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# "You Got Too Much Dip on Your Chip!" How Stagnant Copyright Law is Stifling Creativity

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## Cover Page Footnote

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## I. INTRODUCTION

Imagine you want to write a song. You spend years developing the perfect story and you pitch it to a record label. In your preliminary review, they inform you that your months of work have gone to waste. Your work—while an original product of your own mind—is somewhat similar to other existing songs, and the label is afraid of being sued for infringement. This is a present reality for many creators.

Our concepts of authorship and copying have changed significantly–specifically with the emergence of the internet. What once would have required physical proximity can now be accomplished via the internet in a matter of seconds. Authors from all around the globe can collaborate, and they frequently do. Geographic limitations present virtually no constraint on the number of individuals that can contribute and access a work.

Human creativity, however, has remained the same. The idea of originality and novelty are now long gone, displaced by our modern understanding of ideas. Instead of wholly original works, ideas are generally understood as melting pots of the creative works before them. When creating, authors naturally draw on their human experience, which necessarily includes the creative works with which they have come into contact. Copyright doctrine, however, does not reflect this common sentiment.

The scope of copyright has never truly been defined.[1] Although much attention has been devoted to narrowly defining patent and trademark, the scope of copyright remains an unanswered question. As a result, rights holders have resorted to developing private law—through predatory infringement actions and broad settlement agreements. These settlements are rarely subject to judicial review, leading to increasingly broad copyright infringement claims.

This combination of pervasive collaboration, the fundamental nature of human creativity, and the increased saturation of copyrights presents a unique, impending problem. Copyright thickets—impenetrable licensing barriers—present a serious threat to creativity and the sustainability of the public domain. This Note therefore makes a simple claim: without tailoring our conception of copying, indivisible copyrights granted to joint authors will produce a tragedy of the anticommons. Fear of infringement liability and high transaction costs will stifle the very creation that intellectual property law purports to incentivize.

What is the scope of copyright? How far may infringement settlements go? What are the effects of these settlements on creativity and production? To what extent do these effects diverge with the goals of copyright protection? I explore these questions below. In Section II, I detail the circumstances, contributions, and historical context surrounding this problem. I also explore the nature of human creativity and highlight the overextension of copyright protection. In

[1] *See* Ben Depoorter & Robert K. Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 329-30 (2013).

Section III, I develop my central thesis by explaining why this unique combination of factors will produce a tragedy of the commons, eventually creating an anticommons; how the overextension of copyright protection will stifle creativity; and how the untethered scope of copyright is contrary to the incentives behind copyright law. In Section III.B., I explain that existing defenses to infringement, both in their inception and their application, are inadequate to protect creators in light of this impending issue. Instead, a unique solution must be developed to tackle this unique problem. In Section III.C., I outline a potential solution to the complications that arise when these factors collide. I argue that the federal government should develop a three-part plan to attack this looming issue. First, the United States Copyright Office should develop a filtering system for copyrights that establishes thresholds of protection for certain groups of artistic works. Second, Congress should amend the Copyright Act to expand judicial review of settlement agreements. Third, Congress should amend the Copyright Act and expand defenses to infringement that allow for necessary borrowing to occur.

## II. BACKGROUND

### A. HISTORICAL DEFINITION OF AUTHORSHIP

Authors are central to copyright.[2] This centrality demonstrates the importance that our conception of authorship plays in evaluating copyright law today. From its inception, copyright law has been about authors. Technological advances and increased collaboration between humans have altered our idea of authorship. During the seventeenth and eighteenth centuries, authors were generally understood as isolated beings, creating completely novel works of authorship.[3] This understanding was a uniquely individualistic view for two reasons.[4] First, authors were romantically singled out and designated as the single, ultimate origin of the work of authorship.[5] Second, authorship was understood as a highly isolated, individualized practice.[6] Authorship was "reconceptualized . . . ignoring or obscuring the collaborative and cumulative aspects of creation."[7]

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[2] This is demonstrated by the Intellectual Property Clause, which vests in Congress the power of "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).

[3] Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192-93 (2008).

[4] *See id.* at 193.

[5] *See id.* ("A new, unique, and privileged relationship came to be postulated between the work and its sole originator – the author.").

[6] *See id.*

[7] *Id.*; *see also id.* ("At the extreme, the author was represented as creating in perfect isolation, and the work was seen as attributable to one direct personal origin.")(citing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)).

Similarly, the author herself was depicted as wholly original in two ways.[8] First, the conception of individual authors was "yet another incarnation" of the theory of the author as the origin of the creative work.[9] Second, originality was equated with novelty.[10] "Original works were understood as being completely different from those already in existence. Originality in this sense was marked with a supposed *total break* with traditions and existing materials, as opposed to their reproduction, reworking, or development."[11]

Questions of who owned such works of authorship also centered on this idea of an isolated, completely independent author. Although seemingly simple, much debate surrounded ownership rights.[12] An interesting proponent for the first general copyright act, the Worshipful Company of Stationers and Newspaper Makers, were proponents of this individualistic view of authorship.[13] The support offered by members of the Stationers was surprising, and has been the subject of much historical debate.[14] Their efforts, however, ultimately resulted in the first modern codification of copyright: the 1710 Statute of Anne.[15] "For the first time, copyright became a right of authors rather than publishers."[16]

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[8] *Id.*

[9] *Id.*

[10] *See id.* ("The ideal author was imagined as a creator *ex nihilo* of utterly new things.").

[11] *Id.*

[12] *See id.* at 194.

[13] The Stationers Company, as it was commonly known, was granted a monopoly over the publishing industry and was responsible for establishing and enforcing regulations. *See id.* at 193 (citing RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775), at 31-50 (2004)).

[14] This historical debate is beyond the scope of this Note. Henry Mitchell, a copyright scholar, argued that the Stationers were acting in their own self-interest. *See* HENRY C. MITCHELL, JR., THE INTELLECTUAL COMMONS: TOWARD AN ECOLOGY OF INTELLECTUAL PROPERTY 35-36 (2005). Jason Guthrie, a doctoral candidate at the University of Georgia, argues that the motivation was selfish. *See* Jason L. Guthrie, Authors and Inventors: The Ritual Economy of Early American Copyright Law (May 2018) (unpublished Ph.D. dissertation, University of Georgia) (on file with University of Georgia Libraries) ("The primary beneficiaries . . . were not necessarily authors themselves, but those with sufficient wealth and infrastructure to capitalize upon the production and dissemination of creative works."). For more information about the debate, *see* Bracha, *supra* note 3, at 193-94 n.12 ("Scholars disagree whether the figure of the author was used strategically by the stationers to preserve their traditional privileges in a changing world, or whether it was used as a rhetorical device for attacking the stationers and breaking their monopoly.").

[15] *See* Christopher Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?*, 8 U.C. IRVINE L. REV. 413, 424 (2018) ("The Statute [of Anne] was the first codification of modern, public copyright regulations, and the first recorded articulation of the utilitarian theory of intellectual property law: that the enforcement of a limited monopoly through regulation of use could incentivize creation.").

