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Authors, Online

Daniel Gervais*

The copyright chapter of the Internet story is familiar to all of us by now: the Internet provides access to an incredible array and variety of cultural products from around the world.¹ It is the Great Virtual Library, available at your local café and everywhere else.² It makes cultural products not only easier to access but also to modify (and to disseminate the modified versions).³ Because the Internet allows access and easy reuse, the Internet is the *Global Meme Factory*—it makes possible a great cycle of: (1) access to existing works; (2) copying them; (3) modifying them and (4) disseminating them, which repeats endlessly in various directions.⁴ The Internet offers major advantages for authors (though there are downsides, and I will discuss those later), users and *new* intermediaries.

Beneficiaries of older intermediation models may see things somewhat differently. Traditional professional distributors—such as book publishers, music publishers and others whose job it is to find and *filter* cultural productions by identifying the most (commercially) promising ones—are hardly able to contain the flood of unfiltered “content” streaming down Internet pipes all around the world: books are self-published, songs and sound recordings can be produced using basic software, and YouTube can be used to provide access to homemade and even semiprofessional videos.⁵ The filters still exist, but now they tend to take different forms: either famous publisher trademarks (such as *Nature*, *Science* or major trade

* Professor of Law, Vanderbilt University Law School. Director, Vanderbilt Intellectual Property Program (VIP²). This Paper was presented at the Symposium organized by the Kernochan Center for Law, Media, and the Arts at Columbia Law School on October 10, 2014.

1. The expression “cultural products” is meant to capture productions that may or may not be or consist of copyrighted material that have cultural import, but does not imply physicality.

2. Actually, this statement seems *literally* correct. See Lea Bishop Shaver, *Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge*, 4 I/S: J.L. & POL’Y FOR THE INFO. SOC’Y 235, 247 (2008) (“Where access to the ancient Great Library of Alexandria was physically out of reach for most of the world’s denizens, the digital collections of the modern Bibliotheca Alexandrina can be accessed instantly from anywhere.”).

3. This Essay refers to earlier pieces in which I explored discrete issues raised here in more detail. For example, I examined the way in which digital tools allow access to and modification of existing copyrighted material in Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 843–44 (2009), and the follow-up piece Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785 (2013).

4. This expression was used and discussed in Daniel Gervais & Daniel J. Hyndman, *Cloud Control: Copyright, Global Memes and Privacy*, 10 J. TELECOMM. & HIGH TECH L. 53, 64 (2011).

5. See Maureen A. O’Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC’Y U.S.A. 425, 462 (2003) (describing the emergence of self-publishing starting in the 1990s).

imprints) or the various forms of feedback provided by individuals and aggregated in the form of stars, ratings, reviews, etc.⁶

The traditional content distributors emerged in a non-digital environment where cultural products were generally distributed in the form of the physical copies (books, DVDs, CDs) and/or through a limited number of professional distributors such as the cinemas, television networks or other broadcasters. Often, those distributors acquired the copyright from the author and thus became “right owners.”⁷ This also allowed right owners to control release dates in what has been referred to as the chronology of media.⁸ It is hardly possible today for even a Hollywood studio to try to maintain any kind of chronology, as users expect new releases to be available online on almost the same day as the theatrical release.⁹

New intermediation models are typically implemented by entities *not* operating as right owners. Those new entities (for example, search engines) are in the business of connecting individuals with whatever form of information or “content” they are looking for. Content is not their core business; it is merely a tool to generate more use, which in turn generates advertising dollars.¹⁰ Traditional intermediaries—whose business models depend on *selling* content (copies and/or access) they own or have licensed—must thus now compete with free (advertising-based) distributors of unfiltered content often produced by amateurs, semi-amateurs and what I will call “unaffiliated” professionals.¹¹ As David Lowery explained in his presentation at this Symposium, whether the content is legal or not does not

6. See Gabe Bloch, *Transformation in Publishing: Modeling the Effect of New Media*, 20 BERKELEY TECH. L.J. 647, 669 (2005) (discussing the value of peer review and whether open access models are compatible with the business model of leading academic publishers). Recent legal empirical work tends to cast doubt on the value of ratings and rankings in informing consumer decisions. See Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618, 1622 (2010) (showing that online consumer rankings do not really serve as useful consumer information).

