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The Role of the Author in Copyright

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ABSTRACT

Two encroachments, one long-standing, the other a product of the digital era, cramp the author's place in copyright today. First, most authors lack bargaining power; the real economic actors in the copyright system have long been the publishers and other exploiters to whom authors cede their rights. These actors may advance the figure of the author for the moral luster it lends their appeals to lawmakers, but then may promptly despoil the creators of whatever increased protections they may have garnered. Second, the advent of new technologies of creation and dissemination of works of authorship not only threatens traditional revenue models but also calls into question whatever artistic control the author may – or should – retain over her work. After reviewing these challenges, I will consider legal measures to protect authors from leonine contracts, as well as measures in the marketplace to obtain compensation for the exploitation of their rights, in order to assure authors better remuneration, and more power over the ways their works encounter the public.

The author's place in the future of copyright (assuming copyright has a future) will not be assured until the full range of her interests, monetary and moral, receives both recognition and enforcement. Online micropayment and other systems for remunerating individual authors (including by means of collective licensing), albeit often

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Parts of this chapter are based both on a lecture first given at the American Philosophical Society, Nov. 9, 2007 – later delivered at Willamette University College of Law, Sept. 10, 2008, and subsequently revised for publication in 153 Proc. Am. Philos. Soc. 147 (2009), also published at 45 Willamette L. Rev. 381 (2009) – and on a lecture given in Nov. 2012 at Victoria University of Wellington (N.Z.) and subsequently published as *Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity*, *in* Evolution and Equilibrium: Copyright This Century 15 (Susy Frankel & Daniel Gervais eds., Cambridge University Press 2014).

embryonic, hold promise. But will these new means of remunerating authors (or for that matter older business models that, while often divesting authors of their rights, also often afforded them an income stream) remain viable in a digital environment in which paying for creativity increasingly seems an act of largesse? Most fundamentally, we need to appreciate authorship, and to recognize that a work in digital form is a thing of value, lest the old adage that "information" (meaning, works of authorship) "wants to be free" presage works of authorship that don't "want" to be created.

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In the beginning was the Reader. And the Reader, in a Pirandello-esque flash of insight, went in search of an Author, for the Reader realized that without an Author, there could be no Readers. But when the Reader met an Author, the Author, anticipating Dr. Johnson, scowled, "No man but a blockhead ever wrote, except for money."

And the Reader calculated the worth of a free supply of blockhead-written works against the value of recognizing the Author's economic self-interest. She concluded that the author's interest is also her interest, that the "public interest" encompasses *both* that of authors and of readers. So she looked upon copyright, and saw that it was good.[1]

This, in essence, is the philosophy that informs the 1710 English Statute of Anne (the first copyright statute) and the 1787 U.S. Constitution's copyright clause. The latter states: "Congress shall have Power … to promote the Progress of Science by securing for limited Times to Authors … the exclusive Right to their Writings …," U.S. Const., art. I, § 8, cl. 8. In the Anglo-American system, copyright enabled the public to have what Thomas Babbington Macaulay heralded as "a supply of good books" and other works that promote the progress of learning.[2] Copyright did this by assuring authors "the exclusive Right to their … Writings" – that is, a property right giving authors sufficient control over and compensation for their works to make it worth their while to be creative.[3]

Vesting copyright in authors – rather than exploiters – was an innovation in the eighteenth century.[4] It made authorship the functional and moral center of the

[1] Samuel Johnson, *in* Bartlett's Familiar Quotations 328 (John Bartlett & Justin Kaplan eds., 17th ed. 2002) (quoting James Boswell, Life of Johnson (Apr. 5, 1776)).

[2] Thomas B. Macaulay, *Speech before the House of Commons (Feb. 5, 1841)*, *in* Macaulay: Prose and Poetry 733–4 (G. M. Young ed., 1970).

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

[4] Before the Statute of Anne, the printing privilege system in force in many European states generally conferred the monopoly on printers, though authors too might receive privileges. Papal printing privileges appear to have been granted to authors at least as frequently as to printers or booksellers. *See* Jane C. Ginsburg, *Proto-property in Literary and Artistic Works: Sixteenth-Century Papal Printing Privileges*, 36 Colum. J.L. & Arts 345 (2013). Nonetheless, the Statute of Anne was the first legislation systematically to vest authors with exclusive rights.

system. But all too often in fact, authors neither control nor derive substantial benefits from their work. In the copyright polemics of today, moreover, authors are curiously absent; the overheated rhetoric that currently characterizes much of the academic and popular press tends to portray copyright as a battleground between evil industry exploiters and free-speaking users.[5] If authors have any role in this scenario, it is at most a walk-on, a cameo appearance as victims of monopolist "content owners."[6] The disappearance of the author moreover justifies disrespect for copyright – after all, those downloading teenagers aren't ripping off the authors and performers; the major record companies have already done that.[7]

Two encroachments, one long-standing, the other a product of the digital era, cramp the author's place in copyright today. First, most authors lack bargaining power; the real economic actors in the copyright system have long been the publishers and other exploiters to whom authors cede their rights. These actors may advance the figure of the author for the moral luster it lends their appeals to lawmakers, but then may promptly despoil the creators of whatever increased protections they may have garnered. Second, the advent of new technologies of creation and dissemination of works of authorship not only threatens traditional revenue models but also calls into question whatever artistic control the author may – or should – retain over her work. After reviewing these challenges, I will consider legal measures

[5] *See, e.g.*, John Tehranian, Infringement Nation: Copyright 2.0 and You 14 (2011) (describing today's copyright laws as "a legal regime that threatens to make criminal infringers of us all"); *id.* at 129 ("[T]he widening ambit of copyright protection has increasingly encroached upon critical First Amendment values, suppressing transformative uses of copyrighted works that advance creativity and free speech rights"); Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (2004); Electronic Frontier Foundation, *Intellectual Property*, *available at* www.eff.org/issues/intellectual-property (last visited Feb. 4, 2015) (noting that dysfunctional IP systems give "IP owners a veto on innovation and free speech"); Amanda Beshears Cook, *Copyright and Freedom of Expression: Saving Free Speech from Advancing Legislation*, 12 Chi.-Kent J. Intell. Prop. 1, 20–21 (2013) (discussing the entertainment industry's efforts to push through legislation that would diminish First Amendment interests); Jenna Wortham, *With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle*, N.Y. Times, Jan. 18, 2012, *available at* www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html?pagewanted=all.

[6] *But see* Peter Baldwin, The Copyright Wars: Three Centuries of Trans-Atlantic Battle (2014) (opposing the author-oriented continental copyright tradition against the public-minded Anglo-American copyright tradition and contending that undue attention to authors restricts access to culture and suppresses expression).

[7] David Cloyd, *Music Thievery Laid Bare: When Pirates Rip Off Working Class Artists*, The Trichordist, Feb. 8, 2014, *available at* http://thetrichordist.com/2014/02/08/music-thievery-laid-bare-when-pirates-rip-off-the-working-class-artist-guest-post-by-david-cloyd/ (noting that many pirates "see themselves as modern-day Robin Hoods, fighting against corporate greed and the tyranny of the big bad music industry"); Cord Jefferson, *The Music Industry's Funny Money*, The Root, July 6, 2010, *available at* www.theroot.com/articles/culture/2010/07/the_root_investigates_who_really_gets_paid_in_the_music_industry.html?GT1=38002 (finding that the musicians receive about 13% of profits whereas the record label and distributors receive a combined 87%).

to protect authors from leonine contracts, as well as measures in the marketplace to obtain compensation for the exploitation of their rights.

2.1. AUTHORS AND COPYRIGHT OWNERSHIP

U.S. Copyright vests in a work's creator as soon as she "fixes" it in any tangible medium of expression.[8] But for many authors, ownership is quickly divested, and for some, it never attaches at all. The latter group of creators are "employees for hire," salaried authors who create works in pursuit of their employment, or freelancers who are commissioned to create certain kinds of works, and who sign a contract specifying that the work will be "for hire."[9] An author who is not an employee for hire starts out with rights that she may transfer by contract; unlike many continental European laws, the U.S. copyright law places few limitations on the scope of the rights she may transfer.[10] Moreover, unlike those foreign laws, the U.S. copyright law contains few mandatory remuneration provisions.[11] Thus it is possible for a U.S. author, "for good and valuable consideration" (which could be the mere fact of disseminating the work) to assign "all right, title and interest in and to the work, in all media, now known or later developed, for the full term of copyright, including any renewals and extensions thereof, for the full territory, which shall be the Universe."[12] I'm not making this up. The Roz Chast *New Yorker* "Ultimate Contract" cartoon was not so far off in further specifying: "and even if one day they find a door in the Universe that leads to a whole new non-Universe place, … or everything falls into a black hole so nobody knows which end is up and we're all dead anyway so who cares, we'll STILL own all those rights…."[13] Worse, with one exception, this is a valid contract. The exception is not the extraterrestrial aspect; authors can, it seems, validly grant rights for Mars (at least if the grant is governed by U.S. law). It concerns the author's inalienable right to terminate grants of U.S. rights thirty-five years after the grant was executed. Thus, even if the contract purports to grant rights in perpetuity and for a lump sum, the author can nonetheless retrieve most of her U.S. rights thirty-five years after the

[8] *See* 17 U.S.C. § 102(a) (2006).

[9] *Id.* at §§ 101, 201(b).

[10] *Compare id.* § 204(a) (grant of exclusive rights must be in writing and signed by grantor) *with* France, Code of Intellectual Property, arts. L 131-1 – L 131–9, L 132-1 – L 132–34, *available at* www.wipo.int/wipolex/en/text.jsp?file_id=179120 (detailed provisions concerning contracts, including rules protecting authors against overreaching transfers).

