

On Copyright's Authorship Policy

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On May 4, 2001, a one-man corporation named Bridgeport Music, Inc. launched over 500 counts of copyright infringement against more than 800 different artists and labels.¹ Bridgeport Music has no employees, and other than copyrights, no reported assets.² Technically, Bridgeport is a “catalogue company.” Others call it a “sample troll.”

Bridgeport is the owner of valuable copyrights, including many of funk singer George Clinton's most famous songs—songs which are sampled in a good amount of rap music.³ Bridgeport located every sample of Clinton's and other copyrights it owned, and sued based on the legal position that any sampling of a sound recording, no matter how minimal or unnoticeable, is still an infringement.

During the course of Bridgeport's campaign, it has won two important victories. First, the Sixth Circuit, the appellate court for Nashville adopted Bridgeport's theory of infringement. In *Bridgeport Music, Inc. v. Dimension Films*,⁴ the defendants sampled a single chord from the George Clinton tune “Get Off Your Ass and Jam,” changed the pitch, and looped the sound. Despite the plausible defense that one note is but a *de minimus* use of the work, the Sixth Circuit ruled for Bridgeport and created a stark rule: *any* sampling, no matter how minimal or undetectable, is a copyright infringement. Said the court in *Bridgeport*, “Get a license or do not sample. We do not see this as stifling creativity in any significant way.”⁵ In 2006 Bridgeport convinced a district court to enjoin the sales of the bestselling

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¹ Tim Wu, *Jay-Z Versus the Sample Troll*, Slate Magazine, Nov. 16, 2006, <http://www.slate.com/id/2153961/>.

² See Bridgeport Music, Inc.'s corporate entity details, Michigan Department of Labor & Economic Growth, available at http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=190824&name_entity=BRI DGEPORT%20MUSIC,%20INC (last visited Mar. 18, 2007).

³ See Wu, *supra* note 1.

⁴ 410 F.3d 792 (6th Cir. 2005).

⁵ *Id.* at 801.

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Notorious B.I.G. album, *Ready to Die*, for “illegal sampling.”⁶ A jury then awarded Bridgeport more than four million dollars in damages.⁷

The Bridgeport cases have been heavily criticized, and taken as a prime example of copyright's excesses.⁸ Yet the deeper problem with the Bridgeport litigation is not necessarily a problem of too much copyright. It can be equally concluded that the ownership of the relevant rights is the root of the problem. George Clinton, the actual composer and recording artist, takes a much different approach to sampling. “When hip-hop came out,” said Clinton in an interview with journalist Rick Karr, “I was glad to hear it, especially when it was our songs—it was a way to get back on the radio.”⁹ Clinton accepts sampling of his work, and has released a three CD collection of his sounds for just that purpose.¹⁰ The problem is that he doesn't own many of his most important copyrights. Instead, it is Bridgeport, the one-man company, that owns the rights to Clinton's work. In the 1970s Bridgeport, through its owner Armen Boladian, managed to seize most of George Clinton's copyrights and many other valuable rights. In at least a few cases, Boladian assigned the copyrights to Bridgeport by writing a contract and then faking Clinton's signature.¹¹ As Clinton puts it “he just stole 'em.”¹² With the copyrights to Clinton's songs in the hands of Bridgeport—an entity with no vested interest in

⁶ Jeff Leeds, *Judge Freezes Notorious B.I.G. Album*, N.Y. Times, Mar. 21, 2006, at E2.

⁷ *Id.*

⁸ See, e.g., Matthew R. Broodin, Comment, *Bridgeport Music, Inc. v. Dimension Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims—The Sixth Circuit's Flawed Attempt at a Bright Line Rule*, 6 Minn. J. L. Sci. & Tech. 825 (2005); Jeffrey F. Kersting, Comment, *Singing a Different Tune: Was the Sixth Circuit Justified in Changing the Protection of Sound Recordings in Bridgeport Music, Inc. v. Dimension Films?*, 74 U. Cin. L. Rev. 663 (2005) (answering the title question in the negative); John Schietinger, Note, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DePaul L. Rev. 209 (2005).

⁹ Interview by Rick Karr with George Clinton, at the 5th Annual Future of Music Policy Summit, Wash. D.C. (Sept. 12, 2005), video clip available at <http://www.tvworldwide.com/showclip.cfm?ID=6128&clip=2> [hereinafter Clinton Interview].

¹⁰ George Clinton, *Sample Some of Disc, Sample Some of D.A.T.*, Vols. 1-3 (1993-94).

¹¹ Sound Generator, *George Clinton awarded Funkadelic master recordings* (Jun. 6, 2005), <http://www.soundgenerator.com/news/showarticle.cfm?articleid=5555>.

¹² Clinton Interview, *supra* note 9.

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the works beyond their sheer economic value—the targeting of sampling is not surprising.

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The Bridgeport litigation shows that an excess of author's rights is not always the source of the perceived abuses of copyright, or how copyright gets a bad name.¹³ Instead, lack of authorial control can sometimes be the problem. The relationship between authors and copyright is as old as the law itself, but today's conditions merit a new look.¹⁴

It has long been the stated aspiration of copyright to make authors the masters of their own destiny. Yet more often than not, the real subject of American copyright is distributors—book publishers, record labels, broadcasters, and others—who control the rights, bring the lawsuits, and take copyright as their industries' "life-sustaining protection."¹⁵ Modern American copyright history revolves heavily, though not entirely on distributors, either asking for more industry protection, or fighting amongst themselves.¹⁶

This paper addresses two related questions about the relationship between authors and the copyright system, and shows how they are linked. First, if distributors are central to copyright, why have authorial rights at all, as opposed to rights that vest automatically in distributors upon publication? This paper concedes

¹³ See The Patry Copyright Blog, *How Copyright is Getting a Bad Name*, <http://williampatry.blogspot.com/2006/04/how-copyright-is-getting-bad-name.html> (Apr. 25, 2006, 7:00AM); Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 Colum. J. L. & Arts. 61 (2002).

