Looking Back (and Forward) at the “Moral Right of Revision”

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Copyright Authorship and Ownership

• Author=initial copyright owner, but . . .
  – Rights can subsequently be transferred
  – Works-for-hire are “authored” by employers

• Authors can be non-owners of copyrights to works they have created.
Why Authors Alienate

• In exchange for publication, $$

• Limited capacity for self-publishing, dissemination, management of rights.

→ Efficient market exchange through freedom of alienation?
  • Cf. Cohen & Nachbar on industrial organization
What Authors Alienate

• 17 U.S.C. 106
• Right to reproduce
• Right to publicly distribute, display, and perform
• Right to prepare derivative works
  = Right to revise work, revisit style?
The Reviser’s Dilemma

“One of the rare, but disconcerting aspects of our intellectual property law is that occasionally a creator can suffer some legal consequences because her recent creation is found to impinge upon the propertied region of one of her prior creations. These legal consequences could be either the inability to assert some intellectual property right or, more commonly, having her own freedom limited by property rights now held by someone else.”

Key Examples

• Gross, et al. v. Seligman (1914)
• Esquire, Inc. v. Varga Enters. (1948)
• Warner Bros. Pictures, Inc. v. CBS (1954)
• Franklin Mint v. Nat’il Wildlife Art Exch. (1978)
• Schiller & Schmidt v. Nordisco (1992)
• Fogerty v. Fantasy Attic (1994)

“[O]ne can and often does copy one's own work (and so may be an infringer if one doesn't own the copyright on it)”
Why Worry?

• Authors’ special creative voice
• Authors’ special personhood interests
  – But see Sprigman re “mush”
• Authors’ special bargaining dilemmas
  – Need to publish (changing in digital age)
  – Unforeseeable future creativity
  – Bilateral monopoly
Author Revisers Under the Statute of Anne

- Authors = owners?
  - **Authorial copyright**, unlike Stationer’s Company regime, but typical practice was for authors to assign
  - Short initial term and reversion theoretically returns all rights to author, but could also be assigned

- Non-owners = revisers?
  - No express adaptation or derivative work right for copyright holders, cases sometimes permit “fair abridgement”
  - Q: any claims against author/abridgers under SoA?

- Did authors use their power to revise w/o publisher permission?
  - Seems unlikely given publishers’ practical advantages
Why Worry Now?

- Authors’ special creative voice
- Authors’ special personhood interests
- Authors’ special bargaining dilemmas
  - Need to publish (changing in digital age)
  - Unforeseeable future creativity
  - Bilateral monopoly
- Technology → ability to self-publish revisions but for copyright problems
Voluntary Solutions

• Pre-transfer
  – Retaining *authorial copyright*
  – Out-of-print clauses and other types of contractual reversion

• Post-transfer
  – Renegotiating

• Problems
  – Lack of bargaining power, foresight
  – Bilateral monopoly post-transfer
    • Special hold-out problem for authors
Legal Solutions

• Two existing models
  – Special/strengthened CR exceptions for authors.
    • Recall SoA’s limited scope
  – Authorial right to terminate/withdraw CR assignments and regain rights, sometimes with payment required.
    • Recall SoA’s limited duration and dual terms

• A hybrid solution
UK exception for “making of subsequent works by same artist”

• “Where the author of an artistic work is not the copyright owner, he does not infringe the copyright by copying the work in making another artistic work, provided he does not repeat or imitate the main design of the earlier work.”
Israeli exception for “additional artistic work made by the author”

• “Making a new artistic work which comprises a partial copying of an earlier work, or a derivative work from an earlier work, as well as any use of the said new work, are permitted to the author of the said earlier artistic work even where said author is not the owner of the copyright in the earlier artistic work, provided the new work does not repeat the essence of the earlier work or constitute an imitation thereof.”
UK/Isreal

• Exception for artists whose new artistic works copy old works.

• Unclear re extent of copying permitted
  – No “imitation” allowed?
Right to Withdraw/Terminate
French Right to Reconsider or Withdraw

• “Notwithstanding assignment of his right of exploitation, the author shall enjoy a right to reconsider or of withdrawal, even after publication of his work, with respect to the assignee. However, he may only exercise that right on the condition that he indemnify the assignee beforehand for any prejudice the reconsideration or withdrawal may cause him. If the author decides to have his work published after having exercised his right to reconsider or of withdrawal, he shall be required to offer his rights of exploitation in the first instance to the assignee he originally chose and under the conditions originally determined.”
German Right of Revocation for Changed Conviction

• “An author may revoke an exploitation right if the work no longer reflects his conviction and he therefore can no longer be expected to agree to the exploitation of the work. . . . The author must equitably indemnify the holder of the exploitation right. . . . Should the author wish to resume exploitation of the work after revocation, he shall be required to offer to the previous holder of the exploitation right the same type of right on reasonable conditions.”
Spanish Rights
to Alter and Withdraw

• “The author is invested with the following unrenounceable and inalienable rights: . . . the right to alter the work subject to respect for the acquired rights of third parties and the protection requirements of goods of cultural interest; the right to withdraw the work from circulation for reasons of changed intellectual or moral convictions, after indemnification of the holders of exploitation rights for damages and prejudice. If the author later decides to resume exploitation of his work, he shall give preference, when offering the corresponding rights, to the previous holder thereof, and shall offer terms reasonably similar to the original terms . . . .”
U.S. Termination of Transfer

- Limited time window
- No payment required
- All rights revert to author or statutory heirs
- Reflects “second-bite at the apple policy”
  - About bargaining power imbalance and money, not artistic freedom
  - Criticized for devaluing copyrights
  - Constrained by recent judicial interpretations
A Hybrid Solution

- Limited monetary liability (and no injunctions) for derivative works prepared by human authors of originals.
  - A “liability rule” solution that avoids special hold-up problems for authors
  - Payment requirement limits devaluation of copyright at less cost than indemnification because CR holder retains most rights. (How to calculate? How to afford?)
  - Unlike U.S. termination of transfer, can be exercised at any time
  - Could be combined with doctrines (fair use, etc.) that would yield no liability in some cases
  - Right of first refusal?
Learning from the Statute of Anne

• Authorial autonomy on the books versus publisher power on the ground

• Today: the ground is shifting, but old assignments may constrain authorial autonomy

• SoA’s limits on duration and scope may be combined to inspire a new solution