[11] Certain compulsory licenses include mandatory set-asides or percentages for certain classes of creators. *See, e.g.*, 17 U.S.C. § 114(g)(2) ("Proceeds from Licensing of Transmissions").

[12] For examples of these kinds of contracts, see *Keep Your Copyrights, Clauses about General Assignment of Copyright*, *available at* http://web.law.columbia.edu/keep-your-copyrights/contracts/clauses/by-type/10/overreaching (last visited Feb. 4, 2015).

[13] Roz Chast, *The Ultimate Contract*, The New Yorker, Aug. 11, 2003, *available at* www.condenaststore.com/-sp/The-Ultimate-Contract-New-Yorker-Cartoon-Prints_i8534476_.htm

conclusion of the contract.[14] This is a very important, but otherwise isolated, U.S. legislative nod to authors' weak bargaining position.[15] Unfortunately, authors or their heirs have not always fared well in court when they seek to enforce their termination rights. For example, courts have upheld grantees' assertions that the work was "for hire" and therefore not subject to termination,[16] and they have invalidated termination attempts for failure to comply with the statute's many prerequisites to effective exercise of the right.[17]

It is no accident that the copyright law of the United States and other common law countries favors easy alienability of authors' rights. Our legal system frowns on "restraints on alienation."[18] Perhaps ironically, the ability to freely part with property

[14] *See* 17 U.S.C. § 203. For extensive historical and doctrinal analysis of authors' reversion rights, see, e.g., Lionel Bently & Jane C. Ginsburg, *"The Sole Right Shall Return to the Author": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 Berkeley Tech. L.J. 1475 (2011).

[15] Thus, the U.S. copyright law lacks the kind of author-protective provisions now found in German and French law, which guarantee proportional or fair remuneration as well as some control over new modes of exploitation. See Copyright Act, Sept. 9, 1965, Federal Law Gazette Part I, at 1273 (Ger.), as last amended by Article 8 of the Act of Oct. 1, 2013 (Federal Law Gazette Part I, 3714), arts. 31–41; Code of Intellectual Property, arts. L. 131-1 – 131–6; L. 132-1 – 132-17 (Fr.), as modified by Ordonnance n° 2014–1348 of Nov. 12, 2014 modifying the provisions of the Code of Intellectual Property respecting publishing contracts, *Journal Officiel de la République Française* n°0262, Nov. 13, 2014, page 19101, *available at* www.legifrance.gouv.fr/affichTexte.do;jsessionid=3784253FD9F4E4382CC4719AC49F50A3.tpdjo11v_1?cidTexte=JORFTEXT000029750455&dateTexte=20141114, discussed *infra*. For a review of EU legal restrictions on the scope of authors contracts and obligations to remunerate authors, see generally Séverine Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States (Citizens' Rights and Constitutional Affairs, Policy Department ed., 2014), *available at* www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURI_ET%282014%29493041_EN.pdf

[16] *See, e.g.*, Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 143 (2d Cir. 2013) (concluding that Kirby's comic book characters were works made for hire, and therefore Kirby had no right to terminate transfer of copyright to Marvel); Siegel v. Warner Bros. Entm't, 542 F. Supp. 2d 1098, 1064–79 (C.D. Cal. 2008) (finding that certain "Superman" works were works made for hire, and therefore not within scope of termination right); Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc., 99 U.S.P.Q. 1735, 2010 WL 3564258, at *9 (S.D.N.Y. 2010) (finding that certain works by Bob Marley were works made for hire, and therefore heirs were not entitled to renewal term).

[17] *See, e.g.*, DC Comics v. Pacific Pictures Corp., 545 Fed. App'x 678, 680 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 144 (2014) (holding that agreement between copyright transferee and beneficiary of life pension granted to "Superman" co-creator Joseph Shuster waived right to termination by statutory heirs of termination right); Siegel, 542 F. Supp. 2d at 1118, 1126 (holding that elements of "Superman" comic books fell outside of the scope of termination based on the date of the notices; Statutory heirs of co-creator Jerry Siegel therefore failed to terminate copyright grants as to those elements); Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 622 (2d Cir. 1982) (holding that termination notice's failure to list five *Tarzan* titles failed to terminate the copyright interest in those titles). *See generally* Bently & Ginsburg, *supra* note 14 at 1572–86 (discussing caselaw construing termination rights); *id.* at 1586–87 (concluding that legal limits on scope of transfers might serve authors better than termination rights).

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

is a hallmark of its ownership. That this works to the benefit of the so-called content industries could traditionally be justified as consistent with the overall goals of the copyright scheme. These are not only to promote the care and feeding of authors but also – some would contend, primarily – to ensure the dissemination of works of authorship.[19] After all, the constitutional goal "to promote the progress of science" is not met merely by creating works; someone has to get them from the author's pen (or laptop) into the public's hands. To the extent that authors retard that process by endeavoring to withhold some rights, or make it more expensive by demanding more pay for rights granted, they can seem like pesky interlopers. Australian writer Miles Franklin (best known for her novel *My Brilliant Career*) captured this annoyance in *Bring the Monkey*, her 1933 parody of the English country house murder mystery. The conversation she imagined among members of Britain's budding motion picture industry anticipates what today's motion picture and television producers may have been fantasizing when the members of the Writers Guild went on strike a few years ago for a decent share of the income from new media "platforms" such as the Internet. Miles Franklin wrote:

> [T]hey [the "film magnates"] were generally agreed that the total elimination of the author would be a tremendous advance. . . .
>
> "Authors," said this gentleman, "are the bummest lot of cranks I have ever been up against. Why the heck they aren't content to beat it once they get a price for their stuff, gets my goat." . . .
>
> There was ready agreement that authors were a wanton tax on any industry, whether publishing, drama or pictures . . . .
>
> "I understand your point of view," [the film producer] said suavely. "That is why I want you to see my film – one reason." "It has been assembled by experts in the industry, not written by some wayward outsider." . . .
>
> [And, indeed, in the film] [t]here was no suggestion of an author. [Instead, the suave producer] was listed twice, as continuity expert and producer.[20]

[19] *See, e.g.*, R. Anthony Reese, *A Map of the Frontiers of Copyright*, 85 Tex. L. Rev. 1979, 1982–84 (2007); Jessica Litman, *Readers' Copyright*, 58 J. Copyright Soc'y 325, 339 (2011); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 Wis. L. Rev. 141, 143 ("[T]he purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited."); Malla Pollack, *What Is Congress Supposed to Promote? Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754, 773, 809 (2001) (equating "progress" in the constitutional sense with the dissemination of ideas). *But see* Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 Houston L. Rev. 613 (2014) (Congress does not have power to enact copyright laws for the benefit of disseminators if they do not also benefit authors).

[20] Miles Franklin, Bring the Monkey 38–40, 74 (1933).

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

2.2. WHAT IF AUTHORS RETAINED THEIR COPYRIGHTS?

What difference would it make were authors to retain their copyrights? If it is easy to discredit copyright on the ground that authors have always served as a shill for large, unlovable corporations,[21] would copyright's detractors rally to the cause of exclusive rights to control the exploitation of works of authorship were authors the true beneficiaries?[22] While authors' divestiture may enable copyright antagonists to unmask the corporate wolves who strut the moral high ground in the sheep's clothing of romantic authorship,[23] I doubt that restoring romantic authors to their estates will in fact enhance the popularity of their property rights. After all, proprietary authorship implies not only economic power, but also control over the work's artistic expression. That, in turn, may rankle not only the apostles of remix, but also those who contest the concept of individual creativity in an environment that, as Peter Jaszi predicted in the Paleolithic early 1990s, is making authorship an enterprise that is "polyvocal … increasingly collective … and collaborative."[24] With the increasing Wikipediafication of content, the "wisdom of crowds"[25] overtakes individual expertise in the production of works that everyone can pitch in to create, add to, or modify.

The advent of what I will call the "techno postmodernist participant," challenges proprietary authorship in two ways. First, if creativity now is so dispersed, then no one can claim to have originated a work of authorship, so perhaps no one can fairly own a copyright, either. Second, the communal culture undermines the incentive rationale for copyright. The Internet may have topped up our supply of Johnsonian "blockheads."[26] In addition to the poets who burn with inner fire, for whom creation is allegedly its own reward, and others (such as law professors) for whom other gainful employment permits authorial altruism, we now have Internet exhibitionists (call

[21] *See, e.g.*, W. Patry, Moral Panics and the Copyright Wars 76 (2009).

[22] *See, e.g.*, Jessica Litman, *War and Peace*, 53 J. Copyright Soc'y 1, 19–20 (2006) (suggesting copyright would win more hearts and minds were authors truly its beneficiaries).

[23] For exculpation of the "romantic author," see Lionel Bently, *R. v. The Author: From Death Penalty to Community Service*, 32 Colum. J.L. & Arts 1 (2008).

[24] Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 Cardozo Arts & Ent. L.J. 293, 302 (1992).

[25] James Surowiecki, The Wisdom of Crowds (2004).

[26] *See* Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 Vand. J. Ent. Tech. L. 841, 852–54 (2008) (explaining that technological

them bloggers) and "crowdsources," masses of incremental contributors whose participation, whether occasional or obsessive, belies the Johnsonian calculus. These creators supposedly do not need the carrot of exclusive rights in order to produce works of authorship.

This is, of course, a very short-sighted view, for it describes motivations at a particular point in time. Filthy lucre may not have spurred the first endeavor; many new creators hunger for exposure over income. But to *remain* a creator requires material, as well as moral, sustenance. We may cheer those who generously give their works to the public; we may pause, however when they seek to impose that generosity on other authors' works.