¹⁴ For an extraordinary, recent look at the relationship between copyright and authors, see Oren Bracha, *The Ideology of Authorship Revisited*, (2006), available at SSRN: <http://ssrn.com/abstract=869446>.

¹⁵ *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong, 2d Sess. 5 (1982) (statement of Jack Valenti, President, Motion Picture Association of America).

¹⁶ See generally Tim Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278 (2004). On the other hand, author's groups have occasionally played a pivotal role in copyright policy. See, e.g., Thomas Nachbar, *Constructing Copyright's Mythology*, 6 Green Bag 2d 37, 37-38 (2002) (relating efforts of Noah Webster and others to have copyright laws enacted in the early republic).

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that the basic incentive system central to copyright could in fact operate based on a system of distributor's copyrights, as it already does in many areas thanks to widespread assignments and the work-for-hire doctrine.

For that reason, the paper introduces a new justification for authorial ownership of copyright—both the vesting of the initial copyright in authors, and for providing ways for the right to find its way back to authors.¹⁷ The argument relies on the concept of authors as agents of decentralization in the copyright system. Vesting rights in authors, the argument goes, provides new ways to seed the development of both new forms of distribution, and also support for changing modes and forms of creation. Centuries ago in England, authorial copyright helped introduce competition into bookselling, beyond an centralized publisher's cartel. Today, there are lessons for copyright's authorship policy in the more than five million items under Creative Commons licenses,¹⁸ the proliferation of Open Access licensing in academia, and the use of open source licenses by commercial entities like IBM and Apple. These experiments show the potential of a decentralized copyright system for promoting a full range of production modes.

Second, this paper takes on the question of how copyright should try to encourage authorship. The question is obviously not an easy one. Echoing others but framing the problem slightly differently, I suggest that the challenge for copyright's authorship policy is slightly different than has usually been described. I agree with the premise that copyright should not focus on a single "type" of authorship.¹⁹ But I think we might usefully compare the problem of authorship in copyright to one of industrial organization. If we accept that there are multiple potentially successful modes of authorship—a point discussed more fully below—then the question is not just how to promote authorship, but how to promote various and competing modes of authorship. Just as the economic system at large needs to provide conditions under which sole proprietorships, small business and large corporations can coexist, so too should the goal of managing

¹⁷ Most prominently, through the termination doctrine. See 17 U.S.C. § 203; see also *infra* Pt. V.

¹⁸ See generally Creative Commons, <http://creativecommons.org> (last visited Mar. 18, 2007).

¹⁹ See, e.g., James Boyle, *Shamans Software and Spleens* 119 (1996).

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information production be as impartial as possible. This means that the goal of copyright's authorship policy should be neutrality: a system that declines to favor any mode of production over others, on the premise that optimization in favor of one mode will deoptimize for others.

Fans of alternative production and remix culture sometimes prescribe large reductions in the scope of copyright, or even the abolishment of copyright altogether.²⁰ But such arguments face at least one serious problem: enforceable rights may sometimes be useful for maintaining the integrity of both open and closed works.²¹ It is partially based on a threat of copyright enforcement that BioMed Central's highly respected open access journals publish articles "freely available to all" yet at the same time require that "integrity is maintained and its original authors, citation details and publisher are identified."²² Creative commons depends on copyright, and is the underlying threat of copyright enforcement helps keep open source open and free software free by forcing improvers to share their source code. Every mode of production, even those that strive to keep works open and free require some mechanism, whether legal or otherwise, to prevent behavior that would ruin the project.²³

Since legal rights can keep works open as well as closed, it is perhaps not necessarily the existence of rights so much as the allocation of enforcement decisions that drives the nature of copyright's authorship system. Who gets to decide how copyright will be enforced decides what kind of information economy we live in. Many of today's perceived abuses of copyright may be problems not of the scope of copyright but of inefficient enforcement.

²⁰ See, e.g., Joose Smiers, *Abandoning Copyright: A Blessing for Artists, Art, and Society* (Nov. 26, 2005), <http://www.culturelink.org/news/members/2005/members2005-011.html>.

²¹ What I mean by open and closed works is discussed *infra* Pt. I (modes of authorship discussion).

²² See BioMed Central Copyright Policy, <http://www.biomedcentral.com/info/about/copyright> (last visited Feb. 24, 2007).

²³ To be sure, as just suggested, it is sometimes non-legal mechanisms that preserve the integrity of a project. Wikipedia's editors, for example, don't sue unruly users—they scold them and sometimes shame them. See Wikipedia: Vandalism, <http://en.wikipedia.org/wiki/Wikipedia:Vandalism> (last visited Mar. 17, 2007).

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Finally, the two questions are linked. This paper argues that the keys to a neutral system are mechanisms that promote decentralization of copyright ownership and enforcement, and posits that authorial rights are a key means towards decentralization. As described above, early copyright came up with one such system: the innovation called authorial copyrights, as distinct from stationer's (or publisher's) copyrights. The great if perhaps accidental idea of the 1710 Statute of Anne was to allocate copyright in the author instead of the publisher or the King.²⁴ By splitting the atom of copyright between creator and disseminator, the statute led eventually to the competing modes of production and dissemination we see today.

Yet the role of the author in copyright has shrunk over the last century, not grown, and the full potential of the author as an instrument of copyright decentralization has not been reached. Too much of the debate over authors in copyright begins and ends with a discussion of European-style moral rights.²⁵ The point of this paper is that role of the author in copyright goes far beyond discussions of moral rights. Authors are copyright's agents of decentralization, and one of the ways copyright can adapt to cultural and technological change.

The main points of this paper are to identify the relationship between decentralized copyright and a more neutral copyright system, and also to stress the role that the initial allocation of copyright in the author already plays in driving multiple modes of production. Part I provides an economic rationale for an authorial copyright system. Part II describes various modes of authorship and argues that different modes are optimal in different contexts. Part III lays the case for a copyright system that is neutral as between different modes of authorship. Part IV briefly explores a historic example of how authorial rights have performed a role in copyright decentralization. Finally, Part V examines the termination of transfer right in light of this economic theory of authorship.

