

# Downloading Personhood: A Hegelian Theory of Copyright Law

Karla M. O'Regan\*

I'm sorry; when I worked 9 to 5, I expected to get a fucking paycheck every week. It's the same with music; if I'm putting my fucking heart and all my time into music, I expect to get rewarded for that. I work hard and anybody can just throw a computer up and download my shit for free. That Napster shit, if that gets any bigger, it could kill the whole purpose of making music. It's not just about the money. . . . It's the thrill of going to the store; you can't wait till that artist's release date, taking the wrapper off the CD and putting the CD in to see what it sounds like. I've seen those little sissies on TV, talking about [how] 'The working people should just get music for free,' I've been a working person. I never could afford a computer, but I always bought and supported the artists that I liked. I always bought a Tupac CD, a Biggie CD, a Jay-Z CD. If you can afford a computer, you can afford to pay \$16 for my CD.<sup>1</sup>

Eminem, recording artist.

*Earlier this year, MP3 outpaced "sex" as the No.1 search term on the Web.<sup>2</sup>*

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## INTRODUCTION

On June 12, 2008, Bill C-61 was given its first reading in Canada's House of Commons. This Bill, an Act to Amend the existing *Copyright Act*, listed five aims of the new legislation, the first of which sought to "update the rights and protections of copyright owners to better address the Internet, in line with international

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\* Assistant Professor of Criminology at St. Thomas University in Fredericton, N.B. The author thanks her former professors, Peter Benson and Abraham Drassinower, whose works and teachings inspired her many years ago to think about Hegel and intellectual property with an unbridled curiosity and sense of possibility.

<sup>1</sup> RIAA, "Music Online: The Future is Now" *Wall of Sound* (17 May 2000), online: MusicUnited.org <[http://www.musicunited.org/3\\_artists.html](http://www.musicunited.org/3_artists.html)>.

<sup>2</sup> Jennifer Sullivan and Christopher Jones, "More Popular than Sex" *Wired Magazine* (14 October 1999), online: <<http://www.wired.com/techbiz/media/news/1999/10/31834>>.

standards.”<sup>3</sup> The Bill has come under significant criticism since its first reading,<sup>4</sup> bringing to the fore a number of significant tensions and competing interests the Internet and its technological era have brought to the realm of copyright law. These debates are hardly new, having received the widest audience almost a decade ago when during his second term at Northeastern University, a nineteen-year-old computer science student designed a file-storage system<sup>5</sup> that changed the world of intellectual property.<sup>6</sup> This system, which was later coined “Napster” after designer Fanning’s “unruly” hair,<sup>7</sup> served to revolutionize the music industry and its relationship with technology. By creating a system that allowed Internet users to share MP3’s (a highly compressed, near-CD quality electronic music file)<sup>8</sup> from their

<sup>3</sup> Bill C-61, An Act to Amend the *Copyright Act*, 2d session, 39th Parliament, 56-57 Elizabeth II, 2007-2008.

<sup>4</sup> See Peter Nowak, “Copyright Law Could Result in Police State: Critics”, *CBC News* (12 June 2008) online: CBC News <<http://www.cbc.ca/technology/story/2008/06/12/tech-copyright.html>>. See also Michael Geist, “Troubling Details in New Downloading Law” *The Toronto Star* (13 June 2008) online: The Star <<http://www.thestar.com/article/442677>>.

<sup>5</sup> Ariel Berschadsky, “*RIAA v. Napster*: A Window onto the Future of Copyright Law in the Internet Age” (2000) 18 *J. Marshall J. Computer & Info. L.* 755 at 759-760.

<sup>6</sup> Throughout this article, the term “intellectual property” is used, and while the discussion herein deals primarily with copyright applications, it is not meant to be exclusive to aspects of trademark or patent law. This view is guided by the distinction between “practical” and “general” analyses of intellectual property law made by Kenneth L. Port in his Foreword to the “Symposium on Intellectual Property Theory” (1993) 68 *Chicago-Kent L.Rev.* 585 at 586:

In defining “intellectual property” as a term of art, there are two levels of analysis. The first is the practical, specific level whereby intellectual property is made up of three primary subfields — namely, patents, copyrights, and trademarks. On this level, it is fundamental to recognize that patents, copyrights, and trademarks are not interchangeable.

. . . .

On another more generalized level, intellectual property is the legal regime by which authors or inventors protect their intellectual creations. On this level, distinguishing with any particularity the conceptual differences between the subfields may not be necessary because each begins with the same inquiry — who owns the creation and what is the scope of those ownership rights.

<sup>7</sup> Port, *ibid.* at n. 14.

<sup>8</sup> “MP3” is an abbreviation of the term “MPEG-1 layer-3”, derived from the acronym “MPEG” for the Moving Pictures Expert Group, “a working group formed under the joint direction of the International Standards Organization (ISO) and the International Electro-Technical Commission (IEC) [which] works to develop ‘international standards for compression, decompression, processing, and coded representation of moving pictures, audio and their combination.’” Jocelyn Dabeau, “An Introduction to MP3”, online: William Fisher Homepage <<http://www.law.harvard.edu/faculty/>

home computers via the Internet,<sup>9</sup> “Napster . . . almost single-handedly dragged the music industry into the Internet age.”<sup>10</sup>

Fearing the impact Napster and copy-cat systems would have on record sales and music distribution control, the industry was less than enthusiastic about Fanning’s program or its implications.<sup>11</sup> This was a fear that later turned out to be well placed, with Napster claiming to have had over seventy million users at its peak, located in thirteen countries.<sup>12</sup> Similarly, reports from the Recording Industry Association of America (RIAA) in 2000 indicated a dramatic decrease of sales of compact disc singles, (a direct competitor with MP3 music files).<sup>13</sup> The music industry fought back by filing suit against Napster on behalf of eighteen separate record companies, alleging “contributory and vicarious copyright infringement.”<sup>14</sup> Ultimately, after a District Court hearing and Ninth Circuit Court of Appeals decision, Napster was enjoined from resuming its online file-sharing service.<sup>15</sup> Yet, in

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tfisher/music/MP3.html>; “MP3” is the acronym for “Moving Pictures Experts Group 1, Audio Layer 3.” See Berschadsky, *supra* note 5 at 758-9, n. 9.

<sup>9</sup> While Napster served as the central database, “hosting” users’ music files, none of these files were actually stored with Napster, allowing the owners of Napster to later claim ignorance to copyright infringements of its users. See Berchandsky, *supra* note 5 at 759-60; See also Glasebrook, *infra* note 10 at 822-23.

<sup>10</sup> Sarah D. Glasebrook, “‘Sharing’s Only Fun When It’s Not Your Stuff’: Napster.com Pushes the Envelope of Indirect Copyright Infringement” (2001) 69 UMKC L.Rev. 811 at n. 7, citing Clay Shirky, *FEED Magazine*.

<sup>11</sup> This also extended to recording artists and songwriters who expressed concern that Napster and like systems would effectively steal their profits or the necessary incentive for future artists. See Mike Stoller, “Songs That Won’t Be Written” *The New York Times* (7 October 2000), online: <<http://query.nytimes.com/gst/fullpage.html?res=9903E1DD153CF934A35753C1A9669C8B63&n=Top/Reference/Times%20Topics/Subjects/F/Finances>>.

<sup>12</sup> Grace J. Bergen, “The Napster Case: The Whole World is Listening” (2002) 15 *Transnat’l Law*. 259 at 260-261.

<sup>13</sup> John Borland, “Music Industry Blames Net for Some Revenue Woes” *CNET* (16 February 2001), online: [CNET <http://news.cnet.com/news/0-1005-200-4852756.html>](http://news.cnet.com/news/0-1005-200-4852756.html), cited in Aric Jacover, “I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications” (2002) 90 *Georgetown L.J.* 2207 at 2210, n. 12. Worth noting, is Napster’s claim (during litigation) that its system didn’t take away record sales, but would rather increase revenue as users of the application would “sample” music before purchasing it. See *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, C.A. 9 (Cal.), 2001 at 1017, cited in Jacover, *supra* note 13 at 2210.

<sup>14</sup> Timothy J. Ryan, “Infringement.Com: *RIAA v. Napster* and the War Against Online Music Piracy” (2002) 44:2 *Arizona Law Review* 495.

<sup>15</sup> *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, C.A.9 (Cal.), 2002 at 1098

the wake of its demise, numerous alternate peer-to-peer (P2P) technologies sprung up,<sup>16</sup> (the so-called “Sons of Napster”)<sup>17</sup> sparking a series of legal actions.<sup>18</sup>

The “Napster” case, much like Parliament’s recent Bill C-61, served as a climax for mounting apprehensions and speculations about both the efficiency and feasibility of copyright law to cope with the latest developments of the information age. Similarly, it has prompted many intellectual property theorists to reconsider the impact of a number of technological advancements on traditional principles of intellectual property, copyright in particular.<sup>19</sup> The need for such musings does not seem misplaced given that studies have shown P2P usage has increased following the *Napster* decision,<sup>20</sup> a staggering notion given that Napster alone, at its peak, was reported to have “had over eighty million registered users who downloaded as many as three billion songs per month.”<sup>21</sup> Similarly, P2P usage has been found to reduce the probability of music purchases by thirty per cent.<sup>22</sup> There have been

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<sup>16</sup> Following the Nine Circuit’s ruling in *A&M Records*, *supra* note 13, other P2P applications emerged using a “decentralized” model of peer-to-peer networking, rather than Napster’s “centralized” model. Timothy J. Ryan, in his article, “Infringement.Com: *RIAA v. Napster* and the war against online music piracy”, *supra* note 14 at 517, notes that over 70 different versions of file sharing systems were available following the *Napster* ruling. A perusal of the site “After Napster: The Beat Goes On”, online: Freshnoise <<http://www.afternapster.com>>, reveals more than 100 possible file sharing client software programs. For a more complete description of peer-to-peer technology, see Jacover, *supra* note 11 at 2212–2218.

<sup>17</sup> Sudip Bhattacharjee, *et al.*, “Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions” (2006) 49 *Journal of Law and Economics* at 92.

<sup>18</sup> The RIAA alone launched almost 800 lawsuits against alleged music sharers in the months following the *Napster* case. See Bhattacharjee *et al.*, *ibid.*

<sup>19</sup> Although the “Napster” case was an American copyright case, the inter-dependent relationship between Canadian and U.S. copyright laws and litigation has often been noted: see Sheldon Burshtein “Surfing the Internet: Copyright Issues in Canada” (1997) 13 *Santa Clara Computer & High Tech L.J.* 385. Similarly, the global effects of the *Napster* case have also been frequently commented on, suggesting that an examination of the case within a Canadian copyright context is not uncalled for.

<sup>20</sup> See Fara Tabatabai, “A Tale of Two Countries: Canada’s Response to the Peer-to-Peer Crisis and What It Means for the United States” (2005) 73 *Fordham L.Rev.* 2321 at 2322. It is noted that the P2P network *Kazaa* had a reported 7000 users at the time of a series of FBI (and arguably *RIAA* law suit-inspired) “raids.” Less than a year following the raids, *Kazaa*’s user numbers increased to over twenty-two million in the U.S. alone (with more than three times that number of users worldwide).

<sup>21</sup> Timothy J. Ryan, “Infringement.com: *RIAA v. Napster* and the War Against Online Music Piracy” (2002) 44 *Ariz. L. Rev.* 495 at 520, citing Jefferson Graham, “A slimmed-down Napster Gets Back Online; Trial-Run is Heavy on Little Known Artists” *USA Today* (10 January 2002) D1.

<sup>22</sup> See Alejandro Zentner, “Measuring the Effect of File Sharing on Music Purchases” (2006) 49 *Journal of Law and Economics* 63; “Thanks, me hearties” *The Economist*

multiple responses to this “crisis”, some as radical as to suggest the complete inapplicability and/or overhaul of traditional copyright theory to the world of information technology.<sup>23</sup> This article will examine these responses, identifying the competing interests at work in both traditional copyright schemes and contemporary Internet-based criticisms, and put forth a theory of copyright law capable of addressing the needs of these rival interests in an advanced technological era.

Part I delineates some of the more prominent theories copyright scholars have offered in response to the “IP-IT crisis.”<sup>24</sup> Part II attempts to identify the source of these problems by first examining conventional justifications for copyright and the competing interests inherently at work in its conception. Part III identifies three specific factors I argue are particularly problematic (both in terms of cause and consequence) to the current state of the Internet and copyright theory. These are: (i) the emergence of a corporate intermediary; (ii) the “death” of the author; and (iii) a non-consideration of the copier. I examine each of these factors, suggesting their problematic aspects are the result of an over-emphasis on instrumentalist values in copyright theory. Part IV incorporates the work of Margaret Jane Radin on property as personhood and G.W.F. Hegel’s theory of abstract right in order to address these three areas of concern and propose a “revised” theory of copyright law based on the rights of the would-be-copier. Some concluding remarks on the implementation of the theory are explored in Part V.

