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COPYRIGHT AS PROPERTY IN THE POST-INDUSTRIAL ECONOMY: A RESEARCH AGENDA

Julie E. Cohen[1]

I. INCENTIVES FOR AUTHORS OR INCENTIVES FOR CAPITAL?

The statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation. Court opinions and legislative histories are peppered with references to the incentives-for-authors rationale. Judges recite it as a matter of course when deciding cases, and legislators, lobbyists, and other interested parties invoke it in debates about proposed amendments to the copyright laws. Copyright scholars frame policy problems in terms of an "incentives-access" tradeoff, and that framing in turn affects our analysis of what judges and legislators do. Accepting the fundamental correctness of the incentives-for-authors rationale, we then apply our preferred mode of policy analysis to determine whether particular actions are consistent with it.

The incentives-for-authors rationale also informs scholarly critiques of the copyright legislative process. Jessica Litman's foundational work on the legislative history of copyright documented the ways in which the core legislative functions of drafting and negotiation have been captured by stakeholder industries.[2] Litman showed that neither authors nor the public have been well represented in the back-room lawmaking processes that have become the norm. Building on that work, copyright scholars have carefully scrutinized the public face of copyright lawmaking, and particularly the legislative hearing process. Many charge that the legislative process is pervaded with hypocrisy: that the copyright industries invoke incentives for authors disingenuously, all the while advancing their own particular interests.[3]

In short, scholarly and policy discourse about copyright operates on the baseline presumption that the author-centeredness of copyright is appropriate; it's just the hypocrisy that is bad. Talking about incentives for authors is more palatable than asking for corporate welfare, so that's why the copyright industries do it—often in laughably unsubtle ways. But those aren't the only two

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[1] Professor, Georgetown University Law Center. Thanks to William Bratton, Deven Desai, Wendy Gordon, Jessica Silbey, David Super, Rebecca Tushnet, Molly Van Houweling, Phil Weiser, participants in the University of Michigan Intellectual Property Workshop, and participants in the Wisconsin Law Review Symposium on Intergenerational Equity and Intellectual Property for their helpful comments, and to Jack Mellyn for research assistance.

[2] Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

[3] *See, e.g.*, Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61 (2002-03); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433 (2006-07); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2003-04); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996).

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alternatives. Another is for participants in the copyright policy process to accept that copyright is centrally about corporate welfare—or, to be more precise, that copyright is about the proper industrial policy for the so-called creative industries—and then proceed without the hypocrisy.

In this essay I will argue that the last alternative is the right one. The incentives-for-authors formulation of copyright's purpose is so deeply ingrained in our discourse and our thought processes that it is astonishingly hard to avoid invoking, even when one is consciously trying not to do so. (If you don't believe me, try writing a paragraph about what copyright is for.[4]) Yet avoiding that formulation is exactly what we ought to be doing.

First, the incentives-for-authors story is wrong as a descriptive matter. Everything we know about creativity and creative processes suggests that copyright plays very little role in motivating creative work. Creative people are much more apt to describe what they do as the product of desire, compulsion or addiction, and to understand particular results as heavily influenced by cultural, intellectual, and emotional serendipity.[5] Copyright's role is not, and could not be, to trigger those processes. Creative people are happy to receive copyright protection for their work, and it is certainly defensible to think that we ought to reward them for doing it (of which more later), but copyright isn't why they do the work in the first place.

Second, the incentives-for-authors story impedes clear-eyed assessment of copyright's true economic and cultural functions. In the contemporary information society, the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited. Copyright creates a foundation for predictability in the organization of cultural production, something particularly important in capital-intensive industries like film production, but important for many other industries as well. To be clear, I do not mean to say that predictability in cultural production is copyright's ultimate purpose. Instead, predictability serves the instrumental function that copyright scholars and policymakers have (wrongly) envisioned for incentives-for-authors: It is a means through which copyright seeks to ensure that its ultimate purpose of promoting cultural progress is achieved. And the choice of copyright as a principal means of promoting cultural production has consequences for the content of culture as well.

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[4] A signal virtue of the high-level principles set forth in the recent report of the Copyright Principles Project is that they avoid rote incantation of the "incentives for authors" fallacy in describing how a good copyright law should be constructed. *See* Pamela Samuelson and Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. ___ (2010). Even so, the drafters were not always able to steer clear of the incentives formulation when discussing specific reform possibilities.

[5] *See* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE, chs. 3-4 (Yale University Press, forthcoming 2011); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Rebecca L. Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

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This reframing has four important consequences for debates about copyright law and policy:

First and most critically, abandoning the incentives-for-authors story requires us to talk about cultural progress differently, and that is a very good thing indeed. In debates about copyright's relationship to cultural progress, the incentives-for-authors story has functioned as a smokescreen, enabling scholars, judges, and legislators to conflate economic and creative motivation and obscuring important questions about how creative motivation arises. Severing the motivational link between creativity and economics requires us to come up with a better understanding of how cultural progress emerges, and a more accurate account of how the economic incentives that copyright provides (call them incentives-for-capital) affect progress more generally.

Second, an account of copyright as incentives-for-capital suggests a different approach to conceptualizing the kind of "property" that copyright represents. Copyright scholars habitually compare copyright to property in land, a conceptual move that passes over an important stage in the evolution of economic activity and associated economic rights. There are important benefits to be gained from comparing post-industrial, information property to industrial property, and copyright law more explicitly to corporate law. The comparison requires us to think about copyright as property differently, in ways that foreground its function as a tool for solving resource coordination problems.

Third, comparing copyright more explicitly to industrial property and legal regimes governing its use suggests some different ways of thinking and talking about problems of social welfare that so often bedevil regimes of property law. Real property law has tried to solve social welfare problems chiefly by limiting the scope of entitlements, and so has copyright law. Laws that constitute and regulate corporations, in contrast, have approached such problems in ways that are more explicitly regulatory and relational.

