

TERMINATING COPYRIGHT

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I. Introduction.....	2
II. De Lege Lata.....	4
A. Authorship and Copyright: An Overview.....	7
B. A Brief History of Copyright Term.....	9
C. Section 203 Renewal Rights	11
1. Legislative History	12
2. Procedural Requirements	15
III. Deontic Analysis	18
A. Lockean Labor Theory and the Maker’s Right Doctrine	19
B. Additional Considerations	22
C. Application and Drawbacks	24
IV. Consequentialist Analysis.....	30
A. Coase, Demsetz, and Consequentialism	30
B. Application and Drawbacks	35
C. Further Considerations and Uncertainties.....	40
1. Contract Law as a Substitute?.....	41
2. Reconsidering “Agreements to the Contrary”...43	

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V. Normative Analysis	48
A. Hegelian Personhood	49
1. Hegelian Copyright.....	52
2. Hegel and Section 203	55
B. Kantian Speech and Publishing Privilege	57
VI. Conclusion	63

I. INTRODUCTION

American intellectual property law is in many ways composed of a patchwork of laws with little to no theoretical continuity. While the respective fields of intellectual property law—trademark, copyright, patent, and trade secret—may have relatively modernized and logically structured legislative forms—for example, the Copyright Act of 1976, or the Lanham Act of 1946. However, the theoretical underpinnings of the law as it currently exists are not so apparent. Due to the United States’ common law system, and by virtue of the relatively recent vintage of American intellectual property law, certain intellectual property schemes—particularly copyright law—are in effect a hodge-podge of theories. These theories include protections designed with one specific consumer or scenario in mind, and extensions of historical legal incentives that were understood to function efficiently in the Age of Reason.

Whether or not the theories often cited by scholars as underpinning the existing law *actually do* support current American intellectual property protections is in fact an entirely separate question from determining which theories inspired such protections at the outset of the modern intellectual property age. This paper seeks to examine one particular aspect of the current American

copyright system—the Section 203 right of an author to terminate the transfer of title in their work at the end of the first copyright term—in light of the different major theories often cited in support of intellectual property laws. This analysis will determine not only *whether* these theories support the law as it now exists, but also the shape that these theories dictate that the law *should* take. Ultimately, while the different theories discussed in this paper explain the rationale and form of copyright law as a whole, and of Section 203 in particular, they each point to different weaknesses and potential improvements that could be made to the Copyright Act of 1976. Depending on the goals of copyright law, one or more of these improvements could well be enacted to advance policy.

Analysis proceeds in six parts. Part II provides an overview of current American copyright protection, including the definition of authorship, the term(s) of copyright protection, and the history and procedure for renewal term¹ transfer termination under Section 203. Parts III-V explore the major theoretical frameworks which have been proposed to justify copyright and other intellectual property protection, including Lockean deontic analysis, economic consequentialism, and key normative theories. These frameworks are applied to the Section 203 rights of authors in order to examine (i) whether the different theories support these rights and (ii) in what form these rights should exist under the framework of these theories. Part VI concludes.

¹ Although the Copyright Amendments Act of 1992 removed the renewal notice requirement for any work published on or after January 1, 1964 (making renewal of a copyright automatic in all cases), this paper uses the phrase “renewal term” to refer to the second half of a full copyright term—the period following the first thirty-five years of registration of a copyright. See Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (revising 17 U.S.C. § 304(a) to provide for automatic renewal of any copyright registration first published or registered on or after January 1, 1964).

II. DE LEGE LATA

While complex in many ways, the history of copyright law can be traced back to the late Renaissance with relative ease; therefore, some scholars argue that copyright is among the oldest officially-recognized forms of intellectual property.² In England, Queen Anne’s April 1710 “Act for the Encouragement of Learning” (the “Statute of Anne”) served as an initial basis for copyright protection.³ However, this statute only protected written works, while pictorial and graphic works were later granted protection by King George II in the 1735 Engraver’s (or Hogarth) Copyright Act.⁴ Many other forms of now-copyrightable works did not gain protection for a significant period of time thereafter. Printed musical compositions, for example, were deemed to fall within the scope of the Statute of Anne in a court decision sixty-seven

² See William Weston Fisher, *Copyright*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/copyright> [https://perma.cc/FC2P-TUA2] (last visited Feb. 27, 2020) (“Copyright developed out of the same system as royal patent grants, by which certain authors and printers were given the exclusive right to publish books and other materials. The purpose of such grants was not to protect authors’ or publishers’ rights but to raise government revenue and to give the government control over the contents of publication. This system was in effect in late 15th-century Venice as well as in 16th-century England, where the London Stationers’ Company achieved a monopoly on the printing of books and was regulated by the Court of Star Chamber.”). But see Zachary Shufro, *Haute Couture’s Paper Shield: The Madrid Protocol and the Absence of International Trademark Enforcement Mechanisms*, 45 N.C. J. INT’L L. 645, 651 (2020) (“Trademarks have existed for over four thousand years.”); David D. Mouery, Comment, *Trademark and the Bottom Line: Coke Is It!*, 2 BARRY L. REV. 107, 111 (2001) (“Merchants of the early trading empires of China, Egypt, Greece, India, Persia, and Rome began to ‘mark’ their merchandise in order to identify the maker of the good.”).

³ Statute of Anne 1710, 8 Ann. c. 19 (Gr. Brit.).

⁴ Engravers’ Copyright Act 1735, 8 Geo. 2 c. 13, § 1 (Gr. Brit.).

years after the statute's passage.⁵ Nevertheless, by no later than the second half of the 17th century copyright protection became ingrained in the legal systems of England and its American Colonies.⁶

In America, copyright law has existed as a defined principle of protection for original authors of works since the United States came into being.⁷ Among other enumerated powers, the Constitution declares that Congress has the authority “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸ Despite this constitutional imperative—and the Framers’ insistence that copyright protection be afforded to authors nationwide *ab initio* while lesser rights such as freedom of speech and religion were

⁵ *Bach v. Longman* (1777) 98 Eng. Rep. 1274, 1274; 2 Cowp. 623, 624. In this decision, Lord Mansfield, C.J., held that although music was not explicitly named as a protected subject matter in either the Statute of Anne or the Engravers’ [Hogarth] Copyright Act, written music was contained within the Statute of Anne’s preamble of “books and other writings.” *Id.* See also Statute of Anne, pmbl. (“Whereas printers, Booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published Books and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment and too often to the Ruin of them and their Families: For preventing therefore such practices for the future and for the encouragement of learned Men to compose and write useful books.”).

⁶ See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192 (2008).

⁷ See *id.* at 198 (quoting IV PAPERS OF THE CONTINENTAL CONGRESS, 1774–1789, No. 78, at 370 (1783), *microformed on Microcopy No. 247, Roll 92* (Nat’l Archives Microfilm Publ’ns)) (“In 1783, Joel Barlow—one of the first beneficiaries of author’s copyright in America—wrote to convince Congress that ‘the rights of authors should be secured by law.’”).

⁸ U.S. CONST. art. I, § 8, cl. 8.

left for eventual amendments through the Bill of Rights—it was not until the 20th century that the rationale behind copyright law was significantly examined. The resulting series of Congressional studies and reports⁹ predated the revision of American copyright law now known as the Copyright Act of 1976 (the “1976 Act”).¹⁰ On the basis of these reports—which examined the theoretical, historical, and common law underpinnings of copyright law as it existed in the United States in the 1950–1960 period—Congress re-wrote the entirety of Chapter 17 of the United States Code, creating the 1976 Act.¹¹ While provisions of the earlier (1909) Copyright Act (the “1909 Act”)¹² will continue to govern certain works protected by copyright until December 31, 2072,¹³ this paper focuses on the 1976 Act, though differences between the provisions of the old and new acts are noted when relevant.

⁹ See, e.g., STAFF OF S. COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS, 86TH CONG., 2D SESS., STUDY ON DIVISIBILITY OF COPYRIGHTS (Comm. Print 1960); STAFF OF S. COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS, 86TH CONG., 1ST SESS., STUDY ON THE MEANING OF “WRITINGS” IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION (Comm. Print 1960).

¹⁰ Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as 17 U.S.C. §§ 101-810; 44 U.S.C. §§ 505, 2113; 18 U.S.C. § 2318).

¹¹ See H.R. REP. NO. 94-1733, at 1 (1976) (Conf. Rep.).

¹² Act of March 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1978).

¹³ The very last works to receive protection under the 1909 Act would have been registered by December 31, 1977. See Michael Jacobs & J. Alexander Lawrence, *Copyright Comment: All Shook Up*, INTELL. PROP. MAG. 18, 18 (2019). The first term for such works ended on December 1, 2005. Act of March 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075 § 23 (repealed 1978). The 1976 Act gives these works a 47-year renewal term, and the Sonny Bono Copyright Term Extension Act of 1998 added another 20 years to that term. Eldred v. Ashcroft, 537 U.S. 186, 194–95 (2003).

A. *Authorship and Copyright: An Overview*

Under the 1976 Act, ownership of a valid copyright grants exclusive rights to the owner of a qualifying work of authorship distinct from ownership of the material object in which the work is embodied.¹⁴ Copyright protection is available for “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced or otherwise communicated.”¹⁵ Works of authorship that qualify for copyright protection include literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.¹⁶ However, copyright protection does not extend to any “idea, procedure, process, system, method of operation, concept, principle, or discovery[,]” no matter its form,¹⁷ nor does it encompass words and phrases, familiar symbols and designs, ornamentation and coloring, systems or devices, blank forms, works consisting of information lacking originality, or typeface as typeface.¹⁸ Furthermore, the merger doctrine holds that “when there are a limited number of ways to express an idea, the idea is said to ‘merge’ with its expression, and the expression becomes unprotected.”¹⁹ Similarly, the *scènes à faire*

¹⁴ 17 U.S.C. § 202.

¹⁵ *Id.* § 102(a).

¹⁶ *Id.* §§ 102(a)(1)–(8).

¹⁷ *Id.* § 102(b). See generally *Baker v. Selden*, 101 U.S. 99 (1879) (holding that a method or system cannot be subject to copyright protection, though a description of that method enjoys some thin copyright protection in the exact wording of that description).

¹⁸ 37 C.F.R. § 202.1 (2018).

¹⁹ *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1359 (Fed. Cir. 2014) (citing *Comput. Associated Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707–08 (2d Cir. 1992)).

doctrine provides that “expressive elements of a work of authorship are not entitled to protection against infringement if they are standard, stock, or common to a topic, or if they necessarily follow from a common theme or setting.”²⁰

The general presumption in modern copyright law is that ownership is initially vested in the author upon creation of the work,²¹ although the 1976 Act carves out exceptions governing ownership of “joint work[s]”²² and “[w]orks [m]ade for [h]ire.”²³ The authors of a joint work essentially function like joint tenants in the entirety in the real property context, in that they “are co[-]owners of copyright in the work” and each can dispose of the work as she sees fit.²⁴ Works made for hire, by contrast, are works in which ownership does not vest to the individual creator of the work; rather, “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and owns all of the rights comprised in the copyright.”²⁵

There are two recognized scenarios in which a work is considered to have been “made for hire[:]” when a work is “prepared by an employee within the scope of his or her employment” or when a work is “specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be

²⁰ *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1374 (10th Cir. 1997).

²¹ *See* 17 U.S.C. § 201(a).

²² *See id.* (“The authors of a joint work are co[-]owners of copyright in the work.”).

²³ 17 U.S.C. § 201(b).

²⁴ *Id.* § 201(a).

²⁵ *Id.* § 201(b).

considered a work made for hire.”²⁶ While sole and joint authors have full Section 203 rights, authors of works for hire are unable to revoke an assignment or license in their own work, and “the commissioner of the work is considered the author *ab initio*.”²⁷

B. A Brief History of Copyright Term

As a constitutional matter, copyright duration in the United States is restrained to such protection as is available “for limited Times” of fixed duration.²⁸ The duration of the copyright in a work remained relatively unchanged for a period of over one hundred years, starting with the first British copyright legislation in the early 18th century.²⁹ Initially, works received a fourteen-year period of protection, which in some circumstances could be renewed for an additional fourteen years.³⁰ As Justice Ginsburg summarized over fifteen years ago,

²⁶ *Id.* § 101. See generally *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (analyzing the circumstances under which a work qualifies as a work made for hire).

²⁷ *Ennio Morricone Music Inc. v. Bixio Music Grp. Ltd.*, 936 F.3d 69, 72 (2d Cir. 2019) (citing *Marvel Characters Inc. v. Kirby*, 762 F.3d 119, 137 (2d Cir. 2013)).

²⁸ U.S. CONST. art. I, § 8, cl. 8; see also *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (“[T]he Copyright Clause empowers Congress to prescribe ‘limited Times’ for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”).

²⁹ *Eldred*, 537 U.S. at 200–01.

