

## Dialogical Transactions

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\* Associate Professor, Vice Dean, Radzyner School of Law, Interdisciplinary Center Herzliya, Israel. I am grateful to Balganes Shyamkrishna, Rosemary Coombe, Carys Craig, Pina D'Agostino, Abraham Drassinower, Andrew Gilden, Wendy Gordon, Leslie Green, Hubert Hermans, Dina Nir, Gideon Parchamowsky, Roberta Rosenthal Kwall, Kim Treiger Bar-Am, Michal Shur-Ofri, Miriam Bitton-Markowitz, David Vaver, Steven Wilf, and participants at workshops at University of Tel Aviv and DePaul University College of Law for helpful conversations and comments on previous drafts. My thanks to Amit Elazari, Anat Lior, Ido Mor-Chaim, and Sagi Lapid for excellent research assistance. Parts of the early version of the article were presented three years ago at The International Association for the Advancement of Teaching and Research in Intellectual Property Congress, *Is Intellectual Property a Lex Specialis?* at the University of Oxford, England. A later version of the paper was selected and presented at the 8th International Conference on the Dialogical Self, The Hague, The Netherlands, 2014, and at the 106th Annual Conference of the Society of Legal Scholars, York University, England, 2015.

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*Copyright scholarship is largely a debate about the tension between owners and users. Complaints have been legion that copyright law privileges owners with entitlements incompatible with the nature of the creative act. These complaints have been directed against the hegemony of economic justifications over copyright law emphasizing the utility in expanding the spectrum of the right, and competing social and cultural approaches that reject ideals of original authorship. Such arguments have been asserted by generations of scholars struggling to redefine copyright in order to afford users and the public comprehensive access rights and privileges, while preserving authors' rights commensurate with their efforts. In their competing arguments, scholars protect only a few convenient aspects of the creative process. In this way they have propounded incomplete and misguided understandings of the creative process, of who takes part in its formation, and of how the value that results ought to be rewarded. Because copyright regulates ownership and dissemination of socially created properties, the wrongs in incomplete justifications have left many misconceptions about the right unchallenged. These wrongs affect copyright law's ability to evolve into a law relevant to a cultural and networked life that values participation over singularity.*

*This Article argues that scholars and the courts were unaware of a fundamental element defining the social reality of contemporary copyright and aims to remedy this lack of awareness. It articulates an innovative approach to copyright by arguing that works of art and authorship are expressions of dialogical transactions both between and among artists and authors, and between them and the public. These transactions have become a defining virtue of cultures that create and distribute the properties of social life through networks of information. Using transactions—a term familiar in economic-oriented theories—to explain social processes is new to literature on intellectual property. Dialogue, as contrasted with other forms of speech-communications, is an advanced form of communication. It defines the rituals and social movements of traditional and digital cultures, and it features in the process of translating interhuman relations into the language of creative properties. These relations emerge from the intertextual and intervocal nature of dialogue between two distinct conditions: authors and others. This Article*

*argues that these conditions give dialogue its unique social stature and offers a definition of dialogue as an advanced form of communication that voids closure and finality. This Article shows how the failure of prevalent justifications—whether economic or social—to treat creative works as dialogical, disturbs our expectation that copyright will “promote the Progress of Science and the useful Arts . . .”<sup>1</sup>*

## INTRODUCTION: TWO CONCEPTUAL WRONGS

### *A. African Art, Abstract Art, and Invited Dialogues*

Few copyright fundamentals continue to divide copyright scholars. Disagreements over the limits to authorial rights and how to define them lead this divide. Such disagreements feed the tension between, on the one hand, cultural and social approaches to copyright, and, on the other, justifications that emphasize the role of the author as a unique creative being “with a special connection to reality,”<sup>2</sup> and align the evaluation of copyright law “with the dictates of economic efficiency.”<sup>3</sup> This tension has remained largely unresolved and continues to influence the design of laws regulating the protection of

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>2</sup> Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687 (2012).

<sup>3</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) (“Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”). Scholars that criticize utilitarian justifications to copyright argue that these justifications are limited and do not address the social and cultural implications arising from ownership of intellectual properties. See, e.g., ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* xv (2010) (“The failure of American law to embrace a multidimensional perspective of human creativity is problematic on several fronts.”); ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 307 (2011) (claiming that “[t]he empty promise and ethical holes in the utilitarian theory of IP are just too glaring” and rejecting the prominence of utilitarian justifications. Building on Kant, Locke, and Rawls, Merges offers a multimodal theory of intellectual property rights); see also PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 11 (2003) (defining the tension within the copyright system as a one between optimists and pessimists, between those who consider authors as exclusive owners and those who would like copyright to extend only so far as is necessary to incentivize authors and “treat anything more as an encroachment on the general freedom of everyone to write and say what they please”); Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1117 (2005) (discussing the ways intellectual property discourses struggle to balance ownership and control of creative content); Madhavi Sunder, *IP*<sup>3</sup>, 59 STAN. L. REV. 257 (2006) (criticizing the lack of attention to the social problems that arise from ownership of cultural properties).

cultural expressions. Copyright scholars' attempts to settle this divide have generated complex arguments as to how to reconcile users' and the public's comprehensive access rights and privileges while preserving authors' rights commensurate with their efforts. In their attempts to settle these concerns, scholars have focused on only a few aspects of the creative process. This has given rise to incomplete and misguided understandings of what the creative process involves, who takes part in its formation, and how its results ought to be rewarded. The persistence of the copyright scholarly divide and the lack of a significant conceptual change in the way the creative process is understood continue to disturb our expectation that copyright laws will "promote the Progress of Science and the useful Arts."<sup>4</sup> This Article offers a possible conceptual change: thinking of the creative act as a dialogue.

Four recent exhibitions displayed in U.S. museums and galleries have translated the creative act into the language of dialogue. These exhibitions examined the dialogic nature of artistic expression, providing unique insights into the nature of the creative process. They challenge the main misconception we nurture in copyright law—that although the process of original creation is social, the contribution of the individual author justifies his status as the sole proprietor of his creative expressions. The four exhibitions emphasize the multiplicity and interconnectedness of the creative act, the importance of dialogue, and the role fellow artists and users play in the development and realization of creative meanings. In this way, the exhibitions not only rendered an engaging artistic experience, but also inadvertently contributed to the understanding of the tension among intellectual property scholars with regard to the way the creative process is perceived and defined. In effect, the four exhibitions have created a meeting point between the poles of the copyright divide.

In *Conversations: African and African American Artworks in Dialogue*, The National Museum of African Art brought together African and African American artworks in a visual and intellectual dialogue about particular crosscutting themes including human presence, power and politics, and music and urban culture.<sup>5</sup> The idea was to place the works of African American art "in thematic dialogue

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<sup>4</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>5</sup> *Conversations: African and African American Artworks in Dialogue*, SMITHSONIAN: NAT'L MUSEUM OF AFRICAN ART, <http://conversations.africa.si.edu/> (last visited Dec. 10, 2016) [hereinafter *Conversations*]. The exhibition was on view at the museum from November 9, 2014, through January 24, 2016.

with African traditional works of art” in order “to explore intersecting ideas about history, creativity, power, identity, and artistry . . . .”<sup>6</sup> Two years earlier, in *Artists in Dialogue*, the museum invited artists to communicate with and create new works of art in response to one another.<sup>7</sup> The museum facilitated an introduction between Sandile Zulu from South Africa and Henrique Oliveira from Brazil to enable them to exchange ideas and techniques relating to “the manipulability of a painting’s surface, the workings of the inner body and the inspirational power of elements like fire and water.”<sup>8</sup> The museum noted, “Henrique Oliveira has shared his trademark woods with Sandile Zulu; Zulu, in turn, inspired Oliveira to work with fire for the first time.”<sup>9</sup> Through the course of a year, the artists met and communicated intensively, and their interactions resulted in eight works of art reflecting “an ongoing dialogue” between artists, museum professionals, and the public.<sup>10</sup> The works displayed a dialogic expression of distinctive styles and techniques of two artists united in a visual call and response.

The social nature of art and the role of dialogue in artistic development were at the center of another recent exhibition at the Museum of Modern Art (MOMA). *Inventing Abstraction: 1910–1925* marked the centennial of Abstractionism.<sup>11</sup> The show introduced viewers to the untold story of the invention of abstract art, which occurred during a period when young artists suppressed the use of recognizable imagery in their works. Painters, sculptors, musicians, poets, photographers, filmmakers, and choreographers ventured into this new territory, severing Western art’s age-old tether to legible

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<sup>6</sup> *Id.*

<sup>7</sup> *Artists in Dialogue 2: Sandile Zulu and Henrique Oliveira*, SMITHSONIAN: NAT’L MUSEUM OF AFRICAN ART, <http://africa.si.edu/exhibits/dialogue2/index.html> (last visited Dec. 10, 2016) [hereinafter *Artists in Dialogue*]. The exhibition was on view at the museum from February 2, 2011, through January 8, 2012. A similar theme was at the center of an exhibition showing at the Bates College Museum of Art, which explored the artistic dialogue between makers of sculpture and works on paper. *Back and Forth: The Collaborative Works of Dawn Clements and Marc Leuthold*, BATES COLL. MUSEUM OF ART, <http://www.bates.edu/museum/exhibitions/past-exhibitions/2014-2/back-and-forth-the-collaborative-works-of-dawn-clements-and-marc-leuthold/> (last visited Dec. 10, 2016). The exhibition was on view at the museum from January 16, 2015, through March 21, 2015.

<sup>8</sup> *Artists in Dialogue*, *supra* note 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Inventing Abstraction, 1910–1925*, MUSEUM OF MOD. ART, <http://www.moma.org/visit/calendar/exhibitions/1291> (last visited Dec. 10, 2016). The exhibition was on view at the museum from December 23, 2012, through April 15, 2013.

images, harmonic structure, and rhyme. The show challenged the fallacy of “speaking of the invention of abstraction through stories of solitary protagonists . . . .”<sup>12</sup> Abstract art is a form of dialogical exchange between artists and audience, with a momentum that builds up and accelerates, through a relay of ideas and acts among a nexus of players, between “those who make these artistic gestures and those who recognize and proclaim their significance to a broader audience. It was an invention with multiple first steps, multiple creators, multiple heralds, and multiple rationales.”<sup>13</sup>

The exhibition confirmed that abstract art was never an invention in the sense of emerging from solitary acts but was a unique expression of a “distinctly modern interconnectedness . . . facilitating intellectual dialogue.”<sup>14</sup>

The dialogic power behind the development of artistic styles was at heart of another recent exhibition showing at The University of

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<sup>12</sup> LEAH DICKERMAN, *INVENTING ABSTRACTION 1910–1925: HOW A RADICAL IDEA CHANGED MODERN ART* 18 (2012).

<sup>13</sup> *Id.* This vision of the creative process corresponds to the theories of Roland Barthes and Michel Foucault. See Michel Foucault, *What is an Author?*, in THE FOUCAULT READER 101 (Paul Rabinow ed., Josué V. Harari trans., 1984); Roland Barthes, *The Death of the Author*, in IMAGE MUSIC TEXT 142, 148 (Stephen Heath trans., Noonday Press 1988) (1977). Scholars have applied these arguments in intellectual property discourses. See, e.g., CARYS J. CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* (2011) [hereinafter CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE*] (applying Foucault’s theory of authorship to challenge the origin of the modern author as a sole creator); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991) (showing how intellectual products result from social dialogue); Peter Jaszi & Martha Woodmansee, *Introduction*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1, 9 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the social origin of authorship); Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 99 (2006) (rejecting romantic views of authorship and arguing that a copyrighted work is created when the author assembles jointly owned properties with his unique creative input). For more recent examples, see Carys J. Craig, *Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 273, 282 (Irene Calboli & Srividhya Ragavan eds., 2015) [hereinafter Craig, *Feminist Aesthetics*], and Rebecca Tushnet, *The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 294, 296 (Irene Calboli & Srividhya Ragavan eds., 2015) [hereinafter Tushnet, *The Romantic Author*]. See also Jane C. Ginsburg, *Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity*, in THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE 15, 23 (Susy Frankel & Daniel Gervais eds., 2014) (using Foucault’s words in order to illustrate how the idealization of the romantic author resulted in excessive legal protection).

<sup>14</sup> DICKERMAN, *supra* note 12, at 19.

Michigan Museum of Art (UMMA). This exhibition provided a fresh perspective on the evolution of reductive minimalism. Minimalism, a form of art displaying “highly simplified, usually geometric form, clean composition, clear execution and impersonal appearance,”<sup>15</sup> “opened up a new field of art”<sup>16</sup> in the late 1950’s, and is currently enjoying a resurgence of attention. The UMMA show’s focus on reductive Minimalism was intended, mainly, to criticize the frequent emphasis on male artists in Minimalism and to highlight the dialogical nature of this form of art.<sup>17</sup> The museum displayed the differences between male and female artists in the field by “bringing together formative works from two generations of women Minimalist painters to examine and celebrate the dialogue between them” and “reveal the call-and-response of their artistic symbiosis.”<sup>18</sup>

These four exhibitions underscore the interconnected nature of the creation of art and the social wrongs embedded in conceptions of solitary authorship. Moreover, they justify claims that copyright laws cannot privilege owners with entitlements incompatible with the nature of the creative act. At the same time, the exhibitions expose fundamental misconceptions and misunderstandings about the dialogic nature of creativity, such as the misconception that a creative dialogue is an invited activity. While *Artists in Dialogue* interpreted creative interaction as such invited activity, *Inventing Abstraction* and the other exhibitions emphasized the ubiquity of social and cultural interchange as a precondition for every creative expression. Though *Artists in Dialogue* concentrated on artists as originators of their artistic message and defined dialogical collaboration as a sequence of planned and deliberate events, the artistic message of the MOMA exhibition was that dialogue permeates the creative process. In each of the four exhibitions, dialogue was employed to explain artistic invention, but it was the show at the MOMA that adequately depicted dialogue as a different form of communication, an act transcending planned informational exchanges. As this Article argues, true dialogue is not an ordinary form of speech-communication like a discussion or a conversation carried on between two or more persons.

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<sup>15</sup> ANN LEE MORGAN, THE OXFORD DICTIONARY OF AMERICAN ART AND ARTISTS 313 (2007).

<sup>16</sup> HAL FOSTER, THE RETURN OF THE REAL 36 (1996).

<sup>17</sup> *Reductive Minimalism: Women Artists in Dialogue, 1960–2014*, UNIV. OF MICH. MUSEUM OF ART, <https://web.archive.org/web/20140902200220/http://umma.umich.edu/view/exhibitions/2014-minimalism.php> (last visited Dec. 10, 2016). The exhibition was on view at the museum from October 3, 2014, through January 25, 2015.

<sup>18</sup> *Id.*

Nor is dialogue merely an evolutionary stylistic discourse with artistic predecessors. Dialogue does not require an invitation. It is a definable feature of every part of the creative process, whether spontaneous or planned. The eight works of art that resulted from the dialogue between Sandile Zulu and Henrique Oliveira are inherently dialogical, regardless of the invitation to collaborate. Although the result reflected intense collaboration, the works incorporate more than the information exchanged during the collaborative act.

Intellectual property law regulates spaces of communication. While authorial works communicate thoughts and creative preferences using expressive, verbal, or other creative qualities, patents communicate scientific explorations and inventive ideas. Trademarks, through words and symbols, create a commercial language of source identification. This dual role of communication in intellectual property raises questions about the legitimacy of attaching exclusive rights to creative and innovative commodities.<sup>19</sup> Copyright law is an amalgam of principles that aim to protect communicative spaces. For example, the main objective behind fair use, the distinction between ideas or expressions and the limited duration of copyright protection, is to facilitate “uncompensated transfers” of social wealth,<sup>20</sup> which effectuate and expand communicative and dialogical opportunities by limiting the preemption of cultural properties. However, in practice, because these principles are ambiguous and broadly defined, they are unstable within the copyright system<sup>21</sup> and seem ill suited to support

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<sup>19</sup> JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 53 (1996) (asking if an author deserves a right if he “is merely taking public goods – language, ideas, culture, humor, genre – and converting them to his or her own use”). On the nature of inventing as a social process, see Peter Lee, *Social Innovation*, 92 WASH. U. L. REV. 1, 2 (2014) (“Much social innovation, however, arises from communities rather than individual inventors, evolves from multiple histories, and entails expanding that which already exists from one context to another.”). See also Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 715–16 (2012) (“[T]he vast majority of the most important inventions of the past two centuries . . . were themselves the result of gradual social processes in which multiple inventors developed the key parts of the invention at about the same time.”). For a similar argument on trademarks, see Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999) (arguing that trademarks are socially constructed and result from the social interaction between their creators and the public).

<sup>20</sup> Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

<sup>21</sup> According to Merges, copyright systems define authorial rights so broadly “that they interfere with the freedom of fellow citizens.” MERGES, *supra* note 3, at 90.



and reward a landscape of dialogicality that engages the personality and inner processes of participants both present and absent.<sup>22</sup>

This Article argues that dialogue does not require the physical presence of the other. A person who creatively expresses himself is constantly in dialogue with others. At the same time, dialogue can be understood as a combative communication in which one physically replies to the other. As in *Artists in Dialogue*, interaction in these situations reflects “verbal duels,” where each interlocutor aims to weaken the other or to win.<sup>23</sup> This is only partially accurate: behind every “verbal duel” is a history of communication that precedes the moment when individuals first meet. Dialogue is a defining element of human relations and, as such, exists at all times. It is a constant expression of progressive interaction that, as explained in *Inventing Abstraction*, engages the other at all times, though not physically in any particular moment. Whether African or abstract, a work of art or literature is an evolutionary expression and response to social interactions, be it between invited collaborators or distant artists working in the same field.

The four exhibitions exemplify the nature of dialogue as intertextual and intervocal between two states of beings: those of the artist and those of known and unknown others. In creating artistic and authorial expressions, dialoguers address and respond to a polyphony of voices. Dialoguers do not always know to whom and to how many they respond.<sup>24</sup> This conception contrasts with other forms of intellectual property. In patent law, for example, in most cases, the patentee directs his invention to a particular need and can define the group of users for the product, while trademarks transmit a unidirectional communication to the public.<sup>25</sup> Authors and artists engage in an unlimited dialogue, often with no particular direction.

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<sup>22</sup> See *infra* Part V.

<sup>23</sup> DMITRI NIKULIN, ON DIALOGUE 2–3 (2006); cf. Valentina Pagliai, *The Art of Dueling with Words: Towards a New Understanding of Verbal Duels Across the World*, 24 ORAL TRADITION 61 (2009) (criticizing the common view of verbal duels as expressions of aggression between interlocutors).

<sup>24</sup> See, e.g., JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS (2008) (showing how crowds can create knowledge and respond to a multiplicity of voices without knowing each and every member of the crowd).

<sup>25</sup> Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trademark*, 2008 MICH. ST. L. REV. 199, 229–30 (2008) (“The communication involved in trade-mark law is unidirectional. It flows from the trade-mark owner to the public . . . . The life of a trade-mark as such is rooted in its owner’s control of its meaning.”).

The unique social nature of dialogue renders it an advanced form of communication that defies closure and finality and perpetually serves as a “vehicle for reformulating old elements into new patterns.”<sup>26</sup>

Copyrighted properties are dialogic for exactly the same reasons. First, they are not solitary activities but rather manifestations of the dialogic experiences of the writer, poet, author, or artist. Second, they are futuristic entities because they preclude finality and closure by allowing users (including artists and authors themselves) to take, quote, and share creative works, and to develop parts of a given work into new creative expressions.

### *B. Bounded Dialogues*

Concepts of “dialogue” and “communication” are not entirely absent from scholarship opposing the expansion of ownership rights in intellectual property.<sup>27</sup> However, scholars referring to these concepts have, in the past, failed to provide accurate definitions of the terms. Most scholars who use the concepts “communication” or

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<sup>26</sup> Jan C. Swearingen, *Dialogue and Dialectic: The Logic of Conversation and the Interpretation of Logic*, in *THE INTERPRETATION OF DIALOGUE* 47 (Tulio Maranhão ed., 1990).

<sup>27</sup> See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 46 (1998) (arguing that dialogue is a “powerful regulative ideal with which to orient political life”); CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE*, *supra* note 13, at 53–54 (explaining authorship as a dialogic process); JOANNA GIBSON, *CREATING SELVES: INTELLECTUAL PROPERTY AND THE NARRATION OF CULTURE* 136 (2006) (endorsing the idea that the self is actualized through “dialogue with others, through the ‘selves of others’”); Kyle Asquith, *Publicly Funded, then Locked Away: the Work of the Canadian Broadcasting Corporation*, in *DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE* 90, 99 (Rosemary J. Coombe et al. eds., 2014) (“What better way to create a dialogue and sense of community among Canadians than tossing content out into the public domain . . . ?”); Coombe, *supra* note 13 (criticizing strong intellectual property laws for stifling dialogical experiences); Drassinower, *supra* note 25, at 229–32 (arguing that fair use is a doctrine that facilitates creative dialogue and is an invitation to audiences to take part in this dialogue); Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991, 1005 (2009) (arguing that the exceptions to the fair dealing doctrine are “signposts designed to order juridically a network of communicative acts and responses, utterances and replies, in which both authors and users are integral participants”); Niva Elkin-Koren, *Copyright Law and Social Dialogue in the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345 (1993) (discussing how liability rules in copyright harm the creative process by limiting social dialogue); Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 116 (2014) (arguing that copyright law should be limited in order to encourage continuing conversation on the meaning of creative expressions).

“dialogue” are thrown in a specific direction of thought and enlist these terms as simple justificatory tools to define complex social realities.<sup>28</sup> Scholars tend either to take these for granted or to view them as intuitive. Perhaps, like other social concepts, “‘dialogue’ has suffered from the tendency to be defined so generally that it becomes either a synonym for almost all human contact”<sup>29</sup> or just “too nice a term.”<sup>30</sup> Intellectual property scholars often criticize the antidialogical culture that dominates contemporary intellectual property affairs and argue that current efforts to expand intellectual property laws favor the hegemony of monological forms of meaning-making.<sup>31</sup> This school of thought acknowledges that monologism perpetuates a subtle

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<sup>28</sup> See sources cited *supra* note 27.

<sup>29</sup> John Stewart & Karen Zediker, *Dialogue as Tensional, Ethical Practice*, 65 S. COMM. J. 224, 224 (2000).

<sup>30</sup> Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 864 (arguing that “[a] lot of what people are doing in a democracy is not dialogue: they are mobilizing, denouncing, sermonizing, pushing and pushing back”). Constitutional law provides ample examples for the use of the term “dialogue” in a way that reaps it of its normative benefits. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993) (arguing that the everyday process of constitutional interpretation requires dialogue between the three branches of government, and this allows the Constitution to be constantly interpreted “through an elaborate dialogue as to its meaning”); see also ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65-66 (2004) (contending that “active and ongoing dialogue” amongst judges is a consequence of globalization); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 516-27 (2000) (discussing possible cases of “transnational judicial conversations”); Emily Hammond Mezell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1724 (2011) (defining dialogue as “a process of learning and understanding that enables deliberation toward a common end”); Paul S. Rouleau & Linsey Sherman, *Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?*, 41 OTTAWA L. REV. 171 (2011) (analyzing the landmark decision of *Doucet-Boudreau* where the Supreme Court of Canada recognized the value of supervisory orders in crafting meaningful Charter remedies); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1030 (2008) (criticizing a court for ignoring that “[g]enuine dialogue and consensus require mutual respect and attempts to experience the world from other reasonable points of view”); Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2586 (2004) (book review) (“In the dialogical conception [of comparative constitutionalism], comparative practices in judicial review offer a dynamic process apt to producing constitutional change.”).

<sup>31</sup> See COOMBE, *supra* note 26, at 86 (arguing that “[l]aws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle”); see also MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 8-11 (2012) (arguing that participation and shared meaning must play a decisive role in the design of intellectual property).

form of domination.<sup>32</sup> However, it bypasses the true and authentic meaning of dialogue and offers an only limited understanding of dialogism, as deemed relevant to, or supportive of, such arguments.<sup>33</sup> The first conceptual wrong this chapter examines is that dialogues are invited activities. The second concerns the incomplete ways concepts of “dialogue” and “communication” are presently used in copyright discourses.

Scholars embrace concepts of “dialogue” and “communication” in various specific contexts to explain distribution of copies.<sup>34</sup> Specifically, scholars use these concepts when communicating authorial messages to the public;<sup>35</sup> encouraging “continuing conversation” over creative expression;<sup>36</sup> freely communicating facts;<sup>37</sup> demonstrating the importance of communication for freedom

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<sup>32</sup> COOMBE, *supra* note 26, at 86 (“Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle.”).

<sup>33</sup> A school of “copyright as communication” has emerged among Canadian scholars. Rosemary Coombe pioneered the discussion, and Carys Craig and Abraham Drassinower followed. *See* sources cited *supra* note 27. The Canadian School of “copyright as communication” depicts copyright as an *ab initio* limitation on communication. *Id.* In their arguments these scholars seem to treat communication as a monolithic construct. For a recent example, see ABRAHAM DRASSINOWER, *WHAT’S WRONG WITH COPYING?* (2015) (asserting that an author’s work is a communicative act, and copyright infringement is best understood as an unauthorized appropriation of another person’s speech). In fairness to the Canadian school, no one before or since has done much better. A theory of copyright as communication would have to mediate between the individuality of minds and their creative abilities and the commonality of discourse. It is incumbent upon any such theory to account for the different levels of communication, to explain when a conversation or ordinary communication rises to the level of dialogue, and to identify the resulting legal implications. This Article attempts to address some of these issues and to make clear the cluster of social ties that undergird a dialogical theory of copyright.

