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Copyright’s Capacity Gap

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Copyright's Capacity Gap

Andrew Gilden[†*] & *Eva E. Subotnik*[**]

Most areas of law require that individuals meet a certain threshold of capacity before their decisions — e.g., to marry, to enter into a contract, or to execute an estate plan — are given legal effect. Copyright law, by contrast, gives legal effect to creative decisions by granting the decisionmaker many decades of exclusive rights so long as they are a human being and have demonstrated a "creative spark." This Article examines the overlooked consequences of this gap in capacity standards between copyright and other areas of law. It shows that this gap has produced numerous opportunities for vulnerable creators to be exploited by more powerful individuals — often individuals who have been entrusted with their care. These creators can produce valuable property interests through the copyright system, but they may lack the legal ability to make decisions about whether, when, where, and how to commercially exploit those interests. Copyright law expresses the key message that creative labor by legally incapacitated individuals is important and valuable, but it largely leaves these individuals at the mercy of a legal

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system that is often highly dismissive of their dignity and autonomy. This Article surveys contemporary and historical examples of copyright's capacity gap, and it examines potential ways of closing this gap for the benefit of vulnerable creators.

TABLE OF CONTENTS

INTRODUCTION 901
I. GAPS AND OVERLAPS: COPYRIGHT IN BROADER DOCTRINAL CONTEXT 912
II. CAPACITY UNDER STATE LAW 918
A. *Requirements for Wills, Contracts, and Gifts* 920
1. Wills, Trusts, and Estate Planning 922
a. *Who May Make a Will* 924
b. *The Requirement of "Sound Mind"* 926
c. *The Adjacent Doctrine of Insane Delusion* 927
d. *Application to Authors* 929
2. Contracts and Gifts 931
B. *Requirements for Protective Apparatuses* 933
1. Guardianships and Conservatorships 933
2. Advance Directives 945
C. *Minors and Capacity* 948
III. COPYRIGHT & CAPACITY 952
A. *Big-Tent Copyright* 953
B. *Copyright Capacity = Human Authorship + Creative Spark* 956
C. *Drawbacks for Big-Tent Copyright* 961
D. *Limited Acknowledgements of Vulnerable Authors* 965
IV. MINDING THE GAP 969
CONCLUSION 976

INTRODUCTION

On November 12, 2021, a Los Angeles judge granted Britney Spears' request to terminate her thirteen-year conservatorship.[1] Spears' conservatorship, controlled by her father, had prevented her from making a host of decisions about her own life and career from the age of twenty-six through thirty-nine.[2] By her account, these ranged from the artistic (exhausting tour schedules[3]), to the seemingly mundane ("restaining her kitchen cabinets"[4]), to the most personal (reproductive choices[5]). So long as the conservatorship remained in place, Spears lacked the legal capacity[6] to form binding contracts, provide informed

[1] Zoe Christen Jones & Mandy Aracena, *Britney Spears' Conservatorship Is Terminated After More than 13 Years*, CBS NEWS, https://www.cbsnews.com/live-updates/britney-spears-conservatorship-hearing-2021-11-12/ (last updated Nov. 12, 2021, 8:27 PM) [https://perma.cc/MTG7-PYCX].

[2] Liz Day, Samantha Stark & Joe Coscarelli, *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, N.Y. TIMES, https://www.nytimes.com/2021/06/22/arts/music/britney-spears-conservatorship.html (last updated Nov. 2, 2021) [https://perma.cc/RNY9-K3AB].

[3] *See* Declaration of Sherine Ebadi in Support of Objections & Opposition to the Petition by James P. Spears for Ord. Regarding Payment from Britney Spears at ¶ 19, *In re* the Conservatorship of the Pers. & Est. of Britney Jean Spears, No. BP108870 (Cal. Super. Ct. 2019), (No. BL-2904) [hereinafter Ebadi Decl.].

[4] *See* Day et al., *supra* note 2.

[5] Joe Coscarelli & Julia Jacobs, *Judge Ends Conservatorship Overseeing Britney Spears's Life and Finances*, N.Y. TIMES, https://www.nytimes.com/2021/11/12/arts/music/britney-spears-conservatorship-ends.html (last updated Nov. 15, 2021) [https://perma.cc/2H73-XB4X] ("Ms. Spears . . . claim[ed] that those in charge forced her to take medication, work against her will and use a birth control device.").

[6] We use the term "legal capacity" to refer to an individual's ability to make a decision that will be given legal effect. Legal capacity under this definition might be better understood as "competence" to make a legally-binding choice — a binary yes/no determination. *See* Julie Blaskewicz Boron, *Cognitive Competence and Decision-Making Capacity*, 53 CREIGHTON L. REV. 659, 660 (2020). Outside of law, capacity is generally understood to be a medical determination about where a person falls along spectrum of capabilities, as opposed to the binary determination of whether someone can or cannot make a legally binding choice. *See* Rachel Mattingly Phillips, Note, *Model Language for Supported Decision-Making Statutes*, 98 WASH. U. L. REV. 615, 616 (2020). Nonetheless, case law and scholarship frequently conflate "capacity" with "competence," so we will use the term "capacity" largely in this binary legal sense, as opposed to a medical or sociological assessment of a person's abilities. *Accord* Reid Kress Weisbord & David Horton, *The Future of Testamentary Capacity*, 79 WASH. & LEE L. REV. 609, 617 (2022).

consent to medical treatment, or marry her boyfriend without the approval of her father.[7]

And yet, throughout the time that Spears purportedly lacked the legal capacity to make business or personal decisions, she nonetheless had the capacity to significantly expand her valuable portfolio of intellectual property ("IP"), especially copyrights. In order to be recognized as the author of a copyrighted work, all Spears needed to do was demonstrate a modicum of creativity — a "creative spark" — when writing or recording new work.[8] Moreover, her legal incapacity was no bar to obtaining copyright registrations of her works.[9] Accordingly, during her conservatorship, Spears actively wrote, recorded, and performed music, securing IP protection and cementing her position as a global pop superstar. These activities greatly increased the value of her estate — an estate she had no lawful capacity to control. As summarized in the *New York Times*,

> One of the best-selling artists of all time, Ms. Spears released four of her nine studio albums while under the conservatorship, including, most recently, "Glory" in 2016. She appeared on television, serving as a judge on "The X Factor" in 2012, and even toured internationally, though most of her performances were part of a strictly controlled Las Vegas residency.
>
> Beginning in 2013, "Britney: Piece of Me" ran for four years at the Planet Hollywood Resort & Casino, grossing a reported $138 million across nearly 250 shows.[10]

Even if Spears' net worth in the early 2020s of approximately $60 million falls short of some of her famous peers, she nonetheless has

Where possible, we will indicate that the capacity determination is made by "legal" as opposed to "medical" actors.

[7] *See generally* Robyn M. Powell, Essay, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246 (2021) (describing reproductive oppression in the context of Spears' conservatorship).

[8] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[9] *See infra* Part III.

[10] Coscarelli & Jacobs, *supra* note 5.

done everything necessary to maintain a long-running and spectacular career in the music industry.[11]

Perhaps this success could be seen as a ringing endorsement of the "hybrid business model" under which Spears' conservatorship was harnessed into a revenue-generating machine by her father (and others).[12] Nonetheless, Spears lacked the legal ability to control her own labor, to take time off, or to take her career in a different direction.[13] And herein lies the rub. In the same year that Spears released "Glory" — on which she is listed as co-author of one of the most popular tracks[14] — she was actively resisting the conservatorship, without success.[15] In other words, from the perspective of copyright law, she remained a fully capable and extraordinarily successful author, but from the perspective of conservatorship law, she lacked the capacity to make even the most basic decisions about her life and career. Spears was caught in what we call "copyright's capacity gap." And, as we will discuss, she is not alone.

In this Article, we demonstrate the potential perils of copyright's capacity gap for a wide range of creators who produce commercially successful work, but who are legally barred from making decisions in the commercial realm about that work. In some cases, the barrier is a

[11] Madeline Berg, *Britney Spears' Net Worth Revealed — And It's Shockingly Low Compared to Her Pop Peers*, FORBES (Feb. 17, 2021, 2:23 PM EST), https://www.forbes.com/sites/maddieberg/2021/02/17/britney-spears-net-worth-revealed--and-its-shockingly-low-compared-to-her-pop-peers/?sh=8528f5e18ac3 [https://perma.cc/WU5T-EFYM]. As Spears herself has often said, "You better work, b*tch." BRITNEY SPEARS, *Work Bitch*, *on* BRITNEY JEAN (RCA Records 2013).

[12] Coscarelli & Jacobs, *supra* note 5.

[13] *See* Day et al., *supra* note 2.

[14] *See Public Catalog: Make Me. . .* (Copyright No. PA0002028716), U.S. COPYRIGHT OFF. (July 15, 2016), https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=PA0002028716&Search_Code=REGS&PID=On6hrbwjrIImYoC15oHhNkhMDB9ka&SEQ=20230812145731&CNT=25&HIST=1 [https://perma.cc/JFC7-CSCD]; *see also* Gary Trust, *Katy Perry's "Rise" & Britney Spears' "Make Me" Debut in Hot 100's Top 20*, BILLBOARD PRO (July 25, 2016), https://www.billboard.com/pro/katy-perry-rise-britney-spears-make-me-debut-hot-100/ [https://perma.cc/CM4N-X7X3].

[15] *See* Day et al., *supra* note 2 ("As early as 2014, in a hearing closed to the public, Ms. Spears's court-appointed lawyer, Samuel D. Ingham III, said she wanted to explore removing her father as conservator.").

conservatorship or guardianship[16] imposed on creators because of mental health concerns — as in the case of Spears, Amanda Bynes,[17] Brian Wilson,[18] or Nichelle Nichols.[19] But this Article documents other recurring circumstances where authors are welcomed into the copyright system and then promptly shut out of the decision-making processes that follow the allocation of copyright interests.

Teenage creators, for example (including, at one point in her life, Spears herself), regularly become household names. Yet, due to their legal minority, they are largely reliant on their parents or guardians when deciding where, when, and how they will share their talents with the world. At the other end of the spectrum, elderly creators may have decades of experience planning the contours of their careers — for example, carefully deciding which works to publicly release. But the loss of legal capacity in their twilight years can leave them — and their work — at the mercy of surrogate decision-makers solely focused on revenue extraction from the arrangement.[20]

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[16] See *infra* Part II.B for a discussion of the distinction between guardianships and conservatorships.

[17] *See* Julia Jacobs, *Amanda Bynes, Former Child Star, Is Released from Conservatorship*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/arts/television/amanda-bynes-conservatorship.html [https://perma.cc/U7BW-WY65].

[18] *See* Brian Levine, *Brian Wilson: A Cork on the Ocean*, SCIENTIFIC AMERICAN (Mar. 1, 2017), https://www.scientificamerican.com/article/brian-wilson-a-cork-on-the-ocean/

[19] *See* Makeda Easter, *Inside the Heartbreaking Conservatorship Battle of a "Star Trek" Legend*, L.A. TIMES (Aug. 15, 2021, 9:00 AM PDT), https://www.latimes.com/entertainment-arts/story/2021-08-15/nichelle-nichols-star-trek-uhura-dementia-conversatorship-battle [https://perma.cc/7CKD-SBC3].

[20] Historically, married women were also subject to the capacity gap; they could appear on the copyright register as authors, but under the common law doctrine of coverture, only their husbands could enforce or manage their property rights. *See* MELISSA J. HOMESTEAD, AMERICAN WOMEN AUTHORS AND LITERARY PROPERTY, 1822-69, at 34 (2005). "She continued to 'sweat' at the labor of literary production after marriage, but her 'sweating wages' legally belonged to her husband." *Id.* at 11. Scholarship in the patent context has shown a similar dynamic with respect to the appropriation of labor and innovation by slaveholders in the 19th Century. *See generally* Brian L. Frye, *Invention of a Slave*, 68 SYRACUSE L. REV. 181 (2018) (discussing statutory paradoxes faced by the early U.S. Patent Office when registering inventions of enslaved people).

Exploitation of vulnerable populations within the entertainment industries is, sadly, nothing new.[21] Elderly populations, who may have amassed significant amounts of capital over their lifetimes, have often been the most visible targets. But children, too, have found themselves ready victims. In short, whenever a person lacking full legal capacity has any degree of wealth, there will always be incentives for their personal representatives to abuse the relationship (to the extent they do not fear either getting caught or the consequences if they are caught).

So, is there anything unique about the copyright context? After all, if substantial wealth is to be found, perhaps the economic temptation to exploit the vulnerable alone is enough — and the particular form that the wealth takes (whether in a stock portfolio, real estate holdings, IP assets, etc.) is irrelevant.

In this Article we argue that there is something unique about wealth generated by a legally incapacitated person through the copyright system. Unlike assets (intellectual or otherwise) that are transferred to an incapacitated person — and thus subject to the oversight of a conservator or similar surrogate — the copyright system provides a mechanism by which the incapacitated person can generate *new* wealth by virtue of their ongoing status as a fully capable author. This wealth generation can occur through an author's creation of brand-new works or publication of previously unreleased works, for example.

This dynamic creates unique opportunities and incentives for abuse that have not been previously addressed in the literature on fiduciaries or copyright law. Especially given that the well-being of authors is a central concern of copyright law, and that there is a growing body of copyright scholarship focused on the exploitation of marginalized

[21] *See generally* Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing,* Porgy and Bess, *and Unfair Use*, 37 RUTGERS L.J. 277 (2006) (examining inequitable treatment of musical borrowing); Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615 (2022) (contending that lax copyright registration standards have long cause problems for African-American artists); Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 UC DAVIS L. REV. 591 (2019) (exploring implicit racial hierarchies inherent in copyright law).

authors,[22] the time is ripe to attend to the experience of authors with cognitive disabilities.[23]

The failure to adequately address the nexus of copyright, capacity, and fiduciaries highlights what might be seen as ableism in the copyright system's status quo.[24] Copyright law acknowledges in a few discrete

[22] *See generally* ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS (2020) (examining how U.S. intellectual property laws intersect with the history of race in America); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 551 (2006) (explaining the role that copyright infrastructure plays in sustaining inequality between women and men); K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008) (reviewing a history of piracy of works of African-American creators); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016) (addressing the effect of the copyright system on the allocation of wealth in society); Timothy J. McFarlin, *A Copyright Ignored: Mark Twain, Mary Ann Cord, and the Meaning of Authorship*, 69 J. COPYRIGHT SOC'Y (forthcoming 2023) (reviewing Mark Twain's publication and profit from a story by Mary Ann Cord, a formerly enslaved woman); John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER 343 (2018) (exploring how ideas of joint authorship in copyright law can give rightsholders power to suppress narratives of resistance from women and people of color).

[23] For many years, people with developmental, cognitive, and mental disabilities were marginalized even within the disability community. *See* Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, *in* THE OXFORD HANDBOOK OF LAW & HUMANITIES 145, 152 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2019); Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363, 1401 (2021) ("Disability studies scholars have pointed to the marginalization of people with mental disabilities and chronic illnesses, usually considered less visible, within the disability community and academic discourse that typically focuses on people with physical or sensory disabilities. Similarly, the law itself seems to reproduce a disability hierarchy that disadvantages people with mental disabilities. In tort law, for example, courts have historically been unwilling to depart from the reasonable person standard when dealing with a tortfeasor with a mental disability. This is while the standard of care for a physically disabled person is generally that of a reasonable person 'under like disability.'").

[24] *See, e.g.*, Blake E. Reid, *Copyright and Disability*, 109 CALIF. L. REV. 2173, 2175-76 (2021) (discussing "copyright's ableist tradition of subordinating the interests of people with disabilities"). Most of the scholarship and advocacy in the disability/copyright intersection has focused on *consumers* with disabilities, and the role copyright law plays in limiting the distribution of accessible works, for example books that are accessible to those with print-related disabilities. *Id.* at 2225. Much less copyright scholarship has "actively pressed to highlight disabled authors." *Id.*

places that others will make important decisions with respect to the exploitation of a work (e.g. publishers, studios, and labels),[25] but, crucially, it assumes that the author will be fully able to contract with those third party decision-makers.[26] What gets overlooked is that many creative people are forced to rely on others — due to age or cognitive, intellectual, or developmental disabilities — in the lead-up to making decisions about how their work will be used, managed, sold, or licensed. This dynamic is largely ignored by the copyright system.[27]

In general, fiduciary obligations are meant to limit the abuse and exploitation of legally incapacitated individuals while at the same time protect the economic value of those individuals' estates. But decision-making by fiduciaries in the creative realm can be highly subjective and difficult to challenge, especially when there are opportunities to accumulate wealth for everyone involved.[28] As the Spears example and others show, the maximal exploitation of creative works and talents is not necessarily in the best interests of the author — or a public that is deeply invested in them.[29] To the extent that copyright law positions

[25] *See, e.g.*, 17 U.S.C. §§ 201(d), 204 (addressing transfer of copyright ownership). One might even slot the works made for hire arrangement here. *Id.* §§ 101, 201(b).

[26] The only express safety valve within the copyright system for poor or abusive stewardship decisions by third parties is the termination of transfers provision, which provides an extremely delayed remedy and does not directly address the conservatorship arrangement. Termination of transfers may allow authors to claw back deals that their parents entered into on their behalf as minors, but that's a long time to wait to undo deals that they disagreed with. *See* 17 U.S.C. § 203 (providing for termination of transfers executed by the author). *See infra* Part III.D.

[27] *See infra* Part III.C.

[28] *Cf.* Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 310 (2017) [hereinafter *Artistic Control After Death*] (discussing the possibility of "collusion between the fiduciary and the beneficiaries to sidestep the author's instructions"); Eva E. Subotnik, *Dead-Hand Guidance: A Preferable Testamentary Approach for Artists*, *in* POSTHUMOUS ART, LAW AND THE ART MARKET: THE AFTERLIFE OF ART 59 (Sharon Hecker & Peter J. Karol eds., 2022) [hereinafter *Dead-Hand Guidance*] (noting that "fiduciaries who seek to depart from . . . cumbersome restrictions [left by a predeceasing artist] are likely to find alliances with profit-maximizing beneficiaries" and thereby a shield against any liability).

[29] *See* Dani Anguiano, *The #FreeBritney Movement Finds Its Moment: "All the Hard Work Was Worth It*," GUARDIAN (Nov. 14, 2021, 4:00 PM EST), https://www.theguardian.com/music/2021/nov/14/freebritney-movement-britney-spears-

itself as promoting and reflecting the prerogative of these various stakeholders, the capacity gap can undermine some of its fundamental policy commitments.

Specifically, the capacity gap undercuts the dominant utilitarian justification for U.S. copyright law.[30] This characterization typically focuses on the financial value of copyright's exclusive rights, which (in theory) incentivize economically rational authors to devote time, money, and energy to creative activities they might not otherwise pursue.[31] While this justification story has always had its detractors,[32] copyright's capacity gap upends it: if copyright is available to people lacking the legal or mental capacity to be incentivized, then this basis for copyright no longer makes sense even on its face (at least as to those persons).[33] And worse: we worry that the incentives will instead operate

conservatorship [https://perma.cc/QF8Q-2TV5] (discussing the #FreeBritney and the efforts by fans to bring public attention to her conservatorship).

