISION STUDY NO. 3, at 76 (Comm. Print 1960).

thoughts on this issue.¹³⁶ When sound recordings were finally included, the Committee Reports proclaimed that “sound recordings are *clearly* within the scope of the ‘writings of an author.’”¹³⁷ If sound recordings could then be clearly considered as writings, the earlier rejections could only have been the result of extralegal affairs (i.e., whether proponents were able to garner enough political good will, by making concessions to, or deals with, groups having overlapping economic interests).

II. The Professional/Lay Divide

Modern copyright law is considered a “bargain” between private and public interests, giving private individuals exclusive ownership of their works for a limited period of time to increase production and encourage wide distribution for the public enjoyment.¹³⁸ Professional practitioners embrace the exclusive rights afforded under copyright law, viewing them as justifiable compensation for their expertise.¹³⁹ Only such monopoly rights allow them to continue their professional practices, and society benefits from their undertaking. Due to the extensive discussion of professional excellence, authors protected by copyright law often are imagined as professional practitioners.¹⁴⁰ Part II explains how legal terminologies serve as a tool for different professional practitioners to align potentially conflicting interests in order to fully support the copyright system. Additionally, this Part discusses the widened divide between the private interests of professional practitioners and the public in copyright law.

136. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 1301 (1976).

137. H.R. REP. NO. 94-1476, at 56 (1976) (emphasis added).

138. See LITMAN, *supra* note 4, at 78; LYMAN RAY PATTERSON, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 52-53 (1991).

139. See *Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong., 1st Sess. 540-42 (1967) (statement of Stan Kenton, National Chairman, National Committee for the Recording Arts).

140. See *supra* Part I. See also *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1152 (1966) (statement of Larston Farrar, Farrar Publishing Co.) (asserting that professional writers often receive lower pay than janitors and deserve more because they are instrumental in progressing the nation's mental, spiritual, moral, and physical development).

A. Copyright Law is for the Public—Persuasion and Expansion

The copyright system was first developed in the United Kingdom to mitigate conflicts in the book trade.¹⁴¹ In Britain, the Stationers' Company—a professional guild of book publishers—had long engaged in self-censorship in exchange for monopoly rights.¹⁴² In 1694, upon the expiration of the Licensing Order of 1643, stationers sought to protect their monopolies against competitors from outside guilds using a new legal tool.¹⁴³ While publishers in London only used authors' rights as a pretext for their own commercial interests, authors soon adopted the role and function of the promoters of science and useful arts, and began to demand property ownership as their inherent right.¹⁴⁴ The development of early copyright regulatory techniques was contingent upon the particular historical context in Britain, however, its supporting rhetoric and persuasion gradually traveled to other societies.

The Federalist Papers attributes the original concept of the Copyright Clause in the U.S. Constitution to the original British law,¹⁴⁵ and recognizes the utility of such congressional power: “The public good fully coincides in both cases [of copyright and patent], with the claims of individuals.”¹⁴⁶ Initially, authors were considered a selective category of “Learned Men.”¹⁴⁷ As the subject matter of copyright law expanded beyond writings and maps to cover a variety of cultural activities, more actors, practices, and artifacts were brought under its protection. These newly admitted authors, often organized as professional groups, emphasized copyright's goal of promoting societal progress.¹⁴⁸ By gradually expanding the scope of copyrightable subject matter, the system included more groups of professional practitioners

141. PATTERSON, *supra* note 66, at 143.

142. See ALINA NG, COPYRIGHT LAW AND THE PROGRESS OF SCIENCE AND THE USEFUL ARTS 68-70 (2011).

143. PATTERSON, *supra* note 66, at 139-42.

144. For example, author Daniel Defoe proclaimed a “right of property *created by authors*.” ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 113-14 (2009). However, the Scottish bookseller Alexander Donaldson denied such authors had original inherent property in their work and successfully challenged this assertion in *Donaldson v. Beckett*. *Id.* at 122-24; see also *Donaldson v. Beckett*, [1774] 1 Eng. Rep. 837 (H.L.).

145. THE FEDERALIST NO. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961).

146. *Id.*

147. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 (1710) (Gr. Brit.) (“[F]or the Encouragement of Learned Men to Compose and Write useful Books.”).

148. See *supra* note 131 and accompanying text.

who subscribe to the manner in which the current copyright system frames the concept of the human flourishing problem.¹⁴⁹ Through alliance-building, the copyright regime strengthens its capability to recruit various new professional practitioners as authors. Publishers continue to assume an important role as the distributor—the intermediary between authors and the public—selecting only information deemed worthy of public dissemination. Thus, copyright law grants professional practitioners, including authors and publishers, the power and responsibility to represent the interest of the public.

B. “Author” and “Works”—Abstracted Legal Terminologies as Interest-Aligning Tools

The 1909 Copyright Act included the term “all the writings of an author”¹⁵⁰ to describe the works protected under the Act. The interpretation of author is very flexible, and during the various copyright subject matter expansions the thought seemed not to be “whether the particular object could be constitutionally protected but whether it needed protection because of the progress of its commercial development.”¹⁵¹ It was important that the definition of the terms author and writings remain malleable in order for copyright law to encompass the various practitioners, practices, and products it now protects. The abstract concepts of authors and writings serve to mitigate the differences between various professional groups, and help hold the system together. When Barbara Ringer introduced into Congress the draft bill of the 1976 Copyright Act, she equated “authors of . . . writings” with “creators of copyrighted works as we *now* know them,” brushing aside any technological development or acknowledgement of the extended debates over the meaning of the terms.¹⁵² In the 1976 Act, Congress finally codified this liberal interpretation of author and writ-

149. See JULIE COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 16 (2012). Julie Cohen uses the capabilities approach developed by Amartya Sen and Martha Nussbaum to examine copyright law in a networked society. *Id.* at 15. This approach finds that law and policy should serve the ultimate goal of human flourishing—the fulfillment of human freedom, both the freedom from the absence of restraints and the freedom to “access to resources and . . . the availability of a sufficient variety of real opportunities.” *Id.*

150. Copyright Act of 1909, § 4, 35 Stat. 1075, 1076.

151. See *Derenberg Study*, *supra* note 56, at 1273.

152. *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 106 (1976) (emphasis added) (“[T]he sole and only beneficiary of the copyright law of the United States under the Constitution, [are] the authors of the so-called writings. In other words, the creators of copyrighted works as we now know them.”).

ings, replacing the term “all the writings of an author” in § 4 of the 1909 Act with “original works of authorship.”¹⁵³ Congress did this to “avoid exhausting the constitutional power of Congress to legislate in this field.”¹⁵⁴

Congress carefully attempted to avoid restrictive interpretation of the Act by incorporating broad language into several sections. First, Congress intentionally left “original works of authorship” undefined to incorporate the low originality standard established by the courts.¹⁵⁵ Second, the medium used to satisfy the requirement of fixation can be one “now known or later developed,”¹⁵⁶ and fixation is broadly defined. A work is sufficiently fixed if a work “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁵⁷ Finally, in the section listing copyrightable subject matter, the Act uses the language “include”¹⁵⁸ and indicates that the list is “illustrative and not limitative.”¹⁵⁹

The definitions offered by the Supreme Court also left the Act open to broad interpretation. The Supreme Court stated that an author was “‘he to whom anything owes its origin’”¹⁶⁰ and held that “the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”¹⁶¹ The Court interpreted writings to mean “physical rendering of the fruits of creative intellectual or aesthetic labor.”¹⁶² Because the abstracted terms author and work are elastic and can be applied generally, the expanded copyright system can incorporate a variety of activities, regardless of the differences in the technique and skills involved, material used, process of production, manner in which it is perceived, and technologies deployed in production, storage, reproduction, and distribution. This elasticity allows courts to consider each work specifically, and therefore avoids alienating particular groups of practitioners, by admitting a heterogeneous body of authors.

153. H.R. REP. NO. 94-1476, at 51 (1976).

154. *Id.*

155. *See* H.R. REP. NO. 94-1476, at 131 (1976).

156. 17 U.S.C. § 102(a) (2012).

157. *Id.*

158. *Id.*

159. H.R. REP. NO. 94-1476, at 53 (1976).

160. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884).

161. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (citing 17 U.S.C. § 102).

162. *Goldstein v. California*, 412 U.S. 546, 561 (1973).

In determining authorship in joint work cases with multiple authors claiming ownership over one work, courts must assess contributors with different expertise and who are responsible for different tasks in the production process. The multiple activities necessary to complete a joint work challenge judges to provide interpretations of authors and writings that are both abstract and specific.¹⁶³ This dilemma generally causes courts to favor granting ownership rights in joint work cases to contributors that are professionals in their respective fields.

C. The Missing Public

Those whose interests are not properly represented by the current system are especially critical of the statements heard during congressional hearings, and of the overall legitimacy of the copyright system.¹⁶⁴ While the expansion of protectable subject matter allowed more practitioner groups to join as authors, thus increasing support for the law, the copyright system has not persuaded everyone. For example, those who feel copyright law fails to allocate resources fairly are less likely to consider it a moral wrong to infringe on others' copyrights and obtain unauthorized copies of protected works.¹⁶⁵ Opponents of the copyright system might also advocate against consuming products by companies that pursue aggressive enforcement strategies.¹⁶⁶ The broadened reach of the copyright system and the growing number of authors does not necessarily lead to a less disputed system.

163. See *infra* Part III.C-D.

164. Peter Drahos, *Biotechnology Patents, Market and Morality*, 21 EUR. INTELL. PROP. L. REV. 441, 441 (1999) (explaining that the property right is “the key institution . . . of social and political morality” as “[i]ts definition affects resource distribution and takes one straight into issues of social justice”).

165. See Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 239 (1997) (“People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can steal if they think they can get away with it. . . . If they don't believe the law says what it in fact says, though, they won't obey it.”).

I do not suggest that all those who obtain illegal copies are consciously opposing the copyright system. Nevertheless, they can be seen as actors who refuse to accept the rhetoric of the copyright system emphasizing progress and public/private bargain, and do not consider the price to obtain authorized copies as a fair trade.

166. See, e.g., Jacob Dawid, *Why Proprietary Software is Unethical*, <CYBERCATALYST.NET> (Jan. 20, 2013), <http://cybercatalyst.net/why-proprietary-software-is-unethical/> (showing some free software advocates consciously choose not to use proprietary software); Jason Self, *The (Lack) of Cell Phone Freedom*, JXSELF.ORG, http://jxself.org/the_lack_of_cell_phone_freedom.shtml (last visited Mar. 30, 2014); Richard Stallman, *Why You Should Not Buy Apple Computer Products*, RICHARD STALLMAN PERSONAL SITE, <https://stallman.org/apple.html> (last visited Mar. 30, 2014).

Groups of professional practitioners who are not part of the copyright system represent potential critics. However, so long as they intend to be included as owners and authors in the copyright system eventually, they are unlikely to question the framework of and the justification for this regulatory system. Instead, they tend to echo the general copyright themes of promoting societal progress, the important role of professional practitioners, and question why their valuable professional contribution to society is denied by this system.¹⁶⁷ The notion of professionals being the driving force to ensure progress and enhance quality of works is so strong that even the Copyright Office considers professional practitioners, not the public, as their main clientele.¹⁶⁸

In Register Ringer's address to Congress regarding the proposed 1976 Act, she stated that authors were the one and only group the Copyright Office should serve.¹⁶⁹ By placing a heavy emphasis on authors, she discounted the public as another stakeholder.¹⁷⁰ Ringer's argument demonstrated a deep concern for authors' private interests. She contrasted the public's interests with the authors' and argued that the former does not have a priority over the latter.¹⁷¹ She lamented how authors have been "treated shabbily and stingily" and spoke to advance their interests in Congress.¹⁷² Ringer believed that authors would be unwilling to disseminate their works if there were no copyright protection.¹⁷³ Ringer asserted that the exclusive rights granted

167. See *supra* text accompanying notes 130-32.

168. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 106 (1976) (statement of Barbara Ringer) ("My feeling as the head of the Copyright Office is that my responsibility is to one group and one group only, and that is the group that is identified as the sole and only beneficiary of copyright law . . . authors of the so-called writings. In other words, the creators of copyrighted works as we now know them.").

169. *Id.*

170. See PATTERSON, *supra* note 138, at 53 (noting that the monopoly granted to the author under the copyright bargain is conditional because it is more important to promote learning and to protect the public domain than to protect authors).

171. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 106 (1976) (statement of Barbara Ringer) ("I am also conscious that everyone else besides the author is a user of the author's work, and as between users there may be arguments which are extremely persuasive for reasons unrelated to protection of the author but in some respects are irrelevant to the essential purpose of the copyright law.").

172. *Id.* ("I am profoundly of the belief that authors in this country have been treated shabbily and stingily from the very beginning of our copyright system.").

173. See *id.* at 107.

to authors “*is the ultimate public interest that the Constitution and its drafters were thinking about.*”¹⁷⁴

Promoting societal progress has long been cited as the justification for the copyright system. Such progress is thought to balance out the price each member of society is required to pay copyright owners.¹⁷⁵ However, during the congressional debates regarding past expansions of copyrightable subject matter, the public interest often faded into the background. Instead campaigns concerted by professional organizations representing the interests of their constituencies were at the forefront of the hearings. Using the societal progress justification, these professional groups often couched their claims in the public interest argument.¹⁷⁶ But whether expanding the definition of copyrightable subject matter would have an inadvertent impact on the cultural life of the public was seldom discussed. Register Ringer’s discussion of the public’s role in relation to the authors’ interest in private property rights explains why the public was not of concern when new subject matters were included.¹⁷⁷ Authors are scholars, professionals, and experts, and are seen as the driving force of progress and human flourishing.¹⁷⁸ The public only has a reflective interest as receivers and consumers, if individual members can afford the copyrighted works that are disseminated.

In a committee hearing, the scope of the fair use doctrine¹⁷⁹ generated discussion about the public interest—focusing on exemptions for making copies of protected works, however, not concerning the preparation of derivative works.¹⁸⁰ The discussion appears to imagine

174. *Id.* at 116 (emphasis added).

175. *See supra* text accompanying notes 130-32.

176. *See supra* Part II.A.

177. *See supra* text accompanying notes 84-89.

178. *See Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 90th Cong., 1st Sess. 48-49 (1967)* (statement of Elizabeth Janeway, Authors League of America) (expressing support for the bill and arguing that works contributing to the progress of society have been made by the individual author); *id.* at 41 (statement of Herman Wouk, Authors League of America) (emphasizing that a system of copyright supports the development of free and independent artists and intellectuals whose works would then help to define our lives and the world).

179. *See* 17 U.S.C. § 107 (2012) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”).

180. The discussions regarding fair use pertained to photocopying or reproduction of a copyrighted work. *See Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 98 (1976)* (statement of Barbara Ringer); *id.* at 184-92 (statement of Edmon Low, represent-

the public as a passive user separated from the professional authors who are the sources of quality products and therefore the rightful property owners of their works.

During another congressional hearing on fair use and photocopying, Professor Ralph S. Brown commented that the public is rarely mentioned in the debate and are categorized as “anybody from whom another nickel can be milked for copyright owners.”¹⁸¹ Three professional groups—educators, librarians, and researchers—mediated the interest of the general public. Educators and librarians have an interest in a broader and clearly-defined fair use concept in order to perform their professional services.¹⁸² Researchers represent a special professional group of capable individuals who build their scholarship on pre-existing literature. One commentator argued that, in this case, issues of fair use were raised within a “specific, small, limited classes of people”¹⁸³ (i.e., researchers) and the “restricted [or] limited material which they need.”¹⁸⁴ This commentator suggested that the Fair Use Clause should not relax protection for copyrighted works, and should avoid using broad language by focusing on the user’s specific and limited purpose and needs.¹⁸⁵

ing Six Library Associations); *id.* at 370-71 (statement of David McCurrach, National School and Equipment Association).

181. HOUSE COMM. ON THE JUDICIARY, 88th Cong., 2d Sess., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 170 (Comm. Print 1964).

182. See HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 5: 1964 REVISION WITH DISCUSSIONS AND COMMENTS 98 (Comm. Print 1965) (statement of Harry N. Rosenfield, Ad Hoc Committee on Copyright Revision) (asserting that a judicially determined fair use doctrine does not provide clear guidance, and that because the fair use doctrine was developed to manage the rivalry between commercial competitors it is ill-suited for non-commercial educational uses); *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 185-87 (1976) (statement of Edmon Low, representing six library associations) (stating that (1) libraries are the repositories and storehouses of knowledge that serve the public, (2) fair use as a defense does not keep libraries from being sued, and (3) measures other than the fair use doctrine need to be in place to assure librarians are free from the threat of litigation when making copies for education and research).

183. HOUSE COMM. ON THE JUDICIARY, 88th Cong., 2d Sess., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 177 (Comm. Print 1964) (statement of Bella L. Linden).

184. *Id.* at 178.

185. See *id.* at 177-78. Linden notes that the intention of the bill was not to “draft a clause in this bill that opens the door to free use of every type of literary property, and to every class of individuals that falls within the broad classification of ‘the public.’” *Id.* at 178. She argues that such the impact on these special interests and limited needs of a specific group of people could be solved by adding a tailored limitation to the exclusive rights of copyright owners. *Id.*

In a rare instance, concern for the public interest appeared during the hearings for one proposed subject matter expansion—works made by the federal government.¹⁸⁶ Here, the public interest was mediated through news journalists and broadcasters.¹⁸⁷ As a professional group, journalists have their own vested interest to argue against the copyrightability of federal government works. If the federal government is granted copyright protection for its published material, journalists argued, they would not be able to report information from this material as freely and would be compelled to paraphrase information, which can distort the truth and mislead the public.¹⁸⁸ Unpublished federal government material should also not receive copyright protection, or it would provide an incentive for the government to simply refrain from publishing informative materials.¹⁸⁹ The public interest asserted in the government works context is tailored to the news media’s ability to provide wide dissemination of reliable information to engage citizens in a democratic republic.¹⁹⁰

While prohibiting copyright in government works was widely embraced, the copyrightability of works produced under government contract or with federal grants was contested during the legislative deliberation.¹⁹¹ In the 1961 Report of the Register of Copyrights, the Copyright Office incorporated into the definition of “Government Publication” the practices of a number of government agencies.¹⁹² Government contractors and grant receivers were permitted to secure the copyright of the resulting work, and the agencies obtained a non-exclusive license for publication.¹⁹³ Nevertheless, in 1965, the Office of Education issued a policy stating the opposite: “Material produced as a result of any research activity undertaken with any financial assis-

186. See 17 U.S.C. § 105 (2012) (“Copyright protection under this title is not available for any work of the United States Government.”).

187. See HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 5: 1964 REVISION WITH DISCUSSIONS AND COMMENTS (Comm. Print 1965).

188. *Id.* at 54 (statement of Douglas Anello, National Association of Broadcasters) (expressing concern that government would use copyright as a censorship tool by controlling distribution and interpretation).

189. *Id.* at 46-47 (statement of Harry Rosenfield).

190. See *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1465 (1966) (statement of the American Newspaper Publisher Association (ANPA)) (“This association takes the position that no person should be permitted to copyright any material where a substantial part thereof is created by Government employees or with Government funds.”). ANPA’s position is supported by the National Newspaper Association. *Id.* at 1464.

191. See *id.* at 131.

192. *Id.* at 130-31.

193. *Id.* at 131.

tance through contract with or project grant from the Office of Education will be placed in the public domain. Materials so released will be available to conventional outlets of the private sector for their use.”¹⁹⁴

During one congressional deliberation, Professor Melville Nimmer stated that although a work produced using government funding may render it copyrightable, the same rule should apply to federal government works if the government facilities were used to publish the work.¹⁹⁵ Participants during other revision hearings took a stronger position in questioning the general copyrightability of government-funded research material.¹⁹⁶ Ultimately, Congress limited the scope of protection for works prepared by government employees. In the report, Congress clarified, “The bill deliberately avoids making

194. 30 Fed. Reg. 9345, 9408-09 (July 28, 1965).

195. HOUSE COMM. ON THE JUDICIARY, 88th Cong., 2d Sess., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 102 (Comm. Print 1964).

196. See *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1922-24 (1965) (statement of Senator Ralph Yaborough) (statement titled “Protection of Public Interest in Results of Research Paid for by Federal Government”).

The Office of Education has declared that the main thrust of its policy is to assure competition in the production and dissemination of different versions of curricular materials. As Deputy Commissioner of Education Henry Loomis stated in a conference held with representatives of educational organizations after the policy statement was published: “We want to make this material available to the maximum number of people, in the shortest time, with a minimum of restrictions.” . . . I do not mean to say that there would not be instances in which equity would dictate that a copyright should be allowed for a limited term of years. Nor would I rule out the possibility of allowing a person to copyright a subsequent publication drawing on the results of his Government-financed research, so long as all the information contained therein has already been made public. In this time when more and more research is being paid for by the Federal Government, we must be careful to safeguard the public’s right of access to information which it has paid for.

Id. at 1924.

The original and continuing purpose of this prohibition is to assure maximum availability and dissemination of informational material prepared by or for the Government at the expense of the public. My amendment insures that knowledge developed by contractors and grantees at great public expense shall also be freely available to the press, to scholars, to private enterprise, and to the public at large. Since Federal outlays for research now total over \$15 billion annually, this matter is of far-reaching importance.

Id. (statement of Senator Russell B. Long).

Copyright Law Revision: Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 661-63 (1967) (statement of M. B. Schnapper, Editor, Public Affairs Press, co-signed by other journalists and scholars specializing in journalism and library studies).

any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant.”¹⁹⁷ Congress acknowledged that in certain circumstances, itself or other government agencies might find that “the need to have a work freely available outweighs the need of the private author to secure copyright, [and such a] problem can be dealt with by [enacting] specific legislation, agency regulations, or implementing contractual restrictions.”¹⁹⁸

The public interests outlined by the journalists and the Copyright Office for limiting protection of governmental works differ. The journalists’ concern for the public interest was seen through its fear that granting protection for government works would impair its ability to provide information to the public, who are the consumers of professional journalism.¹⁹⁹ However, other participants in the revision hearings viewed the public as taxpayers that directly fund the government, and such tax revenue indirectly funds research institutions that receive government grants.²⁰⁰ They viewed that “[w]hen the public pays for research, the research properly belongs to the public.”²⁰¹ This rationale was also implied in a congressional report stating, “The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad.”²⁰² The debates surrounding the copyrightability of government-financed research also focused on whether it was acceptable to grant protection if it forces the public to pay a “double subsidy.”²⁰³

Copyright law’s gradual expansion to cover various categories of works was the result of the lobbying efforts of professional practitioners.²⁰⁴ The definitions of the terms authors and writings became more abstract and general in order to accommodate assorted practices. The threshold requirement for originality dropped to a minimum, and the 1976 Copyright Act allows copyright protection to exist in any work as

197. H.R. REP. NO. 94-1476, at 59 (1976).

198. *Id.*

199. *See Copyright Law Revision: Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 629 (1967) (stating that copyright protection would lead to censorship by encouraging government personnel to withhold information, which would “impair [their] ability to discharge [their] responsibility to the public”).

200. *Id.* at 661.

201. *Id.* at 658 (internal quotation omitted).

202. H.R. REP. NO. 94-1476, at 59 (1976).

203. *Id.* (explaining that one major reason to prohibit copyright protection for government works is to avoid requiring the public to pay a “double subsidy” for works produced using public funds).

204. *See supra* Part I.

soon as it is fixed in a tangible medium of expression, which turns everyone into a potential author.²⁰⁵ Nevertheless, a constructed divide between the works produced by professionals and the lay public persists, with the former claiming to move society forward through innovation for the benefit of the latter. The Copyright Office has bought into this logic. Serving as the administrative body as well as the architect of copyright law, the Copyright Office further deepened the imagined divide in copyright protection between the private professional practitioners and the lay public.

III. Professional Authors and the Joint Work Doctrine

Under copyright law, a joint work is defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”²⁰⁶ “The authors of a joint work are co-owners of copyright in the work.”²⁰⁷ The simple statutory language fails to reflect the actual complexity behind the doctrine. Joint work cases are difficult because (1) they often involve collaboration among people with intimate and long-term relationships who do not specify the nature of the partnership in written agreements; (2) entering into contracts is not always appropriate since works often develop organically, and it is difficult to predetermine the amount of contribution by each collaborator; and (3) the diversified expertise among collaborators makes it complicated to objectively evaluate the contribution of each person.

