ENHANCING COPYRIGHT PROTECTION FOR AMATEUR PHOTOGRAPHERS: A PROPOSED BUSINESS MODEL

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The growth of amateur photography hosting websites has increased public access to a large and diverse body of photographic works. This experience has enriched the public and has facilitated exposure for artists that would otherwise remain unknown. But these photographers have increasingly become victims of unscrupulous businesses who pirate the amateurs' works for profit. Because these artists rarely register the copyrights in their photographs, they are often denied a suitable remedy. Unprotected amateurs are thus increasingly denying public access to their works. A solution to this problem is possible: a business model that an amateur photography website can use to register large numbers of photographs inexpensively and efficiently. This model offers profit for photography hosting websites and protection for amateur photographers. It will therefore result in a more flourishing and diverse body of work available to the public.

> *I really believe there are things nobody would see if I didn't photograph them.*
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> —Diane Arbus[1]
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> *I've decided to make my entire flickr stream private. My images are being stolen and used in ways that I am not comfortable with . . . .*
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> —Lane Hartwell[2]

INTRODUCTION

A photograph can change the way we view the world. By freezing a moment in time, a photograph can reveal the beauty and the horror of the everyday

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1. LILLESS MCPHERSON SHILLING & LINDA K. FULLER, DICTIONARY OF QUOTATIONS IN COMMUNICATIONS 161 (1997).

2. Mark 'Rizzn' Hopkins, *Lane Hartwell: Bubble Buster and Party Pooper*, MASHABLE, Dec. 12, 2007, http://mashable.com/2007/12/12/lane-hartwell-bubble-buster-and-party-pooper/.

and the extraordinary. A friend's photographs can show dimensions of the person that we had not known before. A stranger's pictures can show us the world through a new perspective, or reveal common threads in human experience. And the Internet has facilitated access to these experiences.

Yet poor enforcement of photographers' copyrights has discouraged optimal production of their works. Photographers who have chosen to share their images with the world are having their art pirated and used for commercial profit.[3] In addition to causing anger and hurt feelings, this appropriation leads to some owners withdrawing their works from public access or declining to make their works accessible in the first place.[4]

While this particular issue is perhaps of more modern vintage, photography has long had a difficult relationship with the copyright system. Photography is a unique art form. On the one hand, a photograph is a slice of reality—a simple recording of what happened in a particular space and time.[5] But although a photograph often portrays what anyone present at the scene would have observed, it also embodies the photographer's particular expression. One can instantly distinguish between even the crudest snapshot taken by a person and a frame from a security camera video. A photograph is indeed a copy of reality, but a reality that is seen through the eyes of, and influenced by, the photographer.[6] This unique representation of a distinct visual reality is the essence of photographic originality.

Thus photographs are protected by copyright law[7] as "original works of authorship fixed in [a] tangible medium of expression[.]"[8] Yet this protection is often illusory if photographers do not register their copyrights. Theoretically,

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3. *See, e.g.*, Noam Cohen, *Use My Photo? Not Without Permission*, N.Y. TIMES, Oct. 1, 2007, at C3; Monica Hesse, *Hey, Isn't That . . . : People Are Doing Double-Takes, and Taking Action, As Web Snapshots Are Nabbed for Commercial Uses*, WASH. POST, Jan. 9, 2008, at C1; Hopkins, *supra* note 2; Harrison Keely, *Facebook Photos Gone Wild: Web Sites Lift Images of 'Hottest Girls,'* WASH. TIMES, Mar. 20, 2008, at A1; David Topping, *Sin City*, TORONTOIST, May 8, 2008, http://torontoist.com/2008/05/citynews_gets_slapped.php.

4. *See* Hopkins, *supra* note 2. Monica Hesse of *The Washington Post* advises: "Clearly, the only way to really make sure your photos on the Internet don't get splashed around is not to put them up there to begin with." Hesse, *supra* note 3. Similarly, the *Asbury Park Press* in New Jersey published an article warning: "Don't let [infringement] happen to you. Take steps to protect your images online. Your best bet is to make your images private." *Posting Photos Online? Be Careful*, ASBURY PARK PRESS, Oct. 31, 2007.

5. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884) (addressing argument "that a photograph is not a writing nor the production of an author" as it is merely "a reproduction, on paper, of the exact features of some natural object, or of some person"). The Court ultimately rejected this view. *Id.* at 61.

6. Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co., 274 F. 932, 934 (D.C.N.Y. 1921), (Hand, J.) ("[N]o photograph, however simple, can be unaffected by the personal influence of the author . . . ."), *aff'd*, 281 F. 83 (2d Cir. 1922).

7. *Burrow-Giles Lithographic Co.*, 111 U.S. at 61.

8. 17 U.S.C. § 102(a) (2006).

copyright vests in an author as soon as he or she creates a work "in fixed form."[9] But federal courts do not have subject matter jurisdiction over copyright cases involving infringement of U.S. origin works unless the copyrights at issue are registered.[10] Furthermore, copyright owners can obtain statutory damages and attorneys' fees only if the copyrights at issue were registered at the time of infringement.[11] These are crucial remedies since actual damages[12] are frequently minimal or difficult to prove.[13] A plaintiff in such a situation would be hard-pressed to find contingency-based representation.[14] Therefore, registration is critical in order to ensure de facto copyright protection.

Historically, photographers have faced numerous impediments to obtaining the full benefits of registration.[15] While a novelist may compose a single novel in the course of a year or two, a photographer can produce many different photographs within a short time span. Registering each photograph individually is not feasible or efficient.[16] The U.S. Copyright Office has responded with various accommodations for photographers, including the ability to register large collections of photographs by the same author on a single registration[17] without even requiring accompanying thumbnails of each image.[18] While these accommodations diminish the integrity of the registration system's notice function,[19] they seem necessary when balanced against the photographer's need to

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9. U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS 2 (2008), *available at* http://www.copyright.gov/circs/circ01.pdf; *see also* 17 U.S.C. § 201(a).

10. 17 U.S.C. § 411(a).

11. *Id.* § 412.

12. Actual damages are defined as loss to the copyright owner plus any profits of the infringer resulting from the infringement. 17 U.S.C. § 504(b). The infringer has the opportunity to prove that its profits were due to factors other than the infringement. *Id.*

13. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 191 n.63 (1989) (explaining that actual damages can be nonexistent or difficult to prove, so statutory damages may be the only actual remedy available). While, of course, injunctive relief is also available if the copyrights are not registered at the time of the infringement, 17 U.S.C. § 502(a), this remedy does not compensate a plaintiff for damage that has already occurred. Additionally, this remedy does not incentivize attorneys working on contingency to represent the plaintiff.

14. Statutory damages can run up to $150,000 per work for willful infringement. 17 U.S.C. § 504(c)(2).

15. *See, e.g.*, 441 Practising Law Institute, *Copyright Office, Congress, and International Issues*, *in* PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 135, 364 (1996); William Patry, *Is There Such a Thing as Holding Legal Title to a Registration?*, THE PATRY COPYRIGHT BLOG, July 29, 2008, http://williampatry.blogspot.com/2008/07/is-there-such-thing-as-holding-legal.html.

16. *See* 441 Practising Law Institute, *supra* note 15, at 364.

17. 37 C.F.R. § 202.3(b)(10)(ii) (2009).

18. Registration of Claims to Copyright, Group Registration of Photographs, 65 Fed. Reg. 26162-02, 26165 (proposed May 5, 2000) (to be codified at 37 C.F.R. pt. 202). The Copyright Office does require deposit of copies of the images, but the acceptable formats for photographs are now broader. *Id.* For example, the deposited copy may be a CD embodying the entire group of photographs. *Id.*

19. *See* Patry, *supra* note 15 ("The problem for photographers is a practical one and one that has vexed Congress and the Copyright Office for quite awhile: how to enable

benefit from copyright protection and the particular registration challenges photographers face.

Yet, as in other areas of copyright, the enforcement system for photographs has struggled to keep pace with rapidly changing technology.[20] While agencies for professional photographers have adapted to technological changes,[21] amateurs—a rapidly growing segment of photographers—lack the resources of these large corporations and remain unprotected.[22] Without copyright protection, the intellectual property rights of amateurs, and therefore the continued availability of their works, are at risk.

Part I of this Note will give a brief overview of the copyright registration system for photography. It will examine some of the steps that the Copyright Office has taken to assist photographers and some of the tradeoffs that come with these accommodations. Part II articulates a proposed business model that would facilitate amateur photographers' access to copyright registration and examines what changes (if any) to the current registration process would be necessary in order to enable this model's success. Finally, Part III analyzes whether this model would be beneficial from a public policy perspective, specifically through the lenses of the utilitarian and moral justifications for intellectual property protection. This Note concludes that the model will indeed be beneficial from a policy perspective, especially considering the value of dissemination of information.

I. THE COPYRIGHT REGISTRATION PROCESS FOR PHOTOGRAPHY

A. Volume and Cost of Registration

A copyright registration has three basic requirements.[23] The registrant must: (1) complete the applicable registration form;[24] (2) deposit two copies of each work to be registered;[25] and (3) pay the applicable registration fee[26]

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photographers to obtain the benefits of registration while still preserving the integrity of the registration system.").

