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THE FINE ART OF RUMMAGING: SUCCESSORS AND THE LIFE CYCLE OF COPYRIGHT

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ABSTRACT

This chapter argues that a possible justification for the extension of copyright beyond the death of the author is the key role that copyright successors may serve in the life cycle of artistic works. In particular, with respect to an artist's unpublished work, a time-sensitive decision must be made about whether or not to keep the physical artifacts associated with copyrights—an obligation that often falls to these successors. Bulky canvases, sketches, negatives, and myriad other items must be sifted through in order to separate the wheat from the chaff. In this way, the post-death cleanup period offers a once-in-a-lifetime event in which copyright successors can serve a socially valuable function.

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INTRODUCTION

The death of the author figure has been the subject of great critical debate.[1] But, regardless of one's position on that score, it is beyond cavil that authors really do die.[2] Under current copyright law,[3] it is likewise indisputable that virtually all copyright interests still owned by an author at death pass to someone else.[4] Nevertheless, the justifications for postmortem copyrights are still highly controversial, particularly where the system of copyright succession appears to reduce access to an author's work.

Take the curious case of Vivian Maier, who spent much of her working life as a nanny and whose photographic genius was not discovered until 2007,[5] not long before her death at the age of

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[1] *Compare* ROLAND BARTHES, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 148 (Stephen Heath trans., 1988), *and* Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 159–60 (Josué V. Harari ed., 1979), *with* Lionel Bently, Review, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973, 973 n.6 (1994) (collecting sources that contest the poststructuralist view).

[2] Other commentators have been similarly attracted to this rhetorical and conceptual interplay. *See generally* Amy Lai, *The Death of the Author: Reconceptualizing 60 Years Later: Coming Through the Rye as Metafiction in* Salinger v. Colting, 15 INTELL. PROP. L. BULL. 19 (2010); Dawn Watkins, *The (Literal) Death of the Author and the Silencing of the Testator's Voice*, 24 LAW & LITERATURE 59 (2012).

[3] *See, e.g.*, 17 U.S.C. §§ 201, 302(a) (2016).

[4] In the United States, there are some exceptions with respect to affiliated rights. In particular, both moral rights under the Visual Artists Rights Act of 1990 (VARA) and the ability to trigger termination rights through the granting of licenses are personal to the author and generally expire at the author's death. *See* 17 U.S.C. §§ 106A(d)(1), (3), 203(a) (2016); Edward Lee, *Suspect Assertions of Copyright,* 15 CHI.-KENT J. INTELL. PROP. 379, 382 (2016) ("These rights are more personal and are designed to protect the interests of authors, not the general class of copyright owners."); *see also* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1405 (2011) ("For example, as with defamation law, an author's rights under VARA last only for the life of the author, which suggests a concern not with economic interests but with the ability to engage in an ongoing dialogue with one's audience.").

[5] PAMELA BANNOS, VIVIAN MAIER: A PHOTOGRAPHER'S LIFE AND AFTERLIFE 7-11, 264-68 (2017); *see also* Julia Gray, *The Curious Case of Vivian Maier's Copyright*, GAPERS BLOCK (Aug. 13, 2013), http://gapersblock.com/ac/2013/08/13/the-curious-case-of-vivian-maiers-copyright/.

eighty-three.[6] Her work came into the hands of auction participants when she stopped paying the bills on the five storage units that housed her photographic work and other assorted belongings.[7] It was only when those buyers started rummaging through the boxes that they discovered the treasure trove of photographs and motion picture reels contained within—some in the form of prints, slides, and negatives, and many others on thousands of rolls of film that Maier herself had never even developed.[8]

While Maier's story is highly unusual, it serves as a useful vehicle because it affords an opportunity to focus exclusively on the potential roles played by copyright successors. Specifically, it is inconceivable that copyright incentives operated in any way to encourage Maier to take her thousands of photographs[9]—she never did anything with them during life, nor did she express any wishes about how they should be exploited after her death.[10] And following Maier's death, successors to her physical archive posted her work online, mounted exhibitions, wrote books, and produced films and videos that brought much favorable public attention to her work that

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[6] BANNOS, *supra* note 5, at 270-71.

[7] *Id.* at 7-13, 268. The initial purchaser paid a total sum of $260 for the entire contents of all five storage lockers. *Id.* at 8. Apparently, more of Maier's possessions—including newspaper clippings, clothes, and tchotchkes—were contained in two additional storage lockers. *Id.* at 175. Yet, even there, potentially hidden photographic gems were uncovered in the form of "a taped-shut leather case that contained hundreds of rolls of undeveloped color film." *Id.*

[8] *Id.* at 9-11, 268-71. According to one source, "[t]here were about 2,000 undeveloped black & white rolls which we[re] [posthumously] processed and scanned." Vivian Maier FAQ's, http://www.vivianmaier.com/ (last visited May 10, 2019).

[9] On this topic more generally, see Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) ("Copyright's incentive model largely bypasses a persuasive account of creativity that emphasizes a desire for creation, grounded in artists' own experiences of creation.").

