

“WE-INTENTION” AND THE LIMITS OF COPYRIGHT

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I. INTRODUCTION

Works of authorship, whether the result of years of study and labor or sudden leaps of spontaneous insight, are expressions of the dependence of authors and artists on shared collective culture and social elements, on collective commitments, norms and principles. Literature on copyright frequently criticizes conceptions of the “romantic author.” However, we sometimes take this idea for granted, as part of the ordinary copyright lexicon. As Stillingner writes, the naturalness and inevitability of romantic ideas about authorship have become “so widespread as to be nearly universal.”¹ The reason is grounded in the recognition of a fictitious conception of originality as the core principle of copyright protection, on which a system of rewards to authors and artists is premised. Courts are aggressively applying this principle, placing authors as almighty creators while denying the contributions of external sources and the rights and interests of the general public. Copyright laws allow enclosures of portions of the public domain, of social symbols and cultural elements fundamental to the development of society and its members. Copyright laws deny the role of the general public in the formation of copyrighted and artistic entities. They deny the collective

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¹ JACK STILLINGER, MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS 183 (1991).

dimension in the making of authorship and art. They deny, in the words of Wendy Gordon, that “what is true for private property should be true for public property as well.”²

James Boyle advances a conception of “romantic authorship” which characterizes and causes contemporary doctrinal problems in intellectual property.³ His main concern is the uncontrollable expansion of intellectual property at the expense of the public interest and diminution of fundamental societal needs. Similar to Boyle, Rosemary Coombe writes:

[T]he writer is represented in Romantic terms as an autonomous individual who creates fictions with an imagination free of all constraint. For such an author, everything in the world must be made available and accessible as an “idea” that can be transformed into his “expression”, which thus becomes his “work.” Through his labor, he makes these “ideas” his own; his possession of the “work” is justified by his expressive activity. So long as the author does not copy another’s expression, he is free to find his themes, plots, ideas, and characters anywhere he pleases, and to make these his own (this is also the model of authorship that dominates Anglo-American laws of copyright).⁴

Few intellectual property scholars take the argument against solitary authorship a step forward and examine ways in which we can translate it to the language of copyright ownership and entitlement. They emphasize the idea that the existence of artistic and authorial endeavors is dependent on interaction between authors and audience.⁵ Tom Palmer, for example, asserts that “if

² Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1608 (1993).

³ JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-60 (1996).

⁴ ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW 211, 219-220 (1998); see also Rosemarie J. Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies*, 76 DENV. U. L. REV. 1029, 1048 (1999).

On the romantic conception of authorship see for example, MARTHA WOODMANSEE AND PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP (1994); Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973 (1994); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain (Part I)*, 18 COLUM. J.L. & ARTS 1 (1994); BOYLE, *supra* note 3.

⁵ This argument can be viewed as a development of Jessica Litman’s interpretation of the public domain and the concept of originality in copyright. Litman argues that no copyrighted work stands alone. The idea that authors create original works is but a fiction. The creation of every copyrighted work is more akin to “translation and recombination”. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990).

This article, in other words, supports the argument that every intellectual property is derivative. As Judge Leval wittily puts the matter:

Not since Athena sprung from the head of Zeus has an artist emerged fully formed. There is no such thing as a wholly original thought. Every idea takes a

special personal rights governing works of art are to be recognized anywhere, they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist.”⁶ Similarly, Margaret Chon observes that “[t]he production of a “work” that is subject to protection by copyright is an activity undertaken by both author and audience.”⁷

Other scholars take a stronger communitarian standpoint, and view copyrighted creative expression as a collective enterprise that should be collectively owned. The focal point of their argument is the propertization of collectively produced shared symbols and cultural elements.⁸ Steven Wilf’s approach to the creation of trademark is a welcome radical interpretation of the role of the public in the creation of intellectual property. He takes the collectivist approach to intellectual property an important step forward and advocates a joint property title to the public in intellectual creations.⁹ Taking trademarks as his test case, he recognizes the dynamics of author-public interaction, and claims for a public regulatory power in trademarks. He then concludes that “[a] trademark is not authored by the production/marketing of an object in its package, but by a joint interpretive enterprise between author and public.”¹⁰ This confers on the public property entitlement in trademarks, and “the public should retain its entitlement.”¹¹ He continues by remarking that “[t]his reinterpretation requires a rethinking of the very definition of intellectual property. Intellectual property is different.”¹²

substantial part from what has gone before. Intellectual man, like biological man, displays the genes of his forebears. Titian’s Venus and Goya’s Maja are both present in Manet’s Olympia. Cezanne’s geometric reductions are found in Picasso’s cubism. T.S. Elliot tells us that while lesser writers borrow, great writers steal.

Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC’Y U.S.A. 167, 169 (1989).

⁶ Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL’Y 817, 848 (1990).

⁷ Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 264 (1996). See also Craig’s remark that if “[t]he interdependent nature of human culture means that intellectual works are necessarily the products of collective labour” they “ought to be owned collectively.” Carys J. Craig, *Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEENS L.J. 1 (2002). Scafidi also remarks that as members of a cultural unit we “already share the same culture and jointly “own” its cultural products.” Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 810 (2001).

⁸ See, e.g., Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

⁹ Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999).

¹⁰ *Id.* 46-47.

¹¹ *Id.* 36.

¹² *Id.* 45-46.