20. Dan Heller, *Proposal for Privatizing the Copyright Registration Process*, DAN HELLER'S PHOTOGRAPHY BUSINESS BLOG, Jan. 21, 2008, http://web.archive.org/web/20080308071958/http://danheller.blogspot.com/2008/01/proposal-for-privatizing-copyright.html [hereinafter Heller 2008]; *see also* Dan Heller, *Proposal for Privatizing the Copyright Registration Process*, DANHELLER.COM, Jan. 27, 2009, http://www.danheller.com/blog/posts/proposal-for-privatizing-copyright.html [hereinafter Heller 2009].

21. *See generally* Bean v. McDougal Littell, No. 07-8063-PCT-JAT, 2008 WL 2896950 (D. Ariz. July 28, 2008); *Corbis Announces Program to Ease Copyright Registration for Photographers*, BUS. WIRE, June 5, 1995, *available at* http://www.thefreelibrary.com/Corbis+Announces+Program+to+Ease+Copyright+Registration+For...-a016981009.

22. Heller 2009, *supra* note 20.

23. U.S. COPYRIGHT OFFICE, CIRCULAR 4: COPYRIGHT OFFICE FEES 1 (2009), *available at* http://www.copyright.gov/circs/circ04.pdf.

24. 17 U.S.C. § 409 (2006).

25. *Id.* § 407(a)(1).

26. *Id.* § 708(a).

(currently, $35 for each electronic registration or $50 for each paper submission[27]). When photography was in its infancy and images were costly to produce, it may have been feasible for a photographer to fill out a form and pay a fee to register each individual photograph. But as technology has developed, it has become increasingly common for a photographer to produce a high volume of work in a short period of time. Thus, the volume of photographic works has increased dramatically since the copyright registration system was implemented. Today, registering each image individually would be costly and time-consuming.

B. The Copyright Office Makes Accommodations for Photographers

Because of these difficulties, the Copyright Office made accommodations for photographers to allow them to use the registration system effectively.[28] Currently, photographers can register a group of up to 750 unpublished photographs on a single $50 application,[29] as long as the same photographer created each picture.[30]

Additionally, an assortment of published photographs may be registered as a single unit of publication if they are published in the same unit of publication on the same date.[31] As long as the same entity is the claimant[32] of both the individual photographs and the collection of the photographs, the registration will extend to each individual image within the collection.[33] In this case, the photographer of each image would not even have to be the same person.[34] For example, this would apply if a magazine purchased exclusive rights to a number of different photographs that it planned to publish in its next issue from various freelance photographers. The magazine could then register the collection of works in its own name with the Copyright Office. Not only would the collection be protected as a "collection," but each individual photograph within the collection would receive the benefits of registration as well.

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27. U.S. COPYRIGHT OFFICE, *supra* note 23, at 1–2.

28. *See, e.g.*, *Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 103d Cong. 229 (1993) (statement of Ralph Oman, Register of Copyrights, discussing changes made in 1992 to ease copyright registration for photographers).

29. U.S. COPYRIGHT OFFICE, *supra* note 23, at 2. Group registrations must be submitted in paper form; online registration is not available. *Id.* at 6.

30. 37 C.F.R. § 202.3(b)(10)(ii) (2006).

31. *Id.* § 202.3(b)(4)(i)(A).

32. A "claimant" for registration purposes is defined as either: (1) the author or (2) an entity with all rights initially belonging to the author. *Id.* § 202.3(a)(3). Group (2) also includes those entities that hold mere legal title to the copyright. *Id.* at n.1; Bean v. McDougal Littell, No. 07-8063-PCT-JAT, 2008 WL 2896950, at *4 (D. Ariz. July 28, 2008).

33. Morris v. Bus. Concepts, Inc., 259 F.3d 65, 68 (2d Cir. 2001) ("[W]here the owner of a copyright for a collective work also owns the copyright for a constituent part of that work, registration of the collective work is sufficient to permit an infringement action under [17 U.S.C.] § 411(a) for the constituent part.").

34. *Bean*, 2008 WL 2896950, at *4 (finding registration of collection of photographs from many different authors valid).

Thus, in some instances photographers can register many separate photographs simply by submitting a single application. While at one point thumbnails of each image within a group registration were required, even this eventually became burdensome[35] and the Copyright Office no longer requires accompanying thumbnails.[36] Many professional photographers currently take advantage of this system to protect their works.[37]

C. Tradeoffs Associated with These Accommodations

While enabling use of the registration system benefits the copyright holder, decreasing the barriers to copyright registration does not come without costs. The registration system serves many functions for entities other than the copyright owner:[38] it secures an official copy of the work for future infringement suits, provides notice[39] to potential users that the work is registered (and therefore not in the public domain), and enables potential users to find owners so they may negotiate licensing deals. Although Congress has given latitude to the Copyright Office to adjust the registration requirements for practical purposes,[40] the registration and accompanying deposit must ultimately "serve the purpose of identification."[41]

These purposes may be at odds with ease-of-access measures for photographers. For example, the registration system's accommodations that allow registration of multiple works sacrifice some of registration's notice-giving purpose.[42] It is difficult to search for one particular work when it is buried within a group of 750 photographs. It is even more difficult to search for one picture in a single collection when the works comprising the collection are from many different authors. Therefore, it would appear that these accommodations erode the registration system's ability to provide notice.

But these costs do not outweigh the benefits. The copyright registration system would still not provide the public with notice of a photograph's true owner absent the accommodations. Unlike the case of land,[43] for example, universally

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35. *See* 441 Practising Law Institute, *supra* note 15, at 364.

36. Registration of Claims to Copyright, Group Registration of Photographs, 65 Fed. Reg. 26162-02, 26165 (proposed May 5, 2000) (to be codified at 37 C.F.R. pt. 202).

37. For an example of such a use, see *infra* Part II.C.1.

38. *See* Robert Wedgeworth & Barbara Ringer, *The Library of Congress Advisory Committee on Copyright Registration and Deposit—Letter and Report of the Co-Chairs*, 17 COLUM. J.L. & ARTS 271, 279 (1993) ("[T]he present [copyright registration] system can serve a significant dual purpose—to provide extensive and reliable public records of use to copyright owners and users, and to build the collections of the Library [of Congress] now and in the future.").

39. *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) (The importance of notice is "implicit in our recording statutes.").

40. H.R. REP. NO. 94-1476, at 153 (1976).

41. *Id.* at 154.

42. *See* Patry, *supra* note 15 (noting tension between integrity of registration system and ease of use for photographers).

43. Currently, GPS data assists surveyors, as well as the more traditional referencing of streets, addresses, and natural landmarks. *See generally* ROBERT J. CZERNIAK & RICHARD L. GENRICH, NAT'L COOP. HIGHWAY RESEARCH PROGRAM, COLLECTING,

understood "coordinates" by which we can identify a photograph are more difficult to isolate.[44] Currently, a person who does not have access to the title to or author of the photograph cannot realistically search the registry for the work.[45] So while it could be argued that registering works containing large numbers of photographs could compromise the registration system's integrity,[46] the system's notice-serving function has already been abandoned, at least as to photographs.

Moreover, the current system appears to be the only practical way to enable photographers to effectively use the registration service. Photographers still provide a copy of the work to the Copyright Office for reference purposes, and the registration form remains available should the owner need to prove that he has rights to the images at issue.[47] And "innocent infringement" is not a legitimate concern. Because copyright vests upon the creation of the photograph and because photographs do not exist before their actual creation, infringers cannot seriously argue that they were unaware that the photograph belonged to someone else. An owner's precise identity may not be known, but that does not entitle an infringer to take another's property. [48]

PROCESSING, AND INTEGRATING GPS DATA INTO GIS: A SYNTHESIS OF HIGHWAY PRACTICE 35 (2002).

44. The Copyright Office does have a searchable online database of its registrations. U.S. Copyright Office Public Catalog, http://cocatalog.loc.gov/ (last visited Jan. 20, 2010). A user can search the catalog by title, author, keyword, registration number, or document number. *Id.* While author and title are efficient ways of cataloging photographs, often this information is unavailable to the potential licensor (indeed, if it was available, then the need for the information contained in the registration would be lessened). A search by keyword, although more useful theoretically, is unlikely to produce precise results.

45. *Id.* Inexpensive and user-friendly image recognition software could be a possible solution to this problem. *See* Heller 2009, *supra* note 20 (noting that technology used to identify unique photographs exists and that its utilization in a copyright registration system would provide notice to potential infringers). If the Copyright Office were to implement such technology, it could simply upload all of the images on the multi-picture file into its searchable database from the copy of the work delivered with the registration. A multi-picture registration under this system would thus be no less notice-providing than a single-picture registration.

46. *See* Patry, *supra* note 15 ("The problem for photographers is a practical one and one that has vexed Congress and the Copyright Office for quite awhile: how to enable photographers to obtain the benefits of registration while still preserving the integrity of the registration system.").

47. *See* Alice Haemmerli, *Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645, 1665–67 (1996) (registration of copyright and recordation of transfers can enable copyrighted works to be used as collateral for secured loans).

48. The U.S. Supreme Court has noted that the potential usefulness to the public of an author's copyrighted work is not outweighed by the owner's First Amendment right to "freedom of thought and expression 'includ[ing] both the right to speak freely and the right to refrain from speaking at all.'" Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)). Arguably, the owner's desire not to make his identity accessible to the public (and, therefore, not license his works efficiently) should not justify forcing him to license his works.

