EXPRESSIVE INCENTIVES IN INTELLECTUAL PROPERTY

Jeanne C. Fromer*

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ACCORDING to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with just enough incentive to create artistic, scientific, and technological works of value to society by preventing certain would-be copiers’ free-riding behavior.\(^1\) Another group of scholars reasons instead that creators deserve moral rights in their works either by virtue of the labor they expend to create them or because the works are important components of creators’ personhoods (the aspects of creators’ personalities infused into and bound up in their works).\(^2\) Other academics highlight a rhetoric focused on authorship and inventorship within intellectual property law, all the while assuming that it is devoid of substantive effect.\(^3\)

Scholars nearly always see the utilitarian and moral-rights theories as disjoint,\(^4\) likely because utilitarian theories are more concerned with maximizing benefit to society via a properly calibrated incentive to creators whereas moral-rights theories place more emphasis on the creator’s interests. In this Article, I show that the two theories can be complementary in important ways because there is a utility to moral-rights concerns. As evidence from a multitude of vantage points demonstrates, creators of copyrightable and patentable work typically attach great significance to both their personhood and labor interests in their work.\(^5\) As such, the incentive to create ought to be all that much stronger when intellectual property laws are structured both to protect and to communicate solicitude for authors’ personhood and labor interests. Drawing on a rich legal

\(^1\) See infra Section I.A. Typically grounded in distinct theories are other important forms of intellectual property, such as trademarks. Jeanne C. Fromer, The Role of Creativity in Trademark Law, 86 Notre Dame L. Rev. 1885, 1894\(^{\text{f}}\) 96 (2011). I do not consider those other forms herein.

\(^2\) See infra Section I.B.


\(^4\) See infra Section II.A. In that Section, I discuss some important exceptions, which take a different approach than mine. See, e.g., Rochelle Cooper Dreyfuss, The Creative Employee and the Copyright Act of 1976, 54 U. Chi. L. Rev. 590, 590\(^{\text{f}}\) 91 (1987); Alfred C. Yen, The Interdisciplinary Future of Copyright Theory, in The Construction of Authorship 159, 171 (Martha Woodmansee & Peter Jaszi eds., 1994).

\(^5\) See infra Section II.B.
literature on the interaction of law and norms and expressive theories of law, I call the ways in which copyright and patent law can protect creators’ labors and personhood interests and employ rhetoric communicating concern for these interests “expressive incentives.” The law’s careful use of expressive incentives can bolster the utilitarian inducement to create valuable intellectual property. This particular marriage of the utilitarian and moral-rights theories in the use of expressive incentives has been under-theorized, if not overlooked, as a valuable arrow in intellectual property’s quiver. When scholars have explored incentives in intellectual property, they have not looked much beyond offering pecuniary incentives to appreciate that utilitarian incentives can be expressive as well. I ground the notion of expressive incentives in intellectual property in the analogous philosophical issue of the possibility of rights in utilitarian systems.

I approach this broadening of incentive possibilities from the utilitarian position, which is concerned with promoting society’s cultural, technological, and scientific progress at a minimal cost to society, through limited grants to authors and inventors of rights in their works. By complicating the conceptual landscape of intellectual property incentives to include expressive incentives, this Article seeks to open another line of inquiry into the optimal structure of incentives. For society’s benefit, intellectual property utilitarians seek to award the least incentive possible

6 Some legal scholarship occasionally hints at related possibilities. E.g., Sara K. Stadler, Forging a Truly Utilitarian Copyright, 91 Iowa L. Rev. 609, 664–65 (2006) (“[W]ithholding copyright from fine artists but granting moral rights would address the primary concerns of Creators, who care more about the integrity of their work, and receiving credit for its authorship, than they do about licensing its reproduction on consumer goods.”); cf. Jane C. Ginsburg, Moral Rights in a Common Law System, 1 Ent. L. Rev. 121 (1990) (analyzing how some common-law countries—Australia, the United Kingdom, and the United States—have recently implemented moral-rights protections for authors).

in exchange for a requisite degree of valuable artistic, scientific, and technological creation. Expressive incentives are likely to assist utilitarians in this quest. Many might be relatively cost free for society to provide but are very valuable to creators themselves, thereby enhancing the intellectual property incentive at little loss to society at large. In fact, it is plausible that, to secure expressive incentives, individual creators would be willing to relinquish some traditional pecuniary incentives that are costly for society to provide. Expressive interests, however, ought to be protected only when the utilitarian analysis indicates that the benefits of doing so exceed the costs. Moral-rights interests ought to yield to the utilitarian calculus whenever there is a conflict between the two, largely because extensive protection of moral rights is likely to harm society’s cultural, scientific, and technological progress.

I focus in this Article on creators’ expressive interests vis-à-vis their works. Like creators, users of copyrightable and patentable works generally can have expressive interests in the works they consume. Similarly, follow-on creators can have expressive interests in borrowing from or even destroying previous creators’ works. Crafting optimal intellectual property laws requires accounting for these expressive interests as well. Broadly speaking, utilitarians ought to be concerned with the societal cost, including expressive deadweight loss, imposed by granting particular incentives. These sorts of important expressive interests are, however, beyond this Article’s scope.

After setting the theoretical stage in Parts I and II, Part III goes through a number of potential applications of expressive incentives in copyright and patent laws. My discussion there is tentatively normative.

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9 See Julie E. Cohen, The Place of the User in Copyright Law, 74 Fordham L. Rev. 347, 370 tbl 71 (2005); Jessica Litman, Creative Reading, 70 Law & Contemp. Probs. 175, 175, 178 (2007); Jennifer E. Rothman, Liberating Copyright: Thinking Beyond Free Speech, 95 Cornell L. Rev. 463, 497 tbl 98, 500 tbl 01 (2010).
10 Amy M. Adler, Against Moral Rights, 97 Calif. L. Rev. 263, 265 (2009) (maintaining that moral rights law obstructs rather than enables the creation of art because the law fails to recognize the defining role that destruction has come to play in contemporary artistic practice; Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1109 (1990) (First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers. Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday’s theses. (footnote omitted)).
Some areas seem to be promising ones for employment of robust expressive incentives, such as: attribution; copyright’s structure of duration, right of reversion, and originality requirement; and patent’s former first-to-invent rule and written-description requirement. Current copyright and patent laws already employ such incentives in these areas, but their current form is typically anemic. By contrast, providing forceful, expressive incentives in other areas of the law, such as integrity, adaptation, and restraints on creators’ alienation of their rights, is likely to be problematic in light of the overall utilitarian goals of copyright and patent law. I conclude with some thoughts on legal structures that might account for the diverse set of authors and inventors and the different incentives that might work for them. My recommendations are tentative in light of holes in empirical scholarship about the specific effects of varying incentives on creators and society, which future work will carry out. It is the hope that this Article can launch a conversation—both theoretical and empirical—on establishing the ideal mix of expressive and pecuniary incentives to maximize their roles in the American utilitarian intellectual property system.

I. THEORIES OF INTELLECTUAL PROPERTY

American copyright law protects ‘original works of authorship fixed in any tangible medium of expression,’ including literary works, sound recordings, movies, and computer software code. To obtain copyright protection, authors need only create a qualifying work. There is no requirement that a work be published to be protected. Protection vests in authors without any formalities like registration. A copyright holder receives the exclusive right to reproduce the work, distribute copies of it, and prepare derivative works, among other things, typically until seventy years after the author’s death. Copyright protection extends to the

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11 17 U.S.C. §§ 101, 102(a) (2006); see infra Section III.D (discussing the originality requirement as expressive incentive).
12 17 U.S.C. § 102(a) (requiring only that a work be fixed in any tangible medium of expression to be copyrightable).
13 Registration of a protected work with the Copyright Office is permissive. Id. § 408(a). To bring an infringement action, though, a copyright holder must in the ordinary case first have registered the copyright with the Copyright Office. Id. § 411(a).
14 Id. § 106.
15 Id. § 302(a); see also infra Section III.B (analyzing the structure of duration as expressive incentive).
expression of particular ideas rather than to the ideas themselves. Yet protection actually reaches well beyond the literal work to works that have been copied and are substantially similar, otherwise a plagiarist would escape by immaterial variations.

Patent law looks different. It grants protection to inventors of useful, novel, and nonobvious inventions. Patents are granted after successfully undergoing examination by the Patent and Trademark Office (PTO) to ascertain that an invention meets patentability conditions and the description in the patent application satisfies certain disclosure requirements. The patent right permits the patentee to exclude others from practicing the invention claimed in the patent for a term of typically twenty years from the date the patent application was filed.

With this brief outline of copyright and patent law, I now turn to the theories scholars put forth to justify these laws: utilitarianism and moral rights (in two flavors: labor-desert and personhood).

A. Utilitarianism

The Supreme Court, Congress, and many legal scholars consider utilitarianism the dominant purpose of American copyright and patent

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18 Nichols, 45 F.2d at 121.


20 Id. § 131. The Patent Act requires disclosure of certain content within the patent by calling for a written description, enablement, and best mode. Id. § 112. See generally Jeanne C. Fromer, Patent Disclosure, 94 Iowa L. Rev. 539, 546594 (2009) (describing these requirements and arguing that they do not suffice for useful and clear disclosures).


According to utilitarian theory, copyright law provides the incentive of exclusive rights for a limited duration to authors to motivate them to create culturally valuable works. Without this incentive, the theory goes, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free riders, eliminating authors’ ability to profit from their works.

Parallel reasoning supports patent law’s protection of inventors’ exclusive rights in their technologically or scientifically valuable inventions for limited periods of time. The theory is that public benefits accrue by rewarding inventors for taking two steps they likely would not otherwise have taken: to invent, and possibly commercialize, in the first place, and to reveal information to the public about these inventions that stimulates further innovation.

Utilitarianism aligns fluently with (and is frequently justified by) the U.S. Constitution’s grant of power to Congress “to 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.” Some utilitarians understand social welfare to be maximized by the creation of more artistic, scientific, and technological

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24 Sterk, supra note 3.


27 U.S. Const. art. I, § 8, cl. 8.
works.\textsuperscript{28} Others, like Professor William Fisher, employ a broader understanding: that intellectual property protection ought to help foster the achievement of a just and attractive culture.\textsuperscript{29}

Pursuant to utilitarianism, the rights conferred by copyright and patent laws are designed to be limited in time and scope.\textsuperscript{30} The reason for providing copyright and patent protection to creators is to encourage them to produce socially valuable works, thereby maximizing social welfare.\textsuperscript{31} If the provided rights are overly extensive, society would be hurt (and social welfare diminished).\textsuperscript{32} For one thing, exclusive rights in intellectual property can prevent competition in protected works, thereby allowing the rightsholder to charge a premium for access and ultimately limiting these valuable works' diffusion to society at large.\textsuperscript{33} For another, given that knowledge is frequently cumulative, society benefits when subsequent creators are not prevented from building on previous artistic, scientific, and technological creations to generate new works.\textsuperscript{34} For these reasons, copyright and patent laws ensure both that the works they protect fall into the public domain in due course and that third parties are free to use protected works for certain socially valuable purposes.\textsuperscript{35}

At bottom, utilitarian theories of intellectual property rest on the premise that the benefit to society of creators crafting valuable works offsets the costs to society of the incentives the law offers to creators.\textsuperscript{36} Because this utilitarian framework establishes a cost-benefit analysis, the leading scholarly analysis of intellectual property has used an economic lens.\textsuperscript{37}


\textsuperscript{29} Id. at 172\textsuperscript{-}73.


\textsuperscript{31} See, e.g., Ralph S. Brown, Eligibility for Copyright Protection: A Search for Principled Standards, 70 Minn. L. Rev. 579, 592 (1985).

\textsuperscript{32} Lemley, supra note 30, at 996\textsuperscript{-}97.

\textsuperscript{33} See id. at 996.

\textsuperscript{34} See id. at 997\textsuperscript{-}98.

\textsuperscript{35} See id. at 999.

\textsuperscript{36} Id. at 996\textsuperscript{-}97.

Expressive Incentives in Intellectual Property

B. Moral Rights

Despite the dominance of utilitarian thinking in American intellectual property law, scholars also proffer other theories to justify intellectual property protection. These theories are typically grounded in the notion of natural or moral rights that authors and inventors deserve by virtue of having created their works.\(^{38}\) I use the term "moral rights" herein to refer to deontological theories of intellectual property, rather than the class of laws, almost all foreign to the United States, that explicitly incorporate these theories.\(^{39}\)

Moral-rights theories typically come in two flavors: labor-desert and personhood. Labor-desert theory sees intellectual property rights as a Lockean acknowledgment of the labor of creation, in granting copyright or patent protection to creators that have worked sufficiently hard.\(^{40}\) According to Professor Wendy Gordon’s articulation of this line of thinking, intellectual property rights cease to be justified when they "harm . . . other persons’ equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage."\(^{41}\) Unlike the utilitarian viewpoint, which seeks to discontinue intellectual property rights when they cease to be efficient, the American labor-desert approach typically refuses to grant protection in labored-on works only when third parties are prevented from drawing on the public domain.\(^{42}\)

Personhood theories also establish intellectual property protection as a moral right of sorts, but unlike labor-desert approaches, they see a creative work as a Hegelian extension of the author’s personality.\(^{43}\) According to Professor Margaret Radin, a leading American legal-personhood

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\(^{38}\) See, e.g., Balganesh, supra note 7, at 1576.\(^{77}\); Brown, supra note 31, at 589 i.\(^{90}\).


\(^{41}\) Gordon, supra note 40, at 1563 i 64.

\(^{42}\) Id. at 1564; cf. Seana Valentine Shiffrin, Lockeian Arguments for Private Intellectual Property, in New Essays in the Legal and Political Theory of Property, supra note 28, at 138, 140 i 58 (arguing that Lockeian arguments justify only minimal protection).

\(^{43}\) Lawrence C. Becker, Deserving To Own Intellectual Property, 68 Chi.-Kent L. Rev. 609 (1993); Hughes, supra note 40, at 330 i 65; Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 957 (1982).
Theorist, ŗno achieve proper self-developmentō to be a personō an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.ō

There are related understandings of personhood: Professor Roberta Kwall sees ŗthe [workō] importance as a reflection of the authorō meaning and an embodiment of her message.ō Professors Sonia Katyal views creative works as expressions of a personō individualism and freedom.ō And Professor Stewart Sterk perceives that a theory grounded in moral rights ŗconjures up a genius irrevocably committed to his work.ō

Despite its occasional invocation in copyright, personhood theory is less frequently invoked as an explanation for patent law.ō Kwall suggests that personhood theories are absent in patent law because functional scientific and technological works ŗare perhaps less likely [than artistic works] to need modifications that may ultimately conflict with the creatorō artistic vision in order to serve their intended functions.ō

Alternatively, Professor Justin Hughes hypothesizes ŗan implicit social judgment that the degree of personality reflection in most patented works is different and smaller than in most copyrighted works.ō To him, patentable inventions

usually embody strongly utilitarian solutions to very specific needs. We tend not to think of them as manifesting the personality of an individual, but rather as manifesting a raw, almost generic insight. In inventing the light bulb, Edison searched for the filament material that would burn the longest, not a filament that would reflect his personality. Marconi chose to use a particular wavelength for his radio because that wavelength could travel much farther than waves slightly longer, not because that wavelength was his preferred form of expression.ō


ō Kwall, supra note 39, at 25.


ō Sterk, supra note 3.

ō Lemley, supra note 30, at 1031.


ō Hughes, supra note 40, at 351.

ō Id. at 341 n.42.
That said, other scholars underscore a strong notion of the romantic inventor employing his or her particular brand of genius to create valuable scientific and technological works.\(^2\) In fact, Radin's characterization of the connection between personhood and control over one's resources seems just as apt for inventions as it does for artistic works protected by copyright law.\(^3\)

All in all, an inventor might maintain personhood interests in his or her creations, but perhaps in different ways than those an author retains in his or her artistic works, an issue to which I return in Subsection II.B.2.

Personhood theories typically suggest a broader scope of intellectual property protection than utilitarian and labor-desert theories. Margaret Radin theorizes that "[o]nce we admit that a person can be bound up with an external thing in some constitutive sense, . . . by virtue of this connection the person should be accorded broad liberty with respect to control over that thing."\(^4\)

Professor Robert Merges has also recently invoked a Kantian notion of autonomy as justifying intellectual property protection.\(^5\) To Merges, intellectual property rights are valuable because they respect claims over [creative] objects that are bound up with the exercise of an individual's will and thereby promote their personal freedom.\(^6\) In turn, such rights allow creative individuals the opportunity to seek to devote themselves professionally and fully to their talents.\(^7\) There are limits to rights

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\(^3\) Supra text accompanying note 44.

\(^4\) Radin, supra note 43, at 960. But see Justin Hughes, The Personality Interest of Artists and Inventors in Intellectual Property, 16 Cardozo Arts & Ent. L.J. 81, 81ff 82 (1998) (noting the argument that the creator's personality interest in her work must be balanced against the personality interest of consumers who will be further creators using her work in their own acts of creation); Rothman, supra note 9, at 499ff 500 (same); John Tehranian, Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property), 82 U. Colo. L. Rev. 1, 5ff 6 (2011) (same).

\(^5\) Merges, supra note 40, at 68ff 101.

\(^6\) Id. at 72.

\(^7\) See id. at 195.
under this theory, according to Merges, because property claims must not be so broad that they interfere with the freedom of fellow citizens.\(^5\)

Congress, federal courts, and commentators tend to disclaim any significant presence of moral-rights protection within American copyright and patent law.\(^5\) Beyond the limited rights of attribution and integrity (preventing a work’s destruction or alteration) set forth in the Visual Artists’ Rights Act of 1990.\(^6\) Other countries, such as France, Germany, and Italy, provide authors with broad often perpetual and inalienable protections sounding in moral-rights interests: principally, the rights of attribution, integrity, retraction of a work from the public, and first disclosure of a work to the public.\(^6\)

C. Rhetoric of Moral Rights

Despite the dominance of the utilitarian framework in American intellectual property protection, scholars acknowledge historical and rhetorical uses of moral rights in copyright law.\(^6\) Legal commentators similarly point to inventorship rhetoric in patent law. This Section explores these scholars’ discussions of these rhetorical relics of moral rights in American intellectual property law.