In other words, communitarian approaches to copyright hold that if one places the creative individual in historical context, that is, if one attempts to determine what the person knew, how he interpreted that knowledge and how he builds new knowledge, then one is able to understand the development of even the most radical new works. Indeed, this Article argues that the understanding of how intellectual property is built can warrant the design of a more appropriate ownership mechanism for copyrighted works, premised on the contribution of unrewarded sources. Copyrighted entities begin with what has been done in the past, and they go beyond the past in logical and understandable ways. It is possible then to argue that the creative act is mere representation: “x represents y if and only if x resembles y appreciably.”¹³

Authors are limited to what the social stock has to offer. They improve it and add of their own personalities, but they initially create in an environment that comes furnished with certain social and cultural facts and processes. If I decide to be a good author, a decision that I take autonomously, I create in a given social and cultural reality and have to take into account the collectivity of my audience. I should recognize the impact of collective social and cultural interactions, avoid offensive remarks and violations of normatively accepted social forces and legal rules. I am bound to guide my actions and choices by the collectivity that surrounds me. Substituting “public” with “audience”, Palmer highlights the “dependence of the art work not only on the creative activity of the artist but—even more—on the activity of its audience. In order to exist as an art work, an object must have an audience that can appreciate it, that is, an audience with the appropriate capacities.”¹⁴

This Article is neither about crediting the public for its authorial contribution to the copyright creation process, nor about quantifying this contribution for matters of proprietary entitlement. This article recognizes a prerequisite to be met before questions of authorship and ownership in copyright can be discussed. The prerequisite is the public’s collective intention to participate in the making of authorship and art. This Article argues that the public is a plural subject capable of intentional states and shows a collective intention to participate in the creative process and to author. In its five Parts, this Article defends the

¹³ NOËL CARROLL, *PHILOSOPHY OF ART: A CONTEMPORARY INTRODUCTION* 34 (1999).

¹⁴ Palmer, *supra* note 6, at 847.

argument that certain social norms impose on us a collective joint commitment. This is why we create laws and rules and rebuke those who violate them. By virtue of our humanity, we share a collective commitment, a general will, to preserve our cultural and social realities, including their building blocs—elements that we, as a collective, create and nurture—and share and have access to certain items of social wealth which result from this collective commitment.

Part II introduces the arguments postulated by Lawrence Becker and David Nimmer, according to which “intent to be an author” should become a condition in the assessment of authorship and copyright protection. Although they approach intention from an individualistic perspective and do not examine collective intention, the test they develop to the question “who is an author?” provides ample support to the arguments of this Article. Part III examines collective intentionality and differentiates between individual and social approaches to intentionality. After rejecting the legitimacy and accuracy of individual approaches to collective intentionality, and prior to the concluding Part, Part IV argues that the public is a plural subject capable of intentional states and rational choices; that members of the public show “we-intention”—collective intention—to author, and thus deserve a property right in every copyrighted expression.

II. NIMMER AND BECKER ON “INTENT TO BE AN AUTHOR”

In dealing with the question what—besides creative labor, efforts and investment of personality—makes a particular person an author, Lawrence Becker and David Nimmer emphasize the intention to produce a work of authorship. Three conditions, Becker observes, may satisfy a test for when:

a thing may be said to have an author [when] . . . (1) its causal history is traceable to the intentional states of an agent or agents; (2) those agents . . . are also creating and realizing their mental representations of it; (3) those representations either constitute the artifact itself, or play a substantial causal role in its production.”¹⁵

This is a cumulative test and elimination of any part of it will disqualify a thing from having an author.

Intention and causality, the first condition under Becker’s

¹⁵ Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 613 (1993).

formula, are essential ingredients in the process of authorial creation.¹⁶ For causality to subsist and affect creative expressions, a history of relationship between collective and individual labor is necessary. According to these three conditions, causality in authorship is determined by an agent's intentions and their eventual mental representations. Intention and causality, for Becker, take priority. This Article mainly deals with the former. It asks whether *the public*, as an indeterminate group of people, has an intentional capacity. Is it possible to classify *the public* as an intentional agent capable of collective "we-intention" to author?

Like Becker, Nimmer examines the role of intention in copyright. The grant of copyright protection to Elisha Qimron in his decipherment of one of the Dead Sea Scrolls discovered in caves near the Dead Sea¹⁷ brought Nimmer to question the very definition of author and authorship and to place at the forefront of current copyright dialogue the issue of "intent to author."¹⁸ The Scrolls provide fresh evidence of the period in which Judaism was consolidated and Christianity was born. Scholars reconstructed the text of the ancient Scrolls. Although they were not the authors of the Scrolls, they argued for copyright in their version because of the many educated guesses that the fallible process of reconstruction necessitated. Nimmer draws a distinction between the "intent to create a work" and the "intent to create a work of authorship." Copyright should be available only when the latter is present. He writes:

The legal definition of the author is windless, dry, and plain: the author is given rights to a cultural space over which he or she may range and work; all authors share the same cultural space; they are defined by their presence there as well as by their rights to it . . . let us not look to the law for the easy answer: the same law that defines the author is responsible for much of the confusion about what authors were and are.¹⁹

Nimmer argues that we have to ask what constitutes

¹⁶ Intention to author should be distinguished from the requirement of intention in joint authorship. See U.S. Copyright Act, 17 U.S.C. § 101 (1976); Copyright, Designs and Patents Act, 1988, c. 48, § 10(1) (UK). On intention in joint authorship see, for example, *Childress v. Taylor*, 945 F.2d 500, 504 (2d Cir. 1991); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Darryl Neudorf v. Nettwerk Productions Ltd.*, [2000] 3 W.W.R. 522 (Canada); *Beckingham v. Hodgins* [2004] 6 E.C.D.R. 46 (CA) 59-60 (UK); See also, Lior Zemer, *Is Intention to Co-Author an "Uncertain Realm of Policy"?*, 6 J. INTELLECTUAL PROP. L. & POL'Y (forthcoming 2006).

¹⁷ CA. 2790/93, 2811/93, *Eisenman v. Qimron*, 53(4) P.D. 817 (Isr.).

¹⁸ David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 Hous. L. Rev. 1 (2001).