Scholars suggest that courts are reluctant to recognize contributors to a single work as joint authors.²⁰⁸ Courts typically interpret the joint work clause more strictly than a mere literal interpretation.²⁰⁹ The explanations for the reluctance to award joint authorship in a copyrighted work contribute to a long-lasting debate about the concept of authorship in copyright law. Some legal scholars, influenced by the literary criticism developed around the role of the author,²¹⁰

205. See 17 U.S.C. § 102(a) (2012).

206. 17 U.S.C. § 101 (2012).

207. 17 U.S.C. § 201(a) (2012).

208. See, e.g., Lape, *supra* note 20, at 54; Jaszi, *supra* note 20, at 51.

209. Courts have required not only that joint authors intend to merge contributions, but also intend that all would be identified as co-authors. *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991). Another requirement stating that each contribution must be independently copyrightable for joint authorship to be awarded is also a narrow interpretation some courts follow that is not warranted by the statutory reading. See *infra* Part III.C.

210. See, e.g., Roland Barthes, *The Death of the Author* (1967) (criticizing the notion that reading that relies on the author’s identity and biographical background, and argues that authors do not dominate the meaning of the text, but rather each work is read and inter-

focus on the legal construction of romantic authorship.²¹¹ Copyright law favors rewarding sole authorship for copyrights because this romanticist image of one who works in solitude and is the only source from which the resulting work originates, overshadows the unending methods of contribution a production process may involve.²¹² Other scholars argue that the central analytical framework for copyright law is based on a property theory of economics, which favors a centralized control of information over a distributed one to enhance efficiency.²¹³ While both the romantic author and owner-author are important concepts to help understand how courts allocate property interests in copyright cases, the professionalism ingrained in copyright law produces a third image of authorship—expert authors. In joint work cases, courts privilege expert authors whose professional practices are strongly connected with the subject matter of the disputed work.

A. The Joint Work Doctrine Until 1976

Prior to the 1976 Copyright Act, the joint work doctrine was judicially created. In *Maurel v. Smith*,²¹⁴ Judge Learned Hand provided an

preted according to how the reader perceives it); Michael Foucault, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE 124-27 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., Cornell University Press 1977) (stating that although the texts of an author are subject to interpretation, the author still serves a discursive function—as a reference to a certain quality of works associated with his names or as the actual person to which the text refers). See also MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 167-72 (Steven Rendall trans., University of California Press 1984) (rejecting the idea that reading is merely a passive activity). He also argues that although a reader does not take the position of the author, he invents in texts something different from what they intended, detaches the texts from their origin, and reorganizes pieces of the texts to produce something unknown in the space that allows for an indefinite plurality of meanings. *Id.* at 169. But such productive reading is often only reserved for the professional intellectuals due to a kind of social stratification that recognizes the social elites as authorized interpreters and common readers' interpretation as heretical or negligible. *Id.* at 172.

211. See Peter Jaszi, *Toward a Theory of Copyright: Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 455-59 (1991) (stating that since the eighteenth century the concept "authorship" has been closely associated with the Romantic movement in literature and art, but it is in fact a social construct, and failure in recognizing this construction may result in lawyers "embracing the whole complex set of values and associations that attached to the notion of [romantic authorship]"); see also *supra* note 21.

212. See Woodmansee, *supra* note 21, at 291-92.

213. See Lemley, *supra* note 22, at 874 (suggesting that the romantic authorship idea should be replaced with the view that current trends in intellectual property law are better described according to a property-based economic theory).

214. 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921). The case involved three people who contributed to a comic opera "Sweethearts": Fred de Gresac Maurel, Harry B. Smith, and Robert B. Smith. *Id.* at 196-97. Maurel agreed to write scenarios for a comic opera for Werba & Leuscher, a theatrical managing firm, on the condition that she was advertised as the author and no changes would be made without her consent. *Id.* at 197.

analogy between tangible and intangible property that effectively treated joint authors as tenants-in-common.²¹⁵ In the mid-twentieth century, the Second Circuit broadened the definition of joint works.²¹⁶ In 1955, the Second Circuit held that the intention to merge intellectual efforts into a single work does not have to derive from the authors, but can also come from assignees.²¹⁷ The expansion of the concept of joint authorship was heavily critiqued²¹⁸ and was eventually overruled by the 1976 Copyright Act. The 1976 Act clarified that the intent to produce a joint work must come from authors, not from assignees.²¹⁹ Congress also perpetuated prior case law's treatment of joint authors as tenants-in-common, confirming the court-made rules regarding the rights and duties of the co-owners.²²⁰

B. Interpretation of "Intent" Under the 1976 Act

The language of the 1976 Act requires joint authors to merely intend to merge their contributions into a unitary whole.²²¹ Concerned about the Act's implications on property distribution, the Second Circuit requires co-authors to demonstrate a level of intent that is higher than simply the intent to merge intellectual efforts. For exam-

With Maurel's permission, the managers asked Harry B. Smith to write the libretto. *Id.* Harry later discovered he needed help and engaged his brother Robert to write the lyrics. *Id.* Robert B. Smith falsely represented that he and Harry were the sole owners of the piece, and gave G. Shirmer Inc. the right to publish and copyright the opera. *Id.*

215. *Maurel*, 271 F. at 214 ("[T]here is no distinction . . . between literary property and property of any other description.")

216. *See, e.g.,* *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.*, 140 F.2d 266, 267 (2d Cir. 1944); *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, 161 F.2d 406, 409-10 (2d Cir. 1946); *Shapiro, Bernstein & Co., Inc., v. Jerry Vogel Music Co., Inc.*, 221 F.2d 569, 570 (2d Cir. 1955) [hereinafter *Shapiro II*].

217. *Shapiro II*, 221 F.2d at 570 ("We feel that the rule of these [joint work] cases, as extended to the facts of the case at bar, should make the test the consent, by the one who holds the copyright on the product of the first author, at the time of the collaboration, to the collaboration by the second author. That is to say that ordinarily we look to the consent of the first author to see whether or not we have a joint work; when the first author has assigned away all his rights which he can assign, we look to the intent of the assignee.")

218. *See* SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, 86th Cong., 1st Sess., COPYRIGHT LAW REVISION STUDY NO. 12, at 89-92 (Comm. Print 1960) (Gregory D. Carey, *Joint Ownership of Copyrights*).

219. *See* H.R. REP. NO. 94-1476, at 120 (1976).

220. H.R. REP. NO. 94-1476, at 121 (1976) ("There is also no need for a specific statutory provision concerning the rights and duties of the co-owners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use of license the use of a work.")

221. 17 U.S.C. § 101 (2012).

ple, the court in *Childress v. Taylor*²²² ruled that the “equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors.”²²³ However, the *Childress* court was reluctant to find that collaborators must intend to hold equal, undivided interests in the work at issue.²²⁴ But, some courts read *Childress* as requiring parties to intend the legal consequences of joint authorship.²²⁵ While the Seventh Circuit also follows *Childress*, and applies the three factual indicia for finding mutual intent,²²⁶ it provides an interpretation that is generally less stringent and closer to the statutory definition.²²⁷ It is unclear how the Second and the Seventh Circuits produced diverging opinions on the issue of joint authorship. However, when parties disagree on the intent to share ownership, courts typically identify a dominant contributor, and prioritize his or her intent. It is common in joint work cases that the efforts in producing a final product were not evenly distributed among the contributors.²²⁸ Attaining joint authorship does not require each person to

222. 945 F.2d 500 (2d Cir. 1991).

223. *Id.* at 509.

224. *Id.* at 508 (“We do not think [District Court] Judge Haight went so far. He did not inquire whether *Childress* intended that she and Taylor would hold equal undivided interests in the play. But he properly insisted that they entertain in their minds the concept of joint authorship, whether or not they understood precisely the legal consequences of that relationship.”).

225. *See, e.g.,* *Design Options, Inc. v. Bellepointe, Inc.*, 940 F. Supp. 86, 90 (S.D.N.Y. 1996) (citing *Childress*, 945 F.2d at 508-09) (“[B]oth parties must have intended, at the time of creation, that the work be jointly owned.”). Laura Lape cites to many cases that followed *Childress* to require a higher level of intent than merely the intent to merge contributions to be joint authors, and further argues “[w]hat the courts mean by the intent to be joint authors is an intent to share ownership in a work.” Lape, *supra* note 20, at 58.

226. *Childress*, 945 F.2d at 508-09; *Thomson v. Larson*, 147 F.3d 195, 202-04 (2d Cir. 1998) ((1) the decisionmaking authority one has over the final product, (2) how the work is attributed in billing and/or copyright registration, and (3) what kind of written agreement one has made with third parties).

227. *See* *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067-69 (7th Cir. 1994) (focusing heavily on the statutory language to determine joint authorship). “[T]he intent prong does not have to do with the collaborators’ intent to recognize each other as co-authors for purposes of copyright law; the focus is on the parties’ intent to work together in the creation of a single product, not on the legal consequences of that collaboration.” *Janky v. Lake County Convention and Visitors Bureau*, 576 F.3d 356, 362 (7th Cir. 2009) (citing *Erickson*, 13 F.3d at 1068-69). *See also supra* note 206 (providing the statutory definition of a joint work).

228. *See, e.g., Janky*, 576 F.3d at 363 (stating Farag’s contribution accounted for only ten percent of the lyrics); *Fisher v. Klein*, 1990 WL 10072477, at *2 (S.D.N.Y. June 26, 1990) (Fisher claimed that Klein’s contribution was only minimal as she never set her hands on the material).

contribute equally.²²⁹ But because joint authors have equal shares in the property interests of the copyrighted work, contemporary courts show concern for the dominant contributor's property interests. In *Fisher v. Klein*,²³⁰ the district court ruled that joint authorship will only result where the dominant author intends to be sharing authorship.²³¹ In *Childress* and *Thomson v. Larson*,²³² the Second Circuit affirmed this rule by finding that "[c]are must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person rendered some form of assistance,"²³³ focusing its reasoning only on the intent of each author.

C. What Kind of Contribution Can Make One a Joint Author?

The language in the 1976 Act does not provide adequate guidance on what kinds of contributions are enough to be a joint author. An early test, proposed by Professor Melville Nimmer,²³⁴ requires the contribution to be more than *de minimis*.²³⁵ This test gradually gave way to Paul Goldstein's test requiring that contributions must be copyrightable, independent of the joint work.²³⁶

Courts admit that the statute is unclear whether each contribution to a joint work must be independently copyrightable,²³⁷ but still adopt the test for policy reasons. For example, the Seventh Circuit, in *Erickson v. Trinity Theatre, Inc.*,²³⁸ stated that the policy goal is to enhance administrative and judicial efficiency, and applied a test that would "allow contributors to avoid post-contribution disputes con-

229. See *Maurel v. Smith*, 271 F. 211, 215 (2d Cir. 1921) ("It is not essential that the execution of the work should be equally divided, as long as the general design and structure was agreed upon, the parties may divide their parts and work separately.").

230. 1990 WL 10072477.

231. *Id.* at *6.

232. 147 F.3d 195 (2d Cir. 1998).

233. *Childress v. Taylor*, 945 F.2d 500, 504 (2d Cir. 1991); *Thomson*, 147 F.3d at 202 (quoting *Childress*, 945 F.2d at 504).

234. *Melville Nimmer*, WIKIPEDIA, http://en.wikipedia.org/wiki/Melville_Nimmer (last updated Aug. 17, 2014).

235. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 6.07[A][1] ("It is not necessary that the respective contributions of several authors to a single work be equal, either quantitatively or qualitatively, in order to constitute them as joint authors. However, each such contribution must, in any event, be more than *de minimis*. That is, a person must add more than a word or a line to qualify as a joint author.").

236. 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2.1.2, at 4:16.

