

UC Berkeley

UC Berkeley Recent Work

Title

The Concept of Property in the Digital Age

Permalink

<https://escholarship.org/uc/item/142112hd>

Author

Merges, Robert P

Publication Date

2008-12-12

ESSAY:

THE CONCEPT OF PROPERTY IN THE DIGITAL ERA

Robert P. Merges

Abstract

In this Essay I argue that the basic case for property is still a very strong one. Individual control over individual assets still makes sense. I defend property rights in digital creations in the face of two general scholarly critiques: The first is what I call "digital determinism" -- the idea that the central driving force behind IP policy should be the technological imperatives of digital creation and distribution. I argue that the inherent logic of digital technology should not drive IP policy. Second, I discuss the idea that the distinctive feature of digital technology, and therefore the thing that policy should most seek to encourage, is "collective creativity." I argue that individual creators are still crucial, and that IP law does not interfere with widely dispersed collective works such as Wikis. Finally, I push for recognition that IP policy should not be blinded by the promise of massive amounts of amateur content; solicitude for what I call "creative professionals" -- people who make a living creating high-quality content -- has been and must continue to be an important part of IP law.

ESSAY*

THE CONCEPT OF PROPERTY IN THE DIGITAL ERA

*Robert P. Merges***

TABLE OF CONTENTS

I. INTRODUCTION 1240

II. DOES PROPERTY STILL MAKE SENSE?:
A TOPOGRAPHY OF CURRENT IP SCHOLARSHIP 1242

 A. *Problems with Property in
 the Digital Realm* 1247

 1. *The Fluid World of Digital Resources* 1247

 2. *Collectivity: The Essence
 of Digital Era Creativity?* 1248

III. CREATIVE PROFESSIONALS
 AND LEGAL INFRASTRUCTURE 1250

 A. *Some History: A Pro-Property Jefferson* 1253

 B. *Privileging Certain Forms
 of Creative Expression* 1258

IV. UPDATING—NOT ELIMINATING—PROPERTY 1268

 A. *Legislating a “Right to Include”* 1272

* Essay: a form of legal writing where greater latitude regarding writing style and (especially) citation requirements is permitted. A more informal, but preferably informative, type of scholarly writing. Colloquially: the lazy or hurried person’s article.

** Wilson Sonsini Professor of Law and Technology, UC Berkeley Law School. Thanks to Professor Craig Joyce, members of the Baker Botts law firm, and everyone who welcomed me for the Baker Botts lecture at the University of Houston Law School in April 2008. Thanks also to the editors of the Houston Law Review for editing assistance. Remaining errors (can you spot them?) are mine.

1240 *HOUSTON LAW REVIEW* [45:4

B. “Locke for the Masses”:
Exploring Group Rights.....1273

V. CONCLUSION1274

I. INTRODUCTION

Many intellectual property (IP) scholars have emphasized the important benefits of “openness” with respect to digital media. The desire to open up the digital domain leads to calls for doctrinal modification or interpretation, if not outright statutory reform. The general idea is simple enough: digital media, driven by the internal logic of widespread availability and network effects, will better flourish and better serve the goals of the IP system if digital content and the platforms that carry it are freed of as many restrictions on use as the law can promote. In a nutshell, the dominant idea is that in the digital age, the best IP policy is a minimalist IP policy.

In this Essay I aim to take issue with this now widely prevailing wisdom. My basic idea is this: robust IP protection is in no way inconsistent with the promotion of a flourishing environment for digital media. Quite the contrary: IP rights are essential to this goal. IP facilitates a wide range of effective strategies in the digital era, ranging from extensive control and enforcement to the promotion of widespread open access. IP as traditionally defined and understood permits private firms a very large degree of flexibility, which is just what is needed in the dynamic and challenging environment for digital media. As compared to the top-down, one-size-fits-all approach of the “IP minimalists,” traditional, strong IP protection encourages and facilitates a wide variety of approaches—including various degrees of openness—without mandating or coercing any single approach. To summarize, the traditional virtues of individual property ownership—autonomy, decentralization, flexibility—are in no way obsolete in the digital era; they are indeed just as important and useful as ever.

So my ultimate goal in this Essay is pragmatic: I want to argue that property—and IP in particular—has a robust future, notwithstanding the advent of ubiquitous technologies for creation and dissemination of digital works. But I want to make an additional point as well. I have come to see that in order to preserve the utility of property in what is increasingly known as the digital era, we are going to have to pay attention to *conceptual* aspects of property. By this I mean simply the mental

categories and frameworks we bring to our discussions of property. A famous social psychologist once wrote that there is nothing so useful as a good theory, and my plan in this Essay is to apply this wisdom to some current controversies in the IP world. My claim is this: the challenges of digital technology are pushing us to consider not only which industries will survive or change, or which user practices will expand, but also whether property makes sense as a central legal category in this new era. What is at stake, at the conceptual level, is what it means to hold property in the era of widespread digital technologies.

Here is where I come down on this: I believe property is alive and well as a central legal category. For me, the basic case for property is still a very strong one. Digital technologies have eased the mechanical, repetitive aspects of creative work, but they have not, in my opinion, fundamentally made *creativity* any easier. You can sit in front of a notebook computer or an advanced computer workstation and sweat blood, trying to come up with a good idea or a good way to say or do something, just as easily as you can sit in front of a typewriter or drafting table.¹ And once having created something original, there is just as much at stake now—on both the individual and societal levels—in questions of who will reap the financial rewards of creativity and who will control the creative work once it is loose in the world.

An astute reader, familiar with our nation's long tradition of robust IP protection, might well say at this point—big deal, Professor. Is that your whole point? Nothing much original there.

And I would respond, yes and no. There is a long tradition of strong IP protection, it is true. But that tradition is under heavy fire these days in academic literature. Which means that, while arguing for robust IP protection is hardly radical, arguing the central place of traditional property concepts in the current era—the age of digital technologies—does cut somewhat against the grain. On the theory that it helps to know what grain one is cutting against, before I get to my primary argument about the

1. This is taken from a famous line by the screenwriter Gene Fowler: "Writing is easy. All you do is stare at a blank sheet of paper until drops of blood form on your forehead." The Quotations Page, <http://www.quotationspage.com/quote/22020.html> (last visited Oct. 23, 2008). There is a long tradition of similar quotes, all attesting to the difficulty of creating anything worthwhile. See, e.g., JONATHAN F.S. POST, *ENGLISH LYRIC POETRY: THE EARLY SEVENTEENTH CENTURY* 45 (1999) (quoting Ben Jonson, *To the Memory of My Beloved, The Author Mr. William Shakespeare: And What He Hath Left Us*, in *THE FIRST FOLIO OF SHAKESPEARE* 8, 10 ll. 58–59 (1968) ("he / Who casts to write a living line, must sweat")).

continuing viability of property rights, I want to briefly address some aspects of current IP scholarship.

II. DOES PROPERTY STILL MAKE SENSE?: A TOPOGRAPHY OF CURRENT IP SCHOLARSHIP

The legal literature on IP rights is huge. It grows every day. It has become almost impossible to keep up with it. If you add blogs, e-mail newsletters, and webpages to the traditional definition of literature, the picture only gets worse. And it is not only big, it is highly variegated. The practitioner literature alone is staggering. Add to it the highly specialized academic literatures on the various IP topics—patent, copyright, trademark, and the like—and you have an extremely diverse set of writings to consider.

Out of this massive literature, I propose to identify and then critique two major strands of contemporary thought, two important lines of argument. Let me be the first to say that generalizing in this manner is a dangerous, almost preposterous, undertaking. There is just so much material out there. My effort at a quick taxonomy, my attempt to apply a facile set of labels to sizeable chunks of this massive literature, is bound to be incomplete and unsatisfying to many who know this landscape well. My only defense is this is supposed to be a short essay. I am just carrying out orders. The *Houston Law Review* made me do it.

That said, here are the scholarly trends I want to discuss. The first is what I call “digital determinism.” This is the idea that the central driving force behind IP policy should be the technological imperatives of digital creation and distribution.² The rallying cry for digital determinism might be, “network-friendly policies for a network-dominated world.” That is, to those schooled in the digital determinist logic, the goal of policy (in IP as well as other fields) is to get out of the way of the things that digital technology makes possible. Good rules from this point of view are those that permit maximum interconnectivity, maximum throughput of digital “stuff,” and maximum latitude for each node or user on the network.³ The mindset behind this

2. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562 (2000) (“Structural media regulation in the twenty-first century must, in turn, focus on enabling a wide distribution of the capacity to produce and disseminate information as a more effective and normatively attractive approach to serve the goals that have traditionally animated structural media regulation.”).

3. See *id.* at 579 (suggesting that “we develop and sustain commons, wherever possible, in the resources necessary for the production and exchange of information”).

notion shows itself in the scholarly rhetoric used to describe it. Creative works are “inputs”;⁴ viewers and consumers of works are “users”;⁵ creativity and interconnection take place via “fat pipes” in the distinct domain of cyberspace.⁶ Especially with respect to the use of “inputs” to describe creative works, the rhetoric suggests the crucial importance of the technological systems that enable and shape the creation and dissemination of creative work.

A quick word on the pedigree of digital determinism is in order. This idea has some things in common with the general concept of technological determinism, which is defined as the notion that technology drives history.⁷ The spirit of this line of thought is perhaps best captured in “the official motto of the 1933 Chicago Century of Progress world’s fair: ‘Science Finds—Industry Applies—Man Conforms.’”⁸ Sociologists and historians of science and technology since the 1980s have taken issue with the basic premises behind technological determinism, especially that people must conform to whatever imperatives are generated by the “inherent logic” of technology.⁹ Many of them argue that

4. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 56 (2006).

5. See Benkler, *supra* note 2, at 562 (defining “users” as “participants in the production of their information environment”).

6. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 151–53 (2001) (referring to “fatter pipe[s]” as improved infrastructure that allow for enhanced communication).

7. For a thorough exploration, see Merritt Roe Smith & Leo Marx, *Introduction, in DOES TECHNOLOGY DRIVE HISTORY?: THE DILEMMA OF TECHNOLOGICAL DETERMINISM*, at ix, x (Merritt Roe Smith & Leo Marx eds., 1994) (giving examples where “a technical innovation suddenly appears and causes important things to happen”). For more on the historiography of this idea, see JOHN M. STAUDENMAIER, S.J., *TECHNOLOGY’S STORYTELLERS: REWEAVING THE HUMAN FABRIC*, at xix (1985) (exploring the history of technology through a “detailed analysis of every article published in [*Technology and Culture*] from its first issue in 1959 through the last issue of 1980”).

