

ARTICLE

AUTHORS VERSUS OWNERS

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ABSTRACT

Since the Statute of Anne, the hallmark of Anglo-American copyright law has been its nominal veneration of the author. As generations of copyright scholars have noted, author-centric rhetoric has often been deployed by and for publishers and other non-author copyright owners, sometimes to the ultimate disservice of authors themselves. This article will revisit the issue of authors versus owners in an age in which the roles of both are changing dramatically.

Technology empowers authors to disseminate their works without relying on publishers. But technologically-empowered authors are not always legally empowered. In many cases they have assigned away their copyrights. This can be a happy arrangement where authors and publishers share an interest in revenue generation and broad dissemination. But author/owner conflicts often emerge after the initial dissemination of a work, at

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a time when the author but not necessarily the owner wants to *revive* a work that is no longer being disseminated, *revise* a work that the author thinks can be improved, or *revisit* the substance and/or style of a prior work in a new work. Mechanisms for resolving these conflicts under existing law are insufficient.

This essay identifies several ways in which U.S. copyright law could better empower authors who want to revive, revise, and revisit their prior works. My proposals include adjustments to rules about ownership—e.g., rules governing transfers. They include the possibility of a statutory “right to revise.” And they include adjustments to doctrines regarding the scope of copyright protection—e.g., whether it should extend to cover an author’s distinctive style, motifs, and characters. The time is ripe for these reforms to rebalance the interests of authors and owners in the digital age.

TABLE OF CONTENTS

| | |
|--|-----|
| I. INTRODUCTION | 372 |
| II. A BRIEF HISTORY OF AUTHOR-CENTRIC COPYRIGHT AND NON-OWNER AUTHORS | 374 |
| III. THE CASE FOR AUTHOR-CENTRIC COPYRIGHT | 377 |
| IV. CONTEMPORARY COPYRIGHT FOR AUTHORS | 381 |
| A. <i>Ownership and Transfer</i> | 381 |
| B. <i>Statutory Rights to Revise</i> | 387 |
| C. <i>The Right to Revisit</i> | 389 |
| V. CONCLUSION | 401 |

I. INTRODUCTION

Since the Statute of Anne, the hallmark of Anglo-American copyright law has been its nominal veneration of the author. As generations of copyright scholars have noted, however, author-centric rhetoric has often been deployed by and for publishers and other non-author copyright owners, sometimes to the ultimate disservice of authors themselves. This essay will revisit the issue of authors versus non-author owners in an age in which the roles of both are changing dramatically.¹

1. On the relationship between authors and owners, see generally JAMES BOYLE,

I begin in Part I with a brief history of the place of the author in Anglo-American copyright law and practice, observing how well (or poorly) the law has served authorial interests. This Part closes by noting how changes in both law and technology threaten contemporary copyright law's ability to serve three specific authorial interests: (1) the interest in disseminating the author's works to readers through initial and continued publication; (2) the interest in improving the author's existing works; and (3) the interest in creating new works, including works that build upon the author's previous works. These interests can come into conflict with the interests of copyright owners. Such conflicts usually emerge after the initial dissemination of a work, at a time when the author but not necessarily the owner wants to *revive* a work that is no longer being disseminated, *revise* a work that the author thinks can be improved, or *revisit* the substance and/or style of a prior work in a new work.

In Part II, I consider the place of the author, versus the non-author copyright owner, within the leading normative justifications for copyright protection. I argue that every normative justification for copyright protection supports authorial interests in reviving, revising, and revisiting works, even when the author is not the copyright owner.

Part III is prescriptive—or at least suggestive. I identify several ways in which U.S. copyright law could better empower authors who want to revive, revise, and revisit their prior works. My proposals include adjustments to rules about ownership—e.g.

SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 52–55 (1996); JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 203–07 (1994); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 226–27 (1968); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 4–6 (1993); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 631–33 (1988); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192–94 (2008); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 145–46; Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 383, 388–90 (2009); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1067–72 (2003); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 468–71; Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 429–32 (2002); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 559–60 (2010); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425, 426–27, 435–38 (1984); Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1133–36 (2003); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 886–87 (1997) (book review).

rules governing transfers. They include the possibility of a statutory “right to revise.” And they include adjustments to doctrines regarding the scope of copyright protection—e.g. whether it should extend to cover an author’s distinctive style, motifs, and characters. Part IV concludes.

II. A BRIEF HISTORY OF AUTHOR-CENTRIC COPYRIGHT AND NON-OWNER AUTHORS

The hallmark of the Statute of Anne—widely recognized as the first modern copyright law and the model for all subsequent Anglo-American copyright—was that it granted statutory copyright protection for new books to authors, not publishers.² But it also recognized the possibility that authors might transfer those copyrights to publishers,³ and indeed that was the widespread (though not universal) practice in England throughout at least the 18th and 19th centuries and in the United States following adoption of the 1790 Copyright Act.⁴ Except for authors with extraordinary bargaining power, transferring rights to publishers was the only practical way to benefit from statutory copyright protection: protection started with publication, so authors were reliant on publishers to qualify for it in the first place.⁵ What modern copyright did arguably

2. Statute of Anne 1710, 8 Ann. c. 19 (Eng.). For discussion, see, for example, Lionel Bently & Jane C. Ginsburg, *“The Sole Right . . . Shall Return to the Authors”*: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1498 (2010); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1757–58 (2012); Ginsburg, *The Concept of Authorship*, *supra* note 1, at 1064 (2003) (observing that when the U.S. Constitution authorized exclusive rights to authors, “this author-focus was an innovation: only in England, under the 1710 Statute of Anne, did the law then vest authors with a property right in their creations”).

3. Bracha, *supra* note 1, at 256 (“When the United States created its authors’ copyright regime in 1790, it imported wholesale the British institutional framework, again with little conscious consideration of this feature. Assignability was simply there as what copyright had been for more than a century.”); Patterson, *supra* note 1, at 153; Van Houweling, *supra* note 1, at 578.

4. On the majority practice, exceptions, and complications following adoption of the Statute of Anne, see Bently & Ginsburg, *supra* note 2, at 1496. On the early U.S. experience, see Van Houweling, *supra* note 1, at 589. On the common separation of authorship and ownership, see generally Lemley, *supra* note 1, at 883–84 (“For many classes of works, including books, movies, and music, it is de rigeur for the artist to assign the copyright to the publisher, producer, or studio. . . . The cumulative result . . . is that the corporate employer (or publisher or producer), not the romantic author, is the primary beneficiary of copyright . . . law in most instances.”).

5. See Zimmerman, *supra* note 1, at 1137 (noting that “the only significant source of rights for the author for most of the [nineteenth] century was from the common law. Common law copyright was what induced publishers to pay authors because they were subject to legal action if they printed a manuscript without first obtaining the rights to it from the author or her assigns”).

contribute to—eventually—was a more competitive publishing marketplace, giving authors more bargaining power vis-à-vis publishers.⁶ But even as that more competitive marketplace emerged, authors tended to trade their copyrights with publishers for one-time up-front payments.⁷ Royalty contracts became more prevalent starting in the late 19th century, but publishers often continued to take assignments of copyright in exchange for promises to deliver those royalties.⁸ In some cases assignments were not necessary under U.S. law: by the early 20th century, employers and commissioning parties could be deemed the initial owners of copyright by virtue of the judge-made work-for-hire doctrine, a version of which was first codified in the 1909 Copyright Act.⁹

The reality that authors seldom owned copyrights to their own works did not undermine the logic of Anglo-American copyright. During most of modern copyright law's first three centuries, authors relied on publishers to duplicate their works and disseminate them to readers. A system that benefited publishers indirectly benefited those authors. The fact that authors could not legally publish their own books until the copyrights they assigned to their publishers had expired was of little moment in most cases: authors couldn't publish their own books in any event.¹⁰ The only real consequence of an author not owning his copyright was that he couldn't strike a different deal with another publisher. For typical books with limited commercial lives, no other publisher was interested anyway.

Doctrinal and technological changes that began in the 20th century changed all of this.¹¹ Most notably, digital technology

6. See Van Houweling, *supra* note 1, at 580–81; Tim Wu, *On Copyright's Authorship Policy*, 2008 U. CHI. LEGAL F. 335, 351–52.

