

## MAKING COPYRIGHT WORK FOR CREATIVE UPSTARTS

*Sean Pager\**

### INTRODUCTION

Imagine you are a singer in a rock band. You are working hard to make a living, playing gigs, and waiting for that big break. Then one day, you are listening to the radio, and you are thrilled to hear one of your songs being played. Your excitement turns abruptly into anger, as you realize that your song is being played as part of a car commercial. You never approved this. So, you call up the car dealership to protest and demand that they pay you. But they brush you off, saying you should be grateful to get free publicity for your music.

What to do? You cannot afford a lawyer, and even if you could, the cost of litigating this case in federal court dwarfs any license fee you might recover in damages.<sup>1</sup> You never registered your copyrights in the song, so you are not eligible for statutory damages or attorney fees.<sup>2</sup> And you cannot file a claim in state small claims court because copyright cases are subject to exclusive federal jurisdiction.<sup>3</sup> Frustrated at your lack of recourse, you decide to quit music and go to law school instead.<sup>4</sup>

The point of this simple story is that the standard theory of copyright incentives comes with an Achilles heel. This theory justifies giving exclusive rights to authors because doing so will encourage them to create and

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\* J.D. 1998, U.C. Berkeley Boalt Hall School of Law; A.B. 1989, Harvard University; LL.M. 2002, European University Institute. This project benefited from presentations at the 2014 Intellectual Property Law Scholars Conference at U.C. Berkeley and the Center for the Protection of Intellectual Property's Fall 2014 Conference, "Common Ground: How Intellectual Property Unites Creators and Innovators" at George Mason University. I am especially grateful for comments provided by Guy Rub, Eric Priest, Peter Menell, and Sandra Aistars.

<sup>1</sup> See John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L. J. 1399, 1410-11 (2009) (estimating the cost of litigating a "relatively small" copyright infringement case at over \$300,000).

<sup>2</sup> See 17 U.S.C. §§ 412, 505 (2012).

<sup>3</sup> See 28 U.S.C. § 1338 (2012).

<sup>4</sup> For a real-life anecdote of a musician who left to go to law school in part due to piracy of his music, see Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age* (UC Berkeley Public Law Research Paper No. 2347674, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347674](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347674); see also Alex Wild, *Bugging Out: How Rampant Online Piracy Squashed One Insect Photographer*, ARS TECHNICA (Sept. 24, 2014), <http://arstechnica.com/tech-policy/2014/09/one-mans-endless-hopeless-struggle-to-protect-his-copyrighted-images/2/> (presenting a similar story told by an insect photographer).

commercialize original works of authorship that benefit society at large. However, rights, by themselves, are not self-executing. If authors lack the capacity to make use of their intellectual property rights, then the rights may not accomplish their intended goals.<sup>5</sup>

The problem is that, by design or default, the copyright system has grown into an edifice of daunting complexity. Such complexity caters to sophisticated operators while systematically disadvantaging those who lack information and resources. For those in the disadvantaged camp, transaction costs, rather than substantive rights, often dictate outcomes.

This Essay argues that policymakers should take capacity constraints affecting authors more seriously in shaping copyright policy. The digital age has ushered in a new breed of creative upstarts who depend on copyright law to make a living, but lack the knowledge and capabilities to navigate the copyright system effectively. Creative upstarts are a diverse group who may include self-published authors, independent filmmakers, musicians, graphic artists, photographers, mobile app designers, as well as creative entrepreneurs in many other niches.<sup>6</sup> In failing to take their needs into account, the copyright system poorly serves an important constituency in ways that undermine the fundamental goals of copyright law.

Looking at copyright through a creative upstart lens affords a novel perspective on copyright policy. Whereas copyright policy debates are increasingly polarized between actors with starkly dichotomous positions, creative upstarts often present a more nuanced set of interests.<sup>7</sup> Moreover, their perspectives highlight issues that mainstream debate often ignores.<sup>8</sup> Concerns over the scope of substantive rights recede in importance, while questions of procedure, institutional design, and real-world practice loom large.<sup>9</sup> Such issues have been under-examined in recent scholarship.<sup>10</sup> This Essay serves as a partial corrective.

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<sup>5</sup> See Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 LOUISVILLE L. REV. 911, 913 (2010) (noting that “[j]ust as a right without a remedy is empty . . . a right without enforcement procedures can have little value” (footnote omitted)).

<sup>6</sup> This Essay uses “creative upstarts” as a catch-all term to encompass independent creators and producers who (a) are commercially-motivated; (b) operate largely outside the rubric of the mainstream commercial content industries; and (c) therefore lack the kind of copyright-related knowledge, resources, and capabilities that mainstream players take for granted. See *infra* notes 93-96 and accompanying text (giving further examples).

<sup>7</sup> See Sean A. Pager, *Cultivating Capabilities for Creative Industry Upstarts*, 21 MICH. ST. INT’L L. REV. 547, 549 (2013) (noting that as both producers and consumers of creative content, creative upstarts have an interest in achieving a workable balance between these opposing interests).

<sup>8</sup> See, e.g., ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES*, at xiv (2010) (arguing that authors value cultural integrity and attribution over economic interests); JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 145-46 (2015) (same).

<sup>9</sup> See *infra* Part IV.B.

With Congress's much-ballyhooed "comprehensive review" underway<sup>11</sup> and a forthcoming Restatement of Copyright in the works, copyright reform is very much in the air.<sup>12</sup> Focusing attention on the needs of creative upstarts is therefore timely. Creative upstarts epitomize the kind of creative innovation that copyright law is supposed to foster.<sup>13</sup> Reforming copyright to better serve their interests would go a long way toward realizing the constitutional mission statement of "promot[ing] the Progress of Science and useful Arts."<sup>14</sup>

The ensuing argument is structured as follows. Part I describes how the complex nature of the copyright system can be difficult for creative upstarts to navigate. Part II explains how many features of the copyright system disadvantage upstart artists. Part III situates the normative interests of creative upstarts within debates over digital disintermediation and argues that upstart creators fill an important niche in our cultural ecosystem. Part IV offers some practical suggestions for procedural and substantive reforms, and points to the potential for technology to level the playing field. This Essay concludes by linking the plight of creative upstarts to the larger legitimacy crisis confronting copyright law.

## I. DAUNTING COMPLEXITY

On its face, copyright law is simple: creators of original works enjoy protection against unauthorized copying. Unlike patents, which one must apply for specifically and which must undergo expensive and onerous sub-

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<sup>10</sup> Nathenson, *supra* note 5, at 914 (observing that procedural and institutional aspects of copyright law have often been neglected by IP scholars); Tehrani, *supra* note 1, at 1402 (noting scholarly bias toward substantive copyright doctrine over procedural aspects such as registration).

<sup>11</sup> See Press Release, House Judiciary Comm., Chairman Goodlatte Announces Comprehensive Review of Copyright Law (April 24, 2013), <http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw>. Congress is not the only federal branch of government engaged in a review of copyright: the Patent & Trademark Office has undertaken its own comprehensive review of digital copyright issues. See DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 3 (2013), available at <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>. Moreover, the Copyright Office has been just as active. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315, 321-22 (2013) (detailing the many studies, hearings, policy recommendations, and reports undertaken by the Copyright Office in recent years).

<sup>12</sup> See Press Release, Am. Law Inst., The American Law Institute Announces Four New Projects (Nov. 17, 2014), <http://www.ali.org/email/pr-14-11-17.html>.

<sup>13</sup> See *infra* note 84 and accompanying text.

<sup>14</sup> See U.S. CONST., art. I, § 8, cl. 8 (authorizing Congress to promote innovation by "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

stantive review,<sup>15</sup> copyright protection becomes effective automatically upon fixation of the work. No formalities or payment is required.<sup>16</sup> Moreover, the threshold hurdle of originality is set extremely low.<sup>17</sup> As such, copyright law potentially confers its protection on a broad range of creative expression.

Yet, such undemanding formal entry requirements mask the reality of a copyright system that is far from welcoming to the uninitiated.<sup>18</sup> First, the law itself is technically complex. As Justice Story long ago recognized, grasping intellectual property law entails entry into an almost metaphysical realm in which intangible concepts are reified as enforceable rights based on distinctions that are “very subtle and refined, and, sometimes, almost evanescent.”<sup>19</sup> Such conceptual hurdles are exacerbated by a statute whose provisions are widely viewed as both overlong and unduly complicated.<sup>20</sup> Such flawed drafting reflect a series of incremental accretions, often forged through backroom deals between industry lawyers and lobbyists and written in a secret code whose true meaning may be apparent to only a handful of insiders.<sup>21</sup> The result is a Copyright Act laden with hyper-technical language that is all but impossible for ordinary persons to decipher.<sup>22</sup>

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<sup>15</sup> See Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. UNIV. INT’L L. REV. 223, 240 (2012).

<sup>16</sup> Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175, 1198 (2010).

<sup>17</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

<sup>18</sup> See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 25 (2010) (“The current copyright statute . . . instantiates a copyright system that places daunting obstacles in front of creators who seek to author works and convey them to audiences.”).

<sup>19</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (“Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law . . .”).

<sup>20</sup> Litman, *supra* note 18, at 25; Pallante, *supra* note 11, at 338-39 (noting that “[w]hen the Copyright Act was enacted, it contained seventy-three sections, and the entire statute was fifty-seven pages long. Today, it contains 137 sections and is 280 pages long, nearly five times the size of the original”); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 770 (2013) (book review).

<sup>21</sup> Litman, *supra* note 18, at 3 (describing role played by industry lobbyists in drafting both the 1976 Copyright Act and a series of subsequent amendments, employing detailed, context-specific provisions “tailor[ed] . . . to the quirks and caprice of affected interests” that have resulted in “a swollen, barnacle-encrusted collection of incomprehensible prose”).

<sup>22</sup> *Id.* at 34 (describing “statutory sections so complex that even copyright experts claim not to understand them”) (citing 17 U.S.C. § 114); Pallante, *supra* note 11, at 323 (criticizing Copyright Act for requiring “an army of lawyers to understand [its] basic precepts”); *id.* at 339 (quoting former Copyright Register Marybeth Peters’s observation that the current “copyright law reads like the tax code, and there are sections that are incomprehensible to most people and difficult to me” (internal quotations omitted) (quoting Rob Pegoraro, *Debating the Future of Music*, WASH. POST (Sept. 18, 2007), [http://voices.washingtonpost.com/fasterforward/2007.09/debating\\_the\\_future\\_of\\_music.html](http://voices.washingtonpost.com/fasterforward/2007.09/debating_the_future_of_music.html))).

The Act is also full of traps for the unwary.<sup>23</sup> Sections of the Act that purport to resolve basic questions often fail to reference key provisions elsewhere that can lead to a diametrically opposite outcome.<sup>24</sup> Moreover, reading the statute is only the beginning. Many crucial aspects of copyright law remain governed by common law doctrines developed in case law that go well beyond the literal terms of the statute.<sup>25</sup>

Such layered complexity makes it extremely difficult for authors to ascertain their legal rights and to avoid trespassing on the rights of others.<sup>26</sup> Determining what aspects of a work are protected by copyright and how far such protection extends often requires a lengthy analysis of statutory provisions and case law. Even then, key copyright doctrines such as the idea-expression dichotomy and the fair use defense entail highly contextualized, policy-driven analyses whose outcomes are notoriously hard to predict.<sup>27</sup> Even answering more basic questions such as who is an author<sup>28</sup> or whether a work is still covered by copyright<sup>29</sup> can prove a daunting exercise.

The Copyright Act also fails to address the technological challenges of the modern age. It is “the outmoded work product of a mindset dating back to the 1950s.”<sup>30</sup> Provisions that made sense in an analog world translate

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<sup>23</sup> Litman, *supra* note 18, at 33 (“The copyright law is long, complex, counterintuitive and packed with traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors” (citing 17 U.S.C. §§ 112, 203, 304, 1008)).

<sup>24</sup> Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 458-61 (2014) (offering example of misleading work-for-hire provision in section 201 of the Copyright Act).

<sup>25</sup> See Samuelson, *supra* note 20, at 770-78 (surveying wide array of copyright issues governed predominantly by common law standards set through case-by-case adjudication including originality, authorship, fair use, statutory damages, and injunctive relief).

<sup>26</sup> Bartow, *supra* note 24, at 457-58 (“Copyrights are really complicated. . . . Even fairly astute and proactive people can have a difficult time comprehending the complexities of various copyright doctrines”).

<sup>27</sup> See *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (calling the fair use doctrine “the most troublesome in the whole law of copyright”); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (commenting on idea-expression that prior decisions cannot help much in a new case and that “[n]obody has ever been able to fix that boundary, and nobody ever can”).

