

ON THE AUTHOR EFFECT: CONTEMPORARY COPYRIGHT AND COLLECTIVE CREATIVITY

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Are there influences at work that will in time abate feelings of proprietorship and thus modify conceptions of copyright, especially those bearing on plagiarism? Probably so.

Much intellectual work including the distinctively imaginative is now being done by teams, a practice apt to continue and grow. The French have a name for it—*travaux d'équipe*. Such collaboration, I fancy, may diffuse and diminish emotions of original discovery and exclusive ownership.

—Benjamin Kaplan, *An Unhurried View of Copyright*¹

As exemplified by the articles in this volume, recent scholarship on "authorship" reflects various influences. Among the most important are Michel Foucault's article, *What Is an Author?*,² and Benjamin Kaplan's book, *An Unhurried View of Copyright*. Since the late 1960s, these two texts have influenced work in literary and legal studies respectively. Only recently, however, have the lines of inquiry that Foucault and Kaplan helped to initiate begun to converge.

Foucault asked literary critics and historians to question the received modern idea of "authorship," and to reimagine its future by reunderstanding its past. For the first time, he located the emergence of the "author" in the cultural context of the eighteenth century, arguing that "[t]he coming into being of the notion of the 'author' constitutes a privileged moment of *individualization* in the history of ideas."³ Moreover, he emphasized that the idea of "authorship" was neither natural nor inevitable, but represented only one possible means to the end of constraining the "proliferation of meaning."⁴ In so doing, Foucault suggested

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¹ Benjamin Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 117 (1967).

² The essay first appeared in English a decade after its French publication in 1969. See Michel Foucault, *What Is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (J. Harari ed., 1979).

³ *Id.* at 141.

⁴ *Id.* at 159.

(in general terms) the potential for research into how practices of writing and reading have been organized around the idea of the "author."⁵

Kaplan, for his part, expressed an invigorating skepticism about the inevitability of the legal rules that define copyright, pointing out the transformational changes to this field of law over its few centuries of history. He argued that, by demythologizing copyright doctrine, the legal community could make space for reasoned development of the law in a time of rapid technological change. Although he did not specifically anatomize the notion of the "author" around which copyright is organized, Kaplan noted certain corollaries of that notion. He called on lawyers to reconsider the trend in Anglo-American copyright toward ever-greater protection against unlicensed imitation,⁶ the origins of which he located in the obsession with "originality" which marked Romantic literary criticism.

Over the past twenty five years, Kaplan's critique of basic copyright concepts has been influential in practical discussion of legal policy, while followers of Foucault have investigated the "construction of authorship" in the domain of literary culture. In retrospect, however, it is surprising how recently scholars have begun to attend to the ways in which the cultural figuration of the "author," as the inspired creator of unique works of art, has interacted with the legal notion of the "author" as the bearer of the portable rights in literary and artistic property.

In 1984, Martha Woodmansee began to construct the bridge to join literary and legal perspectives. She demonstrated how a new class of professional writers in eighteenth-century Germany, seeking to justify legal protection for their labors, "set about redefining the nature of writing," and thus helped to "give the

⁵ Certainly it would be worth examining how the author became individualized in a culture like ours, what status he has been given, at what moment studies of authenticity and attribution began, in what kind of system of valorization the author was involved, at what point we began to recount the lives of authors rather than of heroes, and how this fundamental category of "the-man-and-his-work criticism" began.
Id. at 141.

[I]f man has any "natural" rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and "progress," if it is not entirely an illusion, depends on generous indulgence of copying.

KAPLAN, *supra* note 1, at 2.

concept of authorship its modern form."⁷ More recently, Mark Rose has explored the ways in which debates over the extent of rights in literary property in eighteenth-century England both fed and fed upon developments in literary theory. He has concluded that the reception of German Romanticism in England came only after "the ground had been prepared by the long debate over copyright," and that "the romantic elaboration of such notions as originality, organic form, and the work of art as the expression of the unique personality of the artist was in a sense the necessary completion of the legal and economic transformation that occurred during the copyright struggle."⁸ And Carla Hesse has shown that in France, the idea of the individualistic "author" as the bearer of literary property rights was introduced as an instrument of monarchist repression—a "legal instrument for the regulation of knowledge"—and that the French revolutionaries later sought to "dethrone the absolute author . . . and recast him, not as a *private* individual (the absolute bourgeois), but rather as a *public* servant, as the model citizen."⁹

For my part, I have begun to trace some of the specific linkages between the ideology of "authorship" and the formation of particular doctrinal structures in the law of copyright.¹⁰ In the quotation I chose to introduce this essay, Professor Kaplan looks forward to a reconfiguration of copyright to take fuller account of collaborative creative practices. In her contribution to this volume, Martha Woodmansee demonstrates that the Romantic notion of "author" handed down to us from the eighteenth century never has been particularly apt to the realities of the writing process.¹¹ In what follows, I have sought to demonstrate how the persistence of the notion of "authorship" in American copyright law makes it difficult for any new legal synthesis, which would focus on the reality of collective creativity, to emerge.

First, however, it may be useful to review how a particular

⁷ Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984).

⁸ Mark Rose, *The Author as Proprietor*: Donaldson v. Becket and the Genesis of Modern Authorship, 23 REPRESENTATIONS 51 (1988).

⁹ Carla Hesse, *Enlightenment Epistemology and the Law of Authorship in Revolutionary France, 1777-1793*, 30 REPRESENTATIONS 109 (1990).

¹⁰ See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 [hereinafter *Metamorphoses*]. Other writers have expanded the discussion by analyzing the significance of the "authorship" concept in domains of law other than copyright. See James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988); James Boyle, *A Theory of Law and Information: Copyright, Spreads, Blackmail, and Insider Trading*, 80 CAL. L. REV. (forthcoming 1992).

¹¹ See generally Martha Woodmansee, *On The Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992).

version of the ideology of "authorship" informed English—and ultimately American—copyright doctrine. Unlike the events in late eighteenth-century Germany, the first introduction of the "author" into English law had not been the outcome of any philosophically-grounded argument for "authors' rights" as such. In fact, late seventeenth- and early eighteenth-century efforts to establish copyright reflected no concern whatsoever about the situation of working writers: The Statute of Anne of 1710 was the result of lobbying by and for established London-based publishers and booksellers seeking new legal weapons against down-market competition spawned by the proliferation of print technology. Even in its incomplete, pre-Romantic form, "authorship" had positive connotations as a designation for literary activity of special merit, and the booksellers co-opted the term to create a stable legal foundation for a market in texts as commodities.¹²

After its introduction into the law of copyright, even as it received new content from developments outside legal culture, "authorship" remained a malleable concept, generally deployed on behalf of publishers rather than writers.¹³ Indeed, the interests most directly at stake in disputes over the content of copyright law usually are those of firms and individuals with capital

¹² In practice the rights thus created were unlikely to remain with the individual "author" for long. Long after the first copyright laws, writers generally continued to sell their rights, bundled with the manuscripts to which they pertained, to publishers for lump sum payments. See I VICTOR BONHAM-CARTER, *AUTHORS BY PROFESSION* 17-25 (1978). For the subsequent development of publishing practices and the market in commodity texts, see N.N. FELTES, *MODES OF PRODUCTION OF VICTORIAN NOVELS* (1986).

¹³ Publishers' invocations of "authorship" as a rationale for the extension of their own effective monopolies did not always succeed: the idea of the "author" did not acquire its full cultural charge for some years after 1710, and (as Mark Rose has documented) in 1774 the London publishers lost their hard-waged battle to establish perpetual copyright as a kind of "natural right" of "authorship," though only barely. See Rose, *supra* note 8. A majority of the common law judges who advised the House of Lords in the case of *Donaldson v. Becket*, 2 Bro P.C. 129, 1 Eng. Rep. 637, 4 Burr. 2408, 98 Eng. Rep. 257 (1774) seem to have accepted the ahistorical proposition that there *had been* a perpetual common law copyright prior to the enactment of the Statute of Anne; however, a majority of the judges (and presumably of the law lords who took the final decision) appear to have believed that this common law right was superseded by that enactment. See GAVIN MCFARLANE, *COPYRIGHT THROUGH THE CASES* 15-16 (1986). For an alternate interpretation of the "holding" of *Donaldson*, see Howard B. Abrams, *The Historic Foundation of American Copyright Law*, 29 WAYNE L. REV. 1119, 1128-29 (1983). For additional discussion of the case and its implications, see Rose, *supra* note 8, at 51. In particular, Rose notes that as of the time of the debate over perpetual copyright, the "mythification of original poetic creation and the concept of the creative process as organic rather than mechanical . . . anticipated in [Edward] Young's *Conjectures on Original Composition*" enjoyed greater currency in Germany than in England. *Id.* at 75-76. Had the case been decided after the popularization of these ideas in England by Wordsworth, Coleridge and others, the outcome on the issue of perpetual copyright might well have been different.

investments in the means by which the productions of creative workers are distributed to consumers.¹⁴ These distributors have reaped most of the benefits of copyright's cultivation of Romantic "authorship."

