

ARTICLE

SHRINKING THE COMMONS: TERMINATION OF COPYRIGHT LICENSES AND TRANSFERS FOR THE BENEFIT OF THE PUBLIC

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Federal law limits the free alienability of copyright rights to prevent powerful transferees from forcing authors into unremunerative bargains. The limiting mechanism is a statutory provision that permits authors or their heirs, at their sole election, to terminate any transfer or license of any copyright interest during a defined period. Indeed, the applicable provisions of the Copyright Act go so far as to invalidate purported waivers by authors of their statutory termination powers.

These statutory provisions may constitute an impediment to the effective grant of rights for the benefit of the public under widely used “open content” licensing arrangements, such as the GNU General Public License (“GPL”) for software or the Creative Commons family of licenses for other sorts of expressive works. Although recent case law suggests that such open-source or open-content licensing arrangements should be analyzed under the same rules that govern other copyright licenses, doing so necessarily raises the possibility of termination of the license. If GPL or Creative Commons-type licenses are subject to later termination by authors (or their heirs), and this termination power cannot validly be waived, then users of such works must confront the possibility that the licenses may be revoked in the future and the works effectively withdrawn from public use, with potentially chaotic results.

Although a number of judge-made doctrines may be invoked to restrict termination of a license granted for the benefit of the public, the better course would be for Congress to enact new legislation expressly authorizing authors to make a nonwaivable, irrevocable dedication of their works, in whole or in part,

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to the use and benefit of the public—a possibility that the Patent Act expressly recognizes, but the Copyright Act presently does not.

I. INTRODUCTION

Copyrights imperfectly resemble property. Like property, the various rights comprised in a copyright may be conveyed, separately or together, from one owner to another.¹ Unlike transfers involving other forms of both tangible and intellectual property, however, all transfers or licenses of copyright interests by a work's author are revocable. They may be terminated, during a defined period, at the sole election of the author or the author's statutory heirs.² Further strengthening authorial control, the Copyright Act expressly makes the author's unilateral power to rescind the transfer irrevocable and nonwaivable.³ Thus, copyright rights differ, in a fundamental way, from any other form of property: their initial ownership cannot voluntarily be permanently and unconditionally divested.⁴

According to the legislative history, Congress intended the statutory provisions allowing termination of transfers to protect authors of expressive works from overreaching by powerful licensees, who may effectively pressure authors to make transfers on unremunerative terms.⁵ To be sure, examples of such overreaching are not difficult to locate in the cases construing the termination provisions. As between authors and publishers, the latter frequently enjoy superior bargaining power.⁶ Importantly, however, although redressing unremunerative bargains and preventing overreaching by licensees supply the underlying rationale for the termination rules, the statute expressly makes *all* copyright licenses or transfers by the author terminable without regard to the details of the parties' bargain.⁷

The statute's termination provisions may pose an underappreciated risk to a wide variety of contemporary "open content" projects,⁸ which depend

¹ 17 U.S.C. § 106 (2006) enumerates the copyright holder's exclusive rights, including the rights to reproduce, distribute, and prepare derivative works from the copyrighted work. Additionally, some expressive works receive further protections in the form of exclusive rights of public performance or display, or of digital audio transmission. *See id.* Each of these rights may be owned and transferred separately upon whatever terms the parties to the transaction agree to adopt. *See generally id.* § 201(d).

² *Id.* §§ 203(a) (governing termination of transfers executed in 1978 or later), 304(c) (governing termination of transfers executed in 1977 or before). *See generally infra* Part III.B.1.

³ *See* §§ 203(a)(5), 304(c)(5). *See generally infra* notes 255–56, 260 and accompanying text.

⁴ The sole exception in the Copyright Act is for transfers by will, which are expressly excluded from the operation of the termination provisions. *See* §§ 203(a), 304(c). For all voluntary transfers or licenses of copyright made *inter vivos*, however, termination remains potentially available. Involuntary transfers, such as by expropriation or by operation of law, lie outside the present inquiry. Regarding such transfers, *see generally id.* § 201(d)(1), (e).

⁵ *See infra* notes 236–39, 261–62 and accompanying text.

⁶ *See infra* notes 231–35 and accompanying text.

⁷ *See* §§ 203(a)(5), 304(c)(5). *See generally infra* notes 255–60 and accompanying text.

⁸ "Open content," as used herein, refers to all expressive works licensed under terms that allow copying, modification, and redistribution by unspecified third parties, with or without

for their vitality upon specialized copyright licenses. From the Linux operating system⁹ to the Firefox web browser¹⁰ to the Wikipedia encyclopedia¹¹ and far beyond, a host of well-known and widely used informational goods have been created by a global community of volunteers. Their efforts are coordinated—indeed, their self-definitions are partly governed—by a family of copyright licenses¹² crafted to permit successive creators to build upon the efforts of their predecessors and to distribute their shared work product.¹³ Recent case law suggests that, consistent with their creators' intent, these licenses are valid under the Copyright Act: they grant rights to users that would otherwise belong exclusively to the owner of the copyright in the

additional conditions such as restrictions on downstream users' choice of licenses for their own content. *See infra* notes 64–65, 111, 128 and accompanying text (discussing so-called “copyleft,” “share-alike,” or noncommercial usage provisions of some open-content licenses). The term encompasses, at a minimum, open source software, as well as non-software works licensed under the Creative Commons family of licenses. *Cf., e.g.,* Séverine Dusollier, *Sharing Access to Intellectual Property Through Private Ordering*, 82 *CHI-KENT L. REV.* 1391, 1397 (2007) (explaining that “open source” initiatives outside the domain of software are frequently called “open content” or “open access” projects); Andrés Guadamuz González, *Scale-Free Law: Network Science and Copyright*, 70 *ALB. L. REV.* 1297, 1325–26 (2007) (recognizing use of “open content” in a similar sense). Public domain works are also open content, although they ordinarily do not depend for their “openness” on the terms of a license as other open-content works do. *But cf. infra* Part III.A.3 (discussing public domain licenses).

⁹Linux, sometimes labeled “GNU/Linux” to reflect the contributions of the GNU Project, arose from an effort to create a free alternative to the powerful Unix operating system that had been developed at AT&T starting in the late 1960s. *See* STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* 20–53 (2004) (recounting history of Unix); *see also infra* note 46. The original Linux kernel was written by Finnish programmer Linus Torvalds, although the kernel project alone has since grown to include thousands of contributors, and many more developers write Linux application software. WEBER, *supra*, at 94–127 (tracing development of Linux and related projects); *see also* ERIC S. RAYMOND, *A Brief History of Hacking*, in *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 5, 23–25 (1999); Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 *U. CHI. L. REV.* 265, 268–69 (2004).

¹⁰Firefox represents a still rare, although perhaps increasing, phenomenon: a once-proprietary product (Netscape Navigator) released for community development under the open-source model. Zittrain, *supra* note 9, at 278 & n.29; *see also* CHRISTOPHER M. KELTY, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE* 99–112 (Michael M. J. Fischer & Joseph Dumit eds., 2008); Greg R. Vetter, *Claiming Copyleft in Open Source Software: What if the Free Software Foundation's General Public License (GPL) Had Been Patented?*, 2008 *MICH. ST. L. REV.* 279, 312–14.

¹¹The English-language version of Wikipedia is online at <http://en.wikipedia.org/> (last visited Mar. 4, 2010). *See* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 70–74 (2006); CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 109–17 (2008).

¹²The provisions of a small, but hopefully representative, sample of the many such licenses in existence are considered *infra* Parts II.B–C.

¹³What one observer said of open-source software could be applied more broadly to other open-content communities: “In a very real sense, the open source community figures out its self-definition by arguing about licenses and the associated notions of property, what is worth protecting, that they embody.” WEBER, *supra* note 9, at 85; *see also id.* at 185 (an open-source license “is not simply a set of legal definitions and restrictions. Rather, the license represents foundational beliefs about the constitutional principles of a community and evolving knowledge about how to make it work.”).

licensed works and impose enforceable conditions upon the exercise of those rights.¹⁴

The ongoing vitality of “commons-based peer production”¹⁵ of informational goods depends critically upon the assumption that the governing licenses will make earlier users’ contributions freely available in perpetuity for later users to copy, modify, and redistribute.¹⁶ The termination provisions of the Copyright Act, however, may call that assumption into doubt. Nothing more definitive may yet be said, for the peer-production phenomenon is sufficiently recent that issues of termination have not yet arisen.¹⁷ The courts have not considered, for example, whether a computer programmer may release software code to the public under commonly used software licenses such as the GNU General Public License (“GPL”)¹⁸ or the BSD License,¹⁹ and then “terminate” that license many years later and recapture all of the exclusive rights that ordinarily accompany ownership of copyright in a work. Nor has precedent established whether the author of an expressive work published under a Creative Commons license²⁰ may later terminate the license and sue anyone who distributes or remixes the work (in reliance on the stated terms of the license) for copyright infringement. Nor do we know, to take the most extreme example, whether an author may use the statute’s termination provisions to rescind her own express dedication of a work to the public domain,²¹ although countervailing policy considerations may weigh particularly heavily against allowing termination in this instance.²² The point is simply that the Copyright Act’s termination clauses may, by their terms, reach some or all of these situations, even though none of these scenarios presents the problem of unequal bargaining power that motivated Congress to enact the termination provisions. Particularly when one considers that the Copyright Act allows persons other than the original author to terminate a license in some circumstances,²³ the possibilities for gamesman-

¹⁴ See *infra* notes 277–85 and accompanying text.

¹⁵ This is Yochai Benkler’s useful formulation, which concisely encapsulates a number of complex analytical constructs. See BENKLER, *supra* note 11, at 59–132; Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 *YALE L.J.* 369, 375 (2002).

¹⁶ See, e.g., *infra* notes 74–76 and accompanying text.

¹⁷ The first version of the GNU General Public License (“GPL”) for software, for example, was issued in 1989. See FREE SOFTWARE FOUND., GNU GENERAL PUBLIC LICENSE VERSION 1.0 (1989), <http://www.gnu.org/licenses/old-licenses/gpl-1.0.txt> [hereinafter GPLv1]. As discussed below, the most likely applicable statutory termination provisions do not take effect until thirty-five years after the execution of the transfer or license. See *infra* note 244 and accompanying text. It will be some years, in other words, before the earliest works licensed under GPLv1 become subject to possible termination. See *infra* notes 294–96 and accompanying text.

¹⁸ See *infra* notes 50–76 and accompanying text.

¹⁹ See *infra* notes 80–88 and accompanying text.

²⁰ See *infra* Part II.C.2.

²¹ See *infra* Parts III.A.2–3.

²² See *infra* notes 311–12 and accompanying text.

²³ See *infra* note 253 and accompanying text.

ship and abuse of the termination regime in the realm of open-content works appear substantial.

An author's termination of an open-content license would present a host of practical difficulties. Rapid evolution characterizes many of the works created under such licenses, and untangling a terminating author's long-ago contributions from the contemporary version of a work may represent an exceedingly complex undertaking. In addition, open-content works often include contributions from many authors—thousands, or even millions, in the case of large-scale projects like Linux or Wikipedia—and the task of excising a terminating author's contributions while simultaneously preserving later users' contributions would prove particularly vexing.

Even aside from these practical considerations, termination would undoubtedly chill the vibrant creative environment that presently surrounds the development and use of open-content works. It would likely surprise later contributors to the project who had been led to believe that earlier users' contributions would remain available for reuse in perpetuity (and whose own contributions may well have been made in reliance on that understanding). It would also present a clear affront to the community norms of nonpropriety and mutual sharing that characterize a number of the most vibrant open-content projects.

For all these reasons, the Copyright Act's termination provisions make a poor fit with open-content works. Because those provisions nevertheless appear on their face to permit termination of open-content licenses, clarification or revision of the law is necessary. Although some judge-made doctrines may be pressed into service towards this end, courts may be understandably reluctant to depart from what would appear to be plain statutory text. Therefore, protections against termination for open-content works may find firmer grounding in new legislation.

Part II of this Article will illustrate the variety of copyright licensing arrangements that underlie the peer-production phenomenon. The objective here is not to advance normative claims about the strengths or weaknesses of peer production as a mode of creative endeavor or to contrast it favorably or unfavorably with the more traditional proprietary model of production. This assessment occurs instead at an analytically "lower" level. It takes the peer-production phenomenon as a given and examines the particular licensing arrangements that bind open-content projects and their creators together. Given the dozens, or even hundreds, of model licensing instruments in existence, this inquiry can do no more than summarize a few of the most widely used alternatives, including the GPL and BSD Licenses for software and the GNU Free Documentation License ("GFDL") and Creative Commons family of licenses for works of other types.

Part III then situates the licensing issue within federal copyright law. The termination clauses represent only one way in which the Copyright Act has evolved to make it more difficult for creators to make irrevocable grants of rights in their works to others. This portion of the Article considers, as

illustrative of the complexities introduced by the evolving statute, whether authors may expressly abandon copyright in their works and dedicate them to the public domain—a question that can no longer be answered unequivocally in the affirmative. After surveying the changes Congress has made to vest rights inextricably in the hands of authors, the analysis turns to a consideration of the statute's complex provisions governing the termination of licenses and transfers. The evolution of these provisions in the legislation that ultimately became the Copyright Act of 1976, and the pattern of case law construing those provisions, both show that Congress's attention was focused on redressing unremunerative transfers made by authors in the face of superior bargaining power:²⁴ a policy that, whatever its normative appeal, clearly has no application to the peer-production phenomenon. The need to address the termination issue draws added force from recent cases applying traditional copyright principles to open-content licenses.

With both the technical and legal aspects of the issue on the table, Part IV considers whether existing doctrine is sufficiently flexible to accommodate a judge-made exception to the statutory termination regime for open-content works. A few tools are available to courts inclined to protect open-content licensees from the prospect of termination by the licensor. The courts might, for example, modify the existing doctrine of copyright abandonment to permit partial, conditional, irrevocable abandonments of copyright rights, to the permanent detriment of authors and their heirs. Alternatively, the courts might extend their current practice of borrowing provisions from the Patent Act when construing the Copyright Act.²⁵ The Patent Act presently includes several provisions that permit creators expressly to abandon rights in their creations and dedicate their works permanently to the public domain.²⁶ Courts might interpret the Copyright Act harmoniously with these provisions of the Patent Act as a way of sidestepping the problems that termination of an open-content copyright license would pose. Neither of these solutions, however, is optimal; either would require a reviewing court to disregard seemingly forceful counterarguments, and a court's receptivity to arguments grounded either in a reformulated abandonment doctrine or in the Patent Act cannot be known with certainty in advance. Such unpredictability, however, only multiplies the present uncertainty surrounding the durability and permanence of open-content licenses.

With no compelling judicial alternatives in view, Part V considers legislative solutions. Congress should recognize the peer production phenomenon as an essential change in the baseline assumptions that prevailed at the time of the Copyright Act of 1976—a change that demands its own recognition in positive law. The better approach, accordingly, would be for Con-

²⁴ See *infra* notes 231–40 and accompanying text.

²⁵ See *infra* notes 337–47 and accompanying text.

²⁶ See *infra* notes 330, 333–36 and accompanying text.

gress to amend the statute to place open-content licenses outside the reach of the Copyright Act's termination clauses.

II. OPEN-CONTENT LICENSING

A. *The Public Benefit of Open-Content Licenses*

In recent years, a vast body of content has been created and distributed under licenses that grant unspecified members of the public rights that, by statute, ordinarily belong to the copyright holder alone. Before discussing the specifics of a few such licenses, it is useful to identify some important commonalities that most open-content licenses share.

First, and most fundamentally, all open-content licenses authorize otherwise unlawful conduct: that is, they expressly permit users of the licensed works to perform actions that would otherwise infringe the licensor's copyright. Absent authorization (or other legal excuse such as fair or de minimis use), reproducing,²⁷ distributing,²⁸ or modifying²⁹ a work infringes the author's copyright. Open-content licenses make such otherwise infringing activities lawful and thereby facilitate uses of works that federal law would ordinarily prohibit.

Second, all the open-content licenses considered herein are universally available: the works are offered to all on equivalent terms³⁰ without the need for individualized bargaining. This is not, of course, to deny the possibility of dual licensing: a prospective licensee dissatisfied with some of the conditions of an open-content license may negotiate with the work's author for a license on different terms.³¹ Absent dual licensing, however, a licensee who

²⁷ 17 U.S.C. § 106(1) (2006) ("the owner of copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords"); *id.* § 101 (defining "copies" and "phonorecords").

²⁸ *Id.* § 106(3) (conferring upon copyright owner "the exclusive rights . . . to distribute copies or phonorecords of the copyrighted work to the public" via enumerated means).

²⁹ *Id.* § 106(2) (conferring upon copyright owner "the exclusive rights . . . to prepare derivative works based upon the copyrighted work"); *id.* § 101 (defining "derivative work").

³⁰ One might imagine a licensing regime that permits copying or modification only by members of a defined group, of course. See BENKLER, *supra* note 11, at 61; Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1430 n.131 (2009) (differentiating "limited-access commons" from "open-access resources"). None of the licensing arrangements considered herein, however, has this feature—which is unsurprising in view of the participation-maximizing goals that most open-content projects share. See, e.g., ERIC S. RAYMOND, *The Cathedral and the Bazaar*, in THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY, *supra* note 9, at 27, 41–44.

