# COPYRIGHT ISN’T FOR EVERYONE: COPYRIGHT FORMALITIES AS A RESPONSE TO AUTHORS’ NEEDS IN THE DIGITAL AGE

**TATIANA KURSCHNER**

**ST JOHN’S COLLEGE**

**MPHIL**

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# ABSTRACT


## COPYRIGHT ISN'T FOR EVERYONE: COPYRIGHT FORMALITIES AS A RESPONSE TO AUTHORS' NEEDS IN THE DIGITAL AGE

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**MPHIL, TRINITY TERM 2021**

The online environment has empowered authors to act on intrinsic and non-commercial motivations for creating and disseminating works in unprecedent ways that conflict with copyright's exclusivity. While all-rights-reserved copyright remains vital to traditional content industries, it is no longer suitable for non-traditional online creators who aim for their works to reach the widest possible audience. The resulting misalignment between copyright law and the terms on which authors wish make their works available – unreliably mediated by social sharing norms and tolerated use – not only deters mutually beneficial content use but risks undermining copyright's credibility as authors implicitly encourage infringement. To remedy this, authors must be given effective control over their works' availability. It is not enough to permit authors to opt out of copyright protection, as this cannot assist creators unaware that copyright attaches to their works. A radical new solution is needed.

This paper proposes 'Copyright 3.0', a bifurcated copyright system providing modest default rights meeting the average creator's needs (moral rights and protection against commercial use), while enabling authors to flexibly 'level up' or 'level down' protection through registration and notice formalities. The default rights would ensure works are never left vulnerable to unjust exploitation, while the burden of opt-in formalities would fall only on those with the most to gain, who can fairly be expected to bear it.

This proposal deviates from the pro-formality literature of the last two decades by arguing for formalities' reintroduction from an authors' rights perspective, rather than a public interest perspective. This makes it uniquely defensible, as the proposed limitations to authors' automatic entitlements are designed specifically to empower and protect authors. While Copyright 3.0 conflicts with article 5(2) of the Berne Convention, it is the best available mechanism for tailoring copyright to authors' needs, and aligns with authors' and users' common-sense expectations.

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| | |
|---|---|
| Berne | Berne Convention for the Protection of Literary and Artistic Works |
| CC | Creative Commons |
| CC BY | Creative Commons Attribution |
| CC BY-NC | Creative Commons Attribution-NonCommercial |
| CC BY-NC-ND | Creative Commons Attribution-NonCommercial-NoDerivs |
| CC BY-NC-SA | Creative Commons Attribution-NonCommercial-ShareAlike |
| CC BY-ND | Creative Commons Attribution-NoDerivs |
| CC BY-SA | Creative Commons Attribution-ShareAlike |
| CPP | Copyright Principles Project |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| UCC | Universal Copyright Convention |
| UGC | User-generated content |
| WIPO | World Intellectual Property Organization |

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# 1 INTRODUCTION

Although it often goes unnoticed, copyright is everywhere. It automatically casts a wide net over virtually every minimally creative expression – personal emails, Instagram photos, and even 200-character tweets – regardless of whether authors regard the work as appropriately the subject of copyright, preventing works from being lawfully copied, shared, or altered without permission. Unfortunately, this all-rights-reserved default protection is increasingly out of step with the realities of modern content consumption, creation, and dissemination. In the age of Instagram influencers and viral memes, many authors now create works designed to be viewed, remixed, and shared as widely as possible,[1] often without commercial motive, and users' perceptions of acceptable content use have shifted to match those desires. In other words, certain authors desire or assume their works to be free,[2] and users follow their lead. This gap between copyright law and content-sharing norms, informally and inconsistently mediated by tolerated use of protected works, carries real problems for authors and copyright as a whole: while some users stick to the letter of the law, deterred from mutually beneficial uses authors wish to permit, other users struggle to see sense in a copyright system that restricts uses authors themselves endorse, which leads them to disregard copyright, slowly eroding its ability to protect works even where authors welcome its assistance. There is no benefit to preserving copyright that runs counter to authors' interests. In order for copyright law to

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[1] Marco Ricolfi, 'Copyright Policy for Digital Libraries in the Context of the i2010 Strategy' (First Communia Conference on the Digital Public Domain, 30 June–1 July 2008) <https://communia-project.eu/communiafiles/conf2008p_Copyright_Policy_for_digital_libraries_in_the_context_of_the_i2010_strategy.pdf> accessed 15 March 2021, 12.

[2] 'Free' as used in this paper means available for others to use, modify, and disseminate free of encumberment, rather than free of cost. Lessig helpfully describes this as 'permission free' (Lawrence Lessig, 'Re-crafting a Public Domain' (2013) 18 Yale JL & Human 56, 57).

retain normative force and value, its misalignment with authors' needs and modern content-sharing norms must be remedied.

This is not as simple as changing copyright's scope or standards – given the diversity of creative modes and motivations in the online environment, alongside the persistence of traditional copyright-dependent content industries, there is no one-size-fits-all solution. Authors must be individually empowered to set the terms on which their works are made available to the public. It is also not enough to guarantee authors' ability to opt *out* of automatically subsisting protection, whether through abandonment or private ordering permissive licensing mechanisms, as this would leave the large contingent of casual creators who are unaware copyright subsists in their works at the mercy of all-rights-reserved protection, permitting the instability of tolerated use and the slow erosion of copyright's credibility to continue. The system must instead meet copyright-unaware authors' needs by default.

This paper proposes a bifurcated opt-in copyright system that establishes a modest set of default rights meeting the needs of the typical casual creator, while permitting authors to 'level up' or 'level down' protection through registration and notice formalities. This default would provide all authors with moral rights protection and protection against commercial use, ensuring no works are inadvertently left vulnerable to exploitation due to compliance failure. Formalities' burdens, designed to be as light as possible, would fall only on those authors wishing to protect their works from even non-commercial exploitation – commercial actors, who can reasonably be expected to take active steps to secure full exclusivity. This system would not only enhance authors' autonomy by providing accessible flexibility in how works are protected, but its default would better align with authors' and users' shared norms for acceptable content use – the

prevailing assumption online is that, unless an author flags otherwise, social works can be used non-commercially with attribution.

While interest in reintroducing copyright formalities has soared over the last two decades,[3] this proposal diverges significantly from standard pro-formality scholarship – rather than leveraging formalities to maximise the *public* interest, this paper regards formalities first and foremost as a response to *authors'* needs. As a result, many of the traditional objections to opt-in formalities – primarily that they risk excluding copyright-unaware or under-resourced authors and non-commercial works from protection – are avoided, because the system is specifically designed to fairly balance the competing needs of all authors. Formalities are imposed not as a burden designed to forcibly alter how authors engage with copyright, but as an aid to help authors more easily give effect to their choices. The goal is *not* to expand the public domain, create an exhaustive list of copyright-protected works, or even resolve the issues around unpublished and orphan works; it is simply to maximise authors' autonomy, so that their works' legal availability matches how they desire their content to be used in practice. Subsidiary public interest goals are facilitated by the bifurcated opt-in system, but only imperfectly, to the extent compatible with fair consideration of authors' interests. This approach is the least

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3 See, among others, William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 U Chi L Rev 471; Christopher Sprigman, 'Reform(aliz)ing Copyright' (2004) 57 Stan L Rev 485, 545–46; Genevieve P Rosloff, 'Some Rights Reserved: Finding the Space between All Rights Reserved and the Public Domain' (2009) 33 Colum JL & Arts 37; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004) 287–93; Cecil C Kuhne III, 'The Steadily Shrinking Public Domain: Inefficiencies of Existing Copyright Law in the Modern Technology Age' (2004) 50 Loy L Rev 549; James Gibson, 'Once and Future Copyright' (2005) 81 Notre Dame L Rev 167; David Fagundes, 'Crystals in the Public Domain' (2009) 50 B C L Rev 139; Pamela Samuelson and others, 'The Copyright Principles Project: Directions for Reform' (2010) 25 Berkeley Tech LJ 1175, 1198–202; Stef van Gompel, 'Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing' (2013) 28 Berkeley Tech LJ 1425; Amanda Reid, 'Claiming the Copyright' (2016) 34 Yale L & Pol'y Rev 425; Dev S Gangjee, 'Copyright Formalities: A Return to Registration?' in Rebecca Giblin and Kimberlee Weatherall (eds), *What If We Could Reimagine Copyright?* (ANU Press 2017).

controversial path to formalities, as it does not raise normative challenges to copyright's scope or availability – it simply recognises authors' needs are not uniform, and adopting a flexible opt-in regime is the best way to accommodate them.

Part 2 canvasses copyright formalities' history and the emergence of the all-rights-reserved default as an international standard, and argues the strongest case for reintroducing formalities comes not from a public interest perspective, but an authors' interests perspective. Part 3 examines how the digital environment has enabled authors to act on non-commercial motivations for creativity in new ways explicitly or implicitly averse to copyright's exclusivity, and why this misalignment between copyright law and authors' intentions is problematic in practice. The section concludes neither tolerated use nor existing opt-out mechanisms are sufficient or sustainable solutions, leaving constitutive opt-in formalities as the only viable response. Part 4 outlines a proposal for a bifurcated copyright system that provides default moral rights and protection against commercial use, while allowing authors to 'level up' and 'level down' protection through constitutive registration and notice formalities. This scheme carefully balances authors' competing needs, protecting vulnerable authors and ensuring burdens fall only on those who can fairly be expected to bear them. Finally, Part 5 defends the proposed system against both theoretical and practical objections, and dismisses potential alternative non-formality reforms as unable to serve the same function of giving authors control over how their works are made available.

# 2 FORMALITIES: WHAT HAPPENED, AND WHAT'S NEXT?

In modern international copyright law, formalities are considered a radical solution. This section outlines how we got to this point, and argues that the case for a return to formalities is best advanced from an authors' interests perspective.

## 2.1 The 'No-Formality' Rule

While copyright's sprawl has been aided by low originality standards and lengthy protection terms, the most significant driver behind its proliferation is copyright's automatic application. Since 1908, under the Berne Convention for the Protection of Literary and Artistic Works, copyright protection has arisen automatically in all works meeting a minimum threshold of originality, without further action.[4] This is due to what is now article 5(2), which requires that the 'enjoyment and the exercise' of the protections enumerated by the Convention 'not be subject to any formality'.[5] Given Berne's incorporation by reference into TRIPS, article 5(2) has become the dominant international standard for copyright subsistence and enforcement.[6] In Berne-compliant countries, individuals acquire rights in their creations by virtue of the act of creation, regardless of whether they are aware of or desire such rights. Over time, generous

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4 Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (adopted 24 July 1971) 1161 UNTS 3 (Berne) art 2(1) confirms 'literary and artistic works' includes 'every production in the literary, scientific and artistic domain'.

5 cf states may, and common law countries typically do, impose fixation requirements (Berne, art 2(2)).

6 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1 <https://docs.WTO.org> art 9(1). cf Universal Copyright Convention as revised at Paris on 24 July 1971 (adopted 24 July 1971) 943 UNTS 178, art 3(1) technically allows states to impose a limited notice formality (the © symbol plus the owner's name and year of first publication on all copies), but this has little relevance given Berne's more restrictive standard's inclusion as a TRIPS obligation.

interpretations of the originality standard in domestic law have revealed the true significance of this rule – copyright casts a very wide, often unnoticed net over virtually every minimally original aesthetic human creation.[7] Given the enormous scale at which copyright-eligible works are produced in the digital environment, it becomes important to ask: is automatic all-rights-reserved copyright still appropriate in the twenty-first century?

Copyright formalities were not always regarded negatively. Prior to the Berne no-formality rule, the earliest statutory copyright systems in many countries used formalities to condition copyright's initial and continued subsistence, its enforceability, and the availability of certain remedies. When the UK first introduced statutory copyright, the Statute of Anne 1710 required works to be registered with the Stationers Company to be eligible for statutory remedies.[8] It was not until the Copyright Act 1911, responding to Berne's no-formality rule, that the UK abolished common law copyright and made statutory copyright wholly unburdened by formality.[9] The US Copyright Act of 1790 was more demanding, requiring authors to register all eligible published works, publish notice of registration, and deposit a copy of the work to secure federal copyright's subsistence.[10]

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7 Eg the US originality standard requires only a 'minimal degree of creativity' (Feist Publications, Inc v Rural Telephone Service Company, Inc, 499 US 340, 345 (1991)), and the EU standard only requires works to be the 'author's own intellectual creation', which could theoretically be satisfied by an original combination of eleven words (Case C-5/08 *Infopaq International v Danske Dagblades Forening* [2009] ECR I-06569, paras 37–38, 48).

8 s 2. The statute left common law copyright and its remedies intact: see *Beckford v Hood* (1798) 7 TR 620; 101 ER 1164, 1167–68.

9 s 1, s 31.

10 ch 15, §§ 3, 4, 1 Stat 124, 125 (repealed 1831). The Act of Apr 29, 1802, ch 36, § 1, 2 Stat 171, 171 (repealed 1831) added a requirement of affixed notice, which eventually became the sole notice requirement (Copyright Act of 1909, ch 320, § 9, 35 Stat 1075, 1077 (repealed 1976) (1909 Act)). While the penalty for notice failure and non-deposit was initially ambiguous, Wheaton v Peters, 33 US 591, 662–65 (1834) interpreted the 1790 legislation, as amended by the Act of Apr 29, 1802, to mean title was imperfect unless all formalities were satisfied.

Subsequent US copyright legislation maintained some degree of mandatory formalities until the late twentieth century, when the US began to ease their force, before removing them entirely for foreign authors after acceding to Berne in 1988.[11] Even French copyright, more firmly based in the natural rights tradition than its common law counterparts, embraced a deposit formality conditioning copyright's enforceability in 1793.[12]

However, as the world became increasingly interconnected and works spread across borders, formality schemes became unwieldy – the difficulties authors faced in complying with the different formality requirements of each country in which they sought protection led them to advocate for the abolition of formalities.[13] Initially, Berne responded by requiring members to fully protect the rights of foreign authors who had complied with formalities in the work's country of origin;[14] unfortunately, authors still struggled to prove compliance with home-state formalities, and some national courts continued to apply domestic standards.[15] As a result, Berne's 1908 Berlin revision

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[11] The 1909 Act §§ 9–10, 12 turned registration and deposit into conditions for enforcement, but affixed notice remained a precondition for subsistence. The Copyright Act of 1976, § 405, 17 USC § 405 (1976) (current version at 17 USC § 405) provided an opportunity to cure notice failure, but notice was only made optional by the Berne Convention Implementation Act of 1988, Pub L No 100-568, sec 7, §§ 401–06, 102 Stat 2853, 2857–2859. The US has retained registration as a prerequisite for enhanced remedies, but made it otherwise optional for all non-US works (17 USC §§ 411(a), 412). See Jane C Ginsburg, 'The US Experience with Copyright Formalities: A Love/Hate Relationship' (2010) 33 Colum JL & Arts 311, 324–27.

[12] French Law of 19 July 1793, art 6. See Jane C Ginsburg, 'Berne-Forbidden Formalities and Mass Digitization' (2016) 96 B U L Rev 745, 748.

[13] Ginsburg, 'Berne-Forbidden Formalities' (n 12) 749.

[14] Convention Concerning the Creation of An International Union for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 5 December 1887) art 2 (reprinted in Arpad Bogsch, *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (International Bureau of Intellectual Property 1986) 228).

[15] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer 1987) 201–03; Stef van Gompel, 'Formalities in the Digital Era: An Obstacle or Opportunity?' in Lionel Bently, Uma Suthersanen, and Paul Torremans (eds), *Global Copyright:*

ultimately modified the rule to prohibit the imposition of formalities on any foreign authors.[16] This produced the current international copyright system, under which any work covered by the Convention and first published in or created by a national of a Berne member state receives automatic protection throughout Berne members' territory.[17] Members may still establish *voluntary* formalities not impacting copyright's enjoyment and exercise, which several states have done,[18] but mandatory formalities, now permitted only in relation to a member's own nationals, have all but vanished.[19]

This shift was celebrated at the time by many authors,[20] particularly those viewing copyright as a natural right, but over time the rationale for the no-formality rule has weakened. The strongest objections to formalities were pragmatic in nature – relating to the difficulty of operating effective formality systems with nineteenth and twentieth century technologies and the complexities of international copyright protection under conflicting formality schemes – and have lost strength in the face of modern technology and globalisation.[21] Online infrastructure could support a globally accessible, searchable, centralised digital register, and widely available technology could enable virtually

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*Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010) 418; Ginsburg, 'Berne-Forbidden Formalities' (n 12) 749–50.

16 Revised Berne Convention for the Protection of Literary and Artistic Works (adopted 13 November 1908) art 4(2) (reprinted in Bogsch (n 14) 229).

17 Berne, arts 3, 5.

18 See WIPO Secretariat, 'Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights' (9 November 2005) SCCR/13/2.

19 Berne, art 5(3). Notably and anomalously, the US *does* impose formalities solely for US works, requiring registration as a precondition to filing suit (17 USC § 411(a)).

20 See eg Arthur Levine, 'The End of Formalities: No More Second-Class Copyright Owners' (1995) 13 Cardozo Arts & Ent LJ 553; Shira Perlmutter, 'Freeing Copyright from Formalities' (1995) 13 Cardozo Arts & Ent LJ 565.

21 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 545–46; Rosloff (n 3) 76; van Gompel, 'Formalities in the Digital Era' (n 15) 421–23.

everyone to submit works to and search the online register.[22] As technological advances make the practical barriers to administering effective international copyright protection involving formalities less compelling, we should consider whether the no-formality rule still has any benefit – and, if it does not, how formalities should return.

## 2.2 Which Formalities?

'Copyright formalities' embrace a wide range of mechanisms with various functions and degrees of Berne compatibility. van Gompel identifies three main functional types: constitutive formalities, which provide preconditions for copyright's subsistence; maintenance formalities, which enable authors to extend copyright's term; and declaratory formalities, which condition subsisting copyright's enforceability.[23] There are also recordation formalities, which condition the validity or enforceability of title transfers on appropriate documentation with the copyright office; these attract support from even those who disapprove of formalities conditioning *authors*' rights.[24] Finally, formalities can be mandatory, creating preconditions for entitlements, or voluntary, remaining optional but typically conferring procedural or remedial advantages to incentivise participation.[25]

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22 van Gompel, 'Formalities in the Digital Era' (n 15) 422; Stef van Gompel, *Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future* (UvA-DARE 2011) 263–64.

23 van Gompel, 'Copyright Formalities in the Internet Age' (n 3), 1438–39.

24 Daniel Gervais and Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It' (2013) 28 Berkeley Tech LJ 1459, 1490–91; Jane C Ginsburg, '"With Untired Spirits and Formal Constancy": Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching' (2013) 28 Berkeley Tech LJ 1583, 1621–22; Daniel J Gervais, *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform* (Edward Elgar 2017) 274–76.

25 van Gompel, 'Copyright Formalities in the Internet Age' (n 3) 1437–38.

In the context of this paper, which aims to prevent authors from being involuntarily burdened by default with unwanted all-rights-reserved copyright, mandatory constitutive formalities are key. Voluntary formalities confer benefits on those who *want* copyright, rather than ensuring authors are not burdened by it, and non-constitutive mandatory formalities, while valuable in other ways, cannot assist with keeping works free from their inception.

## 2.3 Framing the Case for Formalities

While arguments for reintroducing formalities have certainly been in vogue among scholars over the past two decades,[26] this paper takes a different path in arguing for this change. Formalities are justified here on the basis of *authors'* interests, rather than the public interest.

### 2.3.1 The Public Interest Approach

Pro-formality advocates often focus on a public interest rationale when arguing for formalities' return. This makes sense, given that the public interest is often central to copyright reform, serving as a 'baseline against which to assess new developments.'[27] These advocates suggest formalities could serve the public interest in two key ways: (i) by improving the efficiency and certainty of copyright's administration (through formalities designed to produce information about copyright's subsistence and works'

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[26] See eg Landes and Posner, 'Indefinitely Renewable Copyright' (n 3); Sprigman, 'Reform(aliz)ing Copyright' (n 3); Lessig, *Free Culture* (n 3) 287–93; Kuhne (n 3); Gibson, 'Once and Future Copyright' (n 3); Fagundes (n 3); Samuelson and others (n 3) 1198–202; van Gompel, 'Copyright Formalities in the Internet Age' (n 3); Reid (n 3); Gangjee (n 3).

[27] Gangjee (n 3) 224.

ownership) and (ii) by expanding the pool of works which fall into the public domain (through formalities designed to filter out commercially valueless works).[28]

In relation to the administrative benefits, scholars argue reintroducing certain formalities – especially mandatory registration and recordation requirements – would provide improved information about works' copyright status, authorship and ownership, and duration of protection.[29] This information should be reasonably available in a well-designed copyright system, but automatic copyright cannot secure its provision.[30] Information-focused formalities would not only assist with certainty in copyright litigation by offering a clear record of the work, but facilitate the licensing of copyright-protected works by providing potential licensees with the information needed to identify the person from whom they must seek a licence, reducing the often-prohibitive transaction costs of licensing works.[31] Moreover, some suggest registration requirements conditioning copyright's subsistence or enforcement could resolve the growing problem of unusable orphan works – works for which an author cannot be identified by reasonable efforts – as they would not satisfy formalities requiring author identification and thus not receive enforceable protection.[32] Finally, carefully designed constitutive registration formalities can encourage the free use of public domain works by making it easier to

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[28] See eg Rosloff (n 3) 45–52; van Gompel, 'Copyright Formalities in the Internet Age' (n 3) 1430–33; Gangjee (n 3) 225–27.

