

## Author-Centered Copyright Enforcement?

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### INTRODUCTION

This Symposium explores our flexibility within international copyright law to better serve the purposes of copyright and, specifically, to benefit the individual human creators (authors) of our cultural and intellectual heritage.<sup>1</sup> Where other contributions consider the potential for a different allocation of *rights*, here I explore the potential for author-centered copyright *enforcement*: could we frame copyright enforcement practices and remedies with the explicit goal of promoting the interests of authors? Could enforcement reform avoid the zero-sum game that pits homogenous and undifferentiated “copyright interests” (authors *and* publishers) against the rest of the world (commercial infringers, users, intermediaries, and others)? The international legal framework governing copyright enforcement is relatively open-textured. It is worth at least considering

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1. “Authors” here is used in the copyright law understanding, extending to all human creators of copyright-protected subject matter, including artists, computer programmers, composers, etc. See Jane Ginsburg, *The Concept of Authorship in Comparative Law*, 52 DEPAUL L. REV. 1063, 1064 (2003) (“in copyright law, an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work”). I acknowledge that human creators extend beyond this set, to include performers, but am not focused on their potential claims to consideration. See generally Ruth Towse, *The Singer or the Song? Developments in Performers’ Rights from the Perspective of a Cultural Economist*, 3 REV. LAW & ECON. 745 (2007).

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whether we could tailor civil enforcement procedures and remedies so that authors can win without ever more draconian enforcement.<sup>2</sup>

Apart from certain very specific contexts—such as moral rights<sup>3</sup>—authors are rarely recognised as having interests in enforcement distinct from those of other right holders. But although authors and cultural intermediaries (publishers, record companies, and other disseminators of content) “do market battle shackled one to another as they do battle with users” with the “prime aim” of “driv[ing] away pirates and freeloaders and [extracting] returns from licensees,”<sup>4</sup> their interests when infringement is alleged are not co-extensive. The division of risks and rewards in litigation can reflect well-known imbalances in bargaining power between authors and disseminators.<sup>5</sup> Contracts may allocate significant litigation risk to authors, while allocating litigation decision-making and rewards to the entity that owns copyright.<sup>6</sup> Authors have distinct moral claims, and personal interests not likely to be felt with the same intensity by publishers or record companies.<sup>7</sup> Further, needs and desires of authors can conflict with those of investors.<sup>8</sup>

I have argued elsewhere for better recognition of the personhood and interests of defendants in thinking about copyright procedures and remedies<sup>9</sup> and, in other

2. Copyright infringement is also, in some circumstances, a criminal offence. Whilst more consequential for defendants, in general, criminal enforcement cannot be relied upon by authors: illegal activity can be brought to the attention of authorities, but pursuit and prosecution is ultimately at the discretion of the state, and in most systems, monetary judgement or penalty flows to the state. Criminal enforcement is therefore not a focus here.

3. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, and *as amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986), <https://perma.cc/A8MA-9CGV> [hereinafter Berne Convention].

4. William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 (2002).

5. On these imbalances, see generally RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* (2000) (outlining reasons for imbalances in negotiating power as between individual creators and the larger investors); Ruth Towse, *Copyright and Cultural Policy for the Creative Industries*, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY* 427, 427 (Ove Granstrand ed., 2003) ([f]irms in the creative industries are able to “free-ride” on the willingness of artists to create and the structure of artists’ labour markets, characterised by short term working practices and oversupply, mak[ing] it hard for artists to appropriate rewards.); Ruth Towse, *Copyright and Economic Incentives: An Application to Performers’ Rights in the Music Industry*, 52 *KYKLOS* 369 (1999) [hereinafter Towse, *Performers’ Rights*] (discussing the principal/agent relationship between authors and publishers).

6. *Stop Forcing Authors to Take Unlimited Financial Risks*, THE AUTHORS GUILD (Dec. 18, 2015), <https://perma.cc/9R86-7L87> (highlighting contracts that require authors to give indemnities to publishers against suits for copyright infringement, defamation/libel/slander etc. . .).

7. These are generalities, although some publishers are no doubt personally attached to their publications. Further, not all authors have the same kinds of interests. See Martin Senftleben, *Copyright, Creators and Society’s Need for Autonomous Art—the Blessing and Curse of Monetary Incentives*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 25 (Rebecca Giblin & Kimberlee Weatherall eds., 2017) (discussing different interests of the popular artist and the member of the *avante garde*). For examples of intra-artist conflicts, see generally *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (appropriation artist against commercial photographer); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (appropriation artist against anthropologist photographer).

8. Academic authors’ desire for maximum dissemination is an obvious example, but another would be the potential conflict around the value of scarcity in the visual arts. See CAVES, *supra* note 5.

9. Kimberlee Weatherall, *Provocations and Challenges Concerning Enforcement and Civil Procedure in IP*, in *INTELLECTUAL PROPERTY AND GENERAL LEGAL PRINCIPLES: IS IP A LEX*

earlier work, focused on how we might get better value from the public investment in copyright enforcement.<sup>10</sup> So my purpose here is not to advocate for a model, but rather, to demonstrate that there are author-friendly alternatives to the constant upwards ratchet of copyright enforcement reform.

