

## CULTIVATING COPYRIGHT CAPABILITIES<sup>1</sup>

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The US Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”<sup>3</sup> A bedrock assumption of copyright policy holds that such exclusive rights provide incentives that encourage authors to create. Yet, legal rights are not self-executing. On their own, they can prove insufficient: Without the capabilities to exploit their rights, authors may forgo the very benefits that copyright law is supposed to confer.

### **A Capabilities Gap**

On its face, copyright law is simple: Creators of original works enjoy protection against unauthorized copying. Unlike patents which you have to apply for specifically and which must undergo expensive and onerous formalities, copyright is automatically effective upon fixation of the work. Moreover, the threshold originality standard is set extremely low. 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 far from welcoming to the uninitiated. First, the law itself is technically complex. Determining what aspects of a work are protected by copyright and how far such protection extends often requires a convoluted analysis of statutory provisions and case-law. This make it difficult for authors to ascertain their legal rights and to avoid trespassing on the rights of others.

Second, the formal law of copyright itself functions within a complex system of institutions and practices by which rights are transacted. The information and transaction costs required to navigate this system effectively can be daunting. In effect, we have a copyright

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<sup>1</sup> The following was originally written for the Copyright & New Media Newsletter. I am currently in the process of revising and expanding it into a law review article.

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[http://www.law.msu.edu/faculty\\_staff/profile.php?prof=594](http://www.law.msu.edu/faculty_staff/profile.php?prof=594)

<sup>3</sup> US Const., Art. I, s. viii, cl. viii.

system that was created by and for the commercial content industry. It assumes all players have the lawyers and resources to administer and enforce their rights. The uninitiated and under-resourced therefore operate at a systematic disadvantage.

Independent authors and artists often lack even a basic awareness of the copyright system. Accordingly, they fail to take common-sense measures necessary to use secure their rights. Pursuing litigation or even seeking advice from legal counsel can be prohibitively expensive. The result is that such Creative Upstarts do not reap the copyright system's promised rewards. Such forgone potential undermines the incentive value of copyright law.

### **Why We Should Care**

As it stands, our copyright system may not be configured with the interests of Creative Upstarts at heart. However, it should be. Creative Upstarts exemplify the potential for creative industries to innovate both commercially and creatively. Less wedded to traditional business models than legacy media companies, Creative Upstarts are embracing the opportunities that new digital platforms afford to connect with their fans and funders and to project their diverse voices onto the global stage. Creative Upstarts are also less constrained creatively by the imperatives of the mass market than traditional media giants. They can afford to take the chances that lead to artistic breakthroughs. Look at the recent Academy Award-winning Best Picture films. Increasingly, they come from independent filmmakers, not major studios. Similarly, you seldom find path-breaking new music on the top 40 lists dominated by major record labels. Time and again, artistic innovation starts on the fringes and moves to the mainstream only later.

At the same time, as commercial enterprises, Creative Upstarts are capable of far more ambitious and sustained creative investments than amateurs who produce user-generated content. Dancing babies and lolcats can make us smile, but their pleasures are ephemeral. Producing significant works of authorship almost always consumes economic resources on a scale that make commercial funding necessary. It is this combination of creative innovation and commercial dynamism that makes Creative Upstarts so deserving of our support.

If we take seriously the promise of copyright laws to incentivize creative innovation, Creative Upstarts should be a central focus of copyright policy. And for copyright law to unleash the dynamic potential that Creative Upstarts embody, we need to take seriously the capacity constraints that hold Upstarts back. As we have seen, the ease by which Creative Upstarts can navigate the copyright system has direct bearing on the values of incentives that copyright confers. We therefore need to develop a copyright system that is much more user-friendly and sensitive to transaction costs. This means developing mechanisms to disseminate basic copyright information and devising low cost solutions that enable Creative Upstarts to register and license their work, enforce their rights, protect their artistic integrity, and navigate around the conflicting rights of others.

### **Fixing the Capabilities Gap**

Fortunately, there are signs that policy-makers have started to move in this direction. The internet has made possible a wealth of online resources that can educate authors and creators about copyright law. The US Copyright office website itself dispenses helpful information on variety of topics, some practical, some whimsical (e.g. “How do I protect my sighting of Elvis”).<sup>4</sup> Similar websites are operated by many foreign copyright office counterparts. Privately run websites have also stepped into the breach, offering advice to authors on how to “Keep Your Copyright,”<sup>5</sup> how to stay within the contours of the fair use doctrine,<sup>6</sup> as well as other copyright basics pitched at Creative Upstarts constituencies.<sup>7</sup>

A variety of non-profit organizations, professional guilds and law school clinics also provide low-cost legal advice to Creative Upstarts. Such targeted provision of copyright expertise can furnish Upstarts

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<sup>4</sup> See *What Does Copyright Protect?*, US Copyright Office, <http://www.copyright.gov/help/faq/faq-protect.html#star>.