[30] *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (noting that "copyright supplies the economic incentive to create and disseminate ideas"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

[31] *See Mazer*, 347 U.S. at 219.

[32] The critiques are numerous. *See, e.g.*, Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (arguing that the "incentive model largely bypasses a persuasive account of creativity that emphasizes a desire for creation, grounded in artists' own experiences of creation").

[33] For analogous reasoning in a different context, see Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1264 (2016) ("[C]opyright law should limit the extension of rights to those people who are plausibly going to be affected by the incentives it creates. If people do not intend their creations to be treated as works of authorship, they obviously are not creating them because of the incentives that the law provides to works of authorship. Granting such people copyrights generates social costs without any concomitant incentive benefit."). But see McFarlin, *supra* note 22, critiquing this view.

on the "wrong" people — those surrounding the author — in ways that may not benefit the author (or the public).[34]

Moreover, the capacity gap harms not just the author, but also the devoted fans who invest significant resources in purchasing the author's content, tickets, and merchandise. Authenticity often drives the value of copyright interests, and the author's consuming public and fan base may put a premium on obtaining (that is, paying for) works that they believe are unmediated creative expressions by the author.[35] Britney Spears' fans purchased tickets to her shows and streamed her music throughout her conservatorship very likely under the belief that she was thriving, and not "worked . . . 'to the bone'" and "'exhausted' from the workload."[36]

A subsidiary justification for copyright — that of respecting the personhood or dignitary interests of authors[37] — is likewise less persuasive in the face of the capacity gap. The idea here is that the author infuses their very self into their work and would suffer a personal harm without the ability to control how a work is seen, used, or adapted. This justification makes little sense when an author is not in a position to personally approve of the ways in which her work is exploited. A recent illustration involves Harper Lee, famed author of *To Kill a Mockingbird*. The controversial "sequel" to that classic, *Go Set a Watchman*, raised eyebrows when it was released, both because of the

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[34] One response — at least with respect to those authors who may have once possessed legal capacity — is that it suffices for the incentive theory that they were capable of being incentivized when it mattered (that is, at the point of creation). But that response does not address the categories of those authors who are minors or who never possessed sufficient legal capacity.

[35] *See, e.g.*, Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 329 (2018). ("Here I briefly introduce the norm of authenticity, which forms the foundation of the art market; I show how this norm leads the market to value (in most cases) unique, original works, not copies.").

[36] Ebadi Decl., *supra* note 3, at 9.

[37] *See* 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, 59-60 (1884) (noting that copyright protects manifestations of "originality, of intellectual production, of thought, and conception on the part of the author"); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988).

disheartening cloud it cast over a set of beloved characters and because it was not clear that Lee herself (as opposed to her lawyer and personal representative) actually wanted *Watchman* to be published.[38] Where the author selects their own surrogate, it is arguably fair to see the surrogate's decisions as meaningful extensions of the author's autonomy. But with *involuntary* arrangements like conservatorships and guardianships, it is much harder to see copyright management as reflecting the will of the author.[39]

To be clear, the capacity gap we identify is not intended to suggest (a) that individuals who may need assistance with decisions relating to their person or property cannot, at the same time, be highly creative and productive, or (b) that such individuals should face additional hurdles in securing copyright protection for their works. Indeed, some of history's most renowned artists have been known to suffer from varying mental and/or emotional challenges.[40] But what drives our concern in this Article is the possibility that the capacity gap can be exploited by those surrounding the author to take simultaneous advantage of both an author's perceived weaknesses (in the conduct of daily life) and strengths (as a brilliant artist). And even worse, this gap is created by an area of law that is supposed to be committed to the "Progress" of creative fields. To return to Spears, one wonders whether the ready availability — and exploitability — of intellectual property rights generated by Spears directly resulted in her prolonged and likely exploitative conservatorship. In other words, Spears' experience suggests a link between copyright's capacity gap and the potential for abuse.

[38] Joe Nocera, Opinion, *The Harper Lee "Go Set a Watchman" Fraud*, N.Y. TIMES (July 24, 2015), https://www.nytimes.com/2015/07/25/opinion/joe-nocera-the-watchman-fraud.html [https://perma.cc/8454-XPQT].

[39] *Cf.* Andrew Gilden, *Endorsing After Death*, 63 WM. & MARY L. REV. 1531, 1591 (2022) ("Although many posthumous rightsholders undoubtedly take their stewardship responsibilities very seriously, there are few formal guardrails in place to ensure that rightsholders uphold the decedent's express wishes or at least attempt to further the interests of the decedent and their surviving communities.").

[40] *See, e.g.*, Pedro Mota, *Creativity and Mental Illness: Vincent Van Gogh as the Archetypal Figure*, 49 J. PSYCHOHISTORY 139, 139 (2021) ("Creativity linked to art and science is probably one of the few, if not the only, areas in which mental illness is perceived (socially) in a different way.").

Although there are small pockets of fiduciary law that acknowledge the particular challenges of fiduciary management within the entertainment industry[41] — and narrow slices of copyright law that contemplate that authors might be represented by a "duly authorized agent"[42] — neither system as a whole has adequately grappled with the subject of *copyright exercise by a surrogate of a living author* (whether chosen by the author or otherwise). This Article thus demonstrates that stewardship issues arise with respect to copyright not just when the author has died but also in many circumstances while the author is still alive (i.e., when they may lack capacity due to age or disability). Accordingly, we argue, more rigorous thought is needed about how to ensure better stewardship of copyright interests by the living, for the living.[43]

The Article proceeds in four parts. In Part I, we introduce the capacity gap by emphasizing the importance of attending to the frequent interplay between copyright law and state contract, estate planning, and guardianship laws. In Part II, we situate the extremely low-capacity requirements for copyright by highlighting the capacity requirements found in those other areas of law. In Part III, we discuss both the justifications for, and the critiques of, legal capacity requirements as they bear on the topic of copyright acquisition and management. These Parts together will illustrate how federal copyright law's one-size-fits-all approach to authorship, ownership, and management both (1) deprives certain authors of opportunities to fully exploit potentially

[41] *See infra* Part II.C (discussing state Coogan laws, which require a portion of a child entertainer's earnings to be placed in a trust fund).

[42] *See infra* Part III.D.

[43] In this way, we see parallels in the recent article by Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L.J. 1691 (2023), in which they argue that "in light of increased longevity and the graying of America . . . family law suffers from age myopia." *Id.* at 1702. To quote them for our purposes, we might say that "it is essential to fundamentally rethink [copyright] law for the final third of life," *id.* at 1700, and also for the first fifth of life. Another pair of authors has argued, closer to our core subjects, that "many property doctrines are built around the needs of younger people in the prime of their lives. As a result, key aspects of the law do not reflect the needs of the older people who comprise increasingly large segments of the populace in the United States and other developed countries." Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561, 565 (2021). But they do not address IP rights.

valuable copyright interests due to the capacity standards of state laws and (2) renders them vulnerable to exploitation by the substitute decisionmakers appointed under state laws. Finally, in Part IV we consider some approaches that might ameliorate copyright's capacity gap and improve the status quo for vulnerable authors. Although we briefly acknowledge the argument, we underscore at the outset that we are *not* arguing that the threshold requirements for acquiring copyright protection should be raised for any group of authors. We conclude by emphasizing that copyright should be about exploiting legal rights, and not vulnerable populations.

I. GAPS AND OVERLAPS: COPYRIGHT IN BROADER DOCTRINAL CONTEXT

Copyright law (and intellectual property generally) is too-often siloed away from other areas of law that intersect with it in practice. Some of this isolation can be attributed to the structural uniqueness of copyright law — it is governed entirely by federal law and preempts any state-level contract, tort, or property law that conflicts with it.[44] Moreover, significant bodies of law, such as the Uniform Commercial Code and Section 230 of the Communications Decency Act, treat intellectual property issues differently than other forms of ownership and related causes of action.[45]

To the extent that copyright law does expressly intersect with state laws governing ownership, management, and transfer of property interests, we might characterize that relationship as one of *deference* rather than meaningful *engagement*. For example, in *United States v. Windsor*, the Supreme Court observed that "to decide who is the widow or widower of a deceased author, or who are his executors or next of kin, under the Copyright Act, requires a reference to the law of the State which created those legal relationships."[46] Similarly, state contract laws

[44] *See* 17 U.S.C. § 301.

[45] *See* 47 U.S.C. § 230(e)(2); U.C.C. Art. 2-102, 2-105 (AM. L. INST. & UNIF. L. COMM'N 2002).

[46] United States v. Windsor, 570 U.S. 744, 767 (2013) (internal quotation marks and alterations omitted) (quoting De Sylva v. Ballentine, 351 U.S. 570, 580 (1956)).

largely determine the validity and scope of a copyright license.[47] State succession laws (i.e., wills, trusts, and intestacy laws) and contract laws may profoundly impact the real-world, nationwide impact of copyright law, but the Copyright Act takes a remarkably light-touch approach to these areas of law.

This siloing of copyright law from other areas of law is in some ways surprising, given that the basic structure of the federal copyright system anticipates that certain stewards besides the author will make important decisions about copyrighted works. Assignments to publishers, record labels, or movie studios are routinely viewed as the most economically efficient way to extract maximum value out of a copyrighted work, and recent copyright jurisprudence expressly validates the importance of these intermediaries for the economic and social value of copyrighted works.[48] Likewise, the long term of copyright — including a discrete post-author's-death term of seventy years — creates posthumous successors to the author who will enjoy the author's retained copyright interests for a lengthy period after the author's death. These well-recognized stewards (i.e., distributors and heirs) may make core creative decisions about an author's work, such as the decision to publish unpublished work, or to authorize derivative works.[49]

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[47] *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996) ("[W]e treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code.").

[48] *See* Eldred v. Ashcroft, 537 U.S. 186, 206-08 (2003) (upholding the extension of the copyright term from life-plus-50 to life-plus-70 years); Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 618 (2014) ("Those opinions upheld the constitutionality of copyright expansions with arguments that relied on the challenged provisions' providing advantages to noncreative activities like dissemination and physically restoring decayed movie stock.").

[49] *See* Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 258-60 (2011) (discussing the important — and sometimes notorious — role such posthumous successors have had in controlling authors' work); Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 123-24 (2015) [hereinafter *Copyright and the Living Dead?*] (similar). For a discussion about the particular role played by copyright successors with respect to an author's unpublished works, see Eva. E. Subotnik, *The Fine Art of Rummaging: Successors and the Life Cycle of Copyright*, *in* RESEARCH HANDBOOK ON ART AND LAW 26 (Jani McCutcheon & Fiona McGaughey eds., 2019).

As we have observed in our previous scholarship, the inattention to stewardship issues by copyright law and scholarship is not merely a theoretical concern; it results in real-world conflict. Most significantly, a shocking number of world-famous artists have died without any estate plan, resulting in the transfer of copyright ownership to close family members with little expertise in the creative fields — frequently in the form of splintered interests that devolve to siblings or children who inherit through intestacy law.[50] Legendary musician Prince's multiyear probate litigation—among six siblings, several banks, and a music licensing entity — stands out as a prime example of the dangers of siloing intellectual property from estate planning.[51] Even Sonny Bono, for whom the Sonny Bono Copyright Term Extension Act was named, died without a will, meaning that the extra twenty years of copyright protection created in his name were managed by his intestate heirs — *not* a successor of his express choosing.[52]

In analogous fashion, a determination of legal incapacity without an advance directive or power of attorney in place can result in a sudden shift of authority from a living artist to whichever family member or friend manages to win the battle to become a conservator. Artists who have acquired dementia later in life, including Nichelle Nichols[53] and Peter Falk,[54] have been the subject of heated conservatorship litigation between close friends and family battling over who should take the reins of the artist's property, intellectual and otherwise.

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[50] *See, e.g.*, Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. REV. 639, 696 (2017) [hereinafter *IP, R.I.P.*] ("Many of the problems surrounding estate ownership of IP emerge when the author takes all the necessary steps to secure their IP rights but fails to affirmatively decide who will be the proper steward for those rights after they die.").

[51] *See* Bill Donahue, *Prince Estate Court Battle Finally Ends, Six Years Later*, BILLBOARD PRO (Aug. 1, 2022), https://www.billboard.com/pro/prince-estate-court-battle-ends-six-years/ [https://perma.cc/PC6C-AFNG].

[52] *Sonny Bono's Procrastination Led to Years of Estate Battles*, CORTES LAW FIRM: BLOG, https://corteslawfirm.com/sonny-bonos-procrastination-creating-will-led-years-estate-battles/ (last visited Aug. 8, 2023) [https://perma.cc/LD4P-LZKS].

[53] Easter, *supra* note 19.

[54] *Judge Puts Peter Falk in Conservatorship*, TODAY (June 1, 2009, 7:13 PM PDT), https://www.today.com/popculture/judge-puts-peter-falk-conservatorship-1C9483025 [https://perma.cc/9CNW-URG8].

There is no principled reason why artists who enter into complex, multi-decade licensing deals — presumably with the aid of many lawyers — should not have succession and stewardship issues front of mind. And for successful artists who continue working well into old age, their past failure to account for potential incapacity can leave them as vulnerable objects of elder abuse. For example, Mickey Rooney, one of the most famous actors of all time, died with only $18,000 to his name, notwithstanding an active career that lasted until his death in 2014; by the time he was finally subject to a conservatorship in 2011, his spouse and children already had siphoned off millions of dollars in assets for their own benefit.[55] Beach Boy-member Brian Wilson similarly worked for decades, including writing new music, while under the control of a psychiatrist who overprescribed him medication for paranoid schizophrenia. A conservatorship was not appointed until 1991.[56]

On the other side of the coin, we similarly observe little attention paid by fiduciary law (and related fields) to intellectual property issues. The state-law based system of protective apparatuses,[57] for its part, does anticipate that certain types of rights or activities will be exercised by people other than the principal: basic property management, contract rights, *inter vivos* gift giving, and healthcare decisions are the common subjects of such exercise by surrogates. There are some liminal areas involving will execution, sexual advance directives, divorce, etc. that have forced questions about whether surrogates should be able to make or enforce complex socioemotional decisions on behalf of their principal. Nonetheless, the literature in the fields of trusts and estates, donative transfers, and fiduciary management has paid little attention either to (1) the complex mix of economic and emotional challenges that

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[55] Gary Baum & Scott Feinberg, *Tears and Terror: The Disturbing Final Years of Mickey Rooney*, HOLLYWOOD REPORTER (Oct. 21, 2015), https://www.hollywoodreporter.com/movies/movie-features/mickey-rooneys-final-years-833325/ [https://perma.cc/V8LK-QQA9].

[56] Powell, *supra* note 18.

[57] By this we mean the whole protective system as to elderly, disabled, or minors, whether by guardianship, conservatorship, durable power of attorney, parent to a minor, or otherwise.

accompany oversight of a legally incapacitated author's estate or (2) the *sui generis* nature of producing and transferring copyrighted works.[58]

Historically, some of this inattention paid by fiduciary law to copyright law is understandable, given that very few legally incapacitated individuals would become subject to a protective arrangement with a lucrative stream of copyright revenues in tow, and such individuals would likely also have a team of agents and managers handling day-to-day business affairs. But with advances in digital technologies, large quantities of copyrighted works are produced daily by all segments of society, and even if these works are not financially valuable, they may nonetheless be emotionally or culturally significant.[59] Moreover, social media has produced previously unthinkably vast audiences for minors (who generally lack legal capacity) and seniors (who may come to) creating copyrighted material for hundreds of thousands — or even millions — of followers.[60] Digital technologies have ushered in significant, qualitatively-new stewardship challenges that *should* bring together the fields of intellectual property and fiduciary management. Copyright's capacity gap is one salient example of what can emerge when these fields remain in their own silos.

We argue that copyright scholarship too often treats copyright as if it were its own independent system without paying attention to the interplay between the rights afforded by Title 17[61] and the other areas of law that turn those rights into tangible benefits. More specifically, we are driven by the concern that neither system of laws — that is, neither

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[58] *See* Andrew Gilden, *The Social Afterlife*, 33 HARV. J.L. & TECH. 329, 330 (2020) ("With the rise of social media and the expanding number of stakeholders in a person's legacy, the challenges of legacy stewardship have become both more complex and more widespread.").

[59] *See id*. at 338-39.

[60] *See generally* Jordan Meggison-Decker, *Viral TikTok or Copyright Infringement Lawsuit?*, BROWNWINICK (Jan. 25, 2022), https://www.brownwinick.com/insights/viral-tiktok-or-copyright-infringement-lawsuit [https://perma.cc/Y49J-3G49] (discussing copyrightability of TikTok posts); Julie Weed, *As Older TikTok Creators Flourish, Brands Are Signing Them Up*, N.Y. TIMES (June 3, 2023), https://www.nytimes.com/2023/06/03/business/older-creators-tiktok-brands.html [https://perma.cc/Q998-EFLF] (noting that "[o]lder influencers have popped in popularity recently" (internal quotation marks omitted)).

[61] The Copyright statute is codified at The Copyright Act of 1976, 17 U.S.C. §§ 101–1511.

federal copyright law nor relevant state law—sufficiently addresses the possibility that not all creators endowed as "authors" will possess the practical ability to enjoy those rights. In such circumstances, individuals may become caught in the capacity gap and potentially subject to exploitation. In addition, even though the two systems may often coexist harmoniously and productively, we argue that both areas of law (and their respective areas of scholarship) would be enhanced by a clearer focus on the disconnect between what is required for the vesting of copyrights in an author, and what is required to meaningfully exercise those rights.

The benefits of bringing copyright law and state laws into conversation around questions of capacity are both practical *and* conceptual. Practically, such conversation would help minimize the confusion about what should happen when an author dies or loses legal capacity. Moreover, such conversation could produce innovative options for managing the day-to-day needs of the incapacitated author while both ethically maintaining the value of their financial assets and recognizing the potential cultural significance of the author's work.

Conceptually, as discussed below, we observe a fairly stark distinction between the values that drive each system. For example, legal capacity doctrines are largely motivated by a protective paternalism; by raising the bar for access to the world of wills, or contracts, or marriage, it becomes more difficult for third parties to take advantage of a person's vulnerabilities, whether cognitive, intellectual, or developmental. Copyright law, by comparison, puts greater weight on inclusivity and autonomy; all are welcomed into the copyright system, and any exploitation that might result from bestowing rights on incapacitated authors is largely dealt with *ex post*, through terminations of copyright transfers. Vulnerability, inclusivity, and autonomy are all, of course, important considerations, and in the following Parts we examine the strengths and weaknesses of emphasizing certain considerations over others when addressing disability and incapacity. After comparing these divergent approaches, we then extract some guiding principles moving forward that should better incorporate vulnerability, inclusivity, and autonomy into both systems.