Fourth, comparing copyright more explicitly to industrial property foregrounds copyright law's potential to function as a tool for ensuring accountability to the authors without whom the copyright system could not function. Although the incentives-for-authors story purports to celebrate authors, it has supported a system of property rights that as a practical matter relegates authors to the economic and political margins of the intellectual property system. Although the incentives-for-capital story appears to ignore authors entirely, when coupled with a theory of post-industrial property it is potentially far more attentive to the interests of authors than the name suggests.

II. COPYRIGHT AND CULTURAL PROGRESS: A MISUNDERSTOOD RELATION

Conventional wisdom holds that copyright protection serves an ultimate purpose that transcends both incentives for authors and incentives for capital.

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That purpose—copyright's *raison d'etre*—is the promotion of cultural progress. Yet until quite recently, copyright scholars have been surprisingly uninterested in testing the conventional wisdom by exploring whether copyright is in fact producing the beneficial effects that we ascribe to it.[6] The incentives-for-authors story, which rests on the assumption that copyright itself motivates creativity, reassures us that all is well. Abandoning the incentives-for-authors story in favor of an incentives-for-capital formulation of copyright's immediate purpose requires us to think about progress differently. If copyright itself cannot be relied upon to generate creative motivation, we must say something about where creativity comes from and how it leads to "progress." More careful attention to the relationship between creativity and cultural progress in turn suggests a very different account of copyright's cultural role.

Although they don't all use the same terminology, copyright scholars generally describe copyright's effects on the production of culture in two ways: First, copyright supplies incentives to authors (and secondarily to intermediaries) for cultural production. Second, by enabling the economic independence of culture producers, copyright disentangles cultural production from official censorship. Borrowing Neil Netanel's terminology, I will refer to these two functions of the copyright system as the production function and the structural function.[7] Notably, on that account of copyright's operation, the incentive structure of copyright operates to remove content constraints, not to impose them. And the content of the "progress" that copyright facilitates is assumed, absent the twin evils of state censorship and patronage-based distortion, to hold constant.[8] Assuming properly functioning copyright markets, creative works will succeed or fail based on their merit alone. Copyright, then, is a catalyst for rather than an ingredient in cultural change: It accelerates society's progress along a single, inevitable, merit-based trajectory.

Careful contemplation of our own artistic and intellectual history should remind us that progress is far more contingent and less linear than the standard copyright narrative assumes. Within the wider scholarly landscape, the modernist understanding of "progress" that predominates within copyright theory has been thoroughly rejected as both intellectually and historically unsound. Cultural change proceeds in directions and patterns that cannot always be predicted, and that cannot be explained after the fact by reference to any single set of neutral criteria of excellence. Artistic and intellectual practices shift,

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[6] One promising start is Jessica Silbey, *Harvesting Intellectual Property*, __ NOTRE DAME L. REV. (forthcoming 2011).

[7] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347-63 (1996).

[8] For good discussions of the modernist ideal of progress that animates U.S. intellectual property law and theory, see Michael Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFFALO INTELL. PROP. L.J. 3 (2001); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

sometimes unpredictably, in response to historical, economic, legal, and cultural stimuli.[9] Culture changes, but it does not move along an inevitable path.

Understanding how cultural change emerges requires careful attention to both everyday creative practice and its institutional and cultural contexts. Legal scholars investigating "authorship" have tended to characterize creative motivation as both intrinsically unknowable and essentially internal, but that characterization owes far more to legal theory's precommitment to a particular (liberal) understanding of the self than it does to the reality of creative practice.[10] Artists may not be able to tell us why they create, but they can tell us a great deal about the experience of creativity as compulsion—as desire to create that has almost nothing to do with external motivation.[11] And scholarly meditations about creativity's essentially internal nature do not match the experience of creative practice that artists describe at all. Artists can tell us a great deal about the where, what, who, and how of particular creative processes: where they were situated in space and time, what they were seeing, reading, and hearing, who they were talking to, and how those contextual factors became reflected in their creative practice. More academic studies of creativity reinforce those accounts, indicating that creative outputs are heavily shaped by context.[12] Creativity emerges at the margin between self and cultural context. Creative practice also has a strong connection to contextual serendipity—the chance encounter or the unlooked-for juxtaposition that inspires a creative response.[13]

Copyright affects culturally-situated creative practice in three principal ways. First, it creates the conditions for more widespread access to the products of a common culture. This function corresponds more or less to what Netanel calls copyright's production function, but that function is more accurately described as an *intermediation function*: It enables publishers, record labels, performing rights organizations, broadcasters, software companies, libraries, search engines, and other intermediaries to distribute cultural works for wider public consumption. Even when copyright is the primary engine of production (for example, in the case of big-budget motion pictures), it operates to bring

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[9] For more detailed discussion, see COHEN, CONFIGURING THE NETWORKED SELF, *supra* note __, ch. 4.

[10] *See, e.g.*, Justin Hughes, *The Personality Interests of Authors and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 116 (1998); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimensions of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1951-70 (2006). On the significance of liberal precommitments for copyright's model of the author, see Cohen, Configuring the Networked Self, *supra* note __, ch. 3.

[11] *See* Tushnet, *supra* note __.

[12] *See* TERESA M. AMABILE, CREATIVITY IN CONTEXT (1996); MIHALYI CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION (1996); PETER GALISON, EINSTEIN'S CLOCKS, POINCARE'S MAPS: EMPIRES OF TIME (2003); HOWARD GARDNER, CREATING MINDS: AN ANATOMY OF CREATIVITY AS SEEN THROUGH THE LIVES OF FREUD, EINSTEIN, PICASSO, STRAVINSKY, ELIOT, GRAHAM, AND GANDHI (1993); DEAN KEITH SIMONTON, ORIGINS OF GENIUS: DARWINIAN PERSPECTIVES ON CREATIVITY (1999).

[13] *See* COHEN, CONFIGURING THE NETWORKED SELF, *supra* note__, ch. 4.

creative contributors together and to harmonize the legal rights that apply to their contributions.

