On Copyright's Authorship Policy

Tim Wu
Tim.Wu@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol2008/iss1/8

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Making authors the masters of their own destiny has long been a stated aspiration of copyright. Yet more often than not, the real subjects of American copyright are distributors—book publishers, record labels, broadcasters, and others—who control the rights, bring the lawsuits, and take copyright as their “life-sustaining protection.”¹ Much of modern American copyright history, and particularly its legislative history, revolves on distributors either demanding more industry protection or fighting amongst themselves.² It is distributors who make the great financial investments in copyrighted works, and distributors who arguably most need the incentives and protections that the system is designed to provide.

What then is the distinct role, if any, of the author in the copyright system? Why have an authorial copyright—a copyright that vests rights in authors? Here I suggest a new defense of authorial copyright. The reason is to encourage not just writing, but the invention of new types of writing. Stated otherwise, authorial rights may help support not just competition in the market, but

---

¹ Copyright © 2008 Tim Wu.

² Professor, Columbia Law School. I am grateful to Jane Ginsburg, Lior Strahilevitz, Clarisa Long, James Speta, and Molly S. Van Houweling for the discussions that led to this Article, as well as several generations of advanced copyright seminar students at Columbia Law School and Virginia University School of Law. Nicole Altman and Wayne Hsiung provided additional feedback and research assistance.

¹ Home Recording of Copyrighted Works, Hearings on HR 4783, HR 4794, HR 4808, HR 5250, HR 5488, and HR 5705 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong, 2d Sess 1, 4 (1982) (statement of Jack Valenti, President, Motion Picture Association of America) (referring to VCR technology as “a great tidal wave just off the shore ... threaten[ing] profoundly the life-sustaining protection ... on which film people depend, on which television people depend and it is called copyright”).

² Consider Tim Wu, *Copyright's Communications Policy*, 103 Mich L Rev 278, 280 (2004) (describing distributors' push for anti-piracy laws and for legislation regulating certain types of distributor competition). On the other hand, authors' groups have occasionally played a pivotal role in copyright policy. See, for example, Thomas Nachbar, *Constructing Copyright's Mythology*, 6 Green Bag 2d 37, 37–38 (2002) (relating efforts of Noah Webster and others to have copyright laws enacted in the early republic).
for the market. Such rights, I argue here, can act as a means of seeding new types of creative works, as well as new modes of producing creative works, and new entrants into dissemination. On the aggregate, giving rights to authors can make the monopoly-prone creative industries more decentralized and open to market entry.

To restate the point, there are lessons for copyright's authorship policy in the invention of strange new forms of authorship like Wikipedia and other mass works, the proliferation of Open Access licensing in academia, in the use of open source licenses by commercial entities like IBM and Apple, and in the more than five million items under Creative Commons licenses. These experiments in different modes of production are aided by the initial vesting of the copyright in the author. While naturally many of the experiments taken by authors with their rights will be on a small scale, they can be the start of much larger industry developments.

My view is slightly different than existing views of the author's role in copyright. Typically we say that authors are the beneficiary of the incentives created by copyright. That is certainly true but does not map a distinctive role for authorial rights as opposed to distributors' rights. The basic incentive system central to copyright could in fact operate based on a system of distributors' copyrights, as it already often does thanks to widespread assignments and the work-for-hire doctrine.

Another important reason for giving rights to authors is the sense that they are morally entitled to a right in their work—as if a novel were a kidney, so to speak. I do not quarrel with that view in this paper, though it goes without saying that in modern times it is a principle honored in the breach. At its extremes, in some industries, the grant of rights to the author can be almost symbolic, so dominant is the practice of taking rights from the author and giving them to the distributor. But in any event, my aim is not to cast doubt on the strength of moral arguments for

---

3 See <http://creativecommons.org> (last visited Mar 29, 2008).
4 Both assignments and the work-for-hire doctrine tend to result in the loss of authorial copyright. A copyright "assignment" is the transfer of the rights of the author to another party; in this sentence, the implied other party is a distributor. For example, large record labels usually demand that composers assign all of their copyrights to the label. The work-for-hire doctrine automatically vests copyright in the employer if the author is an employee.
5 I use this phrase in its modern sense, not in its original meaning in Hamlet. William Shakespeare, Hamlet Act 1 scene 4 lines 7–16, in G. Blakemore Evans, ed, The Riverside Shakespeare 1197 (Houghton Mifflin 2d ed 1997).
authorial control of copyright, but rather to add other arguments.