8. CARROLL PURSELL, *THE MACHINE IN AMERICA: A SOCIAL HISTORY OF TECHNOLOGY* 230 (1995) (describing the popular attitude toward technology during the 1920s and 1930s). Pursell describes one reaction to the Great Depression, the call for new political structures that would better accommodate the massive economic changes brought on by the mechanization and industrialization of the first thirty years of the twentieth century. See *id.* at 268–69 (“All of the major government reports and most of the public debate on the subject agreed that scientific advancement and technological change were inevitable and that society had no option but to change to accommodate these.”).

9. There is a long association between technological boosterism and technological determinism. See STAUDENMAIER, *supra* note 7, at xvii (“[T]he myth of progress . . . came to be the ideological justification for Western colonialism . . . It was the destiny of the West to be the cutting edge of human progress.”). On Americans’ peculiar inclination to treat new technologies as a sort of secular religious experience, see DAVID E. NYE, *AMERICAN TECHNOLOGICAL SUBLIME* 28 (1994) (“The sublime could hardly avoid becoming intimately interwoven with popular religion.”). The breathless assurances that “the Internet will change everything,” common in the 1990s when the Internet was new, are a

social forces shape and determine many (some say almost all) aspects of technology. For these scholars, the concept of determinism masks numerous occasions for human intervention in technical systems.¹⁰ In other words, these scholars reject the descriptive claim of determinism that technologies shape society. They counter with the idea that technologies do not develop along autonomous paths and do not have an inexorable, internal logic. Instead, they argue, technologies are shaped and guided by human (social) forces.

On this view, the rallying cry of early cyberspace enthusiasts—“[i]nformation wants to be free”¹¹—was at best naïve. For historians of technology, the very idea that information “wants” anything is a form of determinism. But more importantly, and more germane to this Essay, is the normative thrust of this early claim by cyber-enthusiasts. For these folks, “information wants to be free” points directly to a normative agenda: we should help it! Society, in other words, should adapt to the possibilities of this technology by removing whatever obstacles stand in the way, preventing it from achieving its full potential. So while cyber-enthusiasts may not express full faith in technological determinism in the positive or descriptive sense, they do express a normative version of it through their policy proposals.¹²

good recent example of this sort of boosterish enthusiasm. Sober observers have long noted the tendency of contemporaries to overstate the importance of the new technologies of the day. *See, e.g.*, George Orwell, *As I Please*, TRIBUNE, May 12, 1944, *reprinted in* THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: AS I PLEASE 145 (Sonia Orwell & Ian Angus eds., 1968) (“Reading recently a batch of rather shallowly optimistic ‘progressive’ books, I was struck by the automatic way in which people go on repeating certain phrases which were fashionable before 1914. Two great favourites are ‘the abolition of distance’ and ‘the disappearance of frontiers’. I do not know how often I have met with statements that ‘the aeroplane and the radio have abolished distance’ and ‘all parts of the world are now interdependent.’”).

10. *See, e.g.*, WIEBE E. BIJKER, OF BICYCLES, BAKELITES, AND BULBS: TOWARD A THEORY OF SOCIOTECHNICAL CHANGE 281 (1995) (“Determinism inhibits the development of democratic controls on technology because it suggests that all interventions are futile. . . . [I]f we do not foster constructivist views of sociotechnical development, stressing the possibilities and the constraints of change and choice in technology, a large part of the public is bound to turn their backs on the possibility of participatory decisionmaking, with the result that technology will really slip out of control.”).

11. STEWART BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT MIT 202 (1987).

12. Some scholarly writings on digital IP fully recognize the socially determined nature of technologies, and argue that entrenched interests such as large media companies are currently attempting to steer the Internet and other digital technologies in a direction favorable to their interests. *See, e.g.*, TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE 27 (2007) (“This means it is those producers best positioned to produce expensive cultural work who will have the most vested interest in protecting and enforcing copyright.”); LAWRENCE LESSIG, CODE: VERSION 2.0, at 8 (2006) (expressing concern that “specially powered interests” will

The second trend is closely related. It is the idea that the distinctive feature of digital technology, and therefore the thing that policy should most seek to encourage, is “collective creativity.” This is an idea that starts with the fact of greater interconnectivity, but goes beyond. Scholars writing in this vein are interested not so much in the technological logic of networks, but in the potential for human interaction and (especially) group-level creativity that this technology makes possible.¹³ Some of the claims that issue from this school of thought are really quite striking. According to its leading lights, we are in the midst of a hugely important cultural revolution. For the first time, far-flung individuals are connected in virtual communities that make possible all sorts of previously unthinkable collaboration. Creative works—music, writing, film, and the like—can be shared instantaneously with receptive people all around the world without the need for large, self-interested “intermediaries” such as record labels, publishers, and film studios. Small contributions by many individuals can be aggregated seamlessly, making possible a new kind of “distributed creation” that is unlike anything the world has ever seen. With our new knowledge of the power of groups, of virtual creative teams, society is being transformed, and all sorts of “legacy” or “entrenched” interests are being replaced or threatened. Indeed, an entirely new way of doing work (maybe even a new way of

prevent change). The narrative in these works is not centered around an inevitable path of technical development, but instead around the idea of the cooptation of an inherently liberating technological force by self-interested economic actors. There is a political economy dimension to these writings, in other words, inconsistent with a strict version of technological determinism. There is much one could say about this issue, but here I will limit myself to one observation: the growth of content “aggregators” such as Google and YouTube is rapidly creating a natural counterforce against these older media interests, which obviously changes the political economy of IP policy. My main point in raising the idea of “digital determinism” is to argue that many IP scholars believe that digital technology has an *inherent logic* which society ought to conform to by way of IP policy. It is this “softer” determinism I take aim at in this Essay. I think we ought to adapt digital technology to our ends and goals, rather than striving always to adapt ourselves to it. And I further think that our ends and goals ought to include promoting individual autonomy and supporting creative professionals—both of which are furthered by the institution of property rights.

13. See BENKLER, *supra* note 4, at 60 (describing a networked environment of “commons-based peer production” as “radically decentralized, collaborative, and nonproprietary; based on sharing resources and outputs among widely distributed, loosely connected individuals who cooperate with each other without relying on either market signals or managerial commands”); LAWRENCE LESSIG, *FREE CULTURE: HOW THE BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 169 (2004) (calling for copyright regulation “to restore the balance that has traditionally defined copyright’s regulation—a weakening of that regulation, to strengthen creativity”).

being)—a “social” way, an “open” way based on sharing—is emerging right before our eyes.¹⁴

Digital determinism and collective creativity obviously have a lot in common. Indeed, it might not be much of a stretch to say that they are merely two different ways of describing the same thing. Digital determinism looks into the wires and servers that power the interconnectivity that is the platform on which collective creativity rests. Collective creativity looks at the virtual communities, the “distributed single brains,” made possible by all this hardware. There are some distinctions, of course. The digital determinist perspective might emphasize that *individual* creation and consumption/use of digital material are just as much a part of the network picture as collective work, while the collective creativity school of thought might point out that collective interaction is strongly enabled by, but not necessarily dependent on, any particular technological infrastructure.

In this Essay, I concentrate on the similarities between digital determinism and collective creativity. More particularly, I want to hone in on their common view of property rights. Which is, to overgeneralize again, not very sanguine. For whether the central idea is that technological systems should determine policy, or that society ought to be highly concerned with fostering collective interaction and production, individual property rights are usually seen as part of the problem, and not part of the solution. To technological enthusiasts, property rights just get in the way of the efficient flow of information through the network and out to the “nodes” (or people) that it connects. The same goes for those whose interest is in societal transformation through collective creativity. Property rights, associated as they are with *individual* firms or people, tend only to gum up the free sharing and building-upon of information. Property is fundamentally at odds with the spirit of openness and creative humility (i.e., no need for individual credit) that suffuses the virtual communities behind collective creativity.

Now most scholars in the digital determinism and collective creativity camps are far too good at what they do to advocate the complete elimination of property in the digital realm. They admit it is a useful institution in some, perhaps many, contemporary

14. See BENKLER, *supra* note 4, at 60; DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 36 (2d ed. 2008) (describing the new web as “a massive playground of information bits that are shared and remixed openly into a fluid and participatory tapestry”).

contexts.¹⁵ What they argue for are policies that minimize the effect of property rights on the technological imperative (DD) or group ethos (CC) of the digital era; or, at the conceptual level, strict limits on the intrusion of what might be called “property logic” into the digital domain.¹⁶ So as not to deal in straw men, let me be clear that these are the criticisms I will be addressing. I am not arguing that the digital-determinism and collective-creativity worldviews are completely antiproperty in some global sense. The thrust of these perspectives is rather that property as an institution and as a concept gets in the way of important trends in the digital era. I recognize that their goal is not to eliminate property altogether, but to lessen its effect on the digital domain. It is this central idea of “property as obstacle,” both practically and conceptually, that I take aim at here.

A. *Problems with Property in the Digital Realm*

Property rights give individuals control over assets or resources. To hold property is to have the right to say what happens to an asset: who gets to use it and on what terms. Although there is of course very wide divergence across property institutions, these are the core elements of property: (1) control over assets (with at least some degree of exclusivity); (2) by individuals. The basic idea is captured well in a comment by the noted property theorist Jeremy Waldron, who has spoken—usefully, I believe—of property as a one-to-one-mapping between individuals and resources.¹⁷

In the digital world, both these elements of property are problematic. Assets or resources are said to operate according to different rules in this world. And, as already described, individuals are less important; networks, collectivities, are the more essential unit of analysis. Let me describe these ideas a bit more fully so that my response to them can be better understood.

1. *The Fluid World of Digital Resources.* An interesting article by philosopher Gordon Hull makes the point that it is now virtually impossible to tell the difference between a digital

15. See, e.g., TAPSCOTT & WILLIAMS, *supra* note 14, at 26 (acknowledging the need of companies “to protect critical intellectual property”).

16. See, e.g., BENKLER, *supra* note 4, at 278 (arguing that “regulatory efforts threaten the freedom to participate in twenty-first-century cultural production”).

17. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 38–39 (1988) (describing private property as a system of ownership in which a resource belongs to an individual who controls the object’s use).