The extent to which the effects of incentives for capital "trickle down" to authors is an important but so far unanswered question. According to the conventional wisdom on such matters, to the extent that "sacrificial days" devoted to creative endeavor are more likely to be rewarded, copyright's incentive effect is real and direct.[14] Certainly it seems reasonable to posit that an economically robust copyright system might affect the career choices of creative people. I suspect, however, that very few fiction writers and visual artists sustain themselves purely on income from works motivated solely by creative desire and intellectual serendipity.[15] Instead, an economically robust copyright system enables employment in the production of particular types of works produced by the culture industries. Employment as a freelance magazine writer or news photographer, as writer or composer of advertising materials, and so on—or as a creative writing or fine arts teacher at a school or college—may then subsidize the production of additional works motivated by creative desire. At any rate, the question of the precise link between incentives-for-capital and sacrificial days devoted to the pursuit of creative desire requires empirical study.

Second, copyright establishes structural parameters within which the content of common culture develops, but copyright's structural effects are not neutral. A market-based system of private production may avoid the problem of state censorship, but that does not translate into independence from external influence. Copyright's structural function entails the privatization and commercialization of culture, a process that brings other types of external influence to the fore. In particular, the incentives for capital that copyright supplies support the mass culture industries and mass culture markets which in turn have distinct and well-studied substantive preferences and inclinations.[16]

Copyright academics have tended to see works of mass culture as representing a lamentable but unavoidable degradation of authorial purity. As a result we are fond of denigrating mass culture, but we shouldn't be. A copyright regime that works to enable the production of big-budget Hollywood movies and long-running television series is not a bad thing. Mass culture has a value that goes beyond the merely economic; it is what gives us things to talk about with one another, to celebrate or criticize, and to define ourselves against. Many of the examples of spontaneous bottom-up culture that copyright critics

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[14] Mazer v. Stein, 347 U.S. 201, 219 (1954).

[15] One recent study of British and German writers found that fewer than half subsist on copyright-related income alone, see Martin Kretschmer & Philip Hardwick, *Authors' Earnings from Copyright and Noncopyright Sources: A Survey of 25,000 British and German Writers* (2007), available at http://www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf.

[16] *See, e.g.*, C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997); Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81 (2002); *see also* Netanel, *supra* note __, at 358-61.

(including myself) celebrate are based on mass culture. It would be hard to imagine, for example, fan fiction detached from its mass-culture substrate. This essay seeks neither to bury mass culture nor to praise it.[17] My point simply is that copyright's structural function—perhaps better termed its *privatization function*—cannot help but affect the content and direction of "progress."

Third, and despite the formal content-neutrality of most copyright doctrines, copyright also affects the content of common culture more directly, by virtue of the way in which it operates to place certain inputs off limits to unauthorized users. To see this point, it is important to begin by recognizing that what contemporary cultural critics celebrate as "remix" is not simply an Internet-era phenomenon. Creative practice is remix, and always has been. Authors are users first, situated in their own cultures and communities. When situated users become authors, their creative output doesn't develop in a vacuum, but rather builds on the cultural inputs available in ways that relate to both form and substance.[18] What has changed in the contemporary, mass-mediated information society is the substrate for remix culture. Today, mass culture provides much of the raw material for cultural experimentation and self-definition that myths, legends, and other public domain subject materials formerly provided.

Here, a copyright regime that considers only incentives-for-capital creates a potential threat to cultural progress. The conventional account of copyright holds that copyright does not impede progress because it leaves access to essential building blocks unobstructed, but the conventional account is wrong. Copyright necessarily obstructs access to essential building blocks, because of the way creative practice works (and so I will call copyright's third function its *obstructive function*). Although legally we say that users may draw upon the public domain, including both old works and unprotectable "ideas," what matters most to situated users is the culture they can see and hear around them—works located in the immediate "cultural landscape."[19] Works of mass culture so often supply the raw material for new creative efforts because that is what users see every day. And although we in copyright world like to think of "ideas" and "expressions" as definitionally separate, the rest of the world knows it isn't true; processes of cultural transmission don't distinguish between the two so neatly.[20] A healthy system of copyright must consider the inputs that authors require to function as authors, and can't content itself simply with invoking platitudes about the separability of idea and expression or the universally-accessible public domain. Nor can it credibly deny all "unauthorized" cultural creations access to popular distribution platforms.

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[17] [remix reference to be supplied by the reader]

[18] *See* COHEN, CONFIGURING THE NETWORKED SELF, *supra* note __, ch. 4.

[19] Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in LUCIE GUIBAULT & P. BERNT HUGENHOLTZ, EDS., THE FUTURE OF THE PUBLIC DOMAIN 121 (2006).

[20] *See* Cohen, *Creativity and Culture*, *supra* note __.

Copyright does not itself create progress, and it promotes progress most effectively only when it respects all of culture's moving parts. To fulfill its intermediation and privatization functions, a regime of copyright law must supply incentives for capital. To minimize the adverse effects of its obstructive function, it must approach that task in a way that takes into account the essential connection between cumulative creativity by situated users and larger patterns of cultural change. Put differently, a sensible regime of copyright must leave room for culture to move and grow.

III. COPYRIGHT AS POST-INDUSTRIAL PROPERTY?

Taking seriously the idea of copyright as incentives-for-capital—as a regime of rights designed with the immediate purpose of incentivizing the intermediation and privatization of culture while avoiding cultural obstruction—suggests a new perspective on another heated debate among copyright scholars, this one having to do with whether copyright is or isn't "property." I do not intend to take sides in that debate, but rather to suggest that its premises flow from an unduly constrained understanding of what "property" is or might be. If copyright is property, it is post-industrial property: property that performs a different set of social and economic functions than the property in land to which it is so often compared.

