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# A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product

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# A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product

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## I. INTRODUCTION

U.S. copyright law accords its bundle of rights to the “author” of the work.<sup>1</sup> But despite the centrality of this figure in the Copyright Act, the statute doesn’t define the term, and commentators have yet to agree on precisely what characteristics this creature should have. As history and scholarship show, an author can take on many different personas—she can be individual or corporate; she can be someone who creates deliberately or accidentally; and she can work separately or in collaboration with others. Far more attention has been paid to this individual’s creative output: “works of authorship.”<sup>2</sup> Works of authorship are the creations to which rights attach,<sup>3</sup> and so discovering the substance and boundaries of such works is often the first step in any copyright analysis. As a result, in U.S. copyright law, the author is defined more by *what* she creates—a copyrightable “work”—than by *why* she creates.

This result seems odd, because U.S. copyright law is typically explained as affording authors economic incentives to create so that the public benefits from the development of new works.<sup>4</sup> An author will be reluctant to create and commercialize her

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1. 17 U.S.C. § 201(a) (2000) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

2. 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

3. *Id.*

4. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) (reviewing JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996)) (describing intellectual property as “a restriction on the free flow of information

work if a second-comer can simply copy that work and sell it so as to recoup her cost of copying, far more cheaply than the author herself, who must also recoup the cost of production. This explanation assumes, however, that authors create in response to economic incentives. While this may be true for some authors and for some forms of expression, it is unquestionably not true for others.<sup>5</sup> A Hollywood studio or a famous romance writer might well be thinking about profits and losses as they begin work on a new film or novel, but a teenager writing songs in her bedroom might merely be expressing sadness over a breakup or sharing her musicality with her friends. The incentive assumption is made even more problematic by the vast range of expression that is protected under the current Copyright Act. Whereas copyrightability under the 1909 Copyright Act was triggered by publication with the appropriate affixed notice,<sup>6</sup> the 1976 Copyright Act requires only an original work "fixed in a tangible medium of expression."<sup>7</sup> Thus, as others have noted, e-mails, musings on the back of an envelope, and vacation photos might all be equally protected by copyright, even though none of them were written with an eye toward economic exploitation.<sup>8</sup>

Because the term "author" spans a wide range of characteristics, one's notion of how the word should be described might align not only with the kind of creative work one does (or engages with) but also with one's sense of what the scope of the legal rights attached to authorship should be. In the traditional argument, an author is a creator (perhaps a corporate one) who is motivated by economic return.<sup>9</sup> Such an author expects and deserves remuneration for its efforts in order to recoup its investment in selection, production, and distribution. It will be disinclined to create additional works if rampant copying goes on unabated; it is the creator of the standard, the canon, the blockbuster. In the counterargument, an author is the (typically individual) creator who produces new and imaginative works, often by incorporating or commenting on the works of others.<sup>10</sup> She will create without incentives so long as she is not constantly in fear of litigation (and, perhaps, receives attribution); she is the creator of the mashup, the parody, the

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to the minimum extent necessary to encourage needed investment in innovation").

5. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 492 n.139 ("Copyright is often rationalized in terms of its importance as an incentive, but it is not always clear what behavior it is designed to incite.").

6. Copyright Act of 1909, § 10 (1909).

7. 17 U.S.C. § 102(a).

8. See, e.g., Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 974 (1990) ("Copyright vests automatically in your shopping lists, your vacation snapshots, your home movies, and your telephone message slips."); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 6–11 (2008) (discussing works that would likely still be created in the absence of copyright).

9. See, e.g., Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 187 (2007) (describing view that "the purpose of copyright law is to encourage new creation by ensuring that creators get paid").

10. For descriptions of this type of authorship, see Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007). The moral rights scholarship, while approaching the issue from a different angle, also provides a noneconomic rationale for copyright. See, e.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947 (2006) ("The intrinsic dimension of creativity . . . is one characterized by spiritual or inspirational motivations that are inherent in the creative task itself as opposed to motivation resulting from the possibility of economic reward.").

independent film.

Copyright law itself, however, remains fairly agnostic in this debate.<sup>11</sup> Despite the varying interests and incentives that motivate authors to create, copyright law gives all authors exactly the same bundle of rights.<sup>12</sup> Although the term of those rights differs depending on whether the author is corporate or individual,<sup>13</sup> and although an employer can acquire rights in a work without having actually created the work (through the work-for-hire doctrine),<sup>14</sup> both the individual and the corporate author hold the same rights to prevent certain unauthorized uses of the work. Copyright law makes no attempt to match the rights it grants to the needs of the party to whom it grants those rights, resulting in too much protection in some instances and not enough in others.<sup>15</sup> This state of affairs has been exacerbated by the abandonment of any formalities such as registration and notice, such that creators are now no longer required to take some affirmative action to indicate their desire to distribute their work or otherwise exploit their work in order to enjoy copyright.<sup>16</sup> As a result, as James Gibson notes, “authors who have no intention of disseminating their works gain the protection of a legal regime that assumes they will do so,” while authors who “want to share their creativity but have no interest in copyright’s exclusive rights see their works automatically propertized, even though they would be willing to give them away for free.”<sup>17</sup>

It is not clear, however, that this problem can be remedied by taking better account of why an author creates (or, relatedly, her interest in enforcing her copyright) and not merely considering what she creates. Aligning the scope of the rights copyright law provides to the type of author claiming them might help to reduce what Michael Carroll has termed the “uniformity cost” of copyright law.<sup>18</sup> Such tailoring would provide

11. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1066 (2003) (contending that, in copyright law, “[f]ew judicial decisions address what authorship means, or who is an author” and that “[f]ewer laws define authorship”).

12. 17 U.S.C. § 201(a) (2000) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”); *id.* § 106 (describing rights accorded to the owner of the copyright in a work).

13. *Id.* § 302(a) (providing, for most works, “a term consisting of the life of the author and 70 years after the author’s death”); *id.* § 302(c) (“In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.”).

14. 17 U.S.C. § 201(b).

15. Cf. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 873 (2001) (“[T]hose aspects of copyright protection that generate excess incentives merely enrich lucky copyright owners without concomitant public benefit.”); Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, in INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE 94, 95 (Axel Gosseries et al. eds., 2008) (noting that “it is surprising how little attention and research has been devoted to assessing the claim that copyright and patent terms of the sort we have are in fact necessary to incent creative production”).

16. See, e.g., James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004). Gibson notes that in an era when mass distribution of written work was much more costly than it is today, “[t]he law could . . . reasonably assume that authors who bothered to disseminate their writings wanted copyright’s protection against unauthorized copying.” Gibson, *supra*, at 169.

17. Gibson, *supra* note 16, at 170.

18. See generally Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006); see also *id.* at 856 (noting that although the size of needed copyright incentives varies, copyright law provides uniform rights).

sufficient incentive for the types of works being created without unduly impinging on the rights of second-generation creators and audience members to engage with and redeploy those works. So if a corporate author is more concerned about preventing unauthorized distribution of its works and less concerned about unauthorized copying (because distribution is the source of its income stream), perhaps its rights should be weighted toward distribution. An individual author, by contrast, might be more concerned about the use of his work by authors in ways contrary to his wishes and less concerned about unauthorized distribution, and his rights might be weighted accordingly.<sup>19</sup> On the other hand, according heightened sensitivity to the type of author at issue might only further complicate what is already a complicated system. Users of copyrighted works already face substantial uncertainty in determining whether their use of a work is fair or not, so adding additional uncertainty in determining the scope of the author's rights would not ameliorate matters.

One might argue, however, that the overreaching in copyright about which commentators have been justly concerned results, at least in part, from the expansive scope of the rights copyright owners hold, even when those rights bear no resemblance to the harm complained of. In addition, as the Supreme Court has noted, the fair use doctrine, which assesses the nature of the defendant's use of the copyrighted work, requires "a sensitive balancing of interests."<sup>20</sup> It seems particularly unbalanced, however, to engage in a multifactor, nuanced analysis of the defendant's use and then to compare it to a monolithic right on the plaintiff's side of the equation. Copyright law might, therefore, better accomplish its goals if it took better account of the activities and interests of authors rather than focusing on the products of their creativity. Different types of "authors" engage in different modes of creation and therefore have different interests in controlling the results of their work. The goal of this Article is to consider whether copyright law would be improved by recognizing this perspective.

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19. See, e.g., Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. art. 2, par. 11.

If authorship is primarily a commercial venture, very little hinges on attribution. The fact that someone else sells your concept for a screenplay for \$3 million will not bother you any less because the "playwright" acknowledges you in a footnote. What you wanted was the \$3 million. But for other authors, particularly those in the academic community, attribution may be more important than the right to commercial control. Certainly, I don't get paid by law reviews for the articles I publish; my return comes (if at all) in the form of peer recognition of my ideas. From my perspective, the Harvard Law Review is more than welcome to copy this article in its entirety, as long as they put my name at the top. On the other hand, I am likely to be very upset if Harvard publishes my article with someone else's name on it.