In the context of copyright, Professor Oren Bracha writes:

Authorship is copyright’s ghost in the machine. In American culture, . . . the author as the heroic creator of original intellectual works and as their rightful owner looms large. The author plays an important role in popular understanding of copyright law . . . Even in this postmodern era during which the death of the author has been

\(^{58}\) Id. at 80, 89–91.


proclaimed countless times, we often continue to picture solitary authors creating original ideas ex nihilo through their intellectual labors. This picture lies at the normative heart of our vision of copyright.63

By authorship, Bracha appears to be referring to its prototypical act by a prototypical actor: as Professor Jane Ginsburg puts it, "a human being who exercises subjective judgment in composing the work and who controls its execution."64

Copyright's authorial focus first coalesced in England in the early eighteenth century. It was in England that a true and extensive copyright system first arose, following on the heels of laws that had promoted crown favoritism, printer monopolies, and censorship.65 Soon after the printing press arrived in England in 1476, royal grants of privilege and patents to publishers for exclusive printing of certain books or types of books became common.66 Once a publisher acquired an author's work, the author's rights were at an end.67

The author, however, was emerging as a central figure,68 not in small part because of a growing professional class of writers.69 In 1710 the Statute of Anne, the first copyright legislation, was enacted, and it became a model for all early American copyright legislation.70 Its stated purposes were to relieve authors from piracy and for the Encourage-
This legislation transformed what had been the printer’s right into the author’s right.

Oren Bracha meticulously describes the injection of authorship into American copyright in the eighteenth and nineteenth centuries. In the eighteenth century, like England, the United States bestowed copyright on a work’s author rather than its publisher. Nineteenth-century developments continued to emphasize the author’s centrality in copyright law. For example, the requirement that works be original to the author to be copyrightable became a rhetorically central aspect of copyright law, even as courts rendered the originality threshold minimal. Additionally, copyright scope expanded from protecting only against near verbatim duplication of works to “general control of an intellectual work.” Despite these outward manifestations of author centrality, actual authorial ownership of copyrights weakened in the nineteenth century through rules like the work-for-hire doctrine, which vested many copyrights in employers.

Copyright’s current rhetoric is similarly grounded in an authorial focus. Bracha posits that authorship as embedded in copyright law is an ideology, often in ways that do not realistically characterize actual authorship. He concludes that authorship in modern copyright discourse is merely a harmless declaratory layer of rhetoric, a relic of bygone times that has little influence on real copyright law. Stewart Sterk agrees that this rhetoric is present in current copyright law. Sterk, however, is convinced that its presence is harmful, in that it results in an overprotective copyright law unmooed from utilitarian realities. He observes that this rhetoric evokes sympathetic images of the author at work with the aim of extending the scope of copyright protection [to] relieve[] the author’s plight. Sterk notes that this au-

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71 Statute of Anne, 1710, 8 Ann., c.19 (Eng.).
72 Bracha, supra note 3, at 189.
73 Id.
74 Id. at 190; Jaszi, supra note 62, at 483. But cf. infra Section III.D (elaborating on how the originality requirement can be an expressive incentive).
75 Bracha, supra note 3, at 190.
76 Id. at 191, 248 f n 55; see infra Sections III.A–B (discussing the work-for-hire doctrine in the contexts of attribution and duration).
77 Bracha, supra note 3, at 266 f n 67.
78 Id. at 267.
79 Sterk, supra note 3.
80 Id.
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...thor-centered rhetoric has accompanied most attempts (often successful) at expanding copyright protection. 81 As a result, he thinks that copyright law protects works, like architectural designs, which do not need the copyright incentive to be created. 82 He also argues that copyright law's attempts to reward deserving authors are misplaced because "the beneficiaries of expanded copyright doctrine often are not struggling authors but faceless corporate assignees well-versed in the ways of the business world." 83

A comparable story of creator-centered rhetoric might be told in patent law. Despite the scarcity of moral-rights invocations in patent law, there is rhetoric in patent law depicting the inventor as a romantic individual who infuses inventive genius into his or her creations. 84 For one thing, patent rights initially vest in inventors, who must technically file a patent application, even in the now-common case of corporate assignment of patent rights. 85 Moreover, an inventor's name will always remain on a patent for his or her invention, even if someone else owns the patent rights. 86

In sum, although utilitarian thinking dominates American justifications of intellectual property law, there are also voices proclaiming moral rights in its two flavors of labor-desert and personhood as the legal rationale. Supplementing these voices are scholars who highlight significant rhetoric about authorship and inventorship in intellectual property laws.

II. EXPRESSIVE INCENTIVES IN INTELLECTUAL PROPERTY

In this Part, I show that theories of utilitarianism and moral rights are not disjoint, as conventional wisdom tends to suggest. I demonstrate that they can frequently work together harmoniously to maximize societal benefit from improved production of artistic, scientific, and technological works. Relatedly, the scholarly emphasis on creator-centered rhetoric

81 Id. at 1199.
82 Id. at 1197–98.
83 Id. at 1198.
84 See Aoki, supra note 52, at 213–16.
86 See Hughes, supra note 40, at 351; infra Section III.A (discussing attribution in patent law).
in intellectual property law overlooks the substantive impact that expressions of solicitude for and protection of creators' interests can have on stimulating the development of valuable copyrightable and patentable creations.

Evidence from multiple vantage points demonstrates how significantly authors and inventors care about their personhood and labor interests in the works they create. Pertinently, as discussed further below, they believe that their self-concept is critically bound up in their creations; they are uniquely situated to employ their personal vision and genius to create their works; they create in large part for reputational gains; they psychologically possess their creations; and they often hold strong interests in their works and their works' integrity by virtue of their expended labor.\(^{87}\)

As such, utilitarians ought to be deeply occupied with giving weight in intellectual property laws to creators' moral-rights interests in appropriate circumstances. Utilitarians, focused on providing for society's gain via a minimal incentive for maximal artistic, scientific, and technological production, ought to appreciate that copyright and patent laws' substantive protections and expressions of solicitude for creators' moral rights in a variety of ways can provide expressive incentives for creators to create, perhaps in ways that traditional pecuniary incentives do not.\(^{88}\)

Of course, utilitarians ought to be concerned also with the societal costs—both pecuniary and expressive—imposed by granting particular expressive incentives, just as they ought to be concerned with such costs when it comes to granting pecuniary incentives. Only when the societal benefits of granting expressive incentives exceed the societal costs should they be offered.

In building this case for expanding the concept of intellectual property's incentives to include expressive incentives as well as traditional pecuniary ones, I draw parallels to literature on law and norms and expressive theories of the law. This literature has been underutilized in

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\(^{87}\) See infra Section II.B; cf. Merges, supra note 40, at 114 ("The universal experience of creative people is that fashioning something new and distinctive almost always requires sustained attention, effort, and personal vision.").

\(^{88}\) Cf. Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 Cornell L. Rev. 1549, 1559 (2003) ("Utilitarianism and personhood now provide the two main justifications for [real] property rights. . . . Founding Era natural-right theory started from the insight that people rely on having free control over their labor and their external possessions. If this insight is substantially correct, that reliance must count heavily in a utilitarian justification of property.").
intellectual property discussions with regard to incentives within copyright and patent law. I also emphasize the consistency of my inclusive notion of expressive incentives with philosophical work on consequentialism.

Section II.A discusses the possibility of connecting utilitarianism and moral rights. Section II.B provides the lynchpin for this combination by setting out evidence that authors and inventors care deeply about their personhood and labor interests in their creations. Utilitarianism ought therefore to give serious weight to expressive incentives to authors and inventors, where appropriate. Section II.C builds further support for expressive incentives by grounding the notion in scholarship on law and norms, expressive theories of law, and philosophical utilitarianism.

A. Connecting Utilitarianism and Moral Rights

The theories of utilitarianism and moral rights, as presented in the previous Part, are almost always seen as disjoint. Scholars typically choose just one of the theories on which to hang their views of intellectual property. American courts usually favor utilitarianism over the other theories. For example, the Supreme Court has noted that "the primary objective of copyright is not to reward the labor of authors, but..."

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91 See supra Section I.A.
promote the Progress of Science and useful Arts.\textsuperscript{92} Similarly, the Second Circuit has observed that \textit{American copyright law} \ldots does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.\textsuperscript{93} Why utilitarianism and moral rights seem incompatible to so many usually goes unanalyzed. Nonetheless, explicit evaluators note that utilitarian theories are more concerned with maximizing benefit to society via a properly calibrated incentive to creators whereas moral-rights theories usually more heavily emphasize creators\textsuperscript{94} interests. In addition, American utilitarians likely neglect moral-rights dimensions because of their association with rejected deontological theories of intellectual property. Occasionally, as demonstrated in the previous Part, thinkers appreciate the historical or rhetorical force of moral-rights thinking, all the while making utilitarianism supreme in setting policy.\textsuperscript{95}

Nonetheless, there is helpful scholarship that suggests that utilitarian and moral-rights theories or values can overlap in crafting intellectual property laws.\textsuperscript{96} In the context of arguing that copyright law\textsuperscript{97} work-for-hire doctrine ought not to be applied to university academics\textsuperscript{98} works, Professor Rochelle Dreyfuss argues that the utilitarian approach of maximizing the public interest ought to seek to optimize artistic works\textsuperscript{99} quality by giving authors control of their works in some circumstances.\textsuperscript{95} As she explains, \textit{Severing financial considerations from other creative concerns harms \ldots those [interests] of the public in high-quality, accessible, creative material.\textsuperscript{100}} Dreyfuss\textsuperscript{101} insight about the interaction of

\textsuperscript{94} See Brown, supra note 31, at 607; Ginsburg, supra note 90, at 993.
\textsuperscript{95} Supra text accompanying notes 62\--\textsuperscript{78}.
\textsuperscript{97} Dreyfuss, supra note 4, at 590\textsuperscript{\textendash}93, 643.
\textsuperscript{98} Id. at 606. For example, Dreyfuss reasons that granting copyright ownership to universities for academic writing might inhibit authors\textsuperscript{99} creativity by emphasizing the popular taste to which the university would likely want the work to appeal over perhaps more controversial topics. Id. at 609\textsuperscript{\textendash}10. Dreyfuss makes parallel arguments for control of academic works\textsuperscript{99} dissemination, see id. at 616\textsuperscript{\textendash}20 (arguing that university control of the timing of dissemination might dampen both the work\textsuperscript{99} quality and the author\textsuperscript{99} reputation), and the creation of derivative works, id. at 624.
utilitarian and moral-rights theory is that utilitarian intellectual property laws ought to be concerned also with the quality of works produced, something that had been a traditional focus of author-centered moral-rights theories. Relatively, Professors Henry Hansmann and Marina Santilli maintain that there can be economic reasons to support moral-rights legislation. For example, a right of integrity might be useful to society at large in ensuring that important artistic works are not altered or mutilated.

In another vein, Professor Alfred Yen observes that both utilitarianism and moral rights should guide the structure of intellectual property laws. Discussing only copyright law, Yen sets forth two reasons. First, he sets out evidence that American law, both historically and at present, views copyright as a tool to effectuate both utilitarianism and moral rights. Second, Yen argues that the economic thinking necessary to implement utilitarian intellectual property laws cannot answer all necessary questions, such as getting hold of reliable data on individual preferences necessary for calculating utilities. He suggests that in those cases, it is useful to supplement intellectual property rules with moral-rights interests. Not dissimilarly, Robert Merges maintains that efficiency concerns of the utilitarian flavor normally are a midlevel principle for intellectual property law design, but at the highest level, deontological Lockean labor theory, Kantian autonomy theory, and distributive-justice concerns inform the law's design.

This scholarship helpfully shows that utilitarianism and moral rights can play a joint role in structuring the substantive aspects of intellectual property laws. In this Article, I take a different approach to establish that utilitarianism and moral rights can be and ought to be in greater confluence than the conventional wisdom would have us believe. That is, solicitude for, and sometimes protection of, creators' moral-rights interests can strengthen utilitarian incentives in copyright and patent law, thereby

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99 Id. at 643.
100 Hansmann & Santilli, supra note 61, at 102, 142–43.
101 Cf. id. at 110–11 (explaining that alteration and mutilation typically transgress the right of integrity, although complete destruction generally does not).
103 Yen, supra note 4, at 164–66.
104 Id. at 169–71.
105 Id. at 170–72.
106 Merges, supra note 40, at 6, 13–16.
melding the two theories together in an underexplored way.\textsuperscript{107} In the next Section, I demonstrate that evidence from numerous perspectives shows that artists and inventors hold strong and central personhood and labor interests in the works that they create. To maximize the utilitarian incentive to create valuable works for society, then, it is helpful to complicate our understanding of incentives beyond traditional pecuniary incentives to include expressive incentives that convey solicitude for and effectuate these personhood and labor interests, thereby maximizing the creative incentive for the benefit of society.\textsuperscript{108}

\textit{B. Creators’ Strong Beliefs in Moral Rights}

This Section inspects considerable evidence from many vantage points\textsuperscript{109} including philosophy, psychology, sociology, and the arts\textsuperscript{109} to demonstrate how strongly many creators of artistic, scientific, and technological works believe in their moral rights in their works.\textsuperscript{109} Taken together, a constellation of interests that creators typically possess about their works yields a sturdy conclusion about creators\textsuperscript{109}deep conviction in their moral rights.

Before delving into creators\textsuperscript{109}beliefs vis-à-vis their works, a clarification is in order. Beside the point of my inquiry is whether these creators\textsuperscript{109}beliefs reflect the process by which individuals (or groups of individuals) end up creating artistic, scientific, and technological works. My focus instead is on how individuals tend to perceive their creations and

\textsuperscript{107}This harmonization focuses on traditional accounts of utilitarianism rather than on commercialization theory, as set out in Abramowicz & Duffy, supra note 26, at 337, 339 & n.4. To the extent intellectual property laws ought to care about both works\textsuperscript{109}creators and commercializers, there is room for both expressive and pecuniary incentives in these laws.

\textsuperscript{108}Cf. David Fagundes, Property Rhetoric and the Public Domain, 94 Minn. L. Rev. 652, 660 (2010) (“In legal discourse, [rhetoric’s] appeal has two valences. First, rhetoric frames legal arguments, and those frames determine what substantive legal analysis applies to the issue at hand. Second, the choice to use particular terms can persuade or dissuade by calling up particular associations that generate visceral reactions in listeners.”); Jessica Silbey, Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change, 61 Case W. Res. L. Rev. 195, 199 (2010) (concluding that some movements to expand public access to intellectual property are undercut by utilizing the underlying rhetoric and values of traditional intellectual property law).

\textsuperscript{109}Some of this evidence is systematic, whereas some is more anecdotal. Although as of yet, there have been no comprehensive empirical studies addressing this particular question, future work attempts to start answering this question. E.g., Christopher J. Buccafusco, Jeanne C. Fromer & Christopher J. Sprigman, Empirical Studies of Incentives in Intellectual Property (forthcoming manuscript, to be on file with author).
creative process, because that is critical for optimizing the incentives that can actually motivate creators to innovate.\textsuperscript{110} Therefore, while research inquiries doubting the centrality of any particular authors or inventors to their works’ creation are interesting,\textsuperscript{111} they are not germane to my analysis. These theories have not typically affected norms about the personhood and labor interests authors and inventors have in their creations and therefore do not affect what would realistically motivate these creators.

I separate my discussion on authors’ beliefs from that of inventors’ Although derived from different sources, much that is said about one will apply to the other. Nonetheless, the moral-rights interests authors have in their works likely differ in some important ways from those inventors have in their creations.

1. Authors

In a recent book on writing, the author Margaret Atwood offers three pages of reasons why a writer writes. Many relate to an author’s personhood and labor interests. To list a few: \textit{To express myself}; \textit{Because I knew I had to keep writing or else I would die}; \textit{Because to create is human. Because to create is Godlike}; \textit{To amuse and please myself}; \textit{Because I was possessed}; \textit{Because I got pregnant by the Muse and needed to give birth to a book}; \textit{To act out antisocial behavior for

\textsuperscript{110}Cf. Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom 37 (2006) (positing that if information producers do not need the incentive of exclusive rights to create and exploit their works, the justification for giving them would be diminished).

\textsuperscript{111}Some sociological work labels the centrality of any individual’s genius to his or her inventions’ mythology, and places the emphasis instead on sociological factors that make almost any individual’s role incidental rather than crucial. S.C. Gilfillan, The Sociology of Invention 101 11, 71–74 (1935). As an example of such evidence, this work points to the frequency of near-simultaneous inventions. Id. at 75–76; see Mark A. Lemley, The Myth of the Sole Inventor, 110 Mich. L. Rev. 709, 709–712 (2012) (discussing the implications of the limited importance of the sole inventor, contrary to this myth, for patent law). With regard to literary works, one robust strand of literary analysis has sought to show that the author ought not be the central figure in literary works, above and beyond, say, the audience that interprets these works, those literary works from which the author is inspired and borrows, and the publisher that distributes and markets these works. See David Saunders, Authorship and Copyright 51–9 (1992) (showing historically that in addition to the Romantic notion of the author, there has also been a cultural and collaborative conception of authorship); Lior Zemer, The Idea of Authorship in Copyright 6 (2007); cf. Martha Woodmansee, On the Author Effect: Recovering Collectivity, in The Construction of Authorship, supra note 4, at 15, 16–17 (noting that the concept of authorial centrality was not always predominant).
which I would have been punished in real life. To satisfy my desire for revenge, because the story took hold of me and wouldn’t let me go, to search for understanding of the reader and myself, to bear witness to horrifying events that I have survived and to make a name that would survive death. Some of these are about an author harnessing personal emotions or history into an artistic product. Others are about satisfying some deeply felt personal urge to create something intrinsically linked to one’s self-concept. Yet others invoke the author’s concern with reputation. What they share, as this Subsection shows, is how intrinsically linked these reasons are to authors’ personhood interests and how commonly held similar beliefs are.

One critical belief authors usually have about their creations is that they are intimately linked to their self-concept. Psychological and philosophical work demonstrates that one’s possessions are tightly bound up in a person’s self-concept. Objects over which people have control or which they themselves have created or manipulated are more likely to be perceived as part of a person’s self-concept than other types of objects. In this context, psychological benefits shown to flow from this connection to one’s possessions include the experience of efficacy, a feeling of personal autonomy, and a positive association between these possessions and one’s sense of self. Margaret Radin theorizes a tight bond between self and object when the object is personal (such as someone’s own wedding ring), rather than fungible with another item of at least equal market value (such as a wedding ring in a jeweler’s hands).