[10] BANNOS, *supra* note 5, at 276 (noting "Maier's choices to not share…her photography"). Maier died intestate. *Id.* at 146, 231; *see also* Estate of Maier v. Goldstein, No. 17 C 2951, 2017 WL 5569809, at *2 (N.D. Ill. Nov. 20, 2017) (on a motion to dismiss). Nor, apparently, did she leave any detailed instructions that her work be used to benefit some person or cause after her death (which might have indicated that she was motivated by copyright after all in her photographic endeavors). On the latter point more generally, see Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253 (2017).

she did not seek during her lifetime.[11] And yet, because copyright ownership does not travel with the material items to which it pertains,[12] the possibility of copyright enforcement by or on behalf of remote relatives has threatened to restrain the work's circulation.[13]

Because of the tremendous power estates have to diminish or even thwart public use of and access to copyright-protected materials, many commentators decry the role of post-death copyright successors in advancing the arts.[14] As Australian arts writer Katrina Strickland points out, "[c]opyright has … been an effective tool for influencing what is written about an artist, and by whom" because "an art book without images of the artist's work is severely hobbled."[15] In discussing the fallout between art historian Janine Burke and Barbara Tucker over Burke's hoped-for use of

[11] BANNOS, *supra* note 5, at 127, 131, 153, 156, 175, 189, 191, 199-201, 208-12, 222-23, 232-33, 238-243.

[12] 17 U.S.C. § 202 (2016).

[13] *See, e.g.*, *Estate of Maier*, 2017 WL 5569809, at *2 (denying motion to dismiss the Estate of Vivian Maier's "copyright and trademark infringement case against defendants Jeffrey Goldstein and Vivian Maier Prints, Inc., for allegedly engaging in copying, public exhibition, and commercial exploitation of the unpublished photographs of Vivian Maier"); BANNOS, *supra* note 5, at 272-79; Randy Kennedy, *The Heir's Not Apparent: A Legal Battle Over Vivian Maier's Work*, N.Y. TIMES (Sept. 6, 2014), https://www.nytimes.com/2014/09/06/arts/design/a-legal-battle-over-vivian-maiers-work.html [https://perma.cc/FY8Q-JTX4]. The Cook County Public Administrator has represented the Estate, BANNOS, *supra* note 5, at 273–74, further complicating any notion of what approach to her intellectual property is most in the public interest.

[14] *See* Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 80–81 (2015) (collecting commonly held views); *see also* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 144–47 (2010); Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 258–59; Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1822–27 (2009); Michael Bradford Patterson, Note, *To Speak, Perchance to Have a Dream: The Malicious Author and Orator Estate as a Critique of the Digital Millennium Copyright Act's Subversion of the First Amendment in the Era of Notice and Takedown*, 22 J. INTELL. PROP. L. 177, 179–80 (2014).

[15] KATRINA STRICKLAND, AFFAIRS OF THE ART: LOVE, LOSS AND POWER IN THE ART WORLD 194 (2013).

images by the late painter Albert Tucker,[16] Strickland perceptively writes:

> The problem in all cases like this is that history is not objective. Offence can be taken over slights, both intentional and non-intentional, communication breaks down and distrust sets in. It happens in many fields; the difference here is the widow has a weapon up her sleeve.[17]

Unlike the artists themselves,[18] who can (at least theoretically) claim to have invested their labor and personhood into the creation of expressive works on the promise of copyright,[19] copyright successors who acquire their rights from the artist after death appear to be the most passive of copyright owners. No artists are they; indeed, successors need not even display the hustle of a publisher or distributor seeking to acquire rights from the artist during life. It is only the sad but inevitable death of the artist that causes copyright ownership to vest in these post-death successors.[20] Once having acquired these rights, successors, driven by both economic and non-economic motivations (such as grief, protectiveness, or even hurt pride), can make life difficult for would-be users.

While fully appreciating these concerns, this chapter argues in favor of a more nuanced understanding of the roles played by post-death copyright successors and the concomitant justifications

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[16] *Id.* at 196–202.

[17] *Id.* at 200.

[18] Admittedly, artists like Vivian Maier test the bounds of such a generalization since her motives are so unclear.

[19] Here I combine the three well-known justifications for intellectual property, including copyright. *See, e.g.*, 1 PETER S. MENELL, MARK A. LEMLEY, AND ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 2–26 (2018).

[20] This (usually) involuntary transfer of rights provides a unique context in which to consider what Justin Hughes termed a "paradox of personality and alienation": that "on most occasions the complete alienation of intellectual property is an exercise of rights over property in an act that, by its nature, denies the personality stake necessary to justify property rights." Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 347 (1988).

for postmortem copyrights.[21] For, while there may be bad apples in the barrel, beneficiaries and heirs can play a useful function in "necromanagement."[22] Estates that own artists' copyright interests can serve as hubs of activity that aim to keep artists' work relevant and in living discourse.[23] Most critically, where those copyrights are associated with unpublished works, the prospect of copyright protection (including the right of first publication) can serve as a valuable incentive to beneficiaries and heirs to wade through the reams of material left behind by an artist rather than deposit it all in dumpsters. This impetus may be especially important in the visual arts, where large canvases, heavy sculptures, and numerous sketches and film negatives may occupy great amounts of physical space and therefore may need to be dealt with quickly.

As will be discussed below, the positive influence of this system of incentives acting upon post-death successors provides a concrete and under-appreciated justification for postmortem copyrights under both succession law and copyright law principles. In short, the chapter argues that the post-death cleanup period offers a once-in-a-lifetime event—coming at the end of an artistic lifetime—in which successors to intellectual property rights can serve a socially valuable function, especially in the visual arts.[24] For this reason alone, greater theoretical support for the role of post-death copyright successors is perhaps in order.