¹⁹ *Id.* at 199.

authorship and redefine the breadth of the definition of an author, or, in other words, to ask what makes a person an author of a particular work. Nimmer remarks:

[C]opyright law is remarkably unconcerned with any theory at all about what constitutes authorship—with one single exception: intentionality. Copyright protection arises only for works that reflect an intent to produce something personal or subjective. By contrast, works that are objective, whether in fact or as presented, fail to qualify as works of “authorship” in the copyright sense.²⁰

He then adds that an author “must intend to author in order for a copyright work to emerge.”²¹ Intentionalism hereby creeps back as a *sine qua non* for copyright protection.²² Furthermore, in order to prove intent, a plaintiff will have to show intent “to imbue subjectivity into the mix.”²³ Since I argue that the single author, as an agent, cannot act alone and needs the contribution of the public and other fellow commoners in order to successfully imbue creative subjectivity into a copyrighted entity, the issues this Article will address pertain not only to the contribution of the public but also include the question whether the public qualifies for the intent element which both Becker and Nimmer advocate, and which I accept.²⁴

Many social scientists, as I shall shortly argue, believe that

²⁰ *Id.* at 159.

²¹ As Lord Kilbrandon of the House of Lords once remarked, for a work to be an artistic work it must have “come into existence as the product of an author who is consciously concerned to produce a work of art.” *George Hensher Ltd. v. Restawile Upholstery (Lancs) Ltd.*, (1976) A.C. 64.

²² Nimmer, *supra* note 18, at 205.

²³ *Id.* at 209. Patterson supports Nimmer’s argument and remarks:

The Dead Sea Scrolls are an aberrant work in terms of copyright law. One will not find many 2000-year-old manuscripts at the centre of a copyright controversy, especially one of overwhelming importance to world religions and culture. When the intent test is applied to Qimron, it seems clear that in compiling and translating the fragments he did not intend to create a work of authorship. He intended to convey what the Teacher of Righteousness wrote; indeed, creativity on his part would have defiled his reputation as well as his purpose. The only creativity he could employ with integrity was creativity as to how to decipher the fragments. And however difficult and meritorious, that effort was sweat-of-the-brow.

L. Ray Patterson, *Nimmer’s Copyright in the Dead Sea Scrolls: A Comment*, 38 HOUS. L. REV. 431, 443 (2001). *Cf.* Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1085-1088 (2003). *See generally* Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445 (2001); ON SCROLLS, ARTEFACTS AND INTELLECTUAL PROPERTY (Timothy H. Lim et al. eds., 2001).

²⁴ This condition may, as Ginsburg observes, “supply a means to sort out the equities of ownership in cases in which more than one contender is vying for authorship status.” Ginsburg, *supra* note 23, at 1087. However, she rejects placing intent to author as a basic condition for assessment of authorship, except in cases of joint authorship. *Id.* at 1088.

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some groups and organizations have the capacity for intentional action. The question, however, is whether *the public*—an entity which comprises each and every one of us—can have similar intentional capacity to human agents. If a single agent possesses “I-intention”, can the public, in the collective sense, possess “we-intention” to do or not to do a particular act? The public is a group of individuals composed of artisans, authors, peasants, politicians, salespersons, shoemakers, simple people we meet on our way to work, or more important people in our lives such as members of the board of directors of the company where we work. Can such a large group form collective intention? Does it matter whether the public is a social group? If it does, what features does it have that may qualify it as a superagent capable of intentional states?

Just as Becker and Nimmer argue that for a person to be an author, intention is required, social scientists often recognize intention as an essential feature of social groups. I doubt anyone would reject the idea that the general public is a social group, despite the fact that it is, to some extent, an abstract and indeterminate entity. If this is the case, the question whether the public as such is a plural subject, capable of showing “we-intention” to author and own a share in the results of the creative process, is not a simple question with one definitive answer.²⁵ However, “intent to author”, as the next Part shows, must become a core element in discussions on authorial entitlement. I shall attempt to show how we, the copyright community, should utilize this principle in contemporary discussions on the limits of copyright and the future of the public domain.

III. “WE-INTENTION” VERSUS “I-INTENTION”

A. *Individualizing Collective Intention: Summative and Non-Summative Approaches*

It is a known practice to attribute responsibilities to small and large groups. Even ardent individualists accept the argument that a poetry reading group, a football team, a corporation and even nations have intentions. As Deborah Perron Tollefsen asserts:

[T]here is a rich and complex practice of attributing moral and legal responsibility to groups. These attributions presuppose that groups intend to commit the actions for which they are

²⁵ As Searle once remarked: “perhaps the hardest case of all is intention.” JOHN R. SEARLE, *INTENTIONALITY* 34 (1983).

held responsible . . . our everyday practice of holding groups responsible cannot be easily dismissed . . . The social and legal sanctions that groups incur are not metaphorical. They have very real social, economic, and political effects.²⁶

The important question is, however, if large groups accept collective responsibilities, can such responsibilities be attributed to the public at large? Can the public show intention to meet the challenges of these responsibilities? There are many examples in which the general public acts together, claims responsibilities and shares a commitment to take action. We collectively accept the importance of certain needs. We agree that we have to preserve water reservoirs, to limit the use of nuclear weapons, that pollution triggers environmental disasters. We collectively ensure that the commitment we share to preserve environmental stability is not only recognized but also receives the utmost respect by the collective.²⁷

Responsibilities can also be attributed to the general public in the collective sense. For example, the collective is responsible for the climate change and the collective is currently in the process of agreeing and ratifying international rules on that issue. In the very near future the collective may also find itself responsible for the collapse of African states for lack of access to certain medications and food. This means that indeterminate large groups can have the capacity to accept joint responsibilities and intend to collectively execute certain actions. On this basis, I propose that we think of the public at large as having a collective intention to retain a right in every copyrighted entity, by virtue of forming a collective intention to preserve the collective social and cultural realities and a collective intention to participate and contribute to the making process of authorship. This claim is meant literally and not simply metaphorically.

