

# THE LIFE AND DEATH OF COPYRIGHT

DEVEN R. DESAI\*

Copyright law operates under a hidden assumption: that copyright after death is the same as copyright during life. In the United States, the duration of copyright is the author's life plus seventy years. In debates over copyright's duration, those in favor of longer terms and even those in favor of shorter ones have treated pre- and post-death copyright as equal. The law, as well as the current discourse about copyright, merely focuses on time. In this Article, Professor Deven Desai critiques the post-mortem assumption—that the consequences of copyright protection during the creator's life are the same as after the creator's death. He contends that the law must look beyond merely the span of time of copyright protection and that copyright's extension after the author's death is unjustifiable. He explores the historical, philosophical, and economic justifications for copyright after death and concludes that it should not matter in copyright policy.

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\* Academic Relations Manager, Google, Inc.; Associate Professor, Thomas Jefferson School of Law (on leave). The views, opinions, and statements in the work are solely the author's and in no way reflect or should be attributed to Google's views or positions. Parts of this Article have benefited from discussions with and the encouragement and feedback of Dana Becker, Barton Beebe, Al Brophy, Dan Burk, Adam Candeub, Margaret Chon, Stacey Dogan, Mary Dudziak, Brett Frischmann, Shubha Gosh, Roberta Kwall, Mark Lemley, Doug Lichtman, Doris Long, Michael Madison, Ray Maddoff, Eric Mitnick, Adam Mossoff, Mark McKenna, Beth Noveck, Frank Pasquale, William Patry, Margaret Jane Radin, Sandra L. Rierison, Mark Schultz, Daniel Solove, Ned Snow, Susan Tiefenbrun, Rebecca Tushnet, Spencer Waller, Mark Weiner, Alfred Yen, and Peter Yu. I also received helpful comments from the participants at the IP Scholars Conference, August 2007, at Depaul University College of Law; at the IP Roundtable, Drake University Law School, February 2008; at the University of San Diego School of Law, Work, Welfare, and Justice Seminar, January 2008; and the Works in Progress Intellectual Property Colloquium, October 2008, at Tulane University. I could not have worked on the French historical material without the aid of Monica Stampfl. And, I thank Professor Shubha Ghosh and the *Wisconsin Law Review* for their generous time and support in hosting this Symposium. I am grateful for all the input and note that errors are mine alone.

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## INTRODUCTION

Should copyright extend after death? Over the last two centuries Congress has expanded copyright from a fourteen-year term (with a living author able to extend it for another fourteen years)<sup>1</sup> to the current term of the life of the author plus seventy years.<sup>2</sup> For most of copyright's history the term rarely extended beyond the author's life; today's term, however, spans several generations after the author's death.

Recent duration debates have focused on the length of copyright's term and have mostly critiqued or supported the increasing extension of

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1. See Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1834); *accord* 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 7:7 (2010) (explaining same).

2. Corporate authors have a different term: ninety-five years from date of first publication or one hundred twenty years from creation. See 17 U.S.C. § 302(c) (2006). This Article addresses the way copyright law addresses human authors.

the term. Critics have argued that the long term is unnecessary to incentivize the creation of works (and actually impedes the creative process) and defenders have argued the opposite. All sides of the debate have focused on time, and the central question has been: *How long should copyright's term be?*

But time is not the only consideration in copyright's term. An unexplored issue in the debate is the life-death divide. Discussions of copyright often treat pre- and post-death copyright as equal, holding that the entire length of the term faces uniform problems and fulfills uniform goals. In short, copyright law operates with a hidden assumption: that copyright after death is the same as copyright during life. This assumption, however, is false.

In this Article I argue that copyright's extension after the death of the author lacks theoretical grounding and is unjustified. The assumption that post-death copyright is merely an extension of pre-death copyright—what I call the post-mortem assumption—holds that pre- and post-mortem copyright have the same foundations and interests and that copyright should extend beyond the life of the author because a key goal of copyright policy is to use copyright to provide an incentive to authors who see copyright as a way to provide for their children.<sup>3</sup> This view privileges an author's spouse and lineal descendants and generates significant social costs by allowing a select group to extract rent and obstruct society's ability to access and use material for further creation.<sup>4</sup>

Although the standard justification for copyright protection in U.S. law is utilitarian, with the goal of maximizing social welfare,<sup>5</sup> the post-mortem assumption mixes Lockean labor and Hegelian personhood theories with economic arguments to support its presentation of copyright as equivalent to real property. This blending of theories allows the post-mortem assumption to fashion a seductive myth whereby the author labors and should reap all the fruits of his labor. He also gives birth to his work, which is an extension of his personality.

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3. See *Eldred v. Ashcroft*, 537 U.S. 186, 206–08 (2003) (discussing the legislative history and Congress' focus on providing for children as part of the reason for the term extension); 141 CONG. REC. 6551, 6552-53 (1995) (statement of Sen. Hatch) (assuming that “the postmortem protection of copyright was designed to benefit” “descendants” and “heirs” but not questioning or supporting that position); see also *infra* Part I.A.

4. See *infra* Part II.C.2.a.

5. See, e.g., William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169 (Stephen Munzer ed., 2001); Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1306 (2003) (“The economic rationale is widely viewed as the primary philosophical underpinning for U.S. copyright law and policy.”).

When he dies, this work lives on as his children manage, nurture, and grow the work so that it thrives for all to enjoy. This view then adds economic claims that post-mortem copyright is an essential part of the author's incentive to create and fosters the continued development and dissemination of an author's works after his death through his heirs.<sup>6</sup>

When probed, the post-mortem assumption lacks historical or theoretical basis. Instead, the assumption hides rent-seeking behavior, clashes between authors and publishers regarding who can extract that rent, and political maneuvering by the copyright industry, all of which are behaviors that copyright policy ought to avoid and/or prevent. The current doctrine and theory of copyright law fail to offer a coherent explanation as to why copyright after death provides any non-trivial increase in incentive to create prior to an author's death or to continue development of works after an author's death.

In Part I, I examine the way in which current and past debates regarding copyright duration perceived post-mortem copyright. Through close reading and rhetorical analysis, I demonstrate how the post-mortem assumption managed to capture the imagination of policy makers. In addition, I show that although post-mortem copyright is part of the debates, it does not have the importance or traditional role ascribed to it in the assumption's current formulation.

In Part II, I examine the philosophical and economic justifications for extending copyright after death. Although recent economic and empirical studies offer compelling arguments for copyright to last as long as an author is alive, they provide little support for copyright extending post-mortem. Evidence suggests that authors' children are often poor custodians of works,<sup>7</sup> extracting rent and hindering the creative process rather than contributing to further creation.

In Part III, I contend that society is the proper beneficiary of creation for reasons of intergenerational equity.<sup>8</sup>

In Part IV, I offer some theoretically coherent examples of alternatives to the current model of post-mortem copyright.

## I. VIEWS OF LIFE AND DEATH IN COPYRIGHT

The post-mortem assumption is an accepted truth in copyright doctrine. To understand how the assumption has taken hold, this

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6. See *infra* Part II.C.2.

7. See *infra* Part II.C.2.a.

8. As a point of clarification, this Article does not argue that copyright cannot have a relatively long term. Instead, it seeks to show that the current system lacks coherence and ignores the importance of society at large to a well-functioning copyright system.

Section analyzes the recent ways Congress has embraced and deployed it, and then traces the evolution of the expansion of copyright duration in U.S. copyright history to see whether the assumption has any basis in that history. Because U.S. copyright law invokes the Berne Convention as a key justification for post-mortem copyright, this Section also examines European copyright history to see whether it supports the assumption. The picture that emerges is one where, whenever copyright's term was debated, many political issues were at work with each side offering different views regarding the nature and purpose of all aspects of copyright, including its duration; but little, if anything, supports the idea that post-mortem copyright was an animating force in shaping copyright doctrine.

*A. Prologue: The Latest Frays, Current Calls for Extension, and the CTEA of 1997*

Many are calling for extending copyright's term. For example, one author and policy writer argues that Congress ought to extend copyright once more "as far as [Congress] can throw," which for the author would be a never-ending, perpetual term.<sup>9</sup> In addition, despite a report by Cambridge University's Centre for Intellectual Property and Information Law<sup>10</sup> and several other studies<sup>11</sup> showing that extension is not necessary for performers and sound recordings, the European Union is proposing a copyright term extension for those categories.<sup>12</sup> Furthermore, the copyrighted material at issue when Congress passed the Sonny Bono Copyright Term Extension Act (CTEA)<sup>13</sup> will enter the public domain in the next decade. In short, with another round of term

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9. Mark Helprin, Op-Ed., *A Great Idea Lives Forever. Shouldn't Its Copyright?*, N.Y. TIMES, May 20, 2007, § 4 at 12.

10. See generally CTR. FOR INTELLECTUAL PROP. AND INFO. LAW, UNIV. OF CAMBRIDGE, REVIEW OF THE ECONOMIC EVIDENCE RELATING TO AN EXTENSION OF THE TERM OF COPYRIGHT IN SOUND RECORDINGS (2006).

11. See Letter to the Editor, *Copyright Extension Is the Enemy of Innovation*, TIMES (London), July 21, 2008, <http://www.timesonline.co.uk/tol/comment/letters/article4374115.ece> (presenting an editorial signed by seventeen professors and pointing to "a study conducted by the Amsterdam Institute for Information Law for the Commission itself (2006); and the Bournemouth University statement signed by 50 leading academics in June 2008" as additional information available but not considered by the EU in crafting its proposal).

12. See Nate Anderson, *EU Caves to Aging Rockers, Wants 45-Year Copyright Extension*, ARS TECHNICA (July 16, 2008, 2:00 PM), <http://arstechnica.com/news.ars/post/20080716-eu-caves-to-aging-rockers-wants-45-year-copyright-extension.html>.

13. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

extension debates occurring overseas and the way in which the copyright industry fought for the last round of term extensions, further term extension debates are almost guaranteed to occur here in the United States.<sup>14</sup> Just as was the case in 1997 when the CTEA was proposed, these on-going calls for extension will have to find ways to justify yet another expansion of copyright's duration. And just as was the case in 1997, to overcome the objections to further extensions, the post-mortem assumption will be used. As such, understanding how the assumption worked in its most recent, successful example shows how the assumption operates in its current form and the errors it fosters.

In passing the CTEA, Congress faced a problem. The Copyright Act already provided a term of life of an author plus fifty years. The CTEA proposed the addition of another twenty years to the term for individual authors, making the term life plus seventy years. How, then, could one support a claim for another twenty years of protection? Congress first claimed to be addressing the "question of whether the current term of copyright adequately protects the interests of authors and the related question of whether the term of protection continues to provide a sufficient incentive for the creation of new works of authorship."<sup>15</sup> In asserting that term length "relate[s]" to the "interests of authors" and to "incentive[s] for the creation of new works,"<sup>16</sup> Senator Orrin Hatch's language reveals some assumptions: creators will only create if given an incentive, and term length somehow informs the incentive model.<sup>17</sup> Whether these views are supported is to be seen. For now, it is important to discern the claims as they will later connect to the justifications for post-mortem copyright.

Hatch noted that the life-plus-fifty year term came from the Berne Convention<sup>18</sup> and declared that despite the Berne Convention and almost one hundred years of a life-plus-fifty term in international copyright, "I do not believe that [life plus fifty] should be accepted uncritically as an ideal or even sufficient measurement of the most appropriate duration

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14. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 483 (2003) ("There will always be some copyright holders whose income will be diminished when their works fall into the public domain, and they have an incentive to seek retroactive extensions as the end of the copyright term draws near.").

15. 141 CONG. REC. 6551 (1995) (statement of Sen. Hatch).

16. *Id.*

17. *But see* Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (group of seventeen prominent economists, including Akerlof, Kenneth Arrow, Ronald Coase, Milton Friedman, and Hal R. Varian, arguing that the extension from fifty years after life to seventy years provided miniscule increased incentive ("less than 1%") from the current life-plus-fifty term).

18. 141 CONG. REC. 6551 (1995) (statement of Sen. Hatch).

for copyright term.”<sup>19</sup> Given this statement one might think that Hatch intended to question the idea of copyright persisting past life. But given that he was sponsoring an extension of the term, Hatch’s critical examination focused only on reasons to support the additional twenty years, such as other countries’ longer copyright terms<sup>20</sup> and a particular perspective to support the extension: “we need to examine the real-life experience of creators, their reasonable expectations for exploiting their works, and the concerns and views of the descendants, heirs, and others whom the postmortem protection of copyright was designed to benefit.”<sup>21</sup>

Here one sees the assumption in stark form. The CTEA never questioned the idea of post-mortem copyright. It only considered authors’ *and their heirs*’ views—no one else’s. In addition, the phrase “whom the postmortem protection of copyright was designed to benefit” reveals a lack of critical thinking about post-mortem rights in favor of a simple acceptance of the idea as sound.

Hatch’s argument worked because he lulled people into thinking he offered a sound basis for extension. Although Hatch appeared to look at a range of views to assess the “practical aspect[s]” of the proposed extension,<sup>22</sup> Hatch only looked at how the CTEA “matters to some of the most distinguished members of America’s cultural and artistic community”<sup>23</sup> and used that group to great advantage for his argument that post-mortem copyright is important. Hatch started his plea by using the memories of long dead composers, such as George Gershwin, Irving Berlin, and George Cohan—with whom many associate warm feelings—to draw his audience into a sense of worth for the creation. Then the false problem was stated: some copyrights have already fallen into the public domain despite being “widely performed in theaters and through media around the world.”<sup>24</sup> Hatch extended the problem and the supposed threat by layering on name after name of songwriter to give the appearance of loss to individuals as songs enter the public domain but never stated the harm to those composers.<sup>25</sup> And indeed he could not, for the composers were dead.

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19. *Id.*

20. *Id.* (“[W]e should be aware of the many nations that have historically provided longer terms of copyright as well as the recent developments to extend copyright in Europe.”).

21. *Id.*

22. *Id.* at 6552. (“What works are we talking about? Who is affected by this legislation?”).

23. *Id.*

24. *Id.*

25. *See* 141 CONG. REC. 6551 (1995) (statement of Sen. Hatch) (“‘Rhapsody [sic] in Blue’ by George Gershwin; ‘My Buddy’ by Walter Donaldson and Gus Kahn;

Yet Hatch still had to show why this possibility should matter, while not directly addressing why there was a problem with allowing more people to perform and sing songs. After all, these song writers were dead. No incentive could make them generate more music.<sup>26</sup> To support the extension, Hatch needed to move his audience away from dead authors to a more compelling image, so he turned to pathos and a tale of a dead father and his industrious daughter.

