# BOOK REVIEW

## THE AUTHOR AS STEWARD "FOR LIMITED TIMES"

THE IDEA OF AUTHORSHIP IN COPYRIGHT
BY LIOR ZEMER.*
HAMPSHIRE, ENGLAND: ASHGATE PUBLISHING COMPANY, 2007.
PP. XIV, 270. $114.95.

*Reviewed by Roberta Rosenthal Kwall*[**]

INTRODUCTION .......... 685
I. THE THEORETICAL CONCEPTION OF THE PUBLIC AS JOINT AUTHOR .. 686
A. *Social Construction Theory* .......... 688
B. *Lockean Theory* .......... 690
II. PRACTICAL LIMITATIONS OF THE JOINT-AUTHORSHIP APPROACH ..... 692
A. *Copyright Law on Joint Authorship* .......... 693
B. *A Re-Imagined Copyright* .......... 697
III. THE COLLOQUIAL AUTHOR AS STEWARD .......... 700
CONCLUSION .......... 708

### INTRODUCTION

In *The Idea of Authorship in Copyright*, Professor Lior Zemer offers "a new definitional paradigm for copyright" (p. 27) by attempting to conceptually, and practically, reorganize copyright's entitlement structure. Zemer posits the public as a joint author of every copyrighted work. His conceptual critique of copyright is intriguing and provocative. If the purpose of legal scholarship is

[*] Lecturer, Radzyner School of Law at the Interdisciplinary Center (IDC) Herzliya, Israel; Visiting Assistant Professor at Boston University School of Law; Research Fellow at the International and European Research Centre at Ghent University, Belgium.

[**] © Roberta Rosenthal Kwall, Raymond P. Niro Professor of Intellectual Property Law, Founding Director, DePaul College of Law Center for Intellectual Property Law and Information Technology; Visiting Professor of Law, Tulane Law School. I wish to thank Ann Bartow for her thoughtful comments and suggestions on a prior draft of this Book Review, and Dean Glen Weissenberger, DePaul University College of Law, for continued generosity with research support. I also extend thanks and appreciation to Tulane Law School students Susan Jaffer and Johanna Roth for their excellent research assistance, and to Dean Larry Ponoroff for generous research support during my Spring 2008 visit to Tulane Law School.

the development and presentation of thoughtful arguments advanced with the aim of improving the status quo, Zemer's book more than qualifies as a treatment well worth reading.

Part I of this Review delineates and critiques the main points of Zemer's thesis. Part II analyzes the practical implications of his work, concluding that his approach to authorship may prove unworkable in light of several limitations. Part III looks beyond Zemer's specific recommendations and suggests how his perspective may provide a useful basis for further scholarly contemplation.

## I. THE THEORETICAL CONCEPTION OF THE PUBLIC AS JOINT AUTHOR

Zemer does not call for "the death of the author" (p. 228). Instead, he posits a redefinition pursuant to which "the author" is defined as a joint effort by the colloquial author(s) and the public.[1] In crafting this argument, Zemer relies on the idea that both authors and copyrighted works are "social constructs" (p. 9). Literary theorists have documented that the concept of "authorship," as we understand that term today, is a relatively recent notion that began to emerge in the eighteenth century.[2] English professor Martha Woodmansee reminds us that the current conception of "authorship" was not inevitable given the literary heritage of the Renaissance. That era primarily viewed the author as either a "craftsman," who mastered his or her trade for the enjoyment of the "cultivated audience of the court," or alternatively as "inspired" by external forces.[3] The idea that an author is personally responsible for his work was inconsistent with both of these conceptions and emerged later, in part as a result of the influence of a class of eighteenth-century professional writers who sought to justify legal protection for their efforts.[4] Thus, perhaps the authorship construct which we widely accept today was neither natural nor inevitable.[5]

---

[1] I use the term "colloquial" author to mean the actual author of the work in a physical sense, as opposed to the legal author. *See* Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, 699 (2d Cir. 1941) (contrasting the colloquial author with the employer commissioning the work).

[2] *See, e.g.*, ROLAND BARTHES, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 142-43 (Stephen Heath ed. & trans., 1977); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author*,*'* 17 EIGHTEENTH-CENTURY STUDIES 425, 426-27 (1984) [hereinafter Woodmansee, *The Genius and the Copyright*]; *see also* Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 141 (Josué V. Harari ed., 1979).

[3] Woodmansee, *The Genius and the Copyright*, *supra* note 2, at 426-27; *see also* Martha Woodmansee, *Response to David Nimmer*, 38 HOUS. L. REV. 231, 231-33 (2001) [hereinafter Woodmansee, *Response*] (criticizing the modern era's authorship construct).

[4] *See* Woodmansee, *Response*, *supra* note 3, at 232; *see also* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 29-33 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the work of Michel Foucault and other

Zemer does not seek to eliminate the current authorship construct from the discourse. He sees the author as a "transformative entity," who "represents personal qualities and abilities such as talent and creativity" (p. 79). Moreover, Zemer seeks to understand copyrighted works as "social constructs" and to raise awareness of the public's role in their creation. According to this perspective, the public must have "an equal proprietary entitlement in copyrighted endeavours" because the author's contributions "can be realized and then vested in actual creative expressions only by the contribution of the public" (p. 79).

To help elucidate his contention, Zemer's definition of the term "public" should be made explicit. He uses this term to mean:

> an entity comprising: (i) other individual contributors, *except* the principal author, who do not show *individual* intention to share the property in the work created and do not participate in the very creation of the particular copyrighted work; and (ii) the general public by virtue of its collective authorial contribution, provision of social and cultural properties, and collective intention (p. 109).

The first component of this definition includes "previous generations of creative geniuses" (p. 112).

But exactly how, and on what basis, can a concept as amorphous as "the public" be afforded the status of joint author of all copyrighted works? To understand Zemer's argument, it is necessary to outline the theoretical basis for his position. Initially, Zemer asks whether "*the public*, as an indeterminate group of people, [has] an intentional capacity" to engage in authorship (p. 83). He readily finds an affirmative answer to this inquiry by analogizing the public's contribution to the creation of copyrighted works to the general public's collective actions to meet social needs, such as preserving water resources and limiting the use of nuclear weapons (p. 86). His position makes sense to the extent the public elects its lawmakers who in turn determine how best to fulfill the social and other needs of their constituencies. On this basis, the public could be regarded as a joint author of every legislative enactment. Further, according to this perspective, the public's authorship role applies with equal force to the enactment of copyright law itself.[6]

More problematic is Zemer's assertion "that we think of the public at large as having a collective intention to retain a right in every copyrighted entity, by virtue of forming a collective intention to participate in the . . . process of authorship and intention to preserve the collective social and cultural realties" (p. 86). He attributes the authorship of copyrighted works to "our collective

---

scholars who document the influences that contributed to the current construction of "authorship").

[5] *See* Woodmansee, *The Genius and the Copyright*, *supra* note 2, at 426-27.

