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# Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity

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## **Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity**

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### *Abstract*

*It has been suggested that today's authors need copyright exceptions and limitations more than they need exclusive rights. I will first test the proposition by examining what one might call authorship-oriented exceptions, from 'fair abridgement' in early English cases to the original meaning of 'transformative use' in the U.S. fair use doctrine. All of these exceptions trained on the promotion of creativity by allowing authors to make reasonable borrowings from old works in the creation of new ones. I conclude that both today's assemblers of 'remixes' and yesterday's traditional creators of works of entertainment or scholarship have needed the flexibility with which these kinds of exceptions temper exclusive rights.*

*Next I will examine the bolder proposition that, compared with their need for limitations on copyright, authors today neither desire nor require exclusive rights. The claim suggests that today's authors do not (or should not) seek to make a living from or control the exploitation of their creations. Behind the belittling of exclusive rights there loom significant business interests built on the expansion of copyright exceptions. The exceptions in question do not foster creativity, they redistribute the fruits of creativity. They are authorship-undermining exceptions because their justification increasingly relies on the denigration of proprietary authorship.*

*It has long been popular to point out that the romantic author has long been a front for unromantic, unlovable copyright industries, from the booksellers of the eighteenth century to the MPAA and RIAA of today. I would like to suggest that today's counterpart – or antidote? – to the romantic author, the techno postmodernist participant, is also a shill for big industry. The instrumentalization of the author, or of the anti-author, still serves big business, it's just that the business consumes copyrighted works, rather than produces them.*

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\* Many thanks to John Briggs and Philip Sancilio, both Columbia Law School class of 2013.

## Introduction

A lawyer for an immense copyright-exploiting corporation, casting himself as a defender of authors' rights, challenged his interlocutor's incredulity with the following assertion: given today's diversity of authors, 'more of them depend on limitations and exceptions than on exclusive rights'. Some of you might cringe at the resemblance of this credo to Orwell's 'Freedom is Slavery!'<sup>1</sup> Nonetheless I'd like to take seriously the proposition that today's authors need copyright exceptions and limitations more than they need exclusive rights.

First, I will test the proposition by examining what one might call authorship-oriented exceptions, from 'fair abridgement' in early English cases to the original meaning of 'transformative use' in the U.S. fair use doctrine. All of these exceptions trained on the promotion of creativity by allowing authors to make reasonable borrowings from old works in the creation of new ones. I conclude that both today's assemblers of 'remixes' and yesterday's traditional creators of works of entertainment or scholarship have needed the flexibility with which these kinds of exceptions temper exclusive rights.

Next I will examine the bolder proposition that, compared with their need for limitations on copyright, authors today neither desire nor require exclusive rights. The claim suggests that today's authors do not (or should not) seek to make a living from or control the exploitation of their creations. Or, in the words of the same Orwellian advocate, 'Copyright is not interested in people making a living, it's interested in promoting creativity'.<sup>2</sup> - As if creations will spontaneously sprout in even the most nutrient-starved soil. Of course, the Internet did not inaugurate the celebration of altruistic or amateur authorship. Genteel contempt for professional (that is, money-grubbing) authors predates the Statute of Anne.<sup>3</sup> But today's variation on the theme betrays more than social snobbery. Behind the belittling of exclusive rights there loom significant business interests built on the expansion of copyright exceptions. The exceptions in question do not foster creativity, they redistribute the fruits of creativity. They are authorship-undermining exceptions because their justification increasingly relies on the denigration of proprietary authorship.

## I

Let's commence with traditional, authorship-oriented exceptions, beginning with eighteenth-century Britain. In a series of cases starting from 1720, the English courts developed what came to be known as the 'fair abridgement' exception to copyright infringement. For example, *Gyles v. Wilcox*, decided in 1740, concerned condensed versions of law books; Lord Chancellor Hardwicke offered one of the doctrine's more celebrated expressions: 'abridgements may with great propriety be called a new book, because ... the invention, learning, and judgment

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<sup>1</sup> E.g., G. Orwell, *1984* (New York, NY: Signet Classic, 1949), 4.

<sup>2</sup> E. McDermott, 'The Great Copyright Debate', *Managing Intellectual Property* (Mar. 2009), 30 (quoting Fred Von Lohmann, then of the Electronic Frontier Foundation, now a senior copyright counsel at Google).