<sup>34</sup> *See, e.g.*, *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 251 (Gr. Brit.). This historic decision of Lord Mansfield used the term “copy” in the technical sense—to signify an incorporeal right to the sole printing and publishing of something intellectual that was “communicated by letters.” *Id.*

<sup>35</sup> Drassinower, *supra* note 25, at 222 (declaring that “a work of authorship is an instance of communication addressed to the public”).

<sup>36</sup> Fromer, *supra* note 27, at 73.

<sup>37</sup> When the U.S. Supreme Court crowned copyright “the engine of free expression,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985), the Court meant that copyright is vital as an incentive for authors and artists to create social wealth. It also agreed with the Second Circuit, that the idea/expression dichotomy permits a balance between the First Amendment and the Copyright Act “by permitting free communication of facts while still protecting an author’s expression.” *Id.* at 556 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 204 (2d Cir. 1983)).

of expression in the age of new technologies;<sup>38</sup> promoting user rights, whether as contributors to the meaning-making of creative works or as listeners;<sup>39</sup> showing how institutional policies shackle the dialogic relations between creators and users in digital environments;<sup>40</sup> and when discussing general theories on communication<sup>41</sup> and democratic dialogue.<sup>42</sup> None of those examples, however, reach the authentic and true meaning of dialogue. Scholars have avoided questioning dialogue conceptually and, as a result, have contributed to its restricted and bounded meaning.<sup>43</sup> This avoidance perhaps stems from the perception that “copyright has ballooned well beyond” its legitimate proportions “and, in so doing, has strayed from its salutary speech-enhancing core.”<sup>44</sup> A full appreciation of “the significance of freedom of expression therefore requires appreciation of the nature and value of communicative activity.”<sup>45</sup>

Furthermore, scholarly attempts to produce a theory of copyright as social interaction or communication have been only partially successful because they considered different levels of communication interchangeably. Such use discounts the fundamental distinction between communication and dialogue, which are distinct. For example, scholars use the terms “communication” and “dialogue”

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<sup>38</sup> Free speech theories fueled decades of scholarly debates. On the intersection of free speech and copyright and the role of new technologies for communication, see NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 217 (2008) (asserting that communication technologies “make up our system of free expression”); see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (demonstrating how the enclosure movement in copyright risks the diversity of information sources in our information environment and its effect on the freedom of speech).

<sup>39</sup> Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 987–91 (1999) (discussing the role of listeners in meaning-making and reviewing decisions in which courts have recognized that listeners have an interest in communications).

<sup>40</sup> Asquith, *supra* note 27.

<sup>41</sup> CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE*, *supra* note 13; DRASSINOWER, *supra* note 33.

<sup>42</sup> Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283 (1996) [hereinafter Netanel, *Copyright and Democratic Civil Society*] (explaining the responsibility of copyright laws to the democratic character of civil societies); Neil Weinstock Netanel, *Assessing Copyright’s Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998) [hereinafter Netanel, *Assessing Copyright’s Democratic Principles*] (arguing that copyright owner authorization for certain acts will inhibit social dialogue and the dissemination of knowledge).

<sup>43</sup> To this general criticism there is perhaps one exception. See COOMBE, *supra* note 27.

<sup>44</sup> NETANEL, *supra* note 38, at 53.

<sup>45</sup> CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE*, *supra* note 13, at 227.

alongside concepts of “cultural conversation,” “discussion,” “discourse,” or “intercourse of language.”<sup>46</sup> An understanding of the distinction between different levels of communication and the meaning of genuine dialogue would benefit the redesign of the legal principles affecting the existing normative boundaries of copyright.

Although many copyright principles seem to encourage dialogue and communication, in practice, they often obstruct such social activities. The idea/expression dichotomy provides one useful example. The law treats ideas as raw, low-level materials, while expressions are considered high-level products needed to display the creativity eligible for legal protection.<sup>47</sup> The inability of courts to fully distinguish ideas and expressions risks the delicate balance within copyright by potentially placing ideas under protection.<sup>48</sup> This inability contributes to the industry’s success in depleting the public domain of its defining components.<sup>49</sup> An understanding of copyrighted works as both communicative and as the products of genuine dialogue supports claims for more open user access rights to high-level expressive products.

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<sup>46</sup> See, e.g., *id.* at 54 (“With her original expression the creative author is entering a cultural conversation that has been going on long before she appeared . . . .”); Drassinower, *supra* note 25, at 204 (“Authorship is not merely a mode of communication but a mode of discourse – an address that invites engagement in the mutual intercourse of language.”).

<sup>47</sup> Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345, 364 (1991). On the definition and necessity of raw materials, see Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 357 (2016).

<sup>48</sup> Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements*, 66 IND. L.J. 175, 231 (1990) (“Courts have no philosophical or objective basis on which to rely in trying to distinguish the ideas from the expression in works of art.”). This difficulty creates false beliefs that courts can provide a clear definition and interpretation of a literary work. See Graeme B. Dinwoodie, *Refining Notions of Idea and Expression Through Linguistic Analysis*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 194, 204 (Lionel Bentley et al. eds., 2010) (“[C]ourts, who work daily with words, perhaps instinctively believe they understand the nature of literary works.”); see also Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015) (discussing the complexity of copyright’s interpretive choice regime).

<sup>49</sup> As Marcus Boon recently wrote:

as our ability to make copies expands at both macro (geophysics and the manipulation of global weather systems) and micro (nanotechnology and the fabrication and replication of matter from the atom up) levels, [intellectual property laws] are used by corporations to appropriate, copy, and sell increasingly large parts of what was once the “public domain.”

MARCUS BOON, IN PRAISE OF COPYING 4–5 (2010).

Another example of how copyright principles can obstruct dialogue and communication can be found in the doctrine of fair use. Rebecca Tushnet recently disputed the ability of courts to apply fair use in ways that accommodate multiple meanings and interpretations of art—a situation that has resulted in creative humility.<sup>50</sup> Courts “rarely acknowledge multiplicity of meaning.”<sup>51</sup> Instead, they take “a universalist perspective that denies that different observers might generate different meanings from the same view.”<sup>52</sup> Limiting the multiplicity of meanings affects authors’ creative development and curtails the dialogical platforms where meaning-making occurs. Dialogue and meanings should not be bounded or socially enclosed. Although it is perhaps too much to expect that courts draw a complete workable distinction between ideas and expressions or apply a postmodern understanding of the limits of copyright before declaring whether a use is fair or not, definitional challenges must not create a legal reality that favors authors and industry to the detriment of users and the public. A distinction between different levels of communication may alleviate these outcomes.

This Article argues that copyright law regulates *dialogical transactions*, both between authors and between authors and the public. Using “transaction,” a term drawn from economic theory, to depict social processes is new to the literature on intellectual property. This Article introduces the concept of dialogical transactions as a tool to correct some of the misconceptions we nurture in copyright systems. Dialogical transactions define the reciprocal and mutual process of creating copyrighted materials,<sup>53</sup> especially in today’s rapid expansion of virtual markets. This analysis departs from the

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<sup>50</sup> Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20, 22 (2013).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* This is perhaps a result of judges becoming arbiters of art. Eric Felten, *Is It Art? Increasingly, Nowadays, That’s a Judicial Decision*, WALL ST. J. (May 31, 2012), <http://www.wsj.com/articles/SB10001424052702303640104577438242141270380>. A good example to the contrary is a decision of the Second Circuit Court of Appeals where the court accepted a claim for fair use and artistic borrowing, and did not depend on its “own poorly honed artistic sensibilities,” or question “artistic purposes.” *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006); see also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005) (“[J]udges should refrain from indulging in subjective aesthetic determinations.”).

<sup>53</sup> Reciprocity in dialogue is different from mutuality. The former “implies the recognition of the other qua other . . . , it implies recognition through the dialogically mediated presence of the other” while “mutuality is exercised in the immediate presence of the other . . . .” NIKULIN, *supra* note 23, at xi.

economic approach to copyright and argues that economic theories cannot adequately explain the creative process. To borrow from Richard Sennett, present-day creative culture resembles “intimate society.”<sup>54</sup> In that society, “all social phenomena, no matter how impersonal in structure, are converted into matters of personality in order to have a meaning.”<sup>55</sup>

The Article is divided into six parts. Following the introduction, Part I defines dialogue as a web of social transactions and explains how authors depend on their availability. Parts II and III describe the distinction between communication and dialogue by tracing how the dialogic relationship impacts both the making of authors and the actual expressions of their talent. These Parts also examine the nature of dialogism, its etymological and historical roots, and present three dominant theories of dialogue: one by the Russian literary philosopher Mikhail Bakhtin, another by the philosopher Martin Buber, and the third by quantum physicist David Bohm. The main rationale for drawing from these three philosophers is their belief that the very center of the human universe is the dialogical. These Parts also demonstrate how the current configuration of copyright law, if defined as a site of genuine dialogical transactions, awards rights incommensurate with the nature of creativity. Part IV discusses the manner in which the essential features of dialogue have been marginalized in the evolutionary process of contemporary copyright, and critically examines copyright intricacies such as parodies, architecture, urban art, and information networks.

## I

### AUTHORS AND SOCIAL TRANSACTIONS

Authorship, in its basic definition as a unique expression of creative personalities, legitimizes exclusive ownership of creative expressions. The U.S. Supreme Court has applied this understanding, holding that because authors are independent creators of creativity,<sup>56</sup> copyright law must secure them “a fair return” in order “to stimulate artistic creativity for the general public good.”<sup>57</sup> Similar approaches

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<sup>54</sup> RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 219 (1977).

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

<sup>56</sup> In *Feist*, when the Supreme Court introduced the requirement of a modicum of creativity for copyright protection, it meant, as Justice O'Connor remarked, “that the work was independently created by the author (as opposed to copied from other works) . . . .” *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>57</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).



over the past three decades have been met with ample scholarly reply, rejecting the Wordsworthian vision of creation as “the spontaneous overflow of powerful feelings,”<sup>58</sup> and holding the view of authorial texts as representations of creative collectivity and preexisting materials.<sup>59</sup> According to these replies, the materials necessary for the creative process are created in a communal space where authors and the public communicate, consume knowledge, and create trading zones of collaboration.<sup>60</sup> The modern author is not merely, as in primitive times, a member of a social group that controls his thought and action; he is the point of intersection of many social influences.<sup>61</sup> However, the present copyright culture—with its defense of concepts like trespass and exclusive ownership embedded within legal rules and policies—promulgates this wrong assumption about the individual as the independent creator and sole proprietor of the expressions of his talent.<sup>62</sup> One of the main consequences of this culture is foreclosure of communicative spaces.<sup>63</sup>

Copyright (as the law that regulates the ties between creators, contributors, and takers) is expected to create and develop social channels through which creative individuals mutually transact cultural

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<sup>58</sup> William Wordsworth & Samuel Taylor Coleridge, *Preface to LYRICAL BALLADS: WITH A FEW OTHER POEMS* (1798).

<sup>59</sup> Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1202 (2007) (asserting that “anyone who has an interest in the content of culture and the direction of cultural progress . . . must engage with what is already there”).

<sup>60</sup> See sources cited *supra* note 13; see also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 141 (1993) (arguing that “the notorious difficulty of applying copyright doctrine to concrete cases can be related to the persistence of the discourse of original genius and to the problems inherent in reifications of author and work”); Michael J. Madison, Comment, *Where Does Creativity Come From? And Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747 (2003); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

<sup>61</sup> Accepting the social construction of creation, Merges asserts that “genius awakens another genius.” MERGES, *supra* note 3, at 92.

<sup>62</sup> CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE*, *supra* note 13, at 21 (asserting that “the fetishisation of the individual and original author is still very much alive in our current construction of copyright and the policies that inform its development”).

<sup>63</sup> Coombe, *supra* note 13, at 1855 (claiming that intellectual property laws “stifle dialogic practices – preventing us from using the most powerful, prevalent, and accessible cultural forms to express identity, community and difference”); Hughes, *supra* note 39, at 924 (explaining that in deconstructionist approaches to copyright “changes in meaning are welcome and property rights should be limited to give non-owners greater breadth to shape their own messages”).

and personal properties.<sup>64</sup> This expectation requires an understanding of copyright as a complex web of social transactions, where each transaction requires “a mutual exchange of information or influence based on negotiation and reciprocity.”<sup>65</sup> Literature on copyright, though accepting the sociality of the creative act, has failed to explore the creative process as a social transaction. The view of copyright as a social transaction is inevitable and connects previously disjointed approaches to copyright.<sup>66</sup> Whether utilitarian or author-based,<sup>67</sup> copyright theories share the goal of developing ways to explain and deal with the consequences of the binary relations between owners

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<sup>64</sup> The same rationale applies to inventorship. Similar to creative works of literature or drama, inventions are social acts. Every invention involves “a variety of social relationships with real and imaginary others, with individuals as well as social collective.” KAREN BURKE LEFEVRE, *INVENTION AS A SOCIAL ACT* 46 (1987); *see also* sources cited *supra* note 19.

<sup>65</sup> TIM O’SULLIVAN ET AL., *KEY CONCEPTS IN COMMUNICATION AND CULTURAL STUDIES* 318 (John Fiske ed., 2d ed. 1994); *see also* LAWRENCE C. BECKER, *RECIPROCITY* 4 (1986) (stating that reciprocity “has been held to be a central feature of social transactions, and the determining factor in the development of personal and political power”).

<sup>66</sup> This Article makes no claim to reduce all relations to social or economic transactions. As David Gamage and Allon Kedem remarked: “To claim that all human interactions can be categorized as either ‘economic’ or ‘social’ is to ignore the complexity that attends real-world relationships.” David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299, 1326 (2006). This Article uses social transaction as a unique paradigm to question the dialogical content of copyrighted properties and to value the quality of their social wealth. In doing so, this Article follows the distinction between social transaction and its economic counterpart, because while the latter normally focuses on markets, production, distribution and consumption, the former centers on communication and social interaction. *See* Mauro F. Guillén et al., *The Revival of Economic Sociology*, in *THE NEW ECONOMIC SOCIOLOGY: DEVELOPING IN AN EMERGING FIELD* 1, 14 (Mauro F. Guillén et al. eds., 2002). This Author concurs with arguments that market activities are “intensely social – as social as kinship networks or feudal armies.” Harrison C. White, *Varieties in Market*, in *SOCIAL STRUCTURE: A NETWORK APPROACH* 226, 232 (Barry Wellman & S.D. Berkowitz eds., 1988); *see also* Viviana A. Zelizer, *Making Multiple Monies*, in *EXPLORATIONS IN ECONOMIC SOCIOLOGY* 193, 194 (Richard Swedberg ed., 1993) [hereinafter *Zelizer, Making Multiple Monies*] (“The market should not be set in opposition to extra-economic socio-cultural factors.”). However, as recent studies show, the tradition of economic arguments “repeatedly focus[ing] on firms and corporations” is still dominant and distances itself from social arguments. Viviana A. Zelizer, *Intimate Transactions*, in *THE NEW ECONOMIC SOCIOLOGY: DEVELOPING IN AN EMERGING FIELD* 274, 283 (Mauro F. Guillén et al. eds., 2002) [hereinafter *Zelizer, Intimate Transactions*]. Zelizer criticizes the tradition of law and economics for its inability to incorporate social and intimate transactions within its scope. *Id.* at 285–90.

<sup>67</sup> *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1749–59 (2012) (discussing the distinction between utilitarianism and moral rights theories as applied to copyright). Fromer criticizes this distinction and argues that “the two theories can be complementary in important ways.” *Id.* at 1746.

and users. However, as mentioned in the Introduction, scholars exploring these theories have concentrated primarily on the role of incentives<sup>68</sup> rewards, or the morality of authorial autonomy, and in this way left untouched the many flaws they proclaim to have challenged.

Social transactions “expand the compass of social interaction and the structure of social relations.”<sup>69</sup> They are the basic units of analysis in social institutions where agents draw on rational principles of justice and social norms.<sup>70</sup> There is no enumerated set of generalizations that encompasses them all. Social transactions are those acts of communication we explore in different levels and intensity every day.<sup>71</sup> When a customer enters a convenience store in Italy and asks for a French butter, he socially transacts informational properties relevant to his choice of butter—French, in particular. When a visitor enters a museum with a group of friends and curators and views a never-before-seen painting, he may enter into a more intimate conversation that will involve a personal dimension that is irrelevant to the customer buying French butter. In contrast, when an artist invites a group of fellow artists to his exhibition, he expects a higher level of interaction. If he takes comments made by visitors seriously, the comments may inform his future works. This social transaction signifies more than mere informational exchanges or views. The artist—in a way similar to the collaboration between Sandile Zulu and Henrique Oliveira, or different artists present and distant, contributing to the emergence of conceptual art, or the artistic symbiotic relations between women Minimalist painters<sup>72</sup>—internalizes and responds to certain parts of others’ personalities, creative ideals, and cultural preferences.<sup>73</sup>

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<sup>68</sup> Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009) (asserting that “central to all of copyright law is the idea of incentives”); see also Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 797 (2003).

<sup>69</sup> PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 263 (1964).

<sup>70</sup> Dennis J. Baker, *The Impossibility of a Critically Objective Criminal Law*, 56 MCGILL L.J. 349, 368 (2011).

<sup>71</sup> See generally TAMOTSU SHIBUTANI, *SOCIAL PROCESSES: AN INTRODUCTION TO SOCIOLOGY* 1–31 (1986).

<sup>72</sup> See *infra* Part I.A.

<sup>73</sup> It should be noted that it is not only the interaction between the people to a social event that impacts the social transaction. “[N]on-human actors in any social situation” play a significant role in the construction of the transaction. ANDREW MURRAY, *INFORMATION TECHNOLOGY LAW: THE LAW AND SOCIETY* 66 (2013). For example, when two people meet in a restaurant or a museum, the place of meeting affects the social interaction

In his sociocultural transactional model of human interaction, Ali Darwish explains different levels of social transaction by using three concentric circles of interaction: social, interpersonal, and intrapersonal.<sup>74</sup> Most human interactions take place within the social ring of interaction. Renting a car, having a conversation in the grocery store, talking to your employer, using telephone banking services, or commenting to an online post are examples of this social ring. Interpersonal interaction refers to closer, more intimate relationships, like friendship, which reflect a greater level of interpersonal bindingness.<sup>75</sup> To explain *intrapersonal* interaction, Darwish identifies the “black box” in which internal communication, or silent soliloquy, takes place.<sup>76</sup> The removal of an idea from the intrapersonal to the interpersonal involves moving an idea from the private to the public, from the internal to the dialogical. The latter process often requires the former: “[W]e might talk through an argument to ourselves in private, or wrestle with the assembly instructions for some piece of knock-together furniture.”<sup>77</sup> However, these internal activities, as useful and necessary as they may be, are merely pre-stages that require “shared agreements as to what these symbolic forms are to be taken to be” in order to generate meaning.<sup>78</sup>

Copyrighted materials are built similarly. Copyrighted works are not created in a social vacuum: authors interact and converse with other creative individuals, enclosing ideas and other social facts received from the common stock. The level of interaction is not static and ranges from social to interpersonal. Authors also cultivate enclosed ideas and thoughts in their intrapersonal realm. It is only when an author decides to free his ideas from his intrapersonal “black box” that a creative work becomes subject to interpersonal reactions. As Carys Craig put it:

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between them. “[O]ne would expect a different transaction in a luxury Michelin-starred restaurant than in a local café bar. The difference is not so much the surroundings themselves but the semiotic, or concepts, which the human actors have communicated to them through memory, experience and surroundings.” *Id.*

<sup>74</sup> ALI DARWISH, *SOCIAL SEMIOTICS OF ARABIC SATELLITE TELEVISION: BEYOND THE GLAMOUR* 184–85 (2009).

<sup>75</sup> See Jon Cauley & Todd Sandler, *A General Theory of Interpersonal Exchange*, 35 *PUB. CHOICE* 587, 587–606 (1980) (examining the role of social transactions for “interpersonal bindingness”).

<sup>76</sup> DARWISH, *supra* note 74, at 186.

<sup>77</sup> Andy Lock & Tom Strong, *Introduction to SOCIAL CONSTRUCTIONISM: SOURCES AND STIRRINGS IN THEORY AND PRACTICE* 7 (Andy Lock & Tom Strong eds., 2010).

<sup>78</sup> *Id.*

When the author creates original expression in the form of literature, art, drama or music, she is engaged in an *intrapersonal* dialogue (developing a form of personal narrative by drawing upon experience, situation, and critical reflection) and an *interpersonal* dialogue (drawing upon the texts and discourses around her to communicate meaning to an anticipated audience).<sup>79</sup>

All social transactions share two common characteristics: First, social transactions are not mere ideals, but social *requirements*. As the basic units of social institutions,<sup>80</sup> they are so fundamental that they may, as Lawrence Becker asserts, lead to the imposition of blame upon those who disturb social exchanges and reciprocation, “punish[ing] them or extract[ing] compensation from them for their failure to reciprocate.”<sup>81</sup>

Second, social transactions entail a causal connection. They involve a line of action that begins with one person’s behavior, is carried on by others, and is finally terminated by the contributions of still others. “No one carries out the entire transaction alone, although some participants play a more important part than others . . . . Thus, what happens cannot be explained solely in terms of the attitudes, motives and personality traits of the individuals involved . . . .”<sup>82</sup> In other words, social transactions are constructed “over time in a succession of reciprocating adjustments and readjustments of the participating individuals to one another.”<sup>83</sup> Each “person’s contributions are aligned with those of others to make up the total enterprise.”<sup>84</sup>

Copyrighted works, as sites of multiple social transactions, reflect these common characteristics. First, because authorship and creative works are social constructs,<sup>85</sup> authors never carry the “entire transaction alone.”<sup>86</sup> That is, “the texts, discourses, experiences and relationships that constitute the author are combined, interpreted, reinterpreted and retold.”<sup>87</sup> The social construction of authorship

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<sup>79</sup> CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE, *supra* note 13, at 53–54.

<sup>80</sup> Baker, *supra* note 70.

<sup>81</sup> BECKLER, *supra* note 65, at 130.

<sup>82</sup> SHIBUTANI, *supra* note 71, at 7.

<sup>83</sup> *Id.* LeFevre claimed that inventing is “an act that generally is initiated by inventors and brought to completion by the audience, often extending over time through a series of social transactions and texts.” LEFEVRE, *supra* note 64, at 47.

<sup>84</sup> SHIBUTANI, *supra* note 71, at 6–7.

<sup>85</sup> Zemer, *supra* note 13.

<sup>86</sup> SHIBUTANI, *supra* note 71, at 7.

<sup>87</sup> CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE, *supra* note 13, at 51.

dictates that without appreciating reciprocity as necessary “for the generation of primary human goods,”<sup>88</sup> works of art, literature, drama, or choreography would be impossible.<sup>89</sup> Reciprocity is inherent in every social transaction and is therefore crucial to the increased and diverse understanding of the common stock of knowledge. Those who disturb access to copyrighted works, whether through new sets of legal rules or invalid ownership claims, discount reciprocity as a requirement for such works and restrict fundamental social transactions.

Second, principles of copyright law address these concerns through a built-in system of reciprocation and compensation. For example, copyright laws limit ownership to expressions, not ideas;<sup>90</sup> create an open-ended list of known and ad hoc exceptions to the right;<sup>91</sup> subject the right to an expiration date after which the work resides in the public domain;<sup>92</sup> and provide only certain creators with a moral right in their expression.<sup>93</sup> Unlike patent law, which grants a patent holder the right to exclude others from practicing the invention for a typical term of twenty years,<sup>94</sup> copyright law allows the public greater rights of access. These rights are built on reciprocal and compensatory relations. Authors and the public reciprocate in order to form copyrighted works. This is the nature of creative work: socially constructed, historically contingent, and premised on the exchange of ideas, information, and other properties of knowledge within society. The law then attempts to compensate the public through, for example, the fair use doctrine, in exchange for allowing authors to privately own properties that were collectively owned before they became part of a new work. In other words, copyright laws *invite* authors to transact with fellow authors and the general public. In return for new

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<sup>88</sup> BECKER, *supra* note 65, at 132.

<sup>89</sup> See generally LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007) (discussing the social construction theory and arguing that copyrighted works are jointly created by the public and authors).

<sup>90</sup> 17 U.S.C. § 102 (2012); *Nichols v. Universal Picture Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>91</sup> 17 U.S.C. § 107.

<sup>92</sup> *Id.* § 302.

<sup>93</sup> Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650 (tit. VI), 104 Stat. 5128. Scholars argue that the availability of moral rights in the United States is too limited. Most notably see KWALL, *supra* note 3; see also Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 452 (2009) (contemplating that the VARA is “largely insufficient”); cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 853 (2005) (praising VARA’s “balanced and sophisticated approach”).