The story of "authorship's" instrumental role in the development of eighteenth-, nineteenth- and much of twentieth-century Anglo-American copyright doctrine has been told elsewhere.¹⁵ It includes such notable episodes as a court's justification of copyright protection for commercial photography in the form of a studio portrait of Oscar Wilde. In that case, *Burrow-Giles Lithographic Co. v. Sarony*,¹⁶ the Supreme Court concluded that such photographs should be viewed as "representatives of the original intellectual conceptions of the author."¹⁷ Far more recently, lawyers and judges have invoked the vision of the Romantic "author-genius" in rationalizing the extension of copyright protection to computer software. The conceptual challenge to copyright posed by computer technology has been submerged in an insistence that programs are no less inspired than traditional literary works, and that the imaginative processes of the

¹⁴ See CRAIG JOYCE ET AL., *COPYRIGHT LAW* § 1.05, at 19-20 (2d ed. 1991) [hereinafter *COPYRIGHT LAW*]. This is true despite the fact that doctrinal and policy conflicts in copyright law have come to be cast in terms of the notionally opposed interests of "authors" and "users," a binary approach to identifying the interests at stake typical of the Supreme Court's copyright jurisprudence. Justice Stewart, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), put the matter this way:

The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Id. at 156.

¹⁵ See *Metamorphoses*, *supra* note 10.

¹⁶ 111 U.S. 53 (1884). In the first line of its opinion, the Supreme Court tellingly describes the defendant as "a photographer, with [a] large business in those lines in the city of New York." *Id.* In fact, that business entailed not only the taking of photographs, but the sale and distribution of copies to the public, and it was on this latter aspect of the business that the activities of the defendant company impinged.

¹⁷ *Id.* at 58. Photography had perplexed nineteenth-century lawyers who saw the machine, rather than human agency, as the source of the photographic image. See BENJAMIN EDLMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* 43-47 (Elizabeth Kingdom trans., 1979). In *Burrow-Giles Lithographic Co. v. Sarony*, the court resolved the dilemma by stressing the analogies between photography and more traditional forms of creative enterprise. The court found that the image involved there was a useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing [the subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit . . .

Burrow-Giles, 111 U.S. at 54-55.

programmer are analogous to those of the literary "author."¹⁸

The so-called "work-for-hire" doctrine provides an even more dramatic example of the ways in which the ideology of "authorship" has been manipulated. This rule, which is most commonly part of the jurisprudence of countries which trace their laws of intellectual property back to Britain, awards ownership of a work produced within the scope of employment to the employer—as its "author-in law," so to speak. Although it is somewhat unusual in comparative law context,¹⁹ this identification of employer as author is more than a crude, instrumental fiction—rather, it is a logical (if perverse) working out of the underlying assumption that the essence of "authorship" lies in original, inspired creative genius. Judicial opinions in these cases incorporate a characteristic move: If the essence of "authorship" is inspiration, then it is the "employer's" contribution as the "motivating factor" behind that work (in the words of one decision)²⁰ that matters, rather than the mere drudgery of the "employee."²¹ The United States Supreme Court's most recent pronouncement on the subject makes the same point, although in different terms: In "work-for-hire" cases, the crucial inquiry is into "the hiring party's right to control the manner and means by which the product is accomplished."²²

Over the history of Anglo-American copyright, Romantic "authorship" has served the interests of publishers and other distributors surprisingly well. Recently, however, it played a more unpredictable role in shaping legal doctrine, as is apparent from the recent upsurge in interest in "moral rights"—long a feature of continental legal culture with its unabashed adherence to the cause of "authors' rights,"²³ but a recent arrival on the scene in most common law countries.²⁴ As might be expected, publishers,

software manufacturers, and motion picture companies have been less than enthusiastic about new legal rules which would give "authors" the inalienable rights to insist on proper attribution of their works and to object when those works are modified or destroyed in connection with (or subsequent to) their commercial exploitation. But despite organized resistance from the latter-day counterparts of the eighteenth-century London booksellers, the idea of "moral rights" has gained a toe-hold even in the United States, though not yet with respect to literary works.²⁵ The development of "moral rights" is best understood in strictly ideological terms, and it should come as no surprise that legislators arguing in support of "moral rights" should unconsciously echo the rhetoric of William Wordsworth:²⁶

Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly.

Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.²⁷

The instance of "moral rights" is but one example of how the Romantic conception of "authorship" is displaying a literally unprecedented measure of ideological autonomy in legal context.²⁸ Recent copyright decisions show that even as scholars in literary studies elaborate a far-reaching critique of the received

¹⁸ See Anthony Clapes et al., *Silicon Epics and Binary Bonds: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. REV. 1493, 1510-45 (1987). The argument caters to firms that employ individuals to engage in this sort of "authorship." Ultimately, this appeal to notions of "authorial genius" may do more to obscure than to clarify the stakes in decisions about software protection. See Pamela Samuelson, *Creating a New Kind of Intellectual Property: Applying the Lessons of the Copyright Law to Computer Programs*, 70 MINN. L. REV. 471 (1985).

¹⁹ SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 1886-1986, at 158-59 (1987).

²⁰ See *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1214 (2d Cir.), cert. denied, 409 U.S. 997 (1972).

²¹ See *Metamorphoses*, supra note 10, at 485-91.

²² *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

²³ See *Frederic Pollaud-Dublan. Le Droit Moral en France, a Travers la Jurisprudence Recente, [Moral Rights in France, Through Recent Case Law]*, 145 REVUE INTERNATIONALE DU DROIT D'AUTEUR 126, 126-32 (1990).

²⁴ See, e.g., Copyright, Designs and Patents Act, 1988, ch. 48, §§ 77-89 (Eng.), re-

printed in 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (BNA) [hereinafter CLTW], Copyright Act, R.S.C., ch. C42, §§ 12.1-2 and 18.1-2 (1985) (Can.), reprinted in 1 CLTW, supra (Canadian provisions adopted in 1988). "Moral rights" reasoning probably failed to penetrate the common law countries earlier because of the existence of a counter-mould, in tension with that of "authors' rights." The common law countries rationalized copyright to be a limited monopoly designed to serve the public interest by promoting investment in the creation and distribution of works of the imagination. This "incentive" theory—probably the most commonly articulated public policy underlying copyright—draws into question any proposal that would enhance protection at the public users' expense, including the restrictions on re-use of copyright works implied in any "moral rights" scheme. For the various rationales underlying copyright legislation, see COPYRIGHT LAW, supra note 14, at 14-21.

²⁵ Visual Artists Rights Act of 1990 § 603(a) (codified at 17 U.S.C.A. § 106A (West Supp. 1992)). For a discussion of this legislation, see COPYRIGHT LAW, supra note 14, at 621-27.

²⁶ See Woodmansee, supra note 7, at 280.

²⁷ 135 CONG. REC. E2227 (daily ed. June 20, 1989) (statement of Rep. Markey), quoted in Visual Artists Rights Act of 1990, H.R. 514, 101st Cong., 2d Sess. 1, 6 (1990).

²⁸ We can expect more jurisprudential developments to reflect uncritical faith in the concept of "authorship" in years and decades to come: the 1988 adherence of the United States to the Berne Convention inevitably will produce further assimilation of U.S. copyright culture to that of the Berne Union. See Peter Jasszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47, 58 (1989).

Romantic concept of "authorship," American lawyers are reaching out to embrace the full range of its implications.