Finally, registration of groups and collections of photographs enables photographers to obtain the benefits of registration needed to fulfill the constitutional mandate of "promot[ing] the Progress of Science and useful Arts."[49] As registration is often needed to obtain a realistic amount of damages in an infringement suit,[50] artists must be able to use it efficiently so the proper incentives for them to invest in creating their works exist.[51] If our society wants to continue to encourage photography as an enterprise then it needs to protect the photographer's proprietary rights. Therefore, any minimal decrease in notice is outweighed by the sizeable benefits given to the photographers by access to the registration system through registrations of groups and collections of photographs.[52]

II. THIRD-PARTY REGISTRATION OF PHOTOGRAPHS: A PROPOSED BUSINESS MODEL FOR AMATEUR PHOTOGRAPHY WEBSITES

While accommodations made in the current copyright registration system have greatly assisted professional photographers, one group remains unprotected: the growing group of amateur photographers who make their materials available online. By and large, amateurs do not register their photographs with the Copyright Office.[53] While part of the reason for this may be because they simply are not aware that this protection is available,[54] it is unclear that they would take advantage of registration even if they were aware. Often, it is difficult to foresee

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49. U.S. CONST. art. I, § 8, cl. 8.

50. *See* 441 Practising Law Institute, *supra* note 15, at 363 (stating that without ease of access to the registration system photographers "have been given a clear legal right . . . but no effective remedy; and this reality encourages infringers to continue unlawful conduct").

51. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (5th ed. 1998) ("[L]egal protection of property rights creates incentives to use resources efficiently.").

52. This argument assumes, of course, that "promot[ing] the Progress of Science and useful Arts" entails incentivizing creation of more works regardless of quality. There is support for this interpretation in Supreme Court caselaw. Jonathan S. Lawson, *Eight Million Performances Later, Still Not a Dime: Why It Is Time to Comprehensively Protect Sound Recording Public Performances*, 81 NOTRE DAME L. REV. 693, 701–02 (2006). Selectively protecting works on the basis of merit would also run counter to the principle that the Court will protect works regardless of quality, so long as they contain the requisite "modicum of creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–46 (1991); *see also* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits . . . . [I]f they command the interest of any public, they have a commercial value . . . and the taste of any public is not to be treated with contempt."). Further, selective registration could implicate First Amendment concerns. However, some scholars do argue that, due to the costs imposed by copyright, an optimal system may deny protection to some works despite a possible decrease in the number of works created. *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197–1204 (1996).

53. Heller 2008, *supra* note 20.

54. *See id.*

that a particular snapshot has the potential to become popular or make money.[55] While the bulk registration process may be cost-effective for professional photographers, amateurs may be less than enthusiastic to fork over the registration fees.

Yet increasingly, amateur photographers are finding their images appropriated for commercial use without permission, compensation, or even attribution.[56] And unless the rights of these photographers are protected, the public stands to lose the benefit of having these works accessible to them.[57] Further, protecting these rights may encourage an efficient licensing scheme[58] that will encourage more public participation and a higher quality and quantity of images available to all.[59]

This Part highlights the demand for amateur photography in professional advertising and the problems currently faced by amateur photographers when their images are not protected. It thus establishes a need for a simple and inexpensive way to register the copyrights in amateur photographs. Next, it sets forth a business model for amateur photography sites that could function as a potential solution to these problems. It then examines what obstacles would need to be overcome for this model to function. It looks to solutions used by the world of professional photography and predicts whether these solutions would succeed in the amateur realm. Finally, this Part briefly explores some alternatives to the model that could protect the photographer.

A. A Demand Supplied Through Theft

Dan Heller, an author and blogger who explores the intersection of business and photography, has commented on the strange role reversal that has occurred in the world of online photography.[60] While some corporations have worried about consumers' ability to steal their intellectual property, in the case of photography, it is the consumers and amateurs who now have to worry about their property being pirated by established corporations.[61] While admittedly, many amateur photographs on sites such as Flickr and Facebook are akin to "really bad

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55. *See* Mark Milian, *Photographers Find Unwitting Success with Social Media*, L.A. TIMES TECH. BLOG, Nov. 14, 2008, http://latimesblogs.latimes.com/technology/2008/11/photography-dig.html ("Few know what type of photograph, video or news bit is going to explode, and what's going to fizzle.").

56. *See* sources cited *supra* note 3.

57. *See* sources cited *supra* note 4.

58. For more details on a possible licensing structure, see *infra* Part III.A.1.

59. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1300 (1996) (stating that protecting intellectual property rights of content owners can result in efficient licensing schemes).

60. Heller 2008, *supra* note 20.

61. *Id.*; *see also* Deloitte Consulting LLP, *The Maturing Human Network: Can You Find Me Now?*, COMPUTER WKLY., Oct. 14, 2008, *available at* http://www.computerweekly.com/Articles/2009/06/10/232615/The-maturing-human-network-Can-you-find-me-now.htm ("In the Web 2.0 era, users have become both producers and consumers of information.").

snapshots of people's kids playing with a dead frog,"[62] many of these pictures are of surprisingly high quality.[63]

Furthermore, as a post-modern society, the public is becoming less susceptible to traditional forms of advertising.[64] Effective campaigns nowadays consist of "real people doing real things."[65] Therefore, corporations increasingly seek the elusive feeling of authenticity in their advertisements.[66]

This feeling is difficult to achieve with staged professional photography. When an employee in the creative department at St. Luke's advertising agency was asked to select photos for a hypothetical advertising campaign, he criticized much of the content from professional photography sites.[67] "[A] lot of times people look too 'ad-y.' I was looking for images that do not mirror advertising stereotypes of people."[68] In contrast, sites like Flickr fulfill the need for authenticity: "I really like the fact that people aren't taking these photos with an intent."[69]

Similarly, as an experiment, Monica Hesse of the *Washington Post* searched Flickr for the keywords "nerdy teen."[70] The first hit was not a stylized caricature, but rather a yearbook photo of a subtly awkward-looking brunette, hair and glasses "not quite right."[71] "The image," she says, "is more 'right' than the Steve Urkel an ad firm would have created."[72]

The demand for these images exists, but because the copyrights in them are often not registered, there is little remedy for the photographers if advertisers pirate the images for use in their campaigns.[73] In the absence of statutory damages, the actual damages that can be claimed are limited and difficult to prove. Thus, there is scant motivation (apart from ethical considerations and bad publicity) for the advertisers to discontinue appropriating these images.[74]

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62. Heller 2008, *supra* note 20.

63. *Id.*

64. Press Release, Intelliseek, Consumer-Generated Media Exceeds Traditional Advertising for Influencing Purchase Behavior, Finds Intelliseek Study (Sept. 26, 2005), *available at* http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/09-26-2005/0004131975&EDATE.

65. Press Release, Photoshelter Inc., PhotoShelter Inc. Launches Flickr Import Tool (Mar. 5, 2008), *available at* http://www.reuters.com/article/idUS140008+05-Mar-2008+BW20080305.

66. Hesse, *supra* note 3 ("Authenticity is the new consumer sensibility.").

67. Jennifer Whitehead, *Special Report: Photography—Leveraging the Libraries*, CAMPAIGN, May 4, 2007, at 31, *available at* http://www.campaignlive.co.uk/news/655872/Special-Report-Photography---Leveraging-libraries/?DCMP=ILC-SEARCH.

68. *Id.*

69. *Id.*

70. Hesse, *supra* note 3.

71. *Id.*

72. *Id.* (referring to the clichéd character on the hit television series *Family Matters*).

73. Heller 2008, *supra* note 20.

74. Heller 2009, *supra* note 20.

This does not just lead to the economic inefficiencies of free riding; it hurts emotionally when a person's images are appropriated in this way.[75] While some may be thrilled to see their photographs become the center of advertising campaigns, others are far from ecstatic.[76] "It's a picture of a stupid dog. But it's my dog and it's my photo!" complains one victim when a local Fox station stole a picture of her pug that she had posted on her blog.[77] And of course, many have heard of fifteen-year-old Alison Chang, whose picture was pirated by Virgin Mobile Australia.[78] Chang's image was the background for the tag line: "Dump Your Pen Friend."[79] Clearly this was not a flattering juxtaposition: "[I]t's derogatory," said Chang's brother.[80] But never let it be said that Virgin has no respect for intellectual property law. The company still managed to remove the Adidas logo from Chang's cap.[81]

Indeed, intellectual property is a quite personal form of property, and there is often an intense connection between authors and their creations.[82] Many commentators will go so far as to say that an author's creations are not even distinct from the author himself; they are "an extension of the author's personality."[83] "When an artist creates, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world a part of his personality and subjects it to the ravages of public use."[84] Thus, many people feel emotionally linked to their creations and want to take steps to protect them.

B. A Proposed Business Model

Dan Heller has suggested that the Copyright Office make registration more cost-effective and accessible to amateurs by authorizing private companies to register copyrights on the Office's behalf.[85] He compares this proposal to a system where privatization of a government service has worked effectively: with the Network Information Center authorizing private parties to register domain

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75. Hesse, *supra* note 3 ("[T]he more interesting question . . . isn't 'Is it legal?' but rather, 'Why does it sting so badly?'").

76. *Id.*

77. *Id.*

78. Cohen, *supra* note 3.

79. *Teen Finds Her Flickr Image on Bus Stop Ad*, CBS NEWS, Sept. 25, 2007, http://www.cbsnews.com/stories/2007/09/24/tech/main3290986.shtml?source=RSSattr=SciTech_3290986.

80. *Id.*

81. *Id.*

82. Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 374 (1993).

83. *Id.* at 363.

84. *Id.* at 364 (quoting Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (internal quotations omitted)).