<sup>94</sup> 35 U.S.C. § 154(a) (2012).

and creative social wealth, authors own a plot of the social reality. In Hohfeldian terms, once a transaction takes place, and a copyrighted work has been created, the law *imposes* on authors and the public correlative rights and duties both to keep their relations balanced and to maintain a stable order for future social transactions.<sup>95</sup> The law limits the spectrum of the rights in exchange for a public duty to recognize and protect the expenditure of labor and personality in creating the work. Once the work is released to the public, the social transaction thrives through continued communication and exchange with the audience about the meaning of the work and its cultural future.<sup>96</sup>

The entrenched system of reciprocation and compensation in copyright signifies a need for vibrant communication between authors and between authors and the public. Every social transaction that leads to a copyrighted work is not ordinary. It begins in the first concentric circle depicted by Ali Darwish, but goes far beyond.<sup>97</sup> It is an advanced act of communication that is not simply a talk or conversational exchange, but a dialogical embodiment of the other who contributed to the formation of the work. It is *dialogical* by virtue of the properties it involves and the role of interpersonal and intrapersonal communication it requires. A dialogical transaction signifies, as the following Parts show, “a live communication rather than a sheer exchange of meaningful words. It is a communication based upon communion from where words may follow, but words do not constitute it.”<sup>98</sup>

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<sup>95</sup> WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (1919) (devising a comprehensive legal taxonomy, comprising the terms right, duty, privilege, and power as categories of entitlements attached to private property). For useful accounts of the Hohfeldian classification, see Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* 1, 4–9 (Jeremy Waldron ed., 1984) and Wendy J. Gordon, *An Inquiry into the Merits of Copyright*, 41 *STAN. L. REV.* 1343, 1354–78 (1989) (illustrating how the Hohfeldian paradigm applies to copyright).

<sup>96</sup> Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 *HARV. J.L. & PUB. POL'Y* 817, 848 (1990) (asserting that “it is on the audience that the art work depends for its continued existence, and not on the artist”). The role of the audience in intellectual property is not limited to providing a forum to which creative expressions are directed. The audience also plays an important role in cases of infringement, because different audiences, expert or lay, will evaluate infringement differently. See Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 *MICH. L. REV.* 1251 (2014).

<sup>97</sup> See DARWISH, *supra* note 74.

<sup>98</sup> Goutam Biswas, *Martin Buber's Concept of Art as Dialogue*, in *MARTIN BUBER AND THE HUMAN SCIENCES* 223, 223 (Maurice Friedman ed., 1996).

## II THE LIMITS OF CONVERSATIONS

Although scholars view copyrighted works as social constructs or embodiments of complex communicative relations and experiences, or even develop sociocultural approaches premised on theories of communication,<sup>99</sup> these approaches fail to distinguish between the levels of communication required to understand creativity. Works of art and authorship are always expressions of a complex history of different levels of interaction. These include spontaneous works and works emerging from sheer happenstance or serendipity, such as Zapruder's images of the assassination of President John F. Kennedy or the chance creations of Dada artists.<sup>100</sup> Also included are works created away from civilization, on a deserted island reminiscent of that in Defoe's *Robinson Crusoe*, since the mere ability to create, to appreciate, and to respond to creative expressions derives from early social interactions with others and reciprocity.<sup>101</sup> The lack of a comprehensive theory of communication, relevant to copyright, capable of distinguishing between different levels of communication and interaction, creates a false perception that we can define communication in convenient and monolithic ways, and thus, perhaps bypass its inherent complexity. Consequently, the ability of existing scholarship to offer an explanation for this complexity is very limited. In what follows, this Article examines and contrasts the two dominant modes of communication—conversation and dialogue—often used to measure the intensity and level of interaction necessary for the creative act.

Such a distinction requires a general definition of the system of communication. In his seminal theory of communication, sociologist Charles Cooley observed, “[t]he existing system of communication determines the reach of the environment. Society is a matter of the incidence of men upon one another” and “this incidence is a matter of

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<sup>99</sup> See sources cited *supra* note 27.

<sup>100</sup> *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 131 (S.D.N.Y. 1968).

<sup>101</sup> See *supra* notes 85–88 and accompanying text. According to Glăveanu, “the social element is present even when creative acts are performed in complete solitude” since, in absence of sociality, the creator will be unable to recognize and cultivate her creativity. Vlad Petre Glăveanu, *Distributing Creativity: Three Thought Experiments*, in MULTIDISCIPLINARY CONTRIBUTIONS TO THE SCIENCE OF CREATIVE THINKING 67, 74 (Giovanni Emanuele Corazza & Sergio Agnoli eds., 2015). Therefore, the key question in the Deserted Island scenario is whether the creator experienced any human contact prior to her arrival to the island.



communication.”<sup>102</sup> Cooley did not define communication to the degree necessary for authors and artists to create, but if creative expressions are products of communication, they cannot be treated as “something independent of surroundings, but rather a characteristic way of reacting upon them.”<sup>103</sup> When authors sit down to write they take into the act a multiplicity of contributions. Writings that successfully qualify for copyright protection reflect this multiplicity and the presence of others in the process. This presence comes in multiple degrees and deserves further explanation.

According to prevalent theory, communication can be understood in various ways. Communication is not static and does not conform to a particular form nor can it be captured under one particular definition. Studies on communication show that it has many, sometimes competing, meanings.<sup>104</sup> Communication can mean partaking, connection, linkage, transfer, transmission, exchange, or it can serve as a general term for “symbolic interaction.”<sup>105</sup> Levels of communication also differ in terms of the intensity of exchange they require and display. To Leo Lowenthal, “true communication entails a communion, a share of inner experience.”<sup>106</sup> In other words, there are different levels of talk. On the one hand, a simple talk mirrors conversational pleasure and may refer to the exchange of views, words, and other types of simple verbal expressions.<sup>107</sup> On the other hand, true talk “refers to a special kind of talk, distinguished by intimacy and disclosure. An even more intense sense of communication as exchange dispenses with talk altogether and posits a meeting of minds, psychosemantic sharing, even fusion of consciousness.”<sup>108</sup>

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<sup>102</sup> Charles H. Cooley, *The Process of Social Change*, 12 POL. SCI. Q. 63, 73–74 (1897).

<sup>103</sup> *Id.* at 78.

<sup>104</sup> JAMES R. HURFORD, THE ORIGINS OF MEANING: LANGUAGE IN THE LIGHT OF EVOLUTION 168 (2007) (“Defining communication precisely is problematic . . . . For any proposed definition of communication, we can think of some action fitting the definition that we would not want, intuitively, to characterize as communication . . . . And conversely we can think of some other kind of action that is, counterintuitively, excluded.”).

<sup>105</sup> JOHN DURHAM PETERS, SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION 7–9 (1999).

<sup>106</sup> Leo Lowenthal, *Communications and Humanitas*, in THE HUMAN DIALOGUE: PERSPECTIVES ON COMMUNICATION 335, 336 (Floyd W. Matson & Ashley Montagu eds., 1967).

<sup>107</sup> See PETERS, *supra* note 105, at 8.

<sup>108</sup> *Id.*

Conversation is defined as a low-level communicative mode. It is a “simple, bilateral, cooperative” activity.<sup>109</sup> Conversation refers to the exchange of ideas between two or more participants specifically through *speech*.<sup>110</sup> In the early modern period, the concept had two meanings. First, in its wider sense, conversation was understood as “the act of living with and sharing the company of others . . . . In this sense, one did not have a ‘conversation’ with strangers.”<sup>111</sup> The second meaning of conversation was “the act of speaking and discussing with others”<sup>112</sup> in order to please the conversationalists. It is the latter meaning that became the dominant understanding of the word in the seventeenth and eighteenth centuries.<sup>113</sup>

Eighteenth-century studies tell us that the goal of communicative dealings is the conveyance of pleasure between conversationalists. For example, a study of conversation in seventeenth- and eighteenth-century France has found that the aim of salon conversations was “none other than the pleasure of conversation for its own sake.”<sup>114</sup> For Henry Fielding, the “art of pleasing or doing good to one another”

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<sup>109</sup> John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1077 (2015).

<sup>110</sup> See Jacob Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech*, 71 CAMBRIDGE L.J. 355, 371 (2012) (providing examples for low-level conversations such as a talk “between friends in the street, over the telephone or in the pub,” inexpensive communication, and spontaneous comments); see also JOHN MULLAN, *HOW NOVELS WORK* 143 (2006) (explaining that the frequent use of telephone conversations in novels is a way to dramatize failures of communication).

This Part is a definitional exercise. As such, it is open to criticism on the categories used. This Author accepts that conversation can be defined more broadly to encompass a more intellectual exchange of knowledge. For example, Henry Fielding wrote:

The primitive and literal sense of [conversation] is, I apprehend, to turn round together; and in its more copious usage we intend by it that reciprocal interchange of ideas by which truth is examined, things are, in a manner, turned round and sifted, *and all our knowledge communicated to each other*.

HENRY FIELDING, *ESSAY ON CONVERSATION* 2 (1743) (emphasis added). That is, conversation does not only relate to “habits of speech, but to a larger pattern of personal dealings.” G.A. Starr, *From Socrates to Sarah Fielding, in PASSIONATE ENCOUNTERS IN A TIME OF SENSIBILITY* 118 (Maximillian E. Novak & Anne K. Mellor eds., 2000). However, for matters of argumentative clarity, this Article contrasts conversation with dialogue.

<sup>111</sup> Richard Yeo, *John Locke on Conversation with Friends and Strangers*, 26(2) *PARERGON* 1, 12 (2009).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> BENEDETTA CRAVERI, *THE AGE OF CONVERSATION* 342 (Teresa Waugh trans., 2005), *cited in* STEPHEN MILLER, *CONVERSATION: A HISTORY OF A DECLINING ART* 13–14 (2006).

defines the art of conversation.<sup>115</sup> For David Hume, a conversation—which he calls a “transcript of the mind”—is nothing “but the pleasure it conveys to those who are present.”<sup>116</sup> In contrast, to nineteenth-century English essayist Thomas De Quincey, pleasure is too low a threshold for a definition of conversation. He wrote, “Amongst the arts connected with the *elegances* of social life, in a degree that nobody denies, is the art of Conversation . . . .”<sup>117</sup> Hence, a conversation does not only provide low-level social pleasure because, for De Quincey, conversation is not simple talk. Contrasting “conversation” and “talk,” De Quincey finds that there is, in a conversational act, an “absolute birth of new insight into the truth itself, inseparable from the finer and more scientific exercise of the talking art.”<sup>118</sup> When merely talking, the participants enjoy limited intercourse with the thoughts and imagination of others. When authors and artists converse, they play with, consume, and internalize the properties of the conversation in a De Quincey-like way, and they also communicate with the social surroundings of the conversational event. In this process, the conversation reaches a higher communicative level.

For William Hazlitt, like De Quincey, conversation is an advanced form of communication, one in which authors must engage to produce lasting creative works. Hazlitt, once labeled “the first modern man,”<sup>119</sup> wrote in the September 1820 *London Magazine* that those authors who write books of memory converse not only with fellow authors, but also address the social characteristics of society.<sup>120</sup> Hazlitt lived and wrote when Romanticism flourished, and he believed that authors were unique. Even so, Hazlitt asserted that unique individuals like authors still needed to speak a common language that would attract and be understood by a circle of readers.<sup>121</sup> He explained:

Persons of different trades and professions – the mechanic, the shop-keeper, the medical practitioner, the artist, etc., may all have

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<sup>115</sup> FIELDING, *supra* note 110.

<sup>116</sup> DAVID HUME, A TREATISE ON HUMAN NATURE, bk. II, pt. iii, § iv, at 9 (1739).

<sup>117</sup> THOMAS DE QUINCEY, LETTERS TO A YOUNG MAN AND OTHER PAPERS 127 (1854).

<sup>118</sup> *Id.* at 132.

<sup>119</sup> DUNCAN WU, WILLIAM HAZLITT: THE FIRST MODERN MAN (2008).

<sup>120</sup> William Hazlitt, *On the Conversation of Authors* (London Magazine Sept., 1820), in SELECTED ESSAYS OF WILLIAM HAZLITT 1778–1830, at 446 (William Hazlitt & Geoffrey Keynes eds., 1917).

<sup>121</sup> Hazlitt, *supra* note 120, at 450.

great knowledge and ingenuity in their several vocations . . . but over and above this professional and technical knowledge, they must be supposed to have a stock of common sense and common feeling to furnish subjects of common conversation, or to give them any pleasure in each other's company. It is to this common stock of ideas, spread over the surface, or striking its roots into the very centre of society, that the popular writer appeals, and not in vain; for he finds readers . . . .<sup>122</sup>

Hazlitt believed in the authorial power of educated gentlemen and wrote,

[t]he world itself is a volume larger than all the libraries in it. Learning is a sacred deposit from the experience of ages; but it has not put all future experience on the shelf, or debarred the common heard of mankind from the use of their hands, tongues, eyes, ears, or understandings.<sup>123</sup>

For Hazlitt, authors could produce new knowledge, and in order to do so, they needed conversational habits that went beyond simple talks as acts of pleasing.<sup>124</sup> Thus, for both Hazlitt and De Quincey, conversation was an act of exploring and knowledge creation.

Unlike observers in the eighteenth and nineteenth centuries, whose emphases were on pleasure, memorable readership, and conversational exploration, contemporary theorists express different concerns. They trace the influences on conversations and the shapes they take, inquire into the structure of conversations,<sup>125</sup> offer sociolinguistic analyses,<sup>126</sup> and explore implications from gender theories.<sup>127</sup> Modern theorists also note that some groups “tend to dwell on the emotional rewards that come from conversation and argue that conversation is good for the psyche (or soul) or that

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., DONALD E. ALLEN & REBECCA F. GUY, CONVERSATION ANALYSIS 11 (1974) (“Conversation is the primary basis of direct social relations between persons. As a process occurring in real time, conversation constitutes a reciprocal and rhythmic interchange of verbal emissions.” It involves “a tendency towards consensus.”); see also MICHAEL MOERMAN, TALKING CULTURE: ETHNOGRAPHY AND CONVERSATION ANALYSIS (1988); JACK SIDNELL, CONVERSATION ANALYSIS: AN INTRODUCTION (2010).

<sup>126</sup> See, e.g., DEIRDRE BURTON, DIALOGUE AND DISCOURSE: A SOCIOLINGUISTIC APPROACH TO MODERN DRAMA DIALOGUE AND NATURALLY OCCURRING CONVERSATION (2008).

<sup>127</sup> See, e.g., DEBORAH TANNEN, GENDER AND CONVERSATIONAL INTERACTION (1993).

conversation strengthens our ties with friends.”<sup>128</sup> Recent legal scholarship applies a similar rationale to statutory interpretation, showing that conversations are ordinary communicative experiences and that, because conversational events are automatic and spontaneous, their influence on statutory interpretation is limited.<sup>129</sup> Whether for pleasure, ideological interchange, emotional reward, or interpretation of legal texts, a conversation is mainly understood as an ordinary act of speech, a low-level communicative event. At the same time, conversations are not devoid of value. Conversations serve as important platforms for communication. They provide meeting points with closure for individuals, and therein lies their social status. As a low-level interaction, a conversation, as opposed to a dialogue, is a confined social act; it does not require continuity. When Arnold Lakhovsky painted *The Conversation* (1935), he portrayed conversation as a momentary act of communication between participants to a social gathering—a spontaneous and informal interchange of information with limited emotional involvement.

Conversations, brief verbal encounters, or occasional discussions facilitate communication between individuals. Even if conversations do not normally serve as prolonged inspirational sources for creating or interpreting cultural properties, authoring a novel or play, or making a collage, they provide conversationalists a meeting point from which to develop further communication. They contribute some of the raw materials to the creative process: common language, general structures and information, and undeveloped ideas and abstractions. For a copyrightable work to emerge, an author requires conversations and ideas; but to consolidate, to become an expression worthy of protection, the author needs intensive social interaction, a deeper involvement of the other whose footsteps can be traced while engaging with the text or interpreting the work. When Stephen Miller labeled conversation a “declining art,” he began his criticism by defining conversation as an advanced form of communication.<sup>130</sup> Miller then criticized social changes that rendered conversations redundant, empty social vessels.<sup>131</sup> As the following Parts will show,

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<sup>128</sup> MILLER, *supra* note 114, at 20; *see also id.* at 10–28; DEBORAH TANNEN, *CONVERSATIONAL STYLE: ANALYZING TALK AMONG FRIENDS* (2005).

<sup>129</sup> Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1578 (2014); *see also* Deborah Hellman, *Unintended Implications*, 101 VA. L. REV. 1105 (2015).

<sup>130</sup> MILLER, *supra* note 114.

<sup>131</sup> *Id.*

if copyright will not protect a robust system of dialogicality, the very subject matter that copyright was designed to protect, namely original works of authorship and art that display social value, will become low-level communicative constructs—empty social vessels. The next Part further explains the social boundaries of conversations and discusses why they cannot rise to the level of a genuine dialogue.

### III

#### THE MEASURE OF DIALOGUE

##### *A. Authenticity and Genuineness*

What makes dialogues authentic and distinct from conversations is the genuine recognition of “the other” by each participant to the dialogic event.<sup>132</sup> A genuine dialogue is a conversation of change,<sup>133</sup> a “focused conversation,”<sup>134</sup> a purposeful communicative act,<sup>135</sup> and an “interlocutory process”<sup>136</sup> that requires the other for its own existence. As Martin Buber wrote, an authentic dialogue “derives its genuineness only from the consciousness of the element of

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<sup>132</sup> Dialogue comes from the Greek word “dialogos.” Logos means “the word” and dia means “through.” PER LINELL, *RETHINKING LANGUAGE, MIND, AND WORLD DIALOGICALLY: INTERACTIONAL AND CONTEXTUAL THEORIES OF HUMAN SENSE-MAKING 3* (2009). Etymologically, as David Bohm observes, dialogue means a speech across, between, or through two or more people. DAVID BOHM, *BOHM ON DIALOGUE 6–7* (Lee Nichol ed., 1996) [hereinafter *BOHM ON DIALOGUE*]. A dialogue is a practice between two or more people that “will make possible a flow of meaning in the whole group, out of which may emerge some new understanding.” *Id.* This Article does not treat dialogue as a segment of the Socratic genre revolving around speech or discussion, questions and answers. Dialogue, as developed and applied in antiquity, has been frequently used in the pedagogical sense. The Socratic Method is known to students and has been the subject of much academic debate. Studies on antiquity show that the pioneering Socratic method, *elenchus* (to examine, refute, or put to shame) “is a method which lends itself to the dialogue because it requires that at least two voices be heard.” KENNETH SEESKIN, *DIALOGUE AND DISCOVERY: A STUDY IN SOCRATIC METHOD 1* (1987); see also NIKULIN, *supra* note 23, at 1–37 (analyzing the evolution of dialogue in antiquity). This Article applies dialogue qua meaning, not qua method, to explain the creative process.

<sup>133</sup> Patrick M. Jenlink, *The Power of Dialogue in Social Systems*, in *DIALOGUE AS A COLLECTIVE MEANS OF DESIGN CONVERSATION* 51, 53 (Patrick M. Jenlink & Bela H. Banathy eds., 2008).

<sup>134</sup> Patricia Romney, *The Art of Dialogue*, CLARK U. *DIFFICULT DIALOGUES*, [http://www.clarku.edu/difficultdialogues/pdfs/art\\_of\\_dialogue.pdf](http://www.clarku.edu/difficultdialogues/pdfs/art_of_dialogue.pdf) (last visited Dec. 10, 2016).

<sup>135</sup> MILLER, *supra* note 114, at 14 (asserting that “talk is generally purposeful whereas conversation is not”).

<sup>136</sup> Swearingen, *supra* note 26, at 68.

inclusion.”<sup>137</sup> Therefore, what defines a dialogue as such is the fact that the other is integral to the process and is seen as it wants to be seen. From this mutual relation, the dialogic experience emerges.<sup>138</sup>

The sociology of dialogue conveys connecting and interacting in society. In dialogues, parties suspend “personal opinions and judgments” in order “to listen deeply,” understand each other, and create a community through verbal and silent social transactions.<sup>139</sup> Parties to a dialogue create mutual commitments.<sup>140</sup> Never a solitary act, a dialogue connects the thoughts and knowledge of individuals and uses these qualities “to transform existing beliefs as well as create new innovations and cultural artifacts.”<sup>141</sup> That is, dialogue is both “a relation that we create and sustain by conjoint agreement and through shared discourse” and a mechanism for creating culture by virtue of connecting the subjective individual consciousness with the socially

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<sup>137</sup> MARTIN BUBER, *BETWEEN MAN AND MAN* 97 (Maurice Friedman ed., Ronald Gregor Smith trans., 1965) [hereinafter *BETWEEN MAN AND MAN*]. Friedman defines two additional types of quasi-dialogue: technical dialogue and fake dialogue. Maurice Friedman, *Introduction to MARTIN BUBER, BETWEEN MAN AND MAN* xi, xiii–xiv (Ronald Gregor Smith trans., Maurice Friedman ed., 1965). Technical dialogue is akin to a simple conversation because it “is prompted solely by the need of objective understanding.” *BETWEEN MAN AND MAN*, *supra* note 137, at 22. Such dialogue is a “monologue disguised as dialogue.” *Id.*

<sup>138</sup> *BETWEEN MAN AND MAN*, *supra* note 137, at 22 (“There is genuine dialogue – no matter whether spoken or silent – where each of the participants really has in mind the other or others in their present and particular being and turns to them with the intention of establishing a living mutual relation between himself and them.”). Martin Friedman, a scholar of Buber’s ontology dialogue, argues that a genuine dialogue is where the uniqueness of the person is secured. Martin Friedman, *Dialogue of Touchstones: An Approach to Communication and Identity*, 2 COMM. 143, 152 (1976) (“The proper understanding of dialogue includes uniqueness; for it is only in uniqueness that there is real mutuality, presentness, and presence. Dialogue means a mutual sharing in reciprocal presentness of the unique.”).

<sup>139</sup> Patrick M. Jenlink & Bela H. Banathy, *Dialogue and Designing Our Future: Conversation as Culture Creating and Consciousness Evolving*, in *DIALOGUE AS A COLLECTIVE MEANS OF DESIGN CONVERSATION* 159, 161 (Patrick M. Jenlink & Bela H. Banathy eds., 2008). In the words of Banathy and Jenlink, dialogue is best defined as a

culturally and historically specific form of social discourse accomplished through the use of language and verbal transactions. It suggests community, mutuality and authenticity – an egalitarian relationship. So understood, dialogue provides a meeting ground, *communitas*, and manifests itself in a variety of spontaneous and ritual modes of discourse in which nature and structure meet.

*Id.* at 159.

<sup>140</sup> Douglas Watson, *Commitment, Types of Dialogue, and Fallacies*, 14 *INFORMAL LOGIC* 93 (1993) (asking “[w]hat is commitment in dialogue? Is it a state of mind? Or is it an inference to be drawn from what you say and how you act when you are interacting with another participant in a social situation?”).

<sup>141</sup> Jenlink & Banathy, *supra* note 139, at 160.

institutionalized structure of society, which allows for cross-cultural communication and learning.<sup>142</sup> Dialogue, as a relational act, transforms the isolated being from an autonomous to a communicative entity.<sup>143</sup> It renews the participant by virtue of his social exposure and his affiliation to others.

Copyright principles restrict the exclusive ownership of creative works. As a mechanism intended to protect dialogical opportunities when actors' voices cannot win a right or remedy equal to their contribution, copyright attempts to alleviate the imbalance between owners and users. Although the law provides distributional mechanisms for face-to-face dialogues (like in *Artists in Dialogue*),<sup>144</sup> for example, in the form of joint ownership,<sup>145</sup> it fails to reward, protect or recognize the role of the silent, ubiquitous contributor—the other—in copyrighted enterprises. This Part aims to contour the normative boundaries of how a genuine dialogue applicable to copyright should be defined.<sup>146</sup> It examines the thinking of three dominant philosophical authorities on dialogism: Russian literary philosopher Mikhail Bakhtin, quantum physicist David Bohm, and philosopher Martin Buber. The way dialogism evolved in contemporary theories of social relations, the cultural life of

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<sup>142</sup> *Id.*

<sup>143</sup> NIKULIN, *supra* note 23, at 141 (arguing that dialogue “transform[s] the individual from a closed, self-sustaining, and isolated subject to a dialogical person”).

<sup>144</sup> See *Artists in Dialogue*, *supra* note 7.

<sup>145</sup> 17 U.S.C. §§ 101, 201(a) (2012).