The latest copyright decision of the United States Supreme Court, *Feist Publications, Inc. v. Rural Telephone Service*,²⁹ decided in March 1991, is a striking manifestation of this ideological entrenchment. The numbingly mundane facts of the underlying dispute serve to display the legal issues in higher relief: Feist, a firm that specialized in publishing regional telephone directories, was refused a license to use Rural Telephone Service's "white pages" directory, which covered a small part of the larger geographic area to be encompassed in Feist's projected directory. Feist went ahead and copied Rural's alphabetically-organized listings and Rural sued for copyright infringement. The case raised questions about how much copyright protection a telephone book should receive—or whether it should receive any protection at all. Before the Supreme Court weighed in, most lawyers assumed that some degree of copyright protection was available to safeguard capital investments in comprehensive, predictably-organized compilations of uncopyrightable data, such as phonebooks, price lists, and legal databases. Courts and commentators had reasoned that the "skill and effort" or "sweat of the brow" that went into preparing such compilations was enough in the way of "authorship" to justify protection.³⁰ To the consternation of many, the Supreme Court held otherwise by a unanimous vote,³¹ reasoning that, to pass the constitutional threshold, copyrightable works must possess "some minimal degree of creativity," and that, in producing its local telephone directory, Rural Telephone Service had "expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original."³² Reaching back into the Court's store of

historical precedents, Justice O'Connor recalled the language of *The Trade-Mark Cases* of 1879: Copyright should extend only to works that "are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like."³³

The *Feist* decision raises more questions than it answers; it will take time to determine exactly what kind of intellectual steel will suffice to strike "the minimal creative spark required by the Copyright Act and the Constitution."³⁴ The likely answers, in turn, may depend on the values and beliefs underlying the Court's decision. Unlike many important copyright decisions, *Feist* cannot be explained as a more or less transparent concession to the interests of publishers and other distributors. Indeed, the decision runs directly counter to those interests, leaving valuable and vulnerable "information products" which represent considerable capital investments without clear protection against misappropriation.

As a matter of information policy, the Court may have been right to cut back on available grounds of legal protection for compilations of data;³⁵ perhaps the social benefits of making information more generally available outweigh the private costs of denying it protection. There is no indication, however, that members of the Court gave this rationale any consideration, let alone embraced it. So far as Justice O'Connor's opinion reveals, the Court was moved solely by its adherence to a vision of originality "distilled [in earlier opinions] from the Constitution's use of the word 'authors'; an 'author' being defined 'to mean the to whom anything owes its origin; originator; maker.'"³⁶ The obvious criticism of *Feist*—that it embodies a barren jurispru-

²⁹ 111 S. Ct. 1282 (1991).

³⁰ Before *Feist Publications, Inc. v. Rural Telephone Service*, the leading cases on the subject were *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937), and *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1907) (L. Hand, J.), *cert. denied*, 259 U.S. 581 (1922). These cases endorsed copyright protection based on capital investment in compiling "facts." In *Feist*, Justice O'Connor asserted that these earlier courts "misunderstood" the copyright statute. See *Feist*, 111 S. Ct. at 1291. Prior to *Feist*, copyright scholars were divided on the issue. Compare Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Non-fiction Literary Works*, 81 CORN. L. REV. 516 (1981) with William Patry, *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 COM. & THE LAW 37 (1990). For an extremely sophisticated discussion, ultimately favoring "sweat of the brow" protection, see Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990).

³¹ Only Justice Blackmun declined to join in Justice O'Connor's opinion, concurring in the judgment without a stated rationale.

³² *Feist*, 111 S. Ct. at 1296 (emphasis added).

³³ 100 U.S. 82, 94 (1879).

³⁴ *Feist*, 111 S. Ct. at 1297. Early articles discussing the implications of *Feist* include Michael Schwartz, *Copyright in Compilations of Facts: Feist Publications, Inc. v. Rural Telephone Service*, 13 EUR. INTELL. PROP. REV. 178 (1991); Michael R. Klipper & Meredith S. Senter, Jr., *The Facts After Feist: The Supreme Court Addresses the Issue of the Copyrightability of Factual Compilations*, in FACT AND DATA PROTECTION AFTER *Feist* 343 (Jon A. Baumgarten ed., 1991); and David Goldberg & Robert J. Bernstein, *The Fallout from "Feist": (Copyrightability of Telephone Listings)*, 206 N.Y. L.J. 3 (1991).

³⁵ See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989). Other recent Supreme Court intellectual property decisions have reflected concern over the potential of legal protection to restrict vigorous competition. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

³⁶ *Feist*, 111 S. Ct. at 1288, (citing *Barrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)). The constitutional reference is to article I, Section 8, clause 8—authorizing congressional intellectual property legislation.

dence of rule formalism—is ultimately inapposite. In fact, the opinion wears its values on its sleeve; from first to last, its rhetoric proceeds from unreconstructed faith in the gospel of Romantic “authorship.”

That Romantic “authorship” is alive and well in late twentieth-century American legal culture has consequences for the law’s engagement with (or failure to engage) the realities of contemporary polyvocal writing practice—which increasingly is collective, corporate, and collaborative. In practice, the law often proves ungenerous to non-individualistic cultural productions, like “folkloric” works, which cannot be reimagined as products of solitary, originary “authorship” on the part of one or more discrete and identifiable “authors.”³⁷ By the same token, the extension of copyright protection to new categories of works may entail reimagining them so as to suppress complicating details about their modes of production.³⁸ At base, however, the law is not so much systematically hostile to works that do not fit the individualistic model of Romantic “authorship” as it is uncomprehending of them. Such works are marginalized or become literally invisible within the prevailing ideological framework of discourse in copyright—even to the point of literal invisibility.

Feist, once again, provides an example of this process of marginalization. The Court’s discussion of copyright in telephone directories takes off from what is, from the perspective of copyright doctrine, a non-controversial premise: “Facts” are natural and uncreated; they are not protectable in themselves:

Census-takers, for example, do not “create” the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Census data therefore do not trigger copyright because these data are not “original” in the constitutional sense. The same is true of all facts—scientific, historical, biographical, and news of the

³⁷ “Folkloric works,” for example, are corporate productions which have no identifiable author(s), and their continual re-production through transmission within a cultural group makes it difficult to locate the moment at which any hypothesized individual can have made an “original,” “authorial” contribution. See Marie Niedzielska, *The Intellectual Property Aspects of Folklore Protection*, 1980 COPYRIGHT 339.

³⁸ Thus, the extension of copyright to photographs both glorifies the camera operator as an “artist-genius” and suppresses the claims of the photographic subject to merely a part in the production of the image. See *Metromorphoses*, *supra* note 10, at 480-81 n.97. Jane Gaines recently has identified the ways in which the courts minimized or suppressed the “authorship” claims of photographic subjects—including those of Oscar Wilde in the *Barrow-Giles Lithographic Co. v. Sony* decision. See JANE GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 74-83 (1991). For a discussion of *Barrow-Giles*, see *supra* notes 16-17 and accompanying text.

day.³⁹

Thus, any “authorship” in the “white pages” must be sought in the acts of collecting and (especially) presenting the unprotected data which make up the individual directory entries in which individuals’ given (or self-elected) names are associated with their chosen addresses and assigned telephone numbers.

From another perspective the distinction between uncreated “facts” and created “works” is purely fictitious. As Stanley Fish has pointed out, no so-called “fact” is interpretation-free—ultimately facts are products rather than predicates of interpretation.⁴⁰ To revert to the Court’s example in *Feist*, the preordained categories of the census form define the “data” to be reported, not the reverse. If we seek non-circular justifications for the law’s refusal to extend protection to such information collections, we must look beyond the naive distinction between the pre-existent and the “original.”

Thus, the real problem with the “facts” involved in *Feist* is not that they fail to reflect human agency, but that they have—in fact—an embarrassment of very human sources. A telephone directory listing sums up a complex amalgam of choices, to which the subject of a given entry, as well as her parents, friends, teachers, and others—such as various real estate developers and government employees—have made contributions over time. And to complicate matters further, all these have interacted in complex, webbed relational patterns in making their contributions.

There may be sufficient reasons why such data should be placed firmly and irrevocably in the “public domain.” Indeed, the very multiplicity and interdependency of their “authors” may explain why we should treat name/address listings as common property.⁴¹ But rather than engaging in a critical assessment of the utility or disutility of copyright protection for “facts,” the

³⁹ *Feist*, 111 S. Ct. at 1288-89 (citations omitted).

⁴⁰ STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 61 (1989). In the context of copyright, Jane Ginsburg has characterized—and criticized—the argument that “facts and theories” simply “are” as “the Platonic fact precept”.

If an historical “truth” in the Platonic sense exists, it can never be discovered, because the same diversity of understanding, approach, and predilection which makes every personality unique precludes a unity of historical interpretation.

Jane C. Ginsburg, *Schubert and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoelling v. Universal City Studios*, 29 BULL. COPYRIGHT SOC’Y OF THE U.S.A. 647, 658 (1982).

⁴¹ For the values associated with common rights in the real property context, and their gradual extinction through the rise of a strictly proprietary model of property law, see E.P. THOMPSON, *CUSTOMS IN COMMON* 97-184 (1991).

Court in *Fest*, like other courts in prior cases, put its wholly uncritical faith in one vision of the creative process—the Romantic ideal of “authorship.”