Many arguments advocating collective intentionality analyze group intentional states in terms of the individual intentional states of group members. There are two versions of this approach: summative and nonsummative. Summative approaches hold that

²⁶ Deborah Perron Tollefsen, *Collective Intentionality and the Social Sciences*, 32 PHIL. SOC. SCI. 25, 27 (2002). For a brief account on the different approaches to collective intentionality, see Frank Hindriks, *Social Groups, Collective Intentionality and Anti-Hegelian Skepticism*, in REALISM IN ACTION: ESSAYS IN PHILOSOPHY OF THE SOCIAL SCIENCES 213 (Matti Sintonen, et al. eds., 2003). Hindriks advocates the importance of collective intentionality for any adequate analysis of social institutions.

²⁷ There will always be borderline cases and exceptions, and those who would reject these or other collective commitments. I believe these are marginal cases and do not have the power to destabilize the collective agreement we share to respect these commitments.

most members of a particular group have the attitude ascribed to the group. Accordingly, Group G believes in idea I if and only if all or some of its members believe in I. This approach analyzes group attitude in terms of the sum of individual attitudes, and the group attitude is always an indirect way of explaining the attitudes of its members.²⁸ Some say this view is too strong,²⁹ or maintain that collective intentions cannot be reduced to individual intentions.

A key work defending a contrasting non-summative approach is John Searle's *The Construction of Social Reality*.³⁰ Searle attempts, *inter alia*, to explain collective intentionality and why it is irreducible to individual intentions. Imagine two scenarios. In scenario A, a group is walking on a sidewalk close to the university. Suddenly, it begins to rain and the members of the group all run to stand under the first building they see. Group A is composed of individuals who each have what Searle calls an "I-intention": "I intend to find shelter from the rain." In scenario B, a film director organizes a group of actors to perform a similar act to the group in scenario A. The difference between the two scenarios lies in the mental component. In scenario B the group acts collectively. For Searle, collective intentional states are in this way irreducible. They are a distinct form of intentional classification. As he remarks, "[t]he crucial element in collective intentionality is a sense of doing (wanting, believing, etc.) something together, and the individual intentionality that each person has is derived from the collective intentionality that they share."³¹ He argues that collective behavior or collective intentionality cannot be analyzed as the simple summation of individual behavior or individual intentionality, which he takes to be a biologically primitive capacity of individual brains.³² That is, he attributes collective intentional

²⁸ See Anthony Quinton, *Social Objects*, 76 *PROC. ARISTOTELIAN SOC'Y* 1 (1975).

²⁹ See, e.g., Margaret Gilbert, *Modelling Collective Belief*, 73 *SYNTHESE* 186 (1987).

³⁰ JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995) [hereinafter SEARLE 1995]. For criticism of Searle's views, see generally Jennifer Hornsby, *Collectives and Intentionality*, 57 *PHIL. & PHENOMENOLOGICAL RES.* 429 (1997); Dan Fitzpatrick, *Searle and Collective Intentionality: The Self-Defeating Nature of Intentionalism with Respect to Social Facts*, 62 *AM. J. ECON. & SOC.* 45 (2003); and Leonardo A. Zaibert, *Collective Intentions and Collective Intentionality*, 62 *AM. J. ECON. & SOC.* 210 (2003).

³¹ SEARLE 1995, *supra* note 30, at 25.

³² John R. Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATION* 401 (Cohen et al. eds., 1990) [hereinafter Searle 1990]. According to Searle,

anything we say about collective intentionality must meet the following conditions of adequacy: (1) It must be consistent with the fact that society consists of nothing but individuals. Since society consists entirely of individuals, there cannot be a group mind or consciousness. All consciousness is in individual minds, in individual brains; (2) It must be consistent with the fact that the structure of any individual's intentionality has to be independent of the fact whether or not he is getting things right, whether or not he is

states to individuals only where a single person can have in himself the collective intention “we intend to do X”: “The intentionality that exists in our individual heads has the [simple] form ‘we intend.’”³³ As Meijers explains, Searle’s “solution is to conceive collective intentions as genuine we-intentions *inside* the brains of individuals. The mistake is to think that individuals can only have intentional *I* states, whereas, in Searle’s view, these individuals can have intentional *we* states as well.”³⁴ Searle’s approach is thus highly individualistic, and views society as nothing over and above the individuals that comprise it. He strives to show how collective intentions do not undermine individualism. The public, in his account, could never collectively establish a “we-intention.”

Collective intentionality for Searle is a crucial element in understanding social reality. It confers function on artifacts and changes them into social facts. A flower has the meaning of a flower because we create it through collective intentionality. Pieces of colored paper function as money because we intend them to do so. Through intentionality Searle explains how the various parts of the world relate to each other, and how the mental relates to the physical. He approaches this task by formulating two principles: (1) the principle of constitution: according to which “X constitutes Y in context C”; and (2) the principle of transfer: “X counts as Y in context C.”³⁵ The former explains how high-order properties arise in both physical and biological systems. The latter refers to the fact that “[f]unctions of everyday objects—such as pencils, screwdrivers, or radios—exist, according to the analysis in *The Construction of Social Reality*, because they are *assigned* by beings that have intrinsic

radically right, whether or nor he is radically mistaken about what is actually occurring. And this constraint applies as much to collective intentionality as it does to individual intentionality. One way to put this constraint is to say that the account must be consistent with the fact that all intentionality, whether collective or individual, could be had by a brain in a vat or by sets of brains in vats.

Id. at 407.