II. Capacity Under State Law

In order to take advantage of copyrights — for example by entering into a publishing agreement or bringing an infringement lawsuit — authors will necessarily need to lean on other areas of law to accomplish a desired outcome. Like other intellectual property rights, copyrights are often,[62] though not always,[63] conceptualized as negative rights, meaning they empower authors to prevent others from taking certain actions rather than bestow a positive right to exercise those actions.[64] Accordingly, one can view the exclusive right "to reproduce," "to prepare derivative works," or "to distribute copies"[65] of a copyrighted work — or to "authorize" these activities — as rights whose positive content is supplied by other considerations, ranging from other sources of law to an author's financial means. The same might be said about decisions to transfer copyrights themselves, whether by gift, contract, or will.[66]

In this Part, we begin by demonstrating, first, the disconnect between what is required to become an author and what is required to enter into legally binding arrangements — whether by contract, gift, or will — with respect to the rights vested in an author. This discussion will illustrate

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[62] For a thoughtful treatment of this question, see Ned Snow, *Copyright, Obscenity, and Unclean Hands*, 73 Baylor L. Rev. 386, 426 (2021) (noting that "courts and scholars agree that copyright is a negative right" and concluding that "copyright must be a negative right").

[63] *See, e.g.*, Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 UC Davis L. Rev. 199, 202 n.7 (2002) ("Most provisions of the Copyright Act confer negative rights on the copyright holder; in other words, the copyright holder is given the power to prevent others from doing something, such as reproducing the work. Implicit in the Act, however, are affirmative rights. The advantage of having a copyright is not only that one can exclude others from copying, distributing, displaying, and making derivative works of the original, but also by necessary implication that the copyright holder has the right to do these things in the first place. If a copyright holder could not distribute his own work, there would be little point in preventing others from doing so." (citations omitted)).

[64] Copyright ownership vests in authors in the first instance. 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work."). Given the focus of our paper, we will focus on authors as the relevant copyright owners.

[65] 17 U.S.C. § 106.

[66] *See id.* §§ 101, 201(d) (defining "transfer of copyright ownership").

how, despite the seeming attractiveness of federal copyright law's one-size-fits-all approach to authorship, ownership, and management (the topic of Part III), authors may be deprived of opportunities to fully exploit potentially valuable copyright interests if they cannot meet the requisite capacity standards under state law.[67]

Second, we turn to the protective mechanisms available — again, largely by virtue of state law — to assist individuals who are or become disqualified from performing the types of activities required for meaningful copyright exploitation. This discussion will illustrate the major divide between mechanisms that are imposed on individuals and those that are pre-selected by individuals — a difference that may well bear on how we think about the exercise of copyrights by someone on behalf of an author. It will also demonstrate that despite advances in these protective mechanisms generally, the topic of copyright management in particular has not received sufficient attention in either the law or scholarship — rendering authors vulnerable to exploitation by substitute decisionmakers.

Third, because there are specific issues that relate to minors and capacity, we discuss those separately. This discussion will illustrate that while the topic of how to manage minors' earnings in the entertainment space is nothing new, there has been all too little focus on the management of minors' copyright interests.

[67] As mentioned above, a group of scholars has analogously critiqued family law, arguing that its "one-size-fits-all approach to relationships" including its focus on marriage, often does not address the relationship preferences of older adults. Cahn et al., *supra* note 43, at 27.

A. Requirements for Wills, Contracts, and Gifts

Possessing sufficient legal capacity is a requirement in many domains of life. A person cannot vote,[68] pilot a plane,[69] or get married[70] without demonstrating certain legally defined thresholds of age, skill, or ability. At the most extreme, a person's legal capacity is outcome determinative on the question of whether they may face capital punishment for their crimes.[71] Legal capacity can thus be relevant for a wide variety of purposes and is assessed by a wide variety of standards depending on the purpose.[72]

Moreover, throughout private-law doctrines involving property and contract, "mental capacity operates as a threshold to the protections of the law."[73] As James Toomey has pithily observed, "If you have the cognitive abilities demanded by the law, you may make any decision you want; if you do not, your decisions will not be acknowledged by the legal system."[74] Our legal system requires capacity in these contexts for a host of significant reasons, including (1) that individuals lacking a certain quantum of cognitive and emotional ability may be vulnerable to

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[68] *See, e.g.*, Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1482-83, 1488-89 (2012) [hereinafter *Democratic Inclusion*] (describing electoral competence as an accepted criterion for voting eligibility and noting that "[s]ome conception of [electoral] competence . . . must underlie voting-age requirements"). This concept of electoral competence has also manifested itself in "states [that] have adopted voter qualification rules that allow the disfranchisement of adults deemed mentally incompetent." *Id.* at 1483; *see also id.* at 1491-92.

[69] *See, e.g.*, 14 C.F.R. § 67.107 (2023) (providing the Federal Aviation Administration's "[m]ental standards for a first-class airman medical certificate").

[70] *See, e.g.*, N.Y. DOM. REL. LAW § 7 (2023) ("A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto: . . . 2. Is incapable of consenting to a marriage for want of understanding; . . . [or] 5. Has been incurably mentally ill for a period of five years or more.").

[71] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that . . . [the death penalty] is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citation omitted)).

[72] *See* RESTATEMENT (THIRD) OF AGENCY § 3.04 (AM. L. INST. 2006) ("A person may have capacity in some respects but not in others.").

[73] James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1075-76 (2022).

[74] *Id.* at 1076.

exploitation, (2) that meaningful personal autonomy requires validating only those decisions that were made with a certain degree of lucidity and rationality, and (3) that private property systems would lose legitimacy without background rational deliberation.[75]

The flipside, however, is that once a person is deemed to be without capacity, they are effectively prevented from having their personal decisions recognized by the law.[76] Any legally binding decision must be made by a surrogate decisionmaker, such as a parent, conservator, or guardian. Moreover, capacity has been used in earlier eras to exclude disfavored groups — such as enslaved people and married women — from meaningfully participating in the property system.[77] A person without legal capacity may come into possession of valuable property, but what happens to such property is ultimately in the hands of someone else.[78]

One additional point before moving on: at a more granular level, scholars have distinguished between legal incapacity and mental incapacity. Alexander Boni-Saenz has described mental incapacity as primarily the cognitive "condition of lacking the requisite psychological abilities to engage in autonomous decision-making" or "[i]n shorthand: 'She didn't know what she was doing.'"[79] By contrast, legal incapacity is "the condition of lacking the requisite legal authority to engage in

[75] *See* Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & C.R.L. REV. 321, 328 (2003) ("[A] more stringent standard, such as that applied with respect to business transactions, may indicate that society more highly values the activity and has concluded that individuals with diminished capacity should be excluded from participation.").

[76] Toomey, *supra* note 73, at 1076; *see also* Knauer, *supra* note 75, at 323 ("On one side are individuals who are not only empowered to act and to make legally binding decisions, but who will be held legally responsible for their actions and decisions. On the other side are those individuals who are deemed to have no agency, no decision-making authority and who are, therefore, held blameless, or at least not responsible, for their actions and decisions.").

[77] Natalie M. Banta, *Minors and Digital Asset Succession*, 104 IOWA L. REV. 1699, 1709-10 (2019); Knauer, *supra* note 75, at 341.

[78] Banta, *supra* note 77, at 1710 (noting that "the law categorically prevents all minors from executing a will no matter their mental ability or social maturity").

[79] Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1209 (2015).

autonomous decision-making."[80] As Boni-Saenz insightfully points out, these two forms of incapacity may converge or diverge depending on the circumstances.[81] Convergence may be seen in the case of an unconscious person's inability (both cognitively and legally) to consent to sexual activity.[82] Divergence may be seen in the case of a seventeen-year old at noon on election day who is turning eighteen when the clock strikes midnight. Indeed, the Spears conservatorship itself — if wrongly imposed or maintained because Spears in fact retained full cognitive abilities — might be an example of such divergence.[83]

While recognizing these important distinctions — and identifying them where relevant in what follows — our overall aim is to highlight the failure of the copyright system to engage with state-law based capacity determinations of all kinds (i.e., the copyright gap). Thus, in this Part, we set the stage for our discussion of capacity in copyright law (the topic of Part III) by highlighting the capacity standards that govern the day-to-day activities relating to the exploitation of copyright interests. For this reason, we primarily focus — by way of context — on private law activities, the most relevant of which are estate planning law and contract law.

1. Wills, Trusts, and Estate Planning

As each of us has demonstrated in previous work, succession laws — i.e., the laws of wills, trusts, and intestacy — often tackles financially, emotionally, and culturally complex questions of stewardship.[84] By stewardship, we mean decision-making with respect to particular resources on behalf of a particular person or peoples. Although the law

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[80] *Id.* at 1210.

[81] *Id.* at 1211.

[82] *Id.*

[83] *See id.* We thank Alexander Boni-Saenz and Jeanne Fromer for crystalizing this point.

[84] *See, e.g.*, Gilden, *The Social Afterlife*, *supra* note 58, at 330 (noting that "[l]egacy planning . . . is shifting from questions of financial investment and asset management to questions of ongoing emotional and cultural stewardship"); Subotnik, *Copyright and the Living Dead?*, *supra* note 49, at 81 (arguing for a reconceptualization of postmortem copyright from the perspective of "suboptimal stewardship by the living rather than from dead-hand control").

of wills — our main focus here — is focused on *posthumous* stewardship of a person's estate, as opposed to the lifetime stewardship issues raised in conservatorship proceedings, this area of law is home to extensive, well-developed scholarship surrounding issues of capacity.[85] And it is also a space where much attention has been directed at the consequences of *failing* to affirmatively plan for the future and the dangers of instead relying upon default rules of intestacy.[86] The law of wills, and succession laws more generally, confront key questions such as who can execute a legally enforceable will, who should be appointed to represent the decedent's estate, and who ultimately should acquire ownership of the estate's property. This area of law accordingly provides a useful comparator, theoretically and doctrinally, to copyright law.[87]

In the sphere of private law, a fundamental distinction is drawn between those activities incurring lifetime consequences for a person and those that have effect only after their death.[88] Lifetime transactions require the highest capacity threshold. The reason for this is obvious: a high threshold is seen as protecting living people from the consequences of irrational choices, and also as ensuring that valuable resources are being managed rationally.[89] By contrast, transactions that come into

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[85] *See* Toomey, *supra* note 73, at 1088-89 & nn.75–85; Weisbord & Horton, *supra* note 6, at 613-14, 632-35.

[86] *See, e.g.*, Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 MINN. J.L. & INEQ. 1 (2000) (critiquing the privileging of traditional family forms within intestacy law); Jennifer Seidman, Comment, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211 (2004) (critiquing the exclusion of unmarried, long-term partners from intestacy law); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 896-97 (2012) (critiquing costs and inequities of intestacy law); Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Non-Traditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1 (2015) (critiquing intestacy laws for disadvantaging children in nontraditional families).

[87] *See* Gilden, *The Social Afterlife*, *supra* note 58, at 342 (introducing and comparing the stewardship frameworks adopted by copyright and succession laws).

[88] *See* Susanna Blumenthal, *The Default Legal Person*, 54 UCLA L. REV. 1135, 1204 (2007) ("[J]udges frequently declared that it took less capacity to make a will than a contract of sale, chiefly because the latter involved two parties." (internal quotation marks omitted)).

[89] *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. d (AM. L. INST. 2003) (explaining that "[b]ecause an irrevocable gift depletes

fruition only at a person's death typically require a lower showing of capacity because of the lesser potential harms to the principal or others.[90] Thus, as one court put it, "a person may lack sufficient capacity to transact his ordinary business affairs and yet have capacity to make a will. He need not have sufficient mental capacity to enter into complex contracts or engage in intricate business in order to have sufficient capacity to make a will."[91]

a. Who May Make a Will

Even starting at the lower end of the spectrum — with the capacity required to execute a valid will[92] — there are certain unyielding requirements. Typically, one must be eighteen or older.[93] In addition, one must be of "sound mind."[94] Together, these eligibility requirements rope together two different concepts that may or may not be aligned in every case: that of age and of mental competence.[95] Yoking these two requirements together in evaluating requisite capacity is hardly unique

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financial resources that the donor may yet need, the standard for mental capacity to make an irrevocable gift is higher than that for making a will").

[90] The capacity to execute a will has been characterized as "minimal." ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 264 (10th ed. 2017).

[91] *In re* Chongas' Est., 202 P.2d 711, 713 (Utah 1949).

[92] The same threshold applies to revocable will substitutes. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) cmt. e.

[93] UNIF. PROB. CODE § 2-501 (amended 2019) (1969).

[94] *Id.*

[95] Again, the vocabulary can prove to be challenging as these requirements and sub-requirements have been labeled in different ways by different scholars. For example, Mark Glover has referred to the umbrella eligibility requirement as "testamentary capacity," and the sub-requirements as "mental capacity" and "legal capacity." Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 73 (2014); *see also* Weisbord & Horton, *supra* note 6, at 617 ("[F]ollowing the convention of many courts, we will use the words 'competency' and 'capacity' interchangeably even though these two concepts are not the same.").

to estates law[96] — or even to property-oriented fields.[97] These dual requirements could be viewed as separate requirements, but in most instances age is viewed as a proxy for the other.[98] In the case of succession laws, for example, the reasoning is that those younger than eighteen categorically will (or likely will) fail to demonstrate the sufficient cognitive skills[99] and maturity required for executing a will.[100] Age is, of course, only a rough proxy for emotional maturity; accordingly linking age — or at least a particular age — to mental competence in these ways is not immune to critique.[101]

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[96] *See, e.g.*, Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1851-52 (2012) [hereinafter *The Age of Marital Capacity*] ("Minors and the mentally ill continue to presumptively lack legal capacity; the members of both groups are deemed to possess insufficient judgment and understanding to enter an agreement to which they should be held.").

[97] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568, 570 (2005) (rejecting the imposition of the death penalty on offenders under 18 as required by the Eighth Amendment, noting that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988))).

[98] *See, e.g.*, *id.* at 569 ("Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."); Hamilton, *Democratic Inclusion*, *supra* note 68, at 1448. ("Presumably, eighteen is a proxy for voters' attainment of desirable characteristics — e.g., maturity of judgment, knowledge of civics, and understanding of political processes."); Hamilton, *The Age of Marital Capacity*, *supra* note 96 at 1852-53 ("Legally valid consent [for contract law and therefore marriage law] thus requires cognitive and decisionmaking competence — an individual must have legal capacity (itself a proxy for presumptively adequate cognitive and decisionmaking abilities).").

[99] *See* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 332 (2017) (referring to "cognitive failures" in connection with the sound mind doctrine).

[100] *See, e.g.*, Glover, *supra* note 95, at 95-103 (describing and critiquing the use of age as a proxy for competence); *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.2(a) (AM. L. INST. 2003) ("A minor does not have capacity to make a will. A purported will made by a minor is void."). This quote is derived from a section entitled "Incapacity Due to Minority." *Id.* Presumably, too, the rule here derives from the fact that minors were often unlikely to own enough property of value to make the ritual of will execution worth the candle. *Cf.* Glover, *supra* note 95, at 109 (noting that "[m]ost children do not amass large fortunes").

[101] *See*, *e.g.*, *Simmons*, 543 U.S. at 602 (O'Connor, J., dissenting) ("There is no . . . inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers."); Hamilton, *Democratic Inclusion*, *supra* note 68, at 1513 ("Voter qualification

b. The Requirement of "Sound Mind"

With respect to the precise meaning of the substantive term "sound mind" (the principal capacity requirement, besides age, for executing a valid will), although the meaning of this term varies across the states, a testator must generally:

> [1] be capable of knowing and understanding in a general way the nature and extent of his or her property, [2] the natural objects of his or her bounty, and [3] the disposition that he or she is making of that property, and [4] must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.[102]

These requirements are aimed at basic gatekeeping — to ensure that donative intent is effectuated.[103] So, for example, one does not need to know the exact number of soup spoons in one's kitchen drawer in order to have a sense of "the nature and extent of his or her property."[104] In New York, for instance, "[w]hile a testator need not have precise knowledge of the size of his [or her] estate, . . . a testator's lack of

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rules excluding citizens younger than eighteen from the electorate are justified by the presumed electoral incompetence of that category of citizens, but the requirements of electoral competence remain unspecified. . . . Research demonstrates that young people reliably attain electoral competence by the age of fifteen or sixteen. Thus, labeling them incompetent is error and can no longer justify their continued exclusion."). Another notable inconsistency is the fact that "[w]hile the law protects children by denying them testamentary capacity, it grants disabled adults, who possess the mental capacity of minors, the ability to execute wills." Glover, *supra* note 95, at 103 (citing Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.2 reporter's note 3 on cmt. c). For a recent argument in favor of a more nuanced approach to the "question of how we should define legal age after one has reached adulthood" beyond knee-jerk reliance upon "chronological age," see Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. REV. 521, 522 (2022).

[102] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b).

[103] *See, e.g.*, Hirsch, *supra* note 99, at 299 (theorizing in depth the purpose of the "sound mind" capacity requirement).

[104] *See* Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175, 180 (2015) ("[T]he law favors a finding of capacity because it disfavors the alternative outcome."); *see also id.* at 189-90 ("The gatekeeping function of assessing an individual's testamentary capacity is achieved by weeding out only those persons who truly lack the ability to conceptualize what they own.").

awareness of or ability to keep in mind without prompting the general nature and extent of one's real and personal property requires denial of probate."[105] On the subsequent question of how to define the "natural objects of one's bounty," some courts have strictly referred to one's heirs in intestacy,[106] while "[o]thers have adopted a more subjective analysis and consider who might stand in closest relation to the individual, taking account of their particular friendships and attachments."[107] Regardless of how the term is defined, however, there is no obligation to actually leave any property to this group of people.

Admittedly this is just a small taste of the substantive requirements of "sound mind." While readily met in most cases, the point is that the law of wills does have in place detailed capacity requirements that must be met before admitting a will to probate.

c. The Adjacent Doctrine of Insane Delusion

One additional doctrine bears on the capacity question: that of so-called insane delusion. An insane delusion has been defined as "a belief that is so against the evidence and reason that it must be the product of derangement."[108] While sometimes collapsed into the question of capacity,[109] insane delusion is properly conceptualized as a separate doctrine that can operate in the face of an otherwise valid will.[110] "Stated another way, an insane delusion can be a legal issue only when it has first been determined that the testator had capacity."[111] In such

[105] *In re* Falkowsky, 197 A.D.3d 1300, 1306 (N.Y. App. Div. 2021) (citation omitted) (second alteration in original).

[106] *See, e.g.*, *In re* Est. of Tank, 938 N.W.2d 449, 456 (S.D. 2020) ("This Court has consistently held that testamentary capacity exists under the second and third elements of our test if the testator knows his or her heirs and the disposition he or she desires to make of the property.").

[107] Simmons, *supra* note 104, at 190; *see also* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 77 n.248 (2006) ("The phrase 'natural objects of bounty' has eluded crisp definition, incorporating more than testators' intestate distributees and even more than the wider family circle.").

[108] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s.

[109] *See, e.g.*, Hirsch, *supra* note 99, at 326 (noting that some "[c]ourts conceive the insane delusion rule as an addendum to the sound mind doctrine").

[110] *See* Simmons, *supra* note 104, at 180.