[6] Thus, I would concur with Zemer's argument that "we collectively accept the need for an enforceable regulation and accept the institution of copyright as the means to regulate the spectrum of ownership of authorial and artistic endeavors" (p. 92).

commitment and responsibility for the preservation of the cultural and social realities [that] constitute [the] collective intentional state to author" (p. 96). Zemer thus argues that the public's collective vision with respect to copyright regulation translates into an intent to collectively author all copyrighted works. Although Zemer acknowledges that "the public does not have mental capacities, consciousness or self-awareness," he maintains that the public not only manifests an intention to author but also to create and realize "its mental representations of its intention" (p. 95).[7] Despite his articulate invocation of the philosophical underpinnings for his position, Zemer never completely establishes the basis for the public's intention.

Legal scholars have only just begun to study various approaches to human creativity from an interdisciplinary standpoint and to assess how the approaches drawn from other disciplines should impact the formulation of copyright law.[8] Zemer also recognizes this limitation in the discourse.[9] Despite the inherent difficulties of Zemer's position that the public is a joint author of every copyrighted work, the sociological, philosophical, and legal justifications for his position make for fascinating reading. In reading his presentations with respect to social constructionism (Chapter Five), John Locke (Chapter Six), and the legal consequences of joint authorship (Chapter Seven), I am in agreement with many of his arguments, though I reach a different conclusion. These chapters represent the core of his scholarship and demonstrate a wonderfully rich analysis.

### A. *Social Construction Theory*

In Chapter Five, *Subjects of Copyright and Social Construction*, and elsewhere, Zemer offers a social construction paradigm to explain what he perceives to be the appropriate boundaries of copyright law. He defines social constructionism as the "various sociological, historical, and philosophical projects that aim at displaying or analysing actual, historically situated, social interactions or causal routes that led to, or were involved in, the coming into being or establishing of some present entity or fact" (p. 126).[10] Zemer sees copyright law, authors (the subjects of copyright), and even the public domain as "socially constructed" (pp. 135, 141). This theory challenges the narrative

---

[7] Zemer's framework for this vision is derived from Lawrence C. Becker, *Deserving To Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 613 (1993).

[8] *See, e.g.*, Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1190-92 (2007); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1949-75 (2006) [hereinafter Kwall, *Inspiration and Innovation*].

[9] "The origin of authorial knowledge is yet to be fully explored in debates about the proper balance between private and public in copyright despite the fact that every item protected under copyright law is a mixture of prior art and new substances" (p. 102).

[10] Zemer adopts his definition of social constructionism from IAN HACKING, THE SOCIAL CONSTRUCTION OF WHAT? 48 (1999).

of the Romantic author who "creates" in a vacuum because the theory posits that no author can create without drawing from the cultural matrix which composes the public domain. In fact, Zemer challenges the notion of "creation" as applied to authors, preferring to view authors as builders or assemblers (p. 134). Zemer claims that his aim "is to expose the fallacy" that what authors create is their "*own intellectual* creation" (p. 107). Thus, Zemer decries as a fiction the Romantic vision of the author who creates *ex nihilo*, arguing that "copyright creation is a process to which contribution is received from sources other than the individual author" (p. 97). Zemer invokes the phrase "the copyright moment," meaning the time "when one or more individuals collect ideas from the public domain and express them in a tangible medium," thus representing "the union of collectively owned, but unprotected, entities, and the author's personal contribution" (p. 136). Zemer goes on to explain:

> There is no moment in which a wholly original copyright work can be declared. Yet, there is a moment in which actual copyrighted works are born. It starts when the individual interacts in society; the moment when the collective contribution is assembled and merged with the individual's contribution into an inseparable unitary whole, capable of ownership. It cannot be the sole moment of the public or the individual; it is either jointly constructed and realised or it does not exist at all. This moment is a moment of collaboration between authors and the public – an unavoidable consequence of the role of authorial collectivity and the nature of authors and original copyrighted entities as social constructions (pp. 137-38).

To the extent Zemer means that authors draw from the social fabric in crafting their works of authorship, there is no counter-argument. His observation that authors "do not create in a social vacuum" but rather "are influenced by special circumstances, collective and personal social and cultural experiences, and other endless untraceable processes" is irrefutable (p. 112). In this sense, his perception of copyrighted works as "social entities" (p. 98) is absolutely correct. Zemer also rightly suggests that "[w]ithout the public domain, without collectively owned social and cultural properties, copyrighted works are impossible" (p. 138).

Nevertheless, recognizing that authors draw from the collective creativity of the public does not warrant the conclusion that any one copyrighted work should be deemed "collectively authored" by the public and the relevant colloquial author(s). Despite the reality that authors freely draw from the wealth of material in the landscape of existing cultural production, authors nonetheless manifest their individual creativity through their intrinsic and very autonomous personal creative capacities. Zemer clearly recognizes this component of authorship by acknowledging that authors invoke their "capacities to comprehend, then translate and modify collectively owned cultural and social properties" (p. 144). The public domain matrix indeed provides the available and, quite frankly, necessary material from which

colloquial authors draw, but the existence of this matrix does not convert the public into a joint author of all copyrighted works. This idea represents too much of a theoretical stretch and, as will be discussed later, is not workable on a practical level.

B. *Lockean Theory*

Zemer's Chapter Six, *Lockean Copyright Re-Imagined*, is the theoretical centerpiece of his work. Here, Zemer challenges the intellectual property scholarship focusing on Lockean justifications for copyright, arguing that such scholarship is based exclusively on the twenty-six sections of Chapter V, *Of Property*, of the *Second Treatise of Government*.[11] As such, the prevailing scholarship "presents Locke as the undisputed champion of exclusive private property, legitimising inequalities at the expense of public good" (p. 149).[12] Zemer highlights the fact that Chapter V's conceptualization of property fails to account for the public's collective labor in producing works of intellectual authorship. Thus, as a single source for intellectual property rights, Zemer argues that the *Second Treatise* is problematic (p. 164). Instead of discarding the *Second Treatise*, however, Zemer artfully re-imagines Lockean copyright by claiming that copyright law must comport with Locke's famous proviso that man may appropriate from the common so long as he leaves "enough, and as good left in common for others" (pp. 165, 169-70).[13] More specifically, with respect to copyright, this proviso must "be interpreted literally: an author has to leave *exactly* 'enough and as good'" (p. 177). The problem, however, is that while Zemer skillfully analyzes Lockean theory, he does not sufficiently delineate how this objective can be accomplished.

On the other hand, one of Zemer's strengths is his demonstration of how Locke's other works reveal the philosopher's concern with a rights-versus-access balance and with a social constructionist perspective. For example, Zemer discusses at length a letter Locke wrote in 1694 opposing the renewal of the Licensing Act of 1662.[14] Zemer documents how "Locke combines

[11] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-302 (P. Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, TWO TREATISES OF GOVERNMENT].

[12] *But see* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 143-49, 154-67 (Stephen R. Munzer ed., 2001) (questioning, against the weight of scholarly interpretation, whether Lockean theory supports privatization of intellectual property since such ownership is not necessary to make effective use of the resources).

[13] This proviso is part of Locke's overall no-harm principle developed in Chapter V of the *Second Treatise.* The no-harm principle encompasses several conditions including "the no-spoliation" proviso, the "enough and as good" proviso discussed in the text, and a charity principle (p. 165). A detailed discussion of these conditions is beyond the scope of this treatment. *See generally* LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 11, at 290 (no-spoliation); *id.* at 287-88 (enough and as good); *id.* at 170 (charity).