<sup>3</sup> 1710, 8 Anne, c. 19. See, e.g., Nicolas Boileau Despreaux, *L'Art poétique* (1674) (D. Nichol Smith, ed., 1931, p. 33) decrying those authors who 'disgusted with glory and famished for gain/ indenture their muse to a bookseller/ and convert a divine art into a mercenary trade' ('je ne puis souffrir ces auteurs renommés./ Qui, dégoûtés de gloire et d'argent affamés./ Mettent leur Apollon aux gages d'un libraire./ Et font d'un art divin un métier mercenaire.')

of the author is shewn in them, and in many cases are extremely useful.’<sup>4</sup> Even at this early date we recognize a familiar dual preoccupation, to permit the continued circulation of ‘extremely useful’ works by follow-on creators, and to emphasize the authorship contributions of the second-comer whose alterations of the underlying work demonstrate ‘invention, learning and judgment’.

Even more famously, in 1785 in *Sayre v. Moore*, a case about sea charts, Lord Mansfield reiterated the importance of the second work’s utility, but balanced it against the economic interests of the first author:

we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>5</sup>

Or Lord Ellenborough, who in 1802 in *Cary v. Kearsley*, concerning a book of road maps, declared, ‘while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles on science’.<sup>6</sup> Five years later, however, in *Roworth v. Wilkes* he abandoned the manacled metaphor and concentrated on the market impact of failing to secure the enjoyment of copyright: ‘the question is, whether the defendant’s publication [an encyclopedia] would serve as a substitute for [the plaintiff’s treatise].’<sup>7</sup> Substitution, moreover, was not to be ascertained merely by counting pages, as Lord Chancellor Cottenham cautioned in 1836 in *Bramwell v. Halcomb*: ‘One writer might take all the vital part of another’s book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to.’<sup>8</sup>

In the US in 1841 in *Folsom v. Marsh*, which concerned a biography of George Washington, Justice Story summed up over a hundred years of English authority, restating the fair abridgement doctrine as follows:

It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be [a noninfringing] abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.

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<sup>4</sup> (1740) 26 Eng. Rep. 489, 490; 2 Atk. 141, 143.

<sup>5</sup> (1785) 102 Eng. Rep. 139 n.(b), 140 n.(b); 1 East 361 n.(b).

<sup>6</sup> (1803) 170 Eng. Rep. 679, 680; 4 Esp. 168, 170.

<sup>7</sup> (1807) 170 Eng. Rep. 889, 891; 1 Camp. 94, 98.

<sup>8</sup> (1836) 40 Eng. Rep. 1110, 1110; 3 My. & Cr. 737, 738. For a fuller analysis of the English decisions, see Isabella Alexander, *Copyright and the Public Interest in the Nineteenth Century* (Oxford: Hart Publishing, 2010).

... If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient ... to constitute a piracy ... In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.<sup>9</sup>

These case law examples, particularly as synthesized by Justice Story, reveal the basic moving parts of the traditional fair use doctrine: authorship, public benefit, economic impact. The progress of learning advances when the law allows follow-on authors to bestow their intellectual labour and judgment in reworking selections from a prior work, without prejudicing the profits or prospects of that work.

The US 1976 Copyright Act largely codifies Justice Story's restatement. Section 107 instructs courts to assess four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>10</sup>

The factors imply that something less than the whole prior work ('portion used') will be taken (though, as we will see, US courts have overcome this apparent restriction). The examples set out in § 107's preamble, moreover, generally point to new authorship uses: 'criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.'<sup>11</sup> The outlier is classroom copies, though these arguably fall under a special regime because the 1976 Act also anticipated the promulgation of guidelines on classroom photocopying, and appointed a commission representing interested parties to develop them.<sup>12</sup> The other examples all come within what used to be called 'productive use' that yields new works.<sup>13</sup> In an influential article written in 1990, Judge Pierre Leval of the US Court of Appeals for the Second Circuit – which sits in NYC and hears a lot of copyright cases – redubbed this

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<sup>9</sup> 9 F. Cas. 342, 345, 348 (C.C.D. Mass. 1841) (No. 4,901).

<sup>10</sup> 17 U.S.C. § 107 (2006).

<sup>11</sup> *Ibid.*

<sup>12</sup> H.R. Rep. No. 94-1476, at 66–72 (1976) ('Chairman Kastenmeier and other members urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material. The response to these suggestions was positive, and a number of meetings ... were held beginning in September 1975.').