Searle summarizes his argument in the book as an attempt to show “how a world of brute facts can give rise to intentional facts which in turn can give rise to social and institutional facts.” John R. Searle, *Précise of THE CONSTRUCTION OF SOCIAL REALITY*, 57 PHIL. & PHENOMENOLOGICAL RES. 427, 428 (1997). Or as he remarks in his book:

how can there be an objective world of money, property, marriage, governments, elections, football games, cocktail parties and law courts in a world that consists entirely of physical particles in fields of force, and in which some of these particles are organized into systems that are conscious biological beasts, such as ourselves?

SEARLE 1995, *supra* note 30, at xi.

³³ SEARLE 1995, *supra* note 30, at 26.

³⁴ Anthonie Meijers, *Can Collective Intentionality be Individualized*, 62 AM. J. ECON. & SOC. 167, 181 (2003).

³⁵ *Id.* at 168-169.

intentionality, where the assignment can be described in terms of 'X counts as Y in context C.'³⁶ That is, collective intentionality creates social facts.

Searle's views have met with various criticisms. Are intentions merely determined by internal aspects? If intentions belong to individuals, and individuals do not have to possess similar intentions for collective intentions to exist, what do we exactly share in Searle's approach to collective intentionality? How is society socially constructed if collective intentionality is internal to the individual? Michael Bratman argues that some form of *unified* agency is necessary.³⁷ That is, "we intend to do a joint action J" means that we share the intention to do joint action J. "First, our shared intention to paint together will help coordinate my activities with yours (and yours with mine) . . . Second, our shared intention will coordinate our actions . . . Third, our shared intention will tend to provide a background framework that structures relevant bargaining."³⁸ In particular, Bratman emphasizes coordination and interrelations.³⁹ For Bratman:

a shared intention is not a single attitude, but a web of related and interlocking attitudes of the individual participants. Such an intention should lead to coordinated planning and unified activity by a group of agents, or, put the other way around, this planning and action should be explained by appealing to the shared intention.⁴⁰

Like Searle's, Bratman's approach is also broadly individualistic in spirit since he argues that shared intentions are not the intention of a plural agent. Since an individual cannot have a shared intention, collective intentions consist primarily of attitudes of individuals and their interrelations. His emphasis on coordination and interrelations therefore depends on the functioning of individual attitudes.

Searle and Bratman thus "individualize" collective intentions. While the former places "we-intention" as an innate primitive capacity of the individual, the latter avoids recognizing the plural agent, emphasizing that collective attitudes are a mix of individual attitudes with common content and their interrelations.⁴¹ Both are

³⁶ *Id.* at 169.

³⁷ Michael E. Bratman, *Shared Intention*, 104 *ETHICS* 97 (1993).

³⁸ *Id.* at 99.

³⁹ *Id.* at 100-102.

⁴⁰ Meijers, *supra* note 34, at 175; *see also*, Bratman, *supra* note 37, at 108.

⁴¹ For criticism of these views see, J. David Velleman, *How to Share an Intention*, 57 *PHIL. & PHENOMENOLOGICAL RES.* 29 (1997).

concerned with avoiding the specter of the collective mind. Intention is a mental state, and minds belong to individuals or persons. As Searle remarks, “[t]alk of group of minds . . . [is] at best mysterious and at worst incoherent.”⁴² And in Bratman’s words, “[a] shared intention is not an attitude in the mind of some superagent.”⁴³

Many questions emerge from these accounts. One may wonder whether cognitive attitudes are enough to explain collective intentionality, whether they are sufficient to explain the sharing of intentionality. How can several different minds submit themselves to a single element? If Searle attempts to tell us something about the construction of *social* reality, ought he not emphasize the centrality of *social relations* in the process of forming and executing collective intentionality? Can collective intentions be reduced to the aggregate intentions of individuals composing a group? How can we *share* intention?⁴⁴ Is there a plural agent to which we should ascribe collective intentionality? Do normative attitudes take part in the formulation of collective intentionality?

B. *The Sociality of Collective Intention*

Margaret Gilbert argues that there is a normativity involved in collective intentionality.⁴⁵ She claims that obligations and joint commitments are part of collective activities. Her account is less individualistic than that of Searle and Bratman.⁴⁶ Gilbert is willing to speak of a “plural subject” which involves two or more subjects that together create one subject. In the case of a goal, for example, she remarks that the goal is “the goal of the plural subject, as opposed to the shared personal goal of the participants.”⁴⁷ Gilbert places the principle of joint commitment at the heart of her theory and remarks that:

⁴² Searle 1990, *supra* note 32, at 404.

⁴³ Bratman, *supra* note 37, at 99.

⁴⁴ As Velleman explains:

[S]hared intention is not supposed to be a matter of one person’s deciding or planning the activities of a group; it’s supposed to be a matter of shared intending, in which each member of the group participates equally in forming and maintaining the intention, fully recognizing the others as equal participants. What we are going to do is supposed to be determined by you and me jointly, in this case; and each of us is supposed to regard the issue as being thus jointly determined.

Velleman, *supra* note 41, at 34.

⁴⁵ Margaret Gilbert, *Walking Together: A Paradigmatic Social Phenomenon*, 15 *MIDWEST STUD. IN PHIL.* 1 (1990); see also MARGARET GILBERT, *ON SOCIAL FACTS* (1989).

⁴⁶ See also Kaarlo Miller, *Commitments*, in *REALISM IN ACTION: ESSAYS IN PHILOSOPHY OF THE SOCIAL SCIENCES* 169, 172 (Matti Sintonen, et al. eds., 2003).

⁴⁷ MARGARET GILBERT, *LIVING TOGETHER, RATIONALITY, SOCIALITY, AND OBLIGATION* 187 (1996) [hereinafter GILBERT 1996].

