INSPIRATION AND INNOVATION: THE INTRINSIC DIMENSION OF THE ARTISTIC SOUL

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INTRODUCTION

The law governing authors' rights in the United States reflects an incomplete understanding of the dynamics motivating the artistic soul. Copyright law, the body of law governing authors' rights, rewards economic incentives almost exclusively. From its inception, United States' copyright law has been designed to calibrate the optimal level of economic incentive to promote creativity.[1] With the exception of a narrow form of protection for certain types of visual art, copyright law in this country does not afford authors moral rights such as the right to have their works attributed to them, or the right to have their works maintained and presented in a manner consistent with their artistic vision.[2]

Copyright's provision of economic incentives is consistent with its underlying utilitarian philosophy.[3] A perspective grounded in economic and conventionally understood utilitarian rationales for legal protection emphasizes the commodification and dissemination of intellectual works. This perspective fails to take into account that human enterprise also embodies inspirational or spiritual motivations for creativity. This failure creates turmoil for many authors because it fosters a dominant market exchange reality that ignores the importance of noneconomically-based motivations for innovation. This conflict was framed well by writer Lewis Hyde, who observed in his book *The Gift* that "every modern artist who has chosen to labor with a gift

1 The current copyright laws protect authors' economic interests for the limited period of the author's life plus seventy years on the theory that doing so will lead people to maximize their creativity. *See* 17 U.S.C. § 302(a) (2000) (specifying the duration of copyright protection); *infra* notes 205–16 and accompanying text.

2 These rights are known, respectively, as the right of attribution and the right of integrity. See *infra* notes 160, 167–72 and accompanying text, and *infra* Part III for a more complete discussion of moral rights.

3 *See infra* notes 205–09 and accompanying text.

must sooner or later wonder how he or she is to survive in a society dominated by market exchange."[4]

As the twenty-first century progresses, the world will likely continue toward an orientation that is based on information processing rather than pure knowledge. Creative thinking is particularly essential in this environment,[5] and our legal structure must reflect a fuller comprehension of the creative being so that it can respond more effectively to all aspects of authors' needs. Thus, the law can, and should, be shaped in response to all relevant forces motivating creativity, not just those concerned with economic reward. This Article demonstrates that narratives illuminating spiritual or inspirational motivations for innovation are integral to understanding more fully the artistic soul and challenges the dialogue on authors' rights in this country to consider the implications of such narratives.[6]

The intrinsic dimension of creativity developed herein is one characterized by spiritual or inspirational motivations that are inherent in the creative task itself as opposed to motivation resulting from the possibility of economic reward.[7] Such intrinsic motivations can include the desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author. This Article uses the terms "spiritual" or "inspirational" as short-hand designations for a particular type of relationship an author maintains with her creations. This relationship does not emphasize artistic creation for the sake of reaping economic reward. Instead, it is a relationship with one's creations that is characterized by the dual quality of self-connectedness to the work, and authorial distance from the work. In other words, this Article's focus is on an intrinsic creative quality that requires the author to infuse herself into her work, while simultaneously maintaining the appropriate distance and perspective so that the work can emerge. This relationship requires a strong degree of

4 LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY, at xiii (1983). See *infra* notes 154–58 and accompanying text for a discussion of the creativity and commodification considerations that authors encounter.

5 JOHN S. DACEY & KATHLEEN H. LENNON, UNDERSTANDING CREATIVITY 226 (1998).

6 For a further treatment of the potential that narrative offers as a strategy for reform in Intellectual Property law, see generally Roberta Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1 (2001). *Cf.* HYDE, *supra* note 4, at 280 (noting the importance of "Just So" stories in determining how to feed the spirit and preserve the vitality of the "inner gift" of artistic talent).

7 This view is captured well by the Intrinsic Motivation Principle developed by Teresa Amabile. TERESA M. AMABILE, CREATIVITY IN CONTEXT 103 (1996). For a further discussion of her work, see *infra* text accompanying notes 104–08.

faith—not necessarily in God or a higher power, but faith in oneself as a creator, and in the vision of one's emerging work.[8] It will be shown that ultimately, this perspective places an equal degree of importance on both the intrinsic process of creation and on the ultimate product.

Although the relationship between inspiration or spirituality, in the sense these terms are used herein, and artistic innovation has been explored to some degree by scholars in the humanities,[9] this connection largely has been ignored in legal circles.[10] As a society, we are considerably uninformed about the struggle Lewis Hyde and other authors confront because there is a substantial unawareness of the insights that can be derived from sources exploring the intrinsic dimensions of creativity. Further, because these insights have not been incorporated into the dialogue on authors' rights in this country, the resulting legal framework does not represent either a complete view of creativity, or a system adequately responsive to the full panoply of authors' needs. Most significantly, the general absence of moral rights protections for authors in the United States reflects the incomplete nature of the prevailing perspective on authors' rights.

This Article has four dimensions. First, it develops the arguments that a deeper understanding of the conflict about which Hyde writes can only be achieved through an increased appreciation for noneconomic motivations for artistic creation, and that these motivations can be understood better through an examination of a variety of narratives illuminating the intrinsic dimension of innovation. Second, this Article demonstrates that the American legal system historically

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8 *See also infra* notes 87–88 and accompanying text. Robert Fuller has emphasized the distinction between "spiritual" and "religious":

> A large number of Americans identify themselves as "spiritual, but not religious." . . . The word *spiritual* gradually came to be associated with the private realm of thought and experience while the word *religious* came to be connected with the public realm of membership in religious institutions, participation in formal rituals, and adherence to official denominational doctrines.

ROBERT C. FULLER, SPIRITUAL BUT NOT RELIGIOUS: UNDERSTANDING UNCHURCHED AMERICA 5 (2001) (citations omitted). This observation is consistent with the contemplative, inwardly-focused quality characteristic of inspiration or spirituality as these terms are used in this Article. *See* Lucia Ann Silecchia, *Integrating Spiritual Perspectives with the Law School Experience: An Essay and an Invitation*, 37 SAN DIEGO L. REV. 167, 179 (2000) (defining spirituality broadly as "entail[ing] a way of defining and pursuing truth beyond oneself that is more important than the individual, giving the individual's actions meaning and purpose in a larger context").

9 *See infra* Part I.B.

10 *See* Robert Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583, 619–20 (2003) (noting that spiritual texts "have not been fully mined for their insights on law" and that "legal texts have not been adequately scrutinized for their inherent spiritual content").

has ignored the insights derived from these narratives as fundamental sources of human sensibilities regarding artistic creation, resulting in a legal system manifesting an incomplete view of artistic creativity. Third, it argues that the prevalent utilitarian rationale does not preclude invoking noneconomic incentives as a basis for legal reform. Specifically, if our law were to acknowledge the importance of inspirational motivations and the intrinsic dimension of creativity, the insights derived from this perspective can facilitate the development of appropriately tailored moral rights laws that would promote the policies underlying authors' rights in this country. Finally, this Article proposes specific suggestions for modifying the law.

Part I examines both theological and secular narratives about creativity drawn from a variety of sources. The analysis demonstrates how deeply inspirational motivations are embedded in Western civilization's perceptions about creativity. This Part concludes by illustrating how the insights derived from these narratives featuring inspirational motivations for creativity can inform the discourse about the law of authors' rights. Part II probes how the United States' law governing authors' rights has been shaped in response to a largely different perspective, one that focuses on economic as opposed to inspirational motivations. It also demonstrates that a perspective focused on inspirational motivations would advance the policies underlying our authors' rights laws and is constitutionally sound. Part III grapples with the issue of how the United States' law should be changed so that it can be more responsive to all authorship interests rather than just those that are economically motivated. It proposes a viable framework for stronger moral rights protection that is consistent with our existing legal system.

I. THEOLOGICAL AND SECULAR PERSPECTIVES ON INSPIRATIONAL MOTIVATIONS AND THEIR LESSONS FOR AUTHORS' RIGHTS

A more complete understanding of the nature of the artistic soul can be achieved by examining narratives that recount, or seek to explain, the creative process as inspirationally motivated. These narratives concerning inspirational motivations tellingly illustrate the reality that economic incentive is not a necessary impetus for creation.[11] Intuitively, we know this to be true. Consider, for example, the intrinsic

11 Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 249 (1996–1997) (noting that "if payment were the most important consideration . . . most [authors] would probably not write anything at all?they'd be doing something more remunerative with their talents and their time").

creativity present in children.[12] The innate nature of the urge to create also is suggested by the works of authors lacking any expectation or hope of remuneration such as the cave drawings of prehistoric man[13] and the artistic creations of deathrow inmates[14] and Nazi death camp prisoners.[15] This point was underscored recently by the publication of the book *Art Against the Odds*, which features works by inmates and other artists who were isolated, self-taught, and totally disinterested in showing or profiting from their works.[16] Art made the worlds of these artists more comforting and tolerable.

This Part analyzes narratives from a variety of sources featuring a perspective of inspirational motivations for creativity. It explores narratives with particular significance for Western culture because this Article is concerned with the United States' legal system governing authors' rights. Part I.A explores narratives drawn from theology. The oldest, and most foundational, of the sources examined herein are the Creation narratives in Genesis.[17] This discussion proceeds chronologically. Therefore, the first subsection explores creativity through the Judaic perspective and develops a theory of human enterprise deriving from this tradition. The second subsection explores artistic innovation in the context of Christian theology and culture, thereby illuminating the continuity of the theological tradition. Part I.B investigates theories of human innovation in the works of secular authors

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12 *See, e.g.*, AMABILE, *supra* note 7, at 260–61; Frank Barron, *Introduction* to CREATORS ON CREATING 1, 18 (Frank Barron et al. eds., 1997).

13 *See* DANIEL J. BOORSTIN, THE CREATORS 151–52 (1992) (discussing Paleothetic man's depictions of his animals of prey as early as 15,000 BCE).

14 *See* Roberta Harding, *Gallery of the Doomed: An Exploration of Creative Endeavors by the Condemned*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 195, 196 (2002).

15 The Diary of Anne Frank is one of the greatest classics of Holocaust literature. ANNE FRANK: THE DIARY OF A YOUNG GIRL (B.M. Mooyaart-Doubleday trans., Doubleday 1952); *see also* OUT OF THE WHIRLWIND: A READER OF HOLOCAUST LITERATURE (Albert H. Friedlander ed., 1976) (including a selection of works composed during the Holocaust, as well as works subsequently produced by survivors). Elisabeth Kübler-Ross, the psychiatrist who outlined the five stages of grief in her groundbreaking work on the emotional components of dying, often spoke of her experience in volunteering in a concentration camp after World War II as the catalyst influencing the course of her research. Specifically, she was struck by the beautiful butterflies carved all over the walls of the barracks housing the prisoners about to be put to death. She contemplated those butterflies the rest of her life, as they helped her realize that even in the midst of tragedy, human beings can still find beauty. *See* Judith Graham, *Pioneer Who Taught World To Live with Death, Dying*, CHI. TRIB., Aug. 26, 2004, § 1, at 1.

16 SUSAN GOLDMAN RUBIN, ART AGAINST THE ODDS: FROM SLAVE QUILTS TO PRISON PAINTINGS (2004).

17 *See* RICHARD ELLIOT FRIEDMAN, WHO WROTE THE BIBLE? 16 (1987) (noting the profound influence of the Bible on Western civilization).

and scholars who study the psychological dimensions of creativity. Collectively, all of the sources explored in Part I attest to the strong spiritual underpinnings that animate human innovation. Despite the diversity of the sources examined herein, salient common themes emerge regarding the nature of inspirational or spiritual motivations for human enterprise. Part I.C explores the significance of these themes for understanding human creativity.

A. Theological Perspectives on Creativity

"In the beginning God created heaven and earth."[18]

The Old Testament[19] thus begins with a simple sentence whose impact on society has been nothing short of revolutionary. The Creation narratives in Genesis reveal a set of shared societal norms that are reflective of Western society's understanding of human creative enterprise.[20] Although other religions and cultures maintain unique Creation stories that can be mined for their insights about spirituality and artistic creation,[21] the Genesis narratives probably are the most celebrated stories about creativity in Western society. Therefore, they serve as a significant primary source for an examination of the inspirational motivations for creativity in cultures such as the United States that have been influenced substantially by the values of the Judeo-Christian tradition.[22]

1. The Jewish Tradition

The following analysis demonstrates that the Creation narratives, as recounted in Genesis and interpreted through the Rabbinic tradition, reflect an intrinsic dimension of creativity that is rooted in spiri-

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18 ARYEH KAPLAN, THE LIVING TORAH, THE FIVE BOOKS OF MOSES 3 (1981) (corresponds to *Genesis* 1:1).

19 The term "Torah," used throughout this Article, refers to the Five Books of Moses, the first five chapters of the Hebrew Bible.

20 Due to the tremendous impact of these narratives on authors, particularly authors in Western culture, *see supra* note 17, it is possible that they also have played a pivotal role in visibly shaping our society's understanding of human creative enterprise. Although this Article acknowledges such a possibility, an appropriate empirical foundation would be needed to further support such a claim.

21 *See* BOORSTIN, *supra* note 13. In his comprehensive work on heroes of the imagination, historian Daniel Boorstin explores the creation stories of other cultures, and their impact on the specific works produced. *Id.*

22 One current, and noteworthy, example of the impact of the Creation narratives in *Genesis* is furnished by Thomas Wolfe's account of sculptor Frederick Hart's creation of *Ex Nihilo*, which adorns the tympanum over the Washington National Cathedral. *See* Tom Wolfe, *The Artist the Art World Couldn't See*, N.Y. TIMES, Jan. 2, 2000, § 6 (Magazine), at 16; *infra* notes 23–63, 69–80 and accompanying text.

tual motivations. A nuanced examination of the Creation texts in Genesis discloses two distinct Creation stories, each depicting a different image of Adam. Although these two images of Adam can be interpreted as "two representatives of humanity,"[23] for purposes of this discussion it is important to underscore that both Creation narratives contain significant insights about inspirational motivations for creativity.[24] These insights can be derived from a careful exegesis of the biblical text and its interpretative theology.

The first Creation narrative recounts God's creation of the world in six days. God creates man on the sixth day.[25] In the first Creation narrative, Genesis states: "God created man in His image, in the image of God He created him."[26] God commanded man to "fill the earth and master it."[27] Through this language, the first Creation narrative provides important support for a fundamental insight regarding inspirational motivations for artistic creation. This insight can be called the mirroring argument—man's capacity for artistic creation mirrors or imitates God's creative capacity.[28] According to Rabbi Joseph Soloveitchik, a leading modern authority on Jewish law and biblical interpretation, "the term 'image of God' in the first account" of the Creation underscores "man's striving and ability to become a creator."[29] Even historians who are not writing about the Bible from a

23 JOSEPH B. SOLOVEITCHIK, THE LONELY MAN OF FAITH 10 (1965). The character Adam (Eve's partner) actually is mentioned by name only in the second narrative of Creation.

24 Differences exist within the Rabbinic and Biblical scholarly communities as to whether these two accounts derive from two different traditions or sources. *See* Daniel Gordis, *Revelation: Biblical and Rabbinic Perspectives*, *in* ETZ HAYIM: TORAH AND COMMENTARY 1394 (David L. Leiber et al. eds., Rabbinical Assembly 2001) (1985) [hereinafter ETZ HAYIM]. The Orthodox view is that the Scriptures were written in their entirety by God. *See* SOLOVEITCHIK, *supra* note 23, at 9–10. Other movements of Judaism are inclined toward the view that the Scriptures, though perhaps divinely inspired, were composed by man. For an excellent introductory study of the human authorship theory, see generally FRIEDMAN, *supra* note 17.

25 ETZ HAYIM, *supra* note 24, at 9 (corresponds to *Genesis* 1:26).

26 *Id.* at 10 (corresponds to *Genesis* 1:27).

27 *Id.* (corresponds to *Genesis* 1:28).

28 *Cf.* Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 11 (2002) (noting that "some creative spark . . . if unpacked could be shown to carry a numinous aura evocative ultimately of the original divine act of creation itself").

29 SOLOVEITCHIK, *supra* note 23, at 12. Jewish theology teaches that man's capacity for speech mirrors God's, and that man's speech is reflective of his creative capacity in the same way that God's speech reveals his creative capacity: "When we speak, we emulate G-d's speaking the world into being. We, too, create." *Eliezer's Story*, WEEK REV. (Vaad Hanochos Hatmimim, Brooklyn N.Y.), Nov. 22, 1997. In describing the Divine act of creation, the Torah does not say that God *made* a world, but that he *spoke* the world into existence by preceding every creative act by saying what he will do.

theological perspective view this language as furnishing a path leading man to regard himself as a potential creator, thus underscoring an unprecedented parallel between God and humanity.[30] This perspective sees creativity as rooted in inspirational elements.

Further, the "godlike notion of creation" found in the first Creation narrative provides the basis for the parental metaphor of authorship.[31] In fact, the word "creativity" derives from the Latin verb *creo*, which means "to give birth to."[32] Indeed, the opening verses of Genesis reveal a description of the womb: "The deep, unformed darkness is the womb, ripe with potential. The water is the amniotic waters that protect the fragility of life."[33] The first Creation narrative thus serves

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"God said, 'Let there be light,' and there was light." THE CHUMASH: THE STONE EDITION 3 (Nosson Scherman et al. eds., 1st ed. 1993) [hereinafter THE STONE EDITION] (corresponds to *Genesis* 1:3). These "speakings" are referred to as the "Ten Utterances" with which, according to the text, God created the world. *See* BEREL WEIN, PIRKEI AVOS—TEACHING FOR OUR TIMES 184–85 (2003); *see also infra* note 49 and accompanying text (discussing the importance of speech to the nature of man's soul).

30 *See* BOORSTIN, *supra* note 13, at 41; *see also* FRIEDMAN, *supra* note 17, at 235 (noting that at a minimum "the Bible pictures humans as participating in the divine in some way that an animal does not"). It should be noted that the Hebrew root of the word translated as "created" (in Hebrew, *barah*) is used in the Bible only for "divine creativity." This is because *barah* refers to creation *ex nihilo* which can only be done by the Divine. *See* THE STONE EDITION, *supra* note 29, at 3. Despite this distinction, however, Rabbinic scholars regard the first Creation narrative in Genesis as "challeng[ing] man to create, to transform wilderness into productive life." ABHAHAM R. BESDIN, REFLECTIONS OF THE RAV 27–28 (Ktav Publ'g House, rev. ed. 1993) (1979) (quoting a lecture by Rabbi Joseph Soloveitchik).

31 *See* Rose, *supra* note 28, at 9. There are many illustrations of God's parental connection to his creations in the Old Testament and the Hebrew liturgy. One of the most concrete examples of this concept appears in the Book of Jonah, which concludes with the idea that God has pity on the city of Nineveh because this was his creation, and it is God's concern for all creatures that maintains them in life. *Haftarah for Yom Kippur*, *in* ETZ HAYIM, *supra* note 24, at 1246, 1251. Similarly, in the narrative about Noah and the Great Flood, the text recounts that God had "heartfelt sadness." THE STONE EDITION, *supra* note 29, at 29 (corresponds to *Genesis* 6:6). Rashi explains this phrase as meaning that God, in preparing for the Flood, "mourned over the loss of His handiwork." RASHI, THE TORAH: WITH RASHI'S COMMENTARY TRANSLATED, ANNOTATED, AND ELUCIDATED 62 (Yisrael Isser Zvi Herczeg et al. trans., 1995); *see infra* notes 49–50 and accompanying text. Another example appears in one of the weekday prayers recited by observant Jews three times a day. That prayer can be translated as: "Hear our voice, our God, pity and be compassionate to us . . . ." The specific Hebrew word for "pity" used in this prayer is *chus*, which refers to an artisan's special regard for the product of his hands. The underlying concept here is that God should pity us because we are his handiwork. THE COMPLETE ARTSCROLL SIDDUR 109 (Nosson Scherman & Meir Zlotowitz eds., Mesorah Publ'ns 1984).

32 Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 826 (1993).