[16] Mitchell, *supra* note 14, at 125 (2005).

The codification of authorship rights in Statute of Anne did not end the debate. Instead, it fueled a three-decade long debate,[17] which concerned the scope of an author's rights over their creative works. Authors sought a perpetual, common-law property right in their works of authorship.[18] Building on the eighteenth century definition of author, advocates combined popular natural rights theory to justify the treatment of copyright as property.[19] Although the "literary property debate"[20] did not result in a common law property right,[21] its idea of authorship greatly influenced the Anglo-American conception of copyright.[22] "The Statute of Anne laid the foundation for all of copyright law to follow."[23]

Prior to the American Revolution, institutional stakeholders still dominated copyright.[24] These stakeholders, like the Stationers in the early eighteenth century, advocated for stronger, common-law-like rights of authorship.[25] These efforts, although selfish in nature, have proven to be successful.[26] Since the American Revolution and the Copyright Act of 1790, rights continually expanded in both subject matter and length of protection.[27]

Who qualifies as an author has changed drastically since 1710. While authors used to be thought of as individual creators generating completely novel works, today's concept of authorship reflects an understanding that authorship involves collaboration. Guthrie explained:

> The emphasis on individual autonomy in romanticism, the artistic articulation of classical liberalism, is the origin of the 'genius author' archetype. While this mythic figure persists to the present

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[17] *See* Bracha, *supra* note 3, at 194 (describing the "three-decade long series of cases that started in the 1730s" over the scope of copyright ownership).

[18] *See id.*

[19] Natural rights arguments were strengthened by the codification of the "ideal author" in the Statute of Anne, which reflected the highly individual idea of authorship. *See id.* at 193-94; *see also id.* at 194 ("Authors, whose mental labor created intellectual works, were presented as owners, and the intellectual works were presented as objects of property. As one contemporary writer put it, 'Labour gives a man a natural right of property in that which he produces: literary compositions are the effect of labour; authors have therefore a natural right of property in their works.'") (citing William Enfield, *Observations on Literary Property* 21 (1774), *reprinted* in THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774-1775 (Stephen Parks ed., 1974)).

[20] *Id.* at 194.

[21] *See* Bracha, *supra* note 3, at 194; *see also* Mitchell, *supra* note 14, at 35 ("These legal battles continued until 1774, when an appeals court explicitly stated that the only copyright is a statutory one.").

[22] *See id.*

[23] Mitchell, *supra* note 14, at 34.

[24] *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 11 (2010) [hereinafter Litman, *Real Copyright Reform*] ("American copyright law tilts, and has always tilted, the playing field in the distributors favor.").

[25] *See id.* at 11-12.

[26] *Id.*

[27] *See id.* at 35.

> day in the discourse of the creative industries, the complexity of cultural production in an advances capitalist society challenges the legitimacy of any artistic success resulting from individual genius alone.[28]

Exploring the history of copyright doctrine is essential to understanding *why* it has remained stagnant for so long.

The idea that authorship was a highly individualistic process was never *totally* correct. Art and creativity has always involved building on the creativity of others.[29] In fact, "[w]hile art has incorporated referential elements practically since its inception . . . modern artwork has, arguably, embraced appropriation on an even larger scale."[30] Today, authorship is no longer an individual activity, but is in fact "a combination of what other men have thought and expressed."[31] Copyright doctrine, however, has remained stagnant. Problems in copyright law arise from the importance that borrowing plays in development of new creative works.[32] A copyright doctrine that relies on outdated conceptions of fundamental concepts threatens the goals of copyright.[33] By not adapting to the modern realities of creation and authorship, copyright threatens the very creativity it is intended to encourage.

While the right to copy may seem unfair to rights holders, it is a natural by-product of the tradeoff inherent in the intellectual property scheme.[34] The Supreme Court has recognized this, stating that "the copyright law, like the patent statutes, makes reward to the owner a secondary consideration."[35] Intellectual

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[28] Guthrie, *supra* note 14, at 10.

[29] *See* Depoorter and Walker, *supra* note 1, at 320 ("Every form of creative expression – from the crudest imitation to the highest reaches of originality – draws in part from prior art, both in form and in substance.").

[30] Geiger, *supra* note 15, at 429.

[31] Bracha, *supra* note 3, at 202.

[32] *See* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 488 (2007); *see also id.* ("[A] conception of the creative process that imagines that new works are original and autonomous may often be at odds with actual acts of creation that in many instances involve copying, collaboration, and other uses of existing works.").

[33] *See id.* at 517.

[34] As Judge Kozinski put it, "it is the system's very essence." White v. Samsung Elec. Am., Inc., 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting); *see also id.* (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991)) ("This result is neither fair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art."); *see also* Geiger, *supra* note 15, at 447 ("It is therefore inappropriate to start with the assumption that there is some form of harm to the rightsholder when a limitation or statutory license is engaged."); *see also* Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 37 (1996) [hereinafter Litman, *Revising Copyright Law*] (explaining that using unauthorized reproductions as a means of measuring harm is inefficient today and "is a poor approximation of the copyright owners' injury").

[35] United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) ("It may seem unfair that much of the fruit

property guarantees authors rights *in their original works*, implicitly leaving room for others to build upon these works. This sentiment is notably reflected in one of copyright's most significant limitations, the idea-expression dichotomy and the merger doctrine. The idea-expression dichotomy differentiates between facts and "ideas" underlying the work, which are not protectable, from the "expression" of these ideas, which is protectable by copyright law.[36] Similarly, the merger doctrine denies protection to works where the idea and work are so entangled that the grant of copyright would monopolize ideas themselves.[37] These doctrines demonstrate the balancing that already exists in the copyright doctrine. Specifically, they demonstrate where courts and Congress have determined that the public's interest in the underlying material is more important than the "creativity" inherent in these works. While they diminish the rights of a copyright holder, they "are necessary to maintain a free environment in which creative genius can flourish."[38]

### B. NATURE OF HUMAN CREATIVITY

"If I have seen farther, it is by standing on the shoulders of giants."[39] Sir Isaac Newton, in 1676, recognized the importance of building on existing knowledge. This axiom has become increasingly relevant, specifically in the context of intellectual property rights. Creativity is the building block of creativity. Judge Kozinski, when criticizing the expansion of intellectual property protection to areas which threatened creativity, cited Isaac Newton.[40] He further noted that "[a]ll creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy."[41] Nothing is new because creativity inherently involves building upon that which others have created.[42]

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of the [author's] labor may be used by others without compensation . . .. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.").

[36] The idea-expression was first articulated in Baker v. Seldon, 101 U.S. 99 (1880). *See Feist Publ'ns*, 499 U.S. at 350 ("Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.").

[37] *See* Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1359 (Fed. Cir. 2014) ("[The merger doctrine] provides that, when there are a limited number of ways to express an idea, the idea is said to 'merge' with its expression, and the expression becomes unprotected.").

[38] *See White*, 989 F.2d at 1516 (Kozinski, J., dissenting).