<sup>146</sup> For notable works on dialogue as a unique form of conversation and social discourse, see MARTIN BUBER, *I AND THOU* (Ronald Gregor Smith trans., 1958) (examining the essence of dialogue from the I-It to an I-Thou presence in interhuman relations); NICHOLAS C. BURBULES, *DIALOGUE IN TEACHING: THEORY AND PRACTICE* 19 (1993) (contending that dialogue is “at heart a kind of *social relation* that engages its participants”); Friedman, *supra* note 138, at 143 (arguing that a genuine dialogue is achievable only when the participants are vulnerable and allow a true expression of their inner values, identity, and uniqueness); PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramon trans., 1970) (emphasizing the importance of dialogue for education, freedom, and liberation); PATRICK DE MARÉ ET AL., *KOINONIA: FROM HATE, THROUGH DIALOGUE, TO CULTURE IN THE LARGE GROUP* (1991) (arguing that a dialogue requires externalization of internal processes in order to address wrong cultural practices. In support of their position, they employ the Greek concept of *Koinonia*, according to which a good dialogue is premised on impersonal fellowship rather than personal friendship); HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* 66 (David E. Linge ed. & trans., 1976) (asserting that the dialogical relation “carries away” its participants because “one enters into a dialogue with another person and then is carried along further by the dialogue” to explore insights unknown to him prior to the dialogical event).



democracies, and the construction of selves and creative artifacts owes much to these three authorities.

### B. A Continuum of Voices

#### 1. Utterances and Meaning

For Mikhail Bakhtin, the place of the other in cultural meaning-making is best explained through the polyphony of art and literature and the cumulative nature of cultural creativity.<sup>147</sup> According to Bakhtin, it is impossible to understand the literary text of Dostoevsky, or other writers and authors, from a traditional authorial/monological point of view.<sup>148</sup> A true understanding requires attention to the other, that is, to the dialogical. The other can be either a present individual whose reactions are addressed by the speaker or the “generalized other”<sup>149</sup>—the image of an imaginary audience.<sup>150</sup> For Bakhtin, the idea behind “private craftsmanship” is impossible because it both perpetuates misunderstandings about the true nature of creative works, monologism, language, and the effective impact of historicities and fallaciously grounds assumptions about the transcendental ego and the inner construction of the self.<sup>151</sup>

A basic concern that guides Bakhtin is meaning. According to Bakhtin, meaning does not descend from authority to society but instead emerges from a continuous dialogue between the speaker and the other. Dialogue is always in the “process of creation, never

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<sup>147</sup> See generally MIKHAIL BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) [hereinafter BAKHTIN, *THE DIALOGIC IMAGINATION*]; MIKHAIL BAKHTIN, *SPEECH GENRES AND OTHER LATE ESSAYS 7* (Caryl Emerson & Michael Holquist eds., Vern W. McGee trans., 1986) [hereinafter BAKHTIN, *SPEECH GENRES*] (asserting that “our real exterior can be seen and understood only by other people, because they are located outside us in space and because they are *others*”). Bakhtin’s work is helpful in understanding not only the way in which communities may intervene and counter the dominance of a particular institution (including intellectual property law), but also the actions and collaborations of users in the making of knowledge. GIBSON, *supra* note 27, at 135.

<sup>148</sup> *Id.*

<sup>149</sup> This term was coined by Mead who holds that “[t]he attitude of the generalized other is the attitude of the whole community.” GEORGE HERBERT MEAD, *Play, the Game and the Generalized Other*, in *MIND SELF AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* § 20, at 154 (Charles W. Morris ed., 1934). Every socially-organized group has common meanings that allow members of the group to communicate and to form social relations. *Id.*

<sup>150</sup> TZVETAN TODOROV, *MIKHAIL BAKHTIN: THE DIALOGICAL PRINCIPLE*, in *13 THEORY AND HISTORY OF LITERATURE* 1, 43 (Wlad Godzich trans., 1984).

<sup>151</sup> BAKHTIN, *THE DIALOGIC IMAGINATION*, *supra* note 147, at 269.

completed.”<sup>152</sup> Communicative acts can have meaning if understood as a relational continuum. Every utterance, or “the actual communicative interaction in its real situation,”<sup>153</sup> is relational because it exists in relation to other utterances,<sup>154</sup> reflects a myriad of diverse and conflicting voices (heteroglossia),<sup>155</sup> and presents “a process in which [people] oppose or dialogically interlamine each other.”<sup>156</sup> Utterances are constructions saturated with the voices of others,<sup>157</sup> and as such, every utterance can never be a “single-voiced vehicle for expression.”<sup>158</sup> Thus, literary and artistic works—as historical imprints of utterances, social relations, and cultural takings—are not monological constructs.

Expressions exist only if they have meaning. This is why “selves” display a “drive to meaning.”<sup>159</sup> A self cannot be examined as a psychologically isolated organism because “[m]eaning (communication) implies community.”<sup>160</sup> The place of the other is not passive; it goes to the essence of the speaker’s role by making an

<sup>152</sup> COOMBE, *supra* note 27, at 83.

<sup>153</sup> SIMON DENTITH, *BAKHTINIAN THOUGHT: AN INTRODUCTORY READER* 3 (1995). It should be noted that the role of the individual is not diminished and that “dialogue with another . . . does not invite us to cancel what historically separates us but rather to understand other’s historical specificity as fully as possible.” *Id.*

<sup>154</sup> BAKHTIN, *THE DIALOGIC IMAGINATION*, *supra* note 147, at 354.

<sup>155</sup> *Id.* (almost every utterance displays “an intense interaction and struggle between one’s own and another’s word”).

<sup>156</sup> *Id.* Bakhtin further elaborates on this aspect in MIKHAIL BAKHTIN, *PROBLEMS OF DOSTOEVSKY’S POETICS* 37 (Caryl Emerson ed. & trans., 1984) [hereinafter BAKHTIN, *PROBLEMS OF DOSTOEVSKY’S POETICS*]. Here, Bakhtin argues that Dostoevsky does not present authorial surplus of meaning but rather displays a deep dialogic experience of human thought. *Id.* An authorial idea begins its social life “only when it enters into genuine dialogical relationship with the ideas of *others*, ideas embodied in someone else’s voice. The idea does not reside in a person’s head but in dialogic communion . . . .” Maurice Friedman, *Martin Buber and Mikhail Bakhtin: The Dialogue of Voices and the Word that is Spoken*, in *DIALOGUE AS A MEANS OF COLLECTIVE COMMUNICATION* 29, 38 (Bela H. Banathy & Patrick M. Jenlink eds., 2005).

<sup>157</sup> In an utterance, “language always registers not only the subjectivities of its speaker and its intended addressee but also the historical traces of the repeated and varying appropriations of words by individuals who are socially constituted.” Nancy Glazener, *Dialogic Subversion: Bakhtin, the Novel and Gertrude Stein*, in *BAKHTIN AND CULTURAL THEORY* 156 (Ken Hirschkop & David G. Shepherd eds., 2001).

<sup>158</sup> BAKHTIN, *THE DIALOGIC IMAGINATION*, *supra* note 147, at 355. Because Bakhtin’s presupposition that a voice is open in the sense of representing “a whole plurality of interlocutors: speakers and listeners,” then “a single, separate and isolated voice is impossible, because the voice needs to be directed toward, and heard by, the other.” NIKULIN, *supra* note 23, at 39–40.

<sup>159</sup> COOMBE, *supra* note 27, at 83.

<sup>160</sup> TODOROV, *supra* note 150, at 30.

utterance a product of the interaction of the interlocutors. Meaning is a result of responding and addressing and sometimes of fierce conflicts between competing interests or ideals.<sup>161</sup> Indeed, meaning, as it implies community, can be understood in the context of addressivity, which in turn dictates, “I am an event, the event of constantly responding to utterances from the different worlds I pass through.”<sup>162</sup> Further, that I consume and internalize signs brought from outside of the self and I respond to these signs with signs: “[m]eaning comes about in both the individual psyche and in shared social experiences through the medium of the sign, for in both spheres understanding comes as *a response to a sign with a sign*.”<sup>163</sup> This implies that every meaning is coauthored, that every word uttered by one person belongs in part to another.

Bakhtin’s uses of dialogism offer much to inform critical studies on authorship and copyright, especially of literary texts. Copyright scholars Rosemary Coombe, Carys Craig, and Johanna Gibson were inspired and influenced by Bakhtin and developed theories explicating the struggle between ownership and culture. They found that Bakhtin’s approach is particularly relevant to contemporary copyright discourses because, rather than explaining intellectual creation as a juridical account regulated by a system of rules, Bakhtin’s approach urges us to see it as a replica of a progressive social institution that grows indefinitely. This institution requires the presence of others for the sake of creating meaning that was not imposed on the community by one dominant institution/voice. Bakhtin, as Coombe explains,

focuses attention upon the historical actuality of its continuous evolution, the particularities of the multiple social contexts in which the signs that surround us are enunciated, the inequalities between those who have resources to speak and those who must speak the languages of other, and the conflicts and antagonisms around meaning that are generated in such conditions.<sup>164</sup>

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<sup>161</sup> In musical parodies, for example, the meaning is a result of the conflict between the original text and the parodied text. Andrey V. Denisov, *The Parody Principle in Musical Art*, 46 INT’L REV. AESTHETICS & SOC. MUSIC 55, 63 (2015). Denisov observed that a parody is not a simple response to another’s voice, but the result of a “battle between two voices.” *Id.*

<sup>162</sup> MICHAEL HOLQUIST, *DIALOGISM: BAKHTIN AND HIS WORLD* 48 (1990).

<sup>163</sup> *Id.* at 49 (emphasis added).

<sup>164</sup> COOMBE, *supra* note 27, at 83–84.

This historical and progressive notion of dialogism is, for Bakhtin, the novel's hallmark.<sup>165</sup> Bakhtin writes, "the speech of another is introduced into the author's discourse (the story) in a *concealed form* . . ." and "this is not just another's speech in the same 'language' – it is another's utterance in a language that is itself 'other' to the author as well . . ."<sup>166</sup> The place of the other emerges from Bakhtin's vision of meaning as a multiplicity of voices.<sup>167</sup> This multiplicity gives the novel its meaning and social status. Bakhtin's vision of dialogism explains the presence of many languages at work in one community, a reality that aims to "interrupt the possibility of a major and dominant language becoming entrenched as the sole means of relations between individuals in that community."<sup>168</sup>

## 2. *The Carnival and the Public Domain*

Laws regulating intellectual creations tend to strengthen corporate power and lack an understanding of the role of the other in works of authorship. These laws "declare the author the victor,"<sup>169</sup> treating creators as "the moral heroes of copyright,"<sup>170</sup> and explain why Bakhtin's obsession with the concept of carnival, where the center and periphery interact, is invaluable for discourses on intellectual property.<sup>171</sup> Bakhtin's concept of carnival shakes up the authoritative and official versions of language and values in a way that makes room for a multiplicity of voices and meanings. Bakhtin's carnival explains his resistance to the dominance of the "official" in cultures and claims a place for a plurality of linguistic voices that "allows us to see the social significance of discourse and the relational nature of every utterance."<sup>172</sup> Carnival, for Bakhtin, is a means to display otherness by dismantling the hegemonic role of official voices.<sup>173</sup> In carnival,

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<sup>165</sup> See BAKHTIN, *THE DIALOGIC IMAGINATION*, *supra* note 147, at 259–422.

<sup>166</sup> *Id.* at 303.

<sup>167</sup> See NIKULIN, *supra* note 23, at 39 ("Every voice that speaks is meant to be heard, and every voice that is heard is meant to be responded to, and thus every voice craves dialogue.").

<sup>168</sup> GIBSON, *supra* note 27, at 130.

<sup>169</sup> Peter Johnson, *Can You Quote Donald Duck?: Intellectual Property in Cyberculture*, 13 *YALE J.L. & HUMAN.* 451, 467 (2013) (reviewing COOMBE, *supra* note 26).

<sup>170</sup> Michael Spence, *Rogers v. Koons: Copyright and the Problem of Artistic Appropriation*, in *THE TRIALS OF ART 213* (Daniel McClean ed., 2007).

<sup>171</sup> See generally DENTIITH, *supra* note 153, at 39.

<sup>172</sup> CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE*, *supra* note 13, at 39.

<sup>173</sup> See, e.g., Anqi Hu, *Copycatting Culture Study: A Perspective of Bakhtin's Carnival Theory*, 7 *J. CAMBRIDGE STUD.* 120 (2012).

laughter and comic rituals temporarily replace the seriousness and hierarchies of official and religious life.<sup>174</sup> Carnivals suggest the absence of theatre-like footlights,<sup>175</sup> “a change from principles of stability and closure to constant possibility” where “nothing is fixed . . . , and everything is in a state of becoming.”<sup>176</sup> The carnival, as a scene for change, re-energizes the public arena. It “belongs to the whole people, it is universal . . . .”<sup>177</sup> As such, a carnivalesque setting shares features of both the State of Nature, where each individual is free to react and change,<sup>178</sup> and the public domain in copyright, where each individual can use, manipulate, and adjust, unlimited ideas and unprotectable resources.<sup>179</sup>

In the Renaissance and Middle Ages, tensions between the dominant and lower classes spawned a carnivalesque subculture in which sacred symbols associated with the Church and the feudal system were made part of the secular festivity.<sup>180</sup> Lower classes searched for relief from the rigidity of the rules of the dominant.<sup>181</sup> This brought them to live a “second life outside officialdom”<sup>182</sup> through a “boundless world of humorous forms and manifestations [that] opposed the official and the serious tone of medieval

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<sup>174</sup> MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 7, 66, 90 (Hélène Iswolsky trans., 1984) [hereinafter BAKHTIN, RABELAIS] (“The basis of laughter which gives form to carnival rituals frees them completely from all religious and ecclesiastic dogmatism, from all mysticism and piety.”).

<sup>175</sup> *Id.* at 7.

<sup>176</sup> Shanti Elliot, *Carnival and Dialogue in Bakhtin’s Poetics of Folklore*, 30 *FOLKLORE F.* 129, 130 (1999).

<sup>177</sup> BAKHTIN, *PROBLEMS OF DOSTOEVSKY’S POETICS*, *supra* note 156, at 128.

<sup>178</sup> John Locke defined the State of Nature as a “State of Liberty, yet it is not a State of Licence, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions . . . .” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 270–71 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1988) (1689) (emphasis added).

<sup>179</sup> See, e.g., James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *L. & CONTEMP. PROBS.* 33, 68 (2003); David Lange, *Reimagining the Public Domain*, 66 *L. & CONTEMP. PROBS.* 463, 476 (2003) (arguing that the public domain in copyright is “an affirmative source of entitlements” capable of thwarting “the encroachments upon the creative imagination threatened by intellectual property”); Lawrence Lessig, *The Architecture of Innovation*, 51 *DUKE L.J.* 1783, 1788 (2002) (arguing that the public domain is a commons that is “within the reach of members of the relevant community without the permission of anyone else”). See generally Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965 (1990) (discussing the resources that the public domain must protect).

<sup>180</sup> BAKHTIN, RABELAIS, *supra* note 174, at 4.

<sup>181</sup> *Id.* at 4–6.

<sup>182</sup> *Id.* at 6.

ecclesiastical and feudal culture.”<sup>183</sup> All carnivalesque figures and activity, which were partly tolerated by the Church,<sup>184</sup> were present: clowns, fools, giants and jugglers, parodies, and comic cults expressing nonconformist, liberating, and even rebellious views.<sup>185</sup>

Carnival marks “the suspension of all hierarchical rank, privileges, norms, and prohibitions.”<sup>186</sup> Bakhtin contrasts feasts of the Middle Ages with carnivals, in that the former were formal, official, and complete.<sup>187</sup> Middle Age feasts were “monolithically serious,”<sup>188</sup> with laughter ever absent. Conversely, a carnival is a communal feast where people experience their second life. A carnival allows an attendee to enter the “utopian realm of community, freedom, equality and abundance.”<sup>189</sup> From the carnival, Bakhtin borrows flexible values of “becoming,” “changing,” and “incompleteness” for his theory on dialogism.<sup>190</sup> He uses obscene and grotesque images—”open unfinished” images<sup>191</sup>—to explain the nature of “becoming,” as opposed to pre-determined official orders and tendencies and to show that dialogism disrupts hegemonic practices and uniformity of thought. As Shanti Elliot explains, “‘Dialogic’ discourse, like the image of carnival activity, responds and moves; like the open and incomplete carnival body, it is always growing and always open to other words.”<sup>192</sup>

Folk culturists have applied Bakhtin’s concept of carnivalization to explain cultural phenomena. Roberto DaMatta writes that in a carnival setting, “everything is ‘sung.’ Song, indeed, is the form of participation that is possible and legitimate. Through singing simple songs, everybody becomes equal and understands each other.”<sup>193</sup>

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<sup>183</sup> *Id.* at 4.

<sup>184</sup> *Id.* at 14.

<sup>185</sup> As Lior Barshack explains, “[t]he most striking feature of the carnivalesque mode is the fading away of the interior and private realms” where participants “are liberated from the burden of human psychology and reduced to their outward aspects.” Lior Barshack, *Intimate Enunciations: Carnival and Apocalypse in Fellini*, 31 CARDOZO L. REV. 1019, 1020 (2010).

<sup>186</sup> BAKHTIN, RABELAIS, *supra* note 174, at 10.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 9.

<sup>189</sup> *Id.* Carnival is the “true feast of time, the feast of becoming, change, and renewal. It was hostile to all that was immortalized and completed.” *Id.* at 10.

<sup>190</sup> *Id.* at 10, 26, 83.

<sup>191</sup> *Id.* at 281, 317.

<sup>192</sup> Elliot, *supra* note 176, at 133.

<sup>193</sup> ROBERTO DAMATTA, CARNIVALS, ROGUES, AND HEROES 110 (John Drury ed., 1991).

Singing is an event of utmost freedom—in contrast to anti-Bakhtin’s restrained feasts of the Middle Ages—where “it is not an obligatory event that requires certain clothes, motions or attitudes, or the participation of all Brazilians.”<sup>194</sup> It is an event that “marks a transitory moment when the ethic of ‘everything is possible’ comes into being.”<sup>195</sup> DaMatta contrasts the Brazilian carnival with New Orleans’ Mardi Gras.<sup>196</sup> While the former displays a Bakhtinian festivity of “becoming,” about the latter DaMatta writes, “on the ritual level, the Carnival of New Orleans seems to reproduce the deeper truths of class exclusivism.”<sup>197</sup> It is a spectacle with a climax—not an unfinished, unclosed parade.<sup>198</sup>

Festivities include open and closed parades. A parade confined to a particular theme and message allows the organizer to exercise his autonomy to choose the preferred theme of the parade. As the U.S. Supreme Court has held, if a parade does not act as a tool to “silence the voice of competing speakers,” the choice of a theme does not amount to an imposition of official constraints by the State or private speakers.<sup>199</sup> The parade organizers do not “forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”<sup>200</sup> The Court remarked, “parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.”<sup>201</sup> Perhaps a real parade shares some features of a carnival. For example, “[s]pectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages . . . ; marching bands and pipers play; floats are pulled along; and the whole show is broadcast over

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<sup>194</sup> Roberto DaMatta, *A Concise Reflection on the Brazilian Carnival*, in *AESTHETICS IN PERFORMANCE: FORMATIONS OF SYMBOLIC CONSTRUCTION AND EXPERIENCE* 183, 186 (Angela Hobart & Bruce Kapferer eds., 2005); cf. Richard Schechner, *Carnival (Theory) After Bakhtin*, in *CARNIVAL: CULTURE IN ACTION—THE TRINIDAD EXPERIENCE* 3, 4 (Milla Cozart Riggio ed., 2004) (“Trinidad Carnival actually both critiques official culture and supports it. It is an event both ‘of the people’ and ‘of the nation.’”).

<sup>195</sup> DaMatta, *supra* note 194, at 183.

<sup>196</sup> DAMATTA, *supra* note 193, at 127–31.

<sup>197</sup> *Id.* at 129.

<sup>198</sup> *Id.*

<sup>199</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578 (1995) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656 (1994)).

<sup>200</sup> *Id.* at 569–70.

<sup>201</sup> *Id.* at 568 (quoting SUSAN G. DAVIS, *PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA* 6 (1986)).

Boston television.”<sup>202</sup> However, like Mardi Gras, a parade in Boston that represents a dialogue *with* a defined and thematic closure, is not a carnival.

The carnivalesque mode explains how current intellectual property laws exceed their defining objectives.<sup>203</sup> These laws enclose the development of cultural meaning and accept the official as dictating the limits of cultural environments.<sup>204</sup> Authors and artists, corporate players, and other owners of cultural objects seem to have replaced the Church and institutions of the feudal system. They have become the center of cultural power controlling the way meaning evolves and determining degrees of exposure to symbols and signs—the defining properties of the collective. Principles of copyright law attest to these observations. For example, the duration of copyright offers owners spaces free of carnivalesque uses of their texts and monuments for a long time.<sup>205</sup> Copyright systems struggle to overcome this outcome through doctrines such as the idea/expression dichotomy and fair use to secure users some rights and to allow for a carnivalesque experience even during the time the work is under copyright protection.

Though, in theory, users can consume an unlimited number of ideas or ridicule protractible expressions in the course of fair use, in practice, these uses are limited. The “incredibly shrinking” doctrine of fair use<sup>206</sup> and the growth in information feudalism<sup>207</sup> explain why users’ carnivalesque experiences have been reduced to remote expectations. In feudal systems, the Church was entrenched in the spiritual and practical lives of medieval peasants. In copyright systems, members of the public—who attach cultural value to commodified information and create and nurture spaces for dialogic exchange where copyrighted works receive new meanings—are spiritually affected by the closure of access to these objects. Their practical lives are also affected. For example, they are unable to use and enjoy copyrighted materials, advance in certain professions, or

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<sup>202</sup> *Id.* at 569.

<sup>203</sup> COOMBE, *supra* note 27, at 85–86.

<sup>204</sup> *See infra* Part V.

<sup>205</sup> *See* sources cited *supra* note 18.

<sup>206</sup> *See* Symposium, *Fair Use: ‘Incredibly Shrinking’ or Extraordinarily Expanding*, 31 COLUM. J. L. & ARTS 571 (2008).

<sup>207</sup> PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 267 (2004).



contribute to innovation.<sup>208</sup> The peasants likely believed their futures were secured through hard work. In contemporary times, members of the public labor for the maintenance and regeneration of the public domain and contribute, as partners, to the creative process and the execution of creative expressions. As the following Parts demonstrate, irrespective of new information markets that facilitate strong exchange of information, copyright in modern times secures for members of the public the same security that many peasants enjoyed in feudal systems: starvation and a public domain depleted of its constituent properties much akin to a closed parade.

### C. Continuum of Struggles

Dialogue is about subjects interacting. The individual comes into being when he relates to the other. This proposition guided Martin Buber in his classic work *I and Thou*.<sup>209</sup> The opening sentence of the book announces Buber's departure from prevailing philosophical holdings. "To man," he writes, "the world is twofold in accordance with his twofold attitude."<sup>210</sup> These two folds are the pairs of relationships: "I-It" and "I-Thou."<sup>211</sup> Rather than relating to the world

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<sup>208</sup> In June 2013, the international community signed The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (available at <http://www.wipo.int/treaties/en/ip/marrakesh/>). The Treaty does not address all the difficulties of disabled people to accessing copyrighted material. One Irish Report explained that the lack of access rights to the disabled does not only "curtail the life chances of a great many people who are unable . . . to access and enjoy the full range of cultural materials. Moreover, it reduced the contribution they can make, both in general to society, and in particular to innovation . . ." THE COPYRIGHT REVIEW COMMITTEE, MODERNISING COPYRIGHT: THE REPORT OF THE COPYRIGHT REVIEW COMMITTEE FOR THE DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION 66 (2013) [hereinafter MODERNISING COPYRIGHT], <https://www.djei.ie/en/Publications/Publication-files/CRC-Report.pdf> (last visited Dec. 10, 2016).

<sup>209</sup> BUBER, *supra* note 146. Buber had a worldwide influence and inspired eminent intellectuals such as Albert Camus, Albert Einstein, T.S. Elliot, and Franz Kafka. Rob Anderson & Kenneth N. Cissna, *Martin Buber: Bearing Witness to an Experience*, in PHILOSOPHICAL PROFILES IN THE THEORY OF COMMUNICATION 127, 131 (Hannah Jason ed., 2012); see also Ruth Birnbaum, *The Uniqueness of Martin Buber*, 40 MOD. AGE 389 (1998).

<sup>210</sup> BUBER, *supra* note 146.

<sup>211</sup> Bakhtin was also influenced by Buber. In an interview quoted in *The New York Review of Books*, he called Buber "the greatest philosopher of the twentieth century." Quoted in Friedman, *supra* note 156, at 30; see also Anderson & Cissna, *supra* note 209, at 137–39 (discussing Buber's influence within the communication discipline). Bakhtin saw the "I" as emerging from intimate social encounters with otherness. Friedman, *supra* note 156, at 31 ("In exact parallel to Buber's contrast between I-Thou and I-It, dialogue and monologue, Bakhtin defines 'monologism' as the denial of the existence outside oneself of 'another I with equal rights (thou).'" ). For both Bakhtin and Buber, a dialogue is

in a solely subject-object relation (“I-It”), man is capable of an “I-Thou” relationship, which is direct, mutual, present, and open. Although the “It” is necessary, he who lives with “It” alone is not a man.<sup>212</sup> Man begins in union and then separates to I-It and back to I-Thou.<sup>213</sup> Ontologically, Buber believed that there is an inborn Thou within each person, which unfolds in our relationship with the other.<sup>214</sup> If we take the other as an It we will not be able to unfold the inborn Thou. From this unfolding, we can make sense of and understand the other. Legal scholars have used the concept of I-Thou to explain the role of the other in taking mutual events seriously.<sup>215</sup> This does not depend on “one letting himself go before another, but on his granting to the man to whom he communicates himself a share in his being.”<sup>216</sup> Thus, for Buber, “I-Thou” is the realm of interpersonal, interhuman, or dialogical relations. Maurice Freedman, Buber’s biographer and prominent follower, explains, “Only I-Thou gives meaning to the world of It, for I-Thou is an end which is not reached in time but is there from the start, originating and carrying through.”<sup>217</sup>

Buber distinguishes among three different levels of dialogue.<sup>218</sup> First, there exists genuine dialogue.<sup>219</sup> This rare and infrequent level occurs when “each of the participants really has in mind the other or

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an inter- and intra-related web of voices. For both, authentic human life requires “*opened dialogue*.” *Id.*

<sup>212</sup> BUBER, *supra* note 144, at 17 (“Man can live continuously and securely in the world of It, but if he only lives in this world he is not a man.”).