Moreover, just as "copyright industries" may cynically have appropriated the rhetoric of romantic authorship, so may technology interests convert calls for communitarianism to their own benefit. A pre-Internet copyright-exploiting technology furnishes an example: as French legal historian Laurent Pfister has demonstrated, the rhetoric accompanying the rise of the radio in the 1920s and 1930s seems freshly ripped from a current blog. "The moral claims of the community trump the selfish interests of authors who should be obliged to abandon their works so that they may be distributed to the collectivity," urged a representative of the French broadcasting industry.[27] Authors' property rights reflect a spirit of individualism out of step with the times, he declared: "the author has moral obligations to the society which forms the cultural basis for his work. Society has the right to demand that he contribute his works to the cultural capital of the nation."[28] Even then, however, a jaundiced commentator observed "it is pure Pharisee-ism to claim that [the challenges to exclusive rights] had the goal of spreading knowledge of works of authorship; they never had any goal or result other than to allow industry to profit from the labors of authors."[29]

I would like to suggest that today's counterpart – or antidote? – to the romantic author, the techno postmodernist participant, is also a shill for big industry. The

advances have decreased the cost of producing and distributing expressive works, resulting in more blockhead authors). *But see* Graeme Austin, *Property on the Line: Life on the Frontier Between Copyright and the Public Domain*, 44 Victoria Univ. Wellington L. Rev. 1, 12 (2013) (contrasting the "kid in the United States college dorm room, with ready access to bandwidth, hardware and software" with resource-strapped working adults, and pointing out that not all would-be creators can afford to be "blockheads": "Surplus time and money for amateur creativity probably sit somewhere near the top of the Maslovian hierarchy. Not all of us ever reach those toney heights. To champion amateur user-generated content uncritically, without interrogating these class implications, seems like an irresponsible basis for the formulation of social policy.").

[27] Laurent Pfister, *La 'Révolution' de la communication radiophonique, une onde de choc sur le droit d'auteur?*, *in* La communication numérique. Un Droit, des droits, 183, 195 (B. Teyssié ed. 2012), *citing* F. Lubinski, *Droit d'auteur et radiodiffusion. Proposition de modification de l'article 11 bis de la Convention de Berne*, Rev. Jur. Int. Radiodif. 41 (1934, translation mine).

[28] *Id.*

[29] *Id.*, *citing* Paul Olagnier, Le droit d'auteur, vol. 1 (Paris: LGDJ), 73 (1934, translation mine).

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instrumentalization of the author, or of the anti-author, still serves big business,[30] it is just that the business consumes copyrighted works, rather than producing them.

In the welter of interested challenges to authors' property rights in their creations, we should not forget that copyright advances the concerns of the collectivity: it promotes artistic freedom and free speech by enabling authors to earn (or perhaps more often, eke out) a living from their creativity.[31] As Victor Hugo proclaimed at the International Literary Congress convened in 1878 to urge international protection for authors:

> Literary property is in the public interest. All the old monarchic laws have rejected, and continue to reject literary property. To what end? In order to enslave. The writer who is an owner [of his literary property] is a writer who is free. To take his property away is to deprive him of his independence.[32]

So let us take seriously the proposition that proprietary authorship furthers the commonweal. That rather than suppressing speech, it advances it; by providing professional creators with the prospect of earning a living, it promotes a diversity of expressions that might otherwise remain unvoiced. Poverty is a kind of censorship, too.[33]

Regarding authorship in the digital era, I doubt neither that the web vastly enlarges the numbers of people who commit acts of authorship, nor that digital media promote new kinds of authorship, from wikis to mashups to fanzines to

[30] *Cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal. L. Rev. 1331, 1335–56 (2004) ("Just as the trope of the romantic author has served to bolster the property rights claims of the powerful, so too does the romance of the public domain. Resourcefully, the romantic public domain trope steps in exactly where the romantic author trope falters. Where genius cannot justify the property claims of corporations because the knowledge pre-exists any ownership claims, the public domain can.").

[31] Tj Stiles, *Among the Digital Luddites*, 38 Colum. J.L. & Arts 293 (2015).

[32] Société des Gens de Lettres de France, Congrès Littéraire International de Paris 1878 (Paris, 1879), 106 (translation mine).

[33] *See The impact of intellectual property regimes on the enjoyment of right to science and culture, submission by the Kernochan Center for Law, Media and the Arts at Columbia University School of Law to the UN Special Rapporteur on the International Covenant on Economic, Social and Cultural Rights on the Impact of Intellectual Property Regimes on the Enjoyment of Rights to Science and Culture* at 4 (Sept. 2014): "Censorship can be achieved by outright bans of authorial work. It can also be achieved by denying authors the ability to reach a market for their works through techniques such as putting authors on 'gray lists' that prevent them from finding publishers for their works. An especially effective way to censor creative authorship is to eliminate material rewards, so that few people, other than the economically elite, can undertake to be an author."

See also, Austin, *Property on the Line*, *supra* note 26, at 15 (citations omitted): The International Covenant on Economic, Social and Cultural Rights

> invites us to take seriously the idea that liberty interests can be furthered by participation in functional markets for creative work.... [T]he right to participate in private markets for creative work helps to carve out for authors "a zone of personal autonomy in which authors ... control their productive output, and lead independent, intellectual lives." These are things any free society needs, and they are nurtured by a system that enables authors to derive at least some of their income from a paying public (assuming they can find one) rather than

kinetic graphics to blogs and beyond. Professional authorship will nonetheless persist, I believe, whether because we still value individual genius (or at least expertise), and/or because not all readers/viewers/listeners will want to be participatory all the time. Recombinant and instant authorship may or may not be passing fancies; professional authors will still be with us. Moreover, they will be joined by a host of newcomers, for example, as bloggers become novelists or write book-length nonfiction, or simply persist in their online endeavors that they succeed in monetizing. At least, professional authors will remain as long as the writing and other creative trades furnish adequate remuneration.[34] As my former colleague, legal philosopher Jeremy Waldron, put it, the author may be dead, but she still responds to economic incentives. The question for the future of copyright, and for the author's place in it, is how to make those incentives meaningful for creators.

2.3. MAKING COPYRIGHT WORK FOR AUTHORS

That question entails two others. First, will authors retain their copyrights in the digital environment? Second, even if authors are copyright owners, will they be able to avail themselves of business models that succeed in reaping meaningful remuneration despite widescale unauthorized and unpaid use of their works?

2.3.1. *Authors and Publishers*

Some of the same factors that today cause copyright to be derided may also come to the aid of individual authors. The technology that brings works directly to users'

> depending entirely on political or other forms of patronage. In other words, if the public domain were *all* we had, if property in creative outputs were dispatched over the line, we risk creating a new kind of thralldom.

[34] Writers themselves query whether professional authors will survive if, notwithstanding viral readerships, no one pays them for their work. *See, e.g.*, ROB LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK 252–53 (2011) (arguing that the internet diminishes creators' potential to profit from their work because illegal activities and free content undermine the legitimate market); Barbara Garson, *If Only Pageviews Were Dollars*, PUBLISHERS WEEKLY, Sept. 12, 2014, *available at* http://publishersweekly.com/pw/by-topic/columns-and-blogs/soapbox/article/63987-content-provider-goes-bacterial-but-who-will-pay-her.html ("In the online era, who will send first-time authors those small checks that prove to their parents (and themselves) that they're professionals? … [H]ow will we pay writers in a world awash in free words?"); Authors' Licensing and Collecting Society, WHAT ARE WORDS WORTH?: COUNTING THE COST OF A WRITING CAREER IN THE 21ST CENTURY: A SURVEY OF 25,000 WRITERS 9 (2007), *available at* www.alcs.co.uk/Documents/Downloads/whatarewordsworth.aspx (surveying authors in Europe and finding that less than 15% of authors have received compensation for online uses of their work); ROBERT MCCRUM, FROM BESTSELLER TO BUST: IS THIS THE END OF AN AUTHOR'S LIFE?, Mar. 2, 2014, *available at* www.theguardian.com/books/2014/mar/02/bestseller-novel-to-bust-author-life (citing the rise of free content on the Internet as a challenge for authors today and finding that writing is increasingly unprofitable for unknown authors).

computers and personal portable devices no longer requires traditional publishing's infrastructure of intermediaries. Techno postmodernism notwithstanding, maybe every reader is not truly an author, but every author can be a publisher. At least, every computer-equipped author can make her work directly available to her audience via the Internet. Availing oneself of the means of distribution is one thing, but making a *living* from the works one distributes is another,[35] particularly when the media that empower authors also empower users to acquire and disseminate works for free. Moreover, not every author or performer will want to self-publish. Many will prefer the assistance of distribution intermediaries (e.g., book publishers and record producers) to attend not only to the production and distribution, which authors and performers might now do themselves, but also to provide the credibility, publicity, and most importantly, the advances, that come from signing a publishing contract.

But must that signing also condemn the author to the Roz Chast-ian bargain evoked earlier? While, with the exception of the termination right, Congress has not sought to redress the imbalance of power between publishers and most authors, other countries' legislatures, particularly in the EU, have.[36] The French law on authors' contracts, including recent amendments to the regime of publishing contracts, warrants wistful contemplation as an example of how a copyright law might endeavor to ensure that authors either retain their copyrights or receive fair compensation for their alienation.