[39] Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1675/76).

[40] *See White*, 989 F.2d at 1515 (Kozinski, J., dissenting).

[41] *See id.* (citing Sir Isaac Newton, Letter to Robert Hooke (Feb. 5, 1675/1676)).

[42] Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990) ("Intellectual (and artistic) progress is possible only if each author builds on the work of others. No one invents even a tiny fraction of the ideas that make up our cultural heritage."); *see also* Geiger, *supra* note 15, at 430 (explaining that the history of "popular music" and popular art as a whole is a history deeply engrained in technology and its ability to foster creation by appropriating previous works).

United States copyright law does not sufficiently accommodate for the realities of human creativity.[43] Society's understanding of authorship now accurately reflects the realities of copying.[44] Copyright law, however, has yet to recognize this shift. As a result, "copyright analysis in infringement cases is often based on restricted and outdated assumptions about creativity and processes of creation."[45] The conceptions of authorship and creation as singular, isolated processes is at odds with the realities of creation. Therefore, a copyright doctrine that rests on an incorrect conception of creativity and authorship may in fact punish and disincentivize the creative process rather than promote it.[46]

Copyright law has remained stagnant for a variety of reasons. An in-depth discussion of the politics behind modern copyright law is beyond the scope of this Note. However, an examination of the history of the Copyright Act indicates that it most benefits current copyright stakeholders—market leaders in copyright dominated industries.[47]

Congress has never employed a mechanism to account for the viewpoint of the general public to ensure that the statute, in its terms and its effects, does not "unduly burden" private, non-commercial use of copyrighted works.[48] "As a

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[43] Some scholars criticize copyright as a whole, finding it totally incomprehensible and inapplicable in a modern world. *See* Litman, *Real Copyright Reform*, *supra* note 24, at 3 ("Today, title 17 of the *United States Code* is a swollen, barnacle-encrusted collection of incomprehensible prose.").

[44] *See also* Arewa, *supra* note 32, at 494 ("How a prohibition on copying can be reconciled with the reality of borrowing and copying in the creation of new works remains a key point of tension in copyright theory."). *See generally infra* Section II.A. (discussing the history of the definition of "authorship").

[45] Arewa, *supra* note 32, at 480.

[46] *See id.* at 488 ("Consequently, a conception of the creative process that imagines that new works are original and autonomous may often be at odds with actual acts of creation that in many instances involve copying, collaboration, and other uses of existing works."); *see also* Jerry Brito, *Why Conservatives and Libertarians Should Be Skeptical of Congress's Copyright Regime*, *in* COPYRIGHT UNBALANCED: FROM INCENTIVE TO EXCESS (Jerry Brito ed., 2012) ("But if it is too strong, then it will limit the public's ability to enjoy and build on creative works, which after all is the reason why we have copyright in the first place."); *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 16 (explaining that a system that treats creative use as merely a "tolerated use", rather than encouraged or promoted "is not a system designed to encourage the creative enjoyment of copyrighted works").

[47] Litman, *Revising Copyright Law*, *supra* note 34, at 22-23 ("Until now, our copyright law has been addressed primarily to commercial and institutional actors who participated in copyright-related businesses. The statute seems on its face to have been drafted primarily for the benefit of people with ready access to copyright counsel."); *see* Litman, *Real Copyright Reform*, *supra* note 24, at 11-12 (describing that the copyright statutes favor institutional actors because Congress has encouraged these actors "to write a law that works for them").

[48] *See* Litman, *Revising Copyright Law*, *supra* note 34, at 23; *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 8 (citations omitted) (explaining that if modern copyright presents difficult entry barriers for creators and users, "then the system fails to achieve at least some of its purpose").

result, IP law almost exclusively favors publishers and authors."[49] The ultimate goal of intellectual property rights, per the terms of the Constitution,[50] is to return information to the public domain in order to benefit the general public and enable creativity.[51] "Copyright is said to be a bargain between the public and copyright holders."[52] Therefore, excluding the public from the negotiating table is contrary to a central goal of intellectual property rights. Many scholars argue that in order to best reflect the goals of intellectual property rights, it is essential to involve the general public in the drafting process.[53]

Internationally, copyright law has evolved to represent modern realities. Unlike the United States, "major sources of international law . . . recognize freedom of artistic creativity explicitly, or implicitly, as an inherent element of the right to freedom of expression."[54] Canada, for example, recently modernized its copyright statute in a similar way. Section 29.21 of the Canadian Copyright Modernization Act states:

> It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work of other subject-matter in which copyright subsists and for the individual –- or, with the individual's authorization, a member of their household –- to use the new work or other subject-matter or to authorize an intermediary to disseminate it.[55]

The international adaptation of copyright law in light of new understandings of creativity and authorship indicates that real problems exist within the old regime. Just as the printing press and software inspired change, so should the newfound understanding of the realities of human creativity.

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[49] Mitchell, *supra* note 14, at 13.

[50] *See* Litman, *Revising Copyright Law*, *supra* note 34, at 32 ("We can begin with the assertion that the public is entitled to expect access to the works that copyright inspires.").

[51] *See* Miriam Bitton, *Modernizing Copyright Law*, 20 TEX. INTELL. PROP. L.J. 64, 75 (2011) ("Promoting learning and preserving the public domain are important factors in the social bargain struck in copyright law."); *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 15 (stating that a copyright framework that makes the acts of listening, reading, and enjoying less likely is counterproductive to the goals of copyright).

[52] Litman, *Revising Copyright Law*, *supra* note 34, at 31.

[53] *See id.* at 23; *see also id.* at 35 ("Congress did not incorporate specific exemptions for the general population in most of these enactments because nobody showed up to ask for them."). *See generally* Mitchell, *supra* note 14, at 13.

[54] Geiger, *supra* note 15, at 419.

[55] Copyright Modernization Act, S.C. 2012, c. 20, § 29.21 (Can.).

### C. TRAGEDY OF THE ANTICOMMONS

The threat of an anticommons is present in copyright. "Nonetheless, scholars have generally downplayed concerns about a copyright-induced anticommons."[56] In order to effectively understand how these factors combine to create an anticommons, it is important to first define what an "anticommons" is. I use the term "anticommons" to refer to Michael Heller's concept of the "tragedy of the anticommons."

An anticommons, by definition, exists where "multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use."[57] When there are too many rights holders, each with the ability to exclude, the resource is prone to *underuse*.[58] Those seeking to effectively use the property must independently negotiate and obtain consent from all of the rights holders. Heller recognizes that, "[e]ven if one party opposes the use, that party may be able to block others from exercising their rights."[59] The tragedy, that underconsumption leads to the waste of a resource, results from rational individuals acting separately rather than collaboratively. To Heller, this is as equally a "tragedy" as that which plagues the commons.[60]

As a matter of scale, tragedy of the anticommons issues become more threatening as both the number of rights grows and the number of individuals holding these rights grows. Simply put, the more resource that exists, the higher the probability that the resource will be misused. Accordingly, the prevalence of overlapping exclusion rights in a single resource increases the probability that any one of these owners will use their power to inhibit their co-owners "effective use".