“original” and a digital “reproduction.”¹⁸ This quality of digital works leads other scholars to emphasize digital works’ fluid boundaries.¹⁹ It is very easy to add to, modify, or adapt a copy of a digital work, making it very difficult to maintain the original integrity of the work. According to a whole host of scholars, this is one of the great, revolutionary benefits of digital technology and is indeed the hallmark of the emerging set of practices and norms that is rapidly taking shape—what is frequently referred to as “digital culture.”²⁰

2. *Collectivity: The Essence of Digital Era Creativity?* For many, of equal importance with fluidity in the digital realm is the ability for many disparate individuals to contribute creative effort towards large, collective goals. Open source computer programs—many individual programmers contributing computer code to make a sophisticated end product such as an operating system or server software—were the prototype. But now the model has spread into all sorts of interesting pockets. Wikipedia, or wikis in general, are currently the hot examples. Dozens of disparate people, each with some useful knowledge about a given topic, pool their contributions in a single online source that is constantly edited, refined, and updated.²¹ The same dynamic is currently at work in many other areas as well: from “fan” websites (where people contribute stories, commentary, graphic art, and other kinds of content related to a common interest such as a book series or movie), to recipe swapping websites, to all sorts of travel advice websites.

18. Gordon Hull, *Digital Copyright and the Possibility of Pure Law*, 14 *QUI PARLE* 21, 25 (2003), available at <http://ssrn.com/abstract=1019702> (“[A]bsent the baseline of visual intelligibility, there is no criterion for knowing which object legitimately embodies its *eidos* and which does not. The effects of this absence stand behind many of the battles surrounding digital reproduction.”).

19. See, e.g., N.D. BATRA, *DIGITAL FREEDOM: HOW MUCH CAN YOU HANDLE?* 4 (2008) (speaking of the impact of the Internet and related technologies and their “digital fluidity” on traditional cultures). I should note here that some believe individual authorship was a problematic concept long before digital technology—that in fact *all* works are essentially assembled from social or collective sources. See, e.g., LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 1–2 (2007) (arguing that “the public” should be recognized as a formal joint author in all copyrighted works).

20. See, e.g., *READING DIGITAL CULTURE* (David Trend ed., 2001) (compiling essays related to issues central to digital culture); see also ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 82–85 (1998) (writing of the “dialogic culture” we now inhabit: “If what is quintessentially human is the capacity to make meaning, challenge meaning, and transform meaning, then we strip ourselves of our humanity through overzealous application and continuous expansion of intellectual property protections.”) (footnotes omitted); GILLESPIE, *supra* note 12, at 277 (2007) (describing how free access promotes participation and sense of community through collaborative creation of cultural goods).

21. See BENKLER, *supra* note 4, at 70–71 (characterizing Wikipedia as “one of the most successful collaborative enterprises that has developed in the first five years of the twenty-first century”).

The basic logic behind collective works such as these is of course quite old; “many hands make light work,” “two heads are better than one,” and many another clichés attest to this. But once again, digital enthusiasts point out that ubiquitous interconnection and a common (digital) medium have catapulted group efforts into a completely new dimension.²² Whatever analog predecessors there may have been, they offer only a dim comparison to the instantaneous, far-flung, and comprehensive aggregations that the Internet and digital technology make possible.

The enthusiasts certainly have a good argument here. Bands of “amateurs” contributing small amounts of creative work to constitute an impressive single work were not pioneered in the digital era, but they are certainly much more common now. So, for example, the individual instances of word usage contributed by the many amateur lexicographers who worked on the first edition of the Oxford English Dictionary (OED) added up to a magnificent whole, but this was long thought remarkable, and very rare, if not *sui generis*.²³ And “collaborative entertainments,” from spontaneous musical jam sessions to role playing games such as Dungeons and Dragons, while they did exist, were sufficiently unusual that they could be dismissed as out of the mainstream. Today, however, there are now thousands of “little OEDs” and other collaborative communities online. This surely marks a major departure of degree, if not of kind.

There is no disputing that instances of collective creativity are now much more common. What I object to, however, is the idea that collective works will and should systematically replace individual works in the digital era. And, as a consequence of the continuing importance of individual creativity, I argue that property rights still make sense as a legal and social institution. More importantly, I argue that continuing to grant and enforce property rights does not threaten the viability of collective creativity, but that seriously *curtailing* property rights so as to further promote collective creativity *would* significantly undermine the conditions for individual creativity. I return to these themes in Section IV below, “Updating Property.”

22. See *id.* at 212–13 (detailing effects of the “capacity of individuals, acting alone or with others, to be active participants in the public sphere as opposed to its passive readers, listeners, or viewers”).

23. See SIMON WINCHESTER, *THE MEANING OF EVERYTHING: THE STORY OF THE OXFORD ENGLISH DICTIONARY* 44–45 (2003) (describing the OED as “a descriptive creation from all men; it would reflect the people’s words and the people’s uses of them, and so be in yet more ways unlike any other dictionary ever made”).

III. CREATIVE PROFESSIONALS AND LEGAL INFRASTRUCTURE

The DD and CC perspectives have a decidedly negative attitude, overall, about the large entities that amalgamate huge numbers of IP-protected works. Walt Disney, large record labels, movie studios, and their counterparts are frequent targets.²⁴ The prevailing view is that these companies are old, entrenched, and for-profit, and therefore decidedly not on the side of individual creative types; while wikis, fan sites, open source projects, and other collaborative organizations are the opposite: new, fresh, not-for-profit, unencumbered by old ways of doing things, and much more reflective of and responsive to the individuals who comprise them. The contrast comes down to this: faceless, metallic corporations versus vibrant, organic communities.

Big companies, like most big organizations, are easy to pick on. And there is surely at least some truth to the idea that movie studios often churn out “formulaic” movies, and that big record labels produce a lot of “pop bubblegum.” On the other hand, it is also crucial to remember that these big media companies employ thousands of people who have dedicated their careers to the delivery of highly creative mass-market works—movies, records, TV shows, graphic art, and the like. There are thousands of amateur filmmakers who post films to websites such as YouTube, but the major movie studios actually *employ* 270,000 people.²⁵ These people—who I call “creative professionals”—make substantial salaries by contributing to valuable and popular creative works. They make a living through their creativity. From the perspective of IP policy, this group is absolutely crucial. The ability to make a real living from creative works is what IP is all about. It is what ensures a steady supply of high-quality creative works to consumers—the real purpose of IP law. And it therefore cannot be irrelevant that so many creative professionals are employed by large media companies. Policies that favor YouTube contributors at the expense of big media companies must, in my view, account for the negative impact on this essential group of people.

24. See, e.g., SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 148 (2001) (“Ethnocentric notions of creativity and a maldistribution of political power in favor of established artists and media companies have already served to stifle expression—the exact opposite of the declared purpose of copyright law.”).

25. U.S. INT’L TRADE COMM’N, THE MIGRATION OF U.S. FILM AND TELEVISION PRODUCTION: IMPACT OF RUNAWAYS ON WORKERS AND SMALL BUSINESSES IN THE U.S. FILM INDUSTRY 15 (2001), available at <http://www.ita.doc.gov/media/filmreport.html>.

Even if we assume away the contributions of creative professionals in large media companies, we still might want to pause before crafting IP policies that harm them. This is because the health and welfare of large companies affect individual creators and small companies in many significant ways. Large media companies, for example, are often incubators of independent professionals and small companies.²⁶ Many creative designers of large theme parks, world's fairs, and the like, got their start at Walt Disney,²⁷ as did several small players in the animation field, such as Miracle Studios, made up of people who want to preserve the hand-drawn animation tradition of the older Disney movies.²⁸ Even when small creative companies are established independently from the beginning, they often make deals with large media companies to distribute or market creative content. Pixar's arrangement with Disney followed this model (until Disney acquired Pixar in 2006), and independent record producers have made such deals with the large, established record labels for many years.²⁹ In these ways and many others, large, established companies provide resources and give assistance to creative people and small companies. They are, to use some business school jargon, an integral part of the "ecosystem" of the entertainment industry. Damage them, and it will surely affect small and independent creators as well.

Why all this emphasis on the importance of creative professionals and the necessity for large companies to support them? Because those who argue that IP should be downplayed—because it is harmful or irrelevant in the digital era—frequently put forth a kind of three-part syllogism to defend their views:

26. See Thomas Hellmann, *When Do Employees Become Entrepreneurs?*, 53 *MGMT. SCI.* 919, 919 (2007) (citing sources indicating that 70% of all entrepreneurs come from established firms where they receive training and inspiration for new ideas).

27. See JOHN HANNIGAN, *FANTASY CITY: PLEASURE AND PROFIT IN THE POSTMODERN METROPOLIS* 125 (1998) (listing former Disney employees who have proceeded to design major entertainment centers).

28. See Dalya Alberge, *Now Even Disney Goes Digital to Put Drawing Out of the Picture*, *TIMESONLINE*, July 21, 2006, http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/article690659.ece; Eddie Pittman Home Page, <http://eddiepittman.com> (last visited Oct. 13, 2008) (website of freelance animator Eddie Pittman, former Walt Disney employee). For more information on the dynamics of spinoffs in another industry, see Steven Klepper & Sally Sleeper, *Entry by Spinoffs*, 51 *MGMT. SCI.* 1291, 1291 (2005) (discussing a detailed study of numerous spinoffs in the precision laser industry).

29. M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 35 (10th ed. 2007) ("Independent producers with particularly desirable artists under contract may be able to negotiate a *label deal* with a major record label. A label deal may provide that records will be released under the trade name and label of the producer. Producers claim that a label deal helps them attract artists to their fold.").

(1) IP policy is made by big media companies, for big companies, with little or no concern for individual creators; (2) big media companies are bloated and outdated dinosaurs whose fight to preserve a dying economic way of life—in part, by means of ever-stronger IP rights—is both pathetic and dangerous; and (3) policies that truly favor individual creators must necessarily oppose the interests of large media companies, in part by reducing the emphasis on IP rights.³⁰ An overstated simplification might be: in the digital era, if it hurts Disney, it's good for the little guy.