Hatch began the switch by focusing on one songwriter and offering that: “If the present copyright law had been in effect in the 1920’s, all of Walter Donaldson’s compositions would fall into the public domain within the next 2 years.”<sup>27</sup> Knowing that dead authors are not that compelling, Hatch then asserted that that issue was not “academic,”<sup>28</sup> because “it was Ellen Donaldson, the composer’s daughter, who first alerted me to the importance of this issue only 2 years ago.”<sup>29</sup> Hatch described Ms. Donaldson as “extremely active in publishing and exploiting her father’s music and in protecting his copyrights.”<sup>30</sup> Note the idealized image here: a child “active[ly]” fulfilling filial duties by “protecting” and “exploiting” her father’s copyright.<sup>31</sup> Hatch then conflated that one image with all authors’ children and asserted that Ms. Donaldson and many other authors’ children—children in their fifties, who may or may not be such good custodians—had a “legitimate interest” in their parents’ copyrights and their extensions.<sup>32</sup> As support for this view Hatch detailed how he interviewed “writers, authors, and artists of all kinds” and heard testimony “on issues of concern to authors” over the past eighteen years<sup>33</sup> and had “come to the conclusion that the vast majority of authors expect their copyrights to be a potentially valuable resource to be passed on to their children and

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‘What’ll I Do’ by Irving Berlin; ‘Georgia’ by Walter Donaldson and Howard Johnson; ‘It Had To Be You’ by Isham Jones and Gus Kahn; ‘Showboat’ by Jerome Kern and Oscar Hammerstein II.”). This behavior was not limited to the Senate. For example, William Patry has noted that what happened in the House hearings, was a parade of horror stories. William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 908 (1997).

26. Cf. Hal R. Varian, *Copyright Term Extension and Orphan Works*, 15 INDUS. & CORP. CHANGE 965, 968 (2006) (“Retroactive copyright extensions in this way make no economic sense, as what matters for the authors are the incentives present at the time the work is created.”).

27. 141 CONG. REC. 6552 (1995) (statement of Sen. Hatch).

28. *Id.*

29. *Id.*

30. *Id.* at 6552–53.

31. *Id.*

32. *Id.* at 6553.

33. *Id.*

through them into the succeeding generation.”<sup>34</sup> All of which allowed Hatch to proclaim: “the inescapable conclusion must be drawn that copyrights in valuable works are too often expiring before they have served their purpose of allowing an author to pass their benefits on to his or her heirs”<sup>35</sup> without demonstrating the existence of this purpose, let alone the failure to achieve this purpose.

Furthermore one should not be surprised that precisely those benefiting from the extension might believe that copyright was designed to care for heirs and that its term should be extended.<sup>36</sup> The views (or assertions) of the authors and their heirs who collect royalty streams is poor evidence as to whether post-mortem copyright is the proper copyright policy. In other words, when the CTEA was passed, Congress assumed that post-mortem copyright was and would continue to be an essential part of copyright in general. Nothing supported that assumption. Nonetheless, it may be that this assumption was accurate at some time in copyright history. The next Subsections address this issue.

### *B. Pre-CTEA Treatment of Copyright After Death*

A brief history of U.S. copyright law shows that, although post-mortem copyright issues arose in the copyright debates, rather than being a central concern, those issues (along with authors’ spouses and children who were proxies for post-mortem copyright) were used as props to advance other interests at stake regarding copyright’s duration. Students of copyright history know that U.S. copyright law traces its origins to England’s Statute of Anne.<sup>37</sup> Following the English model, under the 1790 copyright statute, U.S. copyright had an initial term of fourteen years with the possibility of an additional fourteen-year term if the author was alive at the end of the first term.<sup>38</sup> England moved away from this model such that in 1842 the term was “42 years or the life of the author plus seven years whichever should be longer.”<sup>39</sup> By 1911

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34. *Id.*

35. *Id.*

36. *Cf.* Varian, *supra* note 26, at 967–68 (arguing that given the small economic gains created by extending copyright’s term by twenty years for new works, the true motivation for extension was to extend the term retroactively for those few works that had a continuing royalty stream).

37. *See e.g.*, JAMES J. GUINAN, JR., STUDY NO. 30: DURATION OF COPYRIGHT (1957), *reprinted in* 1 STUDIES ON COPYRIGHT 473, 475 (Copyright Soc’y of the U.S.A. ed., Arthur Fisher memorial ed. 1963).

38. *Id.*; PATRY, *supra* note 1.

39. GUINAN, *supra* note 37, at 475.

England had moved to the continental European model of life of the author plus fifty years.<sup>40</sup>

In contrast, despite modifications to the Copyright Act such as making the first term twenty-eight years but retaining a fourteen-year renewal term<sup>41</sup> and further extending the potential term so that the first term was twenty-eight years and so was the renewal term,<sup>42</sup> the United States did not adopt a post-mortem copyright approach to duration until the Copyright Act of 1976.<sup>43</sup>

Nonetheless, the post-mortem assumption can be found in the first and succeeding extension pleas. As shown below, the tales offered to support the assumption were nothing more than tactics used to advance other agendas. Understanding them demonstrates the way the assumption was used to support extension and mask economic grabs and reveals how the assumption grew over time.

### 1. THE 1831 REVISION

By the time of the first major revision of U.S. copyright law, prominent writers such as Noah Webster focused on obtaining a longer term, including the possibility of perpetual copyright.<sup>44</sup> Part of Webster's concern was that because of the term structure in place he did not have the full opportunity to benefit from his work during his life<sup>45</sup>—a problem that theory and intuition may agree requires a solution. The revision itself arose in part because of Webster's relationship to William Ellsworth (his father-in-law), the man who introduced the revision legislation.<sup>46</sup> Webster realized that the copyright for one of his books was about to expire and first asked Ellsworth for a special law to protect the copyright.<sup>47</sup> When that effort failed, Ellsworth

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40. *Id.*

41. *See* PATRY, *supra* note 1, § 7:8.

42. *See* Copyright Act of 1909, ch. 320, § 24, 35 Stat. 1075, 1080–81 (repealed 1947); PATRY, *supra* note 1, § 7:10.

43. *See* PATRY, *supra* note 1, § 7:10. (“Whatever the reason, the decision not to provide a term measured from the life of the author was not reversed until the 1976 Act.”).

44. *See id.* § 7:8 (detailing Noah Webster's letter to Daniel Webster “advocating perpetual protection.”) Although the two men shared the same last name, they were not related.

45. After the committee's decision, Noah Webster stated his pleasure at being able to “add much to the value of my property, and I cannot but hope I may now make dispositions of copyright which will make me comfortable during the remainder of my life.” *Id.*

46. *Id.*

47. *Id.*

proceeded to introduce the revision legislation.<sup>48</sup> The report on the proposed bill was based on Noah Webster's views of copyright.<sup>49</sup>

The committee's project was "chiefly to enlarge the period for the enjoyment of copy-right, and thereby to place authors in this country more nearly upon an equality with authors [in] other[] countries."<sup>50</sup> The report started with the familiar plea of the poor family lacking a means to sustain itself if the author dies.<sup>51</sup> It then looked to England to show how its copyright law had progressed and was arguably superior to the United States because of changes to English law that extended copyright's term.<sup>52</sup> By making the overstated claim that England had perpetual copyright,<sup>53</sup> the report suggested that a long—as in unending—term for copyright was just, but even when a country decides otherwise, the term should approach the life of the author.<sup>54</sup> The report hammered this idea of a life term, if not a perpetual term, by noting that France had a life plus fifty term; Russia had life plus twenty, and that Germany, Norway, and Sweden recognized perpetual rights.<sup>55</sup> So just as modern copyright debates have claimed that term extension was required in part because the United States was behind the rest of the world,<sup>56</sup> the 1831 report argued that the United States lagged behind the rest of its peers.<sup>57</sup>

The report explicitly expanded the perpetual copyright theme by tying it to a Lockean view of labor and the idea that intellectual

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* ("In the United States, by the existing laws, a copy-right is secured to the author, in the first instance, for fourteen years; and if, at the end of that period, he be living, then for fourteen years more; but, if he be not then living, the copy-right is determined, although, by the very event of the death of the author, his family stand, in more need of the only means of subsistence ordinarily left to them.").

52. *Id.*

53. *Id.* ("In England, the right of an author to the exclusive and perpetual profits of his book was enjoyed, and never questioned, until it was decided in Parliament, by a small vote, in the case of *Millar vs. Taylor* in the year 1769, and contrary to a decision of the same case in the King's Bench, that the statute of Ann had abridged the common law right, which, it was conceded, had existed, instead of merely guarding and securing it by forfeitures for a limited time, as was obviously intended.").

54. *Id.* ("But Parliament, feeling the injustice of the statute of Ann, thus construed, afterwards passed a statute, which is now the law of that kingdom, securing to an author a copy-right for twenty-eight years, and if he be living at the end of that period, for his life.").

55. *Id.*

56. See NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 182 (2008).

57. See PATRY, *supra* note 1, § 7:8 ("It is believed that this comparison shows that the United States are far behind the States of Europe in securing the fruits of intellectual labor, and in encouraging men of letters.").

property ought to be treated the same as all other property: “Upon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor.”<sup>58</sup> When the report admitted that literary property is “peculiar” but asserted “it is not the less real and valuable,” it set up an unspoken justice claim that was particularly appealing to the audience—Congress—the members of which were men of letters: “If labor and effort in producing what before was not possessed or known, will give title, then the literary man has title, perfect and absolute, and should have his reward: he writes and he labors as assiduously as does the mechanic or husbandman.”<sup>59</sup> By equating the manual labor of the mechanic and husbandmen with the labor of the writer,<sup>60</sup> the report not only said writing is real work but that it should have the same reward—“title”—not just title but “title, perfect and absolute.”<sup>61</sup> Put differently, how could the high work of men of letters not receive the same protection as the product of manual laborers’ work or other property such as a house? Note, however, that this pure property view *might* support the ability to leave copyright to heirs, but it would also allow an author to leave the copyright to *anyone*, including someone other than a spouse or child.

Yet, rather than embrace the pure property approach in its treatment of alienability and the surviving-spouse-and-heirs question, the revision provided for surviving spouses and children by securing renewal rights to them even after an author’s death.<sup>62</sup> As William Patry explains, in deleting the term “assigns” from the act, pure alienability by will was eliminated.<sup>63</sup> The act protected specific relations and took a paternalist view that the rights could only go to those relations. But make no mistake, the reason for this shift was the animosity between living authors and publishers<sup>64</sup>—*not a concern for heirs as needing succor*. Post-mortem copyright as a means of protection for widows and children was not the real focus of the extension; and if it was part of the

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58. *Id.*

59. *Id.*

60. *Id.* (“The scholar, who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best right to the profits of those labors: the planter, the mechanic, the professional man, cannot prefer a better title to what is admitted to be his own.”).

61. *Id.*

62. *See id.*

63. *Id.*

64. *See id.* (“The limitation on the renewal term for the benefit of the author’s surviving spouse and children was expressly directed against publishers.”).

goal of the revision, exactly what grounded that goal is unclear.<sup>65</sup> The labor argument drove the debate. Post-mortem issues enter as an afterthought at best. Nonetheless this early debate shows the seeds of copyright views to come and shows how post-mortem copyright was more of an unsupported prop than a central concern to those who wished to expand copyright's term.

## 2. THE 1909 REVISION

The 1909 revision extended the renewal term from fourteen years to twenty-eight years for a total initial term of twenty-eight years and a renewal term of twenty-eight years.<sup>66</sup> Given the result, one might think that longer duration such as life of the author, post-mortem copyright, or perpetual copyright did not enter the debate. Again, that is not so. Life plus a term of years was presented as an option in Congress. In addition, another important literary figure, Samuel Clemens (Mark Twain) testified to Congress, and his testimony influenced views regarding what copyright was and should be at that time.<sup>67</sup> An examination of the Congressional positions and especially Clemens's statement shows that the arguments initially articulated by Noah Webster persisted and grew. Solid foundations for their positions were not offered. Many pressed for an expanded copyright term by again invoking notions of literary labor and more directly tugging at heart strings through images of impoverished descendants.

Several interested trade representatives testified regarding the proposed changes to the copyright act.<sup>68</sup> The Authors League,<sup>69</sup> the American (Authors') Copyright League,<sup>70</sup> the Music Publishers'

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65. See Pierre Leval & Lewis Liman, *Are Copyrights for Authors or Their Children?*, 39 J. CORP. SOC'Y 1, 2-3 (1990).

66. See PATRY, *supra* note 1, § 7:10.

67. See, e.g., *id.*; SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 35-37 (2001) (surveying and examining the history around the idea of "literary copyright" and Clemens's role and influence in a particular view of copyright).

68. See 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. C, at xv, (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter LEGISLATIVE HISTORY] (listing more than twenty-seven different trade groups encompassing publishers, authors, performers, artists, photographers, advertisers, musicians, and more interests as well as government organizations).

69. See 2 LEGISLATIVE HISTORY, *supra* note 68, pt. D, at 23 (statement of Bowker noting French term length).

70. 2 *Id.* pt. D, at 3. The group had initially sought life plus thirty years but altered the suggestion to life plus fifty years after looking at French law. See 1 LEGISLATIVE HISTORY, *supra* note 68, pt. C, at 78.

Association of the United States,<sup>71</sup> and the National Institute of Arts and Letters<sup>72</sup> supported life plus fifty years as the term.<sup>73</sup> A prime reason offered for the life-plus-fifty term was that European countries had moved to such a system.<sup>74</sup> The American Publishers' Copyright League supported life plus thirty because they feared the fifty-year term would not pass Congress and noted that thirty was the standard in Germany and England.<sup>75</sup> So it appears they wanted a longer term but took a tactical stance as to what could get through the legislature.<sup>76</sup> Some questioned the post-mortem copyright approach as indefinite,<sup>77</sup> and noted that the system would drive up the price of what would otherwise enter the public domain.<sup>78</sup> Still others opposed reversion rights that belonged to heirs and favored fully alienable copyright so that publishers could have all the rights an author had.<sup>79</sup> In addition, the idea that the term should extend beyond an author's life arguably so that the author could care for surviving spouses and/or offspring was asserted. Yet, just as with the 1831 revision, instead of justifications for post-mortem copyright, assumptions were made.

As the Senate Report summarized:

In considering what the term should be your committee *have assumed* that—(a) It ought at least—(1) To assure to the author provision for his old age; (2) To assure to the community the benefit of his own revision of his works as long as he lives (only a complete control of them will do this); (3) To enable him to provide for his children until they reach the age where they are likely to be self-supporting, or, if daughters, married; but that (b) (In the effort to meet the above needs) the provision ought not to tie up automatically

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71. 2 LEGISLATIVE HISTORY, *supra* note 68, pt. D, at V(c). The group had initially sought life plus seven years but changed its mind to harmonize with Russia and other nations. *See* 2 *id.* pt. C, at 77.

72. Edmund Clarence Stedman was also a member of the American Copyright League. 2 *Id.* pt. D, at v.

73. 2 *Id.* pt. D, at 25, 39.

74. *Id.*; *see also* PATRY, *supra* note 1, § 7:8.

75. *See* 2 LEGISLATIVE HISTORY, *supra* note 68, pt. D, at 24.

76. *Cf.* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, at 321 (1987) (noting that although perpetual copyright was a goal for continental European authors, the term advanced in the debates was for the “the longest possible term” that was “politically feasible.”).