The increasingly collaborative nature of creativity is one illustration of a situation where an anticommons may develop. For example, the products of joint authorship are likely to include a multiplicity of overlapping exclusion rights because of the historical construction of joint authorship.[61] As a result, any one of the joint authors has the theoretical ability to prevent any or all of their fellow joint authors from licensing the product to new creators who wish to build on the work.

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56 Clark D. Asay, *Software's Copyright Anticommons*, 66 EMORY L.J. 265, 329 (2017).

57 Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998) [hereinafter Heller, *Anticommons*] ("One can understand anticommons property as the mirror image of commons property.").

58 *See id.* at 624.

59 *Id.* at 639.

60 *See id.* at 688.

61 This example will be used throughout this Note to illustrate some of the problems within the copyright system.

### D. OVEREXPANSION OF COPYRIGHTS IN RECENT HISTORY

We have a problem. As Judge Kozinski put it, "[o]verprotection stifles the very creative forces it's supposed to nurture."[62] While protection of intellectual property rights is important to incentivize creation, the present scope and applicability of copyright protection threatens this very incentive system.[63] Intellectual property rights "involve intangible subject matter" and thus, "the metes and bounds of the rights are more abstract."[64] Copyright presents a unique problem in the intellectual property context because no registration is required to ensure protection against later infringement.[65] Further, unlike patent and trademark protection, the scope of copyright protection is much more broad.[66]

This uncertainty is only exacerbated by the constant development of new technology.[67] "The extension of the field of copyright in the last two hundred years can be understood as the system being extended in response to changes in technology: new kinds of work being found to deserve copyright protection."[68]

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[62] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting). *But see* Bitton, *supra* note 51, at 77-78 (explaining that William Landes and Richard Posner believe that extensive protection creates a larger incentive to create intellectual property with the "net result" being more works that will eventually enter the public domain).

[63] *See White*, 989 F.2d at 1516 (Kozinski, J., dissenting) ("Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large."); *see also* Bitton, supra note 51, at 66 ("[T]he over-propertization of information. . .leads to the gradual contraction of the public domain."); *see also id.* at 68 ("The intellectual property clause is in effect *an exception* to the rule that all knowledge, information goods and expression reside in the public domain.").

[64] *See* Depoorter & Walker, *supra* note 1, at 329 (citing Peter S. Menell & Micahel J. Meurer, *Notice Failure and Notice Externalities*, 4 J. LEG. ANALYSIS 1, 21 (2012)).

[65] *See id.* at 329-30 ("[C]opyrights inure at the moment of fixation without any procedural or substantive inquiry into their scope.") (first citing 17 U.S.C. §§ 1051-1072; then citing 17 U.S.C. § 410); *see also id.* at 329 ("Because intellectual property rights involve intangible subject matter, the metes and bounds of the rights are more abstract.").

[66] *See* 17 U.S.C. § 102 (2018) ("Copyright protection subsists. . .in original works of authorship *fixed in any tangible medium of expression*, now known or later developed. . . .") (emphasis added); *see also* Depoorter & Walker, *supra* note 1, at 330 (explaining that the copyright holder's "original expression is protected, but the amount of originality [their] expression contains is often not readily discernible from the work on its face")

[67] Copyright law has also expanded as a result of the doctrine's clash with technological advancements. As Litman characterized it, "[c]opyright law's confrontation with evolving technology has been a near constant theme since congress enacted its first copyright law in 1790." Litman, *Real Copyright Reform*, *supra* note 24, at 3; *see also* Guthrie, *supra* note 14, at 3 (stating that copyright law has "struggled to keep up with changes in technology" since its enactment in 1790). *See* Depoorter & Walker, *supra* note 1, at 331, for more information about technology's impact on copyright ("The boundary uncertainties in copyright are compounded by the unique relationship between copyright law and new technology."). *See generally id.* at 332 ("Similarly, uncertainty as to the nature and likely impact of new technologies on copyright holders makes it harder for courts to counter excessive claims by way of summary judgment or other procedural safeguards.").

[68] Mitchell, *supra* note 14, at 131.

Copyright, when compared to other intellectual property rights, has a unique relationship with technology.[69] Technological adaptations "enable novel ways to enjoy copyrighted content," causing "difficult questions [to] arise about the legal status of a new technology or users' actions."[70] New technologies challenge the fundamental framework of copyright law and litigation, specifically, what qualifies as a copy, the scope of the exclusion right, and what belongs to the public domain.[71] As a result, boundary issues are pervasive, often resulting in overextended and overbroad claims by copyright holders.[72]

Technological change has drastically expanded the scope of copyrightable subject matter. Copyright historically protected a relatively small number of works and provided narrow exclusion rights for a limited amount of time.[73] This limited scope of copyright left ample space for downstream use and public enjoyment without much concern for potential infringement liability.[74] Over time, the gradual increase of what qualifies for copyright protection has expanded beyond the contemplated "[w]ritings and [d]iscoveries."[75] For example, "[c]opyright law currently contains specialized protection for boat hulls or decks."[76] This expansion has been justified by the courts' reluctance to engage in discussion about artistic value of works of authorship. This "dangerous undertaking"[77] has led courts to overextend copyrights, protecting works that were not contemplated by drafters of the intellectual property clause. Some scholars, like Mitchell, argue that this broadening of protection represents a complete divergence from the purpose of copyright law.[78] The Ninth Circuit has also recognized this problem. In *Garcia v. Google*, it observed that "[t]reating every acting performance as

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[69] Copyright law has expanded as a result of the doctrine's clash with technological advancements. *See* Litman, *Real Copyright Reform*, *supra* note 24, at 3 ("Copyright law's confrontation with evolving technology has been a near constant theme since Congress enacted its first copyright law in 1790."). *See generally* Burrow-Giles Lithographic Co. v. Napoleon Sarony, 111 U.S. 53 (1884) (expanding copyright's definition of "authorship" and "writing").

[70] Depoorter & Walker, *supra* note 1, at 331.

[71] *See id.* at 331-32.

[72] *See id.* at 324-25; *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 14 (explaining that as technology has enabled more widespread individual use by creating new ways of enjoyment, "copyright owners have asked for greatly enhanced control over their works").

[73] *See* Note, *supra* Section III.A.; *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 13; *see also id.* at 38 ("For most of our history, copyright laws were case more narrowly than they are today. . . .").

[74] *See* Litman, *Real Copyright Reform*, *supra* note 24, at 13.

[75] U.S. CONST. art I, § 8, cl. 8; *see* Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 35, 64 (2011) ("The history of copyright law has been one of gradual expansion in the types of works accorded protection . . . .") (citing H.R. Rep. No. 94-1476, at 5 (1976)).

[76] Beckerman-Rodau, *supra* note 75, at 65-66 (citing 17 U.S.C. §§ 1301, 1305(a), and 1309 (2018)).

[77] Bleinstein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (coining the *Bleinstein* "aesthetic nondiscrimination principle").