³⁰ Compare Statute of Anne 1710, 8 Ann. c. 19, § 2 (Gr. Brit.) (“[T]he [a]uthor of any [b]ook or [b]ooks already composed and not printed and published . . . shall have the sole liberty of printing and reprinting such [b]ook and [b]ooks for the term of fourteen years, to commence from the day of the first publishing the same, and no longer.”), with Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (creating a renewable fourteen-year copyright term), and Act of July 8, 1870, § 87, 16 Stat. 198 (repealed 1947) (“[C]opyrights shall be granted for the

The Nation’s first copyright statute, enacted in 1790, provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term. The 1790 Act’s renewable 14-year term applied to existing works (*i.e.*, works already published and works created but not yet published) and future works alike. Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years). Both times, Congress applied the new copyright term to existing and future works; to qualify for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective.

In 1976, Congress altered the method for computing federal copyright terms. For works created by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work’s creation, not—as in the 1790, 1831, and 1909 Acts—its publication; protection would last until 50 years after the author’s death. For anonymous works, pseudonymous works, and works made for hire, the 1976 Act provided a term of 75 years from publication or 100 years from creation, whichever expired first . . . [And finally] [f]or published works with existing copyrights as of [January 1, 1978], the 1976 Act granted a copyright term of 75 years from the date of publication, a 19-year increase over the 56-year term applicable under the 1909 Act.³¹

The Sonny Bono Copyright Term Extension Act of 1998 further extended copyright terms by twenty years, bringing the total term of protection for a work to a hypothetical seventy years after the death of the author, ninety-five years

term of twenty-eight years from the time of recording the title thereof.”).

³¹ *Eldred*, 537 U.S. at 194–96.

from publication, or one hundred twenty years from creation.³²

While the cumulative effect of these consecutive copyright term extensions is relatively straightforward, calculating the duration of a copyright is still a complex computation. It is vital to know the year in which a work was created and/or published, the year in which a now-deceased author died, and whether—for copyright registrations issued prior to December 31, 1963—the original copyright registration was properly renewed prior to the expiration of its first term.³³ Failure to have renewed the original pre-1964 copyright registration, for example, means that a work protected under the 1909 Act would have fallen into the public domain despite the 1992 Copyright Amendment Act’s removal of the renewal requirement for most pre-1976 Act works.³⁴

C. Section 203 Renewal Rights

Section 203(a) of the 1976 Act provides that “[i]n the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright . . . executed by the author . . . is subject to termination” by the author or their successors in interest, at the midpoint of the maximum potential copyright term—

³² 17 U.S.C. § 302; *see also* Sonny Bono Copyright Term Extension Act of Oct. 27, 1998, Pub. L. No. 105-298, 112 Stat. 2827 (revising, *inter alia*, 17 U.S.C. § 302).

³³ *See* 17 U.S.C. § 304(a); Copyright Amendments Act of June 26, 1992, Pub. L. No. 102-307, 106 Stat. 264 (revising 17 U.S.C. § 304(a) to provide for automatic renewal of any copyright registration first published or registered on or after January 1, 1964). For the rationale behind the choice of January 1, 1964 as the cut-off date for automatic renewal, *see* 14 No. 7 ENT. L. REP. 13 (1992).

³⁴ *See* 14 No. 7 ENT. L. REP. 13 (1992) (explaining the timeline for applicability of the 1992 revisions to works registered under the 1909 Copyright Act).

that is, thirty-five years after the publication of a registered work.³⁵ This right was proposed as a significant re-imagining of the similar provisions under the 1909 Act based on the premise that an author could *renew* the registration of their work for a renewed copyright term of twenty-eight years (commencing at the end of the original term).³⁶ Accordingly, (a) the 1976 Act did away with the two-term system (permitting instead a single, longer copyright term),³⁷ and (b) there was no way for an author who had assigned the copyright in a work to another party to maintain the assignment of rights in that work past the end of the first term.³⁸ Thus, the changes to authors’ “renewal” rights in the 1976 Act marked a substantive change in the law, while nevertheless preserving the normative underpinnings of Section 24 of the 1909 Act. Indeed, Section 203 of the 1976 Act represents not only a normative continuity regarding the purpose of Section 24 of the 1909 Act, but also a continuation of the limits of Section 24’s purpose.³⁹

1. Legislative History

Under the 1909 Act, Section 24 permitted the author of a registered copyright to renew his registration for an additional twenty-eight years at the end of the original copyright term, with two caveats.⁴⁰ First, “if the work

³⁵ 17 U.S.C. §§ 203(a)(1)–(3).

³⁶ Act of July 1, 1909, Pub. L. No. 60-349, § 24, 35 Stat. 1075, 1080–81 (repealed 1978).

³⁷ *See Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003).

³⁸ Act of July 1, 1909, § 24.

³⁹ *Compare id.*, with 17 U.S.C. § 203. Under the 1909 Act, authors could waive their renewal right in a work; the 1976 Act changed the balance by making the termination right of Section 203 inalienable and un-waivable, but also imposed a series of formalities which create a similar barrier to authors who wish to exercise this right. *See infra* Part II.c.ii.

⁴⁰ Act of July 1, 1909 § 24.

[was] a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor . . . [was] entitled to the privilege of renewal and extension.”⁴¹ Second, a renewal and extension application was required to “be made to the copyright office and duly registered therein within one year prior to the expiration of the [first] term.”⁴² In this system, the statute recognized “[t]he principle of unlimited alienability of copyright” and the “basic principle that the United States copyright of an individual author [is] secured to that author, and cannot be taken away by any involuntary transfer.”⁴³ At the same time, however, authors who renewed the copyright in a work were unlikely to successfully find a renewed license deal or an assignment of a work in the renewal term, given the norm of assigning works to production companies upon completion of a work and the lack of economic incentive to seek a renewed license for an unsuccessful work.⁴⁴

The system under Section 24 of the 1909 Act prevented authors from controlling the uses of or revenue

⁴¹ *Id.*

⁴² *Id.*

⁴³ H.R. REP. NO. 94-1476, at 123 (1976).

⁴⁴ The House of Representatives report emphatically states that “[transfer] of copyright ownership and [transfer] of a material object in which the copyrighted work is embodied are entirely separate things.” *Id.* at 124. While facially obvious, this report highlights that “[a]s a result of the interaction of this section and the provisions of section 204(a) and 301, the bill would change a common law doctrine exemplified by the decision in *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942). Under that doctrine, authors or artists are generally presumed to transfer common law literary property rights when they sell their manuscript or work of art, unless those rights are specifically reserved.” *Id.* Because “a specific written conveyance of rights [is] required in order for a sale of any material object to carry with it a transfer of copyright” under the 1976 Act definition of ownership, this presumption is the opposite of how it had existed under the 1909 Act and how the motion picture, publishing, and other industries had functioned prior to the passage of the new act. *Id.*

from their works after such a transfer had been completed in the first term, without allowing authors to terminate that transfer prior to the renewal term.⁴⁵ This severely limited the economic incentives available to authors whose works did not have enduring appeal. Thus, while the 1909 Act “secur[ed] for limited Times to Authors . . . the exclusive Right to their respective Writings,”⁴⁶ the statutory scheme in existence for the majority of the 20th century further reinforced the already-extant market reality. Authors generally did not remain invested in the economic and cultural viability of works they assigned or otherwise transferred to others, as these works remained beyond the scope of the authors’ rights under the 1909 Act.⁴⁷ As such, the 1909 Act’s renewal system failed to keep authors invested in successful works—the only works in which an economic incentive would exist for an individual to exercise their renewal rights under Section 24 of the 1909 Act—because the statute allowed authors to preemptively waive their renewal rights.

The 1976 Act contained several significant changes in the areas of authorship, ownership, and the gap between the purpose of copyright and the existing incentive structure under the 1909 Act. In Section 201, for example, the House of Representatives report on the 1976 Act (the “House Report”) highlights that the new act “contains the first explicit statutory recognition of the principle of divisibility of copyright in [American] law.”⁴⁸ The legislative history of Section 203 of the 1976 Act is

⁴⁵ Act of July 1, 1909, Pub. L. No. 60-349, §§ 23–24, 35 Stat. 1075, 1080–81 (repealed 1978).

⁴⁶ U.S. CONST. art. I, § 8, cl. 8; *see also* Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (“[T]he Copyright Clause empowers Congress to prescribe ‘limited Times’ for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”).

⁴⁷ Act of July 1, 1909 § 24.

⁴⁸ H.R. REP. NO. 94-1476, at 123 (1976).

similarly clear in purpose and effect, as the House Report explicitly states “that the reversionary provisions” in Section 24 of the 1909 Act “should be eliminated” in favor of “a provision safeguarding authors against unremunerative transfers.”⁴⁹ As the Senate report on the 1976 Act (the “Senate Report”) explains, “[a] provision of this sort [was] needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”⁵⁰ Although the 1976 Act introduced an “affirmative action” requirement “to effect a termination[.]” of a transfer or license under Section 203,⁵¹ “the right to take this action cannot be waived in advance or contracted away.”⁵² Authors and their successors in interest are thus inalienably vested with the ability to control the renewal term exploitation of their works, and unscrupulous publishers, producers, or other distributors of works cannot manipulate authors to waive this inherent right *ab initio*. However, the scope of the right to terminate an assignment or transfer of copyright under Section 203 is somewhat limited as it is “confined to inter vivos transfers or licenses executed by the author” and applies to all agreements, including “to nonexclusive licenses.”⁵³

2. Procedural Requirements

As originally drafted, Section 203 was based on the second term renewal right of some authors under Section 24 of the 1909 Act.⁵⁴ Accordingly, its provisions only vest a reversion right in authors *after* a period of time has passed from the initial publication, assignment, or license

⁴⁹ *Id.* at 124.

⁵⁰ S. REP. NO. 94-473, at 108 (1975).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Act of July 1, 1909, Pub. L. No. 60-349, § 24, 35 Stat. 1075, 1080–81 (repealed 1978).

of their work.⁵⁵ This timeframe remains unaffected by the 1992 Copyright Amendment Act, which removed the renewal notice requirement for any work published on or after January 1, 1964 and established automatic renewal of a copyright in all cases.⁵⁶ Thus, “as a general rule . . . a grant may be terminated during the [five] years[] following the expiration of a period of 35 years from the execution of the grant.”⁵⁷ However, if a grant includes the right of first publication of a work, “the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier.”⁵⁸ The distinction between grants which include the right of first publication and grants for works already published is “intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.”⁵⁹

In order to allow an assignee or licensee adequate notice of an author’s intent to terminate such a grant, Section 203 directs that “[t]he termination shall be effected

⁵⁵ See S. REP. NO. 94-473, at 109.

⁵⁶ Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (revising 17 U.S.C. § 304(a) to provide for automatic renewal of any copyright registration first published or registered on or after January 1, 1964). Further complications to this timeline arose in 1998 with the passage of the Sonny Bono Copyright Term Extension Act, which amended Section 304 of the Copyright Act to cover works “subsisting in [their] renewal term on the effective date” of the Act “for which the termination right provided in” 17 U.S.C. § 304(c) “has expired by such date.” Further, “where the author or owner of the termination right has not previously exercised such termination right,” 17 U.S.C. § 304(d), the author could elect to terminate any grant “at any time during a period of [five] years beginning at the end of 75 years from the date copyright was originally secured.” *Id.* § 304(d)(2).

⁵⁷ S. REP. NO. 94-473, at 109 (1975).

⁵⁸ *Id.* at 109–10 (quoting 17 U.S.C. § 203(a)(3)) (internal quotations omitted).

⁵⁹ *Id.*

by serving an advance notice in writing, signed by the number and proportion of owners of termination interest[] required . . . or by their duly authorized agents, upon the grantee or the grantee’s successor in title.”⁶⁰ Notice must “state the effective date of the termination,” which is required to “fall within the five-year period specified by” 17 U.S.C. § 203(a)(3)—in most cases, 35 years from the date of execution of the grant or license—”and the notice shall be served not less than two or more than ten years before that date.”⁶¹ The statutory scheme thereby “draws a distinction between the date when a termination becomes effective and the earlier date when the advance notice of termination is served.”⁶² The Copyright Office must also receive a copy of this notice of termination, and the Register of Copyrights has the latitude to set requirements the notice must meet.⁶³ Moreover, though such a termination applies to the grant in an original work, “notwithstanding a termination, a derivative work prepared earlier may ‘continue to be utilized’ under the conditions of the terminated grant,” although “this privilege is not broad enough to permit the preparation of other derivative works.”⁶⁴ Finally, “Section 203(b)(6) provides that unless and until termination is effected . . . the grant, ‘if it does not provide otherwise,’ continues for the term of copyright.”⁶⁵ Thus, a termination of grant is not automatic, nor does it take immediate effect upon execution.

⁶⁰ 17 U.S.C. § 203(a)(4).

⁶¹ *Id.* § 203(a)(4)(A).

⁶² S. REP. NO. 94-473, at 109.

⁶³ *Id.*; see also 37 C.F.R. § 201.10 (2020) (imposing different requirements on terminations made under 17 U.S.C. § 304(c) and 17 U.S.C. § 304(d)).

⁶⁴ S. REP. NO. 94-473, at 111 (1975).