[14] John Locke, Criticisms of the Licensing Act of 1662 (circa Jan. 1695), *reprinted in* LOCKE: POLITICAL ESSAYS 330, 332 (Mark Goldie ed., 1997) (1884). Zemer entitles the

arguments for freedom of expression and social exchange, economic equality, common equity and recognition of authors' rights" (p. 153). He demonstrates how this letter reveals Locke's strong concern with the impact of the Stationers' monopoly upon the dissemination of knowledge, a narrative recognizably familiar to those engaged in modern copyright discourse. Of particular interest is Locke's prescient perspective on copyright duration as optimally lasting for "a certain number of years *after* the death of the author *or* the first printing of the book as suppose 50 or 70 years" (p. 157).[15]

Zemer also draws support for his re-imagined copyright from Locke's *Essay Concerning Human Understanding*,[16] which he interprets as supporting Locke's rejection of human creation as an *ex nihilo* enterprise (p. 178-86). Zemer explores whether Locke believed that human creativity could be equated with divine creativity. He concludes that Locke rejected the idea of human *ex nihilo* creative capacity and its accompanying entitlement to personal, absolute rights over an individual's creations (p. 179-80).

Zemer's Lockean analysis is consistent with Locke's understanding of human creativity as motivated by base economic desire. Natural law theory, particularly as developed by John Locke,[17] claims an inherent right to acquire *external* things, either through labor or by initial possession, and to dispose of such items as desired.[18] Along with this focus on the acquisition of property, however, Locke maintained that the gifts bestowed by God upon man are held in stewardship, and as such are inalienable and subject to strict limitations on

letter "Liberty of the Press," which is actually the title given by Mark Goldie to three different writings concerning the Licensing Act of 1662. LOCKE: POLITICAL ESSAYS, *supra*, at 329.

[15] *Id.* at 337 (emphasis added).

[16] JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Clarendon Press 1975) (1690).

[17] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 11, at 22 ("God gave the World to Men in Common; but since He gave it them for their benefit and the greatest Conveniencies of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated.").

[18] Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 356-57 (1993); *see also* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540-55 (1993) (applying Lockean theory to intellectual property law); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988) (providing a Lockean account of intellectual property); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 529-39 (1990) (discussing the natural rights underpinnings of U.S. copyright law). *But see* Shiffrin, *supra* note 12, at 143, 149, 154-67 (questioning whether Lockean theory supports privatization of intellectual property since such ownership is not necessary to make effective use of the resources).

human conduct.[19] According to this view, an individual cannot dispose of his life and personal autonomy.[20] In contrast, Locke conceived of a person's labor and actions as alienable "private" property.[21] Thus, according to a Lockean theory of copyright law, an author's expression, having been created through his mental labor, is an ideal object for commodification.[22] A Lockean theory of copyright law, therefore, defines labor, and the external product in which it results, in terms of potential commodification.[23] Moreover, once something becomes externalized, the object loses the aspect of it characterized by personal autonomy as an inalienable gift from God because the object itself is capable of commodification. Additionally, Locke's view of labor is that of an unpleasant necessity – something that must be done in order to realize something in return, namely private ownership.[24] Locke's perspective thus underscores that "the passion for material appropriation is viewed as fundamental, even primary, in motivating the creative acts of the individual."[25] Thus, man's physical, economically-driven labor is different from the essence of divine, *ex nihilo* creation.

## II. PRACTICAL LIMITATIONS OF THE JOINT-AUTHORSHIP APPROACH

This Part examines Chapter Seven, *Doctrinal Payoffs: The Public as a Joint Author*, which addresses the law of joint authorship and the practical implications of Zemer's thesis. Zemer maintains that the public's interest becomes effective immediately upon the work's creation because the public is a joint author. However, Zemer appears to acknowledge the inherent theoretical limitations of his argument by observing that "[a] reader may still have a residual concern and ask whether the public can be a singular author" and stating that "this question will have to remain in need for further research" (p. 187 n.2). He then notes that the question of singular authorship by the public is "almost irrelevant, since the *only* way for a copyrighted entity to form is by way of joint collaboration between public and authors" (p. 188 n.2).

---

[19] Sibyl Schwarzenbach, *Locke's Two Conceptions of Property*, 14 SOC. THEORY & PRAC. 141, 146-47 (1988) (stating that the "'spoilage clause' (that we appropriate only so much as we can use before it spoils), as well as the 'sharing clause' (that there be 'enough and as good' left in common for others)" represent the "most visible expression in Locke of such inherent limitations imposed by our guardian roles" (citations omitted)).

[20] *Id.* at 145 ("[T]he body or person cannot (under normal circumstances) be alienated or sold because they ultimately belong to God and are in His service.").

[21] *Id.* at 148-49.

[22] Netanel, *supra* note 18, at 366-67.

[23] *Cf.* Schwarzenbach, *supra* note 19, at 151 (arguing that under Lockean philosophy an "act of labor grants a right to its products . . . , not because the latter is some sort of physical . . . extension of [the laborer], but only because . . . producing, or causing such things to be, furthers God's underlying intentions for the preservation of mankind").

[24] *See id.* at 154-55.

[25] *Id.* at 157.

Section A of this Part examines the law of joint authorship as it pertains to Zemer's thesis. Section B of this Part reviews his specific proposals.

### A. *Copyright Law on Joint Authorship*

The first part of the *Doctrinal Payoffs* chapter examines the law of joint authorship in both the United Kingdom and the United States. Zemer properly analyzes how the rules of joint authorship apply in instances where two or more parties contribute to a copyrighted work and notes their problematic impact on collaborative enterprise (pp. 188-91). The 1976 Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[26] Neither the statute nor its legislative history defines "inseparable" or "interdependent."[27] Yet, appellate courts influential in the copyright arena, such as the Second,[28] Seventh,[29] and Ninth[30] Circuits, adhere to a test for joint authorship that requires both the independent copyrightability of each contribution and the intent of all putative authors at the time of the collaboration that they be co-authors. The decisions in these circuits evince the concern that, notwithstanding the provision of a relatively minor contribution, the strict statutory definition may deem a party a joint-author as long as all parties to the work intended to merge their contributions into a unitary whole. Therefore, courts endorse a more rigorous test for determining joint authorship, de-emphasizing collaboration in favor of independent copyrightability and mutual intent.

Copyright scholars in the United States disagree as to whether the contribution of each joint author must be independently copyrightable,[31] or merely "more than *de minimis*."[32] The case law supports Professor Goldstein's view that each putative co-author's contribution must be independently copyrightable.[33] The requirement that a contribution must be independently copyrightable to serve as a basis for joint authorship has the advantages of simplicity and predictability. On the other hand, this standard does not have definitive support in the statutory definition of "joint work," or the

---

[26] 17 U.S.C. § 101 (2000).

[27] Erickson v. Trinity Theatre, Inc. 13 F.3d 1061, 1068 (7th Cir. 1994).

[28] *See* Thomson v. Larson, 147 F.3d 195, 200 (2d Cir. 1998); Childress v. Taylor, 945 F.2d 500, 506-08 (2d Cir. 1991).

[29] *See Erickson*, 13 F.3d at 1068-71.

[30] *See* Aalmuhammed v. Lee, 202 F.3d 1227, 1233-34 (9th Cir. 2000).