[78] *See* Mitchell, *supra* note 14, at 132-33.

an independent work would not only be a logistical and financial nightmare, it would turn case of thousands into a new mantra: copyright of thousands."[79] If copyright law is meant to protect "the useful arts," then it is difficult to understand how granting protection to any work of original expression without regard to its social value fits within this goal.

The advent of new technologies, however, has blurred the lines of what is and what should be protected.[80] These technologies have increased the likelihood and actual frequency of copyright infringement, resulting in a massive decline in revenue for rights holders.[81] Recent technological advancements—specifically the internet—have caused a panic. Afraid of new methods of infringement that accompany this new technology, rights holders have responded by "aggressive[ly] ramping up enforcement."[82]

Copyright duration has also significantly increased. Originally, works of authorship entered the public domain after fourteen years and could be extended another fourteen years, provided that the author was alive at the end of the first term.[83] Today, for original works of authorship, protection lasts for the duration of the author's life plus seventy years.[84] This continual expansion of copyright's term of enforceability is concerning for two reasons.[85] First, creators are not providing any additional benefit to the public for the benefit they are receiving. Therefore, arguably, the public domain suffers as a result of this transaction.[86] Second, the extensive duration of copyright inches toward a common-law

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[79] Garcia v. Google, Inc., 786 F.3d 733, 742-43 (9th Cir. 2015).

[80] *See* Litman, *Real Copyright Reform*, *supra* note 24, at 13 ("As technology has enabled individuals to enjoy works in new ways, however, copyright owners have asked for greatly enhanced control over their works."); *see also* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting)("Overprotecting intellectual property is as harmful as underprotecting it. . ..Overprotection stifles the very creative forces it's supposed to nurture."); *see also* Depoorter & Walker, *supra* note 1, at 327 ("[C]opyright enforcement in the digital era faces an unprecedented problem relating to the frequency and severity of false positives.").

[81] *See* Depoorter & Walker, *supra* note 1, at 332.

[82] *See id.*; *see also White*, 989 F.2d at 1516 (Kozinski, J., dissenting)("Future Vanna Whites might not get the chance to create their personae, because their employers may fear that some celebrity will claim the persona is too similar to her own."); *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 13 ("As technology has enabled individuals to enjoy works in news ways, however, copyright owners have asked for greatly enhanced control over their works."). *See generally* Lenz v. Universal Music Corp., No. 5:07-cv-03783-JF, 2013 U.S. Dist. LEXIS 9799 (N.D. Cal. Jan. 24, 2013).

[83] *See* Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

[84] 17 U.S.C. § 302(a) (2018); *see also* 17 U.S.C. § 302(c) (2018) (dictating that for anonymous works, works under a pseudonym, and works for hire, the term is either 95 years from date of publication or 120 years from the date of creation, whichever is shorter).

[85] *See* Beckerman-Rodau, *supra* note 75, at 66-67.

[86] *See id.*; *see also* White v. Samsung Elecs. Am., *Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting) (explaining that intellectual property rights that are not limited "impoverish[] the public domain, to the detriment of future creators and the public at large").

property right, departing from the Constitution's express limitation on intellectual property rights.[87]

*1. Settlement Agreements and Copyright Scope*

Copyright overexpansion and high costs have developed an area of private law that itself defines the scope of copyright. Enforcement of copyright infringement, because of its expense—both in litigation and potential damages—rarely sees its day in court.[88] Potential defendants against infringement suits are incentivized into settling overly broad claims, where infringement may not even exist.[89] This, "in turn, creates and perpetuates uncontested false positives."[90] Fear of expensive litigation and potential liability keeps would-be-defendants out of the court's watchful eye.[91] Thus, through settlement agreements, rights holders have developed a massive body of private law that defines the boundaries of copyright. Further, "[b]ecause push back from accused infringers will likely be minimal," copyright holders are incentivized to aggressively assert claims of infringement, including overly broad claims.[92] As a result, these "false positives" spark fears of liability and produce "chilling effects among creative artists."[93]

For many, defending against infringement is simply beyond their means.[94] To illustrate the fear that potential infringers face, it is important to note that litigation for small copyright claims will cost defendants, on average, around $303,000 through discovery and $521,000 through trial.[95] Notably, these costs do not

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[87] *See* Beckerman-Rodau, *supra* note 75, at 67.

[88] I come to this conclusion by virtue of reading a variety of sources. The frequency of settlements coupled with the DMCA takedown procedures indicates that most allegations of infringement never reach a courtroom.

[89] *See* Depoorter & Walker, *supra* note 1, at 322-23; *see also id.* at 321-22 ("[E]ven if successfully challenged by alleged infringers, the litigation costs involved in correcting enforcement errors impose a burden on creative expressions and the rightful exercise of public rights and copyright exceptions.").

[90] *Id.* at 321.

[91] *See id.* at 325 ("This disparity between likely costs and benefits inhibits wrongly accused infringers from opposing copyright infringement actions.").

[92] *See id.* at 338.

[93] *See id.* at 322-23; *see also id.* at 341 ("This chilling effect is especially strong for forms of creative expression, such as parody, which rely on imitation and copying for their efficacy."). This is troubling considering that the Supreme Court and the Eleventh Circuit have recognized the importance of parody as further development of culture by criticizing and building upon previous works. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (discussing parody in the context of fair use and recognizing the importance of copying in parody); *see also* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271 (11th Cir. 2001) (noting that the transformative use of parody is in its social benefit).

[94] *See* Depoorter & Walker, *supra* note 1, at 343; *see also id.* at 321-22 ("In practice, . . . litigation costs involved in correcting enforcement errors impose a burden on creative expressions and the rightful exercise of public rights and copyright exceptions.").

[95] *See id.* at 343.

include potential statutory damages and plaintiff's attorney's fees, all of which together make settlement a very compelling option.[96]

The "disparity between likely costs and benefits" prevents individuals from countering wrongful infringement suits.[97] Such disparity, coupled with high statutory damages and attorney's fees, "provide a strong incentive" for defendants to settle, even if the infringement claim is weak at best.[98] Frequent settlement of overly broad claims creates a "sheen of legitimacy" because the copyright holder can point to previous settlements as evidence of the scope of their copyright, and therefore, "proof of the validity of their claim in future litigation."[99] Thus, private enforcement via litigation settlement suppresses creativity and progress by granting exclusion rights to works that fall beyond the scope of copyright law's protected class.[100] As a result, this leads to "rent-seeking" by rights holders, which increases transaction costs by increasing the cost of licensing across the board.[101] Since licensing requires the authorization of the rights holder, there remains a risk of copyright blocking; placing a large burden on would-be authors and creators.[102]

Furthermore, defendants who do oppose infringement actions are at a severe disadvantage. Because most lawsuits settle, the risks associated with litigation are comparatively small for copyright holders. Where the suits do not end in settlement, alleged infringers must overcome the significant hurdle of the copyright's per se validity, an extremely daunting task.[103] "So, from an economic perspective,

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[96] *See id.* at 343-44; *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 20 ("Failing to cross all the t's and dot the right i's, even with the assistance of counsel, is a good way to find your business sued into bankruptcy."); *see also id.* at 11 (explaining that individual creators cannot efficiently navigate the current copyright licensing system).

