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COPYRIGHT'S EXCESS: SYMPOSIUM FOREWORD

Saurabh Vishnubhakat†

The focal point of this symposium is *COPYRIGHT'S EXCESS*, Glynn Lunney's thoughtful and trenchant critique of copyright law's effects on the U.S. recording industry.¹ Before delving into the book's contribution and into the chorus of scholarly replies that it has inspired, it first bears mention that both the book and its author share a cardinal strength: practicality. As Professor Lunney's colleague at Texas A&M, I have heard him remark more than once that each of his three fields of formal study—engineering, then law, and eventually economics—is ultimately concerned with solving problems. Problem solving is also the basic template of *COPYRIGHT'S EXCESS*. If a principal aim of copyright law in the United States is to encourage the creation of new works, and if the scope and duration of our copyright protection have systematically grown since the Founding,² then here immediately we have specified our problem and described our long-accepted solution. But has it really been a solution?

Professor Lunney offers theoretical and empirical arguments that say no. Where the sound recording copyright is concerned, he identifies various periods of inflation-adjusted increase, decrease, and constancy in music industry revenue over more than a half-century, from 1961 to 2014.³ Contrary to expectation, he finds that during periods of increased sales revenue correspond to both fewer⁴ and lower-quality⁵ songs, and vice-versa. His explanation, in brief, is that although overall earnings from copyright rents may go up, those earnings flow largely to a small subset of top artists, whereas the economic returns to new artists at the margin remain relatively flat.⁶ Moreover, even the disproportionate return to top artists does not actually lead them to produce more music but instead leaves them unhurried to “rush back into the studio.”⁷ The hope of reaching a similar pinnacle does bring some new entrants—and, with them, new music—into the market, but they face a high risk (in general) of failure and a high inci-

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1. GLYNN LUNNEY, *COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE U.S. RECORDING INDUSTRY* (2018).

2. *Id.* at 1–2.

3. *Id.* at 59 et seq. (discussing measures of sales revenue in the recording industry).

4. *Id.* at 84 et seq. (discussing measures of music output).

5. *Id.* at 122 et seq. (discussing measures of music quality).

6. *Id.* at 5.

7. *Id.*

dence (even among successful artists) of one-hit wonders.⁸ As a result, the decline in top-artist productivity more than outweighs the growth from new entrants.⁹

These startling findings, together with Lunney's normative recommendations,¹⁰ represent an important contribution to the law and economics of intellectual property. By their own terms, they invite serious reconsideration of the entire legal framework that underlies the U.S. music industry. By implication, they also invite similar empirical inquiry into other domains in which more expansive copyright protection is currently understood to increase the quantity or quality, or both, of creative output.

To be sure, the premises of the book are not without controversy. My own greatest point of skepticism is the measurement of quality in music output through indices such as *Rolling Stone* magazine's "500 Greatest Albums of All Time" list¹¹ and the Billboard Hot 100 chart¹² as well as streaming data from the Spotify service.¹³ Yet while I find this methodology to be, as Christopher Sprigman put it in his own review, "the most contestable element of his project,"¹⁴ Lunney himself is careful to specify that all of these measures are proxies, that each has limitations, and that each provides one view of a large and complicated picture.¹⁵

Indeed, the selection of *COPYRIGHT'S EXCESS* for a JOTWELL review by Professor Sprigman, an eminent copyright expert in his own right, is itself just one telling example of the robust debate that Professor Lunney's contribution has generated. In October 2018, a roundtable of leading scholars of copyright law, economics, and policy gathered at Notre Dame Law School to discuss and debate the arguments and implications of *COPYRIGHT'S EXCESS*.¹⁶ And that brings us to this symposium at Texas A&M, which convened in February 2019.

What follow in this symposium issue are reply essays from Ann Bartow, Betsy Rosenblatt, and Guy Rub as well as a surreply from Professor Lunney himself. As befits a work of this importance, the commentaries contend with the arguments of *COPYRIGHT'S EXCESS* and also elaborate and expand on them. Professor Bartow extends

8. *Id.* at 9–10.

9. *Id.*

10. *Id.* at 193 et seq. (discussing potential prescriptions for reform).

11. *Id.* at 88.

12. *Id.* at 95.

13. *Id.* at 112.

14. Christopher J. Sprigman, *Lunney's Paradox: More Copyright May Lead to Less Creativity*, JOTWELL: THE JOURNAL OF THINGS WE LIKE (LOTS) (Jan. 18, 2019), <https://ip.jotwell.com/lunneys-paradox-more-copyright-may-lead-to-less-creativity/> [<https://perma.cc/7BCY-APCX>].

15. *E.g.*, LUNNEY, *supra* note 1, at 84–86.

16. University of Notre Dame, "Roundtable Examines Copyright's Impact in Music Industry" (Oct. 26, 2018), <https://law.nd.edu/news-events/news/nd-law-hosts-copy-right-book-roundtable/> [<https://perma.cc/SS4V-A23E>].

the industry segment-specific arguments of the book to propose reforms for a structural feature of copyright law broadly: the unilateral right of authors to terminate licenses over their copyrighted works after a period of time that is set by statute.¹⁷ Professor Rosenblatt similarly extends the conclusions of the book, using them to shed light on social justice questions in the creative enterprise, specifically power dynamics in segments of the music industry that are inflected with race, class, and other axes of identity.¹⁸ Professor Rub, meanwhile, engages with the book's key empirical findings—that sales revenue and music output are not positively correlated as traditional copyright theory would predict—by considering various explanations for this result and taking particular issue with Lunney's conclusion of superstars at rest.¹⁹

For their careful treatment of my dear colleague's work, I am grateful to these commentators as well as to Christopher Buccafusco, Kristelia Garcia, and Aaron Perzanowski—who all took the time to consider *COPYRIGHT'S EXCESS* from their varied perspectives. As faculty advisor for the *Texas A&M Journal of Property Law*, I also appreciate the wide-ranging and accessible discussion that these commentators led during the symposium itself, offering all of the Journal's attending members a rich reward for their hard work and planning. Not least, I sincerely thank the Office of the Dean and of the Associate Dean for Faculty Development at the Texas A&M University School of Law, whose material and institutional support made this symposium a success. The success here, as I see it, was an important contribution to our shared endeavor of identifying social problems worthy of our effort and proposing solutions worthy of our abilities.

17. Ann Bartow, *Using the Lessons of Copyright's Excess to Analyze the Political Economy of Section 203 Termination Rights*, 6 TEXAS A&M J. PROP. L. __ (2020).

18. Elizabeth L. Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEXAS A&M J. PROP. L. __ (2020).

19. Guy A. Rub, *Incentivizing Top-Musicians*, 6 TEXAS A&M J. PROP. L. __ (2020).