³¹ See Bruce Perens, *How Many Open Source Licenses Do You Need?*, DATAMATION, Feb. 16, 2009, http://itmanagement.earthweb.com/osrc/article.php/12068_3803101_1/Bruce-Perens-How-Many-Open-Source-Licenses-Do-You-Need.htm (last visited May 4, 2010). To be sure, this task may become infeasible as the number of authors of the licensed work increases. It probably is not realistic, for example, to expect a prospective licensee to negotiate a non-GPL license for the Linux kernel given the huge number of contributors to that project whose assent would be necessary. See Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 941–42 (2008) (exploring how need to secure assent of "thousands (perhaps tens of

is willing to observe the conditions stated in an open-content license is free to use the work without the particularized approval of (and indeed, without notice to) the licensor. An unavoidable consequence is that an open-content licensor ordinarily has no way of knowing the identities of all the licensees, for the parties to the license may never communicate.

Third, the universal availability of the content on the terms stated in the license minimizes transaction costs. Open-content licenses are available “off the shelf” to accommodate several types of concerns that may confront users of the licensed works.³² Use of the works in a fashion consistent with the license entails no greater burden than reading the license; there is no need to incur the expense of negotiating an individual usage agreement (again, assuming that the licensee is satisfied with the conditions stated in the license). Even the burden of reading the license, moreover, is minimized, because a relatively small number of standard-form licenses govern a wide variety of projects available from different open-content suppliers.³³ There is, correspondingly, a diminished need to become familiar with particularized license terms that may vary from one vendor to the next outside the open-content domain.

Finally, combining the foregoing characteristics yields the defining feature of all open-content licenses: they promote freedom. Open-content licenses expressly authorize a large community of users, at their sole election and without further negotiation or expense, to use a variety of works in a manner that would otherwise infringe copyright. In doing so, the licenses facilitate at least some uses that would not otherwise occur. The licenses create, in economic terms, a commons: a pool of raw materials upon which members of the public are free to draw for their own consumptive or productive ends.³⁴

The public domain presents a possibly more familiar model of such a commons. Any creator is free to draw from public-domain materials and to incorporate them into her own creation.³⁵ A growing literature recognizes the

thousands) of contributing users” inhibits relicensing of Linux). *But cf. infra* notes 141–47 and accompanying text (describing recent successful effort to relicense Wikipedia).

³² See Perens, *supra* note 31.

³³ See, e.g., *infra* note 50 and accompanying text.

³⁴ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 14–15 (2003); BENKLER, *supra* note 11, at 60–62.

³⁵ See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003) (“The rights of a patentee or copyright holder are part of a carefully crafted bargain under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.” (internal quotations and citation omitted)); *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007) (“each member of the public . . . has a non-exclusive right, subject to constitutionally permissible legislation, to use material in the public domain”); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992) (recognizing that software developers are free to incorporate public-domain materials and techniques into their programs).

There is, as others have recognized, not a single “public domain,” but many, the contours of which vary depending on the purpose for which the term is used. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 38–39 (2008); Pamela Samuelson,

beneficial effects on creative production from the existence and availability of freely usable public-domain works. By reducing the costs creators must pay to reuse others' creations in their own, a rich commons pays public dividends in the form of greater production of expressive works.³⁶ As discussed below, however, changes to U.S. copyright law over the past three decades have tended to restrict the entry of new works into the public domain.³⁷ If a robust public domain fuels creativity, the strengthening of private property rights may have the opposite effect—they may increase authors' costs and deter future creativity,³⁸ creating what Michael Heller calls “the tragedy of the anticommons.”³⁹ The parallel rise of the open-content movement, which leverages existing copyright and contract principles to create a new commons outside the public domain,⁴⁰ might be seen as a reaction to the excessive expansion of property rights into fields of intellectual and creative

Enriching Discourse on Public Domains, 55 DUKE L.J. 783 (2006) (developing a valuable taxonomy of the many senses in which the term “public domain” is commonly used). This Article adheres to the conventional understanding of the term as signifying works that are not presently under copyright, irrespective of whether they may have been copyrighted at one time or whether they were ever eligible for copyright protection at all. As the discussion of the copyright abandonment doctrine below suggests, however, even this relatively settled usage may blur into uncertainty at the margins. See *infra* Part III.A.2.

³⁶ See, e.g., Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 548 (1998) (“[S]ocial benefit accrues from the rights to access and use unprotected, public domain elements of existing works These rights and practices lead to the development of creative and scholarly talents and, ultimately, to the creation of new works”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990) (“The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”).

³⁷ See *infra* Part III.A.1.

³⁸ As one judge famously put it:

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.

White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc); see also BENKLER, *supra* note 11, at 38 (“If we pass a law that regulates information production too strictly, allowing its beneficiaries to impose prices that are too high on today’s innovators, then we will have not only too little consumption of information today, but also too little production of new information for tomorrow.”); LANDES & POSNER, *supra* note 34, at 66–70.

³⁹ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); see also MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 9–16 (2008) (offering illustrative examples from copyright); ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 112–15 (2005) (describing how strong intellectual property rights enable market incumbents to slow competitors’ innovation).

⁴⁰ See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 62–66 (2003) (differentiating several features of contractually constructed information commons from the pure public domain); Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 74 (2006) (distinguishing the free reuse of works under open-content licenses from “the public domain”); Samuelson, *supra* note 35, at 799–802 (same).

endeavor,⁴¹ and a conscious effort to provide an alternative supply of expressive resources for future authors.

The public derives at least two identifiable benefits from works produced under open-content licenses. First, perhaps most obviously, open-content works may be consumed without fear of liability. Individuals may freely use software,⁴² or listen to (or share) music⁴³ issued under open-content licenses (assuming, as always, that any applicable conditions in the accompanying licenses are observed). This is a particularly valuable benefit insofar as it aligns with internet-user norms, which have favored the sharing and reuse of works even in the face of legal threats.⁴⁴ Second, making works available for use under open-content licenses has a multiplier effect, permitting the creation of new works which may never have come into existence absent the raw materials that the licenses place into the commons.⁴⁵ These benefits to the public, in turn, help to justify legal protections for the creators and users of open-content works against the uncertainty of termination.

⁴¹ See Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004).

⁴² In the context of software, legal uncertainty presently surrounds the question whether the mere use of a program without authorization (even if no further copying or distribution of the program occurs) may infringe copyright in the work. *Compare* MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir. 1993) (temporarily loading program into computer's RAM memory without authorization infringes copyright), *with* Cartoon Network, LP v. CSC Holdings, Inc., 536 F.3d 121, 127–28 (2d Cir. 2008) (declining to apply MAI where data was stored in computer memory for only a short time). See also 17 U.S.C. § 117 (2006) (creating statutory exceptions to copyright infringement liability for several common uses of computer programs, perhaps inviting negative inference that uses not expressly covered by the exceptions are infringing); Aaron Perzanowski, *Fixing RAM Copies*, 104 Nw. U. L. REV. (forthcoming 2010).

⁴³ The courts have sternly condemned the sharing of copyrighted music over peer-to-peer networks, minting new legal theories and voiding existing defenses to hold defendants liable. See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (creating new theory of liability for inducement of copyright infringement in file-sharing case); BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005) (rejecting fair use defense in file-sharing case); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (same); see also WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 116–19 (2004) (arguing that *Napster* court misapplied the fair use doctrine); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2588–92 (2009) (arguing that some personal uses, such as the use at issue in *Gonzalez*, ordinarily should either receive broad fair use protection or be deemed outside the regulatory scope of copyright altogether).

⁴⁴ See Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 26 BERKELEY TECH. L.J. 651, 654 & nn.4–5 (2006); cf. John Tehrani, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–47 (2007) (offering multiple examples of seemingly benign conduct that a strict reading of the law nevertheless makes punishable as copyright infringement).

⁴⁵ Indeed, some open-content licenses create a ripple effect on this point by mandating that derivative works prepared from the open-content work must themselves be released as open content also. See *infra* notes 64–71, 111, 128 and accompanying text. *But cf.* ORGANISATION FOR ECON. CO-OPERATION & DEV. (“OECD”), PARTICIPATIVE WEB AND USER-CREATED CONTENT: WEB 2.0, WIKIS AND SOCIAL NETWORKING 83 (2007) (calling for further study to assess the net effects of open-content licensing on creative production).

B. Open-Content Licensing: Software

The contemporary peer-production phenomenon began in the software world in the 1970s and 1980s,⁴⁶ with later open-content projects modeling themselves on the paradigm established by free and open-source software (“FOSS”).⁴⁷ Software licensing, accordingly, supplies the logical starting point for an examination of the legal underpinnings of commons-based peer production. Although dozens of standard-form licenses exist for FOSS works,⁴⁸ many of them share a common intellectual ancestor: the GNU Project’s celebrated GPL.⁴⁹

1. The GNU GPL and LGPL

In the FOSS world, the GNU GPL is the most widely used license.⁵⁰ There have been three versions of the GPL: Version 1, which was promul-

⁴⁶ The Unix operating system, which was developed at AT&T Corporation’s Bell Labs beginning in 1969, was widely adopted by scientific and educational institutions under quite liberal licensing terms in the 1970s. See WEBER, *supra* note 9, at 25–29. As Unix’s popularity grew, AT&T sensed an opportunity to capitalize on rising demand, and in the late 1970s it took several steps aimed at maximizing the commercial value of Unix, including dramatically raising its licensing fees and imposing new restrictions on licensees’ authority to redistribute the operating system’s source code. See *id.* at 38–39, 44–46. Rising proprietization of software sparked a backlash, led at MIT by programmer Richard Stallman, who in 1983 founded the Free Software Foundation (“FSF”) and the following year launched the “GNU” (short for “GNU’s Not Unix”) Project with the goal of producing a complete operating system free from proprietary constraints. See *id.* at 46–48.

⁴⁷ The label “free and open-source” is commonly used to pass over an internal squabble that exists in the nonproprietary software community, but which lacks significance for most analyses of that community’s operations and product, including the present one. In brief, partisans of “free software” see avoiding proprietary or commercial entanglements as a moral imperative, while advocates of “open-source” view performance and technological superiority rather than ethics as the key issues. See BENKLER, *supra* note 11, at 66 (noting the dispute); José J. González, *Open Source, Free Software, and Contractual Issues*, 15 TEX. INTELL. PROP. L.J. 157, 178–85 (2007) (same); ERIC S. RAYMOND, *Homesteading the Noosphere*, in THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY, *supra* note 9, at 79, 83–84 (emphasizing “pragmatism” of “open source” advocates); RICHARD M. STALLMAN, *Why “Free Software” is Better than “Open Source”*, in FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN 55–60 (Joshua Gay ed., 2002) (advocating moral superiority of “free software”); Vetter, *supra* note 10, at 298 (summarizing the debate).

⁴⁸ “The Open Source initiative has, to date, approved 73 licenses” as compatible with the project’s Open Source Definition. Perens, *supra* note 31; see also Open Source Initiative (“OSI”), Open Source Definition (Annotated), <http://www.opensource.org/docs/definition.php> (last visited Apr. 1, 2010). The FSF maintains its own, smaller, list of licenses that satisfy its definition of “free software.” See FSF, VARIOUS LICENSES AND COMMENTS ABOUT THEM (2008), available at <http://www.gnu.org/licenses/license-list.html>.

⁴⁹ See BENKLER, *supra* note 11, at 65 (describing GPL as “a legal technique that started a snowball rolling”); LAWRENCE LESSIG, CODE: VERSION 2.0, at 147–48 (2006) (linking dynamism of Linux development process to openness of source code guaranteed by the GPL); WEBER, *supra* note 9, at 49 (“[T]he GPL was a major innovation . . . [that] established a clear social regime with specific principles and norms that defined free software.”).

⁵⁰ As of March 2010, the SourceForge online software repository indexed over 105,000 open-source software projects available under any version of the GPL. See SourceForge.net,

gated in 1989 (“GPLv1”);⁵¹ Version 2, in 1991 (“GPLv2”);⁵² and Version 3, in 2007 (“GPLv3”).⁵³ The various versions of the GPL do not displace or supersede one another, and authors of FOSS works may select earlier versions of the GPL if those versions better reflect their intent.⁵⁴

Although a FOSS author’s use of the GPL effectively places the software into the commons, thereby making it available for copying and modification, GPL-licensed software is not in the public domain.⁵⁵ Rather, all GPL-licensed software is copyrighted.⁵⁶ The Preamble of GPLv3 includes

Software Search, <http://sourceforge.net/search/> (last visited Mar. 28, 2010) (listing number of projects by license status under “License” heading in left margin). A further 18,000 projects were available under the LGPL license (discussed *infra* notes 76–79 and accompanying text) and 12,000 under BSD-style licenses (discussed *infra* notes 80–88 and accompanying text). *See id.*; *see also* Sapna Kumar, *Enforcing the GNU GPL*, 2006 J.L. TECH. & POL’Y 1, 3 (“Between sixty-five and seventy percent of open-source software is GPL-licensed.”).

⁵¹ *See* GPLv1, *supra* note 17.

⁵² *See* FSF, GNU GENERAL PUBLIC LICENSE, VERSION 2 (1991), available at <http://www.gnu.org/licenses/old-licenses/gpl-2.0.txt> [hereinafter GPLv2].

⁵³ *See* FSF, GNU GENERAL PUBLIC LICENSE, VERSION 3 (2007), available at <http://www.gnu.org/licenses/gpl.html> [hereinafter GPLv3]. For a review of the drafting process that produced the GPLv3—a distributed, international endeavor conducted over the Internet—see Christopher M. DiLeo, Comment, “Bazaar” Transnational Drafting: An Analysis of the GNU Public License Version 3 Revision Process, 10 SAN DIEGO INT’L L.J. 193 (2008).

⁵⁴ A division presently exists within the FOSS community between authors who are migrating to GPLv3 and those who are continuing to license their works under GPLv2 due to certain new conditions added in the GPLv3, such as a broadened patent-licensing clause and a restriction on the use of GPL-licensed code in digital rights management technologies. *See* Andrés Guadamuz-González, *GNU General Public License v3: A Legal Analysis*, 3 SCRIPTED 154 (2006) (critically reviewing changes introduced in GPLv3); *see also* Kumar, *supra* note 50, at 3 n.14 (quoting Linus Torvalds explaining why he will not adopt GPLv3 for the Linux kernel). *But cf.* Perens, *supra* note 31 (downplaying significance of GPLv2-versus-GPLv3 rift). The new provisions introduced in the GPLv3 are important to a full understanding of the tradeoffs entailed by the license in practice, but will not be further considered herein.

⁵⁵ *See* Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1198 (11th Cir. 2001) (“[s]oftware distributed pursuant to [the GPL] is not necessarily ceded to the public domain”); Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 BERKELEY TECH. L.J. 443, 469–70 (2005) (summarizing German court ruling rejecting claim that GPL effectuated a waiver or abandonment of copyright); Natalie Heineman, *Computer Software Derivative Works: The Calm Before the Storm*, 8 J. HIGH TECH. L. 235, 262 (2008) (“Calling source code ‘open’ or ‘free’ under the GPL or its equivalent may give the false impression that the copyright owner has waived her copyrights in the work, thereby releasing the work into the public domain.”); Joseph Scott Miller, *Allchin’s Folly: Exploding Some Myths About Open Source Software*, 20 CARDOZO ARTS & ENT. L.J. 491, 496–97 (2002) (“In sharp contrast to placing a piece of software into the public domain by utterly disclaiming copyright protection, using a free software license such as the GPL prevents downstream recipients from using the software to create new programs for distribution under a closed source approach.”); *cf. supra* note 40 (recognizing other authorities that distinguish contractually constructed information commons from public domain).

⁵⁶ Issues surrounding the scope of copyright protection for software lie outside the present inquiry, but would necessarily complicate any actual case involving possible infringement of a GPL-licensed FOSS work. *See, e.g.*, Computer Assocs. Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 701–12 (2d Cir. 1992) (developing analytical methodology for identifying and excluding unprotectable elements of work in software copyright infringement case); Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes From the Scope of Its Protection*, 85 TEX. L. REV. 1921, 1961–73 (2007) (reviewing history of copyright protection for software and significance of 17 U.S.C. § 102(b) (2006)).

the following clause (versions of which also appeared in GPLv1 and GPLv2) explaining the function of the license: “Developers that use the GNU GPL protect your rights with two steps: (1) *assert copyright on the software*, and (2) offer you this License giving you legal permission to copy, distribute and/or modify it.”⁵⁷

Every version of the GPL grants users of the licensed software the rights to engage in the otherwise-infringing acts of copying,⁵⁸ modifying,⁵⁹ and redistributing⁶⁰ the licensed work. Like all open-content licenses, however, the GPL attaches conditions that limit the scope of the authorization the license confers. A licensee’s exercise of one of the rights granted by the license (to copy, modify, or redistribute the work) without observing the applicable conditions exceeds the licensee’s authority, and renders that use unauthorized (and, thus, infringing).⁶¹

Many of the GPL’s conditions exist to inform downstream users about the legal status of the work and to provide them with the resources necessary to execute the rights granted under the license.⁶² To ensure that licensees are able to exercise their power to alter the software, the GPLv3 mandates that the software’s source code also be made available whenever the software is distributed in executable or binary form.⁶³

⁵⁷ GPLv3, *supra* note 53, pmb. (emphasis added); *see also* Miller, *supra* note 55, at 497 (“The GPL does not destroy a software author’s original copyright; rather, it is predicated squarely upon it.”); *cf.* GPLv1, *supra* note 17, pmb. (“We protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software.”); GPLv2, *supra* note 52, pmb. (same).

⁵⁸ *See* GPLv1, *supra* note 17, §§ 1, 3; GPLv2, *supra* note 52; GPLv3, *supra* note 53, §§ 0, 2.

⁵⁹ *See* GPLv1, *supra* note 17, § 2; GPLv2, *supra* note 52; GPLv3, *supra* note 53, §§ 5, 6.