<sup>13</sup> *E.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478–80 (1984) (Blackmun, J., dissenting).

category ‘transformative use’,<sup>14</sup> and the Supreme Court, four years later, for the first time recognizing parody as a potential fair use, adopted the label.<sup>15</sup> In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court inquired whether the defendants’ musical parody had made a ‘transformative’ use: not one that merely supersedes the objects of the earlier work by copying it, but one that ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message’.<sup>16</sup>

US fair use cases involving follow-on authorship largely turn on the ‘transformative’ character of the contribution, as well as on economic impact, though courts sometimes conflate the two factors: courts tend to equate ‘transformative’ works or purposes with those that do not substitute for the copyright owner’s normal markets for the work.<sup>17</sup> Indeed, the Second Circuit has even coined the term ‘transformative market’, apparently meaning an exploitation that falls outside the copyright owner’s zone of exclusivity.<sup>18</sup> The counterpoint to a ‘transformative market’ (favoring fair use) is ‘a traditional license market’, that is, a ‘traditional, reasonable, or likely to be developed market’ (disfavoring fair use).<sup>19</sup> Courts inquire into whether the plaintiff is currently exploiting the market, or whether the market is one that similarly situated copyright owners would normally exploit.<sup>20</sup> Thus, the traditional fair use inquiry balances the new expressive use (promoting the second-comer’s authorship) against the first author’s returns for her intellectual labours. The public interest advances through care for the second author and feeding of the first. Traditional fair use promotes an ecosystem of authorship.

That ecosystem moreover accommodates non-traditional authorship. The apostles of ‘remix’ (from whom we’ll hear more later) decry copyright for oh-so-yesterday consecration of tyrannical romantic authors whose works impose ‘discursive hegemony’,<sup>21</sup> ‘narrowing the rights of imitation and appropriation.’<sup>22</sup> But fair use makes room for a great deal of secondary creativity, so long as it does not unreasonably compromise the first author’s exploitation of paying markets for her work. In some cases, it’s clear from the nature of the work that there’s no serious prospect of competition – think of all the parodies on YouTube of the Hitler Bunker

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<sup>14</sup> P. N. Leval, ‘Toward a Fair Use Standard’, *Harvard Law Review*, 103 (1990), 1111 (‘I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.’).

<sup>15</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>16</sup> *Ibid.*

<sup>17</sup> See, e.g., *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

<sup>18</sup> *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 145 n.11 (2d Cir. 1998) (‘[C]opyright owners may not preempt exploitation of transformative markets, which they would not *in general* develop or license others to develop ...’ (internal quotation marks omitted)).

<sup>19</sup> *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 930 (2d Cir. 1994).

<sup>20</sup> Cf., e.g., *Salinger v. Colting*, 641 F. Supp.2d 250, 268 (S.D.N.Y. 2009) (‘[T]he Second Circuit has previously emphasized that it is the “potential market” for the copyrighted work and its derivatives that must be examined ...’), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010); *Castle Rock Entm’t*, 150 F.3d at 145–6 (‘Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on *Seinfeld* ... the copyright law must respect that creative and economic choice.’).

<sup>21</sup> M. Sunder, ‘IP<sup>3</sup>’, *Stanford Law Review*, 59 (2006), 305.

<sup>22</sup> H. Travis, ‘Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment’, *Berkeley Technology Law Journal*, 15 (2000), 827.

scene from the film *Downfall* (including a parody of Hitler Bunker scene parodies).<sup>23</sup> In other cases, the work might fall within traditional copyright markets, such as sequels of novels or films, but the dissemination, even if potentially widespread, is low-grade and effectively noncommercial<sup>24</sup> – think of fan fiction. Or more specifically, think of Harry Potter; the Harrypotterfanfiction.com site alone boasts (as of February 2013) almost 36,000 authors of over 79,000 HP stories.<sup>25</sup> I’ll pass on the public benefit prong, but these are expressive uses whose economic impact is too trivial to warrant a finding of infringement. (Nor to warrant alienating the fan base.) Authorship may, as Peter Jaszi predicted in the paleolithic 1990s, be becoming ‘polyvocal’, ‘increasingly ... collective ... and collaborative’,<sup>26</sup> but nothing in the authorship-based conception of fair use restricts its application to individual authors, romantic or otherwise.