In other doctrinal settings, faith in solitary, originary Romantic “authorship” blinds decision-makers to the advantages of non-conforming cultural production. Copyright law, with its emphasis on rewarding and safeguarding “originality,” has lost sight of the cultural value of what might be called “serial collaborations”—works resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades. Before copyright law’s acceptance of Romantic “authorship” was complete, for example, copyright actually encouraged the creation of popular adaptations of preexisting works, on the ground that “[a]n abridgment preserving ‘the whole’ of a work ‘in its sense’ is ‘an act of understanding,’ ‘in the nature of a new and meritorious work.’”⁴² But where the law formerly envisioned the possibility of improving existing works by redaction or expansion, modern copyright is more myopic, focusing exclusively on the potential for harm to the interests of the original “author.” Today, the privilege of producing “derivative works” that re-work or incorporate protected pre-existing texts generally is reserved to those who have obtained copyright permission.⁴³

Among the array of doctrines that make up contemporary copyright law, however, there remain several which can be deployed to legitimate unauthorized borrowings from protected works by subsequent “authors.” One of these teaches that in order to constitute an infringement of copyright, a new work must be “substantially similar” to that from which its “author” copied; where the material copied is itself in the public domain, or is too insignificant in quantity, or is altered beyond recognition, there can be no liability. In practice, the crucial question is how the courts will interpret “substantial similarity.” Here, recent case law has tended toward what may be called “totality” analysis, which has had the effect of further restricting re-use of existing textual materials.⁴⁴

⁴² KAPLAN, *supra* note 1, at 12 (quoting *Newberry’s Case*, 10 F. 775, 98 Eng. Rep. 913 (Ch. 1773)). See also *Metamorphoses*, *supra* note 10, at 472.

⁴³ See, e.g., 17 U.S.C. § 106(2) (1988). Even where a “derivative work” has been produced with the permission of the owner of a copyrighted underlying work, contemporary copyright law favors the owner of the underlying work. See *Metamorphoses*, *supra* note 10, at 492-96 (discussing reversionary rights and the Supreme Court decision in *Stewart v. Abend*, 495 U.S. 207 (1990)).

⁴⁴ “Totality” analysis began in earnest with *Sid & Marty Krofft Tel. v. McDonald’s*

“Totality” analysis is yet another doctrinal reflection of the ideology of Romantic “authorship.” In this interpretation of copyright doctrine, “authors’” rights in their “works” extend not only to the content of their own devising, but also to what they have themselves borrowed from the intellectual “commons”—presumably because they subsequently have impressed their artistic personalities on these borrowed materials. This vision marginalizes yet other “authors,” who arrive still later on the scene, and denies that they might have an equally important role to play in the continuing process of cultural transmission by which texts are reformulated and elaborated. In effect, “totality” analysis converts copyright into a textual Homestead Act.

A recent example of this tendency in copyright is provided by the recent trial and appellate court decisions in *Rogers v. Koons*.⁴⁵ The plaintiff, Art Rogers, had photographed a couple holding a litter of German Shepherd puppies. That black-and-white image had first appeared in Rogers’s newspaper photography column. It was undisputed that the defendant, Jeff Koons, had employed the image as the basis for a large three-dimensional wood sculpture with a non-naturalistic color scheme. Indeed, Koons argued that his choice of that image was self-conscious: The theme of the exhibition in which the sculpture was displayed (the “Banality Show”) necessarily entailed the re-use of images already in cultural circulation.

The district court granted summary judgment for the plaintiff on the issue of the defendant’s liability for copyright infringement, and thereafter this ruling was upheld by the Second Circuit Court of Appeals. In each instance, the court’s opinion reflects its writer’s faith in the ideology of Romantic “authorship.” Indeed, the outcome of Judge Cardamone’s opinion on appeal could hardly be in doubt after the opening paragraph:

The key to this copyright infringement suit, brought by a

Corp., 562 F.2d 1157 (9th Cir. 1977), which proved (for better or worse) to be the most influential copyright infringement decision of recent times. The court’s copyright infringement analysis was summarized in a phrase: “[T]he defendants] have captured the ‘total concept and feel’ of the [plaintiffs’] show.” *Id.* at 1167. Traditional copyright limitations, such as the rule that protection attaches only to “expressions” and not to “ideas,” are inherently at odds with “totality” analysis; nonetheless, it has enjoyed considerable favor in the courts. For the subsequent rise of this approach to assessing “substantial similarity,” as well as some indications that its validity is now being called into question, see *Copyright Law*, *supra* note 14, at 687-91 and *Metamorphoses*, *supra* note 10, at 491 n.138.

⁴⁵ 751 F. Supp. 474 (S.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), and *aff’d*, 960 F.2d 301 (2d Cir. 1992). The Second Circuit affirmed summary judgment in favor of the plaintiff on the issue of liability.

plaintiff photographer against a defendant sculptor and the gallery representing him, is defendants' borrowing of plaintiff's expression of a typical American scene—a smiling husband and wife holding a litter of charming puppies. The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.⁴⁶

In this telling summary account, the conflict posed is not between the competing claims of two cultural workers, pursuing different objectives in different media, but between a pure "artist," on the one hand, and corrupt "players in the art business," on the other.⁴⁷

⁴⁶ *Koons*, 960 F.2d at 303.

⁴⁷ Later in the opinion, in introducing basic concepts of copyright, Judge Cardamone notes that James Madison had supported a constitutional grant of congressional power to enact copyright laws on the basis that authors had enjoyed such a right at common law, citing to *The Federalist* and to Blackstone's *Commentaries on the Laws of England*. See *id.* at 306. In fact, the question of what rights British authors enjoyed before the enactment of the Statute of Anne is not free from doubt, and the content and context of the cited passage from Blackstone is revealing. In the *Commentaries on the Laws of England*, Blackstone argues not that English common law *did* recognize the common law rights of individual "authors," but that it *should* (or should have) done so, because copyright should be regarded as a species of natural rights based (like property in land) on "occupancy":

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. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, it is always the identical work of the author which is so conveyed.

² *COMMENTARIES ON THE LAWS OF ENGLAND* 405-06 (Photo reprint 1979) (1766). See the discussion of Blackstone in Rose, *supra* note 8, at 63-64. Blackstone was a near-contemporary of Edward Young. Woodmansee, *supra* note 7, at 280, and his vision of the source of authorial entitlements is bound up with the Romantic ideology of "authorship" of which Young was an early exponent.

The district court opinion in *Koons* also displayed an affinity for the vision of copyright as a natural or inherent right. In his introduction to copyright concepts, Judge Haight quoted at some length from a 1924 decision of the Second Circuit Court of Appeals, *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924). *King Features* involved a three-dimensional reproduction of a two-dimensional work of graphic art in the context of commercial, (rather than fine) art—the imitation of a cartoon character in the design of a mass-produced children's toy. The appellate panel concluded that "[d]oing this is omitting the work of the artisan, but appropriating the genius of the artist," *id.* at 535, and had expressed the view that:

A piece of statutory may be infringed by the picture of the statuery for the Copyright Act *severed to the author the original and natural rights*, and it is the intentment of the law of copyrights that they shall have a liberal construction in order to give effect to what may be considered as an *inherent right of the author in his work*.

The invidious comparison is reinforced in succeeding paragraphs that further characterize the parties: Rogers is presented as a generally acclaimed "artist-photographer,"⁴⁸ widely published and exhibited, whose photograph "Puppies" had come to the defendant's attention as the result of a notecard issued by a firm specializing in "high quality reproductions of photographs by well-respected American photographers including, for example, Ansel Adams."⁴⁹ Koons, although finally conceded the designation of "artist," is portrayed as a controversial figure, whose claims to artistry are tainted by acquisitiveness. Although the information may be legally irrelevant, strictly speaking, Judge Cardamone notes that "[w]hile pursuing his career as an artist, he also worked until 1984 as a mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker," and concludes the description by quoting a newspaper critic's assessment that "Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd."⁵⁰ Clearly enough,

Id. at 536 (emphasis added). That Judge Haight, writing almost sixty years after the *King Features* case, chose to ground his analysis in the quoted language is representative of copyright law's general devaluation of later-created "derivative" works in the ideology of Romantic "authorship."

⁴⁸ *Koons*, 960 F.2d at 303.

⁴⁹ *Id.* at 304.

⁵⁰ *Id.* The comment (attributed only to an unnamed "New York Times Critic"), which concludes the introductory section of Judge Cardamone's opinion headed "Koons," can be found in Michael Brenson, *Greed Plus Glitz, With a Dollop of Innocence*, N.Y. Times, Dec. 18, 1988, § 2, at 41. The article, which, like the opinion, emphasizes Koons's background in financial markets, is generally critical of the sculptor and his productions, characterizing Koons as "wanting more money than any artist his age has ever made from art" and his works as "[f]antasies of American youth and adolescence [which] are embalmed, frozen into glamorous and deathless products." *Id.* at 44. Other passages help to illuminate Judge Cardamone's skepticism about artistic Koons:

His art is largely strategic. Images have been appropriated from photographs of popular culture and then collaged together into spanking new commodities. They were made collectively, even anonymously, by workshops in northern Italy. What seems to matter is not the originality of the artist, but rather images that belong to an entire culture and that everyone in that culture can use.