[31] *E.g.*, 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 4.2.1.2 (1989 & Supp. 1999).

[32] *E.g.*, 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07[A][3][a] (2007).

[33] *See, e.g.*, Gaiman v. McFarlane, 360 F.3d 644, 658-59 (7th Cir. 2004) (acknowledging that an independently copyrightable contribution is the rule but questioning the parameters of this doctrine).

accompanying legislative history. In his discussion of the numerous cases addressing the standard for joint authorship in the United Kingdom, Zemer notes that the issue regarding the nature of a putative joint author's contribution "is complex and is fraught with conflicting interpretations" (p. 192). He concludes, somewhat cryptically, that although the English view is perhaps closer to Professor Nimmer's "more than *de minimis*" standard, "both [the English and U.S.] systems require copyrightable contribution and embrace, although on a different scale, Goldstein's approach" (p. 197). Zemer continues with a critique of the independent copyrightability requirement, arguing that it "discourages authors from creating or providing other creators with valuable ideas," thereby chilling creativity overall (pp. 197-98). His point is well-taken in this regard. Moreover, the independently copyrightable contribution standard does not necessarily comport with the prevailing custom defining authorship in many of the copyright industries[34] and its rigidity results in the automatic exclusion of certain creative voices from the authorship determination.

As a theoretical matter, however, Zemer's "public-as-joint author" theory is problematic because it is based on a joint authorship model that is foreign to the very jurisdictions whose law he addresses. He articulates a legitimate objection to his position, acknowledging some might argue that "the public does not qualify for the condition of significant contribution and merely adds insignificant raw materials such as ideas and principles" (p. 198). Ultimately, though, he suggests a reformulation of the joint authorship doctrine that would require nothing more than two or more parties joining "efforts in furtherance of a preconcerted joint design" in which the parties "knowingly participate in a process that would yield results only if their efforts are combined together" (p. 198). He suggests that the quantity of each author's contribution should be immaterial (p. 199). I am uncertain whether Zemer would apply this proposed test to two or more individual colloquial co-authors. If so applied, I suggest that its inherent vagueness would most likely yield a result of "joint

[34] *See* Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV 257, 270-72 (1996) (critiquing the standard for "joint works" generally as inconsistent with authorship norms in networked computer environments); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership and Accountability*, 53 VAND. L. REV. 1161, 1208 (2000) (remarking that the requirement that each party make a copyrightable contribution "does not flow inevitably from the statute" and that, in the collaborative research context, a more liberal standard regarding the extent of contribution would promote "creative output by providing incentives not only to express, but also to have thoughts worth expressing, and to transfer those thoughts to someone who can express them"); Teresa Huang, Note, Gaiman v. McFarlane*: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673, 681-84 (2005) (presenting an illustration of authorship in the comic book industry and outlining Judge Posner's reluctance to apply the independent copyrightability standard to "mixed media" works).

authorship" in virtually every case of collaboration, a result that would surely chill creativity in many contexts.

Even limited to joint authorship between the public and colloquial author(s), Zemer's test poses a problem not just in terms of the requisite quantity but also the quality of the public's contribution. Zemer proposes that the quality of the public's contribution is "immeasurable" by virtue of the author's dependence on the public's "authorial collectivity" (p. 210). In other words, the ubiquitous nature of the public's contribution, combined with the inability to separate it from the colloquial author's own contribution, "renders the public's contribution substantial" (p. 210). But the test fails to acknowledge that the "public" makes no concrete "authorial" decisions with respect to any particular copyrighted work. Zemer justifies joint authorship by the public because "the public contributes invaluable skill and expertise by virtue of maintaining and providing social and cultural properties" (p. 199). I understand he wishes to privilege the public above any colloquial co-author, and his standard reflects this bias. The requisite contribution Zemer advocates on the part of the public, however, is a far cry from the specificity of contribution and depth of involvement that joint authorship historically has entailed. Further, if he is seeking to create a "special category" of joint authorship reserved just for the public, how much reliance can he then place upon the law of joint authorship as it has developed in the conventional context of two or more colloquial co-authors? Moreover, if Zemer's intent is to create a special category of joint authorship, what are the other implications of this particular category? For example, can the public, as joint author of every copyrighted work, serve as a plaintiff in every copyright infringement action?

As discussed, courts in the United States also require mutual intent for joint authorship.[35] Again, this "intent to be co-authors" standard diverges from the language of the Copyright Act and its legislative history.[36] Moreover, by virtue of its inevitable operation, the mutual-intent standard privileges the dominant author over the non-dominant author.[37] Under a subjective standard focusing on what the parties said and thought, the dominant author or her representatives will deny the intent to co-author. The story of Lynn Thomson amply illustrates this dynamic. Thomson was the plaintiff dramaturg in *Thomson v. Larson*,[38] the high-profile joint-authorship case involving the hit play *Rent*.[39] The New York Theater Workshop hired Thomson to help

---

[35] *See supra* notes 28-30 and accompanying text. Zemer illustrates how this requirement also may be implicit in England's common law copyright (pp. 204, 217).

[36] *See* Dreyfuss, *supra* note 34, at 1206 (asserting in the context of *Thomson v. Larson* that "the statutory reference to intent is quite different from the court's").

[37] *See id.* ("The court's test creates a great deal of mischief, for it allows one collaborator – the dominant party – to lure others into contributing material to a unitary work, all the while withholding the intent to share in its economic and reputational benefits.").

[38] 147 F.3d 195 (2d Cir. 1998).

[39] Zemer discusses *Thomson v. Larson* at length (pp. 197, 201-02, 213-18).

playwright Jonathan Larson clarify and transform the storyline of *Rent*.[40] Their revised version of the play was "characterized by experts as 'a radical transformation of the show.'"[41] The agreement Thomson signed stipulated that she agreed to provide "dramaturgical assistance and research to the playwright and director" in exchange for $2000 and billing credit as "Dramaturg."[42] According to Thomson, her collaboration with Larson resulted in a new script that incorporated only half of the previous text.[43]

Hours after the final dress rehearsal, Larson died.[44] Subsequently, *Rent* opened on Broadway and was a smashing success.[45] Thomson approached Larson's heirs and requested a percentage of the royalties from the play. When negotiations broke down, Thomson brought suit, alleging that she was a co-author of the play and therefore entitled to sixteen percent of the author's share of the royalties.[46] Thomson's complaint alleged that "she developed the plot and theme, contributed extensively to the story, created many character elements, wrote a significant portion of the dialogue and song lyrics, and made other copyrightable contributions to the Work."[47] Thomson initiated her lawsuit to receive, on a personal level, both credit and compensation.[48]

I have argued elsewhere that courts should depart from the notion that co-authorship necessitates an equal sharing of the profits.[49] This sense of mandated equality of profit pervades the law of joint authorship in the United States.[50] The courts are misguided in their focus on the need to divide the

---

[40] *Thomson*, 147 F.3d at 197.

[41] *Id.* at 198.

[42] *Id.* at 197.

[43] Lynn Thomson, *The Rewards of Collaboration, Parabasis,* J.A.S.K. THEATER PROJECTS, Spring 1997, at 12.

[44] *Thomson*, 147 F.3d at 198.

[45] *Id.*

[46] *Id.* at 198 n.11.

[47] *Id.* at 198 n.10.

