

right giving authors sufficient control over and compensation for their works to make it worth their while to be creative.³

Vesting copyright in Authors—rather than exploiters—was an innovation in the 18th century. It made authorship the functional and moral center of the system. But all too often in fact, authors neither control nor derive substantial benefits from their work. In the copyright polemics of today, moreover, authors are curiously absent; the overheated rhetoric that currently characterizes much of the academic and popular press tends to portray copyright as a battleground between evil industry exploiters and free-speaking users.⁴ If authors have any role in this scenario, it is at most a walk-on, a cameo appearance as victims of monopolist “content owners.” The disappearance of the author moreover justifies disrespect for copyright—after all, those downloading teenagers aren’t ripping off the authors and performers, the major record companies have already done that.⁵

Two encroachments, one long-standing, the other a product of the digital era, cramp the author’s place in copyright today. First, most authors lack bargaining power; the real economic actors in the copyright system have long been the publishers and other exploiters to whom authors cede their rights. These actors may advance the figure of the author for the moral lustre it lends their appeals to lawmakers, but then may promptly despoil the creators of whatever

3. U.S. CONST. art. I, § 8, cl. 8. Both the Statute of Anne (England 1710), and the U.S. Constitution’s copyright clause highlight the role of exclusive rights in promoting the progress of learning.

4. See, e.g., Joe Nocera, *A Tight Grip Can Choke Creativity*, N.Y. TIMES, Feb. 9, 2008, available at <http://www.nytimes.com/2008/02/09/business/09nocera.html> (decrying J.K.

increased protections they may have garnered. Second, the advent of new technologies of creation and dissemination of works of authorship not only challenges traditional revenue models, but also calls into question whatever artistic control the author may retain over her work. I will examine both prongs of the pincers, and then will suggest some reasons for optimism for the future.

1. Authors and Copyright Ownership

Copyright vests in a work's creator as soon as she "fixes" it in any tangible medium of expression.⁶ But for many authors, ownership is quickly divested, and for some, it never attaches at all. The latter group of creators are "employees for hire," salaried authors who create works in pursuit of their employment, or freelancers who are commissioned to create certain kinds of works, and who sign a contract specifying that the work will be "for hire."⁷ An author who is not an employee for hire starts out with rights that she may transfer by contract; unlike many continental European laws, the U.S. copyright law places few limitations on the scope of the rights she may transfer.⁸ Moreover, unlike those foreign laws, the U.S. copyright law contains few mandatory remuneration provisions.⁹ Thus it is possible for a U.S. author, "for good and valuable consideration" (which could be the mere fact of disseminating the

and we're all dead anyway so who cares, we'll STILL own all those rights"¹¹ Worse, with one exception, this is a valid contract. The exception is not the extra-terrestrial aspect. It concerns the author's inalienable right to terminate grants of rights 35 years after the grant was executed. Thus, even if the contract purports to grant rights in perpetuity and for a lump sum, the author can nonetheless retrieve most of her U.S. rights 35 years after the conclusion of the contract.¹² This is a very important, but otherwise isolated, legislative nod to authors' weak bargaining position.

It's no accident that the copyright law of the U.S. and other common law countries favors easy alienability of authors' rights. Our legal system frowns on "restraints on alienation."¹³ Perhaps ironically, the ability freely to part with property is a hallmark of its ownership. That this works to the benefit of the so-called "content industries" could traditionally be justified as consistent with the overall goals of the copyright scheme. These are not only to promote the care and feeding of authors, but also—many would contend, primarily—to ensure the dissemination of works of authorship.¹⁴ After all, the constitutional goal "to promote the progress of science" is not met merely by creating works; someone has to get them from the author's pen (or laptop) into the public's hands. To the extent that authors retard that process by endeavoring to withhold some rights, or make it more expensive by demanding more pay for rights granted, they can seem like pesky interlopers. Australian writer Miles Franklin (best known for her novel "My Brilliant Career"), captured this annoyance in "Bring the Monkey," her 1932 parody of the English country house murder mystery. The conversation she imagined among members of Britain's budding motion picture industry anticipates what today's motion picture and television

11. Roz Chast, *The Ultimate Contract*, THE NEW YORKER, Aug. 11, 2003, available at http://www.cartoonbank.com/product_details.asp?sitetype=1&sid=67854.

12. See 17 U.S.C. § 203.

13. See generally 61 AM. JUR. 2D *Perpetuities* § 90 (2002); Bd. of County Supervisors of Prince William County, Va. v. United States, 48 F.3d 520 (Fed. Cir. 1995); Metro. Life Ins. Co. v. Strnad, 876 P.2d 1362 (Kan. 1994); Cole v. Peters, 3 S.W.3d 846 (Mo. Ct. App. W.D. 1999).

14. See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 (1991); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob, and Sega*, 1 J. INTELL. PROP. L. 49, 57 (1993); R. Anthony Reese, *A Map of the Frontiers of Copyright*, 85 TEX. L. REV. 1979, 1982–84 (2007); Jessica Litman,

producers may have been fantasizing during last year's Writers Guild strike for a decent share of the income from new media "platforms" such as the Internet. Miles Franklin wrote:

[T]hey [the movie moguls] were generally agreed that the total elimination of the author would be a tremendous advance. . . .