To break apart the logic of this syllogism, I have tried to argue in this Section that big media companies are not the sworn enemy of all those who contribute to creative works. They are not even necessarily the enemy of “little guy” creators—individuals and small groups working outside the confines of big media.³¹ My ultimate goal, as I said in the Introduction, is to defend the idea of property rights in the digital era. To do so, I have felt it necessary to justify a continuing place in the creative landscape for one of the key interest groups pushing for the maintenance of IP protection—to, in a sense, defend the defenders of property rights. I have argued not that Disney and its ilk are the greatest thing that ever happened to animators, writers, and musicians, but simply that these big companies provide gainful employment to a lot of people who do these things for a living—a nontrivial consideration in an area of policy which has as one of its goals to keep providing such a living to such people. My next task is to turn away from questions of industry structure and address more directly the central issue I see in digital IP policy today: making a case for a legal infrastructure that best facilitates the economic viability of creative professionals. As is obvious by now, I see a continuing commitment to individual property rights as a key

30. See, e.g., Benjamin Coriat & Fabienne Orsi, *Establishing a New Intellectual Property Right Regime in the United States: Origins, Content and Problems*, 31 RES. POL'Y 1491, 1502–03 (2002) (discussing how the current IP regime in the software industry generally favors incumbent firms); BRIAN MARTIN, INFORMATION LIBERATION: CHALLENGING THE CORRUPTIONS OF INFORMATION POWER 50 (1998) (“Intellectual property is supported by many powerful groups: the most powerful governments and the largest corporations.”).

31. It should be noted here that based on one view of things, greater diversity of creative content actually *increases* the rewards to big media companies. The idea is that, in a crowded market where production and distribution costs are low (i.e., today's era of digital production and Internet distribution), the returns for “premium content” made and sold by big media actually increase. Paul Seabright & Helen Weeds, *Competition and Market Power in Broadcasting: Where Are the Rents?*, in THE ECONOMIC REGULATION OF BROADCASTING MARKETS: EVOLVING TECHNOLOGY AND THE CHALLENGES FOR POLICY 47, 59 (Paul Seabright & Jürgen von Hagen eds., 2007), available at http://privatewww.essex.ac.uk/~hfweeds/SeabrightWeeds_paper.pdf.

part of that infrastructure. This has the effect of privileging one subset of creators, a policy I defend just below.³² Before I get to that part of my argument, however, I want to take a slight historical detour. My goal is to show the sterling provenance of an American economic policy friendly to small producers, and the property rights they need to be viable while remaining small. So we turn to Thomas Jefferson.

A. *Some History: A Pro-Property Jefferson*

Almost innumerable commentators invoke Thomas Jefferson as the patron saint of limited IP protection and of the public domain more generally. Many scholars cite a passage from one of Thomas Jefferson's letters in which he describes the animated way ideas jump from one mind to another—the famous “idea = candle” analogy.³³ This quote, in the context of general

32. As I explain later, by “privileging” I mean helping or assisting. Property rights in the digital era are more useful and more profitable to those who make and sell high-quality content and who have the wherewithal to enforce their rights. I do not mean to imply that low-value content does not or ought not to qualify for property rights; it often does. Nor am I arguing that IP policy ought to go out of its way to create disproportionate harm to the creators of low-quality content. My proposals for easier ways to dedicate IP-protected content to the public, to promote sharing—which I lump under the rubric of a “right to include”—push in just the opposite direction: toward an even-handed treatment of sharing, or collective-creativity-based models, and proprietary high-quality content models. My point is simply that, when we look at the “law in action,” the fact is that robust IP rights help or assist individual proprietors of high-quality content more than others. This is all I mean by “privileging.”

33. See, e.g., LESSIG, *supra* note 12, at 182 (quoting Letter from Thomas Jefferson to Isaac MacPherson (Aug. 13, 1813), reprinted in 6 WRITINGS OF THOMAS JEFFERSON, 1790–1826, at 180–81 (H.A. Washington ed., 1854)).

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.

How can you argue with Thomas Jefferson, especially when he has identified those who oppose him as the enemies of progress, people who resist the literal process of enlightenment? The only answer is to accept his argument as far as it goes, but to resist the idea that exclusive appropriation is not at all inconsistent with the spread of ideas. For a stimulating essay that does just that, see R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1033

understandings of Jefferson's generous attitude toward individual liberty, has helped create the image of Jefferson as a staunch partisan for the supremacy of pro-dissemination values in IP (especially copyright) policy.³⁴ And up to a point, this popular reading of Jefferson's views is surely accurate.³⁵ He grudgingly accepted the role of IP rights in the early republic, always on guard that they be prevented from becoming powerful chips that a centralized government could use to reinforce privilege and hierarchy.³⁶

Yet I think this focus on Jefferson's comments about IP rights—and this invocation of Jefferson generally—omits some important context.³⁷ While it is true that Jefferson strongly favored “the little guy,” in my opinion, recent commentators have skipped over an important fact. Those who cite and quote Jefferson combine this “pro-little guy” view with some of Jefferson's scattered and skeptical comments on IP rights to

(2003) (“[A]dditional control may in fact increase the production of open information rather than reduce it.”).

34. See, e.g., VAIDHYANATHAN, *supra* note 24, at 23 (citing Jefferson's objections to state-granted monopolies); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 477 & n.305 (2007) (citing a popular article that discusses Jefferson's minimalist views on copyright); see also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 55–56 (urging revival of “anti-monopolistic” tradition of “free-trade skepticism about intellectual property” in eighteenth and nineteenth century, which stressed overbroad monopolies' censorious “control over our collective culture” and concomitant “harm to the fabric of the republic caused by great concentrations of wealth and power,” as represented by James Madison, Thomas Jefferson, Thomas Babington Macaulay, and Adam Smith).

35. For an insightful—indeed delightful—account of current IP policy debates between “neo-Jeffersonians” and “neo-Hamiltonians,” see the article by my colleague Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the “Digital Millennium,”* 89 MINN. L. REV. 1318, 1319–20 (2005). Farber describes the pro-public domain commentators as following the Jeffersonian tradition, saying:

[They] look to a decentralized future—in which the Internet and other digital technologies will place public discourse and economic innovation in the people's hands. More specifically, the people take the form of Linux users, Internet start-ups, computer hackers, public librarians, music-file swappers, and public school teachers who seek the fair use of copyrighted materials—the modern-day equivalent of Jefferson's yeoman farmers.

Id. at 1319.

36. For a summary—as well as a critique—of scholarship relying on Jefferson for an understanding of early U.S. patent policy, see Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 953–54 (2007) (“[The Article] exposes the nearly universal misuse of history by lawyers and scholars who rely on Jefferson as an undisputed historical authority to critique expansive intellectual property protections today.”).

37. See Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1026–34 (2006) (analyzing Jefferson's writings as a whole to dispel the notion that Jefferson was against IP rights).

2008] *CONCEPT OF PROPERTY IN DIGITAL AGE* 1255

arrive at what seems to them an obvious conclusion: Jefferson would be strongly anti-IP if he were around today, or at least, his writings strongly support those who now take this position.

I think there is something to this, surely. Yet I wonder: is it really irrelevant to the current debate that for Jefferson, one important bulwark against unhealthy centralization of power was to be *property rights*? Is it really so obvious that the contemporary analogue of Jefferson's virtuous yeoman farmer is the file-sharing music lover, the active contributor to open source projects, the avid defender of the public domain and critic of IP rights? Are there any counterindications in his writings— suggestions that maybe his views might lend some sympathy to the pro-IP side of the current debate?

I think so. Consider these comments by Jefferson on the proper distribution of property, from a letter to James Madison:³⁸

I am conscious that an equal division [i.e., distribution] of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind.³⁹

Jefferson expressed consistent support for the idea of "subdividing" (not eliminating) property; it was of a piece with his general approach to property rights. According to legal historian Gregory Alexander:

[Jefferson] proposed equal distribution when the state is compelled to distribute land and when land is inherited, but protection of existing property rights against governmental redistribution. This accommodationist strategy underlay, for example, his well-known reforms of Virginia inheritance law, including the abolition of primogeniture in favor of partible inheritance and the abolition of entail. The strategy was for the state to take advantage of the abundance of uncultivated land in the American West and insure that every able-bodied citizen be given a relatively small parcel of land. *Cultivating this land would make the*

38. See also Letter from John Adams to James Sullivan (May 26, 1776), reprinted in *FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY* 81, 82 (John J. Patrick ed., 1995) ("The only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of land into small quantities, so that the multitude may be possessed of landed estates.").

39. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), reprinted in *8 THE PAPERS OF THOMAS JEFFERSON* 681, 682 (Julian P. Boyd ed., 1953).

*citizen self-sustaining and independent, and the state would then protect the personal autonomy secured through ownership.*⁴⁰

Unlike some of Jefferson's ideas,⁴¹ there was much practical merit in this notion that property ownership is an anchor of personal autonomy. The early land developer William Cooper noted how much it improved an impoverished person's spirits to move from being an indebted lessee to the more secure status of owner in fee simple. "His spirit is enlivened," Cooper wrote, by the thought of leaving property to future generations, the right to sell at an appreciated price reflecting labor expended on making improvements, and the knowledge that "he [is not] bound to remain against his will."⁴² The benefits of property ownership as a spur to greater autonomy come through loud and clear.

The early American experience fits into a long philosophical tradition that equates property ownership with enhanced autonomy. From as early as Aristotle, through Kant and Hegel, up to Hannah Arendt and Jeremy Waldron, many have noted how individual property rights create a zone of autonomous action that both protects people from various collective pressures and encourages them to invest effort and express aspects of themselves in the larger world. Waldron summarizes the argument this way:

[F]reedom of choice in the economic sphere and free trade are often regarded as areas of freedom that are of extraordinary importance. One's choices here (how to manage one's land, whether to sell an asset now or later, how to decorate one's front door) concern an area of decision which is of more than mundane concern. Since our material environment is as important to the conduct of our lives as our political environment—we are, after all, embodied beings—free control of and freedom to manipulate and rearrange elements of that environment are as important to the human individual as, say, the traditional political freedoms.⁴³

40. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 34 (1997) (second emphasis added) (footnotes omitted).

41. For example, his holding of many slaves and persistent postponement of abolitionist policies. See RON CHERNOW, *ALEXANDER HAMILTON* 212 (2004). Jefferson's chief rival, Alexander Hamilton, was by contrast a noted abolitionist. *Id.* at 211–12.

42. ALAN TAYLOR, *WILLIAM COOPER'S TOWN: POWER AND PERSUASION ON THE FRONTIER OF THE EARLY AMERICAN REPUBLIC* 99 (1995) (quoting WILLIAM COOPER, *A GUIDE IN THE WILDERNESS* 11 (6th prt. 1986) (1810)).