The idea of "property" casts a long shadow within copyright law. Copyright expansionists have long argued that "property" supplies an appropriate and economically efficient template for copyright.[21] Conversely, copyright critics have seen property talk about copyright as the root of copyright's recent expansion.[22] Still more recently, a handful of copyright scholars has argued that the property analogy in fact supports a properly restrictive definition of copyright scope.[23] Whatever their views about the normative and descriptive consequences of property talk about copyright,

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[21] *See, e.g.*, Richard Epstein, *The Disintegration of Intellectual Property - A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455 (2009-10); Richard Epstein, *Liberty versus Property - Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005); Frank Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108 (1990); Frank Easterbrook, *Cyberspace versus Property Law*, 4 TEX. REV. L. & POL. 103 (1999-2000); Robert Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187 (2000).

[22] *See, e.g.*, Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005); Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004); Stewart Sterk, *Intellectualizing Property: The Tenuous Connections between Land and Copyright*, 83 WASH. U. L. Q. 417 (2005); *see also* David McGowan, *Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL'Y 109 (2005); Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2005-2006)

[23] *See, e.g.*, Oren Bracha, *Standing Copyright on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799 (2007); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004); Christopher M. Newman, *Transformation in Property and Copyright*, George Mason University Law & Economics Research Paper No. 10-51, http://ssrn.com/abstract=1688585 .

however, copyright scholars are in remarkable agreement about property talk's universe of conceptual referents. All have pursued explanations for copyright's property-ness or lack thereof in the core common law realms of property, contract, and tort. In other words, we have chosen to think about copyright using the doctrinal tools of the pre-industrial property system.

The land-centered nature of property theory about intellectual property ignores a crucial stage in property's history. The information age economy in which we live didn't emerge directly from the pre-industrial economy of property in land. Industrial property—corporate property—came in between.[24] The pre-industrial property system couldn't respond to the needs of the industrial age, so first practice and then the law evolved. Corporate lawyers developed techniques for aggregating assets under fictional ownership. Fictional ownership alone was not enough to allow effective management of corporate assets, however, and so innovations in function followed innovations in form. Corporate law—the law of industrial property—developed formal means for separating ownership from control so things could get done, and rules about governance to ensure that management of commonly owned property remained accountable to other stakeholders.[25]

Property thinking about copyright largely ignores these developments because property theory largely ignores them. Property theory is overwhelmingly land-centered, and has remained so despite a steady stream of challenges to that conceptual hegemony. The study of property rights in natural resources has blossomed precisely to the extent that it has gradually become detached from property rights in land, yet property theory persists in treating property rights in natural resources as variations on the primary theme.[26] Chattel property, with its unruly connections to personhood, has figured in property theory primarily as a source of conceptual disruption.[27] Intellectual property makes the occasional cameo appearance within works of mainstream property

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[24] By this I do not mean to suggest that corporate law is "older" than copyright law in an absolute historical sense. As copyright scholars are surely aware, modern copyright law evolved before the modern corporation did. Instead, the argument is that we can regard both corporate law and copyright law as regulatory schemes that required a baseline level of economic development to mature. Corporate law came into full flower once the basic principles of industrial manufacture had emerged, and the Industrial Revolution was well underway. In similar fashion, copyright has come into its own as a mode of facilitating cultural production in the era of the information economy.

[25] *See* ADOLPH BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); John Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L.J. 655 (1926); William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives From History*, 41 STAN. L. REV. 1471, 1482-98 (1989); *see also* MARK J. ROE, THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 5-8 (1996).

[26] For a conceptual overview of a theory of property rights in natural resources, see Daniel Cole & Elinor Ostrom, *The Variety of Property Systems and Rights in Natural Resources: An Introduction*, version of Aug. 3, 2010, http://ssrn.com/abstract=1656418 .

[27] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

theory, but always as a special case.[28] Industrial property is rarely to be found at all, with the exception of one speculative work by Bell and Parchomovsky which notes the innovation of fictional ownership but does not proceed to consider ensuing innovations in property governance.[29]

As an alternative to this conceptual model of the property universe, I want to suggest that the question "what is property?" has multiple answers that in turn map to multiple organizing paradigms. The answers are bound up with structural and cultural differences among categories of economic resources.

Property theory about copyright ought to understand copyright—and, by extension, other forms of information property—as a legal institution that performs a particular set of economic functions related to the management of a particular type of resource. Specifically, copyright law in the post-industrial era works to separate authorship from control of creative works so that a set of coordination and governance problems closely associated with information resources can be solved. Along with the patent laws, the trademark and unfair competition laws, and various laws governing ownership of trade secrets, Title 17 of the U.S. Code functions as the Delaware law of the post-industrial property system.

Here one terminological clarification and one caveat are in order. By "post-industrial" I do not mean either "industrially owned" or "coming after the era of industrial dominance of culture." As a descriptive matter neither meaning would be accurate. Much intellectual property is industrially owned, but much is not; a property regime for expressive works must supply rules for both. And though some scholars have heralded the death of the copyright industries, so far those obituaries are premature.[30] Certainly a property regime for expressive works cannot begin by presuming the inevitable absence of a large and powerful set of economic and institutional actors. Instead I adopt the meaning used by sociologist Daniel Bell, who coined the term to refer to a moment of economic transition away from an economy based principally on manufacturing to one based primarily on the production of information and the delivery of services.[31] In such an economy, the "industrial property" model first developed in the

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[28] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1047, 1068-70 (2008); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1174-75 (1999); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 19-10 (2000); *see also* Richard A. Epstein, *What Is So Special About Intangible Property? The Case for Intelligent Carryovers*, NYU Law & Economics Research Paper No. 10-49, http://ssrn.com/abstract=1659999 (rejecting the idea that intellectual property might be different). For glimmerings of a resource-specific approach, see Henry E. Smith, *Toward an Economic Theory of Property in Information*, in KENNETH AYOTTE & HENRY E. SMITH, EDS., RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW, ch. 5 (Edward Elgar, 2011).

[29] Bell & Parchomovsky, *Reconfiguring Property in Three Dimensions*, *supra* note __, at 1044-46.

[30] *See, e.g.*, Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004).

[31] DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING (1973).

context of manufacturing is itself redirected toward ownership of service-delivery enterprises. In addition, the rules governing property rights in information (including expressive works) assume new importance, and the need for a conceptually distinct theory of post-industrial property becomes more acute.