85. Heller 2008, *supra* note 20.

names.[86] Privatizing copyright registration would similarly make registration more accessible to the amateur by increasing access and decreasing fees.[87]

Accessible registration is important because, as Heller claims, there is little incentive for the user of an amateur work to legitimately license its use.[88] The transaction costs in negotiating with the owner would be high, and there is little reason for the user to even pay for the use apart from the "good will in his heart."[89] Registering content would provide the "stick" of statutory damages and would also incentivize an efficient licensing system[90] to promote legitimate use.[91]

Ultimately, the default assumption of the infringer may change once the practice of registration became widespread.[92] Instead of assuming that the work was unregistered, the potential infringer would think that the encountered work might well be protected.[93] This would ultimately encourage legitimate licensing agreements. Heller optimistically concludes, "[T]he day could come when most copyrights are respected as a matter of course."[94]

But then why have a registration system for these types of works at all? As the notice-service function of the system for these types of works is currently not served,[95] the law could simply be amended to offer statutory damages for unregistered works regardless of registration status. Registration, however, still remains important for accounting purposes,[96] and the records can also provide documentation needed to enable investment and collateralization.[97] Further, registration is important because it creates a centralized collection of artistic works: the Library of Congress.[98] This assembly of art "sustain[s] and preserve[s] a universal collection of knowledge and creativity for future generations,"[99] and thus enhances U.S. culture.[100]

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86. *Id.*
87. Heller 2009, *supra* note 20.
88. *Id.*
89. *Id.*
90. For more details on a possible licensing structure, see *infra* Part III.A.1.
91. Heller 2009, *supra* note 20.
92. Heller 2008, *supra* note 20.
93. *Id.*
94. *Id.*
95. *See supra* Part I.C.
96. Heller 2009, *supra* note 20.
97. Haemmerli, *supra* note 47, at 1665–67.
98. Wedgeworth & Ringer, *supra* note 38, at 279 ("[T]he present [copyright registration] system can serve a significant dual purpose—to provide extensive and reliable public records of use to copyright owners and users, and to build the collections of the Library [of Congress] now and in the future.").
99. Library of Congress, About the Library: The Mission of the Library of Congress, http://www.loc.gov/about/mission.html (last visited Jan. 19, 2010).
100. Despite these advantages, there is a colorable argument that the costs of maintaining a registration system for this class of works outweigh the benefits. This Note primarily focuses on working within the existing registration system, but an alternative solution requiring more fundamental changes to copyright protection's structure may accomplish similar goals.

While Heller's idea of privatizing the registration system is innovative, this alone may not entirely relieve the cost burdens on the amateur. Heller appears to be advocating for a one-registration-per-photograph model.[101] While it is possible that privatizing registration might drive costs per registration down, paying even a few dollars per work for registration would be burdensome for many amateur photographers, especially if they do not expect that their photographs will ever be infringed.

An alternative solution may be possible with a few adjustments to Heller's model. Given the fact that collections of large numbers of photographs can currently be registered as a single work and that the registration can then extend to each component part of the collection,[102] it seems that it would be possible for a third party, such as a photo-sharing site like Flickr,[103] to register collections of photographs with the Copyright Office on behalf of the photographer-users of the site. The registration would then extend to each photograph within the collection, thus protecting the works. The third-party site could charge a nominal fee, such as ten cents, to cover its costs and still make a sizeable profit. If the site were to implement a commission-based licensing system, it may even be able to make the registration service complimentary.

The service would be opt-in, as not all users would desire registration. However, users would be more likely to participate if the fee was low. Many users already attempt to inform the public of their rights through Creative Commons licenses that restrict certain types of uses.[104] It does not seem farfetched that they would pay a nominal fee to make those rights more enforceable.

C. Legal Hurdles to This Business Model: Valid Claimants

This model would not, however, be without its own unique legal hurdles. The copyright in a collection of many photographs would extend to each individual photograph only if the "claimant"[105] of both the collection and of the individual photograph was the same entity at the time of registration.[106] A claimant for purposes of copyright registration can be either: (1) the author or (2) an entity

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101. Heller 2008, *supra* note 20; Heller 2009, *supra* note 20.

102. *See* Bean v. McDougal Littell, No. 07-8063-PCT-JAT, 2008 WL 2896950, at *6 (D. Ariz. July 28, 2008). For the general proposition that registration of a collection extends to component parts of that work, see Morris v. Bus. Concepts, Inc., 259 F.3d 65, 68 (2d Cir. 2001).

103. Flickr (and other photography-sharing sites) enable users to upload their photographs and share them with viewers of the site. Flickr, About Flickr, http://flickr.com/about/ (last visited Jan. 19, 2010). Flickr, like similar photo-sharing sites, is primarily utilized by amateur photographers who use the site to share their photographs with friends and family or to organize and store their growing collections of photographs. *Id.*

104. For information about the various Creative Commons licenses, see CreativeCommons.org, About Licenses, http://creativecommons.org/about/licenses (last visited Jan. 20, 2010).

105. A "claimant" is one who can assert a property interest (here, one who can assert an interest in the copyrighted material in question). *See* BLACK'S LAW DICTIONARY 265 (8th ed. 2004).

106. *See* 37 C.F.R. § 202.3(b)(4) (2006); *Morris*, 259 F.3d at 68.

with all rights originally belonging to the author (including those with legal title to the copyright).[107] Owning limited copyrights in the work in question (for example, only owning the right to publish the work in a magazine) will not grant the entity sufficient rights to make it a "claimant" for registration purposes.[108] Further, only a claimant may register the copyrights in the work in question.[109] Therefore, in order for the photo-sharing site to be able to register users' individual photographs as part of a collection, it must be a valid claimant for each individual photograph within the collection.[110] There are a few possible methods for fulfilling this requirement: (1) maintain the current registration system and have the authors transfer all of their rights temporarily to the photo-sharing site;[111] or (2) change the registration system to enable an author's agent to become a valid claimant for purposes of copyright registration.

1. Rights Transfer: The Corbis Solution

Corbis is a licensing clearinghouse for professional photographers.[112] Upon recognizing similar registration difficulties in the professional realm,[113] Corbis began to protect its photographers by registering photographs on their behalf with the Copyright Office in 1995.[114]

Corbis satisfied the "valid claimant" requirement by requiring its photographers to sign a simple contract: the photographer would sign over "legal title in the . . . images . . . *solely for the purpose of copyright registration.*"[115] Corbis agreed to reassign title immediately upon registration or for any reason before that time at the request of the author.[116] Thus, Corbis became a valid claimant by having all rights originally belonging to the author (or legal title to those rights).[117] It could then register collections of photographs in its own name, and because it was the valid claimant for both the collection and the individual photographs, the individual photographs in the collection would be registered.[118] Corbis would subsequently transfer all rights in the photograph back to the original

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107. 37 C.F.R. § 202.3(a)(3).

108. Morris v. Bus. Concepts, Inc., 259 F.3d 65, 71 (2d Cir. 2001).

109. 37 C.F.R. § 202.3(c)(1).

110. *Id.* § 202.3(b)(4).

111. This would make the site an entity with "all rights originally belonging to the author" for purposes of 37 C.F.R. § 202.3(a)(3). This solution is presently utilized by professional photographers. Bean v. McDougal Littell, No. 07-8063-PCT-JAT, 2008 WL 2896950, at *2 (D. Ariz. July 28, 2008).

112. Corbis Corporate Overview, http://www.corbis.com/corporate/overview/overview.asp (last visited Jan. 20, 2010).

113. *Corbis Announces Program to Ease Copyright Registration for Photographers*, *supra* note 21 ("In spite of the importance of copyright registration, many photographers do not register their images with the U.S. Copyright Office because of the time and expense required by the registration process.").

114. *Id.*

115. *Bean*, 2008 WL 2896950, at *2.

116. *Id.* at *3.

117. 37 C.F.R. § 202.3(a)(3)(ii) (2006).

118. *Bean*, 2008 WL 2896950, at *2 n.2.

artists, and the artists would then be in possession of a registered work.[119] So far, one district court has upheld copyrights registered in this fashion in *Bean v. McDougal Littell*.[120] As long as authors posting their pictures on photo-sharing sites were willing to sign a similar contract, there is little reason why this solution would not be able to work in the amateur realm as well.

While this is a creative solution to the registration problem, it is not without its downsides. For example, William Patry has called the solution "needlessly complex."[121] It is indeed doubtful that the drafters of the Code of Federal Regulations had this situation in mind when they allowed owners of bare legal title to register copyrights. More likely, the drafters wanted to allow a trust to be able to register copyrights while preserving the beneficiary's equitable rights in the property (such as the ability to earn licensing fees).[122]

This solution also diminishes registration's notice-serving function. The collection of photographs would be registered in the site's name, not in the author's name.[123] The chain of title from the artist to the site and back to the artist would also need to be documented.[124] This leads to a messy registration system and potentially makes the owner or author of any particular work difficult to determine.[125] The ultimate result is inefficiency and increased transaction costs when a potential licensor is unable to find the owner of a particular work in order to negotiate a licensing deal.[126]

Additionally, while on its surface it seems like this method creates a network of formalities to get around the registration system's technicalities, the artists are actually signing legal title in their works over to a large corporation so that the corporation will do something for their benefit. The *Bean* court even noted that the relationship between Corbis and its artists could be analogized to that of a trust and a beneficiary.[127] It remains unclear if such a contract would therefore

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119. *Id.*

120. *Id.* at *4.

121. Patry, *supra* note 15.

122. For this exact contingency, see COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES 622.08, 623.04(e) (1998).

123. *Bean*, 2008 WL 2896950, at *2.