[97] Depoorter & Walker, *supra* note 1, at 325.

[98] *See* Depoorter & Walker, *supra* note 1, at 343; *see also* Guthrie, *supra* note 14, at 11 ("Even those content creators with the most legitimate claims to 'genius' have some level of dependence upon legal representatives, publishers, marketing professionals, and other members of the creative industries.").

[99] *See* Depoorter & Walker, *supra* note 1, at 341 (As a result, these overly broad claims "take on the appearance of legitimacy in a way roughly analogous to an unauthorized tenant accruing rights through adverse possession").

[100] *See* Bitton, *supra* note 51, at 71 ("Too much protection effectively provides exclusivity of ideas and information, as well as expression."); *see also* Depoorter & Walker, *supra* note 1, at 341 ("By squatting on rights that are not lawfully granted, false positives cause a diminution of the public domain and simultaneously reduce the amount of material that is per se available for use by others for expressive purposes.").

[101] *See* Depoorter & Walker, *supra* note 1, at 345.

[102] *See* Geiger, *supra* note 15, at 429 ("As a result, the requirements placed upon outside authors for the creation of derivative works are cumbersome."); *see also id.* at 417 ("If the original author then refuses to grant permission or asks for too high a price, the creative reuse will be hindered.").

[103] Works that are registered within five years of their original creation are presumed to contain only copyrightable material, and subject to minimal review by the Copyright Office prior to registration. Successful registration operates as "prima facie evidence" of the copyright's validity, and the burden of the validity is shifted to the alleged infringer, the defendant.

copyright holders have an incentive to attempt to enforce their interests as broadly as possible, as the foreseeable rewards exceed the accompanying risks."[104]

*2. Licensing Negotiations and Transaction Costs*

Copyright overexpansion and threats of infringement have also privately expanded the scope of copyright. Accordingly, failed licensing negotiations may act as de facto private censorship.[105] In order to avoid infringement liability, potential users must obtain licenses from rights holders.[106] Therefore, "private entities or individuals have the potential to decide what can be created or not."[107] These private negotiations and settlements develop an area of private law that is rarely subject to judicial review.[108] Because of their operation outside of the eye of the law, these uncertain, unchecked, broad conceptions of copyright are "endemic to copyright by nature and design."[109] Further, compulsory licensing offers cold comfort. The principal disadvantage in compulsory licensing, the fact that a judge must order the license, favors those actors with more economic resources to sustain a time-consuming proceeding.[110] Thus, "[w]hile cases are pending, creativity is hampered."[111]

An illustration of the looming problems with modern U.S. copyright law can be found in joint authorship rights. A recent surge of joint authorship, involving multiple individual joint authors with their own respective intellectual property rights,[112] may lead to the production of an anticommons.[113] Multiple authors can

17 U.S.C. § 410 (2006). Not only is this a difficult presumption to overcome, it is also very expensive to prove. *See* Depoorter & Walker, *supra* note 1, at 344.

104 Depoorter & Walker, *supra* note 1, at 344.

105 *See* Litman, *Real Copyright Reform*, *supra* note 24, at 27-28 ("A different but equally pressing set of problems derives from the tangled snarls attending licensing of copyrighted works."); *see also* Bitton, supra note 51, at 71 (explaining that overprotection expands protection to include the building blocks of creativity, therefore stifling it). *See generally* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887-92 (2007) (indicating that, because most individuals are risk-averse, licensing customs reduce the perceived scope of permissible use).

106 *See* Geiger, *supra* note 15, at 428 ("Most of the time, in order to comply with the law, a creator of a derivate work must clear rights associated with the use of the source material.").

107 *Id.* at 431; *see also* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 378 (1996) ("Given copyright owners' propensity to private censorship and systematic ability to demand supracompetitive license fees, copyright owners' expansive control over transformative uses unduly stifles the creative reformulation of existing expression . . . .").

108 *See* Note, *supra* Section II.D.1.

109 *See* Depoorter & Walker, *supra* note 1, at 342.

110 *See* Geiger, *supra* note 15, at 445.

111 *Id.* at 445.

112 *See* 17 U.S.C. § 101 (2018) ("A 'joint work' is 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.").

113 *See infra* Section III.A. (providing an explanation and discussion of anticommons).

collaborate on projects and contribute to one common end product. United States law defaults to joint authorship rights unless otherwise specifically renounced in a formal writing between all of the contributors to a work.[114] This presents an issue in two situations: licensing and alleged infringement.

First, joint authorship rights are obstacles to those seeking licenses. These overlapping rights create a thicket that increases transaction costs and disincentivizes creativity.[115] Frequently, the identity of the owner of the licensed work is difficult to ascertain.[116] As Heller stated, "[i]f people hold multiple rights to exclude each other from a resource, they must incur the transaction costs of finding out with whom to negotiate."[117] Thus, a crucial first step in licensing is ripe with issues. Because the copyright can be held equally by all joint contributors, determining which parties to negotiate with presents a daunting hurdle for those seeking a license.[118] Further, because there are so many "rights owners" in joint works, obtaining each owner's permission—a requirement of a successful licensing deal—is extremely difficult.[119] The current licensing system, therefore, places the fate of future creators in the hands of those who contributed yesterday.[120]

Second, joint authorship rights present issues when infringement is alleged. As Miriam Bitton notes, "[w]hen there are many contributors to the development. . .and each contributor applies a license to their contribution, the question of who is authorized to enforce the license when copyright infringement occurs

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[114] *See* 17 U.S.C. § 201(c) (2018) (emphasis added) ("In the *absence of an express transfer* of the copyright or of any rights under it, the owner of copyright in the collective work is *presumed* to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.").

[115] Heller, *Anticommons*, *supra* note 57, at 639 n.94 (explaining that obtaining the appropriate consent "may be enough to deter long-term investment").

[116] *See* Bitton, *supra* note 51, at 80; *see also* Geiger, *supra* note 15, at 430 ("Clearing rights can also be a very challenging process as it is not always easy to identify rights holders."); *see also* Litman, *Real Copyright Reform*, *supra* note 24, at 20 ("A creator or distributor seeking to exploit works in new media, though, faces daunting problems in identifying the rightsholder entitled to license its uses and negotiating the terms of the licenses.").

[117] Heller, *Anticommons*, *supra* note 57, at 674.

[118] *See* Litman, *Real Copyright Reform*, *supra* note 24, at 20 ("A creator. . .faces daunting problems in identifying the rightsholder entitled to license its uses and negotiating the terms of the licenses."); *see also* Bitton, *supra* note 51, at 80 (noting that identification of rights holders is an issue in licensing).

[119] *See* Bitton, *supra* note 51, at 80-81 ("[B]ecause there are so many owners. . . each owner's permission must be sought in order to carry out a licensing change.").