As for the caveat, my claim is not that copyright functions or ought to function exactly the way industrial property does. Quite the contrary. The industrial property analogy's *imperfections* are exactly what make it interesting. Both the areas of fit and the gaps in fit expose the conceptual poverty of a unitary model of "property." They suggest important questions for future thinking about exactly what kind of property regime intangible information resources require.

The remainder of this essay is intended to sketch a research agenda directed toward three large sets of questions about the function and optimal contours of a regime of post-industrial property, with particular reference to copyright. My excavation of each set of questions is preliminary in nature. I want simply to provoke some much-needed reflection on why we have been content to assume that property in land supplies the best template for resolving them.

IV. POST-INDUSTRIAL PROPERTY AND RESOURCE COORDINATION PROBLEMS

The first set of questions that a theory of post-industrial property needs to answer involves the nature of post-industrial resource coordination problems. Within intellectual property discourse, the unit of analysis is generally the individual work or invention. Any serious student of copyright law rapidly comes to realize, though, that as a practical matter copyright's project is increasingly that of setting parameters to govern access to and use of large numbers of works.

Consider some of the problems that a well-functioning modern copyright system needs to address: It must provide a framework within which authors and intermediaries can come together to negotiate the terms of production and distribution agreements. It must provide a framework for the licensing of already-published works as inputs into various kinds of activities, some consumptive (e.g., classroom photocopying, Internet radio, online search) and others additive (e.g., sound recording, filmmaking, multimedia production). It must provide a set of rules for aggregating contributions to large and complex works such as motion pictures and computer programs.

In each of these cases, copyright is valuable not (only) because it is individual and atomistic (to borrow Molly Van Houweling's terminology) but also because it facilitates combination and coordination.[32] Notably, some copyright coordination problems resemble the coordination problems that

[32] Molly Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549 (2010).

corporate law must address, but others are different. The relationship between coordination and control is also different. Within the system of industrial property, the separation of ownership from control is achieved once assets are transferred to the corporation. Within the copyright system there are multiple layers of control to be taken into account. Some exist because authors hold residual rights, while others exist by virtue of the copyright's transfer to a new owner. Downstream coordination problems arise because many cultural activities require multiple inputs, because of the various network effects that cultural works create, and because of copyright's obstructive function (described in Part II, above).

Explorations of these problems from an economic perspective have seemed to approach the problem with a particular entitlement structure in mind, arguing that copyright needs to be "property" for this or that set of market clearing transactions to emerge in optimal fashion. If we eliminate the assumption of a unitary property paradigm, it becomes apparent that such an analysis begs important questions about the exact entitlement structure that is most appropriate for this resource. This is, in some ways, the point of important work developing the economic proof of concept for the "distributed peer production" paradigm as a third modality of production existing alongside markets and firms.[33] But much work exists to be done in exploring the full range of activities that copyright facilitates.

Also notably, the coordination problems confronting a regime of post-industrial property do not solely concern how the metes and bounds of intangible property are to be defined. They are first and foremost governance problems: problems that require considering and adjusting the interests of multiple groups of stakeholders. Occasional strands in the copyright literature approach this point from a more explicitly regulatory stance.[34] My argument is more general and concerns the ways in which entitlement structures are themselves governance structures, embodying choices about ownership, control, and institutional design. Parts V and VI consider the some of the governance questions surrounding post-industrial property in greater detail.

The description of copyright as a modality for post-industrial resource coordination appears to pull copyright policy even more deeply into the realm of instrumentalism and to divorce it even farther from the personal interests of authors. The temptation, then, is to think that a Continental, authors' rights theory of intellectual property should find the industrial property analogy deeply problematic. Here it is worth noting the prevalence of "neighboring

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[33] YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 91-127 (2006); *cf*. Smith, *Toward an Economic Theory*, *supra* note __ (outlining a theory of intellectual property based on "modularity" and information costs).

[34] *See* Tim Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 279 (2004) (arguing that copyright incorporates both an "authorship" regime and a "communications" regime that functions to "regulat[e] competition among rival disseminators").

rights" laws in Continental authors' rights regimes. Neighboring rights laws respond to the reality of capital-intensive creative industries by enabling those industries to acquire the rights they need to plan and sustain their operations; typical examples include rights for broadcasters and sound recording producers.[35] How to think about the role of neighboring rights within the political economy of a system of authors' rights is a question of considerable importance. One may choose to view those regimes as doling out "lesser" rights; neighboring rights last for shorter terms and are far more limited scope. Alternatively, one can focus on the importance of the rights conveyed within the political economy of information production and distribution. If one takes the latter perspective, it becomes easier to understand authors' rights regimes as concerned to a very real extent with coordination problems, whether or not they admit it.

More generally, the existence of complex regimes of neighboring rights in authors' rights regimes reinforces the notion that a regime of copyright/authors' rights does not concern solely the rights of authors or of intermediaries, but rather the nature of the *relationship* between authors and intermediaries. That view returns us to an understanding of copyright as a distinct, post-industrial modality of property governance.

V. POST-INDUSTRIAL PROPERTY AND SOCIAL WELFARE PROBLEMS

Another benefit of framing copyright as post-industrial property concerns its approach to the broader set of social welfare concerns associated with any property regime. Property scholars often frame debates about the social welfare costs of property regimes through the lens of intergenerational justice. As Peggy Radin explains in an article in this volume, this is a function of property's longevity. Many types of property outlive their initial owners, and this creates concerns both about whether resources will used productively for the future, and about whether control by past owners is just.[36] The industrial property analogy doesn't solve social welfare problems for us; such problems have created thorny difficulties for modern corporate law and practice. But laws that regulate corporations have confronted questions about property and social justice—whether inter- or intra-generational—differently than "property law" has. In particular, within the industrial property framework, social welfare problems are approached in ways that are both relational and regulatory. The analogy therefore introduces a new perspective that might productively inform our thinking about the socially optimal contours of post-industrial property.

