

**“The Exclusive Right to their Writings”:  
Compensation v. Control in the Digital Age\***

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I. INTRODUCTION

Let me begin with an historical anecdote:

“In the beginning was the Reader.” And the Reader, in a Pirandello-esque flash of insight, went in search of an Author, for the Reader realized that without an Author, there could be no Readers. But when the Reader met an Author, the Author, anticipating Dr. Johnson, scowled, “No man but a blockhead ever wrote, except for money.”

And the Reader calculated the worth of a free supply of blockhead-written works against the value of recognizing the Author’s economic self-interest. She concluded that the author’s interest is also her interest, that the ‘public interest’ encompasses *both* that of authors and of readers. So she looked upon copyright, and saw that it was good.

This, in essence, is the philosophy that informs the 1710 English Statute of Anne (the first copyright statute), and the 1787 U.S. Constitution’s copyright clause. The latter provides: ‘Congress shall have Power . . . to promote the Progress of Science by securing to Authors . . . for limited Times the exclusive Right to their Writings . . .’ In the Anglo-American system, copyright enabled the public to have what Lord Macaulay called ‘a supply of good books’ and other works that promote the progress of learning, by assuring authors ‘the exclusive Right to their . . . Writings’ – that is, a property right giving authors sufficient control over and compensation for their works to make it worth their while to be creative. But that does not tell us how *much* compensation authors or other copyright right holders should get from copyright, nor how much control they should be able to exercise over their works. That turns on the scope of copyright protection, particularly with respect, nowadays, to new markets created by new technologies.

The recent coincidence of new technology and new legislation in the U.S. may have enhanced the ability of U.S. copyright owners to wield electronic protective measures to control the exploitation of their works. The legislation, which reinforces the technology, has led many to perceive and to deplore a resulting imbalance between copyright owners and the copyright-using public. Critics assert that the goals of copyright law have never been, and should not now become, to grant ‘control’ over works of authorship, but rather

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to accord certain limited rights over some kinds of exploitations. Economic incentives to create may be needed to achieve the goal of public instruction, but those incentives should be as modest as possible, these critics contend. Thus, when new technologies spawn new markets for copyrighted works, we should not simply assume that a need for copyright incentives justifies copyright owner control over those new markets, or even significant compensation for their exploitation.

There is doctrinal support for this contention. Indeed there is a strong streak of copyright skepticism in U.S. jurisprudence. Moreover, the incentive rationale for copyright invites its own rebuttal. For one thing, we may have an ample supply of ‘blockheads’ – poets who burn with inner fire, for whom creation is its own reward, or for whom other gainful employment permits authorial altruism. These creators do not need the incentive of exclusive rights in order to produce works of authorship. As to this group of authors, then, copyright might be a wasteful windfall. Moreover, even if the incentive rationale justified *some* copyright control and/or compensation, we may be allowing *too much*. That is, the scope of copyright protection may be more generous than is needed to spur initial creativity.

In the abstract, this critique may have some appeal, but it also has considerable practical disadvantages. For example, the scope of a work’s protection could not be known at the outset (thus permitting predictability in licensing). It would be discovered only in the course of an infringement proceeding, in which the court would address the question whether *this* incentive was necessary to create *this* work. Of course, it is rather difficult to project how one would show whether or not copyright was a necessary incentive in a given case. Then-professor (now Justice) Stephen Breyer once wrote that the case *for* the copyright incentive rationale has not really been made – but neither, I would suggest, has the case *against* it. It depends who has the burden of proof: authors to justify copyright, or users to justify non protection.

If abstract arguments about economic incentives do not advance the discussion, perhaps an appeal to history will. Copyright, its skeptics remind us, has not historically covered every way of making money from, or of enjoying, a work of authorship. For example, the ‘first sale doctrine’ (or, in non U.S. terms, the ‘exhaustion’ doctrine) removes the resale and rental markets from copyright owner control. The fair use exception permits a variety of unauthorized reproductions or derivative works, sometimes even for commercial purposes. And new technology cases of the past, from piano rolls to cable television to video tape recorders, have variously limited the scope of U.S. copyright, either by finding that the exploitation did not come within the copyright holder’s statutory rights, or, despite prima facie infringement, by finding fair use.