<sup>5</sup> Kernochan Center for Law, Media, and the Arts, Columbia Law School, <http://web.law.columbia.edu/keep-your-copyrights>.

<sup>6</sup> *Fair Use Checklist*, Columbia Law School, <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>; *Documentary Filmmakers' Statement of Best Practices in Fair Use*, <http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>.

<sup>7</sup> *Resources for Creators*, Copyright Alliance.org, [http://www.copyrightalliance.org/creators\\_resources](http://www.copyrightalliance.org/creators_resources).

with timely, context-specific solutions. Many of these providers also conduct outreach and education initiatives that empower authors with a more sophisticated understanding of copyright.<sup>8</sup>

Technology has a place to play here as well. Computerized “expert systems” can deliver high-quality customized advice at a fraction the cost of conventional legal delivery systems. Tulane University’s online “Durationator” tool, which calculates copyright duration (and thus tells you when the copyright will expire for a given work), offers one example that hints at greater possibilities to come.<sup>9</sup> Computer networks can also yield transactional efficiencies that redound to the benefit of Creative Upstarts. For example, 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.”<sup>10</sup> Such a system could make it far easier (and more profitable) for producers of long-tail content to monetize their creativity.

The U.S. Copyright Office has also begun to recognize the distinctive needs of independent authors and creators and to take steps to respond to them in recent initiatives. The introduction of lower fees for solo authors in its latest registration fee schedule is a welcome development.<sup>11</sup> Proposals for a small claims dispute resolution process would also go a long way toward alleviating one of the biggest hurdles preventing Creative Upstarts from asserting their rights: namely, the crushing expense of conventional litigation.<sup>12</sup>

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8. See Lesley Ellen Harris, *Affordable Copyright Advice*, 17 COPYRIGHT & NEW MEDIA L. NEWSLETTER, Issue 4, p.5 (2013) (surveying providers); *Resources for Creators*, Copyright Alliance.org, [http://www.copyrightalliance.org/creators\\_resources](http://www.copyrightalliance.org/creators_resources) (listing copyright services provided by professional guilds).

<sup>9</sup> *The durationator*, <http://www.durationator.com/>.

<sup>10</sup> See Richard Hooper CBE and Dr Ros Lynch, *Streamlining copyright licensing for the digital age*, Intellectual Property Office, July 2012, available at: <http://www.ipo.gov.uk/hargreaves-copyright-dce>.

<sup>11</sup> Copyright Office Fees: Registration, Recordation and Related Services, 79 Fed. Reg., No. 56, March 24, 2014, at 15910.

<sup>12</sup> U.S. Copyright Office, *Remedies for Copyright Small Claims*, September, 2013, available at <http://www.copyright.gov/docs/smallclaims/>. It is worth noting that because jurisdiction over copyright issues remains exclusively federal, authors of copyrighted works are unable to seek relief in the state court small claims system.

Such efforts remain selective and incomplete. There is much scope yet for fresh thinking and innovative uses of technology. By stripping away the barriers that prevent Creative Upstarts from effectively exploiting their copyrights, we will secure to them the benefits that the copyright is supposed to afford. And by doing so, we will, in turn, diversify our sources of creative innovation in ways that benefit all of us. As policy-makers in US undertake what promises to be a major overhaul of copyright legislation (and with similar efforts happening overseas), hopefully the needs of Creative Upstarts will garner the attention they deserve.<sup>13</sup>

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Their choice has thus far been either to forgo their claims entirely or file a (costly) federal case.

13. See *Chairman Goodlatte Announces Comprehensive Review of Copyright Law*, U.S. House of Representatives Committee on the Judiciary, April 24, 2013, available at: [http://judiciary.house.gov/news/2013/04242013\\_2.html](http://judiciary.house.gov/news/2013/04242013_2.html); Department of Commerce Internet Policy Task Force on Copyright Policy, Creativity, and Innovation in the Digital Economy, 2014 PUBLIC MEETINGS, <https://www.signup4.net/Public/ap.aspx?EID=THEG32E>.