7. See Sarah C. Anderson, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 881–82 (2006) (“Popular music contracts traditionally transfer to the publisher all rights in copyright.”).

8. See Séverine Dusollier & Caroline Colin, *Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?*, 34 COLUM. J.L. & ARTS 809, 834 (2011) (“A final problem specific to the film industry is media chronology. Audiovisual works are traditionally exploited in successive release windows, starting with screening in theaters, followed by DVD rentals and sales and broadcasting, where pay-TV has a priority in time over free-to-air television. Allowing *all* content to be shared in P2P networks might run counter to this chronology.” (footnotes omitted)).

9. See *id.*

10. See Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201 (2006) (“The two most prominent types of search-specific advertisements are paid placement, where an advertisement is linked to a search term, and paid inclusion, where the advertiser pays a fee to the search engine provider in order to get a site included in the search index . . . [P]aid inclusion in particular has caused much controversy among users and even intervention on the part of regulators.” (footnotes omitted)).

11. “Unaffiliated” professionals are a category “above” semi-amateurs. Unlike amateurs who may generate occasional income from cultural products they create, unaffiliated professionals consider themselves fulltime authors, or at least generate revenue on their own. Creation is typically their main occupation, but they are not affiliated with the traditional right owners (major industrial distributors such as publishers).

actually matter to the new intermediaries.¹² A recent column in the *New York Times* encapsulated the ethos of many of the new intermediaries, and how it differs from the ethos of traditional content distributors:

The first principle is to be a middleman—or in tech lingo, a platform—connecting the people who post on YouTube with those who watch their videos, or the people who need a ride with people who will drive them. As platforms, the thinking goes, they are just connectors, with no responsibility for what happens there.

For websites, this is codified in law—they are not legally responsible for what their users publish, according to the Communications Decency Act, perhaps the most influential law in the development of the web. . . .

. . . .

. . . ‘These folks grew up in a world where platforms are not responsible, and then when they go do stuff in the real world, they expect that to be the case,’ said Ryan Calo, an assistant professor at the University of Washington law school who studies cyber law.

. . . .

. . . That leads to yet another principle shared by both older and newer tech companies: Regulators are little more than roadblocks standing in the way of innovation.¹³

When the intermediary’s core business is advertising unrelated to the sale of licensed content, it affects the nature of the intermediation in that it may dictate the choices offered to the user—or at least the order in which search results will appear.¹⁴ This matters.¹⁵ My intuition is that users often tend to follow previous users and to limit themselves to top search results. They decide what to listen to or watch or read by considering feedback left by such previous users among the top choices offered by the search tool they used.

In this new environment, there is no physical scarcity (of copies). There is a scarcity of connections. Physical scarcity has been replaced by what I would call “like scarcity.”¹⁶ Because user time online is necessarily in limited supply, being able to dictate or even just orient user preferences has become the key to creating connection and, hence, value. Put differently, user time and preferences are the main value creation tools for cultural content on the Internet.¹⁷ Too often, this

12. See *Panel Transcript I: Authors’ Perspectives, Part One*, 38 COLUM. J.L. & ARTS 399, 407–08 (2015) (statement of David Lowery, Musician & Lecturer, University of Georgia).

13. Claire Cain Miller, *When Uber and Airbnb Meet the Real World*, N.Y. TIMES, Oct. 19, 2014, at SR5. Not all tech companies fit this description of course, as several of them have tried to respect third party rights in developing new business models.

14. Rolfe Winkler, *Google Pushes Its Own Content—As More Users Move to Smartphones, the Search Game Is Changing in Novel Ways*, WALL ST. J., Aug 19, 2014, at B1.