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387 (19 July 2008), an article published in July of 2008 in the Economist reported that “global sales of recorded music fell by eight per cent in 2007, according to figures released in June by the International Federation of the Phonographic Industry, a trade group. It blamed 70 per cent of the decline on ‘file-sharing’ software.”

<sup>23</sup> Perhaps, foremost in this advocacy has been John Perry Barlow, former lyricist for the Grateful Dead, and current co-founder and Vice-Chair of the “Electronic Frontier Foundation.” See, “The Economy of Ideas” *Wired* (March 1994) 84–90, 126–29, arguably his most influential article on the subject of copyright and the Internet. See also, John Perry Barlow, “The Economy of Ideas — Selling Wine Without Bottles on the Global Net” *Electronic Frontier Foundation*, online: Electronic Frontier Foundation <<http://homes.eff.org/~barlow/EconomyOfIdeas.html>> [Barlow, “Selling Wine Without Bottles on the Global Net”].

<sup>24</sup> Although noted by many, the strongest statement of the current difficulties facing copyright law in the Internet age is offered by Barlow, by way of analogy to a “sinking ship”:

Since we don’t have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship. This vessel, the accumulated canon of copyright law and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as without. (Barlow, “Selling Wine Without Bottles on the Global Net”, *supra* note 23 at 1).

## I. THE BABY AND THE BATHWATER: RESPONSES TO THE “IP-IT” CRISIS

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. . . .

We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.<sup>25</sup>

Many authors have referred to the Internet as the “Wild West” frontier of the modern day.<sup>26</sup> With its seemingly limitless possibilities and unexplored mediums, it poses significant challenges to traditional modes of legal regulation and protection. Both the uniqueness of the forum as well as the ever-increasing influence of cyberspace on daily life suggest an impending need for the law to respond in some fashion. As noted by Lucinda Jones, the difficulty copyright has had in responding to these new tasks is the consequence of two factors, “speed and scale.”<sup>27</sup> Internet usage rates have increased exponentially in the last decade. The most recent internet usage data suggests over one billion users worldwide, with over twenty per cent of the total world population logging on.<sup>28</sup> This figure is far beyond 1999 estimates of 150-200 million users and 2005 predictions of 300 million users.<sup>29</sup> In

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<sup>25</sup> John Perry Barlow, “Declaration of the Independence of Cyberspace,” *Electronic Frontier Foundation*, online: Electronic Frontier Foundation <<http://www.eff.org/~barlow/Declaration-Final.html>>.

<sup>26</sup> See: Shamoil Shipchandler, “The Wild Web: Non-Regulation as the Answer to the Regulatory Question” (2000) 33 *Cornell Int’l L. J.* 435; Burshtein, *supra* note 19.

<sup>27</sup> Lucinda Jones, “An Artist’s Entry into Cyberspace: Intellectual Property on the Internet” (2000) 22 *E.I.P.R.* 79 at 79.

<sup>28</sup> Miniwatts Marketing Group, *Internet Usage Statistics: The Internet Big Picture*, (2008), online: Internet World Stats <<http://www.internetworldstats.com/stats.htm>>. (Last accessed August 17, 2008). See also David Crystal, “Interpreting Interlanguage” *I e magazine: the A-Level English Magazine* 27-28 (1998), where he notes: “in the five minutes it might take you to read this article, 3000 new Internet users have logged on somewhere in the world.” In a 2006 survey commissioned by the CRTC, it was found that 70 per cent of Canadian households had internet access. See, Government of Canada, *Reforming the Copyright Act Backgrounder*, online: Industry Canada <[http://www.ic.gc.ca/epic/site/crp-prda.nsf/en/h\\_rp01151e.html](http://www.ic.gc.ca/epic/site/crp-prda.nsf/en/h_rp01151e.html)>.

<sup>29</sup> Jones, *supra* note 27 at 80, n. 10. Jones also notes that, “[t]he eGlobal Report (<http://www.cipo.gc.ca>) reported that there were 130.6 million active users in 1999, Time Magazine (June 22, 1999) reported a figure of 147 million users, and Nua Internet Surveys (<http://www.nua.ie>) reported a figure of 171 million as at May 1999.”

the face of such rapid change, it seems imperative that copyright law begin to address the issues at stake in cyberspace.

We find ourselves living in an information-fuelled society, an economy largely based on intangibles and knowledge, in which the basis of our relationships and the commodities of our trade are forms of intellectual property — and the source of wealth is increasingly intellectual, as opposed to physical, capital. The worth of Internet stocks, based largely on novel ideas and intangibles, provides evidence of the value that society is placing on this medium, as well as its insubstantiality.<sup>30</sup>

The responses to the challenges created by this new information era have been both vast and various. While some scholars cling to the traditional principles of copyright,<sup>31</sup> others advocate for a complete abandonment of intellectual property law within the electronic realm.<sup>32</sup> Though not meant to be an exhaustive survey, some of these theories and their primary arguments are summarised below.

#### (a) The Law as a Square Peg

A fair number of commentators have suggested that the law simply doesn't "fit" into the cyber world. This response is primarily found among theorists who claim the relationship between law and technology is plagued by two problems: speed and form. As noted by Henning Wiese, "the law, which is by its very nature a carefully applied and reactionary tool to regulate occurring social justices in a constant process, struggles to change in order to keep up with developments."<sup>33</sup> As such, the law-making process is a slow one, and for some, in terms of information technology, too slow:

Faith in law will not be an effective strategy for high tech companies. Law adapts by continuous increments and at a pace second only to geology in its stateliness. Technology advances in the lunging jerks, like the punctuation of biological evolution grotesquely accelerated. Real world conditions will continue to change at a blinding pace, and the law will get further behind, more profoundly confused. This mismatch is permanent.<sup>34</sup>

Similarly, critics of intellectual property regimes within cyberspace suggest that the form of digital media is beyond legal regulation. This approach, finding root in post-modernist critiques of copyright, concentrates on the dichotomy between the legal realm of the tangible and the Internet's world of "virtual reality." It is suggested the current IP-IT crisis "is a consequence of a true information society

<sup>30</sup> Jones, *supra* note 27 at 79.

<sup>31</sup> See M. de Zwart, "Copyright in Cyberspace" (1996) 21 *Alternative L. J.* 266.

<sup>32</sup> Barlow, *supra* note 23.

<sup>33</sup> Henning Wiese, "The Justification of the Copyright System in the Digital Age" (2002) 24 *E.I.P.R.* 387 at 387.

<sup>34</sup> Barlow, *supra* note 23 at 6-7.



where the information product and its mode of delivery are inseparable.<sup>35</sup> Within this view, Napster was an ideal “information society” citizen, allowing “individuals [to] share information and content directly, without central servers, company agendas or inconvenient copyright rules standing in the way.”<sup>36</sup> This view has led some commentators to suggest that the Internet and its evolution will only be encumbered by governmental regulation inept at keeping up with or applying to an electronic forum. As noted by Shipchandler:

The simplest, albeit most frightening, solution leaves the Internet unregulated. While seemingly shocking and morally lax, non-regulation prevents overbroad application of laws that will hinder the growth and development of the Internet. Nations can scramble to tailor laws that will govern the Internet, but the Internet’s infrastructure adapts to avoid such localized laws quickly. The Internet’s global nature makes it impossible to control and impossible to damage; the Internet was designed to be immune to catastrophes and invulnerable to shut down. Similarly, the Internet regulation may be seen as an attack and, as such, will be circumvented. While nations try to keep pace with this ever-changing technology, the world’s governments may be doomed to haplessly chasing the Internet into the sunset.<sup>37</sup>

These recommendations have led both designers and scholars to create and advocate for a system of “copyleft.”<sup>38</sup> A concept attributed to Richard Stallman, “copyleft” is “free software which permits a person to use, modify, and distribute it. The source code is available to all users to run, copy, study how the program works, distribute, change, modify and improve the software.”<sup>39</sup> While seemingly a “free-for-all” regime, copyleft has one rule: there are no rules. As stated by Stallman:

[T]he central idea of copyleft is that we give everyone permission to run the programs, copy the program, modify the program, to distribute modified versions . . . but not permission to add certain restrictions of their own. Thus, the crucial freedoms that define ‘free software’ are guaranteed to everyone who has a copy; they become inalienable rights.<sup>40</sup>

Other similarly radical solutions are offered by scholars and technological practitioners alike, suggesting that the information highway is deserving of new roadmaps. A theory known as “*lex informatica*” advocates for the reform and

<sup>35</sup> Wiese, *supra* note 33 at 387.

<sup>36</sup> J. Borland, *et al.*, “The P2P Myth” *CNET* (26 October 2000), online: CNET <<http://news.cnet.com/news/0-1005-202-3248711-1.html>>, cited by Wiese, *supra* note 33 at 387.

<sup>37</sup> Shipchandler, *supra* note 26 at 463.

<sup>38</sup> Paul Lambert, “Copyleft, Copyright and Software IPRs: Is Contract Still King?” (2001) 23 *E.I.P.R.* 165.

<sup>39</sup> *Ibid.* at 167.

<sup>40</sup> Cited in P. Lambert, *supra* note 38 at 167.



“recodeification” of internet-based copyright laws based on the opinions and recommendations of software engineers and technological developers.<sup>41</sup>

Despite these criticisms of law’s slow moving and archaic traditions, some theorists have suggested these characteristics will prove fruitful for “IP-IT” relations. As noted by Sherman and Bently:

While much energy in this area of law is taken up with reform and harmonisation and, as such, is constantly concerned with the future, there are many reasons why time should be taken to consider the image of intellectual property law that shapes and informs those discussions.<sup>42</sup>

In some cases, this period of contemplation is for the purposes of designing better, more suitable means of securing and protecting information on the Internet. These arguments are explored in further detail in the following section.

### **(b) Tech Solutions for Tech Problems**

*The answer to the machine is in the machine.*<sup>43</sup>

A common response to allegations that the law is too slow to respond efficiently to the demands of the digital era is a suggestion to invest time and money into technological solutions. While the majority of these comments emerge from technology developers and/or designers, some legal writers have begun to support this line of thought, noting that “emerging copyright infringements are less of a legal issue than a technological obstacle.”<sup>44</sup>

Solutions proposed include various forms of encryption,<sup>45</sup> electronic signatures,<sup>46</sup> or the implementation of a form of digitized “watermark,” encoding the protected information within the data of another piece of text, sound, or image.<sup>47</sup> Other solutions are being pursued via various investigative task forces, such as the

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<sup>41</sup> See J.R. Reidenberg, “*Lex Informatica: The Formulation of Information Policy Rules Through Technology*” (1998) 76 Texas L. Rev. 553.

<sup>42</sup> Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (New York, NY: University Press, 1999) at 219-220, cited in Wiese, *supra* note 33 at 393.

<sup>43</sup> S. Dusollier, “Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright” (1999) E.I.P.R. 285, cited in Wiese, *supra* note 33 at 394.

<sup>44</sup> H. Harrington, “Is it the End of the Line for Copyright?” (2000) 38 Commercial Lawyer 66 at 67.

<sup>45</sup> Burshtein, *supra* note 19 at 391.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

RIAA's Secure Digital Media Initiative, aimed at developing an industry standard security system.<sup>48</sup>

Canada's most recent foray into copyright protection, Bill C-61, proposes a series of other "technological" solutions, providing consumers with the right to copy "legally acquired music onto other devices such as MP3 players or cellphones" or to make digital "backup" copies of (once again) legally acquired creations (e.g. books, videos) using devices they own.<sup>49</sup> This process, otherwise known as "format shifting," would include the creation of digital copies of music, videos, photographs, etc., provided they meet a series of statutory requirements (e.g. legal ownership and non-transgression of technological protections).

Interesting to note is the view among some commentators that these systems will merely serve to protect copyrighted materials from those persons for whom access to the information becomes too difficult. As Wiese notes:

As it stands, evasion is just too tempting. If, however, there are technologies to make evasion more difficult and there are laws forbidding evasion, such a combined protection system might prove useful and powerful, if only to keep "honest people honest."<sup>50</sup>

### (c) Economic Proposals

While some analysts are advocating for increased security technologies or reinvented rules for the management of intellectual property on the Internet, others have suggested that enforcement of copyright law should play second fiddle to profit-making.<sup>51</sup> One of these recommendations is a "metering and royalty collection system," which would involve the distribution of compulsory licenses for the downloading of copyrighted material.<sup>52</sup> This would allow Internet users to circumvent having to obtain permission requests from copyright holders for each piece of material desired (a process that can be quite complicated given the various groups and/or individuals who can hold copyright in one work).<sup>53</sup> Compensation would be provided to copyright holders by way of royalties from the use of the material.<sup>54</sup>

A similar strategy suggested, and currently employed with respect to blank compact-discs, is a system of taxation, applied to various entities that derive finan-

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<sup>48</sup> Harrington, *supra* note 44 at 67. For more information on the SDMI, visit the RIAA website, online: RIAA <<http://www.riaa.org>>.