77. *See* 2 LEGISLATIVE HISTORY, *supra* note 68, pt. D, at 26–27 (testimony of Beverly Smith).

78. 2 *id.* pt. D, at 27; *see also* 4 *id.*, pt. H, at 53.

79. *See* 1 *id.*, pt. C, at 9–10.

all copyrights whether or not they require a term so long. Experience shows that a large percentage of them do not.<sup>80</sup>

Here the assumptions were that copyright should last as long as an author's life and that the author needs to have post-mortem copyright but only to provide for certain heirs: those who could not support themselves. Noticeably absent was any discussion of the basis for these assumptions. In addition there appeared to be some sensitivity to the idea that not all copyrighted works retain their value. But nothing was offered to show why copyright should be a way to provide for adults capable of sustaining themselves. The roots and flaws of this iteration of the post-mortem assumption are best illustrated by another famous author, Clemens, who, as Siva Vaidhyanathan and Patry describe, exerted great influence on the way in which Congress viewed the Copyright Act and how it functioned.<sup>81</sup>

Clemens testified before the House and Senate Committees on patents on December 7, 1906<sup>82</sup> and was a sensation.<sup>83</sup> Clemens wanted longer copyright and rallied all his skills to persuade Congress to grant it. His key argument was that copyright after death was necessary to defeat publishers. He mixed the grand image of the genius author, beliefs about labor and just rewards, a pure property view of literary work, visions of women and children in poorhouses, and characterizations of publishers as evil aristocrats and pirates to support the view that copyright should be perpetual; and if not that, at least extended as far as possible.<sup>84</sup> Other than Clemens's open admission that he would rather have the option of wasting his money and knowing that copyright would provide for his family where he did not,<sup>85</sup> no support was offered for the idea that providing post-mortem copyright is a key, justifiable function of copyright. Instead Clemens's testimony tracked the perennial tension between authors and publishers and authors' desire for real property rights in literary work as the driving force behind lengthening copyright's term. Widows and children were props that help hide the true motivations at work. Nothing of substance was

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80. See S. REP. NO. 59-6187, 6 (1907) (emphasis added).

81. See VAIDHYANATHAN, *supra* note 67, at 35-37.

82. See PATRY, *supra* note 1, § 7:8.

83. See VAIDHYANATHAN, *supra* note 67, at 35.

84. See *id.* (describing Clemens's claim to be "the only man in the United States eligible to membership" in "the American Association of Purity and Perfection"); *Arguments on S. 6330 and H.R. 19853 Before the J. Comm. on Patents*, 59th Cong. 116-21 (1906) *reprinted in* Samuel L. Clemens, *Copyright in Perpetuity*, 6 GREEN BAG (n.s) 109, 110-14 (2002) (statement of Clemens before the Joint Committee on Patents).

85. See *id.* at 110-11.

offered to explain why or how post-mortem copyright ought to be part of copyright law.

Clemens's quest for a long copyright term has an ironic twist. Clemens sought a longer, possibly perpetual, term as a way to thwart a system that he believed allowed publishers to be a veritable aristocracy, leading parasitic lives well into eternity: "[Publishers] continue the enjoyment of these ill-gotten gains generation after generation. They live forever, the publishers do."<sup>86</sup> This concern informed the revision. The dual term for copyright was designed as a "second bite at the apple" to address the unequal bargaining power between an author and publisher<sup>87</sup> and the problem that an author might "sell[] his copyright outright to a publisher for a comparatively small sum" only to find that the work was worth much more later.<sup>88</sup> Yet under the Supreme Court's ruling in *Fred Fisher Music Co. v. M. Witmark & Sons*,<sup>89</sup> if an author assigned all his rights to a publisher, he gave away the renewal rights that arguably were designed to provide for him and any surviving family.<sup>90</sup> In other words, the longer term ended up feeding publishers in much the way Clemens feared. More importantly, as shown below, putting authors' offspring in the place of publishers leads to the same result: a small group extracting rent in a parasitic way.

86. *Id.*

87. See William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 446 (2000) (internal quotations omitted).

88. H.R. REP. NO. 60-2222, at 14 (1909); see also *White-Smith Music Publ'g Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911) ("There are at least sentimental reasons for believing that Congress may have intended that the author, who according to tradition receives but little for his work, and afterwards sees large profits made out of it by publishers, should later in life be brought into his kingdom."); Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 949 & n.4 (1977) ("The second period is intended, not as an incident of the first for the benefit of the then owner of the expiring copyright, but as a second recognition extended by the law to the author of work that has proven permanently meritorious . . . ." (quoting *Harris v. Coca-Cola, Co.*, 73 F.2d 370, 371 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935))).

89. 318 U.S. 643 (1943).

90. *Id.* at 656-59; accord *Siegel v. Warner Bros. Entm't*, 542 F. Supp. 2d 1098, 1140 (C.D. Cal. 2008) ("[T]he damage done by *Fred Fisher* to an author's ability to renegotiate through the reversion of rights . . . ."); see also Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 156-57 (2006) (describing the intention of Congress to provide for "[w]ill-bumping"—a system where the statute trumps any will an author may have executed—and the way in which the Supreme Court interpreted the 1909 Act held that an author's assignment of rights was binding despite the 1909 Act's language).

## 3. THE 1976 REVISION

The 1976 revision of the Copyright Act was the first time the United States adopted post-mortem copyright. The House Report, which Melville Nimmer calls the “the most important piece of legislative history concerning the [1976] Act,”<sup>91</sup> listed seven reasons to change copyright’s duration.<sup>92</sup> None of those reasons explicitly looks to post-mortem copyright as a way to provide for an author’s spouse or offspring.<sup>93</sup> The reasons that came closest to matching the post-mortem assumption were that the 1909 Act’s fifty-six-year term failed to account for increased longevity, that the old copyright term was preventing authors from being able to earn during their lives, and that authors’ works should not pass into the public domain while the author was still alive.<sup>94</sup> Providing for authors’ survivors, however, was not the concern. Furthermore, the reasons directly linked to shifting to the model of the life of an author plus fifty years—eliminating complexities in copyright formalities regarding publication and computing copyright’s term, removing problems with the renewal system, and harmonizing U.S. law with the fact that a “large majority of the world’s countries have adopted a copyright term of the life of the author and 50 years after the author’s death”<sup>95</sup>—indicate that post-mortem copyright was seen as doing other work.

The revision did create a special right, a termination right that protected authors and possibly their spouses and/or offspring if they had inherited the right, but that provision has nothing to do with using post-mortem copyright as a way to address whether and how to extend copyright’s term. Instead, as Nimmer explains, Congress picked up where the 1909 Act left off and justified special protection for copyright as opposed to other “forms of property”: “the necessity of ‘safeguarding *authors* against unremunerative transfers . . . [is] needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.’”<sup>96</sup> Like the explanation Congress gave for extending copyright’s term, the issue was how to protect authors from an unfair

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91. Nimmer, *supra* note 88, at 950.

92. H.R. REP. NO. 94-1476, at 134–35 (1976).

93. *Id.*

94. *Id.* at 134.

95. *Id.* at 134–35.

96. Nimmer, *supra* note 88, at 950 (emphasis added) (quoting H.R. REP. NO. 94-1476, at 124 (1976)); accord Tritt, *supra* note 90, at 161 (explaining that the termination provision was designed “to recapture any remaining value in the copyright interest (i.e., to provide an escape mechanism for authors who assigned away their copyright interests before the full value of the interest was apparent)”).

bargaining position. Authors' relatives benefitted from the right only as an extension of a policy that was designed to protect authors from poor or disadvantaged choices.

Furthermore, whether this provision was really designed to protect authors, let alone their descendants, is dubious. Sorting how and when one effects termination requires navigating the following: whether one's copyright was obtained under the 1909 or the 1976 Act, when a specific five-year window is open that allows termination, how to serve notice of termination, when notice may be served, and numerous formalities regarding what must be in the notice.<sup>97</sup> As Patry states, "[i]t is difficult to overstate the intricacies of these [termination] provisions, the result of which is that they are barely used, no doubt the result desired by lobbyists for assignees."<sup>98</sup>

So the policy behind the 1976 Act took a paternalistic attitude towards authors and was concerned about how authors fared with something less than a life term for copyright. Post-mortem copyright entered the picture mainly for reasons related to altering the way copyright term and renewal was calculated and harmonizing U.S. law with international law. In other words, the 1976 revision offers no support for the claim that "postmortem protection of copyright was designed to benefit" "descendants, heirs, and others."<sup>99</sup>

### *C. Before Berne: The Early European View of Descendible Copyright*

Those in favor of extending copyright's term in the United States often point to the practices of other countries as justification for such a change. In Webster's era, several arguments about how Europe offered longer and arguably better protection for writers arose.<sup>100</sup> After the adoption of the Berne Convention, the argument that the United States should adhere to international standards increased. The Berne Convention has post-mortem copyright, and the CTEA explicitly looked to Berne to support the post-mortem assumption. When the European Council addressed term extension under the Berne Convention in 1993, its Directive explicitly embraced post-mortem copyright as a goal of

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97. 17 U.S.C. §§ 203(a)(4), 304(c)(4) (2006); *see also* Nimmer, *supra* note 88, at 977–81 (detailing the numerous steps required to effectively terminate a transfer). For an example of an instance of effective termination and the complicated steps involved *see generally* *Siegel v. Warner Bros. Entm't*, 542 F. Supp. 2d 1098, 1116–17 (C.D. Cal. 2008).

98. *See* Patry, *supra* note 87, at 447; *accord* *Siegel*, 542 F. Supp. 2d at 1117 (quoting *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 621 (2d Cir.1982)) (regarding the "difficult, technical questions" termination procedures present).

99. 141 CONG. REC. 6551 (1995).

100. *See supra* notes 50–57 and accompanying text.

copyright and as part of the explanation for the project.<sup>101</sup> Nonetheless, the foundations of that position are unclear.<sup>102</sup> As Sam Ricketson puts it, “during the life of the Convention . . . ideology has replaced critical inquiry” regarding the ideas of “uniform term for all works, and the length of that term.”<sup>103</sup> Still at one time, 1858 to be precise, debates about duration took place.<sup>104</sup>

One standard explanation for the long duration of copyright in continental Europe is that its approach to copyright draws on a tradition that favors author’s rights and that long duration is simply a subset of that view, but that tradition was not always dominant and there are periods where those conclusions were not forgone.<sup>105</sup> Work by Jane Ginsburg shows that during their respective revolutionary periods, the French and Anglo systems had much in common.<sup>106</sup> As discussed earlier, although the laws of the United States rejected the author-focused system with its long duration, the logic later seen in Europe was present but unsuccessful in the United States.<sup>107</sup> Rather than offering a clear source for post-mortem copyright and its possible term length, copyright debates in Europe parallel debates in the United States with diverging views regarding the nature of literary property, fights between authors and publishers, and concerns about the way in which lengthy copyright terms affects the public domain.

The source of the view of post-mortem copyright was authors, but an examination of the early discussions of copyright reveals that not all authors agreed that perpetual or post-mortem copyright was proper. At least between 1858 and 1878, the early stages of the continental European view of copyright that led up to the Berne Convention, respect for the public domain and the vision of society as the true heir

101. See Council Directive 93/98, art. 5, 1993 O.J. (L 290) (EC) (“Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants . . .”).

102. See RICKETSON, *supra* note 76, at 321 (“While [the Berne Convention’s] prescriptions as to duration are quite precise, there has never been any real effort made to justify why, or to explain how, these terms have come to be adopted . . .”).

103. See *id.* at 323.

104. *Id.* at 321 n.4.

105. See *id.* at 321; see also Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 131, 143 (Brad Sherman & Alain Strowel eds., 1994).

106. See Ginsburg, *supra* note 105, at 158 (summarizing how both systems looked to copyright as a way to develop public knowledge, and to reward authors’ labors, and employed formalities to limit the reach of copyright protection).

107. See *supra* Part I.B.1; accord Ginsburg, *supra* note 105, at 138–39 (noting Webster’s influence on United States copyright law and the Lockean labor view embedded in early copyright discussions of the era).

of creation were as important as, if not more important than, advancing an author-centered copyright system with post-mortem copyright. Although post-mortem rights were mentioned as a possible concern, nothing shows that they have the allegedly central role attributed to them today.

#### 1. THE STARTING POINT: THE CONGRESS OF 1858 IN BRUSSELS

The idea of a universal copyright can be found in documents from around 1840,<sup>108</sup> but “the first organised expression of opinion is to be found in the resolutions of a Congress on Literary and Artistic Property which was held in Brussels in September 1858.”<sup>109</sup> The 1858 Congress stated the duration question as a choice: once a work is published should the duration of copyright be continuous (perpetual) or temporary?<sup>110</sup> As the report put it there were two banners. Those in favor of permanent or perpetual copyright saw literary work as property that belongs to the author.<sup>111</sup> Those opposed to that view held that literary work does not have the characteristics of property and instead saw it as *sui generis* with special characteristics relating to its objective and end.<sup>112</sup>

In elucidating the property view, the report described how possession was offered as the foundation of property,<sup>113</sup> but two further ways to understand property were offered. One view grounded property in the idea that property interests are honored because one affixes one’s mark of personality to a work and society allows that person to be the owner of the work forever as a reward.<sup>114</sup> That view then argued that the same protection should be extended to literary work.<sup>115</sup> In addition, the report noted that some who looked for the metaphysical sources of ownership took a Lockean view that God provides natural resources and one who produces something or generates value has a right to that which has been produced.<sup>116</sup> Here one sees how advocates of extension were blending together views regarding possession of things,

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108. See RICKETSON, *supra* note 76, at 41.

109. *Id.*; accord 1 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 73 (1938).

110. See ANNALES DE LA PROPRIÉTÉ INDUSTRIELLE, ARTISTIQUE ET LITTÉRAIRE, 433 (1858) [hereinafter ANNALES] (“Le droit de l’auteur sur son ouvrage imprimé et livré à la circulation doit-il être perpétuel ou temporaire?”) (emphasis omitted).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (citing Locke among others).

personality theory, *and* labor theory to support their goal. Despite these strong property views, a robust argument for limits on copyright emerged too.

Whereas Webster and Clemens looked to the practices of other countries to justify expanded copyright, those in Brussels in favor of *limiting* copyright exhorted the members to examine the legislation of France, England, America, and Germany and argued that no matter how the right is couched, be it as privilege or copyright, when the public had the strength to intervene, all the countries limited the right.<sup>117</sup> In addition, this group anticipated objections and countered by increasing the stakes. Unlike the American debates which sought to expand the term, the 1858 Congress offered a robust view of the public domain as a way to show why copyright term must be limited. In this view the public domain trumped the powerful place the author held, because once one limited authors' rights and pushed material into the public domain, thought was "emancipated" and "soared free."<sup>118</sup>

This counterview also challenged notions that authors create from nothing by asserting that the public domain was as an integral resource for all humanity, a place where each individual takes what she needs for inspiration, creation, and to fashion her personal mark on the world.<sup>119</sup> In addition, this view described the process as cyclical with each generation building on the last and furthering humanity's progress.<sup>120</sup> Most importantly for this Article, the argument asserted, in language that tracks current economic ideas regarding spillovers,<sup>121</sup> that the cycle opens new doors or paths that belong to and fertilize *future generations'* labor and creation.<sup>122</sup>

At this point one must remember that the session posed the issue as a binary choice between perpetual or limited copyright term. As such the 1858 Congress had to find a compromise. In language similar to modern views regarding how copyright ought to operate, the report asserted that authors' rights would be strong and broad but only during the term of copyright; after that they expired, and the work would move to the public domain.<sup>123</sup>

Only after setting the issue as a balance between authors and the public as part of the creative cycle did post-mortem copyright enter the

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117. *Id.* at 434–35.