43. WALDRON, *supra* note 17, at 294–95.

In many ways, as Alexander suggests in the passage quoted earlier, Jefferson's "yeoman farmer" fits comfortably within this tradition.

The relevant question now is this: in the context of today's IP debates, what policy is equivalent to the promotion of the yeoman farmer class? Is it, as the IP literature would mostly have it, a restrictive IP policy, and a headlong commitment to maximizing the public domain; or is it some updated version of granting and defending at least some property rights, especially in a "subdivided" form that will wind up in the hands of many individuals and "small players" in the economy?

I think this is a closer question than most IP scholars have admitted to date. Without doubt, many IP rights wind up in the hands of large commercial firms—a result I would admit Jefferson might well find offensive. But IP law has also been known to help the "little guy" in many cases. The entire continental tradition is often said to reflect this "pro-author" bias, and some U.S. scholars, steeped in the continental tradition, see strains of the same thinking in U.S. IP law. In any event, as a normative matter, there is certainly room in IP policy for such a middle ground, between the restrictive IP school of thought and those who would defend IP only insofar as it promotes the interests of large, vertically integrated companies. There could be room, in other words, for this: a variant of neo-Jeffersonian IP policy that both defends property rights and remains suspicious of very large IP-holding entities and their concentrated economic power.

In the end, it is not that other commentators are *wrong* about Jefferson. He surely did recognize what so many now call the "public good" nature of ideas—that I can share an idea with you, and be no worse off myself, while you learn something new. My point is that emphasizing this to the exclusion of Jefferson's ideas generally, including those on property and autonomy, is incomplete. Especially with respect to those assets a person needs to remain independent, to thrive as an autonomous individual rather than rely on a larger economic structure for survival, Jefferson was in fact a big supporter of property rights. While his writings were specific to the economic conditions of his time—and therefore of course deficient in specific, clear-cut guidance for today's very different situation—they do provide at least some support for the notion that we ought still to promote small scale, widespread property holdings.⁴⁴ It is possible, in my

44. Might there be room, too, for the idea that property rights may provide a

mind at least, to transpose Jefferson's ideas into the current era. When we do, we see that there is at least some room for a "Jeffersonian" case in favor of IP rights that favor new entrants and other "little guys."⁴⁵

B. *Privileging Certain Forms of Creative Expression*

Recognizing a special class of "creative professionals" raises a number of problems. I will discuss two, one broadly ethical and one more pragmatic. The first is, what justification is there to privilege the contributions of one group over those of another? I will emphasize here especially the claims of "remixers"—people who express their creativity by modifying original works and mixing multiple original works together to create something new and distinctive. The second issue is, why we as a society should take special efforts to protect creative professionals from the sweeping changes wrought by new technologies. If vacuum tube

bulwark against the collective pressures of the "free culture" movement—that they are valuable insofar as they permit an individual to opt out of a system of semi-coerced sharing if he or she does not care to join or have his or her work product joined to it? This more "libertarian" reading of Jefferson fits into a very old tradition in American property law, one which finds support in much contemporary theorizing about property rights. This is the tradition of individual property rights as a bulwark against government (or, more generally, collective) power and pressure. To put it perhaps a bit dramatically: Is there any need, or even room, for the independent "freeholder," the individual property owner, who wants to opt out of, or even push back against, digital culture? Cyber-enthusiasts align themselves against large structures—Disney, Microsoft, governments, etc.—but perhaps fail to see that they now comprise a large and formidable structure themselves, one which some individuals might choose to dissent from. Property rights could help facilitate this dissent, whose motto might be "For me to be free, my information is not free."

45. Of course, Jefferson is not the only member of the founding generation who had strong and still-valuable ideas about the organization of the American economy. Another significant figure from that generation, Alexander Hamilton, had very different views, and it is interesting to contemplate how they might apply to contemporary IP policy. Hamilton was famously in favor of a stronger central government in service of a more "commercial" (versus Jefferson's "agrarian") economy—one based on industrial production, robust trade, and sophisticated financial institutions. *See, e.g.*, CHERNOW, *supra* note 41, at 374–77 (describing Hamilton's classic *Report on Manufactures*, which encapsulated his vision of the many ways that the federal government could invigorate economic activity). Given the current composition of the U.S. economy, it is arguable that, despite the conventions of Jeffersonian hagiography, we live in a thoroughly "Hamiltonian" world. On this view, the mixed pattern of IP ownership in many U.S. industries—i.e., large IP "aggregators" (movie studios, record labels, Yahoo, etc.) interspersed with small and medium-sized companies stemming in part from new entry—indicates a well-functioning economic system. Individual reward in such a "Hamiltonian" economy comes about through large-scale commercial structures, and government's role is to regulate and monitor these on the assumption that when working well they promote individual gain and societal progress. This is in contrast to the Jeffersonian view, which is suspicious of all large structures, and which makes it the government's business to break up these structures in favor of more dispersed individual activity. IP policy in our era, I would argue, is an interesting mix of these two strains of economic thought.

makers, telegraphers, horse drivers, telephone operators, and travel agents can be squeezed out of jobs by new technologies, why not writers, musicians, and artists? What, in other words, is so special about this class of people that we should take special care that their means of economic livelihood be preserved?

Remixers and mashup artists do not just passively consume digital creations; they integrate preexisting works into new creative works. These people present a more difficult case than the “mere user”: they want to treat the digital creation as a starting point for a larger work on which they want to impress their own will. If the law recognizes creativity as an important goal, why should the claims of these remixers be treated with less respect than those of the “original” creator?

The answer, I think, is indicated by the language often used in these discussions. The original creation is said to be an “input” for the remixer. My response: if a creative professional does not want his or her work to be treated as an input, or wants to exercise control over when and how this happens, the law should in general protect that preference. If someone potentially objects to having their original work, a vehicle of self-expression, characterized as a commodity to be thrown into the remixing assembly process (like so much creative slurry), they ought to have the right to insist on permission. To put it as bluntly as possible, the claims of remixers do not usually have the same weight as those of original creators, because they stand in a very different relationship to the original creators’ work(s).⁴⁶ The law may enforce the creators’ property claim here because that claim *is* more deserving of recognition.

At this point in the discussion, IP critics usually enter with the argument that creative work has always involved borrowing. This leads sometimes to the charge that powerful, entrenched interests manipulate the (fundamentally amorphous) concept of “originality” to serve their own ends,⁴⁷ and sometimes to the more

46. I am bracketing here (1) cases where the original creation serves a truly unique cultural role, entitling others to make use of it, which I think will be very rare; (2) cases where the remixer is making fun of the original work; and (3) cases where the original creation is essential for the remixer to make a political or social statement. In other words, put aside First Amendment issues. It should be clear that I do not define legitimate First Amendment issues nearly as broadly as some recent commentators, who would have the First Amendment swallow large chunks of IP law, at least in the digital domain. See, e.g., NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008). For a statement of views on this issue much closer to mine, see David McGowan, *Paradoxically Speaking* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 08-077, 2008), available at <http://ssrn.com/abstract=1266835> (reviewing NETANEL, *supra*).

47. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY, at x (1996) (arguing against the conferral

benign argument that the law ought to get up to date and recognize the coequal contributions of remixers.⁴⁸

In this matter, I have to agree with copyright scholar Doris Estelle Long, who comments on the argument that “creative people have always borrowed” by pointing to the difference between Shakespeare, Michelangelo, and some instances of “remix culture”:

[F]ew would dispute that the works which both Michelangelo and Shakespeare created ultimately enriched the public domain, laying down truly new works that have in turn inspired subsequent artists. Today, in light of the advances in reproductive technology, inspirational reproduction is push button easy and in many instances does not require the training or skill demonstrated by earlier reproductive works. I do not mean to suggest that works created using such reproductive technologies lack creativity or are unworthy of protection. I merely suggest that the level of reproduction allowed through such digital technologies has radically altered the nature of inspirational reproduction, requiring a renewed examination of the purpose and impact of copyright protection in the Digital Age.⁴⁹

In other words: yes, remixers are original. But some works are more original than others. And yes, “originality” here *is* a socially constructed term. But we as a society have so constructed it to reflect what we value. Originality which draws on ideas, rather than fixed and final creations, is to be privileged over originality that mixes together preexisting final works.⁵⁰

of property rights to the “romantic author, those whose contributions to information production are most easily seen as original and transformative”).

48. See, e.g., Remix Theory Home Page, <http://remixtheory.net/> (last visited Oct. 13, 2008) (online resource designed to “host, archive, and promote projects which explore the current possibilities of Remix”); see also LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

49. Doris Estelle Long, *Dissonant Harmonization: Limitations on “Cash n’ Carry” Creativity*, 70 ALB. L. REV. 1163, 1169 n.20 (2007).

50. Important note: remixing is fun, and people like to do it a lot. So there are good reasons for people to share their own original creations with each other, and there is also an excellent business in providing *free* inputs for people who want to remix things. As I argue later, this is one of the great advantages of property rights: you can easily waive them if you want to, and many in the remix community will want to. See Robert P. Merges, *Locke Remixed ; -*), 40 U.C. DAVIS L. REV. 1259, 1262 (2007) (“[H]uge truckloads of IP rights are voluntarily waived every day by those who hold them.”). This means that property rights will apply only to people who want them. Similar points can be found in Lawrence Lessig’s latest book, which talks about the emergence of “hybrid economies,” those that involve a mixture of commercial exploitation and sharing. In this, his position and mine are fairly close, though we begin perhaps at divergent starting points. See LESSIG, *supra* note 48.

This discussion of originality leads us to a related topic. One common theme in recent writings on copyright is that most authors are primarily motivated by intrinsic rewards.⁵¹ This leads many an observer to conclude that the “incentive story” for IP protection is untrue with respect to many artists, and therefore that a major prop under the current IP system has been removed.⁵² The conventional response to this sort of argument is to either cite some general statements on the importance of incentives to particular artists or creators, or to cite some aggregate empirical studies showing a macro-level correlation between rewards and creative output.⁵³

I would like to try something different. I am going to argue that there is more to the incentive story than a simple “binary” effect—incentives do/do not cause creators to produce new works. Incentives may well have more to do with the *quality* of creative works that are produced, rather than whether a certain person

51. The original distinction was described by economist Bruno Frey as “Institutional Creativity” versus “Personal Creativity.” BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* 137–39 (2000) (describing institutional creativity as “creativity produced by adequate institutional conditions,” particularly the price system; personal creativity, by contrast, is “based on the intrinsic motivation to be artistically innovative given the institutional conditions”). The Internet may be changing industry structure for artists, ameliorating an age-old problem that industry structure (oligopolistic) traditionally has diluted the individual incentive effects of IP for the artist. *See* RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 35–36 (1996); Joelle Farchy & Heritiana Ranaivoson, *DRMs and Competition: The Consequences on Cultural Diversity for the Case of the Online Music Market*, SOC’Y FOR ECON. RES. ON COPYRIGHT ISSUES (2005), www.serci.org/documents.html (follow “2005” hyperlink; then follow “Title: DRM and Competition: The Consequences on Cultural Diversity for the Case of the Online Music Market” hyperlink) (claiming that the advent of Digital Rights Management systems makes it possible to exclude violations of and thus protect IP rights).