²⁴ See *infra* Pt. IV for a discussion of the Statute of Anne.

²⁵ See, e.g., Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95 (1997); see also Jane C. Ginsburg, *The Concept of Author in Comparative Copyright Law*, 52 DePaul L. Rev. 1063, 1092 (2003) (concluding that "[b]ecause, and to the extent that, [the author] moulds the work to her vision (be it even a myopic one), she is entitled not only to recognition and payment, but to exert some artistic control over it").

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I. Why Give Copyright to Authors?

With some exceptions, copyright vests in authors at the moment of fixation.²⁶ That's the law, but the economic, as opposed to moral, rationale for such vesting is not completely clear. The argument for granting rights to encourage production of creative works is clear enough, but if encouraging creation is the only goal, the rights could be (and once were) granted to distributors rather than authors. As distributors point out, the bulk of the financial risk in a creative work is usually borne by the distributor, and so it is they, and not the authors, who perhaps most need safeguards against freeriding provided by copyright. In practice, in the United States copyright is already in many creative industries a right that ends up in the hands of distributors or the companies that employ creators.²⁷

We can imagine an alternative scenario in which copyright, even if an author's right pre-publication, vested in distributors at the moment of public distribution (or "first publication"). Indeed we need not imagine, as this was the rule in early English copyright where, as Oren Bracha writes, "it was Stationers and Stationers only that could register copyright."²⁸ That arrangement would, as much as vesting copyright in authors, help protect the investment in the work, and ultimately provide similar incentives to produce creative works. However, that system also no longer a system of authorial copyright. Is anything wrong with that? Why bother with authorial copyright at all?

I suggest that there are good reasons for authorial copyright, though reasons different than those usually suggested. First, some copyright scholars defend the fact that copyright often operates as a distributor's, as opposed to author's right by simply suggesting that

²⁶ 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work."). The principle exception is in § 201(b), the work for hire doctrine.

²⁷ That fact is clearest in the film and commercial software industries, where the work-for-hire doctrine vests most of the relevant copyrights in distributing firms. In journalism, publishing and music industries, moreover, mandatory assignments of copyright accomplishes much the same effect. There are of course exceptions to this, like the rights held by ASCAP (The American Society of Composers, Artists, and Performers), a performing rights organization that licenses and distributes royalties for the public performances of the copyrighted works of its members. See About ASCAP, <http://www.asacap.com/about/> (last visited Feb. 25, 2007).

²⁸ See Bracha, *supra* n. __, at 113.

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the two share the same interests. Here is how point was put by Zechariah Chafee in 1945:

[M]uch of the tax which the Copyright Act imposes on readers goes directly to publishers.

Then is not the talk of helping authors just a pretense? . . .

. . . .

One reason . . . for protecting the copyright in the hands of the publisher is to give an indirect benefit to authors by enabling them to get royalties or to sell the manuscript outright for a higher price. A second reason is, that it is only equitable that the publisher should obtain a return on his investment. . . . Publishing is close to gambling. Many of the . . . publisher's books never pay back his initial outlay. . . . Thus copyright is necessary to make good publishers possible.²⁹

This argument may suggest an alignment of interests between authors and publishers, though, as argued later, the alignment is certainly not perfect. But Chafee cannot explain why the law should then give copyright to authors in the first place.

The traditional rationale for authorial copyright is a natural law, or moral argument. The argument is usually described as the legal offshoot of the rise of modern conceptions of the author, popularized by figures like Williams Wordsworth.³⁰ Authorial rights exist in law, the argument goes, because authors naturally have a right in their work at the moment it is created. We might suggest authorial rights should simply exist because authors are worthy of such rights, and giving authors such rights is the right thing to. What you create is yours: “to every cow her calf.”³¹ Author Victor Hugo, stressing the physical control the author has upon creation, put it as follows:

²⁹ Zechariah Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 508-10 (1945).

³⁰ See, e.g., Peter Jaszi & M. Woodmansee, *The Author Effect: Contemporary Copyright and Collective Creativity* (Editor's Introduction), 10 *Cardozo Arts & Ent. L.J.* 274 (1992). The famous preface of William Wordsworth, see *Supplementary to the Preface*, in *LITERARY CRITICISM OF WILLIAM WORDSWORTH* 158, 184 (Paul M. Zall ed., 1966), is sometimes referenced as an expression of these ideas.

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Think of a man like Dante, Molière, Shakespeare. Imagine him at the time when he has just finished a great work. His manuscript is there, in front of him; suppose that he gets the idea to throw it into the fire; nobody can stop him. Shakespeare can destroy Hamlet, Molière Tartufe, Dante the Hell.³²

Such moral rights arguments surely cannot be overlooked. But if they were taken seriously, American copyright would look very different that it does today. For example, in the example above, were Dante an employee, writing *The Divine Comedy* as a serial of sorts, the work for hire doctrine would place copyright ownership in the hands of his employer, wholly ignoring any moral claim of Dante's to the work. That is why it may be useful to look beyond the traditional moral reasons in seeking a justification for authorial copyright.³³

Here I present a structural argument for authorial copyright. The basic argument is this: the best reason for vesting copyright in authors is that such vesting of rights can be used to seed new modes of production for creative works. That is, although perhaps not making it easy, authorial ownership at least makes possible the rise of different modes of production. Authorial copyright may, along similar lines, act as a check on the market power of dominant distributors. This is possible because authors have the potential to use their independent ownership of copyrights to foster independent modes of production.

The *Battle of the Booksellers*, detailed below, gives one example of how authorial ownership can seed market entry. In the 18th

³¹ Augustine Birrell, *Seven Lectures on the Law and History of Copyright in Books* 42 (1899).

³² Quoted in Karl-Erik Tallmo, *The History of Copyright: A Critical Overview With Source Texts in Five Languages* (forthcoming in 2007).

