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### Copyright and the Living Dead?: Succession Law and the Postmortem Term

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**COPYRIGHT AND THE LIVING DEAD?:  
SUCCESSION LAW AND THE POSTMORTEM TERM**

*Eva E. Subotnik\**

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## I. INTRODUCTION

Intellectual property (“IP”) policy in the United States is primarily aimed at stimulating the creative, inventive, and socially enriching behavior of the living. Yet one key aspect of our incentive-based regime is intimately linked to the death of the creative contributor. Specifically, the term of copyright generally lasts for seventy years following the death of the author.<sup>1</sup> Such a feature is not the product of policy choices in place from time immemorial but rather reflects a contemporary decision to link the duration of exclusive rights to some fixed point in time beyond the author’s death.<sup>2</sup> In particular, until the 1976 Copyright Act,<sup>3</sup> copyright protection lasted for a set (albeit lengthy) term of years without regard to the timing of the author’s death.<sup>4</sup>

The question of what precisely is accomplished by a copyright term structured to outlast each author in every case — as a discrete question from the overall length of the term — is intriguing. In theory, the postmortem feature yields the same benefits as would a lifetime term: it provides an author with the prospect of realizing a return on her work over the course of her entire lifetime. It also spares her from the need, later in life, to compete with her own works that might otherwise have entered the public domain. Most directly, the postmortem feature may allow her to provide for her loved ones (people or organizations) should she die before her work attains its full value in the marketplace.<sup>5</sup>

Such protection comes at a cost, however.<sup>6</sup> For example, a lengthy term of protection may produce heightened search costs for those seeking in good faith to license the work. When the author is no longer living, she is obviously unable personally to assist would-be licensees in tracking down the relevant copyright holders. In addition, some successors to copyrights — who may have no particular claim to the rights other than biological happenstance — have attempted to deter certain

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1. 17 U.S.C. § 302(a) (2012). The term of protection for a joint work persists for seventy years following the death of the last surviving author. *Id.* § 302(b). In the case of anonymous works, pseudonymous works, and works made for hire, the term is calculated differently — by a fixed term of years. *Id.* § 302(c) (“95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first”). While the length of that term has been criticized, and works made for hire encompass a large share of commercially valuable works protected by copyright, this Article focuses on the general term of “life plus,” which pegs the term to the life of the creator plus an additional postmortem period.

2. As will be discussed more fully below, in the bare sense that the death of the author would not have cut short a vested period of protection, the incorporation of a postmortem period of protection is a longstanding feature of Anglo-American copyright law. *See infra* Part III.A. Nevertheless, the structuring of the copyright term around the life of the author plus some additional term of years is a relatively recent policy choice in the United States. *Id.*

3. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

4. *See infra* Part III.A (discussing the evolution of the copyright term).

5. *See* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986* 320 (1987).

6. *See infra* Part V.A (discussing the costs of postmortem protection).

kinds of access and use of copyrighted materials for reasons that seem idiosyncratic or downright contrary to the public interest.

Ready examples of this latter phenomenon can be found in the experiences of a pair of chroniclers of the lives of two American Songbook luminaries. In her biography of the lyricist Dorothy Fields, who wrote such standards as “The Way You Look Tonight” and “Pick Yourself Up,” scholar Charlotte Greenspan described her initial plan to incorporate seventy-five of Fields’s lyrics. As Greenspan put it, “It seemed natural to me to present together the life and the works for which I ha[d] so much admiration.”<sup>7</sup> Those plans were thwarted by the licensing fees demanded by the publishers of the lyrics (\$150 per song), and more particularly by Fields’s own son — the executor of Fields’s estate — who refused to grant the necessary permissions.<sup>8</sup> As a result, Greenspan’s biography, a decade in the making, contains only partial lyrics (four lines maximum per song) and a guide for readers to other sources for Fields’s lyrics, including “the Internet.”<sup>9</sup> Had she obtained the permissions, Greenspan has no doubt that it would have been a “better book.”<sup>10</sup>

Greenspan, however, fared better than Frederick Nolan, a highly regarded writer who was denied permission to reproduce the lyrics of Lorenz Hart, the lyricist of standards including “Isn’t It Romantic?” and “Blue Moon.” Nolan accordingly published his biography of Hart without any lyrics at all, explaining in a note to the reader:

I had, of course, intended to examine many of Larry Hart’s lyrics — including some twenty that have never been published before — at length and in detail; but, unaccountably, the copyright holders denied me permission to use any of them. I can only apologize and say that I cannot imagine for one moment that this would have been the case had Hart himself still been alive.<sup>11</sup>

Elsewhere, Nolan suggested that Hart’s sister-in-law, a trustee with control over his copyrights, refused to license the lyrics because of Nolan’s reference to Hart’s purported homosexuality.<sup>12</sup>

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7. CHARLOTTE GREENSPAN, *PICK YOURSELF UP: DOROTHY FIELDS AND THE AMERICAN MUSICAL* xix (2010).

8. *Id.*

9. *Id.*

10. See Interview with Charlotte Greenspan (June 6, 2014) (on file with author).

11. FREDERICK NOLAN, *LORENZ HART: A POET ON BROADWAY* vi (1994).

12. See *My Hart & I*, FREDERICK NOLAN WEBSITE, [http://fredericknolan.com/My\\_Hart\\_\\_I.html](http://fredericknolan.com/My_Hart__I.html) [<http://perma.cc/99XL-TV6W>]; Frederick Nolan, *Obituary: Dorothy Hart*, INDEPENDENT, Apr. 25, 2000, at 6.

These incidents are troubling because, although cultural gatekeepers, copyright successors may have no particular expertise in the areas of their ancestors' fields.<sup>13</sup> Relatedly, they may try to exert control over the meaning and interpretation of a forebear's work even if they have no special insight into that author's artistic intentions.<sup>14</sup> In addition, "emphasizing prosperity rather than posterity,"<sup>15</sup> these successors may be insufficiently attuned to the larger arc of cultural development that often depends upon unfettered use of copyrighted materials.<sup>16</sup>

For these and other reasons, some commentators have recently objected to the existence of *any* postmortem period of copyright protection. Deven Desai has argued that there is little historical support for the extension of copyright protection beyond the death of the author.<sup>17</sup> Furthermore, he maintains, the traditional theoretical underpinnings for IP rights are also insufficient to justify postmortem rights.<sup>18</sup> Utilitarian theories, for example, which among other things premise copyrights as needed *ex ante* incentives to would-be authors, fail in this respect since few authors are likely to be motivated by the prospect that their descendants will benefit in a tangible way from their works.<sup>19</sup> Lionel

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13. See, e.g., Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1827 (2009) ("Genetic connection is no guarantee of literary sensitivity or historical responsibility. . . . Lengthy copyrights allow mere rightholders to become privileged and sometimes arbitrary custodians of culture."); Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 259 (2011) ("Unlike authors . . . 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.").

14. See Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 595 (1999); Kelly Casey Mullally, *Blocking Copyrights Revisited*, 37 COLUM. J.L. & ARTS 57, 92 (2013); see also Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 327 (2006) ("In the case of heirs, those who control copyright and artistic legacies following the death of a creator often have the right to impose their preferred meanings with respect to uses of protected texts.").

15. *In re Estate of Hellman*, 511 N.Y.S.2d 485, 488 (N.Y. Sur. Ct. 1987).

16. See Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 725–26 (1945) (quoting Lord Thomas Babington Macaulay to this effect); Garon, *supra* note 14, at 595.

17. Desai, *supra* note 13, at 243–44.

18. *Id.* at 221 ("In this Article I argue that copyright's extension after the death of the author lacks theoretical grounding and is unjustified."); *id.* at 271 ("[T]here is no theoretical basis for post-mortem copyright."). Desai's principal target appears to be postmortem copyrights in the specific sense of the compelled extension of copyright beyond the death of the author in all cases that a "life plus" formulation requires. Other statements in his article, however, suggest a broader attack on any structuring of the term in which copyrights might survive the author. See, e.g., *id.* at 270 ("Copyright after death was not, need not, and ought not be part of a coherent copyright policy."). In any event, in this Article, I have engaged with the question of whether, given the policy choice of a "life plus" formulation, there are any justifications for postmortem copyrights.

19. *Id.* at 256; see also Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 794 (2003); cf. William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 914 (1997) (discussing the most recent term extension and arguing that "it is unlikely that any author will be induced to create more works under a term of life of the author plus seventy years than under a term of life of the author plus fifty years"). Postmortem rights of publicity have been critiqued on similar grounds. See, e.g.,

Bently, addressing the topic through the lens of authorship ideology, has suggested that the “creative link between an author and her work may justify protection during that author’s life, but thereafter an earlier author’s claim should readily give way to the needs of subsequent authors.”<sup>20</sup> Ray Madoff, surveying instances of the “rising power of the American dead,” has identified copyright as a species of regime that has granted excessive rights to the dead.<sup>21</sup>

Absent from the contemporary debate over this issue, however, is a systematic study of how longstanding succession law theories and doctrines, which govern the at-death transmission of other forms of property, bear on the justifications for, and scope of, “postmortem copyrights” — that is, the copyright protection of a work beyond the life of its author.<sup>22</sup> This Article takes up that task. It applies the justifications for, and incidents of, the generally robust principle of testamentary freedom, such as the creation of an industrious, wealth-maximizing citizenry and the facilitation of intelligent estate planning, to the particular case of copyrights. For example, it draws upon the well-accepted importance of upholding sentimental gift-giving by a testator under succession law to address the transmission of copyright interests.

The comparative analysis undertaken here suggests two principal lessons. First, succession law principles do provide discrete, though qualified, support for a postmortem term that, in addition to property theories more generally, should be considered in any rigorous debate over copyright duration. Second, more precision should be used in categorizing the costs associated with postmortem protection. In particular, in many instances the costs should be conceptualized as resulting from suboptimal stewardship by the living rather than from dead-hand control. This is not merely a matter of semantics. Distilling the most pressing costs is key to identifying the most appropriate means of addressing them, such as the shortening of the postmortem term, the reining in of dead-hand control where it does exist, and/or the instantiation of better stewardship practices among the living.

In applying succession law principles to the copyright regime, one admittedly runs the risk of falling into the trap that Justin Hughes called

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Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980) (attributing the pursuit of fame to motivators other than the prospect of providing commercial advantage to one’s heirs); see also Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 84 (1994) (recognizing the tension between rights of publicity inherited by remote descendants and the First Amendment rights of others).

20. Lionel Bently, R. v The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 99, 101 (2008) (“The idea of authorship points, as much to a reduction in that term (to life) as to its further extension.”).

21. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 121 (2010).

22. Cf. Bently, *supra* note 20, at 101 (“[W]hile the idea of providing for one’s offspring maintains some general appeal, it is an idea that rarely appears today in the context of debates over copyright.”).

a “funhouse epistemology: two things becoming more acceptable by mirroring one another.”<sup>23</sup> In addition, one runs into a recurrent problem when considering the justifications for, and possible adjustments to, copyright policy: authors and works exist in so many forms that it is nearly impossible to generalize about the effects of copyright law.<sup>24</sup> Nevertheless, viewing the postmortem period of copyright protection through the lens of established justifications for transmissions of property at death offers advantages: it provides a fuller context for evaluating the existence and optimal scope of postmortem copyrights. Analytical clarity is important in advance of what may be yet another congressional revision of the copyright term.<sup>25</sup>

This Article proceeds as follows. Part II outlines the methodological approach for the comparative analysis. Part III traces the evolution of copyright duration under U.S. law. It lays out concrete differences between the exploitation of a copyright while an author is alive and following her death. Part IV discusses the theoretical justifications for, and doctrinal elements of, American succession law with respect to property more generally, which it then applies to copyright interests. Part V categorizes the costs associated with the postmortem term and begins to develop appropriate solutions.

## II. DOCTRINAL BORROWING AS METHODOLOGY

Whether it is appropriate to borrow from one area of the law in order to illuminate another is an age-old question. Doctrines and theories in one area can be deployed to provide helpful perspective on a distinct set of issues, but they can also paper over important differences between two areas.<sup>26</sup> This Part first situates the approach adopted by this Article in the relevant legal and scholarly settings. It then addresses the specific use of succession law principles to evaluate the postmortem copyright term.

In the constitutional law context, Nelson Tebbe and Robert Tsai describe doctrinal borrowing as “the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends.”<sup>27</sup> While IP is sometimes

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23. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 289 (1988).

24. See generally Eva E. Subotnik, *Copyright Policy and the Problem of Generalizing*, 38 COLUM. J.L. & ARTS 375 (2015).

25. See *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (testimony on copyright term); see also Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1404 (2013) (speculating that “Congress [might] extend[] the term of copyright protection again”).

26. See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 467–69 (2010).

27. *Id.* at 461.

said to occupy its own cozy constitutional corner,<sup>28</sup> the Supreme Court has recognized that a number of features distinguish patent from copyright law.<sup>29</sup> The Court thus arguably engages in constitutional borrowing when using patent precedents to assess the constitutionality of copyright statutes.<sup>30</sup> By far the most controversial subject of doctrinal borrowing in the IP context, however, is the invocation of traditional property law concepts — an interpretive move that clearly also has implications for the application of succession law.

### A. Property Law and IP

Property systems have long been justified according to one of two sets of theories:<sup>31</sup> those that emphasize rights,<sup>32</sup> and those that emphasize efficiency.<sup>33</sup> In recent years, the question of whether IP should be

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28. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984) (noting that it was appropriate to refer to patent law in a copyright dispute “because of the historic kinship between patent law and copyright law”).

29. *See id.* at 439 n.19 (noting that the two “are not identical twins” and advocating caution in such cross-pollination); *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003); Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2318 (2013) (arguing against “ready use of comparisons between [copyright and patent law]”).

30. *See, e.g.*, *Golan v. Holder*, 132 S. Ct. 873, 886 (2012) (invoking patent traditions to uphold restoration of public domain works to copyrighted status); *Eldred*, 537 U.S. at 201–02 (invoking patent traditions to uphold term extension of existing copyrights).

31. *See generally* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 95–139 (2000).

32. Rights theorists typically premise the acquisition of rights on the contribution of labor, *see* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, TREATISE II § 27 (Peter Laslett ed., 1988) (1698), or on the fostering of values such as autonomy and personhood, *see* G. HEGEL, PHILOSOPHY OF RIGHT §§ 40–41 (T.M. Knox trans., 1967) (1821); *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–58 (1982).

33. Efficiency theorists ground such systems on the maximization of social welfare. Foundational groundwork for these theories is found in the writings of, among others, Jeremy Bentham. *See* 1 JEREMY BENTHAM, *Principles of the Civil Code*, in THE WORKS OF JEREMY BENTHAM 299, 307–09 (John Bowring ed., 1843) [hereinafter BENTHAM, *Principles of the Civil Code*]; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 40 (9th ed. 2014). Under the utilitarian outlook, private property provides the security needed for long-term investments in the use of scarce resources. *Id.* Harold Demsetz posited that private property better facilitates the internalization of externalities — such as the overuse of a particular resource — than does communal property, leading to more efficient use of such resources. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967).



treated, legally or rhetorically, as property has garnered much attention.<sup>34</sup> Conceptualizing IP as property provides a readymade framework under which to protect and regulate it,<sup>35</sup> including determining whether the Takings and Due Process Clauses apply,<sup>36</sup> and the advisability of injunctive relief.<sup>37</sup>

The propertarian approach has received mixed reviews from commentators. Proponents see the justifications for traditional property as usefully translatable to the realm of IP.<sup>38</sup> Richard Epstein, for example, while expressing doubt about untethered Lockean labor theories as a basis for either regime, nevertheless sees justifications for IP in the same utilitarian principles that for him ground property systems generally.<sup>39</sup> However, given numerous distinctions between IP and traditional property,<sup>40</sup> the property-oriented approach also has its

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34. Just as the rise in economic importance of intangible assets more generally at the turn of the twentieth century required a legal response, *see, e.g.*, John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1638 n.58 (1989); Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 324–25 (1993) (recognizing the “expansion of the concept of property from land or physical objects to various intangibles” in the early twentieth century); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 335 (1980), so too the increase in economic importance of IP over the last few decades has prompted a debate over the appropriate categorization of these interests.

35. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (describing characteristics of trade secrets that made them protectable property interests under state law and the Takings Clause: they could be assigned, form the res of a trust, and pass to a trustee in bankruptcy).

36. *See, e.g., id.* at 1002–04.

37. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972).

38. *See, e.g.*, ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 5 (2011) (arguing that the “one-to-one mapping between owners and assets” of private property “is the best way to handle intangible assets”); Hughes, *supra* note 23, at 290 (“[T]he labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property.”). The view that tilling a patch of ground should secure for the farmer rights to the fruits of his labor, for example, can support the proposition that novelists and engineers likewise should have rights in the products of their creative and inventive efforts. *See, e.g.*, Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 41 (2005).

39. *See* Richard Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 4, 28 (2005) (arguing that “once we recognize that trade-offs are an inescapable feature of social activity, . . . a sensible system of copyright is not such a bad trade-off after all”). Epstein recognizes the salient differences between property and IP; he would simply accommodate those differences in tailoring the relevant laws. *Id.* at 4.

40. The non-rival nature of IP, its overall purpose in enhancing a particular form of social welfare (the advancement of human learning), and the durational restraints imposed by the Constitution, U.S. CONST. art. I, § 8, cl. 8 (“for limited Times”), all suggest a degree or more of mismatch between IP and property.

detractors.<sup>41</sup> For them, the property framework has strengthened IP rights in ways that have not benefited the public.<sup>42</sup>

A third wave of scholars has tried to bridge the gap between the two camps, arguing that a property framework need not signal an expansion of IP rights since property rights themselves are limited.<sup>43</sup> Property concepts can thus be used prescriptively to advocate for restraints on IP rights.<sup>44</sup> For these scholars, it is not only permissible, but also advisable, to draw upon the legal treatment or rhetoric of property in discussing the bounds of IP.<sup>45</sup>

### B. Succession Law and IP

At the heart of contemporary succession law is testamentary freedom, which is a fundamental principle of American law.<sup>46</sup> Scholars have tendered a number of justifications for this principle, including that it comports with natural law, encourages wealth accumulation, stimulates industry and productivity, produces happiness, reinforces family ties and, as a practical matter, may be the simplest solution for dealing with property at an owner's death.<sup>47</sup> As Lewis Simes stated, "A compelling argument in favor of [testamentary freedom] is that it accords with human wishes."<sup>48</sup> In these respects, theories underlying testamentary freedom overlap to a certain extent with justifications for private property more generally. Indeed, the property paradigm itself largely incorporates a right to transmit one's assets at death.<sup>49</sup>

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41. See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 6–7 (2008); Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. 523, 523–24 (2008); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) ("Now, I happen to think that the 'proprertization' of intellectual property is a very bad idea."); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (2007).

42. See generally SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2d ed. 2003).

43. See generally SINGER, *supra* note 31. Translated to IP, these limitations explain, for example, the copyright defense of fair use. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 810–12 (2009).

44. See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 5–6 (2004); Deepa Varadarajan, *Improvement Doctrines*, 21 GEO. MASON L. REV. 657, 658–59 (2014); Molly S. Van Houweling, *The Dead Hand of Copyright* 1–2 (Oct. 7, 2014) (unpublished manuscript) (on file with author).

45. See, e.g., David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 657 (2010).

46. LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 46–47 (2009).

47. See, e.g., Edward C. Halbach, Jr., *Succession — Its Past, Future and Justification: An Introduction*, in *DEATH, TAXES AND FAMILY PROPERTY* 5 (Edward C. Halbach, Jr. ed., 1977); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 117 (2006).

48. LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 21 (1955).

49. See *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (equating the right to transmit at death with the right to exclude). *But see infra* note 173 (discussing views of William Blackstone).

A succession law<sup>50</sup> approach to property ownership and transmission, however, is not analytically co-extensive with a general property law approach.<sup>51</sup> For example, a justification for private property premised on the labor or personhood interests of the initial owner does not establish that his successors, who did not so toil or invest of themselves, should rightfully succeed to his property.<sup>52</sup> A general property approach also does not dictate the scope of rights that should transfer from one generation to the next, or the “rationales, tropes, or other legal elements”<sup>53</sup> that have developed to attend the post-death transmission of property. For these reasons, theories and doctrines drawn from longstanding succession law principles are useful in isolating whether and to what extent society should permit the transmission of particular types of interests at death. To date, however, there has been limited application of succession law to IP.<sup>54</sup>

This is not to say, however, that the topic of copyright’s post-death legacy has merited little attention. To the contrary, authors have long expressed the view that their copyright interests should be available as a means of support for their descendants. In the early nineteenth century, British poet Robert Southey made plain his “opinion . . . that literary property ought to be inheritable, like every other property.”<sup>55</sup> William Wordsworth, too, framed postmortem copyrights partly as a means of providing for one’s dependents.<sup>56</sup> In more recent times, in

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50. Scholars use a variety of terms to describe this area of law, including estates law and succession law. In short, it covers “the law of wills, the law of intestacy, the law of trusts (for the most part), the law of charitable foundations, the law concerning ‘death taxes,’ and . . . aspects of an arcane field of law that lawyers call the law of future interests.” FRIEDMAN, *supra* note 46, at 4.

51. *Cf.* Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2184 (2011) (acknowledging that “particular distinctions between gifts and wills within gratuitous transfers law are justified” and that “[t]he categories we choose to set apart need not be pristine to be useful”).

52. On these distinctions, see *infra* Parts IV.B and IV.C.

53. Tebbe & Tsai, *supra* note 26, at 461.

54. For some extremely insightful takes, see Michael Rosenblum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTEL. PROP. L. 163 (1996); Tritt, *supra* note 47. Another principal instance is the relatively recent debate over the descendibility of rights of publicity. *See, e.g.*, Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 207 (1983); *see also* Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 8 (2009) (describing ongoing tension surrounding the estate tax consequences of newly minted publicity rights and the likely wishes of the testator or her family).

55. Bently, *supra* note 20, at 69 (quoting Letter from Robert Southey to C.W. Williams Wynn (May 23, 1813), in 2 SELECTIONS FROM THE LETTERS OF ROBERT SOUTHEY 323 (John Wood Warter ed., 1856)).

56. *Id.* at 100–01 (quoting Wordsworth); *see also* Martha Woodmansee, *The Cultural Work of Copyright: Legislating Authorship in Britain, 1837–1842*, in LAW IN THE DOMAINS OF CULTURE 65, 88–89 (Austin Sarat & Thomas R. Kearns eds., 2000) (highlighting Wordsworth’s related, though distinct, argument that a postmortem term encourages writers who are ahead of their time as opposed to merely “useful drudges”); PAUL K. SAINT-AMOUR, THE COPYRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 126–27 (2003) (same).

connection with the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”),<sup>57</sup> authors, artists, and their successors articulated a view of copyright as an economic legacy to support one’s family,<sup>58</sup> comparing the transmission upon death of IP interests to that of traditional property.<sup>59</sup> These views, largely accepted by the Senate Judiciary Committee,<sup>60</sup> were challenged by a number of scholars as a basis for prolonging copyright duration.<sup>61</sup> Indeed, scholars have generally taken a skeptical eye toward postmortem copyrights. Zechariah Chafee distinguished between pecuniary and non-pecuniary aspects, seeing a stronger case for the former.<sup>62</sup> Paul Saint-Amour eloquently described “the long-standing tradition of glorifying postmortem copyright as an estate authors may bequeath to their heirs.”<sup>63</sup> On that front, he wrote critically about the way in which postmortem copyrights function to “make the author feel immortal before death” or to “delineate a kind of mourning period.”<sup>64</sup>

Nevertheless, these arguments and counterarguments often focus on the discrete issue of whether the postmortem term should be extended, rather than on its very existence. Where they have addressed the underlying concept, they have not fully engaged with the broader succession law context. By contrast, this Article responds to recent objections to a postmortem term<sup>65</sup> by taking a concentrated look at that issue against the backdrop of entrenched succession law principles. It proceeds on the assumption that copyright interests are sufficiently comparable to traditional property interests to permit the post-death treatment of the latter to be used at least as a basis for discussing the

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57. See *infra* note 85 and accompanying text.

58. See, e.g., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the H. Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 233, 240 (1995) (statement of Quincy Jones); see also *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 43 (1995) (statement of Alan Menken).

59. See *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the H. Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 272 (1995) (prepared statement of Mary Ellin Barrett, daughter of Irving Berlin); *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 64–65 (1995) (prepared statement of Shana Alexander, daughter of Milton Ager).

60. See S. REP. NO. 104–315, at 10 (1996) (“[T]he Committee concludes that the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation.”); see also *id.* at 12 (“One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren.”).

61. See *infra* notes 88–89 and accompanying text.

62. See Chafee, *supra* note 16, at 725.

63. SAINT-AMOUR, *supra* note 56, at 122.

64. *Id.* at 128, 154.

65. See *supra* notes 17–21 and accompanying text.

former.<sup>66</sup> Importantly, as has been demonstrated by the third wave of property scholarship,<sup>67</sup> this conceptual move need not signify an expansion of rights.

### III. CONTOURS OF COPYRIGHT'S POSTMORTEM TERM

It is no exaggeration to state that there has been a centuries-long debate over the ideal copyright term. Not surprisingly, the issue of duration usually comes to the fore when a proposal to amend the then-current term is floated.<sup>68</sup> Advocates for postmortem rights typically argue that such rights provide additional incentives to undertake creative work.<sup>69</sup> And indeed, the term of federal copyright protection has continually grown in length.<sup>70</sup> This Part briefly traces the expansion of the copyright term to include a lengthy postmortem component. It then outlines some distinctions between the exploitation of copyright during the life, and following the death, of the author.

#### A. Evolution of Duration of Copyright Protection

The Constitution gives Congress the power to grant exclusive, time-limited rights in written works to “Authors.”<sup>71</sup> This authorization to benefit authors (themselves) could be seen as a textual prohibition on any postmortem period of protection, although it has never been construed that way. Modeled on the British Statute of Anne,<sup>72</sup> the United States’s first copyright statute of 1790 provided for a fourteen-year initial term that was measured from the date the title was recorded

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66. See Van Houweling, *supra* note 44, at 5 (“[T]he law of tangible property can be an important source of insights about the benefits and costs of granting people rights to control . . . valuable resources, and about the various ways those rights and corresponding remedies can be structured. Copyright law . . . stands to benefit from these insights.”).

67. See *supra* notes 43–45.

68. See RICKETSON, *supra* note 5, at 322–23.

69. See, e.g., MARK HELPRIN, DIGITAL BARBARISM: A WRITER’S MANIFESTO 45 (2009) (arguing that a lengthy or even perpetual postmortem term would provide “an incentive to every author to strive for timelessness and greatness”).

70. It is true, however, that the 1976 federal Copyright Act actually *limited* what had been perpetual state law protection for two types of works — unpublished works and pre-1972 sound recordings. For a discussion of these changes, see Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 330, 351 (2014).

71. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

72. Statute of Anne, 8 Ann., c. 19, § 11 (1710) (Gr. Brit.); see Lionel Bently & Jane C. Ginsburg, “The Sole Right . . . Shall Return to the Authors”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1549 (2010) (tracing the relationship).

with a designated clerk's office.<sup>73</sup> If the author survived the term, he was entitled to an additional fourteen-year renewal term.<sup>74</sup> With the enactment of the 1909 Copyright Act, the term was extended to an initial term of twenty-eight years, measured from the date of first publication, plus an additional renewal term — not contingent on the author's survival — of twenty-eight years.<sup>75</sup> One reason for this extension was to ensure the possibility of at least lifetime ownership of copyrights by authors.<sup>76</sup>

As part of the copyright law revisions that culminated in the 1976 Copyright Act, as originally enacted, Congress made three important and relevant changes. First, it extended copyright protection to all works upon their fixation in a tangible medium of expression (rather than upon their publication), leading to exponential growth in the number of copyrighted works.<sup>77</sup> Second, it provided that copyright interests were thereafter divisible into an infinite number of strands; for example, the rights to publish, perform, or adapt a work could each be separately owned.<sup>78</sup> Third, it revised the general term of protection so that it would be pegged to the life of the author (specifically, it would last for the life of the author plus fifty years), rather than to the date of first publication.<sup>79</sup>

The legislative history reflects several reasons for the last change, such as ensuring that all of an author's works enter the public domain at the same time and avoiding fraught decisions about whether and when a work was first published.<sup>80</sup> The change also harmonized U.S.

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73. The term was measured from "the time of recording the title thereof in the clerk's office" of the "district court where the author or proprietor shall reside." An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, 1 Stat. 124, ch. XV, §§ 1, 3 (1790).

74. *Id.* at § 1.

75. An Act to Amend and Consolidate the Acts Respecting Copyright, 35 Stat. 1075, ch. 320, §§ 23, 24 (1909). In the interim, Congress had extended copyright duration to a twenty-eight year initial term that was renewable for an additional fourteen years. An Act to Amend the Several Acts Respecting Copy Rights, 4 Stat. 436, ch. 16, §§ 1, 2 (1831).

76. R. Anthony Reese, Note, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707, 722 (1995).

77. 17 U.S.C. § 102(a) (2012). Although the 1976 Copyright Act also initially required that each published work provide proper copyright notice, this requirement was dropped (on a prospective basis) in order to ensure U.S. compliance with the Berne Convention, which the United States joined in 1988. *See id.* §§ 401–402 (making copyright notice optional); 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 6:74 (2015).

78. 17 U.S.C. § 201(d). This constituted a significant deviation from the 1909 Copyright Act, which had treated a copyright as "indivisible." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.01 (rev. ed.) (2015).

79. 17 U.S.C. § 302(a) (1976) (amended 1998).

80. H.R. REP. NO. 94–1476, at 134 (1976); *see also* 17 U.S.C. § 302(d)–(e) (providing mechanisms for dealing with uncertainties in determining an author's date of death). For a detailed review and critique of the reasons behind this legislative shift, *see generally* Pamela Samuelson, *Notice Failures Arising From Copyright Duration Rules*, B.U. L. REV. (forthcoming 2015).

law with the large majority of countries that had adopted the same term.<sup>81</sup> Most importantly for purposes of this Article, supporters of the change felt that the 1909 Act's "56-year term [was] not long enough to insure an author and his dependents the fair economic benefits from his works."<sup>82</sup> Since life expectancies had increased, authors were apparently outliving their copyrights and being forced to compete with their own works that had fallen into the public domain. Working from the premise that "life expectancy in 1909, which was in the neighborhood of 56 years, offered a rough guide to the length of copyright protection" under the 1909 Act, the 1976 House Report cited increased human longevity to conclude, arguably as a non sequitur, that a "copyright should extend beyond the author's lifetime."<sup>83</sup>

The structural change effected by the 1976 Act should not be construed to mean that previously there had been no postmortem period of protection. Despite increasing life spans throughout the twentieth century, a 1909 Act copyright that endured for fifty-six years from publication easily could have outlasted the work's creator. Nevertheless, the reconfiguration of the term to a "life plus" formulation ensures that every copyright will outlast its work's human author.<sup>84</sup>

Tensions over this durational aspect were enhanced by the 1998 CTEA, which extended the postmortem period from fifty to seventy years.<sup>85</sup> Once again, the reasons tendered for the amendment included international harmonization and the maximization of protection for

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81. H.R. REP. NO. 94-1476, at 135. Sam Ricketson has detailed how the international standard of a "life plus" formulation was largely a product of deference to continental notions of copyrights as full-fledged property rights as opposed to the Anglo-American view of them primarily as economic rights. See RICKETSON, *supra* note 5, at 321, 323. Deven Desai has argued that the actual sources of the domestic and international momentum to extend copyright beyond the life of the author are less clear than is often thought. Desai, *supra* note 13, at 244.