7. See Zimmerman, *supra* note 1, at 1145.

8. See Bently & Ginsburg, *supra* note 2, at 1557; Zimmerman, *supra* note 1, at 1143 n.88.

9. See Bracha, *supra* note 1, at 248 (“Gradually the default rules that allocated ownership shifted to disfavor the actual creator. This gradual change in the case law culminated in the 1909 legislation of the modern work-for-hire doctrine that explicitly vested ownership in employers rather than the actual creator of a work. Thus, by that time, in the employment context, which became ever more central to creation, copyright law reverted back to publishers’ rather than authors’ rights.”) (citations omitted).

10. See *generally id.* at 255–56 (“Assignability allowed initial ownership by authors, on the one hand, and reliance on market transactions to transfer the work to those who were best situated to exploit them, on the other.”).

11. See *generally* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 12 (2010) (“A law favoring distributors at creators’ expense made more practical sense in the nineteenth and twentieth centuries than it does in the twenty-first. Until recently, mass distribution of copies of works of authorship required large capital investment. Paper, printing presses, broadcast towers, motion picture and video cameras, stores, trucks, and the other incidents of mass distribution networks are very expensive. Before digital

and networks have dramatically decreased the costs of publication and dissemination, so that authors need not rely on publishers and can therefore do much more with their works¹²—if they are not constrained by copyrights they no longer own.¹³ This practical change in the impact of copyright on authors comes on top of doctrinal and statutory changes that have made the constraints imposed by copyright more and more powerful. For present purposes the most important changes are (1) that the exclusive rights of copyright owners extend to the preparation of adaptations and other derivative works¹⁴ and (2) that copyright lasts for the life of the authors plus 70 years.¹⁵ The first development is important because it means that authors who no longer own the copyrights to works they have produced are potentially constrained not only in their ability to disseminate those works, but also in their ability to improve those works and even to revisit their own motifs and stylistic choices. The second development is important because it means that the constraints on authors (and their successors) last decades and decades beyond the commercial lives of most copyrighted works; it also means that authors are constrained by transfers they made long in advance of today's technological empowerment.

This set of developments threatens authors with three dilemmas: (1) they can find themselves unable to reach readers with existing works that are no longer being disseminated by

networks, it was entirely reasonable to assume that only if distributors could rely on collecting the largest share of proceeds from copyrighted works would the business of mass distribution seem likely to reward their investment. Today, of course, there are many ways of disseminating works to everyone in the world without having to spend much money. . . . [T]he new economics of digital distribution mean that we no longer need to shape our copyright law in ways that disadvantage creators vis-à-vis distributors unless we want to.”)

12. See generally Ginsburg, *The Author's Place*, *supra* note 1, at 388 (“The technology that brings works directly to users’ computers and personal portable devices no longer requires traditional publishing’s infrastructure of intermediaries. Maybe every reader is not truly an author, but every author can be a publisher.”).

13. And yet as Jessica Litman observed in 2010: “In most creative spheres, authors’ control over their works is short-lived, and the earnings they collect from them are modest. The control of their works and the bulk of the proceeds they earn are held instead by copyright owners who serve as intermediaries between the authors and their audiences.” Litman, *supra* note 11, at 9–10 (citations omitted). She goes on to suggest that “if the economics of digital distribution now make it possible to engage in mass dissemination without significant capital investment, perhaps it is time to reallocate the benefits of the copyright system.” *Id.* at 29.

14. See 17 U.S.C. § 106 (2012). See generally Bracha, *supra* note 1, at 224 (“For a long period . . . copyright doctrine . . . remained confined to the limited traditional economic entitlement to print a text. During the second half of the nineteenth century, this aspect of copyright underwent a fundamental doctrinal and conceptual change. The scope of copyright protection expanded, new entitlements were created, and a novel concept of copyright as ownership of intellectual works appeared.”).

15. 17 U.S.C. § 302(a) (2012).

their copyright owners; (2) they can find themselves unable to improve their own works in ways that would come within the copyright owner's now expansive rights; and (3) they can be constrained in their ability to create new works that include copyrightable elements of their previous works.

The first dilemma was not worth lamenting in earlier eras when it was prohibitively expensive to keep books in print beyond their commercial lives, regardless of who owned their copyrights. The second and third dilemmas were not common before the expansion of the scope of copyright protection starting in the late 19th century.¹⁶ Today, these dilemmas are commonplace.¹⁷ The specter of these dilemmas is one motivation for authors who are increasingly retaining and managing their own copyrights.¹⁸ But that movement comes too late for authors who have already assigned their copyrights in accord with a copyright system that, as Jessica Litman observes, “encourages the author to assign her copyright to a distributor in exchange for exploitation,” but “does not make it easy for her to retrieve it.”¹⁹

These dilemmas threaten copyright's ultimate public-regarding purpose by constraining authors' ability to reach readers with works that are no longer available, improve their existing works, and create new works. In short, it is harder than it should be for authors to revive, revise, and revisit their works. This situation is lamentable according to every leading account of copyright's purposes, as the next Part explores.

III. THE CASE FOR AUTHOR-CENTRIC COPYRIGHT

This section will consider whether the leading rationales for copyright protection—incentive, labor-desert, and personhood—support copyright doctrine empowering non-owner authors to revive, revise, and revisit their works. I will use the term

16. See generally Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1506–07 (2013) (“For more than two hundred years after the English Parliament enacted the first modern copyright law, authors in England and the United States had no statutory right to control the making or exploitation of derivatives of their works.”) (citations omitted).

17. See Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 831–33, 839–43 (2014). See generally Litman, *supra* note 11, at 35 (“When new opportunities and new media arise, creators who have assigned their copyrights lack the power to license their works for new uses; the copyright owners, meanwhile, may see little percentage in exploiting the new media themselves or in licensing their back catalogues to potential competitors. A large number of works that people still want to read, hear, and see are unavailable without regard to whether their creators are eager to exploit them.”) (citations omitted).

18. See generally Van Houweling, *supra* note 1, at 560.

19. Litman, *supra* note 11, at 11.

“author-centric copyright” as shorthand for this idea, by which I generally mean a copyright system that is more solicitous of the interests of human beings who have authored copyrightable works than it is of the interests of publishers and other intermediaries who own copyrights in works authored by others. More specifically, I focus on what copyright’s rationales suggest about the proper resolution of the dilemmas just discussed, in which conflicts between owners and authors threaten authorial dissemination, improvement, and adaptation of existing works.

The most prominent normative justification for Anglo-American copyright is that exclusive rights provide incentives for the creation of new works that ultimately benefit society. The incentive case for copyright protection offers mixed support for author-centric copyright. Authors often have intrinsic motivations for creativity that do not require copyright incentives; employers in creative industries and other intermediaries who invest in the production and dissemination of works of authorship, by contrast, more often do so primarily for profit.²⁰ Intermediaries will thus often have a stronger case than authors for needing the incentive of copyright in order to play their role in the promotion of intellectual progress.²¹ Note, however, that even the intermediaries’ case weakens as the investment required for creation and dissemination falls.

In support of the incentive case for author-centric copyright, some aspects of copyright protection may offer “expressive incentives” that are relevant only to authors, as Jeanne Fromer has documented.²² Other theories focused on fostering expressive freedom also support favoring authors over intermediaries,²³ as do theories focused on diversifying sources of expression in order to foster both competition and democracy.²⁴

20. See Cohen, *supra* note 1, at 146–47.

21. See generally *id.* at 141–44 (arguing that we should abandon the “incentives-for-authors story” of copyright in favor of “an account of copyright as incentives-for-capital”); Ginsburg, *The Author’s Place*, *supra* note 1, at 384; Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 368 (1993) (“Under the utilitarian model, the widespread dissemination of intellectual works is no less an important goal of copyright than is the creation of those works. Since dissemination is accomplished by publishers and distributors, rather than by authors, copyright is designed as much to protect the publisher’s investment in bringing a work to market as to give the author an incentive to produce.”); Wu, *supra* note 6, at 338 (“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.”).

22. See generally Fromer, *supra* note 2, at 1765–71 (explaining the intimate and psychological link between authors and their ability to control their work).

23. See generally Netanel, *supra* note 21, at 400–03 (discussing the relationship between expression, self-realization, and author control and concluding that “continuing author control is vital to self-realization and autonomy”).