33 Karyn D. Kedar, *The Many Names of God*, *in* THE WOMEN'S TORAH COMMENTARY 127, 129 (Rabbi Elyse Goldstein ed., 2000).

as a highly significant source reflecting man's inclination to view himself as a creator with the potential for possessing a parental connection to his work.[34]

In addition to the mirroring argument, the first Creation narrative, and its depiction of man, provides a second insight regarding inspirational motivations for artistic creation. It depicts man as a spiritual being whose affirmative creative actions are undertaken in response to Divine command. Such creativity embodies the concept of practical spirituality, which recognizes that a spiritual connection to God can be achieved even through the performance of ordinary tasks.[35] The text of the first Creation narrative reinforces this perspective. The human prototype embodied in the first Creation narrative exhibited a practical spirituality by dominating the "elemental natural forces" and invoking "his will to learn the secrets of nature."[36] In so doing, however, he obeyed God's command to "rule the fish of the sea, the birds of the sky, the cattle, the whole earth, and all the creeping things that creep on earth."[37] After God creates man and woman, he blesses them and says: "Be fertile and increase. Fill the land and master it."[38] The man of the first Creation narrative, in performing

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34 Parents often view their children as reflections of themselves just as authors do their works. *See generally* NANCY FRIDAY, MY MOTHER/MY SELF: THE DAUGHTER'S SEARCH FOR IDENTITY (1997). For a discussion of man's connection to his artistic creations, see *infra* notes 101–03 and accompanying text.

35 SOLOVEITCHIK, *supra* note 23, at 18–19. The idea of practical spirituality is prevalent in Judaism. According to classical Judaism, the body is the source of concern for the physical, whereas the soul is the source for spirituality. Judaism strives for an appropriate balance between body and soul, or the physical and the spiritual. Thus, "[w]hen the physical is engaged for spiritual purposes, the conflict is transformed into peace and harmony." *Chanukah in a New Light*, FARBRENGEN, Winter 2001, at 9, 11. This harmony can be achieved even through the creation of mundane physical objects or other artistic creations that, in fact, can allow the author to, in the words of Marc Chagall, "'take flight to another world.'" Barry Oretsky, *Making the Mystical Transition*, FARBRENGEN, Winter 2001, at 7, 7. Oretsky, a painter, also notes that he finds "a wonderful spirituality occurs when the creative process is expressed in paint." *Id.* This same concept was explained, in a completely different context, by prosecutor Samuel Levine: "As a prosecutor, I feel that I . . . further the purpose of creation, by helping the criminal justice system return order to the world. . . . As a result of my work, society is better able to function in accordance with G-d's plans, in an orderly and productive manner. . . . I am a partner with G-d in creating a better world." Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199, 1206 (1996).

36 SOLOVEITCHIK, *supra* note 23, at 14.

37 ETZ HAYIM, *supra* note 24, at 10 (corresponds to *Genesis* 1:26).

38 *Id.* (corresponds to *Genesis* 1:28).

God's instructions, is viewed as the prototype for "collective human technological genius."[39]

An important lesson from this Creation narrative is that an author who labors toward even a physical or material end can be empowered through a sense of practical spirituality in much the same way as the humans depicted in that text. The twelfth-century philosopher Maimonides, historically one of the most noted authorities on Jewish law, recognized this concept of practical spirituality when he affirmed that people should perform even ordinary tasks for the service of Heaven.[40] Thus, a traditional Jewish approach to artistic creation emphasizes that the underlying motivations for physical creative action are rooted in the inspirational elements of mirroring God's capacity for creativity and serving God. More universally, however, the first Creation narrative is significant because it illustrates a perspective that emphasizes the importance of noneconomic motivations for creative actions resulting in tangible, physical embodiments.

The second Creation narrative in Genesis has equal significance for explicating man's inspirational creative spirit. Beginning in chapter two, verse four of Genesis,[41] the translation tells us that "the Lord God formed man from the dust of the earth. He blew into his nostrils the breath of life, and man became a living being."[42] After Adam and Eve partake of the forbidden fruit, God admonishes man, "For dust you are, And to dust you shall return."[43] Thus, God creates man from dust, and to dust he returns. Classical interpretations of this narrative provide support for the view that man's creativity derives from an intrinsic drive that, although endowed by an external source, enables man to suppress his ego and focus on the emergence of his work. Moreover, by emphasizing a cyclical view of creativity, this narrative

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39 SOLOVEITCHIK, *supra* note 23, at 17 n.†. Man also acquires dignity by exercising control over his environment. *Id.* at 15; *see also infra* text accompanying note 199.

40 *See* MOSES MAIMONIDES, MISHNEH TORAH, HILCHOT DE'OT 54 (Za'ev Abramson & Eliyahu Touger trans., 1989). The main excerpt reads: "A person should direct his heart and the totality of his behavior to one goal, becoming aware of God, blessed be He." *Id.* Maimonides is also known as the Rambam (an acronym for Rabbi Moses ben Maimon). YAD HACHAZAKAH (The Hand of The Strength), is the first codified set of Jewish law according to which the laws were arranged by subject matter.

41 The first half of verse four finishes the first story of Creation; the second half begins the second story. One translation of this verse reads: "Such is the story of heaven and earth when they were created. When the Lord God made earth and heaven . . . ." ETZ HAYIM, *supra* note 24, at 13 (corresponds to *Genesis* 2:4). According to the commentary, the inversion of "heaven and earth" and "earth and heaven" "signals a shift in the focus between the two creation stories." *Id.* at 12 n.4.

42 *Id.* at 13 (corresponds to *Genesis* 2:7).

43 *Id.* at 22 (corresponds to *Genesis* 3:19).

illuminates the creator's role as the guardian of her work's meaning for a defined period of time. These themes reinforce creativity as inherent in the task itself.

Initially, this passage illuminates the idea that human ability to engage in expression, including through artistic skill, is endowed by an external source. The renowned Jewish commentator Nahmanides[44] interprets this passage as meaning that God blew his own breath into Adam's nostrils.[45] God's breath is understood to mean "the soul of life,"[46] thus establishing the way in which the creation of human beings differs from all other creations.[47] Moreover, the purpose of this special soul was to enable man to speak and express himself.[48] Rashi, the celebrated eleventh-century French biblical commentator, explains that the soul of man is more alive than the souls of animals because man's soul contains the powers of speech and reasoning.[49] Further, according to Rabbi Soloveitchik, "[t]he Biblical metaphor referring to God breathing life into Adam alludes to the actual preoccupation of the latter with God, to his genuine living experience of God."[50] Thus, Adam enjoyed a closeness with God that facilitated God's direct endowment in man of expressive, creative capacities. Although the classical Jewish tradition, as would be ex-

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44 Nahmanides, who lived in the thirteenth century, is also referred to as the Ramban.

45 RAMBAN (NAHMANIDES), COMMENTARY ON THE TORAH: GENESIS 66 (Charles B. Chavel trans., 1971) [hereinafter RAMBAN]; *see also* RABBI YAAKOV CULI, THE TORAH ANTHOLOGY MEAM LO'EZ BOOK ONE 245 (Aryeh Kaplan trans., 1977); THE STONE EDITION, *supra* note 29, at 11 (corresponds to *Genesis* 2:7).

46 CULI, *supra* note 45, at 245; RASHI, *supra* note 31, at 23.

47 According to classical Jewish belief, although man was created alive, his true form was not attained until God took this further step of infusing him with the soul. CULI, *supra* note 45, at 245; *see also* RAMBAN, *supra* note 45, at 66 (discussing the creation of man's soul).

48 Onkelos, the Roman convert to Judaism who wrote an Aramaic translation of the Five Books of Moses in the second century, translates the words "living being" found in the second Creation narrative as "a speaking spirit." THE STONE EDITION, *supra* note 29, at 11 (commentary on *Genesis* 2:7). Onkeles thus describes God's endowing man with the ability to speak as the purpose of this special soul. Of course, the speech parallels between God and man also have relevance for the mirroring argument discussed in connection with the first Creation narrative. *See supra* notes 25–30 and accompanying text.

49 RASHI, *supra* note 31, at 23–24 (corresponds to *Genesis* 2:7); *see also* CULI, *supra* note 45, at 245; *cf.* MAURICE MERLEAU-PONOTY, PHENOMENOLOGY OF PERCEPTION 178–79 (1976) (likening authentic speech, that which is the creative, original descriptions of feelings, to the expression of artists); Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1339, 1365 (1996) (affirming communication as the essential component of authorship).

50 SOLOVEITCHIK, *supra* note 23, at 23.

pected, views God as the external source of expression and creativity, the more generalized idea is that creative expression, though driven by an intrinsic mechanism, is "gifted" in that it comes from a source beyond the author's control.[51]

The second Creation narrative also emphasizes the connection between creative endowment and self-abnegation. The *Oxford American College Dictionary* defines self-abnegation as "the denial or abasement of oneself."[52] From a theological perspective, self-abnegation facilitates spiritual transcendence to the extent that an individual focuses on God as the Center of the Universe rather than himself.[53] From a creative perspective, self-abnegation is critical to the development of an artistic soul as it reaffirms that because creativity is derived from a higher power, an artist must transcend himself and focus on the source of his gift if true artistic creation is to occur.[54] Thus, the concept of self-abnegation also relates to the idea that creativity is endowed by an external source.

According to Jewish authority, speech is singularly reflective of the quality of self-abnegation. For both God and man, speech is an indication of the ability to transcend the self and relate to someone or something else. Commentators believe that in creating the world, God wished to see his own "thoughts" and "feelings" take form in a consciousness and perception other than his own.[55] According to this view, the Adam of the second Creation narrative, whom God infused with a special soul,[56] possessed the ability to speak and express himself in a way that mirrored the Divine capacity for self-abnegation.[57]

Lastly, the second Creation story, by providing that man returns to dust, underscores the cyclical nature of creation. According to Rashi, the human being is a combination of the earthly and the Di-

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51 As will be discussed, this "gifted" aspect of the creation process also is consistent with Christian and secular psychological perspectives of artistic creation. *See infra* notes 77–83, 115–23 and accompanying text.

52 OXFORD AMERICAN COLLEGE DICTIONARY 1239 (2002).

53 SUE FISHKOFF, THE REBBE'S ARMY—INSIDE THE WORLD OF CHABAD-LUBAVITCH 77 (2003). The importance of self-abnegation for creativity also appears in Christian thought. *See infra* notes 84–88 and accompanying text.

54 Secular scholars also emphasize the importance of self-abnegation in the creation process. *See, e.g.*, DACEY & LENNON, *supra* note 5, at 41–42; *see also infra* notes 121–34 and accompanying text (discussing Dacey and Lennon's studies on the connection between creativity, faith, and self-abnegation).

55 *Eliezer's Story*, *supra* note 29. Recall that according to the text of Genesis, God spoke the world into existence through the "Ten Utterances." *See* WEIN, *supra* note 29, at 184–85.

56 *See supra* notes 45–51 and accompanying text.

57 *See* SOLOVEITCHIK, *supra* note 23, at 21–22.

vine.[58] After death, a person's soul returns to its source, God, and one's body returns to its source, the earth.[59] While alive, however, every person, as God's creation, serves as a testament to God's message for humanity.[60] Just as God's creations are cyclical and return to their source, the author's creations are cyclical and return to their source.[61] According to this view of creativity, the author's creation is an embodiment of his intrinsically motivated message. Moreover, the author has the responsibility for preserving the message of his work and its meaning during his lifetime, after which the work is dedicated back to its source.[62]

In sum, the Genesis narratives depict man as an inspired, creative being. Classical Judaism's interpretation of these narratives facilitates the development of a theory of inspirational motivation that focuses on an intrinsic dimension of human innovation. As the following discussion demonstrates, this perspective also has been embraced by Christianity and by secular artists and psychologists seeking to explain the spiritual roots of human creativity.[63]

2. The Christian Tradition

Western artists clearly have benefited from "the patronage, the inspiration, and the enthusiasm of faithful Christians."[64] Without doubt, in Christian countries the flourishing of painting,[65] sculpture,[66] and music[67] is a measure of the vitality and reach of Christian-

58 RASHI, *supra* note 31, at 23 ("[God] made man from the lower realms and from the upper realms. The body from the lower realms and the soul from the upper realms.").

59 ETZ HAYIM, *supra* note 24, at 13 n.7 (corresponds to *Genesis* 2:7). The word for "earth" in Hebrew is *adamah* because Adam is buried within it. *Id.* at 13.

60 *See* BOORSTIN, *supra* note 13, at 42.

61 Over time, the notion of stewardship, which assumed a prominent theological focus particularly in Christianity, embraced this cyclical view of creativity. *See infra* notes 73–80 and accompanying text.

62 *See infra* notes 142–48, 236–40 and accompanying text.

63 *See infra* Parts I.A.2, I.B.

64 BOORSTIN, *supra* note 13, at 191.

65 The paintings of Sister Gertrude Morgan provide a contemporary example of the link between visual art and faith. *See* Michael Kimmelman, *With an Ear for God and an Eye for Art*, N.Y. TIMES, Feb. 27, 2004, at E27 (reviewing the Gertrude Morgan exhibit at the American Folk Art Museum in New York and providing a brief biographical narrative on the artist's life).

66 *See* MADELEINE L'ENGLE, WALKING ON WATER: REFLECTIONS ON FAITH AND ART 28 (1980) ("Icons are painted with firm discipline [and] much prayer.").

67 See BOORSTIN, *supra* note 13, at 240–45, for a discussion of Christianity's impact on modern music.

ity.[68] As the arts clearly blossomed in conjunction with the growth of the Christian faith, it is not surprising that Christianity would embrace and foster its own outlook on the inspired artistic soul. The Christian perspective is, by and large, consistent with the Judaic perspective developed in the foregoing subsection. In general, the themes of artistic creators mirroring God, Divine endowment of creativity, and self-abnegation are especially prominent in Christian ideologies regarding artistic creativity.

In contrast to classical Judaism, Divine imagery historically has played a significant role in Christian theology. The statement in the first Creation narrative that "God created man in his own image"[69] inspired Christianity's notion of a Divine quality in all images. Christianity embraced the view that if the God-made image of man is Divine, then a man-made image of God also could have a Divine aspect. Ultimately, Christian theology supported affording artists the Divinely appointed task of depicting Divine imagery.[70] The relevance of the mirroring argument discussed in the first Creation narrative is apparent in this development because the growth of imagery reaffirms that man, like God, is a creator. The history of Christianity depicts the growth of image worship in the late sixth and seventh centuries, as legends developed that the images were not of human origin but instead were "miraculous mechanical impressions of a holy original."[71] The connection between this aspect of Christian history and the idea that creativity is endowed by an external source also is evident.[72]

Stewardship theory, which emerged as an especially prominent feature of Christian theology, also comports with the insights about inspirational motivations reflected in the cyclical view of creativity deriving from the second Creation narrative. From a theological standpoint, stewardship reaffirms that gifts are endowed by a Divine power, beyond that of the artist. Also, stewardship embraces a temporary view of possession to the extent it conceives of gifts returning to their original source.[73] The stewardship doctrine became crystallized in the

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68 *See* KAROL BERGER, A THEORY OF ART 90 (2000) ("Until at least 1500, the most impressive architecture, sculpture, painting, and music created in Europe had religious subjects and functions, and through at least the middle of the eighteenth century religious content continued to be of major significance to the European arts.").

69 *Genesis* 1:27 (King James).

70 BOORSTIN, *supra* note 13, at 193; *see also id.* at 191–94 (discussing the history and defeat of the Iconoclast movement in Christianity which sought to prohibit the worship of images in Christianity).

71 *Id.* at 186.

72 *Id.* at 191.

73 *See supra* notes 61–62 and accompanying text. The concept of stewardship was present to an extent in the Jewish tradition, as the Old Testament contemplates that

medieval period, during which time ownership of private property was premised on the idea that it served as a temporary status, one designed to operate exclusively in this world. Since ownership was conceived on the model of a stewardship of God's order, property was regarded as inalienable because it ultimately belonged to God.[74] Medieval theology was instrumental in the development of the view that "all that we 'own,' including our life and freedom, as well as physical objects, has been given to us by God and is held by us in stewardship for Him."[75]

Applying this perspective to works of authorship, the idea is that an author who deems himself to be God's servant believes that God "claims every aspect of an author's creativity."[76] Central to this concept of ownership based on stewardship theory is the idea of possessing something originally obtained as a gift—an unearned benefit "bestowed" upon the recipient.[77] Thomas Wolfe captured this concept fittingly in describing the mindset of sculptor Frederick Hart, who converted to the Roman Catholic religion while working on the nationally acclaimed sculpture *Ex Nihilo*: Hart "became a Roman Catholic and began to regard his talent as a charisma, a gift from God. He dedicated his work to the idealization of possibilities God offered man."[78] Stewardship is also consistent with the idea of the author as the guardian of his work's meaning and message during his lifetime.[79] For example, Hart viewed God as the source of his gift, and during his lifetime fought to safeguard the original meaning of *Ex Nihilo* since that work embodied his intrinsically motivated message to the world.[80]

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the Israelites are to be God's tenants on the land, and only if they live up to the terms of their Covenant with God will they remain there. *See* ETZ HAYIM, *supra* note 24, at 741 (corresponds to *Leviticus* 25:23) ("But the land must not be sold beyond reclaim, for the land is Mine; you are but strangers resident with Me.").

74 Sibyl Schwarzenbach, *Locke's Two Conceptions of Property*, 14 SOC. THEORY & PRAC. 141, 145 (1988).

75 Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 424 (1993).

76 Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 23 (2001).

77 Schwarzenbach, *supra* note 74, at 146. Syn notes, however, that the Christian publishing industry follows the view of modern courts regarding copyright ownership, opting to view copyrights as capable of human ownership. Syn, *supra* note 76, at 24. This view, however, is not inconsistent with the stewardship concept to the extent that humans are regarded as holding the intellectual property in trust.

78 *See* Wolfe, *supra* note 22.

79 *See supra* notes 58–62 and accompanying text.

80 For a more detailed account of Frederick Hart's saga and the litigation it spawned, see Kwall, *supra* note 6, at 34–35.

An especially compelling narrative regarding Christianity's perspective on artistic creativity is furnished by renowned Christian author Madeleine L'Engle in her book *Walking on Water: Reflections on Faith and Art*.[81] In this work, L'Engle explicitly incorporates several of the themes discussed in connection with the two narratives of Creation, although she does not specifically attribute her insights to these sources. L'Engle continually emphasizes that man is called to "co-create" with God, thus underscoring how the communicative power of artists imitates that of God.[82] She also invokes the parental metaphor in combination with the "gifted" aspects of creativity—of the work coming to the author and saying "Here I am. Enflesh me. Give birth to me."[83] Further, L'Engle emphasizes the concept of self-abnegation in the creative process. In her view, the artist must be "obedient to the command of the work," notwithstanding the long hours of labor and effort this obedience will entail.[84] Thus, the work comes to the artist and demands to be served; the artist then has the choice of whether to engage in the privilege of serving the work.[85] This notion of self-abnegation is especially captured by the idea that "[w]hen the work takes over, then the artist is enabled to get out of the way, not to interfere."[86]

According to L'Engle, all artists, regardless of their external propensity for religious observance, are of necessity "in a condition of complete and total faith."[87] This faith may be in their vision as artists or in their work, but faith is what underscores and supports the pivotal moment of creation.[88] Artistic creation necessitates an abandonment of complete control; the work takes over and the "self" recedes. Regardless of whether the artist professes a formal religious faith or

81 Madeleine L'Engle also authored the popular children's book *A Wrinkle in Time*, and she speaks of the creation process of this book extensively in *Walking on Water: Reflections on Faith and Art*. L'ENGLE, *supra* note 66.

82 *Id.* at 34, 81, 98.

83 *Id.* at 18; *see also id.* at 195 (presenting a Christian perspective on the "gifted" aspect of creation).

84 *Id.* at 22; *see also id.* at 185 (noting how the artist must get outside of herself, or get "on the other side" of herself in order to complete her task).