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[35] For good general summaries, see 2 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 1205-86 (2d ed. 2006); Herman Cohen Jehoram, *The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations*, 15 COLUM.-V.L.A. J.L. & ARTS 75 (1990).

[36] Margaret Jane Radin, [**WLR staff add cite**], 2011 WISC. L. REV. ___ (2011).

It is useful to begin by identifying two distinct aspects of the social welfare problem, each of which has commanded the attention of property scholars. The first concerns how good stewardship of property is best achieved. The prevailing, Demsetzian narrative about property rights and economic efficiency addresses the stewardship problem; it posits that individual property rights will produce efficient stewardship of property over the long run.[37] The law of real property chiefly concurs in this assessment, and so has focused principally on cabining restraints on alienation that might interfere with the market's ability to perform its corrective function.[38] It provides a more direct point of entry for the stewardship inquiry chiefly through the law of nuisance, which concerns the relative values that ought to attach to competing uses.

The second distinct aspect of the social welfare problem concerns distributive justice. The Demsetzian narrative doesn't address this problem at all—or, put differently, it treats stewardship problems and distributive justice problems as definitionally separate. Here again, the law of real property concurs, for the most part. The system of estates in land initially supported landed dynasties, but as individual ownership came into favor, the rules changed to enable a more neutral stance predicated on fee simple ownership and market alienability. Courts developed doctrinal means of disfavoring landed dynasties, but those doctrines have waxed and waned in importance over time, and many jurisdictions allow dynasty trusts, which enable wealth accumulation without restricting alienability.

Following the general pattern established by real property law, copyright law has sought to address the stewardship problem chiefly by fostering alienability; copyrights are fully divisible and transferable in whole or in part. Copyright has addressed the distributive justice problem chiefly by setting limits on entitlements. Copyrights are limited in duration, and the copyright system also limits the scope of entitlements through the idea-expression distinction and analogous doctrines, which privilege certain kinds of competing uses more decisively than nuisance law does. As before, the general commonality in approaches between copyright law and real property law ignores the question whether changes in the forms of wealth require corresponding changes in the dominant modalities of property governance.

Regimes of industrial property have confronted both the stewardship problem and the distributive justice problem, and have approached those problems differently than either of the other two regimes. In a backhanded salute to the legal realists' insight that property rights are interpersonal rights, industrial property's responses to the stewardship problem have emphasized its

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[37] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. REV. ECON. 347 (1967).

[38] *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), ch. 3 (2000); RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS, ch. 4 (1983).

relational nature.[39] Because the legal institution of industrial property disperses ownership interests, good stewardship of industrial property requires mechanisms for accountability. Within the framework of corporate law, accountability has been pursued chiefly via governance mechanisms that, at least in theory, are supposed to make managers more accountable to shareholders.[40] Over time society has come to realize that good stewardship of industrial property also requires good stewardship of human capital—of the people whose labor is needed to build and tend industrial capital. Within the industrial property paradigm, stewardship of human capital has taken the form of externally-imposed wage and working-hour regulation and a variety of fair labor practice mandates.[41]

Responses to the distributive justice problem tend to be overtly regulatory and located outside the framework of corporate law proper: in the antitrust laws, which regulate the acquisition and use of market power, in the securities laws, which attempt to limit insiders' ability to profit from their privileged position, and in various bodies of law governing marketplace disclosures, which limit firms' ability to profit based on differentials in information costs.[42] For the most part, each of these frameworks assigns ultimate regulatory authority to markets; however, each sanctions structural correctives for marketplace distortions.

In recent decades, approaches to the stewardship and distributive justice problems that regulate at the margins of markets have confronted a more fundamental objection. We have come to appreciate that capital markets have difficulty valuing and accounting for certain kinds of external harms that corporate conduct creates (and, via limited liability, facilitates), such as environmental harms, health risks, and risks to global financial markets. These harms are real and documented, but our market metrics have not kept pace with them. The corporate social responsibility movement seeks to hold industrial property as an institution accountable for the collective harms and risks it creates. It has done so by pursuing a variety of strategies, including the creation

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[39] *See* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[40] *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

[41] *See e.g.* 29 U.S.C. §§ 651 *et seq*. (setting standards for occupational safety and health); 29 U.S.C. §§ 201-219 (Fair Labor Standards Act, concerning wages and hours); 42 U.S.C. § 2000e (Civil Rights Act of 1964, banning certain types of workplace discrimination); 29 U.S.C. § 151 (National Labor Relations Act, protecting the right of workers to organize into unions).

[42] *See* 15 U.S.C. §§ 1-7 (Sherman Act, banning anticompetitive collusion and monopolization); 15 U.S.C. §§ 41-58 (Federal Trade Commission Act, granting authority to proscribe unfair or deceptive trade practices); 15 U.S.C. §§ 77 *et seq*. (Securities Act of 1933, prohibiting misrepresentations and fraud in the sale of securities); 21 U.S.C. §§ 341 *et seq*. (Food, Drug, and Cosmetic Act, establishing labeling and disclosure mandates for consumer products).

of social responsibility metrics both external to and internal to conventional accounting procedures.[43]

The emerging regime of post-industrial property also confronts problems of cultural stewardship and distributive justice as they relate to the broader claims of publics both present and future. Many scholars have argued that copyright's traditional methods of dividing entitlements between copyright owners and the public do not entirely suffice to protect the public's claims to access and enjoy common culture. Copyright's defenders have argued that industrial property's system of protections—antitrust, consumer protection, and so forth—provides an adequate backstop. Copyright critics have countered that the goals of antitrust and consumer protection law—price competition and informed choice, respectively—do not always map straightforwardly to the intellectual property system's dominant concern with innovation, and more specifically do not take account of copyright's obstructive function and its distributive implications. A theory of post-industrial property might enable a more rigorous treatment of the ways in which the various regimes (do or should) diverge; arguably, there is no reason to expect that regimes of antitrust and consumer protection law developed in the context of industrial property governance would supply the best answers to distributive justice problems that arise in the context of post-industrial property governance.