*Id.*

20. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984); see also, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) ("The task [of fair use adjudication] is not to be simplified with bright-line rules . . . . All [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright."); *Stewart v. Abend*, 495 U.S. 207, 236 (1990) ("The doctrine is an equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.") (internal quotation marks and citation omitted).



## II. THE AUTHOR IN COPYRIGHT LAW

The Constitution grants Congress the power to “promote the progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”<sup>21</sup> As written, either of the key terms—“Authors” and “Writings”—could be seen as generative of the other: An “Author” could be defined as someone who creates a “Writing,” or a “Writing” could be defined as the work of an “Author.” The interpretive choice depends on whether the “progress of Science” is best promoted by creating incentives for certain types of work or for certain types of people.

U.S. copyright law has opted for the former, focusing its attention not on the characteristics of an author but rather on what she creates, giving rights to creators only insofar as they create “original works of authorship.”<sup>22</sup> The courts’ consideration of copyrightability has, accordingly, focused on the nature of the plaintiff’s creative output. *Burrow-Giles Lithographic Co. v. Sarony*,<sup>23</sup> an 1884 Supreme Court decision, is illustrative of this approach. As is well known, the case concerned whether a photograph of the writer Oscar Wilde, taken by Napoleon Sarony, qualified for copyright protection under U.S. law. The defendant, who had copied the photograph without permission, argued that because photography was merely the mechanical process of triggering the camera at an appropriate moment, photographs were not the work of an “author” and so could not constitutionally be afforded copyright protection.<sup>24</sup> In rejecting this position, the Court highlighted the lower court’s description of the way in which the photograph had been created:

[The photograph] is a useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit.<sup>25</sup>

In light of this description, which established the photograph as “the product of [Sarony’s] intellectual invention,”<sup>26</sup> the Court held that there was no constitutional difficulty in extending copyright protection to Sarony’s work.<sup>27</sup> Courts since have taken pains to identify the creative contributions made by photographers seeking copyright in their work, even when those contributions seem more akin to timing and chance than true creative effort.<sup>28</sup> The instances in which photography would not so qualify—what

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21. U.S. CONST. art. I, § 8, cl. 8.

22. 17 U.S.C. § 102(a) (2000).

23. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

24. *Id.* at 57.

25. *Id.* at 60 (internal quotation marks omitted).

26. *Id.*

27. *Id.*

28. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (holding that

*Burrow-Giles* referred to as “the ordinary production of a photograph” involving “simply the manual operation . . . of transferring to the plate the visible representation of some existing object”<sup>29</sup>—seem to be few, with *Bridgeman Art Library v. Corel Corp.* being one modern example.<sup>30</sup> Indeed, in denying copyright protection to what it termed a “slavish copy” of a public domain work, the *Bridgeman* court implicitly acknowledged that the copyrightability question turns on the extent to which the photographer’s efforts are present in the work.<sup>31</sup> Since the goal of the photograph at issue in the case was to eliminate any artistic contribution from the photographer—to render a photograph as indistinguishable as possible from the original—it could not constitute a work of authorship.<sup>32</sup>

Thus, the Copyright Act’s answer to the question “Who is an author?” is: An author is someone who creates a “writing” (or a “work of authorship”). He is the one “to whom anything owes its orig[i]n; originator; maker; one who completes a work of science or literature,”<sup>33</sup> “the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”<sup>34</sup> Once we determine whether the work at issue is sufficiently original and creative to qualify for copyright protection,<sup>35</sup> the identity of the creator becomes much less relevant. Thus, in *Bleistein v. Donaldson Lithographing Co.*,<sup>36</sup> the Court held that the commercial nature of a circus advertisement—in other words, its production by an advertising agency or corporate employee as opposed to an “artist”—did not preclude its embodying the requisite level of authorship;<sup>37</sup> and in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,<sup>38</sup> the

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Abraham Zapruder’s film of the Kennedy assassination could be protected by copyright given that “Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated”). See also Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 433 (2004) (discussing *Burrow-Giles*); Justin Hughes, *Should Copyright’s Originality Standard Be Sort-Of Non-Obviousness?* 14–18 (unpublished article, available at [http://law.richmond.edu/ipi/pdf/Hughes\\_commentary.pdf](http://law.richmond.edu/ipi/pdf/Hughes_commentary.pdf)) (discussing limited scope of copyright in photograph taken at news conference).

29. *Burrow-Giles*, 111 U.S. at 59.

30. *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191, 196–97 (S.D.N.Y. 1999):

There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. “Elements of originality . . . may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.” But “slavish copying,” although doubtless requiring technical skill and effort, does not qualify.

*Id.* (quoting *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992)). See also R. Anthony Reese, *Photographs of Public Domain Paintings: How, If at All, Should We Protect Them?*, 34 J. CORP. L. 1033, 1039–40 (2009) (discussing *Bridgeman*).

31. *Bridgeman*, 36 F. Supp. 2d at 196–97.

32. I thank Adam Hanley for suggesting this characterization.

33. *Burrow-Giles*, 111 U.S. at 58 (internal quotation marks omitted).

34. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

35. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (noting that “originality requires independent creation plus a modicum of creativity”).

36. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

37. *Id.* at 251 (“Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use,—if use means to increase trade and to help to make

court suggested that even accidental authorship caused by a hand jolted by “a clap of thunder” would suffice, so long as the owner of the hand subsequently claimed the work as his own.<sup>39</sup> The focus is on the nature of the work created rather than the effort directed toward its creation; minimal effort that results in a “work of authorship” receives the benefit of copyright, no matter who conducts that effort, while extensive efforts that result in “garden-variety” collections of data do not.<sup>40</sup>

Indeed, *Alfred Bell* provides a particularly interesting point from which to consider copyright law’s view of what constitutes authorship. The individual who accidentally creates “art” through an involuntary mark on a paper or by spilling paint on a nearby canvas cannot, of course, have been motivated to do so by any incentives provided by the law. To the extent she is motivated at all, it is at the time of adoption of the work—the decision to call it one’s “art” rather than simply to discard it as trash. This view of authorship—as rooted in authority or authorization rather than in effort—aligns with norms in several areas of creative production. A judge, for example, is considered to be the author of her opinions regardless of her clerks’ contribution to the drafting because she has adopted the opinion as her own.<sup>41</sup> Marcel Duchamp is the “author” of *Fountain* (1917), a “readymade” sculpture consisting of a urinal, because he has declared his effort to be art.<sup>42</sup> We identify a painting as a “Rubens” despite the fact that many of the brush strokes are the work of assistants.<sup>43</sup> Given the exceedingly low threshold of originality required for copyrightability,<sup>44</sup> the focus of the law seems to be not on the decision or effort to create in the first place but on the later decision to assert that the work created is attributable to oneself.<sup>45</sup>

The Copyright Act’s language largely reflects this view of authorship. An “author” is the entity in whom “[c]opyright in a work . . . vests initially,”<sup>46</sup> and such copyright

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money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.”).

38. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

39. *Id.* at 105 (“A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.”) (footnote omitted).

40. *Feist*, 499 U.S. at 362; see also *id.* at 359–60 (noting that “originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in directories and other fact-based works”).

41. See RICHARD A. POSNER, *LAW AND LITERATURE* 258 (rev. ed. 1998) (“Law clerks often prepare for their job by reading a bunch of their boss’s old opinions (sometimes he tells them to do this), and they model their own style on that of the opinions they read. By this process a chambers style, not perhaps very distinctive but distinctive enough to be recognizable, evolves. All this shows is that style, like intention, can be a corporate attribute.”).

42. See Thierry de Duve, *This Wouldn’t Be a Pipe: Magritte and Marcel Broodthaers*, in *MAGRITTE AND CONTEMPORARY ART* 95, 101 (Stephanie Barron & Michel Draguet eds. 2006) (“Duchamp’s gesture with the readymade was to reduce the artwork to the statement that names it as such.”).

43. Tania Branigan, *Desperately Seeking Rubens*, *GUARDIAN* (London), Sept. 2, 2002, § G2, at 14.

44. See *Feist*, 499 U.S. at 346 (noting that “originality requires independent creation plus a modicum of creativity”).

45. Cf. Ginsburg, *supra* note 11, at 1092 (positing that “an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work” to her vision, thus creating an entitlement to artistic and economic control of the work).