³³ Economic analysis of authorial rights in copyright is scarce—the scholarship tends to defend copyright at large in economic terms, while describing doctrines related to authorial rights in natural law terms. One notable exception is the work of Henry Hansmann and Marina Santilli who presented an economic analysis of various moral rights, such as the right to prevent mutilation of visual arts. Hansmann & Santilli, *supra* note 25. Their work focused on preventing problems like opportunistic owners damaging the greater reputation of the author. That's a problem that an author is probably well situated to police, giving one set of reasons to vest rights in authors.

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century, giving authors control of copyright was important to the development of a competitive booksellers market, as opposed to one dominated by the existing publishers' cartel. Similarly, in present times, authors with the aid of their copyright ownership are helping seed competitive modes of distribution, such as direct online music sales, limited video projects, and open source software production, among others. In all of these cases, the market entry of a new mode of production is aided by the vesting of the copyright in the author.

The point can be made differently: a reason to have copyright owned by authors is as a potential check on the over-centralization of decision-making in copyright-related markets. As I argued in *Intellectual Property, Innovation, and Decentralized Decisions*, one of the ways we must assess intellectual property is as against how it affects industry structure.³⁴ "Intellectual property assignments must be assessed not only by the incentive/cost tradeoff, but by their effects on the *decision architectures* surrounding the property right—their effects on how firms make product innovation decisions."³⁵ Vesting copyright in authors has the potential to quietly influence the industrial structure of the industries centered on copyright in useful ways. Most importantly, authorial ownership can make it easier for new forms of production to come into being.

To develop this argument further, we need develop a different, though ultimately related examination of multiple modes of authorship.

II. Modes of Authorship

"'What does it matter who is speaking?' someone said, 'what does it matter who is speaking?'"³⁶ As every student in an English department knows, authorship past and present comes in many forms, from the romantic model of sole authorship through collaborative works and mass projects ascribed to a single author.³⁷ A key premise of this paper is that different modes of authorship, or creative

³⁴ Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 Va. L. Rev. 123 (2005).

³⁵ *Id.* at 123.

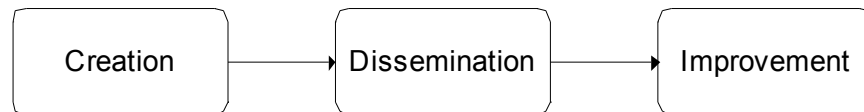
³⁶ Samuel Beckett, *The Complete Short Prose* 109 (Gontarski ed., 1995).

³⁷ For a recent discussion of romantic authorship and its alternatives, see, e.g., Richard Posner, *The Little Book of Plagiarism* (2007); Boyle, *supra* note 19.

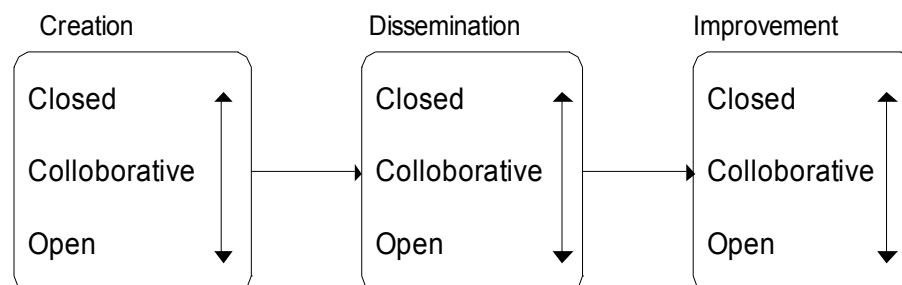
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production, will be optimal for different works and different subject matters at different times. This section defends that premise.

The production of expressive works can be broken down into three standard stages.



At each stage production can be fully open, fully closed, or somewhere in between. By open, I mean that *anyone* may participate in creating, disseminating or improving the product without permission. On the other end of the spectrum, in a closed system only one entity has the permission to create, disseminate, or improve the work in question. In between is an intermediate level, typified by collaborative works, where permission is given in advance to *some* people to participate in one or more of the three production stages.



This simple typology describes much, though obviously not all, of the modes of production that we see today. Consider a few examples. Software under an open source license is mostly open in its creation, dissemination, and improvement.³⁸ Conversely a typical published novel, closer to copyright's original subject matter, is usually closed at all three stages. Many works fall somewhere in between. A typical

³⁸ See Open Source Initiative, The Open Source Definition, <http://www.opensource.org/docs/definition.php> (last visited Feb. 24, 2007).

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paper published in the open access *Journal of Biology* is collaborative in creation, open in dissemination, but closed to direct improvement.³⁹

As alluded to above, this paper suggests that different modes will be optimal for different projects, subject matters, and industries at different times.⁴⁰ First, consider several examples where preserving a certain mode of production for a work can be important to its success. Consider the example of open source software. It can be damaging to an open source project if someone takes the program, improves it, and then distributes a new product with the improved source code kept secret. For that reason most open source licenses condition use of the work on a promise to make publicly available the source code of improvements made, if the modified program is deployed.⁴¹ For example, the Apple Open Source License states:

If You Externally Deploy Your Modifications, You must make Source Code of all Your Externally Deployed Modifications either available to those to whom You have Externally Deployed Your Modifications, or publicly available. Source Code of Your Externally Deployed Modifications must be released under the terms set forth in this License⁴²

Conversely, keeping dissemination closed, or controlled, can be crucial to the financial viability of other types of projects. A film that will cost fifty million dollars to produce might only be a worthwhile investment if it can be disseminated exclusively in movie theatres at a cost of ten dollars per consumer. Without the power to keep dissemination closed the film may not be produced.

As a final example, suppose a team of scientists publishes a paper claiming that sheep can be cloned.⁴³ On the one hand, the scientists almost certainly prefer open and wide dissemination of their

³⁹ For further detail, see the *Journal of Biology's* website, <http://jbiol.com/info/about> (last visited Feb. 24, 2007), and the copyright policy of its publisher, BioMed Central, *supra* note 22.

⁴⁰ Cf. Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 *Yale L. J.* 369 (2002).

⁴¹ See The Open Source Definition, *supra* note 38.