[29] Sprigman, 'Reform(aliz)ing Copyright' (n 3) 501; van Gompel, 'Copyright Formalities in the Internet Age' (n 3) 1430–1432.

[30] Samuelson and others (n 3) 1186.

[31] Sprigman, 'Reform(aliz)ing Copyright' (n 3) 501–02. Gibson, 'Once and Future Copyright' (n 3) 225, 227–28 recognises notice, registration, and recordation could all reduce search costs. Rosloff (n 3) 46–48 highlights just how costly and difficult rights clearance can be.

[32] Fagundes (n 3) 179–81; Reid (n 3) 432–34. However, this creates its own problems (see n 242).

confirm which works are *not* protected.[33] This certainty is increasingly valuable in the twenty-first century, given the exponential increase in anonymous and hard-to-track online works.[34] However, copyright registers have their limits. Registers cannot guarantee that what is registered is the owner's copyright-protected content – the work could be insufficiently original or fraudulently registered – nor can they directly record when copyright will expire, as this depends on the author's date of death.[35] Nevertheless, the additional information is still valuable.

The second public interest claim relates to the expansion of the public domain. Some scholars support mandatory formalities explicitly designed to force authors to make cost-benefit evaluations of compliance, causing works for which compliance costs are greater than copyright's expected benefits to fall into the public domain from the outset or after a shorter term.[36] This would reduce the deadweight losses to society and creative communities caused by locking up works which are no longer commercially valuable to their owners, but could be of great value to others. The argument presupposes copyright protects a large volume of works authors would deem insufficiently commercially valuable to justify complying with mildly burdensome formalities; this is observably true (children would hardly find it worthwhile to take steps to copyright their scribbles, yet currently enjoy copyright), and is empirically supported by pre-Berne American registration data showing only a small portion of copyright-eligible works were registered

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33 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 487. See also Fagundes (n 3) 178–81; van Gompel, *Formalities in Copyright Law* (n 22) 7, 9.

34 van Gompel, 'Formalities in the Digital Era' (n 15) 397.

35 Gervais and Renaud (n 24) 1485–86. However, biographical information *would* help identify if and when the author has died.

36 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 514.

even when registration was constitutive.[37] With this goal in mind, Sprigman proposes reintroducing registration with a fee as a precondition for copyright's subsistence or enforcement, causing authors who expect their works to be worth less, commercially, than that fee to opt to leave their works to the public domain and thereby filtering out non-valuable works.[38] Landes and Posner combine registration and renewal to the same effect, suggesting copyright be granted for shorter terms but made indefinitely renewable at a reasonable fee.[39] Relying on pre-Berne US Copyright Office data showing only a 3–22% renewal rate for registered copyrights between 1910 and 2000, they conclude very few works retain value past their initial term; shorter renewable terms should therefore hasten all but the most enduringly valuable works' transitions into the public domain.[40] Leveraging the same logic, Lessig and Kuhne propose implementing short, *finitely* renewable terms, while Skladany suggests letting authors choose between a ten-to-fourteen-year non-renewable term and a one-year term renewable so long as the work is sufficiently profitable;[41] each proposal should cause the average work to enter the public

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37 Landes and Posner, 'Indefinitely Renewable Copyright' (n 3) 498; ibid 503–13. Sprigman (503–05) estimates only 10–20% of copyright-eligible works were registered from 1790–1800 and 'less than half of all published [copyright-eligible] works' were copyrighted from 1801–70. However, we should question Sprigman's inference that unregistered works lacked commercial value. Eric E Johnson, 'Intellectual Property and the Incentive Fallacy' (2012) 39 Fla St U L Rev 623, 660 notes the unregistered works analyzed were already 'the cream of creative production' – 'only those works… deemed important enough for a publisher to publish and for a library to collect and save.' This suggests many unregistered works were not valueless – their authors or publishers simply did not require copyright.

38 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 502–16.

39 Landes and Posner, 'Indefinitely Renewable Copyright' (n 3) 517–18.

40 ibid 499–500.

41 Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House 2001) 251; Lessig, *Free Culture* (n 3) 248–54, 292–93; Kuhne (n 3) 562; Martin Skladany, 'Unchaining Richelieu's Monster: A Tiered Revenue-Based Copyright Regime' (2012) 16 Stan Tech L Rev 131, 140.

domain faster than under Berne's life-plus-fifty term.[42] Even voluntary opt-out formalities have been leveraged as an expansion strategy – Fagundes and Perzanowski suggest employing monetary incentives or fines to encourage abandonment of low-value copyright.[43] Regardless of the exact mechanics, these proposals see formalities as a means of leveraging economics to prevent commercially dead or non-commercial works from languishing outside the public domain (effectively excluding them from copyright protection, even though commerciality is not part of copyright eligibility), securing their free use for the public's benefit. While formalities' merits as a strategy for public domain expansion have been challenged – how beneficial is intentionally swamping the public domain exclusively with works deemed commercially valueless?[44] – a charitable reading reveals a worthwhile point: works may have immense creative and cultural value as inspiration and material for derivative works, especially in aggregate, while nevertheless lacking sufficient independent commercial value to justify formality compliance.[45]

### 2.3.2 The Problem with the Public Interest Rationales

While it has been thoroughly and convincingly argued that formalities specifically designed to make copyright more efficient or expand the public domain could achieve those goals, their benefits are insufficiently weighty to justify altering the copyright system in a manner that will shrink the pool of authors receiving its protection. Any

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42 See Berne, art 7(1).

43 Dave Fagundes and Aaron Perzanowski, 'Abandoning Copyright' (2020) 62 Wm & Mary L Rev 487, 559–66.

44 Séverine Dusollier, '(Re)Introducing Formalities in Copyright as a Strategy for the Public Domain' in Lucie Guibault and Christina Angelopoulos (eds), *Open Content Licensing: From Theory to Practice* (Amsterdam University Press 2012) 84–86; Niva Elkin-Koren, 'Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s' (2013) 28 Berkeley Tech LJ 1537, 1558–59.

45 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 515–16; Fagundes and Perzanowski (n 43) 520.

mandatory formality adopted would inevitably remove protection from some number of individuals, whether they make the conscious decision that protection is not worth the trade-offs of compliance or, of greater concern, are simply unable or unaware of the need to comply with the requisite formalities.[46] Neither public interest ground can independently justify structural changes to copyright's subsistence in the face of such risks.

It would be problematic to introduce barriers to obtaining economically and personally valuable rights over authors' own creations simply to enhance administrative efficiency and increase user-friendliness, provided copyright itself is still regarded as appropriate in principle for the work. While informational benefits offer strong reason to encourage *voluntary* registration of protected works, removing valuable rights from authors solely for failure to comply with formalities would be disproportionate to those benefits. How would one explain to an author, who has invested the labour and creative spirit to make a copyright-eligible original work, that they will nevertheless miss out on copyright protection because their non-compliance makes it harder for *others* to obtain a licence for *their* work they may not even wish to grant? The essence of the administrative argument suggests authors who fail to make their rights easily identifiable to others should have no rights at all – a rather uncompelling position.[47] This is particularly unjustifiable if one embraces a natural rights justification for copyright – if copyright reflects a pre-legal entitlement earned through the act of creation, it should not be made

46 Gervais and Renaud (n 24) 1484 express particular concern for non-commercial creators who nevertheless desire exclusivity.

47 Levine (n 20) 554 notes any 'additional burden' to *users* 'does not warrant leaving a copyright owner with no effective remedy simply because [they] failed to register'.

contingent on formalities designed purely to improve the efficiency of copyright's administration.

Equally, it would be problematic to expand the public domain by essentially tricking at least some subset of authors out of their rights. While the premise of the public domain argument is that the only authors losing protection are those who *elect* not to comply with formalities (because they do not expect the work's economic value to outweigh compliance costs),[48] in reality many will 'choose' against protection due to lack of awareness of copyright's requirements or a material inability to comply. Since the expansionists do not challenge those authors' right to obtain 'valueless' copyright by formality compliance, nor the legitimacy of making economically valueless works eligible for protection,[49] it is inappropriate to risk underinformed or under-resourced authors involuntarily missing out on legitimate, desirable protection – for both economically valueless *and* economically valuable works – simply to expand the public domain. To justify placing authors at risk of involuntarily missing out on protection they are otherwise entitled to, we need a stronger competing interest than simply expanding the public domain's absolute volume by the arbitrary characteristic of works' worth as assessed by their authors.

This leads into the second objection to the public domain rationale – while mandatory formalities *would* expand the public domain in absolute terms, the arbitrariness of the expansion makes it a weakly compelling benefit. Assuming the best-case outcome where *only* consciously unprotected works enter the public domain, the

48 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 517.

49 Rosloff (n 3) 56–57 notes formalities are 'far less radical' than many believe for precisely this reason.

only unifying characteristics of the newly minted, formality-induced public domain works would be that they are economically valueless and unwanted by their authors.[50] Little consideration is given as to why *this* particular group of works is sufficiently important to the public domain to justify risking otherwise-entitled authors missing out on protection. It would be more persuasive to argue the public interest is served by imposing size or aesthetic thresholds on what counts as a work – while not advanced here, such proposals present coherent normative standards for content which must belong to the public domain because of its specific value (for example, ensuring microworks are left free to secure creativity's base materials). In contrast, using economically burdensome formalities as a strategy for public domain expansion values expansion *for expansion's sake*, even if very little of value is added.[51] If absolute expansion is the ultimate goal, there is no natural stopping point. Why not make formalities excessively burdensome, so only the *most* valuable works receive protection? As Lessig points out, modern formalities 'need not be a burden'[52] – we choose to make them one. There is no fixed level of burden inherent to any formality – expansionists must make a subjective judgment about which degree of burden would appropriately distinguish 'economically valuable' works from 'economically valueless' works, and artificially generate those burdens.[53] The expansionists' logic also overlooks that the burden imposed by a

50 This is the best reading of Dusollier's and Elkin-Koren's point (text to n 44). Landes and Posner, 'Indefinitely Renewable Copyright' (n 3) 500 admit the 'average value of works in public domain will decline' under their proposal, while the most valuable works remain protected indefinitely.

51 cf Omri Alter, 'Reconceptualizing Copyright Registration' (2016) 98 J Pat & Trademark Off Soc'y 930, 936–37 argues constitutive registration's value lies in facilitating the *right* distribution of protection, rather than enlargement for enlargement's sake.

52 Lessig, *Free Culture* (n 3) 288.

53 Dusollier, '(Re)Introducing Formalities' (n 44) 103 notes formalities cannot filter if they are not burdensome.

particular formality will not manifest identically for everyone.[54] A thirty-dollar registration fee for a work with the potential to turn a three-hundred-dollar profit might merit compliance from a relatively well-off creator while being an impossible-to-justify price for a struggling creator, even if they make identical judgments about the work's commercial potential. These scholars see their fixation on absolute expansion as tempered by fairness, through the author's 'choice' to forgo protection, but they do not offer a genuinely autonomous choice, nor can their systems self-restrain. A formalities scheme which is intentionally and necessarily burdensome is highly problematic.

Finally, the public domain rationale depends on conceptualising copyright as purely about enabling authors to profit from their works, with non-commercial or commercially valueless works not requiring or deserving exclusivity.[55] If copyright is instead recognised as 'a right that enables creators to control what can be done with their creations',[56] the argument appears to uncomfortably strip owners of the agency copyright allows them by casting their relationship to their works as purely economic. Expansionists regrettably overlook works' significant non-economic value and authors' deeply personal connections to their creations.

### 2.3.3 A Different Perspective

Since the public interest rationales are too weak to justify formalities independently or in combination, an alternative perspective is necessary – constitutive formalities must be imposed not with administrative efficiency or the public domain as the guiding force, but

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54 ibid 103.

55 ibid 103; Elkin-Koren, 'Can Formalities Save the Public Domain?' (n 44) 1543.

56 Séverine Dusollier, 'The Master's Tools v. The Master's House: Creative Commons v Copyright' (2006) 29 Colum JL & Arts 271, 280.

by considering the competing interests of the authors copyright is intended to serve. Public interest considerations can operate as secondary factors influencing formalities' design, all else being equal, but an authors' interests rationale is needed to justify the normative shift from automatic to conditional copyright. There is a hint of this more compelling rationale in Sprigman's work, which recognises formalities offer authors the opportunity to delineate which works they do and do not want to protect (the filtering function).[57] While Sprigman sees this as distinguishing works which are and are not *economically* valuable, preventing deadweight economic losses,[58] formalities can empower authors to exercise (or opt *not* to exercise) control over their works for *any* reason, regardless of the decision's economic sense. This control is vital, because automatic copyright burdens not only the public wishing to engage with the work, but the copyright-averse author – it locks up works authors would prefer to make free. By allowing authors to choose which works are protected, and how, formalities can enhance authors' autonomy, provided there is a demand for protection deviating from the all-rights-reserved default. This leads to the key question: is copyright right for everyone?

This paper suggests even if copyright's scope is appropriate and justifiable in the abstract, copyright still oversteps from certain authors' perspectives. Focusing on authors' conflicting, equally important individual interests in how their works are protected, rather than pitting authors' existing rights against the public interest, provides the least controversial path to formalities. A proposal to narrow authors' default rights based on what *authors* need can be acceptable to both utilitarian-leaning *and* author-

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57 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 502. See also Pamela Samuelson, 'Is Copyright Reform Possible?' (2013) 126 Harv L Rev 740, 751. cf van Gompel 'Copyright Formalities in the Internet Age' (n 3) 1430 completely overlooks this function.

58 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 524–25.

centric copyright systems; the same cannot necessarily be said of altering authors' entitlements primarily for the public's sake.

# 3 Do We Need to Rethink All-Rights-Reserved Copyright?

Copyright's all-rights-reserved default depends on two key assumptions: (i) that almost all authors want or benefit from copyright and (ii) that unwanted copyright cannot do any harm. Neither is true. The digital environment has empowered authors to act on non-commercial motivations for creation and dissemination in new ways that conflict with copyright's exclusivity. By burdening these authors with all-rights-reserved copyright that they then encourage users to ignore, copyright erects barriers to authors' desired uses of their works and creates a misalignment between law and online sharing norms that destabilises copyright over time. The responses available to authors – tolerated use, abandonment, and permissive licensing – are unsustainable and insufficient, necessitating reform of copyright's default.

## 3.1 Why Do Humans Create?

Humans are both intrinsically and extrinsically motivated. Intrinsic motivation comes from the positive responses individuals experience in acting; intrinsically motivated actors engage in an activity for the sake of the activity itself. In contrast, extrinsic motivation comes from sources external to the self, like directives and expectations of evaluation or reward.[59] Copyright, which rewards creativity through legal entitlements enabling exclusive exploitation of the work, functions as one such extrinsic motivator; law and economics IP literature emphasises this, portraying authors as rational, self-interested economic actors driven to create by appropriately calibrated copyright

[59] Teresa M Amabile, *Creativity in Context* (Westview Press 1996) 115–16.

systems.[60] However, creativity is motivated by many factors – among them, intrinsic desires to create and engage in community and non-economic extrinsic incentives like reputation. Creative impulses can be 'excessive, beyond rationality, and free from the need for economic incentive';[61] moreover, even when creativity *is* economically motivated, authors increasingly find ways to extract value from works without excluding others from them. As a result, creation and dissemination rarely fall neatly into the postulated pattern of copyright-enabled selfish action.

### 3.1.1 Intrinsic Motivations for Creation and Dissemination

Creativity directly responds to authors' intrinsic creative impulses and desires for self-expression, and also serves as a vehicle for satisfying the intrinsic desire to take part in community. The latter dynamic, in particular, explains why creative works are *shared* in the absence of extrinsic incentives.

An intrinsic human desire to create is obvious. People regularly create for pure enjoyment,[62] using art to express emotions, achieve a sense of accomplishment, explore possibilities, and capture memories; creative activity can be a source of self-expression, self-esteem, and creative satisfaction.[63] To create is fundamentally human. Examining both non-commercial creators' and professional writers' personal accounts of why they create, Tushnet observes very few creators describe their motivation as financial, instead

[60] Eg William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 JLS 325.

[61] Rebecca Tushnet, 'Economies of Desire: Fair Use and Marketplace Assumptions' (2009) 51 Wm & Mary L Rev 513, 515.

[62] ibid 526.

[63] Niva Elkin-Koren, 'Tailoring Copyright to Social Production' (2011) 12 Theo Inq L 309, 318.

‘invok[ing] notions of compulsion, [and] overflowing desire’.[64] Kwall’s and Cohen’s analyses of creation narratives additionally reveal authors experience intrinsically motivated creativity as shaped by factors beyond their control – Kwall identifies a sense of ‘gifted’ or ‘endowed’ inspiration, while Cohen observes authors ‘understand particular results as heavily influenced by cultural, intellectual, and emotional serendipity.’[65] Creativity is driven by internal processes and dependent on uncontrollable inspiration, neither of which need to be (nor can be) induced by extrinsic incentives. The intrinsic elements of creative activity may help explain not only why authors create, but why some share their works regardless of extrinsic incentives: one novelist identifies ‘the thrill of seeing oneself in print… you are in print; therefore you exist.’[66] Shared creativity, regardless of material reward, can be a means of existing in and impacting the world.

Creation motivated by the intrinsic desire to take part in community (‘social motivation’[67]) is less immediately apparent, but easy to understand. Ryan and Deci identify relatedness as a basic psychological need essential to wellbeing – humans want to engage with others and achieve a sense of belonging and significance within a community.[68] While there are many ways of participating in community that do not involve creative activity, the online landscape hosts several communities and social

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64 Tushnet, ‘Economies of Desire’ (n 61) 522–27, 532–35. See also Julie E Cohen, ‘Copyright as Property in the Post-Industrial Economy: A Research Agenda’ [2011] Wis L Rev 141, 143.

65 Roberta Rosenthal Kwall, ‘Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul’ (2006) 81 Notre Dame L Rev 1945, 1965–66; Cohen, ‘Copyright as Property’ (n 64) 143. See also Jessica Litman, ‘Copyright as Myth’ (1991) 53 U Pitt L Rev 235, 244–45; Julie E Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 UC Davis L Rev 1151, 1177–92.

66 Anne Lamott, *Bird by Bird: Some Instructions on Writing and Life* (Anchor Books 1994) xiv.

67 Elkin-Koren, ‘Tailoring Copyright’ (n 63) 320–21. Social motivation involves engaging in conversation and achieving a sense of belonging or affiliation.

68 Richard M Ryan and Edward L Deci, *Self-Determination Theory: Basic Psychological Needs in Motivation, Development, and Wellness* (Guildford Press 2017) 10–11.

spaces which individuals participate in primarily via original or derivative creative works. Online platform users share original content, which others engage with, participating in turn by responding with their own content or an extension of the original – this dialogic creativity is a form of social interaction. Through creativity-based participation, individuals not only engage in inherently desirable conversation with others, but may build a recognisable presence (a reputation) among other users and thereby achieve a sense of community affiliation, also valuable in itself.[69] Creative behaviour can thus be a by-product of humans' inherently social natures. Reddit's structure, which emphasises community, is perfectly designed to capitalise on intrinsic social motivation – it is composed of community-fostering 'subreddits' dedicated to particular topics, rewards users' valuable contributions (as determined by peers' reactions) with 'karma', and allows communities to award subreddit-specific 'user flairs' recognising frequent contributors, trusted community members, and status-holders.[70] Social motivation also helps explain collaborative projects like Wikipedia, where authors combine to create free works without seeking exclusive control or material reward – participation is partly driven by the intrinsic desire to find a sense of belonging in a community of like-minded creators.[71]

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[69] 'Designing the Public Domain' (2009) 122 Harv L Rev 1489, 1501; Elkin-Koren, 'Tailoring Copyright' (n 63) 320–23. 'Designing the Public Domain' (1501) distinguishes reputation's role in establishing users' identity within a community, satisfying an intrinsic need, from reputation as an extrinsic incentive.

[70] 'What is karma?' (*Reddit*) <https://reddit.zendesk.com/hc/en-us/articles/204511829-What-is-karma-> accessed 11 July 2021; 'User Flair' (*Reddit*) <https://mods.reddithelp.com/hc/en-us/articles/360010541651-User-Flair> accessed 11 July 2021.

[71] Elkin-Koren, 'Tailoring Copyright' (n 63) 321–22. Like Reddit, Wikipedia emphasises community elements, hosting discussion forums for each entry and a community portal to help contributors discuss, collaborate, and connect with one another ('Wikipedia:Community Portal' (*Wikipedia*) <https://en.wikipedia.org/wiki/Wikipedia:Community_portal> accessed 11 July 2021).