[48] *See* Lynn Thomson, . . . *And an Artist Is an Artist Is an Artist*, AM. THEATRE, Sept. 1998, at 8, 8-9. In his treatment of this case, Zemer asserts that under English law, Thomson might have been a co-author if a court found both collaboration and indistinct contribution, assuming the court viewed the nature of the contributions as inseparable rather than interdependent (pp. 214-15).

[49] *See, e.g.*, Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL L. REV. 1, 57-58 (2001).

[50] In *Thomson*, the court noted that "[j]oint authorship entitles the co-authors to equal undivided interests in the whole work – in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made." 147 F.3d at 199. In *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), the appellate court stated that absent an agreement to the contrary, any profits earned by joint authors are to be evenly divided, even where their respective contributions are not equal.

profits of jointly authored works equally. The statute's legislative history provides that joint authors co-owning copyright in a work are tenants in common.[51] According to property law, tenants in common own undivided interests in the property and no tenant can exclude the others from any portion of the property.[52] Significantly, there is no requirement that this undivided interest be equal.[53] Moreover, the 1976 Copyright Act's language does not explicitly specify that the ownership shares must be equal.[54] If courts were to recognize that tenancy in common does not necessarily require co-owners to enjoy equal shares, they could consider the possibility that copyright law should reward collaborative efforts only to the extent of the collaboration. Zemer quite correctly argues, however, that in the area of joint authorship, the law remains largely unresponsive to the increasingly large number of collaborative endeavors.[55]

Yet, Zemer's suggested reformation of the intent requirement appears unworkable in practice. "[T]o justify joint authorship of copyrighted works between public and authors" (p. 204), he offers "the copyright moment"[56] as the time at which the public's "collective properties and the author's personal contribution are merged into a unitary whole" so that "both parties intentionally and knowingly collaborate" (p. 205). Further, with respect to the colloquial author, Zemer sees "the requirement of intention to co-author with the public" as "implicit in the very act of copyright creation" (p. 205). The problem with this view, however, is that it is a fiction to assume an intention to co-author by *either* the public or colloquial authors.

### B. *A Re-Imagined Copyright*

Zemer addresses the practical applications of his public-as-joint-author thesis in the final pages of his book (pp. 218-25). These pages give me the greatest pause. Even if I were persuaded to designate the public as a joint author of every copyrighted work despite the amorphous nature of the public's contribution, I would still have reservations whether, as a practical matter, Zemer's suggested reforms are viable, particularly in the United States.

Initially, Zemer proposes some changes that he acknowledges may have limited appeal because they would necessitate a complete overhaul of the copyright system. These include a system whereby authors would,

---

[51] H.R. REP. NO. 94-1476, at 121 (1976).

[52] EDWARD H. RABIN, ROBERTA ROSENTHAL KWALL & JEFFREY L. KWALL, FUNDAMENTALS OF MODERN PROPERTY LAW 271.

[53] *Id.*

[54] Section 201 of the Act simply provides: "Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work." 17 U.S.C. § 201(a) (2000).

[55] *See* Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 197-98 (2001).

[56] For a discussion of Zemer's notion of "the copyright moment," see *supra* Part I.A.

immediately upon creation, transfer their property rights to the public domain in exchange for "adequate reward and compensation . . . to serve as an incentive for future productions" (p. 218). More realistic, in Zemer's view, is the idea of "[v]iewing intellectual property through the eyes of human rights advocates" so as to "encourage consideration of the ways in which the property mechanism might be reshaped to include interests and needs that it currently does not" (p. 221). Some scholars have argued that intellectual property should be viewed as part of the "human rights" framework. For example, Peter Drahos hesitatingly posits that a personality based theory might justify at least some intellectual property rights as human rights.[57] Laurence Helfer also believes it is possible to construct a human rights framework for intellectual property.[58] Still, differing opinions remain concerning whether intellectual property rights such as copyright can properly be considered human rights.[59] Significantly, to the extent something is categorized as a human right, it is beyond the power of individual states to adjust for their convenience or preference.[60] As H.G. Schemers concludes, some human rights are "of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement."[61]

On the other hand, perhaps there is a place for dialogue between the intellectual property and human rights communities to resolve the concerns that underlie Zemer's work. Despite the economically oriented justification for copyright law that still pervades our thinking,[62] in recent years scholars and even the judiciary have begun to call for a more nuanced approach to intellectual property law generally. For example, both Peter Yu and Madhavi

---

[57] PETER DRAHOS, THE UNIVERSALITY OF INTELLECTUAL PROPERTY RIGHTS: ORIGINS AND DEVELOPMENT 21 (1998), http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf.

[58] *See* Laurence R. Helfer, *Toward A Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 977 (2007).

[59] *See* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1075-78 (2007). Even with respect to the economic, social and cultural rights that concerned the non-Western signatories to the Universal Declaration of Human Rights and International Covenant on Economic Social and Cultural Rights, it is fair to say that although some types of intellectual property rights legitimately can be seen as having a strong human rights basis, this is not necessarily the case with all intellectual property rights. *See id.* at 1077-78.

[60] DRAHOS, *supra* note 57, at 15.

[61] *Id.* (quoting Henry G. Schermers, *The International Protection of the Right of Property*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 565, 579 (Franz Matscher & Herbert Petzold eds., 1988)).

[62] *See* Sarl Louis Feraud Int'l v. Viewfinder Inc., 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005) (stating that "[c]opyright and trademark law are not matters of strong moral principle" but rather that "[i]ntellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole").

Sunder have argued that the utilitarian economically-oriented justifications for intellectual property are insufficient and therefore, a broader spectrum of justifications is needed. Specifically, Yu urges the development of a holistic perspective on intellectual property so that the interface between intellectual property and human rights can be more fully mined.[63] Sunder contends that "[i]ntellectual property is about social relations and should serve human values."[64] Thus, whereas the traditional narrative of economic incentive is concerned with fostering creativity, a narrative steeped in social and cultural theory offers a "broader normative purpose for intellectual property."[65] Peter Drahos posits an instrumentalist view of intellectual property that echoes similar themes. He believes that the rights created through intellectual property laws should serve fundamental human needs and values.[66] In his view, therefore, "[v]iewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not."[67]

The challenge, however, is to forge a definitive legal framework for recognizing and enhancing the public's interest in copyrighted works. The human rights rhetoric, while controversial and lacking a clear-cut mechanism, ultimately may prove no more helpful than the public-joint-authorship designation proposed by Zemer. The same is true of Zemer's query whether we should "substitute the term 'author' with . . . 'compilator', 'commentator', 'translator', 'selector', or simply 'penman'" (p. 222). I agree with Zemer's ultimate conclusion that any such "definitional changes" are not a ready solution in that "they too require substantial modifications to the law" (p. 222).

Zemer's penultimate proposal is an "indefinitely renewable copyright term in exchange for an open-ended list of fair dealing exceptions" (p. 223). According to his proposal: "[T]here would be no system of fixed copyright duration. Copyrights will be renewable every five years according to objective parameters, such as creativity and degree of originality over prior art, designed to secure the public interest" (p. 224).

Zemer notes that it is beyond "the present study to fully explore the practical implications of this formula" (p. 223). A shortcoming of his work, however, is that he does not address the implications of his proposal under the U.S. Constitution. He cites Lawrence Lessig as an advocate for a five-year

---

[63] Yu, *supra* note 59, at 1136-41.