But the exercise and the rhetoric of control enjoy a long pedigree, too. The historical, if now largely abandoned, division between U.S. common law and statutory copyright rested on ‘publication’, the distribution of copies to the public. Until that moment, the author controlled the decision and the implementation of public disclosure of copies. Moreover, because of the peculiarities of the publication doctrine under the prior U.S. copyright law, and the state of technology before mass market audio and audiovisual recorders, the copyright owner might economically exploit the work through extensive public performance, yet never lose control over the work because the public could not make copies from live or transmitted performances of the work. Traditionally, the fair use doctrine was of little if any application to unpublished works; the law strongly protected the author’s control over public disclosure, for both economic and moral reasons. Economic and moral rights also underlie the development of the derivative works right, particularly as applied to the control over adaptations of literary works. Here, again, Dr. Johnson reminds us of the venerable vintage of authors’ objections to unauthorized adaptations. Boswell recounts a conversation about copyright in which he evoked the view that one who memorizes another’s work might legitimately publish the results of his recollections. Johnson objected, “No, sir, a man’s repeating it no more makes it his property than a man may sell a cow which he drives home.” Boswell then observed that under English decisions, “printing an abridgement was allowed, which was only cutting the horns and tail off the cow.” Retorted Johnson, “No, sir, ‘tis making the cow have a calf.”

U.S. copyright has evolved compromise measures as well, trading control for compensation. A review of past confrontations between copyright and new technological means of dissemination suggests that courts may be reluctant to restrain the public availability of new technologies, even when they appear principally designed to exploit copyrighted works, but Congress often has stepped in to assure some form of compensation to copyright owners through imposition of a compulsory license.

In the digital environment, which approach to copyright and control will prevail? Under the copyright owner control view, so long as the new technological means of dissemination comes within the general scope of the statutory grant, copyright holders should continue to exercise exclusive rights. Moreover, because online licensing reduces transactions costs, and technological measures ensure adherence to the terms of the license, copyright owners can now price discriminate, and offer access to works at increasingly granular levels of enjoyment. This approach maximizes control, but also, at least in theory, is consumer-friendly, because it tailors the price the consumer pays to her actual use of the work.

Under a view that privileges compensation over control, as long as authors get paid something for new technological exploitations, anyone should be able to obtain or make a copy of anything. This view may converge with an ‘all you can eat’ style licensing mechanism: payment of a flat fee entitles the consumer to copy whatever and however much she wants. But will authors in fact be paid if they cannot control price and manner of distribution? The exercise of control entails the ability to set one’s own price. Equally significantly, it empowers copyright owners to select their licensees; licensees who must vie for the grant are likely not only to bid up the price, but to offer assurances of quality control. As a result, one might expect that authors will be paid less than they would be had they the power to negotiate licenses (or to impose them on end-users). Some might therefore fear that authors will be paid so much less that incentive to create will be lost.

But perhaps the choice is not between being paid more or being paid less, but between being paid less and not being paid at all. There remains a third, more radical, paradigm: authors do not enjoy ‘exclusive rights’ to exploit their works, but only narrowly defined and uneasily tolerated opportunities to extract compensation; these should in no event hamper the progress of technology. Moreover, under this view, the role of new technology should be user-empowering as much as copyright holder-empowering. While new technology may enhance right holder control, it can also destroy it, because users as well as copyright owners now may avail themselves of technological locks and keys. New technology in users’ hands can, and for some commentators should, strip authors of any meaningful ability to control and enforce copyright. One might call this last view ‘techno-postmodernism’. Technology allows users to take what postmodernism justifies as truly belonging to the audience in any event. Some postmodernists tell us that a work’s value comes not from its author’s creativity, but from the public’s affection for the work. Without its public, the work is nothing, so the public should ‘share’ in its value, perhaps by acquiring it for free, if the technology so allows.