Id. (emphasis added).

Koons certainly does not fit the stereotype of a Romantic "author," as the following comparison with another artistic rebel makes clear:

In medium, method and response to the past, however, the Koons and the Manet could not be further apart. While Manet painted his work, Koons supervised the production of his statue. While Manet was making art that he hoped would speak on equal terms with Titian and Goya, Koons makes art that he hopes can speak on equal terms with Michael Jackson.

Id.

Judge Cardamone does not refer to the final paragraph of the article, which grants Koons the epithets "smart and inventive," and indicates that his work "helps define some of the deeper tensions within the contemporary art world." *Id.*

A subsequent journalistic treatment of Koons and his works, argues that the controversy surrounding the sculptor stems (at least in part) from the challenge he poses to the

Koons's worldliness in money matters does not weigh in his favor.

Nor does his way of working. Before comparing the two works at issue in the case, Judge Cardamone's appellate opinion emphasizes the differences between the working methods of the individuals who created them. Rogers is a complete artist, whose personal life and art are fully integrated: "[He] has a studio and home at Point Reyes, California, where he makes his living by creating, exhibiting, publishing and otherwise making use of his rights in his photographic works."⁵¹ By contrast, Koons's production is characterized by extreme division of labor. Not only is he "represented" by sales galleries in various parts of the world, but he does not personally execute the projects he conceives for ultimate sale. In preparation for the Banality Show, "[c]ertain European studios were chosen to execute his porcelain works, other studios chosen for the mirror pieces, and the small Demetz Studio, located in the northern hill country town of Orressi, Italy, was selected to carve the wood sculptures."⁵²

Finally, in the treatment of the issue of "substantial similarity," judicial attitudes toward the competing visions of creativity represented by Rogers and Koons are brought to bear on the issue of liability.⁵³ The courts may well have been right to reject

vision of artistic purity, which is closely associated with the ideology of Romantic "authorship":

But to many of the artists who toy with advertising, Jeff Koons among them, "selling out" is a virtue, a backhanded way of stirring artistic rebellion. It is a post-Pop, post-punk pose that defies the traditional notion of what artists and art should be—poor and unknown. Peddling an image of themselves in the manner of a movie star not only promises to make artists famous; it also allows them to thumb their noses at the assumption that art is somehow above the marketplace.

Paul Taylor, *The Art of P.R. and Vice Versa*, N.Y. TIMES, Oct. 27, 1991, § 2, at 1, 35.

⁵¹ *Koons*, 960 F.2d at 303.

⁵² *Id.* at 304-05. Koons's working relationship with the Demetz Studio was independently relevant to the analysis of the liability issue, and Judge Cardamone's opinion emphasizes how Koons directed "his artisans" by specifying that various details of the sculpture were to be "like [the] photo" or "as per photo." *Id.* at 305. At the same time, however, the implicit contrast drawn between Koons's and Rogers's methods helps to show the judge's biases, as does the passage in Judge Haught's district court opinion, which emphasizes that "[q]uestions of size and color aside, the sculpture is as exact a copy of the photograph as [Koons's] hired artisans could fashion, which is precisely what [he] told them to do." *Koons*, 751 F. Supp. at 478.

In Romantic theory the "true" artist was one who had escaped the division of labor that characterized modern life generally, and who united "head and heart, shrewdness and ingenuity, reason and imagination in a harmonious alliance," thus restoring the "whole person" in us. FRIEDRICH SCHILLER, ON BÜCKER'S POEMS (1791), quoted in MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS*, 72 (1993).

⁵³ *Rogers v. Koons* also involved a "fair use" issue, and the characterization of Koons's artistic activities as "commercial" figured significantly there: "[W]e note that Koons's[s]

the main lines of the sculptor's defense: that, in assimilating the image of the photograph, Koons had taken no more than unprotected factual information concerning the existence and appearance of the photographic subjects;⁵⁴ and that, at the same time, he had altered and embellished the image (by, among other things, inserting flowers in the hair of the human figures and providing the puppies with grotesque bulbous noses). After all, the arrangement of the furniture and figures *was* reproduced in the sculpture from the photograph. If it represented Rogers's copyrightable "authorship," then a legally significant taking of protected material probably *did* occur. For the purposes of the present discussion, however, the correctness of the outcome is less significant than the technique of decision.

Certainly, Judge Cardamone's opinion eschews naive "totality" analysis, acknowledging that "ideas, concepts, and the like found in the common domain are the inheritance of everyone," so that "in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the *expression* of an idea or fact, not on the similarity of the facts, ideas, or concepts themselves."⁵⁵ Despite its apparent sophistication,⁵⁶ however, Judge Cardamone's approach to sub-

stantial profit from his intentionally exploitive use of Rogers's work also militates against a finding of fair use. . . ." *Koons*, 960 F.2d at 309.

⁵⁴ In the district court opinion, Judge Haught stated that "Koons does not articulate what non-protectible factual expression he regards himself as having used." 751 F. Supp. at 477, perhaps because the sculptor also relied on the seemingly unpromising (and ultimately ill-fated) argument that "Rogers' copyright protection is strictly limited to the work as a *photograph*." *Id.* (quoting trial brief submitted by Koons). Koons could have argued, however, that Rogers did not "create" or "originate" the physical appearance of the photographic subjects, and that he had not borrowed elements of the photograph for which Rogers was responsible: the lighting scheme employed when the photograph was taken, for example, or the balance of tones achieved when it was processed.

⁵⁵ *Koons*, 960 F.2d at 308. It is less clear whether Judge Haught in the district court appreciated the importance of discounting copying of mere unprotected ideas in the course of substantial similarity analysis.

⁵⁶ In most respects, Judge Cardamone's opinion merely expands upon the analysis of the district court, as reflected in the following passage:

[T]he present test of substantial similarity in the Second Circuit is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."

There is no question in the case at bar that "an average lay observer" would recognize the sculpture "String of Puppies" as "having been appropriated from" the photograph "Puppies." Questions of size and color aside, the sculpture is as exact a copy of the photograph as [the sculptor's] hired artisans could fashion, which is precisely what [he] told them to do. Indeed, [the puppies's owner's] friend, having observed a newspaper picture of the sculpture, assumed that it was [the original] photograph, having been "colonized."

Koons, 751 F. Supp. at 478 (citing and quoting Ideal Toy Corp. v. Feb-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)).

This passage incorporates the ideology of "authorship" and the cult of "originality"

stantial similarity analysis still reflects the tendency to lump together the clearly protected, arguably protected, and certainly even unprotected elements of a copyrighted work in comparing it to another, allegedly infringing work. In characterizing the protected elements of the photograph, Judge Cardamone notes that it is the "expression" that Rogers "caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable."⁵⁷ In the following paragraph, Judge Cardamone asserts that Koons overstepped the line when he used "the identical expression of the idea that Rogers created; the composition, the poses, and the expressions"⁵⁸

It is instructive to set these two lists of elements—protected and copied—side by side. Notably, Judge Cardamone does not rely on the difficult notion that the "particular light" of the photograph somehow was reproduced in the sculpture. But, while this protected element drops out of the comparison, the element of "placement" is subdivided into "composition" and "poses" in the itemization of Koons's borrowings—although the distinction

in a number of reinforcing ways. For one, the totalizing tendencies of the quoted "standard," with its emphasis on "recognition" of "appropriation," necessarily privilege prior works over subsequent ones. The same language, which is drawn from *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966), is identified by Judge Cardamone as a source of precedential guidance on the substantial similarity issue. 960 F.2d at 307. Judge Haight dismisses in passing the claimed differences (matters of "size and color") between the two works, implicitly applying Judge Learned Hand's famous observation that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.), *cert. denied*, 298 U.S. 669 (1938). This *dictum* uncovers the preconception that the truly "original" is superior to the merely "derivative," which has its source in the ideology of "authorship." Notably, it is cited explicitly by Judge Cardamone. 960 F.2d at 308. (In other contexts, it should be noted, Hand's superficially attractive principle has proved difficult to uphold consistently. In *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231 (2d Cir. 1983), for example, Judge Jon Newman reconsiders the validity of the *Hand dictum* and concludes that differences may matter more where substantial similarity determinations involving "graphic or three-dimensional" works are involved. *Id.* at 241.)