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People have the concept of joint commitment and are constantly creating—and dissolving—such commitments. These joint commitments play a major role in organizing their behavior, including their reactions to one another. It follows that social scientists cannot afford to ignore the concept of a joint commitment for either interpretive or descriptive purposes. This concept is of fundamental importance for all who seek to understand human behavior in both *general* and particular circumstances.⁴⁸

For Gilbert, “people become jointly committed by mutually expressing their willingness to be jointly committed, in conditions of common knowledge.”⁴⁹ Once these features are present, the members of a group will recognize themselves as a social group or a plural subject and acknowledge the rights and obligations that their joint commitment imposes on them.

Gilbert’s account borders on talk of group minds or superagents. While she does make frequent references to examples of small groups—for example, of two people walking together—she also recognizes the principle of “society-wide convention”⁵⁰ and provides a broad definition of “plural subject”: “*any set of jointly committed persons, whatever the content of the particular joint commitment in question.*”⁵¹ In her definition she includes items such as unions and armies, and more. She also refers to “*social rules and conventions, group languages, everyday agreements, collective beliefs and values, and genuinely collective emotions.*”⁵² Arguably, her ideal of “plural subject”—an entity formed when individuals unite in a particular way—can apply at a more general level, suggesting the existence of superagents. Gilbert asserts:

[T]here is no reason in principle why larger populations may not create joint commitments for themselves. Here the parties will express their readiness to be jointly committed with certain others described in general terms, such as “people living on this island,” “women,” and so on. As long as there can be common knowledge of the openness of these expressions, the conditions for the creation of a joint commitment can be fulfilled. Hence the parties to a given joint commitment need not know each

⁴⁸ Margaret Gilbert, *The Structure of the Social Atom: Joint Commitment as the Foundation of Human Social Behavior*, in *SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY* (Frederick F. Schmitt ed., 2003) 39, 41 [hereinafter Gilbert 2003] (emphasis added).

⁴⁹ GILBERT 1996, *supra* note 47, at 349.

⁵⁰ Gilbert 2003, *supra* note 47, at 43.

⁵¹ *Id.* at 55.

⁵² *Id.*

other or even know of each other as individuals.⁵³

Gilbert thus emphasizes the sociality of intention and joint commitments. Her argument admits various interpretations, of which one suggests the existence of superagents. On this view, we may say the general public is a plural subject which unites individuals and creates a bond between them to perform certain acts as would a single individual. It does not necessarily mean that we all have to “walk together” in a given act. As long as we commit ourselves to the preservation of some peace, social stability and cultural development, we can create a commitment that binds us all. If we, for example, collectively create language and certain cultural and social symbols, we work as a plural subject. As members of the public we share a commitment, we are part of a body of joint commitments. These are irreducible to aggregate individual commitments. Since our commitments are interrelated, unless every member of the public rescinds, the joint commitment continues.⁵⁴

Although Gilbert requires that people express their willingness to submit to the commitment, there are social activities that do not require express agreement. We share a “collective will”—a general will to preserve certain social norms. This line of reasoning is advocated by Raimo Tuomela, who explains group collective intentionality by reference to an authority system—a group-will formation system. For collective intention we have to believe in one common will: “‘Groupness’ means the existence of ‘one will,’ as it were, and it is shared group-intentions that make one will out of many wills.”⁵⁵ There exists the capacity “of ‘pooling the individual wills into a group will,’” and this allows us to move from a multitude of “I’s” to a “we.”⁵⁶ In this way an authority system is created and individuals transfer their wills to the group. But transference of will is not enough.

Tuomela emphasizes the centrality of the principle of acceptance. Collective intentionality presupposes acceptance of social norms, rules, and institutions (for example, money and law): “[A]n institution is created and, especially, maintained by our

⁵³ *Id.*

⁵⁴ This permits coercion in certain circumstances and rebuking those who violate social rules.

⁵⁵ RAIMO TUOMELA, *THE IMPORTANCE OF US: A PHILOSOPHICAL STUDY OF BASIC SOCIAL NOTIONS* 175 (1995) [hereinafter TUOMELA 1995]; *see also* Raimo Tuomela, *We Will Do It: An Analysis of Group-Intentions* 51 *PHIL. & PHENOMENOLOGICAL RES.* 249 (1991).

⁵⁶ TUOMELA 1995, *supra* note 55, at 177.

collective acceptance . . . ”⁵⁷ For example, we share a “collective will”—“one will”—to regulate ownership of authorial and artistic endeavors. Otherwise we would allow exclusive propertization of every idea, general principles of culture, art and creativity. Even if we have different views on how to regulate ownership of these endeavors, there exists a “we-intention” in the very idea of regulating them. For this matter, we collectively accept the need for an enforceable regulation and accept the institution of copyright as the means to regulate the spectrum of ownership of authorial and artistic commodities.

We accept social and cultural institutions by virtue of expressing our collective will through democratic processes. These wills become part of our community, and their results bind us collectively. Because of these wills, nations adopt certain political policies as a result of economic or civil instability, and democratic systems do not permit limitless private enclosures of culture, language and other types of social institutions through intellectual property laws. We cannot refer to these examples by simply referring to individual intentional states.

So, can the public have intentions? Can we view the public as a party to a joint commitment? Take for example Gilbert’s definition: “Persons *A* and *B* collectively intend to do *X* if and only if *A* and *B* are jointly committed to intend to do *X*.”⁵⁸ I propose that this applies to the relationship between authors and the public. When *X* is the preservation of the public domain and our cultural environment, it would be difficult to reject the proposition that authors and the general public collectively intend to do *X* and are jointly committed to intending to do *X*. This conclusion is derived from our joint commitment to do *X*. This commitment means that we “‘act as a body’ in a specified way, where ‘acting’ is taken in a broad sense.”⁵⁹ This commitment is a common knowledge between authors and the general public.⁶⁰ This common knowledge implicitly exists in virtue of our social nature. This is analogous to Gilbert’s principle of background understanding, according to which “many people develop expectations that the joint activity in which they are participating will reach an appropriate conclusion” and these expectations create reliance

⁵⁷ Raimo Tuomela, *Collective Acceptance, Social Institutions, and Social Reality*, 62 AM. J. ECON. & SOC. 123, 146 (2003). See also TUOMELA 1995, *supra* note 55, at 314-316.