[111] *Id.* at 195.

circumstances, only the portion of a will affected by the insane delusion will be invalidated.[112] Thus causation — that is, a showing that a particular provision of the will was the direct result of an insane delusion — is a key element of the doctrine.[113]

In one classic case discussing insane delusion, the Supreme Court of South Dakota denied probate to a will of a testator who "was possessed of the belief that she had frequent and continual communication with departed spirits, who gave her directions regarding all her actions in the ordinary affairs of life; [and] that she was obliged to follow, and did follow, the directions given her by them."[114] The court in that case drew on a long line of precedents to distinguish between a testator who acted upon her religious belief and one whose will was the product of "coercion of departed spirits" and therefore not "her free and voluntary act."[115] Testamentary provisions under the former may be valid, but under the latter are invalid.

The insane delusion doctrine is inevitably paternalistic, questioning the factual bases for the decedent's worldview and the mindset that

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[112] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s ("A person who suffers from an insane delusion is not necessarily deprived of capacity to make a donative transfer. A particular donative transfer is invalid, however, to the extent that it was the product of an insane delusion.").

[113] *See, e.g.*, *In re* Est. of Tank, 938 N.W.2d 449, 458 (S.D. 2020) ("However, this evidence is insufficient to create a question of fact as to whether Russell suffered from an insane delusion. There was no evidence he was delusional about a particular subject or topic that '*materially affected the terms and provisions of his will.*'"); SITKOFF & DUKEMINIER, *supra* note 90, at 274; Hirsch, *supra* note 99, at 327; Simmons, *supra* note 104, at 194.

[114] Irwin v. Lattin, 135 N.W. 759, 763 (S.D. 1912) (cited as good law recently by *In re* Est. of Tank, 938 N.W.2d at 457).

[115] *Id.* at 763. Similarly, in *O'Dell v. Goff*, the court found an insane delusion, and refused to probate a will, where the testator "believed that the spirits of the departed communicated with him, not only through mediums, but directly." O'Dell v. Goff, 112 N.W. 736, 737 (Mich. 1907). Although the court acknowledged Spiritualism alone "was not evidence of insanity," there was evidence that the testator "dwelt upon the subject of Spiritualism so persistently and profoundly as to make him incapable of reasoning when that subject was concerned." *Id.* at 738; *see also In re* Sandman's Est., 8 P.2d 499, 500 (Cal. Ct. App. 1932) (upholding a finding of insane delusion based on evidence that the testator claimed to have been in communication with his deceased wife and "that his wife had talked to him about his will, and had told him to leave his money to his brother").

drove their testamentary decisions. The doctrine, like much of capacity law, is ostensibly aimed at protecting society (and the decedent's other potential beneficiaries) from irrational, wasteful, or potentially harmful outcomes. Nonetheless, behind this commitment to rationality and efficiency lies opportunity for excluding individuals from the estate planning system along race, gender, and sexual hierarchies.[116] Despite all this, however, insane delusion stands ready as a basis for striking down provisions of a testator's will.

d. Application to Authors

The law of wills thus reveals itself as an area of law with a low but nevertheless extant set of criteria to grapple with both legal and mental capacity issues. More concretely, for our purposes, many authors fully imbued with copyright protections have no lawful ability to choose their post-death successors. Copyrights, once acquired, are subject to transmittal through one's will as personal property.[117] This means that if an author lacking testamentary capacity[118] creates copyright-protected artwork, there will be barriers to later leaving the copyright in that artwork via will. The reason for this is that one person may not execute the will of another person, even if that person is incapacitated.[119]

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[116] For example, when feminist and antiracist prerogatives have appeared in a contested will, the insane delusion doctrine has been used to set aside devises to the National Women's Party as well as to invalidate the emancipation of enslaved persons. *See In re* Strittmater's Est., 53 A.2d 205 (N.J. 1947); Townshend v. Townshend, 7 Gill 10 (Md. 1848).

[117] 17 U.S.C. § 201(d)(1).

[118] *See supra* Part II.A.1.b.

[119] This includes by an agent under a durable power of attorney. *See* Perosi v. LiGreci, 98 A.D.3d 230, 237 (N.Y. App. Div. 2012) ("There are a few exceptions to the powers which can be granted to an attorney-in-fact. These exceptions include, but are not limited to: the execution of a principal's will." (citing N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(3) (2023)); UNIF. PROB. CODE § 5B-201(a)(1) (amended 2019) (1969) (noting that an agent under a power of attorney may "create, amend, revoke, or terminate an inter vivos trust" but excluding will execution from this list); RESTATEMENT (SECOND) OF AGENCY § 17 cmt. b (AM. L. INST. 1958) ("The making of affidavits as to knowledge and the execution of wills are illustrations of acts commonly required by statute to be done personally."); Ralph C. Brashier, *The Ghostwritten Will*, 93 B.U. L. REV. 1803, 1805 (2013) ("Moreover, American law has never permitted an individual to delegate directly her will-making power to another."); *id.* at 1811 ("Recognizing that each individual is shaped

"Indeed, under the nondelegation doctrine, guardians and agents acting under powers of attorney cannot make a proxy will for a testator."[120]

Thus, if an artist were to experience Alzheimer's, dementia, severe brain injury,[121] or other significant cognitive impairment — an increasingly likely possibility given current demographic shifts[122] — they would become unable to make decisions about what should happen to their property at death; they would be bound either by the default rules of intestacy or by a previous, largely-irrevocable estate plan. The entertainment fields have hardly been immune to such demographic

by her singular life experiences, state probate laws traditionally impose an obvious, if unstated, limitation on will execution: No one can make, amend, or revoke the will of another person, and this is so even when that person becomes incapacitated and unable to act for herself."). These activities are to be distinguished from the mere signing of a will on behalf of the testator (for example in the case of testator who lacks the ability to hold a pen), which is allowed as long as it follows the stated protocols. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(1) (2023) (providing that a valid will "shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction, subject to the following"); UNIF. PROB. CODE § 2-502(a)(2) (similar); Brashier, *supra*, at 1812 (noting this distinction).

[120] Weisbord & Horton, *supra* note 6, at 614. In some states, however, there may be an exception to this rule if the incapacitated author is subject to some protective mechanism like a guardianship or conservatorship. UNIF. PROB. CODE § 5-411. To the extent guardians or conservators in those jurisdictions are permitted to execute both wills and trusts on behalf of their principals, that can in turn incentivize the imposition of those mechanisms on authors for ulterior motives.

[121] For more on this particular topic, see Megan S. Wright, Nina Varsava, Joel Ramirez, Kyle Edwards, Nathan Guevremont, Tamar Ezer & Joseph J. Fins, *Severe Brain Injury, Disability, and the Law: Achieving Justice for a Marginalized Population*, 45 FLA. ST. U. L. REV. 313 (2018).

[122] *See* Weisbord & Horton, *supra* note 6, at 615. The authors note:

> America is undergoing a massive demographic shift. Currently, about 50 million people are age 65 or older. By 2060, that number will rise to roughly 95 million, and members of that cohort will enjoy average life expectancies of an additional 19.5 years. Because a third of seniors will suffer from Alzheimer's or dementia, "the likelihood is increasing that, at some point, an attorney will be called upon to help a client or a client's family deal with the challenges posed by incapacity."

Id. (citations omitted).

shifts, as numerous famous individuals and their families have had to face the challenges of Alzheimer's and dementia.[123]

For those authors who lack capacity to create a will because they tragically die too young, control over their assets would automatically go to their closest living relatives — typically their parents.[124] While this shift in control is likely the right outcome for most children, there nonetheless are many high-profile accounts of child performers — such as Macauley Culkin and Drew Barrymore — who have been coerced by their parents into working grueling schedules for their families' enrichment.[125] And there is every reason to suspect that — at least for some subset — today's young content creators on social media will be similarly subject to such coercion.

2. Contracts and Gifts

Of course, testamentary activities are those that come into play at the end of an author's lifetime. Even more relevant are the activities that authors can engage in during their lifetimes, including making contracts and gifts. For example, a musician might enter into a multi-year, multi-album exclusive deal with a particular record label; if the deal entails inadequate compensation or contains onerous provisions, then the contract can have ongoing, damaging ramifications for the musician's financial success and emotional well-being. Because of these serious potential outcomes from *inter vivos* transfers, the Restatement supplies a different capacity threshold than it does for testamentary activities:

> If the donative transfer is in the form of an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.[126]

[123] *See* Paula Span, *Dementia Is Getting Some Very Famous Faces*, N.Y. TIMES (Nov. 9, 2018) https://www.nytimes.com/2018/11/09/health/alzheimers-dementia-celebrities.html [https://perma.cc/QP7P-X7RA].

[124] *See* Banta, *supra* note 77, at 1717.

[125] *See infra* Part II.C.

[126] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(c) (AM. L. INST. 2003).

Giving is different from contracting, and the Restatement discusses the mental capacity required for lifetime gift giving separately from contracting activities.[127] But it analogizes the two in noting that the "standard . . . for having mental capacity to make an irrevocable gift is similar to that for capacity to contract."[128]

More specifically, in variations on a theme discussed above,[129] Vivian Hamilton has described three basic requirements for valid consent under contract law: (i) legal capacity, that is, the "presumptive ability to enter binding contracts at all" (noting that "[m]inors and the mentally ill continue to presumptively lack legal capacity"[130]); (ii) mental or cognitive competence; and (iii) voluntariness (meaning the absence of duress or undue influence).[131] She describes the first requirement as "itself a proxy for presumptively adequate cognitive and decisionmaking abilities."[132] As to the latter two requirements, she explains that they "protect otherwise-capable individuals from the effects of agreements entered under conditions that in some way deprived them of capacity to consent."[133]

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[127] RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16 (AM. L. INST. 1981) (with current updates).

[128] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. d. Standard for mental capacity to make an irrevocable gift:

> The standard set forth in Comment d for having mental capacity to make an irrevocable gift is similar to that for capacity to contract. Section 15 of the Restatement Second, Contracts, provides that a person lacks capacity to contract if "by reason of mental illness or defect . . . he is unable to understand in a reasonable manner the nature and consequences of the transaction."

Id.

[129] *See supra* notes 76–80 and accompanying text; *supra* note 91.

[130] Hamilton, *The Age of Marital Capacity*, *supra* note 96, at 1851.

[131] *Id.*

[132] *See id.* at 1852-53. Marriage has lower threshold requirements because, although it is important to protect vulnerable people from abusive circumstances, there are particularly important autonomy interests surrounding marriage and the consequences of the decision are mostly contained within a family unit. Marriage can hold particular relevance for authors' copyright interests: the person you marry may inherit your copyrights.

[133] *Id.* at 1852.

As Hamilton notes (again with respect to the latter two requirements), "the competence required for a legally enforceable contract is relatively minimal" and the voluntariness requirement "aims to ensure a minimum level of independent thought and volitional behavior."[134] Thus, the point here is not that the laws surrounding lifetime gift giving and contracting are overly onerous; the point is that those areas of the law contemplate the status of a principal's legal and mental capacity and provide some baseline requirements.

B. Requirements for Protective Apparatuses

Some percentage of individuals who cannot make the requisite showings of capacity for routine activities — such as the transactions outlined above that relate, especially, to lifetime contracts and gift giving — will find themselves subject to some type of surrogate decision-making process. As will be described below, these types of surrogates roughly fall into two categories: those that are imposed by the state, and those that are selected by the affected individuals, although even here there is some fluidity. There is robust debate about the appropriate limits of these protective apparatuses — both as to what rights individuals should be deprived of and as to what decisions surrogates should be permitted to make on their behalf (and how they should make them). But, as we will show, there is very little discussion in either the law or the scholarly literature about the conceptualization of copyrights as creating unique challenges and vulnerabilities when placed in the hands of substitute decisionmakers.

1. Guardianships and Conservatorships

Britney Spears' plight may have facilitated widespread public discourse around the use of conservatorships, but such use is not new. By some estimates, there are "1.3 million active adult guardianship or conservatorship cases and . . . courts oversee at least $50 billion of assets under adult conservatorships nationally."[135] Furthermore, "[d]espite the

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[134] *Id.*

[135] NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 65 (2018).

lack of reliable data, there is some evidence that suggests that the number of adults subject to guardianship has been rising."[136]

A preliminary vocabulary note: in keeping with other scholarship, this Article will use the term "guardianships" as the umbrella term for imposed property management by a third party even though some states "use the term 'guardian' exclusively to refer to the individual appointed by the court to make decisions about personal affairs and the term 'conservator' to refer to the individual appointed by the court to manage an individual's property and financial affairs."[137] California, where Spears and many other celebrities reside, uses the term "conservatorship" to apply to both personal and financial matters of an adult, and reserves the term "guardianship" for matters concerning minors.[138]

Guardianship is a creature of state law such that any general discussion may draw upon — at the very least — the laws of fifty states plus the District of Columbia. Generally speaking, these laws can affect "a person's legal right to make some or all of the decisions in their lives, including those about finances, health care, voting, marriage, socializing, and working, among others."[139] Guardianship petitions are filed for a variety of reasons, including:

> by parents when a child with an intellectual disability turns 18; by a son or daughter when a parent begins to show signs of dementia severe enough that there is concern for their safety; for a person with a severe disability due to sudden trauma; or when there is concern that a bad actor is exercising undue

[136] *Id.* at 66.

[137] Nina Kohn & David English, *Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, 72 SYRACUSE L. REV. 225, 227 (2022); *see also* Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 496 n.2 (2016); Weisbord & Horton, *supra* note 6, at 610 n.1.

[138] CAL. PROB. CODE §§ 1510, 1801 (2023); *see* Jocelyn Wiener, *The Britney Effect: How California Is Grappling with Conservatorship*, CAL MATTERS, https://calmatters.org/justice/2021/07/britney-spears-conservatorship/ (last updated Dec. 13, 2021) [https://perma.cc/5D4H-NVR6].

[139] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 102.

> influence over a person with a disability in order to exploit the individual in some way.[140]

In practical terms, at least with respect to older adults, guardianships are typically sought "when a relative, friend, or health care institution believes one of two situations has arisen: (1) some legally binding decision needs to be made and the person is thought not able to make it; or (2) the person is making decisions thought to be irrational and/or harmful to themselves."[141]

This wide sweeping coverage renders guardianship readily characterizable at the extremes. For example, Michael Perlin has written that "[a]t best, the guardianship will provide the personal care and property management that the [person with a disability] alone cannot handle. At worst, guardianship will deprive the individual of decision-making authority that he or she has the capacity to handle, and create the opportunity for personal or financial abuse."[142] The negative outcomes at the latter end of the spectrum are easy to understand: "[a]lthough guardians are often appointed to protect an individual's assets from waste or to prevent a 'bad actor' from obtaining access through undue influence, fraud, or misrepresentation, ironically this often places guardians in the best possible position to financially exploit vulnerable individuals themselves."[143] The Britney Spears

[140] *Id.* at 30-31; *see also* Diller, *supra* note 137, at 501 ("Guardianships have typically affected three main groups: (1) older adults with cognitive impairments, such as dementia and, to a lesser extent, those living with stroke-related conditions; (2) persons with intellectual disabilities; and (3) persons with psychosocial disabilities."). These are bona fide situations where petitions are filed; they can also be filed for more nefarious reasons. NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 30-31.

[141] Diller, *supra* note 137, at 502.

[142] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 101-02 (quoting MICHAEL L. PERLIN, PAMELA R. CHAMPINE, HENRY A. DLUGACZ & MARY A. CONNELL, COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION 246 (2008)).

[143] *Id.* at 103. "However, [a 2010 Government Accountability Office] report detailed the cases of 20 guardians who improperly obtained $5.4 million in assets from 158 incapacitated victims." *Id.* A. Frank Johns wrote that "he expressed continued concerns that the legal system surrounding guardianship focused more on the interest in protecting a person's property than the person him/herself." *Id.* at 102 (citing A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1542 (2012) (not a direct quote)).

conservatorship litigation, for example, was replete with accusations of self-dealing.[144]

While guardianship law has ancient origins,[145] a recent inflection point for contemporary discussion was the scathing review of the guardianship system in the 1980s by the Associated Press.[146] In the wake of that reporting, which has been detailed at length elsewhere,[147] states began to reevaluate and reform their laws.[148] Broadly speaking, one can identify (at least) three interrelated dimensions of attempted improvements with respect to guardianship laws: *when they are triggered*, *what precisely is triggered*, and *how decisions should be made when they are triggered*.[149] While these reforms (and critiques of them) could fill many pages, the discussion below is meant to show two key things: first, how fine-tuned the approaches to these issues have become with respect to protective apparatuses generally, and second how these approaches nevertheless fail to address the challenges of managing copyright interests on behalf of authors under guardianships.

When guardianship laws are triggered. Courts traditionally made two findings to determine whether an individual was incapacitated such that a guardianship might be warranted: first, the "existence of a disabling condition, such as 'mental illness,' 'mental disability,' 'intellectual

[144] *See, e.g.*, Ebadi Decl., *supra* note 3, ¶ 8 ("Mr. Spears used his role as Conservator to enrich himself and those close to him (or useful to him), at the expense of his daughter and the Estate, and he often worked to rid Ms. Spears's inner circle of individuals willing to support or speak on her behalf."); Elizabeth Wagmeister, *Britney Spears' Attorney Claims Tri Star Helped Create Conservatorship, Received $18 Million from Pop Star's Estate*, VARIETY (July 2, 2022, 10:06 AM PDT), https://variety.com/2022/music/news/britney-spears-tri-star-conservatorship-1235308278/ [https://perma.cc/3MNA-WECV] ("Tri Star not only benefited at least $18 million from Spears' estate, but also 'built its company on the back of Britney Spears,' now representing stars ranging from the Kardashian family to Travis Scott." (citation omitted)).

[145] *See*, *e.g.*, Weisbord & Horton, *supra* note 6, at 618 (tracing guardianships to the ancient principle of "parens patriae").

[146] *See id.* at 623.

[147] Mark D. Andrews, Note, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 ELDER L.J. 75, 80-82 (1997).

[148] Diller, *supra* note 137, at 504-05; *see also* Weisbord & Horton, *supra* note 6, at 612.

[149] Another area of reform, outside the scope of this Article, concerns enhancing due process safety valves throughout the process. NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 74.

disability,' 'mental condition,' 'mental infirmity,' or 'mental deficiency,'" and second, that "such condition cause[d] an inability to adequately manage one's personal or financial affairs."[150] While it used to be the case that certain medical diagnoses thus automatically produced an incapacity determination that could trigger guardianship, states have moved more recently to consider a combination of functional, cognitive, and necessity based evaluations of the alleged incapacitated person ("AIP").[151] Indeed, the National Council on Disability ("NCD") — and others — have raised doubts about the significance of "incapacity" as a basis for legally interfering with one's autonomy.[152] The NCD suggests that "it is worth considering that the whole notion of 'capacity' is 'a [legal] fiction determined by prevailing values, knowledge, and even the economic and political spirit of the time.'"[153]

Consistent with these concerns, the 2017 Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (with its mellifluous acronym "UGCOPAA"), has gone so far as even to remove medical conditions as a basis for appointing a guardian for an adult.[154] Instead, under the UGCOPAA, a guardian can be appointed for an adult if the court finds, by clear and convincing evidence, that: "(1) the adult cannot meet essential requirements for physical health, safety, or self-

[150] *Id.* at 35. *See generally* Diller, *supra* note 137, at 503 ("The inability to pass the 'understand and appreciate' threshold is what drives many older people into guardianships, because third parties demand a legally cognizable actor to make health care decisions, engage in banking transactions, enter a residential lease, or engage in other real estate and financial transactions.").