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112 Margaret Atwood, Negotiating with the Dead: A Writer on Writing, at xxii–xxiii (2002).
116 Radin, supra note 43, at 959ff. 60.
Psychologist Lita Furby posits, moreover, that people think something is theirs when it is associated with them.\footnote{Furby, supra note 113, at 314 (discussing this idea’s consistency with study showing feelings of ownership based on association in children); accord Meir Dan-Cohen, Harmful Thoughts: Essays on Law, Self, and Morality 276–77 (2002).}

Likely for all of these reasons, people experience these possessory and self-concept effects with regard to their artistic creations, especially because they are self-made and far from fungible.\footnote{See Csikszenmihalyi & Rochberg-Halton, supra note 113, at 28; Pierce et al., supra note 113, at 86, 93–94; accord Hegel, Philosophy of Right §§ 68–69, at 54–56 (T.M. Knox trans., Oxford Univ. Press 1952) (1821); Hughes, supra note 54, at 87–88. On authors’ belief that their creations are personal and not fungible, see infra notes 130–42 and accompanying text.} A striking illustration of this notion comes from the novelist Anne Lamott, who states immediately the thrill of seeing oneself in print. It provides some sort of primal verification: you are in print; therefore you exist.\footnote{Anne Lamott, Bird by Bird: Some Instructions on Writing and Life, at xiv (1994).} Another comes from John Milton’s characterization of books containing authors’ essences:

\begin{quote}
We should be wary... what persecution we raise against the living labours of public men, how we spill that seasoned life of man, preserved and stored up in books; since we see a kind of homicide may be thus committed, sometimes a martyrdom, and if it extend to the whole impression, a kind of massacre... .\footnote{John Milton, Areopagitica: A Speech to the Parliament of England for the Liberty of Unlicensed Printing 9–10 (Ralph, Holland & Co. 6th ed. 1906) (1644); accord Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903); Thomas F. Cotter, Pragmatism, Economics, and the Droit Moral, 76 N.C. L. Rev. 1, 7–8 (1997); Hughes, supra note 40, at 329–30; Samuel D. Warren & Louis D. Brandeis, The Right To Privacy, 4 Harv. L. Rev. 193, 207 (1891).}
\end{quote}

A feeling of psychological ownership in these works even absent legal ownership according to psychological research, helps people define themselves, express their self-identity to others, and maintain the continuity of the self across time.\footnote{Pierce et al., supra note 113, at 89.} People feel a sense of psychological ownership when they control[ ] an object, come[ ] to know the target intimately, and invest[ ] the self in the target.\footnote{Id. at 92.} All three seem to happen in varying ways when authors create artistic works, typically by expending great amounts of time and energy to au-
author highly personal works. Coinciding with this view is the metaphor of author as parent to his or her literary works, commonly invoked since the sixteenth century.

Because of this possessory interest authors have in their creations, they frequently believe strongly in their works’ integrity, in the sense that they ought to be able to prevent their works from alteration. As Michelangelo illustrates in his explanation of his control of his commissioned painting of the Sistine Chapel:

As soon as I had begun this work . . . I told the Pope how, in my opinion, the placing of the Apostles there alone would have a very poor effect. He asked why, and I replied, because they also were poor. He then gave me fresh instructions, which left me free to do as I thought best . . . .

Similarly, many authors have strong feelings about controlling the contexts in which their works are used. For example, photographer Richard Avedon, in licensing his works, sought to forbid other photographs from appearing on the same page as his.

There is a countervailing view, as articulated by Professor Amy Adler, of the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist. Adler suggests that a view that artists have integrity interests in their work has become increasingly obsolete.

Beyond the strong influence of artists’ creations on their self-concept (and concomitant desire for integrity many have), much else about authorship is considered to be highly personal. Authors typically view the

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124 See Mark Rose, Authors and Owners: The Invention of Copyright 38 (1993).
128 Adler, supra note 10.
129 See id.
process of creation as both personal and subjective.\textsuperscript{130} Filmmaker Francis Ford Coppola conveys his most important piece of advice for his children, who work in the arts: \textquotedblleft Always make your work be personal.\textquotedblright\textsuperscript{131} As I explore in prior work on creativity\textsuperscript{\textsuperscript{132}} role in intellectual property law, artists are preoccupied with \textquotedblleft harnessing experiences and themes for artistic expression.\textquotedblright\textsuperscript{132} Painter Henri-Matisse observes that he is \textquotedblleft unable to distinguish between the feeling [he] ha[s] for life and [his] way of expressing it.\textsuperscript{133} Creativity scholars Jacob Getzels and Mihaly Csikszentmihalyi recount that the goal of the artist is to be sensitive to salient life experiences, and to translate these into [artistic] products, thereby preserving as much of the impact of the experience as possible, while at the same time revealing meanings that were not perceived before the work of art was completed.\textsuperscript{134} Csikszentmihalyi elaborates that artists find inspiration in \textquoteleft real\textquoteright life\textquoteleft emotions like love and anxiety, events like birth and death, the horrors of war, and a peaceful afternoon in the country.\textsuperscript{135} There is a seemingly endless supply of instances of this principle: Spanish painter Pablo Picasso\textsuperscript{136} painting \textit{Guernica} was inspired by his views on the destruction of the Spanish Civil War, fought during his lifetime.\textsuperscript{136} Philip Roth\textsuperscript{137} novels about secular American Judaism in the face of Jewish tradition\textsuperscript{137} mirror the world in which he grew up.\textsuperscript{138} A recent novel by Israeli author David Grossman, about a mother

\textsuperscript{130} See Rose, supra note 124, at 113\textsuperscript{I} 27; Fromer, supra note 123, at 1467; Jane C. Ginsburg, \textit{Creation and Commercial Value}, 90 Colum. L. Rev. 1865, 1881\textsuperscript{I} 86 (1990); cf. Rebecca Tushnet, \textit{Economies of Desire: Fair Use and Marketplace Assumptions}, 51 Wm. & Mary L. Rev. 513, 522\textsuperscript{I} 27 (2009) (arguing that creativity is often inspired by non-economic, intrinsic motivation).


\textsuperscript{132} Fromer, supra note 123, at 1467; accord Csikszentmihalyi & Rochberg-Halton, supra note 113, at 28; Dreyfuss, supra note 4, at 607\textsuperscript{I} 08.

\textsuperscript{133} Henri-Matisse, \textit{Notes d\textquoteright un Peintre}, La Grande Revue, (Dec. 25, 1908) (Fr.), \textit{reprinted in Artists on Art}, supra note 126, at 409, 410; accord Edward Hopper, \textit{Notes on Painting, Preface to The Museum of Modern Art, Edward Hopper Retrospective Exhibition 17} (1933), \textit{reprinted in Artists on Art}, supra note 126, at 471, 472 (\textit{I believe that the great painters ... have attempted to force this unwilling medium of paint and canvas into a record of their emotions.\textsuperscript{J}}).

\textsuperscript{134} Jacob W. Getzels & Mihaly Csikszentmihalyi, \textit{The Creative Vision} 154 (1976).

\textsuperscript{135} Mihaly Csikszentmihalyi, \textit{Creativity} 85 (1996).


\textsuperscript{137} E.g., Philip Roth, \textit{Portnoy\textquoteright s Complaint} (1969); Philip Roth, \textit{The Ghost Writer} (1979).

\textsuperscript{138} See Philip Roth, \textit{The Facts: A Novelist\textquoteright s Autobiography} 135\textsuperscript{I} 36 (1988).
coping with her son’s battles in the Israeli Army, works through the pains he endured following his children’s service in the same army and one child’s death in battle.\footnote{Ethan Bronner, An Israeli Novelist Writes of Pain, Public and Private, N.Y. Times, Nov. 17, 2010, at Cl (discussing David Grossman’s novel To the End of the Land).} And slightly more lowbrow, a novel by reality television star Nicole Richie, the adopted daughter of the singer Lionel Richie, is about the Hollywood lifestyle of the adopted daughter of a famous singer.\footnote{Nicole Richie, The Truth About Diamonds, at vii–viii (2005).}

Closely related to this widespread view that artists infuse their creations with their experiences and emotions is the conventional position that artists are creative geniuses.\footnote{See Rose, supra note 124, at 6, 114–22; Catherine L. Fisk, Authors at Work: The Origins of the Work-for-Hire Doctrine, 15 Yale J.L. & Human. 1, 5 (2003); Woodmansee, supra note 111, at 16.} As such, they are thought to employ their originality in ways that only they could.\footnote{See Dreyfuss, supra note 4, at 608.}

Additionally, to authors, the artistic works they create are a vehicle for their reputation or esteem, surely a strong personhood interest.\footnote{See generally Geoffrey Brennan & Philip Pettit, The Economy of Esteem: An Essay on Civil and Political Society 13 (2004) (studying the central human desire for esteem, or prestige).} A key reason many authors create literary works is the expectation of reputational benefits, such as recognition and attention.\footnote{Greg Lastowka, Digital Attribution: Copyright and the Right to Credit, 87 B.U. L. Rev. 41, 58 (2007).} For example, in the context of open-source software, scholars show that a quest for reputation has largely driven the enterprise.\footnote{See Eric S. Raymond, The Cathedral and the Bazaar 64 (1999); Lastowka, supra note 144, at 59.}

Finally, there is a widely held belief that authors are entitled to some control over their works, for having labored on them.\footnote{See, e.g., Adam D. Moore, A Lockean Theory of Intellectual Property, 21 Hamline L. Rev. 65, 78 (1997); cf. Patricia Kamngiesser et al., The Effect of Creative Labor on Property-Ownership Transfer by Preschool Children and Adults, 21 Psychol. Sci. 1236, 1238–40 (2010) (discussing empirical evidence indicating creative labor has an effect on ownership judgments in children and adults).} William Blackstone articulates this commonly held principle:

When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work
as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property. 147

All in all, this Subsection demonstrates a collection of beliefs that authors typically hold (as society at large often does too) about their strong personhood and labor interests in the works they create. With this demonstration, I now turn to the beliefs that inventors tend to hold with regard to their creations.

2. Inventors

As this Subsection shows, the set of beliefs inventors hold with regard to their inventions is similar to those artists hold about their works. However, they are not identical. Even though both artists and inventors believe they have personhood and labor interests in their works, there appear to be some crucial differences.

Just as authors believe their creations are intimately linked to their self-concept, 148 so too inventors think their inventions are closely linked to theirs. Given that they created their inventions, they tend to feel tightly bound to them. 149 In fact, inventors discuss how much their inventions are a part of their identity. 150 Relatedly, empirical work demonstrates the considerable significance inventors attach to the personal satisfaction and intellectual challenge they derive from inventing. 151

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147 2 William Blackstone, Commentaries *405i 06; accord Rose, supra note 124, at 34f 38 (describing Daniel Defoe’s similar writings).
148 See supra text accompanying notes 113 – 24 124.
149 Pierce et al., supra note 113, at 93.
150 See J.A. Chambers, Relating Personality and Biographical Factors to Scientific Creativity, 78 Psychol. Monographs: Gen. & Applied, no. 7, 1964, at 1, 6, 18i 19 ("The creative research man thus emerges as the dominant, strongly motivated individualist who is self-propelled and whose interests are channeled away from social and civic activities and are directed towards his own individual research problems.") There is a countervailing norm in the sciences, that of a form of communism, in that the substantive findings of science are a product of social collaboration and are assigned to the community. Robert K. Merton, The Sociology of Science 273 (Norman W. Storer ed., 1973). Professor Robert Merton’s thinking might hold more strongly for the scientific community generating theories than for technological innovators. The former is less relevant to intellectual property, as scientific theories typically are not protectable, while innovation based on those theories is. Fromer, supra note 123, at 1442, 1449f 50.
research also shows that the desire for self-expression is a main reason why inventors invent.\(^\text{152}\)

An extreme story illustrates the strong connection inventors can feel to their creations. In the 1980s, Petr Taborsky worked for a Florida power company, having been assigned to assist on a research project using bacteria to extract ammonia from a type of clay used in filtering water.\(^\text{153}\)

The company terminated the project after it appeared that it would not be successful and reassigned Taborsky to work on other tasks. Taborsky, captivated by the research problem, nonetheless continued to work on the original research question.\(^\text{154}\) Taborsky figured out how to use bacteria to accomplish this extraction by raising the temperature.\(^\text{155}\) Taborsky was stunned to learn that he had no legal rights in the invention, having signed them away to his employer in his contract.\(^\text{156}\) Angry and determined, he refused to turn over his research notebooks.\(^\text{157}\)

Taborsky fought so far as to be convicted of theft of the notebooks, being jailed for refusing to assign to the company the patents he ultimately secured for the invention, and later refusing an executive pardon.\(^\text{158}\) Taborsky stated that he was willing to go to jail because his employers weren’t entitled to his invention.\(^\text{159}\)

Although he was likely driven in part by pecuniary considerations, the extent to which he was willing to be punished surely underscored his personhood-based determination, in his words, that the notebooks were mine and the work was mine.\(^\text{160}\)

Another personhood interest in which inventors, and society writ large, believe is that inventors are creative geniuses, uniquely situated to fashion their inventions.\(^\text{161}\) Professor Catherine Fisk elaborates that
The popular and even the academic vision of invention in the nineteenth century was that of the genius alone in his workshop, tinkering away until suddenly a bright idea came to him in a flash.\footnote{Fisk, supra note 161, at 1160.} A quintessential (and somewhat mythical) example is Thomas Edison, depicted as laboring and tinkering with possibilities for the light bulb and then coming up with a solution in a stroke of genius.\footnote{Id. at 1161.} Thomas Jefferson, a noted inventor himself, colorfully called inventions \textit{the fugitive fermentation of an individual brain.}\footnote{Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), \textit{in} 13 The Writings of Thomas Jefferson 333 (Albert Ellery Bergh ed., 1907).} Fisk observes that this view has been so longstanding that \textit{by the nineteenth century, . . . it was so widely accepted as to seem a matter of natural right.}\footnote{Fisk, supra note 161, at 1142.} Twentieth-century psychological work confirms the continuing endurance of this belief, showing that an inventor\textit{ most important characteristic is perceived to be originality.}\footnote{See Rossman, supra note 152, at 48.}

Take Johannes Gutenberg\textit{ }invention of the printing press as but one example of an inventor\textit{ unique situatedness.} A critical step in Gutenberg\textit{ }invention required solving how to press paper to affix images or type.\footnote{Dean Keith Simonton, \textit{Scientific Genius: A Psychology of Science} 34\textsuperscript{19} (1988).} Gutenberg did so when he was participating in a wine harvest, which led him to draw a connection between using the principles for pressing grapes to make wine to press paper to affix images or type.\footnote{Id. at 35.} This illustration suggests what sociologist Robert Merton has shown more systematically, that \textit{once a scientific problem has been defined, profound individual differences among scientists will affect the likelihood of reaching a solution.}\footnote{Merton, supra note 150, at 349.}

This belief that inventors are uniquely placed to solve particular problems in certain ways is distinct from views about authors\textit{ uniquely personal connection to their artistic works.} Inventors, unlike authors, are ultimately guided to their creations by functional considerations of solving a particular problem, such as cooling air, creating software to encrypt communications, or providing a vaccine for polio.\footnote{Id.; Fromer, supra note 123, at 1468\textsuperscript{22} 71; see supra text accompanying notes 49\textsuperscript{23} 51.} A poignant childhood memory, vacation experience, or lasting emotion might help guide
the inventor’s mind to particular scientific and technological problems to study or successful problem solutions. However, if personal emotions, memories, or themes do not help solve a particular problem, inventors will be guided away from them by functional considerations to particular solutions. For Gutenberg, if his experience with grape presses had not helped solve the problem of affixing print to paper, Gutenberg likely would have searched elsewhere possibly beyond his personal experiences and emotions to find a solution.

User innovators are one subset of inventors likely to have strong personhood interests in their inventions. They are users of commercial products that rely on their experiential needs to modify these products to satisfy their own needs. As Professor Katherine Strandburg illustrates with mountain biking equipment, user innovations often depended on information that the inventors had obtained through their own cycling experience, reflecting their own unique circumstances and interests, such as a desire to bike in extreme weather conditions or to perform acrobatic stunts. Their principal goal is to improve commercial products to which they have a personal connection based on use or reputation within the relevant user community. These motivations are frequently romantic and personal. User innovators explains Strandburg, may be more likely to be personally invested in their inventions and more likely to believe that there are acceptable and unacceptable uses for...

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173 In parallel, the audience for artistic works is frequently interested in understanding a creator’s intended meaning. Hughes, supra note 54, at 1421–43. By contrast, the audience for inventions is typically not.
175 Strandburg, supra note 174, at 479 n. 80.
176 Id. at 480.
177 See William W. Fisher III, The Implications for Law of User Innovation, 94 Minn. L. Rev. 1417, 1418 n. 30 (2010); Strandburg, supra note 174, at 469 n. 70, 481.
178 See Gambardella et al., supra note 151, at 35.
Thus, user innovators might strongly hold personhood interests in their advancements.

Inventors' regard for their inventions' integrity might be strong, given their heavy personhood interests. That said, their integrity interests are at less risk than authors'. If a third party makes changes to someone's invention, that invention might no longer work, thus discouraging such changes. By contrast, the public might readily consume changed artistic works, at a detriment to authors' integrity. Therefore, while inventors' integrity interests might be strong, they are somewhat less at risk than authors'.

Another personhood aspect vital to inventors is their reputational interest. Empirical studies show that inventors are heavily concerned with the prestige and reputation that can result from their creative activities. Professor Robert Merton, despite describing a communism pervading the scientific community, observes that scientific norms give innovators a claim to recognition and esteem, such as via eponymy for their results (as in the Copernican system or Boyle's law). This reputation interest is so important, in Merton's view, that society's systems of priority in discovery are designed to protect this interest. If the view that almost all innovations are inevitable products of society's accumulated knowledge is correct, it is all the more striking to see the severe priority fights that ensue when there is near-simultaneous invention by more than one individual.

Finally, inventors underscore the connection between their labor and their discoveries or creations. Thomas Edison famously noted:

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179 Strandburg, supra note 174, at 499.
180 See Dreyfuss, supra note 4, at 641.
181 See id.
182 See id.
183 See id.
184 Gambardella et al., supra note 151, at 415, 351 36, 36 tbl.5.1; Rossman, supra note 152, at 152 tbl.9.
185 Merton, supra note 150, at 273 l. 74.
186 Id. at 273 l. 74, 293 l. 305 (taking cognizance, also, of science's institutional norm of humility, of arguing one's debt to one's predecessors).
187 See id. at 273 l. 74; accord Rebecca S. Eisenberg, Proprietary Rights and the Norms of Science in Biotechnology Research, 97 Yale L.J. 177, 197 l. 98 (1987); cf. infra Section III.E (exploring the first-to-invent standard as an expressive incentive).
188 Supra note 111.
189 See Merton, supra note 150, at 370 l. 83 (noting, also, scientists' strong resistance to studying the phenomenon of multiple invention).
190 See Hughes, supra note 54, at 145; Moore, supra note 146.
us is one percent inspiration[,] ninety-nine percent perspiration. Inventors and those aspiring to invent repeat this aphorism, emphasizing the belief in laboring toward inventions. Moreover, in another example, scientists who made a significant breakthrough with the hypothalamus gland emphasized their labor as a key aspect of their work: Nobody before had to process millions of hypothalami. . . . The key factor is not the money, it’s the will . . . the brutal force of putting in 60 hours a week for a year.