85 *Id.* at 23. L'Engle quotes Jean Rhys, who expresses this same concept with even more imagery: "'All of writing is a huge lake. There are great rivers that feed the lake, like Tolstoy and Dostoyevsky. And there are mere trickles, like Jean Rhys. All that matters is feeding the lake. I don't matter. The lake matters. You must keep feeding the lake.'" *Id.*

86 *Id.* at 24.

87 *Id.* at 55.

88 *Id.* at 148. The discipline required by artistic creation has been, in fact, compared by some to the discipline of prayer. *E.g.*, *id.* at 149.

creed, the very process of artistic creation necessitates a conscious state of self-abnegation, with a concomitant awareness of the emergence of a greater force at work.

The theologies of Judaism and Christianity thus provide powerful bases for explicating the connection between inspiration and art. According to Rabbi Soloveitchik, "the message of faith, if translated into cultural categories, fits into the . . . frame of reference of the creative cultural consciousness and is pertinent even to secular man."[89] As Part I.B demonstrates, the writings of secular authors as well as scholars investigating the psychological elements of creativity attest to the strong presence of the inspirational motivations discussed herein.

B. Secular Perspectives on Creativity

> *"[C]reativity is a quest for meaning . . . an attempt to penetrate the mystery of the self, and perhaps the even greater mystery of Being."*[90]

Art, like religion, facilitates man's reliance on stories in order to satisfy humanity's need for an identity and an existence with "a depth of significance."[91] Thus, both art and religion recognize that stories impart depth to human existence and that in their absence "our world would be appallingly flat, one-dimensional, and impoverished."[92] Notwithstanding these parallels, some secular scholars have noted that although religion has been an important source of inspiration for artists and authors, the secularization of modern society has enabled art to occupy a place of increased importance in satisfying these societal needs.[93] Still, to the extent that both art and religion place a premium on storytelling as a means of providing self-identity and depth, it should come as no surprise that a certain intrinsic level of emotion and psychological influences are common to both. Nietzsche explained this well when he observed that "[a]rt raises its head where the religions relax their hold" by taking over "a host of moods and feelings engendered by religion."[94] Although creativity is currently

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89 SOLOVEITCHIK, *supra* note 23, at 96.

90 Barron, *supra* note 12, at 2.

91 BERGER, *supra* note 68, at 93.

92 *Id.*; *see also id.* at 93–94 (noting that while the advantage of religion is that its stories "unite a whole community," religion also breeds intolerance of different stories; "[a]rt is safer"). In the words of D.H. Lawrence: "Art is a form of religion . . . . Art is a form of supremely delicate awareness and atonement—meaning at-oneness, the state of being at one with the object." D.H. Lawrence, *Making Pictures*, *in* THE CREATIVE PROCESS 62, 66 (Brewster Ghiselin ed., 1952).

93 BERGER, *supra* note 68, at 93.

94 FREIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS 81 (R.J. Hollingdale trans., Cambridge Univ. Press 1986) (1878).

explained by psychologists as emanating from "a complex interaction among biological, psychological, and social forces,"[95] the "moods and feelings" that characterize the artistic soul are, by numerous accounts and studies, consistent with the insights derived from the narratives focusing on inspirational motivations for creativity.

Inspirational motivations for artistic innovation are featured prominently in narratives about creativity by both secular creators,[96] as well as scholars examining creativity from a psychological perspective.[97] As an initial matter, it is instructive to contemplate the secular literature's emphasis on the parental metaphor of authorship.[98] This vision of authorship, reflected in the first Creation narrative, completely pervades our perceptions about creativity. For example, it is evident in how we contemplate unauthorized uses of creative works. As early as 1710, Daniel Defoe referred to literary theft as child snatching.[99] In fact, the word "plagiarism" is derived from the Latin term for "kidnapping."[100]

The concept that an author "gives birth" to her artistic creations provides the foundation for the unique bond between an author and her work, also discussed earlier in connection with the first Creation narrative.[101] As Dan O'Neill, the primary force behind the *Air Pirates* cartoons, once remarked: " 'Taking my comic strip away would be like

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95 DACEY & LENNON, *supra* note 5, at 15 (developing this multifaceted explanation of creativity).

96 As used in this Article, "secular creators" refers to creators who are not writing about creativity from a theological perspective, despite the fact that they may be religious on an individual level.

97 Interest in the creative process on the part of creators themselves did not emerge to a significant degree until the end of the nineteenth century. Barron, *supra* note 12, at 7; *see also* AMABILE, *supra* note 7, at 16 (noting that the "social psychology of creativity is still in its early stages").

98 *See also* Kwall, *supra* note 6, at 62 (developing the idea of joint authors as co-parents); Merry Jean Chan, Note, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186, 1197–205 (2003) (exploring the expressive nature of parenting as the basis for the authorial parent paradigm).

99 KEMBREW MCLEOD, FREEDOM OF EXPRESSION®: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 166 (2005).

100 *Id.*

101 *See supra* notes 31–34 and accompanying text. Of course, not all authors feel a connection to their work. *See* Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 168 (1998) (noting that even where such a manifest connection is lacking, it is possible to conclude that "some protectable interest should be recognized"). For a further discussion, see *infra* note 152.

losing my arms and legs.'"[102] Celebrated filmmaker Federico Fellini captured this connection with the following sentiment: "Deep down I feel that criticism of my work—which is the most sincere and authentic vision of myself—is unsuitable and immodest, whether it is favourable or unfavourable. Because, since I am identified totally with my work, it is as if someone were judging me as a man."[103]

The secular texts explicating theories of creativity place a tremendous importance on the intrinsic dimension of creativity explored in the foregoing analysis of the theological texts. Renowned social psychologist Teresa Amabile's work focuses on the Intrinsic Motivation Principle as a cornerstone of the social psychology of human creativity.[104] She defines intrinsic motivation as "any motivation that arises from the individual's positive reaction to qualities of the task itself; this reaction can be experienced as interest, involvement, curiosity, satisfaction, or positive challenge."[105] Amabile explains extrinsic motivation as arising "from sources outside of the task itself," including "expected evaluation, contracted-for reward, [and] external directives."[106] Amabile's early work concluded that intrinsic motivation is conducive to creativity whereas extrinsic motivation is detrimental to creative enterprise.[107] Although subsequent research resulted in her modified view that in certain instances extrinsic motivation can enhance creativity, her more recent work nonetheless recognizes "the critical importance of intrinsic motivation to creativity."[108]

Individual creators attest to the "gestational period" underscoring creativity—that timeframe in which the creative juices flow internally, almost imperceptibly.[109] Henry Miller's observation is characteristic

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102 Bob Levin, *Showdown, The Pirate and the Mouse: Part 1*, COMICS J., Aug. 2001, at 86, 94.

103 Federico Fellini, *Miscellany*, *in* CREATORS ON CREATING, *supra* note 12, at 31, 34; *see also Legal Issues That Arise When Color Is Added to Films Originally Produced, Sold, and Distributed in Black and White: Hearings Before the Subcomm. on Technology and the Law of the S. Comm. on the Judiciary*, 100th Cong. 7–12 (1987) (statement of Elliot Silverstein, Directors Guild of America) [hereinafter *Legal Issues That Arise*] (opposing film colorization, noting that authors' "sensibilities are acutely bruised when we see 'our children' publicly tortured and butchered . . . by the various instruments of the new technologists" (emphasis omitted)).

104 *See* AMABILE, *supra* note 7, at 115.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.* at 127. *See generally id.* at 107–27 (discussing her early work on the Intrinsic Motivation Principle and its revision).

109 *See generally* DACEY & LENNON, *supra* note 5, at 39 (discussing Carl Jung's theory that high-level creativity involves the unconscious).

of this view: "The best thing about writing is not the actual labor of putting word against word, brick upon brick, but the preliminaries, the spade work, which is done in silence, under any circumstances, in dream as well as in the waking state."[110] This inner labor—termed "the unconscious machine" by mathematician Henri Poincaré—is what creators underscore as the pivotal component of creativity.[111] Poet Amy Lowell similarly noted that a poet "is something like a radio aërial—he is capable of receiving messages on waves of some sort; but he is more than an aërial, for he possesses the capacity of transmuting these messages into those patterns of words we call poems."[112] Similarly, Bertrand Russell has emphasized "the fruitless effort he used to expend in trying to push his creative work to completion by sheer force of will before he discovered the necessity of waiting for it to find its own subconscious development."[113] These observations from creators representing a broad spectrum of disciplines demonstrate belief in the universality of "hidden organic development at some stage of the creative process."[114]

As discussed earlier in conjunction with the theological narratives, the intrinsic dimension of creativity emphasizes inspiration as emanating from an external source beyond that of the author herself. Numerous secular creators have attested to the endowed or "gifted" theory of human enterprise. For example, Roger Sessions embraced this view by positing that a composer is "not so much conscious of his ideas as possessed by them."[115] Sessions observed that "very often he is unaware of his exact processes of thought till he is through with them; extremely often the completed work is incomprehensible to him immediately after it is finished."[116] Lewis Hyde explicitly spoke of inspiration as a gift, noting that although all artists may not emphasize

110 Henry Miller, *Why Don't You Try To Write, in* CREATORS ON CREATING, *supra* note 12, at 27, 28.

111 Henri Poincaré, *Mathematical Creation, in* THE CREATIVE PROCESS, *supra* note 92, at 22, 27; *see also* HYDE, *supra* note 4, at 51 (noting that labor is "bound up with feeling" and "interior").

112 Amy Lowell, *The Process of Making Poetry, in* THE CREATIVE PROCESS, *supra* note 92, at 110, 110.

113 Brewster Ghiselin, *Introduction* to THE CREATIVE PROCESS, *supra* note 92, at 1, 16; *cf.* Rainer Maria Rilke, *Letters to Merline, in* CREATORS ON CREATING, *supra* note 12, at 53, 53 ("Please do not expect me to speak to you of my inner labor—I must keep it silent . . . .").

114 Ghiselin, *supra* note 113, at 16.

115 Roger Sessions, *The Composer and His Message, in* THE CREATIVE PROCESS, *supra* note 92, at 36, 39.

116 *Id.*

the "gifted" phrase of the creation process, all feel it.[117] This notion is epitomized by the following observation Hyde attributes to poet Gary Snyder: "'You get a good poem and you don't know where it came from. "Did I say that?" And so all you feel is: you feel humility and you feel gratitude.'"[118] Thomas Wolfe made a similar observation in the context of writing a novel: "It was something that took hold of me and possessed me, and before I was done with it—that is, before I finally emerged with the first completed part—it seemed to me that it had done for me."[119] Such observations validate Lewis Hyde's global point: "Spiritually, you can't be much poorer than gifted."[120]

Early psychological theories about creativity also emphasized externally endowed inspiration as a key factor responsible for innovation. John Dacey and Kathleen Lennon, contemporary psychologists and creativity scholars, have noted that initially, research on creative thinking was "deterred not so much by ignorance as by the conviction that the nature of innovative thinking was already understood" as "a gift from above."[121] Current psychological theories about creativity are significantly more multifaceted.[122] Interestingly, however, modern scholars of creativity do regard faith and the state of self-abnegation as characteristic of the creative temperament, and believe these qualities are related to an awareness of the "gifted" aspect of the creative process.[123] For example, Dacey and Lennon emphasize the importance of spirituality and faith in the creative process: "Being spiritual . . . means striving to enlarge one's connection to that force lying within, a force that can make it possible to transcend the ordinary self and reach one's fullest potential."[124] Similarly, writing in the middle of the twentieth century, Erich Fromm observed that creativity stemmed from self-transcendence, a state allowing man to perceive

117 HYDE, *supra* note 4, at xii; *see also* AMABILE, *supra* note 7, at 10 (quoting poet Anne Sexton's observation that with the gift comes responsibility and that one must not neglect or "'be mean'" to the gift but "'must let it do its work'" (quoting LINDA GRAY SEXTON & LOIS AMES, ANNE SEXTON: A SELF-PORTRAIT IN LETTERS 414 (1977))).

118 HYDE, *supra* note 4, at 279.

119 Thomas Wolfe, *The Story of a Novel*, *in* THE CREATIVE PROCESS, *supra* note 92, at 192, 194.

120 HYDE, *supra* note 4, at 279.

121 DACEY & LENNON, *supra* note 5, at 15 (noting that the "first effective scholarly inquiry [on creative thinking] was undertaken only a little more than a century ago").

122 *See supra* note 95 and accompanying text.

123 HYDE, *supra* note 4, at 148 ("For a creative artist, 'feeding the spirit' is as much a matter of attitude or intent as it is of any specific action; the attitude is, at base, the kind of humility that prevents the artist from drawing the essence of his creation into the personal ego . . . .").

124 DACEY & LENNON, *supra* note 5, at 130.

God's immanence by doing something greater than himself.[125] Whereas the narcissist believes that his creative gifts come from himself, the true creative spirit is aware of an "abiding sense of gratitude" moving him "to labor in the service of his *daemon*."[126] Similarly, as noted by C.G. Jung: "'The work in process becomes the poet's fate and determines his psychic development. It is not Goethe who creates *Faust*, but *Faust* which creates Goethe.'"[127] Thus conceived, creativity "often defines itself as no more than a sense of self-surrender to an inward necessity inherent in something larger than the ego and taking precedence over the established order."[128]

According to Dacey and Lennon, the nurturing of faith is important not only in achieving the state of self-transcendence, but also in facilitating the ability to delay gratification.[129] The ability to delay gratification is, in their view, critical to the development of self-control, a quality their research has demonstrated is of vital importance to creative development.[130] Their studies show that the type of self-control most associated with creativity "requires insight, faith, and a vision of the future."[131] The model of self-control articulated by these scholars is especially focused on the concepts of faith in oneself, one's plan, and "possibly in the assistance of some higher power."[132] They see this type of faith as a major factor in terms of both the biological and psychological development of human ability to persist despite declines in motivation.[133] Based on their research, Dacey and Lennon have concluded that "[t]hose individuals with a sense of spirituality seem to display more self-control."[134]

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125 *See id.* at 42–43.

126 HYDE, *supra* note 4, at 53 ("The Romans called a person's tutelar spirit his *genius*. In Greece, it was called a *daemon*."); *see also id.* at 149–50 (noting that self-abnegation and self-forgetfulness are qualities marking a creative temperament).

127 Ghiselin, *supra* note 113, at 4.

128 *Id.* at 5; *see also* AMABILE, *supra* note 7, at 10 (quoting poet Anne Sexton for the proposition that the gift "'has more rights than the ego that wants approval'" (quoting SEXTON & AMES, *supra* note 117, at 414)).

129 DACEY & LENNON, *supra* note 5, at 131–32.

130 *Id.* at 132, 230. The idea of ego control, "the extent to which a person can express or restrain impulses, feelings and desires," is relevant to the concept of self-abnegation. *Id.* at 239. Dacey and Lennon believe that ego control is related to delay of gratification, which in turn depends on self-control. *Id.*

131 *Id.* at 120.

132 *Id.* at 234.

133 *Id.* at 129 (discussing the scientific hypothesis of a "faith gene" that arguably influences an individual's "faith in oneself, a plan, or a higher power"); *see also id.* at 116–35 (discussing the development of CCOPE, a biopsychosocial model of self-control).

134 *Id.* at 130.

Accounts of creativity by authors support these psychological theories regarding the connections between faith, self-abnegation and the state of giftedness. A powerful testimonial of these connections appears in a narrative by Pamela Travers, the creator of Mary Poppins:

> C.S. Lewis, in a letter to a friend, says, "There is only one Creator and we merely mix the elements he gives us"—a statement less simple than it seems. For that "mere mixing," while making it impossible for us to say "I myself am the maker," also shows us our essential place in the process. Elements among elements we are to shape, order, define, and in doing this we, reciprocally, are defined and shaped and ordered. The potter, molding the receptive clay, is himself being molded.
>
> But let us admit it. With that word "creative," when applied to any human endeavor, we stand under a mystery. And from time to time that mystery, as if it were a sun, sends down upon one head or another, a sudden shaft of light—by grace one feels, rather than deserving—for it always comes as something given, free, unsought, unexpected.[135]

Another example of the relationship between self-abnegation and the "gifted" phase of artistic creation is provided by Alan Durham in his description of artist Jean Arp. Durham explains that "[b]y 'eliminating all volition' in favor of the workings of chance, Arp believed that he could summon quasi-divine forces to his aid."[136] According to Arp, the most successful artist is one that is most attentive to these external influences and allows himself to be restored "to an attitude of humility vis-à-vis man's experience of the world and his role as a creator within that world."[137] Dancer Anna Halprin echoes these observations: "To me, a performer is simply a vehicle, a submergence of the ego."[138] Similarly, painter Max Ernst has written that "[t]he author is present as a spectator, indifferent or impassioned, at the birth of his own work."[139] In essence, Arp, Halprin, and Ernst all are describing the phenomenon of an artist suppressing her conscious will,[140] and

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135 Pamela Travers, *The Interviewer*, *in* CREATORS ON CREATING, *supra* note 12, at 36, 42–43.

136 Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 597 (2002) (quoting John Hancock, *Arp's Chance Collages*, *in* DAD/DIMENSIONS 47, 55 (Stephen C. Foster ed., 1985)).

137 HARRIETT ANN WATTS, CHANCE: A PERSPECTIVE ON DADA 70 (1980).

138 Anna Halprin, *The Process Is the Purpose*, *in* CREATORS ON CREATING, *supra* note 12, at 44, 46.

139 Max Ernst, *Inspiration to Order*, *in* THE CREATIVE PROCESS, *supra* note 92, at 58, 59.

140 *See also* Durham, *supra* note 136, at 599–600 (discussing Marcel Duchamp's laboring to suppress his conscious judgment).

their sentiments clearly parallel those of Christian author Madeleine L'Engle as she described the emergence of the work as the author recedes.[141]

Secular authors also have emphasized the importance of the concept of stewardship in creativity.[142] Stewardship blends an awareness of both externally endowed inspiration, along with the cyclical dimension of the creative process. Drawing from the "dust to dust" cycle of Divine creativity found in the second Creation narrative, the idea here is that humans also must continually keep their creative gifts in a state of motion. Poet Rainer Rilke articulated this cyclical journey, beginning at a stage of "primal innocence" with every new work:

> I will shuffle slowly ahead, each day moving forward but a half-step, and often losing ground. And with each step will I seem to leave you farther behind, for where I am going no name has any value, no memory can remain; one must reach it as one reaches the dead, in consigning all one's forces to the hands of the Angel who leads you. I am leaving you behind—but *as I will be making full circle*, I will again draw nearer with each step.[143]

Similarly, Lewis Hyde remarked that some artists "take their gifts to be bestowals of the gods or, more often perhaps, of a personal deity, a guardian angel, *genius*, or muse—a spirit who gives the artist the initial substance of his art and to whom, in return, he dedicates the fruit of his labor."[144] He also wrote of myths "closing the circle, of artists directing their work back toward its sources."[145] As an example, Hyde depicted the work of Ezra Pound's creative life as being "animated by a myth in which 'tradition' appears as both the source and ultimate repository of his gifts."[146] According to Hyde, "[t]he only essential is this: *the gift must always move.*"[147] By this he means that "the primary commerce of art is a gift exchange, that unless the work is the realization of the artist's gift and unless we, the audience, can feel the gift it carries, there is no art."[148]

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141 *See supra* notes 84–88 and accompanying text.

142 *See supra* notes 58–62, 73–80 and accompanying text.

143 Rilke, *supra* note 113, at 53 (emphasis added).

144 HYDE, *supra* note 4, at 146.

145 *Id.* at 147. In this regard, he discusses the Chilean poet Pablo Neruda, who took great pride when an unknown worker had heard his poems because that was a sign that his gift was being directed back to the "brotherhood," to "the people," which he believed to be the source of his gift in the first place. *Id.*

146 *Id.*

147 *Id.* at 4; *see also id.* at 53 ("The task of setting free one's gifts was a recognized labor in the ancient world . . . . And without sacrifice, without the return gift, the spirit cannot be set free.").

148 *Id.* at 273.