The French Code of Intellectual Property safeguards authors against leonine transfers in a variety of ways. In addition to mandating that publishing contracts, performance rights contracts, and audiovisual production contracts be in writing,[37] the law further requires that each right granted be distinctly specified in the contract, and that the scope of the grant be defined with respect to its purpose, its geographic

[35] *See, e.g.*, Brian Stelter, *For Web TV, a Handful of Hits but No Formula for Success*, N.Y. Times, Aug. 31, 2008, *available at* www.nytimes.com/2008/09/01/business/media/01webisodes.html?pagewanted=all (Striking Hollywood writers created independent "webisodes." "The strategy seemed simple: make money by going straight to the Internet. Months later, they are realizing that producing Web content may be easy but profiting from it is hard."); Trent Hamm, *The Truth About Making Money Online*, The Christian Science Monitor, Oct. 29, 2013, *available at* www.csmonitor.com/Business/The-Simple-Dollar/2013/1029/The-truth-about-making-money-online (describing how "the only way to make money consistently online is to produce a lot of content on a very consistent basis" and that proceeds are often realized in the long-term, not immediately after publication); Jim Edwards, *Yes, You Can Make Six Figures as a YouTube Star … And Still End Up Poor*, Business Insider, Feb. 10, 2014, *available at* www.businessinsider.com/how-much-money-youtube-stars-actually-make-2014-2 (finding that even YouTube content providers that generate high gross revenue see less than 50% of that revenue, resulting in unsustainable costs for building a business).

[36] *See supra* note 15. In addition, collective management associations representing authors and collectively licensing their rights are far more prevalent outside the U.S.

[37] France, Code of Intellectual Property, art. L131-2. U.S. Copyright law requires that the grant of any exclusive right must be in writing and signed by the grantor, 17 U.S.C. § 204(a).

extent, and its duration.[38] As a general rule, authors are to receive royalties, rather than a lump sum payment.[39] Amendments to the statutory provisions on publishing contracts, introduced at the end of 2014, further detail authors' rights in print and digital editions of literary works. These modifications seek to ensure that publishers will in fact exercise the rights that authors grant them, and will fairly account to authors for the fruits of those exploitations. Failure to publish the work within a certain time, or to pursue the exploitation of the rights in a consistent manner (exploitation permanente et suivie), or to reissue a book that has gone out of print, will result in reversion of print or electronic rights to the author.[40] The new provisions require the grant to distinguish print from digital editions, and impose additional author protections with respect to the latter. Notably, the contract must guarantee authors just and fair remuneration for all the revenues deriving from the commercialization and dissemination of digital editions.[41] In addition, contracts granting electronic rights must include a clause providing for periodic review of the economic conditions of the grant;[42] an accord between associations of authors and of publishers will determine the frequency of the reviews and will provide guidelines for dispute resolution.[43] The law also promotes the development of digital editions because a grantee who fails to disseminate a digital edition within the time set out in an accord between associations of authors and of publishers will lose those rights back to the author.[44] Moreover, as to contracts concluded before the law's effective date, the

[38] *Id*. art. L131-3 ("La transmission des droits de l'auteur est subordonnée à la condition que chacun des droits cédés fasse l'objet d'une mention distincte dans l'acte de cession et que le domaine d'exploitation des droits cédés soit délimité quant à son étendue et à sa destination, quant au lieu et quant à la durée"). The author may grant rights for future modes of exploitation unknown at the time of the contract, but such a grant must be explicit, and must provide for a share in the profits of the new form of exploitation. Id. art. L131-6 ("La clause d'une cession qui tend à conférer le droit d'exploiter l'œuvre sous une forme non prévisible ou non prévue à la date du contrat doit être expresse et stipuler une participation corrélative aux profits d'exploitation.").

[39] *Id*. art. L131-4 ("La cession par l'auteur de ses droits sur son œuvre peut être totale ou partielle. Elle doit comporter au profit de l'auteur la participation proportionnelle aux recettes provenant de la vente ou de l'exploitation.").

[40] *Id*. art. 132-17-1 – 5 (see www.legifrance.gouv.fr/affichCode.do;jsessionid=2D013356C523C269C96912FA8B0AE456.tpdj004v_3?idSectionTA=LEGISCTA000029759371&cidTexte=LEGITEXT000006069414&dateTexte=20150208).

[41] *Id*. art. 132-17-6 ("Le contrat d'édition garantit à l'auteur une rémunération juste et équitable sur l'ensemble des recettes provenant de la commercialisation et de la diffusion d'un livre édité sous une forme numérique.").

[42] *Id*. art. L.132-17-7 ("Le contrat d'édition comporte une clause de réexamen des conditions économiques de la cession des droits d'exploitation du livre sous une forme numérique.").

[43] *Id*. art. L. 132-17-8(8) ("L'accord mentionné au I fixe les modalités d'application des dispositions: 8° De l'article L. 132-17-7 relatives au réexamen des conditions économiques de la cession des droits d'exploitation d'un livre sous forme numérique, notamment la périodicité de ce réexamen, son objet et son régime ainsi que les modalités de règlement des différends.").

[44] *Id*. art. L. 132-17-5 ("Lorsque l'éditeur n'a pas procédé à cette réalisation [du livre sous une forme numérique], la cession des droits d'exploitation sous une forme numérique est résiliée de plein droit.").

law empowers authors two years thereafter to demand that the publisher produce a digital edition; the publisher's failure to do so within three months following proper notification results in reversion of the digital rights to the author.[45]

2.3.2. *Authors as Publishers*

Whether or not measures like France's will inspire the U.S. Congress, were it to embark on "the next great copyright act,"[46] to add author-protections to the rules on transfers of copyright, some authors will in any event choose to forego intermediary publishers (and others will fail to attract them). Having kept their copyrights, what are their prospects for exploiting them? To an increasing extent, every author can employ electronic copyright management, and/or copyright management collectives to set the financial and other terms and conditions for access to and copying of her work. Or, more rudimentarily, she can make the work available without technological restraints, and appeal to user generosity,[47] though, as Radiohead and Stephen King discovered, passing the hat may prove a precarious strategy.[48]

[45] Ordonnance n° 2014-1348 of Nov. 2, 2014, transitional provisions, art. 9. Arts. 11 and 12 provide for application of other author protections to contracts concluded before the law's effective date.

[46] *See* Maria A. Pallante, *The Next Great Copyright Act (26th Horace S. Manges Lecture)*, 36 COLUM. J.L. & ARTS 315 (2013).

[47] Crowdfunding sites, such as Kickstarter and similar websites (Go Fund Me, Indiegogo) can assist authors to generate the funding necessary to create their works in the first place, but are not a useful source of remuneration. On crowdfunding sites, creators are expected to estimate the amount they need to complete a specific project, and induce people to pledge to that project in exchange for rewards (e.g., prints of an art project or free downloads of a song). *See, e.g.*, Kickstarter, *Creator Questions*, *available at* www.kickstarter.com/help/faq/creator%20questions (last visited Feb. 4, 2015). On Kickstarter at least, the creator receives money only if the full amount asked for is funded. If pledges fall short, no money changes hands. For success rates, see Kickstarter, Stats, *available at* www.kickstarter.com/help/stats (last visited Feb. 4, 2015). If pledges exceed the cost of creation, then the creator may keep the difference. However, there are many costs additional to the cost of creation, for example fees to the hosting website or rewards to backers. Amanda Palmer made more than ten times what she needed during a Kickstarter campaign, but once all costs of the project, hosting, and rewards were paid, she cleared only about $100,000 (an 8% profit). Salvador Briggman, *How to Make Money on Kickstarter*, CROWDCRUX, *available at* www.crowdcrux.com/make-money-kickstarter/ (last visited Oct. 30, 2014). *Cf.* Cord Jefferson, *Amanda Palmer's Million-Dollar Music Project and Kickstarter's Accountability Problem*, GAWKER, Sept. 19, 2012, *available at* http://gawker.com/5944050/amanda-palmers-million-dollar-music-project-and-kickstarters-accountability-problem (questioning whether Amanda Palmer's reporting of an 8% profit was honest and pointing out that Kickstarter does not guarantee that the project actually gets completed or that the money is used to fund it).

[48] *See, e.g.*, Joshua Gans, *Pay-What-You-Want Experiments, From Stephen King to Kickstarter*, HARVARD BUSINESS REVIEW, May 3, 2011, *available at* https://hbr.org/2011/05/pay-what-you-want-experiments (describing Stephen King's abandoned experiment with pay-what-you-want); Eric Garland, *The "In Rainbows" Experiment: Did It Work?*, NPR, Nov. 16, 2009, *available at* www.npr.org/blogs/monitormix/2009/11/the_in_rainbows_experiment_did.html (finding that although Radiohead, as a part of its pay-what-you-want scheme, "offered a legal free and low-cost option to obtain the album from its Web

Nonetheless, some variations on pass-the-hat may succeed. For example, The Humble Bundle service offers bundles of digital content, primarily video games and comic books. It makes each bundle available online for a limited amount of time. The user selects the price he is willing to pay (there is no suggested price, but the minimum is $1) and the division of his payment among the content creators, and website-designated charities. The pricing scheme has generated some revenue,[49] but many users continue to pirate works.[50]

Pay-what-you-want, moreover, may disadvantage lesser-known creators, since the desire to pay may decrease with the celebrity of the beneficiary.[51] As one commentator put it, pay-what-you-want can work where there is "a fair minded customer, strong relationship with customer, a product that can be sold credibly at a wide

site, piracy was up … at 10 times the rate of new releases from other top artists"). However some commentators believe Radiohead's experiment was in fact a success, in part because of the interest generated by the novel payment option. *See* Daniel Kreps, *Radiohead Publishers Reveal "In Rainbows" Numbers*, Rolling Stone, Oct. 15, 2008, *available at* www.rollingstone.com/music/news/radiohead-publishers-reveal-in-rainbows-numbers-20081015 (reporting that although "more people downloaded the album for free than paid for it … [$3 million in sales] is a hugely-successful number considering the album was both given away for free and that it was actually downloaded more times via Bit Torrent than free and legally through Radiohead's own site.").