<sup>49</sup> Bill C-61, *supra* note 3 at s. 17.

<sup>50</sup> Wiese, *supra* note 33 at 393 (also noteworthy is Wiese's observation that the majority of copyright infringements on the Internet are accounted for by these "occasional" infringers).

<sup>51</sup> Jacover, *supra* note 13; see also R. Anthony Reese, "Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions" (2003) U. Miami L. Rev. 237.

<sup>52</sup> Jacover, *supra* note 13 at 2250-52.

<sup>53</sup> See e.g. Henriquez's discussion of copyright holders for works of music, *infra* note 122.

<sup>54</sup> Jacover, *supra* note 13 at 2251.

cial benefit from the use of copyrighted material on the Internet.<sup>55</sup> Other proposals include the use of “pay per listen” subscription services (already at work on some sites)<sup>56</sup> and the maximisation of web advertising revenue.<sup>57</sup> Bill C-61 extends these economic responses to the IP-IT crisis with a proposed fixed limit on statutory damages for copyright infringement (i.e. \$500), provided all infringements pertain to the defendant’s private use and/or collection.<sup>58</sup>

Irrespective of the proposals being offered, contemplation of the nature and justifications for copyright entitlements seems integral to any successful implementation or adaptation program. In light of this, the following section attempts to investigate some of the more prominent theories of copyright law, prior to identifying particular problems raised by the application of copyright to the Internet, in Part III.

## II. FRUITS OF THE MIND: JUSTIFICATION THEORIES OF COPYRIGHT LAW

*Now is my way clear, now is the meaning plain:  
Temptation shall not come in this kind again.  
The last temptation is the greatest treason:  
To do the right deed for the wrong reason.*

T.S. Eliot, *Murder in the Cathedral*<sup>59</sup>

Conflict is at the heart of copyright. This is evidenced even in the manner by which commentators organize their reflections on its practice, theory, and challenges, i.e. “questioning the nature of an author’s claim [or] questioning the nature of the copier.”<sup>60</sup> In some instances, this has been attributed to the “right” that copyright seeks to recognize and protect, (i.e. exclusion), and the reason(s) presented for doing so (i.e. access). As noted by Peter Jaszi:

Copyright is informed by a commonly perceived, seemingly basic contradiction of purpose. On the one hand, copyright aims to promote public disclosure and dissemination of works of “authorship”; on the other hand, it seeks to confer on the creators the power to restrict or deny distribution of their works.<sup>61</sup>

<sup>55</sup> *Ibid.* at 2252-3.

<sup>56</sup> Reese, *supra* note 51 at 237, n. 1.

<sup>57</sup> *Ibid.* at 237.

<sup>58</sup> Bill C-61, *supra* note 3 at s. 30(1). Also noteworthy is s. 30(2) that states a defendant can plead ignorance as a means of reducing the \$500 fine to an amount not less than \$200.

<sup>59</sup> T. S. Eliot, *Murder in the Cathedral* (New York, NY: Harcourt Brace, 1935) at part 1.

<sup>60</sup> Port, *supra* note 6 at 585.

<sup>61</sup> Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) *Duke L.J.* 455 at 463.

The origins of this view can be traced back to the Western Enlightenment period.<sup>62</sup> As early as the eighteenth century, Anglo-American jurisprudence began to view intellectual property as a means of managing a set of competing interests between the owner and the user. This can be seen in the comments made by Lord Mansfield in the case *Sayre v. Moore*<sup>63</sup> where he observed the necessity to,

... guard against two extremes equally prejudicial: the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>64</sup>

Centuries later, courts have recognized “what is worth copying is prima facie worth protecting,”<sup>65</sup> while cautioning that “care must always be taken not to allow . . . [patent and copyright laws] to be made instruments of oppression and extortion.”<sup>66</sup>

The need to account for copyright law likely stems from this paradoxical nature. It is founded on the general rule that “the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — became, after voluntary communication to others, free as the air to common use.”<sup>67</sup> Given this inherent contradiction, it isn’t surprising that few copyright scholars agree on either its moral or practical justification. Prior to examining the particular factors arising out of the current Internet dilemma, some attention must be paid to the traditional theories of justification, in order to both identify the source(s) of the problems, as well as contextualize the later discussion of theory.

Copyright theory can be generalized as having two independent camps, each of which has grown out of a need to justify the exclusionary right granted to property owners. These are justifications based on (i) instrumental value, and (ii) intrinsic value.<sup>68</sup>

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<sup>62</sup> David Vaver, *The Law of Intellectual Property: Copyright, Patents, Trademarks* (Concord, ON: Irwin Law, 1997) at 10.

<sup>63</sup> *Sayre v. Moore* (1785), 1 East. 361n, 102 E.R. 139 (Eng. K.B.).

<sup>64</sup> *Ibid.* at 140.

<sup>65</sup> *University of London Press v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 (Eng. Ch. Div.), at 610.

<sup>66</sup> *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109 (Eng. C.A.), at 128 approved 100 years later in *Canadian Assn. of Broadcasters v. Society of Composers, Authors & Music Publishers of Canada* (1994), 58 C.P.R. (3d) 190 (Fed. C.A.), at 196, cited in Vaver, *supra* note 62 at 11.

<sup>67</sup> *International News Service v. Associated Press*, 248 U.S. 215 (U.S., 1918), Brandeis J dissenting at 250.

<sup>68</sup> Although these categories are used frequently in the literature, this particular description was taken from Timothy J. Brennan, “Copyright, Property, and the Right to Deny” (1993) 68 Chicago-Kent L. Rev. 675 at 691.

**(a) Instrumental Value Theories**

“The generally accepted principle of copyright law is to grant protection to specific authors to encourage all authors to create and disseminate their works. As a result, the public at large will have access to this information.”<sup>69</sup> This argument is based on the assumption that in the absence of this protection, creators of intellectual works would be less willing and/or able to engage in this process of creation and disclosure. This “incentive” principle is the foundation for instrumentalist justifications of copyright in most of its forms, three of which are discussed herein.

**(i) Economic Efficiency**

This theory is largely attributed to Ronald Coase who contended that the creation and dissemination of property was attributable to the perceived efficiency of market transactions.<sup>70</sup> In this way, property rights served to increase this efficiency, “by providing the excludability and alienability necessary for consensual transactions.”<sup>71</sup> This view was put forth in his now famed article, “The Problem of Social Cost”, where Coase suggests that property rights should be justified on the basis of their market worth, rather than some intrinsic value or relationship they might have to or with the owner.<sup>72</sup> Instead, property rights were better thought of as bargaining tools with which persons were able to complete transactions in mutually beneficial ways. Consequently, property rights are able to function as a form of incentive for property improvements, sales, and purchases, increasing the overall efficiency and quality of the market.<sup>73</sup>

The attraction of the Coase Theorem to instrumental theorists is easily understood given the tendency among such theorists to justify individual rights of exclusion by way of social utility and/or benefit.<sup>74</sup> The prevalence of this principle in Anglo-American jurisprudence can be found in many places, including the U.S. Constitution, which includes the “promot[ion] [of] the progress of science and the useful arts,” in its first article.<sup>75</sup> Thomas Jefferson, a prominent figure in the devel-

<sup>69</sup> Port, *supra* note 6 at 587.

<sup>70</sup> Ronald H. Coase, “The Problem of Social Cost” (1960) 3 J.L. & Econ. 1.

<sup>71</sup> Brennan, *supra* note 68 at 694.

<sup>72</sup> *Ibid.* at 694. These types of intrinsic values and relationships are discussed in a later section of the article.

<sup>73</sup> *Ibid.* at 694.

<sup>74</sup> While some authors have suggested that this is characteristic of intellectual property in general, (See Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1993) 68 Chicago-Kent L. Rev. 841 at 847–49.), I would submit it is far more prominent in theories emphasising the social and/or “market” values of intellectual property rights than those that argue the relationship between creator and created establishes an inherent entitlement worthy of recognition. Theories along this latter vein are discussed in the following section.

<sup>75</sup> *The United States Constitution*, art. I, s. 8, cl. 8.

opment of American intellectual property theory, was also a strong advocate for this incentive-based argument, arguing “the patent monopoly was not designed to secure the inventor his natural right in his discoveries. Rather, it was a reward, and inducement, to bring forth new knowledge.”<sup>76</sup> Similarly, within the Canadian copyright context, commentators have noted the importance of copyright in ensuring ample production of quality intellectual works.<sup>77</sup>

### (A) Copyright as Contract

The concept of copyright as a manifest “bargain” between the author and the public domain has roots in the early establishment of patent law, where the agreement reached between inventor and the state resembled that of a contract.<sup>78</sup> In exchange for the introduction of a new product, machine, or trade, the state guaranteed the artisan or designer protection from competitors.<sup>79</sup> In this respect, copyright served as a “trading company” of sorts, exchanging intellectual production for commercial and academic monopolies. This perspective is difficult to maintain in the modern scheme of intellectual property, where the negotiation and occasional revocation of conditions is governed by statute. Perhaps most notably stated by Estey J in *Compo Co. v. Blue Crest Music Inc.*<sup>80</sup>

Copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls in between rights and obligations heretofore existing in the common law. Copyright legislation creates rights and obligations upon the terms and in the circumstances set out in the statute. . . . It does not assist the interpretative analysis to import tort concepts. The legislation speaks for itself and

<sup>76</sup> William H. Francis & Robert C. Collins, *Cases and Materials on Patent Law: Including Trade Secrets, Copyrights, and Trademarks*, 4th ed. (St. Paul, Minn.: West Pub. Co., 1981) at 92–94.

<sup>77</sup> Burshtein, *supra* note 19 at 394. Also noteworthy are Burshtein’s observations with respect to the impact that production levels will have on the content (and consequential use) of the Internet. Citing the U.S. Government’s Report on the Internet:

All the computers, telephones, scanners, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful [Internet], if there is no content. What will drive the [Internet] is the content moving through it. (*U.S. White House Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, Executive Summary 6* (Washington, D.C., 1995), [“White House Report”].

<sup>78</sup> Vaver, *supra* note 62 at 12.

<sup>79</sup> *Ibid.* at 12.

<sup>80</sup> *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, 105 D.L.R. (3d) 249 (S.C.C.).

the actions of the appellant must be measured according to the terms of the statute.<sup>81</sup>

Thus, while the contract model of copyright is no longer a strongly advocated position, it is demonstrative of the incentive-based principles that form the foundation for most instrumentalist models. Guaranteed protections for authors and creators against “saucy intruders”<sup>82</sup> continue to serve as incentives for creation, whether this be by reason of contract or statute.<sup>83</sup>

### (ii) *Social Utility*

Central to this perspective is the viewing of intellectual production as integral to society’s “scientific and cultural progress.”<sup>84</sup> As noted by Robinson:

The granting of a patent privilege at once accomplishes three important objects; it rewards the inventor for [her/]his skill and labor; it stimulates [her/]him, as well as others, to still further efforts in the same or different fields; it secures to the public an immediate knowledge of the character and scope of the invention. Each of these objects, with its consequences, is a public good, and tends directly to the advancement of the useful arts and sciences.<sup>85</sup>

As noted in Robinson’s comment, the notion of “social good” is integral to utilitarian justifications of copyright laws. Coined in the work of Jeremy Bentham, the utilitarian school of thought evaluates policies, actions, or laws based on consequences.<sup>86</sup> Having already determined intellectual production to be of social value, utilitarians view actions and/or laws, which result in increased intellectual production, to be justifiable. In this respect, utilitarian theories of copyright law are more closely connected to the “incentive” doctrine than any other instrumentalist philos-

<sup>81</sup> *Ibid.* at 261.

<sup>82</sup> A reference to Livingston J’s judgement in *Pierson v. Post*, 3 Cal. R. 175 (N.Y. Sup.Ct., 1805), at 181 [*Pierson*].

<sup>83</sup> For a thorough discussion of how this notion of a natural rights-based claim to copyright can be limited within a public (instrumentalist) domain via the idea-expression dichotomy, see Abraham Drassinower, “A rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16:1 Cdn. J. L. & Juris 3; See also Abraham Drassinower, “Capturing Ideas: Copyright and the Law of First Possession” (2006) 54 Cleve. St. L. Rev. 191.

<sup>84</sup> Edwin C. Hettinger, “Justifying Intellectual Property” in Adam Moore, ed., *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham, MD: Rowman & Littlefield, 1997).