An examination of both the theological and secular narratives concerned with inspirational motivations for creativity suggests that human innovation is characterized by a compelling intrinsic dimension. As discussed, this intrinsic dimension focuses on creativity as a response to an inherent drive rather than simply a quest for economic reward. If the law embraces a view of creativity that ignores this intrinsic dimension in favor of a perspective concerned exclusively with economic reward, the resulting legal protection for authors' rights will be skewed and incomplete. The final section of this Part illustrates how the insights derived from these narratives can inform the discourse about the law of authors' rights.

C. *The Role of Inspirational Motiviations in the Authors' Rights Dialogue*

The insights derived from the theological and secular narratives about creativity examined in the foregoing sections reinforce two broader, but related, points. First, creativity is spurred largely by incentives that are noneconomic in nature. A perspective grounded in inspirational motivations emphasizes creativity as fulfilling an inalienable responsibility to others, as well as to the creator's own substantive personality. The narratives typifying this perspective view private use and enjoyment, as well as monetary gain, as "secondary to fulfilling a prior and fundamental social role."[149] This paramount responsibility is what drives the intrinsic dimension of innovation. For example, recall that although the first Creation narrative emphasizes man as a physical actor, economic acquisition was not the motivation for creation because the labor supporting the physical activity was driven by a compelling inspirational force.[150] The theological and secular narratives examined herein support this view of creativity by elevating other noneconomic motivations for creativity such as personal satisfaction, challenge, or even stewardship.

The second point drawn from the narratives explored herein is that an inspirationally driven explanation of creativity seeks to unify the intrinsic drive and its external embodiment, so that the external is understood as a reflection of the author's inner cognitive processes. This explanation, by emphasizing the intrinsic process of creativity, recognizes that the value of expression derives from the *effort* to communicate as much as from the tangible result.[151] This intrinsic dimen-

149 Schwarzenbach, *supra* note 74, at 160; *see also supra* text accompanying notes 104–08.

150 *See supra* notes 25–30 and accompanying text.

151 *See generally* Netanel, *supra* note 75, at 407 (discussing the importance of the effort to communicate in expression).

sion of creativity is not necessarily concerned with the commodity's ultimate economic worth but instead values the commodity as a reflection of its creator and an embodiment of the creator's message and the work's intended meaning.[152] According to this perspective, the commodity that embodies the author's work serves as a testament to the author's beliefs and inspirational motivations. During the time the author is in possession of her endowed gift, she seeks to insure that her subjective meaning and message are appropriately attributed and presented to the public. Thus, the intrinsic dimension of innovation emphasizes the creator's responsibility in serving as the guardian of her work's meaning.[153]

An explicit understanding and recognition of the creative process and the connection between art and inspiration is important for it enables us to better comprehend the struggle creators face in navigating the conflict between the intrinsic dimension of creative enterprise and the commodification of its end products.[154] An exclusive focus on commodification at the expense of the intrinsic dimension of crea-

152 The author's message, as used in this Article, refers to the author's subjective view of the message and meaning of his work, as opposed to how the work might be reinterpreted by either the audience or other users. Under this framework, the external work embodies the author's intrinsic creative process. It must be noted, however, that the view of creativity discussed herein may not comport with the manner in which creativity is expressed in all instances. For example, creativity can involve random, accidental, or "eureka-like" moments that arguably conflict with the idea that the ultimate product is an expression of the author's intrinsic creative dimension. Justin Hughes posits that even such unintended occurrences can be reconciled with a personhood interest in the final product through "intentionality in a plan of action," but he indicates that there may be limits to this explanation. *See* Hughes, *supra* note 101, at 161–63, 166–68. Hughes proposes that personhood interests justifying protection of some type "can arise from simply being the human source of an intellectual property *res*." *Id.* at 83; *see also* Durham, *supra* note 136, at 623–42 (proposing that authorship should be defined to include at least certain indeterminate works); Poincaré, *supra* note 111, at 27 (noting that "sudden illumination" is "a manifest sign of long, unconscious prior work"). Although I acknowledge that there may be instances in which a very creative work lacks an inspirationally driven process of creation, these situations do not detract from the need for further consideration of inspirational motivations in the authors' rights dialogue. Further, based on the theoretical predicate developed herein, Part III.B argues that moral rights protections ultimately should be extended to limited categories of works displaying heightened originality. The proposed model is not compromised even if some works meet these criteria for protection despite lacking the type of inspirational focus discussed herein.

153 *See supra* notes 58–62, 76–80 and accompanying text.

154 *See also* Netanel, *supra* note 75, at 361 ("The market demand for human attributes, . . . coupled with the market-driven commodification of objects required for the gratification of human needs, results in a tendency to ascribe quantitative exchange values to personal qualities and activities.").

tivity denudes the beauty and value of the "inner labor."[155] Recall Lewis Hyde's observation regarding how every modern artist must come to terms with society's focus on commodification at the expense of noneconomically based incentives for creation.[156] Indeed, evidence provided by both authors and creativity theorists indicates that too much of a focus on the commodification of one's art can diminish creative enterprise.[157] Mark Rose also has discussed the dichotomy between art and its commodification by questioning how "to negotiate the gap between creativity and commerce, between the notion that copyright is grounded in personhood and the need for a property law to regulate trade in vendible works."[158]

In the United States, the focus of protection for authors is almost exclusively on the physical commodity, or the merchandising interests of authorship. As will be discussed below in Part II.B, narratives concerned with the intrinsic dimension of the creative process historically have not been part of the authors' rights dialogue in this country. In contrast, in other countries the intrinsic dimension of the creative process is recognized independently of the external commodity through moral rights laws.[159] The most prominent components of moral rights laws are the right of attribution and the right of integrity. The right of attribution safeguards the author's right to be recognized as the creator of her work and prevents others from being falsely designated as the author. The right of integrity guarantees that the author's work truly represents her creative personality and is free of distortions that misrepresent her creative expression.[160] Central to moral rights is the idea of respect for the author's meaning and message as embodied in a tangible commodity because the author's meaning and message reflect his intrinsic creative process. On a theoretical level, moral rights focus on inspirational motivations and the

155 *See supra* notes 109–14 and accompanying text.

156 *See supra* note 4 and accompanying text.

157 Hyde has observed that "[f]eeling and spirit mysteriously drain away when the imagination tries to embody them in commodities." HYDE, *supra* note 4, at 239. Teresa Amabile has demonstrated that some authors have experienced blockages of their creativity upon receiving substantial monetary rewards. *See* AMABILE, *supra* note 7, at 8–13.

158 Rose, *supra* note 28, at 9 (noting the incompatibility of the paternity and real estate metaphors inherent in copyright law); *see also* William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 382 (1999) ("The commodity approach to intellectual property confuses the fact that a commodity may have a market value with the existence of a legal entitlement to exercise monopoly control over that commodity.").

159 *See infra* Part II.A.

160 See *infra* Part III for a more complete treatment of moral rights.

intrinsic dimension of creativity; attribution and integrity rights are protected because they are regarded as integral components of a work's meaning and message as conceived by the original author as a result of her endowed creative gift.

Inspirational motivations for human creative enterprise reflect important foundational norms in our society that must, for their own sake, be considered more fully in the dialogue on authors' rights.[161] This argument embraces the view that the moral rights of attribution and integrity comport with a shared sense of authorship morality in our culture. John Merryman perceived these authorship norms years ago when he wrote that "the moral right is the product of legal development in western, bourgeois, capitalist nations with whom we have deep cultural affinity."[162] He further remarked that "[e]ven though our legal traditions often seem quite different from theirs, the differences are superimposed on a common, shared cultural base."[163]

A legal system committed to authorial morality must be committed to recognizing authors' dignity interests. Writing in 1964, Edward Bloustein emphasized the importance of dignity recognition in his classic explanation of the inviolate personality as "the individual's independence, dignity and integrity," which "defines man's essence as a unique and self-determining being."[164] Linking this description of the inviolate personality to the subject of authors' rights, he continued: "It is because our Western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man 'literary and artistic property'—the right to determine 'to what extent his thoughts, sentiments, emotions shall be communicated to others.'"[165] Bloustein's observations underscore the link between dignity as a construct and its embodiment in externalities that command respect and attention. Thus, as a behavioral category, dignity can find realization only in its external embodiments that allow the inner personality to commodify itself, to explain and

161 *See* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1368 (2004) ("To the extent that the new understandings of intellectual property and the public domain reflect concerns outside of utility and liberty . . . we must consider these claims anew.").

162 John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976).

163 *Id.* (referring to the traditions of Greece, Italy, France, Germany, and Spain); *see also* Syn, *supra* note 76, at 16 (advocating the universality of certain moral rights precepts).

164 Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

165 *Id.* (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890)).

interpret itself to the outside world.[166] Under this view, authorial dignity cannot be assessed absent the author's externalized message, but in turn the message and meaning of the author's work cannot be understood without reference to the author's intrinsic motivations.

Appropriate regard for the external embodiment of an author's work as the means through which his message is communicated to the public facilitates the acquisition of authorial dignity.[167] Thus, a legal system concerned with safeguarding authorial dignity is designed to insure that the author's choice of signature and presentation will be respected to the fullest extent possible.[168] Notwithstanding the "gifted" theory of human enterprise,[169] attribution is a vital, and perhaps the most widely endorsed, component of authorial dignity. Consider, for example, Stanford Law School's Creative Commons Project, which offers participating authors easy, predefined terms for dedicating their work to the public domain.[170] In electing the terms in which to participate, virtually all authors require attribution of their work.[171] An author's choice of attribution plays a central role in communicating the meaning and message of his work and thus reflects the intrinsic dimension of an author's creativity. The right of integrity, while more controversial because at times it can be invoked to stifle creativity, nonetheless also represents a foundational authorship value. Assaults upon a work's integrity damage authorial dignity because the author's external embodiment of his message no longer represents his intended meaning and intrinsic creative process. As discussed in Part III, the damage is particularly acute when an author's work is

166 *Cf.* SOLOVEITCHIK, *supra* note 23, at 26 (noting that in Hebrew, the word for "dignity" is *kavod*, which comes from the same root as the noun for weight, *koved*). According to Soloveitchik, "The man of dignity is a weighty person. The people who surround him feel his impact." *Id.*

167 *See id.* ("There is no dignity in anonymity. If one succeeds in putting his message . . . across he may lay claim to dignity. The silent person, whose message remains hidden and suppressed in the in-depth personality, cannot be considered dignified.").

168 *See* Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 837 (2001) (noting that authorial dignity encompasses respect for an author's choice to be an author and to "create one work over another").

169 *See supra* notes 52–54, 76–80, 115–28 and accompanying text.

170 *See* Chander & Sunder, *supra* note 161, at 1361. Conceivably, a guarantee of desired attribution can be analogized to economic reward, and therefore also can be regarded as an external motivation. *See supra* text accompanying notes 104–08. The fact that attribution possesses this dual quality, however, does not detract from its importance as an appropriate mechanism to recognize the intrinsic dimension of creativity discussed throughout this Article.

171 *See* Chander & Sunder, *supra* note 161, at 1361.

used or modified in an objectionable manner and a linkage to the original author exists through attribution.[172]

Moreover, there are practical benefits to designing a legal system of authors' rights that promotes authorial morality. Laws governing authors' rights are vulnerable to being ignored if they fail to embrace widely shared norms regarding authorship. Tom Tyler has demonstrated that the most important factor in shaping compliance with the law is public perception of right and wrong.[173] In other words, people are more likely to obey laws that reflect public morality. Thus, to the extent authors' rights laws comport with public perception regarding the norms of authorial morality, compliance will be more forthcoming.

In sum, there are compelling reasons for the United States to consider the implications of inspirational motivations for creativity. Noneconomic motivations for innovation play an important role in how our society understands creativity, as evidenced by the theological and secular narratives considered in this Part. Before proposing a reformulation of the United States' system, however, it is important to explore more fully the philosophical justifications for copyright law in this country and how they differ largely from the spiritually-based rationales for creativity explored in the foregoing discussion. Part II addresses these topics. It establishes that inspirational motivations and the intrinsic dimension of creativity have not been given an adequate place in the dialogue shaping our laws governing authors' rights. Moreover, it addresses why the conventional justifications for these laws in the United States would be furthered by considering this currently marginalized perspective.

II. THE UNITED STATES' COMPARATIVE PERSPECTIVE ON CREATIVITY AND CONSTITUTIONAL NORMS

The impact of the intrinsic dimension of innovation reflected in narratives about human creativity is undeniably strong in Western culture. In many countries, the law emphasizes authorial autonomy, personal connectedness to one's original work, and the integrity of the author's message. This view of creative expression has facilitated the

172 *See infra* notes 343–46 and accompanying text.

173 Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 225–26 (1997). Although the focus of Tyler's research was on criminal justice, he notes that research in intellectual property reveals similar conclusions. Tyler writes that "the law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality." *Id.* at 227.

development of strong moral rights laws abroad. As Part II.A illustrates, this perspective is very strong in France, which is regarded as among the most hospitable jurisdictions to moral rights,[174] as well as Europe as a whole.[175] In contrast, the authors' rights laws in the United States are grounded in divergent philosophies, which are explored in Part II.B. Part II.C argues that stronger moral rights protections are nonetheless consistent with the traditional utilitarian rationale for copyright protection in this country.

A. Authors' Rights Philosophies in the Civil Law Tradition

The philosophical foundations of the civil law governing authors' rights derive from the works of Immanuel Kant and Georg Hegel. According to Kant, authors' literary works represent a complete embodiment of the internal self,[176] and therefore authors enjoy inalienable rights to their works.[177] This conception of authors' rights provided the philosophical grounding for what eventually became the monist copyright theory characteristic of German law.[178] According to Kant's philosophy and the monist theory, intellectual works belong exclusively to "the internal, personal sphere."[179] Thus, there is little concern for the ability to alienate the externalized or commodified product, as it is not viewed as an entity separable from the creator.

In contrast, although Hegel believed the labor component of a work represents an inalienable part of the author, he perceived that its embodiment in an external medium transformed such a work into an alienable commodity.[180] Hegel thus rejected the protection of pure ideas because "the purpose of a product of mind is that people other than its author should understand it and make it the possession

174 Kwall, *supra* note 6, at 18.

175 Moral rights have been greatly enhanced in European countries over the last several years. *See* WILLIAM CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS 452–53 (5th ed. 2003). In light of the discussion in Part I.A.1, it is also worth noting that Israeli law endorses strong protections for authors' moral rights. *See, e.g.*, CA 2790/93 Eisenman v. Qimron [2000] IsrSC 54(3) 817 (holding that a professor's moral right of attribution was infringed by the publication without attribution of the deciphered text of one of the Dead Sea Scrolls). The case has been unofficially translated by Dr. Michael Birnhack. *See* Unofficial Translation of the Dead Seas Scrolls Case, http://lawatch.haifa.ac.il/heb/month/dead_sea.htm (last visited Feb. 8, 2006).

176 IMMANUEL KANT, THE PHILOSOPHY OF LAW 64 (W. Hastie trans., T. & T. Clark 1887) (1797).

177 *See* Netanel, *supra* note 75, at 376.

178 *Id.* at 378.

179 *Id.*

180 *Id.* at 377.

of their ideas."[181] Hegel viewed mental accomplishments and talents as appropriate subjects for business transactions but believed they also manifest "something inward and mental."[182] Under this conception, although intellectual works are capable of commodification, the author retains general rights of personality which survive market exploitation of the external work.[183]

Hegel's philosophy thus incorporates a concern for the intrinsic dimension of artistic creation as well as the ability to alienate the externalized product. In fact, in France, whose laws embody what has become known as the dualist theory, the commentators address the interdependence of moral and economic rights, although they stress that the moral ones predominate over the economic.[184] Although this perspective does take the tangible work created into account, the external product is viewed substantially as a reflection of the intrinsic sphere. The dualist theory therefore embraces the idea that the external product is the result of the author's message, a message that reflects the intrinsic dimension of creativity. In this way, the dualist view mirrors the holistic approach to creativity manifested in the theological and secular narratives explored in Part I.

Thus, the civil law view of artistic creation, based on the philosophies of both Kant and Hegel, embodies a strong concern for the intrinsic dimension of creativity. Both the monist and dualist theories emphasize this dimension, although the dualist perspective also recognizes the external work as an entity capable of being severed from its creator. Even so, the dualist theory emphasizes both the connection between the creator and her external work and the idea that the tangible product cannot be understood without reference to the intrinsic creative process. These philosophies, as will be discussed below, differ markedly from those which have shaped the United States' laws governing authors' rights.

B. Authors' Rights Philosophies in the United States

The law in the United States fails to incorporate the insights of the narratives concerned with inspirational motivations, resulting in

181 GEORG W. HEGEL, PHILOSOPHY OF RIGHT § 69 (T.M. Knox trans., Oxford Univ. Press 7th ed. 1969) (1821).

182 *Id.* § 43.

183 *See* Durham, *supra* note 136, at 611; Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 423 (1999); Netanel, *supra* note 75, at 380.

184 *See* Netanel, *supra* note 75, at 381.

an incomplete framework governing authors' rights.[185] A comparison of the philosophies shaping copyright law in the United States, as compared with those typically prominent in Europe, may help explain the different perspectives. Anglo-American liberalism,[186] which evolved from "a curious mixture of natural law jurisprudence and positivist utilitarianism,"[187] maintains a sharp divide between two diametrically opposed sets of concepts: "subject and object, person and thing, personality and property," and alienable commodities versus inalienable rights.[188] As will be discussed below, natural law—and even moreso—classical utilitarianism are the philosophical foundations of United States copyright law.[189] The sharp divides characteristic of these perspectives are directly antithetical to the holistic approach toward artistic creation that emerges from the prevalent European tradition.

Natural law theory, though not the predominant philosophical justification for copyright law in the United States, nonetheless has played a role in shaping the law.[190] Natural law theory, particularly as developed by John Locke,[191] espouses the God-given right to acquire *external* things, either through exerting labor or by initial possession, and to dispose of such items as desired.[192] Along with this focus on

185 *See, e.g.*, Litman, *supra* note 11, at 241 (discussing the formation of copyright law by all the experts—"the entities whose businesses involved printing, reprinting, publishing, and vending"—and that noticeably absent are the authors themselves).

186 Netanel, *supra* note 75, at 356 n.30.

187 *Id.* at 356.

188 *Id.* at 354.

189 *Id.* at 365; *see also infra* notes 190–204 and accompanying text (discussing a theory of copyright law based on Locke's conception of natural law); *infra* notes 205–19 and accompanying text (discussing a theory of copyright based on utilitarianism).

190 *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 13 (2002); Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 995, 999–1001, 1001 & n.44 (1990) (noting the presence of an author-centered, natural rights rationale for copyright protection in state copyright statutes preceding federal legislation). *But see* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 138 (Stephen R. Munzer ed., 2001) (arguing, against the weight of scholarly interpretation, that Lockean theory does not support the assertion of natural rights over intellectual property).

191 JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 19–31 (Prometheus Books 1986) (1690).

192 Netanel, *supra* note 75, at 357; *see also* Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (applying Lockean theory to intellectual property law); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (providing a Lockean account of intellectual property); Alfred Yen, *Restoring the Natural Law: Copy-*

the acquisition of property, however, natural law draws upon the stewardship concept prominent in medieval Christian theology[193] by stipulating that all people are the servants and property of God, and therefore an individual cannot dispose of his life and personal autonomy.[194] Specifically, Locke maintained that the gifts bestowed by God upon man are held by man in stewardship, and as such are inalienable and subject to strict limitations on human conduct.[195]

Although Locke espoused the inalienability of the gifts of life, limb, and freedom, he conceived of a person's labor and actions as alienable "private" property.[196] Thus, according to a Lockean theory of copyright law, an author's expression, having been created with his mental labor, is an ideal object for commodification.[197] This theory posits that once something becomes externalized, the Godly part is lost because the object itself is capable of commodification. Once commodified, the problem of alienability restrictions presents itself because the focus is on the object as opposed to the intrinsic process of creation.[198]

Interestingly, the foundation of Lockean theory can be traced to Genesis to the extent that by invoking labor, man transforms objects into new, useful things, thereby fulfilling God's command to master the earth.[199] In a sense, the labor at issue here is a physical labor

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right as Labor and Possession, 51 OHIO ST. L.J. 517 (1990) (discussing the natural rights underpinnings of U.S. copyright law). *But see* Shiffrin, *supra* note 190, at 138, 143, 149, 154–67 (questioning whether Lockean theory supports privatization of intellectual property since such ownership is not necessary to make effective use of the resources).