Importantly, intrinsic motivation has limits and must be balanced against other factors – a sense of fairness is key to intrinsic motivation's strength.[72] While individuals may be driven to create and share works by creative compulsion or the desire for community, they will be less motivated to do so where they feel exploited or unfairly treated in the process.[73] Strong community norms and moral rights protections can help prevent a sense of unfairness from overwhelming the intrinsic desire to share creativity as a means of community participation.

### 3.1.2 Non-Copyright Extrinsic Motivations

Creators may also be extrinsically motivated by non-copyright economic incentives and non-economic incentives – most notably, reputation.[74] Individuals may engage in reputation-building creative activity to secure the benefits following from that reputation and related social standing, like praise, recognition among peers, preferential treatment, or lucrative business opportunities. Creating and widely disseminating content is one method of building such a reputation – individuals can attract powerful followings online by producing content others enjoy, and gain recognition and acclaim in artistic and cultural circles for their creations. This reputational gain alone is often enough to incentivise the creation and dissemination of works, without the need for material benefits derived directly from the work (and thus without the need for copyright) – while creators may not profit from the specific work shared, they hope to leverage the resulting

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72 'Designing the Public Domain' (n 69) 1501–02.

73 ibid 1501–02.

74 Dusollier, 'The Master's Tools' (n 56) 281; Greg Lastowka, 'Digital Attribution: Copyright and the Right to Credit' (2007) 87 BU L Rev 41, 58–60.

reputation to secure future economic opportunities.[75] In today's influencer-based economy, reputation and online visibility are forms of social capital individuals can exploit for economic gain. Reputation *is* an extrinsic incentive, both economic and non-economic, but unlike copyright it relates to the benefits creators get from others' *engagement* with their content, rather than engagement-limiting exclusive control.

## 3.2 Can Copyright Run Against Creators' Interests?

Very few would now deny that copyright is not a necessary incentive for creation;[76] intrinsic motivation and reputation-based extrinsic incentives account for why individuals would create in copyright's absence. The more controversial question is whether some of those creators would or should take the further step of *rejecting* copyright protection if offered the choice. Online cultural, social, and commercial dynamics suggest that, for a significant segment of authors, copyright's all-rights-reserved default is inimical to their goals.

### 3.2.1 Since When Don't Authors Want Copyright?

Prior to the late twentieth century, while the no-formality rule was gaining international traction, the creation and dissemination of creative works was costly and relatively inaccessible to most individuals. Producing a commercial book required access to copying, printing, and binding facilities, recording an album required audio-recording equipment, and making films involved expensive technology and studio space; on top of the costs of producing a master copy, mass-marketing the work added production costs

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[75] Elkin-Koren, 'Can Formalities Save the Public Domain?' (n 44) 1547.

[76] There are even suggestions that extrinsic motivators may *reduce* the quality of creative output. See Christopher Buccafusco and others, 'Experimental Tests of Intellectual Property Laws' Creativity Thresholds' (2014) 92 Tex L Rev 1921, 1935–43.

for making identical physical copies, advertising costs, and distribution costs. As a result, individual creators lacked direct access to the market for their works[77] and were instead forced to go through intermediaries like publishers, film studios, and record labels, which are by nature commercial.[78] Intermediaries would invest in producing the work's master copy and recover their investment by licensing or selling copies of the work under copyright-enabled monopoly pricing.[79] Given that virtually every author wishing to distribute copies of their works had to go through these intermediaries, it was reasonable to assume all creators whose works would reach the public would require copyright as leverage.[80] For those remaining authors not engaging with intermediaries, effectively limiting their works' reach to themselves or a small network of direct consumers, automatic copyright also seemed to do no harm – although unused, copyright's protection did not need to be rejected, because it was rare for such content (personal letters, paintings, etc) to be subjected to copyright-prohibited-but-author-approved copying in the absence of modern technology and online networks.[81] As a result, copyright was designed primarily to regulate transactions among traditional commercial intermediaries;

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77 Marco Ricolfi, 'Consume and Share: Making Copyright Fit for the Digital Agenda' in Melanie Dulong de Rosnay and Juan Carlos De Martin (eds), *The Digital Public Domain: Foundations for an Open Culture* (Open Book Publishers 2012) 50-51 notes limited exceptions to this dynamic, like authors of one-of-a-kind artworks.

78 Dan Hunter and F Gregory Lastowka, 'Amateur-to-Amateur' (2004) 46 Wm & Mary L Rev 951, 980–81; ibid 50–51. Ricolfi (51) labels this creator-intermediary relationship the 'long route' to publication.

79 Elkin-Koren, 'Tailoring Copyright' (n 63) 314.

80 Gibson, 'Once and Future Copyright' (n 3) 169.

81 ibid 213.

it did not contemplate a world filled with non-institutional actors engaging with copyright and mass non-commercial published creation.[82]

The reality of content use first began to shift and come into conflict with copyright as devices capable of perfectly replicating works, like photocopiers and tape recorders, became accessible to individuals, introducing previously trade-focused copyright into individuals' lives.[83] However, truly radical change arrived in the 1990s, when the World Wide Web was made readily available to the public. Over the following decades, the combination of networked content-hosting platforms and social media sites, alongside technological advances that would eventually put smartphones and editing software into every pocket, created radical new possibilities for individuals to not only create but deliver works directly to the public with ease.[84] High-quality digital works can now be created using devices authors already own for daily use, and can be perfectly duplicated and seamlessly transferred between users' devices. Works can also be uploaded to networked platforms and made permanently accessible to the global public at a designated web address, often without any cost to the uploader,[85] at which point algorithms and social networks efficiently deliver the content to the relevant audience. The ubiquity and interoperability of modern technology also means participation in this ecosystem as both consumer and creator is relatively accessible – a single device can stream videos, upload photos to social media, download ebooks, and record and edit

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[82] Jessica Litman, 'Revising Copyright Law for the Information Age' (1996) 75 Or L Rev 19, 22–23. Copyright was not even designed with private copying in mind, as replication technologies were not yet commercially available; now, they are an integral part of content consumption.

[83] Hunter and Lastowka (n 78) 999; Brad Sherman and Leanne Wiseman, 'Fair Copy: Protecting Access to Scientific Information in Post-War Britain' (2010) 73 MLR 240, 244–46.

[84] Hunter and Lastowka (n 78) 982–84, 999–1006.

[85] Elkin-Koren, 'Tailoring Copyright' (n 63) 313.

audiovisual works. As digital and online alternatives to creating and distributing physical copies emerge, Ricolfi suggests commercial intermediaries are increasingly unnecessary; creators can skip the middle-man, making their works directly available to the public via the 'short route'.[86] Social media makes it possible for anyone to achieve global reach from within their home, without backing from any intermediary.[87] These advances have also brought about changes in how content is consumed – while offline consumption rarely involved making copies of works, consuming and engaging with digital content 'routinely results in unauthorised reproduction, adaptation, [and] distribution' of digital works.[88] Everyday consumers of digital media have, almost by definition, become creators and distributors through their use.

While creators can certainly deliver works to the public *more* directly, it is not quite correct to say intermediaries are becoming unnecessary to this process. Independent creators would not be able to reach their audiences without hosting platforms and social networking sites like Facebook, Instagram, Reddit, SoundCloud, TikTok, Tumblr, Twitch, Twitter, Wattpad, and YouTube. These sites provide the necessary infrastructure for users' global reach, which individuals cannot coordinate alone, and provide organic audiences for users' content.[89] However, the *nature* of these modern intermediaries is different. When traditional intermediaries take on financial risk in producing and distributing physical copies of a work, they take a direct interest in the work's copyright

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[86] Marco Ricolfi, 'Copyright Policy for Digital Libraries' (n 1) 12–14. See also Hunter and Lastowka (n 78) 1000.

[87] Gibson, 'Once and Future Copyright' (n 3) 213–14; Elkin-Koren, 'Tailoring Copyright' (n 63) 315–16.

[88] Gibson, 'Once and Future Copyright' (n 3) 214.

[89] Elkin-Koren, 'Tailoring Copyright' (n 63) 316–17. In theory, users could develop alternative non-commercial hosting platforms, but it is unlikely they could operate at the scale required.

and commercial success. In contrast, the new hosting intermediaries used by authors taking the 'short route' have no direct influence over the work, because they have no financial stake in it. Instead, they provide user-authors with a platform for making unfiltered, self-directed content available to other users, commercialising *the presence of users* on the platform (through advertisement revenue and subscription fees) rather than the works themselves. Broadly speaking, user-authors collectively contribute the content that draws others to the platform, making it commercially viable, and in exchange are given the resources to distribute their works to the platform's public free of cost, without commercial pressures influencing the work's content or the terms on which it is made available. Works can be brief, low-effort, and non-commercial, because their publication does not require financial investment; this has changed the way society thinks about content creation. More and more users are publishing casual, non-commercial creations – since they do not need to commit to gaining the support of an intermediary and producing commercially viable works, creating and distributing digital content has become an accessible side project for many.[90] The proliferation of fanworks is a clear example of this shift.

This new paradigm has produced an explosion in distributed creativity – the digital revolution provided the opportunity for individuals to act on their intrinsic motivations for creativity at a scale and in ways never seen before.[91] User-authors have normalised a culture of routine creation and global distribution of digital works, producing a new, previously unthinkable class of non-professional, non-commercial

[90] Gibson, 'Once and Future Copyright' (n 3) 169, 213–14.

[91] Hunter and Lastowka (n 78) 1025; Johnson, 'Intellectual Property and the Incentive Fallacy' (n 37) 647. This includes not only new methods of creation and dissemination, but 'new kinds of work… typical to the Internet environment' (Alter (n 51) 935).

*published* authors. Most importantly, many of these new works are created and published with the explicit goal of being viewed and shared as widely as possible[92] – in other words, 'going viral'. However, the online activities that produce the desired virality – downloading, uploading, editing, remixing, and even screenshotting and copy-and-pasting – are prima facie copyright infringement. For this new kind of author, all-rights-reserved copyright is not simply a matter of indifference – it sits in opposition to authors' goals for their work.[93] In the new creative context of the digital era, automatic copyright is increasingly harmful to many authors' interests.

### 3.2.2 Copyright-Incompatible Authorship

Under the current default, authors are never asked if they want copyright's all-rights-reserved protection – it simply applies.[94] Yet, contrary to Sprigman's suggestion that authors only lack interest in copyright when works are insufficiently valuable, authors may wish to decline protection for a range of reasons – altruism, commercial savvy, reputational benefits, a desire to share their work with a community. It would be impossible to exhaustively capture every instance authors might decline copyright, but this section canvasses key examples, focusing on copyright-conscious authors who explicitly wish to avoid copyright and social creators, both non-commercial and commercial, who would be disadvantaged by strict copyright adherence.[95] While several scholars present casual creators as *indifferent* to copyright, making it acceptable to

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[92] Ricolfi, 'Copyright Policy for Digital Libraries' (n 1) 12.

[93] Hunter and Lastowka (n 78) 1023.

[94] Gibson, 'Once and Future Copyright' (n 3) 169–70.

[95] This ignores authors for whom copyright is truly neutral (eg authors of business emails, family photos, children's drawings). When there is no intention for works to be made available *at all*, copyright offers no benefit, but does no harm (David Fagundes and Jonathan S Masur, 'Costly Intellectual Property' (2012) 65 Vand L Rev 677, 716–17).

narrow their rights for the public's sake,[96] this paper recognises copyright runs counter to certain creators' goals and revising copyright's default would actively benefit them.

#### *3.2.2.1 Free Content, Creative Commons, and Wikipedia*

The first authors to consider are copyright-conscious creators who specifically want their works to be free and take active steps to disclaim copyright's protection, typically because of the work's nature or purpose or the author's views on freedom of information.

For those who create works designed from the outset to be freely shared with the public, copyright is heavy burden – authors go to great lengths to evade exclusivity within copyright's architecture through permissive licences and purported dedications to the public domain. Standardised licences permitting any individual to use, alter, and distribute copyright-protected works first gained traction within Richard Stallman's free software movement, which gave rise to 'copyleft' software licences including the GNU General Public License, Apache License, and MIT License; the key element of a copyleft licence is that further copies of the work, whether identical or modified, are automatically covered by the same licence.[97] The use of permissive (but not necessarily copyleft) licences was then extended to all copyright-eligible works through CC licences.

The CC licensing model provides authors with a menu of permissions and limitations to choose from in licensing their works to the public, moving from the all-rights-reserved default to 'some rights reserved'. This allows authors 'to announce to the

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96 See eg Gibson, 'Once and Future Copyright' (n 3) 216; Rosloff (n 3) 67.

97 Richard M Stallman, *Free Software, Free Society: Selected Essays of Richard M Stallman* (Joshua Gay ed, GNU Press 2002) 22–23.

world the freedoms that they want their creative work to carry.'[98] The CC BY 'Attribution' licence, by far the most permissive, gives users a global, non-exclusive, cost-free perpetual and irrevocable licence to 'distribute, remix, adapt, and build upon' the original works, for any purposes, provided users include appropriate attribution. To this base, users can add a 'NonCommercial' term preventing the work from being used or adapted commercially (CC BY-NC), and can also add either a copyleft-type 'ShareAlike' term requiring works incorporating the licensed content to be made available on the same terms (CC BY-SA or CC BY-NC-SA) *or* a 'NoDerivs' term preventing adaptations and derivative works from being shared (CC BY-ND or CC BY-NC-ND).[99] Creative Commons also offers a CC0 'No Rights Reserved' licence, which waives all rights in copyright-protected works and places them as fully as possible in the public domain.[100] Importantly, CC licences work *within* copyright's framework, using contractual freedom to license copyright-protected works to the public at large on less restrictive terms, avoiding the need for individual licences.

The most notable CC-enabled project premised on the idea of created-to-be-free content is Wikipedia. Wikipedia now has over fifty-six million articles, created collaboratively by individual contributors (who retain any subsisting copyright) and licensed to 'anyone anywhere' under CC BY-SA or CC BY-SA-compatible licences.[101]

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98 Lawrence Lessig, 'CC in Review: Lawrence Lessig on Supporting the Commons' (*Creative Commons,* 6 October 2005) <https://creativecommons.org/2005/10/06/ccinreviewlawrencelessigonsupportingthecommons/> accessed 18 April 2021.

99 'About CC Licenses' (*Creative Commons*) <https://creativecommons.org/about/cclicenses/> accessed 11 July 2021.

100 ibid.

101 'Wikipedia:About' (*Wikipedia*) <https://en.wikipedia.org/wiki/Wikipedia:About> accessed 18 April 2021; 'Wikipedia:Copyright' (*Wikipedia*) <https://en.wikipedia.org/wiki/Wikipedia:Copyrights> accessed 18 April 2021.

Wikipedia is free for all to use and open to contribution by anyone; its mission, in direct opposition to copyright's exclusivity, is 'to create a world in which everyone can freely share in the sum of all knowledge.'[102]

CC licences have also achieved mass adoption beyond Wikipedia. In 2017, they were in use for 1.471 billion works, with nearly fifty million CC-licensed works on YouTube alone,[103] and Flickr now hosts upwards of 470 million CC-licensed photos.[104] CC licences are also integrated into certain content-hosting platforms – Flickr, Vimeo, and YouTube allow creators to mark works with CC licences through the platform's infrastructure.[105]

The massive uptake of CC licences demonstrates a demand for flexibility in sharing works; the all-rights-reserved default already fails to meet the needs of a *large* group of authors, before even considering casual copyright-unaware creators unable to turn to permissive licensing for assistance.

#### *3.2.2.2 Online Participation and Inherently Shareable Content*

Beyond authors who actively waive copyright protection, there are much larger groups of online creators who do not think through copyright's implications for their works or are unaware copyright attaches, but for whom all-rights-reserved copyright is logically counterintuitive.

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102 'Wikipedia:About' (n 101).

103 'State of the Commons' (*Creative Commons*) <https://stateof.creativecommons.org/> accessed 11 July 2021.

104 'Creative Commons' (*Flickr*) <www.flickr.com/creativecommons/> accessed 19 April 2021.

105 'Share your work' (*Creative Commons*) <https://creativecommons.org/share-your-work/> accessed 11 July 2021.

One such group, motivated by both peer validation and the intrinsic need for community and creativity, encompasses those who contribute content to social media sites like Twitter, Instagram, and Facebook, anonymous online communities like Reddit, Tumblr, and fanwork sites, and even community-oriented review sites like Goodreads. Users can upload original photos, share their thoughts, and provide content designed to entertain or help others, in a way that allows them to take part in a community while receiving the validation that comes with successfully participating, having their works appreciated, and building a positive reputation. Mechanisms for engagement and validation are built into the infrastructure of these platforms – in addition to the karma system, Reddit allows users to give and receive awards for valued contributions,[106] and Tumblr, Twitter, Facebook, and Instagram allow individuals to like, comment on, and re-share others' content and follow accounts producing content they enjoy. Since most active users do not have large enough followings to monetise their content, this shared creativity is motivated almost entirely by the desire to connect with others, rather than economic benefit. In this context, copyright's exclusivity does not make sense – by prohibiting acts as basic as copy-and-pasting, copyright artificially limits the reach of users' participation, the ways in which peers can respond to their content, and the audience from which they can seek validation.

In addition to non-exclusivity suiting certain *uses*, certain *types* of social content demand non-exclusivity more than others. Some works are intrinsically motivated by a sense of play – a compulsion to explore endless and alternate possibilities, 'not all of which can be realized in any one [work]', which in turn creates opportunities for

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[106] 'What are awards and how do I give them?' (*Reddit*) <https://reddit.zendesk.com/hc/en-us/articles/360043034132-What-are-awards-and-how-do-I-give-them-> accessed 11 July 2021.

audiences to respond with their own imagined possibilities that explicitly engage with or call back to the original and its derivatives.[107] The wonderful thing about these works is 'the ability to have more and more without erasing the original'[108] – they sprawl and interrelate, growing together, which is *what the authors desire*. There is no room for exclusivity in works driven by play. While Tushnet discusses play primarily in the context of fanworks (authors contribute fanworks as a gift to other fans, exploring possibilities beyond the canonical work, and users respond in turn with contributions influenced or inspired by the author's creation),[109] memes are also prime examples – the very essence of a meme is taking one individual's contribution and adapting it slightly, using the same premise and visual elements in new contexts. By definition, memes must be copied, altered, and shared; automatic all-rights-reserved copyright runs counter to this. Tumblr posts are similarly memetic and non-exclusive in nature – users' responses to an original post often deepen, elaborate, or shift its meaning and tone, collectively producing an enhanced and somehow-cohesive post that is dialogic in nature and holds different meanings for different groups.[110] In each case, the original content is impoverished when viewed without its responses; to prevent this sharing and adaptation would be to stunt the richness of these works and communities.

Notably, inherently shareable social works can hold significant monetary value *because* of their ubiquity. Early 2021 saw buyers pay outrageous sums to purchase original files for popular memes and viral content – pieces of internet history – as non-

107 Tushnet, 'Economies of Desire' (n 61) 527.

108 ibid 536.

109 Ibid 527–28.

110 See Allison McCracken and others (eds), *a tumblr book: platform and cultures* (University of Michigan Press 2020) 70.

fungible tokens (non-replicable unique tokens on the Ethereum blockchain), functionally equivalent to buying the original fixation of physical artwork despite the proliferation of identical copies.[111] Value is created only because the work has been freely shared, becoming a cultural artifact in the process.

Ultimately, for the vast majority of casual internet users, especially creators of inherently shareable content, copyright's exclusivity and restrictiveness are opposed to their goal: to be social. If users complied with copyright's strict rules, much of their current online activity would vanish.

#### *3.2.2.3 Influencer Economics*

The final authors to examine are social creators motivated by the extrinsic incentives of reputation and material gain, the maximisation of which is not always harmonious with copyright's exclusivity.

For content creators seeking to profit from their online following, the desirability of copyright's exclusivity depends on their money-making model. When creators profit directly from each impression, earning ad-based revenue proportionate to the number of views they get, copyright's exclusivity is key – it ensures users must visit the creator's profile to view the content, maximising profits. These authors miss out on potential earnings whenever users view their content elsewhere. This includes YouTubers and Twitch streamers eligible for monetised content, and any blog or website making use of AdSense. However, individuals can alternatively profit online through the influencer model, gaining business opportunities based on their number of followers within target

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111 See eg Kalhan Rosenblatt, 'Iconic "Doge" meme NFT breaks record, selling for $4 million' *NBC News* (New York, 11 June 2021) <www.nbcnews.com/pop-culture/pop-culture-news/iconic-doge-meme-nft-breaks-records-selling-roughly-4-million-n1270161> accessed 1 July 2021.

demographics rather than profiting directly per view. Influencers may be given free products to review, paid to integrate advertisements into their organic social media content, hired as brand ambassadors, offered spinoff opportunities in film and music, and even given the opportunity to design products in partnership with a brand or launch original brands of their own – opportunities worth millions. While influencers still need users to engage with their pages, as large followings and high user-engagement rates are key to securing deals, their followings are effectively grown when content is shared within and across platforms by other users, provided proper attribution directs users back to the creator's page. For example, a YouTube user might decide to follow a TikTok creator when they come across their fan-uploaded content in YouTube's recommended list. Moreover, fan accounts which repost influencers' content can serve as evidence of the creator's potential commercial influence. Thus, for content posted to non-monetised social media platforms, where authors do not miss out on profit just because the content is viewed elsewhere – notably TikTok and Instagram, two of the largest influencer platforms – it makes sense for even economically motivated creators to make their works freely shareable (with attribution). The goal is to be seen, as widely and frequently as possible, even if not every view accumulates directly on the influencer's page. This approach has worked well for the new generation of TikTok influencers – despite (rather, in part *thanks to*) unauthorised cross-platform reposting of their non-monetised content,[112] famous TikTokers are able to make millions each year through brand partnerships, content deals, and leveraging TikTok fame to transition to monetised platforms like YouTube.[113]

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112 Almost always with attribution, as TikTok watermarks videos with usernames.