24. See generally WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW,

For my purposes, the most important thing to observe about incentives is how the incentives of intermediaries and authors can diverge. This is true, for example, for books for which there is no longer any significant commercial market.²⁵ Profit-motivated intermediaries may have no incentive to disseminate such books, or even to preserve existing copies, and copyright protection alone cannot provide one.²⁶ But authors—who have distinct expressive interests in continuing to reach readers—may have ample incentives to preserve and disseminate books they have written even without continued commercial reward.²⁷ A copyright system justified by the importance of incentivizing creative works that are disseminated for the benefit of current and future readers should foster rather than stifle these authorial interests. It should therefore facilitate efforts by authors to revive works that are no longer available.

Authors may also have their own incentives for improving upon works they have created and revisiting the motifs, themes, and styles of those works. Again, incentive-based copyright should aim to foster rather than stifle these authorial impulses to revise and revisit.

As for labor-desert theories of copyright protection, they typically emphasize rewarding *authorial* labor. But they also recognize that protection for intermediaries who purchase rights

AND THE FUTURE OF ENTERTAINMENT 28–29 (2004) (explaining that more sources make the market more competitive because consumers have a greater range of products and ideas to choose from and are enabled to create their own versions of their favorite works); Netanel, *supra* note 21, at 399–400; Wu, *supra* note 6, at 352.

25. See generally Litman, *supra* note 11, at 35 (“In most cases, the intermediary distributor will make the work available to the public within a fairly narrow time window, or will decide not to do so. The work will find its audience, or not; the initial marketing effort will run its course. For the vast majority of creators, the works will then enter a dormant phase that will last for the remainder of the copyright term. Distributors have only modest incentives to invest real money in exploiting their backlists in new media or marketing them to new generations.”) (citations omitted).

26. For evidence of such copyright holder neglect, see R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUS. L. REV. 287, 291–95 (2012). As Reese observes:

It might seem that copyright law’s most important mechanism for encouraging preservation is granting copyright owners exclusive rights in their works. The opportunity to try to earn financial rewards by exploiting a work would certainly seem to give copyright owners every reason to preserve their works. Unfortunately, we have many examples demonstrating that this incentive is not always enough.

Id. at 291–92.

27. Litman, *supra* note 11, at 35 (“When new opportunities and new media arise, creators who have assigned their copyrights lack the power to license their works for new uses; the copyright owners, meanwhile, may see little percentage in exploiting the new media themselves or in licensing their back catalogues to potential competitors. A large number of works that people still want to read, hear, and see are unavailable without regard to whether their creators are eager to exploit them.”) (citations omitted).

from authors can be necessary to ensure that authors profit from their creative efforts.²⁸ Although this case weakens where authors empowered by inexpensive technology can reap rewards without the help of intermediaries, copyright law should not force every author to also be a publisher. A copyright system attentive to rewarding authors should therefore facilitate protection for the intermediaries to whom some authors choose to sell their copyrights. It should not, however, promote the waste of the fruits of authorial labor under circumstances in which intermediaries have reaped their rewards. As with incentive-based justifications for copyright, concern with labor and reward supports authors who want to disseminate works in which intermediaries have lost interest by reviving those works.

Labor-based theories also support the case for authors who want to revise and revisit their existing works. Authors who are motivated to improve works upon which they have labored in the past should be rewarded, not punished, for those efforts. Similarly, when an author labors to develop a set of characteristic motifs, a recognizable artistic style, or a rich character, the value of that labor transcends any single work. Allowing a non-author copyright owner to control those authorial creations merely on the basis of its acquisition of the copyright to the first work in which they appeared would bestow an outsized reward on the owner and deny the author the ongoing fruits of her initial labor.

Personhood theories support the most unequivocal case for author-centric copyright that facilitates reviving, revising, and revisiting. The idea derived from Kant and Hagel that copyright should foster the psychic connection between authors and their works in order to promote autonomy and freedom²⁹ generally favors authors in disputes with owners—who can seldom if ever claim such personhood-based interests.³⁰ This is certainly so in cases where non-author copyrights threaten to disable authors who have personhood-based interests in seeing their work disseminated, and where non-author copyrights stifle authors' interest in exercising their authorial autonomy by improving upon or revisiting their previous works. As with incentive and

28. Netanel, *supra* note 21, at 369–70 (“Since the time of the enactment of the Statute of Anne, the principal avenue open for authors to earn a return from their labor has been to bring their works to the market by selling or licensing the copyright to a publisher.”).

29. See, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 70–78 (2011) (outlining Kantian foundations of property in relation to intellectual property law).

30. See generally Netanel, *supra* note 21, at 376 (explaining why publishers' rights are always secondary to authors' on Kantian view).

labor theories, personhood theories support solicitude for authors over non-author owners in these cases.

Note that my focus here is on normative approaches to disputes between authors and non-author owners, in which the idea of author-centric copyright has a clear valence that I argue favors empowering authors to revive, revise, and revisit. Not all copyright disputes have this character. In some cases, authors who have retained copyrights in their works are suing other authors. By making the case for author-centric law that favors the interests of authors who want to revive, revise, and revisit over copyright owners who would stop them, I do not mean to suggest that it is easy in these other cases to decide what outcome would be most “author-centric” and most consistent with the normative theories just discussed.

IV. CONTEMPORARY COPYRIGHT FOR AUTHORS

In this Part, I identify several ways in which U.S. copyright law could better empower authors who want to revive, revise, and revisit their prior works.

A. *Ownership and Transfer*

One root of the contemporary dilemmas for authors is the ease with which they can transfer their copyrights, including all of the exclusive rights relevant to reviving, revising, and revisiting their works. So rules about ownership and transfer are natural candidates for adjustment in favor of authorship.

One possible adjustment suggested by civil law copyright would be to separate economic and authorial (or “moral”) rights so that authors can easily transfer the former while retaining the later. Note, however, that traditional continental moral rights do not correspond to the authorial interests on which I am focused. The rights of attribution, integrity, and withdrawal allow authors to stop some exploitations to which they object, but these core moral rights do not allow authors who have transferred their economic rights to disseminate, improve upon, or adapt copyright works that they have authored.³¹ There are no generally-recognized moral rights to revive, revise, or revisit.

There are other aspects of civil law copyright outside of the classic moral rights categories that do correspond to authors’ interests in disseminating and revisiting their own work, however. These include rules governing contracts transferring or

31. See *id.* at 383–87 (explaining concepts of nontransferable moral rights of attribution, integrity, and withdrawal).

licensing economic rights.³² For example, several countries enforce a “duty to exploit.” These national laws provide that assignments of copyright will terminate upon notice from the author if the assignee fails to exploit the work or lets it go out of print.³³

There is no similar duty to exploit in Anglo-American copyright law.³⁴ Although a few U.S. cases have held that the implied duty of good faith and fair dealing requires publishers to make reasonable efforts to promote a work’s initial dissemination in order to fulfill the terms of royalty agreements with authors, they have not imposed a more general and continuing duty to disseminate.³⁵

There is an aspect of Anglo-American copyright law that can have a practical effect similar to the duty to exploit: the reversion right. This right was part of the dual term of protection established by the Statute of Anne, under which renewal right automatically reverted to the author if living.³⁶ This form of reversion ended when the dual term of protection was replaced with a unitary life-plus-years term of protection, and reversion has not been revived in Britain.³⁷ But reversion survives in the United States in the form of the termination of transfer

32. See generally Jane C. Ginsburg & Pierre Sirinelli, *Private International Law Aspects of Authors’ Contracts: The Dutch and French Examples*, 39 COLUM. J.L. & ARTS 171, 173 (2015) (citing “detailed limitations on the form and scope of grants found in many continental . . . copyright laws”).

33. *Id.* at 174–76 (discussing Dutch and French law, both of which provide that transferred rights revert to the author upon notice to the transferee who fails to exploit a work or lets it fall out of print); Netanel, *supra* note 21, at 389 (“The obligation to exploit is an integral part of copyright protection under French and German law. The transferee’s obligation to exploit is seen as an essential purpose of the copyright transfer since the author enters the transaction in order to communicate his work. As a result, if the transferee breaches his statutory obligation to publish and disseminate the author’s work, the author may rescind the transfer.”) (citations omitted).

34. See *Cabot v. Jamie Record Co.*, 1999 WL 236737, at *9 (E.D. Pa. 1999) (“At best, the second circuit cases hold that a publisher, holding exclusive rights in a work, has an implied duty to exercise good faith and sound business judgment in working a copyright. Those cases do not stand for the proposition that there is an implied duty to exploit a copyright”); Netanel, *supra* note 21, at 63 (“United States law does not impose the same type of parallel obligation on the publisher to exploit the work, and does not provide the same type of parallel right to the author to terminate the publishing contract for breach of this obligation. United States authors have no statutory or common law right to have their works communicated to the public.”).