118. *Id.* (“[La] limitation . . . permette à la pensée meme de s’émanciper, de se dégager des liens dans lesquels l’enchaîne le droit exclusif de reproduction au profit d’un seul, pour s’élancer, libre et acquise à l’humanité, dans le domaine public.”).

119. *Id.* at 435.

120. *Id.*

121. *See infra* Part III.A.

122. *See ANNALES, supra* note 110, at 435.

123. *Id.* at 435–38.

debate. The reporter noted that authors had previously made arguments regarding how the public domain might strip them of their power,<sup>124</sup> and as before, the solution was to give authors a just and legitimate reach: provide exclusive copyright power to authors and spouses during their lives and their representatives for a limited number of years so that they may be properly remunerated.<sup>125</sup> Yet, the recounting of how authors have made this argument before and that providing for life plus some years is the just and legitimate model did not explain exactly why post-mortem copyright should be part of the equation. Instead it seemed to have been a way to mollify the authors group at the Congress.

Thus, after acknowledging the authors' concerns about the public domain, the reporter immediately offered the argument that authors should consider that by dedicating work to the public, they leave the author's posterity an even more precious heritage: the name genius and the status of being an example of a community author.<sup>126</sup> Insofar as post-mortem copyright was supposed to be a way to take care of offspring, another option was offered: the government would be happy to forgive the debts of the author's children (or perhaps take care of them) in return for the debt society owed to whomever had endowed the country with new glory.<sup>127</sup> The report concluded that having considered all the issues, the majority of the committee decided to reject perpetual copyright in favor of circumscribing an author's and his representatives' rights to a limited time.<sup>128</sup>

The 1858 Congress report reveals several points. First, there was not automatic agreement that a strong property and/or author-centered view of copyright with an extremely long, if not perpetual, copyright term was proper. On the contrary, the session revealed a deep concern for the public domain and the need to limit copyright. And, although provision for widows and children is mentioned, the vague promise of forgiven debts and the emphasis on the pride heirs should have in the glory of their parents' work, indicates that pecuniary returns for authors and heirs was decidedly not an overriding factor in how the Congress approached the question of post-mortem copyright. Indeed, some members of the 1858 Congress believed that if one gave authors perpetual copyright, the public would lose, and the system would establish fiefdoms for the children and grandchildren of industrialists<sup>129</sup>—the group most likely to be able to exploit the

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124. *Id.* at 435–36.

125. *Id.* at 437.

126. *Id.*

127. *Id.*

128. *Id.* at 437–38.

129. *Id.* at 436–37.

copyright. As shown below, the same can be true for authors' children and grandchildren.<sup>130</sup> Nothing in the 1858 Congress shows what theoretical foundations might support post-mortem copyright. At this stage the critical inquiry argued strongly against extended terms based on the practices of other countries and the problems extended terms posed for the interaction between the public domain and the generation of new ideas and works. In addition, the committee's ideal of being a community author explicitly captures the point that post-mortem copyright affects two interests: the lineal descendants of an author *and* society at large.

## 2. VICTOR HUGO AND THE LITERARY CONGRESS OF 1878

The Literary Congress of 1878 is another important source for understanding the ideas behind the Berne Convention. The Literary Congress' recommendations and Victor Hugo's role at the Congress caught the attention of the United States and England.<sup>131</sup> At the end of the Literary Congress five resolutions reflecting ideals for literary work were passed.<sup>132</sup> As Ricketson explains, the offered ideals differed from what the Congress thought it could achieve as "politically feasible,"<sup>133</sup> so the resolutions do not comport with the final results. Nonetheless the third resolution held that after any country's durational limit expired, anyone could reproduce the work subject to a fixed royalty to heirs or legal representatives and that heirs could not prevent an accurate reproduction but had to obey the wishes of the author.<sup>134</sup> Here one sees what appears to be a strong view regarding copyright after death but not in the same form as post-mortem copyright today. An examination of Hugo's speech at the 1878 Congress helps understand this shift in what copyright's purpose might be.

Similar to the way that Webster influenced copyright policy and Clemens testified to shape it, Hugo presided over and spoke to the 1878 Congress. Hugo had been an ardent supporter of author's rights, but

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130. See *infra* Part II.C.2.a.

131. See Blanchard Jerrold, Letter to the Editor, *STANDARD* (London), reprinted in *Results of the Literary Congress*, N.Y. TIMES, Aug. 1, 1878, at 3 (describing Jerrold's role as Secretary to the Congress); *The Literary Congress in Paris*, N.Y. TIMES, June 28, 1878, at 1 (noting Hugo's involvement and some of the Congress' recommendations).

132. See LADAS, *supra* note 109, at 73–74. It should be noted that the Artistic Congress met just before the Literary Congress and, among many resolutions adopted, resolved that artists had a property right in their work and that the duration should be limited to one hundred years from the date of publication. *Id.* at 73.

133. See RICKETSON, *supra* note 76, at 321.

134. *Id.*

also had an appreciation of the public domain's importance to future creation.<sup>135</sup> His views reveal a more nuanced view of the relationship between literary work, creation, and the public domain than one might suspect. Although he addressed the idea of some sort of post-mortem care for an author's heirs, post-mortem rights were again a tangential concern at best.

Hugo's speech came after a long era where entitlements and publisher's rights trumped author's rights.<sup>136</sup> As such, when part of his speech made the point that books have value as property and as literature, he acknowledged the fact that one can generate economic returns from books but also reminded the audience that the old system left authors poor compared to publishers.<sup>137</sup> Clemens's later view echoed the tension between authors and publishers Hugo described. But whereas Clemens derided notions that monopoly and perpetual rights would impoverish the public domain, Hugo argued that the public domain must be maintained.

He explained this idea by first contrasting literary property with the public domain: "[L]e principe: le respect de la propriété. Constatons la propriété littéraire; mais, en même temps, fondons le domaine public."<sup>138</sup> Thus Hugo demanded not just that a system of literary property recognize and respect literary property, but that it simultaneously found the public domain. To accomplish this task, he offered a mandatory licensing system: after an author's death, publishers may publish a work at will provided that they pay the author's heirs a mandatory royalty which was not to exceed 5 or 10 percent.<sup>139</sup> Rather than supporting a general notion of post-mortem copyright, Hugo set forth a system that provided for dependents but did not embrace giving them full property rights.

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135. It should be noted that some thirty years earlier Hugo, along with Alphonse de Lamartine and Honoré de Balzac, was quite vocal about author's rights and opposed the idea of the public domain as a good idea. See Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 *IND. INT'L & COMP. L. REV.* 423, 450-51 (1999). Peeler notes that Hugo presided over the International Literary and Artistic Association (ALAI) and was forceful about his views. The material Peeler cites, however, is from Hugo's statements in 1849. As such it appears that Hugo's views changed by the time he delivered his 1878 speech. See *id.* at 451 & nn.187-89.

136. See Ginsburg, *supra* note 105, at 136; CONGRÈS LITTÉRAIRE INTERNATIONAL DE PARIS 1878: PRESIDENCE DE VICTOR HUGO 104 (1878) [hereinafter HUGO]; Peeler, *supra* note 135, at 428.

137. See HUGO, *supra* note 136, at 106; accord Ginsburg, *supra* note 105, at 136; Peeler, *supra* note 135, at 428; *The Literary Congress in Paris*, *supra* note 131.

138. HUGO, *supra* note 136, at 107.

139. *Id.* at 107. Hugo calls the fee "très faible" which means weak or small here. *Id.*

What is perhaps surprising is how Hugo explained the interaction of the two principles. For Hugo, authors have rights in the works, but the thoughts belong to humanity.<sup>140</sup> Furthermore if the two principles conflict, authors' rights must bow to the public's interests because the public is in fact the main concern of authors.<sup>141</sup> At least according to the recorder, the conclusion was met with approval.<sup>142</sup>

Furthermore, Hugo offered that such a sacrifice of authors' interests to the public interest would not be necessary.<sup>143</sup> For Hugo, authors' and the public's interest were in fact the same. Both were about advancing civilization by sharing the light of knowledge across the world, which, in a practical sense, meant increasing the number of schools and, of course, books in the world available for all to use freely.<sup>144</sup> The pure incentive views of U.S. copyright were not present; if one must choose between the authors' rights and civilization as an open system in which thought is shared, civilization must trump.

As such, although Hugo's speech offered a rather glorious view of authors and literature, it does not show what supports the idea that copyright *should* have post-mortem copyright. In addition, it does not offer a foundation for the unlimited view of copyright duration that some attribute to the authors' rights approach of continental Europe. At most it argues for limited copyright with mandatory royalty and explicitly calls for the public domain to trump authors' rights if the two conflict. Last, Hugo's views regarding the way literature and ideas aid progress, rather than support a pure property view of copyright with perpetual, exclusive control, arguably connect well with recent work regarding the way in which access to ideas fosters further creation and militates in favor of limited copyright.

#### *D. Historical Findings and Lessons*

Contrary to the idea that copyright has always embraced or requires post-mortem copyright, the preceding material shows that post-mortem copyright has a conflicted history and played at most a minor role as a concern of copyright doctrine. As Ricketson notes, the idea

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*; cf. Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 805–06, 818 (2007) (explaining and demonstrating the relationship between copyright, access to textbooks, social justice, and the theory of human capacity and development as offered by Amartya Sen and Martha Nussbaum).

that copyright must persist past an author's life had little foundation.<sup>145</sup> Nonetheless, one can see that similar to the recent debates regarding the CTEA, post-mortem copyright, dressed up as impoverished widows and children, was a prop to further authors' interests in obtaining longer copyright terms. This tactic was especially potent when copyright term lasted less than an author's life, but it still did not show how or why copyright should extend beyond an author's life. Moreover the European debates—where one might expect to find a more absolute explanation and defense of powerful, broad post-mortem copyright—present a different view. There one finds precursors to current views about the way in which copyright must provide a balance between authors' and the public's ability to access and use information. Indeed, at its core the European view lays the groundwork for denying authors' rights in cases where one must choose between authors' rights and the public interest.

Despite history failing to provide clear evidence supporting the need for post-mortem copyright—and indeed the historical material undermines such a view—it provides insight regarding the justifications offered to advance the differing positions. Then, and now, philosophical views regarding property and the way in which literature interacts with society play an important role in understanding what if anything supports post-mortem copyright and how best to structure the copyright system. In addition, these theoretical questions can be understood as asking whether copyright ought to extend beyond life at all. The next Part looks at philosophical theories that may or may not justify post-mortem copyright.

## II. PHILOSOPHICAL THEORIES TO EXPLAIN POST-MORTEM COPYRIGHT

It is not surprising that debates regarding copyright often appeal to Lockean labor, Hegelian personality, and aspects of utilitarian theories to justify the idea of stronger authors' rights. These theories cover the main theoretical foundations for intellectual property.<sup>146</sup> An examination of the theories offers two benefits. First, it reveals whether or not any of the theories (offered before and now) explain why copyright should persist after death. Second, it lays the groundwork for a more coherent understanding of how to manage copyright policy.

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145. See *supra* notes 108-10 and accompanying text.

146. See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 734 n.47 (2007) (“U.S. IP laws are premised on four justifications”: instrumental utilitarianism, Lockean “labor-desert theory,” personality theory, and custom-based theory). See *generally* Fisher, *supra* note 5, at 173.

*A. Lockean Labor Theory*

Lockean, labor-based arguments for intellectual property are a major way in which intellectual property rights are justified and permeate the way the law views copyright.<sup>147</sup> Webster, Clemens, the 1858 Congress, and Hugo raised labor as a key factor for why society ought to protect literary works. Under this view one begins with the basic point that creation involves one's labor. Insofar as one has labored to produce something, one owns it. This view continues to have force. For example, recent calls to treat intellectual property as real property and claims of alleged theft or piracy of intellectual property that equate intellectual property to real property indicate that the natural rights view may be at high mark.<sup>148</sup> Yet, critical examination of natural rights theory and its view regarding inheritance demonstrates that the

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147. See, e.g., Aoki, *supra* note 146, at 734 n.47 (noting Locke's labor-based theory as a key way to justify intellectual property); Wendy J. Gordon, *Intellectual Property*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 617, 624 (Peter Cane & Mark Tushnet eds., 2003) ("On the philosophical side, theories developed from a Lockean base have been the most influential in IP."); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 524–29 (1990) (tracing the Lockean view of natural law and labor-based copyright in England and the United States). Although there is a debate regarding whether intellectual property should be seen as real property, Justin Hughes has noted that the products of intellectual labor especially writings have been viewed as property for hundreds of years. Compare e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 406–10 (1990) (tracing the shift to a pure property approach to trademark rights and noting the way in which this shift limits the potential for expressive use of trademarks) and Gordon, *supra*, at 619–21 (investigating the question "Is it 'Property'?") and Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005) (arguing that use of "the rhetoric of real property, with its condemnation of 'free riding' by those who imitate or compete with intellectual property owners" has resulted in "a legal regime for intellectual property . . . in which courts seek out and punish virtually any use of an intellectual property right by another"), with Justin Hughes, *Copyright and Incomplete Historiographies: Of Privacy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1004–05 (2006). For a discussion of intellectual property as real property in the context of copyright and its duration see Saul Cohen, *Duration*, 24 UCLA L. REV. 1180, 1183–85 (1977) (acknowledging the difference between tangible and intangibles but arguing in general for as long a term as possible).

148. See, e.g., Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005) [hereinafter Mossoff, *Is Copyright Property?*]; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003) [hereinafter Mossoff, *What Is Property?*]; cf. Margaret Jane Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23, 28 (2006) (noting that "[m]any proponents of information propertization have pushed an analogy with real property," but arguing that "[w]e do not need to—and should not—accept the analogy that information propertization is equivalent to land propertization"). For an example of the popular position that real property is the best way to understand intellectual property, see Mark Helprin, *supra* note 9.

theory does not lead to a pure property view for copyright. Furthermore, even if natural rights theory did support the pure property view, the theory does not support post-mortem copyright.