All in all, the evidence suggests that inventors’ typical personhood and labor interests in their inventions are qualitatively similar to those characteristic of authors in their artistic works. However, some notable differences appear between the two, particularly based on inventions’ functionality, a quality not necessary for artistic works. Therefore, inventors’ personhood interests might easily deform to accommodate functionality. In addition, despite qualitative similarity, it is also possible that these interests take on different magnitudes for authors and inventors as distinct groups.

Some notions of personhood and labor that authors and inventors associate with their creations might seem outdated in today’s corporate environments, in which collaboration is mainstay and firm ownership of rights in these creations is rampant. Contemporary invention is frequently the product of many people’s work on a corporate research project and professional writing is equally collaborative. Nonetheless, authors and inventors’ beliefs in their constellation of moral-rights interests seem to remain undiminished and perhaps even magnified in today’s collaborative and corporate environments. For one thing, studies

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194 See Gambardella et al., supra note 151, at 341.
195 Fisk, supra note 161, at 1133.
196 Woodmansee, supra note 111, at 241, 25. See generally Stefan Wuchty et al., The Increasing Dominance of Teams in Production of Knowledge, 316 Science 1036 (2007) (showing that teams increasingly produce knowledge across a wide range of domains, including science, engineering, social sciences, arts, and humanities).
emphasize the unique vantage point individual creators still bring to their collaborations. Moreover, creators’ articulations of their strong moral-rights interests have not diminished in today’s more collaborative environments. In fact, evidence points to increasing individualism in contemporary society, despite (or perhaps in spite of) ever more collaboration and corporatization. As but one example, federal courts have observed in patent cases involving collaborative inventorship that the individual inventors insist that their contributions were the most critical, often magnifying their own efforts post hoc.

Given the importance to authors and inventors of their personhood and labor interests in their creative works, copyright and patent laws advance their utilitarian goals when they incorporate this significance into the incentives they offer to creators. By providing incentives that express solicitude for and effectuate creators’ moral rights—something critical to them—copyright and patent laws can provide a strong incentive to creators to make socially valuable works.

Incentives—the underpinning of intellectual property—work only if they motivate authors and inventors to create (or indirectly stimulate others, like firms, to encourage them to create). Incentives in intellectual property law, as conventionally understood, offer the creator some pecuniary advantage to encourage socially valuable artistic, scientific, or technological production. However, creators’ beliefs in their moral rights typically seem to dominate their pecuniary interests in creating (at least in their own possibly self-serving statements). If true, provid-

197 See Merton, supra note 150, at 345–46; Sauermann & Cohen, supra note 151, at 2136.
198 See Gambardella et al., supra note 151, at 35–36, 42–43; Hughes, supra note 54, at 93.
199 See Hughes, supra note 54, at 93–95.
200 See Acme Highway Prods. v. D.S. Brown Co., 431 F.2d 1074, 1083 (6th Cir. 1970) (applying for this reason a clear and convincing standard to claim of joint inventorship for a patent issued in the name of a single inventor); U.S. Surgical Corp. v. Hosp. Prods. Int’l Pa’ry, 701 F. Supp. 314, 340 (D. Conn. 1988) (noting that one inventor’s feeling of sole ownership did not imply that invention was not joint).
201 In an ongoing project of interviews with artists and inventors, Professor Jessica Silbey finds that obtaining intellectual property protection is important to creators as a moral and personal matter. E-mail from Jessica Silbey to author (July 8, 2010, 10:08 EST) (on file with author); cf. Mary Madden, Pew/Internet & American Life Project, Artists, Musicians and the Internet 20, Dec. 5, 2004, available at http://www.pewinternet.org/~/media//Files/Reports/2004/PIP_Artists.Musicians_Report.pdf.pdf (showing that half of all artists questioned think that copyright laws are successful in protecting artists’ rights).
202 See Loren, supra note 7, at 34–40.
203 See supra note 7 and accompanying text.
204 E.g., Cskkszntmihalyi, supra note 135, at 107–08; Fromer, supra note 123, at 1483.
ing expressive incentives to creators might be more useful to intellectual property’s utilitarian goals than providing traditional pecuniary incentives in two mutually reinforcing ways. First, assuming expressive incentives are more valuable to creators than traditional incentives, they might be more of a lure to creators. Second, they might be cheaper for society to provide than pecuniary incentives, thus maximizing the utilitarian bargain. Given the pervasiveness of creators’ moral-rights interests, expressive incentives are at the very least important for consideration as incentives in intellectual property’s cost-benefit calculus, even if they do not dominate pecuniary interests.

Viewed this way, an optimized intellectual property system would likely contain some mix of pecuniary and expressive incentives. The law might layer expressive incentives atop the current pecuniary incentives it offers. Or, perhaps more tantalizingly, some of the law’s current pecuniary incentives could be replaced by certain expressive incentives valued sufficiently by creators. Of course, a utilitarian framework would consider the full costs and benefits of various pecuniary and expressive incentives: their desirability to creators, the costs they impose on society, and the benefits society derives from creators’ works that were motivated by these incentives.

A question remains as to whether intellectual property laws ought to amplify these moral-rights interests that are held strongly by authors and inventors. For one thing, these interests might not be realistically or rationally grounded. For example, a great deal of evidence casts doubt on the unique genius of inventors, given the near simultaneity of inven-

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205 Cf. Ginsburg, supra note 6, at 122 (“A writer who feels secure that she will receive name credit for her work, or an artist who can rely on the continued existence of his sculpture, may find this background knowledge more conducive to creative activity.”). Interesting psychological research shows that providing individuals with incentives to act creatively might counterproductively dampen their creativity. See, e.g., Beth A. Hennessey & Teresa M. Amabile, Reward, Intrinsic Motivation, and Creativity, 53 Am. Psychologist 674 (1998). These incentives tend to be pecuniary. Forthcoming work assesses how the particular incentives intellectual property offers or might offer affect creativity. Buccafusco, Fromer & Sprigman, supra note 109.


207 According incentives with creators’ beliefs, however, diminishes ethical questions that might arise about offering incentives that are exploitative. See generally Ruth W. Grant, Strings Attached: Untangling the Ethics of Incentives 6 (2012).
tion for many important inventions. As another case in point, probably owing in large part to creators’ expressive interests, Professors Christopher Buccafusco and Christopher Sprigman show that creators value their works more highly than do purchasers and owners of these works. Nonetheless, it is more feasible and productive to align with creators’ (and society’s) expressive norms, at least with regard to grants of incentives, so that they actually work. There is still the important caveat, however, that within the utilitarian framework, such incentives ought not to be granted if the harm they cause society outweighs their benefits. As an illustration, creator-centered expressive incentives that encourage creator narcissism or hubris in ways that hurt society at large might not be worthwhile.

The discussion thus far concentrates on both creators and society. What to make, then, of the fact that firms today own most patent rights and most valuable copyrights? As just discussed, authors and inventors appear to hold strong personhood and labor beliefs, even in today’s corporate world. As argued above, their actual views, even if poorly reflective of corporate realities, ought to be dominant in this context. However, if most intellectual property rights either automatically or eventually vest in firms, in exchange for some consideration—salary, payment, or other reward—to the creator, then it might seem to dampen the need for expressive incentives for creators. It would then seem to follow that the incentives offered by copyright and patent laws ought to speak principally to firms instead of creators.

Nonetheless, individuals still need at least some (pecuniary and expressive) incentives that intellectual property laws provide. For one thing, not all intellectual property rights are divested from a work’s creator. Even when they are, authors and inventors must still have adequate incentive to focus on creative production rather than other expend-

208 See supra note 111.
209 Buccafusco & Sprigman, supra note 123.
210 A study by John Allison and Mark Lemley shows that over eighty-five percent of patents were assigned by individual inventors to a corporate entity by the time of patent issuance. John R. Allison & Mark A. Lemley, Who’s Patenting What? An Empirical Exploration of Patent Prosecution, 53 Vand. L. Rev. 2099, 2117 (2000). For copyright statistics, see infra note 295 and accompanying text.
211 Supra text accompanying notes 194–99.
212 Supra text accompanying note 111.
214 See supra note 210; infra text accompanying note 295.
Itures of time and effort. In fact, thoughtful firms are interested in providing such incentives to their employees, even when their employees will not own intellectual property rights in their creations: evidence shows that some firms confer awards and other recognition on their most productive creator-employees. In addition, evidence demonstrates that most of the firms operating in the copyright and patent sectors are small. Robert Merges reasons, based on social-science research, that small creative teams allow individual participants more leeway than they would have as employees in large companies. With their less bureaucratic and hierarchical structure, these companies grant much personal autonomy to their employees to perform their creative work. Therefore, incentives can have quite a direct effect even in circumstances in which a corporation has been assigned ownership of the creative product ex ante.

More strongly, and perhaps most importantly in the context of expressive incentives, just because firms ultimately secure most intellectual property rights does not mean that no sticks in the bundle of rights ought to remain with the creator. For example, as discussed below, patent law requires an indirect form of attribution of invention to the individual inventors, even when a corporation owns the associated patent rights. Although China is not usually invoked favorably in discussing optimal intellectual property laws, China implements just such a split of rights in its copyright law: there, the author of some copyrighted works has the right to be credited as the author, even though all other rights belong to the author’s employer. In fact, divvying up legal entitlements at the outset between creators and firms can give each group incentives to bar-

215 Gambardella et al., supra note 151, at 35; Robert P. Merges, The Law and Economics of Employee Inventions, 13 Harv. J.L. & Tech. 1, 38–40 (1999). The need for expressive incentives in the law might be diminished in cases of corporate creation to the extent that firms comprehensively provide optimal expressive incentives to motivate their employees. That is only the case, however, if these incentives operate effectively. Compare Merges, supra, at 41 (supposing that they do), with Catherine L. Fisk, Credit Where It’s Due: The Law and Norms of Attribution, 95 Geo. L.J. 49, 60, 103 (2006) (providing various examples, including from Du Pont, the film Erin Brockovich, and the co-writing of a memoir, in which they did not).

216 Merges, supra note 40, at 204 & fig.7.1, 210f 12.

217 Id. at 213.

218 Id.

219 See infra Section III.A.

220 Julie E. Cohen et al., Copyright in a Global Information Economy 131 (3d ed. 2010).
gain with the other in ways that enhance economic efficiency.\textsuperscript{221} This condition can be seen as particularly welcome for creators laboring for firms when they lack sufficient leverage to bargain at arm's length with their firms.\textsuperscript{222}

These possibilities merely underscore the importance of future work studying incentives empirically. Empirical work can help demonstrate the appropriate audiences of intellectual property's incentives. It can also break down whether certain incentives ought to be aimed at creators and others at firms. It is hypothesized here that some expressive incentives might prove valuable to creators even if they know they are unlikely to retain the pecuniary incentives offered by intellectual property laws. The theoretical framework established herein of expressive incentives as a possible supplement to traditional pecuniary incentives ought to help structure the ideal shape of incentives in a utilitarian intellectual property system.

\textit{C. Expressive Law}

The previous Sections establish the notion of expressive incentives in intellectual property and show how they might help maximize a utilitarian system due to creators' beliefs about their moral-rights interests. I now anchor the notion of expressive incentives using work in other legal areas on law and norms and expressive theories of law. I also demonstrate how philosophical thinking on utilitarianism supports the inclusion of expressive incentives in those intellectual property law offers.

A robust literature studies the interaction between legal content and social norms, both descriptively and prescriptively. A dominant view of the interaction is that the law ought to institutionalize the norms people have so as to bolster law's enforceability and legitimacy.\textsuperscript{223} As Professor

Robert Cooter observes in the case of legal punishment, "when law aligns with social norms, the law can use state sanctions to supplement social sanctions. For example, fines can supplement the shame associated with being a tax cheater. Supplementing the social sanction with a legal sanction increases the total sanction." Conversely, when the law does not accord with people's norms, the law's credibility might be undermined.

Scholars show in the context of criminal law that people frequently assume the law's rules are the same as their own moral attitudes. People generally will suppose that the law took the right approach, one that is consistent with their moral attitudes, even when it did not.

Yet more pointedly, even when legal goals differ from people's norms, the law can sometimes achieve those goals in the guise of those different norms. Specifically, Professor Paul Robinson shows that the Model Penal Code, expressly designed to deter crime, frequently is retributive instead, thereby deferring to lay intuitions and norms of justice. For example, the Code contains the following rules and standards, which are strikingly retributive and are hard to explain under deterrence theories: excuses, such as insanity and duress; a failure to take into account coercive crime control factors, like age, family situation, and difficulty of crime detection; and standards requiring jury speculation as to what the defendant believed or hoped.


Id. at 165ff 68.

Id. at 181.


Robinson, supra note 228, at 1839.

Id. at 1842ff 57.
crime control requires a criminal code that is seen as adhering to the community’s shared perceptions of just desert.\textsuperscript{231} He elaborates that

the perception of a criminal code as doing justice is necessary for the code’s moral credibility, which in turn is necessary for the effective crime control that the drafters seek. It is necessary because the extent of criminal law’s moral authority determines the extent of its ability to shape community norms and to influence people’s conduct through normative forces.\textsuperscript{232}

That is, incorporating communal norms of retribution into criminal laws augments the law’s ability to deter criminal conduct.\textsuperscript{233} This amplification of deterrence works by getting potential criminals to see the communal shame they would suffer were they to commit crimes, thereby deterring them more readily than laws conventionally designed to deter without retribution would.\textsuperscript{234} To secure greater compliance with criminal law, then, Robinson and Professor John Darley argue for a just desert allocation of liability, . . . [in an] unusual form . . . : one based upon the community’s shared principles of justice rather than on those developed by moral philosophers.\textsuperscript{235}

This view of the harmonious interaction of law and norms has important implications for intellectual property laws with regard to incentive design. Just as criminal law can obtain deterrence by imposing retributive punishments that communally shame offenders, so too can intellectual property laws provide utilitarian incentives to create sounding in moral rights.\textsuperscript{236} Given that creators’ norms evoke their strong personhood and labor interests in their works, intellectual property laws can

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\textsuperscript{231} Id. at 1840.

\textsuperscript{232} Id.

\textsuperscript{233} Robinson & Darley, supra note 228.

\textsuperscript{234} Id. at 457; Robinson, supra note 228, at 1840\textsuperscript{f} 41, 1861\textsuperscript{f} 62.

\textsuperscript{235} Robinson & Darley, supra note 228, at 456.

\textsuperscript{236} There is, however, a difference from the criminal context. Criminal law operates to sanction violators, even when they are ignorant of its rules. United States v. Int’l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). For this reason, coincidence of norm and criminal law sensibly causes even the ignorant to obey the criminal law. By contrast, intellectual property incentives can work only when creators are aware of them. That said, as most authors and inventors are repeat players in the intellectual property system, Liza Vertinsky, Comparing Alternative Institutional Paths to Patent Reform, 61 Ala. L. Rev. 501, 538 (2010), they are likely to have this awareness after a first legal interaction.
amplify the incentives to create by offering those that are protective of, or express solicitude for, these moral-rights interests.\textsuperscript{237}

To be sure, there is another conflicting way to see the law's role with regard to norms. This alternative view suggests that the law ought to institutionalize those things that lawmakers find desirable but are not norms.\textsuperscript{238} According to this perspective, norms frequently come with their own social enforcement systems (like reputational loss), so law's force ought to be imposed only when there is no good extra-legal mechanism to achieve a result.\textsuperscript{239} Regardless whether this view is sensible, it is not germane to designing intellectual property law's incentives. Unlike criminal law or other legal prohibitions (including those against infringement of intellectual property rights), incentives that seek to motivate individuals to create socially valuable works—something they are under no obligation to do—should align with how people actually view the world. If lawmakers were to decide that certain incentives were optimal in contravention of widespread norms on creation, the incentives would not realistically motivate creators to craft valuable works for society.\textsuperscript{240}

\begin{footnotesize}
\textsuperscript{237} Welfare economics might look at the different individuals and add up utilities to make a rule, but it might make sense within this framework to choose another rule because without it there could be broad harm to the system. That is, to the extent that expressive norms are perceived as fair, creation of intellectual goods might be undermined if those norms are not represented in the law because of a wide perception of unfairness. Cf. Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 Harv. L. Rev. 708, 710 (2007) (Although [contract] law should not aim to enforce interpersonal morality as such, the law's content should be compatible with the conditions necessary for moral agency to flourish. Some aspects of U.S. contract law not only fail to support the morally decent person, but also contribute to a legal and social culture that is difficult for the morally decent person to accept. Indeed, U.S. contract law may sometimes make it harder for the morally decent person to behave decently.).


\textsuperscript{239} See Feldman, supra note 223, at 232.

\textsuperscript{240} Cf. Zamir & Medina, supra note 96, at 327 (Since people's behavior is commonly influenced by social norms and prevailing moral intuitions, any theory seeking to explain and predict people's behavior should take threshold constraints into consideration). In this sense, the context and thrust of my thesis avoids a critique made against Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961 (2001). They argue that if individuals in fact have tastes for notions of fairness that is, if they feel better off when laws that exist or events that they observe are in accord with what they consider to be fair then analysis under welfare economics will take such tastes into account.
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Related to work on law and norms are expressive theories of law. According to this branch of thought, expressive theories tell actors whether individuals, associations, or the State to act in ways that express appropriate attitudes toward various substantive values.\(^\text{241}\) Scholars have developed robust expressive legal theories in other legal areas.\(^\text{242}\) Professors Elizabeth Anderson and Richard Pildes analyze many constitutional rules aimed at expressing moral values, such as against discrimination under the Equal Protection Clause and in favor of religious freedom under the Establishment Clause.\(^\text{243}\) Professor Cass Sunstein writes that environmental laws, such as endangered species protection, are a symbol of a certain conception of the relationship between human beings and their environment.\(^\text{244}\) Professor Carol Rose and others suggest that property law expresses the central role of the institution of property in mediating human conflicts and in drawing people into a fruitful moderation and mutual attentiveness.\(^\text{245}\) Working in the area of criminal law, Professor Dan Kahan, similar to Paul Robinson, argues...
that the law can expressively deter people from committing crimes. He suggests, for example, that certain punishments, like imprisonment, express greater community disapproval than do others, like fines. As such, individuals reasonably seeking to avoid greater community shame ought to be deterred from committing crime by the former class of punishments more than they would be by the latter. Kahan advises that a community that cares about deterrence ought to concern itself not just with how much pain different punishments impose and how many dollars they cost, but also with how forcefully they communicate society’s condemnation.