[151] ABA COMM'N ON L. & AGING & AM. PSYCH. ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 7 (2d ed. 2021). The term AIP has been defined as "[a] person who is the subject of a petition to determine capacity or guardianship, but who has not yet been adjudicated incapacitated." NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 11.

[152] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 74; Diller, *supra* note 137, at 530 ("Thus, it seems as though the entire enterprise of assessing mental capacity, from which so many other legal consequences flow, is deeply flawed.").

[153] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 82-83 (alteration in original) (footnote omitted).

[154] *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301(a) (UNIF. L. COMM'N 2017); ABA COMM'N ON L. & AGING & AM. PSYCH. ASS'N, *supra* note 151, at 7.

care; (2) guardianship is the least restrictive approach to meeting the adult's identified need; and (3) the adult cannot receive and evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making."[155] Nevertheless, medical assessments may still play a role. As one well-regarded authority notes, "as a procedural matter, medical evaluation is still important to ascertain causal factors for one's diminished abilities."[156]

While engaging in — let alone resolution of — the debate over the precise role of capacity in triggering guardianship protections is beyond the scope of this Article, it is important to note that even under a more "functional" and less "medical" approach, individuals may still be caught in copyright's capacity gap. That is, because of the very low threshold for achieving authorship status under copyright law (as described in depth below in Part III), an individual who cannot demonstrate an ability to manage their own "physical health," even when provided "appropriate supportive services," may nevertheless produce protectable creative works.[157]

Likewise, older authors facing dementia — whose valuable works were created long beforehand — can also still be subjected to guardianship even under a functional approach, which will affect the management of those very works. Thus, by itself, any diminution in the definitional importance of "capacity" for guardianship law purposes does not fully address the very real possibility that authors may generate and need to manage valuable copyrights, which opens them up to exploitation by their guardians.

This dimension also relates to the next one: when the relevant circumstances warrant, what, exactly, is triggered?

What protective measures are triggered. It used to be the case that upon an incapacity determination a *plenary guardianship* was imposed,

[155] UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301 cmt.

[156] ABA COMM'N ON L. & AGING & AM. PSYCH. ASS'N, *supra* note 151, at 7.

[157] *See, e.g.*, Anthea Gerrie, *Creating Against the Odds*, VIE MAG. (Aug. 2020), http://viemagazine.com/article/nicholas-kontaxis-art/ [https://perma.cc/5T5B-P75B] (discussing artwork by Nicholas Kontaxis, a successful painter with "severe developmental damage" as a result of an inoperable brain tumor).

stripping the individual subject to guardianship of all rights to engage in legally binding transactions .[158] There has been a steady evolution in the thinking surrounding this approach, and today there is a greater emphasis on alternative arrangements, such as *limited guardianships*, which occur when "the guardian is assigned duties and powers only in those areas for which the individual is unable to make decisions."[159] These types of guardianships can grow out of courts' exercise of their equitable powers or be specifically authorized under state statute.[160]

Not surprisingly, "[l]imited guardianship — and the corresponding rejection of full guardianship — was viewed as consistent with the 'least restrictive alternative' doctrine."[161] Indeed, the UGCOPAA attempts to bolster this approach by reversing the de facto incentives: it makes it harder to seek and obtain a plenary guardianship and concomitantly easier with respect to a limited one.[162] Nonetheless, empirical studies have found that courts are not yet taking full advantage of the limited guardianship option, likely for a variety of reasons including those of judicial economy.[163]

Another "advance" in this area involves increasing support both under state law and internationally for other arrangements altogether, such as

[158] According to the National Council on Disability, "Plenary Guardianship" is defined as follows: "A guardianship where the court gives the guardian the power to exercise all legal rights and duties on behalf of the person subject to guardianship. The guardianship is of both the person and the property, and the individual subject to guardianship has been adjudicated completely incapacitated. This is the most restrictive form of guardianship." NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 13.

[159] *See* ABA COMM'N ON L. & AGING & AM. PSYCH. ASS'N, *supra* note 151, at 7-8.

[160] Kohn & English, *supra* note 137, at 227-28.

[161] *Id.* at 228. *See generally supra* note 155 and accompanying text (referencing the least restrictive alternative doctrine).

[162] Kohn & English, *supra* note 137, at 242 (seek); *id.* at 245 (obtain).

[163] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 88-89. *But see* Kohn & English, *supra* note 137, at 236 ("The extent to which courts employ either limited guardianships or protective orders in lieu of guardianship is unknown."). "Nevertheless, indications are that full guardianship is far more common in practice than limited guardianship." *Id.* at 237; *see also* Diller, *supra* note 137, at 508; Kohn & English, *supra* note 137, at 238 ("There is even less data on the use of protective orders in lieu of guardianship (e.g., single transaction orders) than there is on guardianship itself.").

"supported decision-making"[164] or a pre-selected durable power of attorney (discussed below). This shift in focus, prompted largely by the 2006 Convention on the Rights of Persons with Disabilities ("CRPD"),[165] has been described as a "paradigm shift."[166] As one scholar has explained, an aspect that makes supported decision-making "revolutionary" is that it "decouple[s] the notion of 'legal capacity' — the right 'to make decisions and have those decisions respected' — from cognitive decision-making ability, or what some have termed 'mental capacity.'"[167] Under this approach, a decision by a person otherwise lacking the mental capacity to enter into a binding contract can still be given full legal effect if made with the support of others.[168]

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[164] "A growing number of states have enacted laws recognizing supported decision-making agreements." ABA COMM'N ON L. & AGING & AM. PSYCH. ASS'N, *supra* note 151, at 5. This is "a decision-making model or series of strategies and principles that is gaining recognition as an alternative to substituted decision-making and guardianship." *Id.* at 2. "Supported decision-making can be defined as: a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life." *Id.*; *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 135 (documenting progress of supported decision-making in the states).

[165] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 130; *see also* Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 571-78 (2017) (tracing the key history and tenets of the CRPD). The United States has signed, but not ratified, the CRPD. *See Ratification Status for United States of America*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=en (last visited Aug. 29, 2023) [https://perma.cc/V4KU-EH9G] (listing ratification status by country); *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 60.

[166] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 60, 64; Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 319 (2021); *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 133 ("SDM has gained more headway as an alternative to guardianship for people with intellectual and developmental disabilities, and most SDM pilot projects in the United States have targeted people with intellectual disabilities. However, SDM has not yet been embraced to the same degree as a viable option for older adults with cognitive impairments or people with psychiatric disabilities." (footnotes omitted)).

[167] Diller, *supra* note 137, at 512 (footnotes omitted). *See generally supra* notes 79–83 and accompanying text (noting this distinction between types of capacity).

[168] Diller, *supra* note 137, at 511-12.

Some scholars have weighed in favor of supported decision-making in lieu of guardianship.[169] Others have viewed it as more complementary.[170] Yet others have called for increased appreciation for the need for supported decision-making, which "has its roots in the disability rights movement,"[171] to accommodate the needs of older Americans — the population most subject to guardianship.[172] The primary reason for favoring supported decision-making is that such a move is seen as boosting the autonomy interests of individuals with disabilities.[173]

Although there is no apparent discussion in the literature about the intersection of this path and the exercise of copyright interests specifically, there could be some beneficial consequences to fostering the conversation. Similar to the discussion above relating to limited

[169] *See, e.g.*, Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 161 (2010) (arguing that "supported decision making is less isolating than guardianship and provides greater opportunities for a person with a disability to interact with others" and that "a move to a supported decision-making paradigm is consistent with the ADA, as well as with the recently adopted U.N. Convention on the Rights of People with Disabilities ('CRPD')"). *See generally* NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 134 ("In its purist form, SDM is an *alternative* to guardianship.").

[170] "The National Guardianship Association has recognized the best practice of using SDM principles within guardianship as well, stating that if guardianship is necessary, the supported decision-making process should be incorporated as a part of the guardianship." NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 134 (internal quotation marks omitted). Also, "[i]t remains to be seen whether SDM can coexist within guardianship or whether guardianship is anathema to SDM, but as one scholar has noted, guardianship is here to stay, at least for now." *Id.* (internal quotation marks omitted). Also, at present, "[n]o U.S. jurisdiction has taken the step of dismantling its guardianship system, so where SDM statutes exist, they exist side-by-side with guardianship statutes." Phillips, *supra* note 6, at 630. SDM statutes and guardianship statutes may coexist with varying levels of potential overlap. *Id.* at 630-33; Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1154 (2013) ("[P]olicymakers should explore how supported decision-making could reduce the use of guardianship as well as how supported decision-making approaches could be integrated into guardianship systems.").

[171] Diller, *supra* note 137, at 498.

[172] *Id.* at 498-99.

[173] *See id.* at 524.

guardianship,[174] one can readily imagine a scenario in which a person unable to manage many of the demands of everyday life could — with various support mechanisms — communicate their core desires with respect to their artistic creations. Furthermore, an author's family or other loved ones might feel especially well-equipped to provide such support because they often feel as though they, too, have been along for the ride on an author's long-term creative voyages.[175] In many ways, such an arrangement mirrors the typical client-management relationships in creative fields; this approach merely acknowledges that different artists need different types of support.

The problem, however, is that implementation of supported decision-making is still in "embryonic" form.[176] And some commentators are concerned that individuals with disabilities might in fact become "disempowered through undue influence by so-called supporters."[177] As noted in the NCD's *Beyond Guardianship* report, "[c]ertainly using support decision-making would offer a real opportunity . . . if one or more people were inclined to take advantage or exploit an individual."[178] Nina Kohn, while noting the potential upsides of supported decision-making, is critical of its legislative implementation so far.[179] Among other things, she notes that "all supported-decision-making-focused statutes passed to date opt for a single primary approach: granting legal status to formal supported decision-making agreements and corresponding legal status to persons identified as 'supporters' in such

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[174] *See supra* notes 159–60 and accompanying text.

[175] *See* Gilden, *The Social Afterlife*, *supra* note 58, at 347 (explaining potential justifications for placing IP stewardship in the hands of the deceased author's family); *cf.* Subotnik, *Artistic Control After Death*, *supra* note 28, at 262 (discussing the viewpoint of "those closest to the flame" (internal quotation marks omitted)).

[176] Weisbord & Horton, *supra* note 6, at 627.

[177] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 132; *see also* Phillips, *supra* note 6, at 625 (noting that "even a well-meaning supporter may unintentionally influence the principal's decisions through the manner in which the supporter presents or discusses decisions").

[178] NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 132 (alteration in original) (quotations omitted); *see also* Diller, *supra* note 137, at 535 ("The second, and most significant challenge to supported decision-making, is to ensure that it will not make older adults more vulnerable to abuse.").

[179] *See* Kohn, *supra* note 166, at 315.

agreements."[180] Such legal status, she argues, affords additional tools to so-called supporters without any of the checks that the guardianship system — however flawed — has developed over the years.[181] As she, Jeremy Blumenthal, and Amy Campbell note in a separate article, with "more informal arrangements such as supported decision-making, which may occur in private and with less accountability, the potential for financial or other abuse likely increases."[182] And there is no reason to suppose that these risks would be any different with respect to copyright interests.

How decisions should be made when guardianships are triggered. To the extent that a guardianship of some type is triggered, another interrelated area of development concerns how decisions are to be made — specifically, whose judgment (or what standard) should carry the day.[183] The traditional approach called for a "best interest" standard, which is, just as it sounds, "geared toward making decisions the guardian believes are in the individual's best interest with the person's well-being, health, and safety being the central concerns."[184] This is commonly distinguished from the more evolved "substituted judgment" standard, according to which the surrogate is supposed to make decisions by asking what an individual would have done if they possessed capacity.[185] This latter standard "takes into account the individual's preferences,

[180] *Id.* at 341.

[181] *Id.* at 335-37. Unlike guardianship, "the State need not make any determination about the principal's capacity or be involved in any way" with SDM agreements. Phillips, *supra* note 6, at 635.

[182] Kohn, Blumenthal & Campbell, *supra* note 170, at 1137.

[183] There is a rich literature conceptualizing and surveying the implementation of these standards. *See* Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1254 n.104 (2013) (collecting citations regarding decision-making standards); *see, e.g.*, Diller, *supra* note 137, at 507-10 (discussing the mixed success of such reforms); Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 115-19 (2012) (documenting the evolution of the thinking regarding various standards); Weisbord & Horton, *supra* note 6, at 626 n.96 (collecting sources that discuss these traditional standards).

[184] *See* NAT'L COUNCIL ON DISABILITY, *supra* note 135, at 36.

[185] *Id.* at 14 ("It refers to making a decision on behalf of an individual that is aligned with the decision they would have made for themselves if they had the capacity to do so."); *id.* at 36.

beliefs, and patterns of behavior as well as the individual's wishes, which may have been expressed when the individual had capacity."[186]

This choice of standard could be significant in the context of copyright management. To the extent that there is a particular authenticity principle at work with respect to authorial interests — both as it pertains to the author's plans for a work and as it relates to the interests of the wider consuming public — one could imagine a substituted judgment standard being both preferable and influential upon the guardian's activities.

For example, Britney Spears by most accounts did not want to maintain the busy work schedule imposed on her by her father, notwithstanding the financial rewards that schedule provided. Under a substituted judgment standard, this subjective desire should be central — or at least highly relevant — to the conservator's decisions. Under a best interest standard, by contrast, it could be more easily argued that imposing a grueling schedule, taking full advantage of the available financial opportunities, would be objectively rational on behalf of a world-famous pop star. Similarly in the Harper Lee context, it might seem objectively irrational not to publish an already-written sequel to a classic novel, even if the author herself seemed reluctant.[187]

There might be especially compelling reasons to favor a substituted judgment standard to the extent that the public does not even realize that a guardianship has been imposed and believes the creative decision-making to still be the sole province of the author. Furthermore, it is not always clear what a "best interests" standard means in the copyright context.[188] Obviously, for a starving artist, a multimillion-dollar deal to

[186] *Id.* at 36. One survey, from about ten years ago, found that "the statutory decision-making standard in a jurisdiction does influence how guardians make decisions." Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1532 (2012). In particular, it found that "[f]or financial and property decisions, guardians from the hybrid jurisdictions [i.e., those with a substituted judgment component] were more likely than guardians from the best interest jurisdiction to rely on current conversations with the incapacitated person and on what others told them about the incapacitated person's values and preferences." *Id.*

[187] *See* Nocera, *supra* note 38.

[188] While certainly this is a difficult question with respect to any asset, *see, e.g.*, Whitton & Frolik, *supra* note 186, at 1533 ("Without a clear statutory standard, an almost infinite range of possibilities exist for how a guardian might make a decision under an

license rights to the artist's work might be a decision that is quintessentially in the artist's best interest. But copyright management does not always involve the extraction of maximum financial benefit from a work.[189] An author is free to decline lucrative publishing opportunities and to forbid others from capturing a market segment that the author has expressly declined to enter.[190]

2. Advance Directives

Guardianships may be contrasted with another type of protective apparatus — the advance directive. Unlike guardianships, which are imposed upon a person, advance directives allow people to make certain kinds of choices for their future incapacitated selves and to expect that those pre-selections will be given effect at the operative moment. Indeed, one of the primary reasons for expending resources to execute such instruments is to avoid the need for a guardianship to be imposed down the road.[191]

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expanded notion of best interest."), certainly a best interest approach would never prioritize (or possibly even consider) the best interests of the wider public, such as (potentially) a decision to allow free, widespread, and unfettered uses of a work.

[189] *See, e.g.*, Monge v. Maya Mags., Inc., 688 F.3d 1164, 1182 (9th Cir. 2012) (acknowledging that copyright protects the authors "right to decide" whether to publish — and profit from — a work). With thanks to Andres Sawicki for this insight.

[190] *See, e.g.*, *id.* ("[T]he couple's intention at the time of the publication did not give Maya license to forever deprive them of their right to decide when, whether and in what form to release the photos.") (internal quotation marks omitted); Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987) (observing that J.D. Salinger was "entitled to protect his opportunity to sell his letters, an opportunity estimated by his literary agent to have a current value in excess of $500,000," despite repeatedly disavowing any desire to do so).

[191] "Often, some precipitating event prompts the guardianship, such as a legal transaction that needs to be accomplished which may involve assets that the person accumulated over the course of a lifetime, such as a house or retirement plan. If the individual has executed advance directives such as a power of attorney for financial matters and health care proxy or medical power of attorney for health care decisions, guardianship will likely not be necessary, as third parties will recognize these instruments." Diller, *supra* note 137, at 521; *see also* Boni-Saenz, *Personal Delegations*, *supra* note 183, at 1266-67. It should be emphasized that such planning does require the expenditure of financial resources and time, with implications for the less sophisticated/well-off.

Typically, advance directives cover the financial and/or health related spheres of a person's life. Alexander Boni-Saenz has provided a helpful taxonomy of such directives.[192] The first category, instructional directives, sets forth specific substantive decisions ahead of time on either a permissive or restrictive basis.[193] Familiar examples of these include the last will and testament (instructions for distributing property at death) and living wills (instructions for medical treatments while alive).[194] A second category of advance directive is the proxy directive, "which sets out a particular *surrogate decision-maker* in advance."[195] These include now routine instruments like the durable power of attorney, which allows the principal to designate an agent to make property or financial decisions on their behalf (even after the principal becomes incapacitated).[196] A third category, hybrid directives, cherry picks from the best of the first and second. Hybrid directives "designate a proxy decision-maker but also provide written guidance about the principal's beliefs in varying levels of mandatory language."[197] These ideally maximize both guidance and flexibility.[198]

While, as Boni-Saenz notes, there has thus been much progress in facilitating an individual's ability — both substantively and procedurally — to make fundamental decisions about their future lives, there has not

[192] Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 10-14 (2016).

[193] *Id.* at 10-11.

[194] *Id.* at 10. Some of the most recent innovations in this space involve practical methods for further ensuring that a person's end-of-life medical care decisions are carried out. Lois Shepherd, *The End of End-of-Life Law*, 92 N.C. L. REV. 1693, 1733-34 (2014) (discussing the National Physician Orders for Life-Sustaining Treatment ("POLST") Paradigm and noting that "[t]he form is not an advance directive, but is rather an instrument that can translate the instructions of an advance directive or decisions of a surrogate decision maker or the patient him or herself, when competent, into actionable medical orders").

[195] Boni-Saenz, *Sexual Advance Directives*, *supra* note 192, at 11.

[196] Analogously, the healthcare proxy allows the principal to choose an agent to make healthcare related decisions. *Id.* at 12.

[197] *Id*. at 12.