[49] In 2013, a Humble Bundle co-founder stated that the service had grossed over $50 Million. Interview by John Walker with John Graham, Co-Founder, Humble Bundle, Aug. 23, 2013, *available at* www.rockpapershotgun.com/2013/08/23/interview-humble-bundle-on-humble-bundles/. A currently-available bundle on Humble Bundle has received an average of over $6 per download. *Statistics*, Humble Bundle, *available at* www.humblebundle.com/ (last visited Feb. 4, 2015).

[50] The first bundle available online had a 75% sales rate, but nonetheless grossed $1.3 Million in revenue. Sam Machkovech, *Beyond Radiohead: Video Games One-Up the Pay-What-You-Want Model*, The Atlantic, Dec. 14, 2010, *available at* www.theatlantic.com/entertainment/archive/2010/12/beyond-radiohead-video-games-one-up-the-pay-what-you-want-model/67921/.
Comedians have experimented with pay-what-you-want as well. In 2011, Louis C.K. offered videos of a live performance online and grossed over $1 million in the first two weeks. Press Release, A Statement from Louis C.K., Dec. 13, 2011, *available at* https://buy.louisck.net/news/a-statement-from-louis-c-k. He stated online that, "If anybody stole it, it wasn't many of you. Pretty much everybody bought it." He also stated that his profits (taking into account only short-term profits) were less than he would have made by allowing a large company to film and distribute the performance, but that they would have charged the consumer about $20 for an encrypted and restricted-use copy. Press Release, Another Statement from Louis C.K., Dec. 21, 2011, *available at* https://buy.louisck.net/news/another-statement-from-louis-c-k.

[51] For comedians specifically, it seems that less high-profile performers than Louis C.K. are using pay-what-you-want with mixed success. Comedian Steve Hofstetter released an album under a pay-what-you-want model (with a minimum of 1 cent) even earlier than Louis C.K. Although at the time, he was relatively unknown, he was coming off a successful first album. In the early stages of the offering, he averaged $6 per album, which is more than triple the royalty he would receive if it were distributed by a label. Daniel Langendorf, *Comedian Hofstetter Experiments with Pay-What-You-Want–And Provides Numbers*, Last100, Dec. 14, 2007, *available at* www.last100.com/2007/12/14/comedian-hofstetter-experiments-with-pay-what-you-want-and-provides-numbers/.

range of prices, or a product with low marginal cost."[52] Even then, generosity does not always abound, neither in the proportion of users who pay, nor in the amount expended by those who do pay. For example, the website Tech Dirt, a blog and news source on technology news, provided a pay-what-you-scheme in its "Insider Shop." Customers could choose several options ($0, $5, $10, $20, or $50), although the $5 default payment somewhat masked the zero option. The site optimistically advertised the experiment as a success, although 51% of downloaders paid nothing and the average price paid was $2.41.[53]

Another variation on pay-what-you-want is Flattr, an online service to which internet consumers pay a fixed monthly fee. As Flattr's users peruse websites and see creations they like, they click the "Flattr" button (like the Facebook "like" button). Flattr tallies up all of the users' clicks in a month and divides their monthly subscription fees among the owners of the creations they clicked.[54] The service is a far cry from systematic remuneration for authors; indeed Flattr seems to characterize the payments more as donations than as license fees.[55]

"Freemium," a hybrid free-access/paid-access model, which allows access to the bottom tier of content for free, but charges per unit or by subscription for more or better content, or for content without advertising, offers another approach for authors' self-financing on the Internet.[56] The model has perhaps encountered its greatest

[52] Isamer Bilog, *Are "Pay What You Want" Models the Road to Success?*, Spinnakr Blog, May 2013, *available at* http://spinnakr.com/blog/ideas/2013/05/pay-what-you-want-pricing-model/ (describing various examples of successful pay-what-you-want models).

[53] By contrast, Cards against Humanity (an adult card game similar to Apples to Apples) offered an expansion pack under a pay-what-you-want model. It used social pressure to discourage people from the zero price, by shaming customers who attempted to pay nothing at all. Although almost 20% of customers still paid nothing, the average price paid was $3.89 (greater than the $3 per unit cost of manufacturing and shipping). *Holiday Stats*, Cards Against Humanity, *available at* http://cardsagainsthumanity.com/holidaystats (last visited Jan. 30, 2015).

[54] *How Flattr Works*, Flattr, *available at* https://flattr.com/howflattrworks (last visited Nov. 2, 2014).

[55] *See, e.g.*, Mike Butcher, *Flattr Now Monetizes the Like Economy by Connecting Social Accounts With Payments*, Tech Crunch, Mar. 18, 2013, *available at* http://techcrunch.com/2013/03/18/flattr-now-monetizes-the-like-economy-by-connecting-social-accounts-with-payments/ (noting that "Flattr users can now give and receive micro-donations directly on other web services they already use … [including] Twitter, Instagram, Soundcloud, Github, Flickr, Vimeo, 500px and App.net" but "it's unlikely to make anyone rich just yet because it will require many more people to open Flattr accounts"); L.M., *Go on, Flattr Yourself*, The Economist, Jan. 21, 2011, *available at* www.economist.com/blogs/babbage/2011/01/another_approach_micropayments (noting that "[f]or Flattr to have an impact on the way online content is consumed and produced, however, it would need to become massive").

[56] Currently, the principal successful exploiters of "freemium" models appear to be web services, rather than individual creators. Jason Cohen, *Reframing the Problems With "Freemium" By Charging the Marketing Department*, VentureBeat, Apr. 19, 2013, *available at* http://venturebeat.com/2013/04/19/reframing-the-problems-with-freemium-by-charging-the-marketing-department/ (arguing that freemium is essentially a marketing strategy, and, given its expense, a difficult one to surmount without substantial resources and know-how); Sarah E. Needleman & Angus Loten, *Why*

success with digital phone applications.[57] The content provider hopes to attract a large number of free users and convert a percentage of them to premium users.[58] The freemium model typically begins as a loss-leader, until enough users become premium users to turn a profit.[59] Its success thus depends on attracting and retaining customers and efficiently developing and marketing the premium content.

Following its unhappy essay with pass-the-hat, Nine Inch Nails experimented with the freemium model for its album release of Ghosts I-IV. In conjunction with the release, the band proposed a number of different packages to consumers, including offering the first nine tracks of the album for free on their website and through BitTorrent. Premium packages ranged from $5 for a full album download to a $300 "ultra deluxe" package including CDs, vinyl LPs, and signed prints.[60] Within the first week, lead singer Trent Reznor made over $1.6 million on the release.[61]

Freemium Fails, Wall St. J., Aug. 22, 2013, *available at* http://online.wsj.com/news/articles/SB10000872396390443713704577603782317318996?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10000872396390443713704577603782317318996.html (concluding that freemium is a "costly trap" which can destroy businesses that lack the sophistication to implement it properly and that it is rarely executed well by start-ups in part because "[t]he freemium approach doesn't make sense for any business that can't eventually reach millions of users"). One example is Spotify Premium. With a free Spotify account, a user can stream unlimited music. However, every 10 minutes or so, there is a minute of advertising. A subscription to Spotify Premium for $9.99 per month removes advertising interruptions. It also allows users to download songs to listen to offline on their computers or phones. *See Premium*, Spotify, *available at* www.spotify.com/us/?_ga=1.146397108.1257926096.1414689432#premium (last visited Oct. 30, 2014). Additional examples are Pandora, Angry Birds, and Xobni (a smart address-book service that compiles contact and social information from LinkedIn, Facebook, and Twitter), which remove advertising from the interface once the user pays for a premium account. *See* Michael Learmonth, *Why the "Freemium" Model is Bad for Advertisers*, AdvertisingAge, Apr. 23, 2013, *available at* http://adage.com/article/digital/freemium-model-bad-advertisers/241042/.

57 For recent statistics on how the monetization of mobile apps through the freemium model is working, see John Koetsier, *Mobile App Monetization: Freemium is King, But In-App Ads Are Growing Fast*, Venture Beat, Mar. 27, 2014, *available at* http://venturebeat.com/2014/03/27/mobile-app-monetization-freemium-is-king-but-in-app-ads-are-growing-fast/.

58 It has been suggested that the most profitable model is continually to attract a large number of users, and focus on converting a modest percentage (research suggests successful companies range from 2% to 5%); indeed, even free users are valuable if they refer new users to the content. Vineet Kumar, *Making "Freemium" Work*, Harvard Business Review, May 2014, at 27.

59 Glenn Peoples, *Business Matters: Spotify UK Shows that the Freemium Model is Not "Unsustainable,"* Billboard Biz, Oct. 9, 2012, *available at* www.billboard.com/biz/articles/news/1083467/business-matters-spotify-uk-shows-that-the-freemium-model-is-not (analyzing Spotify UK's profits over multi-year period and finding loss in early years does not indicate overall unprofitability of the freemium business model).

60 Daniel Kreps, *Nine Inch Nails Surprise Fans by Web-Releasing New "Ghosts" Album*, Rolling Stone, Mar. 3, 2008, *available at* www.rollingstone.com/music/news/nine-inch-nails-surprise-fans-by-web-releasing-new-ghosts-album-20080303.