193 *See supra* notes 73–75 and accompanying text.

194 Netanel, *supra* note 75, at 357.

195 Schwarzenbach, *supra* note 74, at 146–47 (noting that "the 'spoilage clause' (that we appropriate only so much as we can use before it spoils), as well as the 'sharing clause' (that there be 'enough and as good' left in common for others)" represent the "most visible expression in Locke of such inherent limitations imposed by our guardian roles" (citations omitted)).

196 *Id.* at 146, 148–49.

197 Netanel, *supra* note 75, at 366–67.

198 *See id.* at 420 (suggesting commodification may cause authors to view their works as "instrument[s] of exchange rather than a basis for self-definition and communication"); *see also* Rose, *supra* note 28, at 9 (noting how an author's production can be treated as a commodity); *supra* notes 154–58 and accompanying text (discussing the harm of exclusive focus on commodification).

199 Schwarzenbach, *supra* note 74, at 150–51 ("Ownership in accordance with productive labor is most just because God commanded men to subdue the earth."); Shiffrin, *supra* note 190, at 138, 144; *cf.* Durham, *supra* note 136, at 609 ("Locke perceived a divine plan to bequeath nature to 'the industrious and rational'—the sort of people most likely to exert themselves in improving the commons.").

reminiscent of the first Creation narrative's depiction of man as the prototype of human technological genius.[200] Nonetheless, a Lockean natural law perspective fails to embrace the theological lessons of the first Creation narrative which focus on creativity prompted by inspirational motivations.[201] In fact, Locke's view of labor is that of an unpleasant necessity—something that must be done to insure a return of private ownership.[202] According to this perspective, "the passion for material appropriation is viewed as fundamental, even primary, in motivating the creation acts of the individual."[203] Thus, a Lockean theory of copyright law discounts the elevated dimension of labor as embodying inspirational motivations and instead defines labor, and the external product in which it results, in terms of potential commodification.[204] In light of the prominence of the externalized product under Lockean copyright theory, this perspective does not sufficiently protect the inward, or cognitive, elements of creativity characteristic of the narratives emphasizing inspirational motivations.

Utilitarianism is the predominant copyright justification in the United States, as evidenced by the Copyright Clause's affording protection for a limited time as an economic incentive to create.[205] As discussed below, the Framers adopted a copyright model that vested authors, perceived as less powerful than publishers, with authority because they were mindful of how concentrated power has the potential for undermining liberty.[206] Indeed, the scant history of the Copyright Clause[207] fails to reflect an explicit concern with recognizing the personal rights of authors as an independent end.[208] On the contrary,

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200 *See supra* note 39 and accompanying text.

201 *See supra* notes 25–30 and accompanying text.

202 Schwarzenbach, *supra* note 74, at 154–55.

203 *Id.* at 157.

204 *Cf. id.* at 151 ("My act of labor grants a right to its products in Locke, not because the latter is some sort of physical . . . extension of 'me,' but only because my producing, or causing such things to be, furthers God's underlying intentions for the preservation of mankind.").

205 *See infra* notes 206–16 and accompanying text.

206 *See* Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, *in* 5 OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM THE BENJAMIN CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY 11 (1999), *available at* http://www.cardozo.yu.edu/news_events/papers/5.pdf (last visited Feb. 27, 2006) ("Viewed as one of the many examples of the Framer's structural technique for avoiding tyranny, the Copyright Clause is not pro-author but rather anti-publisher.").

207 U.S. CONST. art. I, § 8, cl. 8.

208 Hamilton, *supra* note 206, at 13 ("The decision to place copyright in the hands of authors, thus, appears to have been an instrumental and *political* decision, not the inevitable result of Hegelian or Lockean presuppositions about the personal rights or attributes of the author."); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay*

the evidence suggests that the Framers' primary policies were heavily influenced by the utilitarian goals of promoting progress, safeguarding public access and protecting the public domain as the mechanism assuring access to information and facts in expressive works.[209]

The vote on the Copyright Clause was not accompanied by any recorded debate at the Constitutional Convention, and it was approved unanimously.[210] Legal historian Edward Walterscheid notes that the Clause was "an afterthought," and therefore the delegates "gave it less thought than perhaps they should have."[211] We do know, however, that the Framers feared monopolistic concentrations of power and had a desire to foster an atmosphere of intellectual fluidity. James Madison, one of the primary forces behind the inclusion of the Clause,[212] believed that both patents and copyrights were monopolies and therefore had to be circumscribed.[213] Moreover, the central fo-

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Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 EMORY L.J. 910, 945 (2003) ("All the evidence supports an inference that the Founders in 1791 viewed copyright as more a regulatory than a proprietary concept.").

209 *See* Patterson & Joyce, *supra* note 208, at 938, 945 (providing a succinct analysis of the history of the Copyright Clause and emphasizing the importance of the English Statute of Anne as the precursor of our copyright law). See also MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993), for an excellent account of the historical aspects of copyright law in England.

210 *See* Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361 (1992); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1148. According to some commentators, this lack of attention is an indication of the Framers' intent to clarify rather than to change the existing law regarding intellectual property protections. *See* WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953); Heald & Sherry, *supra*, at 1149. Despite the relative lack of discussion surrounding the addition of the Copyright Clause, in recent years the Clause has become a focus of increasing scholarly interest. Undoubtedly, this surge in interest on the part of commentators is attributable to the current perception that recent legislation such as the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. & 28 U.S.C.), and the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.), are detrimental encroachments on the public domain.

211 Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 9 (2003).

212 *See* Heald & Sherry, *supra* note 210, at 1149.

213 *Id.*; *see also* Walterscheid, *supra* note 211, at 37 n.149. Perhaps this cautionary stance regarding monopolies was the impetus for the utilitarian view's emergence over natural law as the primary foundation of United States copyright law. *See* Andrew Hetherington, *Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. & TECH. L. REV. 457, 469 (2003).

cus on preventing monopolies accounted for the need, absent recourse to any explanations, for a durational limit for copyrights and patents.[214] At the same time, the Framers were motivated by concerns regarding dissemination of knowledge and preservation of a public domain to insure access to necessary information. Relevant to these concerns was the Framers' desire for the United States to be "culturally competitive" with other nations, a goal that could only be achieved through the enactment of copyright laws that would encourage authorship activity.[215] It has been suggested that the Framers, many of whom were lawyers, were especially persuaded of the value of literature and therefore "when the chance came to simplify the task of protecting literature and to secure authors their property rights, the framers eagerly jumped on this opportunity."[216]

Similar to natural law theory, utilitarianism maintains the subject-versus-object dichotomy, although on a somewhat different rationale.[217] Although both the utilitarian and natural law models assume and require the free alienability of copyright, under the utilitarian model the operative goal is the widespread dissemination of intellectual works.[218] Moreover, the traditional utilitarian justification for

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On the other hand, a recent historical treatment of the constitutional basis for copyright law suggests that the conventional antimonopoly understanding characteristic of the Founders is one-sided because the Federalists, the dominant political party in the first decade after the ratification of the Constitution, were supportive of monopolies as a means of promoting economic progress. Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2383–84 (2003). These commentators also discuss historical evidence suggesting that even Madison's negative view of monopolies in the specific context of copyrights was more qualified than conventionally understood. *Id.* at 2384–85.

214 Walterscheid, *supra* note 211, at 37.

215 Donner, *supra* note 210, at 362, 372–73. For other discussion of the emergence of copyright law at the time of the Continental Congress, see Heald & Sherry, *supra* note 210, at 1147–48. Subsequently, twelve of the thirteen states enacted copyright laws (only Delaware apparently never passed such legislation). Donner, *supra* note 210, at 373–74.

216 Donner, *supra* note 210, at 374 (noting that thirty-one of the fifty-five Framers were lawyers who "knew the value of having the needed books available"). Donner also notes that this desire to build a national character and become culturally competitive with other countries was part of a larger notion of republicanism prevalent at the time of the Constitutional Convention. *Id.* at 368, 375–76. Further, a uniform federal copyright law was believed to be important in light of the difficulties authors experienced at that time in trying to secure copyrights in their works in each state. *See id.* at 377; Heald & Sherry, *supra* note 210, at 1149.

217 *See* Netanel, *supra* note 75, at 358, 366 n.76; *see also supra* notes 185–89 and accompanying text.

218 Netanel, *supra* note 75, at 368.

copyright law in this country is supported by a functionalist, economically based analysis that views works of authorship as fungible commodities and thus equivalent to consumer goods.[219]

Thus, in light of the utilitarian and Lockean underpinnings of copyright law in the United States, the prevailing law and policies deemphasize the intrinsic process of creation in favor of a narrative favoring dissemination, commodification, and economic reward.[220] According to this interpretation of copyright law, the importance of the product, and its external validation, are paramount. As discussed earlier, both Lockean theory and utilitarianism depart substantially from the civil law perspective under which the product is important as an embodiment of the creator's message.

Despite the important lessons that can be derived from the theological and secular narratives concerned with inspirational motivations for creativity,[221] it is fair to question their relevance specifically to the law in the United States. The following section demonstrates how a focus on inspirational motivations and the intrinsic dimension of creativity can foster a culturally significant climate that is likely to facilitate the objectives of the Copyright Clause.

C. *Moral Rights Legislation and the Advancement of Copyright Objectives in a Constitutional Manner*

This Part argues that appropriately crafted moral rights protections foster the objectives of the Copyright Clause to the extent they "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[222] The Clause is unique in that it is the only one incorporating a grant of power with a specific prescription of how best to accomplish this grant.[223] There is debate regarding the appropriate interpretation of the two critical phrases

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219 *Id.* at 369; Julie Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE PUBLIC DOMAIN OF INFORMATION (P. Bernt Hugenholtz & Lucie Guibault eds.) (forthcoming 2006).

220 For an interesting discussion illustrating how the Framers were predominantly characterized by a pragmatic utilitarian spirit rather than a particular religious creed, see Brooke Allen, *Our Godless Constitution*, NATION, Feb. 21, 2005, at 14, *available at* http://www.thenation.com/doc/20050221/allen.

221 *See supra* Part I.C.

222 U.S. CONST. art I, § 8, cl. 8.

223 Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 32–33 (1994).

contained in the Clause.[224] Some commentators assert that the "to promote" language functions as a statement or purpose, and that the real power inherent in the Clause is in the phrase "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[225] Others, such as Edward Walterscheid, believe that promoting progress is the primary grant, with the ability to secure a limited exclusive right to authors and inventors an illustrative example of how to best accomplish this objective.[226]

Walterscheid's view is compelling in light of two historical realities. First, the Framers believed that the authorization of limited-term exclusive rights for authors and inventors was "the perfect solution to encouraging the progress of science and useful arts with the least expense."[227] Second, the Framers were most likely deliberate about providing legislative authority for their perceived solution to the problem of how to best promote progress in the new nation. They were keenly aware that the tide of public opinion at the time supported the view that Congress would lack the power to issue patents and copyrights absent a specific directive.[228] Therefore, even if the general power resided in the "to promote the Progress" phrase, they would have been inclined to provide Congress with the specific authority to implement their perceived best means of promoting progress.

In contrast, moral rights are neither explicitly prohibited nor sanctioned by the Copyright Clause.[229] Most likely, the Framers did

224 Walterscheid, *supra* note 211, at 3.

225 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 93 (1997); *see also* Hetherington, *supra* note 213, at 467 (noting this probably is the most common interpretation).

226 Walterscheid, *supra* note 211, at 5.

227 *Id.* at 15; *see also* Heald & Sherry, *supra* note 210, at 1149 (noting that all proposals at the Convention sought limited terms).

228 *See* Walterscheid, *supra* note 211, at 5. This belief derived from the Framers' experience with both the unwritten English Constitution conveying unlimited powers upon Parliament, as well as the state constitutions which gave too much power to the respective legislatures. Their reaction was the adoption of a constitutional framework which would afford the federal government only the necessary authority but nothing more, thus insuring adequate state sovereignty. Donner, *supra* note 210, at 363–64.

229 This Article takes the position that the enactment of appropriately crafted federal moral rights legislation is a valid exercise of congressional authority under the Copyright Clause, and therefore it does not discuss at length the issue of whether moral rights laws could be enacted pursuant to other constitutional provisions. Recent judicial opinions, as well as the scholarly literature, have grappled with the subject of Congress's authority to enact copyright-like legislation pursuant to alternate sources of constitutional authority. *Compare* United States v. Martignon, 346 F. Supp. 2d 413, 426 (S.D.N.Y. 2004) ("Congress may not . . . enact copyright or copyright-like

not specify attribution or integrity rights because they were not fully cognizant of these specific rights given their subsequent emergence in Europe years later. The notion of the Romantic author, which impelled courts in France to recognize explicitly authors' personal interests and their authorial dignity, did not take root until the beginning of the nineteenth century.[230] Significantly, the Anglo-American copyright tradition began somewhat too early to embrace these concepts.[231]

Although historically the law has focused on economic motivations for creativity, there is no reason to conclude that the law governing authors' rights also cannot account for inspirational motivations in the creative process. Indeed, the very objectives of the Copyright Clause would be furthered if the laws governing authors' rights embraced appropriately tailored moral rights protections. As the discussion in Part II.B illustrates, the Framers were most concerned with the concept of promoting progress, and their primary objective in enacting the Copyright Clause was to stimulate an open culture steeped in knowledge and education.[232] In the early republic, the conventional understanding of promoting progress appeared to be equivalent to the utilitarian conception of dissemination of knowl-

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legislation, which conflicts with the fixation or durational limitations of the Copyright Clause, even if another clause provides the basis for such power . . . ."), *with* United States v. Moghadam, 175 F.3d 1269, 1282 (11th Cir. 1999) (assuming without deciding that the Copyright Clause cannot serve as the constitutional authority for the anti-bootlegging statute but sustaining this legislation pursuant to the Commerce Clause despite its protection of unfixed musical performances), *and* KISS Catalog v Passport Int'l Prods., 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (agreeing with *Moghadam* that the Commerce Clause can authorize the anti-bootlegging statute). The weight of recent scholarly authority appears to be in accord with the *Martignon* opinion. *See, e.g.*, Patry, *supra* note 158, at 363 n.27, 376; Walterscheid, *supra* note 211, at 32; *see also* Richard B. Graves III, *Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. COPYRIGHT SOC'Y U.S.A. 199, 218 n.119 (2003) (citing several articles supporting the general principle that Congress cannot bypass the restrictions in the Copyright Clause by legislating pursuant to another clause).

It should also be noted that another potential source of authority for moral rights protection is the treaty power. *See infra* notes 264, 320 and accompanying text. For an examination of whether Congress can invoke the treaty power to enact legislation that otherwise would be beyond the scope of its enumerated powers, see Graves, *supra*.

230 *See* Kwall, *supra* note 6, at 18 (noting that in France, the earliest recognition for authors "was dominated by a concern for economic, rather than personal rights"); *cf.* Ginsburg, *supra* note 190, at 1006–10 (noting that recognition for authors' rights began in France as early as 1791 but asserting the initial purpose of such laws was to promote access to the public domain rather than concern for authors' rights).

231 Kwall, *supra* note 6, at 19–21.

232 *See supra* notes 205–16 and accompanying text.

edge.[233] These objectives are best achieved through a legal framework that promotes the public's interest in knowing the original source of a work and understanding it in the context of the author's original meaning. As previously discussed, the essence of moral rights protection is the idea of respect for the author's original meaning because it embodies the intrinsic creative process.[234] For the author's meaning to be conveyed properly, both the integrity of his work and choice of attribution must be respected. Thus, moral rights protections that are narrowly crafted to promote public education regarding the authorship and original artistic meaning of the work represent appropriate measures to achieve the very objectives of the Copyright Clause.[235]

Moreover, the Framers also were concerned with insuring a robust public domain as a means of preventing monopolistic control. They circumscribed both patent and copyright protection for defined periods to safeguard these interests.[236] The concept of stewardship, to the extent it encourages dedication of creative work back to its original, inspirational source,[237] is consistent with the Framers' intentions of preventing monopolistic control over intellectual works in perpetuity.[238] Further, the guardianship aspect of stewardship has particular significance under a framework in which the work is con-

233 Hetherington, *supra* note 213, at 469; *see also* Orrin G. Hatch & Thomas R. Lee, *"To Promote the Progress of Science": The Copyright Clause and Congress's Power To Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 8 (2002) ("The founding-era understanding of 'progress' clearly extends to the dissemination or distribution of existing artistic works and is not limited to an increase in quantity or quality.").

234 *See supra* notes 167–72 and accompanying text.

235 *See infra* notes 343–47 and accompanying text. Additionally, one of the most frequently articulated policy arguments favoring stronger moral rights protections is the need for global uniformity. The absence of meaningful moral rights laws in the United States represents a significant gap between United States' authors and their counterparts worldwide. *See, e.g.*, Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 604 (2001). This lack of harmony is especially compelling in light of Congress's decision to enact the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.), as an amendment to the 1976 Copyright Act, a decision that was influenced by the European Union's directive to establish a "life plus seventy-year" copyright term. The Supreme Court affirmed the constitutionality of this amendment in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), relying largely on the need for global norms in this area. *See id.* at 205–06. *But see id.* at 259–60 (Breyer, J., dissenting) (expressing doubts regarding the extent to which uniformity has been achieved). See *infra* notes 245–48 and accompanying text for a further discussion of *Eldred*.

236 *See supra* notes 212–14 and accompanying text.

237 *See supra* notes 73–80, 142–48 and accompanying text.

238 *See supra* notes 212–14 and accompanying text.

ceived as a testament to the author's beliefs and inspirational perspective.[239] Specifically, during the author's lifetime, he needs to insure that his work's meaning is appropriately attributed and presented to the public because that meaning reflects the author's intrinsic dimension of creativity.[240]

If stronger moral rights protections demonstrably comport with the objectives of the Copyright Clause, the Supreme Court would be likely to uphold such measures as long as it was satisfied they did not violate any other Constitution mandate. As an initial matter, the history of Supreme Court copyright jurisprudence manifests the Court's marked deferential posture regarding the substance and operation of copyright law. Beginning in *Wheaton v. Peters*,[241] the Court adopted the view that it is the legislature's prerogative to determine the specific manner in which the law in this area should be formulated and administered.[242] By holding that Congress created a new right for authors in enacting copyright legislation rather than sanctioning an existing right,[243] the Court began a pattern of deference to the legislature that still continues.[244]

Further, the question involving the constitutionality of moral rights protections likely would be resolved by asking whether the

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239 *See supra* notes 41–43, 76–80 and accompanying text.

240 *See also infra* notes 320–23 and accompanying text (arguing that a duration equivalent to the author's life reinforces a vibrant public domain).

241 33 U.S. (8 Pet.) 591(1834).

242 *Id.* at 663–64 (affirming that the importance of copyright's formalities was solely within the legislature's prerogative). This abdication of authority is somewhat ironic in light of the likelihood that the Framers gave Congress explicit authority in this area only because they feared that an absence of directive would preclude any congressional activity concerning copyrights. *See supra* notes 227–28 and accompanying text. It is not clear, however, that the Framers intended Congress to be the primary arbiter of authors' rights at the expense of the judiciary; the Court in *Wheaton* could have taken measures to expand its power under the Copyright Clause and thereby limit Congress's power. Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317, 326 (2000) ("Copyright law . . . began and persisted as the special provenance of the Congress, not the Court.").

243 *Wheaton*, 33 U.S. (8 Pet.) at 661.