82. H.R. REP. NO. 94-1476, at 134.

83. *Id.* at 135.

84. One possible way to avoid this inevitability is for an author to try to affirmatively dedicate her work to the public domain through her will, using instruments such as the Creative Commons CC0 waiver. See *About CC0 — "No Rights Reserved,"* CREATIVE COMMONS, <http://creativecommons.org/about/cc0> [<http://perma.cc/H83F-2KCJ>].

85. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998). Many scholars have addressed the CTEA. See, e.g., Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 n.4 (2002) (collecting sources). Many were critical both of the justifications for the CTEA tendered by Congress, see, e.g., J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 642 (1996) (critiquing harmonization goals), and of the reasons provided by the Supreme Court in upholding the extension, see *Eldred v. Ashcroft*, 537 U.S. 186 (2003), especially since the extension applied "retroactively" to works already in existence. Raising particular concern was evidence suggesting that the extension did not result from (relatively) balanced policymaking but from strong-arming by powerful entertainment industry lobbyists. See Liu, *supra*, at 421.

U.S. authors in Europe.<sup>86</sup> The increase in the average American life span was also cited.<sup>87</sup>

A number of commentators objected to the lengthy and multi-generational coverage provided by the CTEA. In testimony before Congress, Peter Jaszi disputed the existence of any entrenched principle in U.S. law that “copyright laws would provide a legacy for two generations of an author’s descendants” which needed to be accommodated in the face of increasing life expectancies.<sup>88</sup> At most, he pointed out, the legislative history accompanying the 1976 Act contemplated economic protections only for “an author and his dependents.”<sup>89</sup> Nevertheless, this round of legislative amendment appeared to validate the principle that “authors expect their copyrights to be a potentially valuable resource to be passed on to their children and through them into the succeeding generation.”<sup>90</sup> The fifty-year postmortem period was deemed inadequate and it gave way to the current term of life of the author plus seventy years.

### *B. Categorizing the Works Authors Leave Behind*

One problem that arises in assessing postmortem copyrights is that copyright attaches to extremely varied types of works.<sup>91</sup> Because of the changes embodied in the current law, as just described, postmortem rights apply to everything from the author’s personal correspondence and snapshots to the great American novel that she has left behind.<sup>92</sup> Importantly, and increasingly, the rights also apply to digital works and electronic correspondence that the author created, which may be governed by an elaborate set of licensing terms with the relevant service provider as well as by state laws governing the access rights of executors and successors.<sup>93</sup> A rough categorization of works would therefore

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86. See 141 CONG. REC. S3390-02 (daily ed. Mar. 2, 1995) (statement of Sen. Hatch) [hereinafter Hatch Statement].

87. *Id.*

88. *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 71, 74 n.9 (1995) (statement of Professor Peter Jaszi, Wash. Coll. of Law, Am. Univ.) [hereinafter Jaszi Statement]; *accord Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the H. Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 290 (1995) (statement of Professor Dennis S. Karjala, Ariz. State Univ.) [hereinafter Karjala Statement].

89. Jaszi Statement, *supra* note 88 (quoting H.R. REP. NO. 94-1476, at 134 (1976)).

90. Hatch Statement, *supra* note 86.

91. For a discussion of the uniformity costs associated with an IP regime that applies to a multiplicity of works and uses of works, see, for example, Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361, 1389 (2009).

92. See 17 U.S.C. § 102(a) (2012) (defining wide breadth of copyrightable subject matter).

93. See Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAT. ACAD. ELDER L. ATT’Y J. 135, 140 (2013); Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 LA. L. REV.



facilitate a more refined evaluation of the justifications for postmortem rights.

	Unpublished while author is alive	Published while author is alive
Interest in work by public (preservation for cultural heritage; use for self-expression; etc.)	A	C
Interest in work by author's family or friends	B	D

Figure 1: Interest, Publication, and Postmortem Rights

In the upper left-hand quadrant (A) are works that remain unpublished by the author at her death that might be of interest to a user for purposes of preserving the work or for purposes of self-expression. Examples are an author's diary or correspondence that a scholar wants to use in order to produce a biography, or a conceptual artist's use of an author's letters as part of a multimedia exhibit. In the lower left-hand quadrant (B) are unpublished works that are purely of interest to the author's family members or friends. For, most people, a decedent's letters, email or snapshots will fall into this category. Importantly, with respect to both quadrants (A) and (B), ownership of the only *physical object* embodying the intangible work of authorship, such as a diary, may devolve to the same person who inherits the copyright in that work — for example, because both assets pass through the author's residuary clause, or through intestacy, to the same person(s). In such cases, the successor will be able to control the copyright as well as access to the sole surviving copies of the work.

In the upper right-hand quadrant (C) are works that were published while the author was alive that might be of interest to a user for purposes of preservation or self-expression. Examples are an author's published short stories for use in a new anthology or in a biography; the mounting of a production of an author's published play with a traditional or all-female cast; or the use of an author's published book in

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719, 747 (2014). See generally Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67 (2008); Jason Mazzone, *The Right To Die Online*, 16 J. INTERNET L. 1 (2013).

order to make a film adaptation. Finally, in the lower right-hand quadrant (D) are published works that are purely of interest to an author's family members or friends, such as a book of poetry self-published decades earlier.

A few caveats must be stated about this table. Clearly, some uses of a work will implicate more than one quadrant, which reflects one of the central problems of setting copyright policy. For example, a work can be of interest both to the author's family and to some segment of the public. Furthermore, a work can migrate between quadrants over time. An obscure, out-of-print book may begin as the subject of interest to the author's family but, over time, garner the attention of a scholar with an interest in that literary niche. In addition, there are many other considerations that could be factored into a multi-vectorized categorization of works, such as whether a work — or interest in using the work — is commercially valuable in nature. Finally, it is important to note that many "works" will fall outside of the grid entirely. That is, a huge number of works — perhaps the vast majority — are of no interest to anyone. The journals, post-it reminders, college-era notebooks, etc. that most of us leave behind will constitute copyright-protected detritus to be carted away in order for the living to move on. Nevertheless, the characteristics identified in this table should facilitate a more refined evaluation of copyright's postmortem term.

### *C. Distinction Between Lifetime and Post-Death Exploitation*

There is clearly no more consequential event in a person's life than his or her own death. As great as the impact of death is on an author and her family, however, certain features of the copyright story may change while others may not. From an economic standpoint, after a successful (or moderately successful) author has died, the biggest change is that she can no longer create new works; her *oeuvre* is now complete, even if certain works are not yet known to exist by her agent, successors, or the public because she kept them in draft form. Moreover, the author can no longer embark on book tours, give interviews, write prefaces to new editions, or otherwise promote her body of work. Countering these effects may be a temporary surge of interest in an author's work following her death that generates economic returns.<sup>94</sup>

From a rights management perspective, certain aspects may not change at all. Rights are often assigned or licensed by an author during his or her lifetime. This is likely to be the case for the most successful works — works falling into quadrant (C) above.<sup>95</sup> Book publishers, for

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94. *See, e.g.*, Interview with Jeffrey Posternak, The Wylie Agency LLC (June 30, 2014) (on file with author).

95. *See, e.g.*, RICKETSON, *supra* note 5, at 320–21.

example, are granted publication rights and, for commercially successful works, they will continue to exploit the rights after the author's death just as they did beforehand. If the author assigned the rights for a lump sum, there will be no difference whatsoever; if the author retained a royalty stream, then the only difference will be in who receives the royalties. Furthermore, with respect to many published works — including works falling into quadrant (D) above — the death of the author may not change anything as a practical matter: for works that retain only infinitesimal economic value after an initial run in the marketplace, there may be no interest in exploiting the copyrights even before the author has died.<sup>96</sup>

And yet, in some circumstances, there will be concrete differences. A living author can exploit the copyrights that she still owns in ways that promote her own vision and interpretation of her work. For example, Erica Jong can decide for herself whether the protagonist of her classic *Fear of Flying*, Isadora Wing, should be reprised in a new work — or whether that character should merely make a cameo appearance, as she apparently decided.<sup>97</sup> Such ownership will exist with respect to rights that were never assigned, including but not limited to rights in unpublished works, or rights that were licensed only on a non-exclusive basis.<sup>98</sup> An author will also own rights that were initially assigned but have subsequently reverted to her because she has either terminated the assignments pursuant to her statutory rights<sup>99</sup> or has otherwise reacquired them.<sup>100</sup>

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96. See *Eldred v. Ashcroft*, 537 U.S. 186, 254–55 (2003) (Breyer, J., dissenting); see also MADOFF, *supra* note 21, at 144 (citing congressional testimony of Samuel Clemens, a.k.a. Mark Twain, to the effect that, just like the hypothetical problem of twenty-child families, the problem of long copyright duration tends to take care of itself for most works).

97. Alexandra Alter, *Boldly Defying the Sunset of Sex*, N.Y. TIMES, Sept. 8, 2015, at C1. That said, it must be acknowledged that living authors, despite remaining right holders, may not always have the capacity to exercise such choice. The fanfare and controversy over the recent release of Harper Lee's second novel brought this possibility to the fore. See Adam Gopnik, *Sweet Home Alabama: Harper Lee's "Go Set a Watchman"*, NEW YORKER (July 27, 2015), <http://www.newyorker.com/magazine/2015/07/27/sweet-home-alabama> [<http://perma.cc/44MH-CR92>] (discussing the book's "mysterious provenance").

98. See 17 U.S.C. § 101 (2012) (barring nonexclusive licenses from the definition of "transfer of copyright ownership").

99. See *id.* §§ 203, 304(c)–(d) (setting out statutory rights to terminate assignments and licenses after specified period of time has elapsed).

100. For example, some publishing contracts specify that if a work remains out of print for a specified period, the rights revert to the author — though not automatically. Nicole Cabrera et al., *Understanding Rights Reversion: When, Why, & How To Regain Copyright and Make Your Book More Available*, AUTHORS ALLIANCE 42–49 (2015), <http://www.authorsalliance.org/2015/04/09/keeping-your-books-available> [<http://perma.cc/E87J-HVJC>] (follow "Download *Understanding Rights Reversions* (PDF)" hyperlink); see also Interview with Richard Dannay (May 23, 2014) (on file with author); "Out of Print" Clauses, COLUM. L. SCH., <http://web.law.columbia.edu/keep-your-copyrights/copyrights/out-of-print-clauses> [<http://perma.cc/322N-6LDJ>].

Control over these rights — which can cover a great swath of economically valuable material — will pass from the author to her successors after death. These successors may not have played any role in the creation of the underlying work itself, or have any particular relationship to it, but they are now in a position to control its exploitation and adaptation in the marketplace. J.D. Salinger, for example, was famously iron-fisted with respect to the use of his work.<sup>101</sup> The creative and economic choices that were his are now in the hands of others — successors in the form of trustees.<sup>102</sup>

Even with respect to rights that have been assigned away, there may be differences between pre- and post-death exploitation. Over time, an assignee may have arrived at an established understanding with an author about the exploitation of a work, which may bear on an author's exercise of statutory termination rights.<sup>103</sup> An author's successors to these rights,<sup>104</sup> by contrast, may enter the picture and try to recalibrate the relationship in ways that deviate from the author's expectations.

Given the existence of at least some tangible differences between the exploitation of copyrights during the life and following the death of the author, it remains to consider the justifications under succession law for the postmortem copyright term.

#### IV. SUCCESSION LAW JUSTIFICATIONS FOR THE POSTMORTEM TERM

Many justifications have been advanced in support of a basic principle of testamentary freedom.<sup>105</sup> This Part focuses primarily on three: utilitarian theories, natural rights theories, and intelligent estate planning theories. While each justification has its detractors, the overriding

101. *See, e.g.,* *Salinger v. Colting*, 607 F.3d 68, 70–71 (2d Cir. 2010); *Salinger v. Random House, Inc.*, 811 F.2d 90, 92–94 (2d Cir. 1987).

102. For an exploration of these issues, see Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 *CARDOZO ARTS & ENT. L.J.* 19 (2012).

103. *See* 17 U.S.C. §§ 203, 304(c)–(d) (2012). Copyright law affords specific opportunities that no longer exist following the death of the author. The ability to grant rights that may be statutorily recaptured at the end of a thirty-five-year window will cease, since such recapture opportunities are available only when the living author has executed the grants. *See id.* § 203(a) (providing for the termination of grants made by the author other than an author's grants by will). Grants that an author previously made while still alive *are* capable of being terminated after her death by her statutory heirs. *Id.* § 203(a)(2). In addition, certain moral rights provided by the Visual Artists Rights Act of 1990 — such as the right to claim authorship of, and to prevent the intentional distortion or mutilation of, works of visual art — may also be available only for the life of the author. *Id.* § 106A(d)(1). The lifetime cap on protection of these rights exists only with respect to newly created works of visual art. *Id.*

104. In general, authors cannot choose these statutory successors in the same way that they can bequeath their copyrights and physical copies of their works. *See, e.g., id.* § 203(a)(2)(D) (allowing such choice only where the “author's widow or widower, children, and grandchildren are not living” at the relevant time period).

105. *See supra* note 47 and accompanying text.

question in the present context is whether any given theory should operate differently when the object of transmission is a copyright rather than a traditional property interest.

One more note before proceeding. Any discussion of testamentary freedom requires an initial distinction between an owner's rights to transmit property to the recipients of her choosing and her rights to transmit property at all (that is, to avoid its confiscation by the state) — or between what Adam Hirsch and William Wang term the *right of testation* and the *right of inheritance*.<sup>106</sup> In practice, most jurisdictions today afford both rights, but with some limitations.<sup>107</sup>

### A. Utilitarian Theories

Support for a system of testamentary freedom — whether one focuses on the right of testation or of inheritance — is often based on utilitarian goals of promoting happiness. In its simplest incarnation, the intuition is that the ability to leave property to the persons of one's choosing provides a sense of comfort and happiness.<sup>108</sup> Testamentary freedom has also been viewed as an “inducement to industry and thrift.”<sup>109</sup> Jeremy Bentham, for example, framed the benefits in terms of the utility that comes both from allowing people to provide for those to whom they feel attached, as well as from the discouragement of wasteful lifetime spending.<sup>110</sup> Such incentives promote wealth maximization — a gauge of utility maximization for some<sup>111</sup> — since individuals have reasons to accumulate wealth over and above that which is needed during their own lifetimes.<sup>112</sup> Other commentators have focused

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106. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 n.16 (1992). A jurisdiction could restrict the former but provide for the latter by developing fixed rules of succession regardless of testamentary intent. Likewise, a jurisdiction could restrict the latter but provide for the former by taxing the transmission of some property at death but permitting the rest to pass according to the testator's expressed intent. *Id.*

107. For example, virtually every state will override the right of testation to secure an inheritance for a surviving spouse. *See, e.g.*, JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 511 (9th ed. 2013). Likewise, the imposition of any level of estate tax constitutes a form of government confiscation — a restriction of the right of inheritance.