46. 17 U.S.C. § 201(a) (2000).



subsists "in original works of authorship fixed in any tangible medium of expression."<sup>47</sup> Thus, U.S. copyright law generally contemplates the author as a repository for the rights born when a "work of authorship" is created as a legal matter, not as a creative one. Although those rights are attached to an "original work[] of authorship," there is no language in the Copyright Act invoking the process of creating that work; an author's responsibility for the work's creation is assumed, not described.<sup>48</sup> As such, some commentators have suggested that the word "author" is largely a term of art in the Act—a way simply to indicate the beneficiary of the rights the Act creates.<sup>49</sup> Put differently, the Copyright Act's "author" is the individual (or entity) who names herself as owner of the intellectual content of the work—who looks at the paint inadvertently splattered on the canvas or reviews the draft prepared by an assistant and declares, "That is mine."

The Act is not, however, particularly clear on this point. In some instances, the Act suggests that "author" is equivalent to the actual creator of the work or, at the very least, a natural person.<sup>50</sup> In other instances, the Act suggests that "author" is equivalent to the holder of the rights in the work, whether individual or institutional, a legal fiction distinct from the actual creator of the work.<sup>51</sup> In one provision, implementing the Visual Artists Rights Act, the statute makes a distinction between the two, noting that the rights the provision confers apply only to the "author of a work of visual art . . . whether or not the author is the copyright owner,"<sup>52</sup> yet in the work-for-hire provision, the Act suggests otherwise, noting that in the case of a work made for hire, "the employer or other person for whom the work was prepared is considered the author for purposes of [the Copyright

47. *Id.* The 1909 Act suffered from a similar indeterminacy. Section 4 of the 1909 Act provided that the works for which copyright could be secured "shall include all the writings of an author," thus defining the holder of the rights under the Act by what she created rather than by who she is. 1909 Copyright Act § 4 (1909), amended by 17 U.S.C. § 102(a) (2000).

48. *But see, e.g.,* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 488 (2007) (noting that "the enforcement of copyright as an author's right necessitates consideration of creation processes"); *id.* at 505 ("In the process of allocating rights [under copyright law], the allocation of the right becomes at times intertwined with representations about how a work is produced.").

49. *See generally* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 262 (2008); Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 5 (2003).

50. *See, e.g.,* 17 U.S.C. § 101 (defining "anonymous work" as "on the copies or phonorecords of which no natural person is identified as author"); *id.* (defining "fixation" as including, inter alia, "embodiment in a copy or phonorecord, by or under the authority of the author"); *id.* (defining "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"); *id.* (defining "pseudonymous work" as "a work on the copies or phonorecords of which the author is identified under a fictitious name"); *id.* (defining the author's "widow" or "widower" as "the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried"); 17 U.S.C. § 106A (according the author of a work of visual art the right, in certain circumstances, to "prevent the use of his or her name as the author" of the work); *id.* § 101 (defining a "work of visual art" as, in part, a work existing in limited copies "signed and consecutively numbered by the author"). *See also* Ginsburg, *supra* note 11, at 1072 ("[T]he person who conceptualizes and directs the development of the work is the author, rather than the person who simply follows orders to execute the work.").

51. *See, e.g.,* 17 U.S.C. § 104A(6) (noting that a restored work "vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work"); *id.* § 201(b) (work-for-hire provision).

52. *Id.* § 106A(b).

Act.]"<sup>53</sup>

Joint authors and corporate authors (through the work-for-hire provision) are two particular types of authors identified in the Copyright Act, but neither of these provisions provides much assistance in determining the characteristics of an author more generally. The joint authorship provision notes that joint authors are co-owners of the copyright in the work,<sup>54</sup> but in order to be a "joint" author one must first be an "author" and therefore must already have participated in creating a "work of authorship."<sup>55</sup> Similarly, the work-for-hire provision allows for a corporate employer to control the rights accorded to the author under copyright, but this necessarily requires the work to have come into being (created by an original author) before this provision becomes relevant.<sup>56</sup> Both definitions assume the existence of authorship prior to the question of ownership and thus are concerned primarily with transferring or dividing already existing rights.

The work-for-hire provision in particular illustrates a more basic principle of U.S. copyright law: The law doesn't require that the creator of a work be the person identified as the work's "author."<sup>57</sup> It is concerned not with identifying the true creator—the person who actually put pen to paper—but merely with the legal fiction of the author,<sup>58</sup> a statement of authorship subject only to ex post challenge and not to ex ante proof. Copyright's view of authorship allows an author to be identified with a pseudonym; it allows a celebrity author to claim authorship credit for a ghostwritten work; and it permits works for hire, in which the creator's employer is deemed the legal author.<sup>59</sup> Thus, the "author" under the Copyright Act may well be an intellectual stranger to the creative impulses that inspired the work. As with the attribution of the Gospels to Matthew, Mark, Luke, and John, or the use of pseudonyms in the Shakespearean era as a proxy for collaborative production, the social and legal origin of a work (and thus the

53. *Id.* § 201(b). The Visual Artists Rights Act excludes works for hire from its purview. *Id.* § 101 (providing the statutory definition of a "work of visual art").

54. 17 U.S.C. § 201(a) ("The authors of a joint work are coowners of copyright in the work.").

55. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998) ("A co-authorship claimant bears the burden of establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors.").

56. 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

57. This paragraph is largely taken from Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1393–94 (2005).

58. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 136 (1993) ("In the discourse of copyright, then, the goal of protecting the rights of the creative author is proudly asserted even as the notion of the author is drained of content."); David Saunders & Ian Hunter, *Lessons from the "Literary": How to Historicise Authorship*, 17 CRITICAL INQUIRY 479, 493 (1991) ("[The Statute of Anne] does not assume or require a necessary equivalence between the person of the copyright owner and the aesthetic persona of the writer, even on those occasions where the writer holds copyright.").

59. The courts, as Peter Jaszi has noted, suggest that naming the employer as the "author" of a work-for-hire is consistent with the Romantic vision of authorship because it is the employer who provides the "inspiration" for creation. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 298 (1992). For another example of this authorship-as-authority phenomenon, see *Building Officials & Code Administrators v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) ("The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.").

holder of the rights pertaining to the work) may be nothing more than a convenient branding device,<sup>60</sup> subsuming creative contributions by many individuals under the name of the individual or individuals denominated as the “author” of the work.

Given that copyright law has at its core not this ephemeral “author” but rather the “work of authorship”—fixed and therefore commodifiable—it should not be surprising that the rights granted to an author concern the economic exploitation of the work rather than rights personal to an author.<sup>61</sup> The right to reproduce, distribute, publicly perform and display, and make derivative works based on the copyrighted work all focus on the result of an author’s efforts.<sup>62</sup> Having control of these uses is assumed to be what motivates creation,<sup>63</sup> although the availability of any of the section 106 rights is not conditioned or dependent on any such motivation. Indeed, *Alfred Bell’s* artist, who created only as the result of a “clap of thunder,” had no motivation to create at all, let alone an economic one. Yet, because the result was a work of authorship, he became entitled to the same rights under section 106 as the painter who toiled away in his atelier for months. To the extent he developed any motivation to commercialize his work at all, it arose upon his decision to adopt what otherwise would have been deemed an accident as a work of authorship.

This standard explanation has recently been called into question, however, as rarely reflecting reality in an age of mashups and YouTube. These scholars have highlighted the many ways in which artists create without the need for any incentives—simply because they enjoy doing so or want to get their message out as quickly as possible.<sup>64</sup> Online modes of distribution have undoubtedly contributed to this phenomenon. Although the same impulses were present in the pre-Romantic era, there was a cost to respond to this desire: printing copies of handbills, finding a performance space in the public square, or finding a distribution channel. Even though this process became less and less expensive to conduct, it remained the province of corporations rather than individual authors. As a

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60. DAVID G. MEADE, PSEUDONYMITY AND CANON: AN INVESTIGATION INTO THE RELATIONSHIP OF AUTHORSHIP AND AUTHORITY IN JEWISH AND EARLIEST CHRISTIAN TRADITION 13, 207 (1986); Marcy L. North, *Rehearsing the Absent Name: Reading Shakespeare’s Sonnets Through Anonymity*, in THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY 19, 23 (Robert J. Griffin ed., 2003) (“In both print and manuscript, book producers and compilers [in Shakespeare’s time] utilized a wide variety of conventions to present ‘authors’ to their readers . . . [including] the practice of attributing a miscellany to one prominent author, and, most important, anonymity. These conventions often obscured the intellectual claim of specific authors and called attention to the collaborative production of the text.”).

61. The Visual Artists Rights Act, 17 U.S.C. § 106A, is the only explicit statutory recognition of moral rights in U.S. copyright law.

62. 17 U.S.C. § 106.