⁴² Apple Public Source License, § 2.2(c) (v. 2.0 2003), <http://www.opensource.apple.com/apsi>.

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paper and its results. On the other hand, unauthorized editing of the paper could damage the reputation of the authors and also harm society more generally if it compromises the accuracy of the work.

From these examples we see that the reasons that make a given mode of production optimal in different contexts are complex; nevertheless, we can make some general observations. At the creation stage, the benefits of a collaborative or an open system are the possibilities of efficient trade between differently specialized actors, as set against the costs of coordinating multiple actors. The creation of a film, just discussed, provides an obvious example of where collaboration pays off. While in theory one person could simultaneously serve as director, cinematographer, actor and costume designer, rarely are these abilities found in a single person. Conversely, in the creation of a novel, anything more than a writer and editor may lead to coordination costs that outweigh any potential benefits. Sometimes it is advantageous to combine one person's reputation with another's writing skill—as in the example of a ghostwritten book. Hilary Clinton's *It Takes a Village* combined her well-known name with the skills of uncredited ghostwriter Barbara Feinman. As Richard Posner reminds us, “you can be the author of a work though you were not the writer.”⁴⁴

At the dissemination stage, the predominant question is what combination of direct revenue generation and exposure maximizes the work's value. In the case of an advertisement or an academic paper, for example, the work's purpose may usually be served by the widest possible distribution. It is rare (though not impossible) that an advertiser complains of overexposure. But some works realize greater value for their owners by limiting exposure. For example, investors in a video game that costs millions to make may create more value by maximizing revenue at the expense of exposure. For many works the optimal level of openness in dissemination may be complex or hard to know as exposure and revenue generation are often interrelated. A music band may benefit from the increased exposure in having its music played on the radio or widely downloaded (for free), but it will

⁴³ See Keith H.S. Campbell, et al., *Sheep cloned by nuclear transfer from a cultured cell line*, 380 *Nature* 64 (1996).

⁴⁴ Posner, *supra* note 37, at 28.

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also benefit by limiting the opportunities for free access to its works so that people who want to enjoy the works will need to pay for them.⁴⁵

At the improvement stage there are also various reasons why it might be preferable to allow a work to be improved or adapted freely, in a limited fashion (derivative works, but no direct improvements), or not at all. As Richard Nelson and Robert Merges originally suggested for patent, increased openness in improvement—more freedom to create derivative works—might often serve innovation and consumer welfare.⁴⁶ Proponents of remix culture certainly take this view in the copyright context.⁴⁷ Yet there may be valid reasons to vest control over improvement in a limited number of persons. Some works, though how many is unclear, might be ruined or overgrazed by an open improvement system, as suggested by Posner and Landes.⁴⁸ More frequently, it may also be the case that a closed system of improvement is necessary to preserve not the work itself but a series of related interests—for example, the author's reputation, the accuracy of the work, or to prevent consumer confusion as to source.⁴⁹ Scientists, for example, even if they favor open dissemination of their work, do not want their papers edited or rewritten by others for fear that their findings may be distorted and their reputations damaged.⁵⁰ Even bloggers, who give away their content for free, usually want the power to prevent unauthorized distortion of their work.⁵¹ In short, for a

⁴⁵ See Mary Madden, Pew Internet & American Life Project, *Artists, Musicians and the Internet* 32, 34-35 (2004).

⁴⁶ Robert Merges & Richard Nelson, *On the Complex Economics of Patent Scope*, 90 Colum. L. Rev. 839, 843 (1990).

⁴⁷ See Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 Utah L. Rev. 961, 972-73.

⁴⁸ See Richard Posner & William Landes, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471 (2003). My comment on overgrazing is that it might be a possibility for some works but not others—that it is hard to say for the full range of potentially copyrightable works. Careful readers will notice that, like Posner and Landes, this work advances a justification for the existence of copyright that relies on the static use of copyright to protect the integrity of different modes of production.

⁴⁹ Cf. Hansmann & Santilli, *supra* note 25. It is true that preventing consumer confusion is the designated role of trademark, but that does not mean that authors should not be able to use copyright for that purpose as well.

⁵⁰ Cf. Peter Suber, *Open Access to the Scientific Journal Literature*, 1 J. Biology 3 (2002), available at <http://jbiol.com/content/pdf/1475-4924-1-3.pdf> (noting the ability of open access journals to meet scientists' interests "in dissemination to the widest possible audience" while still being able to rely upon copyright to ensure that "authorized copies will not mangle or misattribute their work").

variety of reasons, the optimal degree of openness for improvements, as with the other two stages of production, varies.

III. Why a More Neutral Copyright?

I have suggested that decentralization is desirable because it will lead to a more “neutral” copyright system. But why should legal neutrality as between different modes of production be attractive? There are several reasons.

First, every industry is different, and if copyright chooses to favor a mode of production common in one industry it may unwittingly hurt production in others. What is good for the film industry might, for example, be bad for the software or publishing industry. The danger is that copyright, if keyed to the mode of production typical of one industry, will slow production in other industries. To the extent that copyright can be modified for use in many different industries it will be more useful.

Second, for reasons that are hard to predict or explain, modes of creative production may evolve over time. Different modes of authorship seem to come into vogue at different times in history—at some points, improvement-driven authorship seems more important, at other points, collaborative writing, and yet at other points, the romantic model of authorship.

Given this constant shift, it would be a mistake for copyright to focus only on encouraging the mode of authorship it takes to be predominant, even if such a system might benefit a good deal of the present content production. For all we know, the novels of the future will be created more like open-source software or science papers, by large teams of authors. Similarly, the currently-popular open source model of software development might someday revert back to a more closed, romantic author model. While these developments sound unlikely, so, perhaps, did the idea of the novel to one generation or

⁵¹ For example, both The Becker-Posner Blog and the blog Boing Boing are licensed under a Creative Commons Attribution-NonCommercial 2.5 License, allowing free reign to adapt the work under the conditions that it is used for noncommercial uses and is properly attributed to the original authors. See Creative Commons Deed, Attribution-NonCommercial 2.5, <http://creativecommons.org/licenses/by-nc/2.5/> (last visited Mar. 17. 2007).