108. Halbach, *supra* note 47, at 5.

109. HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 96–97 (Cambridge Univ. Press 2012) (1891); *see also* STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 65 (2004); Hirsch & Wang, *supra* note 106, at 7–8 (tracing this theory as far back as the thirteenth-century English jurist Henry de Bracton).

110. *See* BENTHAM, *Principles of the Civil Code*, *supra* note 33, at 336–38.

111. The merits of wealth maximization as a normative goal have been much debated over the past few decades. *See, e.g.*, RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (defending such a view); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (attacking such a view).

112. *See, e.g.*, Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465, 471 (1971) (“The first consequence of the enactment of . . . a [100%] confiscatory inheritance tax would simply be that motives for accumulating capital would be much lower than otherwise.”).

more explicitly on the related notion that testamentary freedom generates a more productive citizenry, since individuals have motivations not just to save, but also to produce wealth in the first place.<sup>113</sup>

There are, however, costs associated with a policy of deference to testamentary intent. Such a system gives priority to the distributive wishes of the dead — who are thereby said to have power but not responsibility<sup>114</sup> — over the preferred allocation and management of property by the living, potentially leading to inefficiencies. In addition, society as a whole arguably incurs a cost to the extent it collects only limited estate tax revenues.<sup>115</sup> Furthermore, across generations, such a policy may perpetuate and entrench class disparities, a prospect that many find pernicious,<sup>116</sup> especially in a nation that affirmatively rejected systems of nobility.<sup>117</sup>

For these reasons, some commentators contend that the utilitarian justification for testamentary freedom fails because the benefits do not outweigh the costs. It has been argued, for example, that individuals may have many reasons to generate and accumulate wealth beyond what is needed during their lifetimes, such as their desire for prestige or power, their internal wiring, or other non-testamentary motives.<sup>118</sup> Moreover, to the extent that an ability to direct wealth at death means the enrichment of the living, such ability can theoretically lead to underproductive individuals in the next generation, undermining the utilitarian calculation.<sup>119</sup> Nevertheless, utilitarian theories remain a powerful driver of succession law policy.

In some respects, the utilitarian basis for testamentary freedom matches up well with the ostensible philosophy behind IP rights — that is, the maximization of social welfare by stimulating the production and

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113. See, e.g., Halbach, *supra* note 47, at 5–6.

114. Austin W. Scott, *Control of Property by the Dead. II.*, 65 U. PA. L. REV. 632, 657 (1917).

115. See POSNER, *supra* note 33, at 703–04 (characterizing the federal estate tax, which generates only approximately 1% of federal taxes collected, as a weak generator of the federal government's revenue).

116. See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 87–91 (1990). For John Rawls, wealth transfer taxes are justified primarily as a check on unequal concentrations of wealth and power that thwart key principles of justice like fair equality of opportunity, rather than as a revenue generator for the government. See JOHN RAWLS, *A THEORY OF JUSTICE* 277 (Harvard Univ. Press 2005) (1971). *But see* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 293 (1994) (contending that liberal egalitarian political theory, particularly that of Rawls, actually favors the abolition of such taxes).

117. See U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1.

118. See, e.g., Ascher, *supra* note 116, at 100; *see also* JOSIAH WEDGWOOD, *THE ECONOMICS OF INHERITANCE* 215–16, 232 (Ralph Adams Brown ed., 3d ed. 1971) (1929). This objection also finds substantial resonance in the IP context. See, e.g., Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 960–61 n.134 (2014).

119. See Ascher, *supra* note 116, at 99; Hirsch & Wang, *supra* note 106, at 9.

distribution of creative works that might not otherwise be undertaken<sup>120</sup> — including the provision of postmortem copyrights. While the need to avoid tragedy of the commons problems post-death is clearly different when addressing IP,<sup>121</sup> the perceived need for upfront incentives is similar. And, taken at face value, the proposition that copyrights should last for life but simply evaporate upon an author's death would wreak havoc on the ability to exploit those rights economically, raising the problems that generally afflict life estates.<sup>122</sup> This is because the timing of one's death is usually an uncertainty.<sup>123</sup> Arguments in favor of limiting copyright to life alone<sup>124</sup> seem to take for granted that most authorship is conducted by the young or middle-aged who can expect to live decades more.

By contrast, postmortem protection — like a policy of testamentary freedom more generally — would appear to encourage authors of all ages and levels of health to invest in creative projects by holding out the consolation prize that they may provide for their loved ones after death.<sup>125</sup> Furthermore, as mentioned above, many copyright interests are assigned to others — publishers and other distributors — in order to exploit their value in an efficient manner. Armed only with actuarial tables, or with certain non-copyright tools,<sup>126</sup> some distributors might be willing to invest in the distribution of creative works without a post-mortem term, but many others would likely hesitate.<sup>127</sup> Presumably for similar reasons, patent rights do not cease upon the inventor's death.<sup>128</sup>

Nevertheless, the application of utilitarian justifications for testamentary freedom to the case of postmortem copyrights is worth a closer

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120. *E.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also* William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169 (Stephen R. Munzer ed., 2001); *cf.* Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 515 (1996).

121. Much more could and should be said about what value, if any, is provided by copyright successors with respect to the management of copyrighted works. It is an issue I plan to address in subsequent work on the stewardship of IP. *See infra* Part V.B.

122. *See, e.g.*, *DUKEMINIER & SITKOFF*, *supra* note 107, at 397.

123. There are hybrid solutions for addressing the unknowable length of life. For example, one can grant a lifetime term but also provide, as an alternative, a guaranteed minimum term of years of protection, as the British copyright acts of 1814 and 1842 did. *See, e.g.*, *Bently*, *supra* note 20, at 67, 71.

124. *See, e.g.*, *Desai*, *supra* note 13, at 271 (“History and theory support a life term.”).

125. Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453, 474–75 (1981) (“The survival of copyrights ensures that the prospect of imminent death will not eliminate the financial incentive for . . . ‘late-life’ works.”).

126. The usual suspects could include a sufficient first-mover advantage or technological protection measure. *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 41–50 (2003).

127. *But see generally* Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 *HOUS. L. REV.* 613 (2014) (arguing that copyright's primary concern is stimulating creativity not dissemination).

128. *See* 35 U.S.C. § 154(a)(2) (2012). Of course, the patent term is structured quite differently from the copyright term.

look because of arguable vulnerabilities on two fronts. From one perspective, the strength of the postmortem term as a motivating force is debatable. Specifically, it is unknown how many authors are actually driven to create by the prospect that their works will not only be successful in the short run but also will produce a post-death economic legacy.<sup>129</sup> From the other side, it is possible that the postmortem term may exert too strong a motivating force. That is, if wealth maximization and the preservation of capital are the hoped-for goals of testamentary rights, then such goals are arguably incompatible with copyright policy, which is aimed at encouraging the investment of time and resources into authorship — an activity whose odds of large financial payout have been likened to winning the lottery.<sup>130</sup>

These lines of argument, however, may ask too much. Taken together, they are somewhat contradictory. If the system of incentives is weak, then there is little reason to worry about an excessive entry problem. But even taking each line of critique separately, neither is sufficiently at odds with utilitarian theories to warrant a total cessation of postmortem rights on those grounds.

### 1. Are Postmortem Rights Too Weak?

As with the debate over the post-death transmission of property more generally,<sup>131</sup> there is insufficient evidence about whether the incentives offered by the copyright regime are fully effective or optimally tailored.<sup>132</sup> In addition, many protectable “works,” such as letters, email, or touristy snapshots (works that fall into quadrant (B) in the chart above — unpublished works purely of interest to the author’s

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129. A number of prominent economists have cast doubt on the additional incentive effects of an extraordinarily long copyright term upon would-be authors. Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846, at \*2.

130. See, e.g., ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 9 (1995) (arguing that “[b]ook publishing is a lottery of the purest sort, with a handful of best-selling authors receiving more than \$10 million per book while armies of equally talented writers earn next to nothing”); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 794 (2004) (arguing that copyright policy “enabl[es] publishers in many current lottery-like content markets to dramatically increase their revenues from their most popular works and then to spend them on promoting those works,” thereby “crowd[ing] out more economically marginal works”); Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15 VAND. J. ENT. & TECH. L. 297, 304 (2013) (“[T]he lottery that copyright provides, rewarding an extremely small proportion of artists highly, suggests that copyright creates severe distributional problems and has serious failures in its inability . . . to provide the financial support that professional creators need to pursue their craft.”).

131. See, e.g., POSNER, *supra* note 33, at 704 (citing lack of consensus among economists on the relative influence of the bequest motive in wealth accumulation); Hirsch & Wang, *supra* note 106, at 9 n.28 (noting a similar lack of consensus).

132. Jessica Silbey and others are trying to address this lacuna. See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 5 (2014) (seeking such evidence from series of qualitative studies).



family members or friends) are usually created without any thought of financial remuneration.

Even with respect to more standard works, however, Justice Stephen Breyer and others have expressed doubt about the influence that a desire to provide for one's descendants exerts on authors.<sup>133</sup> But Breyer's critique was principally aimed at the length of the postmortem term, rather than at its very existence.<sup>134</sup> Furthermore, the claim that authors are not likely motivated by the thought of their great-grandchildren is a different proposition from the claim that they are not likely motivated by a desire to provide for their children.<sup>135</sup> That is, even accepting that a seventy-year postmortem period is excessive as a driving force does not necessarily render *any* post-death period of protection useless in that regard.

In fact, succession law default rules are replete with the insight that most people do wish to provide for their children. For example, if a parent inadvertently leaves a child out of his will because the child was born after its execution, the child typically will still be entitled to share in the parent's estate.<sup>136</sup> Such an inferred level of care even extends to multiple generations of one's descendants. Intestacy laws, which have evolved over time to reflect the presumed intent of the average decedent,<sup>137</sup> do not cap the generational distance between decedents and their lineal heirs.<sup>138</sup> One might challenge the relevance of these two examples, however, since they apply only when a decedent has not fully or effectively expressed her intentions through a will, perhaps indicating that she was not driven toward a productive life by concerns about

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133. See *Eldred v. Ashcroft*, 537 U.S. 186, 255 (2003) (Breyer, J., dissenting) (internal quotation marks and emphasis omitted) (“[E]ven if . . . some potential author might be moved by the thought of great-grandchildren receiving copyright royalties . . . so might some potential author also be moved by . . . royalties being paid for two centuries, five centuries, 1,000 years, ‘til the End of Time. And from a rational economic perspective the time difference among these periods makes no real difference.”).

134. His dissent arose out of the congressional extension of the copyright term by twenty years. *Id.* at 243.

135. Cf. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1193 (1970) (“It seems most unlikely that an author, assured of the economic fruits of his labor for his own lifetime, that of his children, and perhaps also his grandchildren, would elect not to engage in creative efforts because his posterity in perpetuity would not also so benefit.”).

136. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2014); UNIF. PROBATE CODE § 2-302(a) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, amended 2010).

137. See, e.g., DUKEMINIER & SITKOFF, *supra* note 107, at 63. Others emphasize that intestacy laws are aimed to ensure the welfare of close surviving family members. See Tritt, *supra* note 47, at 133; see also Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 285 (2010) (arguing that decedent intent should be the governing principle in the contexts of both testacy and intestacy).

138. All lineal descendants, no matter how remote, are eligible to inherit as long as there is no intervening surviving descendant. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1), (3) (McKinney 2014); UNIF. PROBATE CODE § 2-103(a)(1).

her descendants — near or remote. But such a view may overly discount the fact that approximately half of all decedents rely upon default intestacy schemes as their method of distribution.<sup>139</sup>

For even stronger evidence of longstanding interest in providing for one's descendants, one can turn to the patterns of donative behavior that gave rise to the Rule Against Perpetuities (“RAP”), which is still operative in some form in the majority of states.<sup>140</sup> The RAP is said to reflect society's distaste for the long-term fragmentation of property strands that results in the inalienability of the full parcel (especially in the case of land). It also reduces agency costs by shortening the period of separation of control and beneficial ownership (especially in the case of trusts).<sup>141</sup>

The RAP operates by preventing a testator (or living donor) from transferring property interests that may vest too far in the future and, thereby, from exercising control over remote descendants.<sup>142</sup> The very need for the RAP arose, however, because individual decedents attempted to do just that: to provide for multiple generations of their descendants by micro-managing the vesting of interests over time, often through so-called dynasty trusts,<sup>143</sup> rather than by leaving the property outright to their children. This impulse has gained traction in recent years with the increasing curtailment, or abolition, of the RAP in those

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139. Tritt, *supra* note 137, at 293. This is true even if, as Lee-ford Tritt argues, “it is fallacious to assume that all individuals without wills have consciously chosen the intestate distribution scheme.” *Id.* at 285.

140. See generally *The Rule Against Perpetuities: A Survey of State (and D.C.) Law*, AM. COLL. TR. & EST. COUNS., [http://www.actec.org/public/Documents/Studies/Zaritsky\\_RAP\\_Survey\\_03\\_2012.pdf](http://www.actec.org/public/Documents/Studies/Zaritsky_RAP_Survey_03_2012.pdf) [<http://perma.cc/H58Q-Q6ZT>].

141. See, e.g., Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2106 (2003) (assembling traditional justifications for the RAP adduced by courts and scholars). Scholars have offered alternative, yet compatible, justifications for the RAP. Stewart Sterk argues that the RAP stands in opposition to trusts that produce agency costs and externalities without corresponding benefits. See *id.* at 2117. Daniel Kelly justifies the RAP's interference with donor intent as a corrective that reflects the reality that dispositions are made with imperfect information. Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1158, 1182 (2013).

142. For the classic formulation at common law, see, for example, JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (Roland Gray ed., 4th ed. 1942) (“No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”); W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938) (same).

143. It is true that the prospect of establishing these sorts of trusts did not necessarily motivate industriousness, since trusts could also be established to distribute previously inherited wealth. The point is that the perceived need for the RAP reflected an apparently widespread interest of individuals in providing for remote descendants. Much more recently, the federal generation-skipping transfer (GST) tax addresses this same desire of individuals. In brief, the GST tax provides that wealth transfers be taxed at least once per generation. See I.R.C. § 2601 and the provisions that follow. (2012).

states competing to cater to families desirous of creating perpetual trusts.<sup>144</sup>

Further, policies underlying the RAP do not undermine postmortem copyrights.<sup>145</sup> To begin with, the RAP is concerned not with long-term ownership per se but rather with the uncertain vesting of ownership too far into the future. In many cases, as will be discussed below,<sup>146</sup> the various copyright strands that have been bequeathed will be vested interests; they will simply be owned for long stretches of time following an author's death. In addition, an important idea animating the RAP is to render the full parcel of property once again marketable. But the goal of marketability contrasts to some extent with a policy of eliminating copyright interests at the author's death: the elimination of the postmortem term would result in the cessation of exclusive ownership rights altogether.<sup>147</sup> In such a case, the intangible work — assuming users could put their hands on available copies — would become fully available for copying and adaptation by anyone.<sup>148</sup>

Even equating full marketability of the intangible work with its entry into the public domain, however, the time frame associated with the RAP would not require an end to postmortem copyright interests. The RAP period reflects a common law sentiment that a donor should be able to tie up property interests for no longer than the life of anyone she

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144. See, e.g., Sterk, *supra* note 141, at 2103 (describing phenomenon of competition to lure the trust business to their states); see also Robert H. Sitkoff & Max M. Schanzbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 412 (2005) (finding that “through 2003, the movement to abolish the [RAP] has affected the situs of \$100 billion in reported trust assets — roughly 10% of the 2003 total”).