<sup>28</sup> The Copyright Act contains two different work-for-hire rules by which employers and commissioning parties can become the legal authors of works they did not create; neither rule is a model of clarity. See Bartow, *supra* note 24, at 458-59 (exploring subtleties of work-made-for-hire doctrine). Collaborations between multiple authors can give rise to joint authorship under certain circumstances. However, the scope of the joint author rule is just as murky and contested, especially in the recording industry. See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y U.S. 387, 404 (2001) (noting that in addition to featured artists, “[p]roducers, backup musicians, sound engineers, and others” may have a claim to joint author status for a musical sound recording).

<sup>29</sup> *About Us*, LIMITED TIMES, <http://www.limitedtimes.com/#!about/c1n8o> (last visited Apr. 16, 2015) (explaining complex calculus governing copyright duration).

<sup>30</sup> Samuelson, *supra* note 20, at 770.

poorly in an age of digital media.<sup>31</sup> Categories of authorship struggle to cope with the fluidity by which digitally networked works are created.<sup>32</sup> Creators engaged in digital innovation must negotiate “multiple and sometimes inconsistent demands” from preexisting right-holders.<sup>33</sup> As technologies and business models continue to evolve, uncertainty surrounding the interpretation of key provisions of the Act exacts a continuing toll.<sup>34</sup>

Such uncertainty leaves upstart artists exposed to potentially crushing liability. Freedom to operate with peace of mind can remain elusive, even with the assistance of counsel.<sup>35</sup> Moreover, even those with an appetite for risk may find themselves preemptively shut down by the culture of risk aversion built into the copyright system.<sup>36</sup>

This latter point brings up a much broader set of concerns: the formal law of copyright itself functions within a complex system of procedures and institutions that can be just as unwelcoming to the uninitiated and under-resourced. For example, the musician hypothetical that opened this Essay highlighted the importance of timely registration for enforcement purposes: had our budding musician registered his music, he would have been eligible for enhanced damages that might have led to a different outcome.<sup>37</sup>

Given the advantages of registration, one may wonder why any musician would *not* register his work. Yet, any number of explanations suggest

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<sup>31</sup> See, e.g., Litman, *supra* note 18, at 42 (noting that “the distinctions among different exclusive copyright rights have come to seem increasingly inapposite to a networked digital world. When someone views a website or listens to a song over the Internet, is she committing a reproduction, a distribution, a performance or display, or all of them at once?”).

<sup>32</sup> Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 268-70 (1996).

<sup>33</sup> Litman, *supra* note 18, at 20, 42 n.188 (providing example of conflicting claims by both PROs and music publishers to rights in cellphone ringtones); see also Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 601 (2010) (noting difficulties obtaining permission to use divided copyrights when a single use implicates several owners’ rights).

<sup>34</sup> For example, Copyright Office registration procedures vary according to whether or not a work has been published. However, the Copyright Office notes that “[t]he definition of publication in the U.S. copyright law does not specifically address online transmission. The Copyright Office therefore asks applicants [themselves] . . . to determine” the status of online publications. *Copyright Registration of Photographs*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/fls/fl107.html> (last visited Apr. 16, 2015).

<sup>35</sup> See Litman, *supra* note 18, at 20 (“Failing to cross all the t’s and dot the right i’s, even with the assistance of counsel, is a good way to find your business sued into bankruptcy.”). What is worse, upstart creators who lack the foresight/sophistication to incorporate can find themselves personally exposed to a damage award for infringement.

<sup>36</sup> For example, in order to get a film distributed and obtain Errors & Omissions insurance, filmmakers must assemble “a chain of title” that, in addition to clarifying ownership of the work, documents clearance of all copyrighted inputs, as well as trademark and personality/publicity rights. Relying on murky claims of fair use will generally get you nowhere. See PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 97 (2011); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L. J. 882, 890-94 (2007).

<sup>37</sup> See *infra* note 51 and accompanying text.

themselves. Many creative artists do not know the importance of registering their work. Some mistakenly believe that they need to hire a lawyer to file the registration. Others may be deterred by the burden of filing formal paperwork that requires careful judgment and attention to technical details,<sup>38</sup> or they may simply be preoccupied with other matters. Cost can also be a factor for some.<sup>39</sup>

In any case, registering one's works with the Copyright Office is only the first step. Private registries must be considered as well. For example, the hypothetical budding musician would probably want to register his musical compositions with a performing rights organization, such as the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), or the Society of European Stage Authors and Composers ("SESAC"), and license mechanical (cover) rights through Harry Fox. In the case of ASCAP and SESAC (but not BMI), a self-published musician needs to register as a publisher as well as a songwriter, and pay two separate fees, to get his full share of royalties.<sup>40</sup> He would also want to register his sound recordings with SoundExchange.<sup>41</sup> Musicians not only need to know these things, but also need to understand the complex manner in which music rights have been parsed in order to determine which rights belong with which organization.<sup>42</sup> Many fail to take these steps. Sound Exchange in recent years has been sitting on over \$31 million of royalties that

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<sup>38</sup> See Nathenson, *supra* note 5, at 924 (noting "the registration form requires careful judgment on matters that may lack clear answers"). The Copyright Office has made some effort to make the registration less onerous: redesigning its forms to make them "more user-friendly," providing explanatory material, and offering an online registration option. *Id.* Yet, the process can still be daunting to those unversed in the niceties of the copyright. For example, our budding musician would have to understand the difference between sound recording rights and composition rights and realize that he needs to apply for two separate copyrights. If some or all of the works are the product of joint authorship (which is common in a rock band), then figuring out who is the author of which works requires parsing the definition of joint authorship, which is hardly a model of clarity. See *supra* note 36 and accompanying text. Grappling with such technical questions forces creative artists out of their comfort zones and may deter some from even trying.

<sup>39</sup> See Tehranian, *supra* note 1, at 1448.

<sup>40</sup> See *Join ASCAP FAQs*, AM. SOC'Y COMPOSERS, AUTHORS, & PUBLISHERS, [http://www.ascap.com/about/join/ascap\\_faqs.aspx](http://www.ascap.com/about/join/ascap_faqs.aspx) (last visited Feb. 13, 2015); *Royalty Distribution Schedule*, SESAC, <http://www.sesac.com/WritersPublishers/HowWePay/generalInfo.aspx> (last visited Feb. 1, 2015).

<sup>41</sup> SOUNDEXCHANGE, <http://www.soundexchange.com/artist-copyright-owner/independent-music-community/> (last visited Feb. 10, 2015).

<sup>42</sup> Authors and artists working in other genres have their own set of private registries to consider. For example, screenwriters can register scripts with the Writers Guild of America, West. Tehranian, *supra* note 1, at 1449-51. Photographers have their own specialized registries. See, e.g., *About, PHOTOGRAPHER REGISTRY*, <http://www.photographerregistry.com/about.html> (last visited Jan. 31, 2015).

have gone unclaimed.<sup>43</sup> And whether or not the musician chooses to post his music on YouTube, he would probably want to register with Content ID regardless, in case someone else uploads it.<sup>44</sup>

It also pays for the musician to periodically monitor these registries himself to make sure no one is trying to shoehorn in on his rights. Neither the Copyright Office nor private registries undertake much in the way of safeguards against fraudulent registrations.<sup>45</sup> The onus remains on authors and artists to protect their own interests. Trying to make sense of this alphabet soup of public and private registries imposes administrative burdens that distract creators from their primary focus on creating new works. All these difficulties arise even before one gets to distribution, where managing online rights introduces yet a further layer of complexity.<sup>46</sup>

Independent authors and artists are ill suited to navigate such a complex regime. Indeed, many creative upstarts lack even a basic awareness of how the copyright system works. The prevalence of popular myths, outdated information, and misguided beliefs about copyright among the lay public leads many creators astray.<sup>47</sup> Yet, seeking advice from legal counsel can be prohibitively expensive.<sup>48</sup> As a result, creative upstarts often fail to take even basic steps to secure their rights, and thereby miss out on the copyright system's promised rewards.

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<sup>43</sup> See Alex Pham, *More Than 50,000 Musicians Have Money Waiting Unclaimed*, L.A. TIMES (Aug. 15, 2012), <http://articles.latimes.com/2012/aug/15/entertainment/la-et-ms-more-than-50000-musicians-have-money-waiting-unclaimed-20120815>.

<sup>44</sup> Branwen Buckley, Note, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235, 262-64 (2008); Brian Stelter, *Some Media Companies Choose to Profit from Pirated YouTube Clips*, N.Y. TIMES (Aug. 16, 2008), <http://www.nytimes.com/2008/08/16/technology/16tube.html>; *How Content ID Works*, GOOGLE, [https://support.google.com/youtube/answer/2797370?hl=en&ref\\_topic=2778544](https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=2778544) (last visited Feb. 28, 2015).

<sup>45</sup> Chris Daly, *YouTube Copyrightpocalypse*, THE CHRISD (Dec. 17, 2013, 10:55:50 PM), <http://www.thechrisd.com/blog/2013/12/17/youtube-copyrightpocalypse>; Patrick McKay, *YouTube Copyfraud & Abuse of the Content ID System*, FAIRUSE.TUBE.ORG, <http://fairusetube.org/youtube-copyfraud> (last visited Jan. 31, 2015); Larry Rohter, *For a Classic Motown Song About Money, Credit Is What He Wants*, N.Y. TIMES (Aug. 31, 2013), <http://www.nytimes.com/2013/09/01/arts/music/for-a-classic-motown-song-about-money-credit-is-what-he-wants.html>.

<sup>46</sup> There are a many different online distribution platforms to consider—YouTube, Spotify, iTunes, Pandora, to name just a few—and they each employ different licensing models. Some license directly from artists; some work only through aggregators. See generally Sarit Bruno, *How to Distribute Your Digital Music*, EZINE ARTICLES (Nov. 9, 2009), <http://ezinearticles.com/?How-to-Distribute-Your-Digital-Music&id=3233141>; Kristin Thomson, *Music and How the Money Flows*, FUTURE MUSIC COALITION (Mar. 10, 2015), <https://futureofmusic.org/article/article/music-and-how-money-flows>.

<sup>47</sup> See Bartow, *supra* note 24, at 457-58.

<sup>48</sup> Lesley Ellen Harris, *Affordable Copyright Advice*, 17 COPYRIGHT & NEW MEDIA L. NEWSL., no. 4, 2013, at 5, 5; see generally Carol J. Williams, *Another Sign of Tough Times: Legal Aid for the Middle Class*, L.A. TIMES (Mar. 10, 2009), <http://articles.latimes.com/2009/mar/10/local/me-legal-aid10>.

## II. DISCRIMINATORY RULES AND INSTITUTIONS

Creative upstarts are disadvantaged in other ways that go beyond administrative complexity. Other aspects of the copyright system discriminate against small creators. Such problems cut across both public and private institutions. For example, the musician hypothetical above highlighted an enforcement failure: the high cost of litigating copyright cases in federal court disadvantages under-resourced creators.<sup>49</sup> Lacking an affordable mechanism to enforce his rights, the budding musician was obliged to acquiesce even in the face of blatant and willful copyright infringement.<sup>50</sup>

The hypothetical also pointed to the importance of timely registration. Had the musician registered his copyright to his misappropriated music ahead of time, he would have been eligible for statutory damages and potentially attorney fees as well. The availability of such enhanced remedies fundamentally alters the litigation calculus, putting the claimant in a much more favorable position.<sup>51</sup> In this way, a procedural requirement—timely registration—often proves outcome determinative.<sup>52</sup>

Yet, here too, lack of resources can play a role. There are many reasons why creative upstarts do not register their work. But cost can certainly be a factor. On its face, the fees for registering a copyright seem modest: \$35 online for a simple copyright and \$55 for a standard work (which includes any jointly authored work or work-made-for-hire).<sup>53</sup> For proverbial “starving artists,” however, these fees can add up quickly.<sup>54</sup> Particularly, for graphic artists and photographers, who typically create and transact in large numbers of individual works, the cumulative costs of registering one’s work as a matter of routine can quickly become prohibitive.<sup>55</sup>

The burden of registration requirements—and the drastic implications of failing to comply—thus falls disproportionately on creative upstarts. Professor John Tehranian writes of a “hierarchy of care” that privileges the

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<sup>49</sup> See Samuelson et al., *supra* note 16, at 1208 (noting that the cost of litigating copyright claims in federal courts effectively puts such enforcement out of reach for creative upstarts).

<sup>50</sup> Cf. Wild, *supra* note 4 (providing analogous perspective of photographer struggling against online piracy).