To complete the argument I must provide an account as to how copyright actually encourages authorship and the innovation in types and modes of authorship I discussed above. We might usefully compare the problem of authorship in copyright to one of industrial organization. If we accept that there are multiple potentially successful modes of authorship—a point discussed more fully below—then the question is not just how copyright might promote authorship, but how it can promote various and competing modes of authorship. Just as the economic system at large needs to provide conditions under which sole proprietorships, small business, and large corporations can coexist, so too should the goal of managing information production be as impartial as possible. This means that the goal of copyright's authorship policy should be neutrality: a system that declines to favor any mode of production over others, on the premise that optimization in favor of one mode will deoptimize for others.

While not the main point of this paper, all this leads to an interesting defense of the existence of copyright at all. Fans of alternative production and remix culture sometimes prescribe large reductions in the scope of copyright or even the abolishment of copyright altogether. But such arguments face at least one serious problem: enforceable rights may sometimes be useful for maintaining the integrity of both open and closed works. It is partially because of a threat of copyright enforcement that BioMed Central's highly respected open access journals publish articles that third parties may "use . . . freely" as long as the "integrity [of the article] is maintained and its original authors, citation details and publisher are identified." Creative Commons depends on copyright, and copyright's underlying threat of copyright enforcement helps keep open source open and free software free by forcing improvers to share their source code. Every mode of production, even those that strive to keep works open and free,

---


7 What I mean by open and closed works is discussed in Part I (modes of authorship discussion).


9 See <http://creativecommons.org> (last visited Mar 29, 2008).
requires mechanisms to prevent behavior that would ruin the project. I hasten to add that some of these mechanisms can be non-legal—the norms surrounding many open projects are what keep them that way. But mechanisms there must be.

Part I provides an economic rationale for an authorial copyright system. Part II describes various modes of authorship and argues that different modes are optimal in different contexts. Part III lays the case for a copyright system that is neutral as between different modes of authorship. Part IV briefly explores a historic example of how authorial rights have performed a role in copyright decentralization. Finally, Part V examines the termination of transfer right in light of this economic theory of authorship.

I. WHY GIVE COPYRIGHT TO AUTHORS?

With some exceptions, copyright vests in authors at the moment of fixation. That is the law, but the economic, as opposed to moral, rationale for such vesting is not completely clear. The argument for granting rights to encourage production of creative works is clear enough, but if encouraging creation is the only goal, the rights could be (and once were) granted to distributors rather than authors. As distributors point out, the bulk of the financial risk in a creative work is usually borne by the distributor, and so it is they, and not the authors, who most need the safeguards against freeriding provided by copyright. In practice, in many creative industries in the United States, copyright already ends up in the hands of distributors or the companies that employ creators.

10 Sometimes non-legal mechanisms preserve the integrity of a project. Wikipedia’s editors, for example, don’t sue unruly users—they scold and sometimes shame them. See Wikipedia, Vandalism, available at <http://en.wikipedia.org/wiki/Wikipedia:Vandalism> (last visited Mar 29, 2008) (“If you find that another user has vandalized Wikipedia, you should revert the changes and warn the user . . . and administrators may block [repeat offenders].”).

11 17 USC § 201(a) (2000) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”). The principle exception is in § 201(b), the work-for-hire doctrine.

12 That fact is clearest in the film and commercial software industries, where the work-for-hire doctrine vests most of the relevant copyrights in distributing firms. In journalism, publishing and music industries, moreover, mandatory assignments of copyright accomplishes much the same effect. There are of course exceptions to this, like the rights held by The American Society of Composers, Artists, and Performers (“ASCAP”), a performing rights organization that licenses and distributes royalties for the public performances of the copyrighted works of its members. See <http://www.ascap.com/about/> (last visited Mar 30, 2008).
We can imagine an alternative scenario in which copyright vested in distributors at the moment of public distribution (or "first publication"). Indeed we need not imagine, as this was the rule in early English copyright where, as Oren Bracha writes, "it was Stationers and Stationers only that could register copyright." That arrangement, as much as vesting copyright in authors, would help protect the investment in the work, and ultimately provide incentives to authors to produce creative works. (The author's incentive would be to create a work so as to sell it to the distributor, who could then register copyright). However, that system would also not be a system of authorial copyright. Is anything wrong with that? Why bother with authorial copyright at all?

There may be more reasons for authorial copyright than so far imagined. Traditionally, scholars have taken two approaches to this question. First, some have simply suggested that there is not much difference in the interests of distributors and authors. Here is how the point was put by Zechariah Chafee in 1945:

[M]uch of the tax which the Copyright Act imposes on readers goes directly to publishers.

Then is not the talk of helping authors just a pretense?