⁶⁰ *See* GPLv1, *supra* note 17, §§ 1, 3; GPLv2, *supra* note 52; GPLv3, *supra* note 53, §§ 4, 6.

⁶¹ *See* *Jacobsen v. Katzer*, 535 F.3d 1373, 1379–83 (Fed. Cir. 2008) (copying of FOSS work without complying with the terms of the governing license, if proved, would constitute infringement of copyright); *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1316 (Fed. Cir. 2005) (copyright infringement results if otherwise infringing activity occurs without the copyright holder’s authorization); *ItoFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 940 (7th Cir. 2003) (“A licensee infringes the owner’s copyright if its use exceeds the scope of its license.” (internal quotation marks and citations omitted)); *Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998) (“[i]f the nature of a licensee’s violation consists of a failure to satisfy a condition to the license . . . it follows that the rights dependent upon satisfaction of such condition have not been effectively licensed, and therefore, any use by the licensee is without authority from the licensor and may therefore, constitute an infringement of copyright.” (citation omitted)); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989). *See generally* GPLv3, *supra* note 53, § 9 (“nothing other than this License grants you permission to propagate or modify any covered work. These actions infringe copyright if you do not accept this License.”).

⁶² *See, e.g.*, GPLv3, *supra* note 53, §§ 4, 5 (requiring information about the license to be conveyed with any verbatim or modified copies of the licensed work distributed by the licensee).

⁶³ *See id.* § 6.

The so-called “copyleft” condition,⁶⁴ a provision included in one form or another since GPLv1, limits the ability of authors of works derived from GPL-licensed software to release their own work under licenses more restrictive than the GPL. In its current form, the provision requires authors of a modified version of software derived from GPL-licensed code to “license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply . . . to the whole of the work, and all its parts, regardless of how they are packaged.”⁶⁵

In a license document that otherwise celebrates freedom and choice,⁶⁶ the copyleft condition at first seems out of place. It limits, rather than enhances, one potentially important freedom enjoyed by users of the software—the freedom to license derivative software works they create on terms of their choosing.⁶⁷ It is surely this loss of freedom that underlies pejorative labels, such as “viral” or “infectious,” that critics sometimes use in describing the GPL or other copyleft licenses.⁶⁸ As a programmer, using GPL-licensed code in your own work makes you a FOSS author whether you wish to be or not, because the copyleft condition “infects” your final

⁶⁴ See RICHARD M. STALLMAN, *What is Copyleft?*, in FREE SOFTWARE, FREE SOCIETY, *supra* note 47, at 89.

⁶⁵ GPLv3, *supra* note 53, § 5(c). For earlier versions of the GPL’s “copyleft” condition, see GPLv1, *supra* note 17, § 2(b) (“You may modify your copy . . . and copy and distribute such modifications . . . , provided that you also . . . cause the whole of any work that you distribute or publish, that in whole or in part contains the Program or any part thereof, either with or without modifications, to be licensed at no charge to all third parties under the terms of this . . . License (except that you may choose to grant warranty protection to some or all third parties, at your option.)”); GPLv2, *supra* note 52, § 2(b) (“You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.”). For a discussion of the interaction of the GPL’s copyleft condition with the license provisions requiring programmers to make source code available, see John Tsai, *For Better or Worse: Introducing the GNU General Public License Version 3*, 23 BERKELEY TECH. L.J. 547, 564–68 (2008).

⁶⁶ See GPLv3, *supra* note 53, pmb1. (“The licenses for most software and other practical works are designed to take away your freedom to share and change the works. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change all versions of a program—to make sure it remains free software for all its users.”).

⁶⁷ See James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005, 2028 (2009) (“the GPL makes you share source code because someone else shared it with you . . . free software licenses in general are incompatible with the default ethical vision of commercial exchange, and copyleft licenses go further by restraining downstream authors from taking part in the commercial exchange system as well”); cf. Dov Greenbaum, *Academia to Industry Technology Transfer: An Alternative to the Bayh-Dole System for Both Developed and Developing Nations*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 404 (2009) (recognizing “legitimate concerns that viral or infectious terms in an exclusive license may serve as a disincentive to license”).

⁶⁸ See, e.g., Dennis M. Kennedy, *A Primer on Open Source Licensing Legal Issues: Copyright, Copyleft and Copyfuture*, 20 ST. LOUIS U. PUB. L. REV. 345, 362–63 (2001); Ron Phillips, *Deadly Combinations: A Framework for Analyzing the GPL’s Viral Effect*, 25 J. MARSHALL J. COMPUTER & INFO. L. 487 (2008); Greg R. Vetter, “Infectious” Open Source Software: *Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L.J. 53 (2004); cf. Kumar, *supra* note 50, at 9 (criticizing labels like “viral” and “infectious” as resting on a misunderstanding of the GPL).

product, requiring it to be licensed under the GPL as well if it is distributed to others.

Yet just as the law celebrates “those wise restraints that make us free,”⁶⁹ the GPL enhances far more freedom than it limits. The copyleft condition feeds the commons. It ensures that FOSS works remain free even as they evolve and protects earlier programmers against later programmers’ proprietary appropriation of their work.⁷⁰ Because the copyleft condition applies only to software derived from GPL-licensed code, it is sometimes labeled a “reciprocity” provision. In other words, the cost of reusing GPL-licensed code in one’s own work is that one must either offer that work to all under the GPL, or offer it to no one.⁷¹

Although the GPL also includes what is labeled a “termination” provision,⁷² it is important not to confuse this clause with the issue under consideration herein. The GPL provides, in essence, that if a licensee fails to honor the conditions stated in the license (and fails thereafter to cure her default), that licensee may not thereafter rely on the GPL as a defense to the original licensor’s claim of copyright infringement. In the language of the license, the rights of a defaulting user are said to “terminate.”⁷³ Stated differently, a user may, by her conduct, forfeit the rights the GPL grants. This is a different issue from the question that this Article considers, namely, whether the Copyright Act permits unilateral termination of open-content licenses by the author (or the author’s heirs) irrespective of any breach by the licensee.

Unless the licensee forfeits her rights by breaching a condition of the GPL, however, the license is expressly declared to be perpetual: “All rights granted under this License are granted for the term of copyright on the Pro-

⁶⁹ See, e.g., Charles Fried, *The Nature and Importance of Liberty*, 29 HARV. J.L. & PUB. POL’Y 3, 5–6 (2005) (quoting language traditionally used at Harvard Law School’s graduation ceremony).

⁷⁰ See BENKLER, *supra* note 11, at 63–65; WEBER, *supra* note 9, at 85 (“Open source intellectual property aims at creating a social structure that expands, not restricts, the commons” and “promises to ratchet up the process over time as a ‘commons’ of raw materials grows”); Eric E. Johnson, *Rethinking Sharing Licenses for the Entertainment Media*, 26 CARDOZO ARTS & ENT. L.J. 391, 404–05 (2008). See generally STALLMAN, *supra* note 47.

⁷¹ See, e.g., Ronald J. Mann, *Commercializing Open Source Software: Do Property Rights Still Matter?*, 20 HARV. J.L. & TECH. 1, 16 (2006); Christian H. Nadan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349, 359 (2002) (“requiring that any derivative works of GPL code also be covered by the GPL seems reasonable, since but for the GPL license, the user would have no rights to create the derivative works in the first place”); Tsai, *supra* note 65, at 551.

⁷² GPLv3, *supra* note 53, § 8 (“Any attempt . . . to propagate or modify” a GPL-licensed work except as expressly provided under the GPL “is void, and will automatically terminate your rights under this License”); see also GPLv1, *supra* note 17, § 4; GPLv2, *supra* note 52, § 4.

⁷³ See Robert W. Gomulkiewicz, *Conditions and Covenants in License Contracts: Tales from a Test of the Artistic License*, 17 TEX. INTELL. PROP. L.J. 335, 352 n.127 (2009) (“the best reading of this provision is that it is simply a garden variety termination provision, providing that in the event the licensee breaches the license contract, the licensee has no further rights to exercise the rights granted in the license grant provisions”); Tsai, *supra* note 65, at 578 (explaining that GPLv3 introduced new opportunities for defaulting users to avoid termination by curing default).

gram, and are irrevocable provided the stated conditions are met.”⁷⁴ This guarantee makes explicit a promise of permanence that has always been implicit in the peer-production model: it “assur[es] . . . developers that their work could never be taken away from them,”⁷⁵ but will remain in the commons in perpetuity.⁷⁶ It is precisely this assurance that the Copyright Act’s termination provisions may place in doubt.

A GPL variant used for some FOSS works, the GNU Lesser General Public License (“LGPL”), incorporates most of the provisions of the GPL.⁷⁷ The key difference is that the LGPL relaxes the GPL’s copyleft condition as applied to application programs dynamically linked⁷⁸ to LGPL-licensed library code. This waiver from the GPL’s strict copyleft condition is believed to encourage the commercial use of LGPL-licensed content.⁷⁹

⁷⁴ GPLv3, *supra* note 53, § 2 (emphasis added). Earlier versions of the GPL were silent on this point. See Kennedy, *supra* note 68, at 373.

⁷⁵ SHIRKY, *supra* note 11, at 273.

⁷⁶ See Robert W. Gomulkiewicz, *De-bugging Open Source Software Licensing*, 64 U. PITT. L. REV. 75, 83–84 (2002) (“The GPL makes creative use of a contract to reverse the copyright monopoly by permanently giving away the exclusive rights of a copyright holder, what Stallman whimsically calls ‘copyleft.’”); Johnson, *supra* note 70, at 404 (“The GPL dedicates software in perpetuity to a regime in which it must be shared with others.”); Daniel B. Ravicher, *Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses*, 5 VA. J.L. & TECH. 11, 67 (2000) (Copyleft condition “achieves the goal of ensuring that all copies or modifications of the program are forever publicly licensed”); Mitchell L. Stoltz, Note, *The Penguin Paradox: How the Scope of Derivative Works in Copyright Affects the Effectiveness of the GNU GPL*, 85 B.U. L. REV. 1439, 1475 (2005) (“The GPL guarantees that source code will be perpetually available, and this guarantee is an important part of GPL software’s commercial value.”). This is certainly how the GPL has been understood within the FOSS community. See, e.g., Jay Michaelson, *There’s No Such Thing as a Free (Software) Lunch: What Every Developer Should Know About Open Source Licensing*, QUEUE, May 2004, at 41, 42 (“GPL partisans like to call it a ‘protective license’ because it ensures that code covered by it will remain open source forever.”); Chris Maxcer, *Free Software Licensing, Part 2: Beyond GPL*, LINUX INSIDER, July 27, 2007, <http://www.linuxinsider.com/story/58530.html> (“Basically, though, GPL v2 and v3’s key point is to make the code ‘free forever.’”).

⁷⁷ See FSF, GNU LESSER GENERAL PUBLIC LICENSE, VERSION 3 (2007), available at <http://www.gnu.org/licenses/lgpl.html> [hereinafter LGPLv3]. The Preamble of the current version of the LGPL states, in part, that “[t]his version of the GNU Lesser General Public License incorporates the terms and conditions of version 3 of the GNU General Public License, supplemented by the additional permissions listed” in the remainder of the LGPL. LGPLv3, *supra*, pmb1. Use of the LGPL is presently discouraged by the license’s drafters; the Free Software Foundation suggests that FOSS authors use the GPL instead, unless a compelling reason for adopting the LGPL exists. See FSF, WHY YOU SHOULDN’T USE THE LESSER GPL FOR YOUR NEXT LIBRARY (2007), available at <http://www.gnu.org/licenses/why-not-lgpl.html> [hereinafter WHY YOU SHOULDN’T USE THE LGPL].

⁷⁸ “Dynamic linking” refers to a software development technique that makes the functionality of a library accessible to an application program while running without actually copying the library’s object code into the application’s object code. See Stoltz, *supra* note 76, at 1449. Dynamic linking is believed to offer some technical advantages because the library may be updated separately from the application programs that rely on it and its improved functionality made available to all application programs that link to the library without requiring the applications themselves to be updated. See *id.* at 1449–50.

⁷⁹ See, e.g., Carver, *supra* note 55, at 459–60; Lothar Determann, *Dangerous Liaisons—Software Combinations as Derivative Works?: Distribution, Installation, and Execution of Linked Programs Under Copyright Law, Commercial Licenses, and the GPL*, 21 BERKELEY

2. BSD Licenses

In the late 1970s, a group of computer scientists and graduate students at the University of California–Berkeley created the Berkeley Software Distribution (“BSD”), a small collection of software tools they had written for the Unix operating system. Over time, BSD expanded to become a full-fledged Unix-compatible operating system in its own right.⁸⁰ BSD was issued under the BSD License, which lent its name to a family of software licenses collectively known today as “BSD-style” licenses.⁸¹

BSD-style licenses are models of brevity compared with the GPL. They mandate an express copyright notice acknowledging the owner and year of the work⁸² and authorize “[r]edistribution and use” of the licensed software “in source and binary forms, with or without modification[.]”⁸³ This authorization is subject to only three conditions:

- for software works distributed in the form of source code, the distribution must include the copyright notice, the listing of conditions from the license template, and a paragraph disclaiming warranties or liability based in contract or tort;
- for software works distributed in the form of object code, those same items must be included in the accompanying documentation; and
- for either type of work, the name of the owner’s organization or its contributors may not be employed in a manner that suggests endorsement or promotion of products derived from the licensed software.⁸⁴

TECH. L.J. 1421, 1488 & n.255 (2006) (same); Dusollier, *supra* note 8, at 1418 (noting this benefit, although questioning the LGPL’s premise that dynamic linking creates a derivative work); Stoltz, *supra* note 76, at 1452. *But cf.* WHY YOU SHOULDN’T USE THE LGPL, *supra* note 77 (encouraging FOSS developers to release software libraries under the GPL rather than the LGPL precisely to forbid proprietary software works from linking to the library).

⁸⁰ See WEBER, *supra* note 9, at 29–35, 39–42. Legal threats from AT&T in the 1990s, culminating in a lawsuit against the University of California, slowed the pace of BSD development. *Id.* at 49–52; see also David McGowan, *Between Logic and Experience: Error Costs and United States v. Microsoft Corp.*, 20 BERKELEY TECH. L.J. 1185, 1204–07 (2005) (recounting history of BSD).

⁸¹ A BSD-style license template is available at <http://www.opensource.org/licenses/bsd-license.php> (last visited Mar. 4, 2010) [hereinafter BSD License]. As there noted, the particular provisions of the BSD license and its variant forms have changed over time, although in ways that are largely not pertinent to the present analysis. BSD licensing is widely used in FOSS projects, although less commonly than the GPL and LGPL. See *supra* note 50 and accompanying text. The “three-clause” standard-form BSD-style license described herein meets both OSI’s Open Source Definition and the FSF’s definition of “free software.” See *supra* note 48. A “four-clause” variant, seldom employed today, is not compatible with the FOSS definitions of either OSI or FSF. See *infra* note 84.

⁸² BSD License, *supra* note 81 (providing notice of the form “Copyright (c) <YEAR>, <OWNER>. All rights reserved.”). “<YEAR>” and “<OWNER>” represent variables that are to be replaced with the values appropriate for the licensed work when the work is distributed. Express copyright notices of this type are no longer required as a condition of copyright protection, but are permitted, under U.S. and international copyright law. See *infra* note 171 and accompanying text.

⁸³ BSD License, *supra* note 81.

⁸⁴ See *id.* This last requirement is omitted from the “Simplified BSD License,” a variant used by some BSD-derived projects. *Id.* A former version of the BSD License included a

Because they require crediting the owner but omit other limitations on the copying, modification, or redistribution of the licensed works, BSD-style licenses are often characterized (with tolerable, if imperfect, accuracy) as “attribution-only” licenses.⁸⁵ What the BSD-style licenses omit, moreover, is at least as important as what they require. BSD licenses are not reciprocal licenses and have no “copyleft” condition.⁸⁶ Nor do they require source code to be distributed with the software.⁸⁷ Because derivatives of BSD-licensed works need not be licensed under a BSD-style license (or any other recognized FOSS license) and need not include source code, BSD-derived code may be freely incorporated into proprietary software works distributed in binary-only form.⁸⁸

3. Open-Source Licensing: Constraint and Liberation

The GPL, the LGPL, and BSD-style licenses serve as useful examples from the broader universe of FOSS licenses because of their very different presumptions and effects. They represent points along a continuum which can be viewed from either of two directions.

The licenses might first be characterized according to the constraining force they exert on downstream users of the licensed works. The BSD license is minimally constraining; beyond the obligations to recognize the original author’s copyright and to refrain from implying endorsement or promotion, the license places no limitations on a user’s copying, modification, or distribution of the work, including for profit.⁸⁹ At the opposite extreme, the GPL is maximally constraining, regulating not only how a work may be

fourth condition, the so-called “advertising clause,” requiring the crediting of the University of California–Berkeley in advertising materials for any BSD-derived product. This clause was deleted from the standard-form BSD license in 1999, leaving the three conditions stated in the text. *See id.*

⁸⁵ *See, e.g.,* Phillips, *supra* note 68, at 490; Greg R. Vetter, *Commercial Free and Open Source Software: Knowledge Production, Hybrid Appropriability, and Patents*, 77 *FORDHAM L. REV.* 2087, 2096, 2097–98 (2009); *cf.* Zittrain, *supra* note 9, at 269 (“The BSD license materially differs from a wholly public domain release only in that it requires a particular kind of credit or attribution for the original author on whose work the new program is based.”). For a discussion of the reputational interests of authors of BSD-licensed software projects, see Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 *GEO. L.J.* 49, 90–91 (2006). Labeling BSD-style licenses as “attribution-only” seems to misapprehend the significance of the license’s third clause, which requires *nonattribution* in situations where crediting the owner’s organization would carry an implication of endorsement. *Cf.* Jane C. Ginsburg, *The Author’s Place in the Future of Copyright*, 45 *WILLAMETTE L. REV.* 381, 391 (2009) (noting reputational interests of FOSS authors in *not* being associated with later users’ “ill-conceived or badly-executed changes to the underlying program.”).