One can likewise see the worth of expressive incentives in intellectual property. In addition to the utility of conferring expressive incentives that protect moral-rights interests so as to spur creators to make valuable works, expressive incentives can also convey solicitude for the personhood and labor values about which authors and inventors care deeply. By mere virtue of this expression, these incentives can also encourage authors and inventors to create and distribute socially valuable works and opt into intellectual property systems that express respect for their moral rights.

Accommodation of expressive incentives in a utilitarian intellectual property system also finds parallel grounding in philosophical thinking on utilitarianism. Utilitarianism, as articulated by classical thinkers like Jeremy Bentham and John Stuart Mill, holds that actions are right in proportion as they tend to produce happiness [or pleasure or welfare]; wrong as they tend to produce the reverse. The goal is to maximize society’s overall happiness or welfare. According to Mill and other utilitarians, the things intellectual property laws traditionally seek to

247 Id. at 352.
248 Id. at 383–85. But see Eric A. Posner, Law and Social Norms 97–103 (2000) (arguing that criminal punishments that shame can fail to deter when the relevant subcommunity sees these punishments as a badge of honor).
250 Supra text accompanying notes 223–40.
252 Mill, supra note 251, at 111–12.
promote the progress of Science and useful Arts and societal enjoyment of the goods that tend to be covered by these laws are quintessential goals for which utilitarians ought to strive.

Utilitarian thinking in intellectual property is typically one flavor of philosophical utilitarianism: rule utilitarianism. According to this form,

[i]nstead of individual decision procedures, we evaluate codes of moral rules. The ideal code is the set of rules where the consequences of everyone following them would be better than the consequences of everyone following any other set of rules. We then assess acts indirectly. The right act is the act called for by the code.

Intellectual property laws establish rules with the aim of maximizing social welfare by encouraging individuals to create valuable works with the reward of incentives, enough to make individuals pursue creation but not so much as to harm society.

Today, we frequently overlook that classical models of utilitarianism account for the expressive effects of various courses of action in selecting the optimal one. Jeremy Bentham made much the same point as Dan Kahan and Paul Robinson about choosing criminal punishments that express community shame to maximize punishments’ efficacy. Both Bentham and Mill indicate that virtue, freedom, individuality, and other ethical goals that many might see as foreign to utilitarianism are desirable goals in that they bring people and society happiness or pleasure, thereby maximizing general welfare. Measuring individual utility based on the relative personal importance [a person] assigns to various

253 U.S. Const. art. I, § 8, cl. 8.
254 See Mill, supra note 251, at 14 (listing as fundamental goals: mental cultivation; pleasure from music, art, and poetry; and knowledge about nature and history); Henry Sidgwick, The Methods of Ethics 114 (rept. ed. 1922) (1874) (listing as ideal goods: knowledge, the development of knowledge, and beauty).
255 See Moore, supra note 146, at 65.
256 Tim Mulgan, Understanding Utilitarianism 120 (2007); accord David O. Brink, Mill’s Ambivalence About Rights, 90 B.U. L. Rev. 1669, 1671 (2010).
257 See supra Section I.A. But cf. Moore, supra note 146, at 74–76 (observing that American copyright and patent laws might not implement rule utilitarianism strictly).
258 Bentham, supra note 251, at 170–71 nn.11–12.
economic (and noneconomic) alternatives allows us to measure the value individuals attach to the constellation of interests at stake from a moral-rights perspective. Moreover, Mill defends the protection of moral rights, or more generally, a personal right, a claim on the part of one or more individuals, like that which the law gives when it confers a proprietary or other legal right. He reasons that

justice is a name for certain classes of moral rules which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice that of a right residing in an individual implies and testifies to this more binding obligation.

Respecting rights, according to Mill, can have social utility in large part because doing so prevents harm to others on metrics that matter to them.

So too in intellectual property we can see the desirability of accounting for notions of moral rights in utilitarianism. Because moral rights at least the constellation of personhood and labor interests discussed above matter so much to authors and inventors, accounting for them in the rules that constitute the American utilitarian system of intellectual property ought to maximize overall welfare by incorporating the metrics

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261 Cf. Zamir & Medina, supra note 96, at 333 ff. 35 (discussing how utilitarians sometimes argue that accounting comprehensively for both long-term and indirect effects in their analyses leads to conclusions that are akin to threshold deontology).

262 Mill, supra note 251, at 50.

263 Id. at 59.

264 Id. at 57 f. 58, 60 f. 61. Contemporary philosophers make variants of this argument. E.g., R.M. Hare, The Language of Morals 57 (Oxford Univ. Press 1991) (1952). These philosophical parallels might not satisfy those normatively committed above and beyond all other considerations to moral rights rather than utilitarianism. Some contemporary philosophers, most notably Professor David Lyons, seek to show how to read Mill as consistent with a utilitarian approach to moral rights and justice that avoids common problems philosophers usually encounter in trying to fuse the two, such as reconciling utilitarianism and maximization of welfare with inviolable rights. David Lyons, Rights, Welfare, and Mill: Moral Theory 14 f. 17 (1994); accord Brink, supra note 256 at 169 f. 99; Philip Pettit, The Consequentialist Can Recognise Rights, 38 Phil. Q. 42, 51 f. 53 (1988); Peter J. Hammond, Utilitarianism, Uncertainty and Information, in Utilitarianism and Beyond, supra note 260, at 85, 90 f. 102. But see Amartya Sen, Personal Utilities and Public Judgements: Or What Wrong with Welfare Economics?, 89 Econ. J. 537, 554 (1979).
that matter to creators so as to maximize the return to society on creative
works (but not so far as to harm society).

This survey of other branches of scholarship, in both law and philoso-
phy, deepens the support for enlarging the understanding of incentives in
intellectual property to include those that are expressive. Literature on
law and norms suggests that intellectual property incentives ought to re-
ly on authorship and inventorship norms that will persuade authors and
inventors to create. Expressive theories of law further indicate the utility
of incentives in intellectual property that express solicitude for creators’
moral-rights interests. Finally, philosophical thinking on utilitarianism
endorses and encourages looking to non-pecuniary interests that contrib-
ute to people’s happiness or pleasure to maximize utility for society.

I now turn to areas in intellectual property law that can be understood
as potential areas to build up expressive incentives.

III. POTENTIAL APPLICATIONS

In this Part, I examine areas in American copyright and patent laws in
which expressive incentives already seem to be at work. I do so for two
reasons. First, these are promising areas in which to consider implemen-
ting useful expressive incentives, even if the current form such incentives
take is anemic. Second, these areas reveal that expressive incentives al-
ready might be at work even if not optimally in some pockets of
copyright and patent laws, providing further explanatory power for these
areas. My recommendations in this Part are tentative. The precise form
expressive incentives ought to take and the ideal mix of expressive and
pecuniary incentives are both important questions for future study.265

In turn, I consider attribution, copyright’s structure of duration, copy-
right’s right of reversion, copyright’s originality requirement, patent’s
former first-to-invent rule, and patent’s written description requirement.
I also discuss how problematic rights of integrity, adaption rights, and
restraints on alienation of exclusive rights can be to the overall expres-
sive goals of copyright and patent law. I conclude with some thoughts
on legal structures that might account for the diverse set of authors and

265 Cf. Yuval Feldman & Orly Lobel, The Incentives Matrix: The Comparative Effectiv-
eness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, 88 Tex. L. Rev.
1151, 1152 (2010) (studying in the context of encouraging employees to report illegality the
efficacy of four different legal mechanisms: anti-retaliation protection, duty to report, liabil-
ity fines, and monetary incentives).
inventors that create and the different incentives that might work for them.

A. Attribution

Perhaps the most promising expressive incentive is a right attributing a protected work to its creators. In this Section, I explore why attribution can serve as an expressive incentive, as well as how attribution is found in part in patent law but is principally absent in copyright law. I also sketch a more robust form of attribution.

A work’s attribution to its creators can be an expressive incentive for two reasons, both related to personhood interests. First, attribution can bolster an author’s or inventor’s reputation. Attribution makes it easy to broadcast a creator’s involvement, enabling the public to give kudos to the creator. A strongly positive reputation can provide the creator with financial rewards, such as increased professional opportunities and a higher salary. In this sense, providing attribution to creators is nothing more than a traditional pecuniary incentive. Yet attribution can also be expressive. By bolstering a creator’s reputation, attribution expresses the creator’s central value to his or her work. Just as Robert Merton observed with regard to eponymy in scientific theories, attribution rewards the creator with reputational gain, something important to the creator in having created the work.

Attribution can also serve as an expressive incentive in another way. In a visible way, it establishes a link between the creator and the creator’s work. By doing so, it concretizes the personhood interest creators have in viewing their creations as strong components of their self-concept. Even if the creator ends up having no rights to control the work’s use, attribution retains for the creator this visible link.

The case of attribution shows that a single right can confer both pecuniary and expressive incentives. Attribution can provide creators with

266 Fisk, supra note 215, at 50.
267 Id.
268 Cf. Hansmann & Santilli, supra note 61, at 104–05 (explaining how moral-rights protections might serve pecuniary purposes).
269 See supra Section II.B; see also Fisk, supra note 215, at 76 (describing contemporary attribution norms, such as those for Hollywood screen credit and in scientific articles).
270 See supra Section II.B.
271 Cf. Fisk, supra note 215, at 53 (‘[Legal rights to knowledge must be bifurcated into exclusivity rights . . . and attribution rights . . . ’).
increased pecuniary rewards during their careers, as well as boost their reputation and highlight their creations as extensions of the self. Attribution is considered to be highly desirable to artists and inventors. In fact, artists frequently think mistakenly that seeking copyright protection is worthwhile to provide them with attribution rights. Moreover, by 2004, authors were choosing Creative Commons licenses requiring attribution approximately ninety-eight percent of the time, prompting Creative Commons to make it a standard feature of its licenses. Empirical work also shows that, in order to receive attribution for their work, creators are willing to reduce significantly the amount of money they are willing to accept to license their intellectual property rights. Additionally, in a recent instance, a photographer was content to receive attribution for a photograph she took of a sunglasses-wearing Hillary Clinton that was virally used and viewed by many others imagining that Clinton was exchanging certain invented text messages with others, after initially being upset that the photograph had been used without asking, paying, or crediting her. Katherine Strandburg also hypothesizes that some doctors’ prominent and controversial patent-infringement lawsuits against other doctors for using their patented medical procedures were

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272 E-mail from Jessica Sibley, supra note 201.
273 Creative Commons “provide[s] . . . a set of copyright licenses and tools that create a balance inside the traditional ‘all rights reserved’ setting that copyright law creates, ranging from the possibility of opting out of copyright altogether to reserving some or all rights. About, Creative Commons, http://creativecommons.org/about (last visited Mar. 29, 2012).
275 Christopher Jon Sprigman, Christopher J. Buccafusco & Zachary C. Burns, What’s a Name Worth?: Valuing Attribution and Publication in Intellectual Property, 93 B.U. L. Rev. (forthcoming 2013) (manuscript at 26f’27), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011403. Based on this finding, Sprigman, Buccafusco, and Burns tentatively argue against an attribution right in creators because it would likely result in fewer (or less efficient) bargains, because now authors must bargain for this valuable right. Id. (manuscript at 44). That neglects the ex ante value that attribution can serve to get authors to create and distribute in the first place. Relatedly, this finding overlooks the situation in which creators bargain over attribution and other rights before the creation of particular works, as frequently happens in employment and contracting agreements. The finding also assumes that an endowment effect would prevent authors from efficiently bargaining over attribution vis-à-vis other rights.
instigated because they had not received credit they felt they were due for their inventions.\textsuperscript{277}

An attribution right can take different forms. The protected work itself\textsuperscript{280} such as a film, novel, computer software, or machine\textsuperscript{277} might contain the requisite attribution. By contrast, attribution might be more indirect, by appearing in a registration or application for legal rights in the work. In this sense, attribution will be visible only to those reviewing the work's legal rights.

Moreover, varying remedies might be provided for breach of attribution. The law might provide damages for lost financial opportunities\textsuperscript{278} or for personhood harms suffered. It might also require correction of attribution errors. Alternatively, the law might nullify exclusive rights in the work or forbid distribution of a creator\textsuperscript{281} works lacking the proper attribution.

Current patent and copyright laws ever so faintly provide for attribution. Patent law requires attribution to inventors of patented inventions by requiring that all inventors be named in an invention's patent application (and any issued patent).\textsuperscript{280} In so doing, patent law acknowledges the individuals who contributed sufficiently to the invention's creation. Under the recently enacted America Invents Act, patent law provides that the PTO can authorize a correction, with no further repercussion to patent rights, for any failure to attribute the invention in the patent to the correct set of inventors.\textsuperscript{281}

Although this form of attribution has hardy aspects, it is relatively weak overall. Although correcting attribution errors is protective of the attribution interest, its principal infirmity comes from where it happens. It is far more indirect in attributing than a requirement directly crediting all produced or commercialized patented inventions to their inventors.


\textsuperscript{278}Fisk, supra note 215, at 53.

\textsuperscript{279}See id. (noting the presence of this latter remedy in moral-rights regimes).


\textsuperscript{281}Leahy-Smith America Invents Act, Pub. L. No. 122-29, §§ 4, 20, 125 Stat. 284, 295 (2011) (to be codified at 35 U.S.C.). The previous implementation of patent law had provided two possible remedies for failure to attribute the invention in the patent to the correct set of inventors. If an attribution error was made without deceptive intent, the PTO could have authorized a correction, with no further repercussion to the patent rights. 35 U.S.C. §§ 115i 116, 256 (amended 2011). Otherwise, an attribution error would have rendered the patent invalid. Pannu v. Iolab Corp., 155 F.3d 1344, 1349f 50 (Fed. Cir. 1998).
The current requirement conveys attribution information not to all users or viewers of the invention, but only indirectly to those people who see the relevant patent. 282

Interestingly, as law and practice moved away from granting employees ownership of patent rights in their inventions, 283 one might have imagined that patent law’s attribution to inventors would have also fallen away. Yet patent law still requires this attribution even in the not infrequent case that inventors working in a corporate setting have contracted away their patent rights to their employer. 284 Catherine Fisk ascribes this requirement to “reinforce[ment] in the public mind[of] the idea that individual effort, not an organized and employer-sponsored research agenda, produced most inventions.” 285 She concludes that patent law, in requiring attribution, invites inventors to identify their creations as a product of their personal genius. 286

Attribution fares worse in American copyright law than in patent law. American copyright law lacks a general right attributing protected works to their authors. 287 Nothing in copyright law generally requires that authors be identified as a condition for copyright protection or provides authors with an attribution right. 288 That said, copyright law will sometimes encourage indirect attribution of protected works. It does so by promoting copyright registration, which requires that a work’s authors be listed. 289 To secure copyright protection, a work need not be registered (and thus there is no comprehensive requirement of indirect attribution). Copyright law, however, provides a significant incentive to

282 That said, many, if not most, commercialized patented inventions are attributable to their inventors indirectly through the invention itself. Patent law encourages patentees to mark their inventions with the associated patent number, so as to provide notice (constructively) of patent rights for damages recovery in an infringement action. 35 U.S.C. § 287(a) (amended 2011). Doing so leads interested parties from invention to patent, which attributes the invention to its inventors.

283 Fisk, supra note 161, at 1130.


285 Fisk, supra note 161, at 1140.

286 Id.

287 Dreyfuss, supra note 4, at 641 & n. 181.

288 Id. That said, courts often find that failure to attribute a work to its author weighs against finding a fair use. See Núñez v. Caribbean Int’l News Corp., 235 F.3d 18, 23 (1st Cir. 2000); Narell v. Freeman, 872 F.2d 907, 914 (9th Cir. 1989).


290 Id. § 408(a).
register copyrights, as registration is almost always a prerequisite to an infringement action.\textsuperscript{291} When a copyright is registered, then, attribution happens indirectly, similarly as in patent law. Much like patent law, copyright law provides for supplementary registration to correct attribution errors, but does not invalidate the copyright.\textsuperscript{292}

Not only is indirect attribution not required in copyright law, but in some cases the actual individual creators of a copyrighted work are not deemed to be authors of the work and are thus erased from any indirect attribution that ultimately occurs. This situation arises with regard to works made for hire. According to American copyright law, copyright automatically vests in the employer for these works, works created by employees in the scope of their employment (and by some independent contractors commissioned to do works).\textsuperscript{293} When a copyright is registered in a work made for hire, the employer is to be listed as the author, with nary a mention of the employee-creator.\textsuperscript{294} As of 1955, forty percent of all copyright registrations were works made for hire and the percentage has likely increased since then.\textsuperscript{295} For this significant class of works, there is no attribution to the individual creator.

Even beyond registration as a situs of attribution, copyright's work-for-hire doctrine erases the employee-creator. The work-for-hire doctrine principally originated out of concerns for efficiency. As a practical matter, notes Kenneth Crews, it is not surprising that "full rights to [these] works would accordingly repose with the employer who presumably funded the creation."\textsuperscript{296} If ownership of works by employees would nearly always pass to the employer by agreement (or similarly, commissioned works to the commissioner), it was thought to be more effective to grant the initial copyright to the patron than require a transfer each time.\textsuperscript{297} The doctrine originated in the courts in the mid-nineteenth century, with judges deciding that copyright in certain employee-created

\begin{itemize}
\item \textsuperscript{291} Id. § 411.
\item \textsuperscript{292} 37 C.F.R. § 201.5(b)(2)(ii) (2011).
\item \textsuperscript{293} 17 U.S.C. § 201.
\item \textsuperscript{294} Id.; see also U.S. Copyright Office, Form TX, http://www.copyright.gov/forms/formtx.pdf (last visited Mar. 30, 2012).
\item \textsuperscript{295} Lemley, supra note 52, at 883.
\item \textsuperscript{296} Kenneth D. Crews, Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine, 55 Syracuse L. Rev. 189, 237 (2005).
\item \textsuperscript{297} See Ginsburg, supra note 64, at 1088. That said, there is the countervailing interest of ensuring that creators start out with some legal entitlement to facilitate optimal bargaining. Supra text accompanying notes 219 f 222.
\end{itemize}
works was intended to be held by the employer.\textsuperscript{298} Congress implemented this doctrine statutorily in 1909,\textsuperscript{299} later revising it in 1976.\textsuperscript{300}

When Congress codified the work-for-hire doctrine, rather than rewrite the copyright corpus in an unwieldy way, it labeled the employer or commissioner as the work’s author.\textsuperscript{301} In this sense, the label can be viewed as nothing more than a term of art to designate the copyright’s legal owner.\textsuperscript{302} Others, like Justin Hughes, suggest another reason for this label: the patron has "tremendous control over the artistic program," particularly when "the patron’s intentions imbue and control the artistic endeavor."\textsuperscript{303} Judicial analysis of whether a work was made for hire reflects this understanding.\textsuperscript{304} This conception accords with at least some artists’ views of commissioned and noncommissioned works: Hughes tells of a visual artist who "said that although her patron had given her great creative leeway, she could not put her heart and soul into the work."\textsuperscript{305}

That said, this understanding is arguably out of place given the authorial focus of the Constitution’s grant of congressional power to enact copyright laws.\textsuperscript{306} Moreover, many authors view even commissioned works as personal experiences within their control.\textsuperscript{307} Even if it is true that the patron has a greater degree of control over a work than when the individual creator works alone, the creator is not an automaton but is engaged in individual expression within the patron’s constraints.