## II

This brings me to what Graeme Austin has called the second face of fair use, copyright exceptions that are no longer authorship-oriented, but business model-enabling, fostering not new works but redisseminations of content.<sup>27</sup> Along the way, ‘transformative use’ has itself become transformed. In the context of the Supreme Court’s *Campbell* decision, the Two Live Crew rap parody ‘transformed’ Roy Orbison’s ‘Pretty Woman’ by creating a new (and rather raunchy) work.<sup>28</sup> But courts have come to interpret *Campbell*’s reference to ‘something new, with a further purpose’<sup>29</sup> to encompass copying that does not add ‘new expression’, so long as the copying gives the prior work ‘new meaning’.<sup>30</sup> Recent cases evidence a drift from ‘transformative work’ to ‘transformative purpose’; in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation.

In the initial shift from ‘transformative work’ to ‘transformative purpose’ the defendant had in fact created an independent work of authorship, even though that work did not significantly alter the copied work. Thus, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, (which did not concern digital technologies) the Second Circuit held a coffee-table-book biography’s reduced-sized complete images of posters of the legendary rock band The Grateful Dead were ‘transformative’ because the book used the images of the posters as ‘historical artifacts’ to document the Dead’s concerts, rather than for the posters’ original aesthetic purpose.<sup>31</sup> But the documentary/aesthetic distinction has also significantly expanded the application of the fair use exception to new technological uses that do not yield new works. The

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<sup>23</sup> See, e.g., hitlerrantsparodies, *Hitler finds out Obama has been re-elected*, YOUTUBE (7 Nov. 2012), [www.youtube.com/watch?v=MuG1SVLvm6Q](http://www.youtube.com/watch?v=MuG1SVLvm6Q); hitlerrantsparodies, *Hitler rants about the Hitler Parodies*, YOUTUBE (1 May 2009), [www.youtube.com/watch?v=cqxxRPZdfvs](http://www.youtube.com/watch?v=cqxxRPZdfvs).

<sup>24</sup> See generally T. Wu, ‘Tolerated Use’, *Columbia Journal of Law and the Arts*, 31 (2008), 617–35.

<sup>25</sup> *Statistics*, HARRY POTTER FAN FICTION, [www.harrypotterfanfiction.com](http://www.harrypotterfanfiction.com) (last visited 11 Feb. 2013).

<sup>26</sup> P. Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’, *Cardozo Arts and Entertainment Law Journal*, 10 (1992), 302.

<sup>27</sup> G. Austin, ‘The Two Faces of Fair Use’, *New Zealand Universities Law Review*, 25 (2012), 288.

<sup>28</sup> 510 U.S. 569, 572 (1994).

<sup>29</sup> *Ibid.* at 579.

<sup>30</sup> See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2002) (‘By putting a copy of the photograph in the newspaper, the work was transformed into news, creating a new meaning or purpose for the work.’).

<sup>31</sup> 448 F.3d 605, 609–10 (2d Cir. 2006).

search engine practice of ‘indexing’ has been the principal digital beneficiary of the ‘documentary’ or ‘new purpose’ brand of transformativeness.<sup>32</sup>

But other applications of the distinction are emerging. For example, the constitution of a commercial database containing complete copies of copyrighted works may be fair use if the database does not exploit the works for their expressive value.<sup>33</sup> Google has asserted that its scanning and retention of millions of copyrighted books is a transformative fair use because Google’s responses to user queries seeking bibliographic information or arguably fair use “snippets” from the books depends on storing full-text copies in its database.<sup>34</sup> And the Southern District of New York in the recent *HathiTrust* decision concerning library uses of their holdings, as digitized by Google, found the scanning and permanent storage of full copies of in-copyright books to further the ‘transformative use’ of allowing ‘data mining’ of the contents of the books.<sup>35</sup> Such uses are nonexpressive in two senses: they produce no new expression by the copying and storage entities, and the ‘mining’ of the scanned book seeks not to expose its expression, but rather to extract information.<sup>36</sup> For example, in books published between 1980 and 1990 (hence in-copyright) the total number of appearances of the word ‘kiwi’. So stated, characterizing the use as ‘fair’ seems to risk no more than spawning some peculiar academic subspecialties.<sup>37</sup> But how many steps between data ‘mining’ and data delivery, with the datum being the whole book?