⁶⁵ *Id.*

III. DEONTIC ANALYSIS

Two decades before Queen Anne encouraged the enactment of the United Kingdom’s first copyright statute, John Locke wrote his *Two Treatises of Government*, in which he laid out a deontic natural rights theory that colored the justification of copyright law in the intervening three centuries.⁶⁶ Locke’s theories—which have been interpreted in favor of and as arguments against copyright law in its current state⁶⁷—cast a shadow over the policy justifications behind American intellectual property regimes, including copyright law, by importing into these regimes the touchstone concept of the author as a genius without whom expression would not take shape. He does so by grounding the ownership of private property in the fruits of an individual’s work, for in each individual “[t]he labour of his body, and the work of his hands, we may say, are properly his.”⁶⁸ As Mala Chatterjee explains, “Locke’s argument is put forth with the aim of establishing the existence of *moral* or *natural* property rights, in contrast to property rights that are wholly the product of existing legal institutions or other social conventions.”⁶⁹ This Part examines the resulting theory as applied to the provisions of Section 203 of the 1976 Act in order to determine whether this right or its justifications were grounded in deontic principles.

⁶⁶ See generally 2 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Thomas Hollis ed., 1764) (1689); Statute of Anne 1710, 8 Ann. c. 19 (Gr. Brit.).

⁶⁷ See generally Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEGAL ANALYSIS 136 (2020); Seana V. Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL & POLITICAL THEORY OF PROPERTY* 138 (Stephen Munzer ed., 2001).

⁶⁸ LOCKE, *supra* note 66, § 27.

⁶⁹ Chatterjee, *supra* note 67, at 141.

A. *Lockean Labor Theory and the Maker's Right Doctrine*

Locke's deontic property theory must be understood both in the context of its drafting and in the context of his general conception of the state of nature, as both underlay his core understanding of property rights. Locke wrote in opposition to Robert Filmer's "patriarchal theory of authority and property ownership," and he "takes pains to emphasize the egalitarian nature of his contrary position."⁷⁰ Rather than viewing sovereign and political authority as the patrilineal-descended inheritance of God's authority as delegated to Adam, handed down through the generations to the anointed heads of Europe, Locke presupposes his conception of natural property rights upon the following syllogism: (1) "God gave the world to men . . . for their benefit[;]"⁷¹ (2) for human beings to benefit from property they must appropriate it for themselves from the commons; and (3) accordingly, God intended for humans to appropriate from the commons for their own benefit, so that in doing so they may be fruitful and multiply as he commanded.⁷² Accordingly, humanity must convert resources from the public common to private ownership "to the best advantage of life and convenience . . . the support and comfort of [our] beings."⁷³

The question remained, however, as to how humanity could appropriate common property for private use. Beyond "the unanimous consent of the commoners[]" to do so, which Locke casts aside "because such consent would in fact be impossible to obtain," he "endeavor[ed] to

⁷⁰ Shiffrin, *supra* note 67, at 144.

⁷¹ LOCKE, *supra* note 66, § 34 (emphasis added).

⁷² Shiffrin, *supra* note 67, at 145, 147; cf. *Genesis* 9:7 (King James) ("And you, be ye fruitful, and multiply; bring forth abundantly in the earth, and multiply therein.").

⁷³ LOCKE, *supra* note 66, § 26.

devise a way in which individuals [could] legitimately appropriate” from the commons.⁷⁴ To this end, Locke developed the self-ownership thesis,⁷⁵ which observed that “[t]hough the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body [sic] has right to but himself.”⁷⁶ Because each individual owns his own body, “[t]he labour of his body, and the work of his hands, we may say, are properly his,” to the exclusion of the common ownership of all humanity.⁷⁷ Accordingly, “[w]hatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”⁷⁸ In this manner, “Locke concludes that [individuals] may privately appropriate elements from the common stock” through toil, “because this act of mixing joins the un-owned thing with labor, something already owned[, and] thus create[s] a unique entitlement in the formerly commonly held thing.”⁷⁹ In such a way, humanity is entitled to appropriate the resources necessary for human nourishment and self-preservation from the commons, without universal consent.⁸⁰ As such, “the institution of private property [is] justified and consistent with the purposes of God’s grant . . . because it comports with the underlying motivation of the common grant and because it is necessary to fulfill the natural right of self-preservation.”⁸¹

In the context of intellectual property rights, Locke’s conception of rights based in the individual’s labor

⁷⁴ Chatterjee, *supra* note 67, at 142.

⁷⁵ *Id.*

⁷⁶ LOCKE, *supra* note 66, § 27.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Chatterjee, *supra* note 67, at 143.

⁸⁰ *Id.*; see also LOCKE, *supra* note 66, § 28.

⁸¹ Shiffrin, *supra* note 67, at 146–47.

or toil are often presented as the surface-level policy justification for copyright protection specifically. As explained by William Blackstone, “[w]hen a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him . . . is an invasion of his right of property.”⁸² This rationale—referred to by Jeanne Fromer and other commentators as the “labor-desert” theory of property rights—“sees intellectual property rights as . . . [an] acknowledgement of the labor of creation, in granting copyright or patent protection to creators that have worked sufficiently hard.”⁸³

While the vast majority of laypeople would hesitate to ascribe this view to Locke’s deontological justification of private property through self-ownership, “there is a widely held belief that authors are entitled to some control over their works, for having labored on them,”⁸⁴ and empirical evidence has demonstrated that individuals of all ages weigh creative labor as a factor in determining ownership of items and ideas.⁸⁵ Until it was explicitly rejected by the 1976 Act and by the United States Supreme Court in 1991, some federal courts relied upon this form of justification for copyright protection as well. As the Court of Appeals for the Second Circuit explained in *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected

⁸² 2 WILLIAM BLACKSTONE, COMMENTARIES *405–06.

⁸³ Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1753 (2012); see generally ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 31–67 (2011).

⁸⁴ Fromer, *supra* note 83, at 1770.

⁸⁵ Patricia Kanngiesser et al., *The Effects of Creative Labor on Property-Ownership Transfer by Preschool Children and Adults*, 12 PSYCH. SCI. 1236, 1238–40 (2010).

consist or not of matters which are *publici juris*, or whether such materials show literary skill or *originality*, either in thought or in language, or anything more than industrious collection.⁸⁶

As Justice O’Conner explained in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁸⁷ the Lockean “sweat of the brow[] doctrine” of copyright protection “has numerous flaws[]”⁸⁸ and “flout[s] basic copyright principles.”⁸⁹ Since the Court’s decision in *Feist*, Lockean justifications for copyright law have become largely obsolete.

B. Additional Considerations

Much of the discussion surrounding deontic theories of intellectual property law, and copyright law more specifically, focus on Locke’s labor-mixing theory of property.⁹⁰ In 1694 or 1695, Locke drafted a short memorandum (the “1694 Memorandum”) “concerning renewal of the Licensing Act, the parliamentary act which had given the Stationer’s Company exclusive control of publishing in Britain since the abolition of the Star Chamber.”⁹¹ The main thrust of Locke’s analysis of the bill, which granted a renewed monopoly to the Company of Stationers,⁹² focused on the deleterious effect of this

⁸⁶ *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922) (emphasis added).

⁸⁷ See generally *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

⁸⁸ *Id.* at 353.

⁸⁹ *Id.* at 354.

⁹⁰ See Fromer, *supra* note 83, at 1753–54, 1770. See generally Chatterjee, *supra* note 67. See, e.g. Shiffrin, *supra* note 67.

⁹¹ Justin Hughes, *Locke’s 1694 Memorandum (And More Incomplete Copyright Historiographies)*, 27 *CARDOZO ARTS & ENT. L.J.* 555, 555 (2010).

⁹² See Licensing of the Press Act 1662, 14 Car. II, c. 33 (Eng.).

monopoly on the quality of books printed in England.⁹³ A passage toward the end of the memorandum appears to either directly apply (or contravene) his labor-mixing theory of property rights in the intellectual property context.⁹⁴ It is of dubious import to read too far into the text of this memorandum, as “[n]either the memorandum nor, apparently, any other now published writing of Locke makes any express connection between rights (or their absence) in expressive works and Locke’s property theory.”⁹⁵ That being said, Locke does propose a system—merely through contrast with the system established by the monopoly of the Company of Stationers—which could be read as aligning with the 1976 Act:

⁹³ See LORD PETER KING, *THE LIFE OF JOHN LOCKE* 378 (Henry Colburn ed. 1830), <https://books.google.com/books?vid=OCLC00686706&pg=PA1&lpg=PA1&ots=FkrwlAssOL&dq=life+of+john+locke+peter+king.&hl=en#v=onepage&q=life%20of%20john%20locke%20peter%20king.&f=false> [https://perma.cc/487V-C7NH]. (“For the Company of Stationers have obtained from the Crown a patent to print all, or at least the greatest part, of the classic authors, upon pretence [sic], as I hear, that they should be well and truly printed; whereas they are by them scandalously ill printed, both for letter, paper, and correctness, and scarce one tolerable edition is made by them of any one of them.”).

⁹⁴ *Id.* at 386–87.

⁹⁵ Hughes, *supra* note 91, at 557. Compare LOCKE, *supra* note 66, § 44 (“From all which it is evident, that though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniencies [sic] of life, was perfectly his own, and did not belong in common to others.”), with LOCKE, *supra* note 66, § 101, and Hughes, *supra* note 91, at 557 n.9 (“In Section 101 of the Two Treatises Locke also talks about the rise of ‘records, and letters’ coming in civil society after ‘other more necessary arts’ which provide for people’s ‘safety, ease, and plenty’ without commenting about rights in these ‘necessary arts’ or ‘letters.’”).

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious for learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.⁹⁶

This passage does not apply to copyright in the modern sense, but rather to printing privileges.⁹⁷ Nevertheless, some commentators have drawn from this statement the possibility that Locke “believed that authors ‘should have control of their own work . . . for a limited time’—an acorn of the idea that eventually became copyright.”⁹⁸ Regardless of the true import of this passage, the interpretation of which is beyond the scope of this paper, it must be acknowledged that Locke at least considered the concept of some temporal restrictions on the dissemination of an author’s works during their life and for a set period thereafter, a system which could find rationalization in his labor-mixing theory of property.⁹⁹

C. *Application and Drawbacks*

The deontic theory of copyright applies rather well to the surface-level justifications of copyright as a whole and to the Section 203 rights of an author under the 1976 Act, but this application is not without its shortcomings. *Ex ante* it must be noted that the exclusive nature of copyright protection as an *individual right against the world* does not

⁹⁶ LORD KING, *supra* note 93, at 386–87.

⁹⁷ See *infra* Part V.b. (explaining that Kant, in particular, believed that the author’s ability to interfere with these privileges was of utmost importance among an author’s rights with regard to their work.).

⁹⁸ Hughes, *supra* note 91, at 561.

⁹⁹ See *id.* at 558–59.

comport with Locke's proviso that when mixing one's labor with the commons to appropriate property, an individual must leave "enough, and as good, left in common for others."¹⁰⁰ Past scholarship on deontic interpretation of intellectual property law has either (1) entirely avoided discussion of how this command to leave "enough and as good" of intellectual property in the common as to comport with Locke's intent,¹⁰¹ (2) followed the traditional view that "[t]he Field of Knowledge is large enough for all the World to find Ground in it to plant and to improve[.]"¹⁰² or (3) found that "Lockean arguments may reject [the] wider range of protection that extends the rights of exclusive use beyond that of control over the specific [work]."¹⁰³ For the limited purposes of this Section—an examination of the deontic roots of Section 203 of the 1976 Act—it suffices to state that when an individual retains the exclusive copyright in an expressive work, the question remains unresolved as to whether or not "enough, and as good," of the expressive content is "left in common for others."¹⁰⁴

Further, Lockean labor theory does not wholly comport with the idea of exclusive licenses or assignments of the copyright in a work, given the idea that for each individual, "[w]hatsoever . . . he removes out of the state that Nature hath provided, and left it in, he hath mixed his labor with . . . and thereby makes it his own property."¹⁰⁵ As the licensee or assignee did not mix their labor with the ideas in the public domain in order to create the work *eo*

¹⁰⁰ See *id.* at 561–62; see also Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. 319, 319–26 (1979).

¹⁰¹ See, e.g., Chatterjee, *supra* note 67 (failing to discuss this issue).

¹⁰² Shiffrin, *supra* note 67, at 140 (citation omitted).

¹⁰³ *Id.* at 161.

¹⁰⁴ *Id.*

¹⁰⁵ LOCKE, *supra* note 66, § 27.

ipso, it does not follow that they retain the exclusive right to such a work, to the exclusion of the originator thereof. However, through the point of view of Locke’s second proviso—the proviso against unnecessary waste of resources¹⁰⁶—such grants can be justified (accepting certain baseline assumptions about the rationale behind the creation of creative works).¹⁰⁷ Such a justification assumes that creation is a *sui generis* impulse where the creator “cannot help it[,] [j]ust as some people, who may never be recogni[z]ed as poets, continue to pour out volumes of verse, so others may spend their time or part of it devising contrivances or” expressive works.¹⁰⁸ In such a scenario, the creative works which come into being risk waste much in the same way as “if either the grass of [a farmer’s] enclosure rotted on the ground, or the fruit of his planting perished without gathering . . . notwithstanding his enclosure[.]” of the land itself.¹⁰⁹

To avoid such waste, Locke explains that individuals could—through the use of exchange, money, or solely to avoid waste—“g[i]ve away a part to any body [sic] else, so that it perished not uselessly in his possession.”¹¹⁰ As a consequence of the waste proviso, Locke acknowledges that the invention of money allows

¹⁰⁶ *Id.* § 46 (“[I]t was a foolish thing, as well as dishonest, to hoard up more than he could make use of . . .”). *See, e.g., id.* §§ 37–38 (discussing the harm caused by waste).