[198] Arguably supported decision-making agreements might count as another form of directive, but by their terms they are about letting the person decide. *See, e.g.*, Kohn, *supra* note 166, at 316 ("Supported decision-making can thus allow individuals, who would otherwise need to rely on others to make decisions for them, to make their own decisions.").

been a limitless domain to which these instruments apply.[199] For example, as he notes, there has been substantially less attention paid to people's ability to make decisions about their future sex lives.[200] This is problematic because, with a larger proportion of the population likely to clock in over the age of sixty-five by 2050, an ever increasing number of people are likely to find themselves in institutional settings.[201] This population may find itself prevented from engaging in sexual activity out of an institution's protective instincts and its fears about liability — even though evidence suggests continued interest in sex among the elderly and cognitively impaired.[202] It is for these reasons that Boni-Saenz advocates advance planning via any of the forms of advance directive described above.[203]

As discussed further in Part IV, the advance directive framework could be usefully applied to copyright management on behalf of incapacitated authors. Although we of course acknowledge the many distinctions between sexual activity and copyright management, there are nonetheless some important, if less-than-obvious, similarities. Both domains can be highly subjective, and preferences will vary significantly from individual to individual. And although copyright law is typically framed in terms of an economically valuable property interest,[204] decisions around permissions, publication, and collaboration are often

[199] Boni-Saenz, *Sexual Advance Directives*, *supra* note 192, at 14.

[200] In prior work, he has also argued for enhanced personal delegation in the context of divorce, willmaking, and health care primarily under a capabilities approach. Boni-Saenz, *Personal Delegations*, *supra* note 183, at 1231.

[201] Boni-Saenz, *Sexual Advance Directives*, *supra* note 192, at 15.

[202] *Id.* at 8, 15-16, 41. *See generally* Maggie Jones, *The Joys (and Challenges) of Sex After 70*, N.Y. TIMES MAG. (Jan. 12, 2022), https://www.nytimes.com/2022/01/12/magazine/sex-old-age.html [https://perma.cc/N9QE-DZDG] ("But as baby boomers, who grew up during the sexual revolution of the 1960s and 1970s, age . . . many sex experts expect they will demand more open conversations and policies related to their sex lives.").

[203] Boni-Saenz, *Sexual Advance Directives*, *supra* note 192, at 14. His approach would look for evidence of consent both when the individual had capacity ("Time 1") and contemporaneously when they do not ("Time 2"). If the individual at both Time 1 and Time 2 indicates — through established methods — consent to sexual activity, that "consensus of consents" should provide a sufficient basis for an institution to allow such activity to occur (and avoid the fraught question of which self to prefer). *Id.* at 26.

[204] *See, e.g.*, Subotnik, *Copyright and the Living Dead?*, *supra* note 49, at 83-85 (framing the debates about copyright as a property interest).

tightly intertwined with the author's (or their successor's) emotional and cultural investments.[205]

Copyright management decisions, as discussed below in Part III, are often made by an author's surrogate, and the advance directive could be a useful intervention to address the challenges that arise in this space. For example, an author may affirmatively "authorize" copyright exercise by another, and an author's "duly authorized agent" may transfer the author's copyright interests away.[206] However, certain aspects of the copyright statute could be much clearer, such as whether an agent selected *for* the author — like a guardian — rather than *by* the author has equal footing to act. For example, the statutory provision governing termination of transfers, while delineating and empowering certain successors-in-interest of a deceased author, lumps together the various types of agents who may represent and assist a *living* author.[207] In the face of such statutory ambiguities, advance directives could be a useful, autonomy-boosting vehicle for explicitly indicating both *who* is empowered to make copyright decisions and *how* they should exercise the powers they have been given.

C. Minors and Capacity

A third category of surrogate decision-making is far more common, yet also highly important in the copyright context: parental decision-making on behalf of minor children. Although minor children can own valuable property, they generally must rely upon others to manage their property or transfer it to third parties.[208] A parent does not

[205] *See* Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 93-99 (2018).

[206] 17 U.S.C. §§ 106, 204(a). Note that an author's moral rights of attribution and integrity under the Visual Artists Rights Act of 1990 may not be transferred at all, *id.* § 106A(e), and therefore a fortiori may not be transferred by an author's agent.

[207] *Id.* § 203(a)(4) ("The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their *duly authorized agents*, upon the grantee or the grantee's successor in title." (emphasis added)). Further complexities involving termination rights are discussed *infra* at Part III.D.

[208] *See* Banta, *supra* note 77, at 1714-18. Banta notes, however, that the rise of the Internet, contract law has generally enforced online agreements entered into by teenagers with social media platforms and other intermediaries. *Id.*

automatically have the right to control or manage property their children receive through gift or inheritance; they instead must be appointed guardian, by a court, or be named the trustee or custodian, by the person who transferred the property to the child. Whoever is named guardian, trustee, or custodian with respect to the child's property takes that position subject to fiduciary obligations to act in the best interests of the child.[209]

A parent does, however, retain the right to garnish any *wages* received by the child, on the theory that they have a duty to provide for their children.[210] And, as a practical matter, parents may be required to co-sign their children's contractual obligations, should they find young success; this is due to the voidability of many minors' contracts.[211] In order to obtain the full capacity to enter into contracts, buy/sell property, retain their earnings, execute a will, or consent to their own medical treatment, minor children typically must seek legal emancipation.[212]

There is a scholarly debate about whether parents are — or at least should be — considered fiduciaries of their children, even outside the context of a guardianship or custodianship.[213] But regardless of whether fiduciary duties formally attach to the role of parent, parents nonetheless share many of the core characteristics of the other surrogate decision-makers discussed above; they exercise broad

[209] *See id.* at 1715.

[210] *See id.* at 1714.

[211] *See id.* at 1711 ("As a practical matter, the voidability doctrine results in businesses requiring that a parent or guardian co-sign any contract entered into by a minor, which in turn severely limits the freedom of minors to independently enter into a binding contract.").

[212] *See, e.g.*, CAL. FAM. CODE § 7000 (2023) (setting forth the requirements and consequences of legally emancipating minors in California); OR. REV. STAT. § 112.225 (2023) ("Any person who is 18 years of age or older . . . or who has been emancipated in accordance with ORS 419B.550 (Definitions for ORS 419B.550 to 419B.558) to 419B.558 (Entry of judgment of emancipation), and who is of sound mind, may make a will.").

[213] *See* Scott Altman, *Are Parents Fiduciaries?* 42 LAW & PHIL. 411, 411 (2023) (arguing against treating parents as fiduciaries); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2402 (1995) (arguing in favor of characterizing parents as fiduciaries); Lionel Smith, *Parenthood Is a Fiduciary Relationship*, 70 U. TORONTO L.J. 395, 395 (2020) (supporting the characterization of parent-child relationship as fiduciary, as held by some Canadian courts).

discretion on behalf of vulnerable people, and they can be tempted to put their own financial interests above those they are representing.[214]

There are many, many examples of minors in the entertainment fields who have reported being overworked and exploited by family members who stood to receive substantial amounts of money through them.[215] Ariel Winter, of Modern Family, was forced by her mother to become an actor, to eat a restricted diet, and to wear revealing clothes; she eventually was legally emancipated.[216] Drew Barrymore was taken to Studio 54 instead of school and was forced into acting starting at eleven months old.[217]

Money can cloud parental judgment, to the say the least. For example, during the height of Macaulay Culkin's child stardom in the 1990s, his parents entered into a contentious separation battle, which centered around which of them would end up his manager. A court ultimately transferred managerial control to an accountant of Culkin's choosing, and as an adult Culkin ensured that none of his family would have access to his wealth.[218] LeAnn Rimes sued her father for $7 million in theft

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[214] *See* Altman, *supra* note 213, at 411.

[215] *See also* Maria Pasquini, *Everything to Know About Corey Feldman and Corey Haim: '80s Heartthrobs at Center of Hollywood Abuse Allegations*, PEOPLE (Nov. 4, 2016), https://people.com/movies/corey-feldman-corey-haim-everything-to-know/ [https://perma.cc/3PLX-6KFW] (After a childhood of being forced into acting by his parents, being forced to diet and take diet pills, and being sexually assaulted as a child by people in Hollywood, Corey Feldman eventually emancipated from his parents at age 15. Just before being emancipated, Feldman accused his parents of stealing over $1million from him.).

[216] Strawberry Saroyan, *Growing up "Modern": Ariel Winter on Family Turmoil, Online Shaming and a New Life in College*, HOLLYWOOD REP. (Sept. 14, 2017), https://www.hollywoodreporter.com/movies/movie-features/growing-up-modern-ariel-winter-family-turmoil-online-shaming-a-new-life-college-1037963/ [https://perma.cc/6PZP-MNPK].

[217] Drew Barrymore, *Drew Barrymore: The Day I Divorced My Mother — Extract*, GUARDIAN (Oct. 25, 2015, 5:00 AM EDT), https://www.theguardian.com/culture/2015/oct/25/drew-barrymore-the-day-i-divorced-my-mother [https://perma.cc/72EL-5KLX].

[218] Erica Siegel, Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 439 (2000); Susie Linfield, *Trouble in the House THAT Mac Built: A Custody Battle for Macaulay Culkin by His Parent-Managers Offers a Glimpse into What Can Happen in Hollywood When a Son Is Also a Star*, L.A. TIMES (Nov. 5, 1995, 12:00 AM PST), https://www.latimes.com/archives/la-xpm-1995-11-05-tm-64948-story.html [https://perma.cc/53NX-XY8A].

while he worked as her manager.[219] Gary Coleman's parents had squandered his considerable fortune while he was a minor, and at the age of twenty-one, they petitioned to be named his conservator; the presiding judge dismissed the petition, observing that "Mr. Coleman does not come close to requiring a conservatorship."[220] Even closer to the core of our focus on copyrightable assets, with the rise of social media, several parents have found opportunities to monetize their children's copyrightable creativity and humor, and live off the revenue they produce.[221]

As a result of some of these well-documented instances, the child entertainer context is one space where there has been some activity at the state level to attend to the intersection of Hollywood revenues and entertainers' lack of legal capacity. In particular, several states have enacted what are typically known as "Coogan Laws," named after a highly paid child star (Jackie Coogan) who learned at the age of twenty-one that his mother had spent all of his money. Although the precise details vary by state, these laws generally require that a percentage of a child's net earnings (generally fifteen percent) be set aside in trust.[222] Moreover, they provide a streamlined method for courts to review contracts entered into by minors in the entertainment and sports

[219] Lauren Schmitzer, *LeAnn Rimes Sues Father, Former Co-Manager for Theft*, MTV (May 12, 2000, 12:14 AM), https://www.mtv.com/news/872004/leann-rimes-sues-father-former-co-manager-for-theft/ [https://perma.cc/G3EZ-WJR9].

[220] Lukas I. Alpert, *Troubled '80s Child Star Gary Coleman's Life Is Cut Short at 42*, N.Y. POST (May 29, 2010, 4:00 AM), https://nypost.com/2010/05/29/troubled-80s-child-star-gary-colemans-life-is-cut-short-at-42/ [https://perma.cc/3VMG-C57C]; Bella Stumbo, *A Tale of a Falling Star: For Eight Seasons Gary Coleman — of "Diff'rent Strokes" — Was at the Top of the World. When the Laugh Track Stopped, He Had to Scrounge for Work. Now, His Main Role Is in the Courtroom, in a Pathetic Fight Against His Own Parents*, L.A. TIMES (May 20, 1990, 12:00 AM PDT), https://www.latimes.com/archives/la-xpm-1990-05-20-tm-292-story.html [https://perma.cc/DZ2Z-6VKK].

[221] *See, e.g.*, Katherine Rosman, *Why Isn't Your Toddler Paying the Mortgage?*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/style/viral-toddler-videos.html [https://perma.cc/WJ3N-K4XT] (discussing stories of Katie Ryan, who is able to be a stay-at-home mother due to ad revenue, and of Josh Gaines, who made his children make Vines and kept the revenue they provided).

[222] *See, e.g.*, CAL. FAM. CODE §§ 6751-52 (2023) (requiring 15% of minor's gross earnings to be held in trust); N.Y. LAB. LAW § 151 (2023) (same); N.C. GEN. STAT. § 48A-14 (2023) (same).

contexts. California law additionally recognizes the role of intellectual property in the potential value of the child entertainer's labor; it expressly applies to "[a] contract pursuant to which a minor agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties."[223] These provisions acknowledge that there can be a serious risk of self-dealing and wasteful depletion of the child's earnings, and ensure that at least a portion of these earnings be held in trust until they reach the age of majority.

III. COPYRIGHT & CAPACITY

The previous section demonstrated that if an author wishes to create a binding business relationship, execute an enforceable estate plan, or enter into state-sanctioned intimate partnerships, their legal incapacity may prevent them from doing so. Or at the very least, they are prevented from doing so without the aid of an appointed or chosen steward. Recognition by nearly every area of law that an author may need to rely upon, in both their personal and professional lives, hinges on surpassing some legally meaningful threshold of capacity.

Copyright law, by contrast, recognizes and protects the creative work of an author irrespective of their age or of their cognitive, intellectual, or developmental ability. This section demonstrates this notable contrast between copyright and nearly all other areas of law that authors might encounter. First, it shows that contemporary copyright law lacks any meaningful capacity threshold for human authors. Second, it traces this extremely low threshold to copyright's professed commitments to inclusion and nondiscrimination. Third, although copyright's commitments to inclusivity may emerge from genuine judicial and legislative concerns over elitism and inequality in the copyright system, this section shows that the resulting low threshold for copyright protection downplays the diverse circumstances and needs of many authors, especially authors with some form of disability or legal incapacity.

[223] CAL. FAM. CODE § 6750 (2023); *see also* N.C. GEN. STAT. § 48A-11 (2023).

A. Big-Tent Copyright

The evolution of the U.S. copyright system is marked by widening subject matter, greater formal inclusion, and lower barriers to entry. The Copyright Act of 1790 applied only to a narrow range of creative works — maps, charts, and books — that were most closely associated with the advancement of knowledge and learning — "Science" in the 18th Century parlance.[224] Notably absent in these subject matters were popular creative endeavors and forms of entertainment such as plays, magazines, journals, and visual art, all of which were added to the Copyright Act over the course of the following century.[225] Indeed, nearly every time Congress or the courts were confronted with a new — or previously overlooked — form of creative expression, they responded by widening the copyright umbrella.

For example, when confronted with the argument that photographs were merely mechanical reproductions of objects in the world, the Supreme Court recognized that copyright law properly extended "to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression"; this included photographs.[226] Emerging forms of entertainment such as motion pictures, television, and sound recordings all eventually were folded into the copyright system, regardless of whether there was a clear link between the protected work and "higher" forms of human knowledge. By the time Congress enacted the Copyright Act of 1976, copyright protection expansively subsisted in "original works of authorship fixed in any tangible medium of expression, now known or later developed."[227]

As Congress steadily expanded the subject matter of copyright, the Supreme Court emphasized the inclusive, big-tent nature of the copyright system. For example, in *Bleistein v. Donaldson Lithographing*, the Court considered whether advertisements for a travelling circus

[224] *See* Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 35, 64 (2010).

[225] *Id.*

[226] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). For additional background on and discussion of this case, see Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1497-1501 (2011).

[227] 17 U.S.C. § 102(a).

could be protected by copyright even though they were unconnected to the "fine arts."[228] In answering affirmatively, Justice Holmes set forth copyright's core antidiscrimination principle: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[229] If judges were to closely assess the cultural value of each particular copyrighted work, Justice Holmes feared that copyright law would exclude both cutting-edge works that went over the heads of lay judges, as well as low-brow, mass media works that were repugnant to elitist judges.[230] In other words, the sophistication of an artist or their work (or their audience) was irrelevant to the question of whether copyright protection should apply.

So what *was* needed in order for copyright law to recognize certain activity as "authorship" and certain work product as "original" for purposes of the Copyright Act? In *Feist v. Rural Telephone*,[231] the Supreme Court held that all that is required for an individual to produce a sufficiently original work of authorship is to exhibit a "minimal degree of creativity"[232] — a "creative spark"[233] — during the work's production. It does not matter whether the putative author expended time and energy — "sweat of the brow" — while creating the work; the hallmark of originality instead was something in the author's process that was recognizably "creative."[234] Although the Court held that a "garden-variety" telephone book, arranged in alphabetical order,[235] lacked this creative spark, it nonetheless emphasized that "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[236]

[228] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).
[229] *Id.* at 251.
[230] *Id*. at 251-52.
[231] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
[232] *Id.* at 345.
[233] *Id.* at 359.
[234] *Id.* at 352.
[235] *Id.* at 362-63.
[236] *Id.* at 345.

Notably, the Court never *defined* what it meant by "creativity" — a concept explored extensively in psychology, philosophy, and law[237] — but it nevertheless envisioned something happening in the mind and body of the author that would be quite easy for most authors to demonstrate. Indeed, it is generally accepted that the Copyright Act today covers even the barest, most routine expressions of creativity, from notebook scribbles to selfies to social media posts.[238] Copyrightable drawings do not need to be remarkable; copyrightable photographs do not need a day-long photo shoot; and copyrightable social media does not require any sophisticated editing or filters. Copyright is available to anyone who can show a "*de minimis* quantum of creativity."[239]

As copyrightable subject matter expanded, and the Supreme Court reaffirmed the low substantive threshold for copyright, other procedural aspects of copyright law similarly changed so as to lower copyright's barriers to entry. Prior to the U.S.'s entrance into the Berne Convention in 1989, in order to obtain the full protections of federal copyright law, authors needed to deposit copies of their work with the Library of Congress, affix notice of copyright to published works, and/or file a renewal registration during the 28th year of protection.[240] A failure to comply with these provisions — for example, publishing a creative work without notice — resulted in the forfeiture of copyright. Accordingly, copyright law's formerly rigorous formalities were a frequent trap for legally unsophisticated and/or unrepresented

[237] *See* Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 397-400 (2016) (collecting literature).

[238] *See* U.S. COPYRIGHT OFF., COPYRIGHT FOR KIDS 1 (2021), https://www.copyright.gov/history/Copyright_For_Kids.pdf [https://perma.cc/EBG7-VDVY] [hereinafter COPYRIGHT FOR KIDS]; Uri Y. Hacohen, Amit Elazari & Talia Schwartz-Maor, *A Penny for Their Creations — Apprising Users' Value of Copyrights in Their Social Media Content*, 36 BERKELEY TECH. L.J. 511, 521 (2021) ("[T]he standard for copyright originality is so famously low that even works of negligible creative expression, such as many status updates on Facebook or 140-character tweets, might satisfy it.").

[239] *Feist*, 499 U.S. at 363.

[240] Today, the consequence of failing to deposit a copy are less draconian; the result is a potential fine. 17 U.S.C. § 407(d). And although registration is not required to secure or extend the term of protection, it comes with numerous advantages, such as statutory damages and attorney's fees, and is a prerequisite to filing an infringement lawsuit. *Id.* §§ 411-12.

authors.[241] Today, copyright protection is triggered merely by the "fixation" — e.g., the drawing, writing, typing, or recording — of a work in a tangible form, and it automatically subsists for the life of the author plus seventy years. No legal, social, or economic sophistication is needed to come within the broad aegis of copyright — all that is needed is a "creative spark" and some paper, a canvas, or a computer nearby.