These new, nonexpressive copyright exceptions rely for justification on the public benefit (‘access to culture’) that the redistribution confers, coupled with an absence of economic harm to the authors or copyright holders. Since the new use may create a new market for the work, it may not compete directly with the traditional exploitations. But that is not the point. Copyright traditionally vests in the author the control over new markets for reproductions or public communications of their works, including new markets created by new technologies. When the ebook replaces the print volume, copyright will have kept pace with the market; any other rule would consign the system to obsolescence.

But new copyright-exploiting businesses would prefer to avoid the expense and transaction costs of finding and paying authors, so it’s understandable that the technology entrepreneur would seek to portray the author as an impediment to technological progress or to access to knowledge, and/or as the undeserving beneficiary of a windfall created by the entrepreneur’s ingenuity.<sup>38</sup> Literary criticism bolsters the unflattering portrait. The post-

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<sup>32</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174–5 (9th Cir. 2007); *Kelly*, 336 F.3d at 819–20.

<sup>33</sup> See *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) (‘[T]he archiving of plaintiffs’ papers was transformative and favored a finding of “fair use.” iParadigms’ use of these works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism.’).

<sup>34</sup> Defendant Google, Inc.’s Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment or in the Alternative Summary Adjudication at 21–3, *Author’s Guild, Inc. v. Google Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. 27 July 2012), 2012 WL 3055772.

<sup>35</sup> *Authors Guild v. HathiTrust*, No. 11 CV 6351 (HB), 2012 WL 4808939, at \*11 (S.D.N.Y. 10 Oct. 2012).

<sup>36</sup> See generally Brief of Digital Humanities and Law Scholars as *Amici Cuius* in Partial Support of Defendants’ Motion for Summary Judgment, *HathiTrust*, 2012 WL 4808939 (No. 11 CV 6351 (HB)), 2012 WL 3966152.

<sup>37</sup> See, e.g., *ibid.* at 8 (describing example of ‘examining word frequencies, syntactic patterns, and thematic markers in the metadata-enriched context of author nationality, author gender, and time period’).

<sup>38</sup> E.g., X. Tang, ‘That Old Thing, Copyright ...; Reconciling the Postmodern Paradox in the New Digital Age’, *AIPLA Quarterly Journal*, 39 (2011), 85 (‘[T]he harm in courts’ tendency to continuously uphold the copyright holder’s rights over the defendant user’s extends beyond harsh remedies: it also encourages a litigation-happy trend

modernist attack on the author lends convenient luster and intellectual pedigree to what might otherwise seem merely self-serving. The ‘death of the author’ announced in literary theory has produced a syllogism for the heralds of ‘remix culture’: copyright is a consequence of the romantic conception of authorship; romantic authorship is dead; therefore, copyright is (or should be) dead, too.<sup>39</sup> Instead, she stalks among the un-dead, for she holds hegemonic sway over interpretations, and over markets. In postmodernism, authors are tyrants, imposing their meanings on texts: Michel Foucault pronounced that ‘the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction.’<sup>40</sup> Transposed to copyright scholarship, the romantic author, we learn, is obsolete yet is to blame for the ills of excessive legal protection:

The crystallization of ever-greater legal protections for intellectual property occurs around the figure of the originary romantic author, which is ironic because increasingly intellectual properties underwrite the ‘private’ sovereignties of multinational corporations. The embedded figure of romantic authorship embodied in the trend toward ‘international’ standards of intellectual property protection serves ... to legitimate stronger protection ... Representations of this global empire of authorship neglect, or fail to represent at all, alternate models of cultural production ...

...

[A]uthors (particularly contemporary authors) are not only given the ability to tax the future social product via copyright law but also receive a generous subsidy to the extent that they do not have to pay compensation to all of the sources from which they have drawn or by which they have been influenced, only some of which may be in the public domain.<sup>41</sup>

In other words, to borrow a regretted phrase from my reelected president, ‘You didn’t create that.’ Your community did. The ‘authorship empire’ must be stricken back, to liberate those ‘alternate models of cultural production’ empowering communities of readers. Readers give meaning to the texts they peruse; reading itself becomes a creative act. The Internet gives concrete effect to the postmodernist theory of the reader as creator, for all readers can remanipulate the text, and none can impose unilateral significance. As another pundit put it:

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on the on the part of copyright owners. This oppressive practice inevitably stops some remix artists from creating (or at the very least, using copyrighted material) in the first place.’).