⁸⁶ BSD License, *supra* note 81; *cf. supra* notes 64–71 and accompanying text.

⁸⁷ *See* David S. Evans & Anne Layne-Farrar, *Software Patents and Open Source: The Battle over Intellectual Property Rights*, 9 *VA. J.L. & TECH.* 10, ¶ 22 (2004).

⁸⁸ *See* James Gibson, *Once and Future Copyright*, 81 *NOTRE DAME L. REV.* 167, 203 (2005); Fabrizio Marrella & Christopher S. Yoo, *Is Open Source Software the New Lex Mercatoria?*, 47 *VA. J. INT’L L.* 807, 823 (2007); Phillips, *supra* note 68, at 490; Vetter, *supra* note 85, at 2097–98.

⁸⁹ *See supra* notes 82–85 and accompanying text.

reused, but also how derivatives of the work may be licensed.⁹⁰ The GPL thus effectively forbids proprietary or commercial adaptations of GPL-licensed code. The LGPL falls somewhere between, but still effectively permits commercial reuse via linking to an LGPL-licensed library.⁹¹ These three paradigms raise essential questions, such as whether or not attribution should be required, whether derivative works should be required to be licensed under similar terms, and whether commercial reuse of the licensed content ought to be allowed. These questions recur in open-content licensing even outside the software context.⁹² The issue is thus not whether to constrain users' behavior, for all licenses constrain (even if only by maintaining extrinsic constraints imposed by copyright law),⁹³ but rather which constraints a licensor finds best to effectuate her intent.

The same group of licenses might also be evaluated not for how they affect individual users, but for how they affect the commons. BSD-style licenses are essentially agnostic on the question of growing the commons. Developers may add software to the pool, but anyone else is free to incorporate the licensed content into a proprietary product and need not make their own contributions available for others to reuse.⁹⁴ In contrast, the GPL's reciprocity provision demands that what is borrowed from the commons be returned to the commons: modified versions of GPL-licensed software may be distributed only under the GPL (with source code) for universal copying and

⁹⁰ See *supra* notes 58–65 and accompanying text.

⁹¹ See Josh Lerner & Jean Tirole, *The Scope of Open Source Licensing*, 21 J.L. ECON. & ORG. 20, 22 (2005) (labeling BSD-style licenses “unrestrictive,” the LGPL “restrictive,” and the GPL “highly restrictive”). Bruce Perens, a software developer and influential advocate in the FOSS community, labels these three licensing paradigms “gift” (BSD), “sharing with rules” (GPL), and “in-between” (LGPL). See Perens, *supra* note 31. Perens actually cites the Apache License, version 2.0, not the BSD license, as the paradigmatic “gift license.” The Apache License differs from BSD-style licenses in a number of respects that are unimportant for present purposes.

⁹² See *infra* Part II.C.

⁹³ See, e.g., Adam Kubelka & Matthew Fawcett, *No Free Beer—Practice Tips for Open Source Licensing*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 797, 813 (2006) (“[r]egardless of which type of license is applicable, all licenses contain downstream obligations on distributors.”); Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 287 (2003) (characterizing software license as “a soup-to-nuts statement of the scope of legitimate behavior by a user or consumer of that software”); Van Houweling, *supra* note 31, at 935–39 (noting that software licenses often aim to constrain behaviors that copyright law leaves unregulated).

⁹⁴ As one of the leading minds behind the GPLv3, *supra* note 53, explained:

The BSD license says: “Here is a commons. It is not defended by copyright against appropriation. Everything in the commons may be taken and put into proprietary, non-commons production as easily as it may be incorporated in commons production. We encourage people to put material into commons, and we are indifferent as to whether the appropriative use made of commons resources is proprietary, or commons-reinforcing.”

Eben Moglen, *Freeing the Mind: Free Software and the Death of Proprietary Culture*, 56 ME. L. REV. 1, 6 (2004).

modification.⁹⁵ Again, the LGPL stands in between, excusing compliance with the GPL's copyleft condition in some circumstances.

Comparing the licenses' effects along these two dimensions illuminates the underlying bias of contemporary copyright law in favor of proprietary production. Creating a commons of freely reusable works can be accomplished only with licenses that constrain the commons-defeating features of current law. The default positions of copyright law tend to reflect assumptions that emphasize individual production under a strongly proprietary regime.⁹⁶ Those proprietary defaults have only strengthened over time.⁹⁷ FOSS licenses inevitably reflect that underlying copyright regime even as they work to construct an alternative. The GPL, for example, aims to make FOSS works freely reusable by restricting behaviors (such as releasing software in binary-only form or incorporating it into proprietary products) that, although not forbidden by copyright law, inhibit the growth of the commons. The GPL backs its commons-creating mandates with the threat of liability for copyright infringement if they are breached,⁹⁸ thereby cleverly inverting the proprietary architecture of copyright to preserve a domain free from proprietary control.⁹⁹ BSD-style licenses, in contrast, impose fewer constraints on

⁹⁵ In Professor Moglen's words:

The GPL says: We construct a protected commons, in which by a trick, an irony, the phenomena of commons are adduced through the phenomena of copyright, restricted ownership is employed to create non-restricted self-protected commons It says: "Take this software; do what you want with it—copy, modify, redistribute. But if you distribute, modified or unmodified, do not attempt to give anybody to whom you distribute fewer rights than you had in the material with which you began. Have a nice day!"

Moglen, *supra* note 94, at 6. For a discussion of a few (largely inconclusive) cases in which the plaintiff relied on violation of the GPL as support for its claim of copyright infringement, see Clark D. Asay, *The General Public License Version 3.0: Making or Breaking the FOSS Movement?*, 14 MICH. TELECOMM. & TECH. L. REV. 265, 285 & nn.86–87 (2008); Joseph B. Baker, Note, *Contracting to Supplement Fair Use Doctrine*, 39 U. MEM. L. REV. 757, 788–89 (2009); Brad Frazer, *Open Source is Not Public Domain: Evolving Licensing Philosophies*, 45 IDAHO L. REV. 349, 372–73 (2009); Vetter, *supra* note 10, at 299–300 & n.66; Jason B. Wach, *Taking the Case: Is the GPL Enforceable?*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 451, 470 (2005).

⁹⁶ See *infra* Part III.A.1 (discussing evolution of copyright default rules—that is to say, the rules that apply absent agreement by the affected parties). For an argument that some of copyright's default rules are not subject to alteration by private agreement, see Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 141–42 (1999) (citing the statute's provision on termination of transfers as an example of an unalterable default rule).

⁹⁷ See BENKLER, *supra* note 11, at 439–44 (noting both legislative and judge-made expansions of property rights in copyrighted works); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 130–39 (2004).

⁹⁸ See *supra* note 61 and accompanying text.

⁹⁹ See BENKLER, *supra* note 11, at 65 ("the legal jujitsu Stallman used [in the GPL]—asserting his own copyright claims, but only to force all downstream users who wanted to rely on his contributions to make their own contributions available to everyone else—came to be known as 'copyleft,' an ironic twist on copyright"); WEBER, *supra* note 9, at 85; Gomulkiewicz, *supra* note 76, at 83–84; Moglen, *supra* note 94, at 6. As others have noted, the

users because licensors who select that license are indifferent as to whether commons-defeating behaviors permitted under current copyright law occur.¹⁰⁰

There is, in short, an inverse relationship between allowing the exercise of proprietary control over software works and the growth of a freely reusable commons of such works. The GPL, LGPL, and BSD licenses mark several of the possible points along a continuum at which the tradeoff between those two objectives might be effectuated. If FOSS licenses are subject to the Copyright Act's termination provisions, however, all of those tradeoffs become conditional, contingent, and uncertain. By strengthening the commons-defeating features of copyright's statutory defaults, the Copyright Act's termination provisions may pose particular risks to the growth of a software commons.

C. Open-Content Licensing: Non-Software Works

Nothing in the logic of FOSS licensing necessarily confines the creation of an open-content commons to the realm of software, and a number of projects have sought to extend the creative dynamism of the FOSS movement to other productive domains. An overview of some of the commonly used open-content licenses for non-software works reveals both similarities and differences with the software-licensing regime previously discussed. On the one hand, other varieties of open-content licenses must grapple with some of the same tradeoffs that have contributed to the proliferation of FOSS licenses. Issues surrounding attribution, commercial reuse, and reciprocity loom equally large outside the software domain, and diverse licensors might see the issues differently depending upon their attitudes toward the importance of a growing commons. On the other hand, open-content licensing arrangements have become more sophisticated since the earliest versions of the GPL and, as discussed below, one family of model licenses (the Creative Commons licenses) now offers licensors the easy ability to convert their particular policy preferences into specific license terms with almost arbitrary granularity.

construction of a commons sometimes fits awkwardly within the proprietary default regime of copyright law. See, e.g., Vetter, *supra* note 85, at 2108 (“While the core ideas of free software are relatively straightforward, the use of intellectual property law to implement those ‘freedoms’ is circuitous”). It is precisely for that reason that some have proposed amending the copyright statute to provide firmer legal footing for open-content works. See Merges, *supra* note 41, at 201–02; Adrienne K. Goss, Note, *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI.-KENT. L. REV. 963, 992–94 (2007); see also *infra* Part V.

¹⁰⁰ See *supra* note 94 and accompanying text.

1. *The GFDL*

The GNU Project made one of the earliest attempts to apply the commons-enhancing principles of the GPL outside the context of computer software. The result was the GNU Free Documentation License (“GFDL”), which was promulgated in 2000.¹⁰¹ An amended GFDL followed in 2002, which added several new definitional provisions to the license and made a few changes to the language of the license conditions.¹⁰² In 2008, the GFDL was again revised,¹⁰³ primarily to expand the license’s termination (or forfeiture) provision¹⁰⁴ and to add new language permitting the relicensing of GFDL-licensed works.¹⁰⁵

The GFDL was written with software documentation in mind, although by its terms the GFDL may be used for any text.¹⁰⁶ The GFDL, like the GPL, grants users the rights to engage in acts that would infringe the author’s copyright absent a license, including the rights to copy,¹⁰⁷ modify,¹⁰⁸ and redistribute the licensed work.¹⁰⁹ Unlike the GPL, the GFDL expressly permits copying for commercial purposes.¹¹⁰ Like the GPL and other open-content licenses, however, the GFDL attaches conditions to the rights granted.

First, the GFDL is a reciprocal (or “copyleft”) license. Any modified version of a GFDL-licensed work that is distributed to others must itself be

¹⁰¹ FSF, GNU FREE DOCUMENTATION LICENSE, VERSION 1.1 (2000), available at <http://www.gnu.org/licenses/old-licenses/fdl-1.1.html> [hereinafter GFDLv1.1]. Although the label “Version 1.1” might imply the existence of an antecedent “Version 1.0,” in fact Version 1.1 was the first version of the GFDL released to the public. *Id.*

¹⁰² See FSF, GNU FREE DOCUMENTATION LICENSE, VERSION 1.2 (2002), available at <http://www.gnu.org/licenses/old-licenses/fdl-1.2.html> [hereinafter GFDLv1.2]; see also, e.g., Andrés Guadamuz González, *Open Science: Open Source Licenses in Scientific Research*, 7 N.C. J.L. & TECH. 321, 343–44 (2006) (discussing several provisions of the GFDLv1.2).

¹⁰³ See FSF, GNU FREE DOCUMENTATION LICENSE, VERSION 1.3 (2008), available at <http://www.gnu.org/licenses/fdl.html> [hereinafter GFDLv1.3]. This revision of the GFDL was commonly referred to as “GFDL Version 2” or “GFDL 2.0” during discussions leading up to the revision, and such references to the license of that type are still available online. See, e.g., FSF, FDLv2: FIRST DISCUSSION DRAFT (2006), available at <http://gplv3.fsf.org/fdl-draft-2006-09-22.html>. According to the FSF, work is continuing on a future revision of the GFDL, still slated to be called “Version 2.0.” See FSF, FDL 1.3 FAQ, <http://www.gnu.org/licenses/fdl-1.3-faq.html> (last visited May 4, 2008) [hereinafter GFDL 1.3 FAQ].

¹⁰⁴ See GFDLv1.3, *supra* note 103, § 9; see also *infra* notes 119–22 and accompanying text.

¹⁰⁵ See GFDLv1.3, *supra* note 103, § 11; see also *infra* notes 141–47 and accompanying text.

¹⁰⁶ See GFDLv1.3, *supra* note 103, § 0 (“We have designed this License in order to use it for manuals for free software . . . [b]ut this License is not limited to software manuals; it can be used for any textual work We recommend this License principally for works whose purpose is instruction or reference.”). The principles underlying the GFDL are expounded in RICHARD M. STALLMAN, *Free Software Needs Free Documentation*, in FREE SOFTWARE, FREE SOCIETY, *supra* note 47, at 67.

¹⁰⁷ GFDLv1.3, *supra* note 103, §§ 2–3.

¹⁰⁸ *Id.* § 4.

¹⁰⁹ *Id.* §§ 2–3.

¹¹⁰ *Id.* § 2.

released under the GFDL.¹¹¹ In addition, the GFDL mandates attribution¹¹² and the inclusion of an express copyright notice,¹¹³ requires modified works to adopt a new title,¹¹⁴ forbids certain other modifications of the licensed content,¹¹⁵ and empowers authors also to forbid modifications of designated sections of the work, thus requiring the specified portions of the work to be reproduced verbatim in any subsequent version.¹¹⁶ Finally, like many other open-content licenses, the GFDL includes provisions that essentially require users to be informed about their rights. Any derivatives of GFDL-licensed content must include an express public notice alerting users to their GFDL-based permissions to reuse the work¹¹⁷ and a copy of the GFDL.¹¹⁸

Like the GPL, the GFDL includes what the license labels a “termination” clause, providing in essence that a licensee who breaches the conditions of the license may no longer exercise the rights granted.¹¹⁹ Absent default by the licensee, the GFDL expressly provides a license “unlimited in duration[.]”¹²⁰ The GFDL does not declare itself to be “irrevocable,” as the GPL does.¹²¹ Nevertheless, the way the GFDL is used in practice may convey the impression that the license cannot be terminated.¹²²

¹¹¹ *Id.* § 4.

¹¹² *Id.* § 4(B).

¹¹³ *Id.* § 4(E).

¹¹⁴ *Id.* § 4(A).

¹¹⁵ *Id.* § 4(D) (forbidding modification of prior versions’ copyright notices), (G) (requiring verbatim reproduction of lists of invariant sections and required cover texts), (I)–(K) (requiring preservation of other identified sections as they appeared in prior versions of the work), (O) (requiring preservation of any disclaimers of warranty that appeared in prior versions of the work).

¹¹⁶ *Id.* §§ 1 (defining “Invariant Sections”), 4(L) (requiring that modified versions of the work “[p]reserve all the Invariant Sections of the Document, unaltered in their text and in their titles.”). These provisions limit the scope of derivative works that may be produced from GFDL-licensed content by specifying that certain portions of the original work must be reproduced without modification in any derivative works. For an explanation of the limited reach this provision was intended to have, see STALLMAN, *supra* note 47, at 68; see also GFDLv1.3, *supra* note 103, § 1 (explaining, in definition of “Secondary Section,” that the portions of documents authors are allowed to designate as “invariant” must “contain[] nothing that could fall directly within th[e] overall subject” matter addressed by the document’s text).

¹¹⁷ GFDLv1.3, *supra* note 103, § 4(F).

¹¹⁸ *Id.* § 4(H). For a suggestion that this requirement may inhibit widespread adoption of the GFDL, see Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 413 (2005).

¹¹⁹ GFDLv1.3, *supra* note 103, § 9 (“You may not copy, modify, sublicense, or distribute the Document except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense, or distribute it is void, and will automatically terminate your rights under this License.”). The 2008 revisions of the GFDL added new language to the “termination” provision, adapted from language introduced in the GPLv3, permitting users of GFDL-licensed content to cure their default via specified means and reinstate the rights granted under the license. Compare *id.*, with GFDLv1.2, *supra* note 102, § 9. See also *supra* notes 72–73 and accompanying text.

¹²⁰ GFDLv1.3, *supra* note 103, § 1.

¹²¹ See *supra* note 74 and accompanying text.

¹²² See *infra* note 147 and accompanying text.

2. Creative Commons licenses

Although the GFDL extended open-content licensing principles outside the domain of software, the license remains tied to a specific context, namely, the licensing of software manuals and other texts. Many provisions of the GFDL, such as the references to “title pages,” “cover texts,” “invariant sections,”¹²³ are difficult to understand or to apply outside the context of literary works.¹²⁴ Thus, although the GFDL represented an important step in the evolution of open-content licensing, it failed to yield a product generally applicable to all varieties of copyrightable work.