\ldots

One reason [ ] for protecting the copyright in the hands of the publisher is to give an indirect benefit to authors by enabling them to get royalties or to sell the manuscript outright for a higher price. A second reason is, that it is only equitable that the publisher should obtain a return on his investment. \ldots Publishing is close to gambling. Many of the [ ] publisher's books never pay back his original outlay. \ldots Thus copyright is necessary to make good publishers possible.\footnote{Zechariah Chafee, \textit{Reflections on the Law of Copyright}, 45 Colum L Rev 503, 508–10 (1945).}

This argument suggests that the incentive system, floats all boats. But Chafee cannot explain why the law should then give copyright to authors in the first place. The fact that the bulk of the investment is made by the publisher, in fact, would seem to

\footnote{See Oren Bracha, \textit{Ideology of Authorship Revisited} 113 (Jan 2006) (unpublished manuscript, on file with the U Chi Legal F).}
point to giving him the rights. So we are left with no distinctive argument for authorial rights.

The older and stronger rationale for authorial copyright is a natural law, or moral, argument. It can be described as the adaptation in law of the modern conception of the author, as popularized by figures like William Wordsworth. If we care about authors then it is the author who deserves legal rights, not the distributor. What you create is yours: "to every cow her calf." Author Victor Hugo, stressing the physical control the author has upon creation, put it as follows:

Think of a man like Dante, Molière, Shakespeare. Imagine him at the time when he has just finished a great work. His manuscript is there, in front of him; suppose that he gets the idea to throw it into the fire; nobody can stop him. Shakespeare can destroy Hamlet, Molière Tartufe, Dante the Hell.

I do not quarrel with these arguments in this paper. I agree that authors are sympathetic and deserving figures who, as I said in the introduction, might think of their works much like internal organs, and feel similar pain from their unwelcome manipulation. But it must be said that, when push comes to shove, American copyright law does not give these theories much more than lip service. While it insists on the symbolic act of giving authors rights in the first place, it does not do that much to keep them there. Whatever Victor Hugo might say, were Dante an employee, writing The Divine Comedy as a serial of sorts, the work-for-hire doctrine would place copyright ownership in the hands of his employer. Similarly, little prevents transfers of

---

15 See, for example, Peter Jaszi, On The Author Effect: Contemporary Copyright and Collective Creativity, 10 Cardozo Arts & Enter L J 293, 298–99 (1992) (describing how the concept of authorship has played a role in shaping legal doctrine). The famous preface of William Wordsworth is sometimes referenced as an expression of these ideas. See William Wordsworth, Essay, Supplementary to the Preface (1815), in Paul M. Zall, ed, Literary Criticism of William Wordsworth 158, 184 (Nebraska 1966) ("If every great Poet with whose writing men are familiar, in the highest exercise of his genius, before he can be thoroughly enjoyed, has to call forth and to communicate power, this service, in a still greater degree, falls upon an original Writer, at his first appearance in the world.") (emphasis original).

16 George H. Putnam, 2 Books and Their Makers During the Middle Ages: A Study of the Conditions of the Production and Distribution of Literature from the Fall of the Roman Empire to the Close of the Seventeenth Century 46 (Knickerbocker 1898).

copyright through contract after the initial assignment. In favor of both of these practices are arguments suggesting that automatically vesting rights in a centralized figure avoids chaos, transactions costs, anti-commons problems, and so on. But, again, if we took the moral rights of the author seriously, such arguments would hardly be enough. No one, or nearly no one, says you can remove a man's kidney to avoid transaction costs. All this goes to suggest that it might be useful to look beyond the traditional natural law arguments to look for other justifications for authorial copyright.¹⁸

Here I present a different argument for authorial copyright. Authorial copyright can encourage not just writing, but the development of new types of writing, and new modes of production for creative works. That is, although perhaps not making it easy, authorial ownership helps make possible the rise of different modes of production. Authorial copyright may, along similar lines, act as a check on the market power of dominant distributors. This is possible because authors have the potential to use their independent ownership of new or reverted copyrights as the property right that anchors new modes of production.

It may not be clear at first what role authorial control of copyright has in the seeding process I just described. If, for example, copyright were vested in distributors, then perhaps new distributors could simply enter the market with their rights. James Speta, for example, asks whether I am suggesting that there are "copyright thickets" of the kind we see in patent law that block market entry, and if not, what copyright has to do with market entry.¹⁹

The answer is in two parts. First, when it comes to authorial innovation—new means of creating works, or new ideas of what a work is—authorial control of copyright gives the author the initial space to create the work and get rights without considering distribution. The creative product can be conceived and can

¹⁸ Economic analysis of authorial rights in copyright is scarce—the scholarship tends to defend copyright at large in economic terms, while describing doctrines related to authorial rights in natural law terms. One notable exception is the work of Henry Hansmann and Marina Santilli who presented an economic analysis of various moral rights, such as the right to prevent mutilation of visual arts. Henry Hansmann and Marina Santilli, Authors' and Artists' Moral Rights, 26 J Legal Stud 95, 102-08 (1997). Their work focused on preventing problems like opportunistic owners damaging the greater reputation of the author. Reputational damage is behavior that an author is probably well situated to police, giving one set of reasons to vest rights in authors.