52. *See e.g.*, BRUNO S. FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* 20 (1997) (arguing that artists are primarily intrinsically motivated, and sometimes an increase in extrinsic motivations such as compensation actually can reduce performance (known as the “Crowding-Out Effect”).

53. David Throsby has provided some evidence that artists do work partly for the money and that their labor supply responds positively to financial rewards, though intrinsic motivation and preference for arts work is strong. *See* DAVID THROSBY, *ECONOMICS AND CULTURE* 162 (2001) (“[E]conomic concerns impinge on the otherwise pure creative process, modifying and directing it in ways that may not always seem to the artist to be ideal.”); *see also* Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 *J. ECON. SURVS.* 567, 578 (2006) (describing the well-known “winner-takes-all” aspects of the art labor market); Ruth Towse, *Partly for the Money: Rewards and Incentives to Artists*, 54 *KYKLOS* 473, 475 (2001) (“[C]opyright law plays an important role in the balancing act as it represents both intrinsic and extrinsic incentives; this explains the peculiar adherence that artists have for the institution (copyright law) that yields little financial return to creators but a great deal to those who exploit their rights commercially . . .”).

will produce at all, or even necessarily the total quantity of works produced.

There is very little solid evidence on these matters; indeed, when writing about it, one faces difficulty in avoiding a “battle of anecdotes.” So for example, authors often cite biographies of artists, or even their own experience, in support of the intrinsic motivation thesis.⁵⁴ And on the other side, hard-headed economists and those supportive of robust IP protection cite their own counterexamples.⁵⁵ With the issue stated in these terms, there can be little satisfactory resolution.

But with a slight reframing of the issue, we can make some headway on the question of extrinsic incentives versus intrinsic motivation. The problem with the conventional statement of the issue is that it is put so starkly. Artists who cite their intrinsic motivation may be saying only that yes, no matter what the reward structure they were faced with, they would create their art. The alternative, answering “no” to the question, “Would you create even in the absence of IP protection?”, requires people to negate a very large aspect of their identity. And it is true to our experience that “art will out,” somehow. Some writers kept writing in World War II concentration camps, and artists of all kinds find ways to express themselves in prisons, in poverty, and in the absence of any kind of support or encouragement, as with many artists in the former Soviet Union. So there cannot be much doubt that, yes, many artists are indeed driven by a strong intrinsic motivation. Some at least will find a way.

So even if it is worthless to ask whether some artists will create in the absence of extrinsic rewards, we can ask a more refined set of questions. And with these, we may gain better traction on the real issues at stake in the debate over IP protection for works in the digital era, and the role that property rights might play. How *much time* will a creative person be able to put into his or her work; and, can an artist work full-time, so as to grow to full maturity and become in a true sense a creative *professional*? Will an artist’s work be carefully and meticulously edited, refined, and presented to the audience, so as to bring out its full potential and place it in the best light possible? To put it simply, what conditions will surround and shape the work of a

54. See, e.g., Henry H. Perritt, Jr., *Flanking the DRM Maginot Line Against New Music Markets*, 16 MICH. ST. J. INT’L L. 113, 145 (2007) (describing intrinsic motivation of two creative people known to an author).

55. See, e.g., F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES 179–80 (2004) (describing a composer, Giuseppe Verdi, who gained greater control over his career through copyright protection).

creative person, and will those conditions allow the creator to fully flourish—to create works of the highest quality they are capable of?⁵⁶

a. Some Historical Evidence. At the theoretical level, there is a clear relationship between stronger, clearer IP rights and the viability of full-time creative work as a profession. IP, like all property, is really all about the making of markets: rights are granted over a thing so everyone who might want to use that thing knows whom to contact and whom to pay for its use. Without a property right on the thing one produces, there is no *direct* market for that thing. There may be other ways to get paid for making it—as an employee, for example, contributing something to a larger product but paid only for the labor spent in the process. But often, only if some form of property right covers what one makes can one confidently sell one's output on a mass market to a large number of strangers.⁵⁷

This basic logic played an important part in the growth of the market for musical compositions and, hence, in the emergence of composing as a viable professional option. This then serves as an interesting historical case study for our purposes; it illustrates how the property rights infrastructure affected the conditions surrounding the creation of musical works.

It is no coincidence that the professional composer, one who is supported at least partially by income apart from the traditional patronage system, came of age at the same time the

56. See JAMES HEILBRUN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 335 (2d ed. 2001) (“Second jobs [for artists] are a doubled-edged sword: They enable artists to attain a higher standard of living, but they inhibit investment in artistic human capital by reducing practice, class, studio, and rehearsal time.”).

57. See generally Ashish Arora & Robert P. Merges, *Specialized Supply Firms, Property Rights, and Firm Boundaries*, 13 *INDUS. & CORP. CHANGE* 451 (2004) (explaining that IP rights can promote efficiency and technological innovation in specialized firms); Robert P. Merges, *A Transactional View of Property Rights*, 20 *BERKELEY TECH. L.J.* 1477 (2005) (describing how property rights promote transactions). As Neil Netanel has noted, there is a tension between this emphasis on specialization and the standard economic argument that unified property rights—putting fewer, larger rights in individual hands—saves on transaction costs. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 317–19 (1996). The tradeoff is this: unified ownership lowers transaction costs, but more finely divided property rights may in some cases encourage specialization—itsself a positive force in any economy. *Id.* Netanel explained the following:

Like the other neoclassicist principles, the single owner paradigm is not absolute. Among other things, it is in tension with the notion of specialization, the idea that efficiency is best served when each resource attribute is transferred to the person who can best exploit it. But at least as a starting point, single ownership remains the neoclassicist ideal.

Id. at 317–18 (footnote omitted). The solution is to take transaction costs into account in granting rights and in regulating post-grant behavior.

copyright system was explicitly recognizing the rights of composers. For example, a celebrated eighteenth century British case involved John Christian Bach (son of Johann Sebastian).⁵⁸ In this case challenging the rights of composers to claim copyright in their written music, the renowned jurist Lord Chief Justice Edwin Mansfield ruled in favor of Bach after hearing oral argument from Bach's attorney:⁵⁹

The words of the Act of Parliament are very large: "books and other writings." It is not confined to language or letters. Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. . . . "Having heard counsel and considered this case, we are of opinion, that a musical composition is a writing within the Statute of the 8th of Queen Anne"⁶⁰

This expansion in the rights of composers was not limited to Great Britain. Throughout Europe, courts and legislators in the nineteenth century came to grant copyrights for musical compositions.⁶¹ Scholars have tried to answer two questions. First, what were the effects of these legal changes? Second, was professional composing a more viable, more rewarding career after these changes took effect?

The economist F.M. Scherer has gone the farthest to answer these questions. Scherer's statistical analysis tries to estimate the effect of stronger copyright protection on the career choices of Europeans in the eighteenth and nineteenth centuries.⁶² His findings are best described as mixed. On a strictly quantitative basis, he concludes that it is impossible to demonstrate that increased copyright protection definitively increased the number of composer/songwriters in Europe during the period under study.⁶³ At first glance, this strikes a blow against the idea that copyright protection matters for composers of music—that it is an important factor in making composing/songwriting a viable career choice. Before accepting this, however, two pertinent points must be noted. First, despite the importance of copyright during this period, composer/songwriters still usually made at

58. *Bach v. Longman*, (1777) 98 Eng. Rep. 1274 (K.B.).

59. *Id.* at 1274–75.

60. *Id.*

61. *See* SCHERER, *supra* note 55, at 175–78 (attributing this expansion of rights to "the spirit of revolution").

62. *Id.* at 194–96.

63. *Id.* at 196.

least part of their income from noncopyright related sources.⁶⁴ This means that the marginal effect of increased copyright protection may not have been significant enough to persuade more people into careers as full-time composers. This does not mean that copyright was irrelevant, however. As the case of Verdi shows, copyright allowed at least some composers greater control over their professional lives.⁶⁵ So the relevant issue may not be whether people chose to become composers; those with talent may have seen that it was possible to make a living at it even when copyright was weak or nonexistent. It may instead be what *mix* of activities professional composers chose to undertake. All the qualitative evidence here points to an important conclusion, which comprises Scherer's second main contribution.

Scherer shows convincingly that the strengthening of copyright gave composers greater control over what kinds of works they could compose while enabling them to make a living as professional composers. Consider for example the case of Giuseppe Verdi, the great opera composer. According to Scherer,

Obtaining substantial revenues from score sales and performance fees, Verdi observed that he no longer needed to be a "galley slave" and to compose at a frantic pace. Between 1840 and 1849 (he was thirty-six years old in 1849), Verdi composed 14 operas. During the 1850s [when Italian copyright law was being strengthened, and Verdi

64. *See id.* at 53.

65. *See id.* at 179–80 (explaining that copyrights enabled Verdi to earn income and compose less often). As Scherer noted,

During the late 1840s Verdi and Ricordi began to levy fees for each performance. Initially a fixed fee of 400 francs (£16, or three months' earnings for a building craftsman in southern England) was asked, with a 50-percent reduction in territories lacking a copyright law. This led theater impresarios in some of the smaller towns to ignore Verdi's copyright, obtaining their scores surreptitiously, and to lobby for the repeal of Sardinia's copyright law. In an exchange of letters during 1850, Ricordi explained to Verdi the principles of what economists now call second-degree price discrimination. "It is more advantageous," he wrote, "to provide access to these scores for all theaters, adapting the price to their special means, because I obtain much more from many small theaters at the price of 300 or 250 Lire, than from ten or twelve at the price of a thousand." Ricordi proposed to Verdi that each performance fee from a provincial theater be separately negotiated in accordance with ability to pay. Verdi would then receive 30 percent of the revenue from score rentals and 40 percent of score sale revenues for the first ten years of an opera's life. The arrangement was accepted, and later Verdi's share was raised to 50 percent. To enforce it, Ricordi deployed a team of field agents to oversee the use of scores by provincial theaters and prevent theft. He also retained lawyers in the larger Italian cities to handle performance contract disputes. These transaction costs, Ricordi argued, justified his retaining a majority share of the provincial theater licensing revenues.