Extending open-content licensing more broadly to other types of works became the mission of the nonprofit Creative Commons organization.¹²⁵ Creative Commons’s co-founder, law professor Lawrence Lessig, explained that the project aimed to create a commons of expressive works freely available for others to copy and reuse by adopting the same types of licensing arrangements that had proved successful in the FOSS world:

The idea (again, stolen from the FSF [Free Software Foundation]) was to produce copyright licenses that artists, authors, educators, and researchers could use to announce to the world the freedoms that they want their creative work to carry. If the default rule of copyright is “all rights reserved,” the express meaning of a Creative Commons license is that only “some rights [are] reserved.” For example, copyright law gives the copyright holder the exclusive right to make “copies” of his or her work. A Creative Commons license could, in effect, announce that this exclusive right was given to the public.¹²⁶

To appreciate the innovative character of the Creative Commons family of licenses, consider how each of the licenses considered so far joins certain policy decisions together in the terms of the license. In the case of the FOSS licenses, policies surrounding attribution, reciprocity, and commercial use converge, while the GFDL raises the possible prohibition on certain forms of derivative works. Each of the licenses considered previously joins policy decisions on several of those issues together in a single license: GPL-licensed works may be copied for noncommercial purposes, but only on reciprocal terms; BSD-licensed works may be copied for commercial purposes, but only if the licensee provides attribution; and so forth.

¹²³ See GFDLv1.3, *supra* note 103, § 1 (defining these and other related terms).

¹²⁴ Cf. 17 U.S.C. § 101 (2006) (defining “literary works”).

¹²⁵ See Creative Commons, What is CC?, <http://creativecommons.org/about/what-is-cc> (last visited Apr. 2, 2010).

¹²⁶ Posting of Lawrence Lessig to Commons News, <http://creativecommons.org/weblog/entry/5661> (Oct. 6, 2005); see also Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763 (2003) (sketching out philosophy behind the project).

The genius of the Creative Commons project lay in disaggregating all the policy decisions implicit in the pre-existing family of open-content licenses and permitting licensors to recombine them individually in whatever fashion best suited their intent.¹²⁷ Creative Commons licenses present authors, in effect, with a menu of license criteria, each reflecting a particular policy decision, from which the author is free to pick and choose. The various possible license criteria (and the recognized Creative Commons abbreviations) are:

- *Attribution* (“BY”): should users be required to give credit to the original author and/or publisher when they copy or reuse the licensed work?
- *Noncommercial* (“NC”): are users free to copy or reuse the licensed work for commercial purposes, or for noncommercial purposes only?
- *No Derivatives* (“ND”): are users free to create derivative works based on the licensed work, or may they reproduce only verbatim copies of the original?
- *Share Alike* (“SA”): are users free to adopt more restrictive licensing terms for any derivative works they create, or must they adopt the same license chosen by the original author?¹²⁸

All the publicly available Creative Commons licenses presently include the attribution requirement,¹²⁹ leaving authors free to select “yes” or “no” as to each of the remaining three options. Although there are eight possible ways

¹²⁷ To be sure, its innovations in licensing instruments may not be the most important contribution of the Creative Commons project; much like the broader FOSS movement, Creative Commons is as much a social initiative aimed at shifting public norms surrounding the reuse of expressive content as a purely legal organization. See, e.g., BENKLER, *supra* note 11, at 455–56; Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1930 (2007) (“Ultimately, the Creative Commons is more of a social movement than an alternative IP regime.”). For a slightly skeptical view of the Creative Commons project from a strong property-rights perspective, however, see Merges, *supra* note 41, at 196–200.

¹²⁸ See Creative Commons, License Your Work, <http://creativecommons.org/about/license/> (last visited Apr. 2, 2010) [hereinafter License Your Work].

¹²⁹ See Johnson, *supra* note 70, at 412–13 (explaining requisites of required attribution). The Creative Commons organization initially promulgated a set of licenses that omitted the attribution requirement, and indeed, those licenses remain available (albeit difficult to locate) on the organization’s web site. See Creative Commons, Retired Licenses, <http://creativecommons.org/retiredlicenses> (last visited Mar. 29, 2010). The organization ceased offering (or updating) the non-attribution varieties upon discovering that virtually all licensors were selecting the Attribution variants. See Fisk, *supra* note 85, at 91 (noting that it remains possible to disclaim the default attribution requirement); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 79–81 (2007) (describing Creative Commons organization’s decision to withdraw non-attribution license variants); accord Abraham Bell & Gideon Pachomovsky, *The Evolution of Private and Open Access Property*, 10 THEORETICAL INQUIRIES L. 77, 97 (2009) (noting that Creative Commons licenses preserve some incidents of private property ownership insofar as “most content owners insist on receiving attribution from users”); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1361 (2004) (offering empirical support for this proposition); Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 411 & app. A (2006) (same).

to answer a set of three yes-or-no questions, two combinations are off the table because an author cannot choose both “No Derivatives” (derivative works are forbidden) and “Share Alike” (derivative works are permitted so long as they are distributed under the same license terms). The remaining six possible combinations, accordingly, describe the basic family of Creative Commons licenses from which creators may choose: (1) Attribution only (BY); (2) Attribution-Share Alike (BY-SA); (3) Attribution-No Derivatives (BY-ND); (4) Attribution-Non-Commercial (BY-NC); (5) Attribution-Non-Commercial-Share Alike (BY-NC-SA); and (6) Attribution-Non-Commercial-No Derivatives (BY-NC-ND).¹³⁰ Web sites, photographs, instructional materials, scholarly research, comic strips, maps, sound recordings, motion pictures, and many other works—numbering in the hundreds of millions¹³¹—have been published under Creative Commons licenses.

All six of the standard Creative Commons licenses permit users to copy and distribute the licensed works, although the three “NC” licenses disallow copying and distribution for commercial purposes.¹³² Four of the licenses (all except the two “ND” variants) also permit users to create and distribute modified works based on the licensed content, although the two “NC” variants again restrict commercial uses, and the two “SA” variants require retransmission of the same set of licensed freedoms to users of any such derivative works. The combined effect of all these alternatives is to give the licensor fine-grained control over the various policy decisions implicated in the other open-content licensing arrangements discussed above. Whether to allow derivative works, whether to require licensing reciprocity, whether to

¹³⁰ See License Your Work, *supra* note 128. The listing in the text arrays the licenses roughly in increasing order of restrictiveness. See, e.g., Goss, *supra* note 99, at 978; Maritza Schaeffer, Note, *Contemporary Issues in the Visual Art Realm: How Useful are Creative Commons Licenses?*, 17 J.L. & POL'Y 359, 385–87 (2008). Like the GNU GPL and the other licenses considered previously, the text of the Creative Commons licenses has been amended from time to time, with each amended version being assigned a revision number to differentiate it from its predecessors. When referring to works published under a Creative Commons license, it is customary to note the applicable version number of the license. See, e.g., Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 1 n.* (2008) (“This work is licensed under the Creative Commons Attribution-Noncommercial-ShareAlike 3.0 License.”). To add a final layer of complexity, different versions of each Creative Commons license exist that are tailored to the particularities of different national legal systems, and where a particular jurisdiction’s version of the license applies, it is common to so note. See, e.g., Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1 (2008) (adopting BY-SA-3.0-US license).

¹³¹ See OECD, *supra* note 45, at 24 (“figures show that there are at least 200 million pieces of content on the Internet that are under various *Creative Commons* licenses (as counted by the number of ‘link-backs’ to these licenses on the Internet as tracked by Google”).

¹³² To be more precise, a party wishing to make a commercial use of a work licensed under one of the Creative Commons “NC” variants must seek dual licensing of the work from the copyright holder upon terms that allow such use. See Creative Commons, *Frequently Asked Questions – CC Wiki*, <http://wiki.creativecommons.org/FAQ> (last visited Apr. 2, 2010) (“You can always approach the licensor directly to see if they will separately license you the commercial rights.”); *supra* note 31 and accompanying text (discussing dual licensing).

allow commercial uses, and even whether to require attribution are each choices that the licensor may make essentially independently.¹³³

The Creative Commons license documents are expressed in what the organization refers to as “legal code.”¹³⁴ At its most essential level, the “legal code” constitutes the license; it is the formal language expressing the grants of rights and the limiting conditions selected by the licensor.¹³⁵ To encourage widespread adoption and use of its licenses, however, Creative Commons also provides so-called “commons deeds”: accessible, plain-English summaries of the rights and limitations of each of the six standard licenses.¹³⁶ Finally, the organization offers each license as machine-readable metadata to aid indexing of the licensed work by search engines.¹³⁷

The “legal code” of each Creative Commons license includes a “termination” (or forfeiture) clause of the same kind as the GPL.¹³⁸ Section 7(a) of the current version of each of the six standard licenses states, in part, that “[t]his License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License,” subject to specified exceptions.¹³⁹ Absent default by the licensee, however, Creative Commons licenses are expressly declared to be perpetual and, indeed, not capable of withdrawal by the licensor:

Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different license terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this License . . . and this License will continue in full force and effect unless terminated as stated above.¹⁴⁰

¹³³ See R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1032–33 (2003) (arguing that Creative Commons licenses are effective in effectuating licensors’ specific intent precisely because they emerge against a background of strong proprietary rights for the licensor).

¹³⁴ The influence of law professor Lawrence Lessig, a co-founder of Creative Commons and the progenitor of the “code is law” meme, is readily apparent in the choice of the label “legal code.” See LESSIG, *supra* note 49, at 1–8.

¹³⁵ For example, the “legal code” for the Creative Commons Attribution-Share Alike-3.0-United States license is available at <http://creativecommons.org/licenses/by-sa/3.0/us/legalcode> (last visited Mar. 4, 2010) [hereinafter CC BY-SA-3.0-US Legal Code]. See also Séverine Dusollier, *The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 276 (2006) (“The Legal Code is a lengthy contract with numerous detailed provisions . . . that can be legally enforced”).

¹³⁶ See Schaeffer, *supra* note 130, at 385.

¹³⁷ See *id.*

¹³⁸ See *supra* notes 72–73 and accompanying text.

¹³⁹ CC BY-SA-3.0-US Legal Code, *supra* note 135, § 7(a). Identical language appears in the same location in the “legal code” for each of the six standard licenses.

¹⁴⁰ *Id.* § 7(b); cf. *supra* note 72 and accompanying text.

Some Creative Commons-licensed projects have adopted additional explanatory language that tends to emphasize the purportedly permanent and irrevocable character of the rights granted under the license. The massive online Wikipedia encyclopedia¹⁴¹ supplies a prominent example. Since Wikipedia's inception in 2001, user contributions have been licensed under the GFDL.¹⁴² The same characteristics that make the GFDL problematic for content other than software manuals, however, meant that the license never fit perfectly with the rapidly evolving content of Wikipedia. In 2008, in response to a request from the Wikimedia Foundation ("WMF"),¹⁴³ a new "relicensing" section was added to the GFDL permitting some GFDL-licensed works to be relicensed under the Creative Commons BY-SA 3.0 license.¹⁴⁴ Following a strongly favorable vote by the WMF user community,¹⁴⁵ WMF passed a resolution allowing dual licensing of WMF content (including Wikipedia) under both the GFDL and the Creative Commons BY-SA 3.0 license.¹⁴⁶ Today, visiting any editable Wikipedia page and clicking the "Edit this Page" button brings up the following warning at the bottom of the page: "You *irrevocably agree* to release your contributions under the Creative Commons Attribution/Share-Alike License 3.0 and the GFDL."¹⁴⁷

¹⁴¹ Wikipedia, <http://www.wikipedia.org/> (last visited Mar. 29, 2010). As of March 2010, the billion-word corpus of the English-language version of Wikipedia was approximately twenty-five times the size of the *Encyclopaedia Britannica*, as measured only by estimated word counts—a statistic that excludes, for example, the rich graphic and tabular material unique to Wikipedia and its sister Wikimedia Foundation sites. See Wikipedia, Size Comparisons, http://en.wikipedia.org/wiki/Wikipedia:Size_comparisons (last visited Apr. 2, 2010).

¹⁴² See ANDREW LIH, *THE WIKIPEDIA REVOLUTION: HOW A BUNCH OF NOBODIES CREATED THE WORLD'S GREATEST ENCYCLOPEDIA* 72–73 (2009); see also *supra* notes 101–22 and accompanying text (discussing the GFDL).

¹⁴³ WMF, Resolution: License Update, http://wikimediafoundation.org/wiki/Resolution:License_update (last visited Apr. 2, 2010).

¹⁴⁴ See GFDL 1.3 FAQ, *supra* note 103; GFDLv1.3, *supra* note 103, § 11; see also LIH, *supra* note 142, at 212 (anticipating this development).

¹⁴⁵ See Wikimedia Meta-Wiki, Licensing Update/Result, http://meta.wikimedia.org/wiki/Licensing_update/Result (last visited Apr. 2, 2010) (reflecting over seventy-five percent support for proposed relicensing and only ten percent opposition, among the over seventeen thousand valid votes). The author participated in the vote (in his role as a contributor to the English-language Wikisource project, a sister site of Wikipedia) and voted in favor of the relicensing proposal.

¹⁴⁶ See Press Release, WMF, Wikimedia Foundation Announces Important Licensing Change for Wikipedia and Its Sister Projects (May 21, 2009), available at http://wikimediafoundation.org/wiki/Press_releases/Dual_license_vote_May_2009. The joint action of the FSF and the WMF to enable the relicensing of Wikipedia under a Creative Commons license tends to suggest that one of the common criticisms of open-content licensing—namely, that a proliferation of license standards impedes rather than promotes sharing and reuse of the licensed content—has been overstated. See, e.g., Dusollier, *supra* note 8, at 1425–27; Elkin-Koren, *supra* note 118, at 412–13; Van Houweling, *supra* note 31, at 942.

¹⁴⁷ See Wikipedia, <http://en.wikipedia.org/> (last visited Mar. 29, 2010) (emphasis added). Go ahead, try it. You'll see.

Contributors to open-content projects act from a (probably irreducible) diversity of motivations¹⁴⁸—from a desire to practice or to pass along the contributor’s unique skills or knowledge,¹⁴⁹ to political opposition to the predominance of the proprietary production paradigm for informational goods and the agendas of the large and powerful enterprises that the dominant paradigm sustains,¹⁵⁰ to the sense of satisfaction and reputational gains that derive from having one’s expertise recognized and appreciated,¹⁵¹ to the enjoyment of solving complex problems¹⁵² to simple altruism or the desire to advance human knowledge.¹⁵³ Depending on their motivation, individual contributors to open-content projects may react differently to the discovery that the licenses authorizing them to modify and redistribute the content on which they worked are subject to possible termination. For example, those disinclined to see proprietization as an evil to be avoided (such as developers of BSD-licensed software) may be indifferent to the possibility of termination of the license. On the other hand, contributors motivated more strongly by a desire to build a commons of works that will remain freely reusable in perpetuity may view the risk of termination very differently. Those users may have contributed to the project based partly on the understanding that the work to which they contributed would remain forever available for others to copy and modify. Provisions of many existing open-content licenses encourage precisely this presumption.¹⁵⁴ Under existing U.S. copyright law, however, licensors may be disabled from delivering upon a promise of a perpetual, irrevocable license.

¹⁴⁸ See BENKLER, *supra* note 11, at 92–99 (noting that economic models of behavior uniformly tend to oversimplify complexities underlying human action); WEBER, *supra* note 9, ch. 5 (attempting to disentangle collective from individual motivations); Andrew George, Note, *Avoiding Tragedy in the Wiki-Commons*, 12 VA. J.L. & TECH. 8, ¶¶ 9–34 (2007) (focusing particularly on various motivations of contributors to Wikipedia); Karim R. Lakhani & Robert G. Wolf, *Why Hackers Do What They Do: Understanding Motivation and Effort in Free/Open Source Software Projects*, in PERSPECTIVES ON FREE AND OPEN SOURCE SOFTWARE 3 (Joseph Feller et al., eds., 2005); Katherine J. Strandburg, *Evolving Innovation Paradigms and the Global Intellectual Property Regime*, 41 CONN. L. REV. 861, 871 & n.37 (2009) (noting relatively weak role of traditional economic incentives in peer production).

¹⁴⁹ See WEBER, *supra* note 9, at 134–35; George, *supra* note 148, ¶¶ 12–15.

¹⁵⁰ See WEBER, *supra* note 9, at 139–40; George, *supra* note 148, ¶¶ 19–20.

¹⁵¹ BENKLER, *supra* note 11, at 94 (“there will be some acts that a person would prefer to perform not for money, but for social standing, recognition, and . . . instrumental value”); RAYMOND, *supra* note 47, at 97–100, 102–03 (describing FOSS development as a “gift culture” in which contributors compete, in part, to improve their own reputations as skilled coders); WEBER, *supra* note 9, at 141–43; Fisk, *supra* note 85, at 88–92 (emphasizing how reputational motivations are fostered by mandatory attribution policies); George, *supra* note 148, ¶¶ 30–34.

¹⁵² See RAYMOND, *supra* note 47, at 100–02.

¹⁵³ Jyh-An Lee, *New Perspectives on Public Goods Production: Policy Implications of Open Source Software*, 9 VAND. J. ENT. & TECH. L. 45, 53–55 (2006); George, *supra* note 148, ¶¶ 16–18. *But see* WEBER, *supra* note 9, at 131 (identifying several aspects of peer production that tend to weigh against altruism as a primary motivating factor).

¹⁵⁴ See *supra* notes 72–74, 120, 140 and accompanying text.

III. COPYRIGHT LICENSING AND TERMINATION

Between 1976 and 1998, Congress acted repeatedly to limit the entry of copyrighted works into the public domain. What makes this trend remarkable is that in the course of amending the Copyright Act, Congress, in the name of protecting authors, arguably took from them a power they had clearly enjoyed under pre-1976 law: namely, the power voluntarily to relinquish rights in their works for the benefit of the public. At the same time, Congress added new statutory provisions empowering authors to recapture rights in their works that had formerly been licensed or conveyed away. The effect has been to make it ever more difficult for authors permanently to part with their exclusive copyright rights, even where they may knowingly and voluntarily wish to do so.