¹⁹ Email from James Speta, Professor of Law, Northwestern University School of Law (Feb 19, 2008) (on file with author).
gain full legal rights without any mind as to how its dissemination will be achieved. This separation, on the margin at least, should lead to the invention of creative works that are different than those that would be created were copyright something that vested in the distributor.

We see this in the models of mass authorship (like wikis), open source software and, creative commons, which are aided by the existence of an authorial right that exists whether or not there is a distribution stage for the works in question. To repeat: the ability to copyright first and distribute later may encourage innovative modes of production and new types of authorship.

Second, the theory here described in part depends on the importance of reversion of rights to authors. If a highly successful work returns to the author, it should be obvious that it then becomes very useful as a means of seeding a new distribution channel or just a different publisher. If a star author who has given away all of his or her rights gets a second chance to decide how to distribute those rights, the potential for creating new competition in the industry is obvious.

The point can be made differently: one reason to have copyright owned by authors is because it serves as a potential check on the overcentralization of decision-making in copyright-related markets. As I argued in Intellectual Property, Innovation, and Decentralized Decisions, one of the ways we must assess intellectual property is by how it affects industry structure. "Intellectual property assignments must be assessed not only by the incentive/cost tradeoff, but by their effects on the decision architectures surrounding the property right—their effects on how firms make product innovation decisions." Vesting copyright in authors has the potential to quietly influence the structure of the industries centered on copyright in useful ways. Most importantly, authorial ownership can make it easier for new forms of production to come into being.

To develop this argument further, we need to develop a different, though ultimately related examination of multiple modes of authorship.

---


II. MODES OF AUTHORSHIP

"What matter who's speaking, someone said what matter who's speaking."\textsuperscript{22} As every student in an English department knows, authorship past and present comes in many forms, from the romantic single author through mass projects ascribed to a single "author" who played no actual role in writing the work.\textsuperscript{23} A key premise of this paper is that different modes of authorship, or creative production, will be optimal for different works and different subject matters at different times. This section defends that premise.

The production of expressive works can be broken down into three standard stages:

![Diagram of production stages: Creation → Dissemination → Improvement]

At each stage, production can be fully open, fully closed, or somewhere in between. By open, I mean that anyone may participate in creating, disseminating or improving the product without permission. On the other end of the spectrum, in a closed system only one entity has the permission to create, disseminate, or improve the work in question. In between is an intermediate level, typified by collaborative works, where permission is given in advance to some people to participate in one or more of the three production stages.


This simple typology describes many, though obviously not all, of the modes of production that we see today. Consider a few examples. Software under an open source license is mostly open in its creation, dissemination, and improvement. Conversely, a novel, closer to copyright's original subject matter, is usually closed at all three stages. Many works fall somewhere in between. A typical paper published in the open access *Journal of Biology* is collaborative in creation, open in dissemination, but closed to direct improvement.

Different modes will be optimal for different projects, subject matters, and industries at different times. There are instances where preserving a certain mode of production for a work can be important to its success. Consider the example of open source software. If someone takes the program, improves it, and then distributes a new product with the improved source code kept secret, no one can further examine or improve the software, and the process of innovation that open source is designed around will falter. For that reason, most open source licenses condition use of the work on a promise to make publicly available the source code of improvements made, if the modified program is deployed. The Apple Open Source License states:

If You Externally Deploy Your Modifications, You must make Source Code of all Your Externally Deployed Modifications either available to those to whom You have Ex-

---

27 See The Open Source Definition (cited in note 24).
ternally Deployed Your Modifications, or publicly available. Source Code of Your Externally Deployed Modifications must be released under the terms set forth in this License...\textsuperscript{28}

Conversely, keeping dissemination closed, or controlled, can be crucial to the financial viability of other types of projects. A film that will cost fifty million dollars to produce might only be a worthwhile investment if it can be disseminated exclusively in movie theatres at a cost of ten dollars per consumer. Without the power to keep dissemination closed, the film may not be produced.

As a final example, suppose a team of scientists publishes a paper claiming that sheep can be cloned.\textsuperscript{29} On the one hand, the scientists almost certainly prefer open and wide dissemination of their paper and its results. On the other hand, unauthorized editing of the paper could damage the reputation of the authors and also cause harm more generally if it compromises the accuracy of the paper.