## I. BACKGROUND: FLEXIBILITY IN THE INTERNATIONAL LEGAL FRAMEWORK ON ENFORCEMENT

One key reason for thinking about author-centered enforcement as part of a broader project to tailor copyright to better serve its purposes is that we have considerable flexibility in the multilateral conventions to make adjustments to remedies and procedures relating to copyright.<sup>11</sup> Three treaties are mentioned here. The first and most important is the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), the WTO IP agreement.<sup>12</sup> I also include citations to two plurilateral texts which the U.S. and Australia have both negotiated, the Anti-Counterfeiting Trade Agreement (“ACTA”)<sup>13</sup> and the Trans-Pacific Partnership (“TPP”)<sup>14</sup>, although neither has entered into force or looks likely to do so. These two agreements are useful demonstrations that even in the most detailed enforcement provisions proposed to date, there is flexibility in the international framework concerning enforcement.

TRIPS explicitly allows legislatures to think about the goals of copyright law in framing enforcement,<sup>15</sup> affirming that “[t]he protection *and enforcement* of intellectual property rights should [be] *conducive to social and economic welfare*,

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SPECIALIS? 181 (Graeme B. Dinwoodie ed., 2015) (highlighting important substantive concerns and values discussed in the general academic literature on procedures and the justice system such as the need to respect the rights of all participants in legal procedures and facilitate participation by plaintiffs/claimants *and* defendants/respondents so that they are invested in the result even if adverse to their interests. I argued that unless we bring this other set of values into our thinking, we risk focusing only on the needs of IP rights holders, and treating defendants as the means to an end.)

10. Kimberlee Weatherall, *A Reimagined Approach to Copyright Enforcement from a Regulator’s Perspective*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 281, 294–312 (Rebecca Giblin & Kimberlee Weatherall eds., 2017) (imagining how a public copyright enforcer might act).

11. See Kimberlee Weatherall, *Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties*, 32 AM. U. INT’L L. REV. 211 (2016) (on which this Part draws).

12. Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 41–61, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

13. Anti-Counterfeiting Trade Agreement, *opened for signature* Oct. 1, 2011 (not in force) [hereinafter ACTA]. ACTA was negotiated by Australia, Canada, the E.U., Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and the U.S., but has not reached, and seems unlikely to reach, sufficient ratifications to bring it into force.

14. Trans-Pacific Partnership Agreement [hereinafter TPP]. The TPP was negotiated to completion but rejected by the U.S. under President Trump. Negotiations among remaining parties continue with a view to bringing it into force without the U.S.

15. Weatherall, *supra* note 11, 228–30 (arguing that copyright purposes are relevant to understanding the enforcement treaty provisions); Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT L. J. 1, 25 (2011) (“International law permits using remedies, as proposed here, as a method of correcting some of copyright law’s most fundamental flaws”); Antony Taubman, *A PRACTICAL GUIDE TO WORKING WITH TRIPS* 109–10 (2011).

*and to a balance of rights and obligations.*"<sup>16</sup> It is therefore legitimate to consider the interests of authors in framing and applying enforcement provisions, at least within the bounds of any mandatory language.

TRIPS sets out detailed requirements for enforcement procedures that Member States must provide, including civil judicial procedures and remedies available to right holders,<sup>17</sup> "so as to permit effective action against any act of infringement."<sup>18</sup> These must include specified remedies "to prevent infringement" and as a deterrent.<sup>19</sup> But although detailed, TRIPS' enforcement provisions are carefully drafted to preserve domestic sovereignty over practice and procedure, and for the most part, elements of this drafting have persisted even as provisions have become more detailed in later bilateral and plurilateral trade and intellectual property agreements.<sup>20</sup> This is consistent with the general principle that Member States are free to determine the appropriate method of implementation within their own legal system and practice.<sup>21</sup> In general, TRIPS remedies and procedures require only that national courts *have the authority* to make certain orders or grant certain remedies. For example, TRIPS article 45.1 (Damages) requires that the courts shall have the authority to order the infringer to pay the right holder damages. This is not an obligation to exercise authority in every case.<sup>22</sup> Importantly, the details are left to domestic courts and legislatures: while damages must be "adequate to compensate for the injury the right holder has suffered," the methods of calculating monetary awards are not governed by TRIPS. Even in the more recent international trade and IP texts, it is rare to see provisions set down when or how such authority ought to be exercised.<sup>23</sup> In most cases, these texts adopt similar

16. TRIPS, *supra* note 12, art. 7. *See also* TPP, *supra* note 14, art. 18.2; ACTA, *supra* note 13, art. 2.3 (incorporating TRIPS art. 7) (emphasis supplied).

17. TRIPS, *supra* note 12, at art. 42. The "right holder" is the IP (including copyright) owner. A footnote extends the concept to include federations and associations having legal standing (under domestic law) to assert such rights. The civil procedures and remedies are set out in articles 43–50.

18. Taubman, *supra* note 15, at 110 (stating "an essential negotiating impetus for TRIPS lay in the call for effective enforcement"); Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R 52 (Jan. 26, 2009) [hereinafter US–China Panel Report] (stating that "one of the major reasons for the conclusion of the TRIPS Agreement was a desire to set out a minimum set of procedures and remedies").

19. TRIPS, *supra* note 12, art. 41.1. *See also* ACTA, *supra* note 13, art. 7.

20. *See* Weatherall, *supra* note 11, at 266–75.