<sup>85</sup> William C. Robinson, *Treatise on the Law of Patents for Inventions* (Boston, MA: Little, Brown & Co., 1890) at s. 33. Although Robinson speaks exclusively of patent law, the same observations are arguably transferable to the copyright regime.

<sup>86</sup> J.J.C. Smart, “Utilitarianism” in Paul Edwards, ed., *The Encyclopedia of Philosophy* (New York, NY: MacMillan, 1967) at 208.



ophy, and are also the most prevalent in contemporary discussions of information technology. As noted in the 1995 U.S. Report on the Internet:

By granting authors exclusive rights, the public receives the benefit of literary, artistic, musical, and dramatic works that might not otherwise be created or disseminated. Effective copyright protection promotes a cybermarketplace of ideas, expression and products.<sup>87</sup>

These views often go so far as to suggest that “without the copyright, patent, and trade secret property protections, adequate incentives for the creation of a socially optimal output of intellectual products would not exist.”<sup>88</sup> Yet, cautions have been given, even among utilitarian theorists themselves, about the dangers associated with grounding rights exclusively in social utility. As noted by Waldron:

It seems psychologically unavoidable that rights grounded in utility will be taken as ends in themselves: too much emphasis on the utilitarian character of the premises can undermine people’s sense that it is a *right* (as opposed, say, to some defeasible presumption or rule of thumb) that is grounded in this way.<sup>89</sup>

The result is an attempt among utilitarian theories to incorporate a notion of “equity” into discussions of social good, i.e. it is only fair/equitable that investors in intellectual property be given some return on their investment.<sup>90</sup> On pure instrumentalist grounds, these justifications would be difficult to uphold. Similarly, when the effect of globalization on notions of “social good” is considered, these original conceptions of “social utility” are questionable, particularly in the face of developing countries, world poverty, and human rights violations.<sup>91</sup> Also, one of the more common knee-jerk reactions to utilitarian theories of copyright is the suggestion that many intellectual labourers would continue to produce intellectual works in the absence of property rights and/or other monetary incentives. The centuries before the creation of copyright and patent laws were far from barren of inventive and creative work.<sup>92</sup> Furthermore, “authors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection.”<sup>93</sup>

Although a complete analysis of these criticisms and their effect on the validity of utilitarian theories is beyond the scope of this discussion, it is useful to con-

<sup>87</sup> “White House Report”, *supra* note 77 at 394.

<sup>88</sup> Hettinger, *supra* note 84 at 30.

<sup>89</sup> Waldron, *supra* note 74 at 851.

<sup>90</sup> See Waldron’s discussion of publisher’s rights, where he contends arguments of this nature are valid only on grounds of market efficiency, rather than those of fairness or desert, *supra* note 74 at 853-5.

<sup>91</sup> See Marci A. Hamilton, “The TRIPS Agreement: Imperialistic, Outdated, and Overprotective” in Moore, *supra* note 84 at 243.

<sup>92</sup> Vaver, *supra* note 62 at 7.

<sup>93</sup> Stephen Breyer, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs” (1970) 84 Harv. L. Rev. 281 at 282.

sider alternative contentions in light of the prominence given to arguments of social utility within the context of the new information age.

### (A) Intrinsic Value

Arguments asserting the existence of an inherently valuable relationship, worthy of recognition, between creator and created are among the oldest justifications for copyright and find root in eminent theories of real property.<sup>94</sup> The most prominent class of these theories is explored here. A second justification for copyright based on intrinsic values is elaborated on in Part IV with the delineation of my own theory of copyright, where I investigate Hegel's suggestion that the appropriation of property is necessary for the development of personality.<sup>95</sup>

### (iii) Labour-Desert

Proprietary claims have long been recognized as particularly strong when they are characterized as being derivative, in some fashion, of the "person."<sup>96</sup> Many commentators have suggested that although in the absence of further argument, this claim should not carry independent moral weight, social practice has demonstrated a tendency to allot such claims a normative status.<sup>97</sup> This is attributed to the historical prevalence of two inter-related theories of labour and desert, founded on the ideas of John Locke, who held that any person ought to be entitled to the "fruits of her/his labour."<sup>98</sup> The basis for this right has three inter-related origins.<sup>99</sup> Although this section will discuss each in turn, elaboration on these points is made in Part IV.

### (A) Excellence

Labour-desert theorists contend that intellectual works are of such a degree of accomplishment that they justify public response.<sup>100</sup> As noted by Becker, "Some intellectual labour exemplifies human excellence. It exceeds ordinary human achievement — perhaps by being exceedingly original, or difficult, or brave, or beautiful."<sup>101</sup> As a result of these extraordinary achievements, intellectual labourers gain the admiration of society, which in turn should be expressed by way

<sup>94</sup> See John Locke, *Two Treatises of Government*, 2<sup>nd</sup> ed. (London, UK: U of Cambridge Press, 1967).

<sup>95</sup> G.W.F. Hegel, *Philosophy of Right*, trans. by T. M. Knox (Oxford: Univ. Press, 1952).

<sup>96</sup> Lawrence C. Becker, "Deserving to Own Intellectual Property" (1993) 68 *Chicago-Kent L. Rev.* 609 at 619.

<sup>97</sup> Becker, *ibid.*

<sup>98</sup> Locke, *supra* note 94.

<sup>99</sup> These categories are taken from Becker, *supra* note 96, although they appear frequently in the literature.

<sup>100</sup> Becker, *supra* note 96 at 621.

<sup>101</sup> *Ibid.*

of an award of value and/or worth.<sup>102</sup> Although articulations of this argument frequently resemble the “incentive” principle, it is important not to equate what Becker terms “admiration” with the utilitarian notion of a social good. Although supporters of the labour-desert theory would likely not oppose the suggestion that society is enriched by the presence of works of excellence, proprietary rights in these works are not granted, according to the desert theorist, either as a result of this enrichment or for the purposes of encoring more. Rather, the sole justification for intellectual property rights is desert, irrespective of the impact upon society or intellectual production.<sup>103</sup>

### (B) Exchange

Another aspect of the labour-desert argument is based on a notion of exchange or “reciprocal benefits.”<sup>104</sup> The roots of this contention stem from both the work of John Locke and Karl Marx, and base desert arguments on the value of the product rather than the producer. While Lockean theories of labour recognize the creation of value in work, which, at times,<sup>105</sup> will warrant property rights, Marx considered the impact of the political economy on this value to suggest its transformation into “exchange” value.<sup>106</sup> This aspect of the labour-desert theory is frequently cited as its most problematic, given the exclusionary and limited nature of property rights as well as the complications that arise out of collaborative labour.<sup>107</sup> The result has been the adoption of a series of “qualifiers” for the types of labour that would be viewed as deserving of right. Stated succinctly by Becker:

A person who produces a public benefit, by way of morally permissible (but not required) actions, deserves to receive a fitting and proportional benefit from the public for doing so. Similarly, if a person’s unrequired actions produce a public burden, that person deserves to bear a fitting and proportional burden for doing so.<sup>108</sup>

### (C) Need

The last aspect of the labour-desert theory suggests that intellectual labourers may develop a sense of identity as a result of their labour, which is intricately con-

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<sup>102</sup> *Ibid.* at 621-622.

<sup>103</sup> Becker notes the possibility to recognize excellence in ways other than the granting of ownership/exclusionary rights. He suggests medals of honour, public expression, author-identification as some possible examples. See Becker, *ibid.* at 622-623.

<sup>104</sup> *Ibid.* at 623.

<sup>105</sup> *Ibid.*

<sup>106</sup> Ken Morrison, *Marx, Durkheim, Weber: Formations of Modern Social Thought* (London, UK: Sage, 1995) at 65.

<sup>107</sup> See e.g., Timothy Brennan’s discussion of the rightful copyright owner (under the labour-desert theory) to his article, *supra* note 68 at 692.

<sup>108</sup> Becker, *supra* note 96 at 624-625.

nected with the product of that labour.<sup>109</sup> In elaboration of this point, Becker suggests a series of common metaphors, including, “that people internalize, incorporate, or become personally invested in things; that a thing can become an extension of one’s personality; that one can project oneself into a thing.”<sup>110</sup> Although further elaboration of this point is made in Part IV when Hegel’s theory of property and personality are explored, an important component to the notion of “need” in labour-desert arguments is a social one. Becker suggests that where a labourer’s personal need has been “generated and sustained by social norms, and if one’s meeting that personal need requires the help of additional social norms, then either (i) the help should be given, or (ii) the need-sustaining norms should be changed.”<sup>111</sup>

While acknowledging the contestable nature of this latter suggestion, Becker’s recommendation reveals the conventional conflict at work in copyright theory, i.e. consideration of the collective whilst determining the rights of the individual. The following section explores three other problematic aspects to copyright law that have emerged with the greatest resonance in recent years in the wake of the information highway. While these are distinctive characteristics of the IP-IT debate, it is important to recall that they occur against this consistent backdrop of contradiction between access and exclusion inherent in copyright law.

### III. NEEDLES IN A CYBERSTACK: IDENTIFYING THE PROBLEM

Some theorists have suggested that real property enjoys a presumption of exclusivity, personality, and autonomy that intellectual property does not.<sup>112</sup> As Stephen Carter notes:

Our legal theory is premised on the instrumental conception of property rights, but our conversational habits are not. In ordinary conversation, we indulge an instinct that property rights are like other aspects of autonomy — vital, personal, irreducible. That individualistic, almost libertarian, vision motivates both anti-tax agitation and pro-productive choice fervor: What’s mine is mine and the state can’t take it away.<sup>113</sup>

Instead, justifications for copyright are often “hijacked by utilitarianism,”<sup>114</sup> focusing on arguments of social utility and access to information. While Carter suggests this is due to the intimate relationship intellectual property shares with incentive structures, and the “uniqueness” of intellectual property versus real property,<sup>115</sup> I

<sup>109</sup> *Ibid.* at 626.

<sup>110</sup> *Ibid.* at 626, n. 44.

<sup>111</sup> *Ibid.* at 627.

<sup>112</sup> Stephen L. Carter, “Does it Matter Whether Intellectual Property is Property?” (1993) 68 *Chicago-Kent L. Rev.* 715.

<sup>113</sup> *Ibid.* at 717.

<sup>114</sup> Waldron, *supra* note 74 at 858.

<sup>115</sup> Carter, *supra* note 112 at 717.

suggest it is because recent developments in the dissemination of intellectual works, as well as the ways in which their accompanying property rights have been conceptualized, have resulted in the removal of the “person” from copyright. While Part IV below will argue for a theory of copyright law that reincorporates the notion of personhood, this section outlines three of the contributing factors to the “faceless” state of copyright in the technological era. These are: (i) the emergence of a corporate intermediary; (ii) the “death” of authorship; and (iii) the lack of consideration of the copier.

### (a) Corporate Intermediary

One of the more prominent aspects of the *Napster* case was the emergence of discussion about the level of exclusion and/or restriction copyright law imposed on information rightfully thought to be “free.”<sup>116</sup> Interestingly, the issue was rarely framed as one of conflict between author and copier, i.e. artist and Napster user, but rather one of tension between the recording industry and the general public.<sup>117</sup> Similarly, artists who chose to voice opinions in support of the RIAA lawsuit were often cautious, or at least cognisant, of the “commercial” advocacy it could be said to endorse. As noted by one recording artist:

Everyone I know is excited about all the possibilities the Internet has to offer. As a musician, the Internet has made it possible for me to share my music with people that could have never been reached by conventional methods. It has been taboo for artists to speak out concerning the business side of their music. The fear has been that the buying public, as well as other artists, would perceive this concern as greed, and that the artists’ sole purpose for creating was the money. This perception has silenced many artists concerning MP3 and Napster. The silence must end. As a child I created music to express my inner thoughts and feelings, and that purity has stayed with me throughout. The day I decided to share my music with the world, was the day I decided to walk the fine line between art and commerce. I have been blessed in that I do what I love and can support my family with what I create. When my music is given away, as taboo as it is for me to say, it is stealing. I need not defend my motives for making music, but the distribution of my music has made me business conscious. I have decided to sell my music to anyone who wants it, that is how I feed my family, just like a doctor, lawyer, judge, or teacher. Not to insult anyone’s intelligence, but my music is like my home. Napster is sneaking in the back door and robbing me blind.<sup>118</sup>

<sup>116</sup> Barlow, *supra* note 23.

<sup>117</sup> One common exception to this was the financial “backlash” some highly successful (and vocal) bands/artists experienced, (e.g. Metallica), who were frequently criticized as being “anti-Napster” for reasons of financial greed. For images and commentary, see e.g., *Camp Chaos Entertainment*, online: *Camp Chaos* <[http://www.campchaos.com/blog-archives/old\\_cartoons/napster\\_bad/](http://www.campchaos.com/blog-archives/old_cartoons/napster_bad/)>.