<sup>51</sup> See Tehranian, *supra* note 1, at 1410-13 (explaining how without the availability of enhanced damages, litigation frequently “makes no economic sense,” and how their absence enables a defendant to “thumb its nose at claims of infringement” with impunity).

<sup>52</sup> *Id.* at 1412.

<sup>53</sup> Fees, U.S. COPYRIGHT OFF., <http://www.copyright.gov/docs/fees.html> (last visited Jan. 31, 2015). The Copyright Office allows limited leeway for bulk registrations of collected works. A single application can generally claim multiple works for a single fee when they are all created by the same set of authors during a unitary time period.

<sup>54</sup> Keep in mind that musicians typically have to register two different copyrights for each song—one for the musical composition, the other for the sound recording—although in some circumstances a single registration will suffice.

<sup>55</sup> Tehranian, *supra* note 1, at 1448.

works of powerful media corporations and established authors “at the expense of smaller, less sophisticated creators.”<sup>56</sup> The former wield the leverage provided by enhanced remedies to compel favorable outcomes, while simultaneously “laugh[ing] in the face of less sophisticated players who lodge infringement claims against them.”<sup>57</sup>

Adding insult to injury, the Copyright Office registry fails to provide its promised benefits as an easily searchable repository of copyright information.<sup>58</sup> Not only are the records alarmingly incomplete and catalogued in an unhelpful manner,<sup>59</sup> but the Office’s online database also falls well short of the functionality that one would expect from a state-of-the-art data management system.<sup>60</sup> Lack of easily searchable registration information increases the cost of clearing copyrights, a burden that, once again, falls disproportionately on creative upstarts.<sup>61</sup>

Clearing copyrights can be an expensive and time-consuming task, even apart from registration deficiencies.<sup>62</sup> Here too, copyright upstarts are at a disadvantage compared to their Big Media counterparts, who can work through established ties with other industries and proffer a large repertoire of copyrighted works to encourage reciprocal licensing.<sup>63</sup> By contrast, those who attempt to license works outside of conventional markets or uses can face insuperable obstacles.<sup>64</sup>

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<sup>56</sup> *Id.* at 1403.

<sup>57</sup> *Id.* at 1411.

<sup>58</sup> *Id.* at 1428.

<sup>59</sup> *See id.* at 1428-35 (cataloguing multiple dimensions in which the Copyright Office record-keeping falls short; to mention but one example here: registrations of collective works do not typically contain the titles of individual works within the collection, even though they are subject to a separate copyright). Not only is the information incomplete, but the available information can “lead you to the wrong conclusion.” *Id.* at 1432 (giving the example of the iconic Che Guevara photo whose copyrighted status is far from apparent based on the registration records).

<sup>60</sup> Samuelson et al., *supra* note 16, at 1203; Tehranian, *supra* note 1, at 1429-31 (noting that online records are not available for works registered prior to 1978 and that the online database is limited to text-based records).

<sup>61</sup> “Clearing copyrights” is a term of art that describes the process of determining the copyright status of preexisting creative content incorporated in a new work, tracking down the owners of the rights, and obtaining licenses, where required, prior to commercialization.

<sup>62</sup> Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEG. ANALYSIS 1, 4 (2013). Works such as documentary films that incorporate large numbers of copyrighted source materials can be especially challenging to clear. *See id.* at 10 (describing how clearance for fourteen-part Civil Rights documentary, *Eyes on the Prize*, cost “approximately one million dollars and nearly two decades of detective and negotiation work”).

<sup>63</sup> Litman, *supra* note 18, at 19-20.

<sup>64</sup> *Id.* at 20 (noting that rights fragmentation can “subject[ ] would-be licensees to multiple and sometimes inconsistent demands”); *see also* Heritiana Ranaivoson et al., *The Costs of Licensing for Online Music Services: An Exploratory Analysis for European Services*, 21 MICH. ST. INT’L L. REV. 665, 685 (2013) (empirical study documenting how the burden of licensing online music rights in the European market falls disproportionately on innovative start-up businesses).

Such disparate treatment of creative upstarts in the private sector continues when it comes to commercialization and enforcement. For example, YouTube and Spotify are widely believed to pay more favorable rates to major labels and established stars.<sup>65</sup> In addition, YouTube offers Big Media companies privileged technological access that allows the latter to conduct automated notice-and-take-down procedures through its “trusted sender” facility.<sup>66</sup> By contrast, independent artists have to send notices manually—an endless, time-consuming task of Sisyphean frustration.<sup>67</sup>

Major content owners have also partnered with leading internet service providers (“ISPs”) to implement a graduated response regime whereby internet users who engage in illegal file sharing receive a series of progressively sterner warnings, culminating in possible sanctions.<sup>68</sup> This private-ordering enforcement regime was created, in large part, due to government pressure; moreover, in other countries, the government has operated graduated response regimes directly.<sup>69</sup> Yet, participation in the U.S. Copyright

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<sup>65</sup> Stuart Dredge & Dominic Rushe, *YouTube to Block Indie Labels Who Don't Sign Up to New Music Service*, GUARDIAN (June 17, 2014), <http://www.theguardian.com/technology/2014/jun/17/youtube-indie-labels-music-subscription>; Tim Ingham, *Nigel Godrich: Major Labels Did “Secret Deals with Spotify”*, *Leaving Small Labels with “Pittance”*, MUSIC WEEK (Jul. 15, 2013), <http://www.musicweek.com/news/read/nigel-godrich-major-labels-did-secret-deals-with-spotify-giving-small-labels-pittance/055395>; Scott Timberg, *It's Not Just David Byrne and Radiohead: Spotify, Pandora and How Streaming Music Kills Jazz and Classical*, SALON (July 20, 2014), [http://www.salon.com/2014/07/20/its\\_not\\_just\\_david\\_byrne\\_and\\_radiohead\\_spotify\\_pandora\\_and\\_how\\_streaming\\_music\\_kills\\_jazz\\_and\\_classical/](http://www.salon.com/2014/07/20/its_not_just_david_byrne_and_radiohead_spotify_pandora_and_how_streaming_music_kills_jazz_and_classical/). Such discriminatory patterns extend to other licensing contexts as well. See Menell, *supra* note 4, at 260; Mike Isaac, *Disney Inks YouTube Content Deal to Lure New Audiences*, WIRED (Nov. 7, 2011), <http://www.wired.com/business/2011/11/disney-youtube-content-deal/> (describing cross promotion deal between Disney and YouTube); see also Edward Jay Epstein, *Hollywood's Profits, Demystified: The Real El Dorado is TV*, SLATE (Aug. 8, 2005), [http://www.slate.com/articles/arts/the\\_hollywood\\_economist/2005/08/hollywoods\\_profits\\_demystified.html](http://www.slate.com/articles/arts/the_hollywood_economist/2005/08/hollywoods_profits_demystified.html) (explaining how studio majors exploit corporate affiliations to obtain privileged TV distribution deals).

<sup>66</sup> See Annemarie Bridy, *Graduated Response American Style: “Six Strikes” Measured Against Five Norms*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 5 & n.11 (2012) (describing private enforcement deal cut between Big Content rights holders and leading ISP services); Keith Regan, *YouTube Scores Licensing Deal with NBA*, E-COMMERCE TIMES (Feb. 27, 2007), <http://www.ecommercetimes.com/story/55996.html> (describing private enforcement deals with YouTube).

<sup>67</sup> See Section 512 of Title 17: *Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary* 113th Cong. (2014) (statement of Maria Schneider, Bd. of Governors, N.Y. Chapter of The Recording Academy), available at [http://judiciary.house.gov/\\_cache/files/7aa84910-171e-4f3e-82fc-b2cef9a43c3e/031314-testimony---schneider.pdf](http://judiciary.house.gov/_cache/files/7aa84910-171e-4f3e-82fc-b2cef9a43c3e/031314-testimony---schneider.pdf) (describing “frustrating and depressing process” of removing music from websites); Menell, *supra* note 4, at 255-56 (describing filmmaker’s frustrations at playing “whack-a-mole” against infringing copies of her movie that repeatedly pop up on content-hosting websites).

<sup>68</sup> Bridy, *supra* note 66, at 31-33.

<sup>69</sup> See *id.* at 4-5, 13.

Alert System has been restricted to a select group of content industry insiders.<sup>70</sup> Creative upstarts are, once again, left out in the cold.

In theory, collective rights management could mitigate such discriminatory effects and empower independent artists by overcoming many of the transaction costs associated with navigating the copyright system. A new breed of digital rights intermediaries who cater to creative upstarts does function, at least in part, to realize this promise.<sup>71</sup> Yet, established collective rights organizations are just as often part of the problem. Discrimination by performing rights organizations (“PROs”) is subtler than elsewhere, but just as insidious. Even as some question their continued utility in the digital age,<sup>72</sup> the major PROs operate as cozy oligopolies that cling to a variety of inefficient, anti-competitive practices that disadvantage the little guy; these include inflexible licensing terms that prevent upstarts from competing on price,<sup>73</sup> flawed tracking systems and non-transparent apportionment of revenues that unfairly reward superstar artists at the expense of the less suc-

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<sup>70</sup> See Mary LaFrance, *Graduated Response by Industry Compact: Piercing the Black Box*, 30 CARDOZO ARTS & ENT. L.J. 165, 167-68 (2012).

<sup>71</sup> See, e.g., TUNECORE, <http://www.tunecore.com/> (last visited Feb. 24, 2015); *Boost Your Income*, CDBABY, <http://members.cdbaby.com/boost> (last visited Feb. 13, 2015); *Film/TV Distribution*, THE ORCHARD, <http://www.theorchard.com/film-and-tv-distribution/> (last visited Feb. 13, 2015); *IFTA Collections*, INDEP. FILM & TELEVISION ALLIANCE, <http://www.ifta-online.org/ifta-collections> (last visited Feb. 13, 2015); Erick Schonfeld, *Attributor Launches Service to Track Copyright Infringement Across the Web*, TECHCRUNCH (Nov. 4, 2007), <http://techcrunch.com/2007/11/04/attributor-launches-service-to-track-copyright-infringement-across-the-web/>. While such services supply important pieces of a solution for some categories of creative upstarts, they do not resolve all of the concerns outlined above, nor are there equivalent services offered for all types of creators.

<sup>72</sup> See, e.g., Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 311, 342-45 (Daniel Gervais ed., 2006); Ariel Katz, *The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights*, 2 J. COMP. L. & ECON 245, 245, 274 (2006).

<sup>73</sup> See Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & BUS. 731, 734 (2011) (arguing that by eliminating price competition between songwriters, blanket licenses by PROs lead to suboptimal outcomes and reduced audience welfare by encouraging radio DJs to overlay top 10 hit singles at the expense of more diverse programming).

cessful,<sup>74</sup> and overzealous enforcement that denies up-and-coming musicians access to local performance venues.<sup>75</sup>

In effect, the United States has a copyright system that was created by and for the commercial content industry.<sup>76</sup> It assumes all players have the lawyers and resources to administer and enforce their rights, and its terms are structured to favor the powerful at the expense of the weak. As a result, creative upstarts are systematically disadvantaged. This is obviously bad for independent authors and artists. But should the rest of society be concerned by the failure of the copyright system to meet the needs of upstart creators? To answer this, one must first ask who the copyright system is for. The next Part engages this question.

### III. DIGITAL DISINTERMEDIATION AND NORMATIVE INTERESTS OF CREATIVE UPSTARTS

Historically, the answer to who copyright is for was fairly clear as a descriptive matter. The current Copyright Act dates back to 1976, but it was largely written in the decades preceding.<sup>77</sup> Back then, the production of commercial content was a capital-intensive process requiring specialized equipment—printing presses, recording and films studios, and the like—and skilled personnel to operate it. To distribute the finished product likewise required physical copies to be manufactured in factories and loaded

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<sup>74</sup> Mike Masnick, *How ASCAP Takes Money from Successful Indie Artists and Gives It to Giant Rock Stars*, TECHDIRT (Mar. 26, 2012), <https://www.techdirt.com/articles/20120323/18055718229/how-ascap-takes-money-successful-indie-artists-gives-it-to-giant-rock-stars.shtml> (describing how ASCAP's sampling methodology favors superstars at other artists' expense); see also Jeff Price, *How They Legally Steal Your Money*, TUNECORE (July 7, 2011), <http://blog.tunecore.com/2011/07/how-they-legally-steal-your-money.html> (arguing that CROs operate needlessly opaque structures that privilege the interests of publishers and record labels over artists); Harvey Reid, *ASCAP & BMI—Protectors of Artists or Shadowy Thieves?*, RAM.ORG, <http://www.ram.org/ramblings/philosophy/fmp/royalty-politics.html> (last visited Jan. 31, 2015) (describing flawed sampling methodologies used by PROs). In an age where every song played can be instantly Shazam-ed and identified in real-time, there is no excuse for PROs to continue to use imperfect sampling methodologies that undercount upstart artists.