21. *See* TRIPS, *supra* note 12, art. 1.1. *See also* ACTA, *supra* note 13, art. 2.1; TPP, *supra* note 14, art. 18.5. This reflects the fact that these enforcement provisions must accommodate a wide range of different judicial and administrative systems and avoid creating a distinct procedural and remedial system applying only to IP cases. *See* William R. Cornish et al., *Procedures and Remedies for Enforcing IPRs: The European Commission's Proposed Directive*, 20 EUR. INTELL. PROP. R. 448 (2003) (arguing for consistency across areas of private or civil law). *See generally* Taubman, *supra* note 15, at 109–10; Weatherall, *supra* note 11.

22. US–China Panel Report, *supra* note 18, at ¶ 8.1. *See also* Appellate Body Report, United States—Section 211 of the Omnibus Appropriations Act of 1998, WT/DS176/AB/R (Jan. 2, 2002).

23. *See, e.g.*, TRIPS, *supra* note 12, art. 50.2 (specifying that provisional measures *inaudita altera parte* may be appropriate where delay is "likely to cause irreparable harm to the right holder" or where there is a "demonstrable risk of evidence being destroyed"). A rare example of a provision that requires an order be made is art. 13.1 of the E.U. IP Enforcement Directive, requiring that member states "*shall ensure* that the competent judicial authorities, on application of the injured party, *order* the

drafting providing only that courts must have the authority to make certain orders, both in relation to damages<sup>24</sup> and other remedies.<sup>25</sup> Even in cases where newer provisions have, for example, required that courts take into account certain considerations in granting remedies (for example, the retail price of goods), treaty text does not preclude legislatures from taking into account other considerations (like author interests).<sup>26</sup> Finally, Member States are entitled to go further than the treaty texts,<sup>27</sup> meaning states interested in benefiting authors could propose additional remedies specifically targeted to them.

In short, the international legal framework in copyright allows national legislatures and courts to consider author interests in framing and applying remedies or provide additional remedies beyond those provided for in the treaties specifically targeted to benefit human authors. It is not, of course, infinitely malleable, but there is room for author-centered enforcement.

## II. COULD WE PUT AUTHORS AT THE HEART OF ENFORCEMENT?

What would this look like? Not like our current system. Over the last two decades, authors' limited incomes have been used to justify many new, more expansive enforcement policies:<sup>28</sup> anti-circumvention laws, expanded actions against intermediaries, experiments with direct enforcement against individual file-sharers and graduated response, website-blocking injunctions, and follow-the-money approaches focused on advertising and payment providers.<sup>29</sup> But policymakers often fail to ask whether specific reforms actually benefit authors,<sup>30</sup> putting faith in a kind of "trickle down copyright," where stronger publishers lead to more or better-remunerated human creators. Authors are also rarely visible as stakeholders in academic discussion of copyright enforcement.<sup>31</sup> Recent scholarly

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infringer" to pay damages. Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 16, 23 [hereinafter E.U. IP Enforcement Directive].

24. See, e.g., ACTA, *supra* note 13, art. 9.1-2, 9.4-5; TPP, *supra* note 14, art. 18.74.3.

25. See, e.g., TRIPS, *supra* note 12, art. 50; ACTA, *supra* note 13, art. 8.1; TPP, *supra* note 14, art. 18.75.2-3 (establishing obligations to provide for provisional measures drafted in similar terms). On injunctions, see, e.g., TPP, *supra* note 14, art. 18.74.2 (stating the power to issue injunctions in similar terms); TRIPS, *supra* note 12, art. 44.1, 50.1-3.

26. TPP, *supra* note 14, art. 18.74.4; ACTA, *supra* note 13, art. 9.1.

27. TRIPS, *supra* note 12, art. 1.1.

28. Recent studies of author incomes in Australia suggest an overall decline. See, e.g., Jan Zwar, David Throsby & Thomas Longden, *Australian authors - Industry Brief No. 3: Authors' Income*, MACQUARIE UNIVERSITY, <https://perma.cc/RVL7-D4BU>.

29. See Weatherall, *supra* note 10 (discussing copyright's "deterrence death spiral": the upward trajectory of enforcement and how it might undermine respect for copyright).

30. Serious cost-benefit analysis of enforcement initiatives, or *ex post* assessment of whether they worked and why, are the exception rather than the rule. Weatherall, *supra* note 10, at 284.

31. Cf. patent scholarship considering whether remedies should be tailored to provide incentives for invention and technological development. See, e.g., Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 1991, 2036 (2007); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031 (2005); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575 (2003); Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-*

work looks at the industry-level (not author-level) impact of infringement;<sup>32</sup> whether efforts to reduce online infringement have been effective; at the political economy promoting these innovations;<sup>33</sup> and how other interests, such as freedom of expression or open innovation, are affected.<sup>34</sup> To change this dynamic, we need to demonstrate that we can benefit creators specifically via alternatives not involving more draconian and intrusive measures.

Authors are also absent from international legal texts on enforcement. TRIPS' enforcement provisions do not mention authors or human creators, conferring all procedural rights and remedies on right holders (i.e. owners).<sup>35</sup> The E.U. IP Enforcement Directive in its recitals may place human creators front and centre of its rationales, stating in Recital 2 that "[t]he protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation."<sup>36</sup> But authors are mentioned in the substantive articles precisely once: in a provision chiefly aimed at extending the Berne Convention's presumption of authorship to a presumption of ownership in favour of other right holders whose name appears on the work in the usual manner.<sup>37</sup> ACTA, a (failed) plurilateral treaty devoted entirely to enforcement, did not refer to authors or human creators at all in its preamble, identifying only "right holders, service providers, and users" as stakeholders in the IP enforcement system.<sup>38</sup>

This is all explicable. Copyright is a property right: it is generally the right holder who will have standing to enforce it. That could be the author, but more often is their successor in title: their employer or an intermediary (such as a publisher) that specialises in disseminating copyright content. But by treating right holders as an undifferentiated group, we are liable to miss divergences in interests among them. When authors are not at the litigation table, it is their interests most likely to be subsumed.