### 1. NATURAL LAW AND COPYRIGHT

Possession is a key part of the natural rights approach to property.<sup>149</sup> The way one possesses is through labor; it is labor under Locke's view that determines one's property interest.<sup>150</sup> But it is not only labor that justifies property. As Fred Yen has explained, "Since people owned their bodies, Locke reasoned that they also owned the labor of their bodies and, by extension, the fruits of that labor. Thus, a person who mixed her labor with an unowned object became morally entitled to property in that object."<sup>151</sup> Adam Mossoff argues further that the key in natural law is that possessory rights—the right to acquire, use, and dispose of property<sup>152</sup>—flow from what is "one's own," which begins with one's "life, limbs and liberty."<sup>153</sup> In short, as Wendy Gordon and Alfred Yen have argued, natural rights theory has important limits.<sup>154</sup> Indeed, Mossoff, one of the more ardent proponents of a natural rights approach to intellectual property, acknowledges as

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149. See, e.g., Yen, *supra* note 147, at 522 (noting that possession plays a key role in natural law understandings of property and that this view stems from Roman law); Mossoff, *What Is Property?*, *supra* note 148, at 395 ("[T]he *substance* of the concept of property is the possessory rights: the right to acquire, use and dispose of one's possessions. . . . Exclusion therefore represents only a formal claim between people once civil and political society is created, and it has meaning only by reference to the more fundamental possessory rights that logically predate it.").

150. See Yen, *supra* note 147, at 523.

151. *Id.*

152. See Mossoff, *What Is Property?*, *supra* note 148, at 395.

153. *Id.* at 383–84.

154. See Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) ("When the limitations in natural law's premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests.") [hereinafter Gordon, *A Property Right in Self-Expression*]; Yen, *supra* note 147, at 546–57 (examining natural law and modern copyright to show how natural law on its own terms has inherent limits regarding the way one should treat copyright: "The point is that the property rights authors deserve under natural law are neither unlimited nor perpetual. Many copyright claims must be denied because they imply the privatization of public domain material. More importantly, even if property rights are recognized, it is entirely appropriate to restrict those rights to a limited number of years, thereby eventually dedicating the entire work to the public domain.").

much.<sup>155</sup> More specifically, there is at least one inherent limit for property under the natural law view: life.<sup>156</sup>

For the focus is on life. To have life and exercise liberty one must be able to support that life, which in turn leads to being able to exercise liberty and to have property to support one's life, which results in a familiar triumvirate: life, liberty, and property.<sup>157</sup> As such, insofar as intellectual property has become a key if not dominant part of our economy, one can appreciate that one's creations are treated as a type of property that flows from one's labor and supports one's life.<sup>158</sup> Thus natural rights theory, intuitively and structurally, supports the possibility of strong life-rights for copyright; but the same intuition and structure cuts against copyright after death.

## 2. THE SOCIAL DIMENSION OF NATURAL LAW AND INHERITANCE

Work by Jeremy Waldron shows that even under a natural law analysis, inheritance is not absolute.<sup>159</sup> According to Locke, natural law requires that one leave enough to provide for surviving dependents; so the first portion of the estate goes to them but “[a]part from the needs of dependents, there are no natural rights of succession.”<sup>160</sup> The key idea is the distinction between a state-of-nature world and civil-society world. “In the state of nature, any property that becomes ownerless

155. See Mossoff, *What Is Property?*, *supra* note 148, at 441 (arguing in general for an integrated, natural-rights-based view of property and stating “[i]t is important, though, for integrated theorists not to overstate their claims. The integrated theory does much for the property scholar, but it does not do everything. An integrated theorist, for example, would be hard pressed to deduce from the possessory rights the optimal term limit for a copyright or patent. The integrated theorist maintains that there should be legal protection *as such* for intellectual property, but important details of this protection are not deducible from the integrated theory.”).

156. Insofar as possession is a requirement for natural rights claims to property, possession is another possible inherent limit. Thus when one considers that intellectual property is intangible property and not capable of possession in the same way a physical piece of property is, one sees that natural rights may not serve as a good foundation for intellectual property rights in general. See Deven R. Desai, *Property, Persona, and Preservation*, 81 *TEMP. L. REV.* 67, 97–98 (2008).

157. Mossoff, *What Is Property?*, *supra* note 148, at 381, 384; see also Gordon, *A Property Right in Self-Expression*, *supra* note 154, at 1559–60 (discussing the relationship between liberty, property, and the commons and noting Locke's view that people had “a right to possess and use as much as was needed to ‘provide for their Subsistence’” (quoting JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287–88 (Peter Laslett ed., 2d ed. 1967) (1690)).

158. See Yen, *supra* note 147, at 557 (“Authors certainly create material in which they deserve property rights.”).

159. See generally J.J. Waldron, *Locke's Account of Inheritance and Bequest*, 19 *J. HIST. PHIL.* 39 (1981).

160. *Id.* at 50.

reverts to the common stock of mankind and may be appropriated subsequently by anybody who can use it. In a civil society, however, the legislature is likely to make detailed provision for the orderly disposition of such property.”<sup>161</sup> As Waldron summarizes, “[i]n general, the acquisition and transfer of property come under the jurisdiction of civil law once a property holder enters society.”<sup>162</sup>

In addition, as Carol Rose has shown, even Blackstone, who is famous for the over-simplified view of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,” had reservations about the way property actually works.<sup>163</sup> Like Locke, Blackstone begins with a state-of-nature premise where there is a commons from which all may draw and claim property by occupancy, which is a temporary situation.<sup>164</sup> Once society grew and began to develop resources, resources became scarce, and permanent rights emerged that allowed “‘occupiers’ to avoid conflicts with one another and encouraged them to labor on the things to which they now claimed a durable right.”<sup>165</sup> According to Rose, the idea here is utilitarian: “Exclusive dominion is useful because it reduces conflicts and induces productive incentives. As Blackstone observed, no one would bother working and cultivating if someone else could ‘seise upon and enjoy the product of his industry, art, and labour.’”<sup>166</sup> So “necessity” creates property, and “civil society” and governments preserve that property.<sup>167</sup>

The turn to civil society to order property rights appears again. But even more so than for Locke, inheritance is suspect. In Blackstone’s

161. *Id.*; see also *id.* at 45–46 (explaining the way in which the idea of providing a minimal level of subsistence fits within Locke’s view of bequest), 48–49 (detailing how civil society’s structures interact with the state of nature, that offering “[i]ndeed, Locke seems to be convinced that once civil governments are set up there will be only very limited scope for the direct acquisition of property by the investment of labor”).

162. *Id.* at 49. Lord Macaulay’s speech regarding term extension in England in 1841 also drew on the civil aspect of inheritance. See 56 PARL. DEB., H.C. (3rd ser.) (1841) 345 (U.K.), available at [http://copyright-project.law.cam.ac.uk/cgi-bin/kleioc/0010/exec/ausgabe/%22uk\\_1841c%22](http://copyright-project.law.cam.ac.uk/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1841c%22) (“Surely, Sir, even, those who hold that there is a natural right of property must admit that rules prescribing the manner in which the effects of the deceased persons shall be distributed, are purely arbitrary, and originate altogether in the will of the legislature.”).

163. Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601, 601 (1998) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*2).

164. *Id.* at 606.

165. *Id.*

166. *Id.* at 607 (quoting 2 BLACKSTONE, *supra* note 163, at \*7).

167. *Id.* (quoting 2 BLACKSTONE, *supra* note 163, at \*8).

view, death meant that the estate would return to the commons and then belong to the new “first occupant and user.”<sup>168</sup> But because of the disruption that would follow from such a rule, Blackstone argued that society enacted legislation to set forth the proper way to handle the issue of inheritance.<sup>169</sup> As Rose puts it, “In Blackstone’s presentation, property has a place as a natural right, but it is at best incomplete, applying to current occupancy but evidently not to more permanent claims, and especially not to claims based on inheritance.”<sup>170</sup>

Returning to post-mortem copyright, one finds greater problems than already seen in the arguments authors assert to justify the practice. The claim that natural law demands that property be fully descendible is now limited by the idea that “[a]part from the needs of dependents, there are no natural rights of succession.”<sup>171</sup> Looking at the Blackstonian notion of exclusivity, one sees that although it may support and indeed presage the incentive argument that one must have property rights or others will simply “seize upon and enjoy the product of his industry, art, and labour”<sup>172</sup>—an argument that is quite strong in the utilitarian approach to intellectual property—there too civil society enters to order property and especially inheritance rules. Given that copyright is a property right of some sort and post-mortem copyright a derivative inheritance right, post-mortem copyright is not a foregone conclusion nor required under natural rights theory.

### *B. Persona-Based Theoretical Interests*

Personality or persona arguments are another key way to justify intellectual property rights.<sup>173</sup> This view was not present in Webster and

168. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 7 (1977) (quoting 2 BLACKSTONE, *supra* note 163, at \*13).

169. See 2 BLACKSTONE, *supra* note 163, \*11 (explaining that death is the “most universal and effectual way[] of abandoning property” but finding that, because both an unlimited will to control the property and a general rush for new occupants to claim property exist, governments must enter to establish rules for wills and for what to do should a will be lacking); see also Rose, *supra* note 163, at 607 (noting and citing Blackstone’s views on the interaction between property and the need for a civil society to administrate property).

170. *Id.* at 607 n.22.

171. Waldron, *supra* note 159, at 50.

172. Rose, *supra* note 163, at 607 (quoting 2 BLACKSTONE, *supra* note 163, at \*7).

173. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 289–90 (1988); see also PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1996). The theories trace their roots to Immanuel Kant and Georg Hegel. See Fisher, *supra* note 5, at 171, 174; Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV.

Clemens's arguments, but played an important role in the continental-European understanding of copyright advanced in 1858 and later by Hugo. In brief, this view holds that the creation is an expression of the creator's will and personhood.<sup>174</sup> Thus, insofar as one thinks of one's creations as extensions of oneself or that one invests part of one's being into one's creation, one adheres to what Margaret Jane Radin calls the intuitive view of personhood: "Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."<sup>175</sup> At this stage one can appreciate the idea that if part of one's being was constituted in a thing, one should have a claim over it, and another's use of it could pose problems.

Accordingly, one may write a short story, and it may well be personal property in Radin's sense of the term; or it may be a commissioned story, and one may write it with little personal connection to it. In some cases the writing may never be published, and be left to someone. That person may find her attachment to the property to be personal. Given the subjective nature of this view, both the creator *and* the owner of the creation may be bound up with the creation.<sup>176</sup>

Put differently, Radin points out that there is "personhood interest . . . in fungible property"<sup>177</sup> but that interest is on a continuum. The

1945, 1976–77 (2006) [hereinafter Kwall, *Inspiration and Innovation*]. There is, however, some divergence as to how those theorists' views drive the analysis and whether they are compatible with each other. Compare DRAHOS, *supra*, at 79–82 (explicating the difference and clash between Kantian and Hegelian based views of personality and its relation to property), with Fisher, *supra* note 5, at 191 (noting Kant and Hegel's differing views of an author's ability to alienate rights regarding copying).

174. This view can be seen in the 1858 Congress. See ANNALES, *supra* note 110. For a general summary of the personality argument, see Fisher, *supra* note 5, at 171, 174. Radin's *Property and Personhood* is one of the most well-known articulations of this view. Radin's project "attempts to clarify a . . . strand of liberal property theory that focuses on personal embodiment or self-constitution in terms of 'things.' This 'personhood perspective' corresponds to, or is the dominant premise of, the so-called personality theory of property." Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958–59 (1982).

175. Radin, *Property and Personhood*, *supra* note 174, at 959. Radin uses "a wedding ring, a portrait, an heirloom, or a house" as examples of such things. *Id.*

176. For one account of how this distinction poses problems, see generally George H. Taylor & Michael J. Madison, *Metaphor, Objects, and Commodities*, 54 CLEV. ST. L. REV. 141 (2006). But see MARGARET JANE RADIN, REINTERPRETING PROPERTY 9–11 (1993) (explaining that her work identifies this possibility and that her work "blur[s] both the subject/object distinction and the subjective/objective distinction").

177. Radin, *Property and Personhood*, *supra* note 174, at 1008; see also *id.* at 986–89 (detailing the contours of the personal to fungible property continuum and

closer to personal property the thing is, the stronger interest or entitlement one has in preserving that property.<sup>178</sup> Thus, some items may be so close to personhood that no compensation would suffice and other items may be so fungible that “the justification for protecting them as specially related to persons disappears.”<sup>179</sup> Another important aspect of the continuum understanding is that it denies that there is a personhood interest when attachments are fetishistic, which here means one asserts an irrational attachment that “is inconsistent with personhood.”<sup>180</sup> This idea arises within the issue of personal property, which in turn points to Radin’s shift from property to a broader notion of the importance and power of personhood.

For Radin asserts that “some personhood interests not embodied in property will take precedence over claims to fungible property.”<sup>181</sup> Here the theory moves beyond personal property to other interests. As detailed elsewhere, “when Radin turns to the question of using someone else’s property (e.g., a mall) for speech interests, she argues that the speech interests trump based on personhood interests. When two people

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explaining that “[s]ince the personhood perspective depends partly on the subjective nature of the relationships between person and thing, it makes more sense to think of a continuum that ranges from a thing indispensable to someone’s being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum”); Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 164, 164 (Martha M. Ertman & Joan C. Williams eds., 2005) (“Far from offering a single-minded assault on commodification, Radin is a ‘philosophical pragmatist’ who acknowledges that economic and cultural inequalities mandate that sometimes even very private things may be bought and sold, but only under carefully regulated circumstances.”).

178. Radin, *Property and Personhood*, *supra* note 174, at 986 (“Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”); *see also id.* at 1005–06 (explaining that some items are so close to personhood that no compensation would suffice and others are fully fungible); RADIN, *REINTERPRETING PROPERTY*, *supra* note 176, at 13–17 (noting the difficulties and tensions in what we characterize as property and the contextual nature of making such a determination).

179. Radin, *Property and Personhood*, *supra* note 174, at 1005.

180. *Id.* at 968–69; *see also* RADIN, *REINTERPRETING PROPERTY*, *supra* note 176, 4, 10–11 (noting that not all personhood property relations are good). Insofar as this Article develops a sense of how to parse what is fetish and what is not in the context of intellectual property it may respond to Fisher’s call to “deal[] adequately with . . . the problem of fetishism,” Fisher, *supra* note 5, at 192, and Radin’s invitation to explore the relationship between property and human flourishing, which Radin raises to the level of asking what are “*justifiable* property relations.” *See* RADIN, *REINTERPRETING PROPERTY*, *supra* note 176, at 5–6.

181. Radin, *Property and Personhood*, *supra* note 174, at 1008.

need use of a space such as a mall, one determines who needs the property more in light of their respective personhood claims.”<sup>182</sup>

“The emphasis here is on *personhood*, not *property*.”<sup>183</sup> It is the necessity of the individual or public accessing the non- or less personal property so either can have “opportunities to develop and express personhood” that drives this result.<sup>184</sup> Radin later explained and developed this idea as “human flourishing.”<sup>185</sup>

Radin’s view comports with the 1858 Congress and Hugo’s description of the balance between the author’s rights and the public domain. Hugo offered a dichotomy similar to Radin’s: when one must choose between the individual author’s rights and the public domain, the public trumps because that is the way the human spirit becomes free and fulfills its destiny. In Radin’s terms, he may have said, the public domain feeds the potential for human flourishing and demanding author’s rights over that possibility is fetishistic or unjustifiable.