35. See Netanel, *supra* note 21, at 64–65; 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.11 (2015) (“[A]t lease where the grantor is to receive royalties measured by the grantee’s exploitation of the work, certain additional covenants, on the part of the grantee, are implied. In such circumstances, there is an implied covenant that the grantee will use reasonable efforts to make the work as productive as the circumstances warrant.”).

36. Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

37. Bently & Ginsburg, *supra* note 2, at 1547–49.

provisions of the 1976 Act.³⁸ These provisions create nonwaivable rights for authors (or their statutory heirs) to reclaim transferred copyrights decades later. The right is not transferable and persists “notwithstanding any agreement to the contrary.”³⁹

In theory, both reversion of the renewal term under prior law and the current termination of transfer provisions offer authors the opportunity to reclaim rights to their works. So today’s authors empowered by digital technology to disseminate their own works could use the termination of transfer provision to revive works that have fallen out of print, much as continental authors can use the duty to exploit. The termination of transfer right is broader in that it does not depend on any failure to exploit by the copyright owner. Even with regard to works still being actively disseminated, the termination of transfer right gives authors (or their statutory heirs) the ability to choose different dissemination outlets,⁴⁰ and to revise and revisit their prior works in ways that fall within the copyright owners’ exclusive rights.

In practice, however, reversion has not been a very effective means of empowering authors to revive, revise, or revisit their works. Renewal rights were never very effective for these purposes in either Britain or the U.S. because authors assigned away their contingent renewals to publishers and courts enforced those assignments. The termination of transfer provision tries to forestall that possibility by trumping any “agreement to the contrary.”⁴¹ But the daunting intricacies of the scheme make it difficult for authors to take advantage of their rights.

The difficulties of exercising the termination right may be overcome by good lawyering for those authors who can afford it—i.e. authors of successful works for whom the stakes of termination are high (and who, ironically, may be least in need of the statute’s protection).⁴² But authors who want to reclaim

38. 17 U.S.C. § 203(a) (2012) (for post-1978 transfers); § 304(c) (for pre-1978 transfers). For a thorough history of these provisions and their use, see Bently & Ginsburg, *supra* note 2, at 1564–70.

39. 17 U.S.C. §§ 203(b)(5), 304(c)(5).

40. See Wu, *supra* note 6, at 342 (“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.”).

41. See 17 U.S.C. § 304(c)(5).

42. See generally Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 54 (2013) (arguing that termination of transfer and similar “inalienable profit-sharing arrangements . . . reallocate both wealth, from young authors to older and probably wealthier authors, and risk, from the risk-neutral buyer . . . to the author, who is probably risk averse”).

rights for the opposite reason—because they want to revive, revise, or revisit work that was not commercially successful—may be intimidated by the intricate provisions and unable to afford legal advice.⁴³

These challenges are not insurmountable. Organizations representing individual authors are making efforts to help them exercise their rights. And commentators like Jessica Litman have made constructive proposals for making the termination right easier to use.⁴⁴ But even if it works as smoothly as possible, the termination of transfer provision is an awkward solution for authors who want to revive, revise, or revisit their works.⁴⁵ Most glaringly, termination does not take effect for decades after a work was created.⁴⁶ In most cases this will be long after a book has gone out of print, and often also too late to help an active author who wants to revise or revisit her earlier work.⁴⁷

43. See generally *id.* at 93–95 (observing that termination can serve “those whose work is no longer commercially exploited, such as authors whose books have gone out of print” but arguing that “[t]ermination rights seem, at best, to marginally mitigate this problem, because they vest after many decades, require action by the author or her statutory heirs . . . and are administratively expensive”); *id.* at 94 n.188 (“It is unclear how common such a use is or will become. Exercising termination requires the author to precisely follow a procedure prescribed by the Copyright Act, which might be nontrivial for laypersons. Therefore, some authors whose work has very low commercial value might be disincentivized to use this mechanism.” (citations omitted)).

44. See, e.g., Litman, *supra* note 11, at 48.

45. For skepticism of reversion and termination of transfer, see, for example, Bently & Ginsburg, *supra* note 2, at 1586 (“Legislators might improve the reversion rights regime, but it is not clear that authors’ lots will accordingly ameliorate. . . . [S]ubstantive regulation of contracts of transfer, rather than rights to terminate those transfers, may . . . offer the preferable path. . . . Perhaps American and certainly British authors now would be better off with a more continental European approach, limiting the scope of transfers and assuring them royalty participation for each mode of exploitation of the work.”); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332–33 (1989); Rub, *supra* note 42, at 54–55.

46. Thirty-five to forty years after the transfer for post-1978 works and fifty-six or seventy-five years after copyright was secured for older works. See 17 U.S.C. § 203(a)(3), 304(c)-(d).

47. Jessica Litman has suggested reforms that would address this concern:

We can reunite creators with their copyrights and achieve significant disintermediation at the same time by replacing our current fake termination right with a real one. Authors should be entitled to terminate any copyright grant they make, on five years notice, at any time beginning fifteen years after the date of the grant and continuing for the life of the copyright. Termination should continue to be subject, as it is under current law, to an exception allowing grantees to continue to exploit any derivative works created during the grant, but not to make new ones. The combination of a five-year notice period and a derivative works exception should give copyright intermediaries enough protection to make investment in copyrighted works worthwhile without vesting them with excessive control. Meanwhile, the potential for termination at an earlier date may encourage intermediaries to structure their initial agreements for copyright acquisition in more creator-friendly forms.

The awkward procedures and timing of the termination of transfer provisions reflect the fact that in the run-up to the 1976 Copyright Act, publishers and other copyright transferees lobbied to make sure that termination would be difficult and therefore rare.⁴⁸ It is easy to understand why. From the transferees' perspective, termination is strong medicine. It gives exclusive rights back to authors or their statutory heirs, thus threatening to devalue the blockbusters that transferees argue bankroll their investments in their entire creative portfolios.⁴⁹

In terms of enabling authors to revive, revise, and revisit their works, termination of transfer is potentially useful,⁵⁰ but it does too little and too much. It does too little because works may become unavailable long before the termination window opens, because its complexity may stymie authors without lawyers, and because it doesn't cover works made for hire.⁵¹ It does too much because it reverts exclusive rights when authors' dissemination purposes typically require only non-exclusive rights.⁵² These problems are related: termination is stronger than necessary to enable authors to revive, revise, and revisit; and because it is such strong medicine, transferees have successfully lobbied to make it difficult to use. All-in-all, the situation reflects the fact that these provisions are motivated by a concern with the ability of authors and their heirs to capture the benefits of commercially

Litman, *supra* note 11, at 48 (citations omitted). Others have suggested that termination might be triggered not only by the passage of time, but also by the transferee's nonexploitation of the work. See discussion in O'Rourke, *supra* note 1, at 466.

48. See Litman, *supra* note 11, at 36 ("In return for making termination inalienable . . . publishers and film studios insisted on making it difficult.")

49. See generally David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387, 411 (2001); 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 SOC'Y U.S.A. 797, 821–22 (2003).

50. See *supra* note 40 and accompanying text.

51. See generally Fromer, *supra* note 2, at 1806 ("[T]his right has been less author protective than it might seem, as the advance notice requirement is not author friendly and courts have sometimes allowed authors to relinquish the right. The right is in fact infrequently exercised. Moreover, there is no termination right provided to the individual creators of a work made for hire.") (citations omitted).

52. In praising the pro-competitive potential of the termination right, Tim Wu seems to imagine authors exercising their reversions in coordination with profit-motivated distributors, for whom the exclusive potential of the current scheme may be important. See Wu, *supra* note 6, at 353–54 ("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 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.")

successful works, and not with their ability to revive, revise, and revisit works in which the author may be interested regardless of their commercial potential.