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[21] For a different argument favoring a more nuanced view of intellectual property successors, see Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. Rev. 639, 643–44 (2017) (arguing that the "mourning practices" of successors should be respected).

[22] Gavin Edwards, *One Man's Mission to Keep Musicians' Legacies Alive*, N.Y. TIMES (June 17, 2016) (citation and internal quotation marks omitted).

[23] *See, e.g.*, Michael Paulson, *Beyond 'Wonka': They Want Every Kid to Know Roald Dahl's World*, N.Y. TIMES (Aug. 31, 2016) ("The goal, as the estate prepares to celebrate the Sept. 13 centennial of Dahl's birth, is wildly ambitious: to have every child in the world engage with a Roald Dahl story.").

[24] Of course, just because copyright successors can serve a socially valuable function does not mean that they will. For that reason, in forthcoming work I argue in favor of an operative stewardship principle. *See* Eva E. Subotnik, *Free as the Heir?: Copyright Successors and Stewardship* (unpublished manuscript, on file with author).

I. THE VIEW UNDER SUCCESSION LAW

Support for a system of private succession is generally framed in terms of the donor's perspective.[25] Utilitarian justifications for succession laws, for example, are often tied to utility maximization goals that would be accomplished during the decedent's lifetime.[26] In particular, the spur to productivity and to the amassing of capital as well as the engendering of personal satisfaction that come from the availability of individually directed testation take place, if at all, during the decedent's lifetime.[27] In parallel fashion, justifications for postmortem copyrights are frequently based on anticipated incentive effects on authors themselves.[28] To be sure, in both contexts, it is also hoped that these effects will inure to the benefit of society as a whole over time.[29] The difficult question of incentive effects on decedents generally, and on authors specifically, has been greatly debated in the literature.[30] This chapter instead focuses on the impact of such systems on the surviving generations, which has not been as thoroughly considered as part of the overall utilitarian calculation.

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[25] *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."); *see also* Naomi Cahn & Amy Ziettlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 326 (2015) (describing this perspective as a "canonical construct" within succession law).

[26] *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand,* 68 IND. L.J. 1, 8 (1992). Wealth maximization is the best possible gauge of utility maximization for some. *Id.*

[27] *Id.* I include here the satisfaction that (theoretically) would come from knowing that one's close relatives will benefit if one opts for the default rules of intestacy.

[28] *See, e.g.*, S. REP. NO. 104–315, at 12 (1996) ("One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren.").

[29] *See, e.g.*, Lawrence M. Friedman, *The Law of Succession in Social Perspective*, *in* DEATH, TAXES AND FAMILY PROPERTY 14 (Edward C. Halbach, Jr. ed., 1977) (arguing that inheritance laws "help define, maintain and strengthen the social and economic structure" of society); *see also* S. REP. NO. 104–315, at 11 (1996) ("[T]he primary purpose of a proprietary interest in copyrighted works that is descendible from authors to their children and even grandchildren is to form a strong creative incentive for the advancement of knowledge and culture in the United States.").

[30] *See* Subotnik, *supra* note 14, at 96–105 (describing and engaging with some of the main arguments).

Beginning with property succession more generally, there are at least two related benefits for the surviving generations. First, a persuasive argument can be made that without an orderly system of succession, the property of the deceased would be seized by the nearest taker.[31] It does not take too much imagination to appreciate that this prospect would devolve into undesirable social disruption and chaos among the still-living as the strong began to hover over the soon-to-die (perhaps even helping the process along) in order to grab the newly freed-up property.[32] In this way, an orderly system of succession offers advantages to society as a whole—not just to the actual recipients of a decedent's property.

To be sure, a system of forced confiscation of decedents' property by the state could probably provide the same benefit of social order. But it would be costly,[33] and it would likely not produce the most efficient use of the property seized. Furthermore, even under the view that this approach could pay for itself with the property recovered from the recently departed, the prospect of this approach—and certainly the prospect of a shift to it from our current system—would likely cause too much distress among the living to justify it under utilitarian principles.

A second benefit to private succession laws—addressing a potential problem that flows from the first—is that current succession laws produce a ready-made cadre of individuals with incentives to clean up the detritus and organize the affairs of the dead in a way that maximizes economic value.[34] As is familiar to

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[31] *See, e.g.*, MELVILLE MADISON BIGELOW, THE LAW OF WILLS FOR STUDENTS 8, 10-11 (Fred B. Rothman & Co. 1996) (1898).

[32] Under the law, property is not left "up for grabs" at death—but in part, that is because of how we define the term "property." LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 15 (2009) (internal quotation marks omitted). On the topic of "objects and entitlements that defy th[e] norm" of a decedent's right to property transfer at death, see David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 543 (2014).

[33] There are, of course, administrative costs produced by the current system of individually directed wealth transmission. *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 48 (10th ed. 2017) (discussing the costs of probate).