¹⁰⁷ These assumptions include, *arguendo*, that individuals create works eligible for copyright protection through what Plant called “autonomous” or “spontaneous” invention, rather than “induced” invention. *See* Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 *ECONOMICA* 30, 33 (1934). These inventions and creations “are ‘autonomous,’ occurring spontaneously rather than in response to any environmental impulse,” and indeed are examples of creation where “necessity is not the mother of invention; [but] the act of inventing rather is a necessity in itself.” *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ LOCKE, *supra* note 66, § 38.

¹¹⁰ *Id.* § 46.

individuals to appropriate an unfair share of the commons, provided that they sell their excess resources to others in order to avoid “the perishing of any thing uselessly.”¹¹¹ Accordingly, the modern license and assignment system for copyrights, in which individuals generally pay the author a set amount and/or royalty fee for the right to their work, would comport with deontic property theory provided that this framework permits the alienation of property—and particularly in the case of grants of limited duration and those subject to the provisions of Section 203.

The observations contained in Locke’s 1694 Memorandum (depending on how they are interpreted) comport with this view—while he believed it to be reasonable that a printer or publisher have the exclusive right to disseminate an author’s work as limited “to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.”¹¹² In this manner, authors could alienate the property they created through their labor—the work protected by copyright—to a printer for a limited time, in exchange for a form of financial recompense. The provisions of Section 203 further align with the ideas espoused in the *1694 Memorandum* and with Locke’s greater deontic property theory to the extent that they protect the interests of the public and of the creator of a work. In the *1694 Memorandum*, Locke articulates a public interest in the availability of inexpensive and well-printed books, and he claims that the *perpetual* and *exclusive* monopoly of the Company of Stationers resulted in a scenario where “England loses in general, scholars in particular are ground, and nobody gets, but a lazy, ignorant

¹¹¹ See *id.* §§ 45–50 (discussing the ways in which money allows individuals to avoid waste of resources despite an inequitable distribution of property and other resources).

¹¹² LORD PETER KING, *supra* note 93.

Company of Stationers, to say no worse of them.”¹¹³ Much like the system he describes in Holland, where publishers compete with one another to retain the favor of living authors (and thereby retain the exclusive rights to these authors’ works) and to gain public interest in their editions of unprotected works,¹¹⁴ Section 203 prevents the extended and exclusive grant of rights in a work by retaining in the background the implicit threat that, come the end of the initial thirty-five year period, an author or their heirs may revoke the grant of copyright in an ill-printed work. Insofar as the interests of the creator of a work are concerned, Section 203 comports with the labor-mixing theory in that it allows possession of a work to revert to the ownership of the individual who created it through their labor should the economic calculus of the initial grant prove inequitable to the originator of the work.¹¹⁵

Looking solely to the scenario in which an author has created a work and grants a license to or an assignment of the work to a second individual, the proviso against waste suggests that the scope of Section 203 must be limited in applicability. Were the termination provisions in Section 203 to apply solely to *exclusive* licenses and to assignments of copyright, not only would the author be granted a metaphorical “second bite at the apple” in the

¹¹³ *Id.* at 384. Locke further bemoans how the works of “classical authors” in England, under the Company of Stationers, “are by them scandalously ill printed, both for letter, paper, and correctness, and scarce one tolerable edition is made by them of any one” book. *Id.* at 378.

¹¹⁴ *Id.* at 380. Locke observes that the system in Holland “has produced so many fair and excellent editions” of works by classical authors, “whilst the printers all strive to out-do one another, which has also brought in great sums to the trade of Holland.” *Id.*

¹¹⁵ *Cf. supra* text accompanying notes 99–100 (noting that the exclusive nature of copyright protection does not comport with Locke’s proviso of leaving “enough, and as good, left in common for others” when mixing one’s labor with the commons).

reversion term, but those who benefit from non-exclusive licenses would have the ability to preserve their opportunity to benefit from the work as such a non-exclusive license would provide. Non-exclusive licenses that endure through the full copyright term do not prevent the author from authorizing a new publisher to print their works, as Locke said a system that favored the public interest would allow.¹¹⁶ Such a license would still allow the creator of a work to (nominally or otherwise) retain possession of the result of their mixture of labor and commons, as represented in the work itself. By removing the possibility of total abandonment where an exclusive grantee's decision to abandon further publication of a work, and assuming a permissive or royalty-friendly licensing system, it would not prevent others from mixing their labor with the original work in order to create new editions, licensed derivative works, and other products of their own labor.¹¹⁷ Finally, it must be noted that the longer-term problems that Locke points to in the *1694 Memorandum* and in his labor-mixing theory are to some degree mitigated by the constitutional edict that copyright protect works of authorship for "limited Times."¹¹⁸ Under such a requirement, Locke's aversion to perpetual monopolies like that enjoyed by the Company of Stationers are avoided, and furthermore, even if an author terminates the grant in a work and the copyright reverts to their possession, it does so only for a period of time before

¹¹⁶ See *supra* text accompanying notes 100–102. Cf. Hughes, *supra* note 91, at 561–62 (stating that according to Locke, a system favors the public interest if it leaves "enough, and as good, left in common for others").

¹¹⁷ This solution provides an incomplete means of addressing the "second laborer" problem posed by Locke's theory of property rights, which is beyond the scope of this paper. For a full analysis of potential means of addressing such a problem in the context of copyright law, see generally Chatterjee, *supra* note 67.

¹¹⁸ U.S. CONST. art. I, § 8, cl. 8.

it enters the public domain and others become able to mix their labor with it in the future.

IV. CONSEQUENTIALIST ANALYSIS

While Congress was commissioning studies on copyright law in preparation to write the 1976 Act,¹¹⁹ Harold Demsetz and Ronald Coase were each deeply immersed in an exploration of how and why the current legal system governing property came into being.¹²⁰ Building upon his 1937 article in which he first discussed the transaction costs associated with resource allocation in the real world (as opposed to an imagined “efficient” market),¹²¹ Coase published his article *The Problem of Social Cost* in 1960.¹²² Within the decade, Demsetz built upon this examination of how property allocation affects individuals in modern society by examining how property allocation helped *create* modern society.¹²³ This Part examines the resulting legal and economic models as applied to the provisions of Section 203 in order to determine whether this right or its justifications are grounded in consequentialist theory.

A. *Coase, Demsetz, and Consequentialism*

In *The Problem of Social Cost*, Coase examined how the initial allocation of property rights in society to one individual or organization can harm other individuals

¹¹⁹ See *supra* notes 9–11 and accompanying text.

¹²⁰ See *infra* notes 122–123 and accompanying text.

¹²¹ Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

¹²² Ronald H. Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960).

¹²³ Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347 (1967).

and organizations.¹²⁴ The article first discusses a fictional world in which “there were no costs involved in carrying out market transactions”¹²⁵ in which, in order “to attain an optimum allocation of resources . . . both parties . . . take the harmful effect[s]” of their rights and actions “into account in deciding on their course of action.”¹²⁶ This “smooth” or costless market—which Coase stresses is “a very unrealistic” world—is one in which “the problem of the rearrangement of legal rights through the market” can be resolved “through the market whenever this would lead to an increase in the value of production.”¹²⁷ In real life, however, Coase makes it clear that all actions have some sort of cost to those affected.¹²⁸ Unlike as more recent scholars have assumed,¹²⁹ Coase emphasizes the importance of careful consideration of *how* and *why* rights and property are allocated among individuals, as these decisions have a tremendous effect on the resulting abilities of those individuals to negotiate the re-allocation of rights

¹²⁴ Coase, *supra* note 122, at 1 (“This paper is concerned with those actions of business firms which have harmful effects on others.”).

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.* at 15.

¹²⁸ *Id.*

¹²⁹ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 14 (1st ed. 2003) (incorrectly characterizing Coase’s no-transaction cost world as a possible real-world scenario in which “Coase’s well-known analysis of transaction costs implies that enforceable contract rights are all society needs, beyond some underlying set of entitlements so that the parties have something to contract about, to attain optimal use and investment.”). Cf. Coase, *supra* note 122, at 42–44. It is this sort of faulty understanding of Coase’s analysis—and the failure to recognize that the no-cost world he describes in *The Problem of Social Cost* is imaginary and created solely for contrast with the high transaction cost world which we all inhabit—which has led to the rise of a laissez-faire “trickle down” economic theory.

and property—i.e., to seek an equitable and mutually beneficial allocation of rights.¹³⁰

In effect, Coase argues that a solely economic or strict legalistic approach to the allocation of rights and property between parties is incorrect; rather, the social benefit of each party’s actions must be included in the calculus, as must be the cost of any one party’s actions upon the other.¹³¹ As he articulated, “[i]f we are to discuss the problem in terms of causation, both parties cause the damage[;] [i]f we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect” of their activities “into account in deciding their course of action.”¹³² The parties must be assessed and the least cost-avoider identified; that individual is the party best suited to internalize the costs of the transaction, and accordingly, whatever right is at issue must be initially allocated to the less-advantaged party.

The role of the government in such balancing decisions is that of “a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative decision.”¹³³ While it is true that “[a]ll solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market,” Coase does not foreclose the ability of the government to legislate into being a market more capable to handle a problem.¹³⁴ As he explains, “[i]n devising and choosing between social arrangements we should have regard for the total effect,”¹³⁵ for only “[o]nce the costs of carrying out market transactions are taken into account” does it become

¹³⁰ See Coase, *supra* note 122, at 15.

¹³¹ See *id.* at 42–44.

¹³² *Id.* at 13.

¹³³ *Id.* at 17.

¹³⁴ *Id.* at 18.

¹³⁵ *Id.* at 44.

“clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about.”¹³⁶ Coase admits that courts have (perhaps unwittingly) played the role of market corrector as they “are aware . . . of the reciprocal nature of the problem” in many instances;¹³⁷ in re-devising a legislative scheme such as the re-drafting of Title 17 of the United States Code to create the 1976 Act, Congress was similarly situated to play such a role.

Writing seven years after Coase published *The Problem of Social Cost*, Demsetz sought “to fashion some of the elements of an economic theory of property rights” within the framework Coase developed, which is to say through the recognition “that property rights specify how persons may be benefitted and harmed, and, therefore, who must pay whom to modify the actions taken by persons.”¹³⁸ Demsetz notes that property systems are concerned with the minimization of externalities, which he defines as “includ[ing] external costs, external benefits, and pecuniary as well as nonpecuniary” considerations.¹³⁹ As every decision will affect the rights of the decision-maker and of others whose own rights are impacted by the decision, every choice has external and internal effects on society. “What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile,” while internalization “refers to a process, usually a change in property rights, that enables these effects to bear (in greater degree) on all interacting persons.”¹⁴⁰

¹³⁶ Coase, *supra* note 122, at 15–16.

¹³⁷ *Id.* at 19.

¹³⁸ Demsetz, *supra* note 123, at 347.

¹³⁹ *Id.* at 348.

¹⁴⁰ *Id.*

“A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.”¹⁴¹ In order for the market to grant individuals adequate ability to negotiate property rights *inter sese* to achieve “an optimum allocation of resources[,]”¹⁴² the net benefit to both parties must exceed each of their internalization costs. Demsetz thus concludes that “the emergence of new property rights takes place in response to the desires of the interacting persons for adjustments to new benefit-cost possibilities.”¹⁴³ Using the extended metaphor of the development of private property rights in land, Demsetz illustrates how the current legal system creates a “concentration of benefits and costs on owners” which “permits the owner to economize on the use of those resources from which he has a right to exclude others[,]” and therefore to internalize the costs of nonpecuniary considerations like the rights of successor generations in that property.¹⁴⁴ While “[t]he state, the courts, or the leaders of the community could attempt to internalize the external costs” of some transactions¹⁴⁵ through the imposition of a Pigouvian tax—a regulation or tax which represents a state claim on an individual to offset the externalities caused by their actions¹⁴⁶—a legislative re-design which seeks to incentivize the internalization of externalities can also achieve this end. As a close examination of its legislative history reveals, Section 203

¹⁴¹ *Id.*

¹⁴² Coase, *supra* note 122, at 13.

¹⁴³ Demsetz, *supra* note 123, at 350.

¹⁴⁴ *Id.* at 356.

¹⁴⁵ *Id.* at 355.

¹⁴⁶ See, e.g., William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307, 307 (1972) (“Despite the various criticisms that have been raised against it . . . [Pigou’s] tax-subsidy programs are generally those required for an optimal allocation of resources.”).

of the 1976 Act was expressly drafted with this goal in mind.