113 Abram Brown, 'TikTok's 7 Highest-Earning Stars: New Forbes List Led By Teen Queens Addison Rae and Charli D'Amelio' *Forbes* (Jersey City, 6 August 2020)

Similar logic applies to individuals selling creative services online – authors may make a limited number of works freely available, with attribution, to gain visibility and build a reputation that will attract future economic opportunities.[114] In other words, commercial authors can use free content as loss leaders.[115] This could include making digital samples of art freely available to attract commissions or posting music demos on social media free of sharing restrictions to attract notice from industry intermediaries, with the hope that the content will spread virally beyond the author's page and the original platform.[116] Promoting creators through works' familiarity rather than works' scarcity, allowing fans to copy and remix the content, can even be good business sense for industry creators[117] – in particular, permitting the creation of derivative fanworks is a popular mechanism for building fan loyalty and maintaining interest in the original commercial work.[118]

Could this reputation-boosting sharing be achieved in a copyright-compatible way? Not at its current scale. It is true that hyperlinking (including framing) to copyright-protected works made accessible to the public online is compatible with copyright law,[119]

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<http://www.forbes.com/sites/abrambrown/2020/08/06/tiktoks-highest-earning-stars-teen-queens-addison-rae-and-charli-damelio-rule/> accessed 18 April 2021.

114 Robert P Merges, 'A New Dynamism in the Public Domain' (2004) 71 U Chi L Rev 183, 197; Dusollier, 'The Master's Tools' (n 56) 281.

115 Fagundes and Perzanowski (n 43) 526.

116 It is key these works are permission-free, rather than simply cost-free, because copyright-incompatible cross-platform sharing, editing, and remixing can help build internet notoriety.

117 John Tehranian, 'All Rights Reserved - Reassessing Copyright and Patent Enforcement in the Digital Age' (2003) 72 U Cin L Rev 45, 70–72. See also Ricolfi, 'Copyright Policy for Digital Libraries' (n 1) 14.

118 *Fanlore* keeps a running list of commercial authors, including JK Rowling, Neil Gaiman, and Joss Whedon, who have spoken favourably about fanfiction (often on the condition of non-commerciality) ('Professional Author Fanfic Policies' (*Fanlore*) <https://fanlore.org/wiki/Professional_Author_Fanfic_Policies> accessed 10 July 2021).

119 At least in the EU, unless the user knowingly links to unlawfully posted content (Case C-466/12 *Svensson v Retriever Sverige* [2014] 3 CMLR 4, paras 15–28; Case C-348/13 *BestWater*

and intra-platform mechanisms like Twitter's retweet, Facebook's share, and TikTok's duet and stitch functions – allowing users to embed others' content, with the original creator's information visible, in their own videos – are covered by platforms' terms of use.[120] However, these lawful actions make up only a fraction of content sharing. The embedded sharing enabled by platform infrastructure is limited to the platform's ecosystem; while hyperlinks can be used for *some* cross-platform sharing (like linking to an article, image, or video on Facebook), copyright compliance would limit the valuable spread of certain types of works between certain platforms. For example, TikTok videos cannot be shared on YouTube via hyperlink, nor can others' images be posted on Instagram via hyperlink – they must be downloaded and re-uploaded, which is infringing conduct that currently happens on a massive scale. Secondly, even when legal means *can* be used, non-compliant mechanisms may be preferred. It is often more convenient to share content using screenshots or copy-and-paste than to use hyperlinks or intra-platform sharing, as it is easier to view native content (text and uploaded photos) than to open a link to a different site or view the content in glitch-prone embedded format. It may also be more practical to use a permanent screenshot or copy of content than to provide a link, which risks the linked content being taken down or the link rotting. Limiting users to a particular *form* of sharing, when the result is more or less the same, restricts authors' attainment of copyright-compatible virality. Finally, and most importantly, hyperlinks only allow for sharing perfect copies of the work. Where the goal is to create content that

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*International v Mebes* [2014] OJ 2015/C 016/14; Case C-160/15 *GS Media v Sanoma Media Netherlands* [2017] 1 CMLR 30, paras 47–52). US law also seems to protect hyperlinking (Perfect 10, Inc v Amazon.com, Inc, 508 F 3d 1146, 1159–62 (9th Cir 2007); but cf Goldman v Breitbart News Network LLC, 302 F Supp 3d 585, 590–92, 596–97 (SDNY 2018)).

120 Standard terms of use license users' works as needed for the platform's functions, although this licence typically ends when the account is deleted. See eg 'Terms of Use' (*Instagram*, 20 December 2020) <www.facebook.com/help/instagram/termsofuse> accessed 11 July 2021.

takes on a life of its own through modification in the internet ecosystem, as with memes, direct sharing through embedded links is not possible – content must be downloaded, altered, and freshly uploaded. This is also significant for celebrities and influencers – fan content often comes in the form of edited images and video compilations, which, while beneficial to the creator's reputation, are not copyright-compliant.

Given that a significant volume of desirable sharing takes place through copyright-incompatible methods, creators wishing to capitalise on reputation-enhancing sharing would be better served by freely permitting copying, adaptation, and redistribution.

### 3.2.3 Two Caveats: Attribution and Non-Commercial Use

Of course, there are limits to humans' willingness and desire to make their creations free, even when they have no commercial designs for the work.

One element consistent for both those who create to participate in online communities and those seeking to profit through online recognition is a strong desire for attribution – authors want to maintain a continued connection to their work, even as others share it. Attribution holds both intrinsic and extrinsic value – the intrinsic benefit comes from authors' satisfaction or pleasure in being acknowledged as creator of their work, while the extrinsic benefit comes from attribution's role in building reputation, which may help authors earn future profits or attain recognition within their creative communities.[121] Reputation-motivated creation is only made possible by attribution. Fisk

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[121] Catherine L Fisk, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 Geo LJ 49, 50; Christopher Jon Sprigman, Christopher Buccafusco, and Zachary Burns, 'What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property' (2013) 93 B U L Rev 1389, 1401.

describes credit for one's work as a form of human capital,[122] while Tushnet recognises attribution sometimes functions as a legitimate form of payment, especially in non-commercial contexts.[123] Attribution also has *moral* value, satisfying authors' beliefs that they are morally entitled to a connection with their work.[124] This is consistent with Fromer's observations about how authors speak about their works – creations are deeply personal, manifesting authors' self-conception, and authors are strongly attached to their moral rights.[125] It is rare that anyone likes the thought of their contributions being claimed by another or disassociated from themselves – this is true whether their goal is to attract views on their profile for reputational gain or simply to take part in a community for intrinsic satisfaction, as effective community participation requires a recognisable online identity developed through attributed of acts of participation. Finally, attribution is not only necessary, but meaningfully competes in importance with control and compensation.[126] An experimental study by Sprigman, Buccafusco, and Burns suggests some authors perceive publication without attribution as worse than non-publication, and authors are typically willing to part with their works for less financial gain when attribution is guaranteed.[127]

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[122] Fisk (n 121) 50.

[123] Rebecca Tushnet, 'Payment in Credit: Copyright Law and Subcultural Creativity' (2007) 70 LCP 135, 153.

[124] Sprigman, Buccafusco, and Burns (n 121) 1401, 1405.

[125] Jeanne C Fromer, 'Expressive Incentives in Intellectual Property' (2012) 98 Va L Rev 1745, 1764–71.

[126] Tushnet, 'Payment in Credit' (n 123) 167.

[127] Sprigman, Buccafusco, and Burns (n 121) 1405–15, 1426. Professional or advanced amateur creators were more influenced by attribution than casual creators, but the effect was meaningfully present for all.

The importance of attribution is backed up by the experience of CC authors – while non-attribution CC licences were initially available, Creative Commons quickly eliminated this option, as 98% of adopters chose attribution licences.[128] Even authors determined to contract themselves out of all-rights-reserved copyright place significant value on attribution. Attribution's importance is also corroborated by developing norms on social media, a realm typically populated by copyright-unaware users – there are countless examples of high-profile users or brands receiving criticism for non-attribution of content copied from smaller creators. In particular, this is an ongoing source of controversy on TikTok, as creators with millions of followers have popularised dance trends (choreography set to a particular sound, which users are encouraged to replicate) choreographed by lesser-known users without attribution;[129] this sparked an emerging 'dance credit' norm of tagging dances' creators in videos' captions. Online communities' responses to sharing or copying without attribution invoke the ethics of moral rights without the exclusivity of copyright – the objection is not to the work's *use*, but its use *without attribution*, in violation of community norms. Finally, the near-universal desire for attribution is also visible in offline creative subcultures outside copyright's remit, which often developed their own attribution norms enforced through community sanctions like exclusion.[130] A right to attribution is clearly intuitive and desirable for the

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128 Lessig, 'CC in Review' (n 98).

129 Taylor Lorenz, 'The Original Renegade' *The New York Times* (New York, 13 February 2020) <www.nytimes.com/2020/02/13/style/the-original-renegade.html> accessed 20 April 2021; Halle Kiefer, 'Jimmy Fallon Welcomes Actual Creators of TikTok Dances After Addison Rae Backlash' *Vulture* (New York, 6 April 2021) <www.vulture.com/2021/04/fallon-welcomes-tiktok-dancers-after-addison-rae-backlash.html> accessed 20 April 2021.

130 See eg Emmanuelle Fauchart and Eric von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017) 29–30, 33.

vast majority of creators and consumers, making it an unproblematic and essential default right.

The second default right the vast majority of creators, whether commercial or casual, appear to desire is protection against third-party commercial exploitation of their works.[131] Even authors who do not commercialise their own creations, preferring they be available for others to consume and modify freely, balk at the idea of someone *else* monetising that creation, for two reasons: (i) users may be charged for or restricted from accessing content the author intended to make available to all without cost, undermining the author's wishes and (ii) there is a sense of wrongful exploitation when others (especially large commercial actors) profit from an author's work without permission or benefit sharing. Without this protection, it is not hard to imagine authors contributing free content as a gift to their online communities or the public, only to find a large media corporation has co-opted their work for its own profit.[132] This has already happened – in 2016, photographer Carol Highsmith sued Getty Images for charging licence fees for photographs Highsmith had donated to the public domain.[133] The demand for protection against commercial use is clear: CC data indicates only 33% of licensors (an already copyright-skeptical group) permit commercial use of their works.[134] Moreover, even those copyright-conscious authors who employ CC licences permitting commercial use are not fully prepared for the extent of this freedom and its applicability to everyone. In

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[131] Edward Lee, 'Warming Up to User-Generated Content' (2008) 5 U Ill L Rev 1459, 1547.

[132] van Gompel, 'Copyright Formalities in the Internet Age' (n 3) 1442.

[133] Bryan Sullivan, 'Getty Likely to Settle $1B Suit By Photographer For Appropriating Her Public-Domain Work' *Forbes* (Jersey City, 3 August 2016) <http://www.forbes.com/sites/legal entertainment/2016/08/03/pay-up-getty-sends-trolling-letter-to-photographer-highsmith-demanding-money-for-her-own-photos/> accessed 11 July 2021.

[134] Sprigman, 'Reform(aliz)ing Copyright' (n 3) 565.

2014, Flickr announced it would sell prints of Flickr images posted under CC licences permitting commercial use (a legal action), but was forced to swiftly cancel the program when authors complained it was not in the spirit of Creative Commons.[135] Similarly, IBM's attempt to lawfully use almost one million CC-licensed Flickr images to train facial-recognition AI was met with backlash from authors, who did not expect nor want their works to be used in this way.[136] A willingness to share virtually never includes a willingness to become unwitting, uncompensated labour for commercial enterprises. This concern to avoid exploitation by commercial actors applies to both non-commercial creators and creators who are remunerated for their work through avenues other than commercial publication, but go on to share their creations for the purpose of recognition or the sake of free knowledge.[137]

### 3.2.4 What Does This Mean for Copyright's Default?

While the short route has not replaced and likely never will entirely replace the long route – there will always be money in professionally edited novels and films with cutting-edge special effects – Ricolfi rightly emphasises that copyright must accommodate both dynamics, offering creators a choice in how their works reach the public.[138] The all-rights-reserved default no longer works.

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[135] Bernardo Hernandez, 'An Update on Flickr Wall Art' (*Flickr*, 18 December 2014) <https://blog.flickr.net/en/2014/12/18/an-update-on-flickr-wall-art> 19 April 2021.

[136] Olivia Solon, 'Facial recognition's "dirty little secret": Millions of online photos scraped without consent' *NBC News* (New York, 12 March 2019) <www.nbcnews.com/tech/internet/facial-recognition-s-dirty-little-secret-millions-online-photos-scraped-n981921> accessed 15 May 2021.

[137] Dusollier, 'The Master's Tools' (n 56) 279 identifies 'researchers, teachers and non-profit providers of information' as part of this group.

[138] Ricolfi, 'Consume and Share' (n 77) 53–55.

Creators' behaviour suggests default economic rights could be weakened to prevent only commercial exploitation, facilitating desirable sharing, provided there is a strong attribution right independent of economic rights. This would be a significant change to US copyright law, which notably does not offer a free-standing moral right of attribution;[139] however, as norms of sharing and creation change, domestic copyright regimes must evolve to secure the rights authors value most.[140]

## 3.3 An Intolerable Misalignment

The inability of copyright's all-rights-reserved default to accommodate authors' diverse needs is not merely dissatisfying in principle – the misalignment produces real harms to both copyright-averse authors' interests and the copyright system at large.

### 3.3.1 A Benefit to None, a Harm to Many

The first big problem with granting default all-rights-reserved copyright against authors' wishes or interests is that it benefits neither the author nor the public – it actively limits the semicommons,[141] withholding content from its remit that authors would happily relinquish exclusive control over (or may already believe to be shareable, given the common misunderstanding that copyright must be applied for[142]). Copyright puts users

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139 Attribution rights are extended only to a narrow class of limited-edition visual art (17 USC § 106A). cf Berne, art 6bis(1) requires members to protect moral rights.

140 Lastowka (n 74) and Fromer (n 125) 1790–98 argue US law should give attribution a stronger role. See also Samuelson and others (n 3) 1243–45.

141 This paper distinguishes the 'public domain' (content not protected by copyright) from the 'semicommons' (copyright-protected works in which public and private rights coexist, sitting between all and no rights reserved). See Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 Geo Mason L Rev 271, 275. Given that most authors would choose to retain attribution rights and protection against non-commercial use, the works are withheld from the *semicommons* rather than the public domain.

142 Litman, 'Copyright as Myth' (n 65) 238–39; Casey Fiesler, Jessica L Feuston, and Amy S Bruckman, 'Understanding Copyright Law in Online Creative Communities' (18th ACM

in the burdensome position of seeking permission for each use of a protected work, which can be prohibitive to the work's use, especially where the author is difficult to identify or contact. This is hard to justify where the author is indifferent towards or even *in favour* of the work's mutually beneficial re-use.[143] The semicommons should not be restricted to preserve rights authors do not want. Gibson puts it succinctly:

> We saddle [the author] with an entitlement he… cares nothing about and thereby saddle the public with three unappealing options: invest the time and resources necessary to trace the provenance of online content and secure its author's permission, break the law by making and distributing unauthorized copies, or forgo a wholly unobjectionable and socially enriching use of creative material. We need a fourth option.[144]

This may seem to be a non-issue in practice, as authors can effectively place their works into the semicommons through selective non-enforcement, but copyright's persistence does in fact threaten works' free use. Tolerated use lacks the permanence and security of a licence or the absence of copyright protection; this security is key to encouraging users to invest in using, sharing, and repurposing others' works.[145] Even if an author initially intends to allow the work to be freely shared, they can later decide, upon discovering that their work is nevertheless copyright protected or has unexpected commercial value, to litigate for 'opportunistic reasons' or simply because they feel they should use the rights they discover.[146] Users cannot know which authors will change their minds, so a useful,

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Conference on Computer Supported Cooperative Work & Social Computing, February 2015) <https://doi.org/10.1145/2675133.2675234> accessed 19 November 2020, 7.

143 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 497; Fagundes and Perzanowski (n 43) 521–22.

144 Gibson, 'Once and Future Copyright' (n 3) 216. Note, however, many authors are not merely *indifferent* to copyright – they do not or should not want it.

145 Lastowka (n 74) 80.

146 Federico Morando, 'Copyright Default Rule: Reconciling Efficiency and Fairness' in Anne Flanagan and Maria Lilla Montagnani (eds), *Intellectual Property Law: Economic and Social Justice Perspectives* (Edward Elgar 2010) 33.

reliable semicommons depends on certainty from the outset about the sharing permissions for published works and confidence in their permanence.[147] Without clear ex ante permission, users can never be fully confident in their ability to safely use copyright-protected works, which may create a 'chilling effect' on their use contrary to authors' interests and intentions.[148]

Although this chilling effect is unlikely to stop casual users from engaging with intended-to-be-free works, as they are typically unaware of or indifferent to the illegality of use given low enforcement,[149] the lack of legally assured permission *does* prevent use by copyright-conscious authors and publishers concerned about potential legal consequences (unless they are willing and able to track down the author for permission, at the risk that a reasonable licence may not be offered).[150] This is not an issue in relation to commercial actors, since authors rarely wish to freely permit commercial uses, but it risks deterring mutually beneficial uses by the range of *non-commercial* entities who also act cautiously in accordance with copyright law. In particular, non-profit educational organisations, charitable organisations, and free content projects may be deterred from use. It may also deter non-commercial, copyright-conscious individual creators – while the author of an off-the-cuff tweet may not be deterred by potential infringement, authors who invest significant time into creating more substantial non-commercial creative works

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[147] Loren, 'Building a Reliable Semicommons' (n 141) 276–77.

[148] Niva Elkin-Koren, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005) 74 Fordham L Rev 375, 380; Dusollier, 'The Master's Tools' (n 56) 280.

[149] Lee (n 131) 1544–45 observes gray areas are not necessarily chilling – it depends on how users and authors respond to the uncertainty.

[150] Rosloff (n 3) 51–52. Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law' (2007) 116 Yale LJ 882, 887–95 notes risk-aversion is so strong among copyright-conscious professional users that they seek licences even when they have strong claims to fair use.

(serialised fanfiction, short films, music which remixes or samples other works) tend to be aware of copyright to some degree and have a strong interest in complying to ensure their works will not be taken down. Fiesler, Feuston, and Bruckman's empirical work indicates these online creators seek advice about the legality of their uses and allow the odds of their work being taken down to influence their choice of content and hosting platform.[151] This chilling effect is likely stronger where the original work is a commercial work, as even causal users are conscious of copyright's role in protecting such content.

Relying on tolerated use to make up for copyright's misalignment with norms of use may also prove insufficient in the context of intermediaries' emerging monitoring obligations and shrinking safe harbours, which give powerful third parties a stake in online copyright compliance that may lead them to disregard individual authors' wishes. The EU Directive on Copyright in the Digital Single Market now makes major content-hosting platforms responsible for securing licences for the use of copyright-protected works on their platforms.[152] Rather than seek out numerous independent authors or wait to see if they complain, proactive platforms looking to protect themselves against the risk of hosting unauthorised content might simply choose to remove anything posted to the platform that users cannot warrant is their own creation or content they are explicitly permitted to share, inhibiting the spread of works authors intend to make free.[153]

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151 Fiesler, Feuston, and Bruckman (n 142) 5–7.

152 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, art 17(1). Service providers are liable for unauthorised activity unless they have, among other requirements, 'made best efforts to obtain an authorisation' (art 17(4)(a)).

153 While this approach would not properly account for defences like fair use, YouTube's Content ID demonstrates major platforms do not care – copyright owners can in practice block any content flagged as matching their own, without context-sensitive assessment. See Katharine Trendacosta, 'Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online'

Tolerated use's viability is at the mercy of commercial hosting intermediaries' risk-aversion.

Moreover, even where tolerated use is a semi-functional temporary solution, a copyright system that depends for its functionality on users' and rightsholders' reliable and continued disregard for the law is fundamentally unsatisfactory. This system only works until the day norms change, leaving copyright in outdated disarray.