63. See, e.g., Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1122 (2003) [hereinafter Zimmerman, *Reconsidering Incentives*] (“Even the most adamant spokesmen for the ‘information wants to be free’ school when pushed . . . admit that artists do not eat air, and that, absent a sizable trust fund (and maybe even with one), creators need or would like, when possible, to earn an income from what they produce.”).

64. See, e.g., Tushnet, *supra* note 10, at 135 (“Although U.S. copyright law presumes that authors will be compensated in money or in control, fan practices use attribution, or credit, as a separate metric.”); *id.* at 142–43 (discussing how fan culture condemns fan attempts to profit from their work); Zimmerman, *Reconsidering Incentives*, *supra* note 63, at 1136 (describing how poetry flourished during the Victorian era even though many poets had to self-finance publication).

result, authors were more dependent on intermediaries, selling their rights to publishers at the beginning of the publication process.<sup>65</sup> Today, corporations retain control over certain modes of distribution—standard book publishing, theatrical films, and major-label music—but online production and distribution methods mean that individual authors can create and distribute on their own, with the potential to reach as many, if not more, people.<sup>66</sup> They are inspired to create and distribute, but remuneration for their efforts is neither sought nor expected.

This disconnect between the nature of much creativity and the rights afforded by copyright law to the author might be explained by the shift in ownership of copyrights from printers and publishers to writers and artists. In early eighteenth-century England, it was typically the printer or stationer who was held legally accountable for the contents of a publication;<sup>67</sup> not surprisingly, it was also these publishers who were the driving forces behind securing statutory copyrights.<sup>68</sup> Individual writers were convenient characters to use before lawmakers, but they were not seen as needing or deserving the legal rights attached to their work.<sup>69</sup> Thus, copyright was seen as a publisher's privilege, tied to the ability to exploit the work.<sup>70</sup> Copyright doctrine "remained confined to the limited traditional economic entitlement to print a text";<sup>71</sup> accordingly, modern rights such as the derivative works right were not then seen as violations of the author's rights under copyright law.<sup>72</sup>

Because publishers were the beneficiaries of copyright law, the rights at the heart of the law were focused on the kinds of rights publishers needed most: the printing and distribution of a text.<sup>73</sup> As Oren Bracha notes,

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65. Zimmerman, *Reconsidering Incentives*, *supra* note 63, at 1127–28 (describing the nineteenth-century publication model).

66. *Id.* at 1135 ("Once [an electronic] work is produced, the costs of reproducing and distributing it on line approach zero.").

67. David Saunders, *Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 93, 96, 107–08 (Brad Sherman & Alain Strowel eds., 1994).

68. See, e.g., Jaszi, *supra* note 59, at 296 (stating that the Statute of Anne of 1710 was passed in response to publishers' lobbying of Parliament); Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 23, 32 (Brad Sherman & Alain Strowel eds., 1994) (noting that the parties in the leading English copyright cases of the eighteenth century were booksellers).

69. Fisk, *supra* note 49, at 13 ("The modern notion of the author as the individual creator of text *ex nihilo* was a political and legal strategy employed by publishers to galvanize legislative and judicial support for monopoly rights over books.").

70. See Ginsburg, *supra* note 11, at 1064 (characterizing printing privileges as a "best exploiter regime").

71. Bracha, *supra* note 49, at 224.

72. See *Stowe v. Thomas*, 23 F. Cas. 201, 208 (E.D. Pa. 1853) (No. 13,514) (holding that translation of *Uncle Tom's Cabin* did not infringe Harriet Beecher Stowe's copyright). The opinion notes:

All that now remains [after publication] is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, 'copies of her book.' A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.

*Id.*

73. See, e.g., Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 471 (2007)



[t]he economic privileges to exploit a work were granted directly to the person who was seen as being in the best position to utilize them. In the overwhelming majority of cases, this person was a publisher or a printer rather than the author. Copyright was openly and in the most direct sense a publisher's right.<sup>74</sup>

In the second half of the nineteenth century, however, collaboration in the creation of creative works became more common, causing a revision of the idea of an "author."<sup>75</sup> As the notion of individual authorship began to take hold, the dominant economic model became to give the original rights to the creator and let assignment be the method by which those rights ended up in the hands of the entity best able to exploit them economically.<sup>76</sup> "Author" and "owner" thus became conflated, such that two kinds of stakeholders—creators and publishers/distributors—were subsumed within the general category of "author" without any reflection of their divergent interests,<sup>77</sup> a situation that persists today.

### III. FOCUSING ON PROCESS

Not surprisingly, given the Copyright Act's focus, many commentators have analyzed the scope of copyright law by working within the framework of a "work of authorship."<sup>78</sup> Russ VerSteeg has written that "an author is the person who either fixes or authorizes fixation of an original expression . . . . Hence, an author communicates his original expression either directly or indirectly."<sup>79</sup> Other commentators consider what constitutes "authorship"<sup>80</sup>; discuss the allocation of rights among or between authors, whether as collaborators<sup>81</sup> or in an employer-employee relationship;<sup>82</sup> or assess how the construction of "authorship" can have cultural significance, leaving certain types of

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(describing early copyright as a "printing right").

74. Bracha, *supra* note 49, at 255–56 (footnote omitted).

75. *Id.* at 257.

76. *See id.* at 256 (describing a publisher's copyright); Jaszi, *supra* note 5, at 468 (noting that a copyright's proprietor had the right of action).

77. *See* Roberta Rosenthal Kwall, *Commentary on "The Concept of Authorship in Comparative Copyright Law": A Brief Illustration*, 52 DEPAUL L. REV. 1229, 1230 (2003) ("The sole focus of copyright ownership is economic; in contrast, authorship contemplates not only the receipt of compensation but also the ability to exercise important non-economic (moral) rights . . .").

78. *See* Jaszi, *supra* note 5, at 471 (noting the tendency, as copyright law developed, "to define the 'author' reflexively, in terms of the 'work'").

79. Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1342 (1996). VerSteeg also notes that "[a] close reading of the statute suggests that the *sine qua non* of becoming a 'copyright author' is the act of communication." *Id.* at 1339. *See also, e.g.*, Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991 (2009) (rejecting the idea of "balance" in copyright and arguing that copyright is better described as a "dialogue" between authors and users).

80. *See, e.g.*, Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569 (2002) (discussing concept of authorship); Ginsburg, *supra* note 11, at 1072–91 (reviewing principles of authorship across several jurisdictions and characterizing them as rewarding, variously, original products of the mind, technical skill, and authorial intent).

81. *See* Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1166 (2000) (advocating a "rethinking [of] the intellectual property system in light of the increasing prevalence of collaborative production").

82. *See, e.g.*, Fisk, *supra* note 49, at 5 (describing the history of employee authorship).



creative pursuits outside its boundaries.<sup>83</sup> Even scholarship that has worked to dismantle the traditional Romantic notion of the author-genius, describing a process of creation that draws on a tradition of previous authorship and the public domain, still tends to speak in terms of what the author does rather than why he does it.<sup>84</sup>

Two significant fields of scholarship, however, focus more on the characteristics of an author and how those characteristics lead her to create. The moral rights scholarship assesses authorship as a spiritual endeavor, painting authors as concerned foremost with dignity and autonomy and so creating in order to express certain aspects of their personality to the world.<sup>85</sup> These scholars criticize U.S. copyright law as not taking sufficient account of authors' personality-based interests, particularly in light of the country's international treaty obligations.<sup>86</sup> More recently, scholarship focusing on different modes of production has also recognized the ways in which the reasons for creation do not always map onto the traditional models envisioned by the Copyright Act. Rebecca Tushnet, for example, has focused on fan creativity, noting that "[u]sing multiple models of intersecting creative practices . . . would provide a better basis for evaluating copyright's effects on creativity."<sup>87</sup>

But the act of creation is not copyright law's only interest. The constitutional directive to "promote the progress of Science" embodies both a creation incentive and a distribution incentive.<sup>88</sup> Copyright law's goal is to provide incentives for creators not only to create new works but to provide those works to the public and to do so by affording the "author" of the work rights to control certain uses of the work. As noted, however, the law often does not work as such an incentive; it is invoked by authors post hoc rather than considered by them ex ante.

Thus, copyright law, traditionally justified, embodies something of a disconnect. It

83. Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171-72 (2003) (stating that the concept of authorship may be too narrow).

84. See generally, e.g., Jaszi, *supra* note 59 (illustrating this concept); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. (SPECIAL ISSUE) 425 (1983-84).

85. See, e.g., Roberta Rosenthal Kwall, *Originality in Context*, 44 Hous. L. REV. 871, 882 (2007) ("Moral rights are aimed at preserving an author's artistic autonomy and dignity; copyrights afford economic protection and are steeped in a utilitarian framework.").