[64] Madhavi Sunder, *IP$^3$*, 59 STAN. L. REV. 257, 331 (2006).

[65] *Id.* at 332.

[66] DRAHOS, *supra* note 57, at 24.

[67] *Id.* at 25; *see also* Paul L.C. Torremans, *Copyright as a Human Right*, *in* COPYRIGHT AND HUMAN RIGHTS 1, 9 (Paul L.C. Torremans ed., 2004) (explaining that copyright and intellectual property rights were included in the human rights instruments only because they were viewed "as tools to give effect to and to protect other stronger Human Rights").

renewable term (p. 224), but Lessig also calls for a cap of fifteen renewals.[68] Zemer's work contains no such cap on its face. He also observes that William Landes and Richard Posner "advocated" an "indefinitely renewable copyright" (p. 224), but these authors expressly stated that they "are interested in the economics of indefinitely renewing the copyright term and express no view on its legality."[69] In light of Zemer's position that this proposal is his preferred alternative, a more rich analysis of the conflict between an "indefinitely renewable" copyright and the "limited times" command in the United States Constitution would be appropriate.[70]

Moreover, his work would have benefited from more discussion of how the "objective parameters" of "creativity and degree[s] of originality over prior art" (p. 224) would work in either theory or practice. For example, I am unsure what Zemer means by "objective parameters" and how this standard departs from the formula in *Feist Publications, Inc. v. Rural Telephone Service Co.,*[71] which defines originality as requiring independent selection and more than a "modicum" of creativity.[72]

My final point regarding Zemer's indefinite-renewability proposal is that I am puzzled as to the mechanics of an "open ended" list of fair dealing exceptions. In a footnote, Zemer appears to endorse the flexibility of the United States' fair use doctrine as compared to the United Kingdom and European Union models, yet he cautions that even our fair use model does not properly address his concerns (p. 223 n.190). All he offers by way of explanation, however, is the statement that our fair use doctrine's "incompatibility with meeting social challenges and cultural needs also emphasizes the danger in an ill-defined open-ended fair use doctrine that places the author as its primary object of protection at the expense of recognising the public interest" (p, 223 n.190). Here again, the absence of a more concrete analytical framework makes it difficult to evaluate the soundness of Zemer's ultimate proposal.

## III. THE COLLOQUIAL AUTHOR AS STEWARD

Zemer is clear that his concern for the preservation of the public domain underlies his public-as-joint-author thesis. He expressly acknowledges that "[t]he important thing is to increase public access and limit authors' property

---

[68] LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 251 (2001).

[69] William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473 (2003).

[70] The Constitution states that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

[71] 499 U.S. 340 (1991).

[72] *Id.* at 363.

rights" (p. 218). When he speaks of "the imposition of further limitations on copyright ownership" (p. 99), he is speaking of limitations that will facilitate the preservation of the public domain. Further, in his chapter on Locke and elsewhere, Zemer reiterates that "an author-labourer must leave enough *and* as good in the common" (p. 175). Zemer's concern with how a bloated copyright law impacts the public domain is legitimate and representative of the heart of much of the current discourse in copyright law.[73] Zemer sees the public domain as "the treasury of elements which together trigger the creative impulse" and as a social construction that "is constantly being reinvented and enhanced by historical events and social processes" (p. 141).

With respect to the issue of preserving the public domain, the problem is quite clear. It is the solution, and even the essence of what constitutes the public domain, that is elusive. As Diane Zimmerman has observed, the legal academy contains numerous defenders of the public domain who base their arguments on "pragmatic judgments about what will best promote a healthy intellectual property policy" or on normative perspectives of the philosophical justifications for private property rights.[74] Recently, Pamela Samuelson identified and insightfully analyzed a total of thirteen different conceptions of the public domain.[75] The functions of the public domain appear to be as diverse as the academic models seeking to define its essence.[76] The complexities of the public domain have spawned several recent substantial publications treating the subject in comprehensive detail.[77] In light of these multi-faceted conceptions and functions, it has become increasingly difficult to articulate, much less apply, a concise yet viable theory of the public domain.[78]

---

[73] Zemer also is to be applauded for attempting to balance access with rights by reserving authors' exclusive moral rights over their works, although he does not provide a detailed framework for how this could be accomplished (p. 219).

[74] Diane Leenheer Zimmerman, *Is There a Right To Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 308-09 (2004) (discussing both the views of those who favor a strong public domain and their opponents).

[75] *See generally* Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006).

[76] In this regard, Samuelson has articulated the following functions mined from the ever-growing array of scholarship on the topic: "as a building block for the creation of new knowledge, and as an enabler for competitive imitation, follow-on creation, free or low cost access to information, public access to cultural heritage, education, self-expression and autonomy, various governmental functions, or deliberative democracy." *Id.* at 826-27 (footnotes omitted).

[77] *E.g.*, THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) [hereinafter THE FUTURE OF THE PUBLIC DOMAIN]; *The Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 1 (devoting multiple issues to the presentation of papers from a November 2001 conference on the public domain at the Duke University School of Law).

[78] *See* Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, *in* THE FUTURE OF THE PUBLIC DOMAIN, *supra* note 77, at 325, 326 ("The lack of a

The distinct conceptions of the public domain in the scholarly realm are mirrored by the reality that those who produce and use information products likely have divergent concerns and needs with respect to the public domain. These variations may arise from the differences inherent in various user communities. For example, artistic communities may have needs in this regard that are distinct from scientific communities.[79] Similarly, certain audience members might prefer a legal structure that maximizes the chance that a given work will enjoy a stable meaning,[80] whereas others might desire a climate in which users can freely borrow and adapt prior works.

At the risk of oversimplification, material in the public domain entails common ownership by the public as a whole.[81] This means that each member of the public has a "property interest" and "an equal right to adapt and transform the material in question."[82] Zemer might agree with this conception of the public domain, but he desires to expand it by providing that even works subject to copyright protection arguably *should* be included in the public domain by virtue of the public's joint authorship.

Although I remain unconvinced as to how Zemer's public-as-joint-author proposal will work from either a theoretical or practical standpoint, his book makes a more global point that is well worth contemplation. Specifically, by designating the public as a joint author of all copyrighted works, Zemer underscores that language does matter.[83] An analogy is the focus on gender-neutral language by the feminists in the 1970s.[84] Zemer's designation of the public as joint author underscores that we best understand law as expression, and that expression often influences the development of the law. As Yochai Benkler aptly observed, people "contract against the background of law that

core perception regarding free access to and use of information, may lead to ideological fuzziness.").

[79] Samuelson, *supra* note 75, at 824.

[80] For a detailed treatment of this topic, see generally Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999).

[81] Christine D. Galbraith, *A Panoptic Approach to Information Policy: Utilizing a More Balanced Theory of Property in Order to Ensure the Existence of a Prodigious Public Domain*, 15 J. INTELL. PROP. L. 1, 25 (2007); Tyler T. Ochoa, *Origins and Meaning of the Public Domain,* 28 U. DAYTON L. REV. 215, 257 (2002).

[82] Ochoa, *supra* note 81, at 261-62.