B. Application and Drawbacks

As the legislative record on the 1976 Act reveals, the underlying purpose of the re-conceptualization of Section 24 of the 1909 Act was driven by a desire to re-balance the bargaining power in the grantor-grantee relationship in a manner consistent with Coase and Demsetz's consequentialist theories.¹⁴⁷ Under Section 24, authors faced the choice of either (1) renewing their work at the end of the first time, and hoping it was successful enough for a publisher to pay for a new grant in the work or (2) losing copyright protection at the end of the 28-year term.¹⁴⁸ Thus, the sole rights the author of a work possessed were those of registration of a work and of granting a license or assignment in the work. In replacing Section 24, Section 203 was initially conceptualized as "a provision safeguarding authors against unremunerative transfers."¹⁴⁹ Due to "the impossibility of determining a work's value until it has been exploited[,]" Congress specifically enacted a provision that sought to redress "the unequal bargaining position of authors" in negotiating grants of copyright by allowing these authors to terminate a grant after a set period of time so that they may order to re-negotiate a grant based upon the established value of an already-published work.¹⁵⁰

In effect, Congress's action in transforming the renewal term re-licensing right of Section 24 into the termination power of Section 203 mirrors Coase's advice

¹⁴⁷ See generally *supra* text accompanying notes 47–52.

¹⁴⁸ Act of July 1, 1909, Pub. L. No. 60-349 §§ 23–24, 35 Stat. 1075, 1080–81 (repealed 1978).

¹⁴⁹ H.R. REP. 94-1476 at 124 (1976).

¹⁵⁰ S. REP. NO. 94-473 at 108 (1975).

that when devising “a rearrangement of rights[,]” first “the costs of carrying out market transactions [must be] taken into account[,]” and thereafter changes should only be made “when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about.”¹⁵¹ Congress first examined the costs inherent to the market—“the impossibility of determining a work’s value until it had been exploited[.]” and “the unequal bargaining position of authors.”¹⁵² It is of note that these bargaining costs are transaction costs which only increase the power disparity between the parties’ positions. For example, a first-time author who otherwise lacks experience in the publishing market, faces a steeper bargaining cost than a repeat author who has experience in the field. Congress then determined that the benefits of re-designing Section 24 outweighed “the costs which would be involved in bringing it about.”¹⁵³ Namely, the ability of authors to terminate a grant after 35 years and re-negotiate a publication deal for the remainder of the copyright’s term outweighed the minor uncertainty a publisher faced in negotiating with knowledge of the mere *possibility* that such a right could someday be exercised. Finally, to mitigate such an internalization of risk by publishers and other grantees, Congress introduced an “affirmative action” requirement “to effect a termination[.]” of a transfer or license under Section 203.¹⁵⁴

Following this reasoning, in the context of Section 203 the author or copyright creator is the disadvantaged party at the initial negotiation point, and the publisher or other grantee is the least cost-avoider. Grantees in these scenarios are those who maintain market control and effectively exercise total discretion (within market-decided

¹⁵¹ Coase, *supra* note 122, at 15–16.

¹⁵² S. REP. NO. 94-473 at 108.

¹⁵³ Coase, *supra* note 122, at 15–16.

¹⁵⁴ S. REP. NO. 94-473 at 108.

bounds) in controlling the terms of issues such as author remuneration, advances, royalty rates, and in the case of written works, first print volume. While the rights assigned to grantors in Section 203 only vest 35 years *after* the initial grant,¹⁵⁵ the inalienable¹⁵⁶ right of a grantor to terminate serves as a legislative guidepost indicating a public policy which favors protecting the grantor's rights over the market control of the grantee. Despite the legislative record of Section 203 and the clear message it sends in respect to the power disparity in initial grant negotiations, there are significant drawbacks to the manner in which Section 203 is drafted and in how it applies in practice.

As a preliminary matter, an examination of the inalienable nature of the Section 203 termination right reveals that it is only consistent with a consequentialist approach as a form of second-best option. From a conceptual level at least, the ideal (but impracticable) scenario would be to give grantors an unlimited ability to bargain—e.g., to not limit their position by making the termination right non-waivable. However, given the realities of the market and the usual power disparity between the parties in negotiations surrounding a grant of the copyright in a work, inalienability is a second-best option that produces preferable outcomes when compared to other, less preferable options that Congress could have enacted for the same purpose. These other options include additional formalities required as part of the waiver process, or a presumption of non-waiver in the interpretation of an ambiguous grant of copyright. While

¹⁵⁵ *Id.* at 109 (“[A] grant may be terminated during the [five] years[] following the expiration of a period of 35 years from the execution of a grant.”).

¹⁵⁶ *But cf. infra* discussion at Section IV.c. (noting that “agreements to the contrary[]” modify termination rights in a grant for a work protected by copyright).

these options would serve the same general purposes as Congress’s decision to make termination rights inalienable, they fail to protect a grantor’s rights as thoroughly as Section 203.

The most glaring shortcoming of Section 203 as seen through a consequentialist approach is that it creates a right which can only be exercised after a significant period of time has passed from the date of the initial negotiation for a grant of copyright. Thus, despite the purported purpose of Section 203 to serve as “a provision safeguarding authors against unremunerative transfers[,]”¹⁵⁷ there exist three main scenarios in which a grantor loses out on any real recourse for their disadvantaged position at the initial bargaining table. First, there is the case of short-lived successes. For example, an author could write a book for which they receive a \$10,000 advance and a small (but within industry norms) royalty rate. Should the book become a short-lived but intensely popular success, the author would be remunerated accordingly in royalty payments. However, the author would be unable to capitalize on the book’s success to re-negotiate the lump sum payment associated with the grant—in this case, the \$10,000 advance—while the publisher retains the vast majority of the profits.

Second, because only enduring classics or otherwise valuable works retain commercial appeal 35 years after initial publication, and because a publisher is unlikely to seek re-assignment of an unsuccessful work’s copyright after a termination is affected, the author is unlikely to exercise this right unless they foresee a windfall from the “second bite of the apple” that Section 203 provides. Thus, while the authors of evergreen works—be it a composition that turns into a holiday classic or a novel that retains public interest for decades—benefit from Section 203, the

¹⁵⁷ H.R. REP. 94-1476 at 124 (1976).

vast majority of grantors face a scenario in which the termination right is far from likely to yield any pecuniary reward 35 years after publication. Finally, while the possibility exists that a work could prove to be immensely popular in the long term, and while that possibility under Section 203 allows authors the leverage of having some future interest in terminating the grant in a particularly unfavorable deal, this leverage is likely to be overshadowed by industry knowledge. Publishers are far more likely to have a reliable intuition as to the likelihood of future and enduring success in a work than the creators of that work may be. Accordingly, Section 203 at best provides the appearance of re-allocating rights under a consequentialist theory, in the vast majority of circumstances.

Beyond these three scenarios, Section 203 chiefly address pecuniary concerns—the legislative history stresses that it was created as “a provision safeguarding authors against unremunerative transfers”¹⁵⁸—and therefore it entirely fails to address the other forms that market externalities can take. As Demsetz explains, externalities encompass both “pecuniary as well as nonpecuniary” considerations,¹⁵⁹ which in this case could range from poor quality reproductions of the work by a grantee, to disfavored or undesired usage, marketing, or sub-licensing of the work contrary to the grantor’s intentions or desires. For example, consider a musician’s assignment of copyright in a song to a recording studio. Should the studio then grant permission for the composition to be used at campaign rallies and in advertisements by a politician who the musician finds to be morally repugnant, the musician is without recourse despite the potential nonpecuniary harm to the musician’s reputation (and the inchoate dignitary harm the musician suffers) created by the grantee’s actions.

¹⁵⁸ *Id.*

¹⁵⁹ Demsetz, *supra* note 123, at 348.

Given the 35-year period that must elapse before the Section 203 termination right vests,¹⁶⁰ a grantor is powerless to shift the burden of internalization to the least cost-avoiding grantee in such scenarios. A more balanced approach to the external costs inherent to the copyright grant market—guided by Coase and Demsetz’s analysis—would permit a grantor to terminate upon notice, but at a period prior to the current 35-year window envisaged in Section 203. Accordingly, the grantee (who maintains full control over the work prior to termination) would be incentivized to only use the work in manners which would achieve “an optimum allocation of resources[]”¹⁶¹ with respect to *all* externalities involved—pecuniary, dignitary, or other.

C. *Further Considerations and Uncertainties*

While Section 203 conforms with the basic shape expected of a right shaped by consequentialist theory, and notwithstanding its shortcomings regarding the realities of the publishing market and the grantor’s nonpecuniary or time-sensitive externalities, there remain two inquiries related to Section 203 that consequentialist theory demands be addressed. First, there is the simple inquiry as to why contract law on its own could not redress the grantor-grantee power disparity in copyright grant transactions. Second, and related thereto, is the question of how to address a certain category of contracts—referred to in the 1992 Copyright Amendment Act as “agreements to the contrary[]” of a grantor’s Section 203 rights¹⁶²—which modify the timeline and termination rights in a grant for a work protected by copyright by purporting to replace the earlier agreement. A consequentialist approach to these

¹⁶⁰ See 17 U.S.C. § 203(a)(4)(A).

¹⁶¹ Coase, *supra* note 122, at 13.

¹⁶² 17 U.S.C. § 304(c)(5).

inquiries reveals that (1) while contract law may substitute the pecuniary considerations that justify a grantor's Section 203 termination right, it fails to cover other rationales a grantor may consider in terminating a grant, and (2) depending on the circumstances, many "agreements to the contrary[]" of Section 203¹⁶³ actually *respond* to the incentives Section 203 creates, and thus should be upheld.

1. Contract Law as a Substitute?

As a baseline matter, the critique that contract law is equally as suitable as Section 203 at addressing the unequal bargaining positions of the parties in a copyright grant relationship is quite viable. Unlike Section 203, which dictates the terms of how such a relationship may end (without distinguishing between the different factors involved in the commencement of the grant itself, other than to potentially serve as an additional bargaining chip for the grantor),¹⁶⁴ contract law provides an alternative means of addressing the economic and knowledge-based power disparities inherent to most copyright grant negotiations. For example, contract law can provide powerful solutions to issues such as how to "safeguard[] authors against unremunerative transfers"¹⁶⁵ by valuing the payments due to the grantor through variable mechanisms such as running royalties.¹⁶⁶ However, strong value-based

¹⁶³ *Id.*

¹⁶⁴ *See* 17 U.S.C. § 203.

¹⁶⁵ H.R. REP. NO. 94-1476, at 124 (1976).

¹⁶⁶ A "running royalty" is a royalty payment based on the volume of sales which therefore can be scaled in a contract to correspond to different royalty rates based on different volumes of sale. Say, for example, that author *A* grants an assignment of copyright in the work, *B*, to a company *C*. A traditional royalty payment plan would state that for every unit of *B* sold, *A* would receive a payment at rate *x*, with *C* assuming that *B* would only ever sell *y* units. With a running royalty, however, the agreement could specify that for each unit of *B* sold up to and including the *y*-th unit, the royalty rate would remain *x*, but that should the volume of sales exceed *y* units, the royalty rate of *z*

arguments exist against the wholesale, industry-wide adoption of such solutions; to some, a running royalty would be viewed as a regressive tax imposed on grantees “lucky” enough to have negotiated the grant of copyright in a successful work. As the adoption of such a solution would require significant industry buy-in absent the imprimatur of legislative incentives such as Section 203, such framing of contractual options poses a barrier to implementation.

Furthermore, contract law is equally powerless as Section 203 in considering the non-quantifiable aspects of a grantor’s decision to terminate. Solutions like running royalties fail to consider the nonpecuniary externalities grantors face,¹⁶⁷ and it is indeed the case that Section 203 allows grantors to terminate for less easily-quantifiable reasons such as a desire to remove works from circulation.¹⁶⁸ As Demsetz explains, a consequentialist approach to an issue such as the negotiation and termination of a grant of copyright in a work must address externalities “includ[ing] external costs, external benefits, and pecuniary as well as nonpecuniary” considerations.¹⁶⁹ Accordingly, the system that results from such considerations must result in a benefit to both parties based on the articulated concerns and potential forms of harm. While the time delays inherent to Section 203’s 35-year vesting period are barriers to the swift redress of nonpecuniary and pecuniary harms to the grantor, the statutory option does allow a grantor to *eventually* seek redress for dignitary and other non-fiscal harms through

would apply instead, assuming $z > x$. Thus, *A* would be rewarded for the success of *B* beyond this *y*-unit threshold, but *C* would be required to pay the higher royalty rate if and only if *B* proved to be a success in excess of *C*’s expectations.

¹⁶⁷ See *supra* text accompanying notes 153–156.

¹⁶⁸ See 17 U.S.C. § 203(b).

¹⁶⁹ Demsetz, *supra* note 123, at 348.

termination of the grant. Finally, in permitting this termination as an inalienable matter of right for authors, Section 203 significantly reduces the likelihood that a termination could be challenged through litigation, when compared to a contractual alternative. Given the existing power and resource disparity between grantors and grantees in the sorts of relationships Section 203 governs, exposing individual copyright creators to the risk of litigation should they choose to terminate a grant in order to protect their work and reputation from inchoate or otherwise non-quantifiable harms caused by a grantee would only further exacerbate the degree to which any copyright grant negotiation would be slanted against the grantor.