[34] *Cf.* 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) (noting the argument that "giving and bequeathing not only express but beget affection, or at least responsibility"). Halbach here seems to refer primarily to responsibility in the sense of taking care of one's elders in their time

anyone who has gone through the process, in order to most efficiently use or sell the property left behind, the contents of a life must be sorted through and either distributed to willing takers or discarded. These tasks—so heavily grounded in the materiality of physical objects—have particular resonance in contemporary life, where the post-death cleanup process can be both rewarding and onerous.[35] As the journalist Alison Stewart recently put it:

> Looking back, if I could have poured a truckload of cement into that basement, filled the room to the ceiling, and claimed I had no idea what happened, I would have done so. It took me eight months to clean out that house. Junk removal took over my life.[36]

Indeed, for Stewart, one technique for summoning the willpower to tackle the task at hand was to treat it like a job for which she was "being paid to deal with all matters."[37] Despite the emotional and physical toll that such endeavors require, however, society is once again probably better off having this function organized and performed by private parties, who can better sift the wheat from the chaff,[38] than by the state (or its agents[39]).

At first blush, the foregoing discussion about property generally might appear to have no bearing on whether we should have a system of individually devised copyrights—after all, the essence of a work of authorship protected by copyright law is its intangibility. So, it would seem, we need not worry in the abstract

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of infirmity, but the notion of responsibility has obvious carryover to the tasks that need to be done after death.

[35] The devotion to Marie Kondo's KonMari Method is one testament to the contemporary problem of what to do with too much stuff. *See* MARIE KONDO, THE LIFE-CHANGING MAGIC OF TIDYING UP: THE JAPANESE ART OF DECLUTTERING AND ORGANIZING (Cathy Hirano trans., 2014); Penelope Green, *The Cult of Marie Kondo*, N.Y. TIMES (Jan. 23, 2016).

[36] ALISON STEWART, JUNK: DIGGING THROUGH AMERICA'S LOVE AFFAIR WITH STUFF xix (2016).

[37] *Id.* at ix.

[38] An arguable advantage to having a will is that one can choose successors who one thinks will use the inherited assets most capably. *See* GEORGE W. THOMPSON, THE LAW OF WILLS 21 (3d ed. 1947).

[39] In theory, the state could try to employ experts to make these determinations, but the costs would likely be prohibitive.

about the strong overpowering the weak so as to seize intangible works of authorship or about any related social unrest that might ensue from a free-for-all following the artist's death.[40] Likewise, there is no physical mess that must be sorted through in the case of intangible works of authorship. Furthermore, any distress to the artist's survivors would come from lack of *exclusive* control over works of authorship rather than from deprivation of access—arguably a lesser pain to endure.[41] Thus, if we once again set aside the possible pre-death incentive effects on artists, and instead focus on the surviving generations, the key social functions served by a private system of succession seem absent as a basis for justifying postmortem copyrights.

II. THE VIEW UNDER COPYRIGHT LAW

Copyright scholarship has also taken a largely dim view of copyright succession.[42] Scholars have been skeptical that postmortem copyrights serve a net positive purpose, whether viewed under utilitarian, natural rights, or personhood theories.[43] This is so in part because of how protective and idiosyncratic certain highly visible copyright successors have shown themselves to be.[44]

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[40] The discussion here focuses on the question of whether, operating on a blank page, we should extend copyrights beyond an author's death. If, instead, we were to focus on a jurisdiction that has already opted for postmortem copyrights (as is common), problems analogous to those just discussed in the case of traditional property would arise. For example, if the first taker could seize copyright ownership from the dead, the same sort of social unrest would result. Likewise, unraveling thorny copyright ownership issues following a death can be quite labor and time intensive.

[41] *See* Subotnik, *supra* note 14, at 113–14 (noting this distinction).

[42] It might sound odd to suggest that a portion of a law (in this case, copyright law) might be incompatible with itself. Here I refer to the widespread view that postmortem copyrights are largely incompatible with the rest of copyright law's utilitarian thrust.

[43] *See generally* Desai, *supra* note 14 (discussing the problems that attend copyright's extension beyond the life of the author and arguing against such a system). To reiterate, this chapter puts aside the argument that such a system of postmortem copyrights provides meaningful benefits and incentives to artists while still alive. Instead, it concentrates on the effects of postmortem copyrights on the surviving generations.

[44] *See, e.g.*, Spoo, *supra* note 14, at 1822 (noting that the "barriers erected by heirs and estates to the use of unpublished materials … constitute … obstacles to

Some scholars have tried to identify what benefits might theoretically flow from copyright protection that is not aimed at incentivizing authors to create new works but is provided for other reasons.[45] Specifically, Christopher Buccafusco and Paul Heald have classified these non-"incentive-to-create" justifications according to the harm they potentially prevent: underuse, overuse, and tarnishment.[46] Underuse reflects the concern that the inexhaustible and nonexcludable "public goods" nature of intangible works would discourage socially beneficial investments in their use and dissemination because of the impossibility of excluding free-riding competitors.[47] For example, Publisher A might hesitate to publish a high-quality artbook showcasing an artist's oeuvre if Publisher B, with access to state-of-the-art technology, could freely copy the images, produce a competing book, and undercut Publisher A's operation. For this reason, Adam Mossoff and others have called for renewed appreciation of the vital role that copyright law plays for publishers.[48]

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understanding the achievements of modernist writers"); *see also* MADOFF, *supra* note 14, at 144–47; Gilden, *supra* note 21, at 642–43.

[45] The context in that literature is typically the lengthening of copyright protection available to already existing works, rather than a focus on copyright successors per se. But the themes are similar and intersecting.