124. 3-12 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.11[C] (2008) (citations omitted) ("[A]n assignee of a previously registered statutory copyright has the burden of proving his chain of title because nothing in the registration certificate evidences his right to claim through the original copyright claimant.").

125. There would also be a slight timing issue. Authors would probably not want to make their works available until after the registration process had concluded, as any infringement occurring in the interim could give the right of action to the third-party site rather than the author.

126. The Copyright Office is also concerned with this issue in the context of "orphan works" whose owners have abandoned the copyrighted work and cannot be located. Copyright Office, Orphan Works, Notice of Inquiry, 70 Fed. Reg. 3739-01, 3739 (Jan. 26, 2005). The Office is concerned "that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or making such works available to the public." *Id.*

127. *Bean*, 2008 WL 2896950, at *4.

create a fiduciary relationship between the photo-sharing site and the artist.[128] This could create more liability for the sites than may be warranted under the circumstances[129] and could make them less likely to utilize the system.

Further, skeptical web users may have difficulty trusting a large corporation with the rights to their works, even if only for a limited time.[130] The rights transfer would also have to be automated and easily accomplished online for this system to become operational. This would likely involve an electronic agreement that users would probably neither read nor understand but that would transfer many of their rights in their intellectual property. It may prove undesirable to make such a transfer so casual: while perhaps an attractive solution in this instance, it could later be used in an unscrupulous manner.

However, this system also has many benefits. First, it would decrease transaction costs for both the artist and the Copyright Office by allowing large numbers of works to be registered using a single application.[131] Because of this, many photographers will be able to obtain the benefits of registration that otherwise may have been cost-prohibitive. Additionally, the solution is entirely consensual. The agreement is only tested when, as in the *Bean* case, a third-party infringer[132] attempts to attack the registration's validity in order to remove a

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128. *Cf.* A. Brod, Inc. v. SK & I Co., 998 F. Supp. 314, 327–28 (S.D.N.Y. 1998) (legal title in copyright transferred for purposes of bringing infringement suit created genuine issue of fact as to whether a fiduciary relationship was created).

129. An automated registration process may falter at some point. If a user pays for the service and his photographs are accidentally omitted from the batch registration request, then the site could be liable for the statutory damages that the user could have obtained from the infringer if the photographs had been properly registered. While such a situation may be rare, and may be cured through meticulous procedural checks, it may still expose the site to more liability than is warranted.

130. For example, in early 2008 Japanese social networking site Mixi planned to modify its terms of use to give the site the right to use all content posted by users without compensation. Nicolas Lupien, *Social Media and IP Ownership Considerations*, OTTAWA BUS. J., Jan 5, 2009, http://archive.ottawabusinessjournal.com/archive_detail.php?archiveFile=2008/December/04/OBJ-BusinessMatters3/25784.xml. Upon hearing this, users revolted, misunderstanding the agreement to mean that the site would be able to claim any user-generated content as belonging to the company. *Id.*; *see also* David Wier, *Mixi IP Fight: Who Owns Social Media Content?*, BNET INTERCOM, Mar. 12, 2008, http://blogs.bnet.com/intercom/?p=1644. Due to this backlash, the company decided not to modify its terms of use. Lupien, *supra*; David Wier, *Victory for Mixi's Users in IP Dispute*, BNET INTERCOM, Mar. 19, 2008, http://blogs.bnet.com/intercom/?p=1670.

131. *Bean*, 2008 WL 2896950, at *2 n.2 (stating that Corbis' registration process "appears to have been done as a cost saving measure to reduce the time and expense of requiring each photographer to register his own works individually").

132. As in other areas of law, courts are generally hesitant to invalidate an agreement based on the attack of a third party seeking to gain from a technical defect. *See, e.g.*, Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 36 (2d Cir. 1982) (holding that "it would be anomalous to permit a third party infringer to invoke [the writing requirement] provision against [a copyright] licensee" as a defense to the third party's infringement), *superseded on other grounds*, FED. R. CIV. P. 52(a) (changing the standard of review for evaluation of originality of work based on documentary evidence); *see also In re* Vic Supply Co., 227 F.3d 928, 933 (7th Cir. 2000) (Posner, J.) ("[T]he parol evidence rule,

federal court's[133] subject matter jurisdiction over the infringement suit.[134] Thus, the rights transfer solution could enable the business model outlined above.

2. Alternative Solution: Agency

When William Patry criticized the Corbis solution, he suggested the alternative method of simply making Corbis the artist's agent.[135] Indeed, it does seem that an agency relationship more intuitively describes the transaction that is occurring: the site would essentially be registering the copyright on behalf of the artist.[136]

Unfortunately, this solution would not work under the current registration system. As an "agent" for various authors simultaneously, the site would effectively be standing in for many different people at once. When it registered a collection containing works of all of these various authors, the "claimant" would not be a single entity, but many different ones. Therefore, the claimants for each photograph (the many artists) would not be the same as the claimant for the collection (the photo-sharing site). This would not satisfy the registration requirements as they presently stand.[137] The problem, however, could be solved by a simple amendment to the Code of Federal Regulations enabling an agent representing many different artists to be considered the same claimant for registration purposes.

This solution would formalize and officially approve of the Corbis system described above. While an official sanction might enable these agreements to better withstand scrutiny by the courts, this type of approval would not be without its own drawbacks.

The problems associated with notice and with the creation of a fiduciary relationship would be no less present in an agency relationship.[138] The Copyright Office already attempted to solve problems associated with the lack of notice created when a copyright owner is difficult to locate in the case of abandoned

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like other contract defenses, is intended for the protection of parties or alleged parties to contracts; it is not intended to enable a stranger to break up a contractual relation.").

133. Further, a state court would not be able to hear the copyright infringement suit, as it would be forbidden by preemption. 17 U.S.C. § 301(a) (2006) ("On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.").

134. *Bean*, 2008 WL 2896950, at *3.

135. Patry, *supra* note 15.

136. "Agency is the fiduciary relationship that arises when one person (a "'principal'") manifests assent to another person (an "'agent'") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

137. 37 C.F.R. § 202.3(b)(4) (2006).

138. Agency creates a fiduciary relationship. RESTATEMENT (THIRD) OF AGENCY § 1.01.

"orphan" works.[139] Official approval of a registration system where the owner may not even be listed on the registration application could undermine efforts to require more notice elsewhere.

If the Copyright Office required owners to make their identities explicit on the registration, the potential licensor could determine the identity of the rights holder. But it could be argued that this is not a valid or useful responsibility of the Copyright Office. Imagine, for example, that a particular author does not want his identity to be known and he will not even consider licensing out his work. Yet the author still does not want his work to be used by others, so he registers it with the Copyright Office. Requiring the author to provide his identity to obtain protection can discourage the circulation of anonymous works.

In addition, compelling authors to identify themselves in the context of circulating an expressive work may implicate free speech concerns, even if requiring them to do so is in the context of receiving a government benefit.[140] Indeed, prior copyright laws requiring the identification of authors were created to detect and punish creators of subversive works.[141] Perhaps an important part of encouraging free speech and the dissemination of ideas is protecting the anonymity of authors who wish to remain hidden.

Even if the legislature or the courts still wanted to maintain some kind of notice-serving system, it is not clear that requiring explicit notice from the registration system is necessarily the easiest or most efficient way to provide actual notice to potential users, especially given modern technology. For example, it would be theoretically possible to require Digital Rights Management[142] protection, at least in the electronic realm.[143] The owners' information could be

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139. Copyright Office, Orphan Works, Notice of Inquiry, 70 Fed. Reg. 3739-01, 3739 (Jan. 26, 2005). Orphan works are works whose authors are difficult or impossible to find. *Id.* Such works are still copyright protected, so individuals who wish to use an orphan work are faced with the choice of either infringing at their peril (as the owner may surface later and bring an infringement suit) or not using the work at all. *Id.* at 3740. This obviously leads to market inefficiencies. *See id.* at 3741.

140. *Cf.* Wooley v. Maynard, 430 U.S. 705, 714, 717 (1977) (finding that drivers could not be compelled to display the slogan "Live Free or Die" on their license plates and stating that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

141. *See* Sharon E. Foster, *Invitation to a Discourse Regarding the History, Philosophy and Social Psychology of a Property Right in Copyright*, 21 FLA. J. INT'L L. 171, 187 (2009).

142. Digital Rights Management ("DRM") protection is technology embedded in digital copies of works that protects or enforces the copyrights of the owner. Terry Laidler, *Digital Rights Management Systems (DRMS)*, *in* DIGITAL RIGHTS MANAGEMENT AND CONTENT DEVELOPMENT 31 (Bill Cope & Robin Freeman eds., 2001). An example of this is the Content Scramble System that encrypts the data on DVDs. This protects against unauthorized copying of the disc as theoretically only an authorized device is able to unscramble the code and access the work.

143. *See* Jeremiah A. Armstrong, *The Digital Era of Photography Requires Streamlined Licensing and Rights Management*, 47 SANTA CLARA L. REV. 785, 824–26 (2007).

watermarked on the picture itself or else encoded somehow in the image.[144] Enabling a viewer to mouse over a picture and get the contact information for the owner is certainly much more efficient than burying it in a voluminous registration system.[145] This is just one possible solution. Certainly, there must be other creative ways of ensuring that potential licensors will still have access to the contact information that they need.