<sup>75</sup> Jonathan Band & Brandon Butler, *Some Cautionary Tales About Collective Licensing*, 21 MICH. ST. INT'L L. REV. 687, 712-13 (2013); Mike Masnick, *BMI Hurting Artists, Yet Again*, TECHDIRT (Oct. 14, 2011), <https://www.techdirt.com/articles/20111010/04381116281/bmi-hurting-artists-yet-again.shtml>; Mike Masnick, *How ASCAP and BMI Are Harming Up-and-Coming Singers*, TECHDIRT (Jan. 12, 2009), <https://www.techdirt.com/articles/20090109/1823043352.shtml> (explaining how extortionate licensing and enforcement practices by ASCAP and BMI prevent up-and-coming musicians from playing gigs at local performance venues); Reid, *supra* note 74 (describing PRO enforcement tactics as akin to mafia shakedowns, by charging fees for public domain works as well as a litany of other abusive practices).

<sup>76</sup> Literally. See Litman, *supra* note 18, at 11-12.

<sup>77</sup> Samuelson, *supra* note 20, at 770.

and shipped out to stores. The entire process required substantial investment, coordination, and management.<sup>78</sup>

The idea that the copyright system would function in the interest of the large commercial entities that oversaw such production and distribution processes was not unreasonable. After all, these entities directed the creative and commercial investments that copyright sought to incentivize. Accordingly, it made sense to design the workings of the copyright system around their needs, and Congress did so.<sup>79</sup>

The commercial distributors who dominated the culture industry in the twentieth century operated at a scale that made reasonable certain baseline assumptions regarding legal sophistication and administrative competence. The costs of complexity were tolerable, and it did not matter if copyright operated as a kind of inside baseball because all the major players *were* insiders.

To be sure, there were independent authors and freelancers even then. However, federal copyright was tied to publication.<sup>80</sup> And to publish one's work generally required going through a publisher or some analogous commercial intermediary.<sup>81</sup> Therefore, the assumption was that anyone with something worthwhile to share would eventually end up under contract with a commercial intermediary. The intermediary would then assume an interest in the copyright and supply the expertise required to handle copyright formalities and administer the rights going forward.

Fast forward fifty years, and both the production and dissemination of creative content have been greatly decentralized. By empowering ordinary "users" to create and share expressive works on a mass scale, digital technologies have democratized creativity. The commercial content industry has largely ceded its gatekeeper function, and a cacophony of new voices has seized the virtual stage. In this process, copyright law has begun to touch and concern a far greater segment of the public than ever before.<sup>82</sup> And disintermediation is the watchword of the age.<sup>83</sup>

While large commercial intermediaries—publishers, studios, record labels—still dominate commercial content production, the idea that the copyright system need concern itself only with the needs of the mainstream content industry is far less defensible. After all, the point of copyright is not just to create wealth or to make rich companies richer. Copyright's constitu-

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<sup>78</sup> See Litman, *supra* note 18, at 12.

<sup>79</sup> See *id.* at 11-12.

<sup>80</sup> Giuseppina D'Agostino, *Copyright Treatment of Freelance Work in the Digital Era*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 37, 59-61 (2002).

<sup>81</sup> *Id.* at 61 (citing Sampson, *Copyright & Electronic Publishing*, 75 COPYRIGHT WORLD 22-6 (1997)).

<sup>82</sup> See Samuelson et al., *supra* note 16, at 1177.

<sup>83</sup> See ANITA ELBERSE, *BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT* 192-97 (2013) (critically assessing disintermediation's promise and limitations).

tional mission is to promote progress.<sup>84</sup> As the sources of cultural progress diversify and become disintermediated, copyright needs to adapt.

As many have noted, the Copyright Act is an analog statute struggling to make sense of a digital world.<sup>85</sup> The phenomenon of digital disintermediation is likewise well chronicled. Yet, scholars have yet to fully explore the normative implications that follow from these observations. Thus far, scholarly explorations of disintermediated creativity have been one-sided: focused on non-commercial expression, their normative implications for copyright have largely been problematized in terms of expanding copyright's negative spaces.<sup>86</sup>

Commentators have hailed the dramatic outpouring of creativity from remix/mash-up artists, pajama bloggers, wikipedians, and other non-commercial creators as embodying a new digital "folk culture" whose emancipatory potential augurs far-reaching consequences.<sup>87</sup> Embracing the promise of amateur creativity with quasi-Marxist fervor,<sup>88</sup> commentators have dedicated an enormous volume of scholarship to exploring ways to encourage its continued flourishing. Much of this work seeks to limit copyright's perceived chilling effects. Scholars have proposed a wide array of copyright defenses and reforms to shield non-commercial creativity from the perceived censorship of Big Media monopolists, whose abusive enforcement of copyrights is seen as the last gasp of a dying paradigm.<sup>89</sup>

This narrow focus on amateur creativity and on copyright negativity misses important parts of the disintermediation story. After all, copyright is more than just an instrument of censorship: "the Framers intended copyright itself to be the engine of free expression."<sup>90</sup> Instead of dwelling incessantly on the harms that copyright poses to decentralized creativity, scholars should consider the potential for copyright, once appropriately reconfigured, to function affirmatively as a catalyst of decentralized creativity.

Similarly, it is a mistake to think of disintermediation as a story solely about non-commercial creativity. A new breed of commercially minded creators—creative upstarts—has emerged. Having ventured forth into the

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<sup>84</sup> U.S. CONST. art. I, § 8, cl. 8 (empowering Congress "[t]o promote the Progress of Science and useful Arts")

<sup>85</sup> See Litman, *supra* note 18, at 3; Samuelson, *supra* note 20, at 770.

<sup>86</sup> See Samuelson et al., *supra* note 16, at 1245.

<sup>87</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 15 (2006) (hailing digitally networked "folk culture"); Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257, 263-64 (2006) (positing dawn of "New Enlightenment" Age).

<sup>88</sup> See Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1106 (2005) (theorizing the clash between amateur creativity and commercial content in terms of a Marxist culture war).

<sup>89</sup> Scholars have proposed expanding the limits of fair use doctrine, crafting new safe harbors, reforming notice-and-takedown procedures, limiting statutory damages, as well as a host of related proposals. See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 955-960 (2009) (surveying proposals).

<sup>90</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

brave new world of digital disintermediation, creative upstarts are keen to explore the promise of new creative and commercial paradigms from crowdsourcing to “freemium” distribution models. Their stories are not often told in the pages of academic journals, but are no less deserving of scholarly attention than those of amateur creators.<sup>91</sup> Their ranks include many of the conventional protagonists of the content industry—indie musicians, filmmakers, graphic artists, and photographers. Leading examples of what we think of as quintessentially “user generated content” (e.g., blogs, web video, mash-ups) have also gone commercial.<sup>92</sup> A wide array of other creative entrepreneurs have pioneered niches in the online content economy, including teachers,<sup>93</sup> jewelry designers,<sup>94</sup> quilters,<sup>95</sup> woodworkers, and other crafters.<sup>96</sup> Blogs, how-to-videos, and e-commerce websites have capitalized on do-it-yourself trends and transformed hobbies into thriving businesses.<sup>97</sup> Meanwhile, mobile app designers have unveiled an ever-expanding array of online services to occupy our leisure moments, inform our decision making, and satisfy our curiosity.<sup>98</sup>

Choosing to go the “indie” route is not easy. Creative upstarts have to take responsibility for both the creative and business aspects of their work,

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<sup>91</sup> See Robert P. Merges, *Locke Remixed* :-), 40 U.C. DAVIS L. REV. 1259, 1269-70 (2007) (criticizing scholars for romanticizing rebellious remixers at the expense of ordinary creators trying to make a living in the digital media industries).

<sup>92</sup> John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 252 (2008); Amy O’Leary, *The Woman with 1 Billion Clicks: Jenna Marbles*, N.Y. TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/14/fashion/jenna-marbles.html>; Rob Walker, *On YouTube, Amateur Is the New Pro*, N.Y. TIMES (June 28, 2012), <http://www.nytimes.com/2012/07/01/magazine/on-youtube-amateur-is-the-new-pro.html>; *The Gregory Brothers*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The\\_Gregory\\_Brothers](http://en.wikipedia.org/wiki/The_Gregory_Brothers) (last visited Feb. 28, 2015).

<sup>93</sup> Donna Gordon Blankinship, *Teachers Profit by Selling Classroom Materials Online*, PORTLAND PRESS HERALD (Oct. 11, 2012), <http://www.pressherald.com/2012/10/11/teachers-make-money-selling-classroom-materials-online/>.

<sup>94</sup> Karsten Strauss, *\$250 Million for a 14-Year-Old’s Big Idea: Origami Owl*, FORBES (Oct. 22, 2013), <http://www.forbes.com/sites/karstenstrauss/2013/10/22/250-million-for-a-14-year-olds-big-idea-origami-owl/>.

<sup>95</sup> Carma Wadley, *Quilting, \$3.5 Billion Industry, Seeing Bolder Colors, Bling and Recycled-Bottle Batting*, DESERET NEWS (May 22, 2011), <http://www.deseretnews.com/article/700137943/Quilting-35-billion-industry-seeing-bolder-colors-bling-and-recycled-bottle-batting.html?pg=all>.

<sup>96</sup> Kim Leonard, *\$30 Billion Crafts Industry Enjoys Resurgence*, TRIBLIVE (Nov. 17, 2012), <http://triblive.com/home/2912826-74/sewing-percent-stores-craft-quilt-fabrics-montgomery-crafts-fabric-opened#axzz3LEx7ug6c>.

<sup>97</sup> See *id.* The extent to which these creators rely on copyright law in their day-to-day business operations varies according to their business model. Yet, their commercial aspirations make copyright protection at least relevant as a baseline guarantee. Indeed, even open licensing models depend implicitly on the threat of copyright law to enforce their licensing terms.

<sup>98</sup> Chris Gaylord, *The App-Driven Life: How Smartphone Apps Are Changing Our Lives*, CHRISTIAN SCI. MONITOR (Jan. 27, 2013), <http://www.csmonitor.com/Innovation/Tech/2013/0127/The-app-driven-life-How-smartphone-apps-are-changing-our-lives>.

scramble to master new technologies, and keep track of changing business models and online trends. It is also worth noting that for some creative upstarts, functioning autonomously is less a choice than a necessity. Major labels and publishers have been cutting back on the amount of new artists and writers they sign.<sup>99</sup> Similarly, movie studios are funding fewer projects from the ground up and relying instead on “negative pick-up” deals to distribute finished products.<sup>100</sup> Therefore, independent filmmakers have to be much more entrepreneurial in piecing together funding and distribution deals than in decades past.

If the results of their exertions very often prove less rewarding than desired, the positive societal externalities that upstart creators generate are nonetheless considerable. Creative upstarts fill a vital niche in our cultural ecology. A considerable gulf remains between amateur creativity and professional content, particularly in audiovisual media.<sup>101</sup> Creative upstarts in some respects offer us the best of both worlds.

As Big Media conglomerates focus myopically on churning out formulaic blockbuster offerings that pander to the least common denominator of global demand,<sup>102</sup> upstart creators are less constrained by the imperatives of the mass market. They can afford to experiment and take the kind of chances that lead to artistic breakthroughs.<sup>103</sup> It is no accident that indie films increasingly dominate Academy Award nominations and prizes for Best Picture. The major Hollywood studios are no longer much interested in telling original stories: they prefer to invest in “franchises” built around familiar brands, such as comic book characters, that provide the launch pad for a series of predictable sequels, merchandising, and downstream com-

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<sup>99</sup> GIUSEPPINA D’AGOSTINO, COPYRIGHT, CONTRACTS, CREATORS: NEW MEDIA, NEW RULES 20-21 (2010); ELBERSE, *supra* note 83, at 192.

<sup>100</sup> The major studios have also either closed or severely cut back on their in-house “indie” film divisions.

<sup>101</sup> See Pallante, *supra* note 11, at 339-40; Peter S. Grant, Counsel, McCarthy Tétrault LLP, The Cultural Tool Kit: Government Measures to Support Cultural Diversity in a Digital Age, Notes for a Presentation to the Seminar “Theory and Reality: Applying the Convention on Diversity of Cultural Expression to the Real Situation” (Sept. 27, 2008), available at [https://www.fd.ulaval.ca/sites/default/files/recherche/cultural\\_tool\\_kit.pdf](https://www.fd.ulaval.ca/sites/default/files/recherche/cultural_tool_kit.pdf).