15. It has been said to even influence election results. See Craig Timberg, *A Google Effect on Elections?*, WASH. POST, May 13, 2014, at A10.

16. I use the word “like” here to refer to Facebook and other devices that allow individuals to indicate that they enjoyed a particular comment, video, song, etc.

17. I discussed this idea in greater detail inter alia in Daniel Gervais, *Individual and Collective*

value is now zero.¹⁸

The “law” of the new environment is that the value of an information object on the Internet is not derived from its scarcity but rather from the fact that those who value it most will find it. The preference-dictating algorithms mentioned above are based on a user’s search and use history.¹⁹ Those algorithms thus assume that a user will value what she valued in the past and keep her in your “value zone.” As Daniel J. Hyndman and I point out in *Cloud Control: Copyright, Global Memes and Privacy*, “In a world where almost everything is in the Cloud, the inescapable truth is that the value of a particular cultural artifact is an amalgamation created by the number of users connected with that content they themselves value individually,” and share with others.²⁰ This sharing creates network effects that in turn create value.²¹ The point here is that it is the new intermediaries, including social media platforms, that provide the tools for, but also goad users into finding, connecting to and “liking” new cultural products. Can this change in intermediation models be seen as anything but a form of *progress*? To paraphrase former Columbia Law School Professor Harry Jones, change is not always and necessarily progress. As he once wrote, “Change is simply predictable, inevitable and ceaseless as the basic social fact. In the words of the old song, ‘We don’t know where we’re going, but we’re on our way’.”²²

A driving force of our copyright regime is arguably an *assumption* that changes in the way that cultural products are created and disseminated will be translated into human progress.²³ And indeed, progress there has been. The Internet has shown that it can pierce the shield of censorship.²⁴ Distance education is providing a low-cost way to send the latest information to far reaches of the planet. Sight-impaired users have access to more books than ever before. Information-sharing tools have made revolutions and large manifestations easier to organize. True, one can find most anything online. Whether that greater access is necessarily a form of *progress* requires making two significant assumptions, however: namely, that

Management of Rights Online, in COPYRIGHT IN A BORDERLESS ONLINE ENVIRONMENT 89–99 (Johan Axhamn ed., 2012), and in Daniel Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 56 (2004).

18. See Elizabeth Renzetti, *When Iggy Pop Can’t Live off His Art, What Chance Do the Rest Have?*, GLOBE & MAIL, Oct. 18, 2014, at A2 (quoting Tim Kreider as saying, “[M]oney is also how our culture defines value, and being told what you do is of no (\$0.00) value to the society you live in is, frankly, demoralizing.”).

19. See Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CAL. L. REV. 351, 401 (2014) (explaining that a “signed-in user will see customization based on search history” on Google). It may well be that even non signed-in users will see customization based on history and preferences.

20. Gervais & Hyndman, *supra* note 4, at 70.

21. *See id.*

22. Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1030 (1974).

23. See generally Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause* 16 (Benjamin N. Cardozo Sch. of Law, Occasional Papers in Intellectual Prop., Working Paper No. 5, 1999).

24. See Paul R. Williams & Colleen (Betsy) Popken, *U.S. Foreign Policy and the Arab Spring: Ten Short-Term Lessons Learned*, 41 DENV. J. INT’L L. & POL’Y 47, 59 (2012) (“[R]ebels are also using social media and the Internet as a tool to market themselves, their ideas, and their needs.”).

users can find, and then will want to access, a wide array of diverse information and cultural products. As mentioned above, online culture is being reshaped by ad-based intermediation models that drive user choices.²⁵ The Internet is driving informational and cultural choices to already familiar territory. For many, it is the world of more of the same. Users access a lot, but they access what is recommended or pushed by ad-based intermediaries and/or by peers. This may lead to a significant narrowing of choices and is certainly not a guarantee of quality.