[46] 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, 3, 13–17 (2013). Buccafusco & Heald ultimately reject each of these justifications based on their empirical findings. *Id.* at 5, 37.

[47] *See*, *e.g.*, H.R. REP. NO. 105-452, at 4 (1998) ("Extending copyright protection will . . . provide copyright owners generally with the incentive to restore older works and further disseminate them to the public."); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475, 488–91 (2003) (arguing that "an absence of copyright protection for intangible works may lead to inefficiencies because of congestion externalities and because of impaired incentives to invest in maintaining and exploiting these works").

[48] Adam Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 MICH. ST. L. REV. 955, 957 (2015); *id.* at 969 ("Copyright provides the necessary incentives for scholarly publishers to create, invest in, and sustain the business models that make possible the dissemination of reliable, high-quality, standardized, networked, and accessible research that meets the differing expectations of readers in a wide-ranging variety of academic disciplines and fields of research."); *see also* Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 635 n.91 (2014) (collecting sources).

Overuse reflects the "tragedy of the commons" concern that unrestrained overgrazing of an expressive work would undermine its long-term value among consumers.[49] To take an extreme example, if a once beloved painting were suddenly to be found on every billboard, screensaver, television commercial, giftwrap paper, fabric print, and movie backdrop—especially if the use of other images became concomitantly scarce in these settings—the painting's circulation value would plummet as the public tired of it.

Tarnishment reflects the concern that poor-quality or poor-taste uses of expressive works would turn off potential audiences for a work.[50] Such uses might include pornographic, satirical, or merely inferior reproductions of a work.[51] In sum, as William Landes and Richard Posner put it, in addition to the need to invest upfront in the creation of intellectual property goods, "[i]nvestment is necessary to maintain the value of the property as well, and also to resurrect abandoned or otherwise unexploited intellectual property."[52]

Whatever one might think about these justifications, however, it is not clear that copyright successors are always best suited to maximizing the value of creative work once the author has died.[53] Ensuring that a work is neither underused nor overused may take expertise in the author's given field—expertise that family relations or other loved ones may not possess.[54] Likewise

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[49] *See, e.g.*, Landes & Posner, *supra* note 47, at 484-88; *accord* Michael Steven Green, *Copyrighting Facts*, 78 IND. L.J. 919, 925–26 (2003); *see also* Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 321–22 (2005) (extending this argument to the derivative work right). *But see* Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065, 1076-85 (2006) (challenging this thesis).

[50] See Buccafusco & Heald, *supra* note 46, at 16–17; *see also* Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 35–36 (2006) (framing the "debasement" concern in natural right terms); *cf.* Landes & Posner, *supra* note 47, at 486, 487–88.

[51] Buccafusco & Heald, *supra* note 46, at 16–17; Green, *supra* note 49, at 925; Karjala, *supra* note 50, at 36.

[52] Landes & Posner, *supra* note 47, at 491.

[53] Karjala, *supra* note 50, at 38 ("Moreover, after [J.K. Rowling's] death, there is no reason to believe that her successors in copyright ownership will have the same ability to maintain and extend a coherent Harry Potter canon, or indeed a better ability to do so than anyone else who is an intimate fan of the Potter works.").

[54] *See, e.g.*, Spoo, *supra* note 14, at 1827.

tarnishment in some sense may be inevitable once an author has died since no artistic choice with her contemporaneous imprimatur will be possible. In other words, even granting "the interest of a vast number of non-owners in having cultural objects with stable meanings,"[55] it is not clear who is in the best position to preserve that meaning.

III. THE VIEW FROM THE FRONT LINES: UNPUBLISHED WORKS

Notwithstanding the discussion so far, a system of copyright succession may advance the goals of both legal regimes (that is, succession law and copyright law) when the focus narrows to one specific area—the processing of many unpublished works that are left behind. (Here, the reference is primarily to unpublished works in the sense of works that the successors would be introducing to the world for the first time.[56]) Copyright law in the United States has in many respects moved toward a unitary approach to the protection of works—whether published or unpublished.[57] Nevertheless, in this context, a work's unpublished status may constitute a salient feature when considering justifications for postmortem copyrights.

Anthony Reese has categorized these kinds of works to include "works that have been kept entirely private." [58] Artistic

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[55] See Justin Hughes, "Recoding" Intellectual Property and Overlooked Audience Interests, 77 TEX. L. REV. 923, 926 (1999); 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").

[56] A related justification could pertain to the culling of works that might have technically been published at some time in the past but for which high-quality copies are no longer available. In such instances, encouraging successors to preserve the originals could add social value in an analogous way.

[57] *See* Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 330 (2014) (describing this shift). This is so even as numerous differences in treatment remain. *See, e.g.*, Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1725–26 (2008).

[58] R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain,* 85 TEX. L. REV. 585, 595 (2007). On the potentially wide swath covered by this category, see William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUD. 79, 93 (1992).

works of this sort would include "notebooks, sketchbooks, snapshots, and home movies, as well as business correspondence" and "never-published versions of … works of visual art" that were created "with an eye to publication that never occurred."[59] A second category includes "preparatory works," such as "sketches, models, and preliminary studies for paintings, prints, [or] sculptures" produced in the course of creating artwork that has already been published.[60]

The value of this material will of course vary. For famous artists, it might be quite commercially valuable; in other instances, it might have value only for a small cadre of scholars and historians.[61] Furthermore, it is possible that the physical art objects will be left to different persons than the copyright successors to the artistic works contained therein.[62] It is also possible that any unpublished items of interest (whether artworks or personal effects) will already be identified because they were housed in museums, galleries, or archives during the artist's lifetime.[63] The point for present purposes is that, with respect to unpublished works, society has an interest in the optimal processing of the physical artifacts left behind because, by definition, these artifacts embody copyrighted works that exist in only one copy (or limited copies) and that have not been seen by large audiences.[64] And where the tangible goods are left—along with a mountain of other items—to the same people who inherit the intangible rights, those successors can help cull the wheat from the chaff.