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*Injunctive Remedies*, 97 MICH. L. REV. 985 (1999); Ted Sichelman, *Purging Patent Law of "Private Law" Remedies*, 92 TEXAS L. REV. 517 (2014).

32. See Stan J. Liebowitz & Richard Watt, *How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives*, 20 J. OF ECON. SURVEYS 513 (2006).

33. See, e.g., MONICA HORTEN, *THE COPYRIGHT ENFORCEMENT ENIGMA: INTERNET POLITICS AND THE 'TELECOMS PACKAGE'* (2012); Yochai Benkler et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*, 32 POLITICAL COMMUNICATION 594 (2015).

34. See, e.g., Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking*, 32 AM. U. INT'L L. REV. 43 (2016); David Lindsay, *Website blocking injunctions to prevent copyright infringements: Proportionality and effectiveness*, 40 U.N.S.W. L. J. 1507 (2017) (examining human rights and other implications of website blocking); JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* (2008) (considering impact of anti-circumvention law on innovation).

35. TRIPS' other substantive provisions mention authors only once, in conferring rental rights. See TRIPS, *supra* note 12, art. 11. However, TRIPS art. 9.1 imports most of the substantive provisions of the Berne Convention and, by so doing, confers a wide range of rights directly on authors of copyright works.

36. E.U. IP Enforcement Directive, *supra* note 23, at Recital 2.

37. E.U. IP Enforcement Directive, *supra* note 23, art. 5 and Recital 19.

38. ACTA, *supra* note 13. ACTA too mentions authors in its substantive provisions only once, in ACTA art 27.5 (reproducing text from the World Intellectual Property Organization Copyright Treaty, *opened for signature* Dec. 20, 1996, 36 I.L.M. 63 (WCT) (art 10.1) on anti-circumvention law).

We can think of the author as a distinct stakeholder in enforcement in two ways: as a risk-sharer in the creative economic enterprise, and as the bearer of distinct moral and personal interests not shared by other actors in that enterprise. Conceptually disentangling authorial and investor interests through these lenses could reveal ways we might make adjustments to procedures and remedies to better serve authors.

#### A. THE AUTHOR AS RISK-SHARER

Copyright infringement is a tort, or civil wrong, giving the wronged party a right to an injunction against continuing infringement, to compensation for harms suffered, and to restoration, so far as possible, to the position they would have been in but for the infringement. This is reflected in the award of damages, usually quantified as lost sales or license fees.<sup>39</sup> Importantly it is not just the right holder or owner of copyright who can suffer loss as a result of infringement. The independent author is (often) a risk-sharer in the creative business enterprise of a cultural intermediary.<sup>40</sup> An author may receive a lump sum payment for their creative efforts: in such a case, their direct economic risk persists up to the point of acceptance of the final work.<sup>41</sup> More typical in some industries is a relationship that provides authors with a direct financial interest (and share of the risk) via the payment of royalties by a cultural intermediary (e.g. publisher).<sup>42</sup>

To the extent that damages awards (or equivalent sums paid in settlement) are intended to restore the plaintiff to the position they would have been in without the defendant's breach, then authors who receive a royalty are also entitled to compensation. Legal systems around the world also commonly require an infringer to disgorge their profits, often as an alternative to the payment of compensation. To the extent that such disgorgement goes beyond compensation, the idea is to make sure the defendant cannot profit from their wrong. There seems to be no reason in principle why authors who share the risk associated with their creative works ought not similarly share any profits handed over:<sup>43</sup> they too, perhaps more than the investor, contributed to the infringer's profits.

39. Copyright Act 1968 (Cth.) ss 115(3)–(4) (Austl.); 17 U.S.C. § 504; *Bailey v. Namol Pty Ltd.* (1994) 53 FCR 102, 111 (Austl.).

40. Cornish, *supra* note 4. This subsection is focused on independent authors. Employed authors, such as some journalists, are still risk-sharers in that they share in the overall risk of business success or failure. As a risk-sharer, the author has an economic interest in the success of the investor's exploitation of their work. Arguments in this part, however, do not apply well where an author's economic well-being does not depend on their particular works.

41. Although arguably in such a case, the author may still share some reputational risk arising from the way their work is presented and disseminated.

42. RICHARD WATT, *COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES?*, 88-89 (2000). For reasons why such arrangements make sense on both sides, see TOWSE, *supra* note 5 (analyzing the problem as a principal/agent problem). These arrangements are less typical of the music industry, where composers' rights are owned by composers and then subject to a compulsory license. This creates a different set of problems.

43. See e.g. Copyright Act 1968 (Cth.) ss 115(2) (Austl.) (requiring an election between damages and an account of profits (disgorgement)).