145. For one thing, in those jurisdictions where it is in force, the RAP will presumably operate on copyright interests as on other property interests.

146. See *infra* Part V.A.

147. See, e.g., Golan v. Holder, 132 S. Ct. 873, 892 (2012) (“Once the term of protection ends, the works do not revert in any rightholder. Instead, the works simply lapse into the public domain. . . .”). In other words, under the RAP, invalid interests do not escheat to the state; rather, a revised distribution among the donor's named beneficiaries or other successors takes place.

148. Some economists would likely view the cessation of ownership rights to reduce marketability in this context. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 488–89 (2003). Others, however, would likely disagree. See, e.g., Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 4–5 (2013); Paul J. Heald, *Does the Song Remain the Same? An Empirical Study of Bestselling Musical Compositions (1913–1932) and Their Use in Cinema (1968–2007)*, 60 CASE W. RES. L. REV. 1, 5–6 (2009); 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, 1034 (2008); see also Gordon, *supra* note 127, at 623 n.27 (“Unlike tangibles, . . . works of authorship need not be owned by any one person or entity to be used efficiently and well; often common ownership (‘public domain’ status) is the most productive status.”).

possibly knows plus the next generation's minority.<sup>149</sup> By some calculations, this results in a time limit of roughly one hundred years.<sup>150</sup> Moreover, about half the states have now adopted some version of the Uniform Statutory Rule Against Perpetuities (USRAP).<sup>151</sup> The USRAP combines a wait-and-see period of ninety years with an authorization for courts to reform interests that have not yet vested.<sup>152</sup> Under any of these timelines, a postmortem period of copyright protection lasting seventy years is not unseemly. One countervailing consideration, however, is that these comparisons do not take into account the antemortem portion of the copyright term. For example, copyright protection will last 140 years when an author creates a work at age twenty and dies at age ninety. From that perspective, the full term of protection — during life and post-death — is longer than the perpetuities period. Nevertheless, for the other reasons just discussed, mere ownership for a lengthy period of time does not violate the spirit, let alone letter, of the RAP.

Longstanding succession law principles thus suggest that individuals are motivated to amass wealth by concerns about the next generation(s). Those principles, in turn, furnish at least some basis for postmortem copyrights that last for a period of time following an author's death. These principles are less persuasive, however, with respect to the many "works" that are created without any plausible expectation of financial return.

## 2. Are Postmortem Rights Too Strong?

From the opposite perspective, some may argue that a postmortem copyright term is socially harmful if it encourages additional entry into creative fields rather than into more reliably lucrative pursuits.<sup>153</sup> Taken to its logical conclusion, concerns about excessive entry into creative fields might counsel against any copyright protection at all, even for a

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149. Sitkoff & Schanzenbach, *supra* note 144, at 364.

150. DUKEMINIER & SITKOFF, *supra* note 107, at 880.

151. *Legislative Fact Sheet — Statutory Rule Against Perpetuities*, UNIFORM L. COMMISSION, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Statutory%20Rule%20Against%20Perpetuities> [<http://perma.cc/X4HV-Y5NK>] (listing enacting jurisdictions as of 2014).

152. UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1(a)(2), 3 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 1990). There was some debate over the choice of ninety years as the applicable wait-and-see period. *See, e.g.*, Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 162 (1988) (arguing that the period approximates actual measuring lives plus an additional twenty-one years).

153. *Cf.* FRANK & COOK, *supra* note 130, at 109 ("If the least talented contestants were to drop out and become engineers, teachers, or production workers, the performance levels of the top performers in winner-take-all markets would not fall by much, if at all."); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSED THE COMMONS OF THE MIND* 11 (2008) ("For most works, the owners expect to make all the money they are going to recoup from the work with five or ten years of exclusive rights. The rest of the copyright term is . . . a kind of lottery ticket in case the work proves to be a one-in-a-million perennial favorite.").

more limited period of time. While this view may have its adherents, the real question for present purposes is whether postmortem copyright protection completely undercuts wealth maximization goals, and it is not clear that it does.

First, it is certainly possible that the (often irrational) hope of being the exception to the rule — that is, of being the fortunate author whose work generates large revenues during life and after death — contributes to the hard creative work that results in the occasional big financial payout.<sup>154</sup> Second, even if the odds of a blockbuster payout from any given work are slim, many authors and artists rely upon whatever modest revenues their works do yield to supplement, if not fully supply, their income streams. That is, even if the astronomically successful exploitation of any particular book is rare,<sup>155</sup> some books, photographs, musical works, etc. can continue to generate worthwhile returns over time, especially since today's technology allows for the exploitation of the long tail. For example, many photographers deposit their photographs with stock photo agencies in exchange for royalty payments over time. Even if that income stream is modest, it may well supplement the author's and, afterward, her child's income beyond what other pursuits would have yielded.<sup>156</sup> And, such individuals may not be able to readily convert those royalty streams into lump-sum cash payments that could instead be passed on to successors.<sup>157</sup>

As with utilitarian theories of testamentary freedom more generally,<sup>158</sup> the effects of the postmortem term of copyright may also be critiqued at the level of the next generation. Specifically, in those relatively rare cases where copyrights maintain substantial value for extended periods of time, it is possible that authors' successors will simply kick up their heels and collect royalties rather than become productive wealth-maximizing citizens in their own right.<sup>159</sup> Once again, if the copyright system in fact yields more financial disappointment

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154. See Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 73 (2004) (noting that a "lottery ticket that offers a chance at superstardom may be worth more to some than a predictable salary in a more stable profession"); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 490 n.108 (2005) ("While actual financial rewards go to very few, it is possible that the promise and potential of huge financial rewards encourage individuals to create art. Thus, like a lottery effect, the promise of huge rewards may still incentivize artistic creation.").

155. See Desai, *supra* note 13, at 256.

156. Interview with Joel L. Hecker, Esq., photography lawyer (May 22, 2014) (on file with author).

157. *But cf.* Desai, *supra* note 13, at 256 (suggesting that authors who seek to provide for their children "could easily leave money or buy life insurance as a way to provide for heirs").

158. See *supra* note 119 and accompanying text.

159. Desai, *supra* note 13, at 259 ("Unlike authors who labor and pour their being into a work, their children and their children's children simply sit back and collect rent. . . ."); *cf.* Patry, *supra* note 19, at 927 (arguing that the sole beneficiaries of the CTEA's extension would be authors' estates and distributors, neither of whom created the works).

than payout, then idleness among copyright successors does not constitute a pressing problem. In any event, there is no apparent reason to be more concerned about slothfulness among inheritors of copyrights than among inheritors in general.

In sum, there is some theory and evidence to neutralize the argument that utilitarian theories of testamentary freedom operate too strongly as applied to copyright interests. If creative industries were all-or-nothing in terms of likelihood of financial payout, there might be cause for concern. But, given the possibility of modest returns on creative investments that may extend into the future, the existence of post-mortem protection as a strand in the copyright bundle does not necessarily vitiate wealth maximization goals.

### *B. Natural Rights and Labor Theories*

Another venerated theory for testamentary freedom frames it as a natural right that is beyond the government's power to abolish.<sup>160</sup> As is well rehearsed, John Locke posited the acquisition of property as derived from the rights one has in one's own person and, by extension, from the application of one's labor to objects in nature.<sup>161</sup> Natural rights couched in labor theories also serve as a fundamental justification for the granting of IP rights.<sup>162</sup> At its most basic, IP is thought to involve the rigor of the intellect and the adding of social value by an author<sup>163</sup> — investments that are often seen as the basis for a natural right in the fruits of one's mind.<sup>164</sup> But even accepting this premise does not necessitate, a priori, that IP rights should extend beyond the death of the intellectual laborer. Indeed, one might have expected the laborer's property rights to cease upon his death. Interestingly, that was not, apparently, Locke's view: having acquired property, one could use the property during life or transfer it to others, including at death.<sup>165</sup>

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160. Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 RUTGERS L. REV. 741, 749 (1984).

161. LOCKE, *supra* note 32, TREATISE II § 27.

162. It should be noted, however, that the transplantation of Lockean justifications for private property to IP rights has its detractors. See Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 141 (Stephen R. Munzer ed., 2001) (arguing that Lockean presumption of common property ownership undercuts any justification for strong IP rights).

163. Hughes, *supra* note 23, at 305.

164. See generally Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990). As is often emphasized, however, such justifications are secondary to utilitarian justifications. See, e.g., Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1256 (11th Cir. 2014); Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013).

165. This view is not without controversy. Compare Leslie Kendrick, *The Lockean Rights of Bequest and Inheritance*, 17 LEGAL THEORY 145, 165 n.93 (2011) (noting that "[s]ome theorists reject outright that Lockean property rights include the right of alienation" and collecting sources), with *id.* at 165 n.94 (citing opposing views). Kendrick herself concludes that "[s]uffice it to say that Locke repeatedly contemplates a right of transfer." *Id.* at 165. Discussing the issue at length, Eric Rakowski provides a helpful explanation: "The essence of this

But there is an internal conflict with respect to Locke's own views on the postmortem succession of property that bears on the present discussion.<sup>166</sup> On the one hand, Locke argues that an intrinsic principle of self-preservation imposes upon a parent a derivative obligation to sustain the children he has brought into the world.<sup>167</sup> Such an obligation would seemingly translate into a natural right to inherit by children. On the other hand, Locke elsewhere suggests that a right to bequeath property should override any rights to inherit by children.<sup>168</sup> Resolution of this tension is relevant to the existence and scope of postmortem copyrights because the former view could suggest that only the children of the author have a natural right to inherit copyright interests after the parent's death.

Jeremy Waldron has tried to resolve these competing notions in two ways. First, he downplays Locke's commitment to a natural right of testation.<sup>169</sup> Second, he draws out a pair of important distinctions: (1) between what is needed by the younger generation and what is surplus, and (2) between the state of nature and civil society. For Waldron, a coherent Lockean account of property transmission at death would acknowledge that "dependent children of a deceased proprietor [are] entitled automatically, as a matter of natural right, to enough out of his estate to maintain them."<sup>170</sup> However, "[a]part from the needs of dependents, there are no natural rights of succession."<sup>171</sup>

Under this formulation, in the state of nature, that which is surplus (that is, not needed by dependents) should return to the use of all of mankind — to the "common stock." It is only civil society that, for a variety of reasons that migrate into utilitarian thinking, affirmatively puts in place a full-fledged right of testation.<sup>172</sup> This was essentially the view of William Blackstone, who also viewed testamentary freedom as

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[libertarian] view is that people have an especially strong claim to property secured through their personal exertion and that this claim is sufficiently strong to permit them to give that property away, substituting another person's consumption of that property for their own consumption." Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL., PHIL. & ECON. 91, 111 (2005).

166. See Kendrick, *supra* note 165, at 151; J.J. Waldron, *Locke's Account of Inheritance and Bequest*, 19 J. HIST. PHIL. 39, 40 (1981).

167. LOCKE, *supra* note 32, TREATISE I § 88.

168. *Id.* at TREATISE I § 87 (emphasis added) ("But if any one had began, and made himself a Property in any particular thing . . . that possession, if he dispos'd not otherwise of it by his positive Grant, descended Naturally to his Children, and they had a right to succeed to it, and possess it."). Interestingly, neither Jeremy Waldron nor Leslie Kendrick seem to consider the possibility that the disposition by positive grant referred to is a lifetime transfer by the parent to a third party.

169. Waldron views a natural right of testation as largely incompatible with Locke's other closely held philosophical commitments. See Waldron, *supra* note 166, at 44.

170. *Id.* at 50.

171. *Id.*

172. *Id.* at 51 ("The right of bequest occupies at most a secondary position in a Lockean theory of property and is always a matter of civil law, never of natural right.").

a creature of civil law to obviate what would otherwise be “endless disturbances.”<sup>173</sup> Consistent with this strict reading of the natural law, then, copyrights not needed to sustain one’s dependents should terminate and the associated works should enter the public domain.

Leslie Kendrick agrees with Waldron’s interpretation of Locke — that, under natural law principles, a robust right of testation must yield to the right of children to inherit from their parents those items of property necessary for their sustenance and comfort.<sup>174</sup> But, she argues, as long as that duty is satisfied, a natural right of testation finds support in Locke’s view.<sup>175</sup> In particular, such a right is justified under a Lockean philosophy in which autonomous individuals formulate and undertake long-term pursuits. “Just as acquisition and ownership may further these goals, so may a person advance his life projects through transfers, as much at death as in life.”<sup>176</sup> Kendrick thus ties a natural right of testation to the promotion of human flourishing, a goal she sees as consistent with Locke’s overall philosophy.<sup>177</sup> In this way, Kendrick’s interpretation may be partially reconciled with Waldron’s: while she firmly grounds a right of testation in natural law, as opposed to the exigencies of civil society, she nevertheless justifies it as a means to a desirable end.<sup>178</sup>

Nevertheless, Kendrick’s commitment to marshaling support for a vigorous right of testation that is framed in natural law terms merits consideration. This is because a view of the natural law as guaranteeing, at most, a right to inherit by dependents that cannot be overridden has had mixed application under U.S. law.

It is true that longstanding protections for surviving spouses in most jurisdictions, which mandate that the survivors receive some fixed portion of the deceased spouse’s estate,<sup>179</sup> could suggest the validation of such a limited natural right with respect to postmortem transfers.

173. 2 WILLIAM BLACKSTONE, COMMENTARIES \*10–11. For Blackstone, to the extent that property rights, including the right to transfer property, were natural, that characterization was only true among the living: such rights expired at the time of the owner’s death. *Id.* at \*10 (“For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion [over his property].”). There is some conflict over whether Blackstone viewed property rights as natural at all. *Id.* at \*11; see also Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 315 (1979); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601, 607 n.22 (1998).

174. Kendrick, *supra* note 165, at 151.

175. *Id.* at 150–51.

176. *Id.* at 162. As previously mentioned, she acknowledges that there is some debate over the question of whether Lockean property encompasses general transferability rights. *Id.* at 165 n.93.

177. *Id.* at 163.

178. She admits that under her view, “the right of postmortem transfer is an instance of rule-consequentialism in furtherance of the fundamental law of nature.” *Id.*

179. This is the case for separate property states. Community property states protect surviving spouses by way of the “community” deemed to have formed. See, e.g., Terry L. Turnipseed, *Community Property v. the Elective Share*, 72 LA. L. REV. 161, 163 (2011) (arguing for the preferability of community property systems).



Furthermore, the imposition of an estate tax by the federal government and certain states to some extent might signal the weakness of any natural right to transmit one's full net worth at death.<sup>180</sup>

But these aspects tell only a partial story. To begin with, deep-rooted protections for surviving spouses can only loosely be characterized as reflecting a natural right to inherit by dependents. With respect to the relationship between spouses, Locke himself did not consider wives to be dependents of their husbands — at least not in ways comparable to the status of a man's children, whose very existence was caused by him.<sup>181</sup> Moreover, while married women in Locke's era, and for centuries thereafter, were in fact quite dependent on their husbands because of the property rights they forfeited upon marriage,<sup>182</sup> contemporary succession law principles reflect a trend toward grounding a surviving spouse's elective share rights upon economic partnership theories rather than upon more paternalistic support theories.<sup>183</sup> In any event, no matter how the system is characterized, the surplus beyond the surviving spouse's share does not revert to the common stock — it is distributed to the decedent's beneficiaries or heirs, as the case may be.