86. See, e.g., Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1 (2001) (citing U.S. moral rights doctrine and joint authorship doctrine as two areas that do not take sufficient account of authors' personality-based interests).

87. Tushnet, *supra* note 10, at 138. See also, e.g., Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 58 n.95 (suggesting that "the intrinsic enjoyment of creative production has always produced and will always produce the majority of the material that copyright protects"); Shiffrin, *supra* note 15, at 95 (noting that for many artists, "although there is a need to recoup labor and production costs, their primary motivation to create does not hinge on whether substantial pecuniary rewards are offered and does not increase when higher rewards are offered").

88. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 428-29 (1984) (noting that the limited monopoly granted by the Copyright Act "is intended to motivate creative activity of authors and inventors" and "to allow the public access to the products of their genius after the limited period of exclusive control has expired"); Dreyfuss, *supra* note 81, at 1166 ("Patent and copyright laws are aimed at protecting not only innovators, but also the public's interest in access to creative works."); Ginsburg, *supra* note 11, at 1089 (suggesting dual goals of Copyright Clause).

ostensibly incentivizes authors to create and distribute but more often incentivizes authors simply to claim their creations as works of authorship—to say, in the absence of a registration system, “This is mine.”<sup>89</sup> (*Alfred Bell*’s accidental artist is an extreme, albeit pure, manifestation of this view.) If this is the case, then perhaps the entity entitled to legal rights should be discussed in terms of its relation to that goal—in other words, whether it has claimed the work as its own for economic reasons, for personal reasons, or for some other reason altogether. One could approach this task by rebuilding copyright from the ground up, reordering rights narrowly. But there is no particular reason that this effort should be conducted on a uniform or categorical basis, according or denying rights broadly. Courts in copyright law cases could, alternatively, more finely tune their analyses to take account of varying author-stories, such that, for example, authors’ interests in creation are assessed differently from authors’ interests in distribution.

Commentators who have suggested a recasting of copyright’s scope have proposed both the elimination of one of the section 106 rights and a reallocation of those rights among stakeholders. Sara Stadler, for example, has advocated eliminating the reproduction right in favor of the public distribution right, arguing that such a move would mean that “[c]reators would continue to enjoy adequate incentives to create, and the public would gain increased access to copyrighted works.”<sup>90</sup> And Dan Burk has suggested that an “asset specificity” approach to the work-for-hire doctrine might be appropriate, “allocating the reputational interest to the natural author even while assigning default ownership of the work to the firm.”<sup>91</sup> As appealing as these proposals might be in the abstract, they face a number of practical hurdles. First, such proposals would likely require amending the Copyright Act to eliminate existing rights. Given copyright’s history as responsive to political pressure,<sup>92</sup> the likelihood of any amendment that would diminish the strength of the rights available to copyright holders is slim. This is true even if, akin to Dan Burk’s proposal, rights were reallocated among parties rather than eliminated altogether. Second, even if the Copyright Act were amended to reallocate rights to the “natural author,” it is unclear whether those rights would remain in their default position for long. As Catherine Fisk has noted, employees are rarely in a position of bargaining strength vis-à-vis their employers, which means that many, if not most, employment contracts would have a standard provision requiring that the employee

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89. The fact that copyright law no longer requires registration means that this statement of intellectual ownership is not often heard until the cease-and-desist letter is sent, thus creating uncertainty for users of the work.

90. Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 942 (2007). See also Lemley, *supra* note 9, at 187 (“Since the purpose of copyright is to encourage new creation by ensuring that creators get paid, copyright’s logical concern should be primarily, if not exclusively, with infringing uses that deprive creators of revenue they could otherwise have expected to receive.”); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 41 (1996) (proposing reforming copyright “as an exclusive right of commercial exploitation”).

91. Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 14–15 (2004).

92. Jessica Litman has remarked that “most of the statutory language” of the 1976 Act “evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.” Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861 (1987); see also *id.* at 881 (“Congress’s approach to enacting a modern copyright statute reflects an exceptional willingness to adopt particular language because industry representatives had agreed on it.”).

assign or waive any rights aligned with an individual interest.<sup>93</sup> Third, any proposal that eliminates existing rights might be too blunt an instrument; some creators have legitimate claims such that the cumulative effect of more than one exclusive right provides a greater incentive than any exclusive right alone.

Rather than amending the Copyright Act, however, courts might respond to the various kinds of authorship in a more flexible way. On the defendant's side, courts engage in a balancing exercise when determining whether a defendant's use constitutes a fair use.<sup>94</sup> They may give more weight to a relatively small amount taken when that amount constitutes "the heart of the [work]"<sup>95</sup> or more weight to the nature of the market at issue.<sup>96</sup> On the plaintiff's side, however, no such balancing takes place. A plaintiff who creates a work of authorship is entitled to all the rights that copyright law provides and in equal measure, regardless of her identity or the nature of her interest in the work. Courts might therefore provide a more holistic analysis if they considered not only the strength of the four factors going to the defendant's need to use the plaintiff's work but also the strength of relevant factors going to the plaintiff's interest in enforcing its copyright.<sup>97</sup> For example, a court could take into account the circumstances of the work's creation, the characteristics of the author or the owner of the copyright (whether corporate or individual), and the commercial nature of the work, among other considerations.<sup>98</sup> A court might ask, for example, why an individual author has claimed

93. Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 113 (2006) (noting that if attribution rights were an implied term of employment agreements, one would expect employers to ask employees to sign waiver agreements); see also Lemley, *supra* note 4, at 883 ("[T]he vast majority of intellectual property rights end up not in the hands of authors or inventors, but in the hands of corporate economic interests.").

94. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577–78 (1994) (noting that the four fair-use factors "are to be explored, and the results weighed together, in light of the purposes of copyright").

95. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565–66 (1985) (crediting the "expressive value of the excerpts and their key role in the infringing work").

96. *Id.* at 566 (calling the fourth fair use factor "undoubtedly the single most important element of fair use").

97. *Cf. e.g., Stewart v. Abend*, 495 U.S. 207, 224–25 (1990) (discussing the Copyright Act's "balance between the artist's right to control the work" and "the public's need for access"); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 973 (2007) (criticizing balancing approach on the ground that it "implicitly assumes that nearly every challenged use causes some harm to the copyright owner that must be outweighed by the use's benefit to society"); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1030 (2002) ("Once we acknowledge the public good character of copyrighted works, then, from an economic perspective, fair use must necessarily balance, on the one hand, the potential public benefit of additional or better works from prohibiting the use at issue, and on the other, the potential public benefit from the use itself.").

98. *Cf. Shyamkrishna Balganesh, Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009) (noting that "[n]one of copyright's current doctrinal devices enable courts to circumscribe a creator's entitlement by reference to the incentive structure on which the institution is premised"); *id.* at 1603 (proposing to require a copyright plaintiff to establish "that the defendant's copying was *objectively foreseeable* at the time of creation"). Lydia Loren has argued along similar lines, suggesting that works that "do not require the incentive of the copyright to be created and distributed" should receive only "thin" copyright protection. Loren, *supra* note 8, at 3. Loren, however, advocates using an objective, category-based inquiry rather than the more individual, subjective inquiry suggested here. *Id.* at 34–36. The goal here is to replicate on the rights side of the equation, as much as possible, the balancing that takes place on the fair use side of the equation. The rights of both parties, then, would be structured by a basic statutory framework but would be subject to a balancing of considerations dependent on the particular facts at issue, a task particularly suited to courts.

the work as opposed to asking why she created it. An individual author might create as a way of sharing her vision or emotions with the world, without expectation of compensation. If she later brings an infringement suit, a court might examine whether the suit targets an unauthorized commercial distribution (for example, the inclusion of her work in an anthology)<sup>99</sup> or whether it seeks control of some noneconomic interest for which the copyright claim is merely a vehicle.<sup>100</sup> Indeed, as Rebecca Tushnet has suggested, the latter such author might welcome wide distribution as a way of increasing the value of her work (assuming proper attribution);<sup>101</sup> this author's concern is with whether unauthorized copying of the work changes its context.<sup>102</sup> (Her corporate publisher, to the extent she has one, may not have the same interest.<sup>103</sup>) In essence, then, such an author would be using her control of the reproduction right to vindicate more personal rights of attribution and integrity. Because U.S. copyright law does not include these rights directly,<sup>104</sup> and because indirect enforcement through unfair competition law is now disfavored after the Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,<sup>105</sup> courts considering such claims might discount the strength of the plaintiff's copyright interest.<sup>106</sup> The 2008 presidential election provides one example. After Republican vice-presidential candidate Sarah Palin used the rock group Heart's song "Barracuda" as a theme song during some of her public appearances, the group sent the campaign a letter, requesting that the campaign stop using the song.<sup>107</sup> (The rock band Foo Fighters raised the same concern with John McCain's use of the song "My Hero."<sup>108</sup>) In both cases, the group was not concerned about the dissemination of the work as such—in other words, that the campaign's use of the song made it available to

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99. Zimmerman, *Reconsidering Incentives*, *supra* note 63, at 1145.