<sup>102</sup> ELBERSE, *supra* note 83, at 35. These trends are most pronounced in the motion picture industry. Hollywood’s pursuit of global audiences has led to a ruthless pruning of artistic diversity. Even to be considered, studio film projects must fall within well-defined genres with proven audience demand. Once chosen, the projects are ruthlessly pruned of elements that challenge conventional expectations or face difficulty being translated for foreign markets. See Kirsten Acuna, *Hollywood Has Become Incredibly Dependent on Overseas Viewers*, BUS. INSIDER (Mar. 8, 2013), <http://www.businessinsider.com/overseas-audiences-helping-us-box-office-2013-3#ixzz2N3m3IEYi>.

<sup>103</sup> See ELBERSE, *supra* note 83, at 77 (explaining why smaller-scale creators are better positioned to innovate); Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 933 (1999) (noting that “fresh, talented creativity thrives best in [the] ‘entrepreneurial’ milieu” populated by indie artists).

mercialization.<sup>104</sup> Similarly, one rarely finds path-breaking new music on the top 40 lists dominated by major record labels.<sup>105</sup> Where superstar musicians repackage familiar sounds to cater to a global fan-base and build hits around “ear and eye candy” (i.e., catchy hooks, charisma, style, and looks),<sup>106</sup> upstart musicians are the ones who dare to push artistic boundaries. Indeed, time and again, in almost any artistic genre, true innovation starts on the fringes and moves to the mainstream only later.<sup>107</sup>

Freed from the demands of global commodification, creative upstarts also generate a far more diverse output than the mainstream culture industries are capable of. By imbuing their work with their own original ideas, personalities, and sensibilities, upstart creators connect with specific audiences in ways that often resonate powerfully, and they speak to concerns that mainstream media neglect or ignore. At the same time, creative upstarts can take on more ambitious projects and produce works of far greater scope and sophistication than amateur creators are typically capable. “Lolcats” and dancing babies can make us smile, but their pleasures are ephemeral. Producing significant works of authorship requires sustained creative investments. Because they are operating as commercial enterprises, rather than merely dabbling as hobbyists, upstart creators can justify making far greater investments in developing and refining individual projects.<sup>108</sup>

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<sup>104</sup> See ELBERSE, *supra* note 83, at 6; Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright’s Diversity Externalities*, 76 S. CAL L. REV. 1067, 1090 (2003); Epstein, *supra* note 65 (explaining how studio majors exploit corporate affiliations to obtain privileged distribution deals with TV channels that provide a linchpin of studio profitability).

<sup>105</sup> See Henry H. Perritt, Jr., *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTELL. PROP. L. 831, 851-52 (2010); Editorial, *The Development of Early Electronic Music: From John Cage to Karlheinz Stockhausen*, MAP MEANING (Mar. 30, 2010), <http://mapofmeaning.com/2010/03/30/the-development-of-early-electronic-music-from-john-cage-to-karlheinz-stockhausen/>; Michael Azerrad, *Indie Rock’s All Grown Up*, WALL ST. J. (June 1, 2012), <http://online.wsj.com/article/SB10001424052702304019404577420593728223160.html>; Jennifer Castle, *How Record Labels Are Stifling Creativity More than Ever*, TOMCLEMENTSUK (May 6, 2012), <http://tomclements.wordpress.com/2012/05/06/how-record-labels-are-stifling-creativity-more-than-ever/>; Mike Lynn, *Mainstream Music Sucks*, MODERN MUSIC (Mar. 18, 2012), <http://mikelynn2626.blogspot.com/2012/03/mainstream-music-sucks.html>; Jim Paterson, *Electronic Music*, MFILES, <http://www.mfiles.co.uk/electronic-music.htm> (last visited Feb. 13, 2013); Ben Sisario, *When Indie-Rock Genres Outnumber the Bands*, N.Y. TIMES (Dec. 31, 2009), <http://www.nytimes.com/2010/01/03/arts/music/03indie.html>; Chuck Taylor, *Flavorless Top 40?*, BILLBOARD, Jun. 16, 2007, at 6; Calvin Wilson, *Jazz Trumpeter Aims to Avoid Making “Boring” Music*, ST. LOUIS POST-DISPATCH (Mar. 23, 2012), [http://www.stltoday.com/entertainment/music/jazz-trumpeter-aims-to-avoid-making-boring-music/article\\_c41c4262-1d8d-5dd4-b769-5b4a743803cb.html](http://www.stltoday.com/entertainment/music/jazz-trumpeter-aims-to-avoid-making-boring-music/article_c41c4262-1d8d-5dd4-b769-5b4a743803cb.html).

<sup>106</sup> Derek Thompson, *The Shazam Effect*, ATLANTIC (Nov. 17, 2014), <http://www.theatlantic.com/magazine/archive/2014/12/the-shazam-effect/382237/4/>.

<sup>107</sup> See Sean A. Pager, *Folklore 2.0: Preservation Through Innovation*, 2012 UTAH L. REV. 1835, 1881.

<sup>108</sup> See Jane C. Ginsburg, *The Author’s Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 387-88 (2009).

Proponents of amateur creativity often contend that artists “create out of love,” rendering commercial incentives irrelevant.<sup>109</sup> Yet, self-actualizing motivation only goes so far. Such accounts often fail to appreciate the hard work, dedication, and self-sacrifice required to create at the highest level.<sup>110</sup> Authors might write out of love, but to motivate them to develop their work to its highest potential—to edit, revise, rewrite, and rewrite again—it helps to have the lure of extrinsic rewards.<sup>111</sup> Moreover, creativity is often a cumulative process. As professionals who are in it for the long haul, creative upstarts can devote a lifetime to mastering their craft and refining their artistic vision.

All of this is to say that if the copyright system is not designed with the interests of creative upstarts at heart, it should be. Creative upstarts exemplify the artistic progress that copyright law is supposed to encourage. And if policymakers take seriously the promise of copyright laws as an incentive for creative innovation, creative upstarts therefore belong at the center of this calculus. While upstart artists may not account for the greatest economic share of creativity in dollar figures, their contributions can be measured in many other ways: in cultural diversity,<sup>112</sup> in audience appreciation,<sup>113</sup> in innovation,<sup>114</sup> in democratic discourse,<sup>115</sup> and in human flourishing.<sup>116</sup>

Given the potential that creative upstarts embody as antidotes to bland blockbusterization, one may wonder why their plight has failed to garner scholarly attention. In embracing the potential for digital technologies to bypass Big Media gatekeepers, a few commentators have noted with ap-

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<sup>109</sup> See, e.g., Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC. L. REV. 141, 143 (ascribing motivation for creativity to “desire, compulsion, or addiction . . . heavily influenced by cultural, intellectual, and emotional serendipity”).

<sup>110</sup> Edison’s dictum about invention being 10 percent inspiration and 90 percent perspiration applies to creativity as well. There are very few geniuses who can conjure finished works fully formed out of sheer inspiration. Rather, for most artists, creativity is a process that requires constant effort, commitment, and a willingness to push beyond one’s own comfort level in reworking initial concepts to sharpen their bite, jettisoning unnecessary elements, and polishing rough gems into their shiniest potential. See SILBEY, *supra* note 8, at 58, 64-68; Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUSTON L. REV. 1239, 1262-63 (2008).

<sup>111</sup> Just as the performance of professional athletes outclasses even dedicated amateurs, so too professional creators are more likely than amateurs to realize the full potential of their creative ideas, not because their ideas are better, but because they are willing to work harder to develop them.

<sup>112</sup> See *supra* note 102 and accompanying text.

<sup>113</sup> Cf. C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L. J. 311, 411-14 (1997) (explaining that media markets are riddled with social externalities leading profit maximizing business models to overemphasize bland mass market offerings at the expense of audience welfare).

<sup>114</sup> See *supra* notes 12-14 and accompanying text.

<sup>115</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 290 (1996).

<sup>116</sup> See, e.g., JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 225-34 (2012).

proval the prospect that such technologies could offer a fairer shake to commercial creators. However, with a few exceptions,<sup>117</sup> the doctrinal implications of commercial disintermediation have been largely overlooked.

The seemingly petty concerns and largely procedural barriers faced by creative upstarts doubtless make for less exciting scholarly terrain than the paradigm-busting devotion that amateur creativity, peer production, and post-scarcity economics inspire. Scholarly preoccupation with non-commercial creativity, a setting in which copyright's incentives are deemed irrelevant,<sup>118</sup> may in turn account for a failure to explore copyright's upside potential. Moreover, the widespread assumption in academia that copyright protection already far exceeds any reasonably defensible level presumably engenders the assumption that further incentives would be redundant.

Yet, as seen above, creative upstarts represent a class of commercial creators whose ability to respond to copyright's incentives, in fact, remains severely compromised. Hampered by capacity constraints, many creative upstarts miss out on the benefits that the copyright system is supposed to provide. Notably, however, catering to their needs need not entail the upward ratcheting of rights that scholars reflexively oppose. What creative upstarts need is not stronger copyright protection, but rather a more accessible system. Their ability to prosper hinges less on the strength and breadth of their rights on paper than on the ease with which such rights can be actuated.

Herein lies the real answer to why the concerns of creative upstarts have been largely overlooked: they do not fit within the contours around which copyright debates have traditionally been structured. Indeed, Professor Jane Ginsburg has noted that authors of all stripes "are curiously absent" in "the overheated rhetoric that currently characterizes much of the academic and popular press."<sup>119</sup> In these copyright polemics, copyright serves as the battleground for a war of attrition waged across entrenched lines: "more copyright" versus "less"; "censorship" versus "piracy"; and "technological" versus "creative innovation." In this calcified, politicized debate, the needs of creative upstarts simply fall through the cracks.<sup>120</sup>

Policymakers should not let them fall unheeded. To unleash the dynamic potential that creative upstarts embody, they need to address system-

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<sup>117</sup> For some notable exceptions, see Litman, *supra* note 18, at 39; see generally Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833 (2013).

<sup>118</sup> The assumption that copyright is irrelevant to non-commercial creators is not beyond challenge: after all, copyright functions not only as a source of economic incentives, but also as a means to protect creative integrity and attribution, interests which may pertain to non-commercial artists as much as commercial ones. See KWALL, *supra* note 8, at xiv; Ginsburg, *supra* note 108, at 390 ("Copyright is not just about getting paid; it is also about maintaining control, both economic and artistic, over the fate of [one's] work.").

<sup>119</sup> Ginsburg, *supra* note 108, at 382.

<sup>120</sup> See D'AGOSTINO, *supra* note 99, at 2.

atically the capacity constraints that hold upstart creators back. Failing to address these roadblocks undermines the promise of decentralized creativity.<sup>121</sup> Some creative upstarts will drop out of the creative economy entirely.<sup>122</sup> Others will join the mainstream culture industries. Either way, society will be the poorer for it.

#### IV. FIXING THE PROBLEM

What can copyright law do to keep indie artists (and other upstart creators) independent and overcome the capacity constraints that stand in their way? Much of this problem can be reduced to the simple logic of a Coasean law: the higher the transaction costs of the copyright system, the less likely indie artists will be successful going it alone. They will either drop out entirely or will be forced to rely on commercial intermediaries at the cost of ceding creative control of their work.<sup>123</sup>

There is nothing inherently wrong with relying on intermediaries to minimize transaction costs. Indeed, creative artists will generally benefit from delegating their business and legal affairs to others, leaving them more time to focus on creative labors.<sup>124</sup> However, the current structure of copyright markets means that striking such a bargain usually requires giving up both creative control and the lion's share of any proceeds.<sup>125</sup>

If policymakers want to foster the diverse and innovative contributions that creative upstarts make to cultural discourse, they should strive to pre-

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<sup>121</sup> It is difficult to quantify the extent to which upstart creators are being held back due to lack of copyright capacity/sophistication. Indeed, the extent to which creative upstarts are succeeding in today's creative economies is itself contested. Compare ELBERSE, *supra* note 83 (positing blockbuster culture as increasing its dominance in the digital era), with Joel Waldfogel, *And the Bands Played On: Digital Disintermediation and the Quality of New Recorded Music* (June 25, 2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2117372](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117372) (arguing that digital technologies have helped indie musicians increase market share). However, whether the glass is half empty or half full in terms of outcomes, there is no question that the sheer number of disintermediated creators has increased greatly over the last two decades. Moving to a more upstart-friendly copyright system that meets the interests of this growing constituency would therefore eliminate at least one significant obstacle to their continued thriving.