From these examples we see that the reasons that make a given mode of production optimal in different contexts are complex; nevertheless, we can make some general observations. At the creation stage, the benefits of a collaborative or an open system are the possibilities of efficient trade between differently specialized actors as set against the costs of coordinating multiple actors. The creation of a film provides an obvious example of where collaboration pays off. While in theory one person could simultaneously serve as director, cinematographer, actor, and costume designer, rarely are these abilities found in a single person. Conversely, in the creation of a novel, participation by anyone more than a writer and an editor may lead to coordination costs that outweigh any potential benefits. Sometimes it is advantageous to combine one person's reputation with another's writing skill—as in the example of a ghostwritten book. Hillary Clinton's \emph{It Takes a Village} combined her well-known name with the skills of an uncredited collaborator, Barbara Feinman.\textsuperscript{30} As


\textsuperscript{30} Andrew Ferguson, \textit{Read, Weep, and Vote}, 13 Weekly Standard 26 (Dec 3, 2007), available on Westlaw at 2007 WLN\textregistered 24175028.
Richard Posner reminds us, “you can be the author of a work though you were not the writer.”

At the dissemination stage, the predominant question is what combination of direct revenue generation and exposure maximizes the work’s value. In the case of an advertisement or an academic paper, the work’s purpose may be served by the widest possible distribution. It is rare for an advertiser to complain of overexposure. But some works realize greater value for their owners by limiting exposure or consumption of the creative work. A video game that costs millions to produce sharply limits who gets access to it by charging a high price. Some goods get their value from exclusivity, like highly expensive perfumes, liquors, and limited edition prints. For many works the optimal level of openness in dissemination may be complex or hard to know as exposure and revenue generation are often interrelated. A band may benefit from the increased exposure that comes from having its music played on the radio or widely downloaded (for free), but it will also benefit from limiting access to its works to make money.

There are also various reasons why it might be preferable to allow a work to be improved or adapted freely, in a limited fashion (derivative works, but no direct improvements), or not at all. As Richard Nelson and Robert Merges originally suggested for patents, increased openness in improvement—that is, more freedom to create derivative works—might often serve innovation and consumer welfare. Proponents of remix culture certainly take this view in the copyright context. Yet there may be valid reasons to vest control over improvement in a limited number of persons. Some works might be ruined or overgrazed by an open improvement system, as suggested by Posner and Landes.

---

34 See Lawrence Lessig, Free(ing) Culture for Remix, 2004 Utah L Rev 961, 972–73 (describing licensing and legislative changes that would “help remix culture flourish”).
35 See William M. Landes and Richard A. Posner, Indefinitely Renewable Copyright, 70 U Chi L Rev 471, 474–75 (2003) (“[A]n absence of copyright protection for intangible works may lead to inefficiencies because of congestion externalities and because of impaired incentives to invest in maintaining and exploiting these works.”). My comment on overgrazing is that it might be a possibility for some works but not others—it is hard to say for the full range of potentially copyrightable works. Careful readers will notice that, like Posner and Landes, this work advances a justification for the existence of copyright.
More frequently, it may be the case that a closed system of improvement is necessary to preserve not the work itself but a series of related interests—for example, the author's reputation, the accuracy of the work, or to prevent consumer confusion as to its source. As discussed above, scientists favor open dissemination of their work but do not want their papers edited or rewritten by others for fear that their findings may be distorted and their reputations damaged. Even bloggers, who write mainly for fun or sometimes to make advertising money, usually want the power to prevent unauthorized distortion of their work. In short, for a variety of reasons, the optimal degree of openness for improvements, as with the other two stages of production, varies.

III. WHY A MORE NEUTRAL COPYRIGHT?

I have suggested that decentralization is desirable because it will lead to a more “neutral” copyright system. But why is that attractive? There are several reasons.

First, every industry is different. If copyright chooses to favor a mode of production that is prevalent in one industry, it may unwittingly hurt production in other industries. What is good for the film industry might be bad for the software or publishing industries. If keyed to the mode of production typical of one industry, copyright will slow production in other industries. To the extent that copyright can be modified for use in many different industries, it will be more useful.

36 See Hansmann and Santilli, Authors' and Artists' Moral Rights at 95–96, 107 (cited in note 18) (arguing that moral rights doctrine serves to control reputational externalities to the potential benefit, not just of the individual artist, but of other owners of the artist's work and of the public at large and that "the public... has an interest in not being misled about [an artist's work]"). It is true that preventing consumer confusion is the designated role of trademark, but that does not mean that authors should not be able to use copyright for that purpose as well.

37 But see Peter Suber, Open Access to the Scientific Journal Literature, 1 J Biology 3.1, 3.2 (2002), available at <http://jbiol.com/content/pdf/1475-4924-1-3.pdf> (last visited Mar 30, 2008) (noting the ability of open access journals to meet scientists' interests "in dissemination to the widest possible audience" while still being able to rely upon copyright to ensure that "authorized copies will not mangle or misattribute their work").