The truth about hired authorship likely lies somewhere between the two poles. As Fisk observes, "Early twentieth-century firms used that same mythic genius in their effort to assert corporate control over an increasingly wide range of intellectual property, while at the same time

\begin{footnotes}
\item[298] Bracha, supra note 3, at 252; Fisk, supra note 141, at 10ff.
\item[301] Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, 1088 (superseded 1976); Bracha, supra note 3, at 261.
\item[303] Hughes, supra note 54, at 154; accord Hansmann & Santilli, supra note 61, at 134; Peter Jaszi, On the Author Effect, in The Construction of Authorship, supra note 4, at 29, 34.
\item[304] Hughes, supra note 54, at 155ff (citing cases).
\item[305] Id.
\item[306] Dreyfuss, supra note 4, at 602ff; Ginsburg, supra note 64, at 1089ff.
\item[307] Supra text accompanying note 126 (quoting Michelangelo).
\end{footnotes}
downplaying or ignoring individual creative genius so as to assert corporate ownership over those copyrighted works. In most instances, employers are likely dictating some contours of employees’ works, while employees are devising and implementing others. The erasure of the employee-writer, then, from copyright law (including from any attribution similar to that obtained by those outside of the work-for-hire doctrine) likely underrepresents the degree of personhood and labor interests the individual creator has in these works. In fact, French copyright law, which is heavily grounded in moral rights, holds as a dominant principle that only a natural person may be an author. Therefore, French law, albeit with some exceptions, precludes the existence of doctrines of works for hire that vest not only the initial ownership of copyright, but also the status of author, in the employer.

In sum, then, absent a small class of optional copyright registrations for works not made for hire compared with the class of copyrighted works at large, copyright law does not generally provide for attribution of works.

 Nonetheless, via the Visual Artist Rights Act of 1990 (VARA), copyright law does confer an attribution right in a very limited subset of copyrighted works to creators producing visual art in distributions of less than two hundred. These creators have the right to claim authorship and prevent the use of their name on works created by others or modified versions of their work. By contrast, European laws typically provide a general right of attribution as recognition of the author’s moral rights in a work.

Other areas of American law are equally unhelpful in providing authors with attribution rights. Until 2003, many federal courts had held that the Lanham Act would guard authors against false attribution of their works. They had relied on Section 43(a) of the Act, which provides that any person who, on or in connection with any goods or ser-

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308 Fisk, supra note 141, at 6.
309 Id.
310 Id. § 106A(a).
311 Lastowka, supra note 144, at 68–69.
312 Lastowka, supra note 144, at 68–69.
vices... uses in commerce... any false designation of origin... which... is likely to... deceive as to... the origin... of his or her goods, services, or commercial activities by another person... shall be liable in a civil action. But in 2003, the Supreme Court held that the rights conferred by the Lanham Act belong to the producer of the tangible goods that are offered for sale rather than the author of any idea, concept, or communication embodied in those goods. The Court rejected the latter, broader possible interpretation because it would create a species of perpetual patent and copyright, which Congress may not do. As the discussion above implies and as Professor Barton Beebe points out, however, copyright creates rights distinct from attribution: the exclusive right to claim attribution does not necessarily carry with it the exclusive right to control the uses of the good to which that attribution is affixed.

In sum, patent law provides indirect attribution to inventors generally. Copyright law provides attribution indirectly in a limited number of cases and directly in an even smaller number of cases under VARA. Other laws do not seem to protect attribution.

Given that attribution seems likely to be a valuable expressive incentive, it is useful for further exploration as a possible motivator for authors and inventors to create. In fact, authors and inventors might consider it to be more valuable than pecuniary rights provided by intellectual property protection. Moreover, depending on implementation, society might be able to provide this right at a relatively low cost. Linking attribution of individual creators even for works made for hire to any registration or application for intellectual property rights would be cheap to provide. By contrast, requiring attribution to an individual creator every time his or her creation (or any part of it) is invoked

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317 Id.
318 Barton Beebe, Intellectual Property Law and the Sumptuary Code, 123 Harv. L. Rev. 809, 887 (2010). More helpful have been some courts’ interpretations of the Digital Millennium Copyright Act, which prohibits certain removals of copyright management information attached to copyrighted works. See 17 U.S.C. §§ 1201–1205 (2006). Some courts have found a violation under this provision when attribution to the author was removed from a work, even though it does not seem Congress intended such an instance to count as an encroachment. Joseph P. Liu, Universal v. Corley: The Canonical, Yet Atypical, DMCA Case, in IP at the Edge, supra note 277 (manuscript at 10).
319 See Fisk, supra note 215, at 50.
could be expensive to implement, given the amorphousness of invocation and the possibility that the quality of creators’ works would suffer from constantly needed attributions. However, some bright-line attribution rule that is less extreme, yet still protective of many invocations or uses of creators’ works, might be a valuable component of intellectual property protection. Due to both the probably high value to authors and inventors and the possible low cost to society, a carefully designed attribution right might be a useful incentive for intellectual property laws to provide, perhaps even replacing some other pecuniary incentive.

**B. The Structure of Duration**

As another example of an expressive incentive likely to be helpful, this time just in copyright law, consider the structure of duration. Take Stieg Larsson. About a year before he died, he finished writing a trilogy of crime novels that, after his passing, went on to sell more than thirty million copies. Under American copyright law, which confers protection for the author’s lifetime plus seventy years, these books will remain under copyright for just over seventy years. J.D. Salinger, by contrast, published *The Catcher in the Rye* at the age of around thirty-two and died fifty-nine years later. By the same rule, his copyright endures for 129 years (the fifty-nine years of his life following the writing plus seventy years after his death). Thus, Salinger receives nearly fifty-nine years’ worth of protection that Larsson does not. Even a single author’s works can have dissimilar durations. Had Salinger written another novel in the days before his death, copyright in that work would endure for six decades less than that of *The Catcher in the Rye*. Copyright duration, then, varies based on the length of the author’s lifetime and not on the work that has been created.

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323 See infra text accompanying note 340.
At first glance, this durational structure seems hard to explain in a utilitarian framework: why would authors with similar works who just happened to create them at different points in their lifetimes be accorded perhaps wildly different durations for their copyrights? After describing how American copyright law settled on this durational structure, I return to this question and explain that, viewed through an expressive lens, copyright’s durational structure is plausibly sensible in a utilitarian system.

Until 1976, copyright duration did not vary based on an author’s lifetime. Instead, it was fixed and keyed to a work’s publication. The 1710 Statute of Anne protected new books for fourteen years, with a term of fourteen more if the author was still living.325 In 1790, Congress enacted the first federal copyright law, with the same durational terms.326 Over time, Congress extended copyright duration, and by 1909, the law provided for a first term of twenty-eight years, followed by a renewal term of another twenty-eight years.327

In 1976, Congress completed a major overhaul of copyright law. According to the House Report, changes to copyright’s durational structure instituting a general term of lifetime of the author plus fifty years stood above other revisions.328 The House of Representatives Judiciary Committee felt bound to adduce the rationale for this monumental change. Some proffered reasons related to the longer duration provided by this change, such as accounting for increased average life expectancies for authors and for the longer commercial life of works.329 One important reason, however, related to the change in durational structure, from a fixed term to one keyed to the author’s lifetime. Congress observed that a very large majority of the world’s countries have adopted a copyright term of the life of the author and 50 years after the author’s death.330 This disparity had already provoked considerable resentment and some proposals for retaliatory legislation.331

325 Bugbee, supra note 65, at 53–54.
326 Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).
329 Id. at 134.
330 Id., at 135.
331 Id.
ciprocal protection through conformity with international practice, Congress thought, would redound to the benefit of American authors.\textsuperscript{332} Despite these asserted advantages, the Copyright Office noted two downsides to switching to a life-plus-years format. First, it would be easier to measure copyright duration with a fixed term commencing with the work's creation or publication.\textsuperscript{333} While an author is still alive, one could not definitively compute a copyright duration with a life-plus-years structure. Even when the author has died, information about the author's date of death might not be readily accessible.\textsuperscript{334} By contrast, one can measure a fixed copyright duration once one knows when the copyright commenced.\textsuperscript{335} Additionally, a fixed duration could be employed across the board regardless of the type of copyrighted work, whereas a life-plus-years format would necessitate treating certain works like anonymous works differently.\textsuperscript{336}

The 1976 Act provided a different rule for the duration of three types of copyrighted works that do not fall under the general rule: works made for hire, anonymous works, and pseudonymous works.\textsuperscript{337} The last two involve works whose true author is unknown; thus, copyright duration

\textsuperscript{332} Id. Another reason the Judiciary Committee provided is that it would simplify matters. Before, a person inquiring into whether a work was in the public domain for purposes of, for example, licensing, would need to look at the work's date of registration or publication. But now an author's copyrights would all expire simultaneously, a "definite, determinable event, and it would be the only date that a potential user would have to worry about." Id. at 134. Surely, that is true. But it also creates additional offsetting complications, which make it unlikely that this change alone justifies the structural change. For one thing, a term fixed to the author's lifetime is more difficult to trace than one fixed to some fact about the relevant work. For example, it is harder to know if a book's author is still alive (or ascertain the author's date of death) than to know when a book's copyright was registered (or when the book was published, for that matter). See Landes & Posner, supra note 7, at 361; Avishalom Tor & Dotan Oliar, Incentive To Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons from a Behavioral Economic Analysis for Eldred v. Ashcroft, 36 Loy. L.A. L. Rev. 437, 456 (2002). For another thing, it becomes harder to determine copyright duration for works made up of separate contributions (such as a book comprised of original essays), as the copyright in each contribution will expire at the conclusion of seventy years following the death of its author.

\textsuperscript{333} See Copyright Office Report, supra note 59, at 48.


\textsuperscript{335} Copyright Office Report, supra note 59, at 48.

\textsuperscript{336} Id. at 48f-49.

\textsuperscript{337} See 17 U.S.C. app. § 302(c). This Act also treats differently works that were jointly authored but not made for hire, by virtue of the fact that they have multiple authors. See id. § 302(b). Copyright in these works lasts for the life of the last surviving author plus fifty years after the last surviving author's death. Id.
cannot be based on the author’s life. For these three types of works, Congress provided for a term of seventy-five years from the year of first publication or one hundred years from creation, whichever expires sooner.

In 1998, Congress, in the Sonny Bono Copyright Term Extension Act, extended the postmortem term of copyright duration to seventy years. (The increase of twenty years was applied to all copyrights, extending the duration of works for hire and anonymous and pseudonymous works to ninety-five years from the year of first publication or 120 years from creation, whichever expires sooner.)

I now show how copyright law’s durational structure can serve as an expressive incentive. It is important not to conflate duration’s structure with its length. In theory, duration can be long or short. Setting an appropriate length within the framework of a utilitarian system is principally an economic question. In fact, commentators note that patent duration currently set principally at twenty years from the date of patent application is significantly shorter than copyright because of economic differences between the two subject matters. There is greater social need to have patented items fall into the public domain so that they might be built upon cumulatively to advance scientific and technological progress, while copyrighted matter is not as necessary in that way, not least because copyright law permits subsequent creators to borrow ideas and certain amounts of expression from these works.

Once one chooses an appropriate durational length for copyright, one still must decide how to structure that duration. That is, a copyright’s duration might be statistically equivalent in length whether it lasts, say, seventy-five years from the work’s creation or, instead, for the author’s life.

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338 See id. § 101.
339 Id. § 302(c).
345 See Samuel J. Elder, Duration of Copyright, 14 Yale L.J. 417, 422 (1905); Landes & Posner, supra note 7, at 361.
lifetime plus fifty years.\textsuperscript{346} In fact, when it enacted the 1976 Copyright Act, Congress saw the two terms (the former for works made for hire and anonymous and pseudonymous work, the latter for other works) as statistically equivalent.\textsuperscript{347} Once the decision that approximately seventy-five years is an appropriate length is reached, one must still decide whether to create a term keyed to the relevant work\textsuperscript{*} creation, the author\textsuperscript{*} lifetime (plus some possible fixed term), or some other variable altogether.

It is often noted that copyright duration is one of copyright law\textsuperscript{*} most visible components to authors, if not the most visible.\textsuperscript{348} One way to provide incentive for people to create, then, is to use a durational structure that is particularly salient to creators. The structure of copyright duration can be seen as doing just that by invoking the author\textsuperscript{*} personhood interests as an incentive. By setting the author\textsuperscript{*} lifetime as the essential variable of copyright protection, copyright law shields works in an author-centered way: for the author\textsuperscript{*} lifetime (and a fixed terms of years following that). The author\textsuperscript{*} lifetime is arguably the duration for which the author\textsuperscript{*} personhood interest in his or her works remains most important, in that the author is associating his or her works with self-concept and building a reputation.\textsuperscript{349} Duration with a life-plus-years term is keyed to the author himself or herself, also sending a signal of how important the author is in copyright law.\textsuperscript{350} For all of these reasons, copyright\textsuperscript{*} durational structure can serve as an expressive incentive, which can be particularly helpful to advancing copyright\textsuperscript{*} goal of encouraging artistic creations.

Were copyright law to provide a statistically equivalent duration of a fixed term, it might not offer the same incentive to authors because it would not be offering protection for the author\textsuperscript{*} personhood or signaling any solicitude for it. Keying duration to the work\textsuperscript{*} creation or registration, as was once done, signals the work\textsuperscript{*} importance at the author\textsuperscript{*}

\textsuperscript{346} See Copyright Office Report, supra note 59, at 50\textsuperscript{1} 51.
\textsuperscript{347} 1976 House Report, supra note 328, at 138; accord Kaplan, supra note 66, at 112\textsuperscript{1} 13.
\textsuperscript{348} See, e.g., 1976 House Report, supra note 328; Kaplan, supra note 66, at 114\textsuperscript{1} 15.
\textsuperscript{349} See supra Subsection II.B.1.
\textsuperscript{350} That said, extending copyright duration beyond the author\textsuperscript{*} lifetime arguably goes beyond a moral-rights justification, given that the author is no longer alive. The Constitutionality of Copyright Term Extension, supra note 25, at 682\textsuperscript{1} 83. The addition of some term of years past the author\textsuperscript{*} lifetime, however, acts like an insurance policy, giving some certain degree of protection, when a person creates a copyrightable work toward the end of his or her life.
expense. The current durational structure, by contrast, assures the author that protection will attach for the author’s lifetime (and then some). In fact, Professors Avishalom Tor and Dotan Oliar show, in an experiment, that individuals prefer a life-plus-years term like Congress implemented to a comparable fixed term.

My understanding also makes sense of how authors seem to get treated differently for copyright duration. When two people create nearly identical works at different points in their lifetimes—say, fifty years before death and the other, say, fifty years before death—they will receive different terms of protection (seventy years in the first example and 120 in the second). When the same author creates two works—one early in life and another later on—copyright protection for both will expire at the same time, meaning different protective terms for each work. These results seem unfair from the narrower vantage point of rewarding equal term lengths to all similarly situated people or works. However, by viewing duration as an expressive incentive, these differential lengths make sense. If protection of the author’s personhood interests is an important goal, awarding a term that takes account of the author’s particular circumstances fulfills that goal in a way the equivalent fixed term across the board does not.

Whether Congress intended this expressive effect for the 1976 change in durational structure, this explanation makes sense of the change. Recall that Congress maintained that its change was intended to conform to the life-plus-years duration of other countries. Accordance with other countries’ durational structure must have been a thumb on the scale in favor of the switch in durational structure. Harmonization would ensure simplicity in that copyrights on the same work in many countries would expire simultaneously and without foreign resentment at more restrictive terms in the United States. But this interest could not have been the

351 This understanding also makes sense of copyright’s durational structure for works of joint authorship. See supra note 337 and accompanying discussion. For such works, copyright endures until seventy years after the death of the last surviving joint author. 17 U.S.C. § 302(b) (2006). This way, all joint authors’ personhood interests are protected.

352 Tor & Oliar, supra note 332, at 480f 81. Tor and Oliar offer a different and complementary explanation of why individuals prefer a lifetime-plus-years term to a comparable fixed term. They suggest that individuals are not fully rational, overestimating duration under a life-plus-years term. Id. at 441f 42. They hypothesize that authors are overly optimistic about how long they will live, an effect compounded when individuals add together unlike quantities (here, lifetime and a fixed term of years). Id. at 458f 59.

353 See supra notes 330f 332 and accompanying text.

354 See id.
whole weight, given how the United States ignores its treaty obligations or countervailing foreign laws in other areas of intellectual property.\textsuperscript{355} In fact, Bruce Lehman, the Assistant Secretary of Commerce in 1995, testified before Congress that the life-plus-years structure was easy for the United States to adopt because American legislators were in agreement with it anyhow.\textsuperscript{356} Rather than harmonizing just for its own sake, it is likely that Congress also wanted to accord with other countries’ durational structure because Congress was convinced, on the merits, that this structure was appropriate.\textsuperscript{357}

In fact, moral-rights justifications were made in other countries and treaties to which the United States acceded. Pertinently, France’s adoption in the 1790s of a copyright duration of at least the author’s lifetime sounded in large part in the authors’ moral rights in the personal artistic property they create.\textsuperscript{358} Similarly, the 1948 Berne Convention for the Protection of Literary and Artistic Works and its precursors advocated duration for the author’s lifetime plus at least thirty years, emphasizing the centrality of authors’ moral rights in their works.\textsuperscript{359}

Compare the expressive incentive offered by copyright’s general durational structure with its absence in the durational structure for works made for hire. Recall that the current duration for works for hire is ninety-five years from the year of first publication or 120 years from creation, whichever expires sooner.\textsuperscript{360} Commentators justifying the differential durations for works for hire and other copyrightable works do so on both practical and theoretical grounds. When ownership automatically vests in the employer, often a corporation or other enduring entity, duration cannot typically be measured against the employer’s lifetime.\textsuperscript{361} Practically, it must be keyed to something else, such as the creation or

\begin{footnotesize}
355 Two examples are the longstanding, but recently overcome, resistance to converting patent law’s first-to-invent standard to a first-to-file standard as used around the world, see infra Section III.E, and broad moral-rights protections, see Kwall, supra note 39, at 25f. 52.
357 See Elder, supra note 345, at 418, 421 (indicating prior support by American legal scholars for a copyright term keyed to the life of the author).
360 See supra note 341 and accompanying text.
361 See Crews, supra note 296, at 194, 214ff. 16.
\end{footnotesize}
publication date. Nonetheless, duration might still have been keyed to the lifetime of the individual creator, a natural person. Future work ought to explore whether works made for hire should be treated differently. It might be worthwhile to consider keying duration for works made for hire to the individual creator's lifetime, thereby also reasserting this creator's presence in copyright law.