[83] *Cf.* Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 224-25 (2002) (discussing specific examples illustrating that "the way we talk about property matters" and exploring this theme more generally).

[84] Anne Pauwels, *Linguistic Sexism and Feminist Linguistic Activism*, *in* THE HANDBOOK OF LANGUAGE AND GENDER 550, 551 (Janet Holmes & Miriam Meyerhoff eds., 2003) (explaining that the feminist linguistic activism in the 1970s focused on exposing sex bias in language use because such linguistic bias was viewed as particularly discriminatory and damaging to women).

defines what is, and what is not, open for them to do or refrain from doing."[85] Thus, legal rules often make a normative statement that can exert a powerful influence on attitudes as well as potentially regulate behavior. Moreover, although norms traditionally are developed and enforced outside the legal system,[86] they also can create *de facto* standards that can substitute for the law, encourage legal compliance, or even influence the law's development.[87] Viewed in this light, Zemer's public-as-joint-author approach underscores the idea that we need to take the entire idea of the public domain more seriously. Moreover, his perspective highlights that authors contribute to the public domain just as they draw from it.[88]

A different way of addressing Zemer's concern for the public domain is to denominate the colloquial author as a "steward." Scholars of artistic-creation theory emphasize the concept of stewardship as an inspirational motivation for human creativity. Stewardship blends an awareness of both externally endowed inspiration and the cyclical dimension of creative enterprise. Drawing from the "dust to dust" cycle of Divine creativity in Genesis's creation narratives,[89] the idea is that humans also must continually keep their creative gifts in a state of motion.[90] Lewis Hyde wrote about myths "of closing the circle, of artists directing their work back toward its sources."[91] As an example, Hyde depicted the work of Ezra Pound as being "animated by a myth in which 'tradition' appears as both the source and ultimate repository of his gifts."[92]

Over time, the notion of stewardship assumed a prominent theological focus, particularly in Christianity. From a theological standpoint, stewardship reaffirms that gifts are endowed by a Divine power, beyond that of the artist.

---

[85] Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 432 (1999).

[86] For a discussion of custom as it relates to intellectual property law, see generally Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

[87] *See* Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 201, 206-07, 216-17 (Peter K. Yu ed., 2007) (discussing the interrelationship between social norms and the law in the context of file-sharing); Rothman, *supra* note 86, at 1931-37 (discussing the incorporation of customary law into IP decisions).

[88] I thank Ann Bartow for her insight on this particular point.

[89] *See Genesis* 3:19.

[90] *See* Rainer Maria Rilke, *Letters to Merline*, *in* CREATORS ON CREATING 53, 53 (Frank Barron et al. eds., 1997).

[91] LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 147 (Vintage Books 1983) (1979).

[92] *Id.* Hyde also discusses the Chilean poet Pablo Neruda, who took great pride when he discovered that an unknown worker had heard his poems because Neruda saw this as a sign that his gift was being directed back to the "brotherhood," to "the people," whom he believed to be the source of his gift in the first place. *See id.*

Also, stewardship embraces a temporary view of possession to the extent it conceives of gifts returning to their original source.[93] The stewardship doctrine became crystallized in the medieval period, when ownership of private property was envisioned as temporary, designed to operate exclusively in this world. Since stewardship of God's order underlay the theory of ownership, property was regarded as inalienable because it ultimately belonged to God.[94] Recall that stewardship also is a prominent feature of Lockean property theory given his view that gifts are bestowed by God and subject to strict human limitations.[95] Central to this concept of owner as steward is the idea of possessing something originally obtained as a gift – an unearned benefit "bestowed" upon the recipient.[96]

Although a detailed discussion of the implications of "the author as steward" is beyond the scope of this treatment, a few general thoughts on this concept are in order. First, understanding the colloquial author as a steward of her work is consistent with the view that copyright ownership involves duties to the public as well as rights in the work.[97] This idea has been recognized recently by several scholars in the context of general property theory.[98] Specifically, as stewards, colloquial authors must be more accountable to the public for the limited times they are in possession of their works. Accountability refers to the exercise of ownership rights so that public access and enjoyment are maximized, even during the period of ownership.

---

[93] The concept of stewardship is present to an extent in the Jewish tradition, as the Old Testament contemplates that the Israelites are to be God's tenants on the land, but only if they live up to the terms of their Covenant with God will they remain there. *See Leviticus* 25:23 ("But the land must not be sold beyond reclaim, for the land is Mine; you are but strangers resident with me."); ETZ HAYIM: TORAH AND COMMENTARY 741 (David L. Leiber et al. eds., Rabbinical Assembly 2001) (1985) ("Even the Israelites are but God's tenants, resident aliens in the Land. Only if they live up to the terms of the Covenant will they endure there.").

[94] Schwarzenbach, *supra* note 19, at 145.

[95] *See supra* note 19 and accompanying text.

[96] Schwarzenbach, *supra* note 19, at 146. Roger Syn notes, however, that the Christian publishing industry follows the view of modern courts regarding copyright ownership, opting to view copyrights as capable of human ownership. Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 24 (2001). This view, however, is not inconsistent with the stewardship concept to the extent that humans are regarded as holding the intellectual property in trust.

[97] *See* Sigourney v. Am. Psychoanalytic Ass'n, 113 Cal. Rptr. 2d 274, 282 (Cal. Ct. App. 2001) (stating that property ownership encompasses both rights and obligations).

[98] *See, e.g.*, JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 16-18 (2000); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 3-6 (2000); Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 305-06 (2002) (discussing the implications of stewardship for property theory); *see also* Baron, *supra* note 83, at 208-09 (reviewing Singer's books).

In the context of private ordering, this view appears in the "cultural environmentalism" literature, which analogizes the politics of the public domain to those underscoring environmental protection.[99] For example, Molly Shaffer Van Houweling recently analyzed the General Public License (GPL) and Creative Commons licenses and analogized these tools to real property conservation easements.[100] Owners of property subject to these agreements remain in possession of their property, but are restricted in how they can use their property pursuant to the specific terms of these easements or licenses. Van Houweling notes that the underlying idea is "to leverage private property rights to serve the public's interest in resources that might otherwise be undersupplied, be they wildlife habitats, pretty views of open spaces, or accessible raw materials for future intellectual activity."[101] Viewed in terms of the author-as-steward model, these devices can be seen as voluntary assumptions of duties by property owners.

In addition to private ordering, the idea of author as steward has potential for informing both copyright reform and judicial applications of the Copyright Act by emphasizing the duties to the public that correlate to ownership rights. Although the concept of "duty" is not one that has received explicit attention in copyright circles, many scholars are developing models for reform that implicitly endorse the idea that authorship rights must be exercised in conjunction with accountability to the public. These scholars share Zemer's concern for preservation of the public domain in the face of a copyright law that is perceived as too expansive, particularly in the digital age.

In terms of subject matter, Diane Zimmerman has questioned whether a higher standard of originality should be required, thus raising the possibility of restricting copyright by narrowing its overall application.[102] At conferences and in private conversations, copyright scholars discuss amongst themselves the notion that in the digital age, a one size fits all mentality for copyright may be outdated.[103] This view, if ever formally enacted, might result in a graduated system of protection based on distinct levels of originality.[104] Although such a content specific system of protection may seem very remote, hints of this idea exist in the pending federal legislation that would afford a form of *sui generis*,

---

[99] *See, e.g.*, James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 108-14 (1997); Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23, 23 (2007).