There are other ways of adjusting rules about ownership and transfer that therefore strike me as more promising than focusing on termination of transfer. First, in light of the new realities of publishing in the digital era, U.S. courts might reasonably expand the reasoning in cases implying a duty to make reasonable efforts to market works subject to royalty agreements. In prior eras, an author's interest in receiving royalties during a work's initial (and typically short) period of commercial viability might have been the most important interest for courts to protect by implying a duty of good faith on publishers.⁵³ But today, authors' interests in their works are broader, longer-lived, and arguably much more important to a well-functioning copyright system. Publishers unreasonably interfere with those interests when they neither disseminate an author's work nor allow the author to do so (e.g. by voluntarily reverting the copyright or at least giving the author non-exclusive rights to disseminate it).⁵⁴

In other cases the problem may not be an unreasonable copyright owner, but an unfindable copyright owner. Ironically, so-called "orphan works" are often well-loved by the people most deserving of the title "parent"—the works' own authors. But authors' efforts to care for their intellectual offspring can be frustrated by their inability to identify and locate the current copyright owners.⁵⁵ Various proposals to address the orphan works problem could therefore be useful to authors who want to revive, revise, and revisit, and I would argue that such proposals could justifiably grant special immunities to authors who want to exploit their own orphan works.

Other reforms could benefit authors by preventing orphan works problems in the first place. The law does this in one way already: it requires exclusive licenses to be in writing.⁵⁶ This requirement both helps to ensure that authors do not casually or inadvertently assign all of their rights, and also provides some documentary evidence that might make it easier for authors to recall the terms of their licenses and renegotiate them over time. But the reality is that even written contracts are often misplaced—by both authors and publishers. The law could go

53. Litman, *supra* note 11, at 11–12.

54. *Id.* at 35.

55. U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 1, 5 (2015).

56. 17 U.S.C. § 204 (2012).

further to prevent the creation of untraceable transfers. Jane Ginsburg has suggested that a transfer that is not recorded with the Copyright Office should be treated as a mere non-exclusive license.⁵⁷ An author who made such a transfer would thus retain the rights to revive, revise, and revisit. The transferee could prevent this result by the simple expedient of recording, but this too would serve authors' interests in reviving, revising, and revisiting, because it would facilitate voluntary renegotiations of exclusive transfers. These negotiations will not always be successful. But they are not hopeless. I have suggested above that the interests of authors and publishers can diverge over time—i.e. when a work's initial commercial market has been exhausted (and, with it, the publisher's motivation to disseminate) and yet the author still cares about reaching readers by reviving, revising, and revisiting. These divergent interests are not necessarily diametrically opposed, as the unmotivated publisher may simply be indifferent regarding the future of the work. These are circumstances in which voluntary reversion is possible—sometimes though invocation of a reversion clause included in the initial contract and sometimes through ex post negotiations.⁵⁸

B. Statutory Rights to Revise

So far I have discussed primarily statutory, judicial, and voluntary mechanisms by which authors might reclaim either exclusive or nonexclusive rights to their works, thus empowering them to undertake the full spectrum of reviving, revising, and revisiting activities described in Part II. The case for deploying these mechanisms is strongest when a work is otherwise unavailable and there is little purpose served by allowing copyright to compromise the author's interests. The case is more complicated where the copyright owner is actively exploiting the work. Here the author's interest in dissemination is being served, and yet copyright poses an obstacle to the author's new plan to revise or revisit the work. As discussed above, such plans can be

57. Jane C. Ginsburg, "With Untired Spirits and Formal Constancy": *Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1616–17 (2013); see also Molly Shaffer Van Houweling, *Land Recording and Copyright Reform*, 28 BERKELEY TECH. L.J. 1497, 1509–10 (2013) (discussing Ginsburg's proposal).

58. See NICOLE CABRERA, JORDYN OSTROFF & BRIANNA SCHIFIELD, UNDERSTANDING RIGHTS REVERSION: WHEN, WHY, & HOW TO REGAIN COPYRIGHT AND MAKE YOUR BOOK MORE AVAILABLE 42, 72 (2015); Rub, *supra* note 42, at 95 ("[I]f the concern over unexploited works is significant, then it is unclear why the parties cannot address it themselves. . . . [T]he parties are free to agree that if the buyer refrains from exploiting the work the rights will revert to the author.").

stymied by the copyright owner's exclusive right to prepare derivative works.

Some copyright regimes acknowledge these dilemmas by allowing authors limited rights to revise and revisit even where the copyright owner retains the exclusive copyright. Start with the case of an author who wants to revise her work—perhaps because she has had a change of heart about what she initially wrote. This dilemma is addressed, albeit someone indirectly, but the right to withdraw that is acknowledged in some civil law systems. For example, the French “right to repent and retract” provides:

Notwithstanding transfer of his economic rights, an author, even after publication of his work, has the right as against the transferee to correct or to retract his work. He cannot in any event exercise this right absent prior indemnification of the transferee of any damages that his correction or retraction might have caused the latter to incur.

When, after the exercise of the right of correction or retraction, the author decides to publish his work, he must first offer his exploitation rights to the transferee whom he originally chose and on the conditions originally decided upon.⁵⁹

Similarly, the German “right of revocation for changed conviction” provides that:

The author may revoke an exploitation right . . . if the work no longer reflects his conviction and he therefore can no longer be expected to agree to the exploitation of the work. . . . The author must adequately compensate the holder of the exploitation right. . . . Should the author wish to resume exploitation of the work after revocation, he shall be obliged to offer a corresponding exploitation right to the previous holder of the exploitation right on reasonable conditions.⁶⁰

And the Spanish rights “to alter and withdraw” provides:

[T]he right to withdraw the work from circulation for reasons of changed intellectual or moral convictions, after

59. André Lucas & Pascal Kamina, *France*, in INTERNATIONAL COPYRIGHT LAW & PRACTICE § 7[1][d] (Lionel Bently et al. eds., Lexis Nexis 2015) (observing that the right of first refusal condition “explains why this right is rarely exercised in practice”); see also CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L121-4 (Fr.).

60. Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL I] at 1273, § 42, last amended by Gesetz [G], Oct. 1, 2013, BGBL I at 3714, art. 8 (Ger.); Michael Gruenberger & Adolf Diatz, *Germany*, in 2 INTERNATIONAL COPYRIGHT LAW & PRACTICE § 7[1][d] (Lionel Bently et al. eds., Lexis Nexis 2015).

indemnification of the holders of exploitation rights for damages and prejudice. If the author later decides to resume exploitation of his work, he shall give preference, when offering the corresponding rights, to the previous holder thereof, and shall offer terms reasonably similar to the original terms.⁶¹

Although different in some particulars, all of these provisions theoretically allow authors to exploit revised versions of their works even after they have transferred the copyrights to others, subject to an obligation to provide the transferee with both indemnification and a right of first refusal for any deal to disseminate the new version. This right of revision is thus an attenuated consequence of what is more commonly thought of as the right of withdrawal.

These rights are seldom exercised and—much like the U.S. termination of transfer provision—they offer imperfect solutions to the dilemmas faced by digital age authors. They might be useful for an author who has a plan to commercially exploit a new version of a successful work, who could be in a position to comply with the indemnification requirement. But what about an author who is simply motivated by a desire to correct her intellectual legacy by disseminating her reconsidered work as widely as possible without regard to commercial reward? Such an author is not hard to imagine in the digital age. What is hard to imagine is how proper indemnification would be determined in such a case and how a digital age author planning to self-publish her work might provide it.

A more useful statutory right to revise would be neither so threatening to transferees (in that it need not include the right to withdraw the work from circulation altogether), nor so daunting to authors. Consider this possibility: In cases in which a copyright owner refused upon request to disseminate the author's revised version of her work, a statutory right of revision could grant the author a non-exclusive right to disseminate it herself, provided that she shared any profits with the copyright owner under terms equivalent to those of the original transfer agreement.

C. *The Right to Revisit*

Now consider the author who doesn't want to revise her previous work, but rather to create a new work that incorporates

61. Alberto Bercovitz, Germán Bercovitz & Milagros del Corral, *Spain*, in 2 INTERNATIONAL COPYRIGHT LAW & PRACTICE § 7[1](6) (Lionel Bently et al. eds., Lexis Nexis 2015) (quoting Intellectual Property Law art. 14 (B.O.E. 1996, 8930) (Spain)).

only some elements of the first. Authors who revisit characters, motifs, scenes, and other aspects of their own prior works may be vulnerable to claims of copyright infringement if they no longer own their copyrights.⁶² This has become increasingly likely as statutory protection for and judicial interpretation of copyright owners' exclusive rights have expanded. Digital age developments make these conflicts more likely as well, because now even authors without publishers can disseminate their new works and thereby trigger conflicts with copyright owners.