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[59] Reese, *supra* note 58, at 595.

[60] *Id.* at 598. Reese also identifies a "third category, performed or displayed works, [which] is made up of works that were publicly performed or exhibited but were never technically published under copyright law, such as paintings only displayed in museums … ." *Id.* at 595.

[61] *See, e.g.*, *id.* at 596-98.

[62] *See* Subotnik, *supra* note 10, at 262.

[63] *See* 17 U.S.C. § 101 (2016) ("A public performance or display of a work does not of itself constitute publication."); *see, e.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 93 (2d Cir. 1987) (noting existence of unpublished letters "in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives").

[64] *Cf.* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 899-900 (2010) (advancing the First Amendment interests of the public in some types of unpublished materials).

Such a function accords with the approach taken by the United States Supreme Court, which has paid special attention to situations in which copyrights pertain to particular tangible copies of original works. Specifically, it determined that the encouragement of "copyright holders to invest in the restoration and public distribution of their works" through a term extension applicable to already existing works was a constitutionally sound goal under the Copyright Clause.[65] Although offered in a different context (that is, the permissibility of a term extension), the theme resonates here.

There might be quite a lot of material to process, it should be acknowledged, and this may affect whether, and how well, the sifting process is undertaken. The widow of artist Herman Cherry (1909-1992) put it thus:

> [Herman] always said, "I've known too many professional widows with a millstone around their necks. Make a big bonfire. Give it away, or burn it." But he didn't really mean that. . . .
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> The estate is quite large—about 450 paintings and about 1,300 works on paper. Most of the paintings were stored in the basement of this building, though not the works on paper. Shortly after Herman's death, I built these huge racks and brought all the paintings up because it wasn't safe down there. We even had a flood once. Then I had to list and photograph them, which took a long time. I still have to transfer the inventory numbers onto the actual paintings. I do this every time I take one out. The works on paper are already labeled on the back.[66]

In this context, a system of copyright inheritance—at least in theory—can serve social welfare goals of both succession law and

[65] Eldred v. Ashcroft, 537 U.S. 186, 207, 213 (2003); *see also* Golan v. Holder, 565 U.S. 302, 326 (2012) ("Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science.").

[66] ARTISTS' ESTATES: REPUTATIONS IN TRUST 82 (Magda Salvesen & Diane Cousineau eds., Rutgers Univ. Press 2005) (quoting Cherry's widow Regina Cherry (internal quotation marks omitted)).

copyright law. Such a system both avoids social disruption and assembles a ready-made group of individuals with incentives not only to publish but also—in the first instance—to take time (or to spend money[67]) to sort through the files, stacks, and boxes left behind in order to cull out the drafts, canvases, and other items of value produced by the artist during life.[68] Of course, unless they are subject to fiduciary obligations,[69] there is no *requirement* that successors act with care and diligence with respect to the physical materials that come into their possession or that they make the works publicly available.[70] As Reese thoughtfully demonstrates, it seems unlikely that federal preemption would override state property rights with respect to accessing tangible physical originals that were kept private.[71]

Important additional counterarguments await and must be dealt with. One principal objection is that since in many cases the original physical items themselves might have value—for example, one can auction off sketches through Sotheby's or eBay (depending on the artist)—the additional windfall of copyright ownership serves little public purpose.[72] For example, the daughter of Milton

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[67] In some instances, it might be more efficient for successors to outsource this work to those knowledgeable in the deceased artist's field.

[68] Neil Netanel gestures in this direction in his argument in favor of a "term of the life of the author plus five years for unpublished works, to give . . . authors' heirs an incentive to publish those works soon after the author's death." NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 205 (2008).

[69] On this aspect, see generally Subotnik, *supra* note 10. For a fascinating discussion of the distinction between powers and duties in the context of successors to moral rights, see Jani McCutcheon, *Death Rights: Legal Personal Representatives of Deceased Authors and the Posthumous Exercise of Moral Rights*, 2015 INTELL. PROP. Q. 242, 256 ("The [Legal Personal Representative]'s power is expressed as a power to exercise moral *rights*, not as a duty or obligation, so perhaps the LPR should be under no compulsion to act. However, failure to act may cause harm to the author's corpus, the author's link with the work or his reputation or honour as expressed in the work.").

[70] ARTISTS' ESTATES: REPUTATIONS IN TRUST, *supra* note 66, at 132 ("Many artists' relatives are not interested in the art at all and just give or throw it away.").

[71] *See* Reese, *supra* note 58, at 626.