Post-industrial property also has generated a version of the corporate social responsibility critique, manifested most sharply in the form of open access movements that encourage voluntarily assumed limitations on entitlements. Some scholars appear to think that access movements organized around licensing, such as the open source software movement and creative commons, themselves constitute a fully viable solution to the governance problems in creative industries. Arguably, the open licenses have not yet proven capable of solving the full range of coordination problems that expressive works present.[44] Increasingly, however, such movements are understood—and ought to be—as posing a fundamental challenge to a regime of property governance predicated on relatively thick entitlements and relatively thin public access privileges.[45] A theory of post-industrial property might provide a framework for unifying the concerns that the access movements raise.

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[43] *See* Chip Pitts, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. LAW & POL'Y (2009).

[44] *See* Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005); *see also* Van Houweling, *supra* note __, at 634-36.

[45] *See, e.g.*, Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008); Jessica Silbey, *Comparative Tales of Origins and Access: The Future of Intellectual Property Law*, 61 CASE WESTERN RES. L. REV. 195 (2011).

VI. AUTHORS AS STAKEHOLDERS IN POST-INDUSTRIAL PROPERTY

Consider, finally, the problem of the relationship between "authors" and intermediaries. Copyright theory does not often interrogate that relationship directly. The omission flows from the interaction between the incentives-for-authors story, which posits that copyright itself is the reward for creative labor, and the pre-industrial property model, which presumes an atomistic, transaction-by-transaction approach to property governance. As we have just seen, though, the governance problems associated with copyright often are more complicated than the atomistic model assumes, especially in the context of the large-scale coordination problems already discussed. The industrial property analogy opens the way for a different discussion about how authors ought to be treated, because it suggests the possibility of formalizing relationships between and among multiple stakeholder classes.

The copyright industries don't simply transpose the coordination and governance problems associated with industrial (corporate) property into the post-industrial realm. Instead they complicate those problems by introducing a third class of stakeholders. Two important classes of industrial era stakeholders—shareholders and workers—remain squarely in the picture. Authors represent a third class of stakeholders that sometimes overlaps with the other two. Authors can be employees, and sometimes also can perform a role analogous to the shareholder's role, as is the case for some collective rights organizations. But authors also supply a distinct type of input about which we have some different intuitions that a theory of post-industrial property ought to explore.

Here the potential for greater convergence between Continental authors' rights systems and Anglo-American copyright systems becomes apparent. Relational considerations have received greater emphasis within authors' rights regimes; for example, such regimes traditionally have protected authors of literary works more comprehensively in licensing situations by establishing default rules disfavoring practices requiring the transfer of all rights. Yet both legal cultures express recognition of the distinctive value of individual creative contributions. Although the rhetoric about authors in U.S. legal debates about copyright often seems disingenuous, few would support a legal regime that gave no weight whatsoever to individual authorship. The origin of the authorial claim to social recognition and reward is an interesting question for moral philosophers and cultural theorists to debate. Whether the authorial claim is inherent in the nature of things or culturally determined, however, we value the contributions that creative people make.

The more pressing question for contemporary law and policy, which neither copyright systems nor authors' rights systems have confronted effectively, is how authorial interests ought to be recognized and protected within a post-industrial property system organized around resource coordination. The American mistake lies in assuming that what we refer to (often

disparagingly) as the "moral rights" of authors must be propertized according to the real property paradigm rather than viewed through a relational lens in order to be given meaningful protection. Arguably, the Continental mistake lies in assuming that the rights of authors must follow a personality-centered (chattel) property paradigm.

If the artist-intermediary relationship is reconceptualized as a variation on the more general relationship between shareholders and managers, new questions about that relationship suggest themselves. Just as corporate managers are prone to favoring their own interests over those of the true owners (the shareholders), so we might posit that the intermediary copyright industries are prone to favoring their own interests over those of authors, and that this tendency requires appropriate structural correction. Foregrounding the agency problems of corporations, rather than the common law of contract, might allow us to think about the artist-intermediary relationship differently and more productively in the context of the new governance institutions that have been emerging for mediating access to creative works.[46]

The comparison between authors and shareholders has particular force in those areas where the connection between authors and governance is most direct. In this context it's worth noting that antitrust law has recognized the problem even if copyright has not; the ASCAP and BMI consent decrees exist partly to address governance questions.[47] Governance questions also figure importantly in discussions about licensing regimes for orphan works, and in discussions about the proposed settlement in the Google Book Search lawsuit.[48] The industrial property paradigm does not provide clear guidance on how to address the problems of governance within a divided-ownership framework, but it does supply some interesting tools with which to investigate those questions.[49]

Alternatively, the author-intermediary relationship can be reconceptualized in as a variation on the relationship between employees and employers. This comparison allows us to examine the ways in which the

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[46] For a suggestion in a similar vein, see Van Houweling, *supra* note __, at 637-38.

[47] *See* U.S. v. Broadcast Music, Inc., 1966 U.S. Dist. LEXIS 10449, 1966 Trade Cas. (CCH) P 71,941 (S.D.N.Y 1966), *modified by* 1994 U.S. Dist. LEXIS 21476, 1996-1 Trade Cas. (CCH) para. 71,378 (S.D.N.Y.1994) (the "BMI Consent Decree") (governing contract terms between authors and the rights agency); *see also* U.S. v. ASCAP, 1940-43 Trade Cas. para. 56,104 (S.D.N.Y.1941) (the "ASCAP Consent Decree").

[48] *See* Authors Guild Inc. v. Google, Amended Settlement Agreement, Case No. 05 CV 8136-DC (S.D.N.Y. 2008) (proposed settlement, pending court approval); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010); James Grimmelmann, *The Elephantine Google Books Settlement*, __ BUFF. INTELL. PROP. L.J. (forthcoming 2011); Bernard Lang, *Orphan Works and the Google Book Search Settlement: An International Perspective*, 55 N.Y.L. SCH. L. REV. 111 (2010); Matthew Sag, *The Google Books Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010).