Again, there are some copyright regimes that deal with this problem expressly. For example, British law now provides that "Where the author of an artistic work is not the copyright owner, he does not infringe the copyright by copying the work in making another artistic work, provided he does not repeat or imitate the main design of the earlier work."⁶³

The Dutch Copyright Act provides that "[i]f the author of the work has assigned his copyright, he shall continue to be entitled to make such alterations to the work as he may make in good faith in accordance with social custom."⁶⁴ And the Spanish Copyright Act gives the author the inalienable "right to alter the work, subject to respect for the acquired rights of third parties."⁶⁵

The 2007 Israeli Copyright Act, which incorporates aspects of both the common law and civil law traditions,⁶⁶ includes a limitation entitled "Additional artistic work made by the author" that gives authors some special rights to revisit earlier works:

62. Cf. Cohen, *supra* note 1, at 163–64 (noting that debates about alienation of creative workers from their own work product "take the form of litigation over ownership of literary characters, musical themes, and the like").

63. Copyright, Designs and Patents Act 1988, c. 48, § 64 (Eng.).

64. Wet van 23 september 1912, Stb. 1912, 308, art. 25(4), last amended by besluit van 9 augustus 2004, Stb. 2004, 409 (Neth.), <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2006/06/22/copyright-act/copyrightact.pdf> [<https://perma.cc/P8L8-GVQJ>]. Note, however, that the example offered by leading commentators is not one in which the author has the right to publish a modification independent of the copyright owner: "This right enables, for instance, authors of a scientific work, which the publisher wants to republish after some time, to require that they be allowed to update the work first." Mireille van Euchoud & Herman Cohen Jehoram, *Netherlands*, in 2 INTERNATIONAL COPYRIGHT LAW & PRACTICE § 7[1][d] (Lionel Bently et al. eds., Lexis Nexis 2015). Regarding the alteration right, see *id.* (citing Court of Appeal, Leeuwarden, 29 Dec. 1993, Informatierecht/AMI 1996/1, 13-14; President District Court, Leeuwarden, 29 Nov. 1994, Informatierecht/AMI 1996/1, 13-14, note Cohen Jehoram; Herman Cohen Jehoram, *Shoot the widow*, Informatierecht/AMI 1998/4, 62).

65. See Alberto Bercovitz, Germán Bercovitz & Milagros del Corral, *Spain*, in 2 INTERNATIONAL COPYRIGHT LAW & PRACTICE § 7[1] (Lionel Bently et al. eds., Lexis Nexis 2015) (quoting Intellectual Property Law art. 14 (B.O.E. 1996, 8930) (Spain)); S.A.P., Jan. 30, 2001 (R.J., No. 33/2001) (Spain).

66. See generally Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1061–62 (2011) (citing Tony Greenman, *Israel*, in 1 COPYRIGHT THROUGHOUT THE WORLD § 20:1 (Silke von Lewinski ed., 2010)).

Making a new artistic work which comprises a partial copying of an earlier work, or a derivative work from an earlier work, as well as any use of the said new work, are permitted to the author of the said earlier artistic work even where said author is not the owner of the copyright in the earlier artistic work, provided the new work does not repeat the essence of the earlier work or constitute an imitation thereof.⁶⁷

The U.S. Copyright Act does not include any comparable provision. Courts encountering copyright claims against revisiting authors have nonetheless managed in some cases to vindicate the authorial interest in revisiting, albeit without articulating a clear and reliable doctrine establishing a right to revisit.

A few doctrinal issues tend to come to the forefront in such cases. One is whether the author who revisits material from a prior work has in fact copied that prior work. At first glance it might seem as though plaintiffs would have an easy time establishing actual copying, the typical evidence of which is a combination of access and similarity. An author obviously has access to her own prior work. And when she revisits the same topic she will often do so in a similar way. But for just this reason it may be inappropriate to take access plus similarity as strong evidence of copying in such a case. As Judge Posner has explained:

Although one can and often does copy one's own work (and so may be an infringer if one doesn't own the copyright on it), one is also more likely to duplicate one's own work without copying than another person would be likely to do. If Cézanne painted two pictures of Mont St. Victoire, we should expect them to look more alike than if Matisse had painted the second, even if Cézanne painted the second painting from life rather than from the first painting.⁶⁸

Is Judge Posner right to take special care before concluding that an author actually copied from her previous work? Some explanations for the actual copying requirement suggest that the answer is no. Take, for example, Jeanne Fromer's argument that

67. Copyright Act, 5768-2007, § 27, SH No. 2199 p. 34 (Isr.), <http://www.wipo.int/edocs/lexdocs/laws/en/il/il033en.pdf> [<https://perma.cc/KW4S-46CP>]; see generally Michael D. Birnhack, Neil J. Wilkof & Joshua Weisman, *Israel*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 8[2][c][iii] (Lionel Bently et al. eds., Lexis Nexis 2015) (citing CA 7996/11 Safecom Ltd. v. Raviv, ¶ 38 (2013) (Isr.), <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Safecom%2C%20Ltd.%20v.%20Raviv.pdf> [<https://perma.cc/VA3T-PC35>], for the proposition that “[w]hen defendant copied the work at stake almost in its entirety, he did not enjoy the defense”).

68. *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 414 (7th Cir. 1992).

independent creation should not amount to copyright infringement because “subsequent work, having been independently created, is more likely to be adding an important message on its own” whereas “[i]ntentional copies of protected material are less likely to contain an additional important message of value to society.”⁶⁹ Arguably an author’s revisiting of her own work is less likely than another author’s independent creation to contain an additional important message that the author did not express the first time. On the other hand, it may be especially valuable to the author to have the opportunity to revisit, perhaps from a new perspective, a topic that remains important to her.

Or consider Clarissa Long’s notice-based explanation for the actual copying requirement:

The independent creation privilege vests relief from liability in observers who are unaware of the prior existence of copyrighted goods they independently create. Put another way, copyright imposes a rule of actual notice for liability (at least in theory) Given the large number of goods protected by copyright, prospective creators would face prohibitively high information costs if they were held responsible for searching through the entire set of all copyrighted works. With the privilege, observers need not conduct an exhaustive search to ascertain the full set of copyrighted things.⁷⁰

This notice-based explanation does not make sense when applied to an author who revisits topics from a prior work, of which she presumably has notice without having to engage in an onerous search.

Even if the normative rationales for the actual copying requirement applied with full force to revisiting authors, the defense as it has been interpreted by many courts would be of little use to them. Judge Posner’s opinion suggests that Cézanne would be protected by the defense so long as he painted his second picture of Mont St. Victoire while sitting in front of the mountain and not in front of his original painting. But that suggestion does not conform to the way the requirement is typically applied. Where musicians are accused of infringing copyrighted musical works, for example, the plaintiff need not establish that the defendant worked with the copyrighted score

69. Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 109 (2014).

70. Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 529 (2004).

in front of her.⁷¹ It is enough that she had been exposed to the copyrighted work (perhaps even decades before) and could refer to it in her own mind while composing her work.⁷² On this understanding of actual copying, it is hard to imagine how a revisiting author could ever escape the implication that similarities between two of her own works arose due to copying.

Furthermore, to the extent the actual copying requirement operates as a filter that eliminates cases in which it is unlikely that the defendant's work will compete with the plaintiff's, as Fromer also suggests, author revisitations probably shouldn't qualify. While another artist's independent painting of Mont St. Victoire might be unlikely to compete with Cézanne's, another version by Cézanne himself might compete quite effectively.

In sum, although at least one court has suggested that revisiting authors stand to benefit from a careful application of the actual copying requirement, this seems both unjustified and unlikely. The best normative accounts of the actual copying requirement do not work to the benefit of revisiting authors. The requirement in operation is unlikely to be forgiving to revisiting authors. And it is hard to imagine how an author-centric version of the requirement would operate even if it were desirable. How could a plaintiff copyright owner establish that an author had copied from her prior work and not from a free-standing mental image to which both the prior and new work owed their origins? Such an inquiry would be even more difficult than the mind-reading in which courts already engage when they apply the actual copying requirement in more run-of-the-mill cases.

The other critical aspect of infringement analysis is a more promising doctrinal hook for vindicating the interests of revisiting authors. Authors can only be held to have infringed copyright in their prior works if they copy significant amounts of protected material—that is, expression as opposed to ideas, facts and other elements excluded from copyright protection.⁷³ When an author merely addresses the same general topic in a series of works, that alone will not amount to infringement even assuming actual copying.⁷⁴

In *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, the Third Circuit nicely summed up the problem: “[W]e are asked to determine whether an artist infringed a copyright,

71. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482–83 (9th Cir. 2000) (citing *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147–48 (S.D.N.Y. 1924)).