⁵⁸ Gilbert 2003, *supra* note 47, at 46.

⁵⁹ *Id.* at 51.

⁶⁰ If we decline to accept and fulfill our joint commitment we may create a situation where we will share “collective moral responsibility or—in the negative form—collective moral guilt.” *Id.* at 57.

between the participants.⁶¹

There are certain patterns of social behavior one will find difficult to explain if one takes recourse only to individual intentional states. This is especially important when discussing collective commitments and social obligations. Tollefsen examines the interplay between rational choice theory and collective intention.⁶² She argues that groups and organizations can, under certain conditions, form a rational point of view. Jon Elster, for example, applies rational choice theory to nations.⁶³ Although he does not explicitly defend group intentions, he uses this theory to argue that nations, rather than individuals, have the capacity to determine the rational way of making choices. Elster writes, “[o]n the basis of pure self-interest, reinforced by moral reasoning, a nation that has not already acquired nuclear weapons should abstain from nuclear power, so as not to have to hand down to later generations a potential for starting or precipitating a nuclear war.”⁶⁴ Arguably, by applying rational choice theory to nations, Elster implicitly defends collective intentional states. Tollefsen develops this approach and argues that groups and organizations have a capacity to make rational choices, independent of individual decisions. She writes:

Our interpretations of organizational acts in terms of the intentional states of the organization presupposes a certain level of rationality. But the rationality presupposed is not merely a property of individual participants in the organizations; the structure of the organization provides for a unified perspective, a rational point of view, from which organizational members can deliberate . . . rationality is embodied in the structure of the organization, not just in its members.⁶⁵

It is the group, rather than the individuals comprising it, that is “subject to norms of rationality and form[s] a distinct locus of power and responsibility.”⁶⁶ It seems that groups, and the public, share something with individuals—they can, under certain circumstances, form a rational point of view. A problem that Tollefsen addresses is that groups and organizations, let alone the general public, lack consciousness and self-awareness. It would be wrong, she rightly asserts, to judge collective intentions by applying

⁶¹ *Id.* at 45-46.

⁶² *See generally* Tollefsen, *supra* note 26.

⁶³ *See* JON ELSTER, *EXPLAINING TECHNICAL CHANGE* (1983).

⁶⁴ *Id.* at 220 (1983).

⁶⁵ Tollefsen, *supra* note 26, at 34.

⁶⁶ *Id.*

rigid conceptions of subjective intention. Although consciousness and self-awareness are properties important for the formation of individual intention, “[b]ecause groups do not have these properties, the conclusion one should draw is that groups do not have the features necessary for *individual* subjecthood Groups are *not* individual subjects, they are groups.”⁶⁷ The same is applicable to large populations and the general public. The fact that we, as a collective, agree on certain rules and the power of certain norms and make rational choices in light of these, must not be examined merely by employing the parameters applicable to individual intentional states.

IV. AUTHORSHIP AND THE PUBLIC AS A PLURAL SUBJECT

I propose to follow Gilbert, and regard public and authors as forming a plural subject with a general goal, which is “the goal of the plural subject, as opposed to the shared personal goal of the participants.”⁶⁸ On this basis we may see the public *literally* as an intentional agent, capable of intending to participate in the making process of authorial and artistic commodities, and as a plural subject recognizing limits to ownership of such commodities.

The agreement we share in society to commit ourselves to the maintenance of social and cultural stability is apparent in the many ways we regulate ownership of different kinds, including intellectual property. The rapid evolution of international copyright laws and norms—for example, the adherence to the World Intellectual Property Organization (WIPO) Internet Treaties, the agreement on the Doha Declaration and the role of the World Trade Organization Dispute Settlement mechanism in global trade disputes, as well as contemporary international strategies to protect the intellectual property of indigenous communities—shows that the general public has a goal and acts as an intentional agent. Just as nations and large populations can make rational choices and show their intention to do so, so the general public, through the international copyright community, can make rational choices pertaining to the protection of its common culture; to the protection of a strong public domain. This view supports the collective’s standpoint and is not reducible to “I-intentions.”

It is not necessary that the agreement and commitments we

⁶⁷ *Id.* at 44.

⁶⁸ GILBERT 1996, *supra* note 47, at 187.

collectively share are made explicit. As Meijers argues, “[m]any social activities are based on prior explicit or implicit agreements. Such agreements bind the subsequent participants in various ways and are an explanatory factor in the subsequent collective actions. The agreement is constitutive of both the collective intentions and the collective agent.”⁶⁹ Although this remark was made with respect to relatively small groups, it no less is applicable to larger ones. It would be an impossible task to reject the idea that certain social activities represent an implicit agreement of members of the public by virtue of our collective attitude *not* to do certain acts. I already mentioned some of these acts, such as our commitment to preserve the environment and our culture. Intellectual property laws ensure that, for example, patents will be granted only after compliance with certain conditions such as novelty and non-obviousness, that ideas will not be subject to copyright protection, and that relevant trademark authorities will refuse the registration of certain words as source-indicators if found to be offensive or not sufficiently distinctive. In this way intellectual property laws attempt to ensure that disproportionate private linguistic and cultural enclosures do not take place. Intellectual property laws, however, do not fully recognize the role of the public—its implicit, yet undisputable, intention to participate in the making process of authorship through its continuous provision of fundamental materials to this process, its intention to ensure stable cultural polity, and its intention to retain a right in its contribution.