More fundamentally undercutting such a circumscribed scope of natural rights, all states (but one) have long permitted the disinheritance of children, even minor children, at the time of a parent's death.<sup>184</sup> While the United States is increasingly an outlier among nations with respect to this policy — a trend that perhaps bespeaks a natural right of

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180. At present, fifteen states and the District of Columbia have an estate tax (which addresses the donor); six states have an inheritance tax (which addresses the donee); and New Jersey and Maryland impose both forms of tax. See Liz Emanuel et al., *State Estate and Inheritance Taxes in 2014*, TAX FOUND. (May 28, 2014), <http://taxfoundation.org/blog/state-estate-and-inheritance-taxes-2014> [<http://perma.cc/X4Y8-FM7L>].

181. A wife's share in her husband's estate was due to the labor she had contributed to the marital unit, or perhaps by agreement, in contrast to the share of children in their father's estate, which was based on biological ties. LOCKE, *supra* note 32, TREATISE II § 183; *accord* Waldron, *supra* note 166, at 43.

182. See, e.g., Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN'S L.J. 179, 180 (1998) (describing the draconian common law doctrine of coverture).

183. See, e.g., UNIF. PROBATE CODE art. 2, pt. 2, gen. cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 151 (1994); Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 983–84 (1992). There is, however, some debate over the extent to which these contemporary aspirations are actually reflected in the relevant laws and their implementation. See Brashier, *supra*, at 152; Hirsch, *supra* note 51, at 2226–27.

184. See, e.g., Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 131 (2008) (“[E]very American state save Louisiana, has long allowed testators to disinherit their children and grandchildren for any reason or no reason.”). Louisiana provides a forced share for children who are twenty-three or younger or who suffer from permanent and severe mental incapacity or physical infirmity. See LA. CIV. CODE ANN. art. 1493 (2012). These protections date back to the colonization of Louisiana by the French. Joseph Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 LA. L. REV. 42, 58 (1941).

inheritance by dependents<sup>185</sup> — American commitment to its position runs deep. Indeed, the U.S. courts that have addressed the issue have held that the right of testation — even to deprive a minor child of an inheritance — is “inalienable.”<sup>186</sup> Nor does the imposition of the estate tax undermine the entrenched reverence with which the right of testation is held. The relatively high thresholds for the imposition of the estate tax, especially at the federal level,<sup>187</sup> permit a testator to direct the vast majority of her property at death. And, as Kendrick reminds us, “[i]t does not follow from the fact that a natural right is not absolute that it is not a natural right at all.”<sup>188</sup>

In sum, American law does not prioritize a child’s right to support at the parent’s death — as does the natural law under both Waldron’s and Kendrick’s readings of Locke — let alone insist that any surplus (beyond the limited reach of the estate tax) return to the common stock. Instead, it accords great weight to testamentary freedom — a stance that Kendrick demonstrates is at least a possible interpretation of natural law. Such a broader view of testamentary freedom would seem in accord with a policy of extending copyrights beyond the death of the author and of giving the author wide discretion in deciding to whom those interests should be distributed.

Some IP scholars are wary of a natural rights paradigm, fearing that such an interpretive move would require copyrights to endure perpetually.<sup>189</sup> Others disagree, taking the position that rights need not be without limitation in order to qualify as natural rights. Alfred Yen, for example, has posited that a foundational boundary is “possessability” — that is, natural rights to property are limited to “fruits of . . . labor . . . considered capable of permanent possession,”<sup>190</sup> which

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185. See, e.g., Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1–4 (1996).

186. See *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) (holding that Florida’s state constitution protected an “inalienable right[]” to devise property at death); *In re Estate of Beale*, 113 N.W.2d 380, 383 (Wis. 1962) (holding “that the right to make a will is a sacred and constitutional right, which right includes a right of equal dignity to have the will carried out” even to deprive a minor child of inheritance). The Supreme Court has likewise indicated that the right to transmit property at death is “essential,” and that the right of testation is particularly sacrosanct. *Hodel v. Irving*, 481 U.S. 704, 716, 718 (1987).

187. For example, federal law requires a return for estates with combined gross assets and prior taxable gifts that exceed \$5,340,000 for decedents dying in 2014, see I.R.C. § 2010(c)(3) (2012), and applies a tax rate of 40% to amounts exceeding that exempt amount, *id.* § 2001(c). It is true, however, that past rates have been higher. See, e.g., DUKEMINIER & SITKOFF, *supra* note 107, at 920 (noting estate tax rate reaching 77%).

188. Kendrick, *supra* note 165, at 152.

189. Cf. Reichman, *supra* note 85, at 643 (arguing that “a life-plus-fifty standard deviates from . . . the natural property rights thesis, which argues for perpetual protection on a par with the treatment of tangible property”).

190. Yen, *supra* note 164, at 523–24 (drawing from both English and Roman principles and providing examples of the air, the seas, and the like that would be excluded under this framework).

exclude — in the case of IP — incorporeal ideas.<sup>191</sup> Deven Desai extends this possession-based limitation to copyright duration, arguing that natural law justifies, at most, one's right to the IP produced by one's own labor to support oneself during life.<sup>192</sup> Summoning Waldron's interpretation of Locke,<sup>193</sup> Desai maintains that other than supplying the needs of dependents, natural law provides little foundation for the descendibility of copyright interests and, therefore, that copyrighted works should enter the public domain at the author's death.<sup>194</sup>

One might respond to Desai's refutation of postmortem copyrights in the following ways. First, even on the narrow reading of natural law that he prefers, postmortem copyrights would be justified in the case of an author who died leaving behind minor dependent children and valuable copyrights — but not enough other items of property — to support those children.<sup>195</sup> While such instances may not occur frequently, a policy of postmortem copyrights appears justified where they do. Second, as discussed above,<sup>196</sup> Waldron's view of the scope of postmortem rights under natural law is not the only view. There is, as Kendrick demonstrates, a strong argument to be made that natural law encompasses a more robust right of testation.

Moreover, as shown above,<sup>197</sup> to the extent that entrenched succession law policies can be used as an indicator of natural rights, those policies likewise reflect postmortem transmission rights beyond the bare minimum. While it is true that an author's successors did not themselves labor on the copyrighted works, such is often true of the successors of other forms of property. There is no requirement that those who inherit the family farm have actually fed the chickens or milked the cows. Indeed, it may actually be harder to demonstrate that the common stock would be more enriched by the absorption of postmortem copyright interests than it would be by the absorption of other forms of wealth that pass at death.

In sum, natural rights theories would seem to provide at least some support for the continuation of copyright interests beyond the death of the author as they do for the continuation of other interests beyond the death of the laborer.

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191. *Id.* at 537–38.

192. Desai, *supra* note 13, at 247. Although he does not say so explicitly, implicit in Desai's argument is the notion that since, after death, an author is no longer able to possess anything, natural law justifications for her copyrights cease.

193. See *supra* notes 169–71 and accompanying text.

194. Desai, *supra* note 13, at 249; see also *id.* at 221 (arguing that “copyright’s extension after the death of the author lacks theoretical grounding and is unjustified”).

195. Cf. Saul Cohen, *Duration*, 24 UCLA L. REV. 1180, 1191–92 (1977) (arguing that “[a]ny term of years, unless very long, may result in a work falling into the public domain while the author or his spouse or minor children are still alive and in need” and favoring a term of life of the author plus twenty years).

196. See *supra* notes 174–78 and accompanying text.

197. See *supra* notes 181–88 and accompanying text.

*C. Intelligent Estate Planning Theories*

Another justification for testamentary freedom is intelligent estate planning. Not concerned with goals of wealth maximization,<sup>198</sup> this justification posits that individuals are in a better position to dispose of their property than is the state.<sup>199</sup> For example, intestacy laws, which provide for the transmission of property based on presumed intent,<sup>200</sup> are by their nature rough estimates. Intelligent estate planning theories support the status of intestacy laws as default rules that should yield to an individual's more informed right of testation. A familiar example is the testator's superior ability to take account of the differing needs of potential beneficiaries. Where two children, equally loved, achieve different levels of financial success, intelligent estate planning suggests that the law should permit the parent to accommodate this disparity through unequal dispositions, both during life and at death.

There is, however, a fundamental difficulty with the use of intelligent estate planning theories to justify testamentary freedom with respect to any given interest, such as a copyright: these theories largely presuppose the answer to the question being asked, namely, to what extent should the interests survive the decedent at all? That is, intelligent estate planning assumes a right of inheritance and primarily speaks to reasons to favor a right of testation.<sup>201</sup> Framed another way, intelligent estate planning does not presume that individuals are in the best position to judge the needs of their loved ones against the needs of members of society at large.

This difficulty is at least partially surmountable, however, because intelligent estate planning also implicitly reflects other considerations besides a testator's ability to assess raw need among potential beneficiaries. For instance, a testator may wish to leave a house to one child, family heirlooms to another, and cash to yet another. These assets may all be worth equivalent monetary amounts, but the law will usually uphold the particularities of these choices.<sup>202</sup> The reasons it does so reflect values in addition to ensuring need satisfaction in the next generation. Specifically, the upholding of such choices honors the testator's judgment — not just as to the assessment of bare financial need, but also as to who will most appreciate and best tend to an asset that holds sentimental significance to the testator. That is, a testamentary instrument

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198. Hirsch & Wang, *supra* note 106, at 12.

199. *See, e.g.*, WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES, INCLUDING TAXATION AND FUTURE INTERESTS § 3.1, at 135 (4th ed. 2010). Hirsch and Wang call this the “father knows best” hypothesis. Hirsch & Wang, *supra* note 106, at 12.

200. *See supra* note 137 and accompanying text.

201. *See supra* text accompanying notes 106–107 on this distinction; *see also* Hirsch & Wang, *supra* note 106, at 12 n.38.

202. MCGOVERN, *supra* note 199 § 3.1, at 136.

can be seen as a final expression of a person that should be valued as such.<sup>203</sup>

These considerations permeate default principles operative during the probate process. For example, where a testator has provided for an array of gifts in the form of cash, specific items (such as a diamond ring or family heirloom), and a catch-all residuary bequest for any remaining property, the doctrine of abatement ensures that, if at all possible, the specific gifts make their way to their intended beneficiaries. This is so even if it means that the remaining cash and residuary beneficiaries receive nothing because all of the other assets are used to pay off creditors.<sup>204</sup> The rationale for this doctrine reflects the presumed sentimental weight that the testator attached to a particular item and her corresponding preference that the intended beneficiary receive *that* item intact rather than that all available assets be divided proportionately among all beneficiaries.

Intelligent estate planning thus has some parallels with the personhood justification for private property,<sup>205</sup> under which property rights serve as a vehicle for “self-actualization, for personal expression, and for dignity and recognition” of individuality.<sup>206</sup> In advancing this justification, Margaret Jane Radin claimed that certain “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>207</sup> Such things, like a wedding ring, a portrait, an heirloom, or a home, are fundamentally different from things like bank account funds, which, if lost or stolen, are fungible with their monetary replacement value.<sup>208</sup> For this reason, Radin argued, where personhood interests are at stake, they should bear on the resolution of disputes between competing claimants.<sup>209</sup> Personhood theories have also been extended to the realm of copyright, which recognizes that many creative works reflect the infusion of personality by their creators.<sup>210</sup> Thus one may paint a painting,

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203. See David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 88 (2012).

204. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 13-1.3 (McKinney 2014); UNIF. PROBATE CODE § 3-902 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, amended 2010).

205. Contemporary delineation of this theory owes its origin to Margaret Jane Radin. See *supra* note 32.

206. Hughes, *supra* note 23, at 330.

207. Radin, *supra* note 32, at 959.

208. *Id.* at 959–60. On the other hand, Radin takes pains to point out that “[w]hile I have argued that personal property should be specially recognized, I do not argue that there is no personhood interest even in fungible property.” *Id.* at 1008.

209. *Id.* at 958, 987.

210. See, e.g., Hughes, *supra* note 23, at 330. Commentators have pointed out, however, that works protected by IP laws reflect a range of investments of personality. Desai, *supra* note 13, at 250 (explaining that “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”); see also Hughes, *supra* note 23, at 342 (advocating a nuanced approach before ruling out certain genres of works as devoid of indicia of personality).

take a photograph, or write a novel; where the resulting works reflect the personality or self of the creator,<sup>211</sup> the argument runs, that aspect suggests that she should enjoy a privileged position with respect to the use of her work.

But it does not immediately follow that a policy honoring the personhood interests of the living should likewise honor such interests among the dead. The question thus becomes how much purchase the personhood interests of the author should have with respect to the transmission of copyrights at death. For, at first glance, the interests of the dead do not stack up well against the needs of the living — especially the expressive needs of the living — who may wish to use copyrighted works.<sup>212</sup>

It is here that intelligent estate planning theories provide some principled basis for giving weight to the former, for such theories bolster the personhood interests of the living *while they are still living*. That is, it seems likely that one would feel differently about one's most treasured possessions — and more to the point, about oneself — if one knew that although those possessions could be held onto during life, they would be dispersed to the public immediately upon one's death.<sup>213</sup> Under such a system, a whole category of personhood-infused objects cited by Radin — family heirlooms — would never come into existence because each successive generation's possessions would be confiscated by the public. Given the ways in which authors invest themselves into many of their projects, a desire to bequeath (or provide for loved ones through) copyrights that persist beyond their deaths seems consistent with other kinds of particularized bequests and not merely fetishistic.<sup>214</sup>

The chief difference, of course, is that the dispersal of IP to the public that would result from the elimination of postmortem copyrights

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211. Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (noting that “[p]ersonality always contains something unique” and thus even a “very modest grade of art has in it something irreducible, which is one man’s alone” that may be copyrighted); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (noting that copyright protects manifestations of “originality, of intellectual production, of thought, and conception on the part of the author”).

212. See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1242 (1996) (arguing that “given property’s role in filling out the individual personality, it would be particularly difficult to argue from Hegel that copyright protection should extend beyond the author’s death”); see also Desai, *supra* note 13, at 254 (noting that the right “is connected to the author’s life, and, like the Lockean view, does not support extension of copyright interests after death”).

213. See SHAVELL, *supra* note 109, at 68 (noting that “individuals who desire dead hand control will in fact suffer utility losses when they are alive, assuming that they anticipate that property will not be used in the way they want when they are dead”); Kendrick, *supra* note 165, at 162, 165 (noting that “contemplating the bequest may afford the testator satisfaction during life”).

214. Radin was clear that whatever leverage a personhood interest should provide, such an advantage should not come into play where a claimed interest was really a manifestation of an unhealthy “fetish.” Radin, *supra* note 32, at 969.

has practical consequences different from the forced confiscation of tangible property. Principally, a living author would not have to cope with the foreknowledge that, as would be the case for ordinary property, her successors would be deprived of access to, or the use of, the assets upon her death. Rather, authors would merely have to cope with the prospect that their successors would be deprived of *exclusive* control, which would now be shared with the public.<sup>215</sup> In practical terms, the main casualties of such a policy shift would be the ability to ensure that only one's successors could profit from one's copyrighted works, could control the integrity of one's works (including adaptations), and could limit the dissemination of private information contained in the works.