### 3.3.2 The Law-Norm Gap and Copyright's Legitimacy

While the chilling effect may be weak for casual users in the face of online sharing norms, Lee observes a *warming* effect on certain uses when users see others routinely infringing copyright without punishment. Because of copyright law's opacity and irrelevance to the layperson, users 'take their cues about what is an acceptable copyright practice by looking to what others are doing without challenge from copyright holders.'[154] Informal norms, rather than copyright law, come to regulate acceptable content use.[155] This warming effect is especially prominent in the networked online environment, as users can easily use and share millions of others' creations and quickly establish shared norms for this conduct.[156] Moreover, because authors in these environments tend by definition to be

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(*Electronic Frontier Foundation*, 2020) <www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online> accessed 11 July 2021.

[154] Lee (n 131) 1544–45.

[155] Community copyright norms may both decrease and increase perceived obligations compared to copyright – many creative subcultures self-regulate through strong, community-specific norms outside. See generally Dotan Oliar and Christopher Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94 Va L Rev 1787; Marta Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Hart 2016); Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017).

[156] Lee (n 131) 1545. See eg Tushnet, 'Payment in Credit' (n 123) 154–57 on the very particular attribution norms in online fanwork communities.

users, simultaneously creating and consuming content, author and user norms coincide to produce a powerful shared understanding of what is acceptable and desirable. Unfortunately, as users' norms and expectations, fuelled by authors' encouragement, clash with copyright's legal reality, the warming effect threatens copyright law's credibility.

In deeming any use of a creative work infringement by default,[157] regardless of and contrary to authors' wishes, all-rights-reserved copyright law not only conflicts with users' expectations about acceptable copying and sharing online, but contradicts common sense, making it difficult for laypeople to understand and respect.[158] Why should a user assume that sharing a meme, which another user-author has created and made available for the *specific purpose* of sharing and spawning follow-on creation, would violate copyright law? More importantly, why should users care if they do infringe, if it has no practical significance? A consistent pattern of authors implicitly encouraging the violation of copyright in certain types of works has produced social sharing norms affirming the validity of such infringements. The resulting gap between copyright law, social norms, and authors' willingness to enforce copyright has created a society of 'constant infringers'.[159]

This in turn risks the public losing trust in and respect for copyright as a whole, even when properly educated about when and where it applies. When infringement occurs, users either do not realise they are doing something legally wrong or they rationalise infringement as unremarkable and insignificant online; we cannot realistically

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[157] John Tehranian, 'Infringement Nation: Copyright Reform and the Law/Norm Gap' [2007] Utah L Rev 537, 547.

[158] Samuelson (n 57) 751; Reid (n 3) 449.

[159] John Tehranian, 'Infringement Nation' (n 157) 543–47.

expect even users who understand copyright's entitlements to respect them when 'copyright owners themselves admit that most digital infringement is inconsequential.'[160] If users can copy peers' content on social media without consequences, why should they feel protected against others copying their own work, or see a wrong in taking further steps to illegally download commercial content?[161] Ultimately, the law-norm gap generates psychological legitimacy costs for copyright law,[162] which may help explain the 'widespread disregard for copyright protection… [despite] strong rulings from the courts that [activity like peer-to-peer file sharing] constitutes infringement.'[163] Copyright law is so far divorced from the reality of content use that it risks becoming effectively a legal fiction unless adapted to align with users' and authors' needs and expectations.[164]

This problem will become more acute with time, as producing and distributing non-commercial works becomes increasingly central to social life and methods of commercialising works through virality rather than exclusivity grow in popularity. The number of works and authors affected by copyright's misalignment with authors' needs is literally growing by the day – on average, 277,777 Instagram stories and 92,000 Tumblr

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160 Gibson, 'Once and Future Copyright' (n 3) 230–231.

161 ibid 230–31; Reid (n 3) 449.

162 See Tom R Tyler, 'Compliance with Intellectual Property Laws: A Psychological Perspective' (1997) 29 NYU J Int'l Law and Pol 219, 229–223.

163 Lydia Pallas Loren, 'The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection' (2008) 69 La L Rev 1, 17–18.

164 Litman, 'Copyright as Myth' (n 65) 247–49. Note, the coincidence of users' and authors' expectations is key. If authors *wanted* all-rights-reserved copyright, rampant misunderstanding of copyright law would not be a reason to match protection to user expectations; instead, it would indicate a need to alter sharing norms through education. However, since user norms about acceptable use and sharing broadly align with the terms authors desire, the misalignment is a failure of copyright law best resolved by its realignment with authors' wishes.

posts are made, half a million tweets are sent, and 500 hours of video are uploaded to YouTube *every minute*.[165] Copyright needs to keep up.

### 3.3.3 Denying Authors' Autonomy

Finally, even if non-enforcement were sufficient to promote use of the works in the ways authors want, the automatic grant of all-rights-reserved copyright is problematic in principle. It removes control over works' use and exclusivity from authors' hands, disrespecting their intentions and undermining their unique relationships with their works in a way we should not be entirely comfortable with. As Merges argues, property rights are 'not permitted to become a straitjacket' – they must be accompanied by appropriate mechanisms to maximise the owner's autonomy in how the right is dealt with.[166] While rightsholders under the current default may choose not to enforce their rights, this does not have the same quality of freedom as permitting authors to opt for non-protection, obviating the wrong done by currently tolerated-but-infringing behaviour.

## 3.4 Pre-Existing Opt-Out Solutions?

The obvious question in response to this misalignment is whether pre-existing opt-out mechanisms could be used to adequately respond to authors' needs, thereby avoiding the need to introduce formalities that would conflict with Berne. There are two possibilities to explore: copyright abandonment and permissive licensing.

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165 'Data Never Sleeps 7.0' (*Domo*) <www.domo.com/learn/infographic/data-never-sleeps-7> accessed 20 April 2021; 'YouTube for Press' (*YouTube Official Blog*) <http://blog.youtube/press/> accessed 20 April 2021.

166 Robert P Merges, 'To Waive and Waive Not: Property and Flexibility in the Digital Era (23rd Annual Horace S Manges Lecture, April 6, 2010)' (2011) 34 Colum JL & Arts 113, 116.

### 3.4.1 Abandonment

If copyright provides certain authors with unwanted protection, a simple fix seems to be allowing those individuals to abandon their copyright. Abandoned copyright works, unlike abandoned chattel or even trademarks, would be left permanently to the public domain for anyone to use (a unilateral termination, rather than transfer, of rights) and barred from exclusive appropriation by a new private owner.[167] This appears promising as a means of satisfying authors' interests in making their works free, but faces several difficulties upon examination.

#### *3.4.1.1 Is Abandonment a Pre-Existing Solution?*

While there has been significant skepticism about whether copyright abandonment is possible, it is increasingly clear it is indeed possible in principle in at least some jurisdictions. US law has taken a relatively clear stance that copyright can be abandoned – the court in *National Comics Publications, Inc v Fawcett Publications, Inc* expressed no doubt that a copyright owner may abandon copyright through 'some overt act which manifests his purpose to surrender his rights in the "work," and to allow the public to copy it.'[168] Several other countries, including Chile, Colombia, India, and Kenya, legislatively recognise the option of copyright abandonment.[169] However, even where abandonment is recognised as possible, its mechanics are left uncertain – US law has not

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[167] Lior Jacob Strahilevitz, 'The Right to Abandon' (2010) 158 U Pa L Rev 355, 391–92. See also Fagundes and Perzanowski (n 43) 499–503. This is not an argument against abandonment – failing to re-assign ownership in non-rivalrous goods poses no harm and in fact prevents a tragedy of the anticommons (Emily Hudson and Robert Burrell, 'Abandonment, Copyright, and Orphaned Works: What Does it Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?' (2011) 35 MULR 971, 993–95).

[168] 191 F 2d 594, 597–98 (2d Cir 1951).

[169] Andres Guadamuz, 'Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment' (14 April 2014) WIPO Doc CDIP/13/INF/6, 15–23.

clarified what suffices as an overt act manifesting the intention to abandon[170] and statutory abandonment often fails to specify *how* abandonment is achieved.[171] Moreover, some states have taken ambiguous or explicitly dismissive stances on abandonment. English law is vague at best about the possibility of abandonment for all property, including copyright – Phillip Johnson argues it is only possible to grant a revocable bare licence in the UK, rather than genuinely abandon copyright.[172] Australian law is similarly uncertain – while Hudson and Burrell's analysis of the case law offers a strong case for why copyright abandonment *should* be possible under current law, no case has clearly stated a rule to that effect.[173] Meanwhile, German courts have explicitly rejected the possibility of abandoning copyright.[174]

Ultimately, the law on abandonment lacks clarity and consistency both within and across jurisdictions. Abandonment is clearly not a *pre-existing* solution. To truly assist authors who do not wish others to be excluded from their works, abandonment would *at minimum* need to be explicitly recognised as part of copyright law and given clear protocols for use.

#### *3.4.1.2 Can Abandonment Satisfy Authors' Needs?*

Abandonment is an attractive response from an autonomy perspective, as it gives effect to the author's choice to relinquish rights in the work.[175] However, even if abandonment

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170 Gervais, *(Re)structuring Copyright* (n 24) 277; Fagundes and Perzanowski (n 43) 528–52.

171 See Guadamuz (n 169) 16–18.

172 Phillip Johnson, '"Dedicating" Copyright to the Public Domain' (2008) 71 MLR 587, 591–96, 604–07.

173 Hudson and Burrell (n 167) 982–85.

174 *Berlin Wall Pictures*, BGH 23 February 1995 (1995) GRUR 673; (1997) 28 IIC 282, 285.

175 Fagundes and Perzanowski (n 43) 515.

can be put on secure legal footing, it would require significant reform to meet authors' needs. The common law on copyright abandonment, to the extent it exists, does not provide for nuance – a work is either fully protected, or it is abandoned (whatever that may look like).[176] However, authors often have need for a more thoughtful partial abandonment of rights that would protect, depending on their needs, a mix of moral rights and limited economic rights.[177] A fit-for-purpose doctrine of abandonment would therefore need to permit limited but irrevocable abandonment under which authors could reserve whichever rights they wish while permanently relinquishing the remaining protections, irreversibly placing works in the semicommons in line with what tailored CC licences strive to achieve.[178] The complexity of these reforms would require legislative action, rather than gradual extension and clarification of common law abandonment – a clear right to partial abandonment and a mechanism for indicating abandonment's scope to users would be necessary.

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176 Even in states where abandonment, if possible, would involve retaining moral rights – eg French law regards moral rights as inalienable (*Code de la Propriété Intellectuelle*, art L121-1), Colombian law appears to limit abandonment to economic rights (Guadamuz (n 169) 18), and Hudson and Burrell (n 167) 992 suggest the potential Australian abandonment doctrine would leave moral rights intact – abandonment remains *binary* and inflexible. cf US courts have expressed more optimistic, if sporadic, views on partial abandonment: Aronson v Baker, 43 NJ Eq 365, 369 (NJ Ch 1888) held partial abandonment occurred, and dicta from Micro Star v Formgen, Inc, 154 F 3d 1107, 1114 (9th Cir 1998) strongly suggests partial abandonment is possible.

177 cf Fagundes and Perzanowski (n 43) 551 oppose partial abandonment, arguing the 'binary approach' provides a 'simple and clear' set of users' rights, whereas partial abandonment 'would inevitably result in disputes'. They prefer that tailoring occur through licensing, but this would merely retain the same complexity across two non-integrated systems.

178 Loren, 'Building a Reliable Semicommons' (n 141) 323–27. While Fagundes and Perzanowski (n 43) 517 express concern that tailored permission 'comes at the cost of ambiguity' as to permissible uses, this is a tolerable risk given authors' strong interests in preserving limited rights.

### 3.4.2 Permissive Licences

Permissive licensing schemes like Creative Commons provide a not-dissimilar alternative to abandonment – individuals contract themselves out of copyright's exclusivity vis-à-vis the public using licences open to anyone, limiting the ways in which their rights can be infringed. Compared to abandonment, these licences hold the advantage of already being sufficiently detailed to protect different bundles of rights. However, permissive licences face certain disadvantages relative to abandonment, as they work *within* copyright's framework, preserving copyright despite licensing works on different terms, while abandonment removes the right entirely.[179] This private ordering mechanism relies on courts' willingness to accept permissive licences as irrevocable in the way they claim to be – there is a risk of instability in the semicommons should courts react unfavourably to permissive licences' enforceability when authors or subsequent owners change their minds.[180] Fortunately, thus far courts appear to respect permissive licences,[181] and formal recognition of their validity could reinforce their reliability. A second concern is that, for authors who want their works to be unowned as a matter of principle, the continued subsistence of freely licensed rights is less appealing than abandoning them entirely. Lastly, to the extent permissive licensing structures remain the province of private organisations, competing and subtly differing regimes have the

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[179] Fagundes and Perzanowski (n 43) 516–17.

[180] Elkin-Koren, 'What Contracts Cannot Do' (n 148) 417–18; ibid 516–17. Fagundes and Perzanowski (516–17) argue the absence of consideration means CC licences may be treated as revocable.

[181] Many courts have enforced permissive licences as valid contracts against *users* who overstep, but the court in Drauglis v Kappa Map Group, 128 F Supp 3d 46 (DDC 2015) permitted the *user* to rely on a CC licence against the *author*. Estoppel doctrines would also likely prevent courts from dismissing permissive licences.

potential to confuse and be inaccessible to users.[182] A single, state-sponsored licensing scheme would present the strongest case for permissive licences as a solution, but reformed abandonment may be marginally preferable.

### 3.4.3 The Bigger Issue with Opt-Out Mechanisms

Even if these mechanisms are legitimised and structured to meet authors' desires for irrevocable partial relinquishment of copyright, both responses remain inadequate because of their nature as voluntary opt-out mechanisms. Opt-out mechanisms maintain the all-rights-reserved default, putting the burden on copyright-averse authors to voluntarily and proactively disclaim their rights. This is an unsatisfactory solution in both practice and principle.

The practical issue with opt-out mechanisms is that they are only able to offer assistance to those already *aware* of their copyright, its advantages and disadvantages, and the existence of the opt-out mechanism;[183] this will often not be the case when the authors in question are casual internet users without legal or content-industry backgrounds. Those who do not consciously engage in the copyright system, but share works that are by nature meant to be free or that they have an interest in keeping free, will remain oblivious to the fact that their works are not as free as they assume and unable to take advantage of the opt-out solutions available.[184] Under these conditions, copyright would continue to significantly misalign with authors' and users' expectations, leaving the harms unresolved.

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182 Merges, 'A New Dynamism' (n 114) 201; Elkin-Koren, 'What Contracts Cannot Do' (n 148) 377.

183 Elkin-Koren, 'What Contracts Cannot Do' (n 148) 383.

184 Morando (n 146) 32–33.

At a principled level, limiting the response to opt-out mechanisms also presupposes that the burdens of formality compliance should fall on authors wishing to limit their rights instead of those wishing to secure protection. Why should this be the case? A copyright system rejecting universal all-rights-reserved protection must adopt either an opt-*in* mechanism, putting the burden of compliance on those who want protection, or an opt-*out* mechanism, putting the burden on those hoping to remove protection. Regardless of the model chosen, the burden must fall *somewhere* – it is not a choice of whether there is a burden, but who should bear it.[185] This choice must not be obscured by the fact that the burden has traditionally fallen on those wanting less protection. Importantly, the burden is equally weighty under either mechanism – opt-out formalities are 'the mirror image of compliance with [constitutive] registration and notice formalities', as both require the author to signal to the public at large that the rights in the work in some way deviate from the default.[186]

Given that copyright is often rationalised as a method of promoting creation benefiting society, it seems counterintuitive to make it more difficult to leave one's works accessible to the public than to keep them fully protected. Opt-out mechanisms burden authors providing direct benefit to the public and risk the benefit not being provided at all as a result, while shielding authors favouring exclusive control. Although the public interest is not this paper's *primary* concern, it is a strong supplementary consideration when choosing between otherwise-equal methods of meeting authors' needs, and Sprigman rightly notes it is ill-served by an opt-out system dependent on altruism

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185 Gibson, 'Once and Future Copyright' (n 3) 225.

186 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 518.

compared to an opt-*in* system leveraging self-interest.[187] While more than altruism motivates authors to decline protection, opt-out systems place many authors in a position where it seems easiest to simply ignore formality requirements (assuming they are aware of them) and tolerate use to the desired extent.[188] This is the risk of default inertia – the non-default, higher-information-cost opt-out mechanism is unlikely to gain traction compared to the all-rights-reserved default if its benefits appear to be of limited significance to the individual author.[189] In comparison, an opt-*in* mechanism secures immediately apparent benefits, lowering the risk of default inertia that misaligns with authors' interests.

Of course, there are competing arguments for why the burden is better placed on those seeking to decline protection. Most are premised on there being a binary choice between all-or-nothing protection – Gervais argues against opt-in registration because 'authors may not want to exploit their works commercially, but may want attribution',[190] and Merges favours a system of strong property rights with binding opt-out waivers because it would be 'more flexible' than a 'strict no-property regime' and superior to 'simply denying IP rights in the digital domain'.[191] These arguments lose their strength if the chosen opt-in regime preserves a basic level of universally desirable default rights, only requiring authors to opt-in to higher-level protections – this is more flexible than the

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187 ibid 518.

188 While tolerated use may appear to be a viable response to the *individual* author, compound harms arise when authors collectively take this approach (text to n 141). What seems like an insignificant choice snowballs to create problems for the copyright system and authors themselves. This default response should not be encouraged.

189 Morando (n 146) 26.

190 Gervais, *(Re)structuring Copyright* (n 24) 273. See also Gervais and Renaud (n 24) 1487–89, arguing against constitutive registration *because* they want to protect non-commercial works against commercial exploitation and non-attribution, assuming the two to be incompatible.

191 Merges, 'To Waive and Waive Not' (n 166) 114, 121, 126–27.

all-rights-reserved default, and enables the very division of rights Gervais is concerned to secure. Greenberg provides a more compelling argument that, if the burden must fall somewhere, opt-out formalities are preferable to opt-in because they avoid being a trap for unwary authors and are more accessible (requiring only know-how, in contrast to the fees associated with many opt-in formalities).[192] This concern is shared by many opponents of mandatory opt-in formalities, among them Ginsburg, who argues formalities which 'confiscate' rights expose authors to an unfair risk of losing protection out of ignorance or an inability to afford formalities' fees.[193] An opt-out system may overprotect certain authors, but authors never face involuntary under-protection. Fortunately, this concern can again be accommodated. Rather than reject opt-in formalities outright, the system must be designed so that the opt-in formalities are highly accessible and low cost and the burdens are fairly divided among those wanting full and partial protection in a way that secures vulnerable authors' positions. Neither side should bear formalities' burden for the *entirety* of protection – default rights sitting between all- and no-rights-reserved can provide a compromise.

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192 Brad A Greenberg, 'More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age' (2012) 59 UCLA L Rev 1028, 1070.

193 Ginsburg, 'The US Experience with Copyright Formalities' (n 11) 342.

# 4 COPYRIGHT 3.0: A PATH FORWARD

In 1995, Shira Perlmutter, writing in support of the end of America's attachment to formalities, suggested formalities are a binary issue – we can assume that works are either unprotected unless affirmatively claimed or protected until proven otherwise, but '[t]he choice must be made one way or the other.'[194] Copyright scholarship over the last two decades has fortunately recognised this is not the case – copyright can be layered and bifurcated, providing default protection that sits somewhere between 'no rights reserved' and 'all rights reserved', spreading the burden of compliance more fairly among authors with competing interests.[195] The problem is not automatic copyright, but automatic *all-rights-reserved* copyright; in its place, I propose a bifurcated copyright scheme providing an uncontroversial bundle of default rights, alongside options to 'level up' and 'level down' protection through registration and notice formalities.

## 4.1 A Bifurcated Opt-in Regime

The most helpful starting point is Ricolfi's sketch of how to reform copyright in light of the emerging 'short route', as his proposal arises from a shared concern for authors' autonomy. Ricolfi argues modern authors need (i) the ability to secure attribution and (ii) the *choice* to 'reserve the right to prevent third parties from making a commercial profit out of their work' without authorisation.[196] This is consistent with the previous analysis of what authors find important – even where they do not want copyright's exclusivity, attribution and a sense of fairness in how the works are dealt with are key. This forms the

194 Perlmutter (n 20) 584–85.

195 Rosloff (n 3) 38–39.

196 Ricolfi, 'Consume and Share' (n 77) 55.

foundation for Ricolfi's 'Copyright 2.0' proposal, under which authors would be given the option to explicitly claim, via notice, 'Copyright 1.0' protection (the current all-rights-reserved default) *or* receive Copyright 2.0 default protection limited to a right of attribution.[197] While this proposal is not, as Ricolfi admits, 'exactly appropriate', it serves as a helpful starting point for conceptualising how copyright can incorporate options for the rights authors reserve, enabling a system 'better tailored to the characters of production and distribution' in the twenty-first century.[198]

Several other scholars have recognised that a reasonable opt-in copyright scheme must involve some bifurcation of rights, securing minimum default protections reflecting authors' basic interests while making more robust protection contingent on formality compliance. In a paper exploring mandatory declaratory registration, Gangjee recognises moral rights must remain available by default even where economic rights are conditioned on registration.[199] The CPP, composed of several leading American IP scholars, suggests a more ambitious bifurcated registration system, under which unregistered works are protected against 'exact or near-exact copying that would cause commercial harm' but subject to broader fair use exceptions and unable to benefit from enhanced remedies like statutory damages.[200] Most interestingly, Rosloff proposes a default under which unregistered works attract attribution rights and 'protection against

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197 Ricolfi, 'Copyright Policy for Digital Libraries' (n 1) 14–15; ibid 55–56.