<sup>118</sup> Scott Stapp, recording artist for band “Creed” (RIAA website, *supra* note 1).

The presence of a corporate intermediary between the public (and its would-be-copiers) and the intellectual labourer was made particularly known in two distinct ways. The first of these was the creation of the “big bad record company” image, frequently used by both artists and users to justify copyright infringement. As noted by recording artist Chuck D. of the group Public Enemy, “the record companies have been getting away with murder for 12 years, since the advent of the CD, when they could manufacture something for 69 cents and sell it for \$10.98 wholesale.”<sup>119</sup> Similarly, this vein of argument was employed by Napster in its legal defence documents, where views from artists in support of Napster were solicited, often resulting in anti-industry responses. Excerpts from the affidavit of recording artist Steven Wendell Isaacs, filed in support of Napster during the *A&M Records* law suit, demonstrate this point:

Based on my experience in the music and entertainment industry, I believe Napster is a powerful promotional tool for the many artists and bands that want to reach a large number of listeners but have not been able to get, or have been disappointed by, the support provided by large recording labels. . . . Considering what we, and hundreds of other bands, have been through with the antiquated business model of the major label, a program like Napster is a positive and powerful service for artists like Skycycle. Napster puts the power back into the hands of the artist and listener. Taking Napster away from Skycycle will have a negative impact on the band’s ability to reach out to, and create new, fans.<sup>120</sup>

The emergence of this negative image of the recording industry<sup>121</sup> can also be found within the academic literature, where independent labels and online distribution methods are heralded as being more fair to artists than traditional record con-

<sup>119</sup> Jonathan Vankin, “Downloading the Future: The MP3 Revolution — the End of the Industry as We Know It” *L.A. Weekly* (26 March 1999) at 36, cited in Berchadsky, *supra* note 5 at 786.

<sup>120</sup> Declaration for Steven Wendell Isaacs in Support of Defendant Napster’s Opposition to Plaintiff’s Motion for Preliminary Injunction, (26 July 2000), Case Nos. C 99-5183 and C 00-0074 MHP (ADR), *FindLaw*, online: FindLaw <[http://news.corporate.findlaw.com/hdocs/docs/napster/napster/dec\\_wendell.pdf](http://news.corporate.findlaw.com/hdocs/docs/napster/napster/dec_wendell.pdf)>.

<sup>121</sup> Important to note is the existence of many artists’ views which directly oppose this negative image of the industry. As noted by recording artist Don Henley:

The Internet is both a democratizing force and a force for undermining democracy. The concept that music should be free is some holdover from the Sixties, I guess. And I resent it when people imply that this is not a legitimate profession, that what I do for a living should be given away. Napster and MP3.com try to make people believe that they are some sort of Robin Hood organization, stealing from the record companies and giving music to the people. But they are stealing from the people who create that music.

Don Henley, *Rolling Stone Magazine*, (22 June 2000).

tracts.<sup>122</sup> A second indicator of an intermediating force at work in the IP-IT debate is the apparent stark dichotomy between copyright law and the ethics of its violators. A U.S. Internet user study reported in 2000 indicates that over half (53 per cent) of Internet users surveyed do not believe the downloading of copyrighted music amounts to theft.<sup>123</sup>

Further evidence of the recording industry serving as an intermediary between author and copier is found in the measures used to determine the damage of online copyright infringement. Although some recording artists have spoken out about the intrinsic value of the work, much of the discussion surrounding issues of infringement deals directly with the recording industry's financial gains and losses with respect to MP3's.<sup>124</sup> In some cases, this has been attributed to a "chasm between morality in general and selfishness in particular," and the ease with which copyright infringement can be committed, a rationale frequently cited among advocates of increased security technologies.<sup>125</sup> As noted by one commentator, "the vast majority of internet users not only recognizes the copyright rationale but, in many cases, even has an interest in co-operating to preserve those rights; and see the master him[sic]self. . . ."<sup>126</sup>

Yet, neither the actions of Internet users during the Napster hearings, nor in the wake of its demise would seem to support this theory.<sup>127</sup>

In both cases, technology and its users are undermining traditional institutions, while asserting a populist sense of what is ethical that may well clash

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Interestingly, Henley relies upon the personal value of his labour to support his claim.

<sup>122</sup> See Ryan S. Henriquez, "Facing the Music On the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution" (1999) *UCLA Ent. L. Rev.* 57. See pages 111-118, in particular, for a discussion of the typical record contract provisions which financially prejudice artists.

<sup>123</sup> Amanda Lenhart & Susannah Fox, *Downloading Free Music: Internet Music Lovers Don't Think it's Stealing* (28 September 2000), online: PEW Internet & American Life Project <[http://www.pewinternet.org/reports/pdf/PIP\\_Online\\_Music\\_Report2.pdf](http://www.pewinternet.org/reports/pdf/PIP_Online_Music_Report2.pdf)>, cited in Bergen, *supra* note 12 at 261.

<sup>124</sup> This was even present in the legal evidence tendered by the parties in the case, where arguments about the financial impact of Napster and its online services were made on both sides. See Berschadsky, *supra* note 5 at 770.

<sup>125</sup> Wiese, *supra* note 33 at 393. Other commentators have noted both the detachment and anonymity associated with online copyright infringement, suggesting this might also be a causative factor in the dichotomy between law and ethics, or law and practice. See Henriquez, *supra* note 122 at 65-68.

<sup>126</sup> D. Downing, "The Beat Goes On: Music Copyright and the Internet" (1999) 86 *M.I.P.* 3, cited in Wiese, *supra* note 33 at n. 57.

<sup>127</sup> This is evidenced even by the millions of users who visited the Napster website to download last-minute MP3's during the temporary stay on its injunction. Amy Harmon notes: "Despite a clear statement by Judge Patel that Napster was likely to be found guilty of contributing to copyright infringement, millions of individuals swarmed to



with what is legal. That has raised questions that go well beyond the outcome of the court battles.<sup>128</sup>

Although seemingly a new entity, this corporate intermediary is merely emerging from a fairly constant, albeit shadowed, venue in copyright history. The first copyright statute, the *English Statute of Anne*,<sup>129</sup> which created the notion of “authorship,” was arguably a codification of the long-standing practices of the Stationers’ Company, a central group of booksellers in London.<sup>130</sup> Although “copyright” was established as a right of action belonging to the “proprietors” of intellectual works, the publishers were expectant (reasonably) that they would assume this role.<sup>131</sup> As noted by Mark Rose, “copyright had traditionally been a publisher’s not an author’s right.”<sup>132</sup> Perhaps ingeniously, reform movements for new legislation resulted in the *British Copyright Act of 1814*, wherein authors and their literary rights received statutory recognition, while publishers were able to mask the pursuit of their own interests under the guise of those of authors.<sup>133</sup> As Jaszi observes:

[I]t is clear that the booksellers’ short-term goals were well served by the choice. In fact, no other strategy would have allowed them to apply as much rhetorical leverage to back up their novel project of obtaining control over literary texts through the elaboration of portable legal rights as “things.”<sup>134</sup>

Consider, as well, the comment made by Alvin Kernan (as noted by Jaszi):

Why copyright ended up in the hands of writers instead of publishers is suggested by the petition of a group of booksellers recorded in the *Journal of the House of Commons* (26 Feb. 1706, o.s.) when the matter was being considered; it read in part: “[m]any learned Men have spend [sic] much Time, and been at great Charges, in composing Books, who used to dispose of their Copies upon valuable Considerations, to be printed by the Publishers . . . but of late Years such Properties have been much invaded, by other Persons printing the same Books. . . .” It seems a likely inference that while

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download music from the service, or learn about alternative services that provide the means to swap music files.” Amy Harmon, “Online Davids vs. Corporate Goliaths” *New York Times* (6 August 2000), online: <<http://www.nytimes.com/library/review/080600napster-review.html>>. (Last accessed September 14, 2008).

<sup>128</sup> See also Alex Colangelo, “Copyright Infringement in the Internet Era: The Challenge of MP3s” (2001) 39 *Alta. L. Rev.* 891; Alejandro Zentner, “Measuring the Effect of File Sharing on Music Purchases” (2006) 49 *J. Law & Econ.* 63; Sudip Bhattacharjee, *et al.*, “Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions” (2006) 49 *J. Law & Econ.* 91.

<sup>129</sup> *Copyright Act*, 1709 8 Anne, c. 21.

<sup>130</sup> Jaszi, *supra* note 61 at 468.

<sup>131</sup> *Ibid.*

<sup>132</sup> Mark Rose, “The Author as Proprietor: *Donaldson v. Beckett* and the Genealogy of Modern Authorship” (1988) 23 *Representations* 51 at 54.

<sup>133</sup> Jaszi, *supra* note 61 at n. 48.

<sup>134</sup> Jaszi, *supra* note 61 at 469.

it was the booksellers who were pushing the issues, they were using the author's rights as a blind for their own interests. No one, however, seems to have recognised the radical change of ownership from printer to writer that had occurred in the statute, and after its passage all went on, as they had before, selling and purchasing what the booksellers and authors still assumed to be perpetual rights in books old and new.<sup>135</sup>

Noteworthy are the arguments among some legal commentators that while copyright is often justified in terms of the "incentive" principle, it often serves to promote the commercial distribution of intellectual works more than their creation, suggesting that the contemporary IP-IT crisis may well be a continuation of authors' rights being used to serve the interests of corporate intermediaries.<sup>136</sup>

The changes alluded to by Kernan, at the end of the above excerpt, are expanded on in the following section, where the evolution of authorship is discussed, describing the brief recession of the perceived presence of publishers' pseudo-rights and interests.

### (b) Death of Authorship

One of the earliest statements of "authorship" as containing an entitlement to one's intellectual works comparable to contemporary copyright framework is found among the works of Milton. Upon learning that King Charles had appropriated a prayer from Sidney's *Arcadia* on the eve of his execution, Milton voiced two objections, the first religious, and the second resembling copyright:

But leaving aside what might be justly offensive to God, it was a trespass also more than usual against human right, which commands that every author should have the property of his own work reserved to him after death, as well as living. Many princes have been rigorous in laying taxes on their subjects by the head, but of any king heretofore that made a levy upon their art and seized it as his own legitimate, I have not whom beside to instance.<sup>137</sup>

In spite of the presence of such views, Rose suggests the modern day proprietary author did not surface until the middle of the following century when a market capable of sustaining intellectual production existed.<sup>138</sup>

All of these cultural developments — the emergence of the mass market for books, the valorization of original genius, and the development of the Lockean discourse of possessive individualism — occurred in the same period as the long legal and commercial struggle over copyright. Indeed, it was in the course of that struggle under the particular pressures of the requirements of

<sup>135</sup> Alvin Kernan, *Printing Technology, Letters, & Samuel Johnson* (Princeton, N.J.: Univ. Press, 1987) at 99-100, cited in Jaszi, *supra* note 61 at n. 45.

<sup>136</sup> See Arnold Plant, *The New Commerce in Ideas and Intellectual Property* (London, UK: Athlone Press, 1953).

<sup>137</sup> John Milton, *Complete Poems and Major Prose*, ed. by Merritt Y. Hughes (New York, NY: Odyssey Press, 1957) at 794, cited in Rose, *supra* note 132 at 55.

<sup>138</sup> *Ibid.* at 55-56.

legal argumentation that the blending of the Lockean discourse and the aesthetic discourse of originality occurred and the modern representation of the author as proprietor was formed. Putting it baldly, and exaggerating for the sake of clarity, it might be said that the London booksellers invented the modern proprietary author, constructing him[sic] as a weapon in their struggle with the booksellers of the provinces.<sup>139</sup>

Emphasis on the author's proprietary rights issued from Lockean theories of real property, where it was suggested that the works of one's mind were certainly "fruits" worthy of entitlement.<sup>140</sup> This inalienable quality to intellectual property could be transferred to booksellers upon purchase of the copyright, thereby perpetuating publishers' control over the market of intellectual works.<sup>141</sup> In this respect, although the corporate intermediaries of intellectual property became primary rights holders in the proprietary forum, they were secondary characters in the public one, allowing for literary focus to shift to the author.<sup>142</sup>

This discovered focus on "authorship," had a substantial impact on literary theory, which had previously occupied itself with analyses of the text and its effect on the audience rather than the author.<sup>143</sup> Robert Rotstein argues the contemporary view within copyright theory of text as "self-contained, autonomous 'work' that has one valid meaning independent of how an audience approaches it" is an "aberration" in literary history.<sup>144</sup> Rather, literary critics from as early as Plato and Aristotle through the Renaissance, viewed the text "as a force acting upon the world, not as an object to be deciphered."<sup>145</sup> The advent of copyright and its commercial market brought with it the commodification of text, and subsequently, author, marking a departure from notions of "text" and an adoption of objectified "works."<sup>146</sup>

The "death" of authorship was a consequence of both this process of commodification and its treatment by post-structuralist thinkers, who began to question the meanings assigned to works via the market.<sup>147</sup> Pioneered by the work of Jacques Derrida, the "deconstruction" of text served to establish meaning through its

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<sup>139</sup> Rose, *supra* note 132 at 56. Rose does note, in the following paragraph, that it was actually the *Statute of Anne* that introduced the proprietary author; however, earlier commentary in this discussion suggests this statutory reform might well have been the work of the booksellers as well; See, *supra* note 124 and corresponding text.