2. Reconsidering “Agreements to the Contrary”

On the whole, contract law fails to provide a better means of responding to consequentialist incentives than the language of Section 203. However, there is one—albeit uncertain and, in some respects, controversial—form of contractual agreement that provides an additional means of “safeguarding authors against unremunerative transfers.”¹⁷⁰ These are agreements that predate the vesting date of Section 203 rights but which supersede and abrogate the earlier grant by express agreement of the parties to the original negotiation. These agreements are relatively controversial due to the language in Section 304, the portion of the 1976 Act which establishes exactly how and when termination notice may be served under Section 203.¹⁷¹ Section 304 states that “[t]ermination of the grant may be effected *notwithstanding any agreement to the contrary*, including an agreement to make a will or to make

¹⁷⁰ H.R. REP. NO. 94-1476, at 124 (1976).

¹⁷¹ See *supra* note 55 and accompanying text; 17 U.S.C. § 304 (laying out the procedural requirements governing the termination of grants in a work).

any future grant.”¹⁷² Given the paucity of case law on this statutory provision, the issue of superseding later agreements in copyright grants overall¹⁷³ and the fact that more than two-thirds of the federal circuits have yet to address this issue,¹⁷⁴ the degree to which a later agreement modifies or replaces the initial grant remains up for debate. Nevertheless, these agreements do respond to

¹⁷² 17 U.S.C. § 304(c)(5) (emphasis added).

¹⁷³ One reason for this dearth of case law is economic and the other is time-based. From an economic standpoint, as explained above, there are only a small percentage of works with a post-publication value sufficient to justify the termination of an initial grant. *See supra* text accompanying notes 152–156. From a temporal standpoint, the reason there are (as of yet) so few cases may well be that 35 years out from 1978, the year the 1976 Act went into effect, was 2013, and so the time period for cases to arise is of relatively recent vintage. Similarly, the modifications to Section 304 that opened a window for the termination of pre-1978 grants were only enacted in the 1990s. *See* Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, 266 (revising 17 U.S.C. § 304(a) to provide for automatic renewal of any copyright registration first published or registered on or after January 1, 1964); *see also* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2828 (1998) (codified at 17 U.S.C. § 304(d)) (adding language to permit that a work “subsisting in its renewal term on the effective date” of the act “for which the termination right provided in” 17 U.S.C. § 304(c) “has expired by such date” and “where the author or owner of the termination right has not previously exercised such termination right,” could elect to terminate any grant “at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.”).

¹⁷⁴ The majority of cases discussing 17 U.S.C. § 304(c)(5) are in either the Second or Ninth Circuits, and there are less than ten reported cases that the author could identify that directly examine 17 U.S.C. § 304(c)(5). *See, e.g.,* Kaffaga v. Estate of Steinbeck, 938 F.3d 1006 (9th Cir. 2019); Brumley v. Albert E. Brumley & Sons, Inc., 822 F.3d 926 (6th Cir. 2016); Artists Rights Enforcement Corp. v. Estate of King, 224 F.Supp. 3d 231 (S.D.N.Y. 2016); Baldwin v. EMI Feist Catalog, Inc., 805 F.3d 18 (2d Cir. 2015); Classic Media, Inc. v. Mewborn, 532 F.3d 978 (9th Cir. 2008); Penguin Group (USA), Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008); Milne v. Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005).

consequentialist incentives in line with the purpose of Section 203.

The idealized example of such a subsequent agreement which, on its face, abrogates Section 203 but is not “to the contrary” of its purposes¹⁷⁵ is a circumstance like that in *Larson v. Warner Bros. Ent., Inc.*, a 2013 district court case involving the rights to a quintessential American work: Superman.¹⁷⁶ The original copyright in Superman was assigned to D.C. Comics in March of 1938 for \$130,¹⁷⁷ with a copyright set to expire in 2013 (and later, subject to the 1998 Copyright Term Extension Act, in 2033).¹⁷⁸ In 1997, the heirs of Superman’s creator Jerome Siegel served D.C. Comics a “nearly six-pound, 546-page termination notice” subject to the requirements of 17 U.S.C. § 304.¹⁷⁹ Before the termination went into effect, the Siegel family and D.C. entered into a settlement agreement where the Siegel family withdrew the termination notice in exchange for “a \$2 million advance, a \$1 million non-recoupable signing bonus . . . a guarantee of \$500,000 per year for 10 years, a 6% royalty of gross revenues, and various other royalties.”¹⁸⁰ In later litigation

¹⁷⁵ 17 U.S.C. § 304(c)(5).

¹⁷⁶ See generally *Larson v. Warner Bros. Ent., Inc.*, No. 2:04-cv-08776-ODW(RZX), 2013 U.S. Dist. LEXIS 55950, at *4 (C.D. Cal. Apr. 18, 2013).

¹⁷⁷ *Id.* at *4 (citing *Siegel v. Warner Bros. Ent., Inc.*, 542 F. Supp. 2d 1098, 1107 (C.D. Cal. 2008)). Taking inflation into account, \$130 in 1938 would be worth approximately \$2,900 in 2022. *Cost of Living Calculator: What is Your Dollar Worth Today?*, AIER, <https://www.aier.org/cost-of-living-calculator/> [<https://perma.cc/D597-NTP4>] (last visited Nov. 16, 2022).

¹⁷⁸ See *Siegel v. Warner Bros. Ent., Inc.*, 542 F. Supp. 2d 1098, 1145 n. 3 (C.D. Cal. 2008), *overruled by Larson*, 2013 U.S. Dist. LEXIS 55950; see also 17 U.S.C. § 304(b).

¹⁷⁹ *Larson*, 2013 U.S. Dist. LEXIS 55950 at *5 (quoting *Siegel v. Warner Bros. Ent., Inc.*, 658 F. Supp. 2d 1036, 1095 (C.D. Cal. 2009)).

¹⁸⁰ *Id.* at *15–16.

over the enforceability of this settlement, the court determined that “the 2001 agreement was not *contrary* to the Siegels’ termination rights at all[,]” as “it was an agreement consistent with, and which fully honored [the Siegels’] right of termination”¹⁸¹ In essence, this later agreement abrogated the earlier 1938 grant, but in a manner that (1) was in line with the purposes of Section 203 and (2) responded to the consequentialist incentives Section 203 purports to create as a bulwark against “unremunerative transfers.”¹⁸² Indeed, this later agreement ensured Siegel’s heirs an over 2,500% return when compared to the original transfer cost that Siegel received.¹⁸³

As the Second Circuit Court of Appeals explained in a case concerning the writings of author John Steinbeck, another giant of American culture, courts should not “read the phrase ‘agreement to the contrary’ so broadly that it would include any agreement that has the effect of eliminating a termination right[,]”¹⁸⁴ because “[t]o do so would negate the effect of other provisions of the Copyright Act that explicitly contemplate the loss of termination rights.”¹⁸⁵ In this case, the Second Circuit found that a 1994 agreement entered into by Steinbeck’s

¹⁸¹ *Id.* at *17 (quoting *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 988 (9th Cir. 2008)).

¹⁸² H.R. REP. NO. 94-1476, at 124 (1976).

¹⁸³ *See Larson v. Warner Bros. Ent., Inc.*, No. 2:04-cv-08776-ODW(RZx), 2013 U.S. Dist. LEXIS 55950, at *4, *15–16 (C.D. Cal. Apr. 18, 2013).

¹⁸⁴ *Penguin Grp. (USA), Inc. v. Steinbeck*, 537 F.3d 193, 200, 202 (2d Cir. 2008) (citing 17 U.S.C. § 304(c)(5)) (noting that subsequent agreements made by the original copyright creator do not destroy a termination right, but subsequent agreements made by the copyright creator’s heirs or estate extinguish the ability of such successors in interest to later terminate the later agreement, as they have already captured their metaphorical “second bite at the apple” in agreeing to the subsequent grant); *see also* 17 U.S.C. § 304.

¹⁸⁵ *Steinbeck*, 537 F.3d at 202.

wife “terminated and superseded the [original] 1938” grant in the works, and therefore “it also eliminated the right to terminate the grants contained in the 1938 Agreement under sections 304(c) and (d).”¹⁸⁶ Because this later agreement “obligated [Steinbeck’s publisher] Penguin to pay larger guaranteed advance payments and royalties” to Steinbeck’s widow and estate,¹⁸⁷ it directly responded to the consequentialist incentives baked into the initial drafting of Section 203.¹⁸⁸

The legislative history of the 1976 Act makes it plain that Congress did not intend the language of Section 304 on “agreements to the contrary”¹⁸⁹ to wholly “prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one.”¹⁹⁰ Indeed, as one court explained, a subsequent agreement between the grantor and grantee that abrogates the earlier grant “could not be held ineffective as an ‘agreement to the contrary’ inasmuch as [S]ection 304 itself contemplates [the] elimination of termination rights in that manner.”¹⁹¹ Rather, these subsequent re-negotiations of a grant are precisely what Congress envisaged would be permitted under the language of Section 304.¹⁹² As the

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 200.

¹⁸⁸ See *supra* text accompanying notes 144–150.

¹⁸⁹ 17 U.S.C. § 304(c)(5).

¹⁹⁰ H.R. REP. No. 94-1476, at 127 (1976).

¹⁹¹ Penguin Grp. (USA), Inc. v. Steinbeck, 537 F.3d 193, 202 (2d Cir. 2008)

¹⁹² See H.R. REP. No. 94-1476 at 127 (1976); see also *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 290 (2d Cir. 2002) (“[T]he clear Congressional purpose behind § 304(c) was to prevent authors from waiving their termination right by contract.”); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 985 (9th Cir. 2008) (stating that barring the enforcement of subsequent superseding agreements as in 17 U.S.C. § 304(c)(5) “would allow ‘litigation-savvy publishers’ to use their superior bargaining power to compel authors to similarly recharacterize their works [as works for hire], thus rendering § 304(c) a ‘nullity.’”).

Ninth Circuit explained in 2005, Congress “anticipated that parties may contract, as an alternative to statutory termination, to revoke a prior grant by replacing it with a new one.”¹⁹³ Because these agreements are in line with a consequentialist reading of Section 203 as a means of re-balancing the bargaining power in the grantor-grantee relationship in a manner with Coase’s and Demsetz’s theories,¹⁹⁴ they should not only be permitted as a means of protecting copyright creators “against unremunerative transfers[,]”¹⁹⁵ but also should be encouraged as examples of contractual solutions to the shortcomings and that respond to the express incentives of Section 203.

V. NORMATIVE ANALYSIS

In the temporal gap between the emergence of Locke’s deontic theories and the initial codification of copyright law on the one hand, and the passage of the 1976 Act on the other, several schools of thought arose which could broadly be referred to as normative schools of analysis. While more difficult to categorize than the theories of Locke, Demsetz, or Coase, these theorists examined the role of the law in issues such as stabilizing society or developing the self. Their theories offer a third perspective on the legislative rationale behind Section 203. In some respects, these theories strike a better balance than either deontic or consequentialist explanations in justifying an author’s rights as laid out in Section 203 of the 1976 Act. Rather than examining solely the financial or the natural-rights-based aspects of the grantor-grantee relationship, these perspectives take into account the interests of the parties to a grant relationship *and* the

¹⁹³ *Milne v. Slesinger, Inc.*, 430 F.3d 1036, 1046 (9th Cir. 2005).

¹⁹⁴ See text accompanying notes 142–143.

¹⁹⁵ H.R. REP. NO. 94-1476 at 124 (1976).

interests of the general public and the public domain. This Part examines whether the theories of Hegel and Kant shed light into the purpose, role, and justifications of Section 203 in the grantor-grantee relationship.

A. *Hegelian Personhood*

Writing in the early decades of the nineteenth century, Hegel approached property law through the romantic view of the individual.¹⁹⁶ In such a perspective, the apogee of existence was that of the *Idea* made flesh—the complete, externally-perceptible expression of an individual’s personality as shown to the world.¹⁹⁷ As Hegel explains, “[p]ersonality is that which acts to overcome [its subjective nature] and to give itself reality, or in other words to claim that external world as its own.”¹⁹⁸ To overcome the inchoate nature of personality, “[a] person must translate his freedom into an external sphere in order to exist as *Idea*.”¹⁹⁹ It is through “possession, which is *property-ownership*” that “[a] person by distinguishing himself from himself relates himself to another person, and [therefore] it is only as owners that these two persons really exist for each other.”²⁰⁰ Property serves this distinguishing nature—which is to say, it serves as a vehicle through which the individual can display her personality to the world—because Hegel believes that the exertion of one’s internal personality over the external thing is what creates ownership rights in the thing itself. As he explains,

¹⁹⁶ See GEORG WILHELM FRIEDRICH HEGEL, *OUTLINES OF THE PHILOSOPHY OF RIGHT* 57–58 (Stephen Houlgate ed., T.M. Knox trans., Oxford U. Press, 2008).

¹⁹⁷ *See id.*

¹⁹⁸ *Id.* at 39.

¹⁹⁹ *Id.* at 57.

²⁰⁰ *Id.* at 56. *Cf. id.* at 58 (“In his property a person exists for the first time as reason.”).