<sup>39</sup> E.g., K. Aoki, ‘(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship’, *Stanford Law Review*, 48 (1996), 1337 (‘But if all authors to greater or lesser degrees transform and rework preexisting materials, then perhaps a too-strong formulation of copyright property would disadvantage future authors.’); W. Patry, *Moral Panics and the Copyright Wars* (New York, NY: Oxford University Press, 2009), 74 (‘All works of authorship are to some extent communal works; it is therefore inappropriate to vest one person with rights that have the ability to impede the birth of future generations of works.’).

<sup>40</sup> M. Foucault, ‘What Is an Author?’ in J. D. Faubion (ed.), *Michel Foucault: Aesthetics, Method, and Epistemology* (New York, NY: The New Press, 1998), 221.

<sup>41</sup> Aoki, ‘(Intellectual) Property and Sovereignty’, 1305, 1337.

Today's 'audience' no longer just passively consumes creative works. Nor are all works 'fixed' in the sense that they never change once the original author produces them. Rather, the consumer is now often an active participant in the creative endeavor, interacting with, and continuously contributing new material to creative works. In fact, consumers may contribute as much creatively to some copyrightable works as the original producers.<sup>42</sup>

With the increasing Wikipediafication of content, the 'wisdom of crowds' overtakes individual expertise in the production of works that everyone can pitch in to create, add to, or modify. In the context of copyright, if creativity is so dispersed, then no one can claim to have originated a work of authorship, so perhaps no one can fairly own a copyright, either.<sup>43</sup> We have gone beyond opening the gates of traditional fair use to let a thousand writers scribble. For the scribblers' demand does not fundamentally challenge the 'authorship empire.' Rather it just multiplies the number of emperors. Instead, through 'alternate models of cultural production,' the cumulative and fluctuating nature of creative contributions precludes any individual from claiming the work as 'hers.' (I point out as an aside that the attack on authorship has made such inroads that even some copyright owners have reflexively adopted the rhetoric of anti-authorship: one of my publishers has taken to addressing me by mail as 'Dear Content Provider'!)

Once the author descends her romantic pedestal to become what I'll call a 'techno postmodernist participant,' she can no longer be a 'proprietor.' Proprietary authorship is doomed to the dustbin of history, for if the rationale for copyright is incentive to produce and distribute works, the Internet may belie the Johnsonian calculus that anyone who writes, except for money, is a blockhead.<sup>44</sup> In addition to the poets who burn with inner fire, for whom creation is allegedly its own reward, and others (such as law professors) for whom other gainful employment permits authorial altruism, we now have those crowdsourcing masses of incremental contributors whose participation, whether occasional or obsessive, generates a corpus of blockheaded creations. These creators do not need the carrot of exclusive rights in order to produce works of authorship. This is, of course, a very short-sighted view, for (at least as to those who aren't law professors) it describes motivations at a particular point in time. Filthy lucre may not have spurred the first endeavor; many new creators hunger for exposure over income. Free distribution can indeed enhance the author's fame, but if the author cannot capitalize on her fame by exploiting her copyrights, then her prospects for future creativity decline. (A starving artist's garret is still a garret, even if the address is well-known.)

Without exclusive rights, it's harder to command a price for your work, but according to the new orthodoxy, that no longer matters. Either the work isn't 'yours' anyway, or you

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<sup>42</sup> E. Reuveni, 'Authorship in the Age of the Conducer', *Journal of the Copyright Society of the U.S.A.*, 54 (2007), 286.

<sup>43</sup> See, e.g., M. Rimmer, 'Wikipedia, Collective Authorship and the Politics of Knowledge' in C. Arup and W. van Caenegem (eds.), *Intellectual Property Policy Reform* (Northampton, MA: Edward Elgar, 2009), 178 ('Wikipedia and its relatives pose a number of challenges to the assumptions of copyright law about romantic, individual authorship ... [and] challenge[] the emphasis of copyright law upon the moral rights of individual authors to attribution and integrity.').

<sup>44</sup> *Johnsoniana: Life, Opinions, and Table-Talk of Doctor Johnson*, R. W. Montagu (arr. & coll.) (Alfred Boot & Son: London, 1884), 310.

shouldn't be looking to be paid for it. Along with alternative models of cultural production come alternative models of making a living. The public won't buy books or music, but we are supposed to expect it to retain an inexhaustible appetite for merchandizing properties and concert tickets.