A. *From Opt-In to Opt-Out to Locked-In*

1. *The Evolution of Copyright Standards*

The protection of expressive works under copyright has proceeded through three distinct phases. From 1790 to 1977, U.S. law defined an “opt-in” copyright system. Works enjoyed federal¹⁵⁵ copyright protection if, but only if, authors performed all the necessary actions—today commonly labeled “formalities”—that were necessary upon publication of the work for protection to attach.¹⁵⁶ The principal requisites to secure copyright protection included: (1) providing notice of copyright in proper form; (2) registration of copyright in the work; and (3) depositing of a copy of the work with the Library of Congress.¹⁵⁷ Authors who published their works without strictly observing the applicable formalities forfeited copyright protection;¹⁵⁸ indeed,

¹⁵⁵ Although copyright is now a domain of exclusive federal jurisdiction, *see* 17 U.S.C. § 301 (2006), parallel systems of federal and state copyright protection existed until the Copyright Act of 1976. A discussion of state copyright systems is outside the scope of the present work.

¹⁵⁶ *See* NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 54–55 (2008) (observing that early formal requirements imposed “nontrivial” burdens).

¹⁵⁷ *See* Copyright Act of 1909, ch. 320, §§ 9 (notice), 10 (registration), 12 (deposit), 35 Stat. 1075. This listing admittedly simplifies the complex history of formal requirements for copyright protection in the United States. For the unsimplified version, *see* 3 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 6:3 (2009). By referring to the formalities necessary for copyright protection to attach, this Article purposefully elides the formalities that continue to exist under U.S. law for other purposes, such as the requirement to register before bringing suit for copyright infringement. *See* 17 U.S.C. § 411 (2006 & Supp. II 2008); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010) (construing pre-filing registration requirement as nonjurisdictional).

¹⁵⁸ *See, e.g.*, *Mifflin v. R.H. White Co.*, 190 U.S. 260 (1903) (failure of notice requirement); *Holmes v. Hurst*, 174 U.S. 82 (1899) (failure of deposit requirement); *Thompson v. Hubbard*, 131 U.S. 123, 148–51 (1889) (notice in improper form); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 665–68 (1834) (failure of deposit and publication of notice requirements); *Atl. Monthly Co. v. Post Pub. Co.*, 27 F.2d 556, 559 (D. Mass. 1928) (failure of notice requirement). *But cf.* *Washingtonian Pub. Co., Inc. v. Pearson*, 306 U.S. 30, 37–40 (1939) (holding

courts often referred to the author's failure to comply with formalities as a "dedication" of the work to the public domain.¹⁵⁹

This strict "opt-in" regime ended on January 1, 1978, the effective date of the Copyright Act of 1976.¹⁶⁰ The Act converted copyright to an "opt-out" regime: federal copyright protection attached automatically, by operation of law, without any further action by the author, the moment a work was "fixed in a tangible medium of expression."¹⁶¹ The 1976 Act preserved some existing formalities; copyrighted works were still required to bear a notice of copyright in a form specified by statute¹⁶² and to be deposited with the Library of Congress.¹⁶³ In what Congress recognized as "a major change in the theoretical framework of American copyright law,"¹⁶⁴ however, noncompliance with formalities was no longer necessarily fatal to copyright protection. The deposit requirement was expressly declared not to be a condition of copyrightability,¹⁶⁵ and Congress provided a mechanism permitting authors to cure noncompliance with the notice requirement.¹⁶⁶ The mechanism for curing defaults rested upon Congress's perception of a need to protect authors from inadvertent or accidental losses of their rights,¹⁶⁷ although authors who failed to avail themselves of the cure provision still risked having their work enter the public domain.¹⁶⁸

that, under Copyright Act of 1909, failure to comply with deposit requirement did not invalidate copyright).

¹⁵⁹ See, e.g., *Pub. Affairs Assocs. v. Rickover*, 369 U.S. 111, 117–18 (1962) (Warren, C.J., dissenting); *Donald Frederick Evans & Assocs. v. Cont'l Homes, Inc.*, 785 F.2d 897, 912 (11th Cir. 1986); *Cooling Syst. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 489 (9th Cir. 1985); *Data Cash Sys., Inc. v. JS&A Group*, 628 F.2d 1038, 1042 (7th Cir. 1980); *Deward & Rich v. Bristol Sav. & Loan Corp.*, 120 F.2d 537, 540 (4th Cir. 1941); cf. *Goodis v. United Artists Television, Inc.*, 278 F. Supp. 122, 125 (S.D.N.Y. 1968), *rev'd*, 425 F.2d 397 (2d Cir. 1970).

¹⁶⁰ Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2598 (1976) (codified at note preceding 17 U.S.C. § 101).

¹⁶¹ 17 U.S.C. § 102(a); see also H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 (explaining that fixation of work in a tangible medium "represents the dividing line between common law and statutory protection"); *id.* at 130 ("the statute would apply to all works created after its effective date, whether or not they are ever published or disseminated").

¹⁶² See 17 U.S.C. §§ 401-404 (1988).

¹⁶³ See *id.* § 407.

¹⁶⁴ H.R. REP. NO. 94-1476, at 146.

¹⁶⁵ See 17 U.S.C. § 407(a) (2008).

¹⁶⁶ See *id.* § 405; see also, e.g., *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 443–44 (4th Cir. 1986) (finding that plaintiff took adequate steps to cure deficiencies in copyright notice).

¹⁶⁷ H.R. REP. NO. 94-1476, at 143 (justifying cure provisions as necessary to prevent "arbitrary and unjust forfeitures . . . resulting from unintentional or relatively unimportant omissions or errors in the copyright notice").

¹⁶⁸ See, e.g., *Harris Custom Builders, Inc. v. Hoffmeyer*, 92 F.3d 517, 520 (7th Cir. 1996); *Princess Fabrics, Inc. v. CHF, Inc.*, 922 F.2d 99, 102–03 (2d Cir. 1990); *Canfield v. Ponchatoula Times*, 759 F.2d 493, 499 (5th Cir. 1985). Thus, authors who affirmatively desired to opt out of the federal system of copyright protection, and place their works in the public domain, could do so by purposefully failing to cure deficient formalities.

The policy of protecting authors from their own mistakes reached the point of *reductio ad absurdum* on March 1, 1989, the effective date of the Berne Convention Implementation Act (“BCIA”).¹⁶⁹ In the name of bringing the United States into compliance with the Berne Convention’s “no formalities” mandate,¹⁷⁰ Congress made compliance with formalities not only nonessential, but irrelevant. The language of the key statutory provision on notice of copyright was changed from the mandatory “shall” to the permissive “may,”¹⁷¹ and the provision allowing authors to cure defective formalities was amended to have purely retrospective application.¹⁷² Thus, although defects in formalities for works published before March 1, 1989 can still result in forfeiture of copyright if not cured,¹⁷³ later-published works are at no risk of forfeiting copyright protection due to noncompliance with statutory formalities.¹⁷⁴ The conditional protections given to authors under the Copyright Act of 1976 against unintentional, inadvertent losses of their rights had become absolute.¹⁷⁵

As a result, there is a colorable argument that copyright legislation in the United States has gradually converted copyright from a selectable privilege to an infeasible entitlement.¹⁷⁶ That argument, and the presumption of strong rights for authors upon which it rests, may influence courts’ willingness to entertain arguments that an open-content licensor should be disempowered to terminate her grant of rights under a license and recapture ownership of copyright in the work.¹⁷⁷ To complete the picture, however, it

¹⁶⁹ Pub. L. No. 100-568, § 13(a), 102 Stat. 2853, 2861 (1988) (codified at note following 17 U.S.C. § 101 (2006)).

¹⁷⁰ *Id.* § 2(3), 102 Stat. at 2853 (declaring that “[t]he amendments made by this Act, together with [existing law] . . . satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.”); Convention for the Protection of Literary and Artistic Works, § 5(2), *opened for signature* Sept. 9, 1886, 6 U.S.T. 2731 (“[t]he enjoyment and exercise of [copyright] rights shall not be subject to any formality”).

¹⁷¹ Pub. L. No. 100-568, § 7(a)(2), 102 Stat. at 2857 (codified at 17 U.S.C. § 401(a)); *id.* § 7(b)(2), 102 Stat. at 2858 (codified at 17 U.S.C. § 402(a)).

¹⁷² *Id.* § 7(e)(1), 102 Stat. at 2858 (codified at 17 U.S.C. § 405(a)).

¹⁷³ See *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 48 (5th Cir. 1995).

¹⁷⁴ See *Morgan v. Hawthorne Homes, Inc.*, 2009 WL 1010476, at *7 (W.D. Pa. Apr. 14, 2009) (“Each of the eight plans at issue were published after March of 1989, and therefore any omission of notice does not result in forfeiture and provides no basis for finding that Plaintiff does not have a valid copyright in the eight plans.”); *Sadhu Singh Hamdad Trust v. Ajit Newspaper Adver., Mktg., & Commc’ns, Inc.*, 503 F. Supp. 2d 577, 587 n.15 (E.D.N.Y. 2007) (“works first published after March 1, 1989 need not bear a notice of copyright to attain copyright protection”); *Innovative Networks, Inc. v. Satellite Airlines Ticketing Ctrs., Inc.*, 871 F. Supp. 709, 720 (S.D.N.Y. 1995) (“affixing notice is no longer mandatory for works first published after March 1, 1989”).

¹⁷⁵ See Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 743–44 (2001) (“Each new version of the Copyright Act has awarded longer, broader, and more powerful legal protection to expressive works.” (footnotes omitted)).

¹⁷⁶ See *id.* at 742 (“Copyright law, originally excused as a necessary evil, now threatens to become an inescapable burden.” (footnotes omitted)).

¹⁷⁷ See *infra* Part IV.A.

may be useful to examine two related limitations on the strong-property-rights vision of the legislative enactments to date: first, the judge-made principle that creators may affirmatively renounce their own rights under copyright, and second, the introduction of licensing instruments that aim to effectuate such partial or total abandonments of copyright interests by authors.

2. *Abandonment of Copyright*

Before the Copyright Act of 1976, an author could effectively abandon copyright protection for a work and place it in the public domain by publishing without a valid copyright notice or by failing to renew the copyright after the expiration of the initial twenty-eight-year term of protection.¹⁷⁸ The 1976 Act substantially weakened the former alternative (by allowing authors to cure defective notices) and eliminated the latter alternative altogether (by creating a unitary copyright term lacking any renewal requirement).¹⁷⁹ The BCIA, in turn, eliminated mandatory notice entirely.¹⁸⁰ As a result, U.S. copyright law now supplies no clear statutory path for placing a work in the public domain during the author's lifetime. Under the present statute, copyright rights attach automatically the moment a work is fixed in a tangible medium, and nothing in the statute provides for the possible loss of those rights during the lifetime of the author or for seventy years thereafter. This is in marked contrast to the Patent Act, which provides a number of avenues whereby inventions may enter the public domain.¹⁸¹

At first glance, the doctrine of copyright abandonment seems to fill the gap. The courts have, for more than a century, stated that copyright owners

¹⁷⁸ Under the Copyright Act of 1909, the initial term of protection for a validly acquired copyright was twenty-eight years, following which a renewal application for a second term (also of twenty-eight years) could be filed. *See* Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (codified at 17 U.S.C. § 24 (1976)). Failure to renew the copyright at the end of the initial twenty-eight-year term of protection placed the work in the public domain. *See id.* ("in default of . . . application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication"); *see also* G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469, 471 (2d Cir. 1951); Hoepker v. Kruger, 200 F. Supp. 2d 340, 345 (S.D.N.Y. 2002); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1241 (N.D. Cal. 1995); Int'l Film Exch., Ltd. v. Corinth Films, Inc., 621 F. Supp. 631, 635 (S.D.N.Y. 1985). Vestiges of the two-term copyright framework that existed under the 1909 Act and earlier federal copyright statutes survive today in 17 U.S.C. § 304 (2006).

¹⁷⁹ The 1976 Act created a single fixed copyright term for all works fixed in a tangible medium of expression on or after January 1, 1978, consisting of the life of the author plus fifty years. *See* 17 U.S.C. § 302(a) (1976) (amended 1998). The life-plus-fifty copyright term was extended to life-plus-seventy in 1998, when Congress extended by twenty years the duration of all copyrights then in force. *See* 17 U.S.C. § 302(a) (2000); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁸⁰ *See supra* notes 171–74 and accompanying text.

¹⁸¹ *See infra* notes 331–36 and accompanying text.

may disclaim copyright and dedicate their works to the public domain.¹⁸² The case law on copyright abandonment, however, is muddled, because courts often use words like “abandonment” or “dedication to the public domain” to describe mere noncompliance with statutory formalities.¹⁸³ In a world where formalities have been eliminated as a precondition of statutory copyright protection, the continuing relevance of such “abandonment” cases is unclear.

Judge Learned Hand’s opinion in *National Comics Publications v. Fawcett Publications*¹⁸⁴ is often cited for the general proposition that authors may abandon their copyrights. The court stated—unfortunately, without citing authority—that:

We do not doubt that the “author or proprietor of any work made the subject of copyright” by the Copyright Law may “abandon” his literary property in the “work” before he has published it, or his copyright in it after he has done so; but he must “abandon” it by some overt act which manifests his purpose to surrender his rights in the “work,” and to allow the public to copy it.¹⁸⁵

¹⁸² See generally STEPHEN FISHMAN, COPYRIGHT AND THE PUBLIC DOMAIN 6-1 to 6-20 (2008).

¹⁸³ See *supra* note 159; see also, e.g., *Sanga Music, Inc. v. EMI Blackwood Music, Inc.*, 55 F.3d 756, 759–62 (2d Cir. 1995) (finding that a songwriter’s “words and actions,” such as her approval of the publication of her song without formalities, suggested that she intended to dedicate the work to the public domain); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1019 (9th Cir. 1985) (describing publication without formalities as involving both “forfeiture” and “abandonment” of copyright); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 898 (5th Cir. 1972) (holding that district court erred in finding abandonment where necessary statutory formalities were observed); *Stuff v. E.C. Publ’ns, Inc.*, 342 F.2d 143, 145 (2d Cir. 1965) (cartoonist’s acquiescence in publication of cartoon without formalities amounted to “dedicat[ion] to the public”); *Egner v. E.C. Shirmer Music Co.*, 139 F.2d 398, 399 (1st Cir. 1943) (licensees published work by permission of author without formalities); *Nutt v. Nat’l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929) (oral delivery of lecture before filing of application for copyright did not constitute “publication” of the work without formalities); *Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 326–30 (2d Cir. 1904) (reasoning that public display of painting without notice of copyright did not constitute “publication” of the work without formalities so as to void copyright protection); *Falk v. Gast Lithograph & Engraving Co.*, 54 F. 890, 893 (2d Cir. 1893) (circulation of title cards upon which reduced-size versions of copyrighted photographs were reproduced did not divest copyright in the underlying photographs where title cards omitted any copyright notice); *Lopez v. Elec. Rebuilders, Inc.*, 416 F. Supp. 1133, 1135 (C.D. Cal. 1976) (consent to publication without copyright notice); *Jacobs v. Robitaille*, 406 F. Supp. 1145, 1149 (D.N.H. 1976); *Foreign Car Parts, Inc. v. Auto World, Inc.*, 366 F. Supp. 977, 979–80 (M.D. Pa. 1973); *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1188–92 (S.D.N.Y. 1973) (although publishing musical composition in the form of sheet music without observing formalities would have divested copyright, recording of the composition did not do so), *aff’d*, 546 F.2d 461 (2d Cir. 1976); *DeSilva Constr. Corp. v. Herrald*, 213 F. Supp. 184 (M.D. Fla. 1962) (publication of architectural plans without observing copyright formalities); *McCarthy & Fischer, Inc. v. White*, 259 F. 364 (S.D.N.Y. 1919); *Higgins v. Keuffel*, 30 F. 627, 628 (C.C.S.D.N.Y. 1887).

¹⁸⁴ 191 F.2d 594 (2d Cir. 1951).

¹⁸⁵ *Id.* at 598 (footnote omitted). Prior Supreme Court decisions on abandonment of patent rights might have supplied appropriate referents for the court. See *infra* note 331 and accompanying text. Judge Hand’s failure to recognize these analytically related authorities, however, may simply reflect the era in which the case arose. It would be some years before the Supreme

Although Judge Hand's statement was dictum,¹⁸⁶ later courts have accepted and applied the *Fawcett Publications* test for copyright abandonment—an “overt act” that demonstrates the author's intent “to surrender his rights.” In most of the cases, however, the references to the *Fawcett Publications* dictum (or similar restatements of the test for abandonment) are themselves dicta, as the courts virtually always conclude that there has been no abandonment, finding insufficient proof of intent,¹⁸⁷ proof of the required overt act,¹⁸⁸ or both.¹⁸⁹

There are exceedingly few cases squarely presenting a scenario of copyright abandonment. In *Bell v. Combined Registry Co.*,¹⁹⁰ a district court determined that a poet, intending to make “a ‘gift’ to the world,”¹⁹¹ had abandoned copyright in his poem; but the court of appeals found it unnecessary to reach the abandonment issue because the poet had failed to comply with statutory formalities.¹⁹² In *Pacific & Southern Co. v. Duncan*,¹⁹³ a dis-

Court approved the practice of borrowing patent principles when construing the copyright statutes. See *infra* notes 337–45 and accompanying text.

¹⁸⁶ See *Fawcett Publ'ns*, 191 F.2d at 598 (“[t]here was no evidence in this case of any such an intent” to abandon copyright rights).