Authors therefore have an interest in enforcement against infringers. Assuming too that the author has less capacity for and experience in litigation, they also have an interest in the intermediary taking enforcement action where necessary to protect their joint interests. But this does not mean the author's interest—or risk calculus—in copyright litigation is identical to that of the intermediary. As this discussion makes clear, authors and intermediaries may compete for a share of the compensation. As Ruth Towse points out, we need to pay attention to the allocation of risk and reward between intermediary and author.<sup>44</sup>

Because it is governed by contract, the details of this allocation are largely invisible to scholars and policymakers. In relation to monetary awards, the empirical questions are: (1) whether contractual arrangements grant authors any entitlement to the fruits of enforcement, and (2) whether authors receive anything in practice. Both questions would be difficult to examine: contracts can vary widely, and may be silent or vague on such questions. What happens in practice is hard to ascertain given the relative rarity of copyright litigation, difficulties in quantifying the basis for compensatory damages awards, and the fact that monetary flows between authors and intermediaries are confidential. Where multiple different works by multiple different authors are involved in enforcement litigation, it may not be possible to calculate, with any degree of accuracy, the entitlement to compensation for individual authors.

But if generalisation is not possible, author-centered enforcement would, nevertheless, take steps to promote authors' legitimate claims to a reasonable share of enforcement proceeds in individual cases. For example, at the most basic level, courts setting damages awards could (or legislatures could direct courts to) consider proceeds which would have flowed to human authors but for the infringement, and direct intermediaries to notify affected authors and enable payment.<sup>45</sup> This would be consistent with the general position in tort claims, that compensatory damages should compensate for harm actually suffered: an intermediary plaintiff who receives damages but fails to pass on an author's share arguably receives a windfall.<sup>46</sup>

One thing we do know about these contractual relations, from the recent campaigning by the Authors' Guild, that at least in the book industry, publishers commonly seek indemnities against litigation costs arising from allegations of the author's own infringement of others' rights, and may also require authors to obtain copyright clearances.<sup>47</sup> This too creates a divergence of interests: if common across industries, it could mean that on both creative and financial grounds, authors, far more than intermediaries, could have an interest in ensuring that copyright rules do not prevent authors engaging in (justifiable, creative) imitation

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44. TOWSE, *supra* note 5.

45. For example, legislation could stipulate that any judgement or settlement awarded to a right holder must allow for proceeds which would have flowed to the author but for the infringement, with that amount required to be set aside for the author and be made available on application by the author.

46. This is complex: the costs of litigation (inter alia) mean that compensatory damages do not always cover the full loss.

47. THE AUTHORS GUILD, *supra* note 6.



of and reference to existing canons, and overturning, or transforming, existing material—in order to ensure that they themselves are not plagued by frivolous suits.<sup>48</sup>

### B. THE AUTHOR AS THE BEARER OF MORAL AND PERSONAL INTERESTS

Ensuring protection for authors' direct economic interests when copyright is enforced is one thing, but disentangling authorial and non-authorial interests in, and justifications for, copyright in granting remedies becomes really interesting once we consider that not all interests in copyright enforcement are shared. Some rightly belong to authors only,<sup>49</sup> because the author is the bearer of moral claims in relation to their creative output, and this may have implications for remedies.

Authors have a unique connection with their work: in Hegelian terms, creative works uniquely are a manifestation of the creator's personality or self. This justifies the assertion of property, and some continuing stake in the work and its treatment and use after its sale to others.<sup>50</sup> These moral claims are partially recognised in many legal systems around the world via moral rights such as the right to attribution and to integrity of the work, and rights of publication and withdrawal.<sup>51</sup> But we can take this reasoning further. If we believe that copyright works can be an extension of the self, then, to an author, ordinary copyright infringement can be an injury akin to other tortious affronts to the person such as defamation, or trespass to the person.<sup>52</sup> If so, the author has a non-economic

48. Remedies could be adjusted to take account of this. See, e.g., Paul Geller, *Hiroshige vs Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement*, 46 J. COPYRIGHT SOC'Y OF THE U.S.A. 39 (1998) (suggesting serving authorial interests through a kind of sliding scale of remedies, with the most coercive remedies to be applied to mere rote copying, the least coercive remedies to cases involving innovative recasting of work, with cases in-between ("knowledgeable reworking" subject to discretionary adjustment)).

49. The "disentangling" analysis draws on Rebecca Giblin's recent approach on copyright term. See Rebecca Giblin, *Reimagining copyright's duration*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 177-211 (Rebecca Giblin & Kimberlee Weatherall eds., 2017). Giblin argues we could in theory disentangle investor and author interests, by instituting a shorter "copyright" assignable to investors designed to provide the minimum return required to fulfill the incentive purposes of copyright, and a subsequent extended "creator-right" to recognise and reward authors, that would return to the author for their own exploitation or assignment to the same or different investors.

50. For a detailed discussion of the application of Hegelian philosophy to intellectual property, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287 (1988). Another way to conceive of these interests is by reference to the human rights of the author. See Article 27 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

51. Berne Convention, art 6bis, discussed in SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND*, VOL I (2d ed. 2006).