To paraphrase John Dewey, Democracy's sister is Education. Why did Dewey think that education was so important in a democracy? Because to realize the democracy ideal, new humans must acquire the best from the past and have the opportunity to keep building on it.²⁶ As he put it:

[S]ocial efficiency as an educational purpose should mean cultivation of power to join freely and fully in shared or common activities. *This is impossible without culture* And there is perhaps no better definition of culture than that it is the capacity for constantly expanding the range and accuracy of one's perception of meanings.²⁷

Culture implies that one has access to (quality) books, films, music and art—works that carry within them, and expand the meanings of, the past and present, and open horizons about the future. Culture thus grows richer when one has access to—or one might say is confronted with—new forms of high quality creation.²⁸ Great works and other cultural products form part of one's intellectual toolset. This toolset provides ways to *understand*, *analyze* and *criticize* information. It seems fair to ask whether the Internet, as it is now driven by ads and user-preference shaping tools, will prove to be as beneficial for cultural production simply because it is such a great mode of access to and source of information.

The shrinking role of professional filters means flows are immense and much too big for any human mind.²⁹ Second, in an attempt to make content more “relevant” to users, which probably means more familiar, filters give people what

25. Up to a point, which depends on how general the search parameters are. If an online search is very precise, then there is less “wobble room” for a search engine to influence outcomes. For example, if one searches for Anne Tyler's bibliography, one will find a list of her books, including *THE ACCIDENTAL TOURIST* (1985), but also my personal favorite, *BREATHING LESSONS* (1988). However, if I search for best movies based on books, *Accidental Tourist* is not on the list of the top 100. See John Campea, *Top 100 Movies Based on Books*, MOVIE BLOG (Nov. 21, 2008), <http://perma.cc/4EXY-KZZZ>. This is a dubious selection given that the novel was a finalist for the Pulitzer Prize, won the National Book Critics Circle Award for Fiction in 1985 and the Ambassador Book Award for Fiction in 1986, and was adapted into an award-winning 1988 film starring William Hurt, Kathleen Turner and Geena Davis (for which Davis won an Academy Award).

26. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 100 (29th ed. 1957) (discussing the aims and methods of education and how they can help or hamper the adequate realization of the democratic ideal).

27. *Id.* at 144–45 (emphasis added).

28. Quality is defined here as accomplishing the goals just identified.

29. The professional filters of course made mistakes, for example in refusing to publish individuals who would become great authors. Yet they somehow kept the volume of new material a bit more manageable.

they want based on what they already know. This may sound like a good thing, yet it is precisely where the risk lies. Filters, often in the form of search engines or ad-driven social media, govern. Filters may prevent us from seeing other cultures or being exposed to “unwanted” content and viewpoints (or may lead us to presentations that distort or make fun of other cultures or the “unwanted”). The Internet, like many technological tools, is thus a double-edged sword: it greatly increases access to and availability of information and cultural productions, and makes available simple, inexpensive tools to promote culture, cooperation, joint action and consensus building. By the same token, the overabundance of information and culture can easily produce a tunnel vision effect.

Against this backdrop of a changing intermediation paradigm, let me now turn to the principal question explored during this Symposium, namely how to make this new environment work for authors. To begin with, a policy error that is too often made, deliberately or not, in suggesting any type of copyright reform is to stick to the premise of a one-size-fits-all copyright regime. I see this as a fundamental error because, while reform proposals based on the perceived needs of one category of authors can certainly be validly advanced, they should not drive the entire copyright policy effort.³⁰ There is, in other words, an epistemological error at the very root of analyses concerning the operation of the copyright system when they identify and then focus on the need of a single category of authors.

While different taxonomies of the various categories of authors are certainly possible, I offer today a simple categorization of four different types of authors, for the purposes of identifying flaws in, and possible improvements to, the copyright system.

The first category of authors resembles scholars, but they have some different characteristics. These are authors who are “*just sharing*” and who have no serious possibility of making significant income from the sale of their work. This might be because of the size of the potential markets (such as epigraphs or poetry), or works whose purpose is only to disseminate ideas or views (such as blog posts). Unlike scholars, few authors in this category are likely to support financial flows to publishing houses or other commercial intermediaries.