Id. at 179.

and his partner Ricordi were learning how to take advantage of it] he composed 7, in the 1860s he produced 2, and he wrote 1 in each of the succeeding three decades.⁶⁶

As this and other cases demonstrate, stronger IP protection did in fact give a major boost to the viability of composing as a rewarding career.

b. A Creative Elite? There is no escaping the fact that I have framed the incentive problem in a way that may be uncomfortable for some. That is because I have implied strongly that there is such a thing as a “creative professional,” that the care and feeding of this class of people is an essential—maybe *the* essential—function of the IP system, and that perhaps not everyone who wants to work creatively can attain membership in this class. Bound up with my discussion of extrinsic motivation, or the incentive effects of IP, in other words, is a sense of hierarchy, the notion of a creative elite. In short, I do believe that some creative works really do reflect higher quality than others.

This runs headlong into a broad and perhaps even dominant strain of thinking in contemporary observations of the digital world: the “democratization” of creativity at the hands of new digital technologies.⁶⁷ Many who have looked carefully at the emerging digital landscape have noted the rise of “amateurs” or laypeople—nonspecialists, people outside the traditionally anointed elite—as a major force in digital creativity.⁶⁸ My solicitude for the class of people I have called “creative professionals” would seem quite at odds with the democratization trend. I seem to be implying, in fact, that there is some kind of close connection between respect for property rights and the presence and maintenance of a concentrated elite that excludes most amateurs. Even if I am right about the effect of extrinsic motivation, one might legitimately ask, is it worth the cost? Is the maintenance of a creative professional class worth the loss of democratization, of grass-roots creativity? Do we as a society really want to pay that price?⁶⁹

66. *Id.* at 179–80. Several of Verdi’s best-known works date from this period, including *Rigoletto*, which premiered in 1851 and which “remains one of the most frequently performed operas in the international repertory.” THE NEW GROVE BOOK OF OPERAS 537 (Stanley Sadie ed., 2002).

67. ERIC VON HIPPEL, DEMOCRATIZING INNOVATION 123 (2005).

68. *See, e.g., id.* at 122 (“[U]ser firms and increasingly even individual hobbyists have access to sophisticated design tools . . . [which] enable users to design new products and services—and music and art—at a satisfyingly sophisticated level.”).

69. This is a question asked by Yochai Benkler, who says society should be very cognizant of the costs incurred when it regulates technology and passes laws—both part of the “institutional ecology” in his terminology—that hinder the free operation of digital

That at any rate is the question that I think some of the advocates of democratization would like to ask. It leaves people like me in a tough position. Stick to my guns, and argue for the exclusion of the “little guys” who contribute YouTube videos, new scenarios involving popular characters, and new characters for online computer games. Or, alternatively, embrace the value of democratization as an important force in the digital landscape, at the expense of my cherished defense of professional creatives and the property rights they rely on.

c. Does IP “Discriminate Against” Amateurs? Fortunately for me, I reject this whole approach. I believe it presents a false choice. The simple fact is this: amateur culture in all its forms and all its myriad glories can and will thrive even in the presence of strong property rights that support a creative professional class. Of course, a continued commitment to property rights will cut down on *some* amateur creativity in the digital realm.⁷⁰ But this marginal diminution in free digital culture is simply the price we have to pay to maintain the creative professional class. The cost of premium creative works, in other words, is a slight reduction in the volume of amateur works. To me, it is worth it.

Note carefully that we do not have to choose between top-flight movies or music and a plenitude of “amateur content.” We can have both. Indeed, as a quick browse through YouTube shows, we do have both. The *real* choice is between an IP policy that forces potential creative professionals to abandon their careers before they want to or take those careers in undesired directions to survive, and a policy that permits (some) talented and creative people to move, at some point, into the creative professional class. Put differently, the choice is between (1) weakening IP rights (or acquiescing in their de facto weakening), and forcing *everyone* into the permanent amateur class; and (2) maintaining a commitment to robust IP protection.⁷¹ The latter policy will necessarily keep some creative

networks, sharing norms, and the like. BENKLER, *supra* note 4, at 428–29.

70. Because of enforcement costs and voluntary decisions to waive many rights, the effect will not be nearly so severe as many IP critics fear.

71. This does not, by the way, mean that one must support *all* expansions of IP rights and oppose all public-domain enhancing policies. I am arguing only for a commitment to maintaining the economic conditions needed to nurture and support a viable class of creative professionals. Not all expansions of IP rights have that effect. The economist Ruth Towse has provided a good starting point for the kind of analysis we need. See Ruth Towse, *Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry*, 52 KYKLOS 369, 384–87 (1999) (relying on empirical data to argue that performers' rights do not necessarily increase performers' earnings or enhance creativity). Towse produces data about the additional income provided to musicians by the

people out of the top ranks. But the former policy, in my view, is worse. It will prevent anyone from ever entering that class. It will in effect destroy the entire category of “creative professional” as we have come to know it.

It is also important to note that “digitally dependent creators” are not forever barred, en masse, from the ranks of creative professionals. Indeed, some have seen the voluntary submission of “fan” works, game characters, or open source software code as elaborate ways for people to “audition” for admission to the professional ranks. In a related way, robust protection of original, creative works may push people toward creation of such works and away from creation of more straightforward digital creations. Enhancing more original creations with the imprimatur of a property right, in other words, may encourage people to push a little harder to create something that merits the label of legal originality.⁷²

IV. UPDATING—NOT ELIMINATING—PROPERTY

I have argued in this Essay for continued solicitude for creative professionals in the form of a renewed commitment to robust IP rights in the digital era. I have tried to make the case that it matters to society that this group of people be able to continue to earn a solid living in the era of widespread digital distribution of their works. This all forms a counterargument to proposals to deemphasize, narrow, or eliminate property rights in the digital realm.

Many commentators purport not to want to go so far, however. Terry Fisher and Lawrence Lessig, for example, have separately argued that the real problem in the digital era is not

advent of the performance right in Britain, but argues that the median income is not worth the transaction costs necessitated by the new right. *Id.* at 385–87. This is the right approach to the problem; the only question remaining on this particular topic is whether, over time, systems will evolve that might lower the transaction costs enough to make this right worthwhile. Continued extension of the copyright term is another example of protection that exceeds what is necessary to nurture a creative professional class.

72. See, e.g., Steven Heller, *Introduction: Authorship in the Digital Age—You’re Not Just a Designer Anymore, or Are You?*, in *THE EDUCATION OF A DESIGN ENTREPRENEUR*, at x, xii–xv (Steven Heller ed., 2002). Heller describes his experiences teaching students webpage design. Heller relates that he tries to teach students that, if they want to become good designers, they must learn how to make original content and not just assemble pre-existing components. He tells of one student who wanted to use pre-existing content to assemble a website, but ran into permission problems with owners of some of the content. In response, the student changed course: “He . . . decided to expand the parameters to include original material that he will author—a virtuous goal with inherently profound challenges that proved to be his second obstacle.” *Id.* at xii–xiii. This is just an anecdote, but the point is straightforward: there are many people like this designer.

the compensation aspect of property rights, but the fact that they confer so much *control*.⁷³ They propose to separate these two effects of property rights by legislating some sort of blanket payment scheme for all content creators. The details vary, but the schemes as proposed have a basic similarity: creators would be paid on some sort of per-use basis, but would have no say over who gets to use their works or when. They are in that sense “take now and pay later” schemes—compulsory licenses, to use IP jargon.

I have written a fair amount over the years in opposition to expansive compulsory licensing,⁷⁴ and digital technology has not changed my views much. I still think privately ordered clearinghouses, founded by and accountable to their members, existing in competition with other clearinghouses in many cases, are superior to a one-shot legislative solution. These clearinghouses start from individual property rights, but wind up being collectives that draw together a large number of rightholders into a single, one-stop “blanket licensing” organization.⁷⁵ For reasons I have described elsewhere, I think these organizations give creators the best chance to profit from their works. Therefore, I think they may have an important role

73. See WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* 202 (2004) (discussing how the government has protected producers of entertainment in the digital era’s income streams by giving them “extensive legal protection,” and also how this increased protection has “substantial drawbacks: curtailment of traditional ‘fair use’ privileges; high transaction costs; and, most important, frustration of the opportunities for semiotic democracy latent in the new technologies”); LESSIG, *supra* note 6, at 201 (“Artists deserve compensation. But their right to compensation should not translate into the industry’s right to control how innovation in a new industry should develop.”).

74. See, e.g., Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295 (1996) (counseling “against compulsory licensing as a way to reduce transaction costs”); Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 23 (UC Berkley Pub. Law & Legal Theory Research Paper Series, Working Paper No. 1266870, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266870 (arguing that compulsory licensing schemes are “excessively rigid” and “have not as of yet anyway produced a stable platform on which the music industry can base its operations”).

75. See Maralee BATTERY, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 COLUM. L. REV. 1245, 1255–57 (1983) (discussing how individual artists grant the licensing association the right to license their work and the licensing association in turn gives a “blanket license” to the users to perform or reproduce any work in their catalog). The more individual artists that grant the licensing association the right to license their work, the more valuable that association’s blanket license becomes. *Id.* at 1256. Note that the recent settlement between Google and various book publishers over the controversial Google Booksearch resource may just contain the germ of a future collective licensing operation. Whether it is wise to concentrate this potentially important transactional infrastructure in a single private firm—that’s a problem for another day.

to play in maintaining the economic infrastructure that permits creative professionals to thrive.

I have also come to see that there is a dimension to these groups that goes beyond the utilitarian case for profit maximization. It has been argued that in practice, they operate much as a government bureaucracy, so that in essence there is little to separate voluntary licensing organizations from a legislated compulsory license.⁷⁶ Even if it were true at the operational level, about which I have grave doubts, they would still be different in principle from a legislated—or coerced—organization. An individual creator *chooses* to join a voluntary clearinghouse; he or she is not forced. This is a very small point, maybe from a practical perspective, but a very large one philosophically. It means no one agrees to license works except voluntarily. And it means a persnickety individual, someone who wants *real* control, may elect to go it alone, licensing their works only in individual transactions.