198 Ricolfi, 'Consume and Share' (n 77) 56.

199 Gangjee (n 3) 248.

200 Samuelson and others (n 3) 1200–01.

unrestricted, for-profit copying', while authors can opt-in by registration to 'varying levels of protection' similar to the CC options.[201]

However, unlike Ricolfi's Copyright 2.0, these bifurcated models are all proposed as vehicles for the *public* interest: Gangjee's purpose is to 'improve the quality and availability of ownership information';[202] the CPP invokes expansionist language, presenting unregistered works as those authors 'do not value highly enough', with a well-designed registration system protecting only authors 'who place significant value on their works';[203] Rosloff's model focuses on providing only necessary incentives, justifying the proposal through authors' *lack* of incentive from economic copyright rather than their positive desire to control the terms on which their works are made available.[204] This difference in focus not only shapes the detail of the proposed formalities' implementation, but means those proposals require buy-in to the idea that users' rights or the public interest should override commercial authors' interests in the current default.

This proposal takes a cue from these proposals for bifurcation – preserving substantial but uncontroversial default rights in combination with constitutive opt-in formalities as a means of enhancing authors' agency – but provides more ambitious default rights than Ricolfi's 'Copyright 2.0', and is differently motivated than the CPP's and Rosloff's proposals, despite preserving a very similar set of rights. For convenience, I will label the proposed scheme 'Copyright 3.0'.

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201 Rosloff (n 3) 39.

202 Gangjee (n 3) 248.

203 Samuelson and others (n 3) 1201.

204 Rosloff (n 3) 39, 54–56, 67.

### 4.1.1 Default Rights

The default rights Copyright 3.0 would provide to all authors are designed to be uncontroversial, reflecting interests virtually all authors share and being incapable of harming authors' interests.

#### *4.1.1.1 Moral Rights*

Copyright 3.0's default would include the moral right of attribution, reflecting the importance virtually all authors place on connections with their works.[205] Given that Copyright 3.0 is designed for the twenty-first-century digital environment, it is key that 'attribution' include attributing digital works to the profiles or accounts from which they originate, especially for default-protected works (which, without notice or registration, will not have biographical data attached and may be anonymously published). For example, if a user Tweets under the handle @realjanedoe, crediting or tagging that username should count as sufficient attribution.

The default would also include a right of integrity limited to preventing uses that violate discrimination and hate speech laws. The narrowness of this right is important in securing a reliable semicommons. A broad right allowing authors to oppose any modifications to the work they find personally upsetting would inhibit the confidence in works' freedom that the Copyright 3.0 default is designed to secure.[206] In contrast, using discrimination laws as a benchmark for the integrity right provides users with a clear, relatively predictable, and fair standard for impermissible uses, while allowing authors to act privately against uses unlawful under public law regardless. This right is especially

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[205] Text to n 121.

[206] Should authors wish to protect their works in this way, they may opt-in to protection against *all* derivative uses.

important because of attribution – if the default maintains authors' connection to their works, they must be permitted to guard against discriminatory perversions associated with their works.[207] The need for this default right to integrity is made apparent by cases like Matt Furie's legal battle to reclaim his 'Pepe the Frog' meme, which was transformed into an alt-right hate symbol.[208] Authors who allow transformation in the spirit of the work may still strongly oppose uses which warp its message in a manner inconsistent with the author's ethics; when the use is also inconsistent with society's ethics, it is beyond fair to protect against it.

Lastly, the default system of rights should approximate the effect of the moral right of disclosure or first publication (giving authors control over if and how a work is divulged) already in use in certain states.[209] If Copyright 3.0's goal truly is to give authors control over when and how their works are protected, this is essential – they cannot have their works forcibly put into the semicommons, losing a chance at all-rights-reserved copyright protection simply because the work is not registered upon its illicit publication.[210] In practice, this means unpublished works should be protected under all-rights-reserved protection regardless of formality; where a work's first publication is made without the author's consent, it would be considered unpublished and fully

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[207] See Case C-201/13 *Deckmyn v Vandersteen* [2014] Bus LR 1368, paras 29–31.

[208] Matthew Gault, 'Pepe the Frog's Creator Goes Legally Nuclear Against the Alt-right' *Vice* (New York, 18 September 2017) <www.vice.com/en/article/8x8gaa/pepe-the-frogs-creator-lawsuits-dmca-matt-furie-alt-right> accessed 11 July 2021. Furie leveraged economic rights, but integrity rights could secure the same interests while leaving works generally free.

[209] Eg Act on Copyright and Related Rights (*Urheberrechtsgesetz*) of 9 September 1965 (BGBI I, p 1273), as last amended by Article 1 of the Act of 28 November 2018 (BGBI I, p 2014) (Germany), s 12; *Code de la Propriété Intellectuelle* (France), art L121-4.

[210] Morando (n 146) 27 describes control over first publication as a 'basic human right'. cf Gibson, 'Once and Future Copyright' (n 3) 217–20 argues copyright is not designed to secure works' *non*-publication, only their economic exploitation.

protected unless the author identifies a different preferred level of protection via the relevant constitutive formality. This approach, endorsed by several scholars' formality proposals,[211] mirrors American law prior to formalities' abandonment – while the US never embraced moral rights in the civilian tradition, until 1976 it provided full copyright entitlements in unpublished works at common law to protect authors whose works were illicitly published.[212] This right would unavoidably introduce some uncertainty into the semicommons, as illicitly published works would be fully protected despite lacking a non-default signifier in the form of notice or registration, but this risk is necessary to ensure Copyright 3.0 does not compromise any authors' rights. Fortunately, the harm is small given the limited pool of works to which the uncertainty would apply, and it could potentially be further reduced by downgrading works to default protection if the author does not affirm their preferred protection level through the opt-in formality within a year of discovering the unlawful publication. Moreover, those who innocently use these works assuming them to be protected under the default could receive the benefit of an innocent infringer defence, shielding them from all remedies save injunctions.

#### *4.1.1.2 Fairness and Commercial Exclusivity*

Considerations of fairness, acknowledged as a key factor in the strength of intrinsic motivation to create and disseminate works, are not confined simply to authors' desire for attribution – they include a need for reciprocity and non-exploitation. An author who is perfectly content for their work to be freely shared and transformed would likely still feel wronged were a third party to sell copies of their works without the author's

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[211] See eg Lessig, *The Future of Ideas* (n 41) 251–52; Morando (n 146) 32.

[212] 1909 Act § 2; *Wheaton*, 33 US at 657. cf 17 USC § 301(a) (1976) abolished common law copyright.

permission or profit-sharing, even if attribution is given. Content communities and society at large share this judgment that third-party profit is unfair, and a climate of perceived unfairness in online dealings would risk damaging authors' willingness to create and disseminate further free works.[213] For this reason, the default would also include a limited economic right – the exclusive right to profit from the work. Copyright 3.0 would draw a distinction new to statutory copyright, between engaging in activities protected by copyright's economic right fragments for direct or indirect commercial purposes and engaging in those activities for non-commercial purposes. This can be loosely analogised to trademark law's concept of 'use in the course of trade', which makes infringement contingent not merely on *use* of the mark, but on the commercial motive and context of that use.[214] The right is also a direct parallel to CC's NonCommercial term.

Morando suggests fairness concerns might additionally or alternatively be addressed by a copyleft-type default, preventing derivative users from appropriating the original free work's value without freely sharing the 'added value' created through its use and 'virally and persistently propagat[ing]… an open approach to the sharing of knowledge.'[215] While authors should certainly be able to adopt *opt-in* copyleft conditions, there is insufficient demand to justify imposing them as a *default* limitation. Many casual creators do not care if follow-on creators restrict the freedom to use their 'added value' creativity, provided the original work is not exploited for profit – their primary goal is

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213 Rosloff (n 3) 63–64; Morando (n 146) 34–35.

214 Eg Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1, art 10(2).

215 Morando (n 146) 35–37.

*not* to promote the free flow of information. More importantly, a copyleft-type default certainly cannot *replace* the non-commercial-use default, which is vital to addressing the fairness concerns of the copyright-unconscious majority of social creators. As the Carol Highsmith, Flickr, and IBM incidents make clear,[216] authors are rarely, if ever, comfortable allowing large corporations to profit from even their free works. The benefits of bifurcating copyright using the concept of commercial use cannot be replaced by a copyleft term, only supplemented.

The new default's biggest challenge will be delineating what counts as 'commercial use'. One likely controversy is whether inherently commercial social media sites and content-hosting platforms engage in 'commercial use' when private users (whether acting commercially or not) post default-protected content to their platforms. The answer must be no, as this would preclude all otherwise-lawful non-commercial uses by platforms' users. This issue can be resolved using the distinction implicitly drawn by safe harbour provisions between passive and active use.[217] Commercial platforms' passive interaction with content to enable users' activity should not be considered 'commercial use'; 'commercial use' should relate only to the content's *active* user. Platforms would still be liable for failing to meet obligations relating to users' infringing activity,[218] but not because the *platform's* use is commercial. The more difficult issue is deciding when *users* act commercially. If an individual is not selling, charging access to, or directly commercialising a specific work, but *is* profiting indirectly from its use (via

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216 Text to n 133.

217 See eg 17 USC §§ 512(a)–(d); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1, arts 12–14.

218 See eg 17 USC §§ 512(c)(1), 512(d); Dir 2019/790, art 17.

monetisation of posted content, as with YouTube ads, monetisation of their page or profile as a whole, as with AdSense, or – most tenuously – influencer deals based on their profile's viewership and engagement, which are boosted by the shared content), is there commercial use? The same question can be asked of corporate users – if a news-entertainment outlet like Buzzfeed reposts default-protected content (outside of fair use or more specific defences like quotation), which is free to access but makes up part of the material used to attract consumers to their ad-and-sponsorship-monetised website, is there commercial use? The answer should typically be yes. However, a bright-line test may be impossible, as cases will arise at the margins. What if Taylor Swift shares a fan's cover of her song on social media? While her accounts are certainly used commercially to sell music and merchandise, if the shared content is not specifically ad-monetised she is unlikely to profit much from that use, whereas the fan-creator would benefit greatly. Fortunately, this is far from the most complicated question left to judges – while the test must be carefully and thoughtfully developed, there is no reason to think it cannot be designed in a sufficiently clear way that delineates a reasonable, reliable set of default rights. As a starting point, courts might look to CC licences, which define commercial use as 'primarily intended for or directed towards commercial advantage or monetary compensation.'[219]

Unlike the current regime, this default effectively meets the needs and wishes of the typical copyright-unaware social creator. Rather than forcing authors to permit prima facie infringing uses of a work through waiver or non-enforcement of rights, this default makes non-commercial uses lawful ab initio.

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219 'Attribution-NonCommercial 4.0 International' (*Creative Commons*) <https://creativecommons.org/licenses/by-nc/4.0/legalcode> accessed 11 July 2021.

### 4.1.2 Opt-in Rights

Much like Ricolfi's model, in addition to Copyright 3.0's default rights, creators would have the option of securing protection equivalent to the current all-rights-reserved copyright regime (Copyright 1.0). In order to 'level-up' to this degree of protection, obtaining complete exclusivity over works' use rather than exclusivity merely over commercial uses, owners would need to take positive steps to opt-in through formality compliance. To ensure the continued accessibility of copyright to independent and non-commercial creators, the formalities would need to be well-publicised, intuitive, and as cheap as possible to comply with. The new set of default rights and accompanying formalities should also be globally standardised and adopted at the international level, to avoid the difficulties of conflicting domestic regimes that inspired the no-formality rule in the first place.[220]

There are two credible options for this constitutive opt-in formality: notice and registration. The latter conditions copyright on works' registration with a central registry, whereas notice requires authors to signal their intention to claim rights in the work using a prescribed method (typically affixing a specified notice onto each protected copy). A mandatory registration system – requiring authors to register, at no or negligible cost, the works for which they wish to claim Copyright 1.0 protection – is preferable to a pure notice system.[221] While a notice-based system imposes virtually no transaction costs for

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[220] van Gompel, *Formalities in Copyright Law* (n 22) 264–66 notes art 5(2) could be replaced by either returning to the country-of-origin rule or adopting a uniform global formality system. Standardisation is logical, since the goal is to design an optimal formality for responding to authors' needs. cf Sprigman, 'Reform(aliz)ing Copyright' (n 3) 546–47.

[221] Here, secondary public-interest objectives have a role – while administrative efficiency and informational benefits cannot independently justify imposing constitutive formalities, administrative advantages deriving uniquely from a particular formality can weigh in its favour once *a* constitutive formality is accepted as necessary.

authors (especially since many industry works like books and films already carry UCC-compliant notices)[222] and requires far less infrastructure than a registration system,[223] notice has several shortfalls – affixed notices may fail to transfer with each copy of the work (or be deliberately stripped by intentional infringers), negating informational and rights clearance benefits, and notice requirements do not provide a central record of non-default-protected works. In contrast, a registration system would provide a stable and searchable (although not exhaustive, because of the right of first publication) central record of non-default-protected works, allowing potential licensees to identify works and their owners even without a notice-marked copy. A register can also serve as a cultural archive that ensures the continued practical accessibility of protected works even if they go out of circulation, provided there are representation or deposit requirements.[224] Moreover, while both notice and registration can in theory provide identifying information on the author, only registration can provide an *evolving* record of the work guaranteeing up-to-date information. If a transfer of title occurs, the register can be edited to reflect the copyright's current owner and continue to provide informational benefits where an outdated affixed notice cannot;[225] similarly, an author's wish to renounce opt-in protections adopted at publication can be reflected in the register, but cannot be changed on affixed notices. However, copyright registers are notoriously cumbersome and difficult to search in practice; to better secure the register's effectiveness, the opt-in system should impose a *combined* registration and notice condition, requiring authors to

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222 Morando (n 146) 31.

223 Although some states already have infrastructure established for voluntary registries (see n 18).

224 Rosloff (n 3) 77–78; Dusollier, '(Re)Introducing Formalities' (n 44) 81–82.

225 To secure this benefit, recordation of non-default--protected works' transfers of title should be required as a condition of the transfer's validity. Samuelson and others (n 3) 1201 suggest an obligation to keep registration information up-to-date.

mark copies of registered works with information that makes the work's sharing permissions easily searchable (eg the © symbol with a registration number, or UCC-style notice). Users could also be encouraged (but not required) to include copyright information in digital works' metadata, and provided with CC-style user-friendly, machine-readable symbols to communicate works' permissions.

Samuelson and the CPP emphasise that using registration to condition rights is not alien – mandatory registration is already in use for domain names and real property interests.[226] More importantly, mandatory registration constitutive of IP rights is already in use for industrial design and patent rights. Constitutive copyright registration is not an unprecedented leap.

Given how rapidly works cross international borders online, the registration system would ideally feature a centralised global digital register administered by a governing body like WIPO, recording the totality of non-default-protected published works worldwide.[227] Barring this, national or supra-national regional registers would be a second-best option; they would need to be interoperable, so that entries in one register are reflected in the others, given that registration in one Berne state secures equivalent protection in all the others.[228] Existing copyright registers could be integrated into this system. The register(s) should be structured to be search-friendly, and searches themselves should be cost-free and accessible to all. Registration need not and should not include a substantive examination phase – authors should be permitted to file works for

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226 Samuelson and others (n 3) 1202.

227 With the exception of illicitly published works.

228 Alternatively, Lessig, *Free Culture* (n 3) 289–90 suggests a registration system modelled on the internet domain name registration system – a central public registry, fed by data collected from users by accredited private registries. See also Samuelson and others (n 3) 1203–04.

inclusion on the register without evaluation (aside from an automated scan for identical works), as registration would not guarantee the right but rather give notice that, if the individual *is* the rightful owner and the registered work is copyright-protected, they are claiming non-default protection. This keeps formalities low-burden – for users *and* administrators – while still securing a clear, accessible, and determinative record of authors' wishes; moreover, excluding substantive examination would allow works to be registered rapidly online, potentially even in real time.[229] A dispute resolution system could be put in place to address claims of fraudulent or mistaken registration.

Registering a work should be a straightforward and ideally cost-free process, as simple as uploading a digital version of the work to an online form and entering brief biographical information.[230] In moving to a digital environment, the registry could partner with content-hosting platforms like YouTube, Instagram, and Facebook to prompt users posting content to indicate whether they are the work's author and whether they would like to register copyright in the work, providing basic copyright guidance;[231] works receiving affirmative responses could be automatically registered using the account's biographical data and labelled by the platform with the appropriate notice. This would not only simplify registration, but spread public awareness of its existence and when it should be used, reducing the already-low risk of authors missing out.

Gangjee suggests registration systems should include a post-publication window in which authors can opt-in to prospective or even retrospective all-rights-reserved

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229 Gangjee (n 3) 238, 246–47. See also van Gompel, 'Copyright Formalities in the Internet Age' (n 3) 1442.

230 Rosloff (n 3) 76 notes electronic submission is 'easier, quicker and cheaper', and would 'ease registration for authors located abroad'.

231 This takes inspiration from Wikipedia's Upload Wizard, which collects works' copyright and licensing information by asking guided questions during the upload process.

protection – a safety net to prevent authors missing out on desired rights.[232] However, this is made unnecessary by the default right of first publication; authors are only at risk of missing all-rights-reserved protection if they *choose* to publish their work without registering.[233] They need not defensively register from the moment of creation. In contrast, permitting all authors to upgrade protection post-publication would massively undermine the semicommons' reliability; the risk is large even if the window is short, since online content goes viral rapidly and unpredictably. Even if the post-publication cure had only prospective effect, it would prevent consumers and creators from feeling secure in their use of Copyright 3.0 works – if users are only protected against non-commercial uses of unregistered works while they *remain* unregistered, the risk of that use being injuncted *moving forwards* is a deterrent to its use in the first place. Why begin writing a serialised fanfic or editing a video incorporating a particular element of pop culture if the whole project could be made unlawful at any point? This is precisely why CC licences are irrevocable – users must be able to depend on the licence terms *in perpetuity* for the semicommons to be useful.

### 4.1.3 Tailoring Protection

Once the infrastructure for opt-in registration exists, there is no reason to exclude authors from using the same mechanisms to tailor protection beyond the default/Copyright 1.0 binary. If formalities' motivating goal is to empower authors to set the terms on which their works are made available, authors must be permitted to 'level down' beyond the

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[232] Gangjee (n 3) 248. Gibson, 'Once and Future Copyright' (n 3) 225 makes a similar proposal, to ensure an 'equitable' approach.

[233] All-rights-reserved protection for unpublished works is preferable to a retrospective registration exception for illicitly published works because authors would never lose legal control of their works pending further action.

default rights *or* opt-in to protection greater than the default but 'something less than complete control'.[234] Certain authors may wish to decline all economic rights, attribution, or copyright entirely, while others may wish to move slightly above the default by restricting non-derivative non-commercial uses[235] or subjecting non-commercial uses to copyleft terms. Every possibility should be accommodated.[236] This system would resemble, with more expansive options and unlimited combinations, the mix-and-match menu of CC terms, which authors could select from during registration. The register would thus include not merely Copyright 1.0-protected works, but works deviating from default protection in other ways, providing users and authors with more confidence in non-default works' availability than abandonment or permissive licences.[237] These flexible opt-in and opt-out layers would require more informational labour from individuals consulting the register than a binary default-and-opt-in system, so efforts must be made to make the menu options intelligible and familiar to users.[238]

Unlike post-publication 'levelling up', there is little harm in authors *retracting* rights post-publication – broader permissions do not undermine the stability of the semicommons, as users are guaranteed the right to continue using the works as they

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[234] Rosloff (n 3) 65, 67–68.

[235] Permitting derivative but not facsimile non-commercial uses may be of particular interest to commercial creators who wish to encourage fanworks by giving users confidence in their legality.

[236] cf Rosloff (n 3) 79–80 suggests restricting the system to 'discrete bundles' of rights rather than a fully flexible opt-in menu, to reduce complexity. This paper prefers full flexibility, prioritising authors' autonomy over administrative convenience.

[237] This does not mean users *must* use the register to level down – abandonment and permissive licences could retain their current legal effect, should authors prefer them, as this poses no unreliability risks. Users assuming the unmarked work is available on default terms would be acting lawfully within the actual levelled-down permissions.

[238] Rosloff (n 3) 79. The system should take inspiration from CC's 'human readable' licence and notice symbols ('About The Licenses' (*Creative Commons*) <https://creativecommons.org/licenses/> accessed 11 July 2021).

already have. Authors should therefore be permitted to broaden the circumstances under which their works may be used at any point during the copyright term. This is where a register offers significant advantages over notice – it functions as a living record that can reflect downgrades from the initial default or registered protection level, whatever it may have been.