<sup>140</sup> Rose, *supra* note 132 at 58.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work" (1993) 68 Chicago-Kent L. Rev. 725 at 730-731.

<sup>144</sup> *Ibid.* at 730.

<sup>145</sup> *Ibid.* at 731.

<sup>146</sup> *Ibid.* at 799.

<sup>147</sup> *Ibid.* at 736.

reader and her context, shifting with each new reader or context.<sup>148</sup> As Roland Barthes suggests in his now famous 1967 essay, “to give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing.”<sup>149</sup> The result is an effective obliteration of the author.

The author . . . conveniently erases [him/her]self in deference to the Reader, who is thereby freed to take [her/]his pleasure with the text. ‘[T]he birth of the reader . . . must be ransomed by the death of the author.’<sup>150</sup>

Together, the emergence of the corporate intermediary and the post-modernist death of authorship have resulted in the abandonment of the “person” in copyright theory. This seems particularly prominent in the technological environment where detachment from the creator of the work is inflated and corporate rights-holders appear unsympathetic and impervious to minor infringements. As noted by Amy Harmon, following a survey of the comments posted on the Gnutella (a decentralized Napster copy-cat) mailing list after Napster’s shut-down,

Few of the Napster refugees flooding the Gnutella mailing list with set-up questions last week seemed terribly concerned about the outcome of the San Francisco case. “Can someone please inform me on how to start everything up,” read one typical post by a new user, “I wanna get to mp3’s.”<sup>151</sup>

### (c) Non-Consideration of Copier

The tendency within intellectual property is to think about the law and its purposes in terms of the author; however, the role of the copier seems a necessary (albeit overlooked) component to this consideration. As Jeremy Waldron writes:

If we think of an author as having a natural right to profit from [her/]his work, then we will think of the copier as some sort of thief; whereas if we think of the author as beneficiary of a statutory monopoly, it may be easier to see the copier as an embodiment of free enterprise values.<sup>152</sup>

<sup>148</sup> *Ibid.* at 737, n. 56, Rotstein elaborates by suggesting that,

deconstruction is a continuous mode of play with the text by the reader, and its major aim is to destroy the illusory notion of a fixed textual meaning. Every meaning which is presumed to stand by the commentator is shown to be no more than a play between simulation and dissimulation. The true nature of every text therefore is to be in a state of flux as long as it is engaged by the reader and is reduced to a mere trace when the engagement is over because the text has no determinate essence.

<sup>149</sup> R. Barthes, “The Death of the Author” (1967) 5/6 *Aspen* reprinted in D. Finkelstein and A. McCleery, eds., *The Book History Reader* (New York: Routledge, 2002) at 223.

<sup>150</sup> Michael Hancher, “Dead Letters: Wills and Poems” in Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, IL: Northwestern Univ. Press, 1988) at 103, commenting on Roland Barthes.

<sup>151</sup> Harmon, *supra* note 127.

<sup>152</sup> Waldron, *supra* note 74 at 842.

This perspective highlights the correlative nature of property law. Property rights have long been recognized as encompassing a wide array of entitlements. “Legal ‘property’ is not a clod of earth but a bundle of legal entitlements.”<sup>153</sup> As noted above by Waldron, it seems essential when engaged in the acts of bestowing rights, recognizing those rights, and then enforcing those rights, that the role of both parties to any transaction play a vital role in theoretical justifications of those entitlements. Property law has been viewed as involving three particular rights; (1) the right to use, (2) the right to exclude, and (3) the power to transfer these rights.<sup>154</sup>

The suggestion that a conferral of a right necessarily involves the imposition of a duty is, by no means, a “new” theory. Aristotle’s notion of corrective justice suggested that a kind of equilibrium existed between two equal parties in terms of the plaintiff’s rights and the defendant’s duty.<sup>155</sup> He contended that once this equilibrium had been disrupted, the law’s purpose was to restore this balance. The same conception of duality was prominent in the work of Thomas Aquinas, who described justice as being unlike any of the other moral virtues in that it involved a relation to the “other.”<sup>156</sup> He argued that each of the three components of justice; equality, rectification, and action necessitated a consideration of the correlative nature of rights and duties. Writing, “justice by its name implies equality,”<sup>157</sup> Aquinas suggested that the concept of law-breaking was inextricably tied to a principle of an equilibrium, where justice is concerned with the gains and losses of legal persons and the restoration of equal standing.

Other contemporary theorists have argued that a normative understanding of “gain” and “loss” is necessary for a level of cohesion between the material losses/gains of a wrongful act and the “rights-based” analogies instrumental to corrective justice. One such theory has been put forth by Prof. E. J. Weinrib, in terms of tort law, in his article, “The Gains and Losses of Corrective Justice.”<sup>158</sup> Therein, he suggests a defendant’s wrong is not just the breach of a norm, but the focus for any given remedy. Corrective justice requires a reason for considering certain acts wrongful or in need of correction. This reason must be something that can be applied equally to each party (because of the correlativity requirement in corrective justice, and in Aristotle’s equilibrium analysis). Similarly, the reason must be applicable to each party with simultaneity. There cannot be two separate reasons applied

<sup>153</sup> William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, Mass: Harv. Univ. Press, 1995) at 2.

<sup>154</sup> *Ibid.*

<sup>155</sup> Aristotle, “Book V” in *Nicomachean Ethics*, trans. by James Welldon (London: MacMillan, 1930).

<sup>156</sup> Thomas Aquinas, *Summa Theologica* (New York, NY: Benziger Bros, 1947), II-II, q. 58, a. 2 at 1435-6 and a. 4 at 1437.

<sup>157</sup> *Ibid.* at II-II, q. 58, a. 2, at 1436.

<sup>158</sup> E. J. Weinrib, “The Gains and Losses of Corrective Justice,” (1994) 44 *Duke L.J.* 277.

to each party. The reason for conceptualizing the plaintiff's rights must be the same reason for rationalizing the defendant's duty.

In terms of intellectual property, given this correlativity requirement, any justification of copyright must necessarily speak to both the author's right to deny and the copier's duty not to copy. Jeremy Waldron observes:

Intellectual property rights are rewards or incentives, and they serve the excellent purpose of encouraging authors. But the rewards here are not just medals or Nobel prizes; the incentives we dole out amount literally to restrictions on others' freedom that may be exploited for authors' benefits. It sounds a lot less pleasant if, instead of saying we are rewarding authors, we turn the matter around and say we are imposing *duties*, restricting *freedom*, and inflicting *burdens* on certain individuals for the sake of the greater social good. In moral philosophy, where suspicion of utilitarian arguments is rampant, that rings alarm bells. To say that rights are a means to an end is one thing; but the correlative proposition that some should be forced to bear sacrifices for the greater social good smacks dangerously of throwing Christians to the lions for the delectation of Roman society.<sup>159</sup>

This illustrates the need to consider the would-be-copier in any justification of copyright. The following section attempts to do this by elaborating on Margaret Jane Radin's theory of property as personhood and the influence of Hegel's theory of free will and his conception of "wrong."

#### IV. WHOSE "RIGHT"? — A PERSONHOOD THEORY OF COPYRIGHT

##### (a) Context

One of the central functions of property rights is the exclusion of others from one's personal domain, be that land or intellectual works. The definition of property in Black's Law Dictionary emphasises this element, defining property as "that which is peculiar or proper to any person; that which belongs exclusively to one."<sup>160</sup> As stated by Wesley Hohfeld, the first characteristic of property is that the owner has "legal rights, or claims that others . . . shall not enter on the land, that they shall not cause physical harm to the land, etc. . . ."<sup>161</sup> In this way, property rights help to establish the boundaries of the individual.<sup>162</sup>

The notion of bodily integrity and personal freedom has been linked to property law for centuries. Early market societies of feudal Europe conceptualized the

<sup>159</sup> Waldron, *supra* note 74 at 862.

<sup>160</sup> Henry Black, *Black's Law Dictionary*, 6<sup>th</sup> ed., (St. Paul, Minn.: West Pub. Co., 1990) at 1216.

<sup>161</sup> Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale L.J. 710 at 746.

<sup>162</sup> Alexandra Wald, "What's Rightfully Ours: Toward a Property Theory of Rape" (1997) 30 Colum. J.L. & Soc. Probs. 459 at 466.

person on the basis of what s/he owned,<sup>163</sup> and as the free market economy developed, “freedom became a function of possessions.”<sup>164</sup> C.B. MacPherson expands on this view, stating:

The individual in market society is human in [her/]his capacity as proprietor of [her/]his own person; [her/]his humanity does depend on [her/]his freedom from any but self-interested contractual relations with others; [her/]his society does consist of a series of market relations.<sup>165</sup>

As noted previously, these views of property and bodily autonomy were foundational in the work of John Locke, where he argued that “every man[sic] has a property in [her/]his own person: this no body has any Right to but Himself [sic]. The labour of [her/]his body, and the work of [her/]his hands, we may say, are properly [her/]his.”<sup>166</sup> This view was later taken up by intellectual property theorists suggesting that one’s thoughts and feelings are inherently one’s own, and that the placing of these on paper or in design or on canvas, (as examples) is a sufficient basis to warrant property rights against the rest of the world. The argument is one that “if we have rights to control anything, it is the contents of our minds.”<sup>167</sup>

This theory, however, was seemingly undermined with the 1805 case of *Pierson v. Post*,<sup>168</sup> where proprietary rights were held to follow from possession, rather than labour. That is, property was not justified for labour’s sake alone, but rather for what the nature of labour identified about it. This idea was also addressed by Karl Marx, who argued that it was when social relations were dominated by a system of exchange that individuals confronted each other as buyers and sellers, leaving individuals with narrow, shrunken individualities.<sup>169</sup> Strands of this theory can be found in many contemporary labour scholars, including David Beatty. In his article, “Labour is Not a Commodity”,<sup>170</sup> he suggests the understanding of labour and the labour market as commodities (and consequently, sources of property) ignores the deeper value that work has for individuals. “Work” in the modern world has come to be closely connected to some deeper, personal life meaning and is no

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<sup>163</sup> Note that the masculine pronoun is being employed here in recognition of the historical fact that women were not seen as capable of appropriating property, and consequently of being “persons.”

<sup>164</sup> Anne Phillips, *Engendering Democracy* (Univ. Park, PA: Penn. State Univ. Press, 1991) at 31, cited in Wald, *supra* note 162 at 469.

<sup>165</sup> C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon, 1962) at 272.

<sup>166</sup> Locke, *supra* note 94 at 19, s. 27.

<sup>167</sup> Hettinger, *supra* note 84 at 78.

<sup>168</sup> *Pierson*, *supra* note 82.

<sup>169</sup> Morrison, *supra* note 106 at 75.

<sup>170</sup> David Beatty, “Labour is Not a Commodity” in Barry Reiter & John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) at 314.



longer a means of subsistence.<sup>171</sup> Similar to this, Paul Weiler, in his book, *Governing the Workplace*,<sup>172</sup> examines the ways in which the market for the human labour differs from markets for other services and/or commodities. Although very pragmatic in its approach, the impact of Weiler's discussion is the recognition of the ways in which human labour is treated differently and functions differently than other commodities in a free market world, largely because of its intricate connection to notions of autonomy.

### (b) Property as Personhood

The work of Margaret Jane Radin argues that property ownership plays a fundamental role in exercises of self-realization and autonomy.<sup>173</sup> Given that the fundamental characteristic of property is the exercise of control over things and to the exclusion of others, property ownership, by its very nature, implies a relationship between subject and object. The treatment of the object as such, necessarily identifies the other as subject.<sup>174</sup>

Given this understanding, the correlativity of property rights implies that something else is occurring at the moment of possession, which implies the granting of property rights. Take the case of *Pierson*, for example. Pierson's act of seizing the fox and mortally wounding it, served to appropriate it (the fox) for his (Pierson's) use. This serves to both exclude Post (and the rest of the world) from the use of the fox. Perhaps a Lockean theory of property would suggest that if the decision is correct, it is the labour expended by Pierson in this appropriation, which warrants the property right. However, Radin's notions of personhood suggest something else. In order to have exclusive possession of the fox, Pierson must declare his domination and use of the object to Post, thus identifying himself as a non-object and establishing his own personhood. "To achieve proper self-development — to be a person, an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."<sup>175</sup> Granting the notion that intellectual property is property, the same analysis would hold true for copyright and the establishment of personhood via a legal entitlement to publish and exclude others from copying.<sup>176</sup>

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<sup>171</sup> *Ibid.*

<sup>172</sup> Paul Weiler, *Governing the Workplace* (Cambridge: Harvard University Press, 1990) at 136–52.