<sup>122</sup> Popular mythology in scholarly circles today posits creators as driven by a "compulsive need to create." See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 43-48 (2011); Cohen, *supra* note 109, at 143. Yet, many creative upstarts are talented individuals who can choose between many career options. They will either find a better paying outlet for their creative talents, or choose a completely different line of work altogether. Some may continue to dabble in creative activities as a hobby, but on a much-reduced scale, and, without the drive to commercialize their work, society will likely lose out on the benefits.

<sup>123</sup> Cf. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 394 (1937) (explaining how transaction costs lead individual market participants to organize themselves into hierarchically structured firms).

<sup>124</sup> See ELBERSE, *supra* note 83, at 196.

<sup>125</sup> See Litman, *supra* note 18, at 9-11.

vent such Faustian bargains from being struck. True independence may be an unrealistic goal, but creative autonomy should not be. Creative upstarts who retain creative autonomy are far more likely to preserve their authentic voices.<sup>126</sup> They are more likely to experiment creatively and pursue diverse projects and idiosyncratic interests. Moreover, there are collateral benefits to keeping copyright with authors. Compared to commercial distributors, authors are more likely to favor broader dissemination over increased profits, and they may also take a more tolerant view of non-commercial usage of their work.<sup>127</sup>

Reconfiguring copyright to better support decentralized creativity would make such outcomes more likely.<sup>128</sup> Indeed, one could theorize such a policy shift in terms of the “structural role” that copyright plays under the democratic rationale for copyright. As originally enunciated, the democratic rationale focused on the role that copyright plays in supporting creative production through decentralized, market mechanisms to ensure autonomy from government control.<sup>129</sup> However, one could extend the same insight to the role that copyright law plays in structuring production *within* the private sector. Given Big Media’s push toward a homogeneous “monoculture” of blockbusters, a democratic theory of copyright should arguably exert a countervailing, decentralizing force: encouraging creative upstarts to resist the pressures of corporate uniformity by reducing the costs of operational autonomy. The goals here should remain modest: no one should expect a *Gideon v. Wainwright*<sup>130</sup> revolution for copyright law.<sup>131</sup> Rather, we should dismantle hurdles where we can and strive to develop a copyright system that is both user-friendly and sensitive to transaction costs.

As seen above, the ease by which creative upstarts can navigate the copyright system has direct bearing on the values of incentives that copyright confers. An upstart-friendly copyright system therefore requires mechanisms to disseminate basic copyright information and cost-effective solutions for registration, licensing, clearance, and enforcement.

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<sup>126</sup> See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 201 (2011) (citing economic research by F.M. Scherer showing that strengthening copyright “gave composers greater control over what kinds of works they could compose”).

<sup>127</sup> See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1023-25 (2004).

<sup>128</sup> See Hughes, *supra* note 103, at 934-936 (describing the “critical” importance of intellectual property rights in helping creative upstarts rebuff “the rapacious practices of giant companies”).

<sup>129</sup> See Netanel, *supra* note 115, at 288.

<sup>130</sup> 372 U.S. 335 (1963).

<sup>131</sup> *Id.* at 344 (stating that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”). The society interest in ensuring equity in the copyright system may not rank as weighty as that of ensuring fairness in the criminal justice system. However, the intimate connections between copyright, innovation, democratic discourse, and cultural diversity explored above—and the important role that creative upstarts play in these regards—argue strongly against adopting a laissez-faire approach.

So much for the big picture theory, but how can policymakers implement it? To start with, one should dispense with the idea there is a single “magic bullet” solution. Rather, improvements must come through a combination of substantive, procedural, and institutional reforms that yield incremental improvements across the entire copyright system. Inevitably, tradeoffs will be made. Reforms that help creative upstarts from one standpoint may hurt their interests from another.<sup>132</sup> A related caveat is that copyright is an interconnected system: reforms undertaken in one sphere can affect many others. A comprehensive approach is therefore warranted.

Policymakers can draw inspiration for this endeavor from the international context, where a broad consensus has coalesced around the World Intellectual Property Organization (“WIPO”) “Development Agenda,” which aims to reshape international intellectual property law in a more “development-friendly” guise.<sup>133</sup> Capacity building for creative upstarts can be analogized to capacity building in the international context. Just as WIPO has vowed to consider “mainstream” development concerns throughout its intellectual property initiatives,<sup>134</sup> so too copyright policymakers should keep creative upstart interests at the forefront of future policy reforms.

What follows is a brief overview of some potential directions that upstart-friendly reforms could take. It is not intended to advance any specific proposal, nor does it purport to undertake a comprehensive survey of options. Instead, the ensuing discussion merely serves as an illustrative—and intentionally provocative—list in order to begin a discussion and crystallize some of the choices ahead.

#### A. *Substantive Reforms*

For creative upstarts, the overriding goals of any reforms to the substantive law of copyright must be to reduce complexity and enhance legal certainty. Attempts to reduce complexity, however, can seem deceptively simple. Devising a radically simpler copyright system may seem as easy as an ivory tower exercise.<sup>135</sup> In practice, however, policymakers are not starting from a blank slate, and proposing such changes quickly runs into a host

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<sup>132</sup> For example, efforts to improve the accuracy and comprehensiveness of registrations records would help upstarts from a clearance perspective. However, the burden of complying with enhanced registration requirements to achieve this goal is likely to be disproportionately felt by upstart creators who lack the administrative capacity to comply. *Cf.* Nathenson, *supra* note 5, at 924-25 (noting how legal reforms adopting a more lenient stance toward errors in copyright registration undercut the value of copyright public records).

<sup>133</sup> *See* Pager, *supra* note 15, at 224-25.

<sup>134</sup> *Id.*

<sup>135</sup> For example, scholars have proposed consolidating the list of exclusive rights. *See* Litman, *supra* note 18, at 43-45; Samuelson et al., *supra* note 16, at 1209-14. Eliminating statutory licenses would likewise reduce complexity. *See* Litman, *supra* note 18, at 50-51.

of practical objections from vested interests with legitimate sunk costs and established structures built around the status quo.<sup>136</sup>

As for enhancing certainty, in an ideal world, Congress would replace fuzzy standards with bright-line rules that would clearly demarcate legal rights. However, standards have their place. In a world of fast-changing technologies and business practices, bright lines quickly become blurred, or—worse yet—misplaced. Instead, a more realistic fallback goal would be to couple open-ended standards with clear safe harbor provisions or explicit examples.<sup>137</sup> This way, the standards would have room to evolve, but at least their core meaning would be anchored as a starting point.

In any case, efforts to simplify the Copyright Act raise practical and normative concerns that go beyond the scope of this Essay. Suffice to say that such an endeavor will implicate a host of conflicting interests and inspire frenzied lobbying from myriad quarters. Policymakers may never reach the end goal of making “copyright law simple enough that most creators will not need to consult a copyright lawyer.”<sup>138</sup> However, that does not mean this is not an aspiration worth striving for.

A more ambitious—and controversial—set of substantive reforms would seek to alter the balance of power between authors and distributors in order to secure more equitable treatment of the former.<sup>139</sup> Other countries employ a variety of measures along these lines from moral rights provisions,<sup>140</sup> to restrictions on transfers of copyright and reversion provisions,<sup>141</sup> to guarantees of minimum royalty shares.<sup>142</sup> The United States’ main con-

<sup>136</sup> See Litman, *supra* note 18, at 45.

<sup>137</sup> See David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 176-78 (2009) (proposing fair use safe harbors along these lines). Other scholars have proposed administrative mechanisms to clarify indeterminate standards such as fair use. See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1123-27 (2007); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 415-18 (2009).

<sup>138</sup> Litman, *supra* note 18, at 40.

<sup>139</sup> Proposals along these lines admittedly go beyond the focus of this Essay on making the copyright system more “user friendly.” However, such substantive protections could be justified as a means to offset systemic inequalities elsewhere.

<sup>140</sup> See KWALL, *supra* note 8, at xiii. The United States confers moral rights only to natural authors of a narrowly defined category of visual works. See *id.*

<sup>141</sup> D’AGOSTINO, *supra* note 99, at 85; MARIAN HEBB & WARREN SHEFFER, TOWARDS A FAIR DEAL: CONTRACTS AND CANADIAN CREATORS’ RIGHTS 25-26, 32-33 (2006), available at <http://www.creatorscopyright.ca/documents/contracts-study.pdf>; William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 6-7 (2002); *Treat Me Nice: Fairness Compensation for Elvis Presley Enterprises?*, 1709 BLOG (Sept. 19, 2011, 2:32 PM), <http://the1709blog.blogspot.com/2011/09/treat-me-nice-fairness-compensation-for.html> [hereinafter *Treat Me Nice*].

<sup>142</sup> Cf., e.g., The Indian Copyright (Amendment) Act 2012, cl. 8, available at <http://164.100.24.219/BillsTexts/RSBillTexts/PassedRajyaSabha/copy-E.pdf> (providing that the author of the literary or musical work included in a cinematograph film [or sound recording] shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright); HEBB & SHEFFER, *supra* note 141, at 28-30; *Treat Me Nice*, *supra* note 141. The United States’ only foray into these waters

cession to author welfare is its highly restrictive termination provisions, which kick in only four decades after an initial transfer of ownership, and thus, in practice, only benefit the most successful authors. The United States also stands out in the breadth of its work-for-hire provisions that deny the very trappings of authorship to employees and creators of specially commissioned works. Moving to a more author-friendly set of copyright rules would generally redound to the benefit of creative upstarts.<sup>143</sup> At the same time, one must acknowledge the risk that restricting alienation may deter investments in commercialization.<sup>144</sup> Empowering authors at the expense of publishers may lead to a smaller pie for both.<sup>145</sup> This seems an area where experimental research could prove especially fruitful in providing the guidance to tailor rights optimally.<sup>146</sup>

### B. *Procedural Reforms*

An obvious procedural reform that would benefit creative upstarts would be a mechanism for small claims dispute resolution. As discussed above, the high cost of litigating copyright infringement claims in federal

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occurs in the statutory license for sound recordings, which stipulates specific royalty shares to be allocated to both featured and non-featured performers. *See* 17 U.S.C. § 114(g)(1) (2012).

<sup>143</sup> This would not be universally the case. Some creative upstarts may themselves rely on work-for-hire or wish to assume exclusive interests in the copyrighted works of others. However, a more author-friendly position on these issues would still leave ample room for such transactions to occur under commercially reasonable terms.

<sup>144</sup> Termination provisions may also have undesirable distributive effects. *See* Guy A. Rub, *Stronger than Kryptonite?: Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 100-01 (2013) (arguing that termination rights have regressive distributional consequences: by leading distributors to discount the price they pay for initial licenses, they effectively take money away from less successful authors to reward more successful ones). Moreover, different industries have different patterns of commercialization, which suggests one-size-fits-all solutions may not be optimal. In most cases, commercialization occurs fairly early in the life of the copyright, which suggests there may be little harm in causing rights to revert to authors after a decade or two. *Cf.* Litman, *supra* note 18, at 48 (proposing that terminations rights would kick in after fifteen years). Yet, there are significant exceptions. For example, it is not uncommon for film studios to option story rights early on but then to take decades to develop them into story treatments, not to mention green lighting a film production. Whether enabling such delays is normatively desirable is another matter.

<sup>145</sup> The consequentialist debate over such *dirigiste* interventions in copyright parallels the debate over the minimum wage in the employment context. Suffice to say that theoretical models are of limited utility in either context. The effectiveness and desirability of particular policies is ultimately an empirical question that must be tested.

<sup>146</sup> *Cf.* Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. (forthcoming 2015) (arguing for greater use of controlled experiments to assess empirically the effects of alternative intellectual property rules).

court often leaves upstart creators effectively without a remedy.<sup>147</sup> A small claims process would ideally allow for quicker and cheaper resolution of such claims.<sup>148</sup> As it happens, the Copyright Office has recently unveiled such a proposal, which calls for small claims of up to \$30,000 to be resolved by an administrative tribunal housed within the Copyright Office itself, with proceedings to be conducted primarily based on written filings.<sup>149</sup> The Copyright Office conducted extensive hearings and solicited a wealth of external comments in formulating its proposal, and its 200-page report outlining its proposal shows the careful thought and deliberation that went into it.<sup>150</sup>

However, the proposal has one fatal flaw: the proceedings would only be available on a voluntary basis.<sup>151</sup> If either party objected, the process would not go forward. This requirement of mutual assent leaves creative upstarts vulnerable to bullying by better-resourced adversaries who would have every incentive to opt out of small claims and insist on a trial in federal court. Rather than settling for such an ineffective solution, creative upstarts should continue to push for a mandatory small claims mechanism, notwithstanding the constitutional hurdles that must be overcome.<sup>152</sup>

Commentators have also advanced useful proposals to improve other aspects of copyright enforcement, such as combating file sharing through

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<sup>147</sup> See *supra* notes 1, 49, and accompanying text. On the flip side, creative upstarts are also vulnerable to ill-founded or overbroad claims lodged by better-resourced claimants who threaten them with lawsuits, knowing that upstarts cannot afford to wage a protracted defense.