72. *See, e.g., id.* at 484.

73. *Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc.*, 575 F.2d 62, 64 (3d Cir. 1978).

74. *Id.* at 65.

which he had once owned, by painting another work portraying the same general subject matter.”⁷⁵ The case arose after wildlife artist Albert Early Gilbert assigned the copyright to a painting entitled “Cardinals on Apple Blossom” and then subsequently made another painting of a cardinal and distributed copies of it through his licensee Franklin Mint.⁷⁶

The court cited testimony relevant to the special question of author revisiting:

There was also testimony on the tendency of some painters to return to certain basic themes time and time again. Winslow Homer’s schoolboys, Monet’s facade of Rouen Cathedral, and Bingham’s flatboat characters were cited. Franklin Mint relied upon these examples of “variations on a theme” as appropriate examples of the freedom which must be extended to artists to utilize basic subject matter more than once. National vigorously objects to the use of such a concept as being contrary to the theory of copyright. We do not find the phrase objectionable, however, because a “variation” probably is not a copy and if a “theme” is equated with an “idea,” it may not be monopolized. We conceive of “variation on a theme,” therefore, as another way of saying that an “idea” may not be copyrighted and only its “expression” may be protected.⁷⁷

The Third Circuit deferred to the district court’s factual finding of non-copying but would have also affirmed, based on the idea/expression dichotomy:

We have examined the two paintings and based upon our own observations and impressions, we conclude that while the ideas are similar, the expressions are not. A pattern of differences is sufficient to establish a diversity of expression rather than only an echo. . . . The similarities here are of a nature not calculated to discourage an artist in the development of a specialty yet sufficiently distinguishable to protect his creativity in that sphere. Just as Justice Holmes would not ban the ballerinas of Degas, we may not excommunicate the cardinals.⁷⁸

The mention of Degas is interesting. It refers to Justice Holmes’ mention of Degas in *Bleistein v. Donaldson Lithographing Co.*, where Holmes mentioned the artist merely to make the point that depiction of ballet may be within copyrightable subject matter:

75. *Id.* at 63.

76. *Id.* at 63–64.

77. *Id.* at 66.

78. *Id.* at 67 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

“Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.”⁷⁹ Holmes was not grappling with any issues regarding an artist revisiting his own work. But Degas’ work certainly does bring those issues to mind. He made not one but hundreds of paintings and sculptures of ballerinas.⁸⁰ As Degas himself observed, “[p]eople call me the painter of dancing girls.”⁸¹

Degas’ work demonstrates the court’s point about the benefits of giving artists freedom to explore “variations on a theme.”⁸² Note, however, that while the court acknowledged the argument in favor of the artist’s special right to revisit his prior themes, it ultimately vindicated the defendant artist’s interests using generally-applicable doctrinal concepts.⁸³ Another artist revisiting the same theme would not infringe either, insofar as the theme is unprotectable subject matter.⁸⁴

In practice, however, this analysis may work differently for revisiting authors than for new authors. As Judge Posner noted in *Schiller*, Cézanne’s new depiction of Mont St. Victoire would likely appear more similar to the original than would a new depiction by Matisse.⁸⁵ Some of those similarities would be in aspects of the works that we might normally classify as protectable expression—e.g., combinations of brushstrokes, choices about how to depict light and shadow, choices about the vantage point from which the mountain is depicted, etc. Indeed, these are just the types of idiosyncratic flourishes to which courts point when trying to describe the essence of expressive creativity that copyright protects.⁸⁶ And yet, for an artist with a characteristic style, these elements may operate more like

79. *Bleistein*, 188 U.S. at 251.

80. John Richardson, *Degas and the Dancers*, VANITY FAIR (May 18, 2009, 12:00 AM), <http://www.vanityfair.com/news/2002/10/degas200210> [https://perma.cc/FWD5-H47M] (“Obsessed by the ballet, Edgar Degas created hundreds of paintings and sculptures which captured the harsh realities of 19th-century dancers’ lives . . .”).

81. Paul Trachtman, *Degas and His Dancers*, SMITHSONIAN, Apr. 2003, at 88, 89.

82. *See Franklin Mint*, 575 F.2d at 66 (“We conceive of ‘variation on a theme,’ therefore, as another way of saying that an ‘idea’ may not be copyrighted and only its ‘expression’ may be protected.”).

83. *Id.* In its holding, the court ultimately deferred to the trial court’s determination on the credibility of the author’s statements and the trial court’s conclusion that “each painting was a separate artistic effort.” *Id.* at 65–67.

84. *See id.* at 65 (“Since copyrights do not protect thematic concepts, the fact that the same subject matter may be present in two paintings does not prove copying or infringement.”).

85. *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 414 (7th Cir. 1992).

86. *See, e.g., Franklin Mint*, 575 F.2d at 65 (noting that “[a] painter like Monet when dwelling upon impressions created by light on the façade of the Rouen Cathedral” is more likely to create a work that is protected, compared to an artist who lacks those idiosyncratic flourishes).

constraints than choices. Indeed, Cézanne's many depictions of Mont St. Victoire all feature his characteristic use of impressionistic blocks of color. They are similar to each other in ways that transcend their subject matter. If another artist depicted the mountain so similarly, we might not attribute the similarities to the overlap in unprotectable subject matter. But for Cézanne, the similarities arguably flow from the combination of the subject matter and the constraints imposed by his own style. No normative justification for copyright law is well-served by forcing artists to either abandon their own styles or forego revisiting the same subject matter repeatedly in order to avoid liability.⁸⁷ Such a possibility also sharpens copyright's tension with the First Amendment, which is otherwise mitigated by the idea/expression dichotomy.

Some courts have applied a particularly author-friendly version of the idea/expression dichotomy in vindicating authors' rights to revisit.⁸⁸ For example, in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, Dashiell Hammett was accused of copyright infringement for reusing Sam Spade and other characters from his own book *The Maltese Falcon*.⁸⁹ In holding that Hammett had not infringed (both because right to the characters had not been assigned and because the characters themselves were not copyrightable), the Ninth Circuit noted the benefits of allowing authors to reuse their own characters.⁹⁰ The

87. A possible exception is Joseph Fishman's account of the creativity-enhancing function of the constraints imposed by copyright. Fishman observes that "[w]hen the mind is forced to navigate within limits and around obstacles, it is less likely to revert to previous solutions. Because human imagination benefits from adding a bit of resistance to the path of least resistance, freedom and creativity often work at cross-purposes." Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1339 (2015). One could read Fishman to suggest that creativity would benefit if authors were forbidden from reusing their own styles and themes. On the other hand, those styles and themes may themselves serve as creativity-enhancing constraints, the benefits of which would be lost if copyright forced authors to constantly adopt new styles. I think this is the best reading of Fishman, who praises the creativity engendered by stylistic conventions: "Whether it is the structure and meter of a sonnet, the form of a sonata, the plot conventions of a Shakespearean comedy, the technique of classical ballet, or the basic shapes of a Cubist painting, art typically has a governing framework, a set of conventions that restricts its subjects while still allowing a seemingly infinite number of possibilities within those constraints." *Id.* at 1337.

88. See Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CALIF. L. REV. 513, 544-46 (1992); but cf. *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914) (noting that photographer Seligman was held to have infringed a transferee's copyright on the basis of a photograph that was similar to an earlier one he had taken featuring the same model and pose). For discussion of *Seligman*, see, for example, Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 125-27 (1998).

89. 216 F.2d 945, 948-49 (9th Cir. 1954).

90. *Id.* at 949.

court observes, in particular, that this is common in the detective story genre:

[H]istorically and presently detective fiction writers have and do carry the leading characters with their names and individualisms from one story into succeeding stories. This was the practice of Edgar Allen Poe, Sir Arthur Conan Doyle, and others; and in the last two decades of S. S. Van Dine, Earle Stanley Gardner, and others. The reader's interest thereby snowballs as new "capers" of the familiar characters are related in succeeding tales.⁹¹

The court goes on to praise more generally the practice of authors composing sequels to their own works:

The practice of writers to compose sequels to stories is old, and the copyright statute, though amended several times, has never specifically mentioned the point. . . . If Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author's use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provision therefor. Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well. The characters of an author's imagination and the art of his descriptive talent, like a painter's or like a person with his penmanship, are always limited and always fall into limited patterns. The restriction argued for is unreasonable, and would effect the very opposite of the statute's purpose which is to encourage the production of the arts.⁹²

These considerations of the importance of allowing authors to revisit their characters set the stage for the court's articulation of a demanding standard for copyrightability of fictional characters: a character is protectable per se only when it "really constitutes the story being told" as opposed to servicing as a "vehicle[] for the story told."⁹³

The "story being told" standard has not fared well in subsequent cases addressing the question of copyright protection for characters⁹⁴—perhaps because it is not as persuasive in the typical case of character reuse by someone other than the original author.