237. See *Childress*, 945 F.2d at 506.

238. 13 F.3d 1061 (7th Cir. 1994).

cerning authorship, and to protect themselves by contract if it appears that they would not enjoy protections of the Act itself.”²³⁹

The independent copyrightability requirement displays a contemporary judicial response to the joint work doctrine that was developed through case law and adopted by Congress.²⁴⁰ However, some worry that the property allocation function within the doctrine does not always lead to optimal results.²⁴¹ Property interests may be too finely divided if there are many contributors, or the equal division of rights may discourage those who contributed more and may seem unfair. However, if joint authorship is applied restrictively, it may also discourage smaller but important contributions. When the joint work rule was first proposed in the early twentieth century, some found it unfair to distribute the property interests evenly among joint authors, regardless of the amount of their contribution.²⁴² Yet, when protection for joint works was finally codified as part of the 1976 Act, Congress did not find it necessary to deviate from the tenant-in-common property theory.²⁴³ Contemporary courts responded to the codification by interpreting the doctrine narrowly, making it difficult for secondary contributors to obtain co-authorship in order to induce them to negotiate their share with the main contributor.²⁴⁴ This allows courts to avoid ordering a judicial transfer of property interests from the dominant author to the contributors whom they often believe to be less deserving. The independent copyrightability test asks contributors to clarify the process of collaboration by showing the particular contributions of each author,²⁴⁵ and allows courts to appear more neutral when deciding joint work cases.

239. *Id.* at 1069.

240. *See infra* note 243.

241. *See* 2 LEGISLATIVE HISTORY, *supra* note 45, pt. D, at 195-97. When the joint work clause was first proposed in the early twentieth century, the Copyright Office suggested treating joint authors as tenants-in-common. H.R. REP. NO. 94-1476, at 121 (1976). In the preparatory meetings, some argued that the distribution of property interests should be an issue of contract and opposed implementing a general statutory rule. 2 LEGISLATIVE HISTORY, *supra* note 45, pt. D, at 196-97. The Copyright Office responded by emphasizing that such rule is not to restrict joint authors to negotiate their relationship via contractual agreements, but only to deal with the situation where a contract is absent. *Id.* at 197. Nevertheless, some still argued that it is impossible to know what the relationships between collaborators were beforehand, and ridiculed this proposal. *Id.* at 196-97.

242. *See* 2 LEGISLATIVE HISTORY, *supra* note 45, pt. D, at 195-97.

243. *See* H.R. REP. NO. 94-1476, at 121 (1976).

244. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069 (7th Cir. 1994) (stating that the policy goal is to enhance administrative and judicial efficiency—a test will “allow contributors to avoid post-contribution disputes concerning authorship, and to protect themselves by contract if it appears that they would not enjoy protections of the Act itself”).

245. *See* 3 GOLDSTEIN, *supra* note 236, § 4.2.1.2, at 4:16.

Nevertheless, efficiency in adjudication comes at the cost of secondary contributors' potential joint authorship claims. Courts suggest that independent copyrightability strikes the right balance between contract and copyright law because any person whose contribution does not qualify as copyrightable can still receive their share through contractual arrangements. However, relationships between collaborators often evolve over time. Having a pre-negotiated contract does not guarantee that contributors will later remain satisfied with their previously-agreed share. If the courts are unwilling to adjust the distribution of shares to reflect the actual contributions, having a pre-negotiated contract may hold one back from contributing more. Heavy emphasis on the shared portion of property interests may also result in discounting other incentives for collaborators to improve the work.

D. Expert Authors and Allocation in Joint Work Cases

In joint work cases, where multiple skills and activities are involved, courts are unable to use flexible definitions of the terms "originate" or "work of authorship" in its reasoning without articulating why certain inputs count as deserving contributions and others do not. When one co-author is a professional, courts are less likely to consider another contributor as a joint author.²⁴⁶ Some courts appear to favor the professionals, based on the assumption that the parties expect the non-professional to own no property interests.²⁴⁷ However, not all professionals are credited as joint authors. The image of expert author greatly affects copyright law's ability to properly allocate resources.

In *BTE v. Bonnecaze*,²⁴⁸ Bonnecaze, the drummer of the band "Better than Ezra" (BTE), argued to be a joint author because he contributed valuable elements to a song including the harmony, lyrics, percussion and rhythms, melody and song, and musical structure.²⁴⁹ However, Bonnecaze as the drummer, unlike the songwriter, could not present the court with a sheet of fixed composition or drumming notations.²⁵⁰ The court discounted the notion that authorship in a

246. Lape, *supra* note 20, at 63-64 ("Note that where one alleged co-author is a professional, this circumstance appears to bias some courts against joint authorship.").

247. *Id.* at 64 ("Such courts appear to assume that both parties expected that the non-professional would own no interest; they therefore conclude that the non-professional owns none.").

248. 43 F. Supp. 2d 619 (E.D. La. 1999).

249. *Id.* at 621.

250. *Id.* at 628.

composition could be accomplished by spontaneously contributing insights while “working up” a song.²⁵¹ The court emphasized the distinction between the underlying music composition and the sound recording.²⁵² Finding that Bonnezaze failed to prove his alleged contributions with a tangible form of expression, the court ruled that the songwriter was the sole author.²⁵³ Bonnezaze is a professional musician, yet, the court’s distinction between the copyright of the sound recording and the musical composition would still lead to the conclusion that the songwriter was the sole author of the song even when recordings of the jamming sessions demonstrated that Bonnezaze revised the song. This distinction finds songwriters, as a general profession, to have a stronger association with the musical composition of a work, thus is considered more of a natural author of a song when compared to a drummer or other session musicians.

When the collaborator of a work is a business partner, some courts apply a more relaxed standard if his or her professional practice is not directly associated with the specific subject matter in dispute. In *Fisher v. Klein*,²⁵⁴ Klein was Fisher’s business partner in making jewelry sculptures, and was in charge of business management.²⁵⁵ Klein did not possess the skills required to carry out her ideas for a particular jewelry sculpture method, and Fisher was the dominant executor of the products.²⁵⁶ The court held that Klein did not have to put her hands on the material to be considered a joint author.²⁵⁷ Her business contributions allowed Fisher to include clients’ preferences in the works, which was substantial enough to make her a joint author.²⁵⁸

Similarly, in *Janky v. Lake County Convention and Visitors Bureau*,²⁵⁹ Farag, a band member, suggested to Janky, the main songwriter, lyrics for a song, but did not provide fixed expressions of his ideas.²⁶⁰ Farag’s suggestions helped tailor the song to better suit their customer’s vision.²⁶¹ The Seventh Circuit admitted that Farag’s contribu-

251. *Id.*

252. *Id.* at 627-28.

253. *Id.* at 628.

254. 1990 WL 10072477 (S.D.N.Y. June 26, 1990).

255. *Id.* at *1.

256. *Id.* at *3.

257. *Id.* at *2.

258. *Id.* at *7.

259. 576 F.3d 356 (7th Cir. 2009).

260. *Id.* at 359.

261. *Id.*

tion made this a “close case,”²⁶² but nevertheless decided that Farag was a joint author.²⁶³ In both *Fisher* and *Janky*, the courts valued the unfixed contributions of secondary authors that made the products more acceptable to clients, thus producing a higher commercial value for these products.

Courts are generally unwilling to recognize client contributions as sufficient for joint authorship, even though the incorporation of their contributions is critical to making a sale. In several joint work disputes regarding architecture drawings or floor plans of buildings, courts found against holding clients as joint authors because (1) client engagement is typical as part of the general client and engineer relationship;²⁶⁴ (2) clients, even if they provided thumbnail sketches that sufficiently fixed their ideas, did not contribute to the fixation of the floor plan itself;²⁶⁵ (3) client contributions are typically too trivial or are merely ideas;²⁶⁶ and (4) clients generally lack the expertise for turning the ideas into an actual product.²⁶⁷ While copyright’s threshold for originality is low, courts deny clients’ contributions in disputed works by differentiating a sketch from the floor plan, and then questioning the clients’ capability to turn their ideas into the floor plan.²⁶⁸ Floor plans are typically seen as a form of expression that only professionals can produce.²⁶⁹

Courts’ bias toward professionals in joint work cases is especially highlighted in the professional-client scenario. When both parties are of different professions, courts may find the contributions of professionals of a particular subject matter more valuable than those of a

262. *Id.* at 363.

263. *Id.*

264. *See, e.g.,* *Meltzer v. Zoller*, 520 F. Supp. 847, 857 (D.N.J. 1981); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990) (quoting *Aitken, Hazen, Hoffman, Miller, P. C. v. Empire Const. Co.*, 542 F. Supp. 252, 259 (D. Ne. 1982)) (“Such involvement by a client in the preparation of architectural plans is normally expected. . . . Such involvement does not, however, ordinarily render the client an ‘author.’”).

265. *See* *Watkins v. Chesapeake Custom Homes, L.L.C.*, 330 F. Supp. 2d 563, 573-74 (D. Md. 2004); *M.G.B. Homes, Inc.*, 903 F.2d at 1493.

266. *See* *Watkins*, 330 F. Supp. 2d at 574; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (citing 17 U.S.C. § 102(b)) (“No author may copyright his ideas or the facts he narrates.”).

267. *See* *M.G.B. Homes, Inc.*, 903 F.2d at 1487.

268. *See id.* at 1493; *Aitken, Hazen, Hoffman, Miller, P. C.*, 542 F. Supp. at 259.

269. *Aitken, Hazen, Hoffman, Miller, P. C.*, 542 F. Supp. at 259 (“In [the general client-engineer] relationship, it is quite normal for the client to supply the engineer or architect with general design features which the client expects to be incorporated into the architectural plans and for the professional then to create the design drawings incorporating those features.”).

contributor whose trade has a weaker association with the resulting work. Nevertheless, those partner-collaborators whose professional practices do not have a strong association with the product may attain joint authorship if their contribution enhances the product's value in the market.

E. Professionalism: Connecting the Distribution of Material and Symbolic Resources

Exposing the role of the expert author in joint work cases is key to understanding how copyright law allocates not only material resources, but also symbolic resources. Courts' bias toward professional practitioners not only grants them more property interests as the deserving owners of a work, but also implicitly recognizes their prestige, authority, power, and privileged position in the production of copyrightable works.

A general bias for professional practitioners is rooted in the assumption that professional practitioners are the ones who advance science and culture.²⁷⁰ Thus, professional practitioners are the rightful recipients of copyright's financial incentives, granted in exchange for producing more works to benefit the public. Through the expansion of copyrightable subject matters advocated by professional organizations, copyright law inherently associates a particular profession with its respective subject matter. When one collaborates to produce a work that is not an usual product of her profession, a collaborator's contribution could be discounted in a joint work claim.

For example, copyright law adopts a narrow conception of musical works and tends to protect only that which can be notated in the form of a score.²⁷¹ Consequently, copyright law privileges certain musical elements that are important in western classical music, such as melody and harmony, and undervalues others that are significant in popular music, such as rhythm.²⁷² Producing contemporary music does not tend to follow the traditional model in which the composer provides written sheet music to musicians who subsequently perform

270. See *supra* Part I.

271. Barron, *supra* note 127, at 26.

272. *Id.* at 26, 30-31; see also *Copyright Criminals* (PBS broadcast Jan. 10, 2010), available at <http://vimeo.com/9958864> (documentary produced by Kembrew McLeod and Benjamin Franzen, 2009) (stating James Brown's drummer, Clyde Stubblefield, was one of the most sampled musicians, however, copyright royalties went to either the producers, the record companies that owned the sampled tracks, or Brown). Stubblefield never received compositional credit for any of the songs nor received royalties, and was only paid for his time in the studio.

the music without making significant changes.²⁷³ Rather, a collaborative jamming process in the recording studio has largely replaced the use of a written score, where the first fixation of a musical work is made as a recording.²⁷⁴ From this perspective, *Bonnecaze* is an example of the clash between contemporary musical practice and conventional theories on how music is made. The decision awarding sole authorship to the songwriter reinforces the conceptual divide between songwriters and musicians, as well as the connection between songwriters and music compositions.

In *Childress*, the court held that “[a] playwright does not so easily acquire [the status of] co-author.”²⁷⁵ The court disregarded the contributions made by Taylor, the actress who was instrumental for the play’s existence. In *Erickson*, one play in dispute was generated through improvisation—“a form of theatre in which there is no script.”²⁷⁶ The play was not written using the traditional model where a script is provided by the playwright, but instead was developed through a collaborative process.²⁷⁷ The playwright also initially credited one of the participating actors as the co-author.²⁷⁸ Nevertheless, the Seventh Circuit still considered Erickson as the sole author of the play because the actor was unable to prove her contribution was independently copyrightable.²⁷⁹

The same theory of bias seen in music also applies to theater—copyright law prefers written plays and discredits contributions made by actors who did not write down the revisions they themselves made. Even if a play was admittedly improvised, the playwright is still advantaged by having the responsibility to organize notes of the scenes, despite the authors contributing and collectively agreeing upon such alterations. Courts appear to view the playwright as the special figure who exercises professional judgment and aesthetic control over a play.²⁸⁰ However, historically the playwright has not always assumed such a special position. The playwright was not associated with such an authorial position in Elizabethan plays, and actors regularly held au-

273. See Barron, *supra* note 127, at 29, 36.

274. Jason Toynbee, *Musicians*, in MUSIC AND COPYRIGHT 127 (Simon Frith & Lee Marshall eds., 2d ed. 2004); Gabriel Jacob Fleet, *What’s in a Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1251 (2008).