[100] Van Houweling, *supra* note 99, at 29-33.

[101] *Id.* at 30.

[102] *See* Diane Leenheer Zimmerman, *It's An Original!(?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 211 (2005).

[103] This was a major theme in the informal discussion at the Interdisciplinary Intellectual Property & Technology Immersion Conference, in New York City (2006) (sponsored by Albany Law School).

[104] *Cf.* Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 884 (2007) (proposing a standard of heightened originality for moral rights).

or copyright-like, protection for the overall appearance of new and original fashion designs for a three-year period.[105]

With respect to fair use, there has been substantial scholarly activity aimed at reforming this venerable doctrine to ensure greater protection for the public domain and public access to knowledge.[106] One recent provocative proposal has been developed by Wendy Gordon and Daniel Bahls, who argue that the statutory provision should explicitly declare that fair use is a right and that the availability of a license should not necessarily bar fair use.[107] I find their proposal especially attractive because it would explicitly recognize the public's rights in one of the main provisions of the statute that is designed to address the public's access interests. Moreover, their model would not require a substantial overhaul of the current copyright system. Although Gordon and Bahls frame their proposal in terms of public entitlement,[108] their ultimate goal, and even their specific proposed reform, is very consistent with my vision of the "author as steward" in that an author's duties correspond to the public's rights. Indeed, they expressly recognize that natural law provides the moral basis for both authorial reward as well as "a strong set of expressive rights in the public."[109]

Gideon Parchomovsky and Kevin Goldman suggest a distinct fair use reform, arguing that the detrimental aspect of uncertainty that is characteristic of the doctrine can be remedied by the enactment of bright-line rules that

---

[105] Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2 (2007); S. 1957, 110th Cong. § 2 (2007).

[106] A small sampling of the recent literature on this topic includes the following articles: Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 778 (2003) (arguing that fair use's market impact analysis should take into account the age of a work); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 411 (2003) (proposing that fair use consider how much time has passed since a work's creation); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1622-65 (2004) (suggesting that in applying the fair use doctrine and other aspects of copyright law, courts should take established patterns of social and authorial norms into account, especially those delineated and legitimized by tradition in various fields and institutions); Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1017-19 (2007) (advocating a more flexible, liberal approach to the application of fair use in the context of private initiatives such as Google's Book Search Project); Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 249 (2006) (urging courts to adopt a "situational approach" to fair use which uses economic analysis to identify common situations in which the failure of the market for permissions should be presumed).

[107] Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 To Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 624.

[108] *Id.* at 626.

[109] *Id.* at 652.

would recognize certain types of copying as "per se fair."[110] Their recommendations in connection with the Digital Millennium Copyright Act ("DMCA")[111] are of particular relevance to the author-as-steward conception. Specifically, they argue that Congress should mandate that content providers employ technological protection measures "that enable end-users to access the minimal amounts of protected material that the safe harbors would otherwise allow."[112] In urging this reform, they argue it would not require an overhaul of the current DMCA framework, but rather a "reclassification of fair use as a Hohfeldian right and the imposition of a *corresponding duty* on content distributors to create a limited right of access."[113]

Moving beyond the fair use doctrine, Jessica Litman urges a model of "lawful personal use" that would require courts to construe copyright's exclusive rights in a way that preserves "the public's liberties to read, listen, view, or use" copyrighted works.[114] She demonstrates that courts and Congress historically have understood copyright law to afford owners control over the exclusive rights to exploit their works while enabling the public to realize the liberties of enjoyment.[115] This model also is consistent with the author-as-steward paradigm because it reinforces that rights entail responsibilities. Copyright owners have the right to exploit, but that right is tempered by the responsibility to exercise it in accord with the public's enjoyment liberties, which represent the core of copyright law's "dissemination of knowledge" objective.[116]

The proposals by these scholars represent only a sampling of the recent scholarly literature concerned with maximizing the scope of public access.[117]

[110] Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1488 (2007).

[111] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

[112] Parchomovsky & Goldman, *supra* note 110, at 1523.

[113] *Id.* (emphasis added).

[114] Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1904 (2007).

[115] *See id.* at 1883-93.

[116] The Framers were most concerned with the concept of promoting progress, and their primary objective in enacting the Copyright Clause was to stimulate an open culture steeped in knowledge and education. *See* Kwall, *Inspiration and Innovation*, *supra* note 8, at 1985. In the early republic, the conventional understanding of promoting progress appeared to be equivalent to the utilitarian conception of dissemination of knowledge. *Id.* at 1985-86; *see also* Andrew M. Hetherington, Comment, *Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. & TECH, L. REV. 457, 469 (2003). For a comprehensive study of the history of the copyright clause, see generally Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

[117] Another model of enhanced public access is furnished by Peter Menell in the specific realm of digital archiving and search technology. Menell advocates a well-defined array of

The momentum for enhanced access also is reflected in a reform proposed by the Copyright Office in 2006 that would have allowed people to copy "orphan works" whose copyright owners are known but not capable of being located, as long as attribution to *both* the author and the copyright owner is provided.[118] The global point, however, is that various attempts to balance the "rights-versus-access" equation will be of maximum utility when the proposed modifications are designed to be effectuated from within the current system, rather than requiring a complete overhaul of the existing copyright structure. Zemer also recognizes the problems with too much tinkering,[119] although he assumes that the "public-as-joint-author" model can fit comfortably within our existing copyright structure. In this regard, I respectfully disagree. Although some might criticize the "author-as-steward" model because it reinforces an author-centered copyright framework, I believe this model can facilitate the appropriate balance between public access and ownership rights because its underlying premise is that ownership rights exist to further a greater societal need. This premise is, in fact, consistent with the very objectives of copyright protection.

## CONCLUSION

Zemer's provocative book *The Idea of Authorship in Copyright* is a good read. I particularly enjoyed the international and interdisciplinary dimensions he brought to the discourse, and his wonderfully rich Lockean analysis. His publication is even more commendable given the relatively short time he has been in the legal academy, and I anticipate that his future works will contribute substantially to the intellectual property discourse. Even though he did not persuade me that the public should be considered a joint author of every copyrighted work, I very much enjoyed his attempt to do so. More importantly, I learned from his work and it enabled me to refine further my own understanding of authorship. Scholars may not always agree, but if a work enables its readers to learn and grow, a colloquial author (and steward) has achieved a worthy objective.

---

legislatively enacted safe harbors designed to mediate the balance between the public's interest and that of copyright owners. *See* Menell, *supra* note 106, at 1064-65 (stating that such a safe harbor "should be tailored so as not to substitute for acquisition of in-copyright published material" and that "search companies should have to make commitments to the public nature of digital archive information to fall within the scope of the safe harbor").

[118] *See* REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 110-11 (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf. As of this writing, the 2006 bill has been withdrawn, but Register of Copyrights Marybeth Peters remains optimistic that an orphan works bill eventually will be passed. *Photographers at Loggerheads With Copyright Office Over Orphan Works*, 75 Pat. Trademark & Copyright J. (BNA) No. 1860, at 526 (Mar. 21, 2008).

[119] Zemer is critical of certain reforms, such as "public funds, public conservancy and 'rewards for authors' schemes," for this very reason (p. 220).