As already noted, *see supra* note 52, Judge Haight makes much of the point that the sculpture was not executed by the sculptor who affixed his signature to it, but by mere "hired artisans"—thus marginalizing the sculptor's contribution and undercutting the claims of his work to independent legitimacy as a product of "authorship." In this, too, Judge Cardamone's opinion follows.

One important move in the passage just quoted from the district court opinion, however, is not reproduced in that of the court of appeals. Judge Haight trivializes the inquiry into substantial similarity by invoking the subjectivity of an individual (the "friend") who is in no sense representative of any real or hypothetical audience group. The absence of any equivalent passage in Judge Cardamone's opinion is a mark of its greater sophistication, but not necessarily of any basic difference in its orientation.

⁵⁷ *Koons*, 960 F.2d at 308.

⁵⁸ *Id.* at 308.

between the two is not specified. Finally, both lists refer to the "expressions" of the subjects, but nowhere is it indicated to what extent or in what way these reflected Rogers's agency, rather than that of the subjects themselves.⁵⁹ In effect, the case for substantial similarity is strengthened by a systematic inflation of the claims of "authorship." If this is not "totality" analysis in its pure form, it is the next best thing.

On the particular facts, Judge Cardamone may well have been correct to conclude that "no reasonable jury could have differed on the issue of substantial similarity."⁶⁰ Nevertheless, his opinion effectively embraces an approach to substantial similarity analysis that is structurally biased in favor of the claims of the "author" whose work has temporal priority—a standard that cannot account fully for the possibility that "recognizable" borrowings incorporated from preexisting works into new ones may be of elements that are in the public domain.

The Romantic vision of "authorship," in which this approach to "substantial similarity" analysis is rooted, informs other critical passages of the court of appeals opinion in *Rogers v. Koons*. Thus, Judge Cardamone finds a fatal flaw in Koons' defense that the sculpture was a satire or parody qualifying as a privileged "fair use": The "fair use" doctrine applies only when the copied work itself is, "at least in part, an object of the parody"⁶¹ This limitation, he insists, is needed if we are to ensure "public awareness of the original work" in cases of "fair use" parody:

By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.⁶²

In this reasoning, parody can qualify as "fair use" only so long as it acknowledges its subordinate position in the hierarchy of works, and, by extension, the subordinate position of its creator

⁵⁹ For the general tendency of copyright law to efface the role of the photographic subject in the production of images incorporating his or her likeness, *see supra* note 16. *Koons*, 960 F.2d at 308.

⁶⁰ *Id.* at 310 (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981)).

⁶² *Id.* The passage continues: "This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody." *Id.* at 310. Of course, it is not self-evident that had Koons acknowledged Rogers in connection with his sculpture, the outcome would have been different. Finally, Judge Cardamone's views on "fair use" are shaped in large part by his perception that the defendant's "commercial" exploitation of Rogers' photograph was a use of a kind which could prejudice the potential market for that work if it became "widespread."

in the hierarchy of "authors." This limit is required, Judge Cardamone indicates, because "otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement about some aspect of society at large."⁶³ Like other features of the doctrine applied in *Rogers v. Koons*, this one operates to discourage artists whose methods entail reworking preexisting materials, while rewarding those whose dedication to "originality" qualifies them as true "authors" in the Romantic sense.

The outcome in *Rogers v. Koons* notwithstanding, an otherwise actionable appropriation of material from a preexisting work may be excused on the ground that it represents a privileged "fair use" rather than (as is usually the case) an "unfair" one. One persuasive ground on which a defense of "fair use" may be premised is a claim that the defendant not only took protected material, but somehow transformed it in the taking. Thus, in her recent decision in *Basic Books, Inc. v. Kinko's Graphics Corp.*,⁶⁴ District Judge Constance Baker Motley wrote:

[T]he Supreme Court has found that "the distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance [of interests]."⁶⁵

The opinion continued, under the heading "Transformative use":

It has been argued that the essence of "character and purpose" [one of the four considerations itemized in 17 U.S.C. § 107, which codifies the fair use doctrine] is the transformative value, that is, productive use, of the secondary work compared to the original. District Court Judge Leval has noted that, "[t]he use . . . must employ the quoted matter in a different manner or for a different purpose from the original."⁶⁶

Where "fair use" is concerned, it seems, mere "users" need not apply. The doctrine may be invoked only by those who have special claims to "authorship" in their own work.

The *Basic Books* litigation involved another form of "serial collaboration"⁶⁷—making anthologies of selections from pub-

lished writings for use as textbooks in college courses. The suit was brought by publishers against a commercial photocopying service that had prepared anthologies including unauthorized excerpts from copyrighted works; the materials in these compilations had been chosen by instructors to suit their own courses, culled from books and various other publications which totalled (in each case) thousands of pages. The litigation turned on the photocopying company's defense of "fair use," and the finding for the publishers was justified, in significant part, on the grounds that the use in question was a mere "non-transformative repackaging":

In this case, there was absolutely no literary effort made by Kinko's to expand upon or contextualize the materials copied. The excerpts in suit were merely copied, bound into a new form, and sold. . . . The copying in suit had productive value only to the extent that it put an entire semester's resources in one bound volume for students. It required the judgment of the professors to compile it, though none of Kinko's.⁶⁸

This puzzling passage is open to two distinct interpretations. It may be that "literary effort" and mere "judgment" are two different things, and that selecting and collating the excerpts to be included in an anthology is not the kind of new "authorship" that Judge Motley believes deserves recognition.⁶⁹ Or perhaps the photocopying company should not have been given credit for any "literary effort" invested in the design of anthologies by others.⁷⁰ One way or another, the value added to the preexisting materials by the act of compiling them is lost in the economy of this decision. Either way, the intellectual contribution that went into the creation of the "secondary" works goes unacknowledged in the *Basic Books* case, and its significance remains unanalyzed. Cer-

⁶³ *Basic Books*, 758 F. Supp. at 1530-31 (citations omitted).

⁶⁹ Notwithstanding the language of the decision, the "selection, coordination and arrangement" of preexisting materials is considered a form of "authorship" where those materials are not copyrighted or are used with permission. See 17 U.S.C. § 101 (1988) (defining "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship"); see also *Feist Publications, Inc. v. Rural Tel. Serv.*, 111 S. Ct. 1282, 1289 (1991). Is there a double standard at work in *Basic Books* with one level of "authorship" being sufficient to form the basis of a claim to copyright, and another, higher level being necessary to qualify a use as "fair"?

⁷⁰ The professors who used the "anthologies" involved in the *Basic Books* litigation were not defendants in the litigation. The defendant company's efforts to claim that its use was privileged—for educational purposes—were rejected by the court: "The extent of its insistence that theirs are educational concerns and not profitmaking ones boggles the mind." *Basic Books*, 758 F. Supp. at 1532.

⁶³ *Id.* at 310.

⁶⁴ 758 F. Supp. 1522 (S.D.N.Y. 1991).

⁶⁵ *Id.* at 1530 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (alteration in original)).

⁶⁶ *Id.* (quoting Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

⁶⁷ For a definition and discussion of serial collaborations, see *supra* text accompanying note 41.

tainty, the value of such compilations cannot be accounted for within the framework imposed by the ideology of "authorship."⁷¹

In *Feist*, the Supreme Court failed to recognize that "factual" data, like name/address listings in a directory, are themselves the products of complex processes of corporate writing. Similarly, the opinions in *Rogers v. Koons* and *Basic Books* came to their conclusions by marginalizing the cultural significance of what I have called "serial collaboration"—a writing practice that cannot easily be accommodated within the Romantic conception of "authorship."

We should also note that copyright fails to come to terms with the reality of even more obvious forms of literary and artistic collaboration. Although copyright law has a category for works created by several writers working together on a preconcerted basis, the consequences that flow from the categorization of a work as one of "joint authorship" reflect the individualistic bias of American copyright doctrine. In effect, "a joint work" has several individual "authors": Each "joint author" must possess the

⁷¹ The dependence on Romantic ideas of "authorship" by copyright law limits the availability of the "fair use" defense in such a case as *Basic Books*. The same conception of "authorship," however, has been invoked to justify "fair use." In *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991), the most recent in a series of Second Circuit decisions involving the applicability of "fair use" to quotations from unpublished manuscripts, the court concluded that the defendant's unauthorized takings from the unpublished letters and diaries of the writer, Richard Wright, were privileged. One factor that a "fair use" analysis must address, according to section 107 of the Copyright Act, is "the amount and substantiality of the portion used." In setting the stage for the discussion of this factor in the *Wright* decision, Judge Meskill observed that not all the passages quoted by the defendant were the subject matter of copyright: "Of the ten quoted sections [from the letters], four bear Wright's stamp of creativity and meet the threshold test of copyright protection. The other six tersely convey mundane details of Wright's life . . ." *Id.* at 736. This remarkable invocation of the concept of "authorship" to deny protection to merely "mundane" passages is echoed later in the opinion, in the discussion addressing "fair use." See *id.* at 736-40. In the "fair use" section of the opinion, Judge Meskill considered a fifty-five word quotation from an unpublished letter. Judge Meskill states that "[t]he quoted passage is indeed stylistic. However, it is the only quoted piece of expression that represents anything close to the central point communicated in any of the letters." *Id.* at 738.