275. *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991).

276. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1064 (7th Cir. 1994).

277. *Id.*

278. *Id.*

279. *Id.* at 1072.

280. See *Childress*, 945 F.2d at 509; *Erickson*, 13 F.3d at 1071-72.

thorship status.²⁸¹ The playwright, if mentioned at all, was almost never considered the author, but rather was referred to as “our poet” and adjunct to the proprietary group of performers.²⁸²

In photography, contributions such as posing the subjects, selecting and arranging costumes, draperies, lighting, and shading, are all regarded as elements of originality.²⁸³ However, courts do not produce consistent opinions when photographers do not carry out these elements. In *Gillespie v. AST Sportswear, Inc.*,²⁸⁴ the designer of a line of AST’s sportswear claimed joint authorship in the photos taken for an advertising catalog.²⁸⁵ The court found that professional photography “often requires the participation of many individuals,”²⁸⁶ and “a person need not hold the camera or push a button to be considered the author of a visual work, since one can exercise control over the content of a work without holding the camera.”²⁸⁷ In *Tang v. Putruss*,²⁸⁸ a case having similar facts as *Gillespie*, Putruss contributed to the photo shoot by selecting the models, gowns, accessories, and poses.²⁸⁹ The court, however, did not find Putruss’ contribution to the set-up for the photograph to amount to what the court in *Gillespie* regarded as sufficient for joint authorship.²⁹⁰ It therefore granted sole authorship to the professional photographer.²⁹¹

It is uncertain why similar contributions to the production of a photograph garnered differing holdings on the claim for joint authorship. One explanation could be how each court viewed the professions of the secondary contributors. In *Gillespie*, the person working on behalf of AST was the designer after whom the particular line of garments was named.²⁹² Whereas in *Tang*, the person working on behalf of the clothing company was the principle for the business.²⁹³ A fashion designer is not necessarily associated with the production of photographs. However, his aesthetic role and professional reputation

281. DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 42-43 (1992) (citing Joseph Loewenstein, *The Script in the Market Place*, 12 REPRESENTATIONS 101, 102 (1985)).

282. *Id.*

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

284. No. 97Civ.1911(PKL), 2001 WL 180147 (S.D.N.Y. Feb. 22, 2001).

285. *Id.* at *1-2.

286. *Id.* at *6.

287. *Id.*

288. 521 F. Supp. 2d 600 (E.D. Mich. 2007).

289. *Id.* at 604-05.

290. *Id.* at 607.

291. *Id.* at 608.

292. *Gillespie*, No. 97Civ.1911(PKL), 2001 WL 180147, at *1.

293. *Tang*, 521 F. Supp. 2d at 603.

are more at stake if the clothing line carrying his name is displayed in the photograph. This suggests that such designer has a greater incentive to assert aesthetic control over the photographs as compared to a business manager. Thus, while both *Gillespie* and *Tang* involved unauthorized uses of photographs in subsequent catalogs, AST was seen as a collaborator and joint author, while Putruss was held to infringe.

The low originality threshold and abandonment of the 1909 Act's formality requirements suggests the United States currently has an egalitarian copyright regime in which anyone can easily become a legal author for mundane communicative activities. But this egalitarian picture does not hold true in joint work cases. Rather, the image of expert author held in joint work cases suggests a stratified system. With the involvement of various kinds of collaborators, joint work cases demonstrate how the image of the expert author has induced courts to rule in favor of professional practitioners.

IV. The Return of the Lay Public?

While there is a connection between the allocation of symbolic resources and the distribution of material resources in copyright law, this Article does not suggest that copyright law alone determines the distribution of symbolic resources. Other institutions exist that sustain the boundary between professionals and lay people (i.e., between those with prestige and those without).²⁹⁴ When court decisions challenge these boundaries, extra-legal institutions may wish to respond in their own way. For example, scientists form a reputable and tight-knit community within society and its established social norms for accreditation will not be easily challenged by the copyright system.

In *Weissmann v. Freeman*,²⁹⁵ Weissmann argued that she was pressured to comply with the norms for publishing scientific research²⁹⁶

294. For example, knowledge and expertise are often accredited by the completion of an educational degree, and new knowledge is often vetted by a normalized evaluation process as part of the publication process. See PETER W.B. PHILLIPS, GOVERNING TRANSFORMATIVE TECHNOLOGICAL INNOVATION: WHO'S IN CHARGE ch. 9 (2007). Wikipedia's open-editing model is often discussed in contrast with the more traditional models as in *Encyclopaedia Britannica*, which emphasizes its credibility guaranteed by professionalism and a vetting process. See Shun-Ling Chen, *Wikipedia: A Republic of Science Democratized*, 20 ALB. L.J. SCI. & TECH. 247, 278 (2010). However, Wikipedia's model does not pose a fundamental challenge for the traditional knowledge certification process as it requires editors to provide reliable sources and reproduces the hierarchy of certified knowledge. See *id.* at 273.

295. 684 F. Supp. 1248 (S.D.N.Y. 1988).

296. David Healy & Dinah Cattell, *Interface Between Authorship, Industry and Science in the Domain of Therapeutics*, 183 BRIT. J. PSYCH. 22, 22-23 (2003). "There were a number of publications that the document suggests originated within communication agencies, with the

by listing Freeman, a renowned researcher, as the co-author.²⁹⁷ Although the appellate court legally vindicated her rights as the sole author of the disputed work, the outcome did not redistribute the symbolic resources between Freeman and Weissmann in the scientific community. Conversely, Weissmann's victory in court contributed to her expatriation from the community.²⁹⁸ The fact that the scientific community can treat copyright law as an external rule and continue to enforce its own norms shows the relative autonomy it enjoys. Such autonomy is the result of the symbolic weight bestowed upon the scientific community's judgment.²⁹⁹ For those lacking reputation and

first draft of articles already written and the authors' names listed as 'to be determined.'” *Id.* at 22-23.

The profile of the articles reported here suggests that the background of certain authors may have increased the possibility of the company's publications appearing in the most prestigious journals. Specific journals seem to have been targeted. . . . [G]hostwriting . . . leads to a lack of recognition for the people who actually write the articles. . . . [A]cademics become opinion leaders . . . because they get asked to national and international meetings to present data with which they may not have first-hand acquaintance. . . . [T]hese authors cannot share proprietary raw data with colleagues in the way that has been traditional in the science domain.

Id. at 25.

297. *Weissmann*, 684 F. Supp. at 1254 (“Plaintiff testified, in substance, that from the very beginning when she started as a resident, Dr. Freeman had made it clear to her that there are different kinds of articles that ‘we’ write; as to journal articles, for example, plaintiff said that it was clear Freeman expected his name to be added to them when done and submitted by any physician in his division. Plaintiff acquiesced in that procedure; she testified that ‘he was responsible for what I was saying, but I really was doing the primary research.’”).

Weissmann also commented in an interview conducted a few years after the trial:

The understanding was that as my chief [Freeman] could ask my permission to add his name, and I would comply. There were numerous articles and chapters that I had where he did ask, and I did add his name. During the court case he tried to use the prior gratuitous coauthorship I had given him as an attempted defense of the later outright plagiarism.

Insults and Injuries, 13 WOMEN'S REVIEW OF BOOKS, Feb. 1996, at 21.

298. See *Insults and Injuries*, 13 WOMEN'S REVIEW OF BOOKS, Feb. 1996, at 21 (stating that Weissmann's department locked her out of her office on the day the trial began in 1987, and quoting her saying “I left, knowing that it was the end of my job, but never thinking that it was going to be the end of my career”). After winning the plagiarism case in the appellate court, Weissmann filed an employment discrimination case against her institute and received a settlement of \$900,000. *Id.* at 22. However, as part of the settlement she had to agree never to apply for a job at the same institute, or any other institute that are or ever will become its affiliates. *Id.* “At the time of the settlement there were 29 affiliates. In this era of health care reform where everyone is affiliating, the number has increased, and as long as that condition stands I can't apply to any of these places in the greater New York area for employment.” *Id.*

299. See Michael Polanyi, *The Republic of Science: Its Political and Economic Theory*, 1 MINERVA 54 (1962), reprinted in 38 MINERVA 1, 7 (2000) (stating that the body of scientists as a

status, either in society at large or within particular communities, symbolic resources do not necessarily come attached with property interests given under copyright law.

This Part addresses the phenomenon of the return of the lay public,³⁰⁰ represented by large-scale self-organized collaborative works,³⁰¹ and its implications on copyright's role in allocating material and symbolic resources within society.

A. The Lay Public Become Authors—The Irony of the 1976 Act

The 1976 Act marked a watershed in U.S. copyright history by relaxing the formality requirements of the 1909 Act, and changing the fixed-term duration of copyright to a single term that attaches to an author's life.³⁰² Register Barbara Ringer explained in her address to Congress, "[W]hen the author figuratively lifts his pen from his paper, he has a copyright under the Federal law and under the Constitution, and he has it for his lifetime."³⁰³ Ringer reasoned that the formality requirements became outdated when applied to new forms of transmission other than print publication.³⁰⁴ Additionally, for print publi-

whole exercises authority of knowledge and science over the lay public). The scientific community controls how new members are trained and admitted. *Id.* Once admitted, new members "join[] a chain of mutual appreciations." *Id.* Still, power and authority are not evenly distributed within the community. *Id.* Peer-review, as a dominant knowledge-certifying mechanism in scientific journal publication, emphasizes this concept of members exercising authority over each other within the scientific community. *Id.* Peer reviewed articles are important to scholars to enter the job market, to accumulate credits and to secure tenure positions. See Gary Holden, Gary Rosenberg & Kathleen Barker, *Bibliometrics: A Potential Decision Making Aid in Hiring, Reappointment, Tenure and Promotion Decisions*, 41 *SOCIAL WORK IN HEALTH CARE* 67, 67-68 (2005); Stephen J. Zyzanski, Robert L. Williams, Susan A. Flocke, Louise S. Acheson & Robert B. Kelly, *Academic Achievement of Successful Candidates for Tenure and Promotion to Associate Professor*, 28 *FAMILY MEDICINE* 358, 358 (1996). Some scholars criticize the self-referential model because makes it difficult for outsiders to challenge the norms and authority asserted by the scientific community. See SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICY MAKERS* 64 (2009) (regarding professionalism as an institution that allows the scientific profession to "maintain its monopoly over scientific knowledge and over the allocation of funds for the generation of new knowledge"). Self-policing allows professional scientists to "enhance the autonomy and social prestige of science, while holding scientists accountable only to standards considered reasonable by their [peers]." *Id.*

300. This Article defines lay public to include general members of the public, and also members of the public that are experts but lack official credentials.

301. For example, free software projects and Wikipedia.

302. See Berne Convention Implementation Act of 1988, 17 U.S.C. § 101, 102 Stat. 2853-61 (eliminating the formality requirements).

303. *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., 1st Sess. 107 (1976).

304. *Id.*

cations under the 1909 Act, an author could “throw [his] work into the public domain regardless of what [his] intentions were” if copyright notice was not in the correct form or position.³⁰⁵ While commentators associate the notion of paternalism more often with an author’s right to terminate grants of licenses,³⁰⁶ Tom Bell suggests that copyright protection is akin to “author’s welfare.”³⁰⁷ Comparing copyright law with social welfare policies, and “starving artists” with the “deserving poor,” Bell argues that the two exhibit similar paternalistic features.³⁰⁸ By assuming that authors striving to claim copyright protection are so incompetent that they could not meet the 1909 Act’s formality requirement, copyright protection now arises automatically upon completion of a work in order to protect such incompetent authors from inadvertently losing their property interests.