"Authors," said this gentleman, "are the bummiest lot of cranks I have ever been up against. Why the heck they aren't content to beat it once they get a price for their stuff, gets my goat." . . .

There was ready agreement that authors were a wanton tax on any industry, whether publishing, drama or pictures. . . .

"That is why I want you to see my film—one reason," [the film producer said suavely]. "It has been assembled by experts in the industry, not by some wayward outsider. . . . [We have replaced the author with] continuity expert[s] and producer[s]."¹⁵

A copyright law for "continuity experts" (also known as reality television coordinators) or, as the French might more pithily put it, "*le droit d'auteur sans auteur*," that is a vision to spur illegal downloading as civil disobedience: let's strike a blow for authors by stealing from the corporations that fleece them.

2. *Techno-postmodernism—Foucault meets the Web*

We can further sweeten self-serving on the Web when we realize that not only has the author already been divested, she has in fact long been dead. The "death of the author" announced in literary theory has produced a syllogism in copyright rhetoric: Copyright is a consequence of the romantic conception of authorship; romantic authorship is dead; therefore, copyright is (or should be) dead, too.¹⁶ In postmodernism, authors are tyrants, imposing their meanings on texts: Michel Foucault pronounced that

the author does not precede the work; he is a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction.¹⁷

15. MILES FRANKLIN, *BRING THE MONKEY* 38–40, 74 (1984).

16. For exculpation of the "romantic author," see Lionel Bently, *R. v. The Author: From Death Penalty to Community Service*, 32 *COLUM. J.L. & ARTS* 101 (forthcoming 2008).

17. David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 *LAW & CONTEMP. PROBS.* 139, 143 (1992), citing Michael Foucault, *What Is an Author?* (Donald F. Bouchard & Sherry Simon, trans.), in

If the author is dead, or must be dethroned, then the reader not only lives, but reigns supreme. Readers give meaning to the texts they peruse; reading itself becomes a creative act. The Internet gives concrete effect to the postmodernist theory of the reader as creator, for all readers can remanipulate the text, and none can impose unilateral significance. Reception becomes regeneration; as Jessica Litman has emphasized, the reader is no longer a “sponge” passively ingurgitating other people’s creativity.¹⁸ Or, to belabor the aqueous metaphor, the reader no longer merely draws from the well of others’ authorship; she casts the contents of her bucket into the constantly changing stream of reader-modified creations.

In this techno-postmodernist view, “The” author may be dead because individual creativity is discredited; as Peter Jaszi predicted in the Paleolithic early 1990s, authorship is becoming “polyvocal . . . increasingly collective . . . and collaborative.”¹⁹ With the increasing Wikipedification of content, the “wisdom of crowds”²⁰ overtakes individual expertise in the production of works that everyone can pitch in to create, add to, or modify. In the context of copyright, if creativity is so dispersed, then no one can claim to have originated a work of authorship, so perhaps no one can fairly own a copyright, either. Moreover, if the rationale for copyright is incentive to produce and distribute works, the Internet may have topped up our supply of Johnsonian “blockheads.”²¹ In addition to the poets who burn with inner fire, for whom creation is allegedly its own reward, and others (such as law professors) for whom other gainful employment permits authorial altruism, we now have Internet exhibitionists (call them bloggers) and “crowdsources,” masses of incremental contributors whose participation, whether occasional or obsessive, belies the Johnsonian calculus. These creators, even if individually identifiable, may not need the carrot of exclusive rights in order to produce works

of authorship. Copyright, then, is not only a wasteful windfall, it somehow degrades the noble calling of disinterested creativity.

That the author, if still living (metaphorically and actually), should not look to her writings for material sustenance, is not a new idea. In the 18th-century “battle of the booksellers,” Lord Camden belittled writing for profit:

Glory is the reward of science, and those who deserve it, scorn all meaner views It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letter press.²²

Given the rise of the professional author in the 18th century, this outburst was retrograde even its day.²³ As Catherine Macaulay then wryly observed, the need to pay the “sordid butchers and bakers . . . are evils which the sublime flights of poetic fancy do not always soar above.”²⁴

Regarding authorship in the digital era, I believe that the reports of the death of the professional author have been greatly exaggerated. I doubt neither that the web vastly enlarges the numbers of people

22. 17 COBBETT, *PARL. HIST. ENG.* col. 1000 (1813). Lord Camden’s rhetoric evokes that of Boileau, almost a century earlier, deploring those who “disgusted with glory and famished for gain/indenture their muse to a bookseller/and convert a divine art into a mercenary trade.” *See* N