38 For example, both The Becker-Posner Blog, <http://www.becker-posner-blog.com> (last visited Mar 30, 2008), and the blog Boing Boing, <http://www.boingboing.net> (last visited Mar 30, 2008), are licensed under a Creative Commons Attribution-Non Commercial 2.5 License, allowing free reign to adapt the work under the conditions that it is used for noncommercial uses and is properly attributed to the original authors. See Creative Commons Deed, Attribution-Noncommercial 2.5, available at <http://creativecommons.org/licenses/by-nc/2.5> (last visited Mar 30, 2008).
Second, modes of creative production may evolve over time. Different modes of authorship seem to come into vogue at different times in history. At some points, improvement-driven authorship seems more important, at other points, collaborative writing, and yet at other points, the romantic model of authorship.

Given this constant shift, having copyright focus only on encouraging the mode of authorship it takes to be predominant would be a mistake, even if such a mode might benefit a good deal of the present content production. The novels of the future might be created more like open source software or science papers, by large teams of authors. While a project like Wikipedia seems undeniably popular now, its volunteer-based mode of production may simply lose favor one day. While these developments sound unlikely, so, perhaps, did the idea of the novel to one generation of writers, or the idea of Linux to a different generation of programmers. And for that reason changing copyright to encourage only one mode of production would be a mistake. We simply do not know whether or not these or other modes of production will gain prominence in the future. Neither does Congress, the Free Software Foundation, or the Recording Industry Association of America.

Third, whole industries will die and new ones will be born. If you agree with economist Joseph Schumpeter that a healthy process of industrial life and death is necessary to a vital economy, as neutral a copyright as possible may facilitate that process. One hundred and twenty years ago the film, recording, and radio broadcast industries did not exist. Instead, those dominating the creative industries were the book publishers, sheet-music producers, and the live stage producers. As Schumpeter taught, industrial succession is the essence of a capitalist system, and copyright, like any law, always risks becoming a form of protection for the industries of the present at the expense of those of the future. A law that privileges the modes of production common to present creative industries may slow, or even prevent, their natural death.

The challenge of changing modes of production and the ongoing death and birth of whole industries are fundamental and re-

---

39 For a general discussion, see Edward Samuels, The Illustrated Story of Copyright 9124 (St Martin's 2000).

40 See Joseph A. Schumpeter, Capitalism, Socialism and Democracy 61 (Harper Colophon 3d ed 1950) ("[Capitalism's] very success undermines the social institutions which protect it, and 'inevitably' creates conditions in which it will not be able to live.").
occurring challenges for copyright. To deal with the range of industries affected by copyright, scholars occasionally recommend creating multiple sui generis intellectual property schemes.41 Such content-specific regimes, however, have even greater problems of obsolescence. In practice, they have mixed track records: the special system for Digital Audio Tapes ("DAT") adopted in 1992 is a classic example of a failed effort to adapt copyright to specific technology.42 Another solution is to interpret copyright differently for different industries. The various special doctrines that surround software provide a present example, but there are limits in the degree that doctrine can be stretched to accommodate different industries.43

The best solution to these problems lies in a neutral copyright system, and the principal means for achieving this neutrality is to maximize the decentralization of copyright ownership and enforcement. When as many entities as possible control the ownership or enforcement of copyright, they may experiment

---

41 See, for example, Eliana Torelly de Carvalho, Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System, 11 Mo Envir L & Pol Rev 38, 40, 53-58 (2003) (discussing "proposals for a sui generis intellectual property system that could provide a good degree of protection to traditional [biodiversity-related] knowledge"); Jane C. Ginsburg, Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad, 66 U Cin L Rev 151, 171-76 (1997) ("If state law protections of databases are incomplete or vulnerable to copyright preemption on the one hand, or overreaching on the other, perhaps sui generis legislation would be desirable. Sui generis protection might be superior to contract claims, moreover, if the legislation balanced fair-use-type user rights against appropriate protection for compiled data."); Regan E. Keebaugh, Note, Intellectual Property and the Protection of Industrial Design: Are Sui Generis Protection Measures the Answer to Vocal Opponents and a Reluctant Congress?, 13 J Intel Prop L 255, 275-78 (2005) ("Sui generis protection of industrial design may not be the complete solution to the serious threats faced by the United States manufacturing industry, but it does provide one way to curtail the effects of these."); Pamela Samuelson, et al, A Manifesto Concerning the Legal Protection of Computer Programs, 94 Colum L Rev 2308, 2313-14 (1994) ("The Office of Technology Assessment states that it may be easier for Congress to achieve a proper balance in policy objectives through a sui generis approach to software protection than could be achieved through use of existing legal regimes wherein changes in scope of protection to accommodate software might distort principles of protection as applied to other categories of works.").


43 See, for example, Sega v Accolade, 977 F2d 1510 (9th Cir 1992) (holding reverse engineering of a video game to achieve interoperability to be fair use).
with many different modes of production, from which the fittest will survive.