61 *See* Daniel Kreps, *Nine Inch Nails' "Ghosts I-IV" Makes Trent Reznor a Millionaire*, Rolling Stone, Mar. 13, 2008, *available at* www.rollingstone.com/music/news/nine-inch-nails-ghosts-i-iv-makes-trent-reznor-an-instant-millionaire-20080313. The 2500 "ultra deluxe" packages available sold out within 30 hours of the release. *Id.*

Like pay-what-you-want, however, this approach may primarily benefit creators, and especially performers, who already enjoy a substantial fan base. But the scheme can apply more broadly, at least to recording artists. For example, Bandcamp, a music streaming and download website, allows artists to develop their own freemium pricing schemes. Artists upload their music and choose whether to price it free, pay-what-you-want, or for a fixed price.[62]

Freemium models, by placing some content behind paywalls, rely to a greater or lesser extent on technological protection measures to secure the paywall.[63] There has been much debate over whether technological protection measures (also referred to as DRM – digital rights management) are worth the candle, given their unpopularity and the relative ease with which consumers can elude them.[64] Some have contended that DRM decreases music sales, especially for less popular albums because it prevents sharing of the album when uninhibited redistribution would provide more exposure (and, supposedly, in the long run, sales) for the performing artists.[65] In fact, some technological measures are more obnoxious than others. Many people

[62] Bandcamp claims to have made $82 Million for musicians so far. *Artists*, Bandcamp, *available at* http://bandcamp.com/artists (last visited Sept. 30, 2014).

[63] *See generally* Ashkan Soltani, *Protecting Your Privacy Could Make You the Bad Guy*, Wired, July 23, 2013, *available at* www.wired.com/2013/07/the-catch-22-of-internet-commerce-and-privacy-could-mean-youre-the-bad-guy/ (describing various technological measures used to enforce paywalls including tracking cookies and browser fingerprinting). Some companies offer software to website and app developers that allows content providers to protect and monetize freemium content. *See, e.g.*, *INSIDE Secure Protects Premium Content for Snap, Sky Deutschland's Online Media Application*, MarketWatch, June 4, 2014, *available at* www.marketwatch.com/story/inside-secure-protects-premium-content-for-snap-sky-deutschlands-online-media-application-2014-06-04 (reporting on software used to protect online and mobile premium video content); *Solutions*, Ooyala, *available at* www.ooyala.com/solutions (last visited Nov. 2, 2014) (offering software "protect premium content from unauthorized access").

[64] Even though the eluding, or aiding the eluding by distributing descramblers, is illegal, see 17 U.S.C. § 1201(a)(b). For recent entrants in the ongoing debate over the desirability and effectiveness of DRM, see, e.g., Andrew V. Moshirnia, *Giant Pink Scorpions: Fighting Piracy with Novel Digital Rights Management Technology*, 23 DePaul J. Art Tech. & Intell. Prop. L. 1, 6–7 (2012) (describing various methods of DRM and noting that it has been largely ineffectual and that "[a] technologically-impervious DRM is unlikely to emerge"); (Jerry) Jie Hua, *Toward A More Balanced Model: The Revision of Anti-Circumvention Rules*, 60 J. Copyright Soc'y U.S.A., 327, 328–30 (2013) (describing DRM as a preventative measure against piracy and noting criticism of the DMCA's overprotection of DRM technologies).

[65] Andrew Flanagan, *DRM Was a Bad Move: Sales Found to Increase 10% After Dropping the Chains (Study)*, Billboard, Dec. 2, 2013, *available at* www.billboard.com/biz/articles/news/digital-and-mobile/5812288/drm-was-a-bad-move-sales-found-to-increase-10-after (reporting study finding that absence of DRM increased sales by 30% for albums that sold less than 25,000 copies and by 24% for albums that sold less than 100,000 copies; the study found no discernable increase in sales for the most successful albums, reasoning that those albums are already known and do not need sharing to increase awareness).

deplore copy controls on downloads.[66] For example, in 2009, Apple and Steve Jobs, whose iPod had been the most noteworthy and successful utilizer of download control technology, began offering DRM-free music in the iTunes Store.[67] DRM in the e-books market has also provoked opposition on the grounds that the protection measures prevent sharing and resale of e-books and reduce compatibility between devices.[68] By contrast, most people seem not to notice, much less denounce, the technology that controls streaming media[69] for example, the Netflix subscription that lets you watch unlimited quantities of movies but does not let you create retention copies[70] or the YouTube video clips that you can watch in more or less real time, but not download to keep.[71] And, to return to freemium, restricting access to the upper tier of content, or requiring payment after a certain number of free views or downloads (an increasing practice in the beleaguered journalism business[72]) seems to be gaining

[66] There is even a "Day Against DRM." *See* Katherine Noyes, *Four Ways to Celebrate "Day Against DRM" Today*, PC World, May 4, 2012, *available at* www.pcworld.com/article/255066/four_ways_to_celebrate_day_against_drm_today.html.

[67] Press Release, Apple, Changes Coming to the iTunes Store, Jan. 6, 2009, *available at* www.apple.com/pr/library/2009/01/06Changes-Coming-to-the-iTunes-Store.html. Other content, including e-Books, movies, and apps remain protected by DRM. Concerning Apple's motivations for abandoning DRM, see Jessica Litman, *Antibiotic Resistance*, *available at* www.umich.edu/~jdlitman/papers/AntibioticResistance.pdf (discussing the initial role of DRM in contributing to Apple's dominance of market for MP3 players and the disadvantages of DRM once Apple had eclipsed its rivals).

[68] At least one e-book publisher has gone DRM-free, but the major publishers retain DRM protection. *See* Suw Charman-Anderson, *Macmillan's Tor Abandons DRM, Other Publishers Must Follow*, Forbes Magazine, Apr. 25, 2012, *available at* www.forbes.com/sites/suwcharmananderson/2012/04/25/macmillans-tor-abandons-drm-other-publishers-must-follow/.

[69] Note that while end users remain largely ambivalent, some internet entities are opposed to DRM in the streaming context. *See* Jeremy Kirk, *Mozilla Hates It, But Streaming Video DRM is Coming to Firefox*, PC World, May 15, 2014, *available at* www.pcworld.com/article/2155440/firefox-will-get-drm-copy-protection-despite-mozillas-concerns.html (noting that Mozilla opposes DRM technologies and quoting CTO saying, "we would much prefer a world and a Web without DRM").

[70] *See* Anthony Park & Mark Watson, *HTML5 Video at Netflix*, Netflix Techblog, Apr. 15, 2013, *available at* http://techblog.netflix.com/2013/04/html5-video-at-netflix.html (noting that DRM is a requirement for any premium subscription video service).

[71] While YouTube does not allow downloading, *see Download YouTube Videos*, Google Support, *available at* https://support.google.com/youtube/answer/56100?hl=en (last visited Nov. 1, 2014), it is possible to download free software that (illegally) circumvents copy controls and lets users to convert YouTube videos into mp4 files. *See, e.g.*, Jim Martin, *How to Download YouTube Videos – Save to Your PC, Laptop, iPhone, iPad or Android Device*, PC Advisor, Mar. 17, 2014, *available at* www.pcadvisor.co.uk/how-to/photo-video/3492830/how-download-youtube-videos/.

[72] *See* Rachel Bartlett, *News Corp Outlines "Freemium" Subscription Model for Australian*, Journalism, June 7, 2011, *available at* www.journalism.co.uk/news/news-corp-outlines-freemium-subscription-model-for-australian/s2/a544630/ (reporting that News Corp was so "encouraged by the 'success' of paywalls at fellow News Corp titles the Times and Sunday Times" that on a third paper, it "will offer access to some content free … while others will require payment to view"); *New York Times*, Freemium.org, *available at* www.freemium.org/new-york-times/ (last visited Nov. 2, 2014) (reporting statistics on implementation of the *New York Times*'s freemium model and

general public acceptance, despite its reliance on technological protection measures to separate the free and premium tiers.[73]

As a practical matter, the future of copyright for professional authors is likely to depend on the development of consumer-friendly payment and protection mechanisms. Free distribution can, of course, enhance the author's fame, but if the author cannot capitalize on her fame by exploiting her copyrights, then she will not have made much progress. (A starving artist's garret is still a garret, even if the address is well-known.) I am not sanguine about the non-copyright alternatives, most of which involve giving the copyrighted work away as a loss leader to get consumers to spend money on something else whose supply the author can control. This is sometimes called the "Grateful Dead model": I sell my song for a song, but make you pay real money for the t-shirts that allow you to express your affection for my band.[74] Some performing artists today may make money on everything from clothing lines and perfume to licensing their songs to TV shows and movies to uploading content to YouTube.[75] But that kind of licensing operation probably requires a distribution intermediary, and the increasingly popular "360 deal" in contemporary recording contracts, granting to the label the rights including merchandizing, film, and TV or guaranteeing the label a cut of profits from those activities,[76] significantly limits performers' revenues on rights peripheral to the recorded performance.

Furthermore, the success of these models assumes, counterfactually, that the demand for bundled goods or services is infinitely expandable, and even more counterfactually, that it is applicable to all kinds of works of authorship. For example, the public may be willing to purchase some successful performers' "allegiance

concluding that it "proved that freemium model can work in news industry"); Jasper Jackson, *BILD CEO on Freemium Paywalls, Protecting Ads and Being the Burger*, The Media Briefing, Mar. 24, 2014, *available at* www.themediabriefing.com/article/donata-hopfen-bild-axel-springer-paywalls-charging (describing Germany's highest circulation newspaper's new freemium model "which leaves some content outside the paywall on its mobile sites, but charges for content with more 'added value' and for access via apps").

[73] *See* Vineet Kumar, *Making "Freemium" Work*, Harvard Business Review, May 2014, at 27 ("Over the past decade 'freemium' – a combination of 'free' and 'premium' – has become the dominant business model among internet start-ups and smartphone app developers").

[74] For speculation about how to make money notwithstanding widespread unpaid digital uses, see, e.g., Cory Doctorow, Information Doesn't Want to Be Free: Laws for the Digital Age 53–63 ("How Do I Get People to Pay Me?") (2014).