¹⁸⁷ See, e.g., *Dam Things from Den. v. Russ Berrie & Co.*, 290 F.3d 548, 560 (3d Cir. 2002); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001); *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 288 (2d Cir. 1999); *Dodd, Mead & Co. v. Lilienthal*, 514 F. Supp. 105, 108 (S.D.N.Y. 1981); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 362 (N.D. Ga. 1979); *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F. Supp. 531, 535 (S.D.N.Y. 1977); *L&L White Metal Casting Corp. v. Cornell Metal Specialties Corp.*, 353 F. Supp. 1170, 1174 (E.D.N.Y. 1972); *Nat'l Council of Young Israel, Inc. v. Feit Co.*, 347 F. Supp. 1293, 1297 (S.D.N.Y. 1972); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970); *Grove Press, Inc. v. Greenleaf Pub. Co.*, 247 F. Supp. 518, 527–28 (E.D.N.Y. 1965); cf. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 483–84 (2d Cir. 2004) (finding that conflicting evidence of intent to abandon precluded summary disposition); *Schatt v. Curtis Mgmt. Group*, 764 F. Supp. 902, 907–08 (S.D.N.Y. 1991) (same); *Rexnord Inc. v. Modern Handling Sys., Inc.*, 379 F. Supp. 1190, 1199 (D. Del. 1974) (same).

¹⁸⁸ See, e.g., *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998) (although overt act representing partial abandonment may have occurred, “abandoning some rights is not the same as abandoning all rights, and FormGen never overtly abandoned its rights to profit commercially”); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 186 F. Supp. 2d 1, 24 (D. Mass. 2002); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1180 (W.D.N.Y. 1982); *Filmvideo Releasing Corp. v. Hastings*, 426 F. Supp. 690, 695 (S.D.N.Y. 1976) (failure to renew copyright in derivative motion pictures did not constitute an overt act abandoning copyright in the underlying novels on which the motion pictures were based); *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 730–31 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977); *Judscott Handprints, Ltd. v. Washington Wall Paper Co.*, 377 F. Supp. 1372, 1378 (E.D.N.Y. 1974); *Sw. Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc.*, 371 F. Supp. 900, 906 (W.D. Ark. 1974).

¹⁸⁹ See, e.g., *Paramount Pictures Corp. v. Carol Publ'g. Group*, 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998), *aff'd mem.*, 181 F.3d 83 (2d Cir. 1999); *Jackson v. MPI Home Video*, 694 F. Supp. 483, 490–91 (N.D. Ill. 1988).

¹⁹⁰ 397 F. Supp. 1241 (N.D. Ill. 1975), *aff'd*, 536 F.2d 164 (7th Cir. 1976).

¹⁹¹ 397 F. Supp. at 1249.

¹⁹² 536 F.2d at 170.

¹⁹³ 572 F. Supp. 1186 (N.D. Ga. 1983), *aff'd in part, rev'd in part*, 744 F.2d 1490 (11th Cir. 1984).

district court determined, with little analysis, that a television station had taken an overt act manifesting its intent to abandon copyright in its news broadcasts when it regularly destroyed its own copies of the broadcasts a week after they had aired.¹⁹⁴ An appellate court declared it “questionable whether [the station] had such an intent,”¹⁹⁵ but ultimately deferred to the trial court’s finding.¹⁹⁶ The appellate court’s decision in *Duncan* adds little to an understanding of copyright abandonment, however, in light of its focus on the remedies ordered by the trial court and on the First Amendment issues implicated in the case.¹⁹⁷ In *Rouse v. Walter & Associates*,¹⁹⁸ authors of software repeatedly referred to their employer as the holder of copyright. The court suggested that the plaintiffs’ repeated disclaimers of their own copyright interests were tantamount to an abandonment of copyright.¹⁹⁹ The court’s statements regarding the question of abandonment, however, were mere dicta, for it had already concluded that the plaintiffs’ employer was the true owner of the program under the work made for hire doctrine.²⁰⁰

After excluding the cases where “abandonment” represents a mere proxy for noncompliance with formalities or where the concept is invoked merely to add weight to decisions resting on other grounds, there remains a very small number of reported decisions in which the question of copyright abandonment was both squarely raised and case-dispositive. In *Hadady Corp. v. Dean Witter Reynolds, Inc.*,²⁰¹ a copyright holder published a work with a notice that expressly limited the term of copyright in the work to two days.²⁰² A district court held that the notice was tantamount to an abandonment of copyright in the work at the expiration of the two-day period.²⁰³ In *Oravec v. Sunny Isles Luxury Ventures*,²⁰⁴ an architect signed a letter indicating that he “reserved no patent, trademark, copyright, trade secret or other intellectual property rights” in an architectural design.²⁰⁵ Although the architect later sought to clarify that he believed the letter waived copyright protection only as against its recipient,²⁰⁶ a district court held that the letter “clearly and unambiguously manifested his intent to abandon any copyright protection” over the accompanying work.²⁰⁷

¹⁹⁴ 572 F. Supp. at 1196.

¹⁹⁵ 744 F.2d at 1500.

¹⁹⁶ *See id.*

¹⁹⁷ *See id.* at 1498–1500.

¹⁹⁸ 513 F. Supp. 2d 1041 (S.D. Iowa 2007).

¹⁹⁹ *See id.* at 1069–70.

²⁰⁰ *See id.* at 1055–65; *see also* 17 U.S.C. § 201(b) (2006).

²⁰¹ 739 F. Supp. 1392 (C.D. Cal. 1990).

²⁰² *See id.* at 1396 (“The information contained in this letter is protected by U.S. copyright laws though noon EST on the 2d day after its release[.]”).

²⁰³ *See id.* at 1399.

²⁰⁴ 469 F. Supp. 2d 1148 (S.D. Fla. 2006).

²⁰⁵ *Id.* at 1154.

²⁰⁶ *See id.*

²⁰⁷ *Id.* at 1178.

Courts that have considered the abandonment question have generally concluded that abandonment is an all-or-nothing proposition; an abandonment is effective only if the author renounces all rights in the work.²⁰⁸ This rule may limit courts' receptivity to arguments that an author has abandoned her rights, because the consequence of accepting the argument is that the author loses all rights to prevent any copying or other use of the work.²⁰⁹ Judicial reluctance to impose such severe consequences, absent the most unequivocal indication that such was the author's intent, may do much to explain the comparative scarcity of cases finding abandonment of copyright.²¹⁰

For whatever reason, however, it seems difficult to avoid the conclusion that the doctrine of copyright abandonment is presently something of a paper tiger.²¹¹ Courts refuse to apply the doctrine in nearly every case. In many, perhaps most, of the decisions in which the abandonment doctrine is cited with approval, the doctrine is unnecessary to the resolution of the case. Copyright abandonment, accordingly, thus likely does relatively little to counteract the strongly proprietary trend of recent statutory enactments, which have collectively tended to restrict the entry of new works into the public domain.

3. *Abandonment by License*

Perhaps influenced by highly restrictive judicial interpretations of the copyright abandonment doctrine, open-content advocates have sought to facilitate the growth of an expressive commons by drafting what are, in essence, copyright abandonment licenses—instruments that seek to express, with maximum clarity, an author's attempt to abandon copyright and dedicate a work to the public domain. These projects remain both incomplete and untested. The very breadth and specificity of the extant abandonment licenses, however, only underscores the complexities entailed in seeking to depart from the strongly proprietary regime of current law.

²⁰⁸ See, e.g., *Paramount Pictures Corp. v. Carol Pub. Group*, 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998) (“Defendants invite the Court to boldly go where no court has gone before and recognize the doctrine of limited abandonment. The Court declines the invitation.”), *aff’d mem.*, 181 F.3d 83 (2d Cir. 1999). But see *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998) (“abandoning some rights is not the same as abandoning all rights”); *FISHMAN*, *supra* note 182, § 6.02[3] (questioning whether rule against limited abandonment still makes sense in view of divisibility of copyright under the 1976 Act).

²⁰⁹ It is for precisely this reason that some authors have suggested altering abandonment doctrine to permit partial, conditional abandonments of rights under copyright. See *infra* Part IV.A.

²¹⁰ See also *Johnson*, *supra* note 70, at 400 (noting that one consequence of according a work public-domain status is that it may be reused in ways objectionable to its author).

²¹¹ See 2 *PATRY*, *supra* note 157, § 5:155 (“It is difficult to fathom how, in ordinary circumstances, one can be deemed to have abandoned one’s copyright in a system of formality-free, automatic protection, and where one can pick and choose whom to sue.”).

The Creative Commons project provides licenses designed to facilitate dedications to the public domain.²¹² One such license, the Creative Commons Public Domain Dedication, states the author's intent to "dedicate[] whatever copyright the [author] holds . . . to the public domain,"²¹³ with the express recognition that this will permit "anyone for any purpose, commercial or non-commercial" freely to "reproduce[], distribute[], transmit[], use[], modif[y], buil[d] upon, or otherwise exploit" the work "including by methods that have not yet been invented or conceived."²¹⁴ Finally, the license contains a number of terms aimed at assuring a permanent, irrevocable dedication:

Dedicator makes this dedication for the benefit of the public at large and to the detriment of the Dedicator's heirs and successors. Dedicator intends this dedication to be an overt act of relinquishment in perpetuity of all present and future rights under copyright law, whether vested or contingent, in the Work. Dedicator understands that such relinquishment of all rights includes the relinquishment of all rights to enforce (by lawsuit or otherwise) those copyrights in the Work.²¹⁵

Although the Creative Commons Public Domain Dedication has attracted some interest from makers of expressive works,²¹⁶ the Dedication may be legally problematic.²¹⁷ Nothing in the Copyright Act contemplates a voluntary extinguishment of the rights vested by the statute in the creator of a work,²¹⁸ and the courts have been highly reluctant to find copyright abandonment.²¹⁹ Moreover, attempting to cut off the rights of heirs may present a

²¹² See Dusollier, *supra* note 8, at 1408; Corey Field, *Copyright, Technology, and Time: Perspectives on "Interactive" as a Term of Art in Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 49, 67 (2003); Goss, *supra* note 99, at 980; Rothman, *supra* note 127, at 1929 n.109.

²¹³ Creative Commons, Copyright-Only Dedication (Based on United States Law) or Public Domain Certification, <http://creativecommons.org/licenses/publicdomain/> (last visited Apr. 2, 2010).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See, e.g., Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45, 55–56 (2006) (discussing the Open Clip Art Library).

²¹⁷ See Diane L. Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. 1375, 1381 (2007) ("Creative Commons also purports to offer a license that allows creators to inject what they have produced into the public domain, or at least allows them to try."). *But cf.* Matthew Dean Stratton, *Will Lessig Succeed in Challenging the CTEA, Post-Eldred?*, 53 J. COPYRIGHT SOC'Y U.S.A. 481, 522 (2006) (seemingly assuming that the Public Domain Dedication is valid).

²¹⁸ See *supra* notes 177–81 and accompanying text; Zimmerman, *supra* note 217, at 1381 n.29 (observing that, "[a]lthough the statute has provisions that allow authors or their successors, under some circumstances, to terminate copyright grants, no where [sic] does it provide a mechanism by which an author or successor to an author can disclaim copyright altogether." (citations omitted)).

²¹⁹ See *supra* notes 187–89 and accompanying text.

conflict with the statute's termination provisions, which expressly invalidate such commitments.²²⁰

Recognizing these difficulties,²²¹ Creative Commons launched a new project to aid licensing of works in which no copyright rights are retained. The result was a new model license known as "CC0" or "CC Zero."²²² Like the Public Domain Dedication, the CC0 license expressly abandons the author's copyright rights, but the CC0 license includes additional terms (in the form of a broad and unconditional license) designed to effectuate what is functionally a dedication to the public domain even if the abandonment of the author's rights under copyright is determined to be legally ineffective.²²³

The CC0 license includes a brief "Statement of Purpose" explaining the licensor's intent in adopting the license:

Certain owners wish to permanently relinquish those [copyright and related] rights to a Work for the purpose of contributing to a commons of creative, cultural and scientific works ("Commons") that the public can reliably and without fear of later claims of infringement build upon, modify, incorporate in other works, reuse and redistribute as freely as possible in any form whatsoever and for any purposes, including without limitation commercial purposes. These owners may contribute to the Commons to promote the ideal of a free culture and the further production of creative, cultural and scientific works, or to gain reputation or greater distribution for their Work in part through the use and efforts of others.²²⁴

To implement that purpose, the CC0 license next provides for an express abandonment of the author's copyright and related rights "[t]o the greatest extent permitted by . . . applicable law" "for the benefit of each member of the public at large and to the detriment of Affirmer's heirs and

²²⁰ See *infra* Part III.B.1.

²²¹ Creative Commons summarized the problems facing the existing Public Domain Dedication as follows:

Dedicating works to the public domain is difficult if not impossible for those wanting to contribute their works for public use before applicable copyright term expires. Few if any jurisdictions have a process for doing so easily. Laws vary from jurisdiction to jurisdiction as to what rights are automatically granted and how and when they expire or may be voluntarily relinquished. More challenging yet, many legal systems effectively prohibit any attempt by copyright owners to surrender rights automatically conferred by law, particularly moral rights, even when the author wishing to do so is well informed and resolute about contributing a work to the public domain.

Creative Commons, About CC0—"No Rights Reserved", <http://creativecommons.org/about/cc0> (last visited Mar. 29, 2010).

²²² *Id.*

²²³ See *infra* notes 225–26 and accompanying text.

²²⁴ Creative Commons, Creative Commons Legal Code, pml. <http://creativecommons.org/publicdomain/zero/1.0/legalcode> (last visited Mar. 29, 2010) [hereinafter CC0 1.0 Legal Code].

successors, fully intending that such Waiver shall not be subject to revocation, rescission, cancellation, [or] termination[.]”²²⁵ Should this attempt to abandon copyright fail, the license confers in the alternative a broad and unconditional license permitting free reuse of the works and a covenant not to sue.²²⁶

The CC0 license improves upon the Public Domain Dedication in a number of respects. The CC0 license’s Statement of Purpose, which lacks any parallel in the Public Domain Dedication, may supply a useful interpretive guide to courts or other authorities called upon to construe the license insofar as it explicates and justifies the author’s conscious determination to forgo proprietary rewards in favor of building the commons. For lawyers and policymakers steeped in copyright’s historically dominant proprietary-production paradigm, this concise introduction to the open-content movement’s alternative worldview may be highly valuable. The CC0 license also recognizes the potential legal infirmity of the clause abandoning copyright in the work and, in classic open-content fashion, adapts itself to the potentially hostile contours of existing law.

Other aspects of the CC0 license, however, may prove problematic. Both the abandonment clause and the alternative license clause emphasize the intent to create a permanent and irrevocable change in the ownership status of the copyright in the underlying work in order to expand the commons. Existing U.S. law, however, may not comfortably accommodate a transfer “to the detriment of Affirmer’s heirs and successors” that “shall not be subject to . . . termination,”²²⁷ nor an “irrevocable . . . license[.]”²²⁸ Such provisions may run afoul of the termination rights the Copyright Act confers upon the authors of expressive works, which cannot be waived or contracted away.²²⁹

Existing law, in sum, poses a number of obstacles to the growth of the public domain as a commons of freely reusable expressive works. Several of the routes by which expressive works once entered the public domain have been curtailed or eliminated; indeed, the only circumstance the Copyright Act presently expressly recognizes as ending protection under copyright for U.S. works is through the expiration of the statutory term of protection.²³⁰ The strong statutory presumption of continual proprietary protection influences other copyright policymakers, too; the courts, for their part, are exceedingly unlikely to find that an author has abandoned the rights vested

²²⁵ *Id.* § 2.

²²⁶ *Id.* § 3.

²²⁷ *Id.* § 2.

²²⁸ *Id.* § 3.

²²⁹ See *infra* notes 237–38 and accompanying text.

²³⁰ See 17 U.S.C. §§ 302–04 (2006). The qualifier “for U.S. works” is necessary to avoid the complicating effects of 17 U.S.C. § 104A, which provides for restoration of U.S. copyright in some foreign works that had previously entered the public domain in the United States. *But see* Golan v. Holder, 611 F. Supp. 2d 1165 (D. Colo. 2009) (invalidating this provision on constitutional grounds).

automatically by statute from the moment of fixation. Although licensing instruments exist that are designed to provide clear and unequivocal manifestations of intent to abandon copyright, those instruments, too, may not be fully effective in the United States. This background illuminates the multiple difficulties entailed in escaping from the strongly proprietary paradigm of existing copyright law. Those same difficulties, in turn, may color the courts' interpretations of the other method Congress selected in the Copyright Act of 1976 for strengthening authors' proprietary control over uses of their works: the statute's provisions governing terminations of copyright transfers and licenses.

B. Termination of Transfers

1. Text and Purposes

In the early 1930s, writer Jerome Siegel and artist Joseph Shuster created a comic-book character that came to acquire worldwide renown and spawned a host of commercial spin-offs. Originally conceived as a villain called "The Superman," Siegel and Shuster's character quickly evolved into an archetypal hero (with a distinctive costume and a back-story involving extraterrestrial origins), shed the "The" from his name, and took up crime-fighting.²³¹ In March 1938, Siegel and Shuster executed an agreement "assign[ing] to Detective Comics 'all [the] good will attached . . . and exclusive right[s]' to Superman 'to have and hold forever.'"²³² Siegel and Shuster received \$130 in exchange.²³³ Superman made his debut that spring in *Action Comics #1*,²³⁴ and a franchise was born. Superman made millions of dollars for Detective Comics and its successors, but despite a series of negotiations (and lawsuits) between the parties, Siegel and Shuster saw very little of this money.²³⁵

Siegel and Shuster's situation exemplified a pattern that, the legislative history suggests, occurred all too frequently: artists conveyed away their

²³¹ See *Siegel v. Warner Bros. Entm't Inc.*, 542 F. Supp. 2d 1098, 1102–05 (C.D. Cal. 2008) (describing origins and development of Superman). The Man of Steel has been a fixture of copyright casebooks ever since. See, e.g., *Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc.*, 191 F.2d 594 (2d Cir. 1951) (upholding validity of Detective Comics' copyright in Superman comics in case alleging that they had been infringed by "Captain Marvel"); *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432 (2d Cir. 1940) (sustaining judgment for copyright infringement against the creators of "Wonderman," a character differing from Superman chiefly in the color of his costume).