C. Right of Reversion

As with copyright's durational structure, copyright law's right of reversion helpfully expresses solicitude for and protects authors' moral-rights interests. Going back to England's 1710 Statute of Anne, copyright law gave authors a contingent right of reversion. The Statute of Anne provided that if a work's author was still living after the copyright term of fourteen years, the copyright would return to the author for another equal term. As Professors Lionel Bently and Jane Ginsburg explain, '[i]n theory, the second fourteen years should have enabled the author to grant rights anew from a stronger bargaining position should her work have earned a substantial audience.' Ostensibly, then, this right's purpose was to help authors who might have contracted away their rights to the first copyright term for too little money. However, this right frequently went unexercised for two reasons. First, authors would commonly contract away their full copyright (including the reversionary right) to a publisher. Second, at that historical juncture, by the time the reversionary right kicked in, it was typically not worth exercising either because an author's work became valueless within the first term or the work became so valuable that the author was already updating the work, thus securing another copyright anew (along with an opportunity to renegotiate unfair terms).

362 See id. at 215.
363 Cf. id. at 237 ("The copyright law of many other countries is centered more on the interests of the author, or the person who actually did the creative work, whether or not in the context of employment.").
364 Bently & Ginsburg, supra note 69, at 1479.
365 Statute of Anne, 1710, 8 Ann., c.19, §§ I, XI (Eng.).
366 Bently & Ginsburg, supra note 69, at 1479.
367 See id. at 1485186.
368 Id. at 1492193. The exact mechanism by which the reversionary right was rendered ineffective may have been slightly more complex than mere assignment. See id.
369 See id. at 1539140.
When the United States enacted its first copyright law, it built on the Statute of Anne in many ways, but did not expressly include a right of reversion to authors, even though it granted two sequential copyright terms of fourteen years each, the second contingent on the author's survival. As in England, authors could contract away the full two terms. In the nineteenth century, some courts became more protective of the author, allowing the author to contract away the second term in advance only expressly. In response, publishers' contracts typically had authors give up both terms expressly, without separate consideration for the second term.

The year 1976 brought a more robust right of reversion to copyright law. The new law gave the author (or statutory heir) a right to terminate any grant of the copyright from thirty-five to forty years from the grant date (with between two and ten years of advance notification of termination). Nonetheless, this right has been less author protective than it might seem, as the advance notice requirement is not author friendly and courts have sometimes allowed authors to relinquish the right. The right is in fact infrequently exercised. Moreover, there is no termination right provided to the individual creators of a work made for hire.

In two ways, this right of reversion can helpfully serve as an expressive incentive. First, even if it is not exercised very much, it sends a powerful signal to authors that copyright law cares about the personhood, labor, and possessory interests they have in their work by allowing them to regain control of the rights in their work at a certain point in time. Second, to the extent it can plausibly be exercised, the right is protective of those same moral-rights interests authors have in their works. The right of reversion can be seen as restoring to the author control over the work on which he or she labored and infused with personhood. Rights in works that, to the author, are intimately linked with the author's being can be reunited, so to speak, with the author. With this

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370 Copyright Act of 1790, ch. 15 § 1, 1 Stat. 124, 124 (repealed 1802).
371 See Bently & Ginsburg, supra note 69, at 1550 (indicating that the ability to assign the second term was contingent on the author surviving the first term).
372 Id. at 1553.
373 Id. at 1554.
375 Bently & Ginsburg, supra note 69, at 1573, 1580.
right, then, copyright law might be understood as offering the expressive incentive of control, of knowing that a decision to contract away rights will not even legally extinguish the moral rights the author believes attach to the copyrighted work.

That is not to say that the termination right is definitively a helpful component of copyright law. From a pecuniary perspective, it serves both to protect those authors that exercise the right at the expense of transferees and to redistribute wealth from less successful artists to more successful ones. As to the latter, the right does so by ensuring that copyright transferees pay less up front to all artists because of the possibility of authors later terminating these transfers. Only successful authors will likely terminate transfers and thus benefit in a way likely exceeding any offset in price accepted at the outset, but unsuccessful authors likely will not terminate (or benefit), thus losing twice. All in all, in evaluating the desirability of a termination right as an expressive incentive, both the expressive and pecuniary costs and benefits of providing such a right must be understood and considered.

D. Originality

Copyright law’s originality requirement, while not protective of authors’ moral-rights interests in any substantive way, helpfully expresses solicitude for them. As noted earlier, copyright protection extends to fixed original works of authorship. Understanding originality as an expressive incentive places it in a different light than the traditional view of originality as a mere restriction on copyrightability.

The Supreme Court’s most recent formulation of the originality requirement occurred in Feist Publications v. Rural Telephone Service Co., a case involving the copyrightability of a local telephone directory

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379 See Raustiala & Sprigman, supra note 378.

380 See id.

381 See supra note 11 and accompanying text.

listing names in alphabetical order, along with their towns and telephone numbers.\textsuperscript{383} The \textit{Feist} Court held that work is original so long as it was independently created by the author (as opposed to copied from other works), and . . . it possesses at least some minimal degree of creativity.\textsuperscript{384} The requisite level of creativity, according to the Supreme Court, is extremely low; even a slight amount will suffice.\textsuperscript{385} A work must merely evidence intellectual production, . . . thought, and conception.\textsuperscript{386} Originality does not match up to a requirement of true novelty; a minimally creative work is protectable even if there is a nearly identical work, so long as the other work was not copied.\textsuperscript{387} As Judge Learned Hand observed, \textit{[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an author, and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.}\textsuperscript{388} It is thus the rare work that will not meet the low threshold of originality. For example, the Court held that the telephone directory in \textit{Feist} was insufficiently original because its factual raw data did not owe its existence to the directory creator and the selection and alphabetical arrangement of the directory entries was not creative enough.\textsuperscript{389} The threshold for copyright protection is thus minimal but not absent.

Even though there are some works of authorship that are insufficiently original to receive copyright protection, they are few compared with the vast set of authored works that qualify under the minimal originality standard.\textsuperscript{390} In this sense, copyright law would protect almost precisely the same set of works absent its originality standard. As a practical matter, why then include a nominal originality standard?

Of course, one answer might be that it is worthwhile to exclude certain unoriginal works from copyright, even if they are few and far be-

\textsuperscript{384} Id. at 345.
\textsuperscript{385} Id.
\textsuperscript{386} Id. at 362 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884)).
\textsuperscript{387} Id. at 345f 46.
\textsuperscript{389} \textit{Feist}, 499 U.S. at 361f 64.
\textsuperscript{390} Alan E. Garfield, Calibrating Copyright Statutory Damages to Promote Speech, 38 Fla. St. U. L. Rev. 1, 34 (2010).
This traditional view sees originality as a restriction in copyright law.

An additional way to see originality, though, is as an expressive incentive. It communicates to authors that it will protect works infused with the author's personality. In both of its components—Independent creation and a modicum of originality—copyright's standard of originality highlights, as I explore in previous work, an author identifying subjective emotional themes or ideas to transform into artistic expression. With regard to the requirement of independent creation, the emphasis is on the personal discovery of a subjective problem that artists express in their work. Justice Holmes recognized as much in one of the Supreme Court's most notable copyright decisions, *Bleistein v. Donaldson Lithographing Co.* In holding a color poster advertising a circus to be copyrightable, Justice Holmes wrote that creation of an artistic work is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright.

The emphasis helps explain why it is that Judge Learned Hand hypothetically (though improbably) identical and subsequent version of Keats' *Ode on a Grecian Urn* receives copyright protection, even though Keats' version is already a part of the cultural fabric. Because locating the themes and emotions typically necessary to artistic creativity is so personal, copyright law places greater value on rewarding authors for using their pen to convert their valuable emotional and subjective concepts into an artistic product than on making sure that identical works do not receive a copyright. Relatedly, independently created ar-

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391 There is debate over whether the Supreme Court's understanding of originality is sensible. Compare Zimmerman, supra note 382, at 205–06 (suggesting that it accords with the Constitution's minimal requirements for copyright), with Ginsburg, supra note 130, at 1907–13 (arguing in favor of protection for certain works that are often considered to have "low authorship," principally facts and information collected in databases).

392 Fromer, supra note 123, at 1492.

393 188 U.S. 239 (1903).

394 Id. at 251.

395 Id. at 250. That said, *Feist* rejection of copyright protection for sweat-of-the-brow works also renounces any solicitude for an author's labor interests in those works.

396 Fromer, supra note 123, at 1493.
tistic works appropriating the works of others, such as those of Jeff Koons,\footnote{See Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006).} can nonetheless contain sufficient personhood to be original.\footnote{Cf. Hughes, supra note 54, at 127 (arguing that an appropriation artist might be trying to recapture and reconvey his own personal expression).}

The originality standard thus expresses solicitude for authors’ personhood interests in their works. As such, it ought to signal to authors that copyright laws will be protective of these interests in significant ways. In this way, it can serve as a helpful expressive incentive for authors, even though it does not directly protect authors’ moral-rights interests.

\textit{E. First To Invent}

Until recently, one was able to observe a similar expressive incentive at work in patent law with regard to its (recently rejected) first-to-invent standard. After describing this standard and its replacement with a first-to-file standard to comport with international consensus, I explain how it could have served as an expressive incentive, in addition to being a threshold requirement for patentability.

As discussed above, a patent can be obtained on an invention that is novel, useful, and nonobvious.\footnote{See supra notes 19–21 and accompanying text.} Suppose two inventors come up with the same invention. Patent law dictates that only one of them is entitled to a patent in that invention: until this September, it was the person who was the first to invent.\footnote{Dennis D. Crouch, Is Novelty Obsolete? Chronicling the Irrelevance of the Invention Date in U.S. Patent Law, 16 Mich. Telecomm. & Tech. L. Rev. 53, 56 (2009); Mark A. Lemley & Colleen V. Chien, Are the U.S. Patent Priority Rules Really Necessary?, 54 Hastings L.J. 1299, 1299 (2003).} This longstanding law had a mechanism for determining priority between competing claims to inventorship: \[\text{[T]here shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.}\footnote{35 U.S.C. § 102(g)(1) (2006).}

By contrast, patent law in almost every other country employs a first-to-file system, awarding a patent to the first applicant to have filed.\footnote{Crouch, supra note 400, at 54 ff 55.}

This September, the United States aligned itself more closely with these other countries by moving American patent law closer to a first-to-file
When the new law goes into effect in 2013, the first applicant to file for a patent will win the patent, except in a few circumstances, such as when a second filer was first to publicly disclose the invention. There is also a new defense to infringement liability for commercial uses of a patented invention principally predating the patent application by more than one year. As such, the new law is principally a first-to-file system with remnants of something akin to a first-to-invent system, with a perhaps broad exception for someone else who is first to publicly disclose and infringement immunity for some prior users.

Proponents of a move to a first-to-file system emphasized that harmonization with the rest of the world's laws would help establish consistency in entitlement to patent rights. They also suggested that the administrative costs of resolving disputes over priority in a first-to-invent system far exceed those for determining the first filer's identity. Opponents of this legal change maintained that it would discriminate against small firms or individual inventors, who might take longer to file a patent application than a big firm would. They argued that a switch might be unconstitutional, stating that Congress is authorized to award patent rights only to inventors.

Whichever side one took in this debate, there seems to have been a strong sense that the fairest rule in the abstract is to award patent rights to the first to invent, but for the administrative costs and harmonization interest. Moreover, the incorporation of prior-users rights and a public-disclosure exception into the new American law, as other countries have done in part, arguably indicates at least general discomfort with

404 Id. §§ 100, 102, 146, 125 Stat. at 285–86, 293.
405 Id. sec. 5, § 273, 125 Stat. at 297.
406 Lemley & Chien, supra note 400, at 1303f 04.
407 Id. at 1304f 05.
408 Id. at 1299. There is empirical evidence that this effect would occur. David S. Abrams & R. Polk Wagner, Poisoning the Next Apple? How the America Invents Act Harms Inventors, 65 Stan. L. Rev. (forthcoming 2012) (manuscript at 4f 6).
the fairness of an absolute first-to-file system.\textsuperscript{411} And even though a first-to-file system would likely produce differences in priority in only a tiny fraction of patents issued annually,\textsuperscript{412} there were numerous proponents of retaining the first-to-invent system.

What seems to drive the notion that it is fair to vest patent rights in the first to invent is likely linked closely to inventors' personhood and labor interests. Inventors hold strong reputational interests in their creations, and as such are strongly invested in attribution of their inventions to themselves.\textsuperscript{413} More broadly, inventors tend to feel strong personhood and psychological possessory interests in their creations.\textsuperscript{414} Robert Merton has observed that fights over priority, with all their typical vehemence and passionate feelings, are not merely expressions of hot tempers, although these may of course raise the temperature of controversy; basically, they constitute responses to what are taken to be violations of the institutional norms of intellectual property.\textsuperscript{415} Merton notes furthermore that these institutional norms in intellectual property are borrowed from the norms of the scientific community itself.\textsuperscript{416}

It would seem, then, an overlooked downside of moving away from a first-to-invent system toward a first-to-file system, even with reasonably broad exceptions attuned to prior uses or disclosures of an invention, is the diminishment of a helpful expressive incentive. A first-to-invent standard prominently signaled to inventors that their personhood norms including reputation and self-concept were accorded respect in patent law's award of rights.\textsuperscript{417} In addition, then, to having served as a restriction on who might receive a patent, it could have spurred inventors to invent in the constraints of the patent system by expressing solicitude for their interests. This insight ought to have given Congress pause

\textsuperscript{412} Cf. Lemley & Chien, supra note 400, at 1331 (\textsuperscript{While the percentage of patent applications that involve a priority dispute is quite small, it is no smaller and indeed is somewhat larger than the percentage of patents that are ever enforced.\textsuperscript{}}).
\textsuperscript{413} Supra notes 184–189 and accompanying text.
\textsuperscript{414} See supra Subsection II.B.2.
\textsuperscript{415} Merton, supra note 150, at 293.
\textsuperscript{416} See id.
\textsuperscript{417} Cf. Ryan K. Dickey, Note, The First-To-Invent Patent Priority System: An Embarrassment to the International Community, 24 B.U. Int'l L.J. 283, 292 (2006) (\textsuperscript{Arguments to retain the first-to-invent system are especially powerful in light of non-utilitarian theories, such as fairness and personhood.\textsuperscript{}}).
before it replaced the first-to-invent standard (although recognition of prior-user rights does emphasize other inventors’ connections with their own works).

F. Written Description

Patent law has other spots where expressive incentives might be helpful and where they may indeed currently exist, albeit not in full-bodied form. Consider the disclosure requirement in patent law that a patent’s specification shall contain a written description of the invention. The written-description requirement ensures that the inventor is in possession of the claimed invention. Although the written description was originally required to prevent patent applicants from amending patent claims to include things or processes not within their initial application, the Federal Circuit in recent years has invoked it as a substantive test for adequate disclosure. According to the Federal Circuit:

[A] separate requirement to describe one’s invention is basic to patent law. Every patent must describe an invention. It is part of the quid pro quo of a patent; one describes an invention, and, if the law’s other requirements are met, one obtains a patent. . . . A description of the claimed invention allows the [PTO] to examine applications effectively; courts to understand the invention, determine compliance with the statute, and to construe the claims; and the public to understand and improve upon the invention and to avoid the claimed boundaries of the patentee’s exclusive rights.

Just like copyright law’s originality requirement, patent law’s written-description requirement tends to be viewed as a restriction: comply with it or get no patent. For example, many understand the Supreme Court’s 1853 decision in O’Reilly v. Morse to strike down Samuel Morse’s patent on the telegraph as being in violation of the written-description requirement. In addition to narrower claims linked more

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419 Ariad Pharms. v. Eli Lilly & Co., 598 F.3d 1336, 1351 (Fed. Cir. 2010).
421 Ariad, 598 F.3d at 1345.
422 See supra Section III.D.
424 E.g., Ariad, 598 F.3d at 1346 n.4.
tightly to Morse’s actual discovery, Morse’s patent broadly claimed “the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed for marking or printing intelligible characters, signs, or letters, at any distances.” The Court struck down that broad claim, refusing to grant Morse an exclusive right to use a manner and process which he has not described and indeed had not invented, and therefore could not describe when he obtained his patent. In so doing, the Court denied Morse patent protection for aspects he did not demonstrate were in his inventive possession based on his written description of the invention when he sought a patent. In this light, as Professor Michael Risch explains, “written description helps fulfill dual goals of the patent system: securing claims as broad as the inventor’s contribution, but preventing claims that are broader than the inventor’s contribution.”