<sup>213</sup> As one commentator explains,

The process of becoming, as proposed by Buber, is the movement between the attitude of I-Thou to I-It and back to I-Thou. The beginning relational level is the relationship of union. Man begins in union, then separates in order to grasp the world of objects, institutions, abstractions and accumulated knowledge . . . .

BERNARD J. FLEURY, WHAT IS MAN? MALE AND FEMALE 86 (2011).

<sup>214</sup> BUBER, *supra* note 146, at 17.

<sup>215</sup> See, e.g., Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 1008–14 (2006) (applying Buber’s I-Thou relations to business law and ethics and noting that Buber’s ideal requires us to be attentive to the reality of the other in business situations); see also Ronit Zamir, *Can Mediation Enable the Empowerment of Disadvantaged Groups? A Narrative Analysis of Consensus-Building in Israel*, 16 HARV. NEGOT. L. REV. 193 (2011) (using the I-Thou to explain that the role of dialogue is to undermine hegemonic voices and to see the uniqueness of participants to a negotiation, especially when one group is disadvantaged).

<sup>216</sup> BUBER, *supra* note 146, at 77.

<sup>217</sup> MAURICE S. FRIEDMAN, MARTIN BUBER: THE LIFE OF DIALOGUE 67 (Univ. of Chicago Press, 1955).

<sup>218</sup> Anderson & Cissna, *supra* note 209, at 134–35.

<sup>219</sup> *Id.*

others in their present and particular being and turns to them with the intention of establishing a living mutual relationship between himself and them.”<sup>220</sup> The second level is technical dialogue, which occurs when people reciprocate in understanding each other, such as exists between coworkers or strangers seeking directions.<sup>221</sup> Such dialogues are low-level, verbal exchanges.<sup>222</sup> They serve as social conduits for general information, as in Darwish’s first circle of interaction<sup>223</sup> or, in Hume’s terms, for pleasure conveyed through conversation.<sup>224</sup> The third level is a monologue disguised as a dialogue.<sup>225</sup> This level includes “a conversation in which someone seeks only to make a particular impression on the other.”<sup>226</sup> It is not a close conversation, not even as understood by De Quincey.<sup>227</sup> Nor is it a social activity as depicted by Hazlitt.<sup>228</sup> A monologue under these terms is a solitary and exclusionary experience in the sense that “the focus is more on the self than on one’s partner.”<sup>229</sup> Buber provides as an example a debate in which the speakers do not regard each other as persons and “need neither to communicate something, nor to learn some-thing, nor to influence someone, nor to come into connexion with someone, but solely by the desire to have one’s own self-reliance confirmed by marking the impression that is made . . . .”<sup>230</sup> Buber recognizes the need for monological experiences but fears that this has become the frequent and prevailing, rather than the occasional, mode of communication.<sup>231</sup>

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<sup>220</sup> BETWEEN MAN AND MAN, *supra* note 137, at 19. This relates to one of the basic elements in Buber’s conception of dialogue: confirmation. An awareness of the other as unique and whole necessitate turning to the other in the sense of confirming the other. Buber noted: “In human society at all its levels, persons confirm one another in a practical way to some extent or other in their personal qualities and capacities, and a society may be termed human in the measure to which its members confirm one another.” MARTIN BUBER, *THE KNOWLEDGE OF MAN: SELECTED ESSAYS* 67 (Maurice Friedman ed., Maurice Friedman & Ronald Gregor Smith trans., 1988).

<sup>221</sup> Anderson & Cissna, *supra* note 209, at 134–35.

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

<sup>223</sup> See DARWISH, *supra* note 74, at 186.

<sup>224</sup> See HUME, *supra* note 116.

<sup>225</sup> Anderson & Cissna, *supra* note 209, at 134–35.

<sup>226</sup> *Id.* at 135.

<sup>227</sup> See *supra* notes 116–17.

<sup>228</sup> See *supra* notes 119–20.

<sup>229</sup> Anderson & Cissna, *supra* note 209, at 135.

<sup>230</sup> BETWEEN MAN AND MAN, *supra* note 137, at 22–23.

<sup>231</sup> RONALD C. ARNETT, *COMMUNICATION AND COMMUNITY: IMPLICATIONS OF MARTIN BUBER’S DIALOGUE* 77 (Yvonne D. Mattson ed., 1986).

Although the first level of dialogue can occur surprisingly in “all kinds of odd corners” it is, Buber writes, a rare occasion.<sup>232</sup> This Article argues that a genuine dialogue in the realm of copyrighted commodities is not as rare as it may be in other social realms. A genuine dialogue, defined according to the first level, is fundamental to creative expressions in which one’s cultural and social experiences are combined with one’s monological properties. Every copyrighted enterprise establishes “a living mutual relation” between the author or artist and others.<sup>233</sup> Because “the life of dialogue is the turning towards the other,”<sup>234</sup> and because authorial and artistic works require dialogical resources to emerge, formalize, and generate meaning to be understood by the audience, a monological view of copyright that overemphasizes the authorial self and strengthens an author’s exclusive rights is socially and legally wrong.

The interhuman life of a dialogue is impeded by various factors. These factors include ignoring the other by imposing one’s own views, denying the other’s presence, and failing to perceive him as he wishes to be perceived.<sup>235</sup> Buber’s distinction between imposing and unfolding explains these impediments. The former denotes communicative relations where one has no interest in the reality of the other, while the latter refers to a genuine dialogue in which one contributes to the process of the unfolding of the other.<sup>236</sup> An individualistic approach to copyright hinders the interhuman life of creative dialogues by virtue of providing authors exclusive rights to control their creative expressions, ignoring the role of the other in the creative process, and imposing on the public only limited access rights that in turn restrict fundamental interhuman relations necessary for the creative progress.

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<sup>232</sup> BETWEEN MAN AND MAN, *supra* note 137, at 22.

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

<sup>234</sup> *Id.* at 25. Turning towards the other has a temporal dimension as well. Buber referred specifically to “dialogical moments.” Martin Buber, *Replies to My Critics*, in THE PHILOSOPHY OF MARTIN BUBER 689, 692 (Paul Arthur Schilpp & Maurice Friedman eds., 1967). He even refers to “genuine dialogic moments.” *Id.* Cissna and Anderson explain a dialogic moment as “the experience of inventive surprise shared by the dialogic partners as each ‘turns toward’ the other and both mutually perceive the impact of each other’s turning. It is a brief interlude of focused awareness and acceptance of otherness . . . .” Kenneth N. Cissna & Rob Anderson, *Theorizing About Dialogic Moments: The Buber-Rogers Position and Postmodern Themes*, 8 COMM. THEORY 63, 74 (1998).

<sup>235</sup> BETWEEN MAN AND MAN, *supra* note 137, at 75–81.

<sup>236</sup> *Id.*

For example, the term of protection in copyright favors policies of exclusion and imposing rather than unfolding.<sup>237</sup> It limits the evolution of creative development by enclosing the storehouse of cultural resources, imposing on others a duty to comply with the rules of exclusion, and curtailing the process of unfolding creative others.<sup>238</sup> In the first modern copyright law, the initial term of protection was fourteen years.<sup>239</sup> The Statute of Anne recognized a right of reversion should an author live after the expiration date of the copyright.<sup>240</sup> The term could be renewed for another period of fourteen years if merited by social or economic circumstances.<sup>241</sup> In the statute, the author and the interhuman aspect of creativity together were part of the legal bargain. Bentley and Ginsburg explain, “the second fourteen years should have enabled the author to grant rights anew from a stronger bargaining position should her work have earned a substantial audience.”<sup>242</sup> Acquiring an audience substantial enough to secure an additional term required a wide dissemination of the work and, consequently, the recognition of the other—the audience—as the social target for the work’s communicative future. That recognition is possible only in the realm of the interhuman.

To say the reality of the other plays an insignificant role in modern copyright is an exaggeration. Theories of freedom of expression and critical cultural approaches that reject the Romantic model of authorship rescue, protect, and give meaning to the realm of the other. Moreover, the recent attempt by certain jurisdictions to revise the definition of fair uses by introducing *users’ rights*<sup>243</sup> and the

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<sup>237</sup> See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The Act was challenged in *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (rejecting a constitutional challenge to the CTEA). The effect of this extension is to place a burden on creative people. Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 197 (2002) (discussing the extension of copyright and asserting that “the extension will impose strong restraints, many of whose negative effects will be felt by creative activities”).

<sup>238</sup> Boyle, *supra* note 179, at 33.

<sup>239</sup> An Act for the Encouragement of Learning (Statute of Anne), 1710, 8 Ann. c. 19, § 2 (Gr. Brit.).

<sup>240</sup> *Id.* §§ 1, 9.

<sup>241</sup> *Id.* § 11.

<sup>242</sup> Lionel Bentley & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1479 (2010).

<sup>243</sup> In a landmark decision, the Canadian Supreme Court held that “[t]he fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.” *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1

international success in adopting the Marrakesh Treaty<sup>244</sup> widens the scope of public interest. However, the scope of these successes remains limited. As the first three Parts of this Article argue, many scholars are steadfast in their belief that current copyright laws devalue the place of the other and regard the owner as the most relevant other. In this way, copyright policies reflect Buber's third level of dialogue—a monologue disguised as dialogue. A monological dominance in copyright impedes the development of creative personalities and our cultural environment and, consequently, may even limit our basic right to think and imagine.<sup>245</sup> Strengthening the protection of the entertainment industry, limiting fair uses, or departing from users' rights,<sup>246</sup> creates a copyright culture where not only do the voices of others go unheard but where interhuman spaces—spheres in which creative thoughts and exchanges of meaning develop—become a fiction. Were it so, lost would be the ability to unfold and communicate because the laws regulating cultural production limit the spectrum of enjoyment and use necessary for any genuine interhuman/dialogical spaces. Limiting these interhuman/dialogical spaces and enclosing the development of meanings reduces creative dialogues to, at the most, conversational events.

A genuine dialogue requires seeing the other *qua* other, that is, as he wishes to be seen and treated. Copyright laws protect this principle

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S.C.R. 339, para. 48, at 364 (Can.). In later decisions the Court continued to apply and develop the notion of users and rightsholders. *See, e.g.,* Soc'y of Composers, Authors & Music Publishers of Can. v. Bell Can., [2012] 2 S.C.R. 326, para. 15, at 334 (Can.) (reaffirming that research must receive a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained"). For more on the Canadian fair dealing regime after *CCH*, see generally Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 319–36 (2008).

<sup>244</sup> *See supra* note 208 and accompanying text.

<sup>245</sup> Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 58 (2002) (arguing that the First Amendment protects the "freedom of imagination" and that a strong copyright regime imposes limitations on this freedom).

<sup>246</sup> The Canadian Supreme Court's decision in *CCH Canadian Ltd.*, 1 S.C.R. 339, was adopted by an Israeli District Court, which held that a person operating a Web site that provides video streaming of live sporting events enjoys a user's right to provide the public with access to these events and therefore such person's identity shall not be disclosed to the plaintiff, the Premier League. CC (TA) 11646/08 The Football Association Premier League Ltd. v. John Doe, Tak (3)09 8372 [2009] (by subscription, in Hebrew). However, on May 13, 2012, the Supreme Court of Israel rejected the doctrine of users' rights as applicable to Israeli copyright law finding that the 2007 Copyright Act does not provide any user's rights. CA 9183/09 The Football Association Premier League Ltd. v. John Doe, (May 13, 2012), Nevo Legal Database (by subscription, in Hebrew).

too, through a set of moral rights that preserve the integrity of authors' creative text its "meaning and message."<sup>247</sup> The private and social dimensions of moral rights explain their fundamentality to genuine dialogical experiences. Privately, a lack of protection may "strip the author of an important aspect of her persona, and might also garble or diminish the author's attempt to communicate the nature of her culture to the audience."<sup>248</sup> Moral rights give authors the ability to be treated as they wish and restrict the ways in which the public can use or manipulate their creative works. One can license his copyright, but not the moral rights attached to the work. Moral rights are manifestations of one's personality in one's intellectual expressions. They act as barriers to expropriation of inalienable features of one's personality, embedded in his artistic creations. The right of integrity, for example, gives an author the exclusive right to project his "soul of creativity."<sup>249</sup> The relationship between the work and the author is so strong that, as Kwall writes, it resembles that between "a parent and a child."<sup>250</sup> Socially, moral rights act as guardians of accurate information, as they give the author a "right to *inform the public* about the original nature of the artistic message and the meaning of her work."<sup>251</sup> Furthermore, because copyrighted works are products of the creative collectivity, the public and its creative members, which together hold the various roles of the other, retain a legitimate right to communicate with the author *qua* author and to access the new resource created with the public's contribution.

Moral rights ensure that every use of a work will acknowledge the author in his uniqueness and wholeness. The doctrine of moral rights requires an attitude that "encourages turning towards the other, imagining the reality of the other, receiving the other as partner, and hence confirming the other as a person."<sup>252</sup> This means that moral rights require an awareness of I-Thou, and they unfold the other in ways that conform with Buber's ideal dialogue. This supports an argument that moral rights are better candidates for stronger

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<sup>247</sup> KWALL, *supra* note 3, at 58.

<sup>248</sup> Joshua M. Daniels, Note, "Lost in Translation": Anime, Moral Rights, and Market Failure, 88 B.U. L. REV. 709, 715–16 (2008); see also Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

<sup>249</sup> KWALL, *supra* note 3, at 6.

<sup>250</sup> *Id.* at XIV.

<sup>251</sup> *Id.* at 151; see also Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1561–67 (2011).

<sup>252</sup> Anderson & Cissna, *supra* note 209, at 57.

protection than economic rights in order to foster genuine dialogue premised on accurate information and the building of new dialogical routes. The social bargain in moral rights, then, ensures that the author, in his capacity as the other, receives protection for his expression and that the public receives accurate information based on the real message and meaning intended by the author in his expressive commodity. Although moral rights create some barriers to free dialogues,<sup>253</sup> they feed the ground on which public dialogue can receive and benefit from the author's genuine message.

One may wrongly assume that Martin Buber, with his ideal approach to dialogism, was simply trying to convince us to live a harmonious life of dialogue and inclusion. But what Buber attempted to do was remind us of the “*right to community* that deserves our philosophical attention”<sup>254</sup> by crafting a philosophical anthropology depicting the human experience as a continuum of struggles. It is not monological *or* dialogical, but a continuous management of the tension between these two polarities, which allows people to “seek both unity and individuation.”<sup>255</sup> Unity in copyright requires a strong public domain and recognition of the role of the collective in the creative process. Individuation in copyright is manifested in the rewards authors obtain for the labor and personality they invest in a given work. In the copyright-making process, the author begins in union, then separates to I-It before returning to I-Thou. It is an ongoing process premised on mutuality in every act of creation. Indeed, if mutuality can happen, as Buber maintains, in an underground air-raid shelter or between two audience members listening to Mozart in a darkened opera house,<sup>256</sup> then mutuality between creators and others in the process of creating texts and art is unquestionable. Martin Buber's first level of dialogue refers to rare and infrequent occurrences when “each of the participants really has in mind the other or others in their present . . . and turns to them with the intention of establishing a living mutual relationship . . . .”<sup>257</sup> Intellectual properties are dialogical manifestations of I-Thou experiences. Martin Buber's philosophy of dialogue invites us to

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<sup>253</sup> See, e.g., Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

<sup>254</sup> Arthur S. Lothstein, *To Be is to Be Relational: Martin Buber and John Dewey*, in MARTIN BUBER AND THE HUMAN SCIENCES 33, 48 (Maurice Friedman et al. eds., 1996).

<sup>255</sup> Anderson & Cissna, *supra* note 209, at 137.

<sup>256</sup> BETWEEN MAN AND MAN, *supra* note 137, at 242.

<sup>257</sup> *Id.* at 22.



rethink the interpersonal dimension of the creative process.<sup>258</sup> It restores the notion of “we” and its place in this process.<sup>259</sup>

#### D. A Continuum of Thoughts

A theory of dialogue divergent from those of Bahktin and Buber, is offered by David Bohm. Bohm focuses on thought as a system aimed at cultural regeneration.<sup>260</sup> In *On Dialogue*, Bohm presents his dialogical worldview, emphasizing that dialogue is an advanced mode of communication, a “multi-faceted process, looking well beyond typical notions of conversational parlance and exchange.”<sup>261</sup> It is “a *stream of meaning* flowing among and through us and between us . . . out of which may emerge some new understanding.”<sup>262</sup> Bohm emphasizes the “whole” in dialogue.<sup>263</sup> Each participant in a dialogue contributes to the dialogic entity, and, with the parts others bring, a whole is created.<sup>264</sup> A dialogue is a continuum of thoughts, an inquiry into the process of shaping collective thought. “Such an inquiry necessarily calls into question deeply held assumptions regarding culture, meaning and identity. In its deepest sense dialogue is an invitation to test the viability of traditional definitions of what it means to be human, and collectively to explore the prospect of an enhanced humanity.”<sup>265</sup>

In dialogue, contrary to prevailing beliefs, each person does not make public certain ideas known to him, rather he joins another person in “making something *in common*, i.e., creating something new together.”<sup>266</sup> Participants to a dialogue in this sense form a collective body and when a work of art or authorship is created, it is

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<sup>258</sup> Birnbaum, *supra* note 209, at 395 (arguing that “human scientists have conscientiously embraced Buber’s philosophy to restore an interpersonal dimension to their diverse disciplines”).

<sup>259</sup> *Id.* Restoring the “we” into I-Thou interactions “will serve to guard the moral, material, economic, and technological essentials to sustain the core of centralization without destroying the communal character.” *Id.*

<sup>260</sup> NIKULIN, *supra* note 23, at 22 (providing that Bohm’s version of dialogue is “*sui generis*”).

<sup>261</sup> Peter M. Senge, *Preface to BOHM ON DIALOGUE*, *supra* note 132, at xv.

<sup>262</sup> BOHM ON DIALOGUE, *supra* note 132, at 7.

<sup>263</sup> *Id.* at 10.

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

<sup>265</sup> Senge, *supra* note 261, at vii–viii; *cf.* NIKULIN, *supra* note 23, at 141–42 (“[D]ialogue is not a mechanism whose primary purpose is to produce and originate meaning by means of negotiations, as, for instance, Bohm takes it to be.”).

<sup>266</sup> BOHM ON DIALOGUE, *supra* note 132, at 3.

never the expression of one person or source but an assemblage of a multiplicity of sources. Regarding a work of art, Bohm asks:

Can it properly be said that the artist is *expressing himself*, i.e., literally “pushing outward” something that is already formed inside of him? . . . [W]hat usually happens is that the first thing the artist does is only *similar* in certain ways to what he may have in mind. As in a conversation between two people, he sees the similarity and the difference, and from this perception something further emerges in his next action. Thus, something new is continually created that is common to the artist and the material on which he is working.<sup>267</sup>

Dialogue in Bohmian terms, then, is the place where new knowledge is constantly created. In discussions or conversations, participants bat ideas back and forth to win the game. “At best this may produce agreement or compromise, but it does not give rise to anything creative.”<sup>268</sup> In contrast, in a dialogue, “a person may prefer a certain position but does not hold to it nonnegotiable.”<sup>269</sup> Because a dialogue presupposes a collective thought,<sup>270</sup> it serves as a platform for compromises and negotiation over knowledge and ideas. Bohm tells us that dialogues change both the individual and the individual’s relation to the outer world.<sup>271</sup> It is what we call “communion,” or “a kind of participation” in the free exchange of ideas and information.<sup>272</sup>

Understanding dialogue in this way may lead to new insights on prevalent patterns “for transforming culture and freeing it of destructive misinformation, so that creativity can be liberated.”<sup>273</sup> The essential thing is

the presence of the *spirit* of dialogue, which is, in short, the ability to hold many points of view in suspension, along with a primary interest in the creation of a common meaning. It is particularly important, however, to explore the possibilities of dialogue in the context of a group that is large enough to have within it a wide range of view, and to sustain a strong flow of meaning.<sup>274</sup>

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<sup>267</sup> *Id.* at 4.

<sup>268</sup> DAVID BOHM & F. DAVID PEAT, *SCIENCE, ORDER, AND CREATIVITY* 241 (2d ed. 2000).

<sup>269</sup> *Id.*

<sup>270</sup> BOHM ON DIALOGUE, *supra* note 132, at 29.

<sup>271</sup> BOHM & PEAT, *supra* note 268, at 54.

<sup>272</sup> *Id.* at 47.

<sup>273</sup> BOHM & PEAT, *supra* note 268, at 240.

<sup>274</sup> *Id.* at 247.

Translated into copyright terms, copyright systems as social institutions require thriving dialogical sites, discursive participation, and closeness between individuals, groups, and networks if they are ever to “sustain a strong flow of meaning.”<sup>275</sup> As Johanna Gibson asserts, “it is the flow of information in the network that is of critical interest to a re-conceptualization of the priorities of intellectual property systems in the context of cultural development and diversity.”<sup>276</sup> Enclosure movements in copyright and other intellectual property laws reduce the possibility of sustaining a strong flow of meaning. This flow is detrimentally affected by attaching exclusivity to symbols, words, ideas, and other cultural artifacts that comprise the basic units of every dialogic community. Therefore, the allocation of rights in intangible works cannot be the main focal point of copyright laws.<sup>277</sup>

In an interview with a Dutch artist, Louwrien Wijers, Bohm discussed the nature of creativity. Criticizing the Dutch understating of quantum mechanics, Bohm proclaimed that the underlying mathematics of quantum theory imply “a movement in which everything, any particular elements of space, may have a field which unfolds into the whole and the whole enfolds [the field] in it.”<sup>278</sup> He has explained his vision through the example of a hologram. In contrast to a regular photograph, where there is a point-to-point correspondence between the object and the image, “in a hologram the entire object is contained in each region of the hologram, enfolded as a pattern of waves, which can then be unfolded by shining light through it.”<sup>279</sup> In this example exist implicate and explicate orders. The enfolded, implicate order is characterized by the internal relatedness of every constituent, even those that seem independent in the explicate order.<sup>280</sup> Bohm calls this interrelatedness mutual participation that encompasses every aspect of reality.<sup>281</sup> Lee Nichol explains:

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

<sup>276</sup> GIBSON, *supra* note 27, at 27.

<sup>277</sup> Abraham Drassinower, *Copyright is Not About Copying*, 125 HARV. L. REV. 108 (2012).

<sup>278</sup> DAVID BOHM, BOHM ON CREATIVITY 129 (Lee Nichol ed., 1998) [hereinafter BOHM ON CREATIVITY].

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

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

<sup>281</sup> *Id.* at 130.

Our everyday experience of consciousness is one immediate display of the implicate order—thoughts and perceptions emerge, create actions and leave traces in the world, and then are folded back into consciousness, only to recur in another context or another form, individually and collectively . . . This mutual participation, as manifested in the collective consciousness of humankind, is the basis for Bohm’s vision of *dialogue*. The intention of dialogue is to expose the relatedness of our thought processes, and the manner in which we collectively generate fragmented realities through those thought processes.<sup>282</sup>

This vision of dialogue, Bohm contends, applies to all aspects of life and disciplines.<sup>283</sup> He finds considerable similarity between art and the way in which the mathematics of quantum theory works.<sup>284</sup> “Art is exploring fundamentally new modes of perception, through the senses, and new forms of imagination”<sup>285</sup> that emanate from the implicate order. Dialogue is fundamental to cultural evolution and the avoidance of social stagnation. It is not “an agenda but rather we fall into dialogue as a form of social relation.”<sup>286</sup> The central role of dialogue in the attainment of stable social orders is that it brings “to the surface the fragmented thinking and incoherent patterns of thought that have constrained individual and collective growth and change.”<sup>287</sup> Where culture does not develop as a dialogical enterprise, a “mechanical repetitious order” will take its place.<sup>288</sup>

An earlier expression of this claim was made by John Locke, already aware of this risk, who wrote that adopting laws that perpetuate copyright in the hands of guilds of owners would create an imbalanced copyright system discouraging of learning and access to knowledge.<sup>289</sup> In such a system, the communication and dialogical opportunities that feed the creative process would rarely exist. Absent these opportunities, low-level creative repetitions—rather than valuable creative works—would be created. The individual, as Locke contended, would act as “the topical man,” which he called the “worst

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

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

<sup>284</sup> *Id.* at 125–28.