[75] Steve Knopper, *Nine Ways Musicians Actually Make Money Today*, Rolling Stone, Aug. 28, 2012, *available at* www.rollingstone.com/music/lists/9-ways-musicians-actually-make-money-today-20120828. *See also* Peter Dicola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons about Copyright Incentives*, 55 Ariz. L. Rev. 301 (2013) (reporting results of survey regarding sources of revenue streams across 5,000 musicians).

[76] Daniel J. Gervais, Kent M. Marcus, & Lauren E. Kilgore, *The Rise of 360 Deals in the Music Industry*, 3 Landslide 40, 41 (2011). An additional problem is that even though the labels hold these rights, they have "little legal obligation to help the artists develop those revenue streams." *Id.* at 43.

goods," but who ever heard of the non-performing artist *songwriter* whose works the singer performs, much less would be interested in paying to blazon her name across his chest? Or "bundling" *services* with intellectual content may work well for software, for which "helplines" can be an essential adjunct, but I see fewer prospects for a *service après vente* for a photograph.

More fundamentally, copyright is not just about money; it is also about artistic integrity. As Pulitzer Prize-winning playwright Doug Wright recently put it:

> [C]opyright guarantees us only one thing, one ephemeral, fleeting, but indispensable thing: our singularity as artists.
>
> Copyright acknowledges the innate worth of an individual author's voice; that a well-turned phrase by Philip Roth or an acerbic line of dialogue by Edward Albee, or the haunting melody of 'Sunrise, Sunset' by Jerry Bock is as special, as distinctive, as a thumb print or a strand of DNA.
>
> … Because of copyright, I get to be the CEO of my own imagination. When I create a work, copyright acknowledges that it belongs to me as fully as a newborn belongs to its mother. And just like a parent, I am granted responsibility for its future.[77]

Thus, copyright is also about maintaining control – both economic and artistic – over the fate of the work. Artistic control concerns authors' interests in receiving authorship credit and in maintaining the integrity of their works ("moral rights"), as well as their determination of when and how to release their works to the public. Artists who self-distribute on the Internet may exercise the latter form of control, for example, by first making their works available to a dedicated fan base on a site such as Bandcamp, before authorizing its broader dissemination via streaming platforms such as YouTube. Whether or not such strategies yield creators more money, the power to decide whether, when, and how to bring one's work to the public is both one that copyright law has long secured[78] and one of considerable importance to creators, including in the online environment.[79]

As for "moral rights," some developments suggest that the Web may not create an ineluctably hostile environment for these interests. For example, attribution and integrity clauses have long characterized licenses in the open source software

[77] Doug Wright, *Playwrights and Copyright*, 38 Colum. J.L. & Arts 301, 304 (2015).

[78] *See, e.g.*, Harper & Row v. Nation Enters., 471 U.S. 539, 554–55 (1985).

[79] *See, e.g.*, Interview with composer-cellist Zoë Keating, "Google Plays Hardball with Indie Musicians," *available at* www.studio360.org/story/google-plays-hardball-with-indie-musicians-zoe-keating/ (Feb. 5, 2015) ("I'm not going to [agree to YouTube's new contract for streaming music] at the expense of that control over releasing my music."); Holly Robinson, *Should You Self Publish? From Traditional to Indie and Back Again: One Hybrid Author Tells All*, Huffington Post, Aug. 7, 2013, *available at* www.huffingtonpost.com/holly-robinson/should-you-self-publish-f_b_3721206.html ("As an indie author, you have complete control. You decide when your book is ready for public consumption, and you decide what sort of indie publisher to take on as your partner.")

community.[80] Creative Commons (CC) offers a means to self-distribute over the Internet and preserve authors' moral rights of attribution and integrity. The default CC license requires attribution of authorship, and the author may also choose to include an "ND" (no derivatives) icon,[81] which might serve to instruct users not to alter or modify the work.[82] These licenses may even be enforceable.[83]

But CC licenses accompany works distributed online for free. For authors who seek to earn a living from their work online, the absence of a CC payment mechanism may pose an insuperable shortcoming. A CC-licensed work may help introduce an author to an audience, but at some point a professional author needs to be paid. Authors who self-distribute on the Web thus may face the prospect of respect for their names and their works, but without remuneration.[84] In effect if not

[80] *See, e.g.*, Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15 VAND. J. ENT. TECH. L. 297, 339–40 (2013) (describing common license terms in free software license agreements); Rebecca Schoff Curtin, *Hackers and Humanists: Transactions and the Evolution of Copyright*, 54 IDEA 103, 115–16 (2014) (noting that free software "values a software author's moral rights over the kinds of exclusive rights conveyed by U.S. copyright law" and describing incorporation of rights of integrity and attribution into free software licenses); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563, 685 tbl. 2 (comparing the inclusion of rights of integrity and attribution in a few open source licenses and discussing the enforcement of the right of integrity under an open source license); *Various Licenses and Comments About Them*, GNU OPERATING SYSTEM, *available at* www.gnu.org/philosophy/license-list.html (last visited Feb. 9, 2015) (listing and assessing common licenses for open source software).

[81] *About the Licenses*, CREATIVE COMMONS, *available at* http://creativecommons.org/licenses/ (last visited Sept. 30, 2014); *Metrics/License Statistics*, CREATIVE COMMONS WIKI, *available at* https://wiki.creativecommons.org/Metrics/License_statistics#License_property_charts (last visited Feb. 9, 2015) (showing that more than 96% of creative commons licenses contain attribution provision and nearly 25% retain the integrity right).

[82] It is not clear whether the excluded "derivatives" are "derivative works" in the copyright sense, in which case the instruction might not bar all modifications or alterations, but only those which sufficiently transform the work to constitute new works of authorship. To the extent that modifications may compromise a work's integrity without necessarily yielding a new work, the ND icon would not fully correspond to the moral right of integrity. *See* Mira T. Sundara Rajan, *Creative Commons: America's Moral Rights?*, 21 FORDHAM INTELL. PROP. MEDIA ENT. L.J. 905, 928 (2011). On the other hand, CC's plain-English explanation of what ND means – "[t]his license allows for redistribution, commercial and non-commercial, as long as it is passed along *unchanged and in whole*, with credit to you," *id.* at 927 (emphasis added)– suggests a non-technical understanding of the term. *See also* Suzor, *supra* note 80, at 340 ("Each of these different licenses reflects a particular conception of harm, and it is only by building on copyright's exclusive rights that the licenses are able to strike a balance between access and integrity with which the author is comfortable.").

[83] Jacobsen v. Katzer, 535 F.3d 1373, 1380, 1383 (Fed. Cir. 2008) (finding that because "the terms of the Artistic License [requiring attribution of incremental software authorship] allegedly violated are both covenants and conditions, they may serve to limit the scope of the license and are governed by copyright law."). *See also* Victoria Nemiah, *License and Registration, Please: Using Copyright "Conditions" to Protect Free/open Source Software*, 3 NYU J. INTELL. PROP. ENT. L. 358, 387 (2014) (describing best practices for open source licensing enforcement).

[84] Professional publishing contracts, by contrast, in addition to providing for remuneration, may include clauses providing for authorship credit, *see, e.g.*, clause 1 of sample magazine publishing contract at

intention, Creative Commons proclaims that "money is nothing" and "[r]eputation is everything;"[85] if CC-implemented moral rights come at the price to authors of unpaid distribution of their works, then, the overall endeavor of authorship becomes devalued.[86] Authors' moral rights claims underscore their dignitary interests but, particularly in our society, money and dignity are closely intertwined.

In any event, for many authors, whether on principled objection to obligatory gratuity or out of necessity, the trade-off between money and artistic integrity often will favor the former.[87] It may be cynical to suggest that one can bear having one's artistic vision mangled, so long as the mangling occurs all the way to the bank. To the extent the observation is true, it brings us back to payment. Easing[88] or diversifying[89] legal means of accessing work may increase payments to authors and artists. Another way is advertising, and many big copyright battles, notably Viacom's suit against Google-YouTube,[90] have really been about who gets what cut of the

http://web.law.columbia.edu/keep-your-copyrights/contracts/samples/17, and occasionally, for author control over the work's integrity, *see e.g.*, clause 4 of sample book publishing contract at http://web.law.columbia.edu/keep-your-copyrights/contracts/samples/11. *See also* Professional Artists Client Toolkit, *Contracts*, ArtPact.com, *available at* www.artpact.com/Contracts (last visited Feb. 9, 2015) (website for illustrators offers model contracts, all of which contain an attribution clause in conjunction with the copyright notice). Many contracts, however, protect neither attribution nor integrity rights. *See e.g.*, "creator unfriendly" and "incredibly overreaching" contracts on the keepyourcopyrights.org website. Self-publishing through platforms like Amazon's Kindle Direct Publishing (KDR) may provide remuneration, but the KDR license contains neither explicit attribution nor integrity clauses. In fact, it allows Amazon to change the scope of rights at any time in its sole discretion. *See Kindle Direct Publishing Terms of Service*, Kindle Direct Publishing, *available at* https://kdp.amazon.com/help?topicId=APILE934L348N (last visited Feb. 9, 2015). As for whether self-publication in fact pays, *compare* Alison Flood, *Stop the Press: Half of Self-Published Authors Earn Less Than $500*, The Guardian, May 24, 2012, *available at* www.theguardian.com/books/2012/may/24/self-published-author-earnings, *with* Steve Henn, *Self-Published Authors Make A Living–And Sometimes A Fortune*, NPR, July 25, 2014, *available at* www.npr.org/blogs/money/2014/07/25/334484331/unknown-authors-make-a-living-self-publishing (reporting anecdotal evidence through Amazon e-books, "many relatively unknown authors are making a decent living self-publishing their work.").