Several scholars advocate for reintroducing notice formality requirements that apply to both domestic and international copyright law regimes.³⁰⁹ It is more efficient for society to ask authors to properly mark off their copyright claims than requiring the public to trace copyright owners to seek permission to use the work.³¹⁰ Formality requirements serve a filtering function by distinguishing the works authors desire to protect with copyright from those they do not, as authors rarely want to copyright every piece of work they produce.³¹¹

The formality-free rule did not anticipate the boom of information enabled by digital technologies, which produces a vast amount of unidentified works, and increases the cost of searching for copyright owners.³¹² It is ironic that the 1976 Act, which attempts to protect professional practitioners, now turns everyone into a potential author protected under copyright law.

305. *Id.*

306. See, e.g., J. H. Reichman, *Goldstein on Copyright Law: A Realist’s Approach to a Technological Age*, 43 STAN. L. REV. 943, 947 (1991).

307. Tom W. Bell, *Authors’ Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 261 (2003).

308. *Id.* at 259-61.

309. See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 554 (2004); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 211 (2005); WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 203-09 (2011).

310. Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 342 (2010).

311. See Sprigman, *supra* note 309, at 502.

312. See *Copyright Registration and Documentation*, WORLD INTELL. PROP. ORG., http://www.wipo.int/copyright/en/activities/copyright_registration/index.html (last visited Mar. 6, 2014).

B. The Rise of Mass-Collaborative Projects: Private Ordering³¹³ Between Lay Authors

The assumptions that (1) one would not be motivated to produce works without the property interests granted by copyright law, (2) one imagines every product as a commodity, (3) only professionals can produce quality works, and (4) that the current copyright system is indispensable for society to enjoy new and high-quality cultural products, are greatly debated. Contrary to how the public was imagined during the congressional hearings,³¹⁴ some members of the public step outside the passive role of receivers and consumers of information.

The software developing community is one of the first groups to challenge this paradigm.³¹⁵ They strategically used the owner-author position they obtained under copyright law to develop alternative copyright licenses and prevent the exploitation of their code, while simultaneously ensuring that the code can be shared. The licenses grant users, who are also recognized as potential developers, the freedom to tinker with their work. Over time, the free software community worked out a system that recruited enough developers to participate without directly referencing the need for monetary rewards.³¹⁶

Beginning in the early 2000s, Wikipedia, using similar private ordering strategies, also attracted a large number of contributors. In less than a decade, Wikipedia quickly became the *piece de resistance* of the new community-based, peer-production model.³¹⁷ These self-organized, community-based collaborative projects signify the comeback of the lay public speaking its discontent with the current state of copyright law. The free software community and other commons-based, peer-production communities are able to develop common-pool resources that continue to exist and grow.

313. See *supra* note 10 (defining “private ordering”).

314. See *supra* Part II.C.

315. See Christopher Kelty, *Inventing Copyleft*, in *MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE* 133-46 (Mario Biagioli et al. eds., 2011).

316. Developers value indirect interests, such as the attention economy generated from the software contribution. Highly visible free software contributors often are hired for good positions.

317. See *Wikipedia: About*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:About> (last modified July 18, 2014) (stating Wikipedia exists in more than 285 languages with the English Wikipedia alone having more than four million articles and nearly twenty-two million registered users).

C. Are Mass-Collaborative Projects Credible?—Lay Authors Without Symbolic Resources

Private ordering is possible because the community members individually own their works under copyright law and are free to redistribute their property interests.³¹⁸ Nevertheless, members of these self-organized communities lack the symbolic resources, which are traditionally assigned to professional practitioners. This statement proves true, as community members can be experts in certain fields, yet each member's reputation is not carried over to large participatory projects with an open contribution structure. Although all the contributors are authors under copyright law, mere copyright ownership does not automatically confer symbolic resources to the organized public and its resulting products. The lack of symbolic resources, and the missing or erased, connection between the lay public and societal progress in the arts and sciences have become major hurdles for the public to overcome in resuming its role in the process of cultural production.³¹⁹

Professional authors and publishers, having depended on the copyright system and lobbied for its further expansion, feel threatened by the rising importance of the collaborative production model.³²⁰ Since the collaborative model is efficient in producing works, professional practitioners often seek to discredit collaborative communities by (1) dismissing their works as amateurish, (2) questioning the qualitative value of the work, and (3) presenting them-

318. See Elkin-Koren, *supra* note 12, at 399-400. The enforceability of these licenses creates *res universitatis*—a “type of property that is non-exclusive but also bounded.” Carol Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 108 (2003). By policing the boundary of disruptive behavior, *res universitatis* can encourage “group interactions that greatly foster creativity.” *Id.* at 108.

319. Cultural production refers to the normative development process of sociology, sciences, law, religion, and expressive-asthetic activities such as art, music, or literature. David Hesmondhalgh, *Bourdieu, the Media and Cultural Production*, 28 MEDIA, CULTURE, & SOCIETY 211, 212 (2006).

320. For example, in 1998, the Halloween Documents—a series of confidential documents produced by Microsoft analyzing potential strategies to approach the threats created by free software—were leaked. *Halloween Documents*, WIKIPEDIA, http://en.wikipedia.org/wiki/Halloween_documents (last modified June 26, 2014). The fact that the software giant started to feel threatened by “hobbyists” signaled the success of the free software movement in creating a viable alternative to the proprietary software model.

In the field of encyclopedia, Britannica adjusted to new media and began to include user suggestions, although still priding itself for having expert contributors, a team of professional editors, as well as a “rigorous editorial process,” which new articles and proposed revisions have to go through before they are published. *Is Britannica Going Wiki?*, ENCYCLOPAEDIA BRITANNICA BLOG (Mar. 8, 2009), <http://www.britannica.com/blogs/2009/03/is-britannica-going-wiki/>.

selves as the real expert-authors, the producers, and gatekeepers of quality and valuable cultural works.³²¹

Fortunately for free software advocates, even if the collaborative model lacked the social credibility possessed by established, proprietary software companies, the visibility and use of its products helped to validate the model and accumulate the symbolic resources it previously lacked.³²² However, Wikipedia has more difficulty in establishing credibility and gaining symbolic resources. Wikipedia demonstrates its viability as a sustainable project because of its extreme popularity, volume of information, and competitiveness against its long-time reputable proprietary counterparts (e.g., *Encyclopaedia Britannica*).³²³ Wikipedia's prominence as one of the most visited websites is undeni-

321. See, e.g., Bill Gates, *An Open Letter to Hobbyists*, 2 HOME BREW COMP. CLUB 2 (1976), available at <http://www.classiccmp.org/cini/pdf/HT68K/Hcc-vol2-1.pdf> (portraying proprietary software companies as innovators and the software developers outside of these business establishments as amateur "hobbyists"). In 1998, when free software started to gain momentum, "Gates publicly stated that Linux posed no competitive threat to Microsoft." E. GABRIELLA COLEMAN, *CODING FREEDOM: THE ETHICS AND AESTHETICS OF HACKING* 80 (2013). Yet, in the same year, a leaked Microsoft internal report (Halloween Documents) expressed anxiety about free and open source software. See *id.* at 80-81. Microsoft since continued to discredit free software. See *Microsoft: Open Source 'Not Reliable or Dependable'*, CNET (May 19, 2006), http://news.cnet.com/Microsoft-Open-source-not-reliable-or-dependable/2100-7344_3-6074237.html. There are also many criticisms of Wikipedia. See, e.g., Stephen T. Jordan, *The Problem of the Aggregate Author: Attribution, Accountability, and the Construction of Collaborative Knowledge in Online Communities*, 4 INT'L J. OF THE BOOK 161, 161 (2007) (criticizing Wikipedia and discussing the credibility of sources when there is an absence of participation from the academic society); Brock Read, *Can Wikipedia Ever Make the Grade?*, THE CHRONICLE OF HIGHER EDUC. (Oct. 27, 2006), <http://chronicle.com/article/Can-Wikipedia-Ever-Make-the-Grade/26960/> (discussing Wikipedia's refusal to give professors or other experts priority); *Criticism of Wikipedia*, WIKIPEDIA, https://en.wikipedia.org/wiki/Criticism_of_Wikipedia (last modified Sept. 22, 2014).

322. See COLEMAN, *supra* note 321, at 88-89.

323. See Jim Giles, *Internet Encyclopaedias Go Head to Head*, 438 NATURE 900, 900-01 (2005), available at <http://www.nature.com/nature/journal/v438/n7070/full/438900a.html> (conducting the first study using peer review to compare Wikipedia and *Encyclopaedia Britannica*). The result showed that the two are overall comparable, though there were slightly more errors found in Wikipedia. *Id.* In 2011, a study concluded that Wikipedia is a good source of data for political scientists, although its coverage on older and more obscure topics is less complete as compared to recent and prominent subjects. Adam R. Brown, *Wikipedia as a Data Source for Political Scientists: Accuracy and Completeness of Coverage*, 44 POL. SCI. & POLITICS 339, 339-43 (2001). In 2012, *Encyclopaedia Britannica* announced it would stop making a printed version, which was not surprising since the number of Britannica sets sold in 2009 was only 8,000—a steep drop from 40,000 in 1996. Matt Silverman, *Encyclopaedia Britannica vs. Wikipedia [Infographic]*, MASHABLE (Mar. 16, 2012), <http://mashable.com/2012/03/16/encyclopedia-britannica-wikipedia-infographic/>. Meanwhile, the Wikimedia Foundation received sixty million donations to support Wikipedia and its sister projects. *Id.* The last printed edition of Britannica in 2012 contained 65,000 entries, while the English Wikipedia at that time had more than three million articles. *Id.*

able.³²⁴ Yet, Wikipedia is often criticized for not being a credible resource and remains a predominately amateur-edited reference work.³²⁵ Unlike traditional encyclopedias, Wikipedia does not rely on the symbolic resources garnered by the contributions of experts in order to assert authority and prestige. Contrary to the practice of traditional encyclopedias that bury the disclaimer for accuracy while simultaneously emphasizing its reliability,³²⁶ Wikipedia warns its readers that there is no guarantee for accuracy in bolded font at the top of its disclaimer page.³²⁷ Nevertheless, Wikipedia still strives to build a

324. See *The Top 500 Sites on the Web*, ALEXA, <http://www.alexa.com/topsites> (last visited Aug. 15, 2014) (indicating Wikipedia is the sixth most visited website, after Google, Facebook, Youtube, Yahoo, and Baidu).

325. See *Editor Survey 2011/Profiles*, WIKIMEDIA, http://meta.wikimedia.org/wiki/Editor_Survey_2011/Profiles (last modified July 7, 2013). According to a 2011 editor survey conducted by the Wikimedia Foundation, 8% of Wikipedia editors have PhD degrees, 18% with a master's degree, and 35% with a bachelor's degree. *Id.* The report also revealed that 30% of editors have obtained a secondary degree, and 9% have just a primary education. *Id.* However, these numbers are self-reported, and because Wikipedia allows for pseudonymity and anonymity, official credentials of editors are hard to verify. See *id.*

326. See, e.g., *About World Book, Inc.*, WORLD BOOK, <http://www.worldbook.com/world-book-corporate/about-world-book?wbredirect=1&Itemid=197> (last visited Apr. 21, 2014) (stating "World Book, Inc., sets the standard for providing accurate, objective, and reliable reference and instructional materials" in the first sentence on its About page and disclaiming accuracy in the middle of its terms and conditions). World Book's disclaimer states that it "does not warrant or make any representations regarding the use or the results of the use of the Sites in terms of its quality, correctness, accuracy, reliability, or otherwise." *Terms & Conditions*, WORLD BOOK, <http://www.worldbook.com/world-book-corporate/terms-a-conditions> (last visited May 30, 2014). Similarly, on the corporate *Encyclopaedia Britannica* website, the company expressly claims to "provide timely, relevant, and trustworthy information and instructional products." *Britannica Today*, ENCYCLOPAEDIA BRITANNICA, <http://corporate.britannica.com/about/today/> (last visited Aug. 1, 2014). Yet in its terms of use, *Encyclopaedia Britannica* also includes a disclaimer of warranties. *Online Services Usage Agreement ("Terms of Use") For All Britannica Sites, Services and Applications Advertising-Supported and Subscription, Consumer and Institutional*, ENCYCLOPAEDIA BRITANNICA, <http://corporate.britannica.com/termsfuse.html> (last updated Mar. 26, 2014).