244 For a more complete analysis of this deference, see Hamilton, *supra* note 242, at 326–35. *See also* Patry, *supra* note 158, at 363–64 (discussing the Supreme Court's reconceptualization of the Copyright Clause by allowing Congress to grant creators monopolies in original works of authorship and the public a right to copy unprotected material). For a recent discussion by the Supreme Court regarding the extent to which the Court defers to Congress in matters pertaining to copyright law, see *Eldred v. Ashcroft*, 537 U.S. 186, 211–13, 218 (2003). See Schwartz & Treanor, *supra* note 213, for a thoughtful defense of deferential judicial review with respect to constitutional challenges to copyright laws.

Court would consider such measures to represent a "rational exercise of the legislative authority conferred by the Copyright Clause."[245] In a telling footnote in *Eldred v. Ashcroft*, which upheld the constitutionality of Congress's retroactive extension of the duration of copyright protection, the majority opinion reaffirmed the Court's reluctance to subject to heightened judicial scrutiny congressional judgment involving copyright.[246] According to the Court, the "stringent version of rationality" advocated in Justice Breyer's dissent "is unknown to our literary property jurisprudence."[247] Moreover, the Court observed that because the Copyright Clause "empowers Congress to *define* the scope of the substantive right[,] [j]udicial deference to such congressional definition 'is but a corollary to the grant to Congress of any Article I power.'"[248]

Thus, as long as stronger moral rights laws remain within the parameters of constitutional authority, congressional discretion is likely to be upheld by the Court. The First Amendment, unique to the United States,[249] often is cited as the basis for objections to stronger moral rights protection in this country.[250] Scholars have demon-

245 *Eldred*, 537 U.S. at 204. Somewhat surprisingly, little scholarly discussion exists regarding whether the enactment of moral rights protection can be sustained from a constitutional standpoint. No cases have yet challenged the Visual Artists Rights Act (VARA), 17 U.S.C. § 106A (2000), on this ground, and there have been only a few law review articles discussing this issue in any depth. *See, e.g.*, Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 71 (1985) (suggesting pre-VARA that moral rights legislation would be constitutional as long as it was limited in duration); Eric Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996) (arguing that moral rights are not protected by the Constitution and concluding that VARA should be repealed). *But see infra* notes 249–62 and accompanying text (discussing First Amendment challenges to moral rights).

246 *See Eldred*, 537 U.S. at 232 n.8.

247 *Id.* at 205 n.10.

248 *Id.* at 218 (quoting Graham v. John Deere Co., 383 U.S. 1, 6 (1966)) (citation omitted).

249 *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 30–31 (2002).

250 *See generally* Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011, 1070 (1988) ("Expanding the contours of copyright as requested by moral rights advocates might also infringe upon first amendment rights."); Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 10 (2001) (asserting Congress limited VARA's moral rights protection to works of visual art because granting moral rights for other works posed potential conflict with the First Amendment); Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 243 (1994) (noting a

strated that exempting copyright law from the strictures of the First Amendment is not only unfounded,[251] but also inconsistent with the approach courts have taken with respect to other areas of intellectual property.[252] Therefore, this analysis assumes that both copyright law, as well as moral rights, must be applied consistently with the First Amendment. Accordingly, the paramount questions are the appropriate level of scrutiny and whether moral rights protections would survive the designated scrutiny.

The choice of scrutiny is dependent upon whether moral rights are seen as content-based or content-neutral.[253] Commentators are divided on this question with respect to copyright law generally, but the majority believe copyright law is content-neutral.[254] Of course, it could be argued that regardless of the appropriate level of scrutiny for copyright law, moral rights should trigger strict scrutiny indepen-

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"potential clash" between the First Amendment and moral rights); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 93 (1996) (stating First Amendment concerns may be the reason for American reluctance towards moral rights).

251 For a full treatment of this issue, see Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 37–47 (2001). *See also* Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA 233, 288 n.245 (2003).

252 *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (exploring the right of publicity); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987) (exploring trademark law).

253 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.2.1, at 902–03 (2d ed. 2002).

254 *See infra* note 257. Nonetheless, among some scholars who have argued that copyright is content-neutral, there is a sentiment that copyright should be subjected to heightened scrutiny because its application results in the government's distribution of speech-related entitlements in accordance with the rent seeking demands of politically powerful groups. *See, e.g.*, Netanel, *supra* note 251, at 67 (advocating a type of scrutiny that would require the government to demonstrate "that the regulation serves a substantial, legitimate governmental purpose and is narrowly tailored to minimize the burden on speech"); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 76 (2000) (suggesting the use of intermediate scrutiny, which would require Congress to explain how the current copyright laws do not substantially limit more speech than necessary). Other scholars maintain that because copyright law operates to restrict individuals' speech content on the basis of the words or content they choose, it should be seen as content-based and therefore subject to strict scrutiny. *See, e.g.*, C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 922, 936–39 (2002) (arguing that copyright is content-based); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998) ("It's also incorrect to argue that intellectual property law is content-neutral and should therefore be subject to laxer rules. Copyright liability turns on the content of what is published.").

dently.[255] For example, an unbounded right of integrity that would enable authors to prevent all perceived mutilations, unwarranted criticisms, and objectionable contextual uses could be seen as content-based and thus would raise serious First Amendment concerns.[256] Nonetheless, appropriately tailored moral rights protections that do not proscribe speech and are enacted for a legitimate purpose other than discriminating on the basis of the message conveyed are not content-based.[257] Therefore, although such protections may be deemed "content-sensitive," they should neither be regarded as content-based nor evaluated under strict scrutiny.[258]

For the reasons that follow, moral rights protections that are narrowly crafted should be able to withstand a First Amendment challenge. Moral rights seek to safeguard the author's attribution and meaning of choice. As explored in more detail in Part III, laws that mandate attribution and, in certain circumstances, the provision of disclaimers[259] regarding content do not hamper creativity or signifi-

255 Strict scrutiny requires that the government action be justified by a compelling state interest and achieved through the least restrictive alternative. *See* Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

256 Kwall, *supra* note 245, at 68 (noting that the policies underlying the fair use provision would limit the scope of moral rights in this country); *see also* sources cited in *supra* note 250 (noting conflicts between copyright and the First Amendment).

257 *Cf.* Netanel, *supra* note 251, at 50, 54 (asserting that copyright law is content-neutral since it lacks a content-based purpose such as suppressing expression). It could also be argued that the disclaimer remedy proposed herein, *see infra* notes 335–36 and accompanying text, is content-based because it becomes operative only upon a finding that the author disapproves of the manner in which a user is employing his work and therefore amounts to a viewpoint-based regulation. Case law suggests, however, that when legislation is enacted for a legitimate purpose other than suppressing speech or discriminating among subject matter, it is likely to be treated as content-neutral. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 623 (1994) (finding must-carry rules content-neutral as "Congress' overriding objective was not to favor programming of a particular content, but rather to preserve access to free television programming"); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 329 (S.D.N.Y. 2000) (concluding that the Digital Millennium Copyright Act of 1998 (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (codified at scattered sections of 17 U.S.C.), is content-neutral on the ground that the government's purpose was to prevent copyright infringement rather than "to regulate the expression of ideas").

258 *See* Netanel, *supra* note 251, at 48 (discussing copyright law).

259 It could be argued that requiring attribution triggers strict scrutiny because such a law not only impacts the content of speech, but also conceivably represents compelled speech. Similarly, requiring a disclaimer can be viewed as compelled speech. A disclaimer is "a repudiation or denial of responsibility or connection." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 515 (4th ed. 2000). These arguments are unlikely to withstand scrutiny, however, because a finding of compelled speech usually implicates speech involving ideological beliefs or mandat-

cantly impact a creator's choice of content. The freedom to speak embraced by the First Amendment does not necessitate permitting those who use others' expression to omit attribution of original authorship, to misattribute authorship, or to modify another's work and still represent it as that of the original author.[260] Nor will free speech be thwarted if people are barred from using others' expressions in a manner deemed objectionable by the original author absent a public disclaimer that their work does not represent the original author's meaning and message. To the contrary, such moral rights protections are narrowly tailored to promote public education regarding the authorship and original artistic meaning, and therefore foster compliance with the objectives of the Copyright Clause.[261] Just as the economic protections furnished by copyright law arguably would violate the First Amendment were it not for the existence of the Copyright Clause,[262] the policies and objectives of this Clause also create some latitude to protect the noneconomic interests of authors.

III. A REFASHIONED UNITED STATES' SYSTEM FOR MORAL RIGHTS

The foregoing discussion establishes that the natural law and utilitarian perspectives characterizing the development of authors' rights laws in the United States contrasts with the philosophical bases for such laws in other jurisdictions. It also argues that the enactment of stronger moral rights protections not only promotes recognition of the intrinsic dimension of creative enterprise, but also passes constitutional muster. This Part offers a proposal for how stronger moral

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ing a particular viewpoint. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding an order to allow a student petition at a private shopping center did not constitute compelled speech because the viewpoint expressed by the students was unlikely to be associated with the shopping center, and the shopping center could post a disclaimer); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding the government could not enforce a mandatory pledge and flag salute in opposition to individuals' religious beliefs).

260 *Cf.* Baker, *supra* note 254, at 941–42 (suggesting that the First Amendment does not protect a situation in which "the purported infringer does or should know that, even after viewing, hearing, or reading her asserted transformation, people are likely to mistake it for the original author's work").

261 *See infra* notes 343–47 and accompanying text.

262 Patterson and Joyce also discuss why the Copyright Clause is consistent with the First Amendment: "The promotion of learning was a free speech policy because copyright required a new work; the condition of publication was a free speech policy because it insured access; and the limited copyright term was a free speech policy because it protected and enlarged the public domain." Patterson & Joyce, *supra* note 208, at 945; *see also* Netanel, *supra* note 251, at 50 ("[C]opyright's constitutional pedigree has purchase.").

rights protections can be implemented in a manner consistent with the objectives of the Copyright Clause. Part III.A explores existing moral rights protections in the United States as a backdrop to the proposed changes. Part III.B grapples with the deficiencies in the current law in formulating a more viable moral rights model.

A. The Current Moral Rights Landscape

Virtually the only federal protections United States' authors enjoy for their moral rights derive from a 1990 amendment to the copyright law called the Visual Artists Rights Act (VARA).[263] VARA, which was passed two years after the United States joined the Berne Convention for the Protection of Literary and Artistic Works,[264] grants to the authors of certain works of visual art the right of integrity,[265] the right of attribution,[266] and, in the case of works of visual art of "recognized

263 17 U.S.C. § 106A (2000). To a degree, moral rights protections also are embodied in the "copyright management information" provisions of the DMCA, which create a de facto right of attribution in the Internet environment. For a discussion of this issue, see Jane C. Ginsburg, *The Right To Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 283–86 (2004). *See also* 17 U.S.C. § 115(a)(2) (providing a limited moral right in the context of the mechanical compulsory license, discussed in Kwall, *supra* note 245, at 38–39). *But see Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 4–36 (2005) (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=21910.wais.pdf (discussing legislation proposed by the Copyright Office to eliminate the § 115 compulsory license). In addition, several states provide specific statutory moral rights protections for certain types of works, notably visual art. See ROCHELLE DREYFUSS & ROBERTA KWALL, INTELLECTUAL PROPERTY CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW 295 n.5 (2d ed. 2004), for a discussion of these statutes.

264 Berne Convention for the Protection of Literary and Works Property, Sept. 9, 1886, *as revised* at Paris on July 24, 1971, and *amended* on Sept. 28, 1979, S. TREATY DOC. No. 99–27, 1161 U.N.T.S. 3 (entered into force for the United States on Mar. 1, 1989) [hereinafter Berne Union].

265 Under VARA, the right of integrity includes the right to prevent any intentional distortion, mutilation, or other modification of an author's work of visual art that would be prejudicial to the artist's honor or reputation. 17 U.S.C. § 106A(a)(3)(A). Regrettably, the statute fails to define or provide any guidance with respect to how a determination of prejudice, honor, or reputation should be made.

266 With respect to the right of attribution, VARA guarantees the author the right "to claim authorship" of a covered work and the right to prevent attribution in connection with a work not created by the author. *See id.* § 106A(a)(1). VARA also prevents use of the author's name in conjunction with a distorted or modified work prejudicial to the author's honor or reputation. *See id.* § 106A(a)(2); *see also infra* notes 326–42 and accompanying text (proposing a broader attribution standard than

stature," the right to prevent their destruction.[267] One significant problem with VARA is that the statute only applies to a very narrow category of visual art such as paintings, drawings, prints, and sculptures.[268] VARA also specifically excludes protection for reproductions of works[269] and fails to provide any remedy when works are used in a context found objectionable or distasteful by the author.[270] Thus, VARA's circumscribed protection for designated categories of visual art represents very limited protection for authors' moral rights overall.

Absent adequate federal statutory protections for their moral rights, authors in the United States have been forced to rely upon a variety of patchwork measures in attempting to secure some degree of moral rights protections.[271] Nonetheless, the successful invocation of such measures is questionable in many instances. Consider, for example, the Supreme Court's opinion in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,[272] a "reverse passing off" action under section 43(a) of the Lanham Act[273] based on the defendant's copying and modifying tapes of the original version of a television series about General Eisenhower's European campaign during World War II.[274] The defendant copied and edited the tapes, which were in the public domain, and

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VARA and arguing that VARA's limitation of integrity violations mistakenly focuses on the user's motives). *See generally* Edward Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 947 (1990) (arguing that VARA was a major advance for the rights of American artists yet failed to conform with the Berne Convention).

267 The statute also contains special provisions for works of visual art that have become part of buildings. 17 U.S.C. § 113(d). Regarding the prohibition of the destruction of works of "recognized stature," the statute covers both intentional and grossly negligent destructions, but it fails to define the term "recognized stature." *See id.* § 106A(a)(3)(B).

268 *See id.* § 101 (2000 & Supp. 2002) (defining "work of visual art"); *see also* Lilley v. Stout, 384 F. Supp. 2d 83 (D.D.C. 2005) (holding that photographic prints and negatives are works of visual art within the meaning of VARA).

269 17 U.S.C. § 106A(c)(3) (2000).

270 For a full treatment of these problems, see Kwall, *supra* note 6.

271 Kwall, *supra* note 245, at 3.

272 539 U.S. 23 (2003).

273 Pub. L. No 79-459, § 43(a), 60 Stat. 427, 441 (1946) (codified as amended at 15 U.S.C. § 1125).

274 *Dastar Corp.*, 539 U.S. at 25–27. "Reverse passing off" is the representation of the plaintiff's goods as those of the defendant. This differs from "passing off," the representation of the defendant's goods as those of the plaintiff. Roberta Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 1003 (2002). By proscribing "false designations of origin" and "false descriptions or representations in connection with any goods or services," section 43(a) has been invoked as a basis for relief in reverse passing off cases where copyrightable works are misattributed or even unattributed.

manufactured for sale as its own product a video set called World War II Campaigns in Europe. The defendant's tapes did not refer to the original television show or to the book upon which the original show was based. In rejecting the plaintiff's claim that the defendant's sale of the tapes absent appropriate attribution violated section 43(a) of the Lanham Act, the Supreme Court pointed to the confined nature of the right of attribution in VARA and cautioned against invoking section 43(a) as a "cause of action for misrepresentation of authorship of noncopyrighted works."[275]

Although *Dastar* involved the use of a work that was in the public domain and therefore not protectable under copyright law, a substantial body of conflicting pre-*Dastar* case law exists addressing the application of section 43(a) to reverse passing off cases involving copyrightable works.[276] Moreover, subsequent lower courts have relied upon *Dastar* in holding that section 43(a) cannot be invoked as a substitute for the right of attribution in cases involving copyrighted works not in the public domain.[277] These courts have applied *Dastar*

275 *Dastar Corp.*, 539 U.S. at 35. Dastar clearly was the "origin" of the tapes it produced, but the question presented to the Court was whether "origin" under the Lanham Act refers to the actual producer of the end product or to the creator of the underlying work that served as the starting point of the end product. The Court interprets "origin" to mean "the producer of the tangible product sold in the marketplace," rather than to refer to "the person or entity that originated the ideas or communications" embodied in the product. *Id.* at 31, 32. In so holding, the Court refused to apply a different test for "origin" under the Lanham Act for communicative products, as opposed to tangible goods. A different resolution would, according to the Court, cause conflict between the Lanham Act and copyright law. The Court was especially concerned with problems of line-drawing in determining the identity of a work's "origin." Subsequently, the district court held a bench trial on the issue whether Dastar infringed the copyright in General Eisenhower's book, *Crusade in Europe*, by virtue of the defendants' unauthorized use of the book's text as part of the video's narration. The Ninth Circuit affirmed the lower court's holding that Dastar committed copyright infringement because the book was created as a work for hire, and therefore the publisher validly renewed the copyright in accordance with the statutory procedures in effect under the governing 1909 Copyright Act. Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 882 (9th Cir. 2005).

276 See Kwall, *supra* note 274, for an analysis of these cases. *See also infra* note 328 (discussing the scope of attribution under the Berne Convention).

277 *See, e.g.*, Zyla v. Wadsworth, 360 F.3d 243, 252 (1st Cir. 2004) (barring a section 43(a) claim by a former coauthor based on new edition failing to give her credit); Smith v. New Line Cinema, No. 03 Civ. 5274(DC), 2004 WL 2049232 (S.D.N.Y. Sept. 13, 2004) (dismissing section 43(a) claim arising from a screenplay allegedly lacking attribution); Carroll v. Kahn, No. 03-CV-0656, 2003 WL 22327299 (N.D.N.Y. Oct. 9, 2003) (dismissing section 43(a) claim based on failure to give plaintiff proper credit in film); Williams v. UMG Recordings, Inc., 281 F. Supp. 2d 1177, 1183 (C.D. Cal. 2003) (foreclosing section 43(a) claim based on defendant's failure to credit film

absent explicit analysis of the implications of the Court's opinion for nonpublic domain works. According to one federal district court, *Dastar* "left the protection of the creative talent behind communicative products to the copyright laws."[278] This position fails to provide adequate consideration for authors' rights insofar as it ignores the reality that misattribution is not a wrong actionable under copyright law.[279] Thus, absent the enactment of an explicit right of attribution, no clear remedy exists for violations of this interest unless an author is covered under VARA. Violations of authors' integrity rights similarly are not actionable, absent the applicability of VARA, because there is no federal statutory mechanism governing objectionable modifications to a work.[280]

B. Proposed Statutory Modifications

Absent a federal legislative solution, it is unlikely that the values underlying the intrinsic dimension of innovation will find much of a presence in our legal structure. Authors are unlikely to be successful by resorting to contractual measures since, as Yochai Benkler aptly observed, people "contract against the background of law that defines what is, and what is not, open for them to do or refrain from doing."[281] In the area of moral rights specifically, commentators have

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narrator and director). The Court in *Dastar* granted certiorari on the legal issue of "whether § 43(a) of the Lanham Act . . . prevents the unaccredited copying of a work." *Dastar*, 539 U.S. at 25. Thus, since the issue certified for resolution was not limited expressly to works in the public domain, commentators have argued that the holding in the case applies to both works in the public domain, as well as those protected by copyright. *See, e.g.*, Michael Landau, Dastar v. Twentieth Century Fox*: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273, 289 n.70 (2005); David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1 (2004). *But see* Ginsburg, *supra* note 263, at 269 (noting that there is no reason why a court could not consider the application of section 43(a) in the context of reverse passing off claims for works still protected by copyright law).

278 *Carroll*, 2003 WL 22327299, at *6.

279 *See also* Kwall, *supra* note 274, at 995–1003 (analyzing case law on this point).

280 *See generally* Kwall, *supra* note 6, at 33–37 (noting that the statute does not protect either reproductions or objectionable contextual positioning).