<sup>148</sup> Commentators have also proposed other specialized administrative mechanisms to resolve recurring issues. See Carroll, *supra* note 137, at 1122-23 (proposing an administrative body to issue fair use rulings); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410-11 (2004) (proposing streamlined administrative body to hear peer-to-peer filesharing claims). Such mechanisms could also serve the goal of reducing the costs, delays, and uncertainty associated with litigation.

<sup>149</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 4 (2013), available at <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>. The proposal provides that where oral testimony is required, it could be delivered using remote teleconferencing technology. *Id.*

<sup>150</sup> See generally *id.*

<sup>151</sup> *Id.* at 3-4.

<sup>152</sup> See *id.* at 27-40. The main constitutional obstacles are Article III and the Seventh Amendment. *Id.* at 27-31. The former could be resolved either by situating the small claims process within the federal judiciary, or by allowing a conditional appeal to a federal district court. In the event of the latter approach, one would want a restrictive standard of review focused on finding clear error, to deter losing parties from dragging out claims gratuitously or trying for an undeserved second bite at the apple. This would leave the Seventh Amendment requirement of trial by jury to contend with. Jury trials are not easily compatible with low-cost, informal adjudication. However, in many cases where the factual record is uncontroverted, summary judgments could be issued, bypassing the jury. By seeking only injunctive relief, plaintiffs could likewise avoid the jury requirement. Finally, some defendants may be willing to waive the jury, if doing so does not otherwise force a change of venue.

low-cost/high-volume administrative mechanisms.<sup>153</sup> Such proposals would particularly redound to the benefit of creative upstarts who typically lack the means to pursue high cost litigation. Professor Peter Menell has also suggested that the government “can act as an efficient collective enforcement institution” on behalf of upstart creators by solving the free rider problem whereby “[c]ontent owners that wait by the sideline will reap comparable gains to those that incur enforcement costs.”<sup>154</sup>

Another promising area for procedural reform would be an overhaul of the Section 512 procedures for notice-and-takedown of infringing content online. There is widespread agreement among stakeholders that the current provisions are inadequate.<sup>155</sup> While this is a problem that transcends creative upstarts, the burdens of the current procedures are felt particularly by upstart creators, who cannot cope with the sheer volume of takedown notices required to respond to repeated postings of their work (often to the very same website), and who are denied access to automated, “trusted sender” facilities that content hosting sites make available to bigger players.<sup>156</sup> The House Judiciary Committee hearings in March 2014 elicited a number of potentially useful suggested reforms.<sup>157</sup> As content identification systems continue to grow in sophistication, a shift toward automated enforcement seems inevitable. The main questions are how to broker the transition and who should bear the costs. As Congress and the various stakeholders strive to find a workable solution, it is important that the needs of creative upstarts not be overlooked.

Finally, registration represents a further area where reforms could benefit creative upstarts in at least three respects. First, Congress could eliminate the need for upstart authors to register with a multiplicity of public and private registries by creating a single, interoperable system. Professor Pamela Samuelson’s Copyright Principles Project has developed a well-articulated proposal along these lines, whereby authors would register once

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<sup>153</sup> See Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 *CARDOZO ARTS & ENT. L. J.* 1, 1 (2005); Menell, *supra* note 4, at 271-74.

<sup>154</sup> Menell, *supra* note 4, at 294.

<sup>155</sup> *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 10 (2014) (testimony of Sean M. O’Connor, Professor of Law, Univ. of Washington).

<sup>156</sup> See *supra* note 67 and accompanying text.

<sup>157</sup> See *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 10, 12 (2014) (testimony of Sean M. O’Connor, Professor of Law, University of Washington) (proposing a “notice and stay-down” requirement as well as expanded DMCA “red flag” provisions); *id.* at 37-40 (statement of Paul Doda, Global Litigation Counsel, Elsevier Inc.) (calling for expanded use of filtering and measures to crack-down on rogue websites); see also *Discussion Draft: DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices*, U.S. PATENT & TRADEMARK OFF. (Dec. 17, 2014), [http://www.uspto.gov/ip/global/copyrights/Working\\_Group\\_Discussion\\_Draft\\_as\\_Distributed\\_at\\_Sixth\\_Public\\_Meeting.pdf](http://www.uspto.gov/ip/global/copyrights/Working_Group_Discussion_Draft_as_Distributed_at_Sixth_Public_Meeting.pdf).

in the registry of their choice and automatically have their information shared among all relevant databases.<sup>158</sup> Such a system would alleviate the burdens and costs of filing multiple registrations and allow for more effective copyright clearance through “search once, search everywhere” functionality.<sup>159</sup> More complete records and full digitization would also facilitate comparisons between derivative works and their preexisting sources, thereby clarifying who owns which part.<sup>160</sup> Furthermore, registries could also elicit and record default terms that would facilitate automated licensing and enforcement, as elaborated further below.<sup>161</sup>

Second, the goal of ensuring comprehensive registration records could be advanced through other means that are both Berne-compliant and less burdensome to creative upstarts. For example, requiring mandatory registration of transfers would place the primary costs and burden of registration on intermediaries.<sup>162</sup> A system of tiered fees could also be implemented, whereby large content distributors would be pay significantly higher fees

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<sup>158</sup> Samuelson et al., *supra* note 16, at 1200-05. The CPP participants envisioned “an environment in which private firms compete to obtain copyright registration information . . . lead[ing] to lower costs and innovations in registry design.” *Id.* at 1204. They note that this model resembles the decentralized system for registering internet domain names. *Id.* Such a system would “shift the Copyright Office away from day-to-day operation of the copyright registry and toward a role of setting standards and superintending” the integrity of resulting system. *Id.* at 1203. By “superintending,” the CPP proposal identifies regulatory concerns regarding transparency, efficiency, interoperability, and prevention of fraudulent and/or duplicate records/claims. *Id.* at 1204-05. The goal would be leverage private sector efficiencies but channel such efforts in service of public goals.

<sup>159</sup> *Id.* at 1204. Ideally, such registrations would be accompanied by a digital deposit requirement that would allow for full-text search capabilities (or the equivalent thereof for works in other media). Moreover, copyright databases could also be linked to records of public domain materials to allow comprehensive searches of both public and private domain materials. Registration systems could also be buttressed by enhanced notification systems whereby content identification records would be embedded in copyrighted works themselves. *See, e.g.,* Menell & Meurer, *supra* note 62, at 50-51 (describing potential for digital identification technologies to “provide the framework for a universal copyright notification system”). *See also* Harris, *supra* note 48, at 5 (surveying providers); Pager, *supra* note 7, at 555-56 (same).

<sup>160</sup> *See* 17 U.S.C. § 103(b) (2012) (stating that copyright in derivative works does not extend to preexisting material); *cf.* Menell & Meurer, *supra* note 62, at 32 (noting that existing copyright records “rarely provide a clear indication” as to aspects of a work in which copyright subsists).

<sup>161</sup> Samuelson et al., *supra* note 16, at 1204. Online content hosting services would be required to take the registry preferences into account in filtering content on their site. *Cf.* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 260-61 (2008). It is also conceivable that standardized systems could be developed that allow for the automatic capture and recordation of metadata associated with creative content, allowing registration itself to become a self-automated process, based on defaults established through prior transactions. *See* Stef van Gompel, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, 28 BERKELEY TECH. L. J. 1425, 1447-49 (2013).

<sup>162</sup> *See* Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It*, 28 BERKELEY TECH. L. J. 1459, 1472-73 (2013) (explaining that the Berne Convention’s prohibition on formalities as a prerequisite for copyright protections only applies where formalities are imposed on the original author).

that would subsidize the enhanced capabilities of the registry system and make costs affordable for upstarts.

Third, policymakers should consider whether some limited allowance for enhanced damages should be made for upstarts who fail to timely register their work. Making the timely registration requirement a prerequisite for enhanced damages disadvantages creative upstarts and often leaves them without any viable enforcement options.<sup>163</sup> Small claims dispute resolution would help with the latter concern, and the improvements to registration systems suggested above could make compliance with timely registration easier.<sup>164</sup> However, to the extent that creative upstarts continue to encounter difficulties in navigating registration requirements, a small claims tribunal could be authorized to relax such requirements in appropriate cases. To qualify, plaintiffs would need to justify their failure to register based on a showing of excusable neglect or financial hardship. If the tribunal accepted this showing, a limited allowance for enhanced damages might be allowed. For example, where the defendant engaged in clear-cut, willful infringement without a substantial defense, the tribunal could award a multiple of actual damages or infringer profits.<sup>165</sup> In addition, where proof of actual damages or profits is impractical but the defendant's conduct was clearly wrongful, statutory damages could be awarded up to the small claims maximum. Capping enhanced damages and limiting them to egregious cases would address concerns that a small claims process could become a vehicle for abusive bullying by rightsholders,<sup>166</sup> but still allow for a measure of relief to upstart creators who might otherwise fall through the cracks of the system.

### C. *Private Sector Governance*

As the preceding discussion of registration indicated, procedural reforms of the copyright system should ideally encompass both public and private institutions. Moreover, when it comes to the latter, formal rulemaking may often need to supplement regulatory oversight in order to align private incentives with public goals. In doing so, greater weight should be given to the interests of creative upstarts. For example, as elaborated above, upstart interests have been systematically neglected by the leading PROs.<sup>167</sup>

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<sup>163</sup> See *supra* notes 6, 49, and 132 and accompanying text.

<sup>164</sup> See *supra* notes 6, 49, and 132 and accompanying text.

<sup>165</sup> Cf. Samuelson et al., *supra* note 16, at 1222 (noting availability of treble damage awards in patent law).

<sup>166</sup> See Art Neill, *Proposed Copyright Small Claims Court May Have a Bigger Impact than the DMCA*, TECHDIRT (Dec. 7, 2012, 12:43 PM), <https://www.techdirt.com/articles/20121205/23325421252/proposed-copyright-small-claims-court-may-have-bigger-impact-than-dmca.shtml>.

<sup>167</sup> See *supra* note 74 and accompanying text.

As regulated monopolies subject to a judicial consent decree, the case for greater public oversight in this context is particularly glaring. And as noted, there are ample grounds for more aggressive intervention to ensure transparency, efficiency, and non-discriminatory treatment.<sup>168</sup> More fundamentally, there is a case for forcing PROs to abandon “all or nothing” blanket licensing and offer a more flexible array of a la carte options.<sup>169</sup>

Other private ordering mechanisms that enjoy de facto market power or privileged status could also merit regulatory scrutiny. Examples might include the Copyright Alert System anti-file sharing initiative discussed above or YouTube’s Content ID system. Where such arrangements play a dominant role in shaping the copyright landscape, there is arguably a case for regulatory oversight to ensure minimum levels of transparency and fairness.<sup>170</sup> A more drastic—and controversial—step would be to enforce non-discrimination norms regarding access and pricing akin to a common carrier/most-favored-nation obligations. Even assuming that a normative case for such measures can be made, devilish problems would remain in defining their scope.<sup>171</sup> However, the mere threat of such regulatory intervention may encourage voluntary measures to self-regulate and perhaps deter egregious abuses.

A further challenge relates to the lack of a mechanism for creative upstarts to voice their distinct concerns as stakeholders in such regulatory initiatives. As a large, disaggregated group without ready resources, upstarts face a classic collective action problem and thus lack effective advocates. Moreover, the various artists’ guilds that purport to represent them tend to be dominated by more successful members whose interests sometimes diverge from the little guys. One possible solution might be to appoint a “creative upstarts” ombudsman within the Copyright Office, who would have a brief to intervene in public policy deliberations and litigation on behalf of upstart creators.

#### D. *Technology as Savior*

As the preceding discussion of an integrated, interoperable registration system shows, technology can play an important role in leveling the playing field for creative upstarts. There is scope for informatics technology to im-

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<sup>168</sup> See *supra* note 74 and accompanying text.

<sup>169</sup> For example, PROs should be made to grant licenses based on either a sub-category of works or based on infrequent/occasional use at sharply discounted rates rather than insisting on “all you can eat” buffet plans. In addition, they should offer licenses to individual works at prices stipulated by the rightsholders themselves. See Lunney, *supra* note 72, at 345.

<sup>170</sup> See Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L. J. 1537, 1561-62 (2013).