That the author should not look to her writings for material sustenance, is not a new idea. In the eighteenth-century 'battle of the booksellers,' Lord Camden belittled writing for profit:

Glory is the reward of science, [he thundered] and those who deserve it, scorn all meaner views ... It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letter press.<sup>45</sup>

Given the rise of the professional author in the eighteenth century, this outburst was retrograde even its day. As Catherine Macaulay then wryly observed, the 'sordid butchers['] and bakers['] [demands for payment] ... are evils which the sublime flights of poetic fancy do not always soar above.'<sup>46</sup>

Similarly, author-bashing by the apostles of new media did not come in with the digital era, nor with 1970s French intellectuals and their later disciples in the American legal academy. For example, as French legal historian Laurent Pfister has demonstrated, the rhetoric accompanying the rise of the radio in the 1920s and 1930s seems freshly ripped from a current blog. 'The moral claims of the community trump the selfish interests of authors who should be obliged to abandon their works so that they may be distributed to the collectivity,' urged a representative of the broadcasting industry.<sup>47</sup> Authors' property rights reflect a spirit of individualism out of step with the times; 'the author has moral obligations to the society which forms the cultural basis for his work. Society has the right to demand that he contribute his works to the cultural capital of the nation,' he declared.<sup>48</sup>

Similarly, Graeme Austin has identified the debates over radio broadcasters' payment of performance licenses to composers as a prequel to today's laments that copyright is thwarting technological progress. Broadcasters testified before a Senate committee that 'There is no greater human blessing that has come into the body politic ... than this broadcasting idea as at presently conducted ... Now ... when it gets right down to the basical [sic] issue, [it] is one solely between this little group of people and the insiders who control it [ASCAP] and the American people.'<sup>49</sup> Even then, however, some jaundiced commentators observed 'it is pure

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<sup>45</sup> *The Parliamentary History of England*, W. Cobbett (comp.) (T. C. Hansard: London, 1813), col. 1000.

<sup>46</sup> C. Macaulay, *A Modest Plea for the Property of Copy Right* (Edward and Charles Dilly: London, 1774), 15.

<sup>47</sup> Laurent Pfister, 'La "Révolution" de la communication radiophonique, une onde de choc sur le droit d'auteur?', forthcoming in *Mélanges Bernard Teyssié* (2013) citing F. Lubinski, « Droit d'auteur et radiodiffusion. Proposition de modification de l'article 11 bis de la Convention de Berne », *R.J.I.R.*, 1934, p. 41 (translation mine)

<sup>48</sup> *Ibid.* p. 42.

<sup>49</sup> To Amend the Copyright Act: Hearing on S. 2600 Before a Subcomm. of the S. Comm. on Patents, 68th Cong. 17, 47 (1924) (statement of Charles H. Tuttle, National Association of Broadcasters); see also G. Austin, 'Radio: Early Battles over the Public Performance Right' in B. Sherman and L. Wiseman (eds.), *Copyright and the Challenge of the New* (Frederick, MD: Kluwer Law International, 2012).

Pharisee-ism to claim that [the challenges to exclusive rights] had the goal of spreading knowledge of works of authorship; they never had any goal or result other than to allow industry to profit from the labors of authors.<sup>50</sup>

It has long been popular to point out that the romantic author has long been a front for unromantic, unlovable copyright industries, from the booksellers of the eighteenth century to the MPAA and RIAA of today. For one characteristic overstatement:

From the beginning of modern copyright, we see one of the central rhetorical features of copyright discourse – authors put forth as the basis for and beneficiaries of rights that are in truth owned by publishers and other corporations who regard authors as a negative item on balance sheets to be reduced as much as possible. It is a testament to the formidable power of the romantic emotions evoked by the metaphor [of authors as parents of their works] that it continues to hold sway despite 300 years of empirical evidence demonstrating its complete falsity.<sup>51</sup>

I would like to suggest that today's counterpart – or antidote? – to the romantic author, the techno postmodernist participant, is also a skill for big industry. The instrumentalization of the author, or of the anti-author, still serves big business, it's just that the business consumes copyrighted works, rather than produces them.