IV. HOW AUTHORS’ RIGHTS MIGHT DECENTRALIZE

The vesting of rights in authors can serve as a potentially important check on the centralization of copyright ownership. What follows is no original contribution to the voluminous scholarship on the history of authorship. However, the story of the birth of authors’ rights is a good example of how authorial copyright can affect an industry.

As most copyright scholars know, rights to copy were vested in publishers (then called stationers) early in English copyright history. As Ray Patterson tells us, “copyright began as a publisher’s right, a right which functioned in the interest of the publisher, with no concern for the author.” One early function of this right was censorship, but another was the management of competition as between members of the stationer’s guild. One publisher might have had the exclusive rights to publish the works of Isaac Newton and another the exclusive right to publish the St. James Bible. The allocation of exclusive rights prevented competition between different versions of the same book. Like any cartel, the publishers regarded competition as undesirable and sought to destroy competition between its members as well as from outside the guild. As Joseph Lowenstein writes, the stationers’ copyright “was a privilege conferred by the guild on one of its members, part of an imperfect but not ineffective system by which the guild sought to preserve internal order.”

In the eighteenth century, unfortunately for the stationers’ cartel, outsiders—Scottish and Irish publishers—eventually be-

44 For a general discussion, see Wu, 92 Va L Rev 123 (cited in note 20).
45 Relevant works to this history include Benjamin Kaplan, An Unhurried View of Copyright (Columbia 1967); Joseph Lowenstein, The Author’s Due: Printing and the Pre-history of Copyright (Chicago 2002); Harry Ransom, The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710 (Texas 1956); Lyman Ray Patterson, Copyright in Historical Perspective (Vanderbilt 1968); Grantland S. Rice, The Transformation Of Authorship In America (Chicago 1997).
46 Patterson, Copyright in Historical Perspective at 8 (cited in note 45).
47 Id at 43–44 (“[T]he stationer’s copyright was a right recognized among members of the company entitling one who published a work to prevent any unauthorized printing of the same work.”).
48 To a large extent, copyright still plays a role in managing competition between disseminators. For a general discussion, see Wu, 103 Mich L Rev 278 (cited in note 2).
49 Lowenstein, The Author’s Due at 29 (cited in note 45).
gan to bring competing books to market. With this new competition came history’s first accusations of copyright piracy. The efforts of the cartel to stop the pirates using copyright law created the first of many conflicts between rival disseminators: the famous “Battle of the Booksellers.” For at least fifty years the incumbent publishers successfully enforced England’s copyright law, the 1710 Statute of Anne, to block their rivals. But by the late eighteenth century, the Statute of Anne was interpreted in an innovative way: to vest copyright in authors as opposed to publishers. It is somewhat unclear if this was actually the purpose of the Statute, as many doubt that a real system of author’s rights was what Parliament had in mind. But in the hands of “rationalizing” English judges, most famously in the case Donaldson v Beckett, the system of rights vested in authors rather than publishers became the norm.

The House of Lords’ ingenious idea in Donaldson was to use authors as a wedge to force open competition in book publishing. Their interpretation of the Statute of Anne made it hard for the publishers’ cartel to survive. While authors still had far less market power than publishers, the whole idea of copyright in authors was at odds with the indefinite continuation of a stationers’ cartel. The basic concept is that by giving the legal rights to the author, the author became an independent, vested economic entity that made competing modes of production possible. While not exactly a romantic vision of authorship, the significance of

50 Mark Rose, Authors and Owners: The Invention of Copyright 69, 116 (Harvard 1993).
51 For an in-depth discussion of the Battle of the Booksellers, see id at 67–91.
52 See Lowenstein, The Author’s Due at 13–14 (cited in note 45).
53 Benjamin Kaplan explains:

It is hard to know how far the interests of authors were considered in distinction from those of publishers. There is an apparent tracing of rights to an ultimate source in the fact of authorship, but before attaching large importance to this we have to note that if printing as a trade was not to be put back into the hands of a few as a subject of monopoly—if the statute was intended to be a kind of “universal patent”—a draftsman would naturally be led to express himself in terms of rights in books and hence of initial rights in authors. . . . I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors’ interests with their own . . .

Kaplan, An Unhurried View of Copyright at 8 (cited in note 45).
54 1 Eng Rep 837 (HL 1774).
55 See Patterson, Copyright in Historical Perspective at 7 (cited in note 45); Lowenstein, The Author’s Due at 13–23 (cited in note 45) (analyzing the case).
56 Patterson, Copyright in Historical Perspective at 14 (cited in note 45).
authors as independently vested entities nonetheless changed the history both of copyright and publishing.