Foreknowledge of these losses might affect an author's personhood interests while she is still alive. But aspects of these casualties are controversial. There is a genuine doctrinal question about whether copyright should serve as a vehicle for protecting the privacy interests of authors or others.<sup>216</sup> Likewise, the social value of enforcing attempts to preserve the integrity of a work, especially after an author has died, is not entirely clear.<sup>217</sup> Furthermore, the economic reasons behind the derivative work right — preserving the author's market for adaptations of her work<sup>218</sup> — by definition disappear when the author has died without producing an adaptation. Some therefore argue that there is no policy reason to preserve rights to control the integrity of a work or adaptations for an author's successors.<sup>219</sup>

Nevertheless, there are ways to synthesize intelligent estate planning theories with copyright's instrumental underpinnings in these respects. With respect to privacy matters, even accepting their divergence from copyright's core mission, a postmortem copyright period may well prevent authors from destroying diaries, correspondence, and

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215. Where the intangible rights pertain to one or several physical copies over which the author retained control during life — such as a diary — she could of course rely upon her power to transmit the physical copies as a way of preserving her personhood interests even without postmortem copyrights.

216. *See, e.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc); Laura A. Heymann, *How to Write A Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 836 (2009); Deidré A. Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?* 3 (Oct. 3, 2015) (unpublished manuscript) (on file with author) (discussing “the extent to which copyright ought to protect privacy interests”). Such doubts are only exacerbated when an author has died, since privacy rights themselves typically cease at death. *See infra* note 254 and accompanying text.

217. Some, while accepting the possibility that distortions or mutilations of a work may cause emotional harm to an author, argue that such pain is personal to the author. *See* Liu, *supra* note 85, at 447; *cf.* Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 514 (2012) (arguing that the derivative work right is a form of moral right and should be recognized as such).

218. *See, e.g.*, *Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010).

219. Arewa, *supra* note 14, at 347; Liu, *supra* note 85, at 447.

memoirs — that is, the tangible works that represent the only embodiment of a copyrighted work in which there is public interest (see especially quadrant (A) above). Destruction of such materials can be seen as antithetical to copyright’s goals of creation and dissemination. Thus, to the extent that a postmortem term permits an author to entrust a chosen successor with control over the reproduction and dissemination of these sorts of works, such a policy is more likely to lead to the preservation of these works for (eventual) public access.<sup>220</sup> Intelligent estate planning theories, in this sense, fortify an author’s sense of posterity and choice not to destroy her work.

With respect to control over a work’s integrity, assuring that the work is disseminated in the form chosen by the author is also arguably consistent with copyright’s goals of fostering the creation and distribution of works.<sup>221</sup> While some works may be popular or influential enough to withstand distortion or adaptation relatively soon after publication — and still ensure public knowledge of the original — other works may take time to come into their own.<sup>222</sup> For example, “static” works, such as books and photographs, may be capable of being differentiated from later manipulations and adaptations — the plaintiff’s photographic portraits in the recent *Cariou v. Prince* litigation being one possible example.<sup>223</sup> But “dynamic” works that are performed arguably require sufficient public familiarity in order to ensure that same kind of differentiation.<sup>224</sup> It is entirely possible that a work might still

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220. This proposition is consistent with Jeanne Fromer’s thesis that personhood-regarding aspects of IP law can be reconciled with utilitarian aspects. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1802 (2012) (describing how the duration of copyright, as keyed to the life of the author, reaffirms for authors the importance of their personhood interests and thereby may serve as an incentive to creativity).

221. See Hughes, *supra* note 23, at 359; see also Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 926 (1999) (arguing for recognition of “the interest of a vast number of non-owners in having cultural objects with stable meanings”); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 69 (1985) (noting that “[p]rotection for creators’ personal rights . . . also enables society to preserve the integrity of its cultural heritage”).

222. Even Seana Valentine Shiffrin, who has argued against Lockean foundations for strong IP rights, *see supra* note 162, acknowledges that certain kinds of works might “require prolonged exclusive or highly restricted use for their production to be possible, for their communicative purpose to be achieved, or for their meaning to be fully realized.” *Id.* at 157. But she does not appear to include published works or works of a deceased author in that category. *See id.* at 165 (acknowledging the possible need for exclusive control with respect to “works-in-progress, private works, and perhaps unpublished works (of the living)” since “[t]hese works are not yet completely distinct from the person”).

223. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013). *But see* Subotnik, *supra* note 118, at 974 (questioning whether such differentiation would have been likely before the dispute became so well known).

224. *See, e.g., Mission Statement*, THE KURT WEILL FOUND. FOR MUSIC, <http://www.kwf.org/foundation/mission-statement> [<http://perma.cc/4CHH-Z9UT>] (explaining that the purpose of the foundation is to encourage “broad dissemination and appreciation of [Kurt] Weill’s music through support of performances, productions, recordings, and schol-



be in its infancy phase of public familiarization at the time an author dies. Aware of that possibility, an author may be more likely to disseminate her work if she knows that she can entrust a chosen successor with the exploitation of the work some time into the future.

## V. COSTS OF THE POSTMORTEM TERM

Justifications for testamentary freedom thus provide at least some support for a policy of postmortem copyrights. Copyright protection that extends beyond the life of the author signals to authors that their choices about how to direct at death the interests they invested in during life will be honored.<sup>225</sup> It ensures that, where valuable rights have been retained, the author's family — in the paradigmatic case, a non-working spouse and/or minor children<sup>226</sup> — or other chosen successors will be able to benefit financially from continued exploitation of the work. Such a policy thus arguably places value on an author's natural rights and personhood interests, and it encourages, at least in theory, authors of all ages to invest themselves in creative endeavors, even if the products of those efforts may take time to find favor in the marketplace.<sup>227</sup>

There are, however, significant social costs that flow from a system of postmortem copyrights. Here, too, succession law principles are helpful in arriving at a more refined picture of the costs and in beginning to suggest means for addressing these costs short of a total cessation of postmortem copyrights.

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arship" and foster "understanding of Weill's and [Lotte] Lenya's lives and work within diverse cultural contexts"); Interview with Kim H. Kowalke, President and CEO of the Kurt Weill Foundation For Music (June 26, 2014) (on file with author).

225. See Avishalom Tor & Dotan Oliar, *Incentives to Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons from a Behavioral Economic Analysis for Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437, 480 (2002) (using behavioral economic approach and finding that "decision makers find a lifetime-plus-years stream of payments significantly more attractive than a stream lasting for a comparable fixed-term period").

226. There is some historical support for the claim that the postmortem term was aimed primarily at providing for an author's immediate family after his or her death. The legislative history for what became the 1831 general revision of the Copyright Act of 1790 made specific appeal to the fact that if the author did not survive beyond the initial fourteen-year term, "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." 3 PATRY, *supra* note 77, at § 7:8 (quoting the 1830 House Judiciary Committee Report on the general revision). Likewise, the legislative history for what became the Copyright Act of 1909 reflected the need to "enable [the author] to provide for his children until they reach the age where they are likely to be self-supporting, or, if daughters, married." S. REP. NO. 59-6187, at 6 (1907).

227. See Fromer, *supra* note 220, at 1802 (arguing that "copyright's durational structure can serve as an expressive incentive, which can be particularly helpful to advancing copyright's goal of encouraging artistic creations").

A. *Categorization of the Costs*

The problems associated with postmortem copyrights are often framed in one of three ways: as raising search costs that result in market failures, as reflecting dead-hand control, or as resulting from the myopic management by the living.

## 1. Search Costs and Market Failures

Creators often come across earlier works that they would like to use in their own works — uses for which, depending on the circumstances, they would seek authorization and be willing to pay a reasonable license fee. Over time, tracing the chain of copyright title from the author to its present owners can make such an endeavor time-consuming, expensive, and fraught with uncertainty.<sup>228</sup> For example, because of the fundamental distinction between a copyright in the intangible work of authorship and an ownership right in a particular copy of the work, a documentary filmmaker can lawfully purchase a photograph but still not be able to use it in his film because he has not obtained permission from the copyright owner.<sup>229</sup> As search costs become unreasonably high,<sup>230</sup> they may give rise to market failures if the filmmaker forgoes use of what might be a contextually valuable image. Over time, the public may suffer because of such artistic compromises or, at the very least, because of delays in bringing such subsequent uses to market.<sup>231</sup>

It is possible that the postmortem term raises these costs. While an author is still alive, he may be able to direct the filmmaker to the current rights holder even if the author long ago assigned these rights away. By contrast, upon the author's death, and over the ensuing decades, the

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228. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 251 (2003) (Breyer, J., dissenting) (“The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder.”). See generally Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549 (2010).

229. See 17 U.S.C. § 202 (2012).

230. This problem has grown in scale following the congressional determination in 1976 to dispense with formalities for copyright protection and to make copyright interests fully divisible. See *supra* notes 77–78 and accompanying text.

231. See, e.g., Randy Kennedy, *The Heir's Not Apparent*, N.Y. TIMES, Sept. 6, 2014, at C1. The article describes the “in limbo” status of the estate of Vivian Maier, a street photographer who came to prominence only after her death. Despite his apparent best efforts to identify the relevant rights holder — through the use of genealogists — and to pay for the rights to Maier's work, a collector who “spent years tending and promoting her work through commercial galleries, museum exhibitions, books and a recent documentary” has been prevented from further activity by the possible discovery of a long-lost heir living in France. The dispute threatens to undercut the collector's own investment in Maier's work, which was partly responsible for bringing it to public attention in the first place. The estate litigation also affects the public, since it has threatened to put an indefinite hold on future publication and exhibition of Maier's work and “could prevent her work from being seen again for years.” *Id.*

availability of information required to trace the chain of title to the copyright often lessens. It therefore may become more difficult for the good-faith user to track down the current owner.<sup>232</sup>

Nevertheless, while real, the costs of tracing copyright ownership are not inherently a product of the postmortem feature itself.<sup>233</sup> Rather, they appear to be more a function of the overall length of the copyright term and of the prominence of the work in the marketplace.<sup>234</sup> Specifically, even if a copyright lasted only for the author's lifetime, an author in his eighties, for example — merely because he was still alive — might not be in a position to retrace the ownership of rights he had transferred away in his thirties. Conversely, for an author who created a work yesterday but died today, it would often be relatively straightforward to identify the new owner of the copyright tomorrow. With respect to works that retain great economic value over time, tracing the copyright ownership even after an author died long ago may be fairly simple.<sup>235</sup>

## 2. Dead-Hand Control

Ray Madoff has described the current copyright term as granting excessive rights to the dead.<sup>236</sup> She argues that copyright interests should be distinguished from tangible property, not from a law and economics view of an expressive work's characteristics as a public good,<sup>237</sup> but from a cultural perspective. Specifically, given the way in which expressive works build upon each other, and given that the copyright holder can control adaptations, she argues that the duration of copyright harms social progress.<sup>238</sup> Madoff links this problem to one of copyright

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232. Karjala Statement, *supra* note 88.

233. Indeed, Congress has attempted (so far, unsuccessfully) to ameliorate this problem — described in some contexts as the “orphan works” problem — not by curbing postmortem rights, but through limiting the remedies against users who make a diligent search for the copyright holder. *See* Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).

234. *Cf.* Fromer, *supra* note 220, at 1801 (“It is important not to conflate [copyright] duration's structure with its length.”).

235. The types of protracted litigation over rights to John Steinbeck's works and to various comic book character assets may, ironically, be proof of this in the sense that rival claimants tend to make themselves known. *See, e.g.,* *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 124 (2d Cir. 2013); *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 196–97 (2d Cir. 2008).

236. MADOFF, *supra* note 21, at 121, 131, 154.

237. *See, e.g.,* LANDES & POSNER, *supra* note 126, at 14.

238. MADOFF, *supra* note 21, at 144, 146–47. This line of argument has also been advanced in law and economics terms. *See* LANDES & POSNER, *supra* note 126, at 69 (noting that “from an ex ante viewpoint every author is both an earlier author from whom a later author might want to borrow material and the later author himself,” and that copyright policy should thus balance the benefits and costs of reducing copying).

and “immortality.”<sup>239</sup>

Others frame the objection even more squarely as extending control by the generally disfavored dead hand.<sup>240</sup> This age-old concern with respect to the intergenerational transmission of property is that such control is costly from an economic perspective because it may prevent the efficient use of property. But while any adherence whatsoever to a decedent’s testamentary wishes could in some sense be categorized as a species of dead-hand control,<sup>241</sup> such terminology is typically reserved for situations in which a decedent seeks not merely to make outright distributions of property, but to control uses of property into the future.<sup>242</sup>

Classic attempts at dead-hand control exist where a testator imposes a condition upon the receipt of property, such as the obligation to marry a spouse of a particular faith.<sup>243</sup> Such control is typically seen in the context of private trusts, where a trust’s settlor (that is, its creator) seeks to direct the distribution of wealth several generations into the future.<sup>244</sup> These issues frequently also arise with charitable trusts, where courts have long been pressed to balance donor intent with the reality of changed circumstances.<sup>245</sup>

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239. MADOFF, *supra* note 21, at 143. As discussed below, *see infra* Part V.A.3, it is unclear to what degree Madoff’s real target is the lengthiness of the term, MADOFF, *supra* note 21, at 146, or the management of rights by the living, *see id.* at 144–47.

240. *See, e.g.*, Garon, *supra* note 14, at 595 (footnote omitted) (“The Copyright Act of 1976 explicitly created dead-hand control of copyrights by adopting a life-plus-50-year term, and the extension exacerbates this danger by twenty years — an additional generation.”); *cf.* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1385 (2000) (characterizing copyright term, and its extension, as an instance of dead-hand control granted to authors).

241. For a passing articulation of the basic right of testation as implicating dead-hand control, *see* SIMES, *supra* note 48, at 3.

242. The literature here is deep. *See, e.g.*, POSNER, *supra* note 33, at 711 (describing dead-hand control as arising “when death does not result in a clean transfer to living persons that permits them to do with the money as they please”); Hirsch & Wang, *supra* note 106, at 5–6. Lord Hobhouse, a passionate nineteenth-century detractor of such control, colorfully argued that there was no justification why “because a man has been the possessor of property during his life, therefore he should continue to be its master while he is in his grave.” ARTHUR HOBHOUSE, *THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY* 222 (London, Chatto & Windus 1880).

243. *See, e.g.*, *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825 (Ohio Com. Pl. 1974) (discussing a will that imposed a requirement that the putative beneficiary marry “a Jewish girl whose both parents were Jewish” in order to receive his bequest).

244. The very nature of a trust imposes the preferences of the settlor, who may be deceased, in ways that deprive the beneficiaries of outright possession of the property at the moment of the trust’s creation. This feature has been exacerbated by the rise in so-called incentive trusts, which are geared to encourage certain specified behaviors by beneficiaries. *See, e.g.*, Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 448, 453 (2006); J. Peder Zane, *The Rise of Incentive Trusts; Six Feet Under and Overbearing*, N.Y. TIMES (Mar. 12, 1995), <http://www.ny-times.com/1995/03/12/weekinreview/ideas-trends-the-rise-of-incentive-trusts-six-feet-under-and-overbearing.html> [<http://perma.cc/XG76-Y4WF>].