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writers, or the idea of Linux to different generation of programmers. And for that reason changing copyright to encourage only one mode of production would be a mistake. Whether or not these or other modes of production will gain prominence, the point is simply that we do not know what will happen in the future, and neither does Congress, the Free Software Foundation, or the Recording Industry Association of America. That makes some humility and as much neutrality as possible an attractive goal.

Third, industries themselves will die and be born, and as neutral a copyright as possible may facilitate that process. One hundred and twenty years ago the film, recording and radio broadcast industries did not exist. Instead, the dominant creative industries were the book publishers, sheet-music producers, and the stage.⁵² As economist Joseph Schumpeter taught, industrial succession is the essence of a capitalist system, and copyright, like any law, always risks becoming a form of protection for the industries of the present at the expense of those of the future.⁵³ A law that privileges the modes of production common to present creative industries may slow, or even prevent, their replacement by the industries of the future.

The changing modes of production and multiple industry problems are two well-recognized issues in copyright law. To deal with the range of industries affected by copyright, scholars occasionally recommend creating multiple *sui generis* intellectual property schemes.⁵⁴ Such content-specific regimes, however, have even greater problems of obsolesce. In practice they have a mixed track record: the special system for Digital Audio Tapes (DAT) adopted in 1992 is classic example of a failed effort to adapt copyright to specific technology.⁵⁵

⁵² See generally Edward B. Samuels, *An Illustrated Story of Copyright Pt. I* (2000).

⁵³ See Joseph A. Schumpeter, *Capitalism, Socialism, And Democracy* 61 (1950).

⁵⁴ See, e.g., Eliana Torrelly de Carvalho, *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, 10 *Mo. Env'tl. L. & Pol'y Rev.* 38, 53-58 (2003); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 *U. Cin. L. Rev.* 151, 171-76 (1997); Regan E. Keebaugh, Note, *Intellectual Property and the Protection of Industrial Design*, 13 *J. Intell. Prop. L.* 255, 275-77 (2005); Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 *Colum. L. Rev.* 2308 (1994).

⁵⁵ See Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-10. Some attribute DAT's current obscurity to the additional burdens imposed on the technology by this regulation. See Nichelle Nicholes Levy, *Method to Their Madness: The Secure Digital*

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Another solution is to interpret copyright differently for different industries, as in the various special doctrines that surround software, but this method also has its limits.⁵⁶

This paper suggests that the best solution to these problems lies in a neutral copyright system, and that the principal means for achieving this neutrality is to maximize the decentralization of copyright ownership and enforcement. When as many entities as possible control the ownership or enforcement of copyright, they may experiment with many different modes of production, from which the fittest will survive. Author Cory Doctorow and economist Gary Becker are two examples of experimenters. Doctorow, who writes science fiction novels like *Down and Out in the Magic Kingdom*, makes his novels available electronically for free, while his publisher sells print versions.⁵⁷ It may turn out that Doctorow's novels actually sell more in print when disseminated electronically for free, and consequently also reach many more people. Doctorow may also be wrong, and it may turn out that making a book available for free will hurt his reputation and destroy any hope either he or the publisher have of making a profit. The point is not that free online dissemination is necessarily superior to the traditional modes of book dissemination. The point is simply that it may be, and to some degree it is the copyright system that is helping make this experiment possible.

Economist Gary Becker, meanwhile, in 2005 replaced his weekly column at Businessweek Magazine with a blog.⁵⁸ The blog is free, unlike the column, which came with the paid-for magazine. As with Doctorow, whether or not this was a wise idea, the point is that the current copyright system allows for these, and other, forms of decentralized experimentation. The mechanism for this phenomenon is the frequently overshadowed initial vesting of copyright in authors. This initial vesting is a critical mechanism of decentralization, and what

Music Initiative, A Law and Economics Perspective, 5 Va. J. L. & Tech. 12, at *27 (2000), <http://www.vjolt.net/vol5/issue3/v5i3a12-Levy.html>.

⁵⁶ See, e.g., *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992) (holding reverse engineering of a video game to achieve interoperability to be fair use).

⁵⁷ See, e.g., Cory Doctorow, *Down and Out in the Magic Kingdom* (2003), freely downloadable, in many formats, at <http://craphound.com/down/download.php> (last visited Feb. 8, 2007).

⁵⁸ See Posting of Richard Posner to the Becker-Posner Blog, Introduction to the Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2004/12/introduction_to_1.html (Dec. 5, 2004, 12:23AM).

has already encouraged the multiple modes of production I have described. It turns out that this role is no accident, as the next section shows.

IV. How Authors' Rights Might Decentralize

The vesting of rights in authors can serve as a potentially important check on the centralization of copyright ownership.⁵⁹ What follows is no original contribution to writings on copyright's history, or the history of authorship. However, the story of the birth of author's rights is a good example of how the decentralization-function of authorial copyright can function.

As most copyright scholars know, early in English copyright history rights to copy were vested in publishers (then called stationers).⁶⁰ As Ray Patterson tells us, "copyright began as a publisher's right, a right which functioned in the interest of the publisher, with no concern for the author."⁶¹ One early function of this right was censorship, but another was the management of competition as between members of the stationer's guild.⁶² One publisher might have had the exclusive rights to publish the works of Isaac Newton and another the exclusive right to publish the St. James Bible. The allocation of exclusive rights prevented competition between different versions of the same book. Like any cartel, the publishers regarded competition as undesirable, and sought to destroy competition between its members as well as from outside the guild.⁶³ As Joseph Lowenstein writes, the stationer's copyright "was a privilege conferred by the guild on one of its members, part of an imperfect but not ineffective system by which the guild sought to preserve internal order."⁶⁴

⁵⁹ See generally Wu, *supra* note 34.