Will the technology so allow? This is a focus of the current dispute. On the one hand, self-styled ‘cyber anarchists’ invite us to ‘copyright’s funeral’, proclaiming that no protective measures that copyright owners devise will withstand the efforts of hackers who will, moreover, avail themselves of pervasive yet untraceable means of file sharing to distribute the decrypted works and/or the decryption codes. Other copyright skeptics foresee the opposite, but equally apocalyptic, result: copyright owners will impose ‘digital lockup’, relying on technology, contracts, and law to banish fair use and drain the public domain. Either no copyright control can ever be enforced, or, on the contrary, copyright control will acquire Orwellian effectiveness. Either way, resistance will be futile; the only thing that changes is the camp of the frustrated resister.

This lecture does not attempt to gauge future technology, whether protective or

anarchic. Rather, it addresses a basic premise underlying many of the current critiques of U.S. copyright law in the wake of the 1998 Digital Millennium Copyright Act [DMCA]: that the DMCA has vested copyright owners with a power of ‘control’ that is fundamentally at odds with the U.S. copyright scheme articulated in the U.S. Constitution and implemented through 200 years of copyright legislation preceding the 1998 amendments. I disagree. Instead, I contend that the Constitution embodies the concept of author control. I acknowledge that the intervening statutory and caselaw history on occasion elevated claims for enhanced availability of works over copyright owner interest in exercising control over new modes of exploitation. But control remains very much part of the U.S. copyright system; the technological protections, further secured by legal protections, that may be required to preserve control should also be seen as part of, rather than alien to, that system.

In this lecture, I will explore the concept of control and the meaning of exclusive rights in the constitutional text, the pre-1976 Copyright Act regime, and the 1976 Act. I then consider the new technology cases from piano rolls through videotape recorders, as well as Congress’ responses to new technological means of exploitation. I make two submissions. First, I conclude that when copyright owners seek to *eliminate* a new kind of dissemination, and when courts do not deem that dissemination harmful to copyright owners, courts decline to find infringement, even though the legal and economic analysis that support those determinations often seems strained, not to say disingenuous. Second, this does not always mean, however, that courts refuse protection, or that Congress imposes a compulsory license, each time copyright encounters new technology. Rather, when copyright owners seek to exploit the new modes of communication, the courts, and Congress, appear more favorable. In these circumstances, they embrace the proposition that copyright owners should get *something* for the new exploitation. More importantly, they recognize that when the new market not merely supplements but rivals prior markets, copyright owners should *control* that new market, and therefore should be able to charge market prices.

I will end my presentation with two further considerations, one on futility, the other on authors. However convincing the demonstration that copyright vests authors with control over new markets spawned by new technologies, what does it matter, if that control cannot be enforced? And even if exclusive rights persist, how will authors, as opposed to industrial-strength copyright owners, enjoy that control?

## II. AUTHORS' "EXCLUSIVE RIGHT"

The Constitution authorizes Congress to “secure” to authors the “exclusive Right to their . . . Writings.” In eighteenth-century terms, “exclusive right” meant property. James Madison, in the Federalist Papers, supported this measure by emphasizing both the public benefit to be derived from authors’ private rights, and that the author’s exclusive right had already been recognized in England as “a right of common law.” Copyright was a property right like other property rights, vesting its owner with control over its disposition. The constitutional text’s employment of the word “securing” demonstrates that the property right was not one Congress was to *create*, but rather to reaffirm and to strengthen. That right included exclusive control over the work before its publication, as well as the right to prevent unauthorized copying, selling, and publicly performing thereafter.

If the Constitution perceived copyright as a form of property, the early statutes implementing the clause significantly limited its scope. Congress recognized only the rights to ‘print, publish and vend’, and only with respect to certain subject matter: maps, charts, books. More significantly, Congress imposed a prerequisite of compliance with formalities: publication without compliance forfeited the copyright. Congress recognized rights of public performance and of dramatization and translation relatively late, hence the federal copyright law did not assure to authors control over the full economic value to be derived from their published works.

But it is important to recall that federal copyright law concerned only *published* works. As long as the work remained unpublished, the author’s exclusive right was exclusive indeed, because the common law continued to govern. At first blush, it might appear that exclusive rights in unpublished works would be of little economic value. In fact, common law copyright protected not only the right to publish a work, meaning to make the first distribution to the public in copies, but also the right to public performance of unpublished works. This meant that copyright owners could control access to a work that was made publicly available primarily through performances, and later, transmissions. Until the advent of mass market audio and video recording equipment, the public could not acquire access to a work without purchasing a copy, or borrowing one from a library or a friend, or viewing/listening to it through media licensed by the copyright owners.