[85] *See* Sundara Rajan, *supra* note 82, at 931.

[86] *Id.*

[87] *See, e.g.*, Wright, *supra* note 77 (maintaining copyright ownership over his plays allows him to control the integrity of his work, but not to earn a living from it; for the latter he writes screenplays, which pay well, but require him to give up any copyright interest).

[88] It has long been suggested that a way to compete with free music is in combination to lower the cost to consumers or decrease the effort required to download legal music. *See, e.g.*, Henry H. Perritt, Jr., *New Business Models for Music*, 18 Vill. Sports Ent. L.J. 63, 208 (2011).

[89] For example, Spotify, which provides unlimited on-demand music streaming services, reported that its availability reduced piracy in Australia by 20%. Max Mason & Paul Smith, *Artists Suffer as Online Piracy Worsens*, Financial Review, Sept. 16, 2014, *available at* www.afr.com/p/technology/artists_suffer_as_online_piracy_5qsfQmSay6z8rb15utnLvI.

[90] *See, e.g.*, Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

advertising revenue. But the advertising revenue can also go to authors, assuming that they retain the relevant copyright interests.[91]

Some major streaming services share ad revenue with creators. For example, YouTube pays record producers and songwriters a percentage of the revenue received from advertising accompanying videos.[92] But YouTube's policies in connection with its new Music Key streaming service appear to require artists and composers to sacrifice control over which platforms they post to first in exchange for receiving a share of advertising revenue through YouTube's Content ID service. In effect, YouTube will continue to add to its repertory not only content the creator had licensed to YouTube, but also works or performances that third parties have posted, and unless the creator agrees to the new terms instituted with the Music Key service, she will not be paid for any of the content.[93]

Spotify includes ad revenue in calculating the total amount of royalties it will pay out.[94] Blip, a free online distributer of web series, pays content providers 50% of the advertising revenue they generate.[95] It is not clear, however, that these services in fact generate meaningful income streams for authors,[96] or, for that matter that copyright

[91] This approach has been suggested for blogs posting content by unpaid providers, which in theory could either pay a flat fee per article or create an ad-revenue sharing scheme. Nate Silver, *The Economics of Blogging and The Huffington Post*, N.Y. Times, Feb. 12, 2011, 12:28 p.m., *available at* http://fivethirtyeight.blogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffington-post/ (also noting that the complications of a revenue-sharing model would outweigh the benefit of compensating unpaid contributors on the Huffington Post because 96% of traffic is directed to content by paid contributors).

[92] Laura Sydell, *YouTube Shares Ad Revenue With Musicians, But Does It Add Up?*, NPR Music (Sept. 27, 2012 12:01 a.m.), *available at* www.npr.org/blogs/therecord/2012/09/27/161837316/youtube-shares-ad-revenue-with-musicians-but-does-it-add-up.

[93] *See Google Plays Hardball with Indie Musicians*, Studio 360, Feb. 5, 2015, *available at* www.studio360.org/story/google-plays-hardball-with-indie-musicians-zoe-keating/.

[94] *Spotify Explained*, Spotify, *available at* www.spotifyartists.com/spotify-explained/ (last visited Sept. 30, 2014).

[95] *User Terms of Use*, Blip, *available at* http://blip.tv/terms (last visited Sept. 30, 2014).

Blip (also known as Blip.tv), is a website that helps up-and-coming television and webisode producers develop and distribute work. Blip editors select web series to include on the site, and viewing content is free. Blip and its content providers are paid for by ad revenue. *See About*, Blip, http://blip.tv/about (last visited Oct. 30, 2014). For a discussion of how the advertising works, see Janko Roettgers, *Blip to Publishers: We're Going to Monetize Your Videos, Whether You Like It or Not*, GigaOm, Mar. 25, 2013, *available at* https://gigaom.com/2013/03/25/blip-preroll-ads/.

[96] Spotify pays royalties ranging from $0.006 to $0.0084 to artists based on percentage of streams the artist receives of all users' plays. Victor Luckerson, *Here's How Much Money Top Musicians Are Making on Spotify*, Time, Dec. 3, 2013, *available at* http://business.time.com/2013/12/03/heres-how-much-money-top-musicians-are-making-on-spotify/; *see also Spotify Explained*, Spotify, *available at* www.spotifyartists.com/spotify-explained/ (last visited Sept. 30, 2014). Even with millions of streams, however, the sums add up to very little, *see* Phillip Pantuso, *The Best Way to Make Money on Spotify*, Brooklyn Magazine, Mar. 21, 2014, *available at* www.bkmag.com/2014/03/21/the-best-way-to-make-money-on-spotify/ ("Despite the growing user base, a microscopic proportion of bands with songs on Spotify (or Pandora and Rdio, for that matter) see any financial benefits whatsoever.") *See also*

owners, who may be receiving income from advertisements on online platforms, are in fact sharing it with authors.[97]

By contrast, author-oriented business models for aggregating sales of content, or that undertake micro-licensing of content for incorporation in other works, are beginning to emerge. Two examples, both from the independent music business, may point the way. CD Baby is an artist-run hub for sales of CDs and downloads by independent recording artists. The artists set the prices; CD Baby promotes and sells the recordings both direct to consumers and to online music retailers, returning most of the revenue to the artists.[98] CD Baby has also partnered with Rumblefish, a micro-licensing service for recording artists. Musicians place their music in the Rumblefish catalog and video-editors and app developers can license the recorded songs for incorporation in audiovisual works. Rumblefish then distributes license fees to the copyright owners.[99] YouTube and other social video sites link directly to Rumblefish so that uploaders can license their soundtracks as they upload video. So far, the Rumblefish catalog contains more than five million tracks, which have been licensed for more than 65 million videos' soundtracks, resulting, according to Rumblefish, in millions of dollars in royalties for its artists.[100]

U.S. Copyright Office, Copyright and the Music Marketplace 73–80 ("Impact of Music Streaming Models") (Feb. 2015) (detailing diminution in songwriter and performer revenues as consumption shifts from purchases of copies to accessing streams of recorded musical compositions).

97 *See, e.g.*, U.S. Copyright Office, Copyright and the Music Marketplace, *supra* note 96, at 77 (lack of transparency about how – or whether – rights owner intermediaries distribute streaming revenues to creators "can create uncertainty regarding which benefits of the deal are subject to being shared with Artists at all," *quoting* submission of SAG-AFTRA and AFM). Jessica Litman has suggested that pro-author transparency could prove an attractive business strategy: online services which disclosed how much of the price of a stream or download will in fact be paid to creators of a work might garner more users than less transparent services, *see* Jessica Litman, *Fetishizing Copies*, *in* Copyright Law in an Age of Limitations and Exceptions 130 (Ruth L. Okediji ed., 2017).

98 *Available at* www.cdbaby.com/about

99 *Micro-Licensing*, Rumblefish, *available at* http://rumblefish.com/micro-licensing/ (last visited Nov. 2, 2014).

100 Press Release, Top YouTube Music Partner Rumblefish Breaks 1 Billion Monthly Views, Boasts 5 Million Copyrights under Management, Apr. 2, 2014, *available at* www.marketwired.com/press-release/top-youtube-music-partner-rumblefish-breaks-1-billion-monthly-views-boasts-5-million-1895259.htm.

For further discussion of evolving author-oriented micro-licensing business models, see, e.g., Peter Munters, *Digital Pioneers Explore the Social Economy of Music*, Apr. 26, 2014, *available at* www.ascap.com/eventsawards/events/expo/news/2014/04/digital-pioneers-explore-the-social-economy-of-music.aspx.

The "copyright industries" also are seeking to exploit the micro-licensing market. About a year ago, RIAA and NMPA announced they were creating a micro-licensing system, not to be "aimed at music-centric businesses but rather parties outside of the industry." Tom Pakinkis, *RIAA and NMPA Working on Micro-Licensing Platform That 'Could Unlock Millions,'* MusicWeek, June 13, 2013, *available at* www.musicweek.com/news/read/riaa-and-nmpa-working-on-micro-licensing-platform-that-could-unlock-millions/055036; *see also* Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue*, BillboardBiz, June 13, 2013, *available at* www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could (quoting RIAA officials discussing the untapped market of

2.4. CONCLUSION

The author's place in the future of copyright (assuming copyright has a future) will not be assured until the full range of her interests, monetary and moral, receives both recognition and enforcement. Online micropayment and other systems for remunerating individual authors (including by means of collective licensing), albeit often embryonic, hold promise. But will these new means of remunerating authors (or for that matter older business models, which, while often divesting authors of their rights, also often afforded them an income stream) remain viable in a digital environment in which paying for creativity increasingly seems an act of largesse? Most fundamentally, we need to appreciate authorship, and to recognize that a work in digital form is a thing of value,[101] lest the old adage that "information" (meaning, works of authorship) "wants to be free" presage works of authorship that do not "want" to be created.

"businesses[that] want licenses, but haven't a clue how to get them"). It is not clear whether the effort has gone further, although RIAA did respond to a Notice and Request for Public Comment urging the government to take action to promote and facilitate micro-licensing. Comments of the Recording Industry Association of America, Inc. to the U.S. Copyright Office, Docket No. 2014-03, *available at* http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Recording_Industry_Association_of_America_MLS_2014.pdf (responding to Music Licensing Study: Notice and Request for Public Comment, 79 Fed. Reg. 14,739 (Mar. 17, 2014)).

[101] *See* T.J. Stiles, *Among the Digital Luddites*, 38 COLUM. J.L. & ARTS 293, 297 (2015) (deploring those who perceive value only in physical copies – and therefore unrestrainedly pirate digital instantiations – as "Digital Luddites").