⁶⁰ Relevant works to this history include Benjamin Kaplan, *An Unhurried View Of Copyright* (1967); Joseph Lowenstein, *The Author's Due: Printing and the Prehistory of Copyright* (2002); Harry Ransom, *The First Copyright Statute* (1956); Lyman Ray Patterson, *Copyright in Historical Perspective* (1968); Grantland Rice, *The Transformation Of Authorship In America* (1997).

⁶¹ Patterson, *supra* note 60, at 8.

⁶² *Id.* at 43-44.

⁶³ To a large extent, copyright still plays a role in managing competition between disseminators. See generally Wu, *supra* note 16.

⁶⁴ Lowenstein, *supra* note 60, at 29.

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In the 18th century, unfortunately for the stationer's cartel, outsiders—Scottish and Irish publishers—eventually began to bring competing books to market. With this came history's first accusations of copyright piracy. The efforts of the cartel to stop the pirates using copyright law created the first of many conflicts between rival disseminators: the famous "Battle of the Booksellers."⁶⁵ For at least fifty years the incumbent publishers successfully enforced England's copyright law, the 1710 Statute of Anne, to block their rivals. But by the late 18th century, the Statute of Anne was interpreted in an innovative way: to vest copyright in authors as opposed to publishers. It is somewhat unclear if this was actually the purpose of the Statute, as many doubt that a real system of author's rights was what Parliament had in mind.⁶⁶ But in the hands of "rationalizing" English judges, most famously in the case *Donaldson v. Beckett*,⁶⁷ the system of rights vested in authors rather than publishers became the norm.⁶⁸

The House of Lords' ingenious idea in *Donaldson* was to use authors as a wedge to force open competition in book publishing. Their interpretation of the Statute of Anne made it hard for the publisher's cartel to survive. While authors still had far less market power than publishers, they had at least the capacity to take their copyrights with them and market their works through competing publishers. The basic concept is that by giving the legal rights to the author, the author became an independent, vested economic entity that made competing modes of production possible. While not exactly a romantic vision of authorship, the significance of authors as

⁶⁵ For an in-depth discussion of the Battle of the Booksellers, see Mark Rose, *Authors and Owners: The Invention of Copyright* 67-91 (1994).

⁶⁶ Benjamin Kaplan explains:

It is hard to know how far the interests of authors were considered in distinction from those of publishers. There is an apparent tracing of rights to an ultimate source in the fact of authorship, but before attaching large importance to this we have to note that if printing as a trade was not to be put back into the hands of a few as a subject of monopoly—if the statute was intended to be a kind of "universal patent"—a draftsman would naturally be led to express himself in terms of rights in books and hence of initial rights in authors . . . I think it nearer to the truth to say that publishers saw the tactical advantage of putting forward authors' interests with their own

Kaplan, *supra* note 60, at 8.

⁶⁷ 1 Eng. Rep. 837 (H.L. 1774), *reprinted in* 17 Cobbett's Parl. Hist. 953 (1813).

⁶⁸ See Kaplan, *supra* note 60, at 23-25; Patterson, *supra* note 60, at 7; Lowenstein *supra* note 60, at 29.

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independently vested entities nonetheless changed the history both of copyright and publishing.

In this use of the author to open the publishing market we can see the glimmer of a deeper idea. In breaking the stationers' cartel the recognition of the author made possible more variety in how books were published. Authors could promote competition among disseminators, and more broadly, competition among modes of production in the centuries to follow. Today, for example, authors' rights might promote competition not only between Random House and Bloomsburg, but also between open and closed software production, as well as mainstream and open access academic publishers.

The Battle of the Booksellers suggests one answer to the question of authorial copyright. Vesting copyright in authors can help promote competition in dissemination. Stated otherwise, this part of history shows how authorial rights can serve as a slow-burning remedy for structural problems in the production of expressive works.

V. The Relevance of the Termination of Transfer Right

This discussion of the authorial role also provides a new understanding of the economic function of the author's termination of transfer right found in section 203 of the Copyright Code. That section gives the author a right to nullify most copyright assignments and licenses thirty-five years following the assignment or license (details are in the footnote).⁶⁹ If, for example, J.K. Rowling had in 1997 transferred her U.S. rights in *Harry Potter and the Philosopher's Stone* to her publisher Scholastic, she would have the right under U.S. law to regain the copyright in the year 2032.

⁶⁹ Section 203 of Title 17 gives the original author or her heirs the right to terminate assignments and licenses after 35 years after assignment, or 40 years after publication if the publication right was granted. 17 U.S.C. §203(a)(3); see also 17 U.S.C. §304(c) (termination right for works under copyright as of 1978). Works for hire are excluded from the provision. § 203(a). In addition, the author does not regain control of any derivative works made while the agreement was in effect. See §203(b)(1), *construed in* Mills Music, Inc. v. Snyder 469 U.S. 153 (1985). For even more detail, see Melville B. Nimmer *Termination of Transfers under the Copyright Act of 1976*, 125 Pa. L. Rev. 947 (1977).

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The termination right is usually described as a means of correcting uneven bargaining conditions at the time at copyright assignment, giving the author a second chance to assess the bargain thirty-five years later.⁷⁰ The right is unpopular with disseminators, for obvious reasons, as it creates the possibility of losing rights of potential value, and as we shall discuss, rights that can create potential competitors.⁷¹ Consistent with the theory discussed in this article, we can describe a different economic function and impact of the transfer termination right. By giving rights back to authors, it provides the potential to seed the development of new forms or industries of dissemination that might otherwise be blocked.

Incumbent disseminators often see new channels or technologies of dissemination as a competitive threat, and try to slow, block or take control of any such innovations to prevent being displaced in the market. Sometimes, as detailed in the paper *Copyright's Communications Policy*, incumbents use copyright as a means to try and block or squeeze new rivals, as opposed to welcoming them as a potential source of licensing revenue.⁷² The most recent example is seen in the early struggle over online music in the early 2000s that lead to both *Grokster* and the rise of iTunes.⁷³ The early days of record players, radio, cable, and satellite track a similar pattern.⁷⁴

While mechanisms like fair use and compulsory licenses are often used to settle these kind of disputes, the reassertion of authorial rights through the exercise of Section 203's termination right provides another mechanism to curb the use of copyright to block market entrants. Authors by definition are usually not stakeholders in any particular form of dissemination. While a record label may care if a composer sells one thousand CDs or iTunes albums he is, all else being equal, indifferent. In both instances he reaches his audience and makes money. And for that reason, authors, just as in the Battle of the Booksellers example above, may decide to take their rights to

⁷⁰ See Nimmer, *supra* note 69, at 949-50.