In this use of the author to open the publishing market we can see the glimmer of a deeper idea. In breaking the stationers' cartel, the recognition of the author made possible more variation in how books were published. Authors could promote competition among disseminators, and more broadly, competition among modes of production in the centuries to follow. Today, for example, authors' rights might promote competition not only between Random House and Simon & Schuster, but also between open and closed software production, as well as mainstream and open access academic publishers.

The "Battle of the Booksellers" suggests one answer to the question of authorial copyright. Vesting copyright in authors can help promote competition in dissemination. Stated otherwise, this part of history shows how authorial rights can serve as part of the remedy for structural problems in the production of expressive works.

V. THE RELEVANCE OF THE TERMINATION OF TRANSFER RIGHT

This discussion of the authorial role also provides a new understanding of the economic function of the author's termination of transfer right found in section 203 of the Copyright Code. That section gives the author a right to nullify most copyright assignments and licenses thirty-five years following the assignment or license. If, for example, J.K. Rowling had transferred her U.S. rights in *Harry Potter and the Philosopher's Stone* to her publisher Scholastic in 1997, she would have the right under U.S. law to regain the copyright in the year 2032.

The termination right is usually described as a means of correcting uneven bargaining conditions at the time of copyright assignment, giving the author a second chance to assess the bargain thirty-five years later. The right is unpopular with dis-

---

58 Section 203 of title 17 gives the original author or her heirs the right to terminate assignments and licenses thirty-five years after assignment, or forty years after publication if the publication right was granted. 17 USC § 203(a)(3). See also 17 USC § 304(c) (discussing termination right for works under copyright as of 1978). Works for hire are excluded from the provision. 17 USC § 203(a). In addition, the author does not regain control of any derivative works made while the agreement was in effect. See 17 USC § 203(b)(1) construed in *Mills Music, Inc v Snyder*, 469 US 153, 165 (1985). For even more detail, see Melville B. Nimmer, *Termination of Transfers under the Copyright Act of 1976*, 125 U Pa L Rev 947 (1977).
seminators, for obvious reasons, as it creates the possibility of losing rights of potential value and, as we shall discuss, rights that can create potential competitors. Consistent with the theory discussed in this article, we can describe a different economic function and impact of the transfer termination right. By giving rights back to authors, it provides the potential to seed the development of new forms or industries of dissemination that might otherwise be blocked.

Incumbent disseminators often see new channels or technologies of dissemination as competitive threats and try to slow, block, or take control of any such innovations to prevent being displaced in the market. Sometimes, as detailed in the paper Copyright's Communications Policy, incumbents use copyright as a means to try to block or squeeze new rivals, as opposed to welcoming them as a potential source of licensing revenue. The most recent example is seen in the early struggle over online music in the early 2000s that lead to both Grokster and eventually the rise of iTunes. The early days of record players, radio, cable, and satellite track a similar pattern.

While mechanisms like fair use and compulsory licenses are often used to settle these kinds of disputes, the reassertion of authorial rights through the exercise of section 203's termination right provides another mechanism to curb the use of copyright to block market entrants. Authors, by definition, are usually not stakeholders in any particular form of dissemination. An incumbent firm with a stake in existing forms of distribution may care if a composer sells one thousand CDs or iTunes albums. The composer, all else being equal, is indifferent. In both instances he reaches his audience and makes money. And for that reason, authors, just as in the “Battle of the Booksellers” example above, may decide to take their rights to competitive disseminators or even potentially become disseminators themselves.

Authors holding a reverted copyright may be particularly well-situated to seed competition in content distribution. Only a tiny number of works are still actively marketed thirty-five years

---

60 For a general discussion, see Stephen W. Tropp, It Had to be Murder, or Will Be Soon: 17 U.S.C. § 203 Termination of Transfers: a Call for Legislative Reform, 51 J Copyright Socy USA 797 (2004) (detailing why, from the industry's perspective, termination rights might create problems).

61 For a general discussion see Wu, 103 Mich L Rev 278 (cited in note 2).


after assignment. An author holding a reverted right may (successfully or not) try to breathe new life into an old work by making it available through channels that did not exist at the time of assignment. A distributor might also have such interests, but might also need to defend its existing channels against new entrants. The author and distributor often have the same interests, but the distributor's stake in, well, distribution, can make all the difference.

Unfortunately, for now, the reverter right seems to be less known and less used than was intended. However, the logic of this paper provides a new defense and new explanation for the reverter rights in the copyright statute.

VI. CONCLUSION

The question of whether copyright should serve authors or publishers is as old as copyright. While sentiment has always favored authors, I argue that the economics of copyright also support more authorial control over the enforcement of copyright. At a minimum, judges and policy-makers should reacquaint themselves with the difference between disseminator and author interests in the ownership and enforcement of copyright.

---

64 Consider Maureen A. O'Rourke, A Brief History of Author-Publisher Relations and the Outlook for the 21st Century, 50 J Copyright Socy USA 425 (2003).