## Conclusion

To return to the proposition with which I began this essay, 'more authors depend on exceptions to copyright than on exclusive rights,' I think we can acknowledge that the assertion may apply to some of the new universe of creators, those amateur remixers that one commentator has dubbed 'conducers' – consumer-producers.<sup>52</sup> Copyright in its technological neutrality and indifference to quality welcomes new kinds of creativity, including what Margaret Chon has called 'authorial activity, deriving from broadly participatory technologies, [that] undermines the hierarchical and bottleneck control of content suggested by the older, print-based copyright constructs of "author."<sup>53</sup> And when those alternative creations build on their predecessors, the flexibility of the traditional fair use doctrine will allow their creators to flourish - within the noncommercial sphere to which their communitarian altruism should confine them.

But, even in what Margaret Chon has poetically described as 'an environment filled with terabytes rather than trees,'<sup>54</sup> traditional authors, that is, creators who hope to retain authority over the meanings and markets for their works, will also seek to thrive.<sup>55</sup> This group is

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<sup>50</sup> Pfister, 'La "Révolution" de la communication radiophonique', citing Paul Olganier, *Le droit d'auteur*, Paris, LGDJ, 1934, vol. 1, p. 73 (translation mine).

<sup>51</sup> Patry, *Moral Panics*, 76.

<sup>52</sup> Reuveni, 'Age of the Conducer', 286.

<sup>53</sup> M. Chon, 'The Romantic Collective Author', *Vanderbilt Journal of Entertainment and Technology Law*, 14 (2012), 835.

<sup>54</sup> *Ibid.* at 836.

<sup>55</sup> See, e.g., L. Shepherd, *Lloyd Shepherd: My parley with ebook pirates*, GUARDIAN (16 Mar. 2012, 6:30 AM), [www.guardian.co.uk/books/2012/mar/16/lloyd-shepherd-ebook-pirates-mobilism](http://www.guardian.co.uk/books/2012/mar/16/lloyd-shepherd-ebook-pirates-mobilism).

composed of more than musty literary luddites clinging to their quill pens; digital denizens can feel proprietary about their works, too. Moreover today's amateur may become tomorrow's professional, for example as bloggers become novelists or write book-length nonfiction, or simply carry on in online endeavors that they succeed in monetizing. But for their creativity to persist, the writing and other creative trades must continue to furnish adequate remuneration. Innumerable author blogs attest to conditions too parlous to permit the luxury of unpaid intellectual labour.<sup>56</sup> As my former colleague Jeremy Waldron put it, the author may be dead, but she still responds to economic incentives. Without exclusive, enforceable, rights, she may just be dead, that is, otherwise employed.

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<sup>56</sup> E.g., Stella Duffy, *Copyright Theft - Robin Hood it ain't*, (20 March 2012) <http://stelladuffy.wordpress.com/2012/03/20/copyright-theft-robin-hood-it-aint/> ('When writers cannot earn from writing, we will quickly return to a time where the only writers are those with a private income or supported by a rich partner. The day of the gentleman/gentlewoman writer returns. / The really sad thing is that the pirate likes to think of him or herself as a rebel, taking from the man, undercutting the big boys, making all art free – in truth, they're still paying the big old rich man on the hill for the hardware and the internet time – it's only the little craftsperson they're stealing from.');

*Saw a Piracy Post on My Dash*, SARAH REES BRENNAN (30 July 2012), <http://sarahreesbrennan.tumblr.com/post/28366049820/saw-a-piracy-post-on-my-dash> ('Writers tend to be just getting by, having other jobs as well, really, really trying to make it work ... Would I stay up for three nights without sleep until I made myself sick to get something done, if it was just for me, if I wasn't trying to make a career of this? I wouldn't.');

K. Douglas, *Thoughts on Piracy – August 2012*, PASSIONATE BOOK DIVAS (25 Aug. 2012), <http://passionatebookdivas.com/?cat=143> ('It's a tough business to make a living in even when all the rules are followed and no one is stealing the profits, but it's almost impossible when readers choose to steal from the authors they supposedly love to read. As much as I love to write, it's my job. It's how I pay my bills and put food on the table, and I work really hard to do it right.');

N. Hayes, *Piracy ... but not the 'Aaargh' fun kind*, K-BOOKS (28 Aug. 2012), <http://k-booksxo.blogspot.com/2012/08/stop-e-piracy-blog-tour.html> ('[L]et's face it, royalties aren't high, and unless you're J.K. Rowling or Stephanie Meyer, you ain't swimming in gold in this business. I love writing, and the only way I can get to do that all day is by selling enough books, so if someone is downloading them for free that takes me a tiny step away from achieving my goal.').