The 1976 Act largely merged federal and common law copyright, making both published and unpublished works substantially subject to the same regime. One effect of the merger was increasingly to align federal copyright with the natural property rights conceptions of common law copyright: federal copyright now commenced upon creation, rather than upon publication together with compliance with formalities.

Moreover, the 1976 Act conferred broadly-stated exclusive rights, qualified by narrowly-drawn exceptions and limitations. The prominence of exclusive rights in the 1976 Act also reflects Congress' response to Supreme Court decisions narrowly interpreting the scope of the exclusive right of public performance under the 1909 Act. Those decisions, in turn, illustrate the judiciary's frequent reaction to infringement suits that appeared designed to prevent the exploitation of new technological means of making works available to the public.

### III. THE IMPACT OF NEW TECHNOLOGIES

At first blush, the new technology cases, from piano rolls to videotape recorders, might appear to support the proposition that every time a copyright owner tries to control a new dissemination technology, technology wins. In fact, however, the cases fall into two distinct categories. The first covers new technological modes of dissemination of works, when copyright owners seek not to obliterate the technology, but to exploit the new means of communication, for example, radio broadcast of musical compositions. Here, copyright owners have generally prevailed. The second category comprehends new technological modes of dissemination of works, when copyright owners are perceived to be trying to prevent these new means from becoming available to the public. This is the class of cases in which copyright owners have consistently fared ill. Even with respect to the second category, however, copyright owners have not always remained remedy-less. Congress has often imposed a compromise, allowing continued exploitation of the technology, but with remuneration to the copyright owners, in other words, substituting compensation for control. I first will consider the relevant cases; I then will turn to the legislative responses.

One of the first new modes of dissemination that copyright owners sought to participate in, rather than to prevent, was radio broadcasting. The relatively newly-formed collective licensing society, ASCAP, offered performance rights licenses to radio stations. The broadcasters declined the licenses on the statutory ground that their broadcasts were neither public performances 'for profit', because there was no charge to hear the music, nor were they 'public', because the performances were received in private homes. The broadcasters also advanced the economic ground that songwriters were not harmed, as the broadcasts promoted sales of sheet music and sound recordings of the songs. All of these defenses failed.

Retransmissions of radio broadcasts of music over closed-circuit systems in hotels proved another source of licensing disputes, with hotel operators contending the transmissions were not to the public if they were received in private guest rooms. Again, the issue was not whether the hotel operators could avail themselves of the technology; rather it was whether they were obliged to pay the authors for the exploitation by means of the new technology. In upholding the copyright owners' claims, Justice Brandeis remarked, "While this [form of exploitation] may have not

been possible before the development of radio broadcasting, the novelty of the means does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.”

When, however, the Supreme Court perceived that copyright owners were seeking to prohibit a new form of reproduction and distribution, or to leverage their exclusive reproduction rights into monopoly power over the devices employed to effect the new kinds of reproductions, the Court has been considerably more reluctant to “give full protection to the [copyright] monopoly.” An early case in this vein, *White-Smith Publishing Co. v. Apollo Co.*, decided in 1908, concerned pianola rolls. The musical composition was reproduced onto the piano roll through perforations that, when run through a player piano, would perform the musical composition. The Supreme Court nonetheless held that the unauthorized pianola rolls were not infringing “copies” because, unlike sheet music, the musical composition was not directly perceptible from the perforations. The majority so held despite Justice Holmes objection that “On principal, anything that mechanically reproduces that collocation of sound ought to be held a copy...”

The Court’s decision is best understood in light of the then-nascent recording industry. Indeed, music publishers initiated the case as part of a plan between music publishers and a manufacturer of phonogram recording equipment. First, the copyright owners would establish that the copyright extended to mechanical reproduction, and then they all would transfer mechanical recording rights to a single establishment, in return for a kickback on sales of recording equipment.