<sup>173</sup> M. J. Radin, "Property and Personhood" (1982) 34 *Stanford L. Rev.* 957.

<sup>174</sup> This idea has been employed by feminist scholars to suggest that the practice of prohibiting women's status as property owners served to classify them as objects. Catherine MacKinnon writes, "[W]omen have not authored objectifications, we have been them. Women have been the nature, the matter, the acted upon . . .", Catherine MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7 *Signs* 514 at 544.

<sup>175</sup> Radin, *supra* note 173 at 960.

<sup>176</sup> For some discussion on the relationship between intellectual property and property, see Carter, *supra* note 112.

At this stage, three important points need to be addressed. The first is a point Radin herself addresses in response to challenges that her theory is not unlike theories of property based on intrinsic values of autonomy or liberty.<sup>177</sup> Radin suggests that these theories view certain external objects as necessary to one's freedom in the world, i.e. in their absence, a person's liberty or autonomy might be threatened.<sup>178</sup> While this is a worthy philosophy, Radin suggests it fails to convey an adequate "connection with the external world."<sup>179</sup> While the demands for personal autonomy in utilitarian or libertarian theories (e.g. freedom from interference; control of one's environment; attributed responsibilities) represent aspects of what is constitutive of "personhood," they fail to capture the relationship external objects can have with the self.<sup>180</sup> In this respect, Hegel's theory of abstract right is particularly useful. As Radin notes:

[T]he notion that the will is embodied in things suggests that the entity we know as a person cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with portions of that environment.<sup>181</sup>

This raises the second important point of Radin's argument, i.e. the differentiation between property that is constitutive of the person and that which is not. Radin terms property that is linked to personhood, "personal" and describes as follows:

When an item of property is involved with self-constitution in this way, it is no longer wholly "outside" the self, in the world separate from the person; but neither is it wholly "inside" the self, indistinguishable from the attributes of the person. Thus certain categories of property can bridge the gap, or blur the boundary, between the self and the world, between what is inside and what is outside, between what is subject and what is object.<sup>182</sup>

Radin terms property that is not of this nature, "fungible," much of which might be owned for useful or pleasurable purposes (e.g. money); however, they are not inherent to one's person.<sup>183</sup> "Since fungible property is not connected with the self in a constitutive way, but is only held instrumentally, nothing is problematic in trading it off for some other item that the person would rather have."<sup>184</sup> Radin suggests that obsessions with fungible property (e.g. fetishism, materialism) already

<sup>177</sup> Radin, *supra* 173 at 960.

<sup>178</sup> *Ibid.* at 960.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.* at 977.

<sup>182</sup> M. J. Radin, "The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood" (1995) 74 Oregon L. Rev. 423 at 426.

<sup>183</sup> *Ibid.* at 426.

<sup>184</sup> Radin, *supra* note 182 at 427.

suggest the existence of “personhood” property; however, these need to be distinguished from the property she is attempting to advocate. She suggests:

We can tell the difference between personal property and fetishism the same way we can tell the difference between a healthy person and a sick person, or between a sane person and an insane person. In fact, the concepts of sanity and personhood are intertwined: At some point we question whether the insane person is a person at all. . . . Judgements of insanity or fetishism are both made on the basis of the minimum indicia it takes to recognize an individual as one of us.<sup>185</sup>

Setting aside the various difficulties in this particular argument and Radin’s attempt to establish a sense of collective objectivity through use of language, it is important to note that the distinction between personal and fungible property, for Radin, is made on the basis of consensus. This raises the third and final matter of concern that needs to be addressed before the application of this theory to copyright can be explored, and Hegel’s theory of abstract right can prove to be most useful. What is the lack of consensus on this issue in terms of personhood? How does the lack of reciprocal acknowledgement, in terms of an external connection to property, affect personhood? Radin states:

To refuse on moral grounds to call fetishist property personal is not to refuse to call it property at all. The immediate consequence of denying personal status to something is merely to treat that thing as fungible property, and hence to deny only those claims that might rely on a preferred status of personal property.<sup>186</sup>

While not explicitly stated by Radin, I would suggest the result is a disjuncture in one’s conception of self, an argument that will become clearer after a review of Hegel’s theory of abstract right.

### (c) Hegel’s Philosophy of Right

#### (i) *Freedom and Will*

Hegel’s discussion of right is fundamentally linked to both the notion of freedom and its precursor, the will. As stated succinctly by Radin, “Hegel’s property theory is an occupancy theory; the owner’s will must be present in the object.”<sup>187</sup> For Hegel, rights are constituted by and for freedom. It is both the “substance of right and its goal.”<sup>188</sup> The mind (and its work) is where this liberty finds its foundation. Human thought is freedom manifest, the homeland of the “will” — the making of the mind explicit in the external world. Hegel draws upon the distinction between humans and animals to expound on this concept. Although the animal may act within the world, this act is without will.<sup>189</sup> It hunts, it seeks, eats, reacts, and

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<sup>185</sup> Radin, *supra* note 173 at 969-970.

<sup>186</sup> *Ibid.* at 960.

<sup>187</sup> *Ibid.* at 973.

<sup>188</sup> Hegel, *supra* note 95, at 20, s. 4.

<sup>189</sup> *Ibid.* at 227, [A] s. 4.

lives according to instinct. The object of its pursuit is not brought to mind in a self-conscious fashion. This clear dichotomy between thought and action is not present, according to Hegel, within the human mind. Thought is action; in thinking, a person makes the world her own. In willing, one extracts from the particular circumstances of the external world, the complications of nature and social arrangement. I want the thing desired, but do I deserve it? Do I have access to it? Do I have the resources to acquire it? Is the object limited? Will I have to compete to acquire it? These particularities (and others) interfere with any absolute freedom the human actor might have in the external world, but within the mind, the act of willing is an extraction from the particular: “[t]his is the unrestricted infinity of absolute abstraction or universality, the pure thought of oneself.”<sup>190</sup>

There is a certain degree of freedom in this abstraction, in the work of the mind to abandon the particular and its restraints. There is an element of inviolability of the person in this notion. The will, at least in the mind’s internal sense, cannot be altered by the external. The body is merely a shell for the self that lays within it, the untouchable freedom of the will. “*In chains I may be free.*”<sup>191</sup> Hegel warns, however, that this freedom is a “negative” freedom because it can never be actualized, since in actualization, the particular is formed, and it is only in the destruction of the particular that this negative will feels its existence.<sup>192</sup> “Consequently, what negative freedom intends to will can never be anything in itself but an abstract idea, and giving effect to this idea can only be the fury of destruction.”<sup>193</sup> Thus, in order to be free, the will must incorporate the particular; it must be a willing of *something*, rather than just willing in the abstract. Here, one of the first steps of Hegel’s dialectic comes to the fore. An initial level of freedom exists in thought and in the mind’s ability to abstract from all particularities, and yet, this freedom remains incomplete without the incorporation of the particular. While this particular will necessarily oppose the sweeping abstraction of the will, it is in the reconciliation of these two elements that the will is made manifest.<sup>194</sup> The particular is necessary to the attainment of a complete and free will; to be “free” the will must be a willing of something.<sup>195</sup> As a means of explicating this point, Hegel employs the example of the man on the street who believes himself to be free be-

<sup>190</sup> *Ibid.* at 21, s. 5.

<sup>191</sup> *Ibid.* at s. 48.

<sup>192</sup> *Ibid.* at 22, s. 5.

<sup>193</sup> *Ibid.*

<sup>194</sup> This is sometimes referred to as the “synthesis” of the “thesis” and “anti-thesis” of the components of abstract right. This is somewhat of a misrepresentation of Hegelian thought, however, given that these terms do not appear in any of Hegel’s writings, but rather only in the work of subsequent scholars (and interpreters.) See Gustav E. Mueller, “The Hegel Legend of ‘Thesis, Anti-Thesis, and Synthesis’” (1958) 19:3 *Journal of History of Ideas* 411.

<sup>195</sup> Hegel, *supra* note 95 at 228, [A] s. 6.

cause it is open to him to act in any way he pleases.<sup>196</sup> Yet, Hegel points out that it is the very arbitrariness of the man's choice that indicates his lack of freedom.

Arbitrariness implies that the content is made mine not by the nature of my will but by chance. Thus I am dependent on this content, and this is the contradiction lying in arbitrariness. . . . If you stop at the consideration that, having an arbitrary will, a man can will this or that, then of course his freedom consists in that ability. But if you keep firmly in view that the content of his willing is a given one, then he is determined thereby and in that respect at all events is free no longer.<sup>197</sup>

Therefore, in order to obtain autonomy, the will must will something external and particular. "A will which . . . wills only the abstract universal, wills nothing and is therefore no will at all."<sup>198</sup> Returning to the infamous case of *Pierson*,<sup>199</sup> we see Post's "will" to capture the fox, and Pierson's act of doing so. It is only the latter that serves to manifest Pierson's freedom to the world.

It is in this way that Hegel refers to the will made manifest as personality.<sup>200</sup> Hegel states, "freedom is to will something determinate, yet in this determinacy to be by oneself and to revert once more to the universal."<sup>201</sup> Through desire, I reconcile my abstract will with the particular restraints and contexts of the external world, and in so doing, come to know and recognize myself as a person in that world. I am determined by, through, and in the particular, whilst gaining a consciousness of myself as self-relational, universal, abstract, and free.

It is the reciprocity of this recognition — my abstract will seen in the particular; the particular forming part of my will's determination — that forms the basis of Hegel's concept of abstract right. The self-relational aspect of personality allows for a recognition of oneself as free and untouchable. Yet, this personality cannot fully move within the world without encountering and needing others. The self-recognizing component of abstract right is, like that of the undetermined will, a negative freedom. Acting as a person within the world requires the creation of a more tangible category of right, (e.g. property ownership, bodily integrity). For Hegel,

[a] person must translate [her/]his freedom into an external sphere in order to exist as Idea. Personality is the first, still wholly abstract, determination of the absolute and infinite will...The rationale of property is to be found not in the satisfaction of needs but in the suppression of the pure subjectivity of personality. In [her/]his property, a person exists for the first time as reason. Even if my freedom is here realized first of all in an external thing, and so

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<sup>196</sup> *Ibid.* at 230, [A] s. 15.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.* at 228, [A] s. 6.

<sup>199</sup> *Pierson*, *supra* note 82.

<sup>200</sup> Hegel, *supra* note 95 at 37, s. 35.

<sup>201</sup> *Ibid.* at 229, [A] s. 7.

falsely realized, nevertheless abstract personality in its immediacy can have no other embodiment save one characterized by immediacy.<sup>202</sup>

Property and personal rights are manifestations of a reciprocal recognition that occurs between personalities. I am granted the right to own property by others who see me as a property owner and who I, in turn, recognize as persons able to grant me this right. The nature of personality involves a respect for the untouchability of others. The requirement that a person be viewed as free and sacred by others, creates the implicit assumption that it is how others must also be viewed.

**(ii) Freedom and Wrong**

It is the reciprocal recognition of each other's "personality" that forms the foundation of Hegel's analysis of "wrong." For Hegel, no form of wrong is possible without a prior establishment of recognized right. "[T]here is crime only insofar as I am recognized as an individual, and my will is taken as universal counting in itself. Prior to recognition, there is no insult, no injury."<sup>203</sup> In the most general sense, there are two forms of wrong that Hegel's work accounts for, (i) innocent and (ii) malicious. The innocent wrong is one that occurs where each of two parties has grounds for title in the same thing. Only one of them is right and, therefore, the injury is merely in the wrong person having possession of the thing. Hegel argues that this is an "innocent" wrong, given that the recognition of each party's capacity for ownership is preserved. Corrective justice can be applied to remedy this error; the mistaken possession can be redistributed, the loss duly compensated. Hegel's malicious wrong, however, requires something further. It varies from the innocent wrong in that the act of the criminal or wrong doer not only violates the rights of the other party, but in so doing, transgresses the notion of right itself. "[I]t leaves the victim with neither substance nor even the semblance of right."<sup>204</sup> The malicious wrong fails to recognize the other's "personality." Thus, this form of wrong is self-contradictory in that the criminal's act is an act of freedom, an expression of her free will, yet, it serves to nullify the very same freedom in others. Her exercise of force is both an expression and destruction of will, and thus, when taken abstractly, is a wrong.<sup>205</sup>

Wrong in the full sense of the word is crime, where there is not respect either for the principle of rightness or for what seems right to me, where, then, both sides, the objective and the subjective, are infringed.<sup>206</sup>

<sup>202</sup> *Ibid.* at s. 41 and Addition.