Therefore, even though a business model based on enabling third-party registration of amateur photographs would face a few minor legal kinks to its implementation, the courts could easily sanction the rights assignment model or the Copyright Office could provide for an agency model. The only remaining question would be: would we want this to occur?

III. ENABLING A THIRD-PARTY REGISTRATION MODEL: GOOD PUBLIC POLICY?

As discussed above, a strong demand exists for an inexpensive and user-friendly way to register the copyrights in amateur photographs on photo-sharing sites.[146] Despite the presence of a market for the service, however, this model may not be desirable to employ. Specifically, it is not clear that enabling easy and inexpensive access to the copyright registration system would comport with the traditional reasons for protecting intellectual property. This Part will analyze the various justifications for having the costs associated with a system of intellectual property protection and will determine whether sanctioning this business model would effectuate those purposes.

A. Justifications for Protection of Property Rights

In general, there are three accepted underlying principles for property rights protection: (1) the utilitarian model; (2) the labor theory principle; and (3) the personhood justification. This Section will analyze the copyright registration business model under each of these grounds.

1. The Utilitarian Model

In the United States, the utilitarian model provides the primary justification for why society expends resources to protect intellectual property rights.[147] The U.S. Constitution mandates that Congress "promote the Progress of

144. *Id.*

145. This is not, however, the same quid pro quo that is present in the registration system. An artist who failed to disclose identifying information in a registration application would lose the benefits gained from that registration. It is unlikely that artists who failed to maintain their DRMs would suffer any explicit punishment.

146. *See supra* Part II.A.

147. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" (quoting U.S. CONST. art. I, § 8, cl. 8)); *cf.* Graham v. John Deere Co., 383 U.S. 1, 5–6 (1966) ("[The Intellectual Property] [C]lause is both a grant of power and a limitation." It "is limited to the promotion of advances in the 'useful arts,'" and Congress may not "enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby.").

Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[148] Thus, the primary purpose is not to simply "reward" the creator.[149] The monopoly is intended to give the inventor or the artist an incentive to create new works.[150] The public welfare is served through the promulgation of a rich variety of products that otherwise may not have been created.[151]

In order to understand this model, it is crucial to grasp exactly how the grant of a monopoly is necessary for artistic works to be produced. Essentially, the creation of a work of art, be it a motion picture or a hip-hop album, requires a large amount of time and investment of resources. A person looking to earn a living would not make this investment unless the anticipated gains exceed these expenditures.[152] However, (particularly in the digital age) it is easy for a potential consumer of an artwork to make a copy for little or no cost. Absent laws preventing people from doing so, there would be little reason for a user to pay the author for a copy of his creation. Thus, without the enforcement of an intellectual property monopoly, an artist (or a company representing the artist[153]) would have little reason to invest in developing works of art.[154]

However, granting monopoly rights also brings a host of attendant problems. Monopoly limits access both by increasing cost and by limiting the material that can be used in other works.[155] If the purpose of copyright law is to

148. U.S. CONST. art. I, § 8, cl. 8.

149. *See* United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.").

150. *See* Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36 (1939) (stating that the purpose of the Copyright Act was "to afford greater encouragement to the production of literary works of lasting benefit to the world") (internal quotations omitted).

151. Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [C]lause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

152. *See* POSNER, *supra* note 51, at § 3.1 ("[W]ithout property rights there is no incentive to incur [development] costs because there is no reasonably assured reward for incurring them.").

153. As of 2005, approximately two-thirds of the value of large U.S. firms lay in "intangible assets" mostly consisting of intellectual property. ROBERT J. SHAPIRO & NAM D. PHAM, ECONOMIC EFFECTS OF INTELLECTUAL PROPERTY-INTENSIVE MANUFACTURING IN THE UNITED STATES 5 (2007).

154. For a rather catastrophic view, see 2 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON: 1554–1640 A.D., at 805 (Edward Arber ed., 1875) ("And further if [copyright] be revoked no bookes at all shoulde be prynted, within [a] shorte tyme, for commonlie the first prynter is at charge for the Author's paynes, and somme other suche like extraordinarie cost, where an other that will prynt it after hym, come[s] to the Copie gratis, and so maie he sell better cheaper than the first prynter, and then the first prynter shall never [sell] his bookes.").

155. Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996).

improve the public welfare, then overbroad intellectual property rights could actually undermine this purpose.[156]

Thus, in intellectual property law, the traditional utilitarian view attempts to balance providing proper incentives on the one hand and restricting access to valuable works on the other.[157] While many commentators have observed that this dichotomy is flawed or at least grossly oversimplifies the issue,[158] the traditional framework is a good starting point for the present discussion.

And so, given this utilitarian rationale for intellectual property rights, would there be sufficient justification for easing access to the registration system for amateur photographers? The intuitive reaction is that there is not. While there may be many reasons for amateurs to upload their photographs onto sites like Flickr and Facebook, it is unlikely that many do so in order to reap the benefits of the copyright registration system. An interview with Stewart Butterfield, co-founder of Flickr, reveals that the site's original purpose was to enable users to share their photo collections easily with friends and family across the country.[159] Additionally, there was a heavy social networking emphasis;[160] presumably users enjoyed making connections with viewers of their photographs who may not have offered their perspectives if it was not for the access granted by the sites. More recently, as access to photography has become more ubiquitous and as photography collections have grown, users have begun to utilize Flickr as a photography management site.[161] The increasingly sophisticated methods of organizing one's personal photography collection, in addition to the fact that the site provides a backup for sentimentally valuable pictures, are the most common reasons for becoming a Flickr member.[162]

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156. *See* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698 (1998) (discussing problem of "an 'anticommons' in which people underuse resources because too many owners can block each other").

157. *See id.*; Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) ("[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (determining the bounds of intellectual property rights "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").

158. *See, e.g.*, Lunney, *supra* note 155, at 486 (arguing that "the incentives-access paradigm is fundamentally flawed" because the most popular works will be simultaneously those most deserving of protection and those whose widespread dissemination is most needed); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11 (2003) ("[T]o reduce the problem of intellectual property to [the incentive-access] tradeoff is to oversimplify greatly . . . .").

159. Matt Haughey, *Interview with Flickr*, CREATIVE COMMONS, Oct. 1, 2005, http://creativecommons.org/image/flickr.

160. *Id.*

161. *Id.*

162. *Id.*

Conspicuously absent from these reasons is the desire to earn money. Although it is difficult to predict which pictures have the potential to produce income due to the frequently quirky nature of amateur photography,[163] this is only part of the reason why the desire to capitalize is not prevalent. It simply seems that most users are increasingly willing to spend time making their work available for others to enjoy without seeking compensation.

An analogy to this lies in the relatively recent prevalence of "open source" software: peer-reviewed software made available to users over the web for no cost.[164] The open source model presents the puzzle of why programmers would devote large amounts of time to writing open source code when monetary compensation does not provide the motivation to do so.[165] It seems that one motivation for participating in such projects is the strong sense of recognition and community that results from such involvement.[166] Open source took what was previously a solitary activity (coding) and turned it into a complex network of social interaction with all of its attendant benefits.[167] The interaction that comes from involvement in the community appears to be all of the compensation needed for its contributors.[168]

Similarly, these feelings of community and interconnectedness seem to be the totality of compensation needed to incentivize users to share their photographs online.[169] If commercial trade is not the driving force for the distribution of amateur works then the attendant monopoly rights accompanying copyright protection—a commercial incentive—is not needed in order to assure the distribution's continued survival.

While the monopoly rights granted by copyright may be justified if they can indeed "promote the Progress of Science and useful Arts,"[170] they are not justified if they decrease use that authors were previously willing to grant free of charge.[171] Thus, under a strictly utilitarian model, enabling easy access to copyright registration for amateur photographers would increase the enforcement of monopoly rights in works where they may not otherwise have been imposed[172]

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163. *See* Milian, *supra* note 55.

164. Joel S. Alleyne, *Join the Free/Open Source Software Movement*, 71 TEX. B.J. 364, 364 (2008).

165. *See* ERIC S. RAYMOND, *The Cathedral and the Bazaar*, *in* THE CATHEDRAL & THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY 19, 49–50 (2000), *available at* http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/index.html#catbmain.

166. *Id.* at 50–52.

167. *Id.*

168. *Id.*

169. *See* Haughey, *supra* note 159.

170. U.S. CONST. art. I, § 8, cl. 8.

171. *See* Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 507 (1945) ("[W]e must be sure that a particular provision of the Copyright Act . . . does not impose a burden on the public substantially greater than the benefit it gives the author.").

172. If, as Dan Heller hypothesizes, the default assumption as to whether photographs are registered will change from "probably not" to "possibly," Heller 2008,

without the reciprocal public benefit of increasing the availability of these works. When seen through this lens, facilitating access to the registration system for amateur photographers should not be encouraged.

Yet, on the other hand, an economic incentive may not be present because of the lack of an existing efficient licensing system enabling people to easily capitalize on their amateur photographs.[173] The reason for this could be precisely because we are reluctant to fully enforce intellectual property rights in this realm.[174] Perhaps easier access to the benefits accompanying these rights would encourage the development of works yet to be created or shared.