245. This potential conflict has given rise to the *cy pres* doctrine, which permits courts to redirect the funds of a charitable trust whose purposes have become “unlawful, impossible,

It is true that authors and artists sometimes specify affirmative steps that they wish to be taken after their deaths. In some circumstances, the specified steps are to destroy certain of the creator's expressive works because she views the works as incomplete, to protect privacy interests, or for some other reason.<sup>246</sup> Franz Kafka and Justice Hugo Black famously ordered the destruction of certain works following their deaths. In Kafka's case, this included both written and oral instructions to his good friend Max Brod to destroy, among others, the unpublished manuscripts of *The Castle* and *The Trial* — instructions Brod did not follow.<sup>247</sup> Justice Black more successfully instructed his son and his secretary to destroy his conference notes and internal communications among the Justices, which he viewed as presenting a skewed historical record.<sup>248</sup>

Short of explicitly ordering the purging of one's works, an author may issue edicts regarding the future exploitation of the works. It is speculated, for example, that J.D. Salinger may have instructed the trust he created to adhere to his own artistic vision by not licensing a film version of *Catcher in the Rye*.<sup>249</sup>

Detailed authorial instructions expressed at death, if given effect, can affect the subsequent uses of a work in ways that raise public policy concerns.<sup>250</sup> In these situations, it seems fair to identify the issue as one of dead-hand control because the enforcement of such instructions imposes "control of past owners over future generations."<sup>251</sup> From the perspective of the public, these kinds of choices can exert what appears to be shortsighted restraint over the development and preservation of culture. In particular, requiring successors to enforce the destructive wishes of an author can obviously be problematic from a cultural heritage perspective — at least with respect to works that might reasonably be of interest to future users — because of the irreversibility of the

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or impracticable." RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003); see also MARTIN MORSE WOOSTER, THE GREAT PHILANTHROPISTS AND THE PROBLEM OF "DONOR INTENT" 203–04 (3d ed. 2007).

246. See, e.g., Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 813, 830–34 (2005).

247. See, e.g., JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 46–47 (1999); Strahilevitz, *supra* note 246, at 830–31. For an interesting account of the chain of instructions given with respect to Kafka's works, see Nili Cohen, *The Betrayed(?) Wills of Kafka and Brod*, 27 LAW & LITERATURE 1 (2015). As Cohen points out, in forgoing testamentary formalities, "it would appear that Kafka imposed upon his friend a moral, not a legal, obligation." *Id.* at 4.

248. See SAX, *supra* note 247, at 100–01. The Justice also expressed concern that making a practice of releasing such documents would inhibit unfettered discussions among the Justices in the future. *Id.* at 100.

249. See O'Neill, *supra* note 102, at 30.

250. I explore this topic further in a forthcoming paper. See generally Eva E. Subotnik, *Artistic Control After Death* (unpublished manuscript) (on file with author).

251. Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1553 (2007).

specified act.<sup>252</sup> For that reason, such instructions are regularly disregarded.<sup>253</sup> Furthermore, if the author is concerned about his own privacy interests, those interests vanish as a legal matter upon his death,<sup>254</sup> thereby weakening any basis for enforcing the instructions to destroy. The privacy interests of others can be dealt with through less drastic means, such as instituting a moratorium on access and/or publication.<sup>255</sup> Even the less drastic limitations on the use of a work, as in the possible *Catcher in the Rye* scenario, if given effect, can impose costs by disallowing uses of a work that the living rights holders do not themselves object to.

### 3. Suboptimal Stewardship by the Living

In general, however, examples of explicit instructions by authors appear to be relatively rare.<sup>256</sup> (Indeed, given the vast number of copyright interests created on a daily basis, such would have to be the case.) In some instances, successful or moderately successful authors may try to imprint their wishes through the selection of a literary executor or equivalent figure by whom they would like future choices about their works' exploitation to be made.<sup>257</sup> Such authors may express their wishes in a precatory (that is, non-binding) way to these individuals

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252. Scholars have taken a variety of stances on this question. Joseph Sax, while acknowledging the dilemmas faced by successors in the face of such instructions, argues that absent special circumstances, the "grounds favoring preservation ought to prevail." SAX, *supra* note 247, at 44. Such circumstances might exist where the author has left no doubt about his wishes and was unable to perform the act himself — as in the case of correspondence held by others. *Id.* Richard Posner has noted that one reason counseling against the enforcement of such instructions is that it is not possible to convince the dead to change their minds. POSNER, *supra* note 33, at 715–16. On the other hand, without such enforcement, authors might prematurely destroy their draft manuscripts. *Id.* at 716. Lior Jacob Strahilevitz has argued that destruction orders should be enforced because such a policy provides *ex ante* incentives to authors to undertake "high-risk, high-reward projects," because authors are in the best position to determine their own artistic legacy, and because such destruction may itself serve as a mode of self-expression. Strahilevitz, *supra* note 246, at 832–33.

253. POSNER, *supra* note 33, at 716; Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299, 329 (1991).

254. *See, e.g.*, *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979); *Rome Sentinel Co. v. Boustedt*, 252 N.Y.S.2d 10, 12 (N.Y. Sup. Ct. 1964); *see also* RESTATEMENT (SECOND) OF TORTS § 652I (AM. LAW INST. 1977).

255. *See, e.g.*, *Last Will and Testament of James I. Merrill* 13 (Sept. 30, 1994) (permitting access "to my notebooks and journals prepared subsequent to 1980 only after fifteen (15) years from the date of my death") (on file with author).

256. Ironically, instructions by an author-testator to his beneficiaries that they deal liberally with their inherited copyright interests, if enforceable, would actually constitute indicia of dead-hand control.

257. Unlike personal representatives, literary executors have no formal role during probate administration, *see, e.g.*, Symposium, *Estate Planning for Artists: Will Your Art Survive?*, 21 COLUM.-VLA J.L. & ARTS 15, 27 (1996), and may or may not inherit copyright interests themselves. They are typically charged, by contract or by will, with determining the contexts in which the author's work will appear. *See, e.g.*, *In re Estate of Hellman*, 511 N.Y.S.2d 485, 488 (N.Y. Sur. Ct. 1987) (noting that the "management of a literary work requires a delicate balance between economic enhancement and cultural nurture").

prior to death. Authors may, alternatively, simply request that the literary executor use good judgment in managing their corpus of works.<sup>258</sup>

In many cases, however, authorial preferences with respect to future exploitation of works are likely to be expressed solely through the choice to leave one's copyright assets to Beneficiary X as opposed to Beneficiary Y. Indeed, the mere selection of a residuary beneficiary — or the choice to die intestate — may be the only affirmative display of control that an author makes. But, as just discussed,<sup>259</sup> the mere designation of a successor-in-interest by a decedent is not typically categorized as dead-hand control. Rather, American society has embraced a general right to direct the transmission of one's property at death.<sup>260</sup> Applied too broadly, the dead-hand control label would be meaningless in identifying the sorts of transmissions that raise particular concerns about inefficiencies or inequities.

Consistent with the tendency to reserve the dead-hand control designation for circumstances beyond the mere selection of a successor, the most useful aspect on which to focus is often the management of copyright interests by the living.<sup>261</sup> For, while some successors do view their role as imbued with a duty to maximize access to and use of the works entrusted to them,<sup>262</sup> others may disallow artistic or scholarly uses for nebulous reasons. In these cases, control over works by successors can impose a cost on society. Rigid dominion over a work's fate by literary executors, for example, may mean that only authorized biographies get produced, which can skew the historical record.<sup>263</sup> But it is more accurate to describe these costs as resulting from the suboptimal management, or stewardship, of works by living successors than as a species of dead-hand control.

While this distinction may strike some as overly pedantic, the rhetorical label matters. First, it more precisely captures the core phenomenon that appears to bother commentators the most, which generally is not that copyrights are held pursuant to restrictive testamentary instruments but rather that the living are not managing them in the public's

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258. See, e.g., Interview with Edward Mendelson, literary executor for the W. H. Auden estate (May 15, 2014) (on file with author) (describing Auden's instruction to Mendelson: "You must use your judgment.").

259. See *supra* notes 240–42 and accompanying text.

260. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (equating the right to transmit at death with the right to exclude); FRIEDMAN, *supra* note 46, at 19; MADOFF, *supra* note 21, at 57–58.

261. Cf. Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, 31 CARDOZO ARTS & ENT. L.J. 77, 109 (2012) ("The phrase 'the dead hand' comes irresistibly to mind, except that it is a living hand that is allowed to reach out to control the spontaneous choices of the public domain.").

262. See Spoo, *supra* note 13, at 1827 (discussing generous grants of access by the estates of W.B. Yeats and Ezra Pound).

263. See SAX, *supra* note 247, at 143–45 (discussing contexts of authorized biographies of Langston Hughes and Judge Learned Hand).

interest. Lord Thomas Babington Macaulay in 1841 famously denounced a proposal that would have extended the copyright term in Britain to life of the author plus sixty years.<sup>264</sup> One of Macaulay's principal arguments was steeped in the concern that an author's descendants, hostile for whatever reason to their forebear's works, might suppress them and thereby deprive society — and the ages — of works such as Boswell's *Life of Johnson*. Indeed, Boswell's oldest son had made plain his desire to so suppress that work.<sup>265</sup>

In contemporary times, much of the documented evidence of the postmortem term's pernicious effects comes from a number of well-known successors to a group of predominantly British, Irish, and American poets, playwrights, and novelists. These successors are frequently cited for their bad behavior.<sup>266</sup> For example, the successor to James Joyce's copyrights, his grandson Stephen James Joyce, has caused much distress through his seemingly idiosyncratic refusals to license uses of his grandfather's work.<sup>267</sup> Such refusals have taken the forms of multiple attempted curtailments of scholarly use and wider cultural celebrations of Joyce's work — even those to mark the centenary of Bloomsday.<sup>268</sup>

Or, to take another example, consider the experience of Kurt Vonnegut's authorized biographer, Charles Shields.<sup>269</sup> Shields had developed a working relationship with Vonnegut late in Vonnegut's life in order to write a "big literary biography" of Vonnegut.<sup>270</sup> Immediately after their second interview, Vonnegut fell down some steps and slipped into a coma, never to reawaken.<sup>271</sup> Shields completed a draft of the biography, which quoted 258 of the 1,500 Vonnegut letters he had uncovered, but he was ultimately prevented from using any quotations

264. Thomas Babington Macaulay, A Speech Delivered in the House of Commons (Feb. 5, 1841), in *THE MISCELLANEOUS WRITINGS AND SPEECHES OF LORD MACAULAY* 609, 612 (London, Longmans, Green, & Co. 1889).

265. See *id.* at 616; see also Chafee, *supra* note 16, at 725 ("[T]he veto power of the copyright owner loses most of its desirability on the author's death and may become a nuisance when it passes to his descendants.").

266. See, e.g., Desai, *supra* note 13, at 258–59; Spoo, *supra* note 13, at 1822–27. These sorts of activities have spawned calls for courts to expand the defense of copyright misuse from serving as a check on anticompetitive conduct to reining in overreaching that affects users' free speech interests. See David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 543 (2010) (arguing that "copyright misuse should be decoupled from its basis in antitrust principles and instead should be based primarily in First Amendment speech principles"); see also Kathryn Judge, Note, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 933–36 (2004).

267. Spoo, *supra* note 13, at 1825–26.

268. D.T. Max, *The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship?*, NEW YORKER (June 19, 2006), <http://www.newyorker.com/magazine/2006/06/19/the-injustice-collector> [http://perma.cc/P2BN-CVCK]. See generally Spoo, *supra* note 261.

269. Craig Fehrman, *The Last Word*, NEW REPUBLIC (Oct. 12, 2011), <http://www.newrepublic.com/article/books/magazine/96122/vonnegut-shields-and-so-it-goes-estate> [http://perma.cc/768V-72CL].

270. *Id.*

271. *Id.*



by the Vonnegut estate — despite the fact that Vonnegut himself had authorized Shields's biography.<sup>272</sup>

It is true that an author has some causal relationship to this phenomenon by selecting his successor (either actively or by default), and this is presumably at least partly what Madoff means by linking copyright's durational ills to the theme of "immortality."<sup>273</sup> But at the end of the day, she and others do not suggest that dying authors regularly go out of their way to select successors whom they believe will be especially eccentric or selfish. Rather, the concern usually voiced is about how the living are exercising their control over copyrights.<sup>274</sup> Indeed, in some cases, commentators have specifically criticized copyright successors for deviating from what their ancestors would have wanted.<sup>275</sup> Perhaps the greatest downside to the dead-hand control branding is that its rhetorical force unfairly downplays any legitimate basis for post-mortem copyrights. At the same time, it unhelpfully depicts living successors as mere pawns of their author-forebears with no duty to wield their inherited copyright holdings in a socially responsible way.

### *B. Nascent Proposals to Address Costs*

This Article has attempted to demonstrate two things. It has argued that there is a stronger foundation for postmortem copyrights than critics of the policy have acknowledged. Specifically, it contends that any debate over the existence and scope of postmortem copyrights should take into account not just general property theories but also theories and doctrines from succession law. In addition, it argues that the costs flowing from the postmortem term should be properly categorized, and that suboptimal stewardship by successors, rather than dead-hand control, is often the real culprit.

The question becomes how to address these costs short of eliminating postmortem copyrights altogether, which, as has been demonstrated, do find at least some support in succession law. One possibility is to shorten the postmortem term. Such a shortening would directly address the length of time copyright interests are controlled by the author's successors. A lifetime term plus some additional period of protection, short of seven decades, could still be consistent with the succession law principles discussed herein.<sup>276</sup> For example, a post-

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272. *Id.*

273. See *supra* text accompanying note 239.

274. See MADOFF, *supra* note 21, at 144–47; see also *supra* notes 7–16 and accompanying text.

275. See *supra* text accompanying note 11; cf. Spoo, *supra* note 13, at 1827 (noting that some "heirs and transferees . . . are remote historically, and sometimes temperamentally, from the authors whose rights they administer").

276. Cf. Samuel J. Elder, *Duration of Copyright*, 14 YALE L.J. 417, 418 (1905) ("Certainly an author should have the right to the earnings of his works during his life-time and for a limited period his family should have the same after his death.").

death period of five decades, as recently proposed by the Register of Copyrights,<sup>277</sup> might be sufficient to accommodate the intelligent estate planning goals of a decedent-author in effectuating her preferred plan of distribution among her known successors. It might also sufficiently accommodate a natural right of testation, permitting the author to distribute freely her copyrights upon her death even if those interests did not persist for seven decades.

Alternatively, accepting the existence of both some period of post-mortem protection and the reality that that period will come to a close, onerous dead-hand control provisions, where they do exist, might be scaled back. In addition, by channeling the well-developed duty of prudence required of trustees,<sup>278</sup> we could seek ways to encourage successors of copyright interests to manage and invest copyrights as a prudent copyright holder would. Such a duty could involve forethought about preserving the long-term value of works — not only in the sense of economic value, but also in the sense of cultural heritage value. Whether such encouragement should come in the form of enforceable duties — as in the case of trust law — or of behavioral norms remains to be developed in future scholarship.

## VI. CONCLUSION

Much ink has been spilled over the issue of copyright duration. Recently, arguments have been lodged against the very existence of a post-mortem term. While the concerns driving these arguments are real, the debates have not yet fully engaged with whether and how succession law principles, which govern other property or property-like interests, bear upon the transmission of copyright interests. Such an analysis reveals at least some justifications for a postmortem term. Nevertheless, the differences between copyrights and traditional property interests counsel in favor of caution with respect to an extended postmortem term. For these reasons, calls to shorten the current term should be considered seriously. Should that effort fail — and even if it does not — further work is needed to arrive at ways to improve the stewardship of the postmortem term by copyright successors.

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277. See *The Register's Call for Updates to the U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of Maria A. Pallante, U.S. Register of Copyrights) (raising the possibility of “reverting works to the public domain after a period of life plus fifty years unless heirs or successors register their interests with the Copyright Office”).

278. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 11-2.3 (McKinney 2014); UNIF. PRUDENT INVESTOR ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1994).