B. Copyright Capacity = Human Authorship + Creative Spark

Copyright law today extends potentially valuable intellectual property rights to essentially all written or recorded creative works, so long as there is a sliver of something judicially recognized as creative; and again, lower court judges have been advised not to be overly discerning in search of that creative spark. These very low barriers to recognition stand in significant contrast to other key areas of law that oversee (i.e., externally) the ownership, management, and commercialization of creative works, as described above in Part II. This means that barriers to recognition common in other areas of law with respect to age or cognitive, intellectual, or developmental ability do not apply (i.e., internally) in copyright law.

Although there is surprisingly little litigation addressing the protection of works created by individuals who arguably lack mental and/or legal capacity, the Copyright Office has nonetheless very explicitly indicated that neither age nor disability stand in the way of copyright. In the *Compendium of U.S. Copyright Office Practices*, the Copyright Office states: "Intellectually disabled persons may claim copyright, and the U.S. Copyright Office will accept applications submitted either by or on behalf of such persons, provided the application is otherwise proper and complete."[242]

The Compendium similarly welcomes applications from, or on behalf of, child authors: "Minors may claim copyright, and the U.S. Copyright

[241] *See, e.g.*, John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1397 (2009) (highlighting obstacles faced by lesser-known creators in enforcing their copyright interests).

[242] U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 405.3 (3d ed. 2021), https://www.copyright.gov/comp3/docs/compendium.pdf [https://perma.cc/693C-3BL6] [hereinafter COMPENDIUM].

Office will accept applications submitted either by or on behalf of a minor if the application is otherwise proper and complete." Moreover, for better or worse, the Copyright Office's educational outreach expressly *encourages* children to scribble down a writing and to claim it as a copyrighted work:

According to the Copyright Office, "even a child's original finger painting" is protected by copyright, and it is "pretty easy" to be sufficiently creative "when you have an active imagination."[243] By "writing or drawing something about what you have experienced today. . . . [y]our original work is now protected by copyright!"[244] It accordingly is taken as a given that minors are eligible for a lifetime of property ownership, even though they may have limited ability to enter into binding contracts with respect to their drawings. Moreover, this copyright will persist long after their death, even though under the law of wills they must wait until adulthood to choose postmortem successors.[245] To the extent that courts have addressed works created by minors or intellectually disabled adults, no published opinion has

[243] U.S. COPYRIGHT OFF., COPYRIGHT FOR KIDS, *supra* note 238.

[244] *Id.* at 2.

[245] *See supra* Part III.

expressed any need to inquire whether these creators met the threshold requirements of original authorship.[246]

One body of copyright cases does, however, more clearly demonstrate the schism between copyright and other areas of law with respect to legal capacity: cases involving so-called "spiritual authorship."[247] For example, in *Urantia Foundation v. Maaherra*, both parties agreed that the work in question, the Urantia Book, "[was] 'authored' by non-human spiritual beings described in terms such as the Divine Counselor, the Chief of the Corps of Superuniverse Personalities, and the Chief of the Archangels of Nebadon."[248] These entities were alleged to have "delivered the teachings . . . 'through' a patient of a Chicago psychiatrist, Dr. Sadler."[249] The Ninth Circuit bracketed the "metaphysical" questions raised by the parties' beliefs; it held that the Book was copyrightable because the "human selection and arrangement" of the revelations received from the divine beings met the "'extremely low' threshold level of creativity required for copyright protection."[250] Other decisions have similarly rejected arguments that a work could not be copyrightable because the plaintiff had maintained that the true author was a divine entity.[251]

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[246] *See, e.g.*, Chambers v. Green-Stubbs, No. 19-cv-00093, 2020 U.S. Dist. LEXIS 42722 (N.D. Miss. 2020) (entering default judgment on copyright claim by minor); I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 202 (S.D.N.Y. 2015) (assuming the existence of a valid copyright in a design created as part of an elementary school t-shirt design contest); Mason v. Jamie Music Publ'g Co., 658 F. Supp. 2d 571 (S.D.N.Y. 2009) (holding that the plaintiff retained copyright interest in musical composition she wrote at age 17); *cf.* Sinkler v. Goldsmith, 623 F. Supp. 727 (D. Ariz. 1985) (observing that that the issue of whether a party was mentally competent at the time copyright of the letters was registered was not relevant since protection was not dependent on registration).

[247] *See* Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 23-27 (2017) (reviewing spiritual authorships cases).

[248] Urantia Found. v. Maaherra 114 F.3d 955, 957 (9th Cir. 1997).

[249] *Id.*

[250] *Id.* at 958-59; *see* David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMMS. & TECH. L. REV. 355, 405 (2010).

[251] *See, e.g.*, Oliver v. Saint Germain Found., 41 F. Supp. 296, 299 (S.D. Cal. 1941) (observing that there may be copyright in the style or arrangement of messages allegedly received from the spiritual world, though not in the received ideas themselves).

By contrast, as discussed in Part II, the law of wills has rejected similar divine interventions into earthly scribes' estate plans.[252] Under the doctrine of "insane delusion," a will is invalid to the extent it is the result of a false conception of reality with respect to a particular topic. Recall that even if the testator has general capacity to execute a will, if they are delusional with respect to a particular topic, and that delusion materially affects their estate plan, then the affected portions will be unenforceable.[253] Courts have thus been willing to scrutinize an estate plan alleged to be dictated by otherworldly sources and to question the cognition and agency of the testator. By contrast, copyright decisions largely have disregarded otherworldly authorship so long as there was some plausible way of connecting the copyrighted work to human creativity. A creative spark gives rise to many decades of exclusive property rights whether it emerges from years of writing, the scribblings of a child, or conversations with ghosts.

Recently, however, there have emerged some potential outer limits to the creativity that will be recognized, rewarded, and propertized by copyright law: it must occur within the mind of a human being.[254] Although the spiritual authorship cases largely bracketed whether copyright would protect a work *entirely* created by ghosts (likely because ghosts sadly aren't real), the copyright system has been unable to similarly bracket questions of authorship by robots and non-human animals.

Perhaps the highest profile dispute in this area is *Naruto v. Slater*, in which People for the Ethical Treatment of Animals (PETA) asserted the copyright interests of a crested macaque who used the defendant's camera equipment to take a series of selfies. Although the Ninth Circuit dismissed the case based on lack of standing, the Copyright Office has taken the position that nonhuman animals cannot be authors.[255] Previous cases had referred to authorship as "an entirely human

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[252] *See supra* notes 108–116 and accompanying text.

[253] *See id.* (discussing how, under this doctrine, numerous courts have refused to enforce will provisions that were the product of spirits and ghosts allegedly telling the testator what to do with their estate).

[254] *See, e.g.*, Balganesh, *supra* note 247 (discussing the rise of the "human authorship" requirement in copyright law).

[255] U.S. COPYRIGHT OFF., COMPENDIUM, *supra* note 242, § 313.2.

endeavor," and the Copyright Act refers to an author's "children," "widow," "grandchildren," and "widower" — terms that "all imply humanity and necessarily exclude animals."[256] The Copyright Office has extended this same reasoning to works that are attributed entirely to autonomous artificial intelligence systems.[257] Even though these works might be indistinguishable from a painting or song authored by a human, the Office will not register a work whose author is anything but a human (or a business entity who employs or procures one).[258]

The current bar to registering works by nonhuman animals or robots might suggest that there is at least some implicit threshold of capacity for copyright protection that filters out works that were not the product of a certain quantum of rational decision-making. However, the emerging line between human and non-human authors is unlike capacity thresholds in other areas of law. The copyright system is not denying protection to monkeys and AI systems because they lack a sufficient degree of cognitive ability or developmental maturity; instead, the decision is entirely based on the taxonomic classification of the putative author into "human" and "other." As the plaintiff in the *Naruto v. Slater* litigation emphasized, many nonhuman animals are able to satisfy prevailing definitions of "creativity."[259] Moreover, the

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[256] Letter from U.S. Copyright Off. Rev. Bd., to Ryan Abbott, Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071) (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [https://perma.cc/2VNY-ENFP] (quoting Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018)); *see also* Letter from U.S. Copyright Off. Rev. Bd., to Van Lindberg, Zarya of the Dawn (Registration # Vau001480196 (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [https://perma.cc/25MJ-BUUX] (denying registration to aspects of the applicant's submitted work that were generated by Midjourney technology).

[257] *See supra* note 255; *see also* Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment at 2, Thaler v. Perlmutter, No. 22-CV-01564 (D.D.C. Feb. 7, 2023) ("In rejecting the application, the Office confirmed that copyright protection does not extend to non-human authors.").

[258] *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202) ("If a work's traditional elements of authorship were produced by a machine, the work lacks human authorship and the Office will not register it.").

[259] *See* Opening Brief of Plaintiff-Appellant at 3, Naruto v. Slater, 888 F.3d 418 (2018) (No. 16-15469) ("Naruto picked up an unattended camera brought into Naruto's habitat

computational power of AI systems can match or exceed the cognitive abilities of many humans.[260] Accordingly, the human authorship requirement is not — like capacity doctrines in other areas — a functional requirement for copyrightability: an author need not show that they have the ability to understand the meaning and consequence of their creative decisions (akin to mental and/or legal capacity standards in contracts and wills). Instead, the human authorship requirement is entirely formal (or physical): an author needs to slot into a particular category of creator who is thought to have the creative qualities necessary to spark the copyright system into action.[261] To the extent that copyright has a capacity threshold, it is perhaps most similar to the requirement that a testator or contracting party be over a particular age. Age is understood to stand in for developmental maturity;[262] humanity is understood to stand in for a requisite form of creativity. Ultimately, if you've managed to be human, it's not that hard to be an author and thereby a copyright owner.

C. Drawbacks for Big-Tent Copyright

Copyright has evolved from a fairly short term of protection for a few, relatively sophisticated groups of authors to a multi-generation-spanning property right available for nearly all conceivable human authors. This evolution would seem to have many of the hallmarks of a just and equitable property system: low barriers to entry, an explicit

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by defendant Slater. . . . Using that camera, Naruto took a series of photographs of himself through a series of purposeful and voluntary actions that were entirely unaided by Slater.").

[260] *See* Robert C. Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works*, 69 RUTGERS U. L. REV. 251, 252-57 (2016); Russ Pearlman, *Recognizing Artificial Intelligence (AI) as Authors and Inventors Under U.S. Intellectual Property Law*, 24 RICH. J.L. & TECH. 1, at 1, 11 (2018); *cf.* Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. 1887, 1907 (2019) ("If the law is concerned only with functional properties, then these properties could very well be possessed by the states of a nonhuman machine.").

[261] *See* Chatterjee & Fromer, *supra* note 260, at 1908 ("If the purpose is entirely to produce the proper incentives — the dominant American view of copyright — then it is not clear why the actor being held responsible must have consciousness, rather than simply the right functional responses to such incentives.").

[262] *See* Hirsch, *supra* note 99.

commitment to nondiscrimination, and an aversion to cultural elitism. Nonetheless, there are some key conceptual and practical downsides to copyright's formal commitments to inclusivity, equality, and nondiscrimination.

Conceptually, it is difficult to reconcile a big-tent copyright system — lacking any meaningful capacity threshold for human authorship — with U.S. copyright's professed utilitarian commitments. The dominant justification for copyright law — as espoused in numerous judicial opinions — is that some degree of legally-enforced market exclusivity is necessary to incentivize authors to devote resources to creative endeavors; without copyright, if a book or song or computer program could be freely copied upon dissemination, the author would be unable to recoup their investment and they would rationally choose to pour their efforts elsewhere. Copyright's length and scope are meant to balance the need for creative incentives against the public's increased costs of accessing and using creative works in a way that ultimately maximizes net social welfare.

The incentives justification has been criticized extensively — both for its inaccurate description of creative motivations, especially in the digital age, and for downplaying the importance of accessing the creative commons, which can be imperiled by strong copyright protections. For our purposes, however, the problem with the incentive theory is that it is based upon an author exhibiting a certain degree of economic rationality that is in no way required by substantive copyright law today.[263] Unlike contract and succession laws, which condition legal recognition on individuals being able to consider the meaning and consequences of their actions, copyright law contains no such conditions before doling out long, broad property protections. Again, "creative" adults with intellectual disabilities and "imaginative" children can be copyright owners, even if they are unable to survey the marketplace and assess the economic consequences of writing

[263] *See* Balganesh, *supra* note 247, at 54 ("[T]he Court's account of incentives is closely tied to an account of human behavior in which individuals are able to respond rationally to the law's 'promise' of protection for original expression."); *cf.* Chatterjee & Fromer, *supra* note 260, at 1890 (identifying "the ability to pause and analyze the nature of the work in question before choosing to undertake an act of copying" as a necessary prerequisite for volitional copyright infringement).

something down and sharing it with others. Extending protection to these authors might be justified by other copyright theories — such as dignity, labor, personality, or social justice — but these theories largely have not been explicitly embraced by U.S. copyright law.[264]

The human authorship requirement arguably might be seen as a rough proxy for these rationality concerns, but, as several copyright scholars have observed, *homo sapiens ≠ homo economicus*.[265] If copyright in the U.S. is premised on economic rationality, it would seem to require at least some capacity threshold in order to avoid becoming substantially overinclusive by extending to all possible forms of creativity produced by *homo sapiens* authors. Ultimately, the absence of a capacity threshold adds to the much-remarked incoherence of U.S. copyright theory.

Copyright's big-tent, seemingly inclusive approach is not merely a concern for copyright theorists; on a practical level, it may also negatively impact some of the authors it claims to care about. Copyright's doctrinal commitments to equality and inclusivity send important messages about the equal worth of all authors and the cultural value of all works — highbrow or lowbrow, fine art or popular culture, blockbuster or market fringe — but they are ultimately a commitment to *formal*, as opposed to substantive, equality. In other words, copyright's big-tent approach abstracts away from the actual needs and vulnerabilities that face real-world authors in ways that perhaps overly disregard just how diverse and differently situated many creators are in fact. This stands in contrast with capacity doctrines in wills or contracts, which demand highly case-specific inquiries into the

[264] *See* Chatterjee & Fromer, *supra* note 260, at 1915 ("One might also argue that, because status as an author under copyright involves possessing rights of ownership in one's creative work, it ultimately requires personhood, something which — the argument would go — requires possessing a conscious mind.").

[265] *See, e.g.*, Carys J. Craig, *Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self*, *in* DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 273, 281 (Irene Calboli & Srividhya Ragavan eds., 2015) ("The well-rehearsed . . . critique of the liberal subject readily extends to the idea of the 'homo economicus' or 'economic man' who dominates copyright's increasingly utilitarian narratives."); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 351-52 (2005) ("While *homo economicus* may of course have moral preferences as well as monetary ones . . . markets are not the ultimate arbiters of moral choices.").

nature and extent of those vulnerabilities, or at least those vulnerabilities as perceived by the court.

All authors — regardless of age, ability, race, gender, or wealth — receive essentially the same bundle of rights from the Copyright Act, but they are not similarly situated with respect to their ability to leverage those rights or commercialize the fruits of their creative labor. For example, a growing body of critical race IP scholars has demonstrated that IP laws, including copyright, have racially disparate benefits and burdens.[266] It is not enough to formally include a broad range of authors in the IP system; attention must be directed at the material conditions, such as race, that expose certain authors to hostile market conditions and limit their ability to both access and commercialize creative works. Similarly, Jessica Silbey has emphasized that the copyright system too often overlooks the economic and social precarity facing many creators today. Even the most talented artists will be unable to harness their creativity if they, for example, are either struggling to access housing and healthcare or facing incredibly lopsided bargaining power when dealing with publishers or other commercial intermediaries.[267]

Copyright law's uniquely low-bar approach to capacity echoes the dynamics called out by these scholars and represents another problematic angle to copyright's formally inclusive approach to authorship. Authors otherwise lacking legal capacity, whether due to disability or age, may be able to undertake the tasks necessary to spark copyright, but they may face a range of different obstacles to actually benefiting from copyright law, whether negotiating a publishing deal or policing infringement or hiring lawyers and managers.

Moreover, they may be especially vulnerable to exploitation by those chosen or appointed to assist them *precisely because* they have potentially valuable property rights that they are unable to meaningfully exploit. For example, former Eagles' bassist Randy Meisner requested a

[266] *See generally* ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS (2020) (discussing the continuing relationship between race and colonialism in intellectual property law).

[267] JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 279 (2022) ("Creators and innovators often see little choice but to accede to the will of the intermediary and to a system that favors the scale commercializers.").

conservatorship for himself in 2015, due to a strained relationship with his wife Lana, who he claimed was purposefully keeping Randy from getting better in order to maintain control over him and his wealth.[268] Nichelle Nichols, best known for her role of Lt. Uhura on *Star Trek*, suffered dementia and was the subject of heated litigation about whether her son was a properly appointed conservator. A court-appointed temporary conservator observed that "it was clear that other people had handled her financial affairs and that there was no evidence that they handled them in a way that was to her best benefit."[269] If authors, and not publishers or managers or momagers, are meant to be the primary beneficiaries of copyright's exclusive rights,[270] then it is insufficient to simply extend copyright broadly to all human authors without attending to the varied, particular circumstances faced by many categories of authors.

D. Limited Acknowledgements of Vulnerable Authors

Concerns about the exploitation of authors, and their potentially unequal bargaining powers, are not *entirely* foreign to the copyright system. There are some pockets of copyright law that do recognize the vulnerabilities that can emerge from a big-tent system where authors enter into a power-asymmetrical market. The most notable areas of copyright that display an awareness of power asymmetries are the termination of transfer provisions. Under Section 203 of the Copyright Act, any agreement transferring a copyright interest executed by an author on or after January 1, 1978 may be terminated by an author, or their duly authorized agent, during a five-year window beginning thirty-five years after the transfer.[271] Even if a perpetual grant of an author's

[268] Erin Donaghue, *Court Battle After Death of Eagles Bassist's Wife*, CBS NEWS (Apr. 1, 2016, 7:12 PM), https://www.cbsnews.com/news/court-battle-after-death-of-lana-meisner-wife-of-eagles-bassist-randy-meisner/ [https://perma.cc/R4F4-V9BY].

[269] Easter, *supra* note 19.

[270] *See generally* Gordon, *supra* note 48 (arguing that the promotion of authors, and not intermediaries, is the proper focus of copyright law and policy).

[271] 17 U.S.C. § 203(a). Section 304 of the Copyright Act contains a parallel termination provision for works first published before 1978. Such works received an additional 19 years of protection upon passage of the 1976 Copyright Act and an additional 20 years of protection under the Sonny Bono Copyright Term Extension Act

rights would be enforceable under state contract law, federal copyright law kicks in "notwithstanding any agreement to the contrary" and displaces state law to protect the long-term interests of authors.[272] Two aspects of the termination of transfer provisions stand out.