Solicitude for a nascent dissemination industry also underlay the Court’s determinations in two controversies during the late 1960s and early 1970s in which it held that cable retransmissions of broadcast television did not involve a ‘performance’ of the works, and thus fell outside the copyright monopoly. In one case, the cable retransmission enhanced local signals, in the other, it imported distant signals. The Court determined that the retransmissions did not ‘perform’ the works contained in the signals because performance implied active conduct, while the retransmission was more passive. In the first case, the Court distinguished cable retransmission from a performance on the ground that cable was more akin to mere ‘viewing’ than ‘performing’. The analogy held even when, in the second case, the ‘viewer’ reached out to bring in programming not otherwise available in that area. The Court’s analysis is rather strained, and should be seen in the context of its perception that the broadcast industry was endeavoring to kill off a new rival, cable. In addition, the Court contended that television broadcasters and copyright owners would not be harmed by distant signal retransmissions, because they could adjust their advertising rates to account for the broader audience. Thus, copyright owners appeared to be behaving like unseemly monopolists, while, in the Court’s perception, the new technology would not harm, but might in fact expand, their traditional markets.

Given those considerations (and in hindsight), the Court's decision in the mid-1980s 'Betamax' controversy might seem like a rerun of a bad television series – the “Neighbors” of U.S. copyright jurisprudence. There, motion picture producers sued the manufacturers and distributors of mass-market videotape recorders, on the ground that the recorders facilitated massive uncompensated and infringing private copying. On a traditional copyright analysis, the dissent is considerably more carefully reasoned than the majority opinion, which treats the statutory fair use factors rather cavalierly. The majority's forgiving approach is best understood in light of the features the controversy shared with the cable cases. First, the motion picture industry was attempting to prevent the distribution of videotape recorders, in favor of a different technology, non recordable videodisc players. Second, the majority found no economic harm to existing markets from 'time shifting' of free broadcast television programming (having excluded other kinds of copying or programming from its analysis). The dissent charged the majority with focusing on the wrong market; the court should have inquired into the impact of the video tape recorder on *new* markets for television programming, not merely on extant television markets. This objection recalls the cable cases as well: there, the dissenters observed that the technology had opened up a new market, that normally would come within copyright owner control, but the majority responded that copyright owners could nonetheless extract revenues from the new markets. While the *Betamax* majority did not project what benefits the new technology would bring copyright owners, that outcome is well-known (and frequently asserted against subsequent copyright owner objections to new technologies of copying).

#### IV CONGRESSIONAL COMPROMISES: MUTING CONTROL FOR COMPENSATION

In many of the new technology cases, courts faced with what appeared to be all-or-nothing attempts at copyright enforcement preferred to interpret the statute in a way that would leave the copyright owners with nothing. Congress, however, has often readjusted the balance by imposing a compulsory license scheme that permitted continued distribution of the new technology, while assuring payment to copyright owners. Although the early forms of statutory intervention generally removed copyright owners from control over the licensed exploitation, more recent versions combine compensation with control, or even restore a degree of control.

The 1909 Act established the first compulsory license regime. After *White-Smith*, record producers sought to preserve the free rein the Supreme Court had left them, while copyright holders endeavored to repair the loss of exclusive rights wrought by their ill-fated litigation strategy. Congress sought to reconcile the right of the composer to prohibit mechanical reproduction with a public policy to prevent 'the establishment of a great mechanical-music trust'. The legislative compromise gave the composer the exclusive right to determine if any recording would be made at all, but once the first recording was authorized, any other record

producer was entitled, upon obtaining the statutory license and paying the statutory fee, to make its own recording of the musical composition. This measure thus compensated copyright holders, but permitted the development of a recording industry, by ensuring competition among record producers and the manufacturers of the phonograph equipment.

The cable retransmission compulsory license introduced in the 1976 Copyright Act followed a similar pattern. After the Supreme Court had held that the retransmissions were not ‘performances’, Congress defined ‘performance’ in extremely broad terms amply sufficient to cover the conduct at issue in those cases. Congress then instituted a complicated compulsory license scheme designed to permit retransmission of local and distant signals, but subject to payment of the statutory license fee, as well as to a requirement that the cable operator not change the content of the retransmitted signal in any way.