[72] For a distinction between visual and literary estates, see ARTISTS' ESTATES: REPUTATIONS IN TRUST, *supra* note 66, at 13 (quoting B.H. Friedman (internal quotation marks omitted)):

A writer's estate is quite different. You just really try to keep the work in print. There's little in terms of manuscripts that has any immediate value, but it has this

Avery (1885-1965) stated, "When my father died, I cannot tell you the condition the drawings were in, or how they were kept. It's embarrassing. I've spent literally years just trying to sort them out."[73] But Avery's paintings themselves have sold for millions of dollars.[74] Therefore, inherited copyrights, as distinct from the inherited artworks and artifacts themselves, might not be necessary to incentivize a carefully performed sifting and preservation initiative.[75] This dynamic may also be true of the Vivian Maier estate, where some money to fund the preservation efforts appears to have derived from the sales of Maier's vintage prints and negatives without the need for a copyright-backed sword with which to pursue infringers.[76]

Indeed, to take the objection even further: to the extent that copies of visual artworks have economic value in the marketplace, perhaps that value derives from their being high-quality prints or replicas—that is, reproductions that are made directly from the original physical artifacts that the successors in my story already control. Once again, this notion may well be true of aspects of the Maier estate, where "many first-time collectors paid $1800, and up to $3000, for a limited-edition print from a selection of Maier's negatives"[77] and books by those with access to her negatives sold well.[78] Such a market reality would seem to obviate any benefit to

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possibility of recurring value through being kept in print. There are very few writers who make the kind of money that visual artists make today. It's the difference between things and words.

[73] *Id.* at 156 (quoting Avery's daughter March Avery (internal quotation marks omitted)).

[74] *Id.* at 159; *see also* Lot 22, The Collection of Joan and Preston Robert Tisch, Milton Avery (1885-1965), Red Nude, CHRISTIE'S (May 22, 2018), https://www.christies.com/lotfinder/paintings/milton-avery-red-nude-6141179-details.aspx?from=salesummery&intobjectid=6141179&sid=5f09310b-982b-4b6d-9d1a-4f55f6bd3696 (last visited May 10, 2019).

[75] *See generally* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313 (2018) (casting doubt upon the role of copyright in the visual art market); *cf.* Pascale Chapdelaine, *The Undue Reliance on Physical Objects in the Regulation of Information Products*, 20 J. TECH. L. & POL'Y 65, 119 (2015) (discussing at length how the "over emphasis on the presence of a physical object" affects IP policy in the digital era).

[76] *See* BANNOS, *supra* note 5, at 271 (noting that Maier's "own prints sell[] at upward of $10,000 apiece" and that her negatives had been sold on eBay); *see also id.* at 88, 95-99, 108-10, 188.

[77] *Id.* at 198; *see also id.* at 199, 210-11, 231.

[78] *Id.* at 191; *see also id.* at 210.

the public from copyright control by successors.[79] By contrast, with literary works, fans arguably care less about the quality of the reproduction than about the content of the unpublished story—suggesting more of a justification for successor-owned copyrights in the case of literary estates. To cast the distinction in slightly different terms, one might say that there is less public interest in close proximity to the "aura" of literary works.[80]

To these counterarguments, I offer the following responses. First, with respect to the value of the originals: while some original artworks may be worth millions (like Avery's), in many cases they will be worth much less. Accordingly, inheriting them—on their own, without the relevant copyright interests—may provide an insufficient incentive to sift and/or preserve.[81] Second, with respect to copies: it is increasingly likely that as copying technology continues to improve, high-quality copies of artistic works will be obtainable from third-party sources that the successors to the physical artifacts do not control or benefit from, which would likewise diminish their incentive to perform these functions absent the relevant copyright interests. (This is certainly the case for original artwork that is born digital.) Third, artistic estates contain not just unpublished artworks but also unpublished writings of the artists, which might suffer from free-riding competition, too.

Another objection emerges. Perhaps, at its core, the Maier estate example could be read to support the opposite conclusion from the one advanced in this chapter. After all, in Maier's case there were people ready, willing, and able to care for and exploit her unpublished works[82] without acquiring the relevant copyrights.[83] In

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[79] On the separate question of whether those producing copies of Maier's photographs in these settings were permitted to do so under copyright law, see *infra* note 83.

[80] *See* WALTER BENJAMIN, *The Work of Art in the Age of Its Technological Reproducibility*, *in* 4 WALTER BENJAMIN: SELECTED WRITINGS, 1938-1940, at 251, 254 (Howard Eiland & Michael W. Jennings eds., Edmund Jephcott et al. trans., Belknap Press of Harvard University Press 2003).

[81] With respect to bulk preservation of an artist's estate, which can become unmanageable and/or unaffordable, we might at least want to furnish successors with incentives to digitally photograph artifacts that might have value.