52. There might be some who argue that ordinary copyright infringement—reproduction and dissemination of the work—shows respect for the author. Some authors may indeed feel that way, especially in some cases of transformative or creative infringement that builds on an author's work without free-riding. It is simply facetious however to argue the author is respected in the case of widespread or commercial re-use of copyright material, without permission from the author, and without excuse.

interest in the recognition and vindication of that affront. These are personal interests, not shared by employers or investors.<sup>53</sup>

A desire to recognise and protect this personal interest may help explain, or justify, the peculiar structure of remedies available in copyright law, and in particular three aspects of it. First, the tort of copyright infringement is actionable *per se*—meaning that the law treats the interests protected as sufficiently important that they warrant a serious remedy even without proof of any harm.<sup>54</sup> Second, it is striking how readily legislatures and courts provide for civil remedies for copyright infringement which have the explicit goals of deterrence and punishment. Infringing copies can be seized and destroyed without compensation to the infringer,<sup>55</sup> and so can instruments and assets used in the course of infringement, even where not predominantly so used.<sup>56</sup> In some countries, a remedy known as conversion damages deems infringing copies to be the property of the copyright owner and allows that owner to recover the value of those infringing copies as if the infringer had misappropriated them.<sup>57</sup>

Most striking is the availability of punitive and deterrent damages.<sup>58</sup> Statutory damages in the U.S., although originally compensatory, are regularly granted in large sums for explicitly punitive or deterrent purposes.<sup>59</sup> The punitive aspects of the remedy are reflected in a tripartite structure which sets out a default range for each award of \$750–\$30,000, but allowing for a maximum per work infringed up to \$150,000 in the case of willful infringement, or reduction of the range in the case of innocent infringement.<sup>60</sup> In the U.K. and in other jurisdictions whose legislation

53. There are exceptions: e.g. where the right holder to whom copyright has been assigned is a single director, single employee company (i.e. the corporate entity shadow of the author).

54. *Aristocrat Tech. Australia Pty Ltd v. DAP Services (Kempsey) Pty Ltd.* (in liq) (2007) 71 IPR 437 at 444 [39] (Austl.).

55. Art. 16 of the Berne Convention requires States to provide for the seizure of infringing copies. The deterrent aspects of the remedy are explicitly recognized in TRIPS art. 46: “*In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed*” (emphasis supplied). *See also* ACTA art. 10; E.U. IP Enforcement Directive art. 10.

56. *See* Copyright Act 1968 s 116 (Austl.); *Autodesk Inc. v. Yee* [1996] FCA 812; 139 ALR 735; T.H.W. Wells, *Monetary Remedies for Infringement of Copyright*, 12 ADEL. L. REV. 164, 200 (1989-90), (outlining particularly punitive cases). *See also* COPYRIGHT LAW REVIEW COMMITTEE, REPORT ON CONVERSION DAMAGES (1990) (recommending reform to reduce the remedy’s most punitive aspects, which was followed in 1998). The U.K. abolished the remedy by enacting the Copyright Designs and Patents Act 1998 (U.K.).

57. *See supra* note 56 and accompanying texts.

58. Advocate General Mengozzi Opinion in *Arjona Camacho*, C-407/14, EU:C:2015:534, [49].

59. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (“The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct.” (emphasis supplied)). *See* H Tomas Gomez-Arostegui, *What History Teaches Us about US Copyright Law and Statutory Damages*, 5 W.I.P.O. L.J. 76, 85 (2013); Pamela Samuelson & Tara Wheatland, *Copyright Statutory Damages: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 461-63 (2009) (noting that punishment is a common feature of U.S. statutory damages).

60. 17 U.S.C. §504(c).

derives from the U.K., such as Australia and New Zealand, courts can award additional damages.<sup>61</sup> Although their exact nature is unclear,<sup>62</sup> Australian and New Zealand courts have held that additional damages provisions can be motivated by a need for punishment,<sup>63</sup> and considerations relevant only to punishment of the defendant rather than vindication of the plaintiff's rights, such as flagrancy, are relevant under the Act.<sup>64</sup>

A third striking aspect of copyright remedies in some countries, including both Australia and the U.S., is that courts award substantial damages (under the statutory or additional damages heads respectively) without proof of especially egregious behaviour. Samuelson and Wheatland show that U.S. courts have awarded substantial statutory damages awards for what might be considered ordinary (rather than flagrant, or criminal) infringement.<sup>65</sup> In Australia, the flagrancy of an infringement is relevant, but not necessary, to the award of additional damages.<sup>66</sup>

These features of copyright remedies are difficult to explain, unless we see copyright law as protecting an exceptional interest, rather than mere utilitarian incentives. Punishment is a controversial goal for the civil law, and often seen as the exclusive concern of the state, as pursued through the criminal law.<sup>67</sup> Concern has been expressed regarding whether it is appropriate to apply punishment in civil cases where the burden of proof is lower, and procedural protections reduced.<sup>68</sup> In many countries, exemplary or punitive damages are either not available as a civil remedy,<sup>69</sup> or excluded or confined to certain categories of cases (a set that includes

61. See Copyright Act 1968 s 115(4) (Austl.). Australian courts state that additional damages are directed to both exemplary (punitive) and aggravated damages (given to compensate when harm done has been aggravated by the manner in which it is done): *Facton Ltd v. Rifai Fashions Pty Ltd* (2012) 95 IPR 95, [33]–[34] (Austl.).

62. LAW COMMISSION, *AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES*, 1997, 59–60 (UK); LIONEL BENTLY AND BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 1259 (4th ed. 2014).