<sup>285</sup> *Id.* at 109.

<sup>286</sup> Jenlink, *supra* note 133, at 57.

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

<sup>288</sup> BOHM ON CREATIVITY, *supra* note 278, at 133.

<sup>289</sup> See John Locke, *Liberty of the Press*, reprinted in JOHN LOCKE: POLITICAL ESSAYS 329 (Mark Goldie ed., Cambridge Univ. Press 1997) [hereinafter Locke, *Liberty of the Press*].

conversation partner.”<sup>290</sup> Also relevant to a stable copyright regime and the realization of dialogue as a fundamental layer in creative processes is a

proper understanding of the nature of culture. It seems clear that in essence culture is meaning as shared in society. And here ‘meaning’ is not only *significance*, but also *intention*, *purpose* and *value*. It is clear, for example, that art, literature, science and other such activities of culture are all parts of the common heritage of *shared meaning*.<sup>291</sup>

Copyright scholars challenging current expansions of the ownership spectrum in copyright embrace this wisdom when claiming that copyrighted works are built on shared meanings and collectively created and maintained cultural symbols. They also embrace this wisdom when claiming that copyright policies have become a powerful monological tool of owners and industry. These scholars view dialogue as an intersection between subsocieties and subcultures where interaction with, and learning from, others takes place and results in a societal system consisting “not of monolithic structures but rather of a dynamic unity within plurality.”<sup>292</sup> It would be impossible to have the literary texts and inventions that we have without dialogical plurality because they “exceed those imagined in their inception.”<sup>293</sup> Interestingly, Bohm’s ideal of creative dialogue recapitulates the struggles within copyright systems, with owners favoring monological dominance and unilaterally conditioning the exchange of information:

Rather the struggle of each idea to dominate is commonly emphasized in most activities in society. In this struggle, the success of a person’s point of view may have important consequences for status, prestige, social position, and monetary reward. In such a conditioned exchange, the tacit infrastructure [of our culture], both individually and collectively, responds very actively to block the free play that is needed for creativity.<sup>294</sup>

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<sup>290</sup> John Locke, *Of Study*, quoted in Yeo, *supra* note 112, at 16, 18; see also Richard Yeo, *John Locke’s ‘Of Study’ (1677): Interpreting an Unpublished Essay*, 3 LOCKE STUD. 147 (2003).

<sup>291</sup> DAVID BOHM, *Dialogue as a New Creative Order* (1987), in THE ESSENTIAL DAVID BOHM 289 (Lee Nichol ed., 2003).

<sup>292</sup> BOHM & PEAT, *supra* note 264, at 242.

<sup>293</sup> COOMBE, *supra* note 26, at 134.

<sup>294</sup> BOHM & PEAT, *supra* note 268, at 243.

### *E. Three Commonalities*

Although Bakhtin, Buber, and Bohm developed different theories of dialogism, their commitment to a theory of genuine dialogue makes these differences reconcilable. This commitment is so fundamental to the social strength of their theories that one can find shared commonalities in the three theories. First, a genuine dialogue, as a deeper and unique act of interaction, denotes a transaction between individuals and society. Information and other properties exchanged in this transaction require reciprocity, and this will dictate the potential of the transaction to yield creative results. No dialogical transaction will be possible without reciprocity. It is a total enterprise in which each “person’s contributions are aligned with those of others . . . .”<sup>295</sup> The evolving structure of this enterprise and its transactional nature are explained through Bakhtin’s insistence on the place of the other and the polyphony of art and literature as sites of multiple historical voices; through Buber’s argument on the constant movement between the I-It and the I-Thou, and the dominance of the latter; and Bohm’s concept of creation as a continuum of thoughts where participants are not batting ideas back and forth to beat each other, as in low-level interactions, but rather act together to create a whole.

Second, the process of dialogue is a process of “awakening” in the sense that one is fully existent only in dialogue. Therefore, one *must* enter the dialogical to exist fully. Dialogue creates a free flow of meanings between all participants and rescues a self from solitude. For Bakhtin, Buber, and Bohm, dialogue is a socially constructed activity—it is a progressive social event. This process feeds self-realization through knowing the limitations of individuality. Dialogue suspends individuals’ preconceived opinions in the quest for generating collectively shared meanings. It is a participatory act, an organized process. The individual thrives in a group that gives him the “unity of self.”<sup>296</sup> For example, “in the case of such a social group as a ball team, the team is the generalized other in so far as it enters—as an organized process or social activity—into the experience of any one of the individual members of it.”<sup>297</sup> Systems that, through laws and policies, lack or disturb robust and durable dialogical platforms or that avoid treating the dialogical as an eminent feature in good social

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<sup>295</sup> SHIBUTANI, *supra* note 71, at 6–7.

<sup>296</sup> MEAD, *supra* note 149, at 229.

<sup>297</sup> *Id.*

and creative life, produce, in Bohmian terms, “mechanical repetitious order,”<sup>298</sup> under which the development of meanings, social cohesion, and creative selves is frustrated.

The third commonality is the indisputable existence of a plural subject. While the first two commonalities recognize and justify the ubiquity of dialogicality and presuppose an implicit genuine social compact to preserve social stability, the plural subject holds collective commitments and joint responsibilities to preserve societal stability through, *inter alia*, vibrant discursive sites. Notably, the agreements and commitments we collectively share need not be made explicit. As Antonie Meijers asserts, “[m]any social activities are based on prior explicit or implicit agreements. Such agreements bind the subsequent participants in various ways and are an explanatory factor in the subsequent collective actions. The agreement is constitutive of both the collective intentions and the collective agent.”<sup>299</sup> Bakhtin, Buber, and Bohm do not dismiss the individual but define dialogue as a whole in which the individual and the public intentionally agree—both implicitly and explicitly—to create a unitary entity. Their theories imply the existence of a plural subject expressing, metaphorically, the will of a collective mind. While Bakhtin and Buber apply the collective mind paradigm implicitly, Bohm explicitly proclaims that “there is both a collective mind and an individual mind, and like a stream, the flow moves between them.”<sup>300</sup> If authors and artists are part of a plural agent, when consuming cultural properties, they move between their individual mind and the collective mind. The collective commitments they share obligate them to refrain from depleting the commons, to allow fellow authors and users access to newly created objects, and to leave resources for subsequent creations.

Literature on plural subjects accepts the public as a collective entity able to work in accordance with certain conventions and values. Though the public lacks a human mind or a biological brain, the collective commitment to, and responsibility for, the preservation of cultural and social realities constitutes a collective intentional state. In

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<sup>298</sup> BOHM ON CREATIVITY, *supra* note 278, at 133.

<sup>299</sup> Antonie W.M. Meijers, *Can Collective Intentionality Be Individualized*, 62 AM. J. ECON. & SOC. 167, 177 (2003).

<sup>300</sup> BOHM ON DIALOGUE, *supra* note 132, at 27. Dialogue for Bohm was concerned “with suspending individual preconceived opinions and with originating new ‘collectively shared meanings’ among the dialogue’s participants, who, thus, must not only participate in a collective mind, but also, in a sense, must constitute a collective body.” NIKULIN, *supra* note 23, at 23.

this state, the public participates in, contributes to, and controls certain events and processes—a collective mind uniting society. Margaret Gilbert argues that obligations and joint commitments are collective activities. She speaks of a “plural subject” that involves two or more subjects, which, together, create one subject.<sup>301</sup> For Gilbert, “people become jointly committed by mutually expressing their willingness to be jointly committed, in conditions of common knowledge.”<sup>302</sup> She defines “plural subject” broadly: “*any set of jointly committed persons, whatever the content of the particular joint commitment in question.*”<sup>303</sup> She includes in her definition formalized organizations, like unions and armies, and more amorphous conglomerates, like “*social rules and conventions, group languages, everyday agreements, collective beliefs and values, and genuinely collective emotions.*”<sup>304</sup> Gilbert’s ideal “plural subject” seems applicable to almost limitless social configurations, such as the group of authors or artists that today create in the most interconnected environment. This thinking exceeds the narrow definition of “a collection of readers”<sup>305</sup> artists, or other interpretive communities like social or historical societies that share linguistic backgrounds,

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<sup>301</sup> MARGARET GILBERT, *LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION* 187 (1996). The concepts of a plural subject, collective minds, and collective intentions are fraught with criticism. For example, John Searle and Michael Bratman “individualize” collective intentions in order to reject strong conceptions of the plural agent. Both are concerned with avoiding the specter of the collective mind. Intention is a mental state, and minds belong to individuals or persons. As Searle notes, “talk about group minds . . . [is] at best mysterious and at worst incoherent.” John R. Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATION* 401, 404 (Phillip R. Cohen et al. eds., 1990). In Bratman’s words, “a shared intention is not an attitude in the mind of some superagent . . . .” Michael E. Bratman, *Shared Intention*, 104 *ETHICS* 97, 98 (1993); cf. J. David Velleman, *How to Share an Intention*, 57 *PHIL. & PHENOMENOLOGICAL RES.* 29 (1997); see also *Concepts of Sharedness: Essays on Collective Intentionality* (Hans Bernhard Schmid et al. eds., 2008) [hereinafter *Concepts of Sharedness*] (discussing collective intentionality).

<sup>302</sup> GILBERT, *supra* note 301, at 349.

<sup>303</sup> Margaret Gilbert, *The Structure of the Social Atom: Joint Commitment as the Foundation of Human Social Behavior*, in *SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY* 39, 55 (Frederick F. Schmitt ed., 2003).

<sup>304</sup> *Id.* This argument has been recently applied to coauthorship, corporate responsibility, and explaining contested meanings. See Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 *VA. L. REV.* 1683, 1705–24 (2014); Bernadette Meyler, *Accepting Contested Meanings*, 82 *FORDHAM L. REV.* 803, 803 (2013); Pammela Q. Saunders, *Rethinking Corporate Human Rights Accountability*, 89 *TUL. L. REV.* 603, 634–36 (2015).

<sup>305</sup> Fromer, *supra* note 27, at 94.



“interpretive strategies,”<sup>306</sup> and patterns for creating meanings. Gilbert claims, “there is no reason in principle why larger populations may not create joint commitments for themselves.”<sup>307</sup> If this is correct, then authors and artists share a group-mindedness<sup>308</sup> different than simple cooperation.<sup>309</sup> This group-mindedness defines the depth of their cooperation and their collective commitment to and expectation of preserving a stable cultural environment in which dialogical transactions are not stifled by a rigid set of property rules.

A dialogue, as defined by Bakhtin, Buber, and Bohm, is perhaps one of the best examples confirming the inevitable existence of plural subjects. A social activity, like dialoging, that requires interdependence between the subjects comprising the plural presupposes shared commitments and group-mindedness. By its very nature as a social transaction responsible for the evolution of human selves and groups, elements defining the public as a plural subject are embedded in every dialogical experience. If, as Deborah Perron Tollefsen argues, large groups and organizations are able to make, as a collective, rational choices independent of individual decisions,<sup>310</sup> then discussions of plural subjects, collective minds, and collective intention can expose some of the wrongs we nurture in copyright. Such as, for example, the need to reward authors solely on utilitarian grounds, industry incentives to generate more social wealth without authorizing access to this wealth, or a copyright culture based on exclusivity or on fear of being sued.<sup>311</sup>

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<sup>306</sup> STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 161 (1980).

<sup>307</sup> Gilbert, *supra* note 303, at 55.

<sup>308</sup> Michael Tomasello et al., *Two Key Steps in the Evolution of Human Cooperation: The Interdependence Hypothesis*, 53 *CURRENT ANTHROPOLOGY* 673, 685 (2012) (“Group-mindedness . . . relies on a kind of collective intentionality in which all members of the group participate, both following and enforcing the norms that define the group and stabilize its cooperative activities.”).

<sup>309</sup> Michael Tomasello & Hannes Rakoczy, *What Makes Human Cognition Unique? From Individual to Shared to Collective Intentionality*, 18 *MIND & LANGUAGE* 121 (2003). See generally MICHAEL TOMASELLO, *WHY WE COOPERATE* (2009).

<sup>310</sup> Deborah Perron Tollefsen, *Collective Intentionality and the Social Sciences*, 32 *PHIL. SOC. SCI.* 25, 27 (2002).

<sup>311</sup> For example, a study found that educators fear the consequences of making copies of copyrighted materials for classroom use, although these uses are permitted under copyright law. WILLIAM W. FISHER & WILLIAM MCGEVERAN, *THE DIGITAL LEARNING CHALLENGE: OBSTACLES TO EDUCATIONAL USES OF COPYRIGHTED MATERIAL IN THE DIGITAL AGE: A FOUNDATIONAL WHITE PAPER 1*, 57–61 (Berkman Centre for Internet & Society, Pub. No. 2006-09), [https://cyber.harvard.edu/publications/2006/The\\_Digital\\_Learning\\_Challenge](https://cyber.harvard.edu/publications/2006/The_Digital_Learning_Challenge) (last visited Dec. 10, 2016); see also James Gibson, *Risk Aversion*

Bakhtin, Buber, and Bohm's conceptualization of dialogue tells us that modern copyright laws block access to knowledge in ways that diminish the opportunity to rearticulate the relationship between individuals, users, and producers. Commodified texts are living constructs. They are linguistic expressions that deploy meaning and communicate messages constructed by social and cultural properties. Dialogism, as envisioned by Bakhtin, Buber, and Bohm, does greater justice to defining the essence of human creative expressions. It situates the creative act on a continuum of authorial voices, struggles, and thoughts, where every creative act takes and embeds in its final configuration "the multiple social contexts in which the signs that surround us are enunciated . . . ."<sup>312</sup>

#### IV

#### DIALOGICAL INTRICACIES

This Part applies the dialogical transaction model to intellectual property controversies. In all examples used, the model would have given users and the public *en masse* rights of access more comprehensive than courts were willing to provide. The examples show that the narrowly constructed interpretation of copyright favored by courts is inconsonant with the societal environment that gave rise to the principles of copyright. A direct result of this inconsonance is that "the concept of the author-genius has succeeded brilliantly in the legal realm, justifying ever-greater expansions of copyright—often for the benefit of large corporations . . . ."<sup>313</sup> Furthermore, applications of the dialogical transaction model highlight the risks embedded in a copyright system that restricts communicative experiences and demonstrates that the authorial self as dialogic transcends the cultural affiliation to individualism because, as Bakhtin, Buber, and Bohm would proclaim, the existence of the other—either the individual or collective other—is vital for the emergence and maturity of the authorial self.

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*and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (showing how fair users are requested to pay for licenses in order to avoid subsequent litigation); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 100 (2010) (arguing that users "will always prefer to take *less* than what they perceive to be the permissible amount and will be sheltered from liability").

<sup>312</sup> COOMBE, *supra* note 27, at 83.

<sup>313</sup> Tushnet, *The Romantic Author*, *supra* note 13.

The dialogical intricacies examined do not aim to declare the “death of the author,”<sup>314</sup> deprive him of proprietary rights to the expressions of his talent, or claim that there is no authentic originality and every creation is in succession of imitation.<sup>315</sup> The authorial self is a unique construct. Although the nature of copyrighted works as socially and dialogically constructed stands in sharp contrast to Macpherson-like approaches to possessive individualism,<sup>316</sup> authors bring to the creative process their own unique personal properties which entitle them to a reward for the creative value they generate. This Part looks at examples from parody, architecture, urban art, and information networks to demonstrate the fundamentality of preserving dialogical spaces and how, if considered and applied in the course of copyright disputes, the dialogical transaction theory can provide basic interpretive tools with which to redesign copyright principles and restrict official constraints on access to, and the use of, creative properties.

### A. Official Parodies

A parody is an example of a work that involves, builds upon, and produces strong dialogical transactions and puts limits on official rightholders’ authorial control of communicative exchanges. A parody is a unique dialogical construct akin to a “festive liberation of laughter.”<sup>317</sup> Its ubiquity derives from its unavoidable reliance on another’s work, “muddying the original author’s viewpoint”<sup>318</sup> while continuing a conversation on the meaning of the other’s version, displaying “repetition with critical difference”<sup>319</sup> and creating a “refunctioning of preformed linguistic or artistic material.”<sup>320</sup> These characteristics demonstrate the role of otherness in the process of making parodies premised upon intense dialogical relations between

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<sup>314</sup> See Barthes, *supra* note 13.

<sup>315</sup> See generally JONATHAN KEATS, FORGED: WHY FAKES ARE THE GREAT ART OF OUR AGE (2013).

<sup>316</sup> CRAWFORD B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (1972).

<sup>317</sup> BAKHTIN, RABELAIS, *supra* note 174, at 89. For an interesting inquiry into the festive aspect of parodies, see DAVID R. SMITH, PARODY AND FESTIVITY IN EARLY MODERN ART: ESSAYS ON COMEDY AS SOCIAL VISION (2012).

<sup>318</sup> Fromer, *supra* note 27.

<sup>319</sup> LINDA HUTCHEON, A THEORY OF PARODY: THE TEACHINGS OF TWENTIETH-CENTURY ART FORMS 6 (Univ. of Illinois Press 2000) (1985).

<sup>320</sup> MARGARET A. ROSE, PARODY: ANCIENT, MODERN, AND POST-MODERN 52 (1993).

the author of the original text, the author of the parody, and the audience.

Two decades ago, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held parody to be a valuable form of social communication that “lie[s] at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . .”<sup>321</sup> The recent growth of parodic expressions made them “central to the American conversation,”<sup>322</sup> irrespective of original authors’ attempts to treat parodies as unwanted or coerced speech.<sup>323</sup> Parodies became a form of communication that reflected society’s image and need for humor and freedom from official restraints on expressive creativity—a form of communication that dismantled the primacy of authorial control and the hegemonic power of right holders to facilitate creative transactions and establish vibrant “interpretive communities.”<sup>324</sup>

In *Campbell*, the Court supported a parody of Roy Orbison’s famous song “Oh, Pretty Woman” by the rap group, 2 Live Crew.<sup>325</sup> The success of 2 Live Crew prompted the right holder of Orbison’s song to sue for infringement.<sup>326</sup> The district court granted summary judgment for 2 Live Crew on the ground that the song was a parody within the meaning of the Copyright Act.<sup>327</sup> The court of appeals reversed and remanded, holding, *inter alia*, that, because 2 Live Crew took the heart of Orbison’s song and had market success with the song, the parody could not qualify as fair use.<sup>328</sup> The Supreme Court

<sup>321</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>322</sup> William McGeeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 WASH. L. REV. 713, 714 (2015); see also DAN HARRIES, *FILM PARODY* 22 (2000) (observing that cinematic parody has become a “major mode of Hollywood film-making”); HUTCHEON, *supra* note 319, at 3, 109–11 (1985) (discussing the ideological and cultural implications of parodies); Jonathan Gray, *Television Teaching: Parody, The Simpsons, and Media Literacy Education*, 22 CRITICAL STUD. MEDIA COMM. 223, 228 (2005) (noting that contemporary television is “heavily populated by parody and parodic texts”).

<sup>323</sup> KWALL, *supra* note 3, at 59–60 (“The free speech interests of subsequent users must be balanced against those of original authors not to have their works distorted or modified in objectionable ways with implicit or explicit attribution, resulting in a coerced use of their expression.”).

<sup>324</sup> David Tan, *The Transformative Potential of Countercultural Recoding in Copyright Law: A Study of Superheroes and Fair Use*, in *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* 403, 403 (Irene Calboli & Srividhya Ragavan eds., 2015).

<sup>325</sup> *Campbell*, 510 U.S. at 594.

<sup>326</sup> *Id.* at 573–74.

<sup>327</sup> *Id.* at 573; 17 U.S.C. § 107 (2012) (defining the fair use exception).

<sup>328</sup> *Campbell*, 510 U.S. at 573–74.

reversed, finding 2 Live Crew's use of the original to be sufficiently transformative to constitute fair use.<sup>329</sup>

Two aspects of the Supreme Court's *Campbell* judgment are noteworthy. First, after examining the four-pronged test of fair use, the Court concluded that the lower appellate court erred by giving all but dispositive weight to the commercial nature of the parody in accordance with the presumption,<sup>330</sup> ostensibly culled from *Sony Corp. of America v. Universal City Studios, Inc.*, which provides, "every commercial use of copyrighted material is presumptively . . . unfair . . ."<sup>331</sup> Second, the Court justified the need to adopt the heart of the song for the parody to take shape.<sup>332</sup> A parodist relies on the *individual* other—the original author—to be able to create a work of public interest. He likewise relies on the *generalized* or *imagined* other—the audience—who needs to be sufficiently familiar with the original in order to understand, absorb, and value the parody and respond to and communicate with its message. Because an understanding of the original work is vital, a parodist must use the "heart" of the original song.<sup>333</sup> In this sense, a parodist is both a parasitic user and an original creator.<sup>334</sup> The parodist employs the heart of an original expression but then brings to the audience something that the original work never intended to do.<sup>335</sup> It is that heart that most readily conjures the original in its parody and allows the audience to recognize it as such.<sup>336</sup> The interpretation of the parody defense in *Campbell* substantiated the interconnected nature of a parodied text and its unique dialogical construct.

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<sup>329</sup> *Id.* at 594.

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

<sup>331</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (emphasis added).

<sup>332</sup> *Campbell*, 510 U.S. at 588–89.

<sup>333</sup> *Id.*

<sup>334</sup> Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1884 (2011) ("[F]air use or fair dealing for the purpose of criticism is fair because the defendant is responding to the plaintiff's work in her own work. She is not merely repeating the work parasitically.").

<sup>335</sup> Michael Spence, *Intellectual Property and the Problem of Parody*, 114 L.Q. REV. 594, 607 (1998) (arguing that a parodist "must be able to use existing works if he is to communicate effectively").

<sup>336</sup> *Campbell*, 510 U.S. at 588 ("What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.").

It would be a mistake to think that “anyone who calls himself a parodist can skim the cream and get away scot free.”<sup>337</sup> Indeed, the judgments in parody cases show that courts treat the defense as “contingent, not absolute.”<sup>338</sup> Thus, courts will have to continue to define the limits to parodies because authors of parodied works (and their heirs) will continue to invoke their exclusive right to reproduce, adapt, distribute, and display the original work,<sup>339</sup> including its derivative uses,<sup>340</sup> even while the work is still protected and has not entered the public domain.<sup>341</sup> However, in this process, attention is owed to the basic definition of a parody as a form of expression aiming to facilitate free, unrestrained, dialogue—a place for criticism, laughter, and creative chaos.<sup>342</sup> When Bakhtin celebrated the medieval parody, he gave as an example the medieval carnival, largely to rescue a notion of a politicized popular laughter in an era characterized by a hegemonic religious-state order. If legalized

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<sup>337</sup> *Id.* at 589. The need to limit a wide definition of “parody” is fundamental; otherwise, we may end up with an uncontrollable copycatting culture where carnivalesque mocking, imitating or spoofing becomes the norm and replaces “piracy” of popular cultural expression, programs, and brands with “justified use.” Hu, *supra* note 173. Therefore, intellectual property laws are required to suppress the expansion of copycatting. Barton Beebe, *Shanzhai, Sumptuary Law, and Intellectual Property Law in Contemporary China*, 47 U.C. DAVIS L. REV. 849, 872–73 (2014).

<sup>338</sup> McGeeveran, *supra* note 322, at 720.

<sup>339</sup> 17 U.S.C. § 106 (2012).

<sup>340</sup> *Id.* § 103(a).

<sup>341</sup> *Id.* § 302(a).

<sup>342</sup> Two decades after *Campbell*, the Court of Justice of the European Union (CJEU) defined “parody” for the first time and endorsed certain aspects from *Campbell*. Case C-201/13, *Deckmyn v. Vandersteen*, 2014 EUR-Lex CELEX WESTLAW 613CJ0201, at para. 20 (Sept. 3, 2014). That case arose from the request of a Belgian Court to provide a uniform definition of the prerequisites for a lawful parody under European law. *See id.* The Court also had to deal with the task of drawing the definitional limits of parody. *Id.* The Court stated that if a parody conveys a discriminatory message—for example, by replacing the original characters with people wearing veils and people of color—the holders of the rights to the work parodied have, in principle, a legitimate interest in ensuring that their work is not associated with such a message. *Id.* at para. 29. One blogger commented on the CJEU decision, asserted that it can be a slippery slope, and asked:

Could there potentially be developing a big humour gap between the EU and the rest of world – at least with the USA? One wonders how the CJEU, in light of this decision, would have looked at the raunchy and arguably anything but “politically correct” rap lyrics of the 2 Live Crew parody lyrics of “Pretty Woman” that pretty soon turns into “Big Hairy Woman” and go rapidly downhill from there . . . . But it was fine for the US Supreme Court in 1994.

Howard Knopf, commenting on, *Parody, Deckmyn and the Right to Object to Discriminatory Messages: Today’s CJEU Ruling*, THE 1709 BLOG (Sept. 3, 2014), <http://the1709blog.blogspot.co.il/2014/09/parody-deckmyn-and-right-to-object-to.html> (last visited Dec. 10, 2016).