In its early decision in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), the United States Supreme Court disclaimed any role for the judiciary in assessing the "worth" of works for which copyright protection is claimed, "outside of the narrowest and most obvious limits." *Id.* at 251. If the issue in *Wright* had been posed as a choice between characterizations of the passages in question as meritorious or meritless writing, conflict with the *Bleistein* principle would have been inevitable. By presenting the choice as being between the characterizations "stylistic" and "non-stylistic" writing, however, the conflict is avoided. The issue, as the court presents it, is not whether the passages are worthwhile, but whether they are the outcome of "authorship" in the first instance. In one respect, this treatment of the issue may represent a mere sleight of hand; in another, however, it accurately reflects the underlying assumptions of the copyright system. If a glorified vision of "authorship" animates our law of copyright, we should expect to find that works deficient in "authorship" are denied all protection or (at least) rendered particularly vulnerable to "fair use."

legal attributes and should retain the legal prerogatives associated with solitary, original "authorship." Thus, only identified or identifiable individuals can receive legal recognition for their contribution to a "joint work,"⁷² while the duration of protection for a "joint work" is measured in terms of the longest-surviving of its several "authors." Perhaps most critically, each of those "authors" is entitled to use and authorize the use of the work as though he or she were solely responsible for its creation.⁷³ Far from acknowledging the extent to which participation in a corporate, creative enterprise entails the surrender of individual prerogative, copyright law implicitly assumes the continued relevance of the Romantic vision of "authorship" to this domain.

The Copyright Act and case law thus tend to treat "joint authorship" as a deviant form of individual "authorship." Indeed, in many particular instances copyright refuses to acknowledge the existence of "joint authorship," or does so only grudgingly. Notably, one of the significant innovations of the major statutory revision of American copyright law completed in 1976 was its substantial narrowing of the range of circumstances in which

⁷² American copyright law provides for anonymous works, "of which no natural person is identified as author." 17 U.S.C. § 101 (1988). However, the statute assumes that in such instances one or more potentially identifiable individuals created the work, and includes special provisions allowing them to come forward and declare their identities. See 17 U.S.C. § 502(c) (1988).

⁷³ The "joint author's" right to use or authorize use is subject to a duty to account to his or her collaborator(s) for the financial proceeds. It also is subject to a limited and ill-defined exception, derived from the general law of co-tenancy. Uses of the work that are deemed "destructive" require the general consent of all "joint authors" of the work. There was early support for the view that a transfer of rights by one joint owner which "practically precludes the other from a like use" should fall within the bar. See Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 265 (S.D.N.Y. 1947). But see *Hertbert v. Fields*, 152 N.Y.S. 487 (1915). But recent commentators have stated that "as a general matter [courts should] confine relief to situations in which a co-owner's conduct may place the work in the public domain." PAUL GOLDSTEIN, 1 COPYRIGHT § 4.2.2.2 (1989). Others have noted that "only in those limited circumstance [sic] where by its nature the work can be exploited in one and only one medium and that medium customarily does not use competitive versions of the same work . . . a most rare type of situation." MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.10[A], at 6-28 (1991).

Since American copyright traditionally has provided only for "economic" as distinct from "moral" rights, we have no guidance on the problems that could arise, under the recently-enacted Visual Artists Rights Act of 1990. Although the Visual Artists Rights Act, which is codified at 17 U.S.C. § 106A, does provide for joint ownership of moral rights, nothing in the statute or the legislative history specifies the result when one "joint author" of a qualifying work objects to a use proposed or undertaken by another on non-economic grounds. Although it states that "authors" of a joint work of visual art are co-owners of the rights to claim authorship and object to the distortion, mutilation, or other prejudicial modification of the work, the statute gives no guidance concerning how that right would be exercised between the "joint authors"—nor does the legislative history. If the treatment of "economic" rights is any guide, we may presume that when one "joint author" has authorized a particular use, the scope of another right to object will be limited.

what might be termed a "collaboration" in the lay sense is recognized as a "joint work" in the legal one. Before 1976, courts were content to hold that a work of "joint authorship" need not be the result of face-to-face collaboration: as when, for example, lyrics were added to an already-completed tune.⁷⁴ By contrast, Section 101 of the 1976 Copyright Act defines "joint authorship" so to require "the intention, *at the time the writing is done*, that the parts be absorbed or combined into an integrated unit."⁷⁵

Law's insistence on formally disaggregating collaborative productions, rather than categorizing them as "joint works," is apparent in recent decisions concerning the vexed question of whether the contribution of each "joint author" must be one which would be considered a copyrightable "work" in itself.⁷⁶ Although many courts have dealt with this issue in recent years,⁷⁷

⁷⁴ See Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., Inc., 221 F.2d 569 (2d Cir.), modified, 228 F.2d 252 (1955) (the "Twelfth Street Rag" decision).

⁷⁵ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 103, 120, reprinted in 1976 U.S.C.A.N. 5659, 5736 (emphasis added) (glossing the definition of "joint work" in Section 101 of the 1976 Copyright Act). All questions of temporality aside, the requirement that contributions to a "joint work" be ones intended to be "merged into inseparable or interdependent parts of a unitary whole," *id.*, is notably restrictive in itself, although it is nothing new. Here, the hyperbolic language of a 1944 opinion of Judge Learned Hand is instructive. A work of "joint authorship" comes into being, he stated, because "when [both] authors plan an undivided whole . . . their separate interests will be as inextricably involved as are the threads out of which they have woven the seamless fabric of the work." Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944). The continuing tendency of courts to disaggregate creative contributions wherever possible, on the grounds that the resultant product is not "unitary," or "integrated," or "undivided," is exemplified by such decisions as Weissman v. Freeman, 868 F.2d 1313 (2d Cir.), *cert. denied*, 110 S. Ct. 219 (1989).

⁷⁶ As detailed below, this problem usually arises when one collaborator is responsible for the basic idea of a project, while another has undertaken its actual execution. But it could arise in other contexts as well. Copyright law does not extend protection to words, individual musical notes or short phrases. Strachorn v. ARC Music Corp., 357 F. Supp. 1393, 1405 (S.D.N.Y. 1973); Shapiro, Bernstein & Co. v. Jerry Vogel Music, 161 F.2d 406, 409 (2d Cir. 1947). Obviously, however, we can imagine a literary or musical project realized by inviting large numbers of individuals to make separate, sequential contributions, each consisting of sub-copyrightable expression. It seems unlikely that the whole would be considered more than the sum of the parts under prevailing copyright doctrine. (For this example, though not necessarily for the conclusion I draw from it, I am indebted to Bruce Joseph, Esq.)

⁷⁷ See, e.g., S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081 (9th Cir. 1989); Olan Mills, Inc. v. Eckerdt Drug of Texas, Inc., 1989 Copyright L. Dec. (CCH) ¶ 26,420 (N.D. Tex. 1989); Ashton-Tate Corp. v. Ross, 728 F. Supp. 597 (N.D. Cal. 1989); Boggs v. Japp, 1988 Copyright L. Dec. (CCH) ¶ 26,347 (E.D. Va. 1988); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 609 F. Supp. 1307 (E.D. Pa. 1985), *aff'd*, 797 F.2d, 1222 (3d Cir. 1986), *and cert. denied*, 479 U.S. 1031 (1987); Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981).

The Ninth Circuit Court of Appeals summarized the prevailing view in S.O.S.:

A person who merely describes to an author what the commissioned work should do or look like is not a joint author for purposes of the Copyright Act To be an author, one must supply more than mere direction or ideas; one must "translate[] an idea into a fixed, tangible expression entitled to copyright protection." [citing CCNV v. Reid, 846 F.2d 1485 (D.C. Cir. 1988), modified on other grounds, 490 U.S. 730 (1989)]. The supplier of an idea is no

and most have answered in the affirmative,⁷⁸ the most important precedent in the area is the recent decision in *Childress v. Taylor*.⁷⁹ *Childress* involved a dispute over ownership in a play about the legendary black entertainer "Moms" Mabley. Alice Childress was a veteran stage performer, who had conceived the idea of such a play as a vehicle for herself and had assembled extensive documentation of Mabley's life and career. Childress then persuaded a playwright, Clarice Taylor, to prepare a script embodying her ideas and incorporating her research.