281 Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 432 (1999); *cf.* Maureen O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 464 (2003) ("The higher the valuation [of an authorial class that makes its living independently by writing] the more likely one is to support measures targeted toward increasing authors' bargaining power, believing that such steps will move the system closer to the optimal quality and quantity mix of copyrighted works.").

observed that the very purpose of moral rights laws is to "alter the bargaining power between the authors and artists and those who use their works."[282] Similarly, history has shown that the judiciary is unlikely to take an activist stand in this area without legislation conducive to change.[283]

VARA is the logical starting point for designing stronger moral rights protections. Although VARA has been criticized on the ground that its scope is far too narrow, the real problem is that its confined scope was not the result of thoughtful deliberations regarding the appropriate content of moral rights protection for our particular legal system.[284] The resulting legislation not only is poorly drafted, but also reflects questionable and seemingly inexplicable choices.[285] A more thoughtful legislative process would have recognized, for example, that significant differences exist between copyright law as it is applied in this country and moral rights. Concerns regarding an increasingly expansive copyright law are shared by many scholars who believe that copyright law inappropriately allocates speech entitlements to "highly organized, amply funded, and politically influential speech industries."[286] Indeed, widespread apprehension exists among both legal scholars and artistic creators that expanding copyright protection adversely impacts smaller, less powerful creators at the expense of large conglomerates.[287] Regarding moral rights, however, these same con-

282 Adolf Dietz, *ALAI Congress: Antwerp 1993, The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 212 (1995); *see also* Kwall, *supra* note 6, at 44, 54 (noting disparities in bargaining power).

283 *See generally* Kwall, *supra* note 274 (discussing this point in the context of the right of attribution).

284 *See, e.g.*, Roberta Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997).

285 For a full treatment of these aspects of VARA, see Kwall *supra* note 284.

286 Netanel, *supra* note 251, at 65; *see also id.* at 68–69 (describing increasing congressional deference to industry figures in drafting copyright legislation). Jessica Litman has carefully documented this aspect of copyright law history in JESSICA LITMAN, DIGITAL COPYRIGHT 35–63 (2001). *See also* Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987) (arguing that courts frequently refer to precedent under the 1909 Act to the detriment of the intent behind the 1976 Act); Baker, *supra* note 254, at 950 ("The losing side in the legislative decision to approve copyright 'enclosures' often is not represented by well-organized, financially and politically powerful advocates. Observers commonly report the public was largely excluded from the bargaining table."); Benkler, *supra* note 281, at 422 (noting that the hearings on the anticircumvention provisions of the DMCA suggest they were in enacted in response "to concerns expressed primarily by the motion picture and musical recording industries").

287 Benkler, *supra* note 281, at 408 ("[E]nclosure is likely to have the most adverse effects on amateur and other non-commercial production" and "tends to benefit or-

cerns do not necessarily apply because individual creators, as opposed to large corporations, often will be the beneficiaries of stronger moral rights protections. For example, Congress's decision to confine moral rights protection pursuant to VARA was the result of its desire to avoid conflict with politically savvy entities who expressed concern about the ability of their industries to continue to derive profits and remain powerful in the face of expanded moral rights protection.[288] In contrast, those groups desiring stronger moral rights protection were handicapped by limited financial resources and their inability to unite.[289] Although Congress heard the testimony of some artists and individual film directors urging a broader scope of coverage for moral rights, in the end their stories were drowned out by those who were more politically powerful.[290]

In addition, moral rights are distinguishable from copyrights based on the theoretical predicate supporting the respective doctrines. Moral rights are aimed at preserving an author's dignity, honor, and autonomy; copyrights afford economic protection. As Part II demonstrates, moral rights laws embrace inspirational motivations for creativity whereas copyright law, as it has been designed in the United States, has been shaped by justifications based on economic incentives. A more viable approach to the implementation of moral rights in this country necessitates a careful consideration of the intrinsic dimension of creativity as informed by narratives focusing on inspirational motivations. The resulting legal provisions must reflect both a complete view of creativity as informed by this intrinsic dimension as well as the realities of the laws already in place.[291]

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ganizations with large owned-information inventories."); Netanel, *supra* note 251, at 28 ("Copyright's benefits inure disproportionately to large media firms that already own vast inventories of copyrighted expression. Copyright's burdens fall most heavily on individuals, nonprofits, and small independents that do not."). In a recent book, author David Bollier has observed that copyright actually works to the disadvantage of "[i]ndividual creators [who] need to be empowered more than ever." DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 8 (2005); *see also* MCLEOD, *supra* note 99 (recommending that artists and authors aggressively exercise their intellectual property rights in the face of threats and legal challenges from overbearing copyright holders); *cf.* William Cornish, *The Author as Risk-Sharer*, 26 COLUM.-VLA J.L. & ARTS 1, 12 (2002) (calling for increased recognition of "the author" in copyright law).

288 Kwall, *supra* note 6, at 28–29 (noting Disney and Turner Entertainment as examples).

289 *Id.* at 28–29, 41.

290 *Id.*

291 *See generally* Sheldon Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65, 65 (1997) (cautioning that we need to design moral rights laws that are consistent with our particular culture and legal framework).

The following discussion suggests some broad themes relevant to designing appropriate moral rights legislation in the United States. For both constitutional and practical[292] reasons, it recommends a relatively narrow approach to moral rights. Indeed, an explicit recognition of the conceptual differences between copyrights and moral rights suggests the propriety of moral rights provisions that are more circumscribed in operation than copyright law. Unlike the narrowness of VARA, however, this proposal endorses a moral rights design which thoughtfully accommodates authorship norms within the framework of the existing law. Part III.B.1 proposes that moral rights cover a limited category of copyrightable works whose authors satisfy a heightened standard of originality. Additional issues concerning the operation and scope of moral rights protection are discussed in Part III.B.2.

1. Heightened Originality and Limited Categories of Works

The arguments advanced herein are that moral rights protections should apply to more narrow categories of works of authorship than are currently eligible for copyright protection and that only those works satisfying a heightened standard of originality should qualify for protection. In light of the distinct theoretical foundations supporting copyrights and moral rights, separating the mechanics of their application and operation is logical.[293] As discussed below, there are sound reasons for recognizing moral rights as part of our copyright law generally but nonetheless confining their application to a smaller category of works than are covered by copyright law.

Edward Walterscheid has speculated about the precise intent of the Framers in using the term "writings" in the Copyright Clause, concluding that they most likely intended to cover forms of literary expression other than just books.[294] Yet, it is far from clear what the

292 Kwall, *supra* note 274, at 1030 ("[P]ractical considerations suggest that a limited moral rights provision with more widespread acceptance has a greater chance of getting through Congress than more controversial measures.").

293 Early case law shows that the right of attribution was treated under common law as an entity separate from copyright law and enforceable regardless of whether the author had a copyright in the work. *See* Gunlicks, *supra* note 235, at 628–29. Eventually, the law of unfair competition absorbed the attribution interest. *Id.* For a complete treatment of how unfair competition law treats this interest, see Kwall, *supra* note 274.

294 Walterscheid, *supra* note 211, at 61 (noting that the term "writings" may have been used by the Framers because it had been used in the Statute of Anne, as well as in several previously existing state copyright statutes).

Framers meant by "writings."[295] Over time, Congress has extended copyright protection to an increasingly broader category of works, and the courts have acquiesced in these determinations.[296] The first copyright statute in 1790 covered only books, charts, and maps.[297] Walterscheid posits that although it required a significant stretch to fit maps and charts within the scope of "writings," this result was justifiable on the ground that extending copyright protection to such works would promote learning and knowledge.[298] In contrast, President Washington refrained from asking Congress to extend protection to fine art because he did not believe the Clause provided the basis for such authority.[299] Yet, fine art categories were added beginning in 1802.[300]

The 1909 Copyright Act seemingly broadened copyright's coverage even further by providing that "[t]he works for which copyright may be secured . . . shall include all the writings of an author."[301] By stipulating that copyright protection applies to "works" and includes "all the writings of an author," the statute neither confined copyright protection to "writings" nor included any limit on the types of works eligible for protection.[302] The 1976 Act circumvented these problems by stipulating that copyright protection instead extends to "original works of authorship."[303] In 1991, the Supreme Court in *Feist Publica-*

295 *Id.* at 62 (noting the absence of discussion at the federal convention of the final language of the Copyright Clause).

296 *Id.* at 59 ("[O]ver time both Congress and the Supreme Court engaged in a series of legal fictions by which the interpretation given to 'writings' has been constantly expanded until today, until it bears little relationship to either the common dictionary definition at the end of the eighteenth century or to the modern dictionary definition.").

297 Copyright Act of 1790, ch. 15, 1 Stat. 124.

298 Walterscheid, *supra* note 211, at 63.

299 *Id.*

300 Copyright Act of 1802, ch. 36, 2 Stat. 171. In 1802, designs, engravings, etchings, cuts, and other prints were added to the copyright statute as covered works. *Id.* § 2. The entire history of the Clause and its judicial interpretation suggests that from the outset "'Congress and the courts have been operating outside and in violation of an express power delegated to Congress.'" Walterscheid, *supra* note 211, at 59 (quoting *Copyright Law Revision, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 86th Cong. 86–87 (1960)). For a concise summary of the expanded scope of copyright protection, see Birnhack, *supra* note 251, at 290 n.260.

301 Copyright Act of 1909, ch. 320, Pub. L. No. 16-349, § 4, 35 Stat. 1075, 1076, *repealed by* Copyright Act of 1976, Pub. L. No. 95-553, 90 Stat. 2541 (current version at 17 U.S.C. § 101 (2000)). *But see* H.R. REP. No. 60-2222 (1909).

302 *See* Walterscheid, *supra* note 211, at 65–66.

303 17 U.S.C. § 102(a). The legislative history for the 1976 Act notes that by omitting a definition of originality, the statute intended to "incorporate without change

tions, Inc. v. Rural Telephone Service Co.[304] declared originality to be a constitutional requirement. In elaborating upon the standard for originality, the Court held that it requires "only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[305] Distinguishing originality from novelty, the court emphasized that "the requisite level of creativity is extremely low; even a slight amount will suffice," and "[t]he vast majority of works make the grade quite easily."[306] Significantly, *Feist*'s elevation of the originality requirement to a constitutional magnitude signifies the importance of Congress's role in determining the parameters of how the originality standard should be applied. As Bill Patry has observed: "The *Feist* Court did not strip Congress of its voice on all originality issues; instead, the Court only set a threshold standard. Congress is free to set a higher standard, or, in protecting particular types of works, to declare how the originality requirement must be satisfied."[307]

Despite the broader scope of coverage for copyright law, it is clear that Congress has discretion not only to enact moral rights, but also to confine their application to more limited types of works. As previously discussed in Part II, the language used by the Framers in crafting the Copyright Clause is consistent with the view that promoting progress was the primary goal and providing economic incentives was seen as an illustrative rather than an exclusive means of achieving this objective.[308] Moreover, the Supreme Court has long deferred to

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the standard of originality established by the courts" under the 1909 Act. S. REP. NO. 94-473, at 50 (1975).

304 499 U.S. 340 (1991).

305 *Id.* at 345.

306 *Id.* The standard for originality articulated in *Feist* is vulnerable to being challenged on the ground that it fails the objectives of the Copyright Clause by including works that will not necessarily promote progress. *See* Walterscheid, *supra* note 211, at 71 (advocating a standard of novelty and observing "[h]ow granting an exclusive right in a writing that is not novel in any way promotes the progress of science is simply not apparent").

307 Patry, *supra* note 158, at 377 n.104. Interestingly, the standard for copyright originality varies within the European Community. *See* Herman Cohen Jehoram, *The EC Copyright Directives, Economics and Authors' Rights*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 821, 829 (1994) (noting that historically, Germany's standard was among the most stringent to the extent "courts require more than just personal expression").

308 *See supra* notes 222–28 and accompanying text.

Congress's judgments regarding the specific implementation of copyright legislation.[309]

The current low standard for originality, while perhaps familiar and comfortable for determining whether a particular work deserves the economic protections of copyright law, should not be imported unthinkingly as the standard for a work's eligibility for moral rights protections. Copyright's standard of originality fulfills the goals of the Copyright Clause with respect to works whose incentive for creation depends completely, or even primarily, upon an economic motivation. There are, quite simply, copyrightable works with fairly low degrees of originality that would not be created at all if their authors did not have the guarantee of some economic reward. *Feist* recognizes this difficulty by setting a low standard for originality and suggesting that the level of originality in a particular work will determine the scope of copyright protection such work receives.[310] Works containing large amounts of unprotected expression will have more thin copyright protection than works containing greater amounts of truly expressive material.[311]

In contrast, for works whose creation also is rooted in the inspirational realm of authorship, economic incentive is not the only relevant factor.[312] As discussed, a perspective of creativity grounded in inspirational or spiritual motivations emphasizes the intrinsic dimension of the creative process. The focus of this perspective is on the author's relationship to his work and his sense of personal satisfaction or fulfillment resulting from the act of creativity itself. Moreover, the external product of creativity is seen as the embodiment of the au-

309 *See supra* notes 241–48 and accompanying text. Indeed, "the task of definition, of inclusion and exclusion, upon deliberation and compromise, is precisely the type of line drawing that is the function of the legislature." Lee, *supra* note 168, at 839.

310 499 U.S. at 345–47.

311 *See id.* at 349 ("[C]opyright in a factual compilation is thin. . . . [A] subsequent compiler remains free to use the facts . . . to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."). Some courts, in fact, invoke a more stringent test for infringement when the work at issue has a narrow range of protectable and unauthorized expression. *See, e.g.*, Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994) (invoking the "virtual identity" test rather than the more lenient "substantial similarity" test for infringement); Trek Leasing, Inc. v. United States, 66 Fed. Cl. 8, 19 (2005) (concluding that the test for infringement of copyright in a post office building constructed in a particular architectural style requires "supersubstantial similarity" since the plaintiff's copyright is "thin" (internal quotation marks omitted)).

312 As Elliot Silverstein of the Directors Guild of America testified before Congress in 1987 against film colorization, "some values are more important than material reward . . . some things are just not for sale." *Legal Issues That Arise*, *supra* note 103, at 12 (emphasis omitted).

thor's meaning and message.[313] Moral rights protections are designed to recognize this intrinsic dimension of creativity. In light of these considerations, the legislative standard for moral rights should require "substantial" creativity in lieu of *Feist*'s "modicum of creativity." Ideally, the legislature should provide a definition of "substantial," but from a practical standpoint judicial discretion likely will be required in its application.[314]

Additionally, moral rights protections should apply only to categories of copyrightable works that either completely lack or contain de minimis utilitarian or functional elements. As a practical matter, this standard would eliminate the possibility of moral rights being asserted in subject matter such as databases, building codes,[315] office memos,[316] cabinets,[317] or any other work characterized by a significant functional component.[318] These requirements for protection not only comport with the underlying theory of moral rights, but also avoid potential criticisms that stronger moral rights will open the door to covering a multitude of "creative" enterprises with little significant artistic value.[319]

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313 *See supra* notes 151–53, 159–72 and accompanying text; *cf.* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987) (endorsing a test for copyrightability of applied art that looks to whether the design process reflects the creator's artistic judgment independent of functional considerations).

314 *Cf. infra* note 318 and accompanying text. In VARA, the legislature failed to define key terms, requiring the judiciary to create relevant definitions. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 323, 325 (S.D.N.Y. 1994), *rev'd on other grounds*, 71 F.3d 77 (2d Cir. 1995); *supra* notes 265–67.

315 *See, e.g.*, Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (holding that building codes are copyrightable until they become enacted as law, after which they enter the public domain).

316 *See* Lee, *supra* note 168, at 839.

317 *Id.*

318 Of course, this standard would entail judicial discretion in its application. By way of comparison, the rule that original works are capable of copyright protection unless they are "useful articles" with an "intrinsic utilitarian function" sometimes has been somewhat difficult to apply in practice. *See* 17 U.S.C. § 101 (2000 & Supp. 2002) (defining a "useful article"); *see also* Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913 (7th Cir. 2004) (holding copyrightable the face of a mannequin with particular types of features); Boyds Collection, Ltd. v. Bearington Collection, Inc., 365 F. Supp. 2d 612 (M.D. Pa. 2005) (holding that unlike clothing designed for humans, clothing for a toy bear has no utilitarian function and thus is capable of copyright protection); *supra* note 311 and accompanying text (discussing infringement of works with low degrees of originality).

319 *Cf.* Open Source Yogan Unity v. Choudhury, No. C 03-3182 PJH, 2005 WL 756558, at *4 (N.D. Cal. Apr. 1, 2005) (observing that if the selection and arrangement of the yoga sequence at issue is entitled to copyright protection, the resulting protection would be considered "thin"); David Nimmer, *Copyright in the Dead Sea*

2. Additional Issues Pertaining to Operation and Scope

At the outset, this proposal advocates that the duration of moral rights protection be limited to the life of the author. Although this duration is more limited than the "life of the author plus seventy year" period afforded under copyright law,[320] a duration limited to the author's life is consistent with the theoretical framework for moral rights advanced in this Article. Specifically, an author's external work embodies his personal message and thus is reflective of his individual, intrinsic creative process.[321] No one, not even the author's spouse and children, can substitute a personal judgment regarding the substance of the author's message and meaning of his work, and therefore the author functions as the guardian of his work's original message and meaning during his lifetime.[322] Moreover, a duration equivalent to the author's life reinforces a vibrant public domain. A more limited duration also is consistent with the overall confined approach to moral rights advocated herein.[323] For these reasons, moral rights protection should expire upon the author's death.

Scrolls: Authorship and Originality, 38 HOUS. L. REV. 1, 184 (2001) (noting how works of "low authorship . . . flood the theoretical portholes for federal copyright protection" despite the small degree of attention they attract in practice since few people attempt to copyright such works); Sarah Kutner & Holly Rich, Note, *Dirty Dancing: Attributing the Moral Right of Attribution to American Copyright Law: The Work for Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham*, 22 HOFSTRA LAB. & EMP. L.J. 325, 349 (2004) (urging that VARA be expanded to cover performing arts and noting that the creativity of choreography is particularly "the most misunderstood and underestimated" due to its seemingly effortless and undisciplined physical appeal).

320 *See supra* notes 222, 235 and accompanying text. It should be noted that the recommended duration is inconsistent with Berne, which provides that the covered rights are to be maintained after an author's death "at least until the expiry of the economic rights." Berne Union, *supra* note 264, art. 6 *bis*, ¶ 2. This discrepancy should not be problematic, however, given that Berne contemplates that the specific legislation of the respective Union members will govern substantive applications of the right. *See id.* ¶ 3. Moreover, the core problem with moral rights centers on living authors.

321 *See supra* notes 151–53, 159–72, 246–48 and accompanying text.

322 *See supra* notes 79, 153 and accompanying text.

323 The limited duration proposed herein would eliminate VARA's strange dichotomy regarding duration between works created prior to VARA and works created on or after the statute's effective date. *See* 17 U.S.C. § 106A(d) (2000). This recommendation also is consistent with VARA's approach to joint works, which affords protection until the death of the "last surviving author." *See id.* § 106A(d)(3). By way of comparison, a recent ruling by a recognized authority on Jewish law maintains that the obligation to give proper credit is perpetual. MENASHE WEISSFISCH, MISHNAS ZECHUYOS YOTZAIR 115 (Hiachal Nachum 2002) (quoting Rabbi Yosef Elyashiv). The obligation to provide credit apparently is regarded as an obligation of the second

The question of what conduct should be actionable requires a complex analysis. In crafting appropriate attribution and integrity rights,[324] the underlying objectives of moral rights protections must be carefully assessed and weighed against critical limitations inherent in the existing legal structure. Such an analysis compels the conclusion that attribution rights should be defined far more broadly than integrity rights.

With respect to attribution, this approach would make actionable the following conduct: (1) actual use of an author's original work without attribution or with false attribution; (2) substantial reproduction of an author's work without attribution or with false attribution; (3) modification of an author's work resulting in a substantially similar version to the original without attribution or with false attribution; and, (4) false attribution of authorship of a work to an author. The first three elements of this standard safeguard the right of attribution when an author's work is used directly or substantially reproduced or modified, and the original author is not given credit for the work. These elements also proscribe reverse passing off, which occurs when someone else takes credit for an author's work. The fourth element prohibits designating someone as the author of a work he did not create.[325] In addition, the author should have the right to publish a work anonymously or pseudonymously and to claim authorship at a later point in time should he so desire.