[82] As Jeffrey Goldstein, one principal acquirer of Maier's physical materials, put it (albeit in a self-serving way): "What the public now knows of Vivian Maier as a photographer has been through the collective interpretation of Vivian Maier's negatives" by himself and his skilled team of technicians. BANNOS, *supra* note 5, at 278 (citation and internal quotation marks omitted).

that way, "the [Vivian Maier] project is mostly paying for itself"[84] without copyright ownership entering the picture. One art world insider has likewise noted that "I know people whose specialty is to go out and buy artists' estates for very little cash. They'll buy them very, very cheaply and store them, then try to resell the individual pieces—fine work, art of the fifties."[85]

Nevertheless, most artists do not leave most of their worldly possessions in a handful of storage lockers with an auctioning off process readily at hand. In many cases, artists leave real property teeming with items that need to be sorted through—and perhaps sorted through quickly because of competing demands on the physical space containing them. And, even if it were economically efficient, it is not entirely clear that most successors would want to permit strangers to traipse onto the property to cull out what might be valuable. Furthermore, such a haphazard process could lead to the dispersal of works in a disorganized fashion.[86] Accordingly, in the average case, it is at least conceivable that copyright ownership—and its promise of exclusive control—is a stimulus to copyright successors who are also the inheritors of the physical

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[83] Although some acquirers of Maier's physical materials attempted to secure her copyrights as well, that effort appeared to be more for the purpose of shielding their own copying activities than for the purpose of needing copyright as an incentivizing force to disseminate. *See id.* at 274-76. It should be noted, however, that John Maloof, a principal acquirer of Maier's physical materials and promoter of her work, apparently paid $5000 for a full transfer of copyright from Maier's (possible) heir, *id.* at 275-76, and now asserts the following sword-like copyright policy on his website:

All photographs appearing on this website and in the archive of the Maloof Collection are copyrighted and protected under United States and international copyright laws. The photographs may not be reproduced in any form, stored or manipulated without prior written permission from the Maloof Collection.

Vivian Maier FAQ's, http://www.vivianmaier.com/ (last visited May 10, 2019).

[84] BANNOS, *supra* note 5, at 201 (citation and internal quotation marks omitted).

[85] ARTISTS' ESTATES: REPUTATIONS IN TRUST, *supra* note 66, at 133 (quoting Anita Shapolsky (internal quotation marks omitted)).

[86] *See, e.g.*, *id.* ("You never know where that work will go, as they're not willing to share records or put any energy into keeping documentary photographs." (quoting Anita Shapolsky (internal quotation marks omitted))). Pamela Bannos discusses the downsides to the wide dispersal of Maier's prints and negatives at length. *See* BANNOS, *supra* note 5, at 98, 108-09, 208-09.

artifacts to take care either to preserve the potentially important materials themselves or to hire experts to do so.

Admittedly, these responses are unlikely to convince those scholars, like Wendy Gordon, who have argued that copyright law and policy is driven, and should be circumscribed, by the need to encourage creative output by authors.[87] Such a perspective places little to no weight on the role played by inheritors of copyright. Indeed, Gordon argues that constitutional challenges to copyright's interference with free speech should gain strength when premised merely on the ground of encouragement of "noncreative *dissemination* standing alone."[88] A principal concern Gordon expresses is that when copyright policy is untethered from fostering creative acts, the argument for further extensions of the copyright term—indeed, for a perpetual copyright term—becomes more pronounced. After all, a would-be disseminator can always make some colorable claim that copyright protection would encourage his distribution of the work—even years after the author's death.[89]

The very premise of this chapter—that we switch gears and focus on potential benefits that flow from copyright's effect upon the surviving generations—is obviously at odds with her view. This chapter suggests that a reason to aid noncreative disseminators through copyright is the key moment in the life cycle when a decision has to be made about whether or not to keep stuff. In other words, while Gordon's concerns are compelling, we can view the post-death cleanup period as a once-in-a-lifetime event that need not give rise to endlessly extended copyright.[90] Furthermore, there might still be another angle to assuage Gordon's concerns:[91] letting an author's survivors publish work she could no longer publish because of an intervening death could be viewed as copyright in the service of authorship. (Of course, this is a weaker argument if the

[87] Gordon, *supra* note 48, at 617 (arguing that copyright's primary concern is stimulating creativity not dissemination).
[88] *See id.* at 616-17.
[89] *Id.* at 623-24, 631-32.
[90] One basis for Gordon's concern is further congressional expansions of copyright. *See id.* at 618-19, 631. This chapter does not argue for expansions, but rather seeks to determine whether there are justifications for aspects of the status quo.
[91] *See id.* at 631.

artist never intended to publish the work.[92]) However, Gordon herself goes so far as to say that under her proposal, aspects of the current copyright law—such as Section 303(a)—might be unconstitutional.[93] That provision gave copyright holders an incentive to publish by a certain date already existing unpublished works so as to achieve an extended copyright term.[94] Accordingly, it simply may not be possible to convince those who stand with Gordon on this score.

CONCLUSION

What this chapter has articulated about the life cycle of copyright is not brand new under the sun. Indeed, the U.S. Supreme Court long ago made this point in the case of unpublished literary works:

> What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings, which now encourages their publication thereof,

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[92] On the difference between work the author wanted to keep unpublished and work she intended to publish but did not get around to publishing, *see, e.g.*, Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 554-55 (1985); Landes, *supra* note 58, at 90.

[93] Gordon, *supra* note 48, at 677.

[94] 17 U.S.C. § 303(a) (2016) provides:

> Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

> from time to time, after the author has passed to the grave.[95]

Rather, this chapter has sought to demonstrate that, particularly in the visual arts, which encumber successors with so many bulky physical items to process, copyright may serve as an important impetus for thoughtful preservation—and as a bulwark against the pressing and understandable temptation to dump. In other words, if dissemination is an important (albeit contested) objective of copyright law, this chapter has tried to relate that objective to the time, expense and physical exhaustion it takes to pack up the artist's studio.

[95] Folsom v. Marsh, 9 F. Cas. 342, 347 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4,901).