It is arguable that the public shows its intention through social relations between its members and between them and the collective. Meijers advocates an externalist conception of collective intentionality that incorporates social relations:

It conceives of collective intentional states as states of related individuals. The bonds between these individuals are the social relations formed in their speaking and acting. Agreeing is an act that creates such social relations as claim and obligation between the participants. It is constitutive of many forms of collective intentionality. Like Searle’s approach, the relational approach avoids the false dilemma sketched above. It is neither reductive, nor does it allow for super minds “floating over individual minds.” It is not compatible, however, with Searle’s version of methodological individualism, which claims that all social phenomena can be fully accounted for in terms of the intentions, beliefs, and desires of individuals (whether collective

⁶⁹ Meijers, *supra* note 34, at 177.

or not). Social reality requires a radical relational approach.⁷⁰

I do not claim that the public possesses a super mind. I also do not metaphorically claim that there exists a public artificial mind. I argue only that the public is a social group, a non-human agent that exists independently of human agency and sometimes controls the actions of individuals. As members of the public we form a collective with a capacity to possess intentional states that determines certain ways that we, the collective, follow, and certain ways that we, the collective, reject. We share intention. I reach this conclusion by virtue of our tacit agreement to preserve our human nature which necessitates preservation of our cultural and social realities. This tacit agreement confers on us a shared commitment to preserve these elements. This commitment operates on a more abstract level than a commitment between two or four people to go to the opera or between the directors of a private corporation to adopt a new marketing strategy. The fact that this commitment operates on a higher level of abstraction means that it allows deviations and disagreements which are less possible in small groups. These, however, do not affect the existence of the public's collective intention.

Becker's strategy for individual authorship is composed of three steps.⁷¹ The first step includes the constituent of intention on the part of the author in his or her individual capacity. Having shown that the public is an agent capable of intentional states, we may now conclude that the second and the third steps are also satisfied: (2) the agent is also creating and realizing its mental representations of its intention, and (3) those representations either constitute the artifact itself, or play a substantial causal role in its production. First, as argued above, copyrighted entities are a joint enterprise created by public and authors and represent their collaboration, distinct contribution and intention. Second, following Tollefsen, we should not examine collective intention through the prism of individual intentional states. Therefore, despite the fact that the public does not have mental capacities, consciousness or self-awareness, acknowledging the independence of collective representations and general social facts—which means acknowledging their irreducibility to facts about individuals—would qualify the public for Becker's second and third conditions. In *Sociology and Philosophy* Durkheim writes:

⁷⁰ *Id.* at 181.

⁷¹ *See* Becker, *supra* note 15, at 613.

If there is nothing extraordinary in the fact that individual representations, produced by the action and reaction between neural elements, are not inherent in these elements, there is nothing surprising in the fact that collective representations, produced by the action and reaction between individual minds that for the society, do not derive directly from the latter and consequently surpass them. The conception of relationship which unites the social substratum and the social life is at every point analogous to that which undeniably exists between the psychological substratum and psychic life of individuals The independence, the relative externality of social facts in relation to individuals, is even more immediately apparent than is that of mental facts in relation to cerebral cells⁷²

In essence, Durkheim connects social facts, individuals and the public. He clarifies the causal relations among these three items. He argues that “social facts are in a sense independent of individuals and exterior to individual minds”⁷³ and that:

collective representations are exterior to individual minds . . . they do not derive from them as such but from the association of minds No doubt in the making of the whole each contributes his part, but private sentiments do not become social except by combination under the action of the *sui generis* forces developed in association.⁷⁴

He continues and remarks, “From society derive all the essentials of our mental life”⁷⁵ I refer to Durkheim to emphasize that collective representations exist and they are independent. The lack of the constituent “mental”—which Becker includes in his test—does not negate their existence.

This conclusion is supported by Tollefsen’s account of collective intentionality, on which I largely base the argument that the public in its collective sense is capable of intentional states. The public is a non-human, or superhuman agent that exists independently of human individuals and controls the actions of individuals. The public is responsible for the creation of certain mental properties and social relations that are reducible to physical entities. That is how copyrighted entities are born.

Although the public does not have a human mind or a biological brain, our collective commitment to and responsibility

⁷² EMILE DURKHEIM. *SOCIOLOGY AND PHILOSOPHY* 24-25 (1953).

⁷³ *Id.* at 24.

⁷⁴ *Id.* at 25-26.

⁷⁵ *Id.* at 73.

for the preservation of the cultural and social realities constitute a collective intentional state to participate, contribute and control certain events and processes. This includes a collective intention to participate in the making process of authorial and artistic commodities which define the essence of our culture. As a collective that shares responsibilities of different kinds, we share a responsibility to keep a stable culture. As a collective that protects certain social values, we show a group will to contribute to the making process of copyrighted cultural and social commodities. By virtue of this contribution and the public's collective intention, the public should retain a right in each and every copyrighted entity.

V. CONCLUSIONS

Ascription of intentional states to the public provides us with a rich explanatory resource. For the reasons discussed, it would be wrong to reject the idea behind attributing moral and legal responsibilities to the collective. We make rational choices, decisions that affect the collective, and show intention to commit to certain actions which represent the collective interest. As long as we collectively accept certain concepts as dominating features of our collective reality, we may say that we show "we-intention" to maintain the stability of these concepts. This does not in any measure confirm the superiority of "I-intentions" but simply reinforces the existence of collective intention that cannot be reduced to individual intentions.

We share a common interest and a joint obligation to preserve the Amazon basin, not to deplete the ocean of its natural resources, and not to privatize our cultural reality in ways that restrict our daily access and use of it. Copyright laws, in effect, promote the expansion of the private at the expense of the public. Even if we do not expressly announce our joint obligation to preserve the cultural and social collectivity we have an intention to participate in the making of authorship, and through this intention to jointly form a social commitment, by virtue of our humanity, to respect this obligation.