More recently, Congress has introduced more complicated ways of splitting the difference between the control that exclusive rights implies, and the fostering of new technologies of dissemination. For example, the 1992 Audio Home Recording Act [AHRA] was a post-*Betamax* measure designed to respond to the perceived threat to the music industry from digital audio recording media. Copyright owners contended that digital audio recorders would harm sales of authorized phonograms, because digital recorders, unlike analog devices, could make perfect multigenerational copies of the recorded music. Having learned a lesson from *Betamax*, copyright owners cooperated with hardware manufacturers in proposing to Congress that the distribution of digital audio recording devices be permitted, subject to a statutory royalty on the equipment and blank recording media, and so long as the devices allowed the recording only of a first-generation copy. In other words, copyright owners conceded a de facto license to make private digital copies from the original recorded source, in return for a royalty that would help compensate for the copying.

On the other hand, copyright owners secured control over second-generation copying, because the statute curtailed copyright owners’ exclusive rights only for the first generation, and more importantly, because the statute mandated the inclusion of the Serial Copy Management System in every covered digital audio recording device. SCMS recognizes when a copy has been made, and prevents further copying from that copy. In addition, Congress made it unlawful to offer services or to distribute devices primarily designed to circumvent SCMS. For the first time, Congress reinforced exclusive legal rights by providing for technological measures to protect those rights, and then by granting additional legal protection to those technological measures. As publishing lawyer Charles Clark often proclaimed, “The answer to the machine is in the machine,” in that an anti-copying device may forestall rampant digital reproductions; technology might therefore fix what technology breaks. But, given that a third machine will likely come along to defeat the second, to leave copyright entirely up to technological fixes may simply produce a never-ending “arms race”. Congress recognized that preservation of exclusive

rights in a digital environment may require not only technological adjuncts, but a legal cease fire in the form of a prohibition on circumvention.

Seen in this light, Congress' addition in the DMCA of a new level of copyright owner control, through the legal protection of technological measures, is consistent with a pattern of ensuring that exclusive rights remain exclusive when entrepreneurs or users of new technologies propose not merely to "share" in a new market that the technologies have opened, but to undermine the rewards drawn from the old. At least, that claim can be made of the DMCA provisions on circumvention of measures protecting "a right of the copyright owner" – essentially, technological protections against copying. But those provisions have not provoked the same ire as the prohibition on circumvention of technological measures controlling access to a work, principally because access controls may still operate even after the user has lawfully acquired a copy of the work. Do access controls also preserve exclusive rights, or instead expand them to an extent antithetical to the flourishing of new technologies, and therefore to the "progress of Science"?

The answer largely depends on one's projections for the Internet and electronic commerce in copyrighted works. If one believes that the market for hard copies is likely to recede as works become ubiquitously available through audio- and video-streaming and downloading, then control over access will become the principal way that exclusive rights are exercised. In an earlier era, copyright owners maintained control over access by withholding copies from the public. Today, technology has overtaken that technique, so copyright owners respond with more technology. Arguably, the current allocation is out of balance, because copyright owners may, with some exceptions, employ the technological measures they choose to prevent both access and copying, while users are not similarly free. But users were not similarly free before: copyright law is *supposed* to disable unauthorized copying (that does not qualify as a fair use). Only now, the disability is both legal and technological.

## V. OF ENFORCEMENT AND AUTHORS

Copyright owners may enjoy technologically-butressed exclusive rights under the statute, but can these rights be enforced against rampant user copying through file sharing and dissemination of circumvention hacks? If control cannot in fact be exercised, something like a compulsory license compensation scheme may seem increasingly attractive. At least two foreign jurisdictions, Canada and Germany, are considering imposing a levy on access provider service contracts or on digital media, including recordable CD ROMs and hard drives. The levy would permit digital private copying, but would compensate music copyright owners. Pricing the surcharge may nonetheless be problematic. For example, the proposed Napster-Bertelsmann settlement would give Napster subscribers a license to copy anything from the Bertelsmann catalogue, for \$4.95 a month. But will it still be only \$4.95 if other record producers join in? And what about other kinds of works potentially subject to file sharing, such as text, photographic images, and audiovisual works? What sum will generate enough return to compensate a broad class of copyright owners, yet still seem reasonable to the consumer? Moreover, it may seem antiquated to rely on such imprecise methods as 'all-you-can-eat' licensing when digital media

permit copyright owners to offer more kinds of distributions, from pay-per-view to unlimited copying, and to bill and track more cheaply and effectively than in the analog world . . . at least when the customer is willing to pay, rather than to ‘share’ copies for free.