Which takes us to our second category: *scholars*. Scholars are typically employed by universities or research institutes and are generally paid both to teach and to add to the body of knowledge in their field. They rarely make any substantial income from the sale of copies of their works and are happy just “to be read.”³¹ In other words, their income is mostly independent from the commercial potential, if any, of their research and publications.³² For them, producing and

30. We see this, for example, in the spat between the Authors Guild and the Authors Alliance, which supports authors “who write to be read” and “who want to harness this potential to share their creations more broadly in order to serve the public good,” *About Us*, AUTHORS ALLIANCE, <http://perma.cc/5TBM-7PRV> (last visited Feb. 11, 2015). On the Guild’s site, T.J. Stiles noted, “If any of you earn a living as a writer, or hope to, I strongly urge you not to join the Authors Alliance.” *What is the “Authors Alliance?”*, AUTHORS GUILD, <http://perma.cc/4B3M-GEN9> (last visited Feb. 11, 2015); see also T.J. Stiles, *Among the Digital Luddites*, 38 COLUM. J.L. & ARTS 293, 294 (2015).

31. See *About Us*, AUTHORS ALLIANCE, <http://perma.cc/5TBM-7PRV> (last visited Feb. 11, 2015).

32. I explored the distinction between the motivations of scientists and technologists in an essay

publishing copyrighted works is more about visibility, the sharing of ideas and access (access to one's works and gaining access to the work of other scholars in the field). Some scholars may have an indirect interest in having healthy financial flows to publishers who can provide peer review and continue publishing at least the more well-known titles, because scholars may want the recognition of being published by those publishers.

The third category is creators who believe that they can “make it” but have not (yet) obtained support from a professional distributor. They are in a phase that I would call visibility-seeking creators in their “*promotional*” phase. The prime behavioral driver of authors at this stage might logically be to maximize the number of potential users of their work—that is, people who will find them in an ocean of new cultural productions and, authors hope, “like” them.

Fourth, and last, there are *professional* or “career” authors whose income depends on users paying for their work (that is, for a copy or access to a performance of the work). These authors work within different industrial constraints depending on the type of professional distributor with which they are working. These range from professional novelists to songwriters to film directors and scriptwriters. They also include artists who sell artwork through galleries and the like. Their common denominator is that they need an enforceable basis to exert some degree of control over commercially significant forms of exploitation of their work.

If one were to consider the differences between these four categories of authors, I suggest that whether an author (still) sees her work has her “child” once it is “out there in the world” might drive some of the analysis: Is the author a good and willing parent? The point here is that if authors have parental responsibility, they must also have the necessary rights to exercise such responsibility.

The new environment undoubtedly leads to a major paradigm shift in the notion of authorship. As Marshall McLuhan wrote, “[T]o treat [new media] as humble servants . . . of our established conventions would be as fatal as to use an X-ray unit as a space heater.”³³ We (authors, users and distributors) must undoubtedly adapt. Opinions differ widely as to how. Some advance anti-authorial arguments rooted in post-modernism, the inevitable death of the author and the emergence of post-human creation.³⁴ I am unable to predict whether human authors will or will not

based on several conversations with university researchers in physics, chemistry and engineering. See Daniel Gervais, *The Patent Target*, 23 FED. CIR. BAR J. 305 (2013). I would suggest that a similar analysis would be justified in determining the type of IP-based incentive that the scholars need.

33. MARSHALL MCLUHAN, *ELECTRONIC REVOLUTION* (1959), quoted in *NEW MEDIA POETICS*, at v (Adelaide Morris & Thomas Swiss eds., 2006).