327. See *Wikipedia: General Disclaimer*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (last modified Jan. 24, 2014) ("Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, WIKIPEDIA CANNOT GUARANTEE THE VALIDITY OF THE INFORMATION FOUND HERE. . . . Note that most other encyclopedias and reference works also have disclaimers."). See also *Wikipedia: Content Disclaimer*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:Content_disclaimer (last modified May 22, 2014) ("Wikipedia contains obscure information that would not be covered in a conventional encyclopedia. Wikipedia's coverage is based on the interests of its volunteer contributors. Readers should not judge the importance of topics based on their coverage in Wikipedia, nor assume that a topic is important merely because it is the subject of a Wikipedia article.").

certain level of credibility as an important discursive platform,³²⁸ and a project worth contributing. It also seems that the credibility of a reference work is more difficult to assess than the usefulness of software,³²⁹ thus harder for Wikipedia to establish integrity based on level of use.

The ideas to establish things such as free software and Wikipedia's public-contributed, reference database derived from society's distrust for the institutionalized authority of both proprietary software companies and publishers.³³⁰ Compared to other open-source software projects, Wikipedia appears to dispose of the image of the expert-author more radically since contributing texts in natural languages seems easier than contributing source code in programming languages.³³¹ The contributions of lay people are the source of Wikipedia's credibility issue and expose the project to more distrust for lacking symbolic resources. Edit wars on Wikipedia are common on pages explaining controversial topics.³³² Although relying on the credentials and authority of expert authors may mitigate such disagreements, it is a solution that the Wikipedia model does not utilize.³³³

328. See *Category: Wikipedia Content Policies*, WIKIPEDIA, https://en.wikipedia.org/wiki/Category:Wikipedia_content_policies (last modified Apr. 13, 2014) (attempting to encourage a certain level of quality by providing links to Wikipedia's sets of content policies including among others: verifiability, no original research, and neutral point of view).

329. Prominent free software projects such as Linux, Apache, Firefox, and Android indicate that they are viable substitutes for proprietary options. See *August 2013 Web Server Survey*, NETCRAFT, <http://news.netcraft.com/archives/2013/08/09/august-2013-web-server-survey.html> (last visited Aug. 15, 2014); Emily Protalinski, *IE11 More Than Triples Market Share to 10.42%, Firefox Slips a Bit, and Chrome Gains Back Share*, THE NEXT WEB (Jan. 2, 2014), <http://thenextweb.com/insider/2014/01/02/ie11-triples-market-share-10-42-firefox-slips-bit-chrome-gains-back-share/#!zJKX8>; Jon Fingas, *Android Climbed to 79 Percent of Smartphone Market Share in 2013, But Its Growth Has Slowed*, ENGADGET (Jan. 29, 2014), <http://www.engadget.com/2014/01/29/strategy-analytics-2013-smartphone-share/>.

330. See *supra* Part IV.B.

331. But see *Wikipedia: Visual Editor*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:VisualEditor> (last modified Sept. 12, 2014) (providing a new tool for contributing source code that offers an easy to use interface).

332. See Besiki Stvilia, Michael B. Twidale, Linda C. Smith & Les Gasser, *Information Quality Work Organization in Wikipedia*, 59 J. AM. SOC'Y INFO. SCI. & TECH. 983, 999 (2008).

333. See *Wikipedia: Verifiability*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:Verifiability> (last modified Sept. 9, 2014); *Wikipedia: Citing Sources*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Citing_sources (last modified Oct. 3, 2014). In 2007, a scandal erupted after a prominent user operating under a pseudonym revealed his faked credentials. See Chen, *supra* note 294, at 286. The Wikipedia community did not respond to this incident by asking general users' to reveal their identities, but rather it started to require users with higher levels of administrative responsibility to provide personal identification to the Wikimedia Foundation. *Id.* at 287.

D. The Disenfranchised Public Re-Entering Copyright Politics

Various copyright-affected industries heavily lobbied for the establishment of copyright law, and organizations heavily advocating for the public rarely got a seat at the table.³³⁴ In the congressional hearings regarding legislative expansion of copyright, the voice of the public was largely missing.³³⁵ The lay public, seen as passive receivers and consumers of products, has been disenfranchised in the politics of copyright law. Professional groups repeatedly assert that their financial interests coincide with the public interest since they claim that professionals produce quality products that enhance public discourse. The Copyright Office considers the promotion of the public interest as part of their mission, but the legislative history shows professional groups are its primary constituency.³³⁶ The decreasing cost in reproduction and distribution of copyrighted works due to new technological development created more conflict between the public and professional content producers, escalating to the level of a “copyright war.”³³⁷ Empowered by new information technologies, the lay public fights professional organizations that push for stronger and more restrictive copyright protection, seeking to limit the public’s newly acquired power.

The U.S. Supreme Court has done little to avail the lay public and reverse the trend of copyright expansion. In landmark cases such as *Eldred v. Ashcroft*³³⁸ and *Golan v. Holder*,³³⁹ the Supreme Court recognized the constitutionality of the Copyright Term Extension Act and the Uruguay Round Agreement Act—with the former granting twenty more years of exclusive rights for new and existing copyrighted works,³⁴⁰ and the latter resurrecting copyright protection of foreign works that had previously fallen into the public domain in the United States.³⁴¹ In both cases, the Supreme Court upheld the legislation because Congress has the constitutional authority to decide the appro-

334. Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 314 (2009).

335. See *supra* Part II.C.

336. See *supra* Part II.C; Litman, *supra* note 334, at 314-15.

337. Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC’Y 1, 1-2 (2006) (tracing the origin of the term to a 1995 whitepaper prepared by the White House Information Infrastructure Task Force, and by 2003 the term was used so often it became standard).

338. 537 U.S. 186 (2003).

339. 132 S. Ct. 873 (2012).

340. *Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003). “In sum, we find that the CTEA is a rational enactment.” *Id.* at 208.

341. *Golan v. Holder*, 132 S. Ct. 873, 875 (2012).

priate scope of copyright law to promote the useful arts and sciences.³⁴² Even though a law that extends copyright protection retrospectively to existing works does not provide any new incentives to the author, and despite the inadvertent impacts such a law might have on the public, the Supreme Court assumes Congress conducts the proper weighing of opposing interests before enacting a statute.³⁴³ For the disenfranchised lay public, these judicial interpretations are unfortunate because the transcript from the congressional hearings shows that the legislative floor is not a fair playground.³⁴⁴ The Court's ruling disregards the absence of the public interest problem that has persisted throughout the history of copyright law, offers no assistance to those who were unable to participate in the previous negotiations, and confirms the copyright politics that gives priority to special interest groups over the public's interest in free speech and access to information.

In *Kirtsaeng v. John Wiley & Sons, Inc.*,³⁴⁵ the U.S. Supreme Court reversed the trend of favoring publishers and held that individuals who purchase cheaper books printed in foreign countries to resell in the United States do not infringe publishers' copyright because the

342. *Eldred*, 537 U.S. at 208; *Golan*, 132 S. Ct. at 888.

343. *Eldred*, 537 U.S. at 198 (“[T]his Court has been similarly deferential to the judgment of Congress in the realm of copyright.”); *Golan*, 132 S. Ct. at 889 (“[Section] 514 falls comfortably within Congress’ authority under the Copyright Clause. Congress rationally could have concluded that adherence to Berne ‘promotes the diffusion of knowledge.’” (quoting Brief for Petitioners at 4, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2423674, at *4)). “A well-functioning international copyright system would likely encourage the dissemination of existing and future works.” *Golan*, 132 S. Ct. at 889.

344. See, e.g., *supra* Part II.C; *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1208 (1965) (statement of Hayward Cirker, President, Dover Publications, Inc.).

Who is speaking for the [public who will bear the increased cost imposed by this revision]? This great mysterious copyright area is not likely to arouse the public and consumers into group action, and the absence of pressure from these groups may be creating a very distorted picture. I hope that my testimony may disturb you and make you realize that someone is going to pay for all these lovely gifts generously given to private interests, and that someone is the public.

Id. at 1208.

Congressman Robert Kastenmeier acknowledged that although there were oppositions to aspects of the revision from teachers and organizations, he was not sure “whether anyone ha[d] appeared opposed to the bill in terms of certain specifics and purportedly in behalf of the public,” as Cirker did in his testimony. *Id.* at 1209. Congressman Herbert Tenzer noted that Cirker was the only publisher that spoke against the term extension, to which Cirker clarified that he spoke on behalf of himself and not as a publisher, otherwise he would support the extension. *Id.* at 1212.

345. 133 S. Ct. 1351 (2013).

first sale doctrine³⁴⁶ applies internationally.³⁴⁷ In the majority opinion, Justice Breyer reasoned that ruling in an opposite decision would have negative impacts on the public.³⁴⁸ Justice Ginsburg, who wrote the majority opinion in *Eldred* and *Golan*, in her dissenting opinion called the suggested negative impacts a “parade of horrors [that is] largely imaginary,” and expressed concerns for the publishers’ ability to maximize profit.³⁴⁹ The outcome of *Kirtsaeng* differed from *Eldred* and *Golan* because international treaties do not dictate domestic exhaustion as a rule, and Congress has not spoken on the issue. Had the special interests of organizations persuaded Congress to codify the domestic first sale doctrine, *Kirtsaeng* could have had an opposite outcome.

In light of the legislative history and judicial decisions, it is hard to overlook the series of public outrage and campaign against two bills that sought to strengthen the enforcement of copyright—Stop Online Piracy Act (SOPA)³⁵⁰ and Protect Intellectual Property Act (PIPA).³⁵¹ The public campaign to squash the bills climaxed on January 18, 2012, when Wikipedia, along with several other websites, temporarily suspended their services and directed visitors to a protest message.³⁵² This action resulted in millions of tweets,³⁵³ millions of signatures for the petition against the bills, and millions of emails to Congress.³⁵⁴ These widespread protests killed the two bills that were expected to

346. See 17 U.S.C. § 109(a) (2012) (stating that the lawful owner of a particular copy of a work is entitled, without first obtaining the authority of the copyright owner, “to sell or otherwise dispose of the possession of that copy”).

347. *Kirtsaeng*, 133 S. Ct. at 1355-56.

348. *Id.* at 1366-67 (stating that a geographical interpretation of the first-sale doctrine could have a negative impact on foreign trade, and also would require booksellers, libraries, museums, retailers, etc. to engage in a complex permission-verifying process to determine copyright status).

349. *Id.* at 1373-74.

350. H.R. 3261, 112th Cong. (2011).

351. S. 968, 112th Cong. (2011).

352. See *Wikipedia: SOPA Protest Led 8 Million to Look Up Reps in Congress*, L.A. TIMES (Jan. 19, 2012), <http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html>; Matt Peckham, *Did It Work? ‘Day After’ Results of the SOPA, PIPA Blackout*, TIME (Jan. 19, 2012), <http://techland.time.com/2012/01/19/did-it-work-day-after-results-of-the-sopa-pipa-blackout/?xid=gonewsedit>; Andy Greenberg, *Amidst SOPA Blackout, Senate Copyright Bill Loses Key Supporters*, FORBES (Jan. 18, 2012), <http://www.forbes.com/sites/andygreenberg/2012/01/18/amidst-sopa-blackout-senate-copyright-bill-loses-a-key-supporter/>.

353. *Tweet*, TECHTERMS.COM, <http://www.techterms.com/definition/tweet> (last updated Mar. 19, 2009) (defining a “tweet” as “an online posting, or ‘micro-blog’ created by a Twitter user”).

354. See Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/technology/senate->

sail through Congress.³⁵⁵ Adrian Johns, a professor and historian of copyright and piracy,³⁵⁶ stated, “For the first time, public resistance had called a halt to a process in which intellectual property law had expanded inexorably for as long as anyone could remember.”³⁵⁷

The Wikipedia blackout was a spectacle, as the community of Wikipedia editors for the first time worked to protect its interest in ensuring a legal environment that permits its collaborative model to prosper. Jimmy Wales, the co-founder of Wikipedia, and Kat Walsh, then chair of the Wikimedia Foundation³⁵⁸ Board of Trustees, wrote an op-ed piece following the blackout stating, “We acknowledge[] that our existence is itself political, and we spoke up to protect it.”³⁵⁹ The long-disenfranchised lay public has not only returned in the form of self-organized, collaborative groups that refuse to follow the interest-based underpinnings of copyright law. In the campaign against SOPA and PIPA, the public returned as an undeniable political force that strove to protect a legal regime that allows sharing and collaboration in the production of cultural and informational materials. The op-ed piece clarifies that Wikipedia is not against copyright laws per se, and that Congress should recognize the publishing industry’s contribution to innovation and economy.³⁶⁰ However, it declared that in the new collaborative model of knowledge production, the public is the media industry, the authors, and the innovators.³⁶¹ It also requested that Congress make laws that recognize the value and power of free and open knowledge.³⁶²

SOPA and PIPA were killed in January 2012, but that did not signify that Congress now gives more recognition to the capacity of the

postpones-piracy-vote.html?_r=0; *Wikipedia: SOPA Protest Led 8 Million to Look up Reps in Congress*, *supra* note 352; Peckham, *supra* note 352.