[120] *See* Geiger, *supra* note 15, at 444-45 (Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann (RTE) v. Comm'n, 1995 E.C.R. I-808, §§ 49-51); *see also id.* at 445 n. 173 ("The finding, however, took years of litigation, which demonstrates the need for internal mechanisms inside copyright to avoid these kinds of situations from the start.").

is unclear."[121]Thus, a creator may find themselves liable to either one, or many, rights holders for misappropriating one single work.

The joint authorship scheme, for obvious reasons, is ripe with potential collective action problems.[122] This presents many issues for creators and authors. At least, individually, it presents the potential for holdouts.[123] At most, when viewed collectively, licensing thickets resemble the foundations of an anticommons. Further, more fundamentally, this enforcement of private censorship "moves copyright radically away from the spirit from which it emerged in the eighteenth century and from its cultural and social function."[124]

Simply put, without modifying our conception of copying to incorporate our modern understanding of human creativity, indivisible copyrights granted to joint authors will produce a tragedy of the anticommons. Fear of infringement liability and high transaction costs of licensing negotiations will stifle the very creation that intellectual property law purports to incentivize.

## III. ANALYSIS

### A. TRAGEDY OF THE ANTICOMMONS

The combination of pervasive collaboration, increased saturation of copyrights, and the fundamental nature of human creativity presents a unique impending problem. An anticommons is present where there is a breakdown of coordination of rights holders with overlapping rights in the same property. As a result, the underlying property becomes the victim of underuse, ultimately preventing socially desirable outcomes. The threat of an anticommons is uniquely alarming in the context of intellectual property rights. Because intellectual property is inherently intangible, the rights associated with it are unaffected by the size or substantiality of the work itself.[125]

First, collaboration among multiple creators presents a novel problem. As collaboration becomes more commonplace due to technological advancement, the potential for an anticommons increases. Today, joint authors own indivisible

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[121] Bitton, *supra* note 51, at 80 ("[T]he current licensing system gives today's contributors too much control over the future decisions of tomorrow's contributors.") (citing Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 941-43 (2008)).

[122] Heller, *Anticommons*, *supra* note 57, at 639 ("Because multiple parties may hold the same right, almost any use . . . requires the agreement of multiple parties.").

[123] *See* Asay, *supra* note 56, at 292 ("[T]he paradigmatic example of an anticommons is when a rights holder refuses to allow others to use the common resource on the basis of her rights.").

[124] *See* Geiger, *supra* note 15, at 431.

[125] Compare intellectual property to real property. For example, an owner of a 1-inch parcel of land is limited in their enforceability of their property rights due to the size of their parcel. In order to enforce their rights, a third party would have to interact with their tiny parcel. I recognize that modern conceptions of property rights may present a tragedy of the anticommons, as demonstrated by the "bundle of sticks" metaphor. These rights, however, are still limited by the size of the real property itself.

rights in the entirety of the creative work, irrespective of their contribution. Courts rarely look into the amount or quality of the contribution.[126] This stems from a fear that judges will be the final determination of what qualifies as creatively valuable. While a credible fear, the alternative presents an equally negative result. The classification of joint authorship relies primarily on the individual contributors and their mindsets.[127] Determining, *post hoc*, what the intention of the creators was at the time of creation is difficult in itself. When considered during the course of litigation, it creates a serious problem of hindsight bias favoring joint authorship. As a result of frequent finding of joint authorship,[128] the rights of the owners often overlap significantly. Trends in authorship and technological advancements, however, demonstrate that the creation of works today may involve hundreds of authors, each with indivisible rights in the whole work.[129] If modern copyright law continues to ignore these present trends of collaboration, its outdated rights-granting scheme will harm future creators by increasing transaction costs beyond that which makes creating worthwhile.[130]

Increased collaboration, and thus joint authorship rights, are chilling enough in their own right. Combined with the seemingly limitless grant of copyright protection, it creates a maze that creators must navigate in order to express themselves without risking an infringement suit and is reminiscent of the beginning of a tragedy of the anticommons.[131]

Second, overextension of copyrights contributes to the problem as well. Historically, copyrights were narrowly granted to works that fit certain, well-defined criteria. Creators of the past were aware of certain categories of works that qualified for copyrights and could avoid liability. Today, more works are copyrightable than ever, blurring the lines of what qualifies for protection. Consequently, today's creators are not on notice as to what protection a work of authorship warrants and what it does not. Courts—fearing being the last word on artistic merit—are reluctant to engage in a substantive analysis of what qualifies as "creative." Works are merely analyzed for their "originality" instead, which is not much of a standard at all.[132] This fear creates a presumption that works qualify

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126 In *Bleinstein*, the Court actually discourages courts from engaging in a valuation of a work's creative value when determining protectability. *See* Bleinstein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

127 *See* Note, *supra* Section II.D.2.

128 *See* Note, supra, note 112.

129 *See* 17 U.S.C.A. § 201(c) (2018); *see also* Note, *supra* note 119 and accompanying text.

130 By transaction costs, I am referring specifically to the costs associated with identifying rights holders and licensing negotiations. *See also* discussion Note, *supra*, Section II.D.2.

131 *See* discussion Note, *supra* Section II.C.; *see also* Guthrie, *supra* note 14, at 11 (explaining that complex relationships between publishers and authors "are exceedingly complex for authors, musicians, photographers, and other content creators to navigate").

132 *See generally* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

as copyrightable, so long as they are in a "tangible medium" [133] and are moderately original.

Third, the nature of human creativity presents a unique problem in light of the oversaturation of copyrights.[134] Human creativity necessarily relies on building upon preexisting works. As such, it would follow that some moderate amount of borrowing would be permitted in order to foster future creativity. Copyright doctrine, both in its substance and form, does not appropriately account for this fact of human nature.

In substance, the doctrine does not reflect modern conceptions of creativity. An analysis of the history of copyright indicates that the conception of authorship has changed significantly since the Copyright Act of 1790.[135] This change, however, has not been reflected in the substance of the doctrine. While copyright law has somewhat morphed to accommodate a change in copyrightable *subject matter*, the doctrine has failed to proportionately reflect the same change in its concept of infringement. Qualifying subject matter is growing larger, while the freedom to use such works remains limited.

In form, the doctrine is shrinking the use of copyrightable subject matter. The extreme costs of litigation and high damage awards push most copyright infringement suits out of the eyes of the law. Because infringement claims rarely see their day in court, the likelihood of rights holders overextending the scope of their own rights is high. Further, the extremely high statutory damage awards alone are enough to scare away even the most formidable, determined creator. The combination of high litigation costs and high damages awards has developed a robust area of private law, made up of settlements, unnecessary licensing agreements, and overly broad copyright scope. This private law allows for essentially no exercise of creative borrowing of other works. On one hand, those who dare to copy are at risk of being involved in costly litigation or costly settlement. On the other hand, for some, the price of creation is too high of a burden to justify creation in the first place.