Although not dealing specifically with development of a licensing model, an analogous advance can be seen in the growth of the weblogging, or "blogging," industry. The main incentive for bloggers to publish their works was, and remains, the ability to use their blogs as a means for self-expression and expertise-sharing.[175] While it is unlikely that many of the first bloggers were motivated by a desire to earn money, it soon became possible for a successful blogger to earn a significant income through advertising on the site.[176] In 2008, approximately 42% of bloggers hoped to eventually make money from their endeavor.[177] The average blogger earned $6000 per year,[178] with the top 10% of bloggers earning $19,000 annually,[179] and the top 1% earning over $200,000.[180] Certainly this has encouraged more people to join the blogosphere, and, as would be expected, those who earn revenue spend more time and money on their blogs, thus increasing the value and usefulness of those blogs that are the most profitable.[181] This leads to a larger variety and a higher quality of material available to the public.[182]

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supra note 20, then one group that would likely become aware of this change would be practicing attorneys. Thus, one could imagine a contingent of copyright "ambulance chasers" who would seek out photographs that were likely appropriated and then would attempt to track down the original owner to see if he or she would want to instigate a lawsuit. The desire to do so might become quite compelling with the availability of up to $150,000 in statutory damages for willful infringement. 17 U.S.C. § 504(c)(2) (2006).

173. *Cf.* Merges, *supra* note 59, at 1294–1301 (arguing that stronger protection of intellectual property rights can lead to innovative licensing systems that will in turn spur innovation).

174. *Id.*

175. Dave White, *Day 2: The What and Why of Blogging*, TECHNORATI, http://technorati.com/blogging/state-of-the-blogosphere/the-what-and-why-of-blogging/ (last visited Jan. 27, 2010).

176. Dave White, *Day 4: Blogging for Profit*, TECHNORATI, http://technorati.com/blogging/state-of-the-blogosphere/blogging-for-profit/ (last visited Jan. 27, 2010).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. The number of available blogs has increased from four million in 2004, David Sifry, *State of the Blogosphere*, SIFRY'S ALERTS, Oct. 10, 2004, http://www.sifry.com/alerts/archives/000245.html (citing Technorati's statistics), to approximately 22.6 million in 2007. Phillip Winn, *State of the Blogosphere: Introduction*,

Of course, a licensing system should not just exist; it should also be efficient. A licensing structure is of little use if its transaction costs exceeded the economic value of the licenses. Further, the system should promote use of the works by others, thus maximizing economically beneficial transactions. The easiest way to implement such a system would likely be through the host site itself as the infrastructure needed to exhibit the photos already exists. Further, on sites such as Flickr, the photographer may tag a photo with descriptive search terms including personality characteristics ("nerdy"), colors ("purple"), proper names ("Bob Dylan"), and more. This makes for a user-friendly and searchable interface.

Flickr could then include a licensing link on the picture's page. The rates for standard uses, such as including a picture on a blog post, could default to set market values that content owners could amend as they wished. This would make licensing quick and easy for routine transactions. Additionally, Flickr could provide a means for contacting the owner if a potential licensor wanted to negotiate a more complicated arrangement, such as a large advertising campaign.

Therefore, it is entirely possible that protecting the rights of amateur photographers would enable development of a profitable licensing system.[183] This may, as in the blogging realm, encourage a greater number and a higher quality of available works. While this is perhaps a speculative scenario, it is a possible avenue to satisfy the utilitarian requirement. Yet, due to its uncertain nature, this prospect standing alone is not a very compelling reason to invest a sizeable amount of resources into a system that could just as easily backfire by restricting access to works that otherwise would have been freely available to the public.

2. Natural Rights and Labor Theory Justifications

Perhaps the more classical notion of property rights is the idea that society owes property rights to the person who put effort into the creation or cultivation of the property.[184] A person obtains a natural right in what he captures or creates so long as it is not more than he can make use of and he leaves enough resources for others.[185] The U.S. Supreme Court has explicitly rejected the idea that the creator of intellectual property possesses a "natural right" to a monopoly over his creation.[186] Yet some scholars argue that courts nevertheless often decide

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TECHNORATI, http://technorati.com/blogging/article/state-of-the-blogosphere-introduction/ (last visited Jan. 27, 2010). Speaking to the quality increase, "[b]logs have representation in top-10 web site lists across all key categories, and have become integral to the media ecosystem," an assertion that could hardly be made four years ago. *Id.*

183. *See* Merges, *supra* note 59, at 1294–1301.

184. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("Whatsoever then he removes out of the state that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.").

185. *Id.* at 288–89.

186. Graham v. John Deere Co., 383 U.S. 1, 9 (1966) ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge.").

cases without explicit economic analysis and that the natural rights justification is in fact driving some of these decisions.[187]

Moreover, a purely economic justification for intellectual property rights can result in some unsavory social consequences. For example, a solely economic rationale may lead to broadening the author's rights at the expense of those wishing to build upon the author's work; monopoly prices may be extracted for licenses or permission to use the work may be refused altogether.[188] Because concepts of fairness and equity cannot be overtly considered, the outcome of some intellectual property cases can often seem unjust.[189] While it could be argued that courts should not consider these factors in the absence of statutory direction, this perspective may be at least one to reflect on when considering policy implications in a broader sense.

Of course, a bare natural-rights theory is not without its own wrinkles. On some level, it seems absurd that all that is required for ownership is a mere mixing of one's labor with the property. As philosopher Robert Nozick has famously noted, one does not dump a can of tomato juice into the sea (thus mixing his labor with the ocean) and thereby become its owner.[190] In order for this model to have value, there should be some guidelines by which we can realistically apply it.

One of these proposed guidelines dates back to the principles of equity outlined in some of the earliest notions of property rights: one is not entitled to property rights in the entire value of the object, only in the value added by the laborer.[191] While this principle provides a useful tool when dividing up property rights in objects presently owned, it becomes conceptually harder to apply when considering non-owned objects found in nature. If I am the first to come upon a plot of land and I farm it for five years, am I really only entitled to the value of the crops?[192] Who, if anyone, is entitled to the value of the land? Further, it can become increasingly difficult to separate the original value of the object from the value added by the labor.[193]

Another factor to consider is the amount of labor actually expended in the creation or the seizure of the object.[194] The value granted to the property holder

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187. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 520–21 (1990).

188. *Id.* at 519–20 (arguing that the economic perspective has led to the extension of copyright protection to increasingly general levels of abstraction of authors' works and has thereby impermissibly broadened copyright's monopoly grant).

189. *Id.* at 520.

190. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 175 (1984).

191. This was a feature of ancient Roman law as described in the Justinian Code. *See* THE INSTITUTES OF JUSTINIAN Lib. II Tit. I ¶ 34 (explaining that if a painter paints on the canvas of another he becomes owner of the painting but owes the original owner of the canvas for the value of the canvas).

192. Locke assumed that human labor added the majority of the value to objects, but this is clearly not the case when it comes to land or natural resources. Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 37 (1989) ("One does not create 99 percent of the value of an apple by picking it off of a tree . . . .").

193. *Id.*

194. *Id.* at 41–42.

should be commensurate with the amount of effort invested.[195] While this also does something to mitigate the effects of Nozick's tomato juice example, it too should be taken with a grain of salt. If the notion is that one deserves a higher reward for expending more labor, then one's natural talents or abilities are an irrelevant factor in the analysis because one does not expend additional effort when exercising those natural talents.[196] It could even be argued that the ability or desire to expend labor is in itself a natural ability that one cannot control.[197] Regardless, the framework is still a useful analytical tool so long as one uses it as a rough guideline and does not apply it too literally.

Applying the natural-rights or labor-theory justification to the present business model has some interesting implications. First, Locke's mandate that no one take more than he can make use of while leaving enough for others[198] seems like a strange notion to apply to photography. On the one hand, as to photographs in general, the fact that I have an exclusive right to all of the photographs that I take does not decrease your ability to acquire photographs. Thus, no matter how many photographs I have exclusive rights over, it seems that I am "leaving enough" for you and satisfying the Lockean proviso.

On the other hand, I am restricting access to my particular photograph, and I am leaving you no use of that specific expression.[199] While this distinction may not be as important in the case of a more fungible asset, restricting the use of a particular thought or image has important implications for freedom of expression.[200] What is important may not be that I can take more photographs, but that I cannot make use of a particular image that has a special significance.[201] Yet if my obligation to share rights in my asset increases as the fungibility of that asset decreases, this seems to produce some counterintuitive results. After all, what is less fungible than my own body? Certainly I am under no obligation to share my rights in it. Therefore, it is unclear in which direction this factor should cut.

Applying the value-added restriction also presents some difficulties. On the one hand, photography may be the exact kind of instance where the human labor does indeed add the vast majority of the value to the asset. Film and paper and chemicals are not worth that much on their own—the value comes from the images that the photographer imposes on the paper.[202] Yet it is not simply a property right in the particular tangible photograph that is being claimed; it is nearly all uses of that image. And ultimately the photograph itself is a reproduction of the vision of a particular place or person at a precise moment in time.

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195. *Id.*

196. *Id.* at 42.

197. *Id.* at 42–43.

198. LOCKE, *supra* note 184, at 288–89.

199. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1536 (1993).

200. *Id.*

201. *Id.* (discussing society's interest in making use of a particular expression).

202. Obviously this same point applies with more force when discussing digital photography.

If the property right being claimed is an exclusive right to that particular vision, it becomes difficult to disaggregate the naturally occurring value from the value added by the photographer. One could easily conclude that the bulk of the value exists in the naturally occurring moment itself, thus making the photographer's contribution miniscule. But one could also argue that the photographer's labor generates the entire value of the photograph, as, without this expression, those absent would never be able to experience the vision in the first place. Of course, there must be at least some value added as "no photograph, however simple, can be unaffected by the personal influence of the author,"[203] but the actual delineation of boundaries becomes less clear as the notion of the property right becomes more abstract.