34. See Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064–65 (2003) (“More recently, however, the claims of authorship, indeed the concept of authorship in copyright law, have encountered considerable skepticism, not to say hostility, and not only from postmodernist literary critics. Many of the latter contend that copyright, or *droit d’auteur*, obsoletely relies on the Romantic figure—or perhaps fiction—of the genius *auteur*.”); Adelaide Morris, *New Media Poetics: As We May Think/How to Write*, in *NEW MEDIA POETICS*, supra note 33 at 1, 4 (“From a posthuman point of view, we are not the bounded, autonomous, coherent, and fully self-conscious beings imagined by Enlightenment thinkers but cybernetic organisms joined in continuous feedback loops with media and information technologies.”).

survive as a significant source of cultural production in the medium to long run. In the short run, however, a fair question to ask is whether (human) authors should receive monetary payment, not simply recognition or “attribution.”

There are two major strands of argument used to support claims that authors should *not* get paid for their work (by the grant of a copyright and ability to license or sell their rights). First, one can claim that many and possibly most authors do not expect monetary reward.³⁵ Therefore, the argument goes, authors do not need copyright—or at least the economic component of copyright. What can one respond? That some authors use copyright to obtain payment from users for access to and/or use of copyrighted material and that others are free to choose not to use or exercise their rights.³⁶ Authors can give their work away without payment using Creative Commons.³⁷ Authors of audiovisual or musical content can upload it to several sites (e.g., YouTube or Vimeo) where it can be accessed for free. Academic authors (especially those in the U.S. legal academy who publish mostly with student-edited, rather than commercial, journals) can make material available for free, as the success of the Social Science Research Network has demonstrated.³⁸ Scientists who do not want to be published in *Nature* or *Science* can just upload papers to “free” sites as well. That said, I suggest we also need a system that works for professional authors to create viable financial flows. Only then will copyright truly accommodate the needs of all.

This is, as I will discuss below, only a partial answer. For now, let us observe that of the four categories of authors identified above, arguably only one of them (professionals) uses copyright rights to get paid. For authors in the third category—namely those essentially using the Internet to disseminate their work for free as a form of promotion—there is a temporal factor at play. If those authors do eventually succeed in becoming known and are then able to use this fame to seek payment for their work, then they may well switch to the fourth category (professional or “career” authors) and use copyright to earn money.

It is undoubtedly true, in my mind at least, that most professional or career authors are not thinking intensely about possible financial incentives *as they are writing* or otherwise creating (that is, when they are in the creative “moment”). They too, therefore, are subject to this temporal critique. However, the response is precisely that professional authors need a revenue stream to have the time to be “in the moment.”³⁹ They need to have the time to invest in creating new, high-quality works.⁴⁰

35. See *supra* note 30 and accompanying text.

36. Basically, because making a copy or a public performance requires permission unless an exception, such as fair use, applies. See *generally* 17 U.S.C. §§ 106–21.

37. See CREATIVE COMMONS, <http://perma.cc/69NS-T6C2> (last visited Feb. 11, 2015).

38. See, for example, SOCIAL SCIENCE RESEARCH NETWORK, <http://perma.cc/MEX3-3S8V> (last visited Feb. 11, 2015), where thousands of academic articles are available for free.

39. See Renzetti, *supra* note 18 (“Someone has to produce this content—this art—and sadly, the shoemakers’ elves are all busy elsewhere It comes down to a question of value: Do we value artists’ effort?”).

40. To go back to Anne Tyler, mentioned in note 25 above, “Tyler works in this room Monday through Friday from early in the morning until about two in the afternoon, unless she breaks earlier to

A second strand of argument against copyright is that a lot of new creations are now based on the reuse of pre-existing content, such as fan fiction and appropriation art.⁴¹ The appropriate doctrinal response to this argument is not to eliminate copyright but rather to espouse a proper and adequate fair use doctrine.⁴² I have discussed this elsewhere.⁴³

Having responded to those two strands of argument (if only briefly), how should we proceed to make copyright work (better) for authors? I would posit as the starting point of any prescriptive vision of a better copyright regime that we need to find a system that can accommodate at least the four categories of authors enumerated above.⁴⁴ Showing an ability to modulate copyright rules and their enforcement (remedies appropriate to the type of infringement) to accommodate various types of authorship is likely to make copyright more understandable and accepted. This in turn is likely to narrow the gap between the legal norm and online social norms. In the words of the Chief Justice of Australia, “A comprehensible normative basis for an intellectual property right is necessary to its moral clarity.”⁴⁵