<sup>171</sup> Here, an analogy could be made to the content neutrality debate.

prove almost every facet of the copyright system.<sup>172</sup> For example, one of the most basic hurdles holding creative upstarts back is their lack of access to basic information about the copyright system. While a variety of non-profit organizations, professional guilds, and law school clinics provide low-cost legal advice to creative upstarts,<sup>173</sup> the capacity for such traditional, face-to-face counsel is both inherently limited and often geographically restricted.<sup>174</sup>

Fortunately, the Internet has made possible a wealth of online resources that can educate authors and creators about copyright law. The U.S. Copyright Office website itself dispenses helpful information on a variety of topics, some practical, some whimsical (e.g., “How do I protect my sighting of Elvis?”).<sup>175</sup> Privately run websites have also stepped into the breach, offering advice to authors on how to “Keep Your Copyright”<sup>176</sup> and how to stay within the contours of the fair use doctrine,<sup>177</sup> as well as other copyright basics pitched at creative upstart constituencies.<sup>178</sup> As such resources grow in scope and sophistication, they will move beyond mere passive repositories of information toward interactive advising. Computerized “expert systems” can deliver high-quality customized advice at a fraction the cost of conventional legal service providers. Tulane University’s “Durationator” tool, which calculates copyright duration (and thus predicts when the copyright will expire for a given work), offers one example that hints at greater possibilities to come.<sup>179</sup>

The next step would be to design software that goes beyond offering advice and actively assists with copyright transactions. Here, one can take inspiration from another notoriously complex domain of legal regulation—the tax code.<sup>180</sup> Think how easy it has become for ordinary citizens to file their tax returns with the assistance of programs such as TurboTax. Comput-

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<sup>172</sup> Indeed, the preceding discussion has already illuminated several examples where technology could make a difference, from enhanced registration and notification systems to automated enforcement. See *supra* Part IV-B.

<sup>173</sup> See Harris, *supra* note 48, at 5 (surveying providers); Pager, *supra* note 7, at 555-56 (same).

<sup>174</sup> See Neill, *supra* note 166.

<sup>175</sup> See *How Do I Protect My Sighting of Elvis?*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-protect.html#elvis> (last visited Mar. 3, 2015).

<sup>176</sup> *Keep Your Copyrights*, COLUMBIA L. SCH., <http://web.law.columbia.edu/keep-your-copyrights> (last visited Feb. 28, 2015).

<sup>177</sup> *Fair Use Checklist*, COPYRIGHT ADVISORY OFF., COLUMBIA UNIV. LIBRS., <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/> (last visited Feb. 28, 2015); *Documentary Filmmakers’ Statement of Best Practices in Fair Use*, CENTER FOR MEDIA & SOC. IMPACT, <http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use> (last visited Feb. 28, 2015).

<sup>178</sup> *Resources for Creators*, COPYRIGHT ALLIANCE, [http://www.copyrightalliance.org/creators\\_resources](http://www.copyrightalliance.org/creators_resources) (last visited Feb. 28, 2015).

<sup>179</sup> See LIMITEDTIMES, <http://www.limitedtimes.com/> (last visited Feb. 28, 2015).

<sup>180</sup> Cf. Pallante, *supra* note 11, at 338-39 (citing former Register Marybeth Peter’s comparison between the Copyright Act and the tax code).

erized expert systems—Turbotax for copyright—could eliminate a lot of the guesswork in negotiating the copyright system. For example, such a program could serve as the front-end interface that assists authors with registration. After eliciting a basic set of information, the program would guide authors through a menu of choices based on the nature of their work. For example, musicians would be prompted to choose a PRO. Photographers could decide whether to join one of the photography guilds or register their work with commercial licensing services.<sup>181</sup> Information regarding each of these choices could be accessed via hypertext links.

Finally, as noted, registrants could also specify preferences and default terms regarding licensing and enforcement. This information could be used to facilitate automated licensing transactions. Such automated transactions could make it far easier (and more profitable) for producers of long-tail content to monetize their creativity.<sup>182</sup> A prototype for such a system is currently under development in the United Kingdom.<sup>183</sup> Here, the analogy would be not to Turbotax, but rather to Kayak or Travelocity. As with the registries, the ideal would not be to rely on a single system, but rather to promote interoperable standards so that multiple copyright licensing platforms could compete for customers, each relying on a common set of information inputs regarding available works, licensing terms and conditions, etc., drawn from a multiplicity of providers, and with the potential for dynamic pricing analogous to airline yield management.

Who should develop such innovative systems? As with Turbotax or Travelocity, the private sector is the preferred source of informatics innovation. However, government has a crucial role to play as well, as the catalyst, coordinator, standard-setter, patron, and, ultimately, the regulator of such private developments. Resources that reduce uncertainty or improve efficiency in the copyright system amount to a public good that may justify government subsidies where the market under-provides.<sup>184</sup>

Moreover, private sector solutions are not always inclusive. Just as the Internal Revenue Service pressured Turbotax to make a free version available to low-income users, so too the Copyright Office has a responsibility to ensure that private sector solutions do not become the informatics equiva-

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<sup>181</sup> See Robert Levine, *Photo Wars: A \$2 Billion Business Gets Rough*, CNN MONEY (Apr. 4, 2007), [http://money.cnn.com/magazines/business2/business2\\_archive/2007/04/01/8403372/index.htm?postversion=2007040409](http://money.cnn.com/magazines/business2/business2_archive/2007/04/01/8403372/index.htm?postversion=2007040409) (describing growing competition in the stock photo licensing business).

<sup>182</sup> See DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, *supra* note 11, at 96.

<sup>183</sup> The United Kingdom has conducted feasibility studies for a Digital Copyright Exchange that would facilitate high-volume, low-cost licensing of copyrighted works via an automated, online “Copyright Hub.” See *id.* See also RICHARD HOOPER & ROS LYNCH, U.K. INTELLECTUAL PROP. OFFICE, STREAMLINING COPYRIGHT LICENSING FOR THE DIGITAL AGE 2 (2012), available at <http://www.copyrighthub.co.uk/Documents/dce-report-phase2.aspx>.

<sup>184</sup> Cf. Menell & Meurer, *supra* note 62, at 36.

lent of gated mansions or private helipads.<sup>185</sup> Technology should be inclusive and serve to level the playing field rather than widen the rift between haves and have-nots.

## CONCLUSION

The needs of independent authors, artists, and other small creators have been systematically neglected by the copyright system. Copyright has become far too complicated and too unwelcoming to the uninitiated and under-resourced. Yet, it should not be. Creative upstarts exemplify the diverse sources of innovation that copyright is supposed to encourage. And digital disintermediation has only enhanced the potential for upstart creativity to blossom.

To realize this potential, the copyright system needs to take seriously the capacity constraints that hold upstart creators back. This means undertaking both substantive and procedural reforms to minimize transaction costs and ensure greater equity in the system. Smarter use of technology offers a promising way forward and could go a long way toward leveling the playing field, but government needs to act proactively and channel developments in the public interest.

Addressing the needs of creative upstarts not only makes sense from the standpoint of copyright policy. It also has value from a public choice perspective. It is no secret that copyright law faces a widespread crisis of legitimacy. On one side, the content industry decries a culture of piracy that the law seems powerless to stymie. On the other side, skeptics condemn copyright as an outdated paradigm that serves only to enrich media mogul monopolists while stifling amateur creativity. Authors have been strangely absent from this debate. While the content industry claims to speak in the name of authors—following a tactic that goes all the way back to the Stationers Company in seventeenth century England<sup>186</sup>—such claims are widely derided as hypocritical.<sup>187</sup> The role that authors play in the post-industrial landscape of today's blockbuster culture "is at most a walk-on, a cameo appearance as victims of monopolist 'content owners.'" The disappearance of the author moreover justifies disrespect for copyright—after all, those downloading teenagers aren't ripping off the authors and performers, the major record companies have already done that.<sup>188</sup> Sadly, such caricatures are not without their grain of truth.

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<sup>185</sup> Cf. LaFrance, *supra* note 70, at 171-75 (criticizing the Copyright Alert System as reflecting such an exclusionary ethos).

<sup>186</sup> W.S. Holdsworth, *Press Control and Copyright in the 16th and 17th Centuries*, 29 YALE L.J. 841, 846-47 (1920).

<sup>187</sup> Cohen, *supra* note 122, at 142.

<sup>188</sup> Ginsburg, *supra* note 108, at 382.

The relative indifference of copyright policymakers to the plight of actual flesh and blood authors stands in contrast to the situation in patent law, where solo inventors, if anything, exert an outsized influence. The lore of the garage inventor, the lone genius toiling in her workshop, exercises a powerful sway on the popular imagination.<sup>189</sup> And the plight of small inventors resonates in debates over patent policy. Perceived hardships to small inventors played an important part in the debate over the recent shift in the United States from a first-to-invent to a first-to-file system.<sup>190</sup> The Patent Office also has a longstanding practice of offering reduced fees for small entity applicants.<sup>191</sup> And unlike in copyright, even work-for-hire inventors proudly get their name on their patented inventions.<sup>192</sup> The Bayh-Dole Act even requires equitable compensation be paid to university inventors.<sup>193</sup>

Analogous reference points to solo authorship are hardly unfamiliar. Everyone knows about documentary filmmakers, garage bands, and great American novelists. Yet, these upstart authors—real examples of actual flesh-and-blood creators—are not taken seriously as protagonists in copyright policy debates. Such independent creators are either assumed to be intrinsically motivated and thus indifferent to copyright incentives, or if they are commercially inclined, they are simply delusional because authorship is not rewarded in today's system.<sup>194</sup>

If the public really thought creators had a fair chance to prosper, then popular attitudes to copyright might change.<sup>195</sup> Looking out for the needs of actual, real-life authors is one thing on which both sides in an otherwise

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<sup>189</sup> See Mark A. Lemley, *The Myth of the Solo Inventor*, 110 MICH. L. REV. 709, 710 (2012).

<sup>190</sup> Nathan Hurst, *How the America Invents Act Will Change Patenting Forever*, WIRED (Mar. 15, 2013), <http://www.wired.com/2013/03/america-invents-act/all/>.

<sup>191</sup> *Filing, Search, and Examination Fees*, U.S. PATENT & TRADEMARK OFF. (Oct. 2014), <http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-16>.

<sup>192</sup> See Joshua L. Simmons, *Inventions Made for Hire*, 2 N.Y.U. J. INTELL. PROP. & ENTERTAINMENT L. 1, 7-8 (2012).

<sup>193</sup> Vicki Loise & Ashley J. Stevens, *The Bayh-Dole Act Turns 30*, LES NOUVELLES, Dec. 2010, at 185, 187, available at [http://www.bu.edu/otd/files/2011/02/The\\_Bayh-Dole\\_Act\\_Turns\\_30.pdf](http://www.bu.edu/otd/files/2011/02/The_Bayh-Dole_Act_Turns_30.pdf).

<sup>194</sup> See Zimmerman, *supra* note 122, at 31.

<sup>195</sup> Cf. Menell, *supra* note 4, at 329 (proposing “Grand Kumbaya Experiment” whereby record labels would agree to pay artists vastly increased royalties as the inducement for a critical mass of music fans to commit to paying for premium music subscription services). Menell comments that [re]structuring the economic terms of trade in the music industry could potentially lift all boats. If artists could get a reasonable share of income from new services, consumers could be more readily enticed to the marketplace. Consumers could feel better about their market participation. Artists would start seeing serious income to the extent that fans streamed their songs. Labels would see greater income, even if their share of the pie were to fall. Technology companies would see a lessening of pressures to ramp up copyright enforcement. *Id.* at 328. See also *Announcing the “Fair Trade Music” Initiative*, World’s Songwriters and Composers Unite to Form a Global Advocacy Network, SONGWRITERS GUILD AM., [http://www.songwritersguild.com/sandboxsga2010/fair\\_trade\\_music.html](http://www.songwritersguild.com/sandboxsga2010/fair_trade_music.html) (last visited Feb. 28, 2015).

hopelessly polarized climate could potentially agree.<sup>196</sup> To test this intuition, policymakers and industry leaders alike need to overhaul aspects of the copyright system that systematically disadvantage independent authors. Giving creative upstarts a fairer shake could alter the terms on which copyright debate is waged: rather than propping up Big Media monopolists, copyright would once again be seen to live up to its claims to foster authorship. As policymakers in the United States undertake what promises to be a major overhaul of copyright legislation, hopefully the needs of creative upstarts will garner the attention they deserve.

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<sup>196</sup> See Litman, *supra* note 18, at 55 (describing reforms to “make copyright law more creator-friendly” as the “small wedge that will allow further conversation” in a policy climate of log-jammed positions).