A person has as his substantial end the right of putting his will into any and every thing and thereby making it his . . . [t]hus everyone has the right to make his will the thing or to make the thing his will, or in other words to supersede the thing and transform it into his own²⁰¹

Accordingly, at its most simple, “[t]o have power over a thing *ab extra* constitutes possession[,]”²⁰² but “to secure this end . . . entails [the] capacity” for an individual’s dominion of will over the thing *eo ipso* “to be recognized by others.”²⁰³

In Hegel’s view, this possessive act can take multiple forms. As he explains, “[w]e take possession of a thing (α) by directly grasping it physically, (β) by forming it, and (γ) by merely marking it as ours.”²⁰⁴ Hegel dismisses the first and third options for appropriation due to their limited temporal scope. Physical seizure “is only subjective, temporary, and seriously restricted in scope, as well as by the qualitative nature of the things grasped”²⁰⁵—and due to their indeterminate nature, which arises because labelling items as one’s possessions “is not actual but is only *representative* of my will to mark the thing with a *sign*, whose meaning is supposed to be that I have put my will into the thing.”²⁰⁶ By contrast, option (β)—to “impose

²⁰¹ *Id.* at 60.

²⁰² HEGEL, *supra* note 196, at 60.

²⁰³ *Id.* at 65.

²⁰⁴ *Id.* at 67.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 71 (arguing that marking an item is a proper means of appropriating possessions subject to the ability of others to understand the import of such marking, insofar as “the sign is implicitly at work . . . [as] a sign given to others in order to exclude them and show that I have put my will into the thing.”). Accordingly, in societies which understand abstract logic, this symbolic form of possession is the means by which “the human being shows his mastery over things.”). *Id.*

a form on something”—is the preferred means of appropriation, because in creating, re-shaping, or otherwise putting form to a thing, “the thing’s determinate character as mine acquires an independent externality and ceases to be restricted to my presence here and now and to the presence of my knowledge and will.”²⁰⁷ By giving form to a thing, the personality of the creator becomes perceptible in an external form, and therefore “[t]o impose a form on a thing is the mode of taking possession most in conformity with the Idea”²⁰⁸

While possession is the means by which an individual can externalize their personality, and accordingly can attain self-actualization, this ownership must exist within certain bounds in order to exist in society. To that end, Hegel stresses that there is a division between ownership of a thing as a universal idea or expression and that of a work as a concrete physical item, as “partial or temporary use of a thing . . . [must] be distinguished from ownership of the thing itself.”²⁰⁹ Incomplete ownership of a thing is impossible as only one individual can imbue an item with her will at a time.²¹⁰ Using an extended analogy to usufruct rights in Justinian’s Institutes, Hegel explains that to use “another’s property . . . [and] enjoying its fruits while preserving its *substance*” is not ownership, as such usage does not allow the individual to externalize their personality for the perception of others.²¹¹ He rationalizes that “[t]he reason I can alienate my property is that it is

²⁰⁷ HEGEL, *supra* note 196, at 68–69.

²⁰⁸ *Id.* at 68–69, 71 (“By being taken into possession, the thing acquires the predicate ‘mine’ and my will is related to it positively.”).

²⁰⁹ *Id.* at 73.

²¹⁰ *Id.* at 66, 72.

²¹¹ *Id.* at 73; see J. INST. 2.4.4 (J.B. Moyle trans., 5th ed. 1913) (“When a usufruct determines [*cum finitus fuerit autem*], it reverts to and is reunited with the ownership [interest]; and from that moment he who before was but bare owner [*nudae proprietatis*] of the thing begins to have full power over it [*incipit plenum habere in re potestantem*].”).

mine only insofar as I put my will into it[,]”²¹² and therefore “I may abandon as ownerless anything that I have or yield it to the will of another and so into his possession, provided always that the thing in question is a thing external by nature.”²¹³

1. Hegelian Copyright

While true with physical possessions, Hegel emphasizes the neatness with which the concepts of alienability through the withdrawal of the dominion of one’s will and of the divisibility of ownership between the physical and universal thing apply to what in modern terms would be referred to as expression or copyrightable subject matter.²¹⁴ As Hegel states, “[s]ingle products of my particular physical and mental skill and of my power to act I can alienate to someone else . . . because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being.”²¹⁵ Accordingly, “[w]hat is peculiarly mine in a product of my spirit may, owing to the method whereby it is expressed, turn at once into something external like a ‘thing’ which *eo ipso* may then be produced by other people.”²¹⁶ In this manner, the expression of an individual’s personality can be externalized and made perceptible to the world; and

[s]ince the owner of such a product, in owning a copy of it, is in possession of the entire use and value of

²¹² HEGEL, *supra* note 196, at 77.

²¹³ *Id.*

²¹⁴ *Id.*; see also 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”). *But cf. id.* § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

²¹⁵ HEGEL, *supra* note 196, at 78.

²¹⁶ *Id.* at 79.

that copy *qua* an individual thing, he has complete and free ownership of that copy *qua* an *individual* thing, even if the author of the book or the inventor of the technical device remains the owner of the *universal* ways and means of reproducing such products and things.²¹⁷

The idea itself—what Hegel refers to as the work *eo ipso* or “the universal ways and means” of understanding the idea—is divisible from the physical form in which the idea is expressed.²¹⁸ This distinction arises because the “power to reproduce has a special character, *viz.* it is that in virtue of which the thing is not merely a possession but a resource” and thus “this distinction falls into the sphere of that whose nature entails its divisibility, into the sphere of external use, to retain part of a thing’s use while alienating another part is not to retain proprietorship without use.”²¹⁹ Hegel concludes, almost summarily, that the divisibility and alienability of expressive works is integral to intellectual property law, namely because “[t]he purely negative, though the primary, means of advancing the sciences and arts is to guarantee scientists and artists against theft and to enable them to benefit from the protection of their property”²²⁰ Beyond this policy goal, “the purpose of a product of the intellect is that people other than its author should understand it and make it the possession of their ideas,” and “[t]hus copyright legislation attains its end of securing the property rights of author and publisher only to a very restricted extent, though it does attain it within limits.”²²¹

Accordingly, a Hegelian conception of copyright ownership and purpose tracks onto copyright as it exists in

²¹⁷ *Id.* at 80.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ HEGEL, *supra* note 196, at 81.

²²¹ *Id.*

the United States under the 1976 Act. For example, the copyright doctrine of the idea-expression dichotomy²²² protects the “property rights of author and publisher only to a very restricted extent”²²³ while nevertheless allowing second-comers to make use of the work as a resource in their own intellectual development.²²⁴ Similarly, Hegel’s theory of divisibility of the work *eo ipso* and its physical copy not only tracks the concept of the divisibility of copyright which allows an individual creator to retain the overall rights in a work while licensing some of those rights—such as that of reproduction or performance—to a grantee.²²⁵

This conception of ownership is reflected in Section 202 of the 1976 Act, which restates that “[o]wnership of a copyright, or of any of the exclusive rights under a copyright,” such as the right of reproduction or performance, “is distinct from ownership of any material object in which the work is embodied.”²²⁶ Much like how

²²² See 17 U.S.C. § 102(b).

²²³ HEGEL, *supra* note 196, at 81.

²²⁴ See *id.* at 79 (“[B]y taking possession of a thing . . . its new owner may make his own the thought communicated in it . . .”).

²²⁵ Compare *id.* at 79–82 (noting the distinction between the work and its physical embodiment), with 17 U.S.C. § 102(a) (“Copyright . . . subsists” only “in original works of authorship fixed in any tangible medium of expression . . .”), 17 U.S.C. § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . .”), H.R. REP. NO. 94-1476, at 124 (1976) (“The principle restated in section 202” of the 1976 Act “is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things.”), and STAFF OF S. COMM. ON THE JUDICIARY, SUBCOMM. ON PATS., TRADEMARKS, & COPYRIGHTS, 86TH CONG., 2D. SESS., STUD. ON DIVISIBILITY OF COPYRIGHTS 17 (Comm. Print 1960) (examining the prior doctrine of indivisibility of copyright and noting that “members of the copyright bar treat it as an anachronism and, except for procedural purposes, tend to disregard it.”).

²²⁶ 17 U.S.C. § 202.

Hegel states that “the owner of . . . a copy . . . has complete and free ownership of that copy *qua* an *individual* thing, even if the author of the book or the inventor of the technical device remains the owner of the *universal* ways and means of reproducing such products and things[.]”²²⁷ Section 202 specifies that the “[t]ransfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object.”²²⁸

2. Hegel and Section 203

While Hegel’s theory aligns relatively well with the other operative provisions of the 1976 Act, Hegelian rules of property ownership would squarely disclose the rights embodied in Section 203, insofar as they apply to assignments of copyright. Hegel’s primary focus was that the creator of a work be able to share that work with the public for their internal personality to be known to the world, but his conception of property ownership cannot comport with a right for a second individual to assume ownership of a work while the creator retains an ownership interest, even one that vests only after 35 years.²²⁹ This contemporaneous dual ownership interest—in which an assignee owns the work and can dispose of it as they choose, but in which the assignor retains an irrevocable (or, as Hegel perhaps would have called it, a true) ownership of the work through their ability to revoke the assignment at will—is in essence more like a form of the Roman usufruct that he expressly disavows.²³⁰ Just as a parcel of land may be owned by one individual while another retains a life estate and rights of profit from the fruits of the land until such a time as the proper owner revokes the right or the

²²⁷ HEGEL, *supra* note 196, at 80.

²²⁸ 17 U.S.C. § 202.

²²⁹ HEGEL, *supra* note 196, at 5758.

²³⁰ *Id.* at 73.

usufruct determines,²³¹ the same rights exist in the assignor-assignee relationship. The grantee owns the work, and has the right to reproduce, sub-grant, destroy, sell, and prepare derivative works as any other copyright owner, but these rights remain contingent upon the grantor’s continued assent upon the vesting of Section 203 rights.²³² Unlike in a Kantian publisher’s privilege understanding of copyright, this right of the assignor serves as both a means through which they can avoid removing the entirety of their will from an item while nevertheless alienating it to another and as an impediment against full, free, and clear use by the assignee without fear of future loss of his rights thereto.²³³ Just as Hegel observes that “[a] property which suffered the ‘permanent cessation of usufruct’ . . . would not merely be ‘useless[,]’ it would no longer be a ‘property’ . . . at all[,]” a work in which the grantor has not fully withdrawn their will cannot become the property of another at all.²³⁴

²³¹ *Id.* (citing J. INST. 2.4.1–4).

²³² *See* 17 U.S.C. § 106.

²³³ *See infra* Part V.b. *Cf.* HEGEL, *supra* note 197196, at 65 (“The reason I can alienate my property is that it is mine only insofar as I put my will into it.”).

²³⁴ HEGEL, *supra* note 196, at 73 (quoting J. INST. 2.4.1) (“[L]est ownership should be entirely valueless [*ne tamen in universum inutiles essent proprietates*] through the permanent separation from it of usufruct [*semper abscedente usufructu*], certain modes have been approved in which usufruct may be extinguished, and thereby revert to the owner [*extingui usufructum et ad proprietatem reverti*].”). Here, Hegel misses the main thrust of Justinian’s language: he claims that the cessation of usufruct renders a property useless, when in fact the Roman law states that a property can be rendered useless through the permanent inability to rejoin the usufructuary and possessory interests therein as a result of the divergence between successors to these two rights in the land. *See id.* Either conception of the separation between usufruct and fee simple would lead to the same condemnation of Section 203 under Hegel’s belief in the requirement that one remove her will entirely from an item in order to transfer ownership therein.

By contrast, Section 203, insofar as it relates to licenses, fits neatly with Hegel's beliefs. Rather than providing a complex web of as-of-yet unvested interests and withdrawals of the will from the vessel that is a work, a license is merely a grant of one particular right in a work—for example, to reproduce the physical manifestations of the work itself. In this manner, Hegel explains that “[w]hat is particularly mine . . . may . . . turn at once into something external like a ‘thing’ which eo ipso may be produced by other people.”²³⁵ A Hegelian version of Section 203, therefore, would only apply to grants of license in a work because in such a relationship, Hegel believes that contracts can allow for a proper balance between the ownership interests of the grantor in the work itself and of the grantee in the right to reproduce the physical copies of the work.²³⁶ Assignments, by contrast, would have to be excluded from the Section 203 termination rights accordingly.

B. Kantian Speech and Publishing Privilege

Unlike Hegel, who addressed the field of copyright law in an oblique but broad manner, Immanuel Kant discussed the printing privilege of publishers and their relationship to the original authors of books.²³⁷ As he sets out the initial syllogism upon which this relationship is based and upon which it may be understood, Kant articulates that publication is not “a use of a property in a copy” of the work, like Hegel suggests.²³⁸ Rather, Kant claims that “there are grounds for regarding publication not

²³⁵ *Id.* at 68.

²³⁶ *See id.* at 78.

²³⁷ *See* Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books*, reprinted in PRACTICAL PHILOSOPHY 28, 29–35 (Mary J. Gregor ed., Cambridge University Press 1996).