In determining whether copyright policy can accommodate all categories of authors, at least three issues come to mind. First, there is a major unfairness in certain areas of digital distribution.⁴⁶ Music seems by far the biggest culprit here. In the United States, this is due to a major regulatory capture issue. While the two main performing rights organizations (PROs) that represent songwriters and publishers are subject to antitrust consent decrees that tie their hands, record companies have full exclusive rights with respect to interactive digital transmissions of sound recordings.⁴⁷ This has allowed record companies to shift financial flows for digital music so that the current ratio of payments to record companies versus payments to songwriters is untenable.⁴⁸

have lunch with a friend. While she is writing, Tyler doesn't like to think about her audience. She doesn't read reviews about her work because she says that would remind her that she has readers. But she does care about the connection she makes with her audience.” Patricia Rowe Willrich, *Watching Through Windows: A Perspective on Anne Tyler*, VQR, Summer 1992, available at <http://perma.cc/V9N5-V9KL>.

41. See *supra* note 3 and accompanying text.

42. See, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007) (proposing the creation of a Fair Use Board in the U.S. Copyright Office that would have the power to declare a proposed use of another's copyrighted work to be a fair use).

43. See Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 848–50 (2013) (arguing that “transformative fair use” should both be recast and interpreted liberally for some new forms of creation.).

44. Then it must also work for others, including users, but this Symposium is about making it work for authors.

45. Robert French, *A Public Law Perspective on Intellectual Property*, 17 J. WORLD INTELL. PROP. 61, 65 (2014).

46. See e.g., *Panel Transcript II: Authors' Perspectives, Part Two*, 38 COLUM. J.L. & ARTS 425, 427–28 (2015) [hereinafter *Panel Transcript II*] (statement of Eddie Schwartz, President, Songwriters Association of Canada).

47. See Daniel Gervais, *Keynote: The Landscape of Collective Management*, 24 COLUM. J.L. & ARTS 423, 435–36 (2011).

48. This is based on the study mentioned by Mr. Schwartz, see *Panel Transcript II, supra* note

The second issue is the massive reuse of existing works as a new creation paradigm. If to create is to transform, then fair use and other flexibilities must be carefully recalibrated accordingly. Because reuse often entails cutting and pasting and other forms of copying, reuse has become a major source of tension for a regulatory system (copyright) that has allowed the reuse of ideas but has historically been much more stingy in allowing unauthorized reuse of someone else's expression.⁴⁹ This means that the transformative fair use doctrine must stretch, but only up to a point, and determining that point may call for more policy forethought than allowing courts to make law case-by-case.⁵⁰

There is a third, related issue: the need to examine carefully the evolution of the case law on access-based (noncreative) fair use. In a few cases, courts have found that the simple act of providing digital access to works—even if those works were already available in digital format and already on the Internet—was “transformative” because the intermediary/fair user was making it easier to find (and, consequently, reuse) works.⁵¹ More recently, courts have found that providing search capability by scanning the contents of millions of books was similarly “transformative” and, therefore, a form of fair use.⁵² I am not disputing the value of those initiatives, but I do question the use of a single policy tool—fair use—to address the reuse of, search of and access to works on the Internet. There is a serious risk of diluting the doctrine if it sails too far from its traditional normative moorings.⁵³

A shot against the bow of a drifting fair use jurisprudence was fired in a recent Seventh Circuit opinion which found that transformativeness was now covered in normative fog.⁵⁴ The court noted that the “fair-use privilege under § 107 is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses

46, at 427–28, showing that, in some contexts, as much as ninety-seven cents of every royalty dollar is paid to labels (shared with the artist) and three cents to the songwriter.