63. *Wellington Newspapers Ltd v. Dealers Guide Ltd.* (1984) 4 IPR 417 (CA NZ); *Concrete Systems Pty Ltd. v. Devon Symonds Holdings Ltd* (1978) 20 ALR 677 at 683 (Australia); *Autodesk Australia Pty Ltd. v. Cheung* (1990) 17 IPR 69 at 76–77 (Aus); *Television Broadcasts Ltd. v. Tu* (1990) 19 IPR 307 at 321–22; *Aristocrat Tech. Australia Pty Ltd. v. DAP Services (Kempsey) Pty Ltd.* (in liq) (2007) 71 IPR 437 at 445, [48].

64. Copyright Act 1968 s 115(4)(b)(ia) (Austl.).

65. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (“Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy”); Samuelson & Wheatland, *supra* note 59.

66. *Raben Footwear v. Polygram Records Inc* (1997) 75 FCR 88, 93, 103; *Polygram Pty Ltd., Island Records Ltd. & A & M Records Inc. v. Golden Editions Pty Ltd.* (1997) 76 FCR 565, 575; *Sony Entm't (Australia) Ltd. v. Smith* (2005) 215 ALR 788; *Aristocrat Tech. Australia Pty Ltd. v. DAP Services (Kempsey) Pty Ltd* (in liq) (2007) 71 IPR 437, 444.

67. LAW COMMISSION, *supra* note 62, at 97–99; Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. LEGAL STUD. 87 (2003)

68. *Id.*

69. Volker Behr, *Punitive Damages in American and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI-KENT L. REV. 105, 107 (noting the German Federal Supreme Court has stated that sanctions serving the purposes of punishment serve to protect the general legal order, and that falls under the state's monopoly on punishment); Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in International Law, But For How Long?* 60 J. COPYRIGHT SOC'Y. OF U.S.A. 529 (2013).

torts that protect the integrity and dignity of the individual, such as defamation or trespass to the person),<sup>70</sup> and/to only the most egregious cases.<sup>71</sup> It is hard to argue that the interests of investors in cultural products are so important (and so much more important than the interests of commercial parties in other areas of the economy) that they warrant this kind of special treatment. The best explanation for this part of copyright's remedy structure is that in addition to seeking to remedy economic harms, it also protects the personal, moral interests of authors.<sup>72</sup>

But if this is right—if it is authorial interests that justify the punitive nature of copyright remedies—there is no principled reason why the resulting monetary rewards should go to an investor.<sup>73</sup> An author-centered copyright enforcement system would seek to direct such damages to the author, rather than whomever happens to own the copyright at the time.<sup>74</sup> This would ensure that copyright defendants are still deterred or punished, but would grant the windfall to the party the harm to whose personal and moral interests justify the award. The idea of directing damages to a party other than the right holder or plaintiff is certainly unorthodox, but not entirely unheard of. The U.K. Law Commission when considering exemplary damages in 1997 considered, for example, directing that some proportion of an exemplary damages award be directed to the state.<sup>75</sup>

Two key complications are immediately obvious. First, sums awarded in damages serving a punitive goal in both Australia (in additional damages) and the U.S. (in statutory damages awards) also simultaneously serve a range of other purposes. In Australia, additional damages may also provide compensation for loss that is “not merely economic”: e.g. for injury to author's reputation or feelings,<sup>76</sup>

70. This was previously the approach in the United Kingdom under *Rookes v. Barnard*. *But see* *Kuddus v. Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29, [2002] 2 AC 122 [63] (abandoning the categorical approach, but characterising punitive damages as a remedy of last resort). For a comparative discussion, see James Goudkamp & John Murphy, *The Failure of Universal Theories of Tort Law*, 21(2) LEGAL THEORY 47 (2015).

71. *See* James Goudkamp & John Murphy, *The Failure of Universal Theories of Tort Law*, 21(2) LEGAL THEORY 47 (2015).

72. *See* Beever, *supra* note 67 (arguing that the most serious kind of (private) wrong involves injury to the plaintiff's moral dignity, resulting from the defendant's denial that the victim is entitled to respect as a moral person. Beever's example of such a wrong is assault). *See also* Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES IN LAW 1, 27-29 (2000).

73. *See supra* note 67 and accompanying text (noting that the fact that punitive damages generate a windfall is often cited as a reason punitive damages should not be available at all—but this is exacerbated in copyright if the damages are not even flowing to the person who has been relevantly wronged).

74. This could also be done by refusing punitive damages to right holders who are not authors. But this would reduce deterrence; it would also be inconsistent with some more recent additions to the international legal framework. Many recent bilateral trade agreements, and recently negotiated plurilateral agreements require that statutory damages be available on the election of the right holder, and that they be available in all copyright infringement cases (including for subject matter without a human author, such as sound recordings). *See, e.g.*, ACTA art 9.3; Australia-US Free Trade Agreement art 17.1.7; TPP art 18.74.6.

75. LAW COMMISSION, *supra* note 62, at 141–44.

76. *Nichols Advanced Vehicle Sys. Inc. v. Rees* [1979] RPC 127 (rivals copied racing car, gaining fame for own team and inflicting humiliation); *Milpurruru v. Indofurn Pty Ltd.* (1994) 54 FCR 240.

for vulgarisation of the work,<sup>77</sup> or activity that undermines the exclusivity and success of the claimant.<sup>78</sup> In some cases too it has been clear that the availability of additional damages has assisted a court to provide effective compensation where ordinary damages were hard to calculate.<sup>79</sup> Statutory damages in the U.S. are, of course, explicitly designed to provide compensation in cases where quantification of harm is difficult or impossible. And even in relation to damages that are explicitly punitive, courts have recognised that damages serve a purpose of appeasement and to assuage the feelings of the wronged party: reasoning that might also apply to a non-authorial right holder.<sup>80</sup> Without seeking to make light of the difficulty involved in seeking to disentangle these various motivations, at least in theory this problem could be overcome if damages awards were granted more explicitly to distinguish—however rough the justice might need to be—between punitive and compensatory aspects.