Once an audience for an individual's work develops, the question of compensation becomes more fraught. Authors who might previously have been willing to labor in obscurity, or even to dip into their own pockets to have their work published, will expect that, if others are willing to pay for access to their work, they will be compensated relative to the size of the market for it.

*Id.*

100. Lemley, *supra* note 9, at 194 (noting claims by copyright owners that "invoke an interest in control but not compensation"). Occasionally, the economic and personal may co-exist; a visual artist, for example, might earn more money from selling the original work than from selling authorized reproductions and so has an interest in using copyright law to indicate authenticity. (Thanks to Mark Badger for this point.)

101. Tushnet, *supra* note 10, at 152 ("The value of [such] works comes from circulation, dissemination, motion: credit benefits the creator only when some third party sees the new use.").

102. *Cf.* Gibson, *supra* note 16, at 218 (stating that copyright law is "ill suited" to deal with cases in which the author's goal is to prevent distribution of the work to the public).

103. Ginsburg, *supra* note 11, at 1068 ("Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert.") (footnotes omitted).

104. The exception is the Visual Artists Rights Act, 17 U.S.C. § 106A (2000).

105. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 38 (2003) (rejecting attempt to bring reverse passing off claim under section 43(a) of the Lanham Act for unattributed public domain work).

106. *See* Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 74-76 (2007) (discussing relative strengths of a copyright interest).

107. Posting of Ashby Jones to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2008/09/05/mccain-campaign-to-go-heart-less/> (Sept. 5, 2008, 12:45 EST).

108. Posting of Ashby Jones to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2008/10/09/john-mccain-no-hero-to-foo-fighters/> (Oct. 9, 2008 17:42 EST).



members of the public for free—but by the (false) suggestion that the group's members were supportive of the campaign.<sup>109</sup> Thus, despite the understandable interest of the groups in correcting this impression, it was not a particularly strong copyright interest and so should be given less weight (indeed, perhaps none at all).

The corporate author, by contrast to the individual author, is more likely to be interested in controlling the right to distribution rather than the right to copy on its own.<sup>110</sup> Publishers—book publishers, movie studios, and recording companies—depend, of course, on the creative endeavors of individuals, but their economic interest lies in post-creation activities: finding, shaping, producing, and distributing commercially appealing material.<sup>111</sup> Their interest is not in the copying of the work as such but in their ability to recoup the costs of publishing the work.<sup>112</sup> To the extent, therefore, that corporate authors are asserting claims that diverge from this interest, courts might likewise accord less weight to such claims. Thus, for example, an infringement claim targeting private in-home copying (such as that which occurs when viewers use a VCR or digital video recorder or copy lawfully owned music onto a different personal device) probably shouldn't be resolved by deeming the use a fair use of copyrighted material; as Jessica Litman has argued, such a use shouldn't be considered infringement at all.<sup>113</sup> Except in the presumably rare event that a single individual would, absent copyright law or technological protection measures, purchase more than one copy of a work, the copying of a work for personal use, unlike the distribution of a work to others, implicates no significant economic rights.

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109. In a statement, the Foo Fighters said, "The saddest thing about this is that 'My Hero' was written as a celebration of the common man and his extraordinary potential. To have it appropriated without our knowledge and used in a manner that perverts the original sentiment of the lyric just tarnishes the song." *Id.* Heart responded similarly:

Sarah Palin's views and values in NO WAY represent us as American women. We ask that our song "Barracuda" no longer be used to promote her image. . . . [It] was written in the late '70s as a scathing rant against the soulless, corporate nature of the music business, particularly for women . . . . There's irony in Republican strategists' choice to make use of it there.

Posting of Ashby Jones to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2008/09/05/mccain-campaign-to-go-heart-less/> (Sept. 5, 2008, 12:45 EST).

110. Copying is, of course, a predicate to distribution, but a corporate publisher doesn't earn money by keeping its copies of a book locked in a warehouse. *Cf.* Carroll, *supra* note 18, at 889 (suggesting that the right to prohibit unauthorized copying is required "if copyright is to serve as any kind of solution to the appropriability problem").

111. Ginsburg, *supra* note 11, at 1088 ("In the United States, the work for hire doctrine rests on the grounds of facilitation of investment and exploitation."); Dreyfuss, *supra* note 81, at 1202 ("The work for hire doctrine is, therefore, best understood as a way to put decisions on disseminating, revising, or building on works in the hands of the entity that will maximize creative value, rather than on the entity that bankrolled the production.").

112. *See* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 927 (2d Cir. 1994) (noting that in the realm of academic and scientific articles, "the monopoly privileges conferred by copyright protection . . . are not directly serving to motivate authors to write individual articles; rather, they serve to motivate publishers to produce journals, which provide the conventional and often exclusive means for disseminating these individual articles").

113. *See generally* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1903 (2007) (describing a "zone of personal use that is uncontroversially noninfringing"); *cf.* Gibson, *supra* note 16, at 192 ("Deciding whether a given activity constitutes fair use requires review of several complicated, interdependent, and nonexclusive statutory factors, an intimidating and expensive undertaking.") (footnote omitted).



The copyright misuse doctrine provides one model of how courts have responded to a plaintiff's claim of copyright infringement by assessing the strength of the copyright interest.<sup>114</sup> In a copyright misuse claim, the plaintiff is asserting a valid *prima facie* case but is doing so to achieve some disfavored end. While the doctrine itself is employed as a defense,<sup>115</sup> it requires the court to assess the nature of the plaintiff's activities rather than, as in the fair use doctrine, the nature of the defendant's activities. The justification for the doctrine is an equitable one: that one who has benefited from the limited monopoly provided by copyright law should not be permitted to enforce that monopoly to the detriment of the public interest.<sup>116</sup> While the copyright misuse doctrine has typically been used by courts to address anticompetitive activity,<sup>117</sup> courts and commentators have suggested the possibility of a broader public policy basis for the doctrine's application.<sup>118</sup> Examples of cases in which such a basis has been invoked are few, and cases in which the doctrine has been invoked specifically on this ground are fewer still. In *Rosemont Enterprises, Inc. v. Random House, Inc.*,<sup>119</sup> a concurrence joined by a majority of the panel suggested that the famous aviator and businessman Howard Hughes should not have been allowed to use a recently acquired copyright in a series of magazine articles about him to thwart publication of a forthcoming biography allegedly based on those

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114. See Heymann, *supra* note 106, at 74–76 (describing the origin and range of applications of the misuse doctrine).

115. *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir. 2005).

116. For useful scholarship considering the copyright misuse doctrine, see, e.g., Tom W. Bell, *Codifying Copyright's Misuse Defense*, 2007 UTAH L. REV. 573; Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1103 (2003); Brett Frischmann & Daniel Moylan, *The Evolving Doctrine of Copyright Misuse*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 269 (Peter Yu ed., 2007); Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 904 (2004); Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 514 (2004); David Scher, Note, *The Viability of the Copyright Misuse Defense*, 20 FORDHAM URB. L.J. 89, 101 (1993); Note, *Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values*, 104 HARV. L. REV. 1289, 1304–07 (1991).

117. *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1105 (N.D. Cal. 2002) (noting that courts “rely on antitrust-like inquiries in determining what licensing agreements violate public policy”).

118. See, e.g., *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 205–06 (3d Cir. 2003) (asserting that the doctrine is potentially appropriate where the copyright holder uses an infringement suit “to restrict expression that is critical of it”) (dicta); *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) (contending that the doctrine is appropriate where a plaintiff uses a copyright “infringement suit to obtain property protection, [for example,] in data, that copyright law clearly does not confer”); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (“The question is . . . whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.”); Burk, *supra* note 116, at 1133 (“The consistent theme of misuse cases is refusal to reward private extension of intellectual property rights contrary to public policy; not simply to ward off antitrust violations, or even to prevent economically anticompetitive activity.”); Frischmann & Moylan, *supra* note 116, at 274 (noting that courts have used the copyright misuse doctrine “to reinforce subject matter limitations and channeling doctrines that maintain boundaries”); Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1047 (2006) (contending that fraudulent use of copyright occurs when copyright owners attempt to prohibit fair use); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1658 (2004) (terming the copyright misuse doctrine acceptable “where litigation is threatened in an effort to extract a licensing fee or other profit when there is no reasonable basis for supposing that the threatener’s copyright has been infringed”).

119. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

articles.<sup>120</sup> Hughes was asserting what may well have been a valid copyright but was doing so to vindicate rights outside those of the copyright grant. Accordingly, the concurrence noted, “[t]he courts should not tolerate any attempted interference with the public’s right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.”<sup>121</sup> Further, the concurrence noted, “[h]ere Rosemont Enterprises acquired the Look copyright and sued upon it six days later asking injunctive relief, not with a desire to protect the value of the original writing but to suppress the Random House biography because Hughes wished to prevent its publication.”<sup>122</sup>

*Online Policy Group v. Diebold, Inc.*<sup>123</sup> provides another possible model. Diebold, a manufacturer of electronic voting machines, sent a notice under the Digital Millennium Copyright Act to several Internet service providers hosting archives of Diebold employees’ e-mails that acknowledged problems with the machines. Diebold claimed that the ISPs were hosting Diebold’s copyrighted material without authorization and demanded its removal. Section 512(f) of the Copyright Act provides, inter alia, that a person who sends such a notice with knowledge that the copyright claim is false is liable for damages.<sup>124</sup> The court concluded that Diebold was liable under section 512(f) because its DMCA notice “knowingly materially misrepresented that Plaintiffs infringed Diebold’s copyright interest, at least with respect to the portions of the email archive clearly subject to the fair use exception.”<sup>125</sup> In this regard, the court held, Diebold had offered no evidence to counter the fourth fair use factor (“the effect of the use upon the potential market for or value of the copyrighted work”<sup>126</sup>), noting,

Diebold has identified no specific commercial purpose or interest affected by publication of the email archive . . . . Publishing or hyperlinking to the email archive did not prevent Diebold from making a profit from the content of the archive because there is no evidence that Diebold itself intended to or could profit from such content.<sup>127</sup>

Even though this discussion took place within the context of a fair use analysis, the court’s emphasis on the e-mails’ lack of economic value as a commodity and the use of copyright law to suppress publication rather than to vindicate economic interests<sup>128</sup> suggests a willingness to assess the validity of the copyright owner’s claim in the first

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120. *Id.* at 311 (Lumbard, C.J., concurring).

121. *Id.* at 311–13 (Lumbard, C.J., concurring).

122. *Id.* at 313 (Lumbard, C.J., concurring).

123. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

124. *Id.* at 1202.

125. *Id.* at 1204.

126. 17 U.S.C. § 107 (2000).

127. *Diebold*, 337 F. Supp. 2d at 1203.

128. *Id.* (“[T]here is no genuine issue of material fact that Diebold, through its use of the DMCA, sought to and did in fact suppress publication of content that is not subject to copyright protection.”); *see also id.* at 1203 n.13 (explaining that the fact that the company “clearly . . . indicated that it never intended to publish . . . does not obviate application of the fair use doctrine”). *But see, e.g.*, *Religious Tech. Ctr. v. Lerma*, No. 95-1107-A, 1996 WL 633131, at \*7–8 (E.D. Va. Oct. 4, 1996) (rejecting the argument that “where a copyright owner intends never to exploit the right of first publication, the need to protect that right diminishes and the scope of fair use correspondingly expands”).

instance, and at least some commentators have so suggested.<sup>129</sup>

Thus, the willingness of courts to hold that a copyright holder, although able to establish a *prima facie* case of infringement, should not be permitted to enforce its rights to the extent provided under the Copyright Act demonstrates the possibility of adjusting the scope of the rights on the copyright owner's side on a case-by-case basis. Application of the copyright misuse doctrine differs in one important way, however, from an effort to take the strength of the copyright holder's interest into account in an infringement case. When copyright misuse is found, the copyright holder is prohibited from enforcing its rights, but only until the misuse ends.<sup>130</sup> By contrast, a balancing of the copyright holder's interests against the defendant's need to use the work would resolve the particular case at hand, with no opportunity to relitigate it against that particular defendant—and with possible implications for future litigation if the copyright owner's interest were to change in the future. On the other hand, unlike the copyright misuse doctrine, a balancing approach is not all or nothing. In certain cases, such as those described earlier, the copyright interest might indeed approach zero. But this will not always be the case; accordingly, a balancing approach allows courts the flexibility to address various types of authors and various claims of authorship. Ultimately, it would be important in any such balancing for the court to be sensitive to the possibility of malleable interests,<sup>131</sup> while maintaining awareness of litigation-motivated attempts to create new evidence.

#### IV. PRACTICAL CONCERNS

Even if copyright law would be more coherent if the varying interests of authors could be taken into account, there are several administrative and practical difficulties with implementing such an approach. First, in light of the alienability of virtually all the rights afforded under the Copyright Act,<sup>132</sup> and the prevalence of works for hire in

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129. Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1082 ("We need more courts to adopt the reasoning of Online Policy Group v. Diebold: sometimes a copyright claim . . . is so obviously outside the borders of the copyright owner's rights, the action constitutes an abuse of process.") (citation omitted); Sprigman, *supra* note 16, at 525.

Clearly, copyright incentives have little to do with whether Diebold creates the type of corporate documents at issue in this case . . . . In contrast, in a reformed system, most of the Diebold documents likely never would be subject to copyright in the first place (because Diebold does not expect to profit from the content itself, it almost certainly would not invest in compliance with formalities) and consequently Diebold would be unable to use copyright law as a means of limiting discussion regarding an issue of the highest public concern.

*Id.*

130. Bell, *supra* note 116, at 582 (describing the "majority view" that "misuse merely tolls copyright rights; it does not permanently destroy them").

131. Cf. *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 568 (1985) (noting that inquiry as to the fourth fair use factor "must take account not only of harm to the original but also of harm to the market for derivative works"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1018 (9th Cir. 2001) (noting that "positive impact in one market . . . [does not] deprive the copyright holder of the right to develop identified alternative markets").

132. The rights afforded under the Visual Artists Rights Act are waivable but not transferrable. 17 U.S.C. § 106A(e) (2000).

certain industries, a corporate copyright owner may wish to bring claims to vindicate the interest of the “true” author of the work.<sup>133</sup> In such a case, a court must consider whether to assess the strength of the plaintiff’s copyright interest with respect to the individual who created the work or the institution that now holds the rights. And even if the court is inclined to consider the individual creator’s interest, it is not always clear whose interests and incentives should count. While it may be the case, as Rebecca Tushnet suggests, that “[i]nformation about the author may be easier to determine than information about a copyright owner who is a distant successor in interest,”<sup>134</sup> the term “author,” like many such terms in intellectual property, is one laden with both sociological and legal meaning, two spheres that are not entirely coextensive. If, as Abraham Drassinower notes elsewhere in this issue, copyright is a dialogue,<sup>135</sup> then perhaps, contrary to Michel Foucault’s suggestion, it indeed matters who is speaking.<sup>136</sup> In its colloquial sense, an author is the individual responsible for the genesis of a creative work. At first glance, this individual (or individuals) is easier to identify for some modes of creative production than for others in light of conventions in different industries. A book’s author, for example, is typically identified as such on the title page of the book. The artist responsible for a painting has either signed her name to the work or can be identified by a gallery or some other entity having a connection to the painting. The lyricist and composer of a song will typically be identified on liner notes or elsewhere and are probably both presumed to be “authors” of the song. A film or television program gets more complicated: various individuals are identified as directors, producers, screenwriters, and so forth, but the language of authorship doesn’t map neatly onto this more collaborative form of production,<sup>137</sup> hence the statutory categorization of such

133. See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008):

“Prince believes it is wrong for YouTube, or any other user-generated site, to appropriate his music without his consent. . . . And legally, he has the right to have his music removed. We support him and this important principle. That’s why, over the last few months, we have asked YouTube to remove thousands of different videos that use Prince music without his permission.”

*Id.* (quoting statement from plaintiff recording company that owned copyright to artist’s work).

134. Tushnet, *supra* note 10, at 152.

135. Drassinower, *supra* note 79, at 992–93.

136. Michel Foucault, *What Is an Author?* in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURAL CRITICISM* 141, 160 (Josué V. Harari ed., 1979) (“‘What difference does it make who is speaking?’”).

137. As the Ninth Circuit has noted:

The word “author” is taken from the traditional activity of one person sitting at a desk with a pen and writing something for publication. It is relatively easy to apply the word “author” to a novel. It is also easy to apply the word to two people who work together in a fairly traditional pen-and-ink way, like, perhaps, Gilbert and Sullivan. In the song, “I Am the Very Model of a Modern Major General,” Gilbert’s words and Sullivan’s tune are inseparable, and anyone who has heard the song knows that it owes its existence to both men, Sir William Gilbert and Sir Arthur Sullivan, as its creative originator. But as the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help, the word is harder to apply.