Recent work by Roberta Kwall expresses another view of personality-based intellectual property that echoes Hugo’s views. For Hugo the author’s work is part of progress. It is the essence that allows civilization to advance and grow. Rejecting the public domain runs contrary to the author’s role in society, and to hold the author’s rights too tight enslaves thought. Kwall has argued that U.S. copyright law should recognize moral rights because they protect “the human spirit, an interest that transcends the artist’s concern for property or even

182. Desai, *supra* note 156, at 102–03.

183. *Id.* at 103; *see also* Radin, *Property and Personhood*, *supra* note 174, at 1015 (arguing that someone’s claim over another’s fungible property “is strongest where without the claimed [personhood interest], the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened”); *accord* Sunder, *supra* note 177, at 169 (“Assertions of power over one’s own identity necessarily lead to assertions of property ownership . . . Property enables us to have control over our external surroundings. Seen in this light, it is not enough to see all claims for more property simply as intrusions into the public domain and violations of free speech. Instead, we may begin to see them as assertions of *personhood*.”).

184. Radin, *Property and Personhood*, *supra* note 174, at 1010.

185. *See generally* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903–15 (1987) (explaining the link between personhood and flourishing and arguing that “market-inalienability is grounded in noncommodification of things important to personhood”); RADIN, REINTERPRETING PROPERTY, *supra* note 176, at 5–6 (explaining that property relations ought to be justifiable ones, that is, ones that are connected to human flourishing); Fisher, *supra* note 5, at 171 (summarizing that some see this view as supporting the creation of “social and economic conditions conducive to creative intellectual activity, which in turn is important to human flourishing”); Radin, *Property and Personhood*, *supra* note 174. Professor Julie Cohen’s discussion of Radin’s work notes this distinction but places human flourishing as somewhat separate from Radin’s concept of personhood. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1383 (2000).

reputation.”<sup>186</sup> Furthermore Kwall has argued that U.S. copyright law should have a right of attribution—what might be honor in the 1858 Congress and Hugo’s terms—as part of author’s rights and the personality approach to copyright<sup>187</sup> and grounds the call for an attribution right in “the dignity and personality interests of the author, and the ability of the author to command her reputational due.”<sup>188</sup> Kwall explicitly states, however, that such rights must be limited to the life of the author.<sup>189</sup>

Some may argue that current European views of moral rights demand a stronger form of the rights.<sup>190</sup> Others see the moral rights view of authorship as part of a Romantic view of authorship that over-privileges authors’ rights.<sup>191</sup> Yet, even for those who want or require a broader notion of moral rights, it appears that there is a lack of uniformity regarding whether such rights should extend beyond the copyright term.<sup>192</sup> Again, what theoretical grounds exist for such rights persisting beyond life is unclear. Furthermore Kwall’s view matches Hugo’s vision: authors have large control in their lives, but when they die, the work returns to the public to fuel further inspiration and creation<sup>193</sup> and is closer to that view of European copyright.<sup>194</sup>

186. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152.

187. See Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985 (2002) (calling for a federal right of attribution for copyrightable works because copyright and trademark law fail to address personality or other non-monetary interests with which an attribution interest is concerned).

188. *Id.* at 996.

189. See Kwall, *Inspiration and Innovation*, *supra* note 173, at 1957–58, 1969–70, 2003 (describing a system where the author has control over her work in life but returns it to the community at death and the idea of author’s stewardship as entailing inspiration that fuels creation, but as part of a cyclical process).

190. See, e.g., Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 200–01, 203 (1995) (noting the view that Article 6bis of the Berne Convention, which addresses moral rights, is “minimalist” and does not capture the range and breadth of rights found across European laws covering moral rights, such as the divulgation right and the withdrawal right and, in Spain, the rights regarding access to sole or rare copies in another’s possession).

191. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 497–98 (arguing that moral rights approaches embrace a Romantic author perspective).

192. Dietz, *supra* note 190, at 213–17 (detailing European countries’ varying views of whether moral rights exist in perpetuity or expire with the copyright term, concluding that it is “a question of culture and policy” perhaps better left “to the legal and cultural traditions of individual countries”).

193. Kwall, *Inspiration and Innovation*, *supra* note 173, at 2003.

Thus, although the personhood approach involves property, the ideas that one may have a claim over someone else's property and that life is terminus for personality-based rights point to limits on property in this theory. One cannot claim property, or one can claim it but that claim will lose, when another requires that property for personhood or human flourishing. At this point, human flourishing as it relates to copyright seems to involve understanding which type of system will allow individual flourishing or development through creation while also allowing others to draw on and use those creations so that they too may develop. The details of what a system that fosters such potential looks like come later.<sup>195</sup> For now a key insight is that the right is again personal. It is connected to the author's life, and, like the Lockean view, does not support extension of copyright interests after death. At most one finds a possible tension between an author's survivors and society regarding necessity for the property in question with a preference for society's interests trumping an heir's.

### *C. Utilitarian-Based Theoretical Interests*

The standard or most popular explanation for intellectual property protection in U.S. law is utilitarian; the goal is the maximization of social welfare.<sup>196</sup> This approach to intellectual property "requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations."<sup>197</sup> In simplest terms this view holds that the law must provide protection for the creation of nonrivalrous goods,<sup>198</sup> such as a writing, because after

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194. As Dietz notes, many European countries facing a tension between public use and moral rights employ cultural and policy views to allow comments and criticism on the work and in some cases do not allow heirs to exercise the right to withdraw a work from the public. See Deitz, *supra* note 190, at 215.

195. See *infra* Parts III-IV.

196. See, e.g., Fisher, *supra* note 5, at 169; Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1306 (2003) ("The economic rationale is widely viewed as the primary philosophical underpinning for U.S. copyright law and policy.").

197. Fisher, *supra* note 5, at 169.

198. *Id.* (noting William Landes and Richard Posner's work on copyright theory and their explanation that, unlike tangible goods, intellectual goods are easily copied at little or almost no cost after creation). But see Brett Frischmann & Mark Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 272-73 (2007) (explaining that nonrivalrous goods allow for simultaneous use without depriving others of use and that often such use is a spillover use that does not compensate the creator, but produces another creation which others may use (rather than being a passive consumption)).

its creation “it is like an idea: it need only be created once and has an infinite capacity in that once it is created there is no additional marginal cost in allowing others to use it.”<sup>199</sup>

As William Fisher explains, the utilitarian approach raises questions regarding what welfare maximization means and how it operates in this context.<sup>200</sup> He notes that three approaches have emerged to answer these questions: incentive theory, optimizing patterns of productivity, and rivalrous invention.<sup>201</sup> Under the incentive theory one wishes to establish a system where the duration of protection and/or strength of protection is “increased up to the point where the marginal benefits equal the marginal costs.”<sup>202</sup> The optimization-of-productivity approach draws on Harold Demsetz’s work and concludes that full internalization of costs—one should be able to recoup any possible income for other’s enjoyment of one’s literary or artistic work—is best because one would then know what consumers want and then would invest one’s efforts and resources accordingly.<sup>203</sup> The rivalrous-invention view addresses the problem that the current intellectual property system can decrease social welfare because creation and innovation are often uncoordinated, and thus wasteful acts occur.<sup>204</sup> Whether this view fits well with copyright after death remains to be seen.

#### 1. CLAIMS REGARDING CREATION, INCENTIVES, AND POST-MORTEM COPYRIGHT

The incentive branch tracks closest to the recent reasons offered for post-mortem copyright. The argument has been that authors would not create without a long term or would have much more incentive to

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199. Desai, *supra* note 156, at 78 (quoting Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 946 (2005) (“An idea only needs to be created once to satisfy consumer demand while an apple must be produced for each consumer. Essentially, this means that the marginal costs of allowing an additional person to use an idea are zero.”)).

200. See Fisher, *supra* note 5, at 177–79.

201. *Id.* at 178–79.

202. *Id.* at 178.

203. *Id.*; see also Frischmann & Lemley, *supra* note 198, at 265–66 (“The basic idea behind ‘internalizing externalities’ is that if property owners are both fully encumbered with potential third-party costs and entitled to completely appropriate potential third-party benefits, their interests will align with the interests of society, and they will make efficient (social welfare-maximizing) decisions. . . . [Property owners] must also internalize benefits in order to have the proper incentive to invest in maintaining and improving their property. According to the Demsetzian theory, internalization is the silver bullet that magically aligns private and social welfare.”).

204. Fisher, *supra* note 5, at 179–80.

create when the copyright term is long. In this case long equals the life of the author plus numerous, that is seventy, years. Although not stated directly, the claims that authors wish to use copyright to care for their spouses or inept children is an incentive argument. The unstated idea (or threat) is that authors would pursue other endeavors so that, without better protection and incentives, creation would stop or at least diminish significantly. But as Professors Brett Frischmann and Mark Lemley note, despite many applying the internalization view to creation,<sup>205</sup> not all creation requires incentives.<sup>206</sup> Furthermore some argue that the nature of incentives is less clear.<sup>207</sup>

Nonetheless, authors have claimed that providing for their children is a motivation for writing. That claim is dubious for two reasons. First, authors who make this argument have already earned in their lifetime and could easily leave money or buy life insurance as a way to provide for heirs while still leaving creative works for society's use. Second, as a practical matter, the idea that a work will provide for heirs is more of a dream than a reality. Few authors are actually successful; high sales for *any* book are rare.<sup>208</sup> As economist Hal Varian has noted, "a constant flow of returns from [copyrighted works]" is an assumption, for "[i]n reality, there are very few works that produce such a royalty stream."<sup>209</sup>

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205. See Frischmann & Lemley, *supra* note 198, at 266 ("The Demsetzian view is more or less the same in the context of innovation. If an inventor cannot capture the full social benefit of her innovation, the argument goes, she will not have enough incentive to engage in the research and development that will produce that innovation. If there are spillovers from innovation, they must be interfering with incentives to innovate, and we should find them and stamp them out.").

206. See generally *id.* at 279–81.

207. See, e.g., Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 515 (1996) ("Cultural norms can substitute for legal property rights as an incentive for production. In many situations, contrary to Benthamite reasoning, people produce without monetary benefit-internalization incentives."); see also Desai, *supra* note 156, at 79–81 (examining the growth of attention economics as a way to explain how online creation generates value but not in a pure monetary manner); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 51–63 (2007) (tracing monetary and reputation incentives for creation and showing where the two intersect and diverge).

208. Tim O'Reilly, *Search and Rescue*, N.Y. TIMES, Sept. 25, 2005, at 27 ("[O]nly 2 percent of the 1.2 million unique titles sold in 2004 had sales of more than 5,000 copies."); Sathnam Sanghera, *A Novel Idea May Not Be a Lucrative One*, TIMES (LONDON), Feb. 16, 2008, <http://business.timesonline.co.uk/tol/business/columnists/article3378297.ece> (The United Kingdom has similar numbers: "of 200,000 books on sale last year, 190,000 titles sold fewer than 3,500 copies. More devastating still, of 85,933 new books, as many as 58,325 sold an average of just 18 copies."); see also Landes & Posner, *supra* note 14, at 475 (finding an average of fifteen years of value for copyright).

209. Varian, *supra* note 26, at 968.

In addition, Robert Frank and Philip Cook show that cultural goods, such as copyrighted materials, can be understood as part of winner-take-all markets.<sup>210</sup> In such markets only a few items succeed with enormous market returns while a host of other goods vanish into obscurity. Thus, “[t]he world’s libraries . . . are filled with high-quality books that never succeeded commercially.”<sup>211</sup> Such markets end up fostering over-entry into the field because too many people believe they will be the one to sit at the top of the market when only a few or arguably one can do so.<sup>212</sup> At least one study indicates that most writers do not look to writing as the prime source of income.<sup>213</sup> That fact indicates that writers cannot be telling the whole truth about their beliefs regarding writing and income. Writers are at best hoping to win a lottery. If an author knows that a work is not sustaining him while alive, the idea that an author thinks the work would sustain descendants after he is dead is incoherent and deluded and also encourages further waste by estates trying to exploit work that has a demonstrated low likelihood of success. Authors’ claims for long or perpetual copyright as a method of support for surviving spouses and children relied in part on notions of women’s inability to work. Today, that view is untenable.

Furthermore, the idea that all authors work to provide for their families is a rather large assumption. Clemens’s testimony suggests he wanted the state to care for his children by extending copyright term, because he preferred to waste his income and ignore caring for them. In general terms this idea is that one should not have to manage whatever one makes in one’s lifetime such that there is something left for surviving spouses and children. Of course Hatch deployed a single story of a laudable heir who managed her father’s copyrights and generated income. That instance proves little and reveals another major assumption that is troubling if not false from a utilitarian analysis.

This one does not take the guise of providing for the next generations. Instead it paints a picture that lineal descendants are somehow better custodians than anyone else. The argument tracks a related custodial argument: without long copyright great works will not be published, for corporations will have little incentive to publish. This position seems to fit within the utilitarian analysis. But two things

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210. See ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 191 (1995).

211. *Id.* at 193.

212. *Id.* at 212.

213. MARTIN KRETSCHMER & PHILIP HARDWICK, *AUTHORS’ EARNINGS FROM COPYRIGHT AND NON-COPYRIGHT SOURCES: A SURVEY OF 25,000 BRITISH AND GERMAN WRITERS* 3, 5 (2007) (stating that “60% of professional writers” in the United Kingdom and Germany require another source of income and engage in non-authorial work to survive).

undercut this claim. First, authors' children's behaviors to thwart publication—a concern that the continental Europeans acknowledged and sought to curtail—show not only that an authors' offspring are poor custodians, but that they often upset and thwart the side of the utilitarian balance aimed at fostering further use of the creation. Second, recent work by Professor Paul Heald shows that public domain works in general do not suffer from under-publication.

## 2. POOR CUSTODIANS AND ROADBLOCKS TO PROGRESS

As the Anglo-American discussions acknowledged and the European debates decried, copyright after death opens the potential for monopoly, the establishment of a type of aristocracy, and the denial of access to or use of creations.<sup>214</sup> Recent examples demonstrate that authors' offspring often have interests that run contrary to the interest of having material available for others to use. In addition, insofar as one thinks a longer copyright term fosters better development and exploitation of creative works, evidence suggests that the opposite is true.

### *a. Misbehaving children*

Authors' children can be capricious or even malicious as they exert control over copyrighted material. This behavior denies access to and use of material that serves as the basis for others' to create new works—an ideal that Hugo championed. For example, Stephen James Joyce, James Joyce's only living heir,<sup>215</sup> manages the Joyce estate and has often tried to prevent academic uses of public material related to Joyce and succeeded in preventing public readings of such material.<sup>216</sup> The estate leverages its copyright power to threaten and limit legitimate use of the material<sup>217</sup> so much so that in one instance Professor Carol Schloss, a Joyce expert, had to sue the estate to protect her ability to

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214. See *supra* notes 84-87, 129 and accompanying text.