Finally, the "effort expended" aspect certainly deserves consideration. This is perhaps the strongest natural rights factor weighing against the third-party registration model. While surely many people may take a considerable deal of care when creating personal photographs, the vast majority of amateur works are snapshots taken casually and without much effort. Landing a particularly thought-provoking or entertaining picture is likely due more to luck than to any effort put into staging or seeking out the perfect photograph.[204]

Thus, under the labor-theory justification, it seems that there would be some legitimate hesitancy to the adoption of the third-party registration model. It is perhaps a bit disproportionate to encourage the grant of a monopoly right in a work that likely takes little effort to create.[205] However, the way that this justification should apply to an intangible asset is not quite clear. It thus becomes necessary to complete the analysis with a final framework for understanding property rights.

3. The Personhood Framework

While the utilitarian framework is certainly the primary motivation behind the intellectual property statutes,[206] there are a few moral rights codified in the Copyright Act. The Visual Artists Rights Act of 1990 (VARA) granted authors

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203. Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co., 274 F. 932, 934 (D.C.N.Y. 1921) (Hand, J.), *aff'd*, 281 F. 83 (2d Cir. 1922).

204. This is not to imply that there are no amateur photographers for whom photography is a hobby that they take seriously and to which they devote a significant amount of time and effort. Indeed there is a growing contingent of "serious amateur photographers" who clearly invest the requisite amount of labor in the creation of their art. *See* Jeff Lynch, *Colophon*, SERIOUS AMATEUR PHOTOGRAPHY, http://jefflynchdev.wordpress.com/about/ (last visited Jan. 20, 2010). However, by and large the photographs that have been discussed in this Note are of the snapshot variety. Arguably, serious amateurs are more akin to professionals than they are to the casual amateur and would be more likely to actively seek out copyright protection on their own without needing the aid of this third-party model.

205. *Cf.* Mazer v. Stein, 347 U.S. 201, 219 (1954) (discussing the economic philosophy behind the Intellectual Property Clause but also stating that "[s]acrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered"). *But see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (stating that works need only a "modicum of creativity" to attract copyright).

206. *See supra* Part III.A.1.

the rights of attribution and integrity.[207] These entitlements deviate from the traditional utilitarian justification for intellectual-property protection and instead enforce rights of the author for purely moral reasons.

Despite this, moral rights have very little more than "stirrings" in the law of the United States.[208] The only reason for VARA's enactment was that it was needed in order to bring the United States into compliance with the Berne Convention.[209] The rights themselves are strictly limited to works of "visual art."[210] Indeed, moral rights have historically had much more traction in Continental law than in the United States.[211]

Yet, understanding the moral justifications for protecting intellectual property rights is still important in order to have a complete picture of U.S. law.[212] Often moral rights will be enforced under different labels, such as unfair competition or defamation, instead of under the intellectual property statutes.[213] Moral rights are thus still an important consideration when evaluating increased access to property right protection.

Ultimately the purpose of moral-rights protection is to protect the personhood interest of the author.[214] The theory that certain types of property are so closely tied to our notion of our personhood that our rights to them deserve legal protection[215] is particularly applicable to intellectual property.

As discussed above, there is often a strong personal tie between an artist and his creation.[216] For example, Immanuel Kant considered an artist's work to be nothing less than an expression of his inner self.[217] Thus, an infringer would, in theory, force the artist to speak against his will.[218] This idea of infringement as

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207. 17 U.S.C. § 106A (2006). The attribution right ensures that the author is credited with creation of the work, and the right to integrity protects the work itself from intentional mutilation. *Id.* § 106A(a).

208. 3-8D MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[A] (2008).

209. *Id.* at § 8D.06; Dana L. Burton, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 641–42 (1995). The Berne Convention is a treaty for international copyright protection signed by the United States that went into effect on March 1, 1989. 1-OV MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (2008). The United States was required to amend portions of the Copyright Act in order to bring it into compliance with the provisions of the treaty. *Id.*

210. 17 U.S.C. § 106A.

211. 3-8D NIMMER, *supra* note 208, at § 8D.02[A]. ("Under Continental notions of moral rights, the author's personality may be said to pervade works of authorship across categories, from the literary to the graphical to the musical.").

212. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350–55 (1988) (discussing personhood justification for intellectual property creeping into the history of U.S. law).

213. 3-8D NIMMER, *supra* note 208, at § 8D.02[A].

214. Hughes, *supra* note 212, at 350.

215. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

216. Netanel, *supra* note 82, at 374.

217. *Id.*

218. *Id.* at 375.

violating the artist's right not to speak even carried over into the German Copyright Act.[219]

An examination of the business model under this lens makes it clear that the personhood justification is by far the strongest argument for protection of amateur photographers' rights. When infringed-upon amateur photographers have discussed their feelings about why the infringement was wrong, lack of economic compensation or feeling that their labor was not rewarded were not the reasons cited.[220] Overwhelmingly, it was the personal violation to the artist that was considered to be the source of the injustice.[221]

Yet if this is the case, how could indiscriminately registering amateur photographs in large numbers be justified under the current U.S. law? If moral rights are infrequently seen as a valid basis for protection of intellectual property rights, then under what theory could this model be endorsed?

B. Weighing the Competing Policy Justifications

To summarize the analysis above, a utilitarian justification for the business model is not strong. It is unclear how protecting the intellectual property rights of amateurs would lead to an increase in available works when the motivation for distributing the works is not economic.[222] The natural rights perspective also presents some problems, primarily centering on the intangible nature of the property right.[223] Ultimately though, it seems unjust to grant monopoly rights in something that likely took little effort to create.[224] The true reason we might seek to protect the rights of photographers is to prevent the personal violation that accompanies infringement.[225] Yet if this is the true justification for this protection, how can the system be implemented in a country that rarely recognizes moral rights in intellectual property?[226]

The first step in solving the problem comes with the recognition that, although dividing the policy considerations into broad categories is a useful analytical tool, the boundaries of these definitions are hardly fixed. For example, in *Gilliam v. American Broadcasting Cos.*, the Second Circuit stated that for the economic purpose of intellectual property law to be served the artist must be able to obtain relief for violation of his moral rights.[227] This does not mean that broad moral-rights protection (i.e., always compelling attribution and protecting integrity) is necessarily desirable. And, under *Dastar v. Fox*, extensive moral

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219. *Id.* at 379.
220. *See* discussion *supra* Part II.A.
221. *Id.*
222. *See supra* Part III.A.1.
223. *See supra* Part III.A.2.
224. *Id.*
225. *See supra* Part III.A.3.
226. *Id.*
227. 538 F.2d 14, 24 (2d Cir. 1976). Additionally the Supreme Court in *Mazer v. Stein* arguably brought Lockean labor theory into the economic analysis when it stated that "[s]acrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered." 347 U.S. 201, 219 (1954).

rights are unlikely to be protected by courts in the absence of major legislative change.[228] But the reasoning is useful to support the proposition that in some cases protecting an artist's feelings from damage—ordinarily considered a "moral" violation—may "promote the Progress of Science and useful Arts"[229]—an economic imperative.

Indeed, this overlap of personhood interests and economic incentives is quite present in the rationale behind the business model this Note proposes. Many amateur photographers have restricted access to their works due to the personal violation resulting from poor protection of their intellectual property rights.[230] The main reason why the economic considerations above would not be satisfied would be because it is against public policy to restrict access to intellectual property that the public could previously use free of charge.[231] But it appears that some artists will not grant access to their works if their moral rights are not protected.[232] We should not protect their rights simply because it would be morally wrong not to; it is because we, as a society, stand to lose much of the beautiful and entertaining work made available to us if we do not.

The utilitarian requirement can thus be satisfied in this rather roundabout way. Combining the fact that protection is necessary to make a wider variety of works available with the possible economic incentives from a licensing structure, it appears that enabling third-party registration would help to "promote the Progress of Science and useful Arts."[233]

CONCLUSION

Rapid technological developments have increased public access to creative works and have facilitated the involvement of casual amateurs in realms previously only accessible by serious hobbyists or professionals. Unfortunately, the amateur often lacks realistic access to copyright registration and, therefore, does not have access to the full protection of the Copyright Act. Access to this copyright protection by amateurs is in demand as many of these photographers have clearly suffered upset due to the violation of these rights.

A third-party registration model, whereby the artists would have easy and inexpensive access to these protections, would therefore appear to be a tenable business model for photography sharing sites to employ. The Code of Federal Regulations could permit this model to exist either through a rights-transfer method or through an amendment explicitly allowing for agency registration.

Further, such a model would serve traditional policies behind intellectual property protection in the United States. As authors increasingly restrict public access to their works due to incomplete rights protection,[234] this model becomes

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228. 539 U.S. 23, 38 (2003) (refusing to protect an attribution right under the Lanham Act when the copyright to the work was in the public domain).

229. U.S. CONST. art. I, § 8, cl. 8.

230. *See* sources cited *supra* note 4.

231. *See* Chafee, *supra* note 171, at 507.

232. *See* sources cited *supra* note 4.

233. U.S. CONST. art. I, § 8, cl. 8.

234. *See* sources cited *supra* note 4.

necessary to enable the continued development of and access to these works. Thus, the model is beneficial for both society and the artists. It would use technological expediency to solve a copyright protection problem created and enabled by the same technology. We can, therefore, take one small step towards filling in the cracks of the copyright system created by rapid technological growth by implementing a system that works with, and not against, increased public access to information through technology.

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