⁷¹ Stephen W. Tropp, *It had to be Murder, or Will Be Soon – 17 U.S.C. § 203 Termination of Transfers: a Call for Legislative Reform*, 51 J. Copyright Soc'y U.S.A. 797 (2004) (detailing why, from the industry's perspective, termination rights might create problems).

⁷² See generally Wu, *supra* note 16.

⁷³ See *id.* at 360-66.

⁷⁴ See *id.* at 288-341.

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competitive disseminators or even potentially become disseminators themselves.

Authors holding a reverted copyright may be particularly well-situated to seed competition in content distribution. Only a tiny number of works are still actively marketed thirty-five years after assignment. An author holding a reverted right may (successfully or not) try to breath new life into an old work, by making it available through channels that did not exist at the time of assignment.

Unfortunately, the actual effectiveness of this mechanism is difficult to gauge, and the reverter right seems to be less known and less used than was intended. However the logic of this paper provides a new defense and new explanation for the reverter rights in the copyright statute.

VI. Conclusion

The 2004 Presidential election campaign was best captured not by the thousands of editorials, columns, or feature articles, but rather something called the “JibJab” parody. JibJab was a cartoon animation featuring candidates George Bush and John Kerry trading insults to the tune of the Woody Guthrie’s tune “This Land is My Land.” “You’re a sissy liberal,” sang the cartoon Bush; “You’re a right wing-nut job” responded cartoon Kerry. “This land will surely vote for me,” sang both in the chorus.⁷⁵

The free and easily downloadable animation quickly spread around the nation and the world. But on July 28, 2004 its authors received a letter from lawyers working for music publisher Ludlow, Inc., the ostensible owner of the copyright to “This Land is My Land.” The letter stated that JibJab “constitutes a blatant and willful copyright infringement which has caused, and continues to cause . . . serious injury.”⁷⁶ Kathryn Ostien, a spokeswoman for Ludlow stated to the

⁷⁵ JibJab, This Land!, <http://www.jibjab.com/originals/originals/jibjab/movieid/65> (last visited Mar. 9, 2007).

⁷⁶ Letter from Ludlow’s counsel, Sonnenschein, Nath & Rosenthal to JibJab (Jul. 23, 2004), *quoted in* Complaint ¶ 13, JibJab Media, Inc. v. Ludlow Music, Inc. (N.D. Cal filed Jul. 29, 2004), *available at* http://www.eff.org/legal/cases/JibJab_v_Ludlow/20040729_JibJab_Complaint.pdf.

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press that Jib-Jab “puts a completely different spin on the song,” and that “the damage to the song is huge.”⁷⁷

Legal academics, bloggers, and other critics seized on the threat as a prime example of copyright's excesses. The Electronic Freedom Frontier stated “it looks like yet another parodist interested in free expression will be called upon to risk litigation in order to vindicate our First Amendment rights.”⁷⁸ The Dallas Morning News wrote “It's irreverent. It's funny. It jabs both sides. The true danger would be a lack of good satire in a presidential election year.”⁷⁹ Joining the chorus were Woody Guthrie's heirs. “That parody was made for you and me,” said granddaughter Cathy Guthrie.⁸⁰

Like the Bridgeport example we encountered at the start of this paper, the problem with the JibJab litigation was not necessarily a problem of too much copyright as many have concluded. Again, it can be equally concluded that the allocation of rights is to blame. Based on what they said, Guthrie's heirs or Guthrie himself would have been fine with the JibJab tune, avoiding litigation in advance. But what Ludlow did was predictable: it tried to maximize the value of its existing assets, which (it thought) included the Guthrie copyright. Unfortunately, Ludlow's interests happened to be at odds with the both the author's and the public's interest. Fair use is the traditional way of solving such conflicts, but as this paper has suggested, there is another way—a way that can avoid litigation all together, and simultaneously promote the neutrality of copyright through increased decentralization. The final irony of the JibJab litigation is that it was, in fact, solved by the route of ownership rather than fair use. On closer examination, Ludlow's ownership of the copyright in Guthrie's song proved unclear, and the case quickly settled.⁸¹

⁷⁷ See Allen Wastler, CNNMoney.com, A Jibjab showdown, July 26, 2004, <http://money.cnn.com/2004/07/26/commentary/wastler/wastler/>.

⁷⁸ EFF Deeplinks, This Land Isn't Your Land (Jul. 26, 2004), <http://www.eff.org/deeplinks/archives/001765.php> (last visited Feb. 25, 2007).

⁷⁹ Corante, JibJab Files Lawsuit for Right to Distribute Parody?, http://importance.corante.com/archives/2004/07/31/jibjab_files_lawsuit_for_right_to_distribute_parody.php (Jul. 31, 2004) (citing Dallas Morning News, If this is danger, bring it on (Jul. 31, 2001)).

⁸⁰ Posting of Mark Frauenfelder to Boing Boing, Cathy Guthrie's opinion of the JibJab parody of her grandfather's song, http://www.boingboing.net/2004/08/06/cathy_guthries_opini.html (Aug. 6, 2004, 10:43AM).

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The question of whether copyright should serve authors or publishers is as old as copyright.⁸² While sentiment has always favored authors, I argue that the economics of copyright also support more authorial control over the enforcement of copyright. At a minimum judges and policy-makers should reacquaint themselves with the difference between disseminator and author interests in the ownership and enforcement of copyright.

⁸¹ See EFF: DeepLinks, *This Song Belongs to You and Me* (Aug. 24, 2004), <http://www.eff.org/deeplinks/archives/001840.php>.

⁸² See generally Maureen 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 (2003).