215. See D.T. Max, *The Injustice Collector*, NEW YORKER, June 19, 2006, at 34.

216. See Amended Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 47-66, *Schloss v. Sweeney*, 515 F. Supp. 2d 1083 (N.D. Cal. 2007) (No. CV-06-3718-JW-HRL), 2006 WL 3619866 (detailing the efforts of the Joyce estate to prevent the publication of Schloss's work and the changes to the work based on the threats of litigation); *id.* ¶¶ 80-87 (detailing the Joyce estate's use of litigation to stop arguably fair uses); *id.* ¶¶ 93-96 (showing the way in which the estate invoked copyright to further non-copyright interests such as privacy).

217. See *id.*

use material for her scholarship.<sup>218</sup> The Joyce estate is not alone. The estates of T.S. Elliot, J.R.R. Tolkien, J.M. Barrie, J.D. Salinger, Sylvia Plath, Samuel Beckett, and Bertolt Brecht have expressed similar displeasure at and/or desires to control academics' approach to the creator's work.<sup>219</sup> Post-mortem copyright fosters such problems.

Unlike authors who labor and pour their being into a work, their children and their children's children simply sit back and collect rent without appreciation for the creative system upon which their parent drew to create in the first place.<sup>220</sup> In addition, not all offspring agree about how to manage estates. The Martin Luther King, Jr. estate is currently in a lawsuit regarding the general management of the estate.<sup>221</sup> The Tolkein estate disagrees about how to manage the estate and whether the film adaptations should receive the family's blessings.<sup>222</sup>

Thus the image of dutiful children managing the material well has a counter-image: in-fighting adults who deny others access to work and/or disagree about what works can and cannot be made or released to the public. Rather than a world where further creation occurs and new material is produced, a world where fewer works are made because of pettiness and the need for permission is in place. A related issue is the claim that longer copyright will nonetheless foster publication of works because without that protection, publishers would not have reason to publish the great works; that is, the public domain

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218. Professor Schloss had the assistance of the Stanford Law School Cyberlaw Clinic Center for Internet and Society. *Id.*

219. See Ethan Gilsdorf, *Lord of the Gold Ring*, BOS. GLOBE, Nov. 16, 2003, at 10 (noting the Tolkien estate's approach to literary material); Max, *supra* note 215 (noting the Elliot estate's view of academic work); Matthew Rimmer, *Bloomsday: Copyright Estates and Cultural Festivals*, 2 SCRIPT-ED 345, 360 (2005), <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-3/bloomsday.asp> (citing the Barrie estate's exertion of resurrected property interests to stop later work based on Peter Pan and noting the other author's estates' tendency to thwart historians); see also Deven R. Desai, *Ozymandias Lessons for Copyright*, CONCURRING OPINIONS, Nov. 18, 2009, <http://www.concurringopinions.com/archives/2009/11/ozymandias-lessons-for-copyright.html> (detailing how the heir to the Louis and Celia Zukofsky estate has invoked copyright to threaten academics with legal action if they fail to obtain permission and pay a fee to quote the poet and his wife's writings).

220. Cf. Patry, *supra* note 25, at 927–28, 932–33 (noting the beneficiaries of term extension are those who have already created copyrighted works and those who live off income from trust funds from already famous authors).

221. See Errin Haines, *Lawsuit Exposes Rift Among Kings*, VIRGINIAN-PILOT, July 20, 2008, at A10.

222. See Gilsdorf, *supra* note 219 (detailing the disagreement between Christopher Tolkien, son of J.R.R. Tolkien and manager of the estate, and his son Simon resulting in Simon's removal as trustee).

will result in under-exploitation.<sup>223</sup> Until recently that claim had little to prove or disprove it. Paul Heald's work, however, shows why this claim is unpersuasive. It is a complex study that merits some explication to see how its findings relate to the question of post-mortem copyright.

*b. Evidence of greater, not less, production for public domain works*

Heald's study seeks "to determine whether extending a property right in an existing work of fiction is necessary to ensure its adequate exploitation. To that end, the set of 166 public domain works, published from 1913–1922, and the set of 168 copyrighted works, published from 1923–1932, were compared over time in terms of their in-print status, number of available editions in 2006, and their current 2006 price."<sup>224</sup> The study shows "that from 1988–2001, public domain bestsellers were in print at the same rate as their copyright-protected counterparts. After 2001, the public domain books are available at a significantly higher rate than the copyrighted books."<sup>225</sup> In addition when one examines the probability of being in print as it relates to the number of years elapsed since publication, it appears that "eighty years after publication . . . *public domain works will be more available than copyrighted works.*"<sup>226</sup> Variance in editions of books did not indicate under exploitation either.<sup>227</sup>

The study also examined the most enduringly popular books of the comparison period. Again public domain status did not hurt the probability of being in print, number of editions in print over time, or comparative shelf space (which might indicate whether a book was really available for sale).<sup>228</sup> But if one is interested in the public's cost of obtaining one of these durable works, a difference in price *is* found: "The lowest average price listed by *Books In Print* is \$4.45 for a

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223. See, e.g., Cohen, *supra* note 147, at 1181 (arguing strongly that authors work more when offered protection for their work and that the idea that the public domain will possibly result in less expensive works is supported as "equally" as the idea that copyright will foster more publication because copyright protection is necessary to cover costs). Paul Heald's work provides evidence that the public domain fosters greater publication and at lower prices and thus shows how this sort of claim, although common, is less powerful and perhaps false in the face of dropping production costs for many copyrighted goods. See Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1033 (2008).

224. Heald, *supra* note 223, at 1039.

225. *Id.* at 1040.

226. *Id.* at 1043 (emphasis added).

227. *Id.*

228. *Id.* at 1044–47.

durable public domain book and \$8.05 for a durable copyrighted book, an 81% higher average price.”<sup>229</sup> Even if one limits the field to major publishers’ editions, one sees a 41 percent higher average price in general and if one compares Amazon’s pricing one sees 55 percent higher average price.<sup>230</sup> The study further probed the price question by examining only the Penguin Classics editions as a way to control for popularity and/or quality of printed material discrepancies.<sup>231</sup> Again the copyrighted work cost more, and, at 56 percent higher average cost, tracked the findings of the Amazon comparison.<sup>232</sup> In short, one sees a deadweight loss here.<sup>233</sup> Furthermore, the study offers evidence that non-owners (i.e., non-copyright holders) will indeed publish work and often recover currently unpublished but “easily duplicated works.”<sup>234</sup>

So when one considers that authors’ surviving family members become a proxy for a longer copyright term in general, two points become clear. First, adult heirs often hinder rather than help copyrighted work reach the public. Second, copyright is not necessary to foster better custodial efforts of many easily duplicated works.

#### *D. Theoretical Findings and Lessons*

Those seeking longer term for copyright cannot simply assert that they wish to collect royalties and have their children benefit for no work. They can, however, invoke a blend of Lockean labor, personality, and utilitarian arguments to give the appearance of injustice and to establish the basis for extending copyright term. Insofar as copyright term lasts less than one’s life, it seems too short. Both Lockean notions of being able to sustain one’s life and personality theories that seek to protect that which is an extension of, or somehow an embodiment of, one’s being support protection during life. Both also hold that these interests diminish if not extinguish at death.

Utilitarian theory may support leaving copyrights to heirs, but only if those copyrights are used to increase the access and use of the underlying material such that we have reached “an optimal balance” between incentives to create *and* “widespread public enjoyment of those creations.”<sup>235</sup> As Terry Fisher notes, “The truth is that we don’t have

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229. *Id.* at 1048.

230. *Id.*

231. *Id.*

232. *Id.* at 1049.

233. *Id.* at 1053.

234. *Id.* at 1051. The phrase “easily duplicated works” distinguishes books and musical works which have been subject to dropping production costs from film, which continues to require large amounts of capital to produce. *Id.*

235. *See* Fisher, *supra* note 5, at 169.

enough information to know who is right” regarding incentive claims in general.<sup>236</sup> In addition, little evidence supports the claim that authors look only to writing as a way to support them when alive, which calls into question any system based on the dream of a work supporting descendants after the author is dead. There is evidence, however, that the fears of some misbehavior and mismanagement by authors’ successors have been realized. They can and do thwart, rather than foster, better use of copyrighted material. This behavior can deny the access necessary for widespread enjoyment. In addition, Heald’s empirical work indicates that the shorter a work is under anyone’s control, the sooner it will reach a widespread public. The idea that copyright ought to persist past death prolongs the period of time between exclusive, limited use and edifying public use. To understand this point one must have a fuller conception of edifying use and of who is making such use. In short, one must see how there is another, ignored interest: society.

### III. THE MISSING HEIRS: SOCIETY AT LARGE

There is a different and important interest—society—that the current post-mortem assumption misses. The historical and theoretical analysis presented above and recent work regarding infrastructure and spillover theory point to the way that society has as much—if not more—of a claim to use a creation as an author’s lineal descendants.

#### A. *Creative Cycles and Copyright*

Creativity requires inputs. As Radin has put it, “[c]reativity is deeply a collective matter; in a sense, all creativity is collective creativity.”<sup>237</sup> Similarly, Larry Lessig’s model of free culture explains how unencumbered culture operates as inputs for others to use in their

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236. *Id.* (“With respect to incentive theory, the primary problem is lack of the information necessary to apply the analytic. To what extent is the production of specific sorts of intellectual products dependent upon maintenance of copyright or patent protection? With respect to some fields, some commentators have answered: very little.”). For example during the CTEA debates at least one group of economists argued that the extension from fifty years after life to seventy years provided miniscule increased incentive (“less than 1%”) from the current life-plus-fifty term. *See* Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 457 (2005).

237. Radin, *Property Evolving in Cyberspace*, *supra* note 207, at 511.

creation.<sup>238</sup> Jessica Litman and James Boyle have explicitly disputed the notion of creation out of nothing.<sup>239</sup> This notion of a communitarian creative process is not a new one.<sup>240</sup> Authors at the 1858 Congress in Brussels described creations as a common source for inspiration and other creative acts<sup>241</sup> and challenged members of the audience to deny that great writers of modern times study and dig through the works of those who came before as part of the creative process.<sup>242</sup> Not only literary and cultural explanations of creativity view the creative process as a feedback system. Recent economic work regarding spillovers parallels these views.

Spillovers are “uncompensated benefits that one person’s activity provides to another.”<sup>243</sup> They are externalities which can be either positive or negative.<sup>244</sup> Some argue that all externalities require complete internalization.<sup>245</sup> Yet as Frischmann and Lemley explain, “[S]pillovers are good for society. There is no question that inventions create significant social benefits beyond those captured in a market transaction.”<sup>246</sup> Indeed, studies show that industries and cities with high spillover rates generate more innovation.<sup>247</sup> Yet, these greater innovations are not because of some sort of theft or free-riding; “rather, they are part of a virtuous circle because they are in turn creating new knowledge spillovers that support still more

238. See LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 21–30 (2004).

239. JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 57 (1996) (“[E]ven. . . remarkable and ‘original’ works [of authorship] are *not* crafted out of thin air. As Northrop Frye put it in 1957, . . . ‘Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise.’”); Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 965–67 (1990).

240. See, e.g., Desai, *supra* note 156, at 105–07 (examining philosopher Wilhem Dilthey’s presentation of each human being as a part of a productive nexus in which one is both a taker and creator in this process).

241. See *ANNALES*, *supra* note 110, at 435. (“C’est que, messieurs, le domaine public forme un fonds commun où chacun s’inspire, puise, cherche sa voie, se la fraye.”).

242. *Id.* (“Que seraient les grandes écrivains des temps modernes s’ils n’avaient pu étudier et fouiller les œuvres de ceux qui les ont devancés dans cette vaste arène ouverte au génie, dès l’instant où l’homme s’est mis en relation avec ses semblables, où la terre lui a été livrée?”).

243. See Frischmann & Lemley, *supra* note 198, at 258.

244. *Id.* at 262 (“[P]ositive (or negative) externalities are benefits (costs) realized by one person as a result of another person’s activity without payment (compensation).”).

245. *Id.* at 266.

246. *Id.* at 268.

247. *Id.* at 268–69.

entrepreneurial activity.”<sup>248</sup> Although couched in terms of inventions, this presentation of spillovers matches the description of creation offered in 1858 and comports with the non-economic presentation of creation as a communal process.

Thus several different approaches and experiences converge on the idea that creative systems function best when one has increased and improved access to previous creations,<sup>249</sup> because creation, by its nature, draws on others’ creations. That point suggests a duty to allow others to create based on one’s work. In other words, that duty may flow from an understanding of intergenerational equity as it explains the way in which society also has important interests in the access to and use of creative works.

### *B. Intergenerational Equity*

If one acknowledges that creation is a derivative process, one is hard pressed to explain why his work should somehow be exempt from feeding others’ creation. The 1858 Congress understood this point and explicitly described the creative cycle as providing fertile ground for future generations to till.<sup>250</sup> Hugo, a successful author himself, declared that authors’ property rights must cede to their main concern: nurturing society in general by providing for the development and progress of future generations.<sup>251</sup> In other words, these views see copyright as a question of intergenerational equity. Intergenerational equity may demand that copyright pay more attention to society’s claim to a creative work and may show that society’s claim is greater than an author’s lineal descendants.

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248. *Id.* at 269; accord Radin, *Property Evolving in Cyberspace*, *supra* note 207, at 515–16 (examining the balance between no-property and full-property protection for intangible creations and noting “there’s a feedback relationship: while the ‘right amount’ of information may depend upon the existence of a particular desired culture, at the same time the development of that particular desired culture may depend upon there being available the ‘right amount’ of information.”).

249. See Francesco Parisi & Ben Depoorter, *The Market for Intellectual Property: The Case of Complementary Oligopoly*, in *THE ECONOMICS OF COPYRIGHT: DEVELOPMENTS IN RESEARCH AND ANALYSIS* 162, 165 (W. Gordon & R. Watt, eds. 2003) (“An increase in the number of copyright holders exercising independent control on the price of their respective licenses exacerbates the degree of underutilization.”); cf. MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008) (detailing the way in which too many and fragmented property rights create an anticommons or wasteful underuse).

250. See ANNALES, *supra* note 110, at 435 (“[O]uvre des voies nouvelles, qu’il appartient aux générations à venir de féconder”).