“[m]edieval laughter is directed at the same object as medieval seriousness,” then the clown and the foul can ridicule the church and the state and build a world separated from the official world—their “own church versus the official church, [their] own state versus the official state.”<sup>343</sup> The unrestrained legalization of laughter came in “small scattered islands of time,” as official feasts took place, and it rid people of the fear of intimidation or prohibitions because “[b]arriers were raised,” and laughter took precedent.<sup>344</sup>

Bakhtin used parody not as a way to criticize an original text but as a dialogical dimension of literature. Parody and laughter “does not deny seriousness but purifies and completes it. Laughter purifies from dogmatism . . . it liberates from fanaticism and pedantry, from fear and intimidation, from didacticism, naiveté and illusion, from the single meaning . . . .”<sup>345</sup> Parodies allow cultures to evolve and serve as platforms for “ongoing activity of transformative meaning-making.”<sup>346</sup> Parody, a ridiculing imitation of an original work, is “not a form, but rather a relation between one text and another; it is a *function*”<sup>347</sup> that creates a “hybrid and double-voiced” discourse.<sup>348</sup> For example, Woody Allen’s film *Play It Again Sam* is a 1972 parody of the 1942 classic film *Casablanca*, and aims to parody “Hollywood’s aesthetic tradition of allowing only a certain kind of mythologizing in film . . . .”<sup>349</sup> In copyright terms, one function of a parody is to create space for creative freedom independent of the availability of unprotectable ideas or facts and to allow parodists to use the heart of the original work. A parody cannot resemble a parade with a climax. If a parody is an expression aimed at satisfying official wills and interests, then it is not a parody.

Despite the fact that courts seem somewhat more receptive to parodies post-*Campbell*,<sup>350</sup> and the fact that “[w]hen IP owners use

<sup>343</sup> BAKHTIN, RABELAIS, *supra* note 174, at 88–90.

<sup>344</sup> *Id.* at 90.

<sup>345</sup> *Id.* at 123.

<sup>346</sup> Coombe, *supra* note 13, at 1877.

<sup>347</sup> Lars Kleberg, *Parody and Double-Voiced Discourse: On the Language Philosophy of Mikhail Bakhtin*, in *DIALOGUE AND TECHNOLOGY: ART AND KNOWLEDGE* 95, 96 (Bo Göransson & Magnus Florin eds., 1991) (emphasis added).

<sup>348</sup> HUTCHEON, *supra* note 315, at 28; *see also* Denisov, *supra* note 158, at 56 (“[I]t is natural that the ‘original-parody’ relationship is always bilateral.”).

<sup>349</sup> HUTCHEON, *supra* note 319, at 26.

<sup>350</sup> A famous example is *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001), where the Eleventh Circuit vacated an injunction barring the publication of Alice Randall’s *The Wind Done Gone* (2001).

copyright law to suppress parodies, the courts have generally rejected those claims,”<sup>351</sup> the road is still “long and convoluted.”<sup>352</sup> Even if courts are more willing to accept parodies as a form of expression worthy of protection under fair use,<sup>353</sup> the expansion of intellectual property laws mitigates this judicial tendency.<sup>354</sup> This constrains the potential breadth of parodic opportunities and has deterrent effects on cultural activities. First, it discourages “overt reliance on earlier works . . . .”<sup>355</sup> Second, strong copyrights “conflict with the human propensity to respond to stories by altering and retelling them.”<sup>356</sup> Third, the official is continuously reinvigorated by laws limiting fair uses and free access to creative content. Fourth, because copyright law includes many vague principles, it creates, absent bright-line rules

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<sup>351</sup> Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 473 (2013).

<sup>352</sup> McGeeveran, *supra* note 322, at 715. For example, in 1996 Dr. Seuss Enterprises successfully sued Penguin Books for copyright infringement, a rejection of the parody defense. *Dr. Seuss Enters, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (1997); *see also* Esther Milne, *Parody: Affective Registers, Amateur Aesthetics and Intellectual Property*, 19 CULTURAL STUD. REV. 193, 199 (2013) (observing that “the parody defence within US case law has not always been successful”). Moreover, the struggle of courts to distinguish between parody and satire, detrimentally affects the definition of parody. *See* Amy Lai, *Copyright and Its Parody Defense: Multiple Legal Perspectives*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 311, 320 (2015) (“[T]he Court’s narrow definition of parody and its determination that satire is not protected to the same degree as parody, have arguably served to expand owners’ rights to the detriment of creative citizens.”).

<sup>353</sup> *See, e.g.*, *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012) (finding fair use in a case involving a *South Park* episode, the court ruled on fair use defense against copyright infringement on a motion to dismiss because it only required to compare the original work with the parody).

<sup>354</sup> McGeeveran, *supra* note 322 (contemplating that the “spread of parody coincides with the huge expansion of trademark law to confer much broader rights”); *see also* Robin Jacob, *Parody and IP Claims: A Defence?—A Right to Parody?*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 427 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014). In addition, it is a cause of concern that lower courts seem less willing to embrace a wide interpretation of freedom to parody. *See, e.g.*, McGeeveran, *supra* note 322, at 722 (“Lower courts have not always been so sensitive and have sometimes been clumsy in applying the ‘parody’ label.”); *Suntrust Bank*, 268 F.3d at 1270; *see also* *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009). In *Salinger*, the District Court for the Southern District of New York ruled in favor of Salinger, the author of the 1951 novel, *The Catcher in the Rye*. *Id.* at 254. Colting wrote a critique of Salinger in his book, *60 Years Later: Coming through the Rye*. *Id.* The Court found that this was not a parody entitled to protection as a transformative work under the fair use doctrine. *Id.* at 268–69. In April 2010, the Second Circuit upheld the injunction granted by the district court. *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

<sup>355</sup> Tushnet, *The Romantic Author*, *supra* note 13, at 302.

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



as to what amounts to a parody,<sup>357</sup> a culture of fear amongst users that they may be sued<sup>358</sup> and that their “remix [will be] threatened with sanctions.”<sup>359</sup> It is a culture that prevents competition with protected works<sup>360</sup> and favors settlements and financial concessions regardless of the fairness of the use,<sup>361</sup> all to satisfy owners who demand the eradication of parodies directed at their intangible properties.<sup>362</sup> Recent scholarship observes how pervasive these problems are in the field of trademarks. For example, Stacey Dogan and Mark Lemley show that “courts have struggled with the evaluation of parody under trademark law,” given the “surprising number of cases that hold obvious parodies illegal.”<sup>363</sup> In these cases, courts enclosed the evolution of meanings, limited the availability of communicative experiences, and refused to treat parodies as a “natural and desirable

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<sup>357</sup> See, e.g., Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 668 (1997) (observing that “it is difficult to draw clear lines between parody and other types of transformative use, including political protest”); see also Fromer & Lemley, *supra* note 96, at 1257 (“Because IP laws protect intangible concepts, communicating what the IP right covers is more difficult than articulating the scope of property rights for tangible items, whose bounds are easier to describe and depict.”).

<sup>358</sup> See Tollefsen, *supra* note 310.

<sup>359</sup> Tushnet, *The Romantic Author*, *supra* note 13, at 314.

<sup>360</sup> An example to this power is found in employment contracts that display “archaic control mentality” by increasingly restricting employees’ motivation and performance. ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 4 (2013).

<sup>361</sup> For example, despite the finding of the Court in favor of a parody, Alice Randall’s publishing company settled with the estate of Margaret Mitchell, the author of the novel *Gone with the Wind* (1936), to make an unspecified donation to Morehouse College. David D. Kirkpatrick, *Mitchell Estate Settles Gone With the Wind Suit*, N.Y. TIMES (May 10, 2002), <http://www.nytimes.com/2002/05/10/business/mitchell-estate-settles-gone-with-the-wind-suit.html>. An additional example is the 2014 copyright dispute involving Beastie Boys. In this dispute, a settlement was reached between the hip-hop group and a toy company, GoldieBlox, over the unauthorized use of a 1987 hit song “Girls” in a viral video. Jon Blistein, *Beastie Boys Settled over ‘Girls’ Toy Commercial*, ROLLINGSTONE (Mar. 18, 2014), [www.rollingstone.com/music/news/beastie-boys-settle-lawsuit-over-girls-toy-commercial-20140318](http://www.rollingstone.com/music/news/beastie-boys-settle-lawsuit-over-girls-toy-commercial-20140318). After the former filed a preemptive suit against Beastie Boys for a declaratory judgment that their video is a parody, the latter sued in return claiming copyright infringement. *Id.* The parties settled within four months of the initial filing. *Id.*; see also *J.D. Salinger’s Miserly Legal Legacy*, THE ECONOMIST (Jan. 17, 2011) (discussing the settlement reached between the heirs of Salinger and Colting), <http://www.economist.com/blogs/prospero/2011/01/copywrongs>.

<sup>362</sup> McGeveran, *supra* note 322, at 715 (“While there are few litigated cases, marketholders routinely send cease-and-desist letters demanding the eradication of parodies aimed at their trademarks. Many parodists comply.”).

<sup>363</sup> Dogan & Lemley, *supra* note 351, at 474, 490–96.

part of social conversation,” even in the absence of harm to the mark.<sup>364</sup>

Parodies are invaluable to modern societies.<sup>365</sup> Bakhtin emphasized “the importance of the comic elements which had been either eliminated, overlooked, or looked down upon by some formalist and other modern critics.”<sup>366</sup> Parodies serve as the place where the real carnivalesque experience resides. As such, their social and cultural impact is vast and “often explodes traditional thought patterns, being a catalyst for further creative quests.”<sup>367</sup> The *Campbell* Court allowed the silliest or most lowbrow speech to escape liability for infringement. However, contemporary expansions of intellectual property rights raise concerns as to the future of these critical and comic dialogical works.

When parodies become the voice of the official, by virtue of the boundaries imposed upon users by the law, the official defines the evolution of meanings. Meaning cannot be controlled by governmental or corporate power because such control would “lead to social stultification and cultural paralysis.”<sup>368</sup> Stifling the progression

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<sup>364</sup> *Id.* at 496.

<sup>365</sup> This is especially true in jurisdictions that either do not recognize, or have just recently begun to recognize, parody as fair use. For example, until October 1, 2014, a parodist in the UK could escape copyright liability if his use of an original work could be viewed as criticism or review of the work. LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 241 (4th ed., 2014). This, however, “was anything but straightforward.” *Id.* Following several governmental reports, a new fair dealing exception for “caricature, parody or pastiche” was introduced into British copyright law. *Gowers Review of Intellectual Property*, THE GOWERS REVIEW (Dec. 6, 2006), [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf), recommendation 12 at 68; *Taking Forward the Gowers Review of Intellectual Property*, UK INTELLECTUAL PROPERTY OFFICE (Jan. 2008), <http://www.rin.ac.uk/system/files/attachments/UKIPO%20consultn%20on%20copyrightexceptions%20Jan%2008.pdf>, at 6–31; *Digital Opportunity: A Review of Intellectual Property and Growth*, DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS, HARGREAVES REV. INTELL. PROP. & GROWTH (May 18, 2011), [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf), at 1–50; *Modernising Copyright: A Modern, Robust and Flexible Framework*, HMGOVERNMENT (July 26, 2012), <http://www.allpartywritersgroup.co.uk/Documents/PDF/Modernising-copyright.aspx>, at 29–31; see also *The Copyright and Rights in Performances (Quotations and Parody) Regulations 2014*, SI 2014/2356 (Eng.) (incorporating amendments to The Copy, Designs and Patents Act 1988, c. 48 (Eng.).—mainly section 30A(1)).

<sup>366</sup> ROSE, *supra* note 320, at 169.

<sup>367</sup> Denisov, *supra* note 161, at 69. As the Supreme Court explained in *Campbell*: “Like less ostensibly humorous forms of criticism, [parody] can provide social benefit, by shedding light on earlier work, and, in the process, creating a new one.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>368</sup> Johnson, *supra* note 169, at 457.

of meaning is a major concern wherever there is a privately owned and led copyright regime. In such a regime, the availability of dialogical opportunities necessary to feed authorial and artistic creation is severely restricted. The immediate consequence is that creative works will fail both to yield the expected social value and to “advance society’s knowledge systematically, factually, and culturally.”<sup>369</sup> Such a copyright regime will produce works and meanings that resemble low-level conversations or other simple verbal exchanges.

## B. Urban Voices

### 1. Multivoiced Tangibles

Dialogism conveys interaction. This includes interaction with fellow beings as well as with properties of the urban space such as architectural designs; street art; non-traditional art forms like land art,<sup>370</sup> and other tangibles such as books, furniture, and even plastic bags.<sup>371</sup> Thus, the “other” can be a person or an object. Both produce voices within the authorial self. For example, discussing Buber’s conception of art, Biswas remarks:

We desire also to enter into personal relationships with things and to imprint on them our relation to them . . . . Artistic creation and awareness proceeds from our dissatisfaction with the stringent meaning-contents of the world of It and our urge to elevate it to the level of intimacy with our own being.<sup>372</sup>

For John Locke, the most celebrated political philosopher on intellectual property,<sup>373</sup> man must converse and communicate with others in order to create, accumulate, refine, and disseminate knowledge.<sup>374</sup> Locke claimed that every system of regulation must limit knowledge enclosure and “enable us to deliver and make that

<sup>369</sup> Fromer, *supra* note 27, at 86.

<sup>370</sup> See, e.g., Xiyin Tang, *Copyright in the Expanded Field*, 42 HOFSTRA L. REV. 945 (2014) (discussing options for legal protection of nontraditional art forms such as land art). In a recent case, the Seventh Circuit explained the complexity of attaching copyright protection to land art such as a wildflower garden. *Kelly v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

<sup>371</sup> See RONI MESHULAM ABRAMOVITZ, *A JOURNEY WITH A PLASTIC BAG: AN INTIMATE DIALOGUE BETWEEN WRITING, SCULPTURE AND PHOTOGRAPHY* (2014).

<sup>372</sup> Biswas, *supra* note 98, at 225.

<sup>373</sup> See, e.g., Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. L. & POL’Y REV. 891, 892 n.1 (2006).

<sup>374</sup> JOHN LOCKE, *Study* (1677), in JOHN LOCKE: POLITICAL ESSAYS 365 (Mark Goldie ed., 1997).

knowledge available to others.”<sup>375</sup> In addition to human interaction, commoners converse with tangibles, from which they generate creative ideas. Locke gave the example of an artist painting the “springs and wheels and other contrivances within of the famous clock at Strasburg.”<sup>376</sup> To do so, the artist uses items in his memory that come to him once he sees the clock and the surrounding cultural scene. The clock generates ideas and inner voices within the artist’s self. From these, the artist develops creative meanings embedded in his expression. Justine Hughes proclaimed that authors “produce the basic units of dialogue” necessary for copyrightable expressions,<sup>377</sup> but that does not mean that they are above societal dialogue. On Lockean grounds, the process by which these units are produced is influenced by properties both verbal and nonverbal, by humans and tangibles alike.

Written materials are the tangible source most likely to generate creative ideas. Locke offered books as an example to show that people form conversational relations with sources other than humans. There are a myriad of books man should read, from those written by ancient lawyers, “books of travel,” chronological accounts, and readings of history that “help to give an insight into [human nature],” to poetical and dramatic books of pleasure and delight, and dictionaries that are necessary for the “gentlemen’s study.”<sup>378</sup> Exposure to a variety of books and conversation with the knowledge therein makes people more knowledgeable and creative.

To allow readers access to a variety of books, people can own, and hence converse with, a physical book, but they cannot exclusively own the knowledge therein. Locke advocated for limits to what one could come to own, in order to ensure human interaction.<sup>379</sup> Locke considered interaction and communication basic human values and provided that only by enjoying communicative experiences with fellow gentlemen, strangers, and external tangibles, could knowledge, information, and books be made possible. In the absence of

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<sup>375</sup> JOHN LOCKE, *Some Thoughts Concerning Reading and Study for a Gentlemen* (1703), in LOCKE: POLITICAL ESSAYS 348–49 (Mark Goldie ed., 1997) [hereinafter LOCKE, *Some Thoughts*].

<sup>376</sup> JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING, bk. III, ch. vi, § 3 (Oxford Univ. Press 1975) (1690) [hereinafter LOCKE, ESSAY].

<sup>377</sup> Hughes, *supra* note 39, at 976.

<sup>378</sup> LOCKE, *Some Thoughts*, *supra* note 375, at 352–54.

<sup>379</sup> Locke, *Liberty of the Press*, *supra* note 289, at 37.

communicative experiences, readers would end up reading commonplace arguments. As Locke put it:

[Those who] converse but with one sort of men, they read but one sort of books, they will not come in the hearing but of one sort of notions: the truth is, They canton out to them selves a little Goshen in the intellectual world where light shines . . . but the rest of that vast expansum they give up to night and darkness, and so avoid coming near it.<sup>380</sup>

Locke criticized the politics of educating through books filled with a “stock of borrowed and collected arguments”<sup>381</sup> and contended that such an approach risked producing limited communicative experiences and conversational partners.<sup>382</sup> A dialogical view of copyright addresses Locke’s concern for promoting the value of multivoicedness, cultural diversity, and communication.

## 2. Multivoiced Places

Urban spaces provide communicative platforms that contribute to collective and individual dialogical processes and revitalize neighborhoods and communities.<sup>383</sup> They create “a space for mutual dialogue and creative interpretation . . . .”<sup>384</sup> Art placed in urban spaces “provides a pretext for conversations and in some cases for cooperation between strangers.”<sup>385</sup> A Lithuanian researcher found that publicly placed urban furniture—a “Street Komoda,” designed for sharing and inviting passers-by to intervene—in the Capital city of Vilnius, has created a network of users of the work, thereby generating new meanings. Just like Locke’s example of the clock in the center of Strasbourg igniting creative ideas in a communal space,

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<sup>380</sup> LOCKE, *Some Thoughts*, *supra* note 375, at 349. That knowledge, communication and the role of the audience are important for Locke is evident also in his statement that “[w]hen a man speaks to another, it is that he may be understood; and the end of Speech is, that those Sounds, as Marks, may make known his Ideas to the Hearer.” LOCKE, *ESSAY*, *supra* note 376, bk. III, ch. ii, § 2.

<sup>381</sup> Locke, *Of Study*, *supra* note 290, at 123.

<sup>382</sup> Yeo, *supra* note 111, at 18. Ironically, when Thomas Hobbes’ reputation was being assailed, it was said that he did his cause no good by working alone too much. John Wallis (admittedly an enemy) alleged that “He [Hobbes] Thinks too much, and Converses too little, either with Books, or Men.” JOHN WALLIS, *HOBBIUS HEAUTON-TIMORUMENOS* 8 (Oxford, 1662), cited in *General Introduction*, in *THE CORRESPONDENCE OF THOMAS HOBBS* VOL. II: 1660–1679, p. xxx (Noel Malcolm ed., Oxford: Clarendon Press, 1994).

<sup>383</sup> Jekaterina Lavrinec, *Community Art Initiatives as a Form of Participatory Research: The Case of Street Mosaic Workshop*, 7 *CREATIVITY STUD.* 55 (2014).

<sup>384</sup> *Id.* at 56.

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

this example shows how these kinds of participatory, artistic experiences “become a community setting” and turn passers-by into “potential co-authors of the whole project.”<sup>386</sup>

Architectural and other properties of the urban space function as open communicative and multivoiced sites for artists and dweller informants—the consumers of public places. Meanings generated by urban art are created through two main channels: First, by artists who externalize their personalities in order to express themselves “outside given aesthetic standards.”<sup>387</sup> They use this form of expression as a way to share with others “their emotional relationship to life”<sup>388</sup> and to “stress the importance of communicating with outsiders as well as the quality of their art.”<sup>389</sup> Artists of urban art engage in intensive dialogical transactions with others. They “use the aesthetics of popular culture, consumerism, and other socio-political themes to converse with each other and their viewers.”<sup>390</sup> Second, urban art is created by members of the public acting as a community of translators “who become potential co-authors” of street art.<sup>391</sup>

Viewers form an integral part of the urban space and its development. This explains why architectural works are “laced with cultural and psychological dimensions”<sup>392</sup> that make the planning process a dialogical transaction between architects and the various audiences likely to be affected by the design. We are all exposed to copyrighted architectural designs on a daily basis. In fact, while “individuals may choose to opt out of the consumption of other public goods, preferring, for example, private schools over public schools, and bottled water over tap water, it is impossible not to consume public space at all.”<sup>393</sup> This exposure, with particular regard to public architectural art, leads to intensive communication between viewers,

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<sup>386</sup> *Id.* at 57.

<sup>387</sup> Meike Watzlawik, *The “Art” of Identity Development—Graffiti Painters Moving Through Time and Space*, 20 *CULTURE & PSYCHOL.* 404, 413 (2014).

<sup>388</sup> Mariane Hedegaard, *Exploring Tension and Contradictions in Youth’s Activity of Painting Graffiti*, 20 *CULTURE & PSYCHOL.* 387, 396 (2014).

<sup>389</sup> Watzlawik, *supra* note 387, at 409.

<sup>390</sup> Laura Werthmann, *Street Art Dialogue*, XV *GNOVIS J.* 1, 4 (2015); *see also* SUSAN C. HAEDICKE, *CONTEMPORARY STREET ARTS IN EUROPE: AESTHETICS AND POLITICS* 3 (2013) (observing that street artists create “safe public spaces that encourage gathering and dialogue”).

<sup>391</sup> Lavrinec, *supra* note 383, at 60.

<sup>392</sup> KENDRA SCHANK SMITH, *ARCHITECTS’ SKETCHES: DIALOGUE AND DESIGN* 3 (2008).

<sup>393</sup> Luca M. Visconti et al., *Street Art, Sweet Art? Reclaiming the “Public” in Public Place*, 37 *J. CONSUMER RES.* 511, 512 (2010).

architects, and producers of urban art. The exposure also affects viewers' wellbeing, even the construction of their national identity.<sup>394</sup> Although architecture will always “compete poorly with utilitarian demands for humanity's sources,”<sup>395</sup> a city's architectural tapestry has a powerful impact on our happiness and sense of belonging, goodness,<sup>396</sup> collective memories, and shared identities.<sup>397</sup> Therefore, when applying copyright principles to architectural designs, we must note the role of viewers on such designs, and, in turn, the designs' permanent and infinite existence and effect on viewers.

Artists sometimes use the urban space as a large museum in which to display their creative talent through street art like graffiti, murals, sticker art, “Lock on” street sculptures, and other installations. Street art is a fast-growing artistic movement that has been compared to the cubist revolution.<sup>398</sup> Street artists like Banksy, Haring, Shepard, Gaia, and Basquiat have created art unique in its relationship to and inseparability from its surroundings and in its ability to communicate instantly to viewers. Street artists use public locations like buildings, subway stations, doorways, and walls and consider the public space their essential working environment. Street art transforms urban spaces into large dialogical and meaning-making forums. Street artists, regardless of whether their art is unsolicited or invited, create *places*. Harrison and Dourish differentiate space and place by noting that “[s]pace is the opportunity; place is the understood reality.”<sup>399</sup> As Martin Irvine elaborated:

Street art also assumes a foundational dialogism in which each new act of making a work and inserting it into a street context is a response, a reply, an engagement with prior works and the ongoing debate about the public visual surface of a city. As dialogue-in-progress, it anticipates a response, public discourse, commentary,

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<sup>394</sup> Aura Bertoni & Maria Lillà Montagnani, *Public Architectural Art and its Spirits of Instability*, 5 QUEEN MARY J. INTELL. PROP. 247 (2015).

<sup>395</sup> ALAIN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* 18 (2006).

<sup>396</sup> *Id.* at 199.

<sup>397</sup> Visconti et al., *supra* note 393, at 513.

<sup>398</sup> MAGDA DANYSZ & MARY-NOËLLE DANA, *FROM STYLE WRITING TO ART: A STREET ART ANTHOLOGY* 18 (2011). The growth in street art produced a vibrant market for these works, and it also created a corpus of legal conflicts regarding the appropriation of street art by book publishers, clothing companies, and even Olympic swimming teams. See Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295, 297–307 (2013).

<sup>399</sup> Steve Harrison & Paul Dourish, *Re-place-ing Space: The Roles of Place and Space in Collaborative Systems*, in *CSCW '96—PROCEEDINGS OF THE 1996 ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK* 67, 69 (Mark S. Ackerman ed., 1996).

new works. The city is seen as a living historical palimpsest open for new inscription, re-write culture in practice.<sup>400</sup>

Street art can be either commissioned or uncommissioned, and as such, it creates legal ramifications for the law-art divide. For example, because illegality and anonymity are integral components of graffiti, major graffiti works are part of intellectual property's "negative space" —an area that intellectual property law may regulate, but declines to.<sup>401</sup> These problems notwithstanding, the meanings street art produces can never be commissioned. They represent a continuous conversation between the artists, property owners, and known and unknown users. This raises other legal ramifications relating to the tension between, for example, the First Amendment and property rights,<sup>402</sup> and between copyright and moral rights.<sup>403</sup>

The Ninth Circuit recently answered in the affirmative the question of whether the unauthorized use of a street artist's work in the video backdrop of a rock band's stage show was a fair use under U.S. copyright law.<sup>404</sup> In 2003, street artist and illustrator Derek Seltzer created *Scream Icon*, a drawing of a screaming, contorted face.<sup>405</sup> His work became very popular: posters of the print were plastered on walls as street art in Los Angeles and elsewhere.<sup>406</sup> In 2008, Richard Staub, set designer for Green Day's 2009–2010 tour, took a photograph of a brick wall covered in graffiti and posters, including a reproduction of *Scream Icon*.<sup>407</sup> He used the photograph to create a four-minute video depicting the alleyway, graffiti and all.<sup>408</sup> The center of the video is dominated by an unchanging but modified *Scream Icon*; its modifications include the addition of, for example, "a large red 'spray-painted' cross over the middle of the screaming

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<sup>400</sup> Martin Irvine, *The Work on the Street: Street Art and Visual Culture*, in THE HANDBOOK OF VISUAL CULTURE 235, 242 (Ian Heywood & Barry Sandywell eds., 2012).