As a practical matter, the future of copyright for professional authors is likely to depend on the development of consumer-friendly payment and protection mechanisms. Free distribution can, of course, enhance the author's fame, but if the author cannot capitalize on her fame by exploiting her copyrights, then she will not have made much progress. (A starving artist's garret is still a garret, even if the address is well-known.) I am not sanguine about the non-copyright alternatives, most of which involve giving the copyrighted work away as a loss leader to get consumers to spend money on something else whose supply the author can control. This is sometimes called the "Grateful Dead model": I sell my song for a song, but make you pay real money for the t-Shirts that allow you to express your affection for my band.³⁰ This assumes, counter-factually, that the demand for bundled goods or services is infinitely expandable, and even more counter-factually, that it is applicable to all kinds of works of authorship. For example, the public may be willing to purchase some successful performers' "allegiance goods," but who ever heard of the *songwriter* whose works the singer performs, much less would be interested in paying to blazon her name across his chest? Or, "bundling" *services* with intellectual content may work well for software, for which "helplines" can be an essential adjunct, but I see less prospect for a *service après vente* for a photograph.

Copyright is not just about getting paid; it is also about maintaining control, both economic and artistic, over the fate of the work. If J.K. Rowling chooses to end the Harry Potter series with the *Deathly Hallows*, her copyright entitles her to keep Harry from matriculating at medical school, or for that matter, turning into an axe murderer. Unless J.K. Rowling changes her mind, there will not be an 8th Harry Potter novel. On the other hand, Rowling is unlikely to succeed (if she even tries) in shutting down the innumerable websites in which techno-postmodernist fans (or detractors) are sharing their variously guileless or perverse versions of the series. (For example,

commercial distinction may be increasingly elusive on the Web. I am not sure what would be the desirable (or feasible) response to this kind of public appropriation of works of authorship. Some years ago, an Internet guru pronounced: "You have no privacy [on the Net]: Get over it!"³² Will authors just have to "get over" their apparent inability to maintain the integrity of their creations?

Recent developments suggest that the Web may not create an ineluctably hostile environment for authors' reputational interests in their works. The U.S. Court of Appeals for the Federal Circuit upheld the enforceability of the "artistic license" provisions of an online open source free software licensing agreement which obliged users of the software to give name credit to the licensing creator and to mark off any modifications the licensees may make to the program.³³ I infer that one reason for requiring that the person who modifies the software own up to her alterations is to protect the original author from being tarred with the brush of the second author's potentially ill-conceived or badly-executed changes to the underlying program. The agreement does not seek to prevent alterations, but merely to ensure that the original creator is not associated with them.

The world of open source licensing may not, however, offer an appealing template to authors of other kinds of works. For one thing, other authors may not want their works to become a continuous collaborative project. They may prefer not only credit for their creations, but also to preserve their works as they created them. Or at least to extract a price for foregoing pristine conservation. It may be cynical to suggest that one can bear having one's artistic vision mangled, so long as the mangling occurs all the way to the bank. To the extent the observation is true, it brings us back to payment. One way to make money is by selling copies of or access to works of authorship, if possible notwithstanding the availability of unauthorized means of copying, such as unlicensed peer-to-peer file-sharing. Another way is advertising, and the big copyright battle

the relevant copyright interests. Those Harry Potter fan sites carry a lot of ads, including those placed by Google. I don't know whether J.K. Rowling licenses the sites and participates in the advertising revenue, but if she wanted a share, she probably would have a good claim against the websites, and maybe even against Google (though that's a longer shot).

Will authors retain the relevant copyright interests to benefit from authorized Internet exploitations? Those who self-publish will, but publishers can still add value, particularly in credibility and publicity, so many authors will still want intermediary distributors. Perhaps less celebrated authors would be better off abandoning any pretence to copyright ownership and urging Congress instead to impose more compulsory licenses with mandatory percentages of royalty distribution to the works' creators. That is, however, a desperate solution, which authors could come to regret if technology and business models develop in a way that resistance to unreasonable publisher demands is not in fact futile.

In that spirit, I'd like to invite readers to take a tour of a website, www.KeepYourCopyrights.org, which the Kernochan Center for Law, Media and the Arts, and the Center for Law and Technology at Columbia Law School have launched in the hope of bringing some power back to the people who create works of authorship. The website's credo is "a creator forewarned is a creator forearmed." As the website explains,

Today, too many creators take a passive attitude toward their copyrights. The matter seems complex, and publishers or distributors may tell you that everyone does it their way, -ssoh.4(y)4,Arts, -0.4(crfc4W(y)4(y)4.Rard t)-

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thumbs up), “could be worse” (signalled with a yellow thumb in equipoise), “author unfriendly” (indicated by an orange thumbs down) and “incredibly overreaching” (designated by a big red claw). The contracts are categorized by type of grant and type of creator. The site includes the full contracts, in order to place the granting language in context. There is also a “before and after” section showing the contract language originally proposed, and the final version, after the author pushed back. It is important to recognize that

set aside for “reserves for returns”—make sure the changes in the contract are reflected in the royalty statement! If the first version of the contract you were shown was a “standard form,” chances are the royalty statement form is standard, too, and therefore tracks the first version of the contract. *If the royalty statement isn’t modified to incorporate the changes made to the contract, then*