251. See *supra* notes 139–44 and accompanying text.

As Larry Solum has put it “[t]he problems of intergenerational ethics are notoriously some of the most difficult in moral and political philosophy.”<sup>252</sup> Although a full discussion of the contours of intergenerational equity and copyright merits separate investigation, a brief discussion here illustrates how the idea relates to copyright after death. Discussions of intergenerational equity often focus on real property and the question of how much one generation can consume a resource to its favor but to the detriment of future generations.<sup>253</sup> In cultural contexts, ideas of communal ownership similar to ones offered by the 1858 Congress and Hugo arise, but the cultural protectionists are often focused on rivalrous cultural items, such as works of art, that may be irreplaceable.<sup>254</sup>

Copyrighted works are intangible and nonrivalrous so, unlike real property, copyrighted material cannot be consumed unless the original is destroyed and no copies remain. As a matter of intergenerational equity, the question shifts from consumption to access and use. Who should have access to and the ability to use creative works—works that drew on communal resources in the first place: a small group of adult offspring who may or may not be good custodians of creations or society at large?<sup>255</sup>

These questions echo the tension that arises when two or more people claim they need a specific property to develop their personhood and pursue what Radin calls human flourishing.<sup>256</sup> Analogous work by Martha Nussbaum helps clarify the way in which copyrighted material fits into the idea of human flourishing. Nussbaum has looked at the question of human development and sought to set forth what are the “most central human capabilities”<sup>257</sup> necessary for such development.

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252. Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 164 (2001).

253. See Brett Frischmann, *Some Thoughts on Shortsightedness and Intergenerational Equity*, 35 LOY. U. CHI. L.J. 457, 461–62 (2005).

254. See John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1195–96 (1989); see also JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (2001) (examining the clash between property rights which allow private owners of artifacts to destroy or cut-off access to artifacts and society's need for access to such artifacts). But see Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 177–78 (2000) (arguing for communal rights to protect intangible cultural resources such as songs).

255. Cf. Solum, *supra* note 252, at 169–71 (noting differences between lineal descendants and future generations in general when one considers the meaning of intergenerational).

256. See *supra* notes 182–85 and accompanying text.

257. See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 285–86 (1997).

Nussbaum explicitly calls out “[b]eing able to use imagination and thought in connection with experiencing and producing expressive works and events of one’s own choice, religious, literary, musical, and so forth” as one of the central aspects of human capability and part of humanity’s process of education and progress.<sup>258</sup> As such, insofar as someone—authors’ children or publishers—lock up expressive works, they take away resources vital to human flourishing and human development because those endeavors seek to draw on those expressive works to partake of society and in turn contribute to it.

Another way to understand the tension is as a problem of fetish. Fetish here is an irrational attachment that “is inconsistent with personhood” that should not to be honored.<sup>259</sup> Given that more than one person can use copyrighted material, and considering the behaviors of the Joyce estate among others, it may be that authors’ children’s interests are a type of fetish to which copyright policy ought not defer. And even if one decides that the position is not a fetish, copyright’s nonrivalrous nature makes a lineal descendant’s claim that he must have exclusive use for his development untenable. Both the descendant and society can make use of the material to further their respective developments. Moreover, if a descendant tries to claim that his property rights should trump society’s interests, neither labor or persona theories of property support that view. Both indicate that once one dies, little if any property interests should pass to lineal descendants, because the basis for the property—the author—is dead.

Nonetheless, authors and lineal descendants offer a generation-based argument regarding copyright’s term that must be addressed as one determines what intergenerational equity may require of copyright policy. This claim argues for extending the life term so that it tracks the increasing average life span of people. More precisely, the view holds that it is fair and part of the purpose of copyright to feed at least the immediate offspring of authors, a distinctly generational argument.

Yet, as Patry notes, “[t]his argument is internally contradictory” for the current life-plus-seventy-year term protects not only one generation but on average four to five generations.<sup>260</sup> “Extension of protection to such remote heirs is impossible to justify in terms of encouraging the author to create, or any reasonable societal interest in the author’s immediate heirs.”<sup>261</sup> Unless one agrees that authors should be allowed to use copyright as a way for descendants to receive passive income not only while they are minors but for decades and generations

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258. *Id.* at 287; *accord* Chon, *supra* note 144, at 805.

259. *See supra* note 180 and accompanying text.

260. *See* Patry, *supra* note 25, at 931.

261. *Id.* at 932.

beyond that point, the idea makes little sense.<sup>262</sup> Furthermore, if an author fails to exploit a work during her life, the potential for descendants to do so is low.<sup>263</sup> The idea that copyright will generally provide for authors' adult children is nice; it is also an illusion. Given the rarity of authors' success while alive and their related need for supplementary income,<sup>264</sup> any successors in interest will certainly have to retain day-jobs, as it were, while trying to exploit a parent's creation. A copyright policy that serves the dream of long-term passive income in the face of these realities is incoherent.

Furthermore, if an author has exploited a creation during her life such that it generates income, a ready solution is possible. As a matter of seeking an affirmative social good, children should try to be employed, and the author should take income earned while alive and invest it and/or purchase life insurance as most people who wish to leave something to their children do. This approach does not rely on wishful thinking about future income streams. Instead it acknowledges the difficulties of creation and encourages better behaviors by authors and their descendants. Put differently, as a question of intergenerational equity, the claim that copyright must provide for immediate offspring lacks basis in fact. Copyright does not usually reach this goal. In the cases where descendants can generate income from a copyrighted work, copyright over-provides not just for the immediate offspring but several generations, thus fostering rent-seeking and other undesirable behaviors.

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262. *Cf. id.* ("Not a single example has been given of a work that failed to make a profit in its first seventy-five years, or during the life of the author plus fifty years, but which would make a profit if term was extended an additional twenty years.").

263. *Id.* For an unpublished work the odds are even worse. The book industry is notoriously bad at predicting which books will sell well. *See e.g.*, Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 388 (2008) (detailing the highly unpredictable nature of book publishing, an average 23.87 percent return rate for books, and "persistent risk" in the industry); *see also* Dianne Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1139 (2003) (noting publishers' difficulty in predicting which books would "enjoy a long shelf-life"); Daniel Gross, *Book Clubbed: Why Writers Never Reveal How Many Books Their Buddies Have Sold*, SLATE, June 2, 2006, <http://www.slate.com/id/2142810/> (noting several book advances of \$1 million or more that sold poorly); Edward Wyatt, *The Fall Season's Winners and Losers*, N.Y. TIMES, Dec. 7, 2005, at E1 (reporting the \$2 million advance to Martha Stewart and the planned initial book run of 500,000 copies but sales of only 37,000 books and disappointing sales numbers for Salman Rushdie in contrast to unexpected sales for Joan Didion and President Jimmy Carter's works).

264. *See* KRETSCHMER & HARDWICK, *supra* note 213, 5–6 (finding that the majority of authors must maintain non-writing jobs to supplement their writing income).

In sum, the assumption that copyright is supposed to provide for authors' children through post-mortem copyright runs contrary to insights regarding the relationship between authors and society. There is strong practical and theoretical support for copyright to last as long as the author's life. Beyond that period of time, however, copyrighted material serves another important function. French congresses, modern creativity theorists, and recent economic theorists all come to the same conclusion: creation is fueled by other creation. Human capacity theorists see the ability to access and use creations "in connection with experiencing and producing expressive works and events of one's own choice" as vital to fostering the continued development of individuals and humanity in general.<sup>265</sup> As a matter of intergenerational equity, we all owe something back to the society which provided the material for our creation. Each future creative individual ought then to have the ability to draw from the creative pool as part of her creative process, which will have the potential to stimulate yet more creation. Little supports leaving the underlying work only to authors' children and denying society access to the legacy it fostered. Society at large ought to be understood as heirs to creative works.

#### IV. ALTERNATIVE APPROACHES

Neither history nor theory offers a sound basis for post-mortem copyright in its current form. Nonetheless, one may ask what should be copyright's model duration? A few possible models flow from the goal of having a copyright system with theoretical coherence. Like possibilities (i.e., perpetuity) presented in previous copyright debates, these approaches offer ways copyright *could* change and point to a question well beyond the scope of this Article: namely what the ideal term for copyright should be. The goal here, however, is to show that several possible options exist to address many of the ills present in copyright and exacerbated by the post-mortem assumption.

Copyright began with an original term of fourteen years. Even with ensuing expansions and complex renewal requirements, many works with us today fared well under something far less than the post-mortem copyright model in place now. Indeed, the theoretical arguments analyzed above show that rather than theory, political interests, the lobbying efforts of living authors, and political feasibility had much to do with the shifts in copyright's duration. Deciding which of the following possibilities is politically palatable or feasible is a separate matter. For now, seeing the possibilities allows one to appreciate that copyright's term does not have to be a one-way ratchet

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265. Nussbaum, *supra* note 257, at 287.

leading to longer and longer duration. Briefly then, here are a few possible options.

Neil Netanel argues that copyright should “ideally” have a twenty-eight-year term with a twenty-eight-year renewal.<sup>266</sup> He also offers that unpublished works should have a five-year term so that some incentive is in place for their production even after an author dies.<sup>267</sup> For Netanel this system provides incentives to authors and other potential publishers while diminishing the burden copyright imposes on users of copyrighted works.<sup>268</sup>

In contrast, one might want a term based on the life of the author alone. The early arguments for extending copyright’s term came against a backdrop of systems that removed copyright while Webster and Clemens recoiled at the thought of losing control over their work while they were alive. As shown above, a range of theories support a life term. In addition, a life term does little harm to the determinacy of today’s copyright system, as any system based on life, such as the current one, has an indeterminate variable regarding the potential length of copyright for a given work.<sup>269</sup>

One could also imagine a purely fixed term of years without renewals. The current approach of ninety-five years from first publication or one hundred twenty years from creation for works made for hire (in essence corporate works)<sup>270</sup> might be a metric to inform a fixed copyright term for individual authorship. One would not encounter the issues of renewals and determining whether the work was in the public domain would be simpler. Authors could create a work at ten, twenty, fifty, or one hundred years old and have a simple, fixed

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266. NETANEL, *supra* note 56, at 205.

267. *Id.*

268. *Id.* at 200–205. As Netanel notes, attempts to cure duration’s problems fall short because they often turn on a vague and ungenerous understanding of a non-commercial-use requirement. *Id.* at 206; *cf.* Frischmann & Lemley, *supra* note 198, at 285–86 (noting that copyright may be thought of as a semi-commons where duration and scope are supposed to provide “leaks and limitations on the private rights” but that determining what uses are permitted can nonetheless be difficult).

269. The lack of stability inherent in a life-based term was noted in the 1909 revision debates. *See supra* note 77 and accompanying text.

270. Anonymous work and a pseudonymous work have the same term but morph to life plus seventy if the name of an author is attached to the work during the ninety-five or one hundred twenty years, provided that the name appears in a registration with the Copyright Office as specified under the Copyright Act. *See* 17 U.S.C. §302(c) (2006).

term that would meet the theoretical concern for providing for an author while alive, and in most cases quite some time after death.<sup>271</sup>

As another alternative, William Landes and Richard Posner have argued that either an indefinitely renewable copyright or one that has “an initial term of twenty years and a maximum of six renewal terms of ten years each, for a maximum duration of eighty years” would be economically efficient.<sup>272</sup> According to them, copyright has “an expected or average life of only about fifteen years.”<sup>273</sup> A work’s low life span and high renewal costs would mean that most work would enter the public domain quickly, while those that are valuable would be able to maintain protection so long as they remain valuable.<sup>274</sup> This view runs contrary to the idea of a life term, but it does address the reality of the low-likelihood that an author will generate significant value from a work.

Given Heald’s recent work regarding more than sufficient production of precisely the type of works Landes and Posner seek to promote and the way those works stimulate further creation, the perpetually renewable model is not favored here. If, however, one combined Landes and Posner’s model regarding short term renewals with Hugo’s model of a fixed copyright royalty for descendants and strong limits regarding heirs’ ability to curtail the public’s ability to access and use a work, one would have a system that pushes much material into the public domain while still accounting for possible underproduction and access concerns for works that enjoy a robust market. In addition, the fixed royalty would address concerns based on providing for offspring.

These models are possibilities to address flaws in the current system. None requires post-mortem copyright as part of their solutions. Instead, they show that problems stemming from copyright’s protection of all works under the subject matter of copyright—instead of only registered works—are reduced by limited terms. Later users can more easily determine whether a work is available for use or not. The models provide authors ample coverage to allow them to benefit from their creations during their life. Depending on which model one chooses and when an author dies, an author’s offspring may or may not be explicitly covered. And that is the point. Copyright after death was not, need not, and ought not be part of a coherent copyright policy.

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271. See Hsiang-Ching Kung et al., *Deaths: Final Data for 2005*, 56 NAT’L VITAL STAT. REP., Apr. 24, 2008, at 1, (noting that the average life expectancy in the United States is 77.8 years).

272. Landes & Posner, *supra* note 14, at 473.

273. *Id.* at 475.

274. *Id.* at 517–18.

## CONCLUSION

Copyright and its scope have been the subject of legal discourse for hundreds of years. Various theoretical foundations have been offered to explain copyright and to sculpt its contours. These arguments have shifted over time, as has copyright's reach, depending on whether publishers or authors have the upper hand and the interests they wish to advance. Duration has always been a key issue in this debate. Given the power of copyright, there is no reason to think that current holders will rest easy once the material that drove the CTEA again nears entry into the public domain. Because a concern for authors' offspring has been offered as a primary justification for post-mortem copyright and its concomitant extension of copyright term, it will likely be offered again. For these reasons this Article has examined the basis for the post-mortem assumption and found several problems.

The historical debates regarding copyright do not support the claim that post-mortem copyright was part of copyright's design or purpose. Moreover, there is no theoretical basis for post-mortem copyright. Probing the predominant, yet varying, theories offered to explain copyright shows that none of them support post-mortem copyright, but they do support, if not mandate, a life term for copyright. As such, when copyright terms were less than the life of the author or structured so that they could easily result in work entering the public domain while the author was still alive, there was reason to demand longer terms. Nonetheless, analysis of the arguments offered to extend copyright's duration shows that, even during this early period, the arguments were overstated and often invoked the post-mortem assumption as a way to advance the cause of extending copyright's duration but without support for such claims. This tactic has helped foster a system with an over-long and unstable copyright term, one based on the life of the author plus seventy years and possibly longer as new calls for term extension arise.

The post-mortem assumption not only lacks a sound historical and theoretical grounding; it has negative normative implications as well. Historical, philosophical, and economic theories agree about the way in which creation fosters future creation: each cycle of creation builds on the outputs of the last one. A system that prolongs the inability to use an output inherently slows down the next cycle of creation. Thus, extending the copyright term in the name of providing for authors' offspring imposes a cost on society.

The question then becomes one of what is theoretically and practically supported for copyright's term. History and theory support a life term. Given the current system of life plus a number of years, however, moving to that standard seems unlikely. Nonetheless, this

Article has shown that theoretically supported alternatives to the current model exist as a way to open avenues to new thoughts about copyright's duration. Regardless of which model is put forth, insofar as the post-mortem assumption is deployed to justify copyright's term or its expansion, such arguments lack foundation and should be seen as proxies for other agendas and interests.

In short, whenever an extension of copyright term is sought, the post-mortem assumption is offered as an explanation for why the extension is necessary. The assumption and myth is that copyright after death matters for copyright policy. This Article has shown it does not and should not. Indeed, if one admits that we are all heirs to cultural creation and that we are all heirs who draw on such work to create anew, the longer copyright locks up material, the longer it denies society its inheritance.