91. *Id.*

92. *Id.* at 950 (citations omitted).

93. *Id.*

94. See Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 455–57 (describing judicial confusion and uncertainty in the wake of the case).

Note that although the court seemed particularly concerned with the plight of authors revisiting their own work; it did not purport to be establishing a standard applicable only in such cases, but rather a test for the copyrightability of characters generally—whether the defendant be the original author or a newcomer.⁹⁵ But in subsequent cases involving newcomers, courts have not been so reluctant to protect characters.⁹⁶ And that now leaves authors vulnerable to claims that they have infringed copyright in their own characters, contrary to the result in the *Sam Spade* case. The court's vindication of the authorial right to revisit may have been more enduring had it explained why something might operate as an idea for an author but expression for someone else.

How is that possible? Doctrinal extensions of the idea/expression dichotomy recognize how the doctrine may be context-specific, and they can usefully be deployed differentially in the special context of revisiting authors. One of these doctrinal extensions is merger. As the Second Circuit summarized in *Kregos v. Associated Press*, “even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.”⁹⁷ There are infinite ways to depict Mont St. Victoire and Cézanne's particular depiction reflects his expressive choices among those infinite possibilities. And yet my argument above suggests that it would be undesirable to fault Cézanne for making similar expressive choices when he paints the mountain again, insofar as those choices reflect a personal style that would be difficult for him to abandon. In light of that difficulty, protecting Cézanne's expression might well effectively prevent *him* from revisiting the idea, although it would leave the idea unconstrained for other artists with their own styles. To avoid this result, the merger doctrine could be applied differentially in recognition of the way

95. *But cf.* Hughes, *supra* note 88, at 132–33 (observing that the court held the character protectable on other grounds and concluding that the real motivation for the holding in the case was solicitude for Hammett's authorial interest in revisiting his own character, not a more general skepticism about protection for characters).

96. *See, e.g.*, *DC Comics v. Towle*, 802 F.3d 1012, 1017, 1022 (9th Cir. 2015) (extending character protection to the Batmobile in a suit against newcomer defendants in the business of making custom cars); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978) (holding that Disney characters are copyrightable because they, like comic book characters, are “distinguishable from literary characters”); *Universal City Studios, Inc. v. Kamar Indus., Inc.*, No. H-82-2377, 1982 WL 1278, at *2–5 (S.D. Tex. Sept. 20, 1982) (finding that the character E.T. is copyrightable and that newcomer defendant Kamar Industries likely committed infringement by putting the well-known character on its mugs).

97. 937 F.2d 700, 705 (2d Cir. 1991).

in which an author's personal style, technique, and other characteristics might constrain his expressive choices. After reflecting on the value of artist's individual "styles," Justin Hughes comes to a similar conclusion, arguing that "we might want the law to use a double standard, by which the creator of a copyrighted work is permitted to use much more other the 'look and feel' of the copyrighted work than other non-owners,"—an idea he calls a "moral shop right."⁹⁸

Applying merger in the way I propose would mean that transferring a copyright (or preparing a work-made-for-hire) would not prevent an author from taking a similar creative approach to the same topic in the future. In other words, the right to revisit would be inalienable. This proposal might therefore trigger objections that have dogged other inalienable authors' rights—including the U.S. termination of transfer right and some European moral rights.⁹⁹ One might object, for example, that the proposal disserves authors because publishers would be less willing to pay for copyrights subject to the right to revisit. But the copyright analysis that I am proposing would not limit authors' ability to contractually agree not to revisit their prior works.¹⁰⁰ What, then, is the point of using merger to create a right to revisit that authors will likely sign away in situations when they have little bargaining power and perhaps little foresight about their future creative desires? For one thing, contractual remedies are typically less powerful than copyright remedies, so authors would be less likely to be enjoined from revisiting their prior works than they would be if revisiting amounted to copyright infringement.¹⁰¹ The contractual privity requirement also makes it more plausible that authors who changed their minds could find the promisee and renegotiate the terms of their deal. Orphan contracts are less common than orphan works.

Merger is not the only doctrine that might help revisiting authors land on the right side of the idea/expression dichotomy.

98. Hughes, *supra* note 88, at 131.

99. *Cf.* Rub, *supra* note 42, at 53–54 (cautioning that that inalienable profit sharing arrangements tend to reallocate both wealth and risk from the risk-neutral buyer to a risk adverse author).

100. *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 670–71 (1991) (applying promissory estoppel in refusing to limit the ability of parties to contractually agree not to disclose confidential information).

101. See generally John F. Duffy & Richard Hynes, *Statutory Domain and the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1, 74 (2016) (recognizing that several commentators have argued that Section 301 of the Copyright Act may broadly preempt contractual rights restricting distribution). Even when not specifically preempted, the authors nevertheless note the expansive scope of copyright remedies by observing that "[c]ontract rights are typically limited to the parties; property rights are good against the world." *Id.*

The scènes à faire doctrine could also be deployed to this end. This doctrine operates to exclude from copyright protection “material that is ‘standard,’ ‘stock,’ or ‘common’ to a particular topic, or that ‘necessarily follow[s] from a common theme or setting.’”¹⁰² In one of the most comprehensive treatments of the doctrine, Leslie Kurtz describes the rationale for the doctrine this way: “New authors should not be deprived of a whole series of plot elements that naturally arise from the basic theme. An author attempting to write without using these elements would be forced into unnatural contortions in an attempt to design around them.”¹⁰³

Kurtz goes on to argue that another key to scènes à faire is the desirability of allowing authors to satisfy audience expectations. She describes the doctrine as covering material “which the audience expects and desires, without which the logic of the action is harmed and the audience left dissatisfied.”¹⁰⁴ Although Kurtz does not explore the issue of revisiting authors, this rationale for the scènes à faire doctrine could have special application to such cases. Audiences may come to have specific expectations of authors—expecting Cézanne to apply a particular artistic style to landscape, expecting Degas to apply a particular style to dancing girls, expecting Hammett to place Sam Spade in a new detective story. Audiences will thus be especially disappointed if authors are forbidden from fulfilling those expectations. For an author, certain elements might flow more naturally from a certain topic they have addressed before than they would for new authors, thus justifying especially accommodating application of scènes à faire.

In sum, although there are comparative models of statutory versions of the right to revisit, the most promising avenue for vindicating the right to revisit under U.S. law appears to be further context-specific development of the idea/expression dichotomy and extensions of it. Fair use might also play a role. These doctrinal routes are consistent with the normative underpinnings of these doctrines and more generally with the progress-promoting reasons to foster authors in their efforts to revive, revise, and revisit their works.

102. Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1494 (10th Cir. 1993).

103. Leslie A. Kurtz, *Copyright: The Scenes A Faire Doctrine*, 41 FLA. L. REV. 79, 94 (1989).

104. *Id.* at 95.

V. CONCLUSION

Technology empowers authors to disseminate their works without relying on publishers. But technologically-empowered authors are not always legally empowered. In many cases they still assign away their copyrights. This can be a happy arrangement where authors and publishers share an interest in revenue generation and broad dissemination. But the interests of authors and copyright-owning publishers tend to diverge over time. As revenues dwindle, authors typically retain a strong interest in the dissemination of their past work while publishers move on to the next best-seller. Authors may also want to revise the prior works or revisit elements of them in ways that implicate the exclusive rights of the copyright owner. U.S. law allows some authors to be reunited with their copyrights through the termination of transfer provisions. Authors can also reclaim their rights via contractual out-of-print clauses or renegotiation. But these need not be the only mechanisms for resolving author-owner tensions and vindicating the authorial (and societal) interest in reviving, revising, and revisiting existing works. I have argued that both statutory reform inspired in part by comparative examples and doctrinal development consistent with the spirit of U.S. copyright law can serve these interests. The time is ripe for these reforms.