## 4.2 Striking the Fairest Balance

Dividing default and opt-in rights between those wishing only to avoid unfair exploitation of otherwise-free works and those wishing to actively commercialise or for other reasons prevent unrestricted non-commercial dissemination of their works is the fairest response to the key question: who should bear formalities' burdens?

Unlike an all-or-nothing opt-in regime where each author wanting any degree of moral or economic rights must comply with formalities, Copyright 3.0 only expects individuals seeking to profit from their works (or for other reasons protect their work beyond non-commercial users' typical needs) to bear the burden of compliance.[239] Provided the formalities are sufficiently well-publicised and time- and cost-effective for even independent, part-time commercial creators to comply with, this strikes a fair balance – those whose business model depends on others not being able to copy, share, or adapt their works can be expected to research how to secure the relevant rights and take the necessary steps to do so. This is no different from expecting business owners to investigate necessary permits, comply with regulatory schemes, and pay business taxes – these are the information costs of doing business. In contrast, casual creators, commercial creators not dependent on exclusivity, and creators of designed-to-be-free content who

[239] See Gibson, 'Once and Future Copyright' (n 3) 225.

aim to contribute works to the semicommons without expectation of material reward are not asked to take additional steps to make their works available, nor are they placed at risk of missing out on moral rights entitlements or having their works co-opted and exploited by commercial actors.

Copyright 3.0 is the best way to reintroduce formalities without risking anyone being *unjustly* left behind. This is not to claim not a single soul will fail to secure their desired protections, but rather that the system burdens each actor in only a modest and reasonable manner proportionate to the benefits they seek to gain from copyright. It leaves no one undefended. The default moral rights ensure even unregistered works remain meaningfully connected to their authors, and authors risk *at most* losing out on a monopoly that secures their own profit – the opportunity to profit cannot be stolen by another, and authors are still free to commercialise the work without copyright's exclusivity.

Furthermore, this balance coincides with the expectations and norms of internet users in the twenty-first century. While individuals expect it to be unlawful to share peer-to-peer files containing the new blockbuster Marvel movie, because they recognise the industry stance on piracy and the work's commercial nature,[240] they do not expect it to be unlawful to copy and re-post group photos from their best friend's Instagram. Copyright 1.0 registrations can be expected to roughly align with works that users recognise are not fair game to copy for themselves, while the default rights align with online norms surrounding the use of non-professional content. The proposed default would be intelligible to users because it falls into what can essentially be summed up as

[240] Whether they care that this activity is illegal is another issue.

a plagiarism standard – do not steal others' work, acknowledge your sources, and do not use content in ways that feel ethically suspect. This is an intuitive norm well-suited to community self-policing, and it will make copyright law in the non-commercial domain appear much more rational to users – the layperson's understanding and practice of copyright often already reduces to a plagiarism standard.[241]

## 4.3 Secondary Benefits

While Copyright 3.0's aim is to empower authors to set the terms of their works' availability, it would also incidentally advance the public interest objectives of other formality proposals. Admittedly, it would not secure these secondary benefits as well as targeted proposals could – that is completely okay.

With regard to administrative and informational benefits, the register would provide information about non-default-protected works and their owners, assisting with rights clearance and attribution. However, while the register would increase certainty about registered works' permissions, it would not provide an exhaustive list of copyright-protected works (since default rights apply without registration) or even non-default-protected works, given the right of first publication. Furthermore, the orphan works problem would only be partially mitigated. Published orphan works would still receive default protection, which poses little issue as the preservation and research institutions most interested in their use act non-commercially; however, the right of first publication would cause the significant portion of orphan works that are unpublished or unfinished

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241 Karl Fogel, 'The Public's Perception of Copyright – Video Interviews with Randomly-Selected People in Chicago' (*Question Copyright*, 15 August 2006) <https://questioncopyright.org/public-perception-of-copyright> accessed 9 July 2021; Tushnet, 'Payment in Credit' (n 123) 151.

to remain protected by Copyright 1.0.[242] The orphan works problem will require its own targeted solution.

Public domain expansion is similarly only partly realised. Because Copyright 3.0 preserves default rights in unregistered works, it moves works not into the public domain, but into the semicommons. The works are owned, but fewer exclusive entitlements subsist in them. However, this proposal has advantages over law-and-economics proposals for formality-based public domain expansion in that it aims to capture a richer range of newly free works. Copyright 3.0 aims to secure not merely works viewed as commercially valueless by their creators,[243] but *valuable* and *valued* works for which creators nevertheless do not need exclusivity. This includes works with significant commercial potential which authors opt not to monopolise, like Wikipedia pages, high-profile public domain art donations, and viral social media content. By framing non-protection as an autonomy-enhancing choice benefiting authors and their works, rather than a necessary and purely economic choice, Copyright 3.0 may lead authors to feel positively about some-rights-reserved protection, rather than viewing themselves as begrudgingly sacrificing copyright to avoid its burdens under an expansionist scheme.

## 4.4 Copyright 3.0 and the Berne Convention

### 4.4.1 Is Copyright 3.0 Berne-compatible?

The final big issue is whether Copyright 3.0 can be made compatible with Berne's no-formality rule. The short answer is that it cannot. Berne excludes formalities affecting

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242 Scholars using constitutive registration to respond to orphan works either overlook unpublished and unfinished works, or sacrifice their protection.

243 In fact, it may even secure slightly fewer of those works, since, unlike the expansion-inspired formality schemes, the formalities would be as low-burden as possible.

copyright's 'enjoyment' and 'exercise', which Ricketson translates to 'subsistence' and 'exploitation and enforcement' respectively.[244] This is a broad prohibition. Nevertheless, as formality proposals have surged within copyright scholarship over the last two decades and Berne's no-formality rule has come under pressure in the radically different digital networked environment, many have been at pains to argue certain formalities *could* be compatible with Berne. Perhaps the boldest claim is Michael Carroll's:

> [A] dynamic interpretation of the Berne Convention would lead to the conclusion that, at least in countries with ready access to computers and the Internet, a mandatory notice or registration formality should not be read to affect an author's ability to exercise or enjoy her rights under copyright. This would be especially true for formalities that affected the scope of rights or remedies available to an author based on steps that would be trivially easy and commonplace to take in the digital environment.[245]

While Carroll's view is sympathetic – the technological and administrative challenges of earlier formality systems could be virtually obliterated with today's technology, making it possible to have extremely low-burden, globalised constitutive formalities – it is also incorrect. We must not conflate provisions *affecting* copyright's enjoyment and exercise with provisions creating *barriers* to enjoyment and exercise – while a sufficiently accessible and low-effort formality system might not be realistically seen as a *barrier* to the enjoyment and exercise of the right, it does *affect* it, since non-compliance causes the right not to exist. The spirit of the Berne rule is not a requirement that formalities not pose unreasonable burdens, but that they not impact the enjoyment and exercise of the

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[244] Sam Ricketson, 'The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles' (2018) 41 Colum JL & Arts 341, 365. See also Ginsburg, 'Berne-Forbidden Formalities' (n 12) 746. Sprigman, 'Reform(aliz)ing Copyright' (n 3) 541 understands art 5(2) as prohibiting any administrative obligation conditioning the existence, continuation, or *practical availability* of copyright.

[245] Michael W Carroll, 'A Realist Approach to Copyright Law's Formalities' (2013) 28 Berkeley Tech LJ 1511, 1523. In particular, Carroll (1522) emphasises '[m]etadata can be preconfigured to automatically associate with digital files… and creating account information in a digital database has become a routine precondition for participating in… digital life.'

right *at all*. Courts in member states would need to become much more hostile toward copyright's default before Carroll's dynamic interpretation argument stands a chance at acceptance. So long as the Berne Convention remains unaltered, Copyright 3.0 cannot be Berne-compatible – its purpose is to make the very subsistence of copyright's core rights, to the extent the activities are done for non-commercial purposes, contingent on compliance with registration, which undeniably affects the enjoyment and exercise of the right contrary to article 5(2).

To adopt this proposal would therefore require modifying Berne, which many acknowledge is highly unlikely at present.[246] Modification would require the unanimous agreement of all members voting on the issue,[247] and many states would likely be reluctant to reopen negotiations on Berne's terms, even if they did unanimously agree with altering the formality rule, because of the risks it would carry for the balance of power Berne has struck.[248] However, scholars do not rule out the possibility that such changes could be made in the future; some even recognise these changes may be necessary, given the rule's increasing misalignment with content use in the digital landscape in which copyright operates.[249] van Gompel suggests the unsustainability of copyright's current form may well push policymakers in that direction in the near future, especially since the twentieth-century pragmatic barriers to formalities have lost force.[250]

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246 See eg van Gompel, *Formalities in Copyright Law* (n 22) 263; Ricketson, 'The International Framework for the Protection of Authors' (n 244) 353.

247 Berne, art 27(3). Unlike Berne's original 1886 text, this provision leaves room for members' abstention (Ricketson, 'The International Framework for the Protection of Authors' (n 244) 352).

248 Ricketson, 'The International Framework for the Protection of Authors' (n 244) 348–52.

249 Ricolfi, 'Copyright Policy for Digital Libraries' (n 1) 15; Morando (n 146) 38; ibid 353. Ricketson (353) emphasises that Berne, art 27(1) obligates members to revise the Convention with a view to improvement.

250 van Gompel, *Formalities in Copyright Law* (n 22) 263.

Unfortunately, for the time being the rule is very much in place, leading several authors to consider 'second best' reforms capable of achieving their goals in place of Berne-incompatible formalities.[251]

## 4.4.2 Second-Best Solutions

### *4.4.2.1 New-Style Formalities*

The most commonly suggested Berne workaround is the use of non-constitutive 'new-style' formalities, which condition copyright's enforceability and remedies rather than its subsistence; proponents argue these 'nominally voluntary' but 'de facto mandatory' formalities are Berne-compatible.[252] Sprigman suggests states could introduce 'formally voluntary' registration as a prerequisite for all remedies and instead subject noncompliant rightsholders' works to a compulsory default licence at a low fee approximating the compliance costs, deeming authors to signal through non-compliance that their work's value does not exceed that cost; this converts the owner's property interest into a liability interest, supposedly preserving copyright's enjoyment and exercise.[253] Reid makes a more modest proposal to reserve remedies beyond injunctions and damages for authors who have 'claimed' copyright through notice and registration, recognising that reserving

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[251] See eg Sprigman, 'Reform(aliz)ing Copyright' (n 3) 551–68; Morando (n 146) 38–42.

[252] Sprigman, 'Reform(aliz)ing Copyright' (n 3) 490.

[253] ibid 555–57. Sprigman (564) suggests the default licence could protect moral rights, and registration could 'allow rightsholders to signal exactly which rights they wish to retain'. This approaches the Copyright 3.0 proposal, seeming to offer a plausible alternative if it *is* Berne-compatible; however, it is only even *plausibly* Berne-compatible because it substitutes enforcement for compulsory licensing at a fee, obliterating the scheme's utility as a second-best substitute for Copyright 3.0. Copyright-averse authors do not want their works to be freely shareable *at a cost* – this would likely carry *more* of a chilling effect than the risk that authors might cease tolerating the work's use. Encouraging works' permission-free circulation online requires making works permission-free *and* cost-free.

basic remedies would violate 'the spirit, if not the letter of the no-formality rule.'[254] This approach is adopted in practice by the US, which reserves statutory damages and attorney's fees solely for registered works.[255] However, others question the Berne-compatibility of new-style formalities. Rosloff observes proposals like Sprigman's 'effectively [make] registration mandatory for authors who wish to retain control over their works';[256] it is hard to see how conditioning *all* enforcement rights on formalities could not affect enjoyment and exercise.[257] Ginsburg agrees – basic remedies (injunctive relief and actual damages) must be preserved even for noncompliant works, since copyright 'cannot be "exercised" if it cannot be enforced.'[258] Ginsburg is also skeptical of more limited proposals conditioning optional remedies on formalities – while Berne does not *require* states to offer enhanced remedies, it 'does not distinguish between… basic remedies and additional, unusual, or new remedies', leaving no room for formality-dependent 'Berne-plus' remedies.[259] If the remedy exists, it is part of copyright's enjoyment and exercise. While the legality of 'Berne-plus' remedies is arguable,[260]

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254 Reid (n 3) 459–69. Reid (463) would restrict damages for unclaimed works to the cost of a fair and reasonable licence.

255 17 USC § 412. This applies to domestic *and* foreign works.

256 Rosloff (n 3) 60. Sprigman, 'Reform(aliz)ing Copyright' (n 3) 490 acknowledges this.

257 cf Rosloff (n 3) 71 suggests the absence of injunctive relief *alone* does not interfere with 'exercise', provided damages are available. Christopher Jon Sprigman, 'Berne's Vanishing Ban on Formalities' (2013) 28 Berkeley Tech LJ 1565, 1570–73 similarly argues absence of injunctions does not affect the right itself, only the remedies available for its violation. This cannot be correct – it would reduce copyright from a right to *exclude* and *control* to a mere right to exclusively profit from the work, since control cannot be meaningfully regained without injunctions once the exclusivity is breached.

258 Ginsburg, '"With Untired Spirits and Formal Constancy"' (n 24) 1593, 1599–600.

259 ibid 1597–600.

260 Eg Rosloff (n 3) 70 argues since Berne permits members to determine *how* rights are protected (art 5(2)), states can restrict additional remedies that do not 'entirely deprive' owners of enforcement or compensation to incentivise registration; Ricketson, 'The International Framework for the Protection of Authors' (n 244) 365 supports the validity of Berne-plus remedies and procedural incentives that 'do not otherwise prevent the enforcement of rights.'

especially given the ongoing use of formality-contingent enhanced remedies in America, conditioning injunctions, damages, or copyright's scope[261] – all key to meaningfully exploiting copyright – on formalities undeniably obliterates the Berne rule.

Regardless of which, if any, remedies could be made subject to formalities, any valid new-style formality would need to allow authors to curatively comply at any point – otherwise, they would undeniably violate copyright's enjoyment and exercise, as non-compliance would permanently preclude the author from fully exploiting their rights. As a result, new-style formalities cannot serve as a solution – authors already *have* the option of case-by-case non-enforcement or requesting only limited remedies. Berne-compatible new-style formalities cannot help authors permanently, reliably foreclose copyright's application or enforcement.

#### *4.4.2.2 Opt-Out Mechanisms*

Although opt-out mechanisms are ultimately unsatisfactory, they are admittedly the best interim solution until opt-in mechanisms can be lawfully introduced. Morando argues that, while registration formalities remain barred, the state should endorse or provide menus of CC-like 'altering rules' to assist users in contracting away from the Berne default.[262] He hopes legitimising and increasing the visibility of opt-out mechanisms will change agents' choices, reducing the default-induced perception that 'all rights reserved'

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261 See Samuelson and others (n 3) 1199–2000; cf Ginsburg, '"With Untired Spirits and Formal Constancy"' (n 24) 1604.

262 Morando (n 146) 38–42. Samuelson and others (n 3) 1227 similarly suggest a statutory provision for dedications to the public domain, and Dusollier, '(Re)Introducing Formalities' (n 44) 105 recommends adopting opt-out formalities and an 'overall regime for public domain works'.

is the morally right or fair choice.[263] While a Berne-compatible statutory abandonment system permitting partial abandonment (effectively merging abandonment and permissive licensing) would be marginally preferable,[264] Morando's point is correct. While article 5(2) persists, partial abandonment should be legislatively formalised and actively promoted as a legitimate, socially productive, reliable state-backed option for managing one's copyright.[265]

The key is that the opt-out mechanism must not be left entirely to decentralised private ordering – states and the international copyright apparatus must step up, even if they cannot implement opt-in formalities. While the Berne no-formality rule persists, states must engage with voluntary private formality systems and establish and administer state-backed Berne-compatible opt-out mechanisms as needed.[266] As Merges notes, 'no private initiative will ever quite match the ability of the statute to channel copyright owners into a uniform, widely understood standard practice.'[267]

However, opt-out mechanisms are merely a stop-gap – they cannot resolve the problems created by automatic all-rights-reserved copyright. States must prioritise removing Berne's outdated barriers and reforming international copyright to better align with modern norms of content use and creation.

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263 Morando (n 146) 38–42. Fagundes and Perzanowski (n 43) 557–58, 566–68 similarly suggest states should clarify the status of works purportedly dedicated to the public domain, and argue abandonment must be made visible for users to perceive it as a legitimate, available social practice.

264 See text to n 179.

265 This should include a searchable voluntary abandonment register (Fagundes and Perzanowski (n 43) 557) and CC-inspired standardised symbols authors can use to signal the terms on which partially abandoned works are available.

266 See Carroll (n 245) 1516, 1526, 1533.

267 Merges, 'A New Dynamism' (n 114) 202.

# 5 A SATISFACTORY SOLUTION?

This final section defends Copyright 3.0 against potential objections and considers and dismisses alternative non-formality solutions, which are unable to accurately map onto authors' wishes without collapsing into opt-in formalities. Copyright 3.0 is not only a defensible solution to copyright's misalignment with authors' needs, but the *best* solution.

## 5.1 Incompatibility with Copyright's Justifications?

There are two main understandings of copyright's underlying justification – copyright as incentive and copyright as natural right. If Copyright 3.0 is incompatible with either, that could be a significant stumbling block; fortunately, neither theory prevents a shift to bifurcated opt-in copyright for the *specific purpose* of better securing authors' autonomy. This conclusion does not require descriptive or normative claims about which justifications do or should underlie copyright – each is equally unable to require the Berne default.

### 5.1.1 Incentive Theory

The standard economic rationale for copyright is that, by ensuring authors' ability to commercialise and profit from what would otherwise be non-rivalrous, non-excludable public goods, copyright's marketable exclusive rights incentivise creation, producing a net social benefit despite the resulting burdens on use of protected content.[268] Relying on this rationale, some argue copyright's all-rights-reserved protection must not be

[268] This is US copyright's dominant rationale. See US Const art I, § 8, cl 8; Harper & Row, Publishers, Inc v Nation Enterprises, 471 US 539, 558 (1985); Twentieth Century Music Corp v Aiken, 422 US 151, 156 (1975).

conditioned on formalities, as added barriers could create uncertainty and inconsistency, thereby harming the efficacy of copyright's incentive.[269]

This utilitarian incentive argument depends on the benefits of a strong incentive outweighing the deadweight losses of protecting works authors want to make free. This is doubtful, especially as UGC grows in volume, quality, and social importance. Several studies reveal our understanding of copyright's efficacy as even a partial, non-necessary incentive is shaky at best, and certain research suggests copyright may not function as an incentive at all – in many cases, copyright's extrinsic incentive may not impact creative output or may even *harm* the intrinsic motivation behind creative output.[270] A stronger version of the incentive argument claims copyright's incentive is necessary to secure not the intellectual creation of works, but investment in producing, advertising, disseminating, and improving commercial works, as intermediaries must be able to turn a profit.[271] However, even this may not be universally true – empirical evidence shows the market meets commercial demand for free works even without the benefit of copyright's exclusivity.[272]

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269 See Perlmutter (n 20) 585, arguing against constitutive formalities because 'the law's first priority should be to ensure that the incentives provided [by copyright] are meaningful, reliable and consistent.'

270 See Amabile (n 59) 116–22; Diane Leenheer Zimmerman, 'Copyrights as Incentives: Did We Just Imagine That?' (2011) 12 Theo Inq L 29, 43–54; Johnson, 'Intellectual Property and the Incentive Fallacy' (n 37); Buccafusco and others (n 76) 1946–63, 1968–72; Christopher Jon Sprigman, 'Copyright and Creative Incentives: What We Know (and Don't)' (2017) 55 Hous L Rev 451.

271 Elkin-Koren, 'What Contracts Cannot Do' (n 148) 384. See also Mark A Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property' (2004) 71 U Chi L Rev 129, 132–35.

272 Lemley (n 271) 135–41 rejects the premise that the copyright owner is uniquely capable of efficiently exploiting the work. Empirical studies show public domain works are often made more available than copyright-protected works of similar age and prominence, while maintaining the same quality. See Paul J Heald, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers' (2008) 92 Minn L Rev 1031, 1039–43; Paul J Heald, 'How Copyright Keeps Works Disappeared' (2013) Illinois Public Law Research Paper No. 13-54 <https://ssrn.com/abstract=2290181> accessed July 1 2021; Christopher Buccafusco and Paul J Heald, 'Do Bad Things Happen When Works Enter

Most importantly, even if copyright *does* provide an effective incentive worth preserving at the expense of deadweight losses, Copyright 3.0 would not weaken it. Copyright 3.0's default still secures moral rights and protection against commercial exploitation, which, to most causal creators, are copyright's most valuable and compelling incentives. The remaining opt-in rights are only capable of incentivising commercially motivated authors and authors who otherwise desire greater exclusive control over their works.[273] For those authors capable of being incentivised, it is not clear why opt-in formalities would necessarily reduce copyright's incentive, provided they are sufficiently low-burden, accessible, and predictable.[274] Commercial publishers and distributors have much to gain by jumping through minor hoops (which their lawyers can easily navigate), and formality compliance would take only a fraction of the total effort required to bring the work to market. The corporate world already complies with trademark registration formalities and the substantive evaluation of patents, because the exclusivity benefits of compliance massively outweigh its costs. Even for small commercial creators – for whom the concern that they might not make enough profit to make compliance worthwhile or have the legal know-how to comply is more acute – there is no reason formalities *must* weaken copyright's incentive. Well-designed formalities

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the Public Domain? Empirical Tests of Copyright Term Extension' (2013) 28 Berkeley Tech LJ 1, 17–29.