49. After all, as Judge Hough said, “Infringement of copyright is a tort, the burden of proving which is on the plaintiff, and it can be committed in only one way: By copying some substantial part of that which is lawfully copyrighted.” *Frankel v. Irwin*, D.C., 34 F.2d 142, 143, *quoted by* *Oxford Book Co. v. Coll. Entrance Book Co.*, 98 F.2d 688, 692 (2d Cir. 1938).

50. See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008) (“[I]n evaluating transformativeness the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work.”).

51. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

52. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

53. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555 (2004) (“Courts have found transformation—and therefore, fair use—in minimized images of larger pictures, used to index the pictures for an Internet search engine, and in photographs taken for a modeling portfolio that were used instead for a news report. This is not transformation of the copyrighted works, only of their contexts, as a copyright owner would quickly discover were she to attempt to register the smaller image or news photo as a derivative work.” (footnotes omitted)).

54. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“[A]sking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do no explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights under § 106(2).”).

that would not be possible if users always had to negotiate with copyright proprietors.”⁵⁵ A scholar has recently argued in the same vein that forcing creators to create “around” copyright might be a good thing, at least in some circumstances.⁵⁶

There are many ways to re-orchestrate copyright norms according to the variegated picture of authorship that emerges in the online environment.⁵⁷ Based on my analysis in the previous pages, here are but a few ideas: (1) separate reuse fair use from access fair use by tailoring a safe harbor for search engines that does not ask fair use to do all the policy work; (2) use recordation (of transfers of copyright) to differentiate between categories of authors, because most authors in categories other than professionals (the fourth category above) are likely to retain their rights, while professionals will often transfer them to a publisher or function in a work-for-hire arrangement for audiovisual productions⁵⁸ and (3) use remedial modulation based on recordation of any copyright transferred by contract by the author and reflecting whether an author has been an active parent or not. I note that a number of authors have also proposed small-scale (compared to the federal courts) mechanisms, such as arbitration or a specialized board, to deal with fair use.⁵⁹

CONCLUSION

The fate of professional creators is a major cultural issue. While specific copyright rules are obviously contingent and should be adapted to the new realities of online distribution and easy reuse, professional authorship remains necessary. I also believe that to be a professional author, creators need *time*, which, in turn, does require some form of payment. We need healthy financial flows to allow professional authors to make a decent, market-based living. This requires a move away from one-size-fits-all copyright and the resulting “tug of norms” that requires a shift of the entire policy package to the benefit of one category of authors and/or users to the detriment of all others.

55. *Id.* at 759.

56. An interesting argument has been made that having constraints (not copying) may in fact lead creators to exert greater creative effort and result in better outcomes. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. (forthcoming 2015).

57. A more detailed presentation of my suggestions can be found in my testimony before the House of Representatives, *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 21–36 (2013), available at <http://perma.cc/4P5L-SNM2>.

58. The interface between public (government-based) formalities and private formalities should also be explored. See Michael W. Carroll, *A Realist Approach to Copyright Law's Formalities*, 28 BERKELEY TECH. L.J. 1511, 1527 (2013) (describing three groups of privately-administered formalities: registries administered by organizations that either own rights under copyright or related rights or, more often, act as transactional agents for rights holders, and third-party registries or copyright documentation services and organizations that compete directly with public formalities systems to provide rights holders with copyright documentation services, such as notice (e.g., watermarking), registration or deposit).

59. See Carroll, *supra* note 42.

If we are to have "Progress of Science and useful Arts,"⁶⁰ we need to do better. As Ernest Hemingway—a professional author who spent many hours of most days writing—wrote, "For him it was a dark passage which led to nowhere, then to nowhere, then again to nowhere, once again to nowhere, always and forever to nowhere."⁶¹ I hope he was not talking about the future of authorship.

60. U.S. CONST. art.1, § 8, cl. 8.

61. ERNEST HEMINGWAY, *FOR WHOM THE BELL TOLLS* 159 (Scribner 1940).