Notwithstanding O’Reilly and a handful of other cases, some suggest that the written-description requirement is at best meaningless, in that very few cases fail to meet the requirement. They also emphasize that the bulk of any useful disclosure that patent law demands already happens through the law’s enablement requirement, which requires to demonstrate in the specification to “any person skilled in the [relevant] art [how] . . . to make and use the [invention] without undue experimentation.” Some go further and suggest harm that the written-description requirement might impose on the patent system, in providing

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425 O’Reilly, 56 U.S. (15 How.) at 112.
426 Id. at 113.
429 Ariad, 598 F.3d at 1364 (Rader, J., dissenting in part and concurring in part); id. at 1367/68 (Linn, J., dissenting in part and concurring in part).
430 35 U.S.C. § 112 (2006). This, however, does not mean that a person skilled in the art must be enabled to make and use a perfected, commercially viable embodiment absent a claim limitation to that effect. CFMT, Inc. v. Yieldup Int’l Corp., 349 F.3d 1333, 1338 (Fed. Cir. 2003).
431 Monsanto Co. v. Syngenta Seeds, 503 F.3d 1352, 1360 (Fed. Cir. 2007) (quoting In re Wright, 999 F.2d 1557, 1561 (Fed. Cir. 1993)).
courts with an ad hoc tool to strike down patent claims they do not like.\textsuperscript{432}

This debate over the written-description requirement overlooks the requirement's possible expressive utility. Consider the Federal Circuit's 1998 decision in \textit{Gentry Gallery v. Berkline Corp}.\textsuperscript{433} Before Gentry Gallery came up with its invention, the reclining seats of a sectional sofa would face different directions because the recliner needed to have an arm on which to put the controls, which placement was not good for television viewing or intimate conversation.\textsuperscript{434} Gentry Gallery found a way to make a sectional sofa in which two reclining units, both independently controllable, faced in the same direction, and secured a patent on its invention.\textsuperscript{435} Gentry Gallery solved this problem by putting the recliner controls on a console between the two recliners.\textsuperscript{436} As described by the Federal Circuit, the patent specification only describes sofas having controls on the console and an object of the invention is to provide a sectional sofa with a console . . . that accommodates the controls for both the reclining seats.\textsuperscript{437} In addition, James Sproule, the patent's named inventor, testified that locating the controls on the console is definitely the way we solved [the problem of building a sectional sofa with parallel recliners] on the original group [of sofas].\textsuperscript{438} Some of the patent claims were, however, broader, in that they described an invention in which the recliners' control means were not limited to a fixed console between the two recliners.\textsuperscript{439} Sproule admitted that he did not consider placing the controls elsewhere until after the patent application was filed and he saw that some competitors had done so, thereby prompting Gentry Gallery's lawyers to broaden the patent claims.\textsuperscript{440} The patent specification, however, could not be amended to include new matter,\textsuperscript{441} which is why it remained narrower. The Federal Circuit invalidated these broader

\textsuperscript{433} 134 F.3d 1473 (Fed. Cir. 1998).
\textsuperscript{434} Id. at 1474\textsuperscript{1} 75.
\textsuperscript{435} Id. at 1475 (quoting Reclining Sofa, U.S. Patent No. 5,064,244 col.4 l. 68\textsuperscript{1} col.5 l. 27 (filed Jan. 3, 1991) (issued Nov. 12, 1991)).
\textsuperscript{436} Id. at 1477.
\textsuperscript{437} Id. at 1478 (quoting 244 Patent col.1 ll. 35\textsuperscript{1} 37).
\textsuperscript{438} Id. (second alteration in original).
\textsuperscript{439} Id. at 1475.
\textsuperscript{440} See id. at 1479.
claims on the ground that the patent specification did not show that Sproule was in possession of the broader invention because the original disclosure clearly identifies the console as the only possible location for the controls.\textsuperscript{442}

Rulings like \emph{Gentry Gallery} and \emph{Morse}, even as rare as they are, suggest that the extent of the patent right is based on what the inventor actually appreciated to be the scope of his or her invention, as set out in the patent specification. Patent claims cannot be broadened beyond what the inventor actually devised. Even though this rule serves to limit the breadth of an inventor’s patent claims in a way that can be contrary to the inventor’s pecuniary interests the rule expresses the centrality of the inventor’s vision of his or her creation to patent rights. Even when an inventor files a patent application on behalf of an assignee,\textsuperscript{443} the inventor must swear that he or she invented the creation described in the patent.\textsuperscript{444} The written-description requirement, in conjunction with this oath, expresses solicitude for and protects inventors’ personhood and labor interests. For one thing, it reinforces the psychological possessory interest they feel in the invention. Moreover, it enables inventors to define the invention so closely linked with their self-concept. Additionally, the particular description can help inventors control the shape of their reputation. Finally, beyond protecting their moral-rights interests, the mere fact that a patent’s claim scope hinges on what the inventor discovered expresses solicitude for the inventor’s moral-rights interests by indicating that the inventor is the key inventive figure.

\section*{G. Integrity and Adaptation}

I now turn to a major right typically invoked when discussing moral rights, the right of integrity, to demonstrate the possible harm to intellectual property’s utilitarian goals in implementing the wrong sort of expressive incentives, at least in a strong form. As discussed above, authors and artists often have strong feelings of integrity with regard to their works.\textsuperscript{445} They will often be worried about the changes that might

\textsuperscript{442} \textit{Gentry Gallery}, 134 F.3d at 1479 (reasoning that the patent specification provides for only the most minor variation in the location of the controls, noting that the control may be mounted on top or side surfaces of the console rather than on the front wall \ldots without departing from this invention (quoting 244 Patent col.2 l. 68\textsuperscript{-}col.3, line 3)).

\textsuperscript{443} Supra Subsection II.B.2.

\textsuperscript{444} 35 U.S.C. § 115.

\textsuperscript{445} Supra text accompanying notes 125\textsuperscript{-}129.
be made to physical copies of the work they have distributed as well. Moreover, they also might be concerned with others making adaptations or other uses of their work, even when these adaptations or uses do not affect the physical copies of their work.\textsuperscript{446} By comparison, even though inventors might have similar feelings, their integrity is less likely to be at risk because changing an invention\textsuperscript{447} either physically or conceptually in some way might make it stop functioning.\textsuperscript{447} That said, inventors frequently seek to make improvements to others’ inventions by building upon them conceptually.\textsuperscript{448}

In this Section, I focus principally on copyrightable material, although some of what is said about art might be said about inventions as well.\textsuperscript{449} Despite authors’ frequently strong interests in integrity, there is a critical countervailing societal interest, as Amy Adler discerns, in allowing subsequent authors' modifications, destructions, and adaptations of existing creations to create further art.\textsuperscript{450} Any diminishment in such modifications or adaptations has an impact on those in society who would possess and enjoy such works. Thus, even though a robust right of integrity to authors might serve as a strong expressive incentive, it is likely to be inadvisable due to the intense expressive and other costs it might impose on society and its cultural progress.

VARA has provided authors with integrity rights in a very limited subset of copyrighted works, to creators producing visual art in distributions of fewer than two hundred.\textsuperscript{451} A creator of such work has the right, subject to certain limitations for visual art installed in or made part of a building,\textsuperscript{452} to prevent any intentional distortion, mutilation, or other

\textsuperscript{446} Not all authors care very deeply about maintaining control over derivative works, particularly noncommercial ones. Over two-thirds of Creative Commons licensors permit others to use their creations to make derivative works. Christopher Sprigman, Reform(ali)zing Copyright, 57 Stan. L. Rev. 485, 565 (2004).

\textsuperscript{447} Supra text accompanying notes 180\textsuperscript{f} 83.

\textsuperscript{448} See Fromer, supra note 20, at 548\textsuperscript{f} 49.

\textsuperscript{449} Patent law is different from copyright law in allowing improvers to obtain patents on their significant improvements to an already patented invention, which then blocks both the original and subsequent inventors from using the improvement unless they bargain with one another to do so. See Lemley, supra note 30, at 1008\textsuperscript{f} 10. By so doing, it protects the competing tugs of integrity in a different way than does copyright law.

\textsuperscript{450} Supra text accompanying notes 128\textsuperscript{f} 29.

\textsuperscript{451} 17 U.S.C. § 106A(a) (2006) (providing any author of a work of visual art with certain integrity rights); id. § 101 (defining a work of visual art as a painting, drawing, print, sculpture, or photograph produced in distributions of less than two hundred).

\textsuperscript{452} Id. § 115(d).
modification of [qualifying] work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.\textsuperscript{453} Moreover, subject to the same limitations, creators have the right to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.\textsuperscript{454} VARA thus gives authors a limited right of integrity in the physical manifestations themselves of certain visual art.\textsuperscript{455}

In terms of an integrity right with regard to conceptual borrowings or uses of copyrighted works, copyright law is more broadly protective of original authors. Copyright law confers on authors an exclusive right to prepare derivative works based upon the copyrighted work.\textsuperscript{456} A derivative work is defined broadly as any work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.\textsuperscript{457} As one notable example, the Second Circuit preliminarily enjoined ABC from broadcasting edited versions of \textit{Monty Python's Flying Circus}, in which twenty-four minutes of programming were cut from three thirty-minute programs to make time for commercial advertising and to remove offensive or obscene matter.\textsuperscript{458} Monty Python had claimed that this editing was a

\textsuperscript{453} Id. § 106A(a)(3)(A).
\textsuperscript{454} Id. § 106A(a)(3)(B).
\textsuperscript{455} By contrast, European laws typically provide a robust form of integrity rights as recognition of the author's moral rights in a work. See, e.g., Lucas & Plaisant, supra note 309, § 7(1)(c) (noting the broad scope of integrity rights under French copyright law).
\textsuperscript{456} 17 U.S.C. § 106(2). Similar protection of integrity is present in the compulsory license the law provides for covers (adaptations) of musical compositions that have already been publicly distributed in a sound recording. Id. § 115(a)(1). The privilege of compulsory licensing, however, allows only minimal changes to the musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.
†mutilation† that ruined the integrity of its work. The Second Circuit thought that copyright law could provide Monty Python with a successful cause of action, reasoning that the edits likely contravened Monty Python’s right to prepare derivative works from its underlying script. This case illustrates that the copyright owner’s right to prepare derivative works can be used as a way to ensure against edits and modifications to a copyrighted work that violate the author’s integrity.

Even in the face of copyright law’s broad grant of rights to original creators to their integrity against modifications to their work, copyright law is also protective of the competing societal interest in enabling subsequent creators to make such modifications. Copyright’s fair use doctrine excuses certain uses of a copyrighted work that would otherwise be infringing based on a judicial determination. To determine whether a use is fair, courts look to at least four factors: †the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,† the nature of the copyrighted work,† the amount and substantiality of the portion used in relation to the copyrighted work as a whole,† and the effect of the use upon the potential market for or value of the copyrighted work.”

In reliance on this doctrine, courts sometimes excuse material that uses—and perhaps modifies—other authors’ existing copyrighted material, such as parodies of other works, use of relevant art in historical reference books, and use of photographs to help tell a news story.

In spite of the great countervailing need to protect subsequent creators’ and society’s interest in valuable modifications to existing works, the fair use doctrine’s honorable as its goals might be is likely to be underprotective of these modifications. The four central factors of the fair use standard are thought to have infinite elasticity, possibly

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459 Id. at 18.
460 Id. at 20–21.
465 Núñez v. Caribbean Int’l News Corp., 235 F.3d 18, 20–21 (1st Cir. 2000) (judging the use of semi-nude modeling photographs of Miss Puerto Rico Universe in a news story about a scandal about those photographs’s propriety to be fair use).
suggesting their concomitant inability to resolve difficult questions. Documentarians do not know whether they can air an interview clip containing a copyrighted song in the background, the artist Jeff Koons does not know whether he can incorporate a copyrighted photograph into a collage painting, and avid fans do not know whether they can publish a reference guide to the series of Harry Potter books. Much of the uncertainty in applying the four-factor test derives from the fact that it is a standard.

As is, then, risk-averse authors might frequently avoid modifying works in ways that ought to be construed as fair uses or secure an unnecessary license authorizing this modification. In practice, then, fair use is probably not sufficiently protective of society’s interest in modifying works. Proposed fixes that might improve the expressive net value of authors’ integrity rights and subsequent authors’ interests in modifying existing works include establishing safe harbors for certain uses and setting out clearer sub-standards of fair use based on the major fair use patterns courts are finding.

All in all, the competing expressive tugs of original authors’ integrity interests and subsequent authors’ interests in using or modifying existing

466 4 Nimmer & Nimmer, supra note 456, § 13.05[A][5][c]; see also Michael W. Carroll, Fixing Fair Use, 85 N.C. L. Rev. 1087, 1094–95 (2007) (referencing judicial and scholarly frustration with the four-factor test); Pierre N. Leval, Commentary, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1107 (1990) (“Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.”). But see Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005, 156 U. Pa. L. Rev. 549, 574–7 (2008) (suggesting, after an empirical review of fair-use doctrine in the courts, that it is somewhat more predictable than is typically thought); Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L. Rev. 1525, 1533 (2004) (maintaining that social and cultural patterns underlying case-by-case adjudication of fair use problems may have achieved . . . a framework . . . that is both stable and relatively predictable in the context of legal doctrine”).


468 See Blanch v. Koons, 467 F.3d 244, 246, 259 (2d Cir. 2006) (finding the use to be fair).


471 Gibson, supra note 467, at 937 (suggesting that fair use be supplemented with a rule that no license is required for excerpts fewer than a certain number of words or seconds of recorded music); Gideon Parchomovsky & Kevin A. Goldman, Fair Use Harbors, 93 Va. L. Rev. 1483, 1488–89 (2007) (proposing safe harbors that would treat minimal uses, such as the reproduction of films that are ten seconds or less, as per se valid).

works to society’s benefit illustrate the dangers of granting expressive incentives that are too broad in certain contexts. Copyright law attempts to navigate the competing interests through a combination of VARA, exclusive rights to authors to prepare derivative works, and fair use. Although well meaning, this arrangement is likely to be overprotective of original authors’ expressive interests at the expense of subsequent ones.

**H. Exclusive Rights and Alienability**

Just as with the fear of heavy expressive costs associated with a broad right of integrity, there ought to be a worry about imposing heavy restraints on creators’ ability to alienate their rights in their intellectual property. The rights provided by copyright and patent law primarily and visibly serve to exclude others from certain uses of the creator’s work. As such, these rights themselves signal copyright and patent laws’ solicitude for creators’ expressive interests by granting them broad rights excluding others from using their work in ways that do not accord with the creators’ expressive goals.

Given that there are, or can be, substantial expressive protections for creators in intellectual property laws, should the law allow more expressive forms of protections to be alienated by creators? If so, the law might be signaling approval of creators’ commission of an abstract form of suicide, of relinquishing some part of their personhood. If not, the law might be seen as limiting creators’ personhood for the sake of their personhood. Forbidding alienation can harm society by rendering inefficient the variety and quality of works available to it, but allowing alienation too readily might injure creators in ways that make them less willing to create in the first instance.

Copyright and patent laws chart a course between these two concerns. Although copyright and patent laws generally allow creators to alienate their exclusive rights, there are some limitations that are protective of creators. For one thing, as discussed above, copyright law provides authors with the ability to terminate transfers at certain points in the copyright cycle. For another, copyright law has a statute of frauds, requir-

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474 See supra Section III.C.
ing all transfers\textsuperscript{475} other than those that happen by operation of law\textsuperscript{476} to be \textit{in writing} and signed by the owner of the rights conveyed or the owner's agent.\textsuperscript{476} Patent law similarly requires assignments of \textit{patents}, or any interest therein, to be \textit{by} an instrument in writing.\textsuperscript{477} A writing (signed, in the case of copyright law) is required to provide evidence of what tend to be valuable agreements, thereby deterring fraud; to prevent misunderstandings; and to emphasize the seriousness of the transaction.\textsuperscript{478} The Ninth Circuit has elaborated on these reasons: the writing rule \textit{ensures} that the creator of a work will not give away his copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price.\textsuperscript{479} In this sense, the writing rule forces creators to reflect on any expressive (and pecuniary) protections they may be relinquishing, without forbidding them from doing so. These laws are thus somewhat protective of creators' expressive interests, without going too far against alienability in ways that might hurt society at large.

\begin{quotation}
All in all, the potential applications discussed in this Part show some promising areas in which to consider implementing useful expressive incentives, even if the current form such incentives take is anemic, and some dangerous areas in which broad expressive incentives would harm the utilitarian system. In addition, these areas reveal the ways in which expressive incentives already might be at work in some pockets of copyright and patent laws, providing more explanatory power for these areas. Further work is important to shed light on the precise ways in which incentives either enhance or weaken creators' creative output and on the
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\textsuperscript{475} A transfer is defined broadly as \textit{an assignment}, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.\textsuperscript{475} 17 U.S.C. \textsection 101 (2006).

\textsuperscript{476} Id. \textsection 204(a).

\textsuperscript{477} 35 U.S.C. \textsection 261 (2006); see Abraxis Bioscience v. Navinta LLC, 625 F.3d 1359, 1366 (Fed. Cir. 2010); Gaia Techs. v. Reconversion Techs. 93 F.3d 774, 777 (Fed. Cir. 1996).


\textsuperscript{479} Effects Assocs. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990).
costs and benefits that various incentives might impose on society at large.\textsuperscript{480}

In carrying out future work, it is important to keep in mind that the set of authors and inventors is heterogeneous. Some creation happens with individuals working alone; other creation happens in firms. Some creators need pecuniary incentives to create; others might care more about expressive incentives. Some creators are attentive to the extent of exclusive rights that patent and copyright law provide; others are happy to do no more than list the patents they have received on their curriculum vitae.

As such, in reconceptualizing the role of incentives in intellectual property, it might be sensible to provide creators with a menu of incentive packages from which to choose as to the extent of their protection. For example, one incentive package might be heavily pecuniary with little expressive reward, another might be principally expressive with little pecuniary incentive (such as attribution), and another might be a tempered mix of the two. In an ideal world, each incentive package would be carefully calibrated to offer maximal societal benefits at minimal cost. Creators presumably knowing what they need can then choose the incentive package that best fits their needs, thereby maximizing the utility of the incentive.

\textbf{CONCLUSION}

This Article shows that what most scholars have seen as a conflict between theories of utilitarianism and moral rights in intellectual property can in fact frequently come together in a useful harmony. Moral-rights interests, if employed intelligently in the form of expressive incentives, can enhance the utilitarian incentive to create copyrightable or patentable works at minimal cost to society, thereby helping intellectual property laws fulfill their constitutional purpose. In that sense, this Article's aim is to complicate the understanding of incentives, beyond traditional pecuniary ones, to include expressive incentives. This Article illustrates a number of areas for potential implementation of expressive incentives in intellectual property law: attribution; copyright's durational structure, originality requirement, and right of reversion; and patent's recently rejected first-to-invent standard and written-description requirement. By contrast, some other areas, such as integrity, adaptation, and restraints on

\textsuperscript{480}See, e.g., Buccafusco, Fromer & Sprigman, supra note 109.
alienation of exclusive rights, are precarious places to implement broader expressive incentives because of the intense costs they would likely impose on society.

Although this Article’s goal has been to deepen the discussion of incentives in intellectual property laws, the ultimate goal of this line of inquiry is to illuminate the ideal mix of pecuniary and expressive incentives. As future work, a number of empirical projects would be particularly beneficial. First, it would be helpful to understand when pecuniary incentives might be traded away for expressive ones. For instance, would creators prefer copyright duration lasting for the author’s lifetime to a statistically longer, but fixed, duration? Would creators be willing to relinquish some of intellectual property laws’ exclusive (pecuniary) rights for a practicable form of attribution? Second, understanding the effects of different expressive incentives on creation would be valuable. One might compare regimes based on whether they confer moral rights of sorts: for example, the production of visual art before and after VARA’s enactment; countries with moral-rights protections and comparable ones without; and regimes with a first-to-invent standard and those with a first-to-file standard. Relatedly, we need to understand the costs and benefits of particular expressive incentives, such as attribution to a creator in a protected work itself as compared with in legal registration or application. Finally, it is important to probe how much incentives should speak to creators and how much to the firms that typically take pecuniary control of creators’ works. A richer understanding of pecuniary and expressive incentives will go a long way to optimizing intellectual property laws.