[49] For a sampling, see the articles including in *Symposium: In Berle's Footsteps – A Symposium Celebrating the Launch of the Adolf A. Berle, Jr. Center on Corporations, Law & Society*, 33 SEATTLE U. L. REV. 777 (2010).

copyright regime provides, or fails to provide, for good stewardship of its human capital. Copyright scholars in the U.S. generally have been content to say relatively little about the terms of the contracting relationships in the creative industries, or about potential disparities in bargaining power between authors and intermediaries. For authors who are also employees, and whose outputs therefore qualify as works made for hire, we rely on background principles of labor and employment law to govern bargaining. Freelance authors are thought to be protected by their ability to bargain in the marketplace, and once again this attitude flows largely from preconceptions about the kind of property that copyright is.[50] But property frames have policy consequences. For example, if we think that termination of transfers is the best way to put authors in a good bargaining position with respect to what is, in some transcendent sense, rightfully "theirs," we may concentrate our energies on reforming termination of transfers rather than engaging in substantive regulation of labor contracts in the creative industries. If we think that copyright stimulates corporate cultural production principally by attributing "authorship" to employers, we may overlook the role that attribution practices play within creative workplaces.[51]

Perhaps, however, the relative disinterest in bargaining between authors and intermediaries is a mistake, and perhaps the paradigm of industrial property has something to teach us here as well. The Industrial Revolution has figured in copyright theory principally as a way of describing the relationship between copyright owners and the public, via an analogy to the enclosure and appropriation of common property.[52] But the Industrial Revolution also reshaped the relationship between capital and labor, entities that before had existed in ways largely separate from each other. In particular, it worked a partial displacement not only of agricultural workers from the land, but also of skilled craftsmen from their trades. It involved both the enclosure of land and the relocation and deskilling of labor.[53]

Has the postindustrial revolution worked a comparable deskilling of creative labor? The answer is unclear. The culture industries require a continual supply of creative labor to thrive, and there is reason to think that deskilling is more difficult, for example, in the case of animated movie production than it

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[50] *See, e.g.*, New York Times v. Tasini, 533 U.S. 483, 505 (2001) ("[I]t hardly follows from today's decision [holding that collective work publishers improperly included individual contributions in electronic databases] that an injunction . . . must issue . . . . The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works . . . .").

[51] *See* Catherine Fisk, *The Modern Author on Madison Avenue*, *in* PAUL SAINT-AMOUR, ED., MODERNISM AND COPYRIGHT 173 (2010).

[52] *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003).

[53] *See* J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700-1820 (1993); E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1963); J.D. CHAMBERS & G.E. MINGAY, THE AGRICULTURAL REVOLUTION, 1750-1880 (1970).

would be in the case of dining room furniture production. Questions remain, however, about the extent to which current transactional frameworks have the effect of alienating individual creative workers from their own work product (bringing copyright's obstructive function to the fore), and about the extent to which the background regimes of labor and employment law afford adequate protection for those workers given the particular considerations that attend the production of post-industrial property. Debates about the appropriate scope of noncompete covenants for high-level employees in the technology industries are about exactly this question.[54] Outside the high technology industries, such debates take the form of litigation over ownership of literary characters, musical themes, and the like, and are framed as questions about copyright scope rather than as questions about labor relations in the post-industrial realm.[55] But perhaps these disputes might benefit from reframing, and from resolution using a relational lens.

VII. CONCLUSION: BETTER LIVING THROUGH CYNICISM?

One premise of this essay has been that getting beyond the charming but inaccurate notion of copyright as an author-centered system might actually improve it. The reader might be forgiven for wondering whether this is actually true. Politically speaking, the corporate law analogy does not inspire great optimism. At minimum, it suggests that meaningful reforms in the governance of valuable resources will always lag well behind implementation of the initial coordination mechanism, and may be doomed to remain perpetually a work in progress. Even so, however, clearing away the rhetorical kudzu generated by the incentives-for-authors story serves valuable purposes.

First, the idea of industrial property and by extension post-industrial property underscores the perversity of the Demsetzian narrative about the natural and ineluctable evolution of property rights.[56] While the corporate form

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[54] *See* Ronald Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete,* 74 N.Y.U. L. REV. 575 (1999); Catherine Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441 (2000-2001); *see also* Edwards v. Arthur Anderson LLP, 189 P.3d 285 (Cal. 2008) (holding non-compete agreements to be illegal restraints of trade unless covered by a specific statutory exception).

[55] *See, e.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994); Franklin Mint Corp. v. National Wildlife Art Exchange, 575 F.2d 65 (3d Cir. 1978); Warner Bros. v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955); Gross v. Seligman, 212 F. 930 (2d Cir. 1914); Hughes, *supra* note __, at 127 (discussing *Gross v.* Seligman and the continuing interests of authors in their works); Leslie Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WISC. L. REV. 429 (1986).

[56] See Demsetz, *supra* note __. For a sampling of commentary critical of Demsetz on this point, see Jonathan Barnett, *Property as Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L.J. 384 (2009) (criticizing Demsetz's model as applied to state-created intellectual property); Katrina Wyman, *From Fur to Fish; Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005) (arguing that the Demsetzian account neglects the role of the state in property formation); Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2000-2001) (questioning the inevitability of the

introduced undeniable efficiencies into the law of industrial property, so far as I am aware it has not inspired its admirers to offer Demsetzian accounts of its inevitable emergence. To the contrary, the industrial property analogy makes more transparent the extent to which ownership and governance regimes are inextricably intertwined and socially constructed.

Second and relatedly, the idea of industrial property and by extension post-industrial property reminds us that different regimes of property governance may require different structural safeguards to ensure the optimal stewardship and distribution of particular resources. Detaching copyright from the conceptual baseline of common law property rights, granted to but then bargained away from authors, is a useful exercise if it provokes more careful examination of questions about institutional design and optimization. Because of the complex role that incentives-for-capital play within our cultural ecology, and because of the diversity of stakeholders within a regime of cultural property, the legal institution of copyright requires thoughtful tailoring.

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privatization of common resources); Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649 (2007).