It is important to note that Heller himself downplayed the potential of a copyright-induced anticommons. He has suggested that when compared with patent law, "copyright law's tragedy of the anticommons is less costly" because the fair use doctrine allows for the use of copyrighted materials without necessarily requiring permission of the owner.[136] While he downplayed its significance, he acknowledged that underuse may occur—even in light of fair use—because transaction costs and potential for rent seeking.[137]

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133 *See* 17 U.S.C. § 102 (2018).

134 *See* discussion Note, *supra* Section II.B. (explaining human creativity).

135 *See* discussion Note, *supra* Section II.A. (detailing a brief history of copyright law).

136 *See* Asay, *supra* note 56, at 329 (quoting Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1175 n.61 (1999)).

137 *See* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1175 (1999) [hereinafter Heller, *Boundaries*].

His lack of concern, however, is disturbing when viewed in light of present developments in authorship. While transaction costs and rent seeking were likely a problem in 1999 when Heller authored his article, they are even more concerning today. Rent seeking and transaction costs are extremely high entry costs for creators today.[138] The massive sphere of private law that has developed as a result indicates that Heller's reliance on the fair use doctrine as a protection against overprotection and underuse is no longer applicable.

### B. EXISTING DEFENSES ARE INADEQUATE

Defenses for copyright infringement are inadequate both in their substance and in their application given the demonstrated importance that copying plays in human creativity. First, copyright defenses are inadequate in their substance. As discussed in Section I.A & B, creation of artistic works is increasingly collaborative. Fair use, however, has remained stagnant. As it stands, fair use principles do not appropriately account for our new understanding and conception of authorship. Thus, it fails to adequately incentivize creation and preserve elements of the public domain. The fair use doctrine generally assesses four factors: (1) the purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the copyrighted work used; and (4) the effect on the marker for or value of the original work. The most influential factor for the fair use inquiry is the purpose and character of the use, which measures the "transformativeness" of the alleged infringing work.[139] The importance of this factor indicates that some forms of copying are accepted, namely parody. However, it is unclear—based on current precedent—whether subsequent adaptations of copyrighted material qualify as "transformative" or not. Therefore, relying on fair use as a protection for this necessary element of creation is inadequate protection for creators in the present and near future.

Second, defenses are inadequate to protect creators because they are applied in a proportionately small group of infringement cases. Copyright infringement claims have developed a sphere of private law that is not subject to judicial review.[140] As a result, potential defendant-infringers do not have the chance to employ these defenses in response to infringement claims.

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138 *See* discussion Note, *supra* Section II.D. (outlining problems that result from the overextension of copyrights to institutional stakeholders).

139 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (explaining that "the more transformative the new work, the less will be the significance of other factors").

140 *See* discussion Note, *supra* Section II.D.1.

### C. CHANGES ARE NECESSARY

Perhaps it is time that the United States follow its international peers and modernize its copyright laws to allow for limited borrowing.[141] If the goal of copyright is to incentivize creation, then it is important to understand and incorporate our understanding of the creative process, which undeniably involves building upon preexisting works.[142] Thus, an important first step would be recognizing the "reality and importance of copying in the creation of new works."[143] This recognition would advance the core goals of copyright: to promote the progress of science and the useful arts.[144]

#### *1. Hierarchy of Protection*

The United States Copyright Office should develop a categorization system that classifies certain works based on their requisite amount of creativity. Each tier of creativity would have increasingly strong protections, in which the most creative works receive the strongest protections. Works that are less original and creative, those that incorporate more of which belongs to the public, would be afforded less protection as a direct consequence of borrowing from the public domain. Similarly, statutory damage amounts should also reflect the tier system developed by the Copyright Office. This categorization is not novel to the realm of copyright. The idea that some works of authorship deserve more protection is engrained in the second factor of the fair use analysis, which questions the nature of the copyrighted work. This factor acknowledges that "some works are closer to the core of intended copyright protection than others."[145] In its application, this factor raises the threshold for proving fair use much higher when highly creative works are copied. Applying this factor *ex ante*, rather than during the course of litigation, would further encourage the production of highly creative works.

A tier system would incentivize creation of highly original and creative works because authors would be motivated to achieve the highest tier of protection. Similarly, those works that borrow much from the public domain would permit more use, therefore incentivizing creators to build off of the raw materials within the public domain.

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141 *See* Bitton, *supra* note 51, at 94 ("[I]f we want copyright law to serve as an engine of creativity, we need to adjust it to the new reality.").

142 *See* Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U.L. REV. 1441, 1443-44 (2010); *see also id.* at 1444 (describing how accounting for the process of creativity will provide meaningful insight into how intellectual property laws should be structured).

143 Arewa, *supra* note 32, at 517.

144 *See id.*(citing U.S. CONST. art. I, § 8, cl. 8.).

145 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

*2. Mandatory and Permissive Judicial Review*

While settlement is a favorable tool in litigation because it removes the burden from the judicial system, that is the precise reason why predatory infringement actions exist. Judicial review is necessary in order to restore balance in the infringement sphere. The current development of private law outside of the purview of the courts is one example of why judicial review is necessary. Presently, the limits of copyright doctrine are developed by institutional stakeholders who are incentivized to define the scope as broad as possible. While imposing judicial review availability would require more judicial intervention, it is necessary in order to return copyright doctrine to its reasonable limitations.

Congress should amend the Copyright Act to expand judicial review of settlements of infringement lawsuits. First, the amendment should require judicial review of settlements that exceed a certain threshold dollar amount. This would both encourage lower settlement damage awards and would decrease predatory rights holder's incentives to pursue non-meritous claims. Second, the amendment should allow for judicial review of any settlement of a copyright infringement claim. Like the mandatory review, this would ensure that *only* meritous copyright claims end in settlement.

*3. Modification of Statutory Defenses*

In order to effectively incentivize the creation of artistic works, the Copyright Act should be amended to accommodate for the present understanding of human creativity. Doing so would ensure that creativity is incentivized, the central underlying goal of copyright protections. This amendment should recognize copying as a fundamental element to the development of new works and as central to human creativity.

Ultimately, this would require that Congress consider the viewpoints and motivations of a variety of stakeholders. Rather than merely drafting a copyright statute that favors institutional big-wigs, Congress should involve cognitive scientists and psychologists in the drafting of the statute to ensure that creativity is understood and incorporated appropriately. Incorporating the realities of creativity would ensure that the purpose of copyright law, incentivizing creation, remains central in the statute's language and application.

## IV. CONCLUSION

Copyright law boasts an extensive historical pedigree, beginning in 1710 with the Statute of Anne. The marketplace at the time of copyright's inception was very limited, both by what and who qualified for exclusion rights. Copyright is unique from its other intellectual property subcategories, in that it is much broader in what it purports to protect. This Note argues that the problem with modern copyright doctrine is not copyright in itself, but the seemingly limitless grant of rights on an insufficiently particularized basis. The solution offered is two-fold: the extension of copyright protection should be more limited, and the

allowance of copying should be broader. This would ensure that copyright doctrine most efficiently incentivizes creation, by protecting what is creative yet allowing individuals to build upon existing works.