<sup>401</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1765 (2006) (defining the negative space of intellectual property as those areas in which creation and innovation thrive without significant protection).

<sup>402</sup> Margaret L. Mettler, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 251 (2012).

<sup>403</sup> See, e.g., Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J.L. & TECH. 454, 467 (2014); Amy Wang, *Graffiti and the Visual Artists Rights Act*, 11 WASH. J.L. TECH. & ARTS 141 (2015).

<sup>404</sup> *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

<sup>405</sup> *Id.* at 1173.

<sup>406</sup> *Id.* at 1173–74.

<sup>407</sup> *Id.* at 1174.

<sup>408</sup> *Id.*



face.”<sup>409</sup> Quoting *Campbell*, the Ninth Circuit held that Staub’s video was transformative, altering Seltzer’s work “with new expression, meaning or message.”<sup>410</sup> The court explained that the spray-painted cross in Staub’s video, in conjunction with the song’s message about hypocrisy, conveyed new aesthetics and understanding.<sup>411</sup> The decision opened the door for other musical stage shows to incorporate existing artworks and, in doing so, inadvertently recognized the social role of urban art—its nature as multivoiced, open, and continuous dialogue. In other words, the decision confirms the transactional nature of street art. If viewers contribute to the meaning of street art by virtue of being exposed to it, communicating with it, and making it part of their inner selves—then they own a legitimate right to reuse it.

Although “people are too quick to view street art through the lens of vandalism”<sup>412</sup> and often “speak of graffiti and street art as the imposition of some personal will upon the public good,”<sup>413</sup> graffiti is a form of art that “deploys aesthetics in the service of a reclaimed commons.”<sup>414</sup> Graffiti engages the public in “practiced dialogism, using and exploring the basic grammar of art through art history . . . and creating new codes to be entered into the conversation.”<sup>415</sup> Street artists “bemoan the rapid disappearance of public space”<sup>416</sup> because “the rules of property take precedence over the inherent rights of free use and self-expression.”<sup>417</sup> On the one hand, consider the tragic example of the 5Pointz site in New York, which was once “the largest collection of exterior aerosol art . . . in the United States,”<sup>418</sup> and is now demolished.<sup>419</sup> On the other hand, we see courts, like that in *Green Day*, reluctant to reimagine artistic appropriation or accept the cultural effect of urban art on users appropriating this art.<sup>420</sup>

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<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 1177.

<sup>411</sup> *Id.*

<sup>412</sup> Marc Schiller & Sara Schiller, *Preface* to TRESPASS: A HISTORY OF UNCOMMISSIONED URBAN ART, 10, 11 (Ethel Seno ed., 2010).

<sup>413</sup> *Id.* at 23.

<sup>414</sup> Visconti et al., *supra* note 393, at 525.

<sup>415</sup> Werthmann, *supra* note 390, at 7.

<sup>416</sup> Schiller & Schiller, *supra* note 412.

<sup>417</sup> *Id.* at 23.

<sup>418</sup> *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

<sup>419</sup> Susanna Frederick Fischer, *Who’s the Vandal? The Recent Controversy Over the Destruction of 5Pointz and How Much Protection Does Moral Rights Law Give to Authorized Aerosol Art?*, 14 J. MARSHALL REV. INTELL. PROP. L. 326, 333–34 (2015).

<sup>420</sup> *See Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

Urban art, as an engagement with the public, creates a bridge between artists and unsolicited viewers—a continuous invitation to converse with the work. In this way, urban art emancipates the spectator by redefining his ordinary cultural scene. The street becomes a theatre. Viewers are not so much participants in the spectacle; rather, they are members of a community of translators of the event or work.<sup>421</sup> Members of the community converse about the works in a Hazlitt or De Quincey style and, in doing so, create new meanings. Community members cannot avoid the presence of such works. Urban art exemplifies that a creative idea does not fully reside in one person's isolated consciousness but rather "begins to live"<sup>422</sup> only when it enters into dialogue with the voices of others, only when it forms a communion with others.<sup>423</sup> In Buber's words, urban art explains why creative expressions are best defined as continuous events of "genuine dialogic moments."<sup>424</sup>

### C. Scarce Cybercarnival<sup>425</sup>

Information networks, as opposed to traditional creative industries, offer an unprecedented wealth of information and opportunities to dialogically transact with others. Within these networks, "tens of thousands of conversations, debates, and social dialogues"<sup>426</sup> take place, and "[c]ontent ranges from academic writings, to art and literature, to medical information, to music, to news and other information . . . ."<sup>427</sup> Although networks and other digital markets pose a serious threat to dialogists' ideal of genuine communication based on face-to-face interaction,<sup>428</sup> their ubiquitous nature has "enabled individuals—even impecunious amateurs—to create and

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<sup>421</sup> HAEDICKE, *supra* note 390, at 80–81.

<sup>422</sup> Friedman, *supra* note 156.

<sup>423</sup> BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS, *supra* note 156.

<sup>424</sup> Buber, *supra* note 234.

<sup>425</sup> The term "cybercarnival" is borrowed from, Johnson, *supra* note 169, at 484 (using this term to criticize the expansion of intellectual property laws at the expense of a wide-open society).

<sup>426</sup> PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 615 (W.D. Va. 2000).

<sup>427</sup> *Id.* As Jacob Rowbottom put it: "While content on social networks such as *Twitter* and *Facebook* are often characterized as conversations, those platforms can include high level content from media companies and professional advertising campaigns." Rowbottom, *supra* note 110, at 371.

<sup>428</sup> Anderson & Cissna, *supra* note 209, at 148 (arguing that technology "changes communicators' goals and affects the vectors of speaking and listening, presence and absence").

communicate in ways that were previously possible only for well-funded corporate publishers.”<sup>429</sup>

Users enjoy the prominence of the networks and digital media that provide an infinite source of materials to consume, manipulate, mix, and remix,<sup>430</sup> making users an integral part of the development process of the digital culture.<sup>431</sup> As such, information networks may provide carnivalesque experiences by making room for a multiplicity of voices and meanings. After all, the Internet is “individualistic, informal, decentralized and extremely resistant to authority and control,”<sup>432</sup> a “perfect post-modern medium,”<sup>433</sup> and it encourages ideals of collective knowledge production and justified cultural takings. Moreover, the Internet has the potential “to weave the mass of humanity together into a thriving, infinitely powerful organism.”<sup>434</sup> However, given the nature of intellectual property rights as a form of governmental regulation of market entry and prices, “the rise of creativity- and communication-empowering technology has coincided with the expansion of the scope and duration of copyright protection and with new regulatory schemes designed to foster copyright-holder self-help.”<sup>435</sup> James Boyle defined this as the “second enclosure

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<sup>429</sup> Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 551 (2010).

<sup>430</sup> See generally LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

<sup>431</sup> On the meaning of “digital culture,” see, e.g., HILDE G. CORNELIUSSEN & GILL WALKER RETTBERG, *Introduction: “Orc Professor LFG”, or Researching in Azeroth, in DIGITAL CULTURE, PLAY AND IDENTITY: A WORLD OF WARCRAFT READER 3* (2008) (“A digital culture is, like every culture, constructed according to norms, rules and traditions.”); LAUREN RABINOVITZ & ABRAHAM GEIL, *Introduction to MEMORY BYTES: HISTORY, TECHNOLOGY, AND DIGITAL CULTURE 1, 4* (Lauren Rabinovitz & Abraham Geil eds., 2004) (defining digital culture as “a trope for the ethos of contemporary life”); see also Sean Cubitt, *Case Study: Digital Aesthetics, in DIGITAL CULTURES: UNDERSTANDING NEW MEDIA 11, 23* (Glen Creeber & Royston Martin eds., 2009) (showing how digital representation of the world is aesthetically different from the one that was provided by the analogue and how it transformed our professional and personal lives); Jenlink & Banathy, *supra* note 139, at 162 (defining the digital culture as a new culture with new rules, that values diversity and considers difference “as the very energy that fires social and cultural creativity”).

<sup>432</sup> Johnson, *supra* note 169, at 474.

<sup>433</sup> *Id.*

<sup>434</sup> Howe, *supra* note 24, at 11.

<sup>435</sup> Shaffer Van Houweling, *supra* note 429, at 552; see also Lee Edwards et al., *Communicating Copyright: Discourse and Disagreement in the Digital Age, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 300, 301* (Matthew David & Debora Halbert eds., 2015) (discussing the evolution of, and how to solve, the “division between the beliefs of users and the norms expressed in copyright regulation”).

movement”<sup>436</sup> where limits to individuals’ freedom to reuse existing information are continuously introduced. This movement risks reinvigorating the feudal system, the industrial model, or the institutionalization of, what Gilles Deleuze called, the “control society,”<sup>437</sup> in which individuals, as well as institutions, use their power to overregulate, foreclose market production, and restrict social communications and free access to information.<sup>438</sup> This and other “regimes of authorization”<sup>439</sup> aim to control the development of the information society and to produce “a configuration of networked space that is increasingly opaque.”<sup>440</sup>

When Jürgen Habermas coined one of his famous critical concepts, “ideal speech situations,”<sup>441</sup> he explained the error of manipulated and distorted visions of communication favoring authority and control over participatory and inclusive dialogues. The concept “can be understood as the projection of the conditions for a perfect discussion”<sup>442</sup> and the avoidance of the “imbalance of power between the participants to the conversation.”<sup>443</sup> This means “nobody can force his opinions upon anyone else, and cannot exclude somebody from the discussion, or prevent them raising problems or challenges.”<sup>444</sup> It has long been argued that the institution of modern copyright perpetuates inequalities between authors and the public. By favoring individual owners, modern copyright principles impose unilateral restrictions on the public’s enjoyment of, and participation in, the creation of ideal speech situations. Because copyrighted materials are embodiments of multiple dialogical transactions and are fundamental for cultural discourse and social and personal change, the lack of balance between owners and users destabilizes the basic structure of the copyright system. One of the immediate consequences

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<sup>436</sup> JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 42–53 (2008).

<sup>437</sup> Gilles Deleuze, *Postscript on the Societies of Control*, 59 *OCTOBER* 3, 4 (1992).

<sup>438</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOMS* 26 (2006).

<sup>439</sup> JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 188–89 (2012).

<sup>440</sup> *Id.* at 202.

<sup>441</sup> See JÜRGEN HABERMAS, *Truth and Society: The Discursive Redemption of Factual Claims to Validity*, in *ON THE PRAGMATICS OF SOCIAL INTERACTION: PRELIMINARY STUDIES IN THE THEORY OF COMMUNICATIVE ACTION* 85, 97–103 (Barbara Fultner trans., 2001).

<sup>442</sup> ANDREW EDGAR, *HABERMAS: THE KEY CONCEPTS* 65 (2002).

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

of this imbalance is the ease by which users are labeled pirates, citizens of an “infringing nation,”<sup>445</sup> or members of a violent gang.<sup>446</sup> This is especially worrisome in an age that values participation and sharing and constantly reinvents channels for interaction and the exchange of information.

The fundamentality of the protection of networks’ social role as conduits of information is evident in many ways. For example, it is evidenced by the failed legislative attempts of Congress to impose more stringent enforcement of laws against online piracy<sup>447</sup> and by the emergence of alternative models of creative production and distribution.<sup>448</sup> It is similarly reflected when search engines escape civil liability for copyright infringement by facilitating access to online content and providing “a significant benefit to the public.”<sup>449</sup> Recently, a district court justified Google’s endeavor, Google Books, which enabled users to find information quickly and easily, stating that the book access Google provides benefits authors as well, as it “increas[es] their audiences.”<sup>450</sup> Despite all this, media and Internet giants have persuaded Congress to pass a multitude of new laws criminalizing copyright infringement on the Internet<sup>451</sup> and have filed endless lawsuits against people who have posted copyrighted materials online.<sup>452</sup> These giants have also introduced privately governed systems, like the Copyright Alert System (“CAS,” or “six strikes”)<sup>453</sup> and other arrangements, that make the digital culture one of fear of being sued,<sup>454</sup> as well as a culture that supports “the emergence of architectures of control.”<sup>455</sup>

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<sup>445</sup> JOHN TERHANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* (2011).

<sup>446</sup> BOON, *supra* note 49, at 101–02.

<sup>447</sup> See HACKING POLITICS: HOW GEEKS, PROGRESSIVES, THE TEA PARTY, GAMERS, ANARCHISTS, AND SUITS TEAMED UP TO DEFEAT SOPA AND SAVE THE INTERNET (David Moon et al. eds., 2013).

<sup>448</sup> See LESSIG, *supra* note 430, at 277–79 (discussing the culture of Creative Commons).

<sup>449</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

<sup>450</sup> *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

<sup>451</sup> See 17 U.S.C. § 505(a)(1)(B) (2012) (criminalizing willful infringement without requiring financial gain).

<sup>452</sup> Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 483 (2015).

<sup>453</sup> See CENTER FOR COPYRIGHT INFORMATIONAL, *What is a Copyright Alert?* (2014), <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> (last visited Dec. 10, 2016).

<sup>454</sup> See LESSIG, *supra* note 207.

<sup>455</sup> COHEN, *supra* note 439, at 187.

As in every system built around concepts of production and ownership, limitations on access to networked resources are legitimate and necessary to create normative boundaries of what is and is not permitted.<sup>456</sup> In imposing such limitations, however, Congress should refrain from constantly introducing new “regimes of authorization,”<sup>457</sup> which are socially undesirable and only perpetuate the copyright divide. Control regimes affect our ability “to transform ourselves and our environment.”<sup>458</sup> They affect the ability of individuals to dialogically transact knowledge and information. For this reason, we should focus our attention not only on how to enforce rights, but also on how users experience the accessibility of information networks and resources. Only then should we design relevant laws. Attention to users is fundamental, given the recent proliferation of tools for direct social interaction and informational exchange between individuals, groups, and collectives.<sup>459</sup> These tools include the rapid development of new multifaceted technologies such as wikis, peer-to-peer file-transfer protocols, social networking facilities, 3D printing, and the augmentation and replacement of pre-millennial Internet media. These tools will have powerful implications for legal systems by creating a vibrant, interconnected Web 2.0 environment; they will also influence the inner construction of individuals’ selves,<sup>460</sup> further reflecting the broad affinity for the self as dialogical.

According to a prevalent psychological theory, the self is engaged in a constant process of active positioning. Exposure to information and contribution to dialogical exchanges in cyberspace “make possible a far broader engagement in constructing personal identity as a ‘society’ of mind.”<sup>461</sup> As Vincent Hevern observed, “the rise of

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<sup>456</sup> For example, there are copyrighted works, such as big-budget movies, that need strong intellectual property laws, otherwise they could not be produced. Lemley, *supra* note 452, at 496.

<sup>457</sup> COHEN, *supra* note 439.

<sup>458</sup> BOON, *supra* note 49, at 104.

<sup>459</sup> COHEN, *supra* note 439, at 187.

<sup>460</sup> HUBERT HERMANS & AGNIESZKA HERMANS-KONOPKA, DIALOGICAL SELF THEORY: POSITIONING AND COUNTER-POSITIONING IN A GLOBALIZING SOCIETY 1 (2010) (“In a world society that is increasingly interconnected and intensely involved in historical changes, dialogical relationships are required not only *between* individuals, groups and cultures, but also *within* the self of one and the same individual.”).

<sup>461</sup> Vincent W. Hevern, *Dialogicality and the Internet*, in HANDBOOK OF DIALOGICAL SELF THEORY 185, 189 (Hubert J. M. Hermans & Thorsten Gieser eds., Cambridge Univ. Press 2012) [hereinafter Hevern, *Dialogicality*]; see also Vincent W. Hevern, *Threaded Identity in Cyberspace: Weblogs and Positioning in the Dialogical Self*, 4 IDENTITY: INT’L

social networking tools such as Facebook or MySpace and their integration into other online presentation utilities continues to give selves the means of expressing valued and quite varied positions with ease.”<sup>462</sup> Users’ active roles in cyberspace contribute immensely to this process. Users do not merely buy a newspaper or watch a program on television “but actively contribute to self-definition by posting messages, uploading visual and sound productions (to YouTube, Flickr, etc.), and engaging others in extended conversations in chat rooms or comment threads, and similarly active processes.”<sup>463</sup> The nature of this process is collaborative. This collaboration provides creative individuals like authors with the properties necessary for meaning-making and challenges concepts like authorial individuality and ownership because imprints of information produced by the imaginary other are evident in authors’ creative expressions.<sup>464</sup>

From the processes taking place in information networks emerged the “networked self.”<sup>465</sup> To flourish,<sup>466</sup> the networked self requires “access to resources and . . . the availability of a sufficient variety of real opportunities.”<sup>467</sup> Control regimes change these opportunities and create different networked selves.<sup>468</sup>

The laws of these regimes, in addition to the strategies employed by private players, stifle two carnivalesque spaces—one public and one private. First, they reintroduce and apply feudal principles to networks. Authors and artists, corporate players, and other owners of cultural objects have replaced the Church and institutions of the feudal system. They have become the centers of cultural power that control the way in which meaning evolves.<sup>469</sup> Second, they limit individuals’ ability to transform themselves, to develop their

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J. THEORY & RES. 321 (2004) [hereinafter Hevern, *Threaded*] (showing how weblogs illustrate processes of cultural exchange and how authors of weblogs construct their identities online and negotiate internal positions in these processes).

<sup>462</sup> Hevern, *Dialogicality*, *supra* note 461.

<sup>463</sup> *Id.* at 190.

<sup>464</sup> Jeremy Phillips, *Authorship, Ownership, Wikiship: Copyright in the 21st Century*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 193, 203–04 (Estelle Derclaye ed., 2009) (noting that in digital environments there cannot be one particular owner of information; there must be multiple owners).

<sup>465</sup> COHEN, *supra* note 439.

<sup>466</sup> *Id.* at 223.

<sup>467</sup> *Id.* at 216.

<sup>468</sup> *Id.* at 217 (providing that “the networked self in the age of authorization is a different self”).

<sup>469</sup> See *supra* notes 199–200 and accompanying text.

personalities. A human self requires exposure: it must remain an open construct and continuously remodel itself.<sup>470</sup> As Herman and Gieser put it, “internal dialogues within the self and external dialogues with actual others are both needed in order to reach a cross-fertilization of the mini-society of the self and the macro-society at large.”<sup>471</sup>

Intellectual property laws were created in a world of scarcity. They were designed to artificially replicate scarcity in places where it could not subsist. These laws now target public goods that would otherwise be available for all uses and users and artificially restrict their distribution. They create a *false* scarcity in order to render owners’ benefits excludable.<sup>472</sup> The Internet challenged artificial scarcity by making information “no longer scarce”<sup>473</sup> and by introducing the democratization of content distribution. Legal systems responded with laws designed to overregulate access to information and combat online piracy. The scarcity problems will likely become even more complex as we reach a post-scarcity age in which ideas become even more abundant. In such an age, intellectual property laws will be forced to respond to the challenges brought about by new technologies and find ways to re-introduce false scarcity in order to protect the rights of authors and inventors.<sup>474</sup> New laws may further restrict informational carnivals that digital networks permit. Therefore, as Mark Lemley recently observed, “we should resist the tendency to expand IP reflexively to meet every new technological challenge.”<sup>475</sup>

In the early days of the Internet, the Supreme Court declared, “the strength of the Internet is chaos [and] the strength of our liberty depends upon the chaos and cacophony of the unfettered speech”<sup>476</sup> on the Internet. This chaos defines the value of information networks.

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<sup>470</sup> N. KATHERINE HAYLES, *HOW WE BECAME POSTHUMAN: VIRTUAL BODIES IN CYBERNETICS, LITERATURE AND INFORMATICS* (1999) (coining the term “posthuman” as a definition of the transformative human self in light of human-machine relations).

<sup>471</sup> HUBERT J.M. HERMANS & THORSTEN GIESER, *Introductory chapter*, in *HANDBOOK OF DIALOGICAL SELF THEORY*, *supra* note 461, at 1, 18.

<sup>472</sup> J.W. HARRIS, *PROPERTY AND JUSTICE* 46 (1996) (“[S]ociety’s laws have been extended to include those trespassory rules which create artificial scarcity in unpublished and published ideas . . .”).

<sup>473</sup> Lemley, *supra* note 452, at 469–71 (explaining how the Internet changed things).

<sup>474</sup> See, e.g., James Grimmelman, *Indistinguishable from Magic: A Wizard’s guide to Copyright 3D Printing*, 71 *WASH. & LEE L. REV.* 683, 696 (2014) (claiming that new technologies will force inventors and authors to “confront exactly the same enforcement challenges” their predecessors had to face when, for example, Napster was launched).

<sup>475</sup> Lemley, *supra* note 452, at 507.

<sup>476</sup> *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).



It feeds carnivalesque opportunities bereft of official constraints. Networks and new technologies may survive some legislative attempts to curtail this chaos, but not all. The effect of these attempts on the development of dialogical spaces and dialogical selves will be vast. Just as illegal graffiti painting will continue even if space is provided for legal graffiti (“since disobedience is a major motive for many painters,”<sup>477</sup>) users of information networks will continue to confront intellectual property laws, declaring their freedom to use information without the consent of rightholders.

Consequently, the networked environment will be affected by legislative attempts—perhaps in vain—to curtail users’ disobedience in ways that may severely disturb the freedom to dialogically transact with others. Users in this situation will increasingly become “habituated to processes of authorization.”<sup>478</sup> This may deepen the copyright divide between owners and users, further restricting sites for public engagement and stifling the “becoming” nature of authorial and artistic selves.

#### CONCLUSION

Dialogue is a basic need in contemporary culture. Absent dialogicality—whether with fellow individuals or the collective and its symbols—the author will become an “isolated being,” “ungraspable,”<sup>479</sup> “the topical man.”<sup>480</sup> This Article did not attempt to dissolve “the self in the collective dynamics of social processes.”<sup>481</sup> Instead, this Article argued that parallel to common conceptions of authors or artists as autonomous, self-contained individuals, distinct and separate from their environment, the nature of copyrighted materials as dialogical transactions requires shifting conceptions of the ownership of creative content and meaning-making. For a copyrightable work to emerge, an author requires conversations and ideas, but to consolidate, to become an expression worthy of protection, the author needs intensive social interaction—a deeper involvement of the other, whose footsteps can be traced when engaging with a text or interpreting a work.

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<sup>477</sup> Watzlawik, *supra* note 387, at 412.

<sup>478</sup> COHEN, *supra* note 439, at 202.

<sup>479</sup> NIKULIN, *supra* note 23, at XI.

<sup>480</sup> Locke, *Of Study*, *supra* note 290.

<sup>481</sup> Anna Stetsenko & Igor M. Arievitch, *The Self in Cultural-Historical Activity Theory*, 14 *THEORY & PSYCHOL.* 475, 479 (2004).

Dialogue theory must address how to reconcile the older and fundamental split of society with the individual. Dialogue, as a genuine conversation, reflects progressive communicative achievements that have become a fundamental characteristic in a cultural and networked life that values participation over singularity. The logic of dialogue is to maintain a fair play between the dialogue's participants. Copyright laws should strive to provide "rules of dialogue that allow for 'fair play' by distributing power in a reasonably equitable way . . . ." <sup>482</sup> Though intellectual property laws presuppose the presence of intensive communicative relations in the creative process, they deny the fact that personal existence "creates a demand within one to relate oneself to the world in ever new ways and not always with reference to a given meaning-structure." <sup>483</sup>

The philosophy of dialogue abounds with dormant potentialities that have been actualized across a broad spectrum of fields <sup>484</sup> but largely taken for granted in legal discourses. A theory of dialogue for copyright is needed—one that helps to decenter and make more fluid the monological self that copyright laws celebrate. Such a theory emphasizes an emergent and relational reality, values a multiform truth that can only result from *real* conversation, and enacts a profound respect for difference and otherness. A theory of copyright as a dialogical transaction tells us that the story we were told—of the author as a lone creator who creates *ex nihilo*—is better told as the story of the others who use their voices to interrupt the loneliness of the person who wants to become an author.

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<sup>482</sup> Douglas N. Walton, *New Directions in the Logic of Dialogue*, 63 *SYNTHESE* 259, 273 (1985).

<sup>483</sup> Biswas, *supra* note 98, at 225.

<sup>484</sup> Cissna & Anderson, *supra* note 234, at 65–66 (surveying fields other than law where the theory of dialogue was applied).