<sup>203</sup> Hegel, *Hegel and the Human Spirit: A Translation of the Jena Lectures on the Philosophy of Spirit, (1805-6)* cited and trans. by Leo Rauch, (Detroit: Wayne State University Press, 1983) at 125.

<sup>204</sup> Robert R. Williams, *Hegel's Ethics of Recognition* (Berkeley: Univ. of California Press, 1997) at 153.

<sup>205</sup> Hegel, *supra* note 95 at 67, s. 92.

<sup>206</sup> *Ibid.* at 245, [A] s. 90.

Hegel describes this criminal act as an act of coercion that serves to negate the universal free will. The criminal's act appears, on the surface, to be an act of freedom, an expression of her free will; however, the freedom this act delivers is incomplete in its self-contradiction. The criminal's act serves to deny the other exactly of what has allowed her to act and, in so doing, has removed the possibility for recognition and thus, for right. Hegel notes, "there is crime only insofar as I am recognized as an individual, and my will is taken as universal, counting in itself. Prior to recognition, there is no insult, no injury."<sup>207</sup> The criminal's act of infringing the other's personality has served to negate her own.

In this respect, the freedom in the wrong is, once again, what Hegel refers to as a "negative freedom." The only means of correcting this wrong is through its own negation. For Hegel, this negation takes place in the form of a second act of coercion, manifested through punishment. The wrongdoer's rights are violated (e.g. imprisonment, death) as a response to the violation her act was to another's personality. Hegel warns against considering this punishment as merely punitive, noting "that crime is to be annulled, not because it is the producing of an evil, but because it is an infringement of the right as right."<sup>208</sup> Instead, the punishment is restorative; the criminal's act is honoured as the act of a rational and autonomous being.

The injury [penalty] which falls on the criminal is not merely *implicitly* just — as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e. in his objectively embodied will, in his action. The reason for this is his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right.<sup>209</sup>

As such, punishment serves to negate the criminal's original negation of right and re-establish the value and autonomy of free will.

Personality requires that each person recognize the free will of others as sacrosanct. Such a system would be inoperable if certain members were exempt from this simply because the exercise of their free will occurred in a manner incompatible with others. What value would the free will have if the criminal's choice could be merely discarded as incoherent or irrational? Therefore, Hegel argues that the punishing of the criminal as a rational being is not an exaltation of her violation of another's right; rather, it is the celebration of the free will in each person. It is a recognition and respect for the autonomy of each actor. As noted by Williams:

Wrong clarifies the substantial nature of right. It shows that right is more than a contract; it is more than an artificial, posited universal that is subject in principle to revocation by the arbitrary subjective will of individuals.

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<sup>207</sup> *Ibid.* at 125.

<sup>208</sup> Hegel, *supra* note 95 at s. 99.

<sup>209</sup> *Ibid.* at s. 100.



Rather right is the basic requirement and fundamental condition of a community of freedom.<sup>210</sup>

**(iii) Application to Copyright**

Radin's theory of personhood functions along a continuum, which she terms the "personhood dichotomy."<sup>211</sup> It suggests that where fungible property rights can be overruled in some instances, personal rights cannot. She notes:

This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.<sup>212</sup>

As discussed earlier, Hegel's formulation of the will suggests that its embodiment in the expressed or external will is the manifestation of personality or "personhood." Hegel suggests that proprietary rights are intrinsically related to the development of freedom:

The capacity for rights here signifies that the free individual is a 'person' insofar as he[sic] has the right of disposition over objects of the will, and, with this power of disposition, stands in rightful relation to other free individuals as a person.<sup>213</sup>

Furthermore, intellectual property rights, for Hegel, are a means by which authors, inventors, designers, artists, and the like, distinguish themselves from that which they have created. Radin also suggests, that in terms of "personal" property, making the leap from real property as personhood to intellectual property as personhood rather straightforward (particularly given Hegel's emphasis on the will as work of the mind).<sup>214</sup> However, the categorization of intellectual property as "personal" property raises the concern partially addressed above in the discussion of Radin's theory. What is the consequence of a lack of consensus on this classification?

Similar to Radin's refusal to grant "personal" property status to fungible objects without adequate consensus, Hegel's theory emphasizes the need among persons for recognition by others. Most importantly, this recognition is a "self" recognition in that a person's will is manifested in objects so as to show a person's concurrent connectedness and detachment from that object. Therefore, in copyright, the author needs the copier to be an equally autonomous being. For Hegel, this is

<sup>210</sup> Williams, *supra* note 204 at 155.

<sup>211</sup> Radin, *supra* note 173 at 986.

<sup>212</sup> *Ibid.* at 986.

<sup>213</sup> Joachim Ritter, "Person and Property: On Hegel's Philosophy of Right, Paragraphs 34-81 (1961)" in *Hegel and the French Revolution: Essays on the Philosophy of Right* (Cambridge, Mass: MIT Press, 1982) at 124.

<sup>214</sup> See *supra* note 173 and accompanying text.

not possible if the copier chooses to violate the rights of the author, for in so doing, she acts to undermine and negate her own personality. In violating the rights of another subject, the copier reduces that subject to object, thereby enjoining the possibility of “self” recognition of her own person. The duty of the copier is grounded in her own autonomy, where she is bound to respect the rights of the author in order to afford herself her own rights and distinction as a “subject” rather than an object.

In this respect, a theory of copyright that is based on personhood responds to many problematic factors associated with the digital era. Through a positing of the creator’s rights as central to the debate, the corporate intermediary can be both left to hold and enforce copyrights, and yet by-passed for the purposes of justification. Similarly, while authorship is “revived,” it is not done so at the expense of commodifying the intellectual labour of the author. Rather, the manifestations of will embodied in intellectual works are methods by which other subjects are recognized as such. Finally, and perhaps most crucially, the role of the would-be-copier is made central, suggesting a form of self-regulation whereby the infringement of another’s personal rights results in the negation of one’s own self.

### CONCLUSION: FUTURE PERSONS IN CYBERSPACE?

Bill C-61 died on the table when a federal election was called in early September 2008; however, its resurrection appears imminent with promises of copyright reform in four of the five political party election platforms released during the fall 2008 campaign.<sup>215</sup> Of these, only the Bloc Québécois couched these legislative intentions within the context of the “IP-IT” crisis, suggesting that Internet users

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<sup>215</sup> The Conservative Party of Canada has promised to “reintroduce federal copyright legislation that strikes the appropriate balance among the rights of musicians, artists, programmers and other creators . . . but also protects consumers who want to access copyright works for their personal use,” *The True North Strong and Free: Stephen Harper’s Plan for Canadians* (Conservative Party of Canada, Ottawa: 2008) at 14. The NDP platform suggests that the Party will “[e]nsure that new copyright reform legislation fairly addresses compensation for artistic creators and includes proper input from all affected stakeholders including: arts/artist groups, educators, software innovators, consumer groups and ordinary Canadians,” *Platform 2008* (New Democratic Party of Canada, Ottawa: 2008) at 37. The Green Party promises to “[p]rotect the copyright for artists such that they are not surrendered to museums and galleries in the process of permitting exhibits,” *Vision Green* (Green Party of Canada, Ottawa: 2008) at 94. The Liberal Party of Canada did not include copyright issues in its 2008 election platform.

were currently the only beneficiaries of the fruits of authors' labours.<sup>216</sup> Evidence, of the now familiar pendulum, swings between a heavily regulated, protective copyright scheme on one hand, and its complete overhaul on the other, and continues to dominate discussions of copyright reformation. This article has examined these conventional responses, identifying the competing interests at work in both traditional copyright schemes and contemporary internet-based criticisms, in order to suggest that a copyright law capable of both surviving and thriving in an advanced technological era must resituate itself within a new frame, one emerging from the perspective of the would-be copier. Without this paradigm shift, copyright schemes grounded in instrumentalist values will do little to address the problems that technology and its (post)modernizing implications have presented for copyright theory, namely the emergence of a corporate intermediary and the subsequent overshadowing (if not complete elimination) of the author and artist. Instead, copyright regimes are posited as enterprises in "balance" between the competing interests of consumers and industry. The "person" (and her "right") are lost in such configurations.

Using the work of Margaret Jane Radin on property as personhood and G.W.F. Hegel's theory of abstract right, I have argued that an effective copyright scheme for the 21<sup>st</sup> century is not one focused on competing interests, but rather, one based on principles of correlativity, reciprocity, and freedom. The positioning of copyright as a personal right embodies the individual's ability to stand amidst other free individuals and stake claims. Yet, to impose duties under a rights scheme, without contemplation of their corresponding entitlements, is to undermine the possibility for subjects to recognize themselves within the scheme itself. Instead, the subject is made object of the law; she does not see herself within it, is not seen by others, and thus, is not capable of substantively holding rights nor of fulfilling their corresponding duties. This reduces the law's perceived, and arguably, actual legitimacy, as well as the will and rationale for recognizing other rights hold-

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<sup>216</sup> See *Présent! pour le Québec: Plateforme électorale* (Bloc Québécois, PQ: 2008) at 58-59. In this document (only available in French), Bill C-61 is addressed directly:

La Loi sur le droit d'auteur ne tient pas compte de l'impact des nouvelles technologies. La Plateforme Électorale Élections 2008 logies, notamment l'arrivée de l'Internet, et doit être modifiée le plus rapidement possible. Tout travail méritant salaire, il faut que les créateurs puissent recevoir leur dû tout en s'assurant que les consommateurs bénéficient de cette nouvelle source d'accès à la création. À l'heure actuelle, le téléchargement illégal sert mal les artistes qui ne reçoivent rien de leurs créations, alors que les fournisseurs de service Internet sont les seuls à recevoir le fruit du travail des autres. Le projet de loi C-61, déposé en juin 2008 par les conservateurs, ne responsabilise nullement l'industrie et se limite à s'attaquer aux consommateurs qui paient pourtant celle-ci pour leur accès à Internet. Le Bloc Québécois s'assurera que la nouvelle Loi sur le droit d'auteur sera équitable et ne désavantagera ni les créateurs ni les consommateurs (58-59).

ers.<sup>217</sup> According to Hegel, this results in a “negative” freedom and one that cannot sustain rights protection. The copier downloads music neither because it’s easy nor because it’s there, but because it belongs to no one. The copier is not “seen,” and thus, cannot “see.”

The concrete changes, which could be expected as a consequence of adopting a “personhood” theory of copyright law, are difficult to predict, particularly with respect to intellectual works that are more aligned with a “sweat of the brow” doctrine than others.<sup>218</sup> Perhaps one of the more important implications of the theory would be the alignment of intellectual property rights with real property rights. Recent trends, particularly with the adoption of utilitarian philosophies, have resulted in a detachment of intellectual property from the realm of real property. Many have argued that this direction has served to remove the notion of “right” from copyright.<sup>219</sup> A theory of personhood might be more apt at demonstrating the likeness between the two realms of property law, and the ability of each to assign entitlements in pursuit of the establishment and proclamation of individual autonomy. The practice of relying solely on arguments of social benefit and public policy to justify the conferral of rights seems even more problematic given the particular demands of the new information age.

Certainly, one of the more difficult challenges facing a copyright theory of personhood is that of implementation. However, copyright has withstood significant challenges since its inception: the development of the printing press, enabling mass production and dissemination of intellectual work; the emergence of a market economy of intellectual production; the development of broadcasting, computer programs, and software; and the information highway, with its seemingly limitless routes and hazards.<sup>220</sup> And while I assign the details of a cohesive “personhood” enforcement plan to future discussions and scholars, I do not doubt its possibilities. As noted by M. de Zwart, “Copyright has adapted in the past; it will again.”<sup>221</sup>

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217 This notion is a central principle of Hobbesian philosophies of law. As Hobbes identifies in Law 10 of his text, *Leviathan*: “That at the entrance into conditions of Peace, no man require to reserve to himselfe any Right, which he is not content should be reserved to every one of the rest,” Hobbes, *Leviathan*, in C.B. Macpherson ed., (London: Penguin Classics, 1986; original publication date, (1651)) at chap. 15, 210–212. See also D. Dyzenhaus, “Hobbes and the Legitimacy of Law” (2001) 20 *Law and Philosophy* 461.

218 *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), 76 C.P.R. (3d) 296 (Fed. C.A.); *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (U.S.Kan., 1991).

219 Moore, *supra* note 84.

220 Lewis A. Kaplan, “Beyond Napster: Debating the Future of Copyright on the Internet” (2000) 50 *AULR* 410 at 414.

221 M. de Zwart, *supra* note 31 at 270.