273 This is not to claim authors must know specifically how copyright works or that it applies to be incentivised by it (cf Litman, 'Copyright as Myth' (n 65) 241–42) – it is enough to understand creators profit *somehow*, with copyright enabling that profit behind the scenes. But the authors at issue do not even think, eg, 'Reddit users profit somehow from their posts', since such content does not typically have commercial potential – Copyright 1.0 is not an incentive for such uses capable of being weakened.

274 Rosloff (n 3) 57. The disincentive argument is more compelling against deliberately burdensome formalities designed to expand the public domain – by employing formalities as burdens, rather than facilitators of autonomy, scholars strengthen objections to their proposals.

could ensure the exclusivity incentive remains as compelling as it is now for commercial intermediaries and self-employed creators alike.

Ultimately, Copyright 3.0 would not meaningfully reduce copyright's incentive, whereas automatic all-rights-reserved copyright generates 'significant transaction costs… without increasing incentives to create'[275] – a dynamic that incentive theory's utilitarian rationale cannot justify. The incentive justification is not a barrier to Copyright 3.0; quite the opposite, formalities follow naturally from a commitment to utilitarian copyright, which only supports beneficial protection.[276]

### 5.1.2 Natural Rights Theories

An alternative objection to opt-in copyright lies in natural rights theories, which regard authors as the absolute owners of their works as a matter of pre-legal natural property rights arising by virtue of acts of creation. Lockean labour theory locates the property entitlement in the author's creative labour,[277] while Hegelian personality theory justifies the property right on the ground that authors' intellectual creations are manifestations of the self which must be secured as property to enable self-actualisation.[278] Many assume that if copyright is justified by natural rights, formalities which function as *preconditions* to authors' rights are logically incompatible – copyright must arise automatically to

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[275] Morando (n 146) 34.

[276] Sprigman, 'Reform(aliz)ing Copyright' (n 3) 528; Rosloff (n 3) 53–54; Ginsburg, 'The US Experience with Copyright Formalities' (n 11) 318–19.

[277] John Locke, *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (Richard H Cox ed, John Wiley & Sons, Inc 1982) para 27. See Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Geo LJ 287, 297–329.

[278] Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right* (Sir Thomas Malcolm Knox ed, OUP 1952) paras 41–43, 68–69. See Hughes (n 277) 330–34.

reflect the pre-legal entitlement.[279] Fortunately, Copyright 3.0 can be reconciled with natural rights rationales.

Natural rights theories clearly do not require authors to *retain* all-rights-reserved copyright. Hegel explicitly permits the abandonment of property by will,[280] and Locke's 'enough and as good' and spoilage provisos seem to support returning unwanted IP to the commons as public goods.[281] Therefore, van Gompel argues natural rights justifications only oppose formalities which condition copyright's *acquisition* – they do not preclude non-constitutive formalities affecting copyright's *exercise*, so long as they do not unfairly prejudice the right.[282] However, since Copyright 3.0 targets the default subsistence of all-rights-reserved copyright, we must challenge the claim that constitutive formalities are incompatible.

While natural rights provide pre-legal entitlements to property in the work, copyright law has never perfectly reflected this absolute right – it does not, for example, offer perpetual protection, but instead '[seeks] to balance interests of creators and users'.[283] And yet, copyright has not crumbled. As long as the system aligns with the *spirit* of the natural property right, the implementation need not conform perfectly to the

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279 Ginsburg, 'The US Experience with Copyright Formalities' (n 11) 319; Gervais, *(Re)structuring Copyright* (n 24) 259–60. See also van Gompel, 'Formalities in the Digital Era' (n 15) 410–13.

280 Hegel (n 278) para 65. cf Hughes (n 277) 347 suggests abandonment of intellectual works is alienation of personality, which Hegel (paras 66–69) prohibits as alienating 'universal' parts of the self. This tension is resolved by distinguishing economic rights from deeply personal moral rights (Hughes 348–50); Hegelian theory could at most demand inalienable moral rights, which align with Copyright 3.0's default (although Copyright 3.0 permits *opting out* of moral rights). Regardless, alienating moral rights seems unproblematic for personality theory if the author no longer regards the work as a manifestation of the self.

281 Locke (n 277) paras 27, 31; Hudson and Burrell (n 167) 978.

282 van Gompel, 'Formalities in the Digital Era' (n 15) 419–20.

283 Reid (n 3) 453. See also Sprigman, 'Reform(aliz)ing Copyright' (n 3) 543; van Gompel, 'Formalities in the Digital Era' (n 15) 420–21.

natural entitlement. It is not in the nature of either labour theory or personality theory to require that rights be imposed upon those who do not want them or who would be made worse off by their default application – both theories *empower* individuals through their relationships to works. If natural rights theories do not require authors to *retain* all-rights-reserved protection, they should not be used to burden authors with unwanted default rights that must then be actively discarded, provided full protection remains accessible to all those who *do* want it through a simple, objective process. Formalities which essentially amount to explicitly confirming or claiming rights authors are entitled to enjoy by virtue of creation are unobjectionable from a natural rights perspective.[284] As long as the shift away from default all-rights-reserved copyright is a better method of realising the bundles of legal rights authors desire in the works they own under natural law, burdening fewer authors with unwanted rights, natural rights theory should not be a barrier to Copyright 3.0.

## 5.2 Objections to Constitutive Opt-In Formalities

Several objections directed more specifically at the fairness of constitutive opt-in formalities reveal a concern for vulnerable authors who may lose protection or be disadvantaged by opt-in formalities.

The essence of the main objection is that authors not educated about copyright's intricacies may miss the opportunity to protect their works. Many worry formalities will favour well-resourced and experienced commercial creators while disadvantaging non-

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[284] cf formalities imposing an examination phase, non-nominal costs, or other onerous standards which serve as effective barriers to claiming the right would be seriously questionable from a natural rights perspective.

commercial creators.[285] This would be troubling – formalities which largely exclude non-commercial authors from copyright due to lack of awareness, leaving their content vulnerable to unrestricted use by commercial actors whose own copyright remains fully intact, would be nearly impossible to justify. This concern is not only about the disparity of resources and knowledge, but the fact that opting in will appear less attractive to non-commercial users, leaving UGC under-protected despite its value.[286] A variation on this objection notes inexperienced or non-professional authors may lack the expertise to identify, at publication, which works have sufficient commercial potential to be worth registering.[287] Sprigman concedes it is a 'certainty that some authors will make the wrong decision' about opt-in protection.[288] While he maintains authors are nevertheless in the best position to assess the merits of formality-compliance,[289] authors are not perfect economic actors; even when they understand a choice must be made and what it entails, they may choose poorly or irrationally.[290]

The concern that some authors will miss out is important, and one I expressed in relation to the public-domain expansion argument for formalities. While some pro-formality scholars recognise the issue – the CPP emphasises the need to avoid 'unreasonable hurdles' and prevent rights being 'entirely forfeited' due to small

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285 Rosloff (n 3) 61; Elkin-Koren, 'Can Formalities Save the Public Domain?' (n 44) 1554–55.

286 Dusollier, '(Re)Introducing Formalities' (n 44) 84; Elkin-Koren, 'Can Formalities Save the Public Domain?' (n 44) 1552–54; Alter (n 51) 942.

287 Greenberg (n 192) 1048–49; Elkin-Koren, 'Can Formalities Save the Public Domain?' (n 44) 1552–54.

288 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 558.

289 ibid 558.

290 Alter (n 51) 946–50.

mistakes[291] – others obscure the point in their response. For example, Gibson rejects these concerns because they held true for much of pre-Berne copyright history, and yet creation still flourished;[292] this response is concerned with preserving *net creative output* for society's benefit, but overlooks the system's injustice towards *individual* under-informed authors who may find themselves unable to benefit from rights they are entitled to claim. Evaluating a registration system which would alter authors' default entitlements requires us to consider not only the net creativity impact on the public domain and users' interests, but the fairness of the impact on individual creators. Sprigman is similarly dismissive of 'unintentional noncompliance' fears – he argues, erroneously, that noncompliance proves the work's value is 'less than the cost of educating oneself about and complying with a particular formality', and, as a fallback, that mistaken noncompliance could be mitigated through user education.[293]

A similar, more pragmatic concern is that, even when authors are well-informed and capable of identifying works worth protecting, compliance may simply not be possible for certain authors. This comes down to compliance costs, whether financial or simply time and effort spent.[294] Greenberg expresses particular concern for independent authors who create multiple works per day, for whom registering each work may be unmanageable (especially if registration carries a cost);[295] Alter similarly recognises that registration could disproportionately harm creative projects with high-volume, small-

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291 Samuelson and others (n 3) 1185–86.

292 Gibson, 'Once and Future Copyright' (n 3) 225.

293 Sprigman, 'Reform(aliz)ing Copyright' (n 3) 517–18.

294 See eg Rosloff (n 3) 61; Alter (n 51) 943–44. Fagundes and Masur (n 95) 705–25 note high costs would systematically deter creation of 'low private value/high social value' works.

295 Greenberg (n 192) 1048–50. See also Ginsburg, 'The US Experience with Copyright Formalities' (n 11) 342–43; at 346, Ginsburg offers solutions to this particular worry.

scale contributions (Wikipedia, blog posts, photography shoots with thousands of images).[296]

Fortunately, the risk of opt-in formalities disadvantaging under-informed, non-commercial, or independent creators is significantly reduced by Copyright 3.0's structure. These objections are posed with an all-or-nothing opt-in system in mind; by reserving a substantial bundle of default rights to shield non-industry creators against commercial exploitation and loss of attribution, and narrowing the gap between the protection offered to registered and unregistered works,[297] Copyright 3.0 reduces vulnerable authors' risk exposure to a distinctly tolerable level. No author is left unprotected; at most, authors could miss out on the right to exclusive non-commercial use. Moreover, by designing formalities to be as low-burden as possible, Copyright 3.0 ensures opting in is accessible to all.

A broader pragmatic objection recognises that a system providing tailored bundles of rights in the CC style is inherently more complex, and thus carries greater costs, than a pure all-rights-reserved default system.[298] While this is true, the complexity costs are balanced by the benefits of aligning protection with authors' wishes *and* more closely with users' expectations (although this may not map on perfectly, as some authors may make surprising opt-in choices). When 'complexity facilitates a law that comports with common sense' – as Copyright 3.0 does, by better reflecting author and user expectations of works' permissions – complexity may actually secure a greater 'sense of

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296 Alter (n 51) 942.

297 Rosloff (n 3) 61–62.

298 Loren, 'The Pope's Copyright?' (n 163) 25–27.

fairness in the law and… a higher level of compliance with the law.'[299] This goes back to the claim that Copyright 3.0's default essentially matches a plagiarism standard, which users can easily comprehend and respect.[300]

One final objection addresses the message sent by constitutive opt-in formalities – Gervais and Renaud argue they only encourage the creation of 'valuable' commercial works and only support creators with the resources for compliance.[301] This appears to be a normative concern about what the state and copyright itself should encourage, and it aligns with my criticism that public domain expansionists fail to treat copyright as about more than securing profit. Fortunately, Copyright 3.0 again avoids this objection – by securing baseline moral rights and protection against commercial exploitation for every work, Copyright 3.0 affirms that value lies in all works and authors' connections with them, whereas economic relationships with works are only one *optional* dimension of copyright. Copyright 3.0 signals that authors' works are *theirs*, whether or not they commercially exploit them. Moreover, Copyright 3.0's explicitly low-burden formalities would ensure creators with fewer resources will not be excluded from the commercial dimension, in messaging or practice.

A survey of these objections reveals Copyright 3.0 is capable of meeting the criticisms levelled at its opt-in predecessors. Copyright 3.0 leaves no group of authors overburdened, whether by formalities or unwanted rights.

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299 ibid 25.

300 Text to n 241.

301 Gervais and Renaud (n 24) 1484–85. Greenberg (n 192) 1049 similarly objects to opt-in formalities because he assumes they *must* be burdensome, discouraging authors from entering the copyright system; this is only true if formalities are being used to filter out non-commercial works.

## 5.3 Why Formalities at All?

Since Copyright 3.0 is not Berne-compatible, necessitating major revision, the final consideration is whether better, non-formality solutions emerge when Berne's shackles are cast off. Various levers can be used to achieve copyright reform, among them introducing new defences and exceptions or altering copyright's scope.[302] Could these levers align copyright with authors' desires, avoiding the need for Copyright 3.0?

### 5.3.1 Defences and Exceptions

While some desirable online copying, sharing, and adaptation is covered by existing copyright defences (for example, EU quotation, news reporting, and parody, and US fair use[303]), no defence or combination of defences captures every use authors may wish to permit. In particular, non-transformative uses of entire works without commentary are hard to defend.[304] A new defence tailored to the problem would be necessary to provide a plausible alternative to Copyright 3.0.

This potential defence could be structured in several different ways, leveraging the work's or use's nature or the author's intentions; however, no formulation is truly satisfactory. Defences based on how users deal with the work can be quickly ruled out – a categorical exception for personal or non-commercial uses, or uses which do not harm owners' commercial interests, would fail to reflect authors' individual needs, instead

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302 Copyright defences and exceptions are currently restrained by the Berne 'three-step test' (art 9(2)). Berne does not impose a fixed originality standard, but does require copyright to cover 'every production in the literary, scientific and artistic domain' (art 2(1)) without any substantive conditions beyond originality.

303 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, arts 5(3)(c), 5(3)(d), 5(3)(k); 17 USC § 107.

304 See eg 17 USC § 107, factors one and three; Case C-476/17 *Pelham v Hutter* [2019] Bus LR 2159, paras 69–71.

enabling particular uses of *all* works. A defence based on the work's nature, permitting non-commercial uses of 'non-commercial' works, would also fail, regardless of how 'non-commercial' works are identified. Deeming fixed categories of works (eg social media posts, fanfiction, memes) 'non-commercial' would not only be *under*inclusive of works authors wish to make free,[305] but *over*inclusive of works within the designated categories which authors nevertheless intend to commercialise.[306] No work-type is inherently commercial or non-commercial. Unfortunately, a context-sensitive evaluation of whether particular works are non-commercial is also problematic. Even if the defence avoided conditioning permissible uses on undesirable aesthetic judgments about which works have commercial potential, relying more appropriately on the author's commercial intent or motivation,[307] commerciality does not map perfectly onto a need for exclusivity. The ultimate question must be whether the author intends the work to be *freely available*, rather than commercialised, recognising authors have interests in their works beyond their commercial value.

This leaves only one absurd option for the potential defence: that there is no infringement where a work is put to a use the author subjectively or objectively intends to be permissible. This defence faces significant disadvantages compared to Copyright 3.0. Firstly, defences in general are less user-friendly than formalities, as they are not an ex-ante guarantee of permissible conduct – users are only protected if a court agrees, ex-

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305 Many traditional work-types go both ways: software can be open-source, databases like Wikipedia can be free, and works like essays, short films, photographs, and audio recordings can be intended to be freely shared *or* exclusively marketed.

306 Greenberg (n 192) 1047–48 emphasises many online creators using social platforms *are* commercially motivated and only share their works because they are confident in copyright protection.

307 See eg Loren, 'The Pope's Copyright?' (n 163) 38–39, proposing to broaden fair use where works' authors lack commercial motivation.

post, with the user's inference about the author's intention, made without the benefit of a legal background. In contrast, the Copyright 3.0 default and register would provide a reliable ex-ante confirmation of the terms on which works are protected, allowing users to rely on the work's explicitly free status. By giving users confidence in the legality of their use before they act, Copyright 3.0 would produce a greater comparative reduction in the chilling effect than this defence.[308] Secondly, this defence requires users to ascertain the author's intention, leaving users' and authors' positions unchanged – informed authors will publish their works with a relevant expression of intent (where previously they would have used a permissive licence), while under-informed authors will fail to make their intention explicit, forcing users to seek individual permission or an expression of intent or else blindly risk infringement. This is unsatisfactory for uninformed authors who create content to be shared, as it puts the opt-out burden back on them to repeatedly offer permission or acquire the know-how to express their intent sufficiently for users to rely on the defence.[309] While this is a minor improvement from an opt-out solution in terms of accessibility to underinformed authors, since authors could conceivably express sufficient intent without specifically knowing about the defence, default protection that aligns with authors' wishes or even ex ante opt-outs are far better options.

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[308] Gibson, 'Risk Aversion' (n 150) 890–91 notes risk-averse copyright-conscious actors are unwilling to act in reliance on defences even when they have a decent case they apply, as litigation can halt projects and cause significant losses.

[309] Eg Gervais and Renaud (n 24) 1494–95 suggest a defence for use of works 'published under a "no-claim" license… that the licensee relied on… in good faith', but this *requires authors to attempt to license their works* to secure the defence for users.

### 5.3.2 Copyright's Scope

The second alternative to consider would be altering copyright's scope, narrowing either its subject matter or its standards, to better reflect the works authors wish to keep free; unfortunately, this is also unhelpful. The works users desire to make free do not come in one medium, size, or level of quality or originality. Any attempt to approximate authors' wishes via fixed categories or standards will be less accurate than a system that simply *asks* authors what they intend, to authors' and users' detriment.

A blanket rule excluding certain types of work as inappropriate subject matter for copyright entirely would be undesirable for the same reason that a defence relying on fixed categories of works would fail – it would be both overinclusive and underinclusive of the works authors wish to keep free. Moreover, unless copyright were modified to provide Copyright 3.0's default protection to *all* work-types, reserving all-rights-reserved protection to 'valid' work-types, such a rule would put authors in a worse position than the Copyright 3.0 proposal – if they produced works falling outside the approved categories, they would receive *no* protection. Raising the originality standard to exclude low-effort works, like 200-character tweets and memes, would be similarly problematic – certain works authors might wish to protect, like professional photographs, would fall short of copyright-eligibility if the originality threshold were high, while copyright-averse high-effort, highly original works like open software, TikTok videos, and original fanworks would be fully protected. Finally, a commercial intent threshold, similar to Loren's proposal to tailor the scope of works' protection depending on authors'

*motivation* for creation rather than their *desire* for protection, is unattractive.[310] Limiting rights' scope to what authors *need* in order to be incentivised to create rather than what they *want* for their works, centring utilitarian copyright, is not a solution to *this* problem.

As with defences, the only copyright-eligibility standard that could accurately reflect authors' wishes, addressing the problem, would be one limiting copyright's subsistence to works authors subjectively or objectively intend to protect. This collapses into opt-in copyright – unless copyright's subsistence is left fully ambiguous until a court determines the author's intent, creating complete chaos, this standard would require implementing formality-like mechanisms for authors to signal their intent.

This is not to say copyright's subject matter and standards do not need to be revised and clarified,[311] but that doing so cannot satisfactorily match protection to authors' desires. Revising copyright's scope would challenge, from a *social* perspective, what merits copyright, rather than taking copyright as-is and securing authors' desired rights within that range. Addressing copyright's misalignment with authors' desires and expectations ultimately requires some form of constitutive opt-in formality, and Copyright 3.0 is the best option.

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310 Loren, 'The Pope's Copyright?' (n 163) 34–41. Loren (34–35) specifies protection would be narrowed even for works which *could* be commercialised, but 'would be created and sufficiently distributed in the absence of strong copyright protection'.

311 R Anthony Reese, 'What Should Copyright Protect?' in Rebecca Giblin and Kimberlee Weatherall (eds), *What If We Could Reimagine Copyright?* (ANU Press 2017) argues they do, and explores what an ideal copyright's subject matter and standards would look like.

# 6 CONCLUSION

As norms surrounding content use and creation change in the digital environment, copyright must adapt to keep pace. Copyright's all-rights-reserved default, which imposes counterintuitive rights that run against certain authors' interests and slowly undermine copyright's utility, is not sustainable – authors must be given control over their works' availability, not merely in theory but in a reasonable and accessible manner. A bifurcated opt-in registration system is uniquely capable of addressing and balancing the needs of both traditional commercial creators and copyright-averse creators, without unfairly jeopardising or burdening either group's access to copyright entitlements. While the proposed system would be a radical change, redefining copyright's relationship to the default user and requiring a politically-challenging revision of the Berne Convention, it would also be a smart one. Copyright 3.0's plagiarism-like default rules not only meet casual creators' needs, but form an intuitive standard for users and authors alike that would make copyright appear rational and relevant. Moreover, Copyright 3.0 is able to overcome formality-skeptics' main concerns and objections, while still providing an effective mechanism for meeting *all* authors' needs. Given that Copyright 3.0 is not only the strongest response to copyright's misalignment with authors' needs, but perhaps the only viable solution, overcoming Berne's no-formality rule must be made a priority if copyright is to remain credible and capable of supporting authors in the twenty-first century.

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