Why *would* the customer be willing to pay? In the post-Napster world, it would be a foolish copyright owner indeed who assumed that users’ consciences are quickened by the direction in the Decalogue: “Thou shalt not steal.” Copyright owners therefore will have to be able to compete with “free.” How? Depending on the kind of work, copyright owners might offer auxiliary services, such as updates of informational works, or helplines for software. For more free-standing kinds of works, particularly entertainment product, copyright owners might propose auxiliary goods, such as fan club merchandise, or attractive packaging. In general, if the digital copy can be bundled with a hard copy whose disposition the copyright owner can regulate, control may yet survive. But this depends on the hard copy’s retention of independent value as an object, such as a beautifully-bound book, or as an artifact, such as an autographed CD cover. Alternatively, copyright owners may persuade consumers to switch to a new format; this has happened before, when, convinced of the new format’s superior convenience and durability, consumers switched from vinyl LPs to CDs. One may anticipate that, unlike current CDs, the next consumer-desirable format (perhaps a DVD audio that holds 100 songs) will be access- and copy-protected.

Perhaps most likely, copyright owners might offer consumer convenience: they can make it easier to copy with a license than without one. A licensed download or audio- or video-stream would need to be easier to find, faster to acquire, and give a better quality copy than a “shared” file or a hacked download. Indeed, in the digital environment, given the easy manipulability of unprotected documents, copyright owners may enhance the attraction of licensed copies by assuring their authenticity. The price, if low enough, or varied enough, would be worth the savings in transactions costs of finding the file or downloading the hack and using it. Technological protections remain relevant to this system, as the transactions costs of unauthorized access and copying are increased if the user has to circumvent, and if at least some of the circumvention activity and device market can be discouraged through the anticircumvention provisions of the DCMA, and analogous legislation elsewhere. Similarly, technological protections can ensure that the document delivered has not been altered.

Finally, what has all this to do with Authors? The Framers of the U.S. Constitution provided that the “exclusive Right” was to be “secur[ed] . . . to *Authors*,” not directly to publishers, producers, or other intermediate exploiters. The control that non-author right holders enjoy derives from the rights the Constitution ensures to creators. If authors do not benefit from the control they cede, then concerns about the potential incursion on public prerogative achieved through technologically enhanced means of control assume greater force. If authors drop out of

the copyright balance, we should more carefully watch the weight of the right holders.

But do authors have to drop out? Admittedly, employee authors and others subject to the U.S. “works made for hire” rule, are cast out of copyright, as the statute deems their employers and hiring parties the “author”. Moreover, in many sectors, creators who retain initial authorship status nonetheless assign all rights for a small royalty, or even a flat one-time payment. Perhaps, then, just as 18<sup>th</sup>-century publishers advanced their claims through appeals to the moral justice of remunerating authors whom they promptly despoiled, today’s copyright rhetoric of control is merely a pretext for corporate greed.

Indeed, one might suppose that authors would be better off with a compulsory license regime than an “exclusive right,” at least if a statute guaranteed creators a fixed and generous percentage of the sums collected under the license. But the conclusion that a compulsory license regime is better for authors than exclusive rights presumes that authors are obliged in practice to give up their rights to a publisher; it disregards the potential of digital media to free authors from the corporate distributors on whom they once depended to bring their work to the public. Traditionally, publishers have performed or overseen the following functions: selection; editing; reproducing the work in copies for distribution; distributing; marketing, including advertising and promotion; and accounting to the author for royalties. Today, some of these functions are no longer required, and others can be disaggregated; we can foresee that authors may undertake many of these tasks themselves, or subcontract them without giving up their copyrights. Similarly, freelance authors who can self-distribute may more effectively resist hiring parties’ attempts to contract into work for hire status. As a result, and in conclusion, it would be premature to surrender the control the copyright law vests in authors, at least if that surrender despairs of authors’ abilities effectively to manage their own copyrights in a digital environment.