After Taylor's script had been completed, Childress allegedly misappropriated its contents as the basis for a "Moms" Mabley play of her own, and Taylor brought suit. The issue of "joint authorship" was squarely presented—only if Taylor was found to be the sole "author" of the play did she have a claim against Childress. The trial court ruled in favor of Taylor, on the ground that Childress's "ideas and research" did not represent a copyrightable, and thus legally significant, contribution. The court of appeals revisited the issue in an opinion which conceded that the issue posed was "open in this Circuit" and "troublesome,"⁸⁰ both because it is one to which the statute does not speak in so many words⁸¹ and because conventional policy justifications for

more an "author" of a program than is the supplier of the disk on which the program is stored.

866 F.2d at 1087 (alteration in original).

⁷⁸ The most important exception is the *dictum* in Judge Ruth Ginsberg's opinion in *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1497 (D.C. Cir. 1988), modified on other grounds, 490 U.S. 730 (1989). After disposing of the "work for hire" issue, Judge Ginsberg noted that the question of whether the statue at issue had been a "joint work" hadn't been before the court, but suggested that it "might qualify as a text-book example of a jointly-authored work," and that merely supplying the general idea or concept for the work might count toward a finding of "authorship" on the part of one of the claimants to ownership rights. *Id.* at 1497. She continued: "Its contribution to the stream grate pedestal added to its initial conceptualization and ongoing direction of the realization [of the work]." *Id.* (emphasis added). The emphasized contributions, of course, are not ones which conventionally would be regarded as copyrightable in themselves.

More recently, another federal appellate court has explicitly held that the issue is an open one. See *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 136 (3d Cir. 1991) (en banc). See also *Steve Altman Photography v. United States*, 18 Cl. Ct. 267 (1989) (suggesting that "conceiving the idea" for a photograph may be a legally relevant authorial contribution).

⁷⁹ 945 F.2d 500 (1991).

⁸⁰ *Id.* at 506.

⁸¹ Judge Newman's opinion for the circuit court notes that [the textual argument from the statute is not convincing. The Act surely does not say that each contribution to a joint work must be copyrightable, and the specification that there be "authors" does not necessarily require a copyrightable contribution. "Author" is not defined in the Act and appears to be used only in its ordinary sense of an originator. The "author" of an uncopyrightable idea is nonetheless its author even though, for entirely valid reasons, the law properly denies him a copyright on the result.

Id. Although the passage demystifies the statutory terminology, its vision of the "ordi-

copyright protection do not dictate a clear answer:

If the focus is solely on the objective of copyright law to encourage the production of creative works, it is difficult to see why the contributions of all joint authors need be copyrightable. An individual creates a copyrightable work by combining a non-copyrightable idea with a copyrightable form of expression; the resulting work is no less a valuable result of the creative process simply because the idea and the expression came from two different individuals. Indeed, it is not unimaginable that there exists a skilled writer who might never have produced a significant work until some other person supplied the idea.⁸²

Indeed, such working relationships are more than "not unimaginable." Our knowledge of contemporary writing practice, to say nothing of our reconstructions of historical instances like Samuel Johnson's various "secret collaborations,"⁸³ suggests they are common—if not typical—among collaborators.

The above quoted passage comes as close as anything in copyright jurisprudence to acknowledging the complexities of collaboration, and the difficulties inherent in a legal framework shaped by the individualistic assumptions of Romantic "authorship." Unfortunately, having achieved this insight, Judge Jon Newman, who wrote the opinion for the circuit court, turns away from it. He discusses, instead, the various pragmatic justifications for insisting on copyrightable contributions from all "joint authors,"⁸⁴ concluding, somewhat vaguely, that such a rule embodying such insistence "seems more consistent with the spirit of copyright law."⁸⁵

Ultimately, the *Childress* court fails to confront the issues it identifies so clearly. Instead, it retreats into a restrictive vision of "joint authorship," aligning itself with the general tendency of American statute and case law. Once again, copyright law has been baffled by its inherited vision of Romantic "authorship," and reconsideration of the law's uncomprehending treatment of corporate creativity has been deferred. Rather than confronting the reality of prevailing writing practice, another court has be-

come an active participant in the ongoing process of its mystification.

The revision of copyright concepts to take fuller account of collaborative cultural production, foreseen by Professor Kaplan, has yet to occur. But what, one might fairly ask, are the implications of copyright's recursive insistence on forcing all writing into to the Procrustean doctrinal model shaped by the individualistic, Romantic concept of "authorship"? In closing, let me suggest one area (among many) in which the continuing failure of copyright to comprehend collective creativity may soon have real, adverse consequences.

As Martha Woodmansee has noted, electronic technology is playing a crucial role in promoting writing practices in which the identities of individual contributors to shared dynamic texts are deemphasized, and their useful contributions effectively merged.⁸⁶ One environment in which this trend is notable is that of the many loosely connected national and international computer networks that form, collectively, the so-called "Internet." To date, the Internet (with its bewildering array of available "bulletin boards," "newsgroups," and "electronic texts") has developed as a spontaneous, cooperative, non-governmental response to the potential of new technologies. Thus, activities in the Internet environment have been free (for the most part) from legal regulation.⁸⁷ Among other things, the Internet environment has fostered a class of new "infopreneurs," who gather available data from the network, augmenting and repackaging it for further distribution.⁸⁸

Obviously, there are tensions between some practices the Internet facilitates and traditional notions of proprietary rights in writing. As one commentator has noted, "In this informal and often unpredictable intellectual collaboration, authorship is frequently unrecorded"⁸⁹—not to say uncompensated! In many respects, the conditions of the Internet environment today resemble those which prevailed at other moments of polymorphous collaboration, unrestrained plagiarism, and extraordinary cultural productivity—such as the Elizabethan stage or Hollywood before 1915.

nary sense" of the word "author" is dependent upon a set of assumptions inherited by law from Romantic aesthetics.

⁸² *Id.*

⁸³ See Woodmansee, *supra* note 7, at 281-88.

⁸⁴ These include the discouragement of fraudulent claims and the striking of "an appropriate balance in the domains of both copyright and contract law." *Id.* at 507.

⁸⁵ *Id.*

⁸⁶ See Woodmansee, *supra* note 7, at 289-91.

⁸⁷ See generally *Information Policy: Superhighway Bill Sketches Outline of Ubiquitous Computer Network*, DAILY REP. FOR EXECS. (BNA), § C-1, Nov. 26, 1991.

⁸⁸ See Bruce L. Flanders, *Barbarians at the Gate: New Technologies for Handling Information Pose a Crisis Over Intellectual Property*, 22 AM. LIBRARIES 668 (July 1991).

⁸⁹ *Id.*

These conditions, however, may not prevail for long. Last year's congressional enactment of the so-called "Information Superhighway" legislation, which calls for the creation of a new, federally-funded, high-speed network within the Internet (the National Research and Education Network, or NREN), may serve as the catalyst for bringing the electronic network environment as a whole under firmer legal control, through (among other means) the extension of copyright regulation to the activities of network users.

A battle is shaping over the future of the Internet. On the one side are those who see its potential as a threat to traditional notions of individual proprietorship in information, and who perceive the vigorous extension of traditional copyright principles as the solution.⁹⁰ On the other side are those who argue that the network environment may become a new cultural "commons," which excessive or premature legal control may stifle.⁹¹ There will certainly be some need for regulation as the network environment evolves, and copyright will most definitely have a role to play.⁹² The ideology of Romantic "authorship," however, has greater potential to mislead than to guide the decision-makers who will shape the legal regime for this new and promising communications technology.

⁹⁰ See, e.g., *id.* (predicting "an information anarchy where current copyright law and policy is, to put it politely, ineffectual and outdated").

⁹¹ The position is typified by the views of Mitchell Kapor, president of the Electronic Frontier Foundation, Inc., and Jerry Berman, director of the American Civil Liberties Union Information Technology Project, who argue for "open network architecture," and stress that

[w]e know from past demand on the Internet and commercial personal computer networks that the network will be used for electronic assembly—virtual town halls, village greens, and coffee houses, again taking place not just through shared text (as in today's computer networks), but through multimedia transmissions, including images, voice and video. Unlike the telephone, this network will also be a publications medium, distributing electronic newsletters, video clips and interpreted reports.

Mitchell Kapor & Jerry Berman, Building The Open Road: The NREN as a Test-Bed for the National Public Network (1991) (on file with the Electronic Frontier Foundation, Inc.).

⁹² See, e.g., John R. Garrett, *Text to Screen Revisited: Copyright in the Electronic Age*, ONLINE, Apr. 1991, at 22 (describing activities of the Copyright Clearance Center in clearing rights for the distribution of copyrighted texts by electronic means).