Of course, it is this quality of property—you have to get permission to use it first—that causes so many problems. Lawrence Lessig, in his book *Free Culture*, laments the rise of the “permissions culture,” a direct outgrowth of the fact that IP rights are real property rights:

[In the pre-Internet era,] [t]he focus of the law was on commercial creativity. At first slightly, then quite extensively, the law protected the incentives of creators by granting them exclusive rights to their creative work, so that they could sell those exclusive rights in a commercial marketplace. This is also, of course, an important part of creativity and culture, and it has become an increasingly important part in America. But in no sense was it dominant within our tradition. It was instead just one part, a controlled part, balanced with the free.

This rough divide between the free and the controlled has now been erased. The Internet has set the stage for this erasure and, pushed by big media, the law has now affected it. For the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law, which has expanded to

76. See Kristóf Kerényi, *DRM Strategies Debate in the US: A Report from a JupiterMedia Conference*, 1 INDICARE MONITOR 29, 30 (2004), available at http://www.indicare.org/tiki-download_file.php?fileId=64 (noting how some attendants of the Digital Rights Management Strategies Conference argued that “there is no difference between voluntary and compulsory licensing from the industry’s point of view: content providers who do not agree with the terms of voluntary licensing, will get none of the collected money; so at the end of the day it is compulsory, too, if one wants to get revenue”).

draw within its control a vast amount of culture and creativity that it never reached before. The technology that preserved the balance of our history—between uses of our culture that were free and uses of our culture that were only upon permission—has been undone. The consequence is that we are less and less a free culture, more and more a permission culture.⁷⁷

The basic idea here holds that IP rights over digital creations clash violently with individual freedom in the Internet era. Of course, this is true of all property rights regimes: individual property claims always impinge on the freedom of others (*all* others, in theory, by virtue of being “good against the world”).⁷⁸ What is frustrating to critics of the permissions culture is that the burden of getting permission seems to be increasing, compared to historical standards. (Again, I would point out the frequency of voluntary waiver of rights, which is now becoming very common.) This is for two reasons: tighter IP laws and the Internet’s (at least theoretical) capacity to demand permission in more situations.

So, the crux of the problem: individual property rights versus the freedom of third parties. For my part, I resolve the problem this way. I do not think mere use of a digital creation is the type of freedom that ought to trump a claim of individual property.⁷⁹ At the same time, I recognize the burdens that are *potentially* created by stricter permission requirements in the digital era. Therefore, I recognize a serious social interest in reducing transaction costs.

What does this insistence on property get us anymore? What is the payoff from requiring all these permissions? Here is a thought: for some creators, it is more important to maintain the integrity of their work than to command a high price. Perhaps the primary reason they do the work in the first place is to express a certain aspect of themselves, or to communicate a certain feeling or idea. For these creators, control is not a distant concern that falls far down the list. It is central to their decision to create and distribute their works. It makes no sense to tell them, “Don’t worry, you will be paid no matter how your work is used.” They might respond, “That makes it worse than if I had

77. LESSIG, *supra* note 13, at 8 (footnotes omitted).

78. See Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 842 (1993) (describing the right to exclude others as the “most important thing about any property right”).

79. See Merges, *supra* note 50, at 1264–65 (arguing that remixers should not have the freedom to remix with no legal risk because content creators deserve property rights over digital content they create).

never created it. I want to shape how the work is presented—to control its presentation. That’s why I did it and put it out there, it is a big part of what motivated me.” We might say that for them, control cannot effectively be separated from compensation,⁸⁰ because control *is* compensation, or part of it anyway.

A. *Legislating a “Right to Include”*

Property rights are a good thing, but so is the public domain. How to keep the one without damaging the other? One way is to legislate a “right to include”—a binding notice on some creative work that says in effect “take it, use it, I disclaim any rights in it.”

U.S. copyright law permits people to place a notice on items sold in commerce.⁸¹ Congress should enact a parallel provision permitting items to be sold, or information to be published, with a “Copyright Waived” notice. This would permit buyers or users to rely on the public domain status of the item or information. Without such a notice, there is no assurance that IP rights will not eventually attach to the item or information. Public announcements of intent not to copyright or enforce may at most give rise to an estoppel claim by someone relying on the public domain status of the resulting data. Statutory notice would be a more robust and enforceable mechanism.

This would have the effect of codifying voluntary restrictive licenses accompanying digital content, such as the General Public License (GPL) and the various Creative Commons licenses. As a device for preempting unwanted property rights (such as derivative work rights for downstream contributors), voluntary licensing makes sense and seems to be working. There are, however, two potential problems with it. The first is that there are several forms of restrictive licenses in use, all of which differ—in some respects significantly—from each other, creating the potential for confusion. Users will have to read these contracts carefully to understand their rights. I suggest a simple alternative: The Copyright Act could be amended to provide a statutory “safe harbor” capturing at least some of the attributes

80. For this perspective, see LESSIG, *supra* note 12, at 183 (distinguishing real property from IP, and claiming that society needs an incentive to produce and protect real property, but only needs an incentive to produce IP—no need to protect or control it).

81. See 17 U.S.C. § 401(a) (2006) (“Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright . . . may be placed on publicly distributed copies from which the work can be visually perceived . . .”).

of GPL-type licenses. It would become available simply by following statutory notice provisions, such as affixing an “L in a circle” notice (for “Limited Copyright Claimed—Full Copyright Waived”). While recent initiatives such as the Creative Commons license might ultimately achieve the same effect, no private initiative will ever quite match the ability of the statute to channel copyright owners into a uniform, widely understood standard practice.

In addition, statutory notice sidesteps a second problem with licensing schemes—the issue of contractual privity. Although it may be difficult as a practical matter to strip out licensing information from digital content, it is probably not impossible. And if licensing terms were detached from a piece of content, downstream users would not be bound by them. A statutory notice provision has one key attribute which contracts cannot quite emulate: it creates a property right that is “good against the world.” Privity is unnecessary, as the restrictions on use are inherent in the content by virtue of the property right that covers it.

B. “Locke for the Masses”: Exploring Group Rights

Here is a more radical idea. One of the chief insights of the digital era is that collective efforts can lead to important creative works. Wikis and fan websites are examples; there are many others. I have rejected a number of critiques of the classic property rights story in the digital era, but in this area one such critique seems apt. Our system identifies individual authors, and is in fact designed to link individuals or small groups with the assets they create. But that system has difficulty recognizing affirmative rights in the fruits of group creativity. There are doctrines and rules that operate negatively, so to speak, preventing rightholders from reaping the fruits of group efforts.⁸² In a recent article, a co-author and I describe just such a doctrine in cases where groups of technology adopters have adopted a standard technology on the assumption that it is not covered by patents, or that any patents on it will not be enforced.⁸³ We

82. See Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 96 CAL. L. REV. (forthcoming 2008) (manuscript at 25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134000 (listing laches, estoppel, and misuse as doctrines which limit the rewards of rightholders). See also my brief “Idea” essay, Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, HOFSTRA L. REV. (forthcoming 2009).

83. See Merges & Kuhn, *supra* note 32, at 14–17 (describing the “snake-in-the-grass” and “bait and switch” strategies used by patent holders who enforce their patents after an industry is locked in to using a particular technology).

propose an estoppel doctrine in such cases to prevent a patentee from reaping the rewards of group effort.⁸⁴

What I am arguing for here is a stronger version of this: a more affirmative—and more general—way to recognize group rights. Models for such rights are starting to emerge, for example in the area of special IP rights for indigenous peoples who serve as the stewards of ancient cultural craft techniques, art styles, and the like. I think it is time to take ideas such as this and turn them more broadly on the digital era to find a way to reward group-level effort with group-level rights.

V. CONCLUSION

What am I really saying here? What does this add up to?

The central idea is fairly simple. If we award property rights, people or other entities that end up owning them can waive them if they see fit. If that is more profitable, or serves some other purpose, they can let them go. But if we make serious inroads on property rights, what then? Then we lose this flexibility. We mandate a “low protection” threshold for everyone. In the name of maximizing democratic creativity, we eliminate the possibility of choice on the part of the individual artist or assignee firm. One consequence of this, as I have suggested, is that we may also eliminate or (further) shrink the possible horizons of what I have called “creative professionals.”

The earlier discussion of digital resources was directed toward two main points. First, there is a strong element of digital determinism at work in much recent theorizing—what might almost be called a kind of “digital defeatism.” The trajectory and impetus of this major new technology is pushing us as a society away from property rights. Our best response, and maybe our only response, is to adapt ourselves to this new technology; to get used to it, to internalize it, to accept it as inevitable. The second major point is that the Internet and other digital technology has made possible a brave new world of collaborative, interactive creativity, whose logic and momentum are inconsistent with the structures of property rights. To cling to the anachronistic idea that resources ought to be controlled in many cases by individuals thwarts the promise of this new technological paradigm.

84. See *id.* at 25 (suggesting the doctrine of “standards estoppel” which combines “the triggering event of laches and estoppel (delay in filing) with the policy rationale of misuse (strategic, anticompetitive uses for which patents were not intended)”).

2008] *CONCEPT OF PROPERTY IN DIGITAL AGE* 1275

The issue may come down to this: either you believe that this wondrous new technology has so fundamentally reshaped reality that all the old bets (including bets about human nature and the importance of the individual in our thinking) are off, or you believe that the Internet, and maybe no conceivable technology, can forever put an end to the age-old dialectic of individual and collective, self and society. Perhaps we are too early in the digital era to settle this. Perhaps I, a product of the old world, the analog era, am simply too bound to my formative mentalité to clearly grasp the emergent new reality. It's certainly possible.

I don't think so, though. For me, the first alternative above—the idea that digital technology will sweep away the importance of the individual on a tide of collective interaction and creativity—has little chance of panning out. The second alternative seems much more likely. While I think digital technology is fantastic in many ways, including its ability to foster some truly innovative collective enterprises such as open source software and Wikipedia, I do not think it marks the end of human nature as we know it. And I have also read enough history to know that similarly revolutionary rhetoric surrounded the birth of other, previous technologies: the telegraph, radio, television, atomic power, and space travel, to name just a few. No, if I have to bet whether the Internet changes us as a species, or if instead we end up putting our imperfect but distinctive imprint all over this technology (as with others before it), I place my money on the latter. To me, this means that property—as durable and flexible an economic institution as any we have known—is likely to have a long and promising future, into and through the digital era, and on to whatever era lies beyond.