First, these provisions as a whole recognize that early in an author's career, they may not be in a position to negotiate a lucrative — or even necessarily fair — deal with a publisher or record label or other commercial intermediary.[273] The termination provisions allow authors a second bite at the apple, allowing them to walk away from an undesirable relationship or to renegotiate it in light of the work's three decades of proven commercial value. The termination provisions were designed to protect against the inequality and uncertainties common in negotiations with third-party intermediaries, but they could — at least theoretically — be used to claw back a transaction negotiated by a conservator, parent, or legal guardian on behalf of the author that ultimately turns out to be contrary to the interests or desires of the author.[274] They might also be used to terminate assignments of copyright *to* the author's surrogate, or an entity controlled by them.[275] In sum, the termination of transfer provisions recognize that federal copyright policy cannot simply rely on state contract law to protect the

of 1998. Under Sections 304(c) and (d), authors and their statutory heirs were given a mechanism to terminate copyright grants that would have continued into these extended terms. 17 U.S.C. § 304(c)-(d).

[272] *See* 17 U.S.C. § 203(a)(5).

[273] *See* Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefiting Transfers*, 119 W. VA. L. REV. 297, 309 (2016). Another important justification for the termination provisions is the uncertainty and difficulty of placing monetary value on a creative work before its commercial appeal has been tested. *See* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1346 (2010).

[274] We say "theoretically" because, at least with respect to § 203, the statute allows for termination of grants "executed by the author," and there is little to no case law on whether that language might cover grants made by others acting on behalf of a legally incapacitated author. *See infra* notes 281–84 and accompanying text.

[275] *See* Evans, *supra* note 273 (discussing the wide range of common transfers, both during life and at death, that can be terminated).

long-term economic interests of authors and requires some federal legislative intervention.[276]

Second, these provisions recognize that sometimes it's not the author, but their "duly authorized agents," who will be representing them in commercial interactions.[277] This phrase also appears in Section 204(a), copyright's statute of frauds provision, which requires that all transfers of copyright be "in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."[278] Although the Copyright Act does not define "duly authorized agent," the Copyright Office interprets the term as "[a]ny person entitled to act on behalf of an author, a copyright claimant, or an owner of one or more of the exclusive rights."[279] Such persons include, but are not limited to, "*legal guardians*, business managers, literary agents, and attorneys."[280] Accordingly, the copyright system *does* anticipate some form of dependency or assistance on behalf of the copyright owner, perhaps in situations involving diminished capacity.

Nonetheless, these potential acknowledgements of authors' vulnerabilities and/or legal incapacities do little to meaningfully protect authors from copyright's capacity gap. The termination provisions should provide an opportunity for an author (or author's new surrogates) to second-guess decisions made by a previous surrogate on the author's behalf.[281] But such second-guessing is permitted only with respect to assignments and licenses "executed by the author"; the statute does not expressly extend termination rights to assignments and

[276] The termination of transfers provisions also dislodges aspects of state-level estate planning laws. If an author dies before the five-year termination window opens, the termination right does *not* pass by will or trust. Instead, the Copyright Act sets forth a statutory list of family members who automatically inherit the ability to terminate and reclaim copyright interests assigned by a deceased author. 17 U.S.C. § 203(b)(3).

[277] *Id.* § 203(a)(4).

[278] *Id.* § 204(a).

[279] U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES GLOSSARY 2 (3d ed. 2021), https://copyright.gov/comp3/docs/glossary.pdf [https://perma.cc/NL7Y-TJG4] (defining "Authorized agent").

[280] U.S. COPYRIGHT OFF., COMPENDIUM, *supra* note 242, § 409; *see also infra* note 284 (discussing the legislative history relating to the use of "their duly authorized agents" in Section 203).

[281] *See supra* note 274.

licenses executed by the author's legal representative.[282] While principles of agency law as articulated by the Supreme Court,[283] and the legislative history of Section 203,[284] strongly suggest that contracts entered into by legal representatives of an incapacitated author — on behalf of that author — should remain terminable, still, the statute should explicitly state as much.

Furthermore, the termination window doesn't open until three-and-a-half decades after the transaction occurred. And even if the author were still alive thirty-five years later, they would need to have attained sufficient personal autonomy and legal capacity — or at least better representation — and the financial means to oversee the termination process.

The "duly authorized agent" in both statutory provisions might contemplate the existence of legal incapacity requiring a surrogate decision-maker for the author, but there is nothing in the Copyright Act or in the Copyright Office's procedures that distinguishes between principal-agent relationships in purely business contexts from the types of fiduciary relationships that emerge from cognitive, intellectual, or developmental disability or status as a minor.[285] Indeed, the only

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[282] *See* 17 U.S.C. § 203(a). For a detailed discussion of this phrase, though in a different context, see Peretti v. Authentic Brands Grp. LLC, 33 F.4th 131, 139 (2d Cir. 2022).

[283] *Cf.* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) ("It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" (internal citation omitted)).

[284] The legislative history accompanying Section 203 emphasizes that grants made by an author's *successors* are not subject to termination rights. H.R. REP. NO. 94-1476, at 125 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5740 ("The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by the author's successors in interest or to the author's own bequests."); *accord* S. REP. NO. 94-473, at § 203 (1975), 1975 WL 370212 ("The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by his successors in interest or to his own bequests.").

[285] The closest we have found to this sort of detail is in the legislative history accompanying Section 203, which explains who may exercise the termination right as opposed to which transfers are subject to termination. *See* H.R. REP. NO. 94-1476, at 126, *as reprinted in* 1976 U.S.C.C.A.N. at 5741 ("The notice of termination may be signed by

reported decisions involving "duly authorized agents" concern whether a particular individual was a sales agent authorized to transact on behalf of the copyright owner — a commercial entity.[286] Deeper inquiries into the substance of the relationship between author and agent — and whether the decisions made pursuant to the relationship adequately protect the interests of the author — fall entirely outside of the federal copyright system.

Copyright law brackets the processes by which agents, guardians, or conservators are chosen or appointed and kicks questions of stewardship and fiduciary obligations (if any) to the fifty states' family law, estate planning, and guardianship systems. Even though (1) these questions significantly impact the economic and social lives of federally-recognized authors, and (2) Congress has altered state contract and estate planning laws to protect authors in other scenarios through termination rights, very little in the federal copyright system has anything to say about relationships between legally incapacitated authors and, while they are still alive, the stewards of their copyright interests. Any meaningful protections for authors caught in the capacity gap must come from (often divergent) state law, notwithstanding the ramifications the author-surrogate relationship can have on federal copyright policy.

IV. MINDING THE GAP

In this final section, we take a step back and assess ways to limit the risks of exploitation and abuse that can emerge from the gap between copyright law's big-tent approach to authorship and the more paternalistic approaches embodied in state law capacity doctrines. In a system where some individuals will necessarily rely upon others to make decisions on their behalf, there is of course no way to fully ensure that those decisions are made with full care and loyalty; stated differently, there is no way to remove all agency costs associated with vulnerable

the specified owners of termination interests or by 'their duly authorized agents,' which would include the legally appointed guardians or committees of persons incompetent to sign because of age or mental disability.").

[286] United Fabrics Int'l, Inc. v. C&J Wear, Inc., 630 F.3d 1255, 1258 (9th Cir. 2011); Novelty Textile Inc. v. Wet Seal Inc., No. CV 13-05527, 2014 WL 10987396, at *3 (C.D. Cal. Sept. 9, 2014).

authors. But the divergent experience of copyright law and its state-law cousins provides a menu of options that could be brought to the table and combined together in a variety of creative ways. In the remainder of this Article, we bring together the insights and cautionary tales of the various areas of law surveyed above in order to, at the very least, limit the impact of falling into the capacity gap.

We first acknowledge, and dismiss, what might appear to be an easy solution: raise copyright's capacity threshold so that it more closely aligns with contract and succession law. In other words, instead of simply requiring a "creative spark," copyright protection might require some showing that an author had some ability to understand the nature and consequences of the creative decisions they were making, similar to what would be required to enter into a valid contract. Although this approach might limit the lucrative, and potentially corrupting, stream of IP produced during a guardianship — and might better align copyright doctrine with its theoretical commitment to economic rationality — it nonetheless comes at the cost of far too much exclusion and likely discrimination against authors who have — or are perceived to have — various forms of disability. Indeed, a persistent critique of capacity doctrines, especially in the succession law context, is that they are used to second-guess decisions that fail to conform to majoritarian culture and politics.[287] On the flip side, if we were to fully eliminate capacity doctrines under state law, then vulnerable authors could find themselves at much greater risk of exploitation and abuse by third parties, even if they retained greater autonomy than under the status quo.[288]

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[287] *See, e.g.*, Kevin Bennardo, *The Madness of Insane Delusions*, 60 ARIZ. L. REV. 601, 604 (2018) (arguing that "the current administration of the law of wills is much more likely to effectuate testamentary freedom when a testator's devises align with cultural norms"); E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 276 (1999) ("[T]he law disfavors testamentary dispositions that deviate from the norm; it prefers gifts to the testator's legal spouse and close blood relations over gifts to other beneficiaries.").

[288] *See* Banta, *supra* note 77, at 1731 ("Capacity laws of minors are meant to protect them and ensure that scheming adults do not take advantage of a child's vulnerability, naiveté, or ignorance.").

Instead, our suggestions involve two steps: (1) increase opportunities for dialog between copyright law (and lawyers) and state contract and succession laws; and (2) deploy protective toolkits, developed in one area, across doctrinal lines. As to the first step, there are several ways in which acquisition and transfer of copyright interests might more explicitly consider the author's potential loss or lack of legal capacity. As one of us has suggested in previous work, when an author registers a work with the Copyright Office, this can be an opportunity for the Copyright Office to prompt the registrant to indicate their preferences for how their rights (which will last seventy years after the author's death) should be managed in the future.[289] These preferences might include testamentary wishes, i.e. who should inherit those rights, but they also might include the name of a person or entity that the author would like to take over copyright management should they lose legal capacity during their lives. As discussed above, a major source of conflict emerges from the lack of advanced planning about who is best positioned to represent the incapacitated individual; by affirmatively asking authors about their preferences during the registration process, the Copyright Office is well-positioned to nudge them to make stewardship decisions for their own sake and for the benefit of the copyright system more broadly.[290]

If the copyright system prompted authors to make decisions about death, incapacity, and surrogate decision-making, the Copyright Act already contains an important lever for addressing the capacity gap: express preemption.[291] As discussed above in the context of termination of transfers and the statute of frauds, where Congress has determined that state contract law is insufficiently protective of authors' interests, it can and has preempted state law in order to allow authors and their families to claw back and renegotiate inadequate transfer or licensing deals. This attention to authors' vulnerabilities, and preemption of state

[289] *See* Gilden, *The Social Afterlife*, *supra* note 58, at 382.

[290] Subotnik, *Copyright and the Living Dead?*, *supra* note 49, at 121 (advocating approaching postmortem copyright through the lens of "suboptimal stewardship").

[291] 17 U.S.C. § 301. On the copyright-copyright interface more broadly, see generally Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1141 (2017) (discussing tensions between copyright policy and state contract laws and the application of copyright preemption to address this tension).

laws that exacerbate them, could be expanded in numerous ways. If the Copyright Office were to provide opportunities for authors to name successors — during life or at death — to steward copyright management, Congress could give these decisions preemptive effect.

By taking a more active, and preemptive role, in the areas of incapacity and succession, the copyright system could incorporate some of the recent innovations in fiduciary management and protective apparatuses into the federal system — but tailored to the unique challenges of copyright stewardship. For example, a "copyright advance directive" might both set forth who the author thinks would be best suited to make decisions about licensing, publishing, and enforcement as well as provide some guiding principles on how the appointed person should approach those questions. The result would be a fiduciary arrangement that is far more likely to represent the actual, subjective desires of the author and not those deemed best by their steward. Moreover, the copyright advance directive could explicitly impose a substituted decision-making framework, as opposed to a best interests framework, on the appointed person. Such decisions could be enforceable in state and federal courts, notwithstanding any directive "to the contrary."[292] Although a copyright advance directive could certainly inform protective proceedings on non-copyright issues, the targeted nature of the copyright advance directive leaves other decisions, e.g., about medical care or intimate life or real property, in the hands of state law. Through copyright advance directives, the federal copyright system could work in tandem with state law to surface the unique challenges of copyright management and take a more proactive role in protecting authors' well-being.

While the advance directive could provide some greater assistance to authors who later lose capacity, the copyright system could also do more to protect the interests of authors who currently lack, or have yet to obtain, legal capacity. In other words, the copyright system could do more for authors like Britney Spears, who acquire new copyright interests while in a conservatorship, or child authors, whose economic

[292] 17 U.S.C. § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.").

interests are often controlled by their parents. We envision at least two possibilities.

First, termination of transfers could be adapted to this circumstance so that, for example, a transfer of copyright effectuated on behalf of the author during their incapacity could be terminated by the author within a reasonable period of time after they have gained/regained capacity.[293] At the very least, an explicit statutory affirmation by Congress or by the courts that grants of copyright "executed by the author" include those grants made by surrogates of an incapacitated author — on their behalf — and may therefore be terminated pursuant to Section 203 would be an important step.[294]

Second, and to the extent that third parties might be reluctant to negotiate in the shadow of termination rights and incapacity, copyright law might learn from state Coogan laws, which provide avenues for validating contracts with minors under court supervision so long as a certain amount of the proceeds are held in trust for the minor. The federal copyright system already has experience overseeing collective rights organizations that safeguard copyright royalties for authors in various circumstances; a government-funded entity, or perhaps a nonprofit entity, could similarly safeguard funds for the benefit of incapacitated authors.[295] In sum, the capacity gap could be less

[293] *Cf.* Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. VA. L. REV. 431, 459 (2010) (proposing that "Congress could provide for the termination of transfer or license . . . within five years of the author's attaining the age of majority").

[294] Otherwise, bright-line statements taken out of context from other cases resolving very different facts may be wrongly (in our view) deployed against incapacitated authors by assignees seeking to avoid termination. *See, e.g.*, Peretti v. Authentic Brands Grp. LLC, 33 F.4th 131, 138 (2d Cir. 2022) ("We hold, therefore, that based on the plain reading of the statute, a grant 'executed by the author' is a grant that is documented in writing, that is signed by the author, and that conveys rights owned by the author."). Another court suggested a broader interpretation of the relevant phrase, but without explaining its meaning or reasoning. *See* Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430, 441 (S.D.N.Y. 2020) ("Only grants 'executed by the author' (*or the statutorily designated successor*) may be terminated." (emphasis added)).

[295] *See* 17 U.S.C. § 114(g)(2) (designating a nonprofit organization to collect and distribute royalties from noninteractive digital audio transmissions of sound recordings); *id.* § 115 (d)(3) (designating a mechanical licensing collective to receive

precarious if there were broadened opportunities to renegotiate exploitative contracts, increased court supervision, and additional safeguards for revenue streams meant to benefit the author.

State law and state court practice might also adjust to account for the unique challenges of authors without legal capacity. A few possibilities stand out. First, copyright management may present distinctly difficult questions of how to balance the socioemotional needs of the incapacitated author, the economic potential of their estate, and the desire of the author's potential audience to consume and reuse their work.[296] Accordingly, a limited guardianship might be a useful vehicle for dividing up difficult stewardship questions between the author and third parties. For example, if an author needed someone else to manage their business and financial decisions generally but retained the ability to make a reasonably supported decision about whether to adapt a book into a movie — or to produce a new album — a limited guardianship could preserve for the author the right to decide.[297] Likewise, increased use of a "copyright advance directive" — even just as a typical advance planning instrument without federal preemptive effect — would likely improve the current state of affairs.

Second, although Coogan laws recognize the potential for exploitation of minors in the entertainment fields, the comparison with copyright law signals that they are likely far too modest in their protections; placing only approximately fifteen percent of proceeds in trust for a minor does little to extinguish the incentives to overwork young artists.[298]

Third, the capacity gap signals more than anything a need for communications between the IP and probate bars. Probate and estate

licensing fees from streaming music platforms and to distribute royalties to musical work owners).

[296] *See* Gilden, *IP, R.I.P.*, *supra* note 50, at 685-96.

[297] It's not a foolproof solution, however. One reason is that any creative decision can be recharacterized as a business or financial decision, rendering it subject to the control of the (limited) guardian. After all, who could call a decision to turn down a multi-million-dollar film adaptation of one's work reasonable? Another reason is that some authors may truly find themselves in a condition for which limited guardianship is simply too narrow.

[298] *See* Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMMC'NS & ENT. L.J. 351, 360 (2013).

planning lawyers would benefit from greater appreciation of how copyright law might alter the calculus of fiduciary management and their approach to setting up effective and humane protective arrangements for their clients.[299] IP lawyers would benefit from education on how better to prepare their clients, and their clients' copyright portfolios, for death and incapacity.[300] Our research has found little evidence that artist- or author-related organizations are widely advising on the importance of these issues. This is surprising because the field is rife with resources about the need to plan one's estate after death.[301] The Elder Artists' Legal Resource, for example, advises on the importance of making a will and keeping one's estate plan up to date "to reflect life's changes."[302] The Volunteer Lawyers for the Arts' (VLA's) Artists Over Sixty program informs readers that it:

> provides legal services and education to senior artists to address age-specific legal and business issues. The program emphasizes the need for will drafting and estate planning services, and offers access to other legal services, including counseling on the use of artwork on the Internet and other digital media. The program also includes special education courses directed to the needs of senior artists.[303]

While these resources certainly *could* include information about the need for artists to plan for future incapacity, there is little on these websites (and the others like them) that signals the potential importance of focusing on pre-death representation by others. Instead, the average artist or author reviewing these sites is likely to focus on the word "will." Thus, it would be helpful to develop a more widely robust practice of advance planning instruments for copyright management.

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299 *See* Subotnik, *Dead-Hand Guidance*, *supra* note 28, at 61-65.

300 *Id.*

301 *See id.* at 67 nn.41–42 (collecting sources).

302 *Updating Your Estate Plan*, ELDER ARTISTS LEGAL RES., https://elderartistslegalresource.org/updating-your-estate-plan/ (last visited Aug. 16, 2023) [https://perma.cc/VD3Z-RN5G].

303 *Artists Over Sixty*, VOLUNTEER LAWS. FOR THE ARTS, https://vlany.org/artists-over-sixty/ (last visited Aug. 16, 2023) [https://perma.cc/9F2B-R336].

Our goal in this Article has been to raise awareness of the neglected intersection of copyright law with issues of capacity. The proposals set forth above are just a few examples of concrete steps that could be taken to better protect the authors who are welcomed into the copyright system but who lack the legal ability to make decisions about how best to enjoy their potentially valuable property rights.

Conclusion

In this Article, we have shown that federal copyright law diverges from state contract and succession laws in terms of how to address artists with disabilities or who otherwise face social, cognitive, developmental, or mental health challenges. State law capacity doctrines signal a strong concern with protecting vulnerable individuals who operate in the marketplace or otherwise deal with economically valuable property; moreover, these doctrines require a surrogate decision maker to represent the interests of legally incapacitated authors. Copyright law, by contrast, emphasizes inclusion of all authors, regardless of age or ability, and places only narrow limits on their autonomy. Although a legal lattice that emphasizes vulnerability, inclusion, and autonomy to varying degrees in various places may at first glance appear unproblematic, the divergence in theory and doctrine between copyright and intersecting state laws creates largely overlooked opportunities for exploitation and mistreatment of vulnerable authors.