355. See Julianne Pepitone, *SOPA and PIPA Postponed Indefinitely After Protests*, CNN MONEY (Jan. 20, 2012), http://money.cnn.com/2012/01/20/technology/SOPA_PIPA_postponed/.

356. *Adrian Johns Curriculum Vitae*, UNIV. OF CHICAGO, <http://home.uchicago.edu/~johns/cv.htm> (last visited Aug. 2, 2014).

357. Adrian Johns, *The Information Defense Industry and the Culture of Networks*, AMODERN, <http://amodern.net/article/the-information-defense-industry-and-the-culture-of-networks/> (last visited Apr. 21, 2014).

358. WIKIMEDIA FOUNDATION, <http://wikimediafoundation.org/wiki/Home> (last modified Aug. 14, 2014).

359. Jimmy Wales & Kat Walsh, *We Are the Media, and So Are You*, WASH. POST (Feb. 9, 2012), http://www.washingtonpost.com/opinions/we-are-the-media-and-so-are-you/2012/02/09/gIQafNW81Q_story.html.

360. *Id.*

361. *Id.*

362. *Id.*

lay public or the value of the collective model of production. New legislative efforts, including the Trans Pacific Partnership³⁶³ negotiations, still support a stronger copyright regime and do not respond to the public's discontent of Congress's abandoned precedents.³⁶⁴ Public interest organizations continue to protest against such negotiations, and the copyright war persists.³⁶⁵ However, the political balance of power has changed, and the public now expresses their discontent with the passive role copyright law has assigned them and strives to have its voice heard.³⁶⁶

For example, Creative Commons,³⁶⁷ a leading organization in the free culture movement, used to take a more ambivalent role in the copyright wars. While free software activists were seeking to surpass copyright law with a philosophy that prioritizes users' freedoms, Creative Commons conformed to the copyright regime while also championing authors' rights.³⁶⁸ But in 2013, after an international meeting in Buenos Aires, Creative Commons openly stated that private ordering strategies have limitations, and expressed its commitment to support copyright reform to benefit the public interest.³⁶⁹

363. *Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited June 6, 2014).

364. See generally Michel A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 30-31 (2013).

365. See, e.g., *Trans-Pacific Partnership Agreement*, ELECTRONIC FRONT. FOUND., <https://www EFF.org/issues/tpp> (last visited Apr. 21, 2014); *The Trans-Pacific Partnership Agreement: Your Guide to Copyright in the TPP*, PUB. KNOWLEDGE, <http://tppinfo.org/> (last visited Apr. 21, 2014); Joe Wolverton II, *SOPA: Dead in Congress, Alive in Trans-Pacific Partnership*, NEW AMERICAN (Mar. 17, 2014), <http://www.thenewamerican.com/economy/item/17861-sopa-dead-in-congress-alive-in-trans-pacific-partnership>.

366. See James Temple, *'SOPA Blackout' is Web's Political Coming of Age*, S.F. CHRONICLE (Jan. 19, 2012), <http://www.sfgate.com/technology/dotcommentary/article/SOPA-Blackout-is-Web-s-political-coming-of-age-2619699.php> (regarding the anti-SOPA campaign as the new form of politics); Matt Stempeck, *#DontBreakTheInternet: How the Web Became a Political Force v. SOPA*, PBS (Nov. 21, 2011), <http://www.pbs.org/idealab/2011/11/dontbreaktheinternet-how-the-web-became-a-political-force-vs-sopa322/>.

367. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited June 6, 2014). Creative Commons publishes and maintains copyright licenses "that give the public permission to share and use [author's] creative work[s]—on conditions of [the authors's] choice." *Id.*

368. See Shun-Ling Chen, *To Surpass or to Conform—What are Public Licenses For?*, 2009 U. ILL. J.L. TECH. & POL'Y 107, 117-21 (2009).

369. Timothy Vollmer, *Supporting Copyright Reform*, CREATIVE COMMONS BLOG (Oct. 16, 2013), <https://creativecommons.org/weblog/entry/39639> (explaining Creative Commons cannot be restricted in the role of a mere license steward, but should also take part in the copyright reform).

The public spectacle surrounding SOPA and PIPA has not been repeated. Wikipedia declared that it would only use a blackout technique sparingly as a last resort.³⁷⁰ However, it is uncertain if such a campaign would work for a second time. It is interesting to observe how Congress or courts would recognize, if at all, the value of works produced by the collaborative lay public, as well as the active role the lay public plays in promoting useful arts and sciences. For those who discredit Wikipedia's editing model, the powerful effect of a blackout still may not give Wikipedia credibility. However, it recognizes that, although *Encyclopaedia Britannica* still is viewed as more trustworthy,³⁷¹ Wikipedia is significant in our contemporary life and politics, and has the ability to persuade people to participate in an orchestrated campaign.

The publishing industry is likely to continue discrediting the lay public's collaborative efforts by promoting the assumption that only professionals can ensure the quality of a work. The lay public's comeback challenges the link between quality and professionals, or the symbolic power to which the lay public has submitted to professionals. To be certain, Wikipedia cares about the quality of its work and administers a standard of reliability for included information.³⁷² But, Wikipedia does not aspire to become trusted in the same way as *Encyclopaedia Britannica*. Rather, its model calls for users to be vigilant in evaluating the quality of information and to become contributors through which users will acquire new literacy skills. The mass collaboration model is not just a distributed model of production, as it calls for a looser connection between established institutions, formal credentials, and quality in cultural works. Instead, the model also parallels an epistemological model that helps reorient the relationship between knowledge and symbolic power.

Conclusion—Toward a More Inclusive Semiotic Democracy

The association between the author as the producer of copyrighted works and a source of professional authority is under-explored

370. Wales & Walsh, *supra* note 359 (“[P]rotests like the Wikipedia blackout are a last resort.”). Wales and Walsh stated that Wikipedia's core mission is “mak[ing] knowledge freely available,” and not advocacy. *Id.*

371. See Andrew J. Flanagin & Miriam J. Metzger, *From Encyclopaedia Britannica to Wikipedia: Generational Differences in the Perceived Credibility of Online Encyclopedia Information*, 14 INFO. COMM. & SOC'Y 355, 355 (2011).

372. See *Category: Wikipedia Content Policies*, WIKIPEDIA, https://en.wikipedia.org/wiki/Category:Wikipedia_content_policies (last modified Apr. 13, 2014)

in copyright literature.³⁷³ Professor Joseph Miller posits that by granting copyright protection to mediocre works, contemporary U.S. copyright law leads to a proliferation of pedestrian authors.³⁷⁴ However, by examining legislative history detailing the expansion of copyrightable subject matter and court decisions on joint work cases, this Article exposes the persisting connection between the recognition of the “expert” and authorship in U.S. copyright law. This connection justifies a copyright system that prefers expert authors. By privileging professional practitioners over their collaborators who are not considered professionals or rather have expertise in a different field, copyright law reinforces the authority of expert authors, and distributes symbolic resources within society accordingly.

Facilitated by recent information and communication technologies, the traditional model of distribution that heavily relied on professional practitioners is now being challenged. Not only is the boundary between users and authors blurred, but also the reliance on professional publishers decreases as the number of channels of distribution multiply. The new digital environment allows for new and experimental works with various degrees of decentralization and collaboration. These developments excite and inspire many new forms of cultural production and create new roles for citizens to perform.³⁷⁵ Although the public has been disenfranchised by copyright law’s history that ties progress to professional practices, members of

373. See Margaret Chon, *The Romantic Collective Author*, 14 VAND. J. ENT. & TECH. 829, 830-31 (2012) (noting that the issue of authority is addressed in the romantic authorship critiques, but is less developed).

Less developed, but still central to these critiques [of romantic authorship], is their claim that the romantic individual author has too influential a role in *authorizing* an approved set of cultural practices as “secular prophet with privileged access to experience of the numinous and a unique ability to translate that experience for the masses of less gifted consumers.”

Id. (quoting Peter Jaszi & Martha Woodmansee, *Introduction*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUALIST APPROPRIATION IN LAW AND LITERATURE*, *supra* note 20, at 3). Chon also quotes Peter Jaszi’s more recent statement as a continual endorsement of his position: “[O]ne of the specific roles assigned to creative and scientific genius was the work of imposing a comprehensible pattern on the evidence of experience.” *Id.* at 831 (quoting Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, in *INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE*, *supra* note 315, at 413, 414-15). Chon states that the romantic authorship critique contains two strands: one is the author as the “genius,” and the less developed examines the author as the “cultural arbiter.” *Id.*

This Article separates the two strands completely. Viewing the cultural arbiter strand as a subset of genius is not helpful for fully investigating the development of the authority associated with professionalism.

374. Miller, *supra* note 3, at 458.

375. See *supra* text accompanying notes 361-62.

the public have gradually taken up a more proactive role in the meaning-making process in our society. This is the belief and the hope of those who advocate for a semiotic democracy.³⁷⁶

Much scholarship is devoted to reforming the copyright system. Such scholarship advocates for a less restrictive copyright regime that encourages reinterpretations of existing works, emphasizes free speech rights, and prevents copyright owners from imposing artificial limitations on the use of their works by outlawing legitimate technological uses.³⁷⁷ These are all important ways to help cultivate a robust semiotic democracy. However, copyright's role in the distribution of symbolic resources enables professional practitioners and the copyright industry to continue asserting themselves as the exclusive producers of quality work, hindering the public, who are viewed as amateurs or mere consumers, from participating effectively in culture and society.³⁷⁸

Works generated by the lay public are now abundant, and many self-organized collaborative projects continue to thrive. Online collaborative projects question the authority of the traditional publication channels and offer new mediums, but do not claim to be the new dominant authority. Rather, these innovations remind people to avoid blindly submitting to the authority of professionals, and to learn to evaluate the quality of information in different ways.³⁷⁹ Conversely, professional practitioners that continue to rely on the conventional models of copyright and knowledge production discredit the work of laymen.³⁸⁰

376. See FISHER, *supra* note 28, at 30-31.

377. See, e.g., Dan Burk, *Anti Circumvention Misuse* 4, 15 (Minnesota Pub. Law Research Paper No.02-10, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=320961; Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 286 (2006).

378. However, not everyone advocating for legal reform in intellectual property rights wants a general relaxation of the exclusive control currently awarded to the property owners. See Robert D. Cooter, *Freedom, Creativity, and Intellectual Property*, 8 N.Y.U. J.L. & LIBERTY 1, 10 (2013) (advocating for legal patent reform that would give owners weak (or no) protection against innovators but strong protection against producers and consumers in order to bring about more innovation and societal progress). Nevertheless, the differences between those who want more relaxed intellectual property rights and those who do not begs the question of how legislative lines are drawn. In particular, this Article highlights how we distinguish innovators and authors from mere consumers, how we identify the professor practitioners as innovators and the public as consumers, and how we have come to assume that professionals are more likely to make more valuable contributions than the public. Studies on user innovation point to the complexity of this assumption. See generally ERIC VON HIPPEL, *DEMOCRATIZATION INNOVATION* (2005).

379. See *supra* Part IV.C.

380. See *id.*

This Article attacks the link between professionalism's symbolic power and copyright. With aid of the image of the expert author, copyright law is vulnerable to seizures by self-interested professional organizations. Exposing professionalism in copyright law is not only insightful for exploring the history of copyright authorship. Such exposure calls for a serious reevaluation of the relationship between knowledge and symbolic power and the role copyright plays in endorsing the credibility and authority of professional practitioners. This notion is especially important to recognize while examining the recent copyright politics. The long-disenfranchised lay public has returned to debate, challenging established institutions on how society evaluates the quality of a product. The public is also questioning whether a restrictive copyright system that gives priority to professionals is in society's best interest. Exposing professionalism in copyright law is key to obtaining copyright reform that moves toward a more inclusive semiotic democracy.