Second, removing a significant component of the damages award available to investors might reduce their incentive to enforce copyright, and increase the likelihood of settlement in ways that would undermine benefits to authors. This would be contrary to the author's economic interests and defeat the purpose of redirection. It may not seem fair to ask right holders to bear the entire risk of litigation, just so that an author could come in at the last moment to reap damages that went beyond compensation. It might be possible to address these concerns through some appropriate division of punitive aspects of the award.<sup>81</sup> In any event, the purpose of this paper is not to set out the finer details of any model or system, but rather, to point out that there are, potentially, ways that remedies in copyright currently merge the interests of authors into those of right holders—and that “de-merger” might create a more author-centered system.

### III. CONCLUSIONS

I have argued that there is flexibility in the international legal framework addressing copyright enforcement to address the purposes of copyright, and to serve the interests of stakeholders in the system other than just right holders—including authors. I have sought also to make some specific suggestions to illustrate the point that thinking about the interests of authors specifically does open up different ideas for enforcement reform.

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77. *Conde Nast Publ'n Ltd. v. Jaffe*, 1951 (1) SA 81 at 87 (S. Africa).

78. *ZYX Music GmbH v. King* [1995] FSR 566.

79. *See, e.g., Aristocrat Tech. Australia Pty Ltd. v. DAP Services (Kempsey) Pty Ltd. (in liq)* (2007) 71 IPR 437. The court concluded that in the absence of proof of quantified loss, the plaintiff was entitled to nominal damages only. The court assessed additional damages at \$200,000: \$105,000 reflected profit made by the defendant, with an uplift to reflect flagrancy and mark the court's disapproval.

80. *See Lamb v. Cotogno* (1987) 164 CLR 1; *Merest v. Harvey* (1814) 5 Taunt 442; 128 ER 761; *W v. W* [1999] 2 NZLR 1, 3 (PC).

81. One mechanism to deal with this would be to craft a statute to allow authors up to fifty percent of damages awarded beyond compensation contingent upon the proportion which they decided to contribute to enforcement costs. This would provide a scaling mechanism which would give authors greater incentive to contribute and flexibility in decision making.

The ideas presented here are illustrative only, and we could no doubt think of others. States could, for example, make protection of authors' interests a core consideration in deciding how to distribute the scarce resources of government enforcement agencies. For example, the State could direct prosecutors to focus on cases where authors specifically have suffered substantial detriment. The State could also allocate greater funding to facilitate enforcement action in circumstances where authors own copyright but lack the resources to enforce their rights.<sup>82</sup> Parallel to this, governments could choose to direct any fines or penalties derived from criminal enforcement in the direction of human authors and creators. These funds could be applied to compensate authors affected by the criminal infringement, or allocated to creative organisations which promote authorship, for example through author grants, training or other services. Given the rapid growth of international provisions relating to enforcement, governments could also actively adopt an author-centric approach to drafting new international enforcement rules. If, for example, like the parties that negotiated ACTA, government representatives are writing provisions to encourage private solutions, or if, like the E.U., government representatives are drafting provisions to require online intermediaries to proactively enforce copyright, then they should at least *think* about the potential impacts on creators, and how to fix them. Some more recent private enforcement tools are simply inaccessible to human creators.<sup>83</sup> Possibly too we should be thinking beyond reform by courts or legislatures. Ideas in this paper could inform, for example, initiatives to push for fair contracts initiated by representative bodies. No short piece could hope to be comprehensive, and in any particular proposed reform, there are many details to consider, and other stakeholders.

As I set out at the start: the point of this paper is not to propose a model, but to show that it is possible to think about enforcement in terms other than as a zero sum game pitting undifferentiated copyright interests against everyone else. But authors are at the heart of the copyright system, and a core reason given for ongoing efforts to improve that system. They should not disappear once their creative acts are complete.

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82. See TRIPS art 41.5 (States may choose how they distribute their law enforcement resources).

83. Some modern systems for enforcement online, for example, have been structured as voluntary, cooperative efforts between large right holders (music or film companies) and intermediaries: a structure which excludes direct access for individual human creators. See, e.g., Marianne Grant, *Voluntary Mechanisms for Addressing Online Infringement*, World Intellectual Property Organization Advisory Committee on Enforcement, WIPO/ACE/9/27 (Feb. 18, 2014), <https://perma.cc/K5E3-FH8L> (discussing the U.S. Copyright Alert system, subsequently discontinued); Jennifer M. Urban, Joe Karaganis, & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 60–61 (UC Berkeley Public Law Research Paper No. 2755628, 2017). Other recent voluntary systems provide procedural advantages to sophisticated users. See generally Jennifer M. Urban, Joe Karaganis, & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 54–55 (U.C. Berkeley Public Law Research Paper No. 2755628, 2017) (describing trusted sender and direct takedown systems).