²³⁸ *Id.* at 29. *Cf.* HEGEL, *supra* note 196, at 79 (noting that a copy of a work is “something external like a ‘thing’ which eo ipso may be produced by other people.”).

as dealing with a commodity *in one's own name*, but as *carrying out an affair in the name* of another, namely the author, and that in this way [he] can easily and clearly show the wrongfulness of unauthorized publication.”²³⁹ Kant then provides an exegesis on two key statements: first, the premise that “[i]n a book, as a writing, the author *speaks* to his reader[,] and the one who has printed the book *speaks*, by his copy, not for himself but simply and solely in the author's name[;]” and second, that the publisher of a work “presents the author as speaking publicly and only mediates the delivery of his speech to the public.”²⁴⁰

As a preliminary matter, Kant, like Hegel, recognized the distinction between the work *eo ipso* and the physical copies of the work in book form. Kant states, “[i]t does not matter to whom the copy of [the author's] speech belongs,” as “to make use of it for oneself or to carry on trade with it is still an affair that every owner of it can carry on *in his own name* and at his discretion.”²⁴¹ Such is not the case for the act of printing copies of the work which are subsequently distributed to the public. However, as printing is a means “*to let someone speak publicly*,” it “is undoubtedly an affair that someone can execute only in another's name and never in his own name (as publisher).”²⁴² In Kant's understanding, the work of an author—that is to say, his written work—is the *speech* of a person (*opera*), and one who publishes it can speak to the public only in the name of this other and can say no more of himself than that the author through him (*Impensis Bibliopolae*) delivers the following speech to the public.”²⁴³ The author is the ultimate arbiter of if and how another individual may distribute this speech to the public in the

²³⁹ Kant, *supra* note 237, at 29.

²⁴⁰ *Id.* at 30.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 34.

form of the printed book, as “the author has in [his actions] an inalienable right (*ius personalissimum*) always *himself* to speak through anybody else, the right, that is, that no one may deliver the same speech to the public other than in his (the author’s) name.”²⁴⁴

When the author consents to allow another to deliver his speech to the public in the printed form, the author-publisher relationship is formed.²⁴⁵ In such an arrangement, the publisher “provides in his own name *the mute instrument for delivering the author’s speech to the public.*”²⁴⁶ In this manner, the publisher—or the grantee in any other form of copyright transaction of this nature under the 1976 Act—is “the one *through whom the* [grantor] *speaks* to the public,” and nothing more.²⁴⁷ The limited role that the publisher plays in such a relationship is bounded by Kant’s aversion to forced action as a violation of the individual’s bodily and mental autonomy.²⁴⁸ As he explains, one’s “right to carry on some affair in another name is a positive right against a person, that is to compel the author of this affair to perform something.”²⁴⁹ It follows, Kant explains, that as “publication is speech to the public (through printing) in the name of the author and hence an affair carried on in another’s name[,]” and as the right of publication “is therefore a right of the publisher against a person[,]” it amounts to “a positive right against a person.”²⁵⁰ To print against the author’s wishes in such a circumstance is thus forced speech, and violates the ethical norms shared by Kant and by modern society against forced labor and compelled speech. This view of compelled

²⁴⁴ *Id.* at 35.

²⁴⁵ Kant, *supra* note 237, at 35.

²⁴⁶ *Id.* at 30.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 32.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 32–33.

action is only one-sided, however, as the publisher is in Kant’s view merely the agent of the author, and is therefore bound to act on their behalf.²⁵¹ This view is demonstrated to the extreme in Kant’s belief that “[w]ere the author to die after he has given the manuscript to the publisher for printing and the latter has bound himself to print it, the publisher is not at liberty to hold the manuscript back as his property[,]” but instead is obliged—on the author’s behalf—“either to publish or to turn the manuscript over to someone else who offers to do so.”²⁵²

Abstracting from Kant’s discussion of the publisher-author relationship to the more general grantor-grantee relationship as governed by Section 203, *in toto* the rights that Kant seeks to ensure are preserved for copyright creators align with the provisions of Section 203 itself. This is to say, as a general matter, Section 203 actually comports well with Kant’s understanding of the author-publisher relationship and its revocability at the author’s behest: the grantor maintains control over whether another may distribute their works, and the grantee is according this ability to disseminate the grantor’s speech on their behalf only upon the grantor’s consent given at the time of grant and either re-affirmed or withdrawn once the grantor’s Section 203 rights vest. Drilling down to specifics of the overlap between these two conceptions of grants of copyright and a grantor’s ability to terminate such grants, however, reveals some inconsistencies—primarily in areas which Section 203 fails to adequately address—for which a Kantian perspective is instructive. One such inconsistency arises when the procedural rules for termination of a grant are compared to Kant’s beliefs on the continuing obligations of a publisher after an author’s death. Kant states that it is imperative that the publisher of a work

²⁵¹ Kant, *supra* note 237, at 32.

²⁵² *Id.* at 33.

disseminate that work to the public after an author's death, no matter the circumstances.²⁵³ However, under the 1976 Act the right to terminate a grant survives the grantor's death and is descendible, such that a grantor's heirs may choose to terminate a grant made during the grantor's life under Section 203 in contravention of the grantor's initial wishes.²⁵⁴ At the same time, however, Section 203 does not allow termination of a grant made on the grantor's behalf but after her death,²⁵⁵ which aligns with Kant's belief that publication should be imperative notwithstanding the death of the author.²⁵⁶

The most significant inconsistency between Kant's conception of the author-publisher relationship and Section 203 rights is that while Kant saw *any* publication for which the author had withdrawn consent as a violation of the author's bodily and mental autonomy,²⁵⁷ under Section 203 the right to terminate a grant in a work protected by copyright—i.e., to revoke the grantor's consent—only vests after a period of 35 years.²⁵⁸ While *sensu stricto* this is not a comparison of like rights—Section 203 governs a more one-sided relationship than Kant envisaged. Rather than just covering the reproduction rights in a work like in an author-publisher relationship it instead governs any grant of

²⁵³ See *id.* at 33.

²⁵⁴ 17 U.S.C. § 203(a)(2) (describing the descentance and divisibility of termination rights and specifying the rights of a widow or widower). § 203(a)(2)(A) explains the rights of children and grandchildren distributed per stirpes. *Id.* § 203(a)(2)(B) details the rights of executors, administrators, or trustees. *Id.*

²⁵⁵ See, e.g., S. REP. NO. 94-473, at 108 (1975) (stating that the right to terminate an assignment or transfer of copyright under Section 203 is “confined to inter vivos transfers or licenses executed by the author.”).

²⁵⁶ See Kant, *supra* note 237, at 33.

²⁵⁷ See *id.* at 32–33.

²⁵⁸ S. REP. NO. 94-473, at 109 (1975) (“[A] grant may be terminated during the [five] years[] following the expiration of a period of 35 years from the execution of a grant.”).

any and all rights in the work. This period during which the grantor is unable to withdraw consent is troubling under Kant’s framework of analysis. As Kant might put it, for an author to be required to speak through a publisher for 35 years solely because of the date at which the initial grant was created amounts to a bodily violation of the author’s autonomy and being, as it creates a period in which the publisher profits from the author’s unwilling and compelled speech.²⁵⁹

At the same time, there is an entirely different—and equally troubling—scenario which could arise, in which the grantor wants to continue to disseminate their work to the public, but for one reason or another—be it fiscal, market-based, or personal in nature—the grantee chooses to not continue to make the work available to the public. Again, in such a scenario the grantor/author would be powerless to

²⁵⁹ There is some uncertainty in Kant’s writings as to whether a publisher would be required to immediately cease publication once an author has withdrawn consent, or whether such a right would need to be subject to the basic fact that business dealings rely on a presumption of continuity which justifies the costs associated with publishing a work. This is to say, as Kant seems to a certain extent to imply, one must understand the author’s will as consistent with the facts of the world, including the fact that a publisher would be unlikely to accept the costs of preparing a work for publication without a guarantee that the author will not withdraw consent for publication for a certain minimum period of time. *See* Kant, *supra* note 237, at 31. Absent a contract to the contrary, a sensible requirement from a purely business-focused viewpoint would be to require an author to consent to publication of a work for a certain period—e.g., the duration of publication in which sales would be sufficient to justify the publisher’s investment in the cost of publication—before a withdrawal of consent would be permitted. Section 203 seems to imply that this period of time is approximately 35 years, and thus the termination right vests at the end of that period; the Author presumes that a window of time shorter than 35 years could be determined as a matter of economics, not law, that would both correspond with this interpretation of Kant and with the facts of the publishing world, which would minimize this “compelled speech” issue. *See also* S. REP. NO. 94-473, at 108–09 (1975).

change anything about this relationship until their Section 203 rights vest at the 35-year mark. In either scenario, Kantian theory would argue that a different form of Section 203—one which permits termination prior to 35 years after the initial grant, at the grantor's discretion and with all the attendant notice provisions of which currently accompany Section 203 termination—would cure these defects in the law as it currently stands.

VI. CONCLUSION

Intellectual property law has rarely been described as neat or straightforward, and the 1976 Act is no such exception. This paper demonstrates how the incomplete and, at times, incongruous theoretical underpinning of one specific provision of copyright law—Section 203—was shaped by, but does not fully comport with, the three principle schools of intellectual property: deontic theory, consequentialist theory, and what this paper has labelled as normative theory—a catch-all encompassing Hegelian and Kantian perspectives on authorship. These various theories operate in concert and in tension with each other in the current statutory system.

While the relative success of Section 203 in the five decades since its passage demonstrates that it provides a workable means of satisfying the interests of copyright creators and their grantees, this paper has shone the spotlight upon some of the cracks in Section 203's foundation and revealed three primary sets of recommendations for how Section 203 could be improved. Naturally, as each set of recommendations was shaped by the theoretical frame employed in analyzing Section 203, the recommendations serve to advance the goals of copyright law *as understood* through that framework of analysis and do not purport to serve the ends of all goals of the law as understood under all modes of analysis. With

that caveat in mind, the commonalities between these suggestions nevertheless suggest a potential path forward for Section 203.

Among the theories examined in this paper, the Lockean and Hegelian perspectives both express discomfort at the applicability of Section 203 to certain forms of grants in a copyright, but for different reasons. A deontic approach struggles to permit a system whereby one individual prohibits second comers from appropriating a non-rivalrous good out of the common marketplace of ideas for their own use, and thus encourages Section 203 to *only* apply to exclusive licenses—and thereby indirectly prioritizing market adoption of non-exclusive licensure of works. A Hegelian approach, by contrast, squarely discloses the possibility of the cotemporaneous ownership interests—vested or otherwise—of two individuals in the same work. Under this framework, Section 203 should *only* apply to licenses, as the termination right creates a form of contemporaneous dual ownership interest, in which an assignee owns the work, and can dispose of it as they choose, but in which the assignor retains an irrevocable (or, as Hegel perhaps would have called it, a true) ownership of the work through their ability to revoke the assignment at will. Like Hegel’s aversion to usufruct in Roman law, such a possibility is untenable under his understanding of possession, and thus Section 203 should permit termination of licenses and licenses alone. While these theories lead to contradictory policy proposals, which are shaped more by their own theoretical bent than by the legal landscape in copyright law, they expose some of the tensions inherent in Section 203 itself.

Beyond just shedding light onto the competing interests in copyright law and in Section 203 specifically, some areas of overlap between these suggestions indicate a more broad-reaching justification for changing Section 203 as it currently stands. For example, both the

consequentialist and the Kantian perspective on Section 203 advocate for an abandonment of the 35-year vesting period for Section 203's termination right. Adherents to the perspectives of Coase and Demsetz would advocate for this change based on the economic consequences of a 35-year vesting period and based on the unlikelihood that the average copyright creator would be in a position to avail themselves of Section 203's provisions as a means of protection against "unremunerative transfers."²⁶⁰ A Kantian perspective similarly advocates against a dramatic shortening of the period within which these rights vest, as *any* period of time in which a copyright creator's work is disseminated to the public without the grantor's affirmative consent amounts to a violation of the author's bodily and mental autonomy to some extent. The fact that this 35-year period only represents a hold-over from the legislative structure of the 1909 Act, and that legislation which is now almost 30 years old itself removed the only procedural hold-over from that old scheme which aligned with this system,²⁶¹ only bolsters the argument these theories make against the 35-year vesting period for Section 203. Similarly, a Kantian perspective of the author-publisher relationship and the publisher's role as agent acting under the author's affirmative assent bolsters the consequentialist view permitting post-grant contractual agreements which modify the timeline and termination rights in a grant for a work protected by copyright by purporting to replace the earlier agreement. Such agreements are not "agreements to the contrary[]" of Section 203,²⁶² but rather represent

²⁶⁰ H.R. REP. NO. 94-1476, at 124 (1976).

²⁶¹ Copyright Amendments Act 1992, Pub. L. No. 102-307, § 106, Stat. 264 (1992) (revising 17 U.S.C. § 304(a) to provide for automatic renewal of any copyright registration first published or registered on or after January 1, 1964).

²⁶² 17 U.S.C. § 304(c)(5).

contractual solutions to the shortcomings and that respond to the express incentives of Section 203.

In sum, while scholars and courts may on occasion speak of an underlying theory of American copyright law, a closer analysis demonstrates that the legal landscape governed by the 1976 Act is more of a patchwork quilt of theoretical justifications than it is a uniform stretch of canvas. Section 203 is one such patchwork of theory and legislative memory. By examining the justifications upon which Section 203 is supposedly based, this paper points to the different weaknesses and potential oversights of the statutory provision itself and identifies improvements which could be enacted to advance the goals of copyright law.