The proposed standard for attribution admittedly is broader than VARA in several respects. For example, VARA does not include the negative rights of anonymity or pseudonymity.[326] Nor does it specifi-

speaker rather than as a right of the first speaker. Thus, limiting the obligation to a timeframe based on the first speaker's life would not make sense under Jewish law.

324 Another major component of moral rights is the right of disclosure or divulgation. Underlying this component of moral rights "is the idea that the creator, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work." Kwall, *supra* note 245, at 5. This proposal does not incorporate an explicit right of disclosure for two reasons. First, the Berne Union does not require any such provision. *See supra* note 320. Moreover, since the copyright in a work typically "vests initially in the author or authors of the work," 17 U.S.C. § 201(a), in the vast majority of instances the right of first publication will be within the control of the author. As David Nimmer notes, the United States Supreme Court vindicated the first publication right as a component of copyright law in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), which involved the unauthorized scoop of President Ford's forthcoming autobiography. *See* Nimmer, *supra* note 277, at 17 (recognizing that the relevant Berne provision "has some vitality under U.S. law").

325 This element also is actionable under VARA. *See supra* note 266.

326 *See supra* note 266 and accompanying text.

cally prohibit reverse passing off, although such conduct arguably could be construed as interfering with the author's right to "claim authorship" of a work covered under VARA.[327] These components should be included in a federalized right of attribution. With respect to the author's right to publish anonymously or pseudonymously, these rights should be included because they comport with the intent of the Berne Convention.[328] As for providing authors with the ability to redress reverse passing off claims in the context of works of authorship, such explicit protection is necessary in light of the uncertainties created by the case law, both prior and especially subsequent to *Dastar*.[329] Moreover, the codification of these measures recognizes authorship norms vital to a complete conception of creativity.[330]

Despite the breadth of this proposed attribution standard, the public should not be harmed by a requirement of accurate authorship designation, especially in light of the proposed law's limited duration and application only to works that manifest heightened originality in the form of substantial creativity.[331] Therefore, such pure attribution violations should be enforceable by injunctive relief governing future

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327 *See* 17 U.S.C. § 106A(a)(1). *But see* Nimmer, *supra* note 277, at 13–15 (observing that Berne, in contrast to the French right of attribution, is not designed to prevent others from taking credit for an author's work). Recall that VARA also excludes protection for reproductions of covered works, and therefore does not encompass the second type of attribution violation discussed in the text. *See supra* notes 263–70 and accompanying text.

328 *See* Nimmer, *supra* note 277, at 15 (noting that although the language of the Berne Convention is sparse, the semi-official guide published by the World Intellectual Property Organization recognizes this aspect of the right of attribution as being within the scope of the Convention); *supra* notes 264, 320 and accompanying text.

329 *See supra* notes 272–80 and accompanying text; *see also* Ginsburg, *supra* note 263, at 304, 307 (noting the uncertainty regarding authors' and performers' entitlement to name credit after *Dastar*). *But see* Nimmer, *supra* note 277, at 43 (arguing that the laws of passing off sufficiently protect author's rights to compel recognition for their works even after *Dastar* but that *Dastar* properly refused relief for reverse passing off situations involving both copyrightable works and those in the public domain).

330 *See supra* notes 161–63 and accompanying text.

331 *See* Ginsburg, *supra* note 263, at 269 ("Where . . . the work is still subject to the author's exclusive right to make the work available in copies or by transmission, the requirements as to how the copies or transmissions are labeled take nothing from the public."); Kwall, *supra* note 274, at 1029 ("[R]equiring a right of attribution imposes a fairly insignificant burden while safeguarding important authorial interests . . . ."). Indeed, the heightened originality standard also avoids the Supreme Court's concern in *Dastar* that "figuring out who is in the line of 'origin' would be no simple task" for purpose of requiring attribution of uncopyrighted materials. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003). Presumably, anyone who satisfies this standard of originality would be a viable candidate for attribution credit. *Cf.*

distributions.[332] In light of the predominant noneconomic nature of the injury, a damage remedy should be eschewed except in the following instances: where a clear showing of economic harm exists as a result of the attribution violation;[333] where the violation is entirely in the past and future injunctive relief therefore is meaningless; or, where exceptionally willful violations are involved.[334]

In contrast to a broadly defined right of attribution, this proposal recommends a narrowly tailored right of integrity designed to vindicate the author's right to *inform the public* about the original nature of her artistic message and the meaning of her work. Specifically, this standard encompasses integrity damage in the following circumstances—(1) objectionable modifications are made to the work, or (2) the original work, or a close copy, is publicly displayed, distributed, or transmitted in a context deemed objectionable by the author—and the work is either expressly attributed to the original author, or absent attribution, still likely to be recognized as the original author's work. When such conduct occurs, the user should be required to provide a disclaimer adequate to inform the public of the author's objection to the modification or contextual usage.[335] This standard assumes that,

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Ginsburg, *supra* note 263, at 304 (advocating a "reasonableness" standard for determining attribution violations).

332 Feasible modifications of existing inventory might also be an appropriate remedy. *See* Ginsburg, *supra* note 263, at 306.

333 *See id.* (allowing damages "based on a showing of specific harm" and suggesting the possibility of statutory damages); *see also supra* text accompanying note 172 (discussing damage to an author through objectionable modification and attribution); *cf.* Gunlicks, *supra* note 235, at 626 (noting that French law limits damages for a failure to attribute absent an economic injury).

334 *Cf.* 17 U.S.C. § 504(c)(2) (2000) (providing that statutory damages under copyright law can be increased to a sum of up to $150,000 for cases involving willful conduct by the defendant).

335 This proposed remedy would have provided an independent basis for relief for Monty Python in the celebrated case *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976). In that case, the court vindicated the plaintiff's complaint under section 43(a) of the Lanham Act based on the defendant network's broadcasting of a program truthfully designated as having been written and performed by the plaintiffs but which had been edited, without plaintiffs' consent, into a mutilated and distorted form that substantially departed from the original work. To the extent the proposal developed herein calls for a moral rights remedy in the form of a disclaimer, however, it departs from the view of the panel majority in *Gilliam* that a disclaimer would not provide adequate relief. *Id.* at 25 n.13. For a brief discussion of the impact of *Dastar* on this case, see Nimmer, *supra* note 277, at 45 n.263. *See also supra* notes 257–59 and accompanying text (discussing why the disclaimer remedy advocated herein should be regarded as content-neutral and does not involve compelled speech).

Although the content of the required disclaimer will vary from case to case, consider the following example. Composer Carl Perkins is a known advocate for chil-

absent the proposed right of integrity, the user would otherwise have the unencumbered right to use the author's work pursuant to copyright law. The proposed standard thus forges a compromise between respecting the author's intrinsic dimension of creativity and the user's freedom to create and build upon prior works. As with the attribution right, an author should be entitled to enforce this right prospectively through injunctive relief. Similarly, an author should be unable to enjoin a proposed use accompanied by an appropriate disclaimer or obtain damages for prior objectionable uses lacking a disclaimer except in circumstances involving a clear showing of economic harm or exceptionally willful conduct.[336] Moreover, as an additional safeguard, the statute should incorporate a requirement that the author's objections to the use of his work be reasonably "credible."

A further examination of this standard reveals that the objectionable modification component operates somewhat similarly to VARA which affords a covered author the "right to prevent the use of his or her name as the author of the work . . . in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to . . . [the author's] honor or reputation."[337] Nevertheless, VARA also prohibits integrity violations absent attribution in situations involving intentional distortions, mutilations, or other modifications

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dren's rights. His song *Honey Don't* was used as background music for a scene depicting the rape of a child in the movie *Prince of Tides.* Although the licensing of the song was beyond Perkins's control, he was outraged and embarrassed by the use. *See* Kwall, *supra* note 6, at 36. In such a situation, at a minimum a disclaimer should provide that the song was used without the author's permission. Depending on the circumstances of the use and subject to the dictates of the First Amendment, a disclaimer also could provide more substantive information regarding the inconsistency of the use and the author's original message. A somewhat similar remedial structure was part of the National Film Preservation Act of 1988, Pub. L. 100-446, 102 Stat. 1782, *amended by* National Film Preservation Act of 2005, Pub. L. 109-9, 119 Stat. 218, which authorized the Library of Congress to designate twenty-five culturally significant films per year and include a prominent label alerting the public to any material alterations, *id.* § 3(a)(1)(C), (2)(A). This label also served as a warning that the alterations were done without the consent of the creative talent responsible for the film's creation. Subsequently, Congress repealed this statute. *See* Nimmer, *supra* note 277, at 26–27; *cf.* Weight Watchers Int'l Inc. v. Luigino's Inc., 423 F.3d 137, 143–44 (2d Cir. 2005) ("Where [a trademark] infringer attempts to avoid a substantial likelihood of consumer confusion by adding a disclaimer, it must establish the disclaimer's effectiveness.").

336 *Cf. supra* note 334 and accompanying text.

337 17 U.S.C. § 106A(a). David Nimmer notes that under Berne, the integrity right is "'very elastic and leaves for a good deal of latitude to the courts.'" Nimmer, *supra* note 277, at 15 (quoting WORLD INTELLECTUAL PROP. ASS'N, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971), at 42 (1978)).

that are prejudicial to the author's honor or reputation.[338] This proposal thus departs from VARA in four important ways. First, VARA incorporates both integrity violations that are independent as well as those existing in conjunction with attribution violations, but both are triggered only when they are prejudicial to the author's honor or reputation. Second, independent integrity violations only are actionable to the extent they are intentional. Third, VARA does not cover objectionable contextual modifications or any reproductions of covered works.[339] Finally, one who violates VARA is subject to the same remedies as an ordinary copyright infringer.[340] Thus, the right of integrity advocated herein is more narrowly crafted than VARA's in some ways whereas in other ways it is significantly broader.

VARA's limitation of integrity violations to those that are intentional and prejudicial to the author's honor or reputation mistakenly puts the focus of the standard for violation on the motives of the user and the public's perception of the author and his work rather than where it belongs—on the author's intrinsic motivations in creating. The primary reason to redress integrity violations is to recognize the authorial dignity deriving from the intrinsic dimension of the creative process and its embodiment in an external medium.[341] The proposed standard, when applied in conjunction with a heightened originality requirement calling for substantial creativity, is designed to facilitate public knowledge of the original author's message regarding works possessing these qualities.[342] Whether the violation was intentional or prejudicial to the author's honor or reputation is irrelevant. Moreover, the proposed protection extends not only to actual modifications but also to objectionable contextual displays, performances and transmissions. In this way, the proposed standard is broader than that of VARA.

In contrast, this proposal is narrower than VARA to the extent it makes actionable only integrity violations in conjunction with recognition of the original author. This standard, however, advances the objectives of the Copyright Clause to the extent it seeks to insure that the public is informed of the existence of the original author's message and meaning in situations where the original author would be associated with the covered work.[343] Moreover, requiring a connec-

338 17 U.S.C. § 106A(a)(2).

339 *See supra* notes 269–70 and accompanying text.

340 *See* 17 U.S.C. § 501 (2000 & Supp. 2002).

341 *See supra* notes 151–53, 159–72 and accompanying text.

342 *See supra* notes 312–14 and accompanying text.

343 *Cf.* Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1420, 1446 (2005) (proposing "a doc-

tion between attribution and integrity also is supported by the analysis of authorship norms developed earlier.[344] If a work is modified in a manner the author deems objectionable, his artistic dignity theoretically can be violated regardless of whether the public is aware of the damage. On the other hand, recall that as an authorship norm dignity demands an external embodiment allowing the inner personality to commodify and explain itself to the outside world.[345] This conception of dignity requires a public linkage between the author's inner labor and its external embodiment, and absent a setting in which this linkage is made the dignity violation is diminished.[346]

The remedial nature of the proposal for integrity violations also is more narrowly crafted than VARA. The disclaimer component aims to reinforce the objectives of the Copyright Clause by promoting and disseminating accurate knowledge about the storehouse of our creative surroundings. Further, requiring a disclaimer when integrity and attribution interests are violated simultaneously facilitates congruence between the purported harm and its remedy. Creators whose authorial dignity is compromised can be made whole through the communication of information designed to educate the public about the nature of the authentic external embodiment of the author's message.[347]

In essence, the remedial structure for combined attribution and integrity violations advocated by this proposal is similar to a liability

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trine of moral rights for readers," and explaining an "authornym" as a branding choice offered by the author to the consuming public which functions in part as a mark of authorization enabling consumers to "build coherent interpretive structures").

344 *See supra* notes 161–63 and accompanying text.

345 *See supra* notes 161–66 and accompanying text.

346 *See supra* notes 171–72 and accompanying text; *cf.* Lee, *supra* note 168, at 799, 840–42 (advocating a dignity-based right of integrity that would include procedural devices of prior notice of another's alteration or use of the author's work and the author's opportunity to object, along with a "balancing of the author's dignity interest and the competing interest of the opposing party").

347 Perhaps this remedy is best understood in the context of works created in the academic environment, the impetus for which are clearly understood to "advance the frontiers of human knowledge and . . . win their authors recognition." *See* Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than the U.S. Copyright Law?*, 27 J.C. & U.L. 53, 63 (2000) (noting scholarly authors often have little commercial interest in publishing but rather create works to build their professional reputations); Lee, *supra* note 168, at 816 n.116 (discussing extensive anecdotal evidence of moral rights violations in the academic context); Nimmer, *supra* note 277, at 75–76 (proposing that reverse passing off should be actionable in the context of plagiarism violations in the "House Rules" governing the university setting).

rule approach in which the user's conduct is allowed as long as the appropriate remedial measures are implemented. This approach has the benefit of a remedy truly consistent with the nature of the harm and thus avoids the concern that stronger protections for the integrity interests of today's authors will privatize more than is necessary to provide an incentive for tomorrow's creators.[348]

In light of this proposal's circumscribed protections for moral rights, formal waivers should be inoperative. Given that moral rights are designed to recognize inspirational motivations for creativity, any system sanctioning waiver is inconsistent from a theoretical standpoint with the justifications for adopting these protections. In other words, if moral rights protections are intended to redress violations of human dignity, they should never be capable of being waived.[349] An author should always be in a position to protest that a publicly displayed or distributed version of her work does not comport with her artistic vision. Moreover, allowing waiver exacerbates the disparity of bargaining power between authors and those with whom they contract.[350] Finally, given the limited nature of protection for authors' integrity interests proposed herein, the typical reasons supporting a waiver provision are absent. By mandating appropriate attribution and public acknowledgment of variations inconsistent with the author's original message, this proposal affords authors a viable remedial structure tailored to recognizing the intrinsic dimension of innovation. These limited measures supporting authors' dignity interests should not be compromised by affording the possibility of their elimination through a waiver mechanism.[351]

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348 *See supra* notes 286–90 and accompanying text.

349 Jane Ginsburg has suggested that although the inability to waive attribution may be the best recognition of moral rights, this position may be "too extreme" for the United States. Ginsburg, *supra* note 263, at 300. She also notes that Berne does not require a prohibition on waivers. *Id.*; *see also* Gunlicks, *supra* note 235, at 624–26 (noting that there is a wide variation among Berne members regarding waiver).

350 *See supra* notes 281–83 and accompanying text.

351 *Cf.* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 129 (1997) (noting that the more narrowly crafted the right of integrity, the more inefficient it is to allow waiver). To the extent the recommendations proposed herein are inconsistent with VARA, any proposed statute must consider whether some of VARA's concepts should be retained for the types of visual art presently covered by that statute. For example, it might make sense to retain the specialized provisions dealing with works of art that have become part of buildings. *See supra* note 267. In contrast, a new statute should attempt to cure some of VARA's especially egregious problems such as its bifurcated duration provisions, its automatic inapplicability to works made for hire, and the ability of one joint author to waive unilaterally her coauthor's moral rights. *See infra* notes 352–54 and accompanying text. For a discussion of recommendations for

Finally, collaborative works present a particular challenge for moral rights.[352] Whereas the economic interests of copyright owners do not have to be equal,[353] the notion of moral rights almost demands that each coauthor's contribution, message and meaning, be given its due. VARA takes a particularly indefensible position regarding coauthored works by allowing one joint author to waive the moral rights of her collaborators.[354] Probably the greatest difficulty with collaborative works is presented by the right of integrity, especially if coauthors have different conceptions of what conduct constitutes a violation. The disclaimer remedy is particularly suitable to resolving

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VARA by the Register of Copyrights following a report commissioned by the Copyright Office immediately after the statute's passage, see Kwall, *supra* note 284, at 45–51.

352 For a detailed discussion of this topic, see Kwall, *supra* note 6, at 37–40 (noting the difficulties presented by the exercise of moral rights in joint works). Another important issue involving moral rights protection concerns the treatment of works made for hire. VARA excludes such works from coverage. *See* 17 U.S.C. § 101 (2000 & Supp. 2002) (defining "work of visual art"). In light of the theoretical predicate for moral rights protection developed herein, works made for hire present a difficult problem requiring extended discussion of whether, in practice, such works embody the messages of their actual creators as opposed to employers or those who commission the works. *See id.*; Hughes, *supra* note 101, at 149–61 (discussing intentionality with respect to works made for hire). Although an appropriate treatment of this topic requires empirical evidence and case analysis, a few brief observations follow. An author who otherwise meets the standards called for in this proposal should not automatically lose this protection simply because her work is one made for hire. *See* Kwall, *supra* note 274, at 1028. *But see* Lee, *supra* note 168, at 846–47 (recommending that moral rights not apply to works made for hire since this doctrine has "become such an ingrained part of the American copyright culture"). Yet, for moral rights to apply, any given work for hire must represent an embodiment of the author's message, as opposed to someone else's. One possibility is to afford authors of works made for hire a rebuttable presumption of coverage under this proposal, subject to a showing by the employer or commissioning party that the work in question was too much under someone else's direction or control to qualify for moral rights protection. *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee . . . we consider the hiring party's right to control the manner and means by which the product is accomplished."); *see also* Kutner & Rich, *supra* note 319, at 328 (arguing that the right of attribution must override work for hire determinations in circumstances involving a nonprofit organization created solely to further the founder's artistic vision); *Cf.* Hansmann & Santilli, *supra* note 351, at 136 (suggesting that ghostwriters typically do not operate as authors in their "own right" but rather attempt to suppress their own personalities in order to "capture . . . the style and character of the nominal author for whom" they are working).

353 *See* Kwall, *supra* note 6, at 57.

354 17 U.S.C. § 106A(e)(1) (2000); *see also* Ginsburg, *supra* note 263, at 305 (disagreeing with VARA and proposing only coauthors who sign a specific waiver agreement should be subject to a waiver).

such disputes because the dignity concerns of coauthors can be individualized in the event there is disagreement. With respect to attribution, the principal issue is the magnitude of the contribution a coauthor must provide in order to receive attribution credit. This inquiry relates to the discussion in the previous subsection regarding originality because its resolution lies in requiring, on the part of each coauthor, a contribution manifesting a heightened standard of originality in the form of substantial creativity.[355]

The foregoing recommendations provide an initial pathway for a viable moral rights doctrine in the United States. The proposal achieves a balance between stronger protections for authors' rights and the public's interest in maintaining access to protected works. Its operative provisions are sensitive to the objectives of the Copyright Clause as they have been understood historically while still safeguarding important authorship norms.

CONCLUSION

The intrinsic dimension of the artistic soul is real. It operates at the level of inspirational or spiritual motivations and is evident in a broad variety of narratives that reflect our society's perceptions of the creative process. The traditional economic incentive model supporting our copyright law is incomplete because it fails to consider these motivations for human enterprise. Historically, the discourse on authors' rights in the United States has emphasized the externalized product of creativity at the expense of the underlying process. As a result, our copyright law fails to account fully for the wellsprings of creativity, a glaring flaw in a legal system that seeks to promote progress and disseminate knowledge. Creativity must be understood in a broader context in the United States. Armed with a more complete vision of human creative enterprise, the laws governing authors' rights can be crafted with sensitivity to both foundational authorship norms and the policies that have shaped our copyright law since its inception.

355 *See supra* notes 312–14 and accompanying text.