Who, in the absence of contract, can be considered an author of a movie? The word is traditionally used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the “Author of Nature.” For a movie, that might be the producer who raises the money. Eisenstein thought the author of a movie was the editor. The “auteur” theory suggests that it might be the director, at least if the director is able to impose his



works as works for hire.<sup>138</sup>

The second difficulty is whether greater sensitivity to the nature of authorship ultimately creates more problems than it solves. One lesson to be learned from the fair use jurisprudence is that flexibility in interpretation risks creating uncertainty as much as it can provide equity.<sup>139</sup> An author might justifiably object to any such flexibility on an economic basis, noting that in order to provide an incentive at all, the rights provided by copyright law must have fixed boundaries. An uncertain incentive is, under this argument, no incentive at all. From a user's perspective, greater sensitivity to authorial incentives might only add to the uncertainty surrounding the propriety of using copyrighted works. Users will now have to attempt to predict not only a court's balancing of the four fair use factors but also a court's assessment of the strength of the plaintiff's copyright interest. On the other hand, as Michael Carroll has noted, copyright law already accords courts some degree of discretion on the rights side of the equation, such as whether a work satisfies the originality requirement for copyrightability, so taking a more holistic view of the plaintiff's interest is not entirely novel.<sup>140</sup> And users of copyrighted works might benefit from an analysis that doesn't focus on an assessment of the "fairness" of their activity but rather evaluates the "fairness" of the plaintiff's claim.<sup>141</sup> Copyright holders less certain of the strength a court will accord its interest—and, therefore, less able to assume it will benefit from the fact that the burden of proving fair use rests with the defendant—might think twice about bringing claims farther afield from the core economic interests copyright law is thought to protect.

Even assuming this benefit, however, one might also consider whether the interests of any particular author can be defined with sufficient particularity to make the balancing a worthwhile endeavor.<sup>142</sup> If a court cannot say, with any degree of certainty, that a

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artistic judgments on the film. Traditionally, by analogy to books, the author was regarded as the person who writes the screenplay, but often a movie reflects the work of many screenwriters. [One writer] suggests that the person with creative control tends to be the person in whose name the money is raised, perhaps a star, perhaps the director, perhaps the producer, with control gravitating to the star as the financial investment in scenes already shot grows. Where the visual aspect of the movie is especially important, the chief cinematographer might be regarded as the author. And for, say, a Disney animated movie like "The Jungle Book," it might perhaps be the animators and the composers of the music.

*Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000) (citation omitted).

138. 17 U.S.C. § 101 (2000) (including "a work specially ordered or commissioned for use . . . as a part of a motion picture" in the definition of "work made for hire").

139. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (noting that "fair use analysis must always be tailored to the individual case").

140. See Carroll, *supra* note 18, at 891–92 (noting that legal standards offer discretion to adjudicators). See also Joseph S. Miller, *Hoisting Originality* (unpublished article, available at <http://ssrn.com/abstract=1361040>) (proposing calibrating protection of work to degree of originality); Gideon Parchomovsky & Alex Stein, *Originality* (unpublished article, available at <http://ssrn.com/abstract=1361911>) (same).

141. Courts should be careful, however, to heed *Bleistein's* exhortation against judging the aesthetic merit of copyrighted works. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.").

142. Cf. Lunney, *supra* note 15, at 881–82 (describing arguments for excess incentives and noting that "nothing could be more dangerous to a vibrant and varied creative output than to recast copyright into the mold of a rate regulation statute requiring copyright owners to submit evidence of their fixed and marginal costs and



corporate author is vindicating certain interests while an individual author is vindicating other interests, evidence of those interests might enter litigation only post hoc, when a plaintiff might be particularly motivated to state its interest in a way that leads to a successful outcome of the litigation.<sup>143</sup> The harm posed by this possibility can be limited, however. A plaintiff's past practices might be relevant to this consideration, much as a trademark owner's failure to use its trademark is a relevant consideration in determining the scope of its rights.<sup>144</sup> Evidentiary material as to potential and actual markets might also be useful, as it is on the fair use side,<sup>145</sup> although perhaps not always dispositive.<sup>146</sup>

Finally, one might argue that the tailoring sought by flexible interpretation of the rights accorded to copyright owners under § 106 is already provided through the fair use factors in § 107. In particular, the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work,"<sup>147</sup> already takes into account the nature of the copyright owner's interest. If, for example, the defendant has distributed a copyrighted photograph, the assessment of whether that use has caused a detrimental effect on the copyright owner's market for the work will differ depending on whether the defendant has engaged in an online photo-supply service or an online image search engine.<sup>148</sup> But, as others have noted, the fourth factor's market inquiry often becomes circular, devolving into barely more than the plaintiff's assertion that it would be happy to accept a licensing fee for the defendant's use.<sup>149</sup> Moreover, in cases like *Diebold*, in which wholesale appropriation of the plaintiff's work takes place, a defendant runs the risk that a court will deem the defendant's use of the work to be nontransformative, thus potentially tipping the first three of the four fair use factors in the plaintiff's favor. The benefit of focusing on the plaintiff's incentives in the first instance is that it provides a more balanced assessment of the incentives on both sides of the conflict, requiring those who would claim the benefit of the law to do more to justify a need for those rights than

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requiring courts to then tailor copyright protection to ensure a fair return on owners' investment").

143. Of course, parties already have an incentive to do this; accordingly, courts must always be aware of the possibility that justifications may be post hoc. *Cf.*, e.g., *Blanch v. Koons*, 467 F.3d 244, 255 n.5 (2d Cir. 2006) (acknowledging that defendant's "clear conception of his reasons for using [the plaintiff's photograph], and his ability to articulate those reasons" eased the court's fair use analysis).

144. *See, e.g.*, *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1173 (11th Cir. 2002) (citing *J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* §§ 17:1 (4th ed. 2001)) ("If a mark holder stops using a mark with an intent not to resume its use, the mark is deemed abandoned and 'falls into the public domain and is free for all to use.'").

145. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (noting that a party asserting a fair use defense should present "favorable evidence about relevant markets").

146. *Cf. Lemley, supra* note 9, at 191.

[C]ourts have sought to avoid the circularity problem by limiting claims for lost licensing revenue to "traditional, reasonable, or likely to be developed" licensing markets, but this effort is likely to be unavailing. Once courts announce that a copyright owner can stop uses of their work merely by offering to charge for those uses, it is reasonable to expect that copyright owners will strive to develop such a licensing market.

*Id.* (citation omitted).

147. 17 U.S.C. § 107(4) (2000).

148. *See, e.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–20 (9th Cir. 2003) (noting that the use of Kelly's images as part of Arriba's search engine database was less exploitative than using the images to directly promote its website).

149. *See, e.g.*, *Lemley, supra* note 9, at 190.

to simply assert them.<sup>150</sup>

#### V. CONCLUSION

While any large-scale transformation of U.S. copyright law will have to wait for a groundswell of congressional will, adjustments can be made in the interim by the courts. The courts are the forum for case-sensitive application of facially inflexible statutes, and our experience with the Copyright Act's fair use provisions, while not perfect, demonstrates the courts' ability to take individual circumstances and developing technology into account.<sup>151</sup> Currently, too much deference is given to copyright owners' interests and too little to defendants' needs to use copyrighted works. The assessment is further skewed by the description of fair use as a defense, rather than as a category of activity that is not infringement in the first place.<sup>152</sup> A more holistic and equitable assessment of each party's rights can restore the balance.

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150. Cf. Shiffrin, *supra* note 15, at 101 (asserting that the strong rights of the current copyright regime are unnecessary in many instances). As Shiffrin notes, however, there is an inherent difficulty here, in that there may be little evidence of the need for copyright protection "independent of the testimony of the person who demands it." *Id.* at 96 n.6; see also Stadler, *supra* note 73, at 435 ("In defining the rights of creators by asking about their incentives to create, copyright law is creating and satisfying increasing expectations in a cycle that leads inexorably to the creation of more rights."). I don't disagree with these cautions; my point is that a simple demand should be seen as insufficient, while testimony as to one's creative process, for example, should prove more useful.

151. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is widely viewed as such a case. See *id.* at 442 (developing "substantial noninfringing use" standard to assess liability for sale of copying equipment). But see *id.* at 430-31 ("Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.").

152. See, e.g., Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 846 n.358 (2000) (citations omitted).

Section 107 of the 1976 Copyright Act by its literal terms appears to provide that no *prima facie* case of infringement will lie against a fair use, as opposed to a fair use claim serving as an affirmative defense to infringement. Section 106 grants copyright holders certain exclusive rights "subject to" section 107, which is itself titled "Limitations on exclusive rights" and refers to fair use as "not an infringement of copyright," rather than as an infringement saved by a defense. The legislative history, however, appears to have cast section 107 as an affirmative defense.

*Id.*