²³² *Siegel*, 542 F. Supp. 2d at 1107.

²³³ *Id.* The parties also executed a later agreement providing for additional per-page royalties for Siegel and Shuster's subsequent Superman stories and illustrations. The later agreement, however, reconfirmed that exclusive ownership of the rights to Superman had already been transferred to Detective Comics. See *id.*

²³⁴ *Id.* at 1110; see also *id.* at 1146–59 (reproducing the cover and thirteen-page Superman story from *Action Comics #1*).

²³⁵ See *id.* at 1111–13.

copyright interests in a work for a comparatively small sum and did not share in the resulting profits when the work later proved to be commercially valuable. In the years leading up to the passage of the Copyright Act of 1976, remedying these unremunerative transfers was identified as an important congressional objective. The 1961 Report of the Register of Copyrights, which proposed comprehensive copyright revision, noted that “authors are often in a relatively poor bargaining position” as compared with publishers and suggested that Congress should “permit them to renegotiate their transfers that do not give them a reasonable share of the economic returns from their works.”²³⁶ The Register singled out, as particularly problematic, transfers of authors’ rights in exchange for a one-time lump sum payment—just the sort of agreement Siegel and Shuster had made.²³⁷ To better protect authors, the Register proposed that all transfers or assignments of copyright not requiring continuing royalty payments should terminate automatically, by operation of law, twenty years after they were made.²³⁸ When that proposal encountered opposition, the Register proposed instead that authors be empowered (but not required) to terminate licenses or transfers of their rights after a fixed period of time.²³⁹ Congress accepted this alternative proposal, and it became part of the Copyright Act of 1976.²⁴⁰

²³⁶ STAFF OF H.R. COMM. ON THE JUDICIARY, 87TH CONG., REGISTER’S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 92 (Comm. Print 1961) [hereinafter REGISTER’S REPORT]. The Register recognized that one mechanism aimed at providing such an opportunity for renegotiation—to wit, the grant of a separate renewal term of copyright to the author at the expiration of the initial twenty-eight-year term of protection—already existed under the 1909 Act. *See id.* at 53–54; *see also supra* note 166 (summarizing dual-term framework). The reversion of renewal term rights, however, had failed adequately to protect authors against the risk of unremunerative transfers, due in part to court decisions upholding authors’ assignments of renewal-term rights made during the initial twenty-eight-year term of the copyright. *See, e.g.,* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943). If authors could validly contract away their renewal term rights at a time when their bargaining power was thought to be weakest, then the separate renewal estate provided no real benefit. As the Register observed: “It has become a common practice for publishers and others to take advance assignments of future renewal rights. Thus the reversionary purpose of the renewal provision has been thwarted to a considerable extent.” REGISTER’S REPORT, *supra*, at 53. Although later court decisions recognized that the renewal term rights would revert to the author’s estate, free and clear of any assignments or encumbrances made during the first term if the author died before the vesting of the renewal term rights, those cases did nothing to reduce the risk of unremunerative transfers where the author survived long enough for the renewal term rights (and hence, the prior assignment of those rights to the publisher) to vest. *See Stewart v. Abend*, 495 U.S. 207 (1990); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960). *See generally* Stephen W. Tropp, *It Had to be Murder or Will Be Soon—17 U.S.C. § 203 Termination of Transfers: A Call for Legislative Reform*, 51 J. COPYRIGHT SOC’Y U.S.A. 797, 804–06 (2004) (recounting some of this history).

²³⁷ *See supra* notes 217–18 and accompanying text; REGISTER’S REPORT, *supra* note 236, at 93 (“The situation in which authors are most likely to receive less than a fair share of the economic value of their works is that of an outright transfer for a lump sum.”).

²³⁸ REGISTER’S REPORT, *supra* note 236, at 93–94.

²³⁹ STAFF OF H.R. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REGISTER’S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 71–76 (Comm. Print 1965); Tropp, *supra* note 242, at 805–07.

²⁴⁰ Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at scattered sections of 17 U.S.C.).

The Copyright Act of 1976 included two provisions governing the termination of any transfer of license of copyright rights. The date of transfer at issue determines which of the two termination provisions applies.

For transfers made on or after January 1, 1978, the relevant statutory provision is § 203, captioned “Termination of Transfers and Licenses Granted by the Author.”²⁴¹ This termination provision applies to any “exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978,”²⁴² except for transfers by will or transfers involving works made for hire.²⁴³

For living authors, the mechanics of termination are comparatively uncomplicated. The author may unilaterally terminate any transfer during a five-year period that commences thirty-five years after the date of the original grant,²⁴⁴ provided that the author gives the transferee at least two years advance written notice.²⁴⁵ If the grant is not terminated within the five-year window, the transferee keeps the rights for the duration of the copyright, unless the parties have agreed otherwise.²⁴⁶ When the termination becomes effective, the rights conveyed in the original grant revert to the author,²⁴⁷ with one important exception: derivative works prepared under the terminated grant may continue to be utilized, but no new “derivative works based upon the copyrighted work covered by the terminated grant” may be created.²⁴⁸

The death of the original author complicates matters. The time period during which termination may occur (a five-year window commencing thirty-five years after the original transfer of rights) remains the same,²⁴⁹ as does the written notice requirement.²⁵⁰ Different parties, however, become

²⁴¹ 17 U.S.C. § 203 (2006).

²⁴² § 203(a). The words “by the author” signify that the termination provisions do not govern “transfers by the author’s successors in interest[.]” H.R. REP. NO. 94-1476, at 125 (1976); *see also* 17 U.S.C. § 101 (defining “transfer of copyright ownership”).

²⁴³ *See* § 203(a).

²⁴⁴ § 203(a)(3). This general rule is subject to a proviso where the original grant of rights included the right of publication of the work. In such a case, the five-year window during which the transfer may be terminated begins at the earlier of: (1) forty years after the grant, or (2) thirty-five years after publication of the work. *Id.*

²⁴⁵ § 203(a)(4). This provision of the statute also establishes requirements for the form and content of the written notice. It further provides that notice of termination may not be given more than ten years in advance. *See id.*

²⁴⁶ § 203(b)(6); *see also* *Walthal v. Rusk*, 172 F.3d 481 (7th Cir. 1999) (construing licensing agreement that was silent as to duration as permitting termination at will at any time). *But cf.* *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 585–86 (9th Cir. 1993) (refusing to construe copyright licensing agreement as terminable at will). *See generally* H.R. REP. NO. 94-1476, at 128 (noting that termination provisions were not intended to limit parties’ freedom to negotiate a license for a term shorter than thirty-five years).

²⁴⁷ 17 U.S.C. § 203(b).

²⁴⁸ § 203(b)(1).

²⁴⁹ § 203(a)(3).

²⁵⁰ § 203(a)(4).

entitled to terminate the grant.²⁵¹ Rather than adopting a simple rule allowing authors to decide who should be able to recapture their copyrights, Congress established a statutory succession scheme enumerating the parties who become entitled to terminate a grant of copyright rights following the death of the original author.²⁵² The parties who are entitled to terminate a deceased author's transfer of rights are:

- In the case of an author survived by a spouse, but not by any children or grandchildren, the author's surviving spouse holds the power to terminate the transfer;
- In the case of an author survived by at least one child or grandchild, but not by a spouse, the author's children share the termination rights equally, with the author's grandchildren eligible to vote the shares of their deceased parents on a *per stirpes* basis;
- In the case of an author survived both by a spouse and by at least one child or grandchild, the spouse holds fifty percent of the termination rights and the author's children collectively hold the other fifty percent divided equally among them, with the same *per stirpes* rule for grandchildren; and
- In the case of an author survived neither by a spouse nor by any children or grandchildren, the author's executor, administrator, personal representative, or trustee enjoys the power to terminate grants of the deceased author's copyright rights.²⁵³

Termination causes the granted rights to revert to the persons listed in the statutory succession scheme.²⁵⁴

Parties cannot opt out of the termination regime. The statute specifically provides 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 any future grant."²⁵⁵ Thus, every license or transfer of any

²⁵¹ 17 U.S.C. § 203(a)(2).

²⁵² This policy choice has been criticized on the grounds that it interferes with an author's freedom to dispose of her estate in accordance with her testamentary wishes. See Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 167–82 (2006). Where the author is survived by a spouse, child, or grandchild, the rights to terminate transfers made during the author's life and to recapture the transferred rights in the underlying work pass to the author's statutory successors irrespective of the terms of the author's will. See, e.g., *Larry Spier, Inc. v. Bourne Co.*, 953 F.2d 774, 777–78 (2d Cir. 1992).

²⁵³ See § 203(a)(2)(A)–(D). The listing of statutory successors seems to enshrine, as a matter of federal copyright law, a certain orthodoxy regarding "nuclear family" relationships that predominated during the 1960s and 1970s when the statute was drafted. See Tritt, *supra* note 252, at 181–82 (noting that blended and nontraditional families, as well as families headed by same-sex or unmarried couples, are nowhere comprehended within the statutory succession scheme established by the termination rules). The statute's disregard of nontraditional family structures was even stronger before 1998, when Congress (without explanation) added the paragraph permitting authors' executors, administrators, personal representatives, or trustees to succeed to the author's termination rights. See 3 PATRY, *supra* note 157, § 7:61.

²⁵⁴ See 17 U.S.C. § 203(b).

²⁵⁵ *Id.* § 203(a)(5) (emphasis added); see also H.R. REP. NO. 94-1476, at 125 (1976) ("although affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away."). This provision represented a reaction to court

copyright interest is inherently and unavoidably conditional: it is subject to future revocation by the author or the other persons named in the statute, notwithstanding the author's stated desires or the provisions of the original grant.²⁵⁶

Another part of the statute, § 304(c), governs the termination of transfers made before January 1, 1978.²⁵⁷ Many of the provisions mirror those of § 203: the same individuals (living authors or a list of statutory successors) hold termination rights, and the same provisions for written notice apply.²⁵⁸ There is, once again, a five-year window during which termination may occur, but it comes into being at a different time, measured not from the date of the original transfer, but from the date copyright in the underlying work attached.²⁵⁹ Again, the statute forbids parties to contract around the termination rules.²⁶⁰

The termination provisions were intended to compensate for unequal bargaining power as between authors and publishers who, Congress be-

decisions that had permitted contractual agreements between the parties to override Congress's attempts to protect authors against unremunerative transfers by granting a new estate in the renewal term. *See supra* note 221; Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 982–83 (1977).

The courts are presently divided on whether a new agreement between the same parties that supersedes an earlier transfer and makes a new transfer of the same rights is an "agreement to the contrary"—that is to say, whether the grantor retains the power to terminate the earlier grant notwithstanding the provisions of the later agreement. *Compare* Penguin Group (USA) v. Steinbeck, 537 F.3d 193, 202–04 (2d Cir. 2008) (upholding later agreement), *with* Classic Media, Inc. v. Mewborn, 532 F.3d 978, 982–86 (9th Cir. 2008) (invalidating later agreement). Although this disagreement may prove highly consequential as it affects the business relations of authors and publishers, it is unlikely to carry much significance in the context of open-content licensing. *See generally* Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights* (UC Berkeley Pub. Law, Research Paper No. 1525516, 2009), available at <http://ssrn.com/abstract=1525516> (arguing that statutory provisions should be construed to discourage opportunistic attempts by licensees to frustrate authors' termination rights).

²⁵⁶ *See* Lemley, *supra* note 96, at 141–42; *cf.* Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 Mo. L. REV. 85, 86 (1993) (because of statutory termination provisions, "an author's assignment of all his copyright rights is more like the conveyance of a fee simple subject to condition subsequent than the conveyance of a fee simple absolute").

²⁵⁷ *See* 17 U.S.C. § 304(c).

²⁵⁸ *See* § 304(c)(1), (2), (4). The grants subject to termination are somewhat broader under § 304(c) insofar as they include grants made other than by the original author, although the distinction is unimportant for present purposes. *See generally* H.R. REP. NO. 94-1476, at 140–42 (summarizing key differences between termination provisions of §§ 203 and 304(c)).

²⁵⁹ § 304(c)(3) ("Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later."). By permitting termination of existing assignments fifty-six years after the vesting of the initial copyright, Congress meant to ensure that authors and their successors, rather than assignees, benefited from the 1976 Act's extension of the second copyright term from twenty-eight to forty-seven years. *See* H.R. REP. NO. 94-1476, at 140 ("the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it"). Congress repeated this step in 1995, when it again extended the duration of existing copyrights by twenty years and gave authors a new termination opportunity. *See* 17 U.S.C. § 304(d); 3 PATRY, *supra* note 157, § 7:62.

²⁶⁰ § 304(c)(5).

lieved, could acquire rights for a comparative pittance and then grow wealthy off the author's work.²⁶¹ By allowing authors unilaterally to terminate unremunerative transfers, and by forbidding the parties to contract around the statute, Congress effectively gave authors and their heirs a second bite at the apple, thereby permitting them to recapture their rights and negotiate for more favorable licensing terms after time had revealed the true value of the author's work.²⁶²

The Superman case illustrates the termination provisions in operation. Siegel and Shuster parted in 1938 with rights that proved to be worth vastly more than the \$130 they received.²⁶³ Jerome Siegel died on January 28, 1996.²⁶⁴ On April 3, 1997, Siegel's widow and daughter served written termination notices under § 304(c), with a stated effective termination date of April 16, 1999, seeking to terminate the 1938 assignments of rights to the Superman character.²⁶⁵ The court noted the complexity of § 304(c)'s termination provisions, which it portrayed, with some justification, as a barrier to the parties' exercise of their rights.²⁶⁶ Nevertheless, it concluded that Siegel's heirs had satisfied the requirements of § 304(c) and rejected a number of defenses raised by Siegel's assignees.²⁶⁷ "After seventy years," the court concluded, "Jerome Siegel's heirs regain what he granted so long ago—the copyright in the Superman material that was published in *Action Comics*, Vol. 1."²⁶⁸

The Superman case confirms that the statute's termination provisions may be employed in a fashion that furthers Congress's intent to redress unremunerative transfers and remedy unequal bargaining power. That circumstance, however, does not limit the application of the statute. To the contrary, both the text of the statute and recent case law tend to suggest that the termination provisions apply even to an author's voluntary release of a copyrighted work under an open-content license, which clearly does not involve

²⁶¹ See H.R. REP. NO. 94-1476, at 124 ("A provision of this sort is 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.").

²⁶² This policy choice has been criticized on the grounds that it enables an author's heirs—who have themselves created nothing—to extract continuing rents based on the author's creation, to the detriment of the public. See William F. Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 932–33 (1997); cf. Deven R. Desai, *Copyright's Hidden Assumption: A Critical Analysis of the Foundations of Descendible Copyright* (Mar. 5, 2009), available at <http://ssrn.com/abstract=1353746> (suggesting that rhetoric in copyright debate surrounding the need to provide for authors' heirs has been strategically deployed to mask the real underlying battle between the interests of authors and publishers, and that the public's status as the ultimate beneficiary of authors' creativity has been unjustly overlooked).

²⁶³ See *supra* notes 231–35 and accompanying text.

²⁶⁴ Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1113 (C.D. Cal. 2008).

²⁶⁵ *Id.* at 1114. Shuster's heirs did likewise, although their rights were not before the court that heard the case involving Siegel's termination. See *id.* at 1114 n.3.

²⁶⁶ See *id.* at 1117.

²⁶⁷ See *id.* at 1117–39.

²⁶⁸ *Id.* at 1145.

the problem of unequal bargaining power that the termination provisions were designed to remedy.

2. *Termination of Open-Content Licenses*

A literal reading of the Copyright Act's termination provisions suggests possible difficulty for users of works distributed under the various open-content licensing arrangements illustrated earlier.²⁶⁹ Each of the open-content licenses considered above authorizes members of the public to copy, to distribute, and (in most cases) to modify the licensed works,²⁷⁰ actions that would otherwise be reserved by statute to the copyright holder alone. Thus, every open-content license creates a “nonexclusive grant of a . . . license of . . . any right under a copyright”²⁷¹ within the meaning of the statute's termination provision.²⁷² Accordingly, individual contributors²⁷³ to a host of open-content projects would appear to be empowered under the statute to terminate licenses and recapture the copyright rights in their contributions to the project.²⁷⁴ Existing derivative works based on those contributions could continue to be used, but no new derivatives could be created.²⁷⁵ Thus, although the issue is less than perfectly clear, the existing statutory text suggests that open-content licenses are not (and cannot be) truly perpetual, notwithstanding the intent of licensors and the settled understandings of the open-content user community.²⁷⁶

²⁶⁹ See *supra* Parts II.B-C. Because all the open-content licenses discussed above were promulgated, and all the works licensed thereunder were licensed, after January 1, 1978, the pertinent termination provision is § 203.

²⁷⁰ See generally *supra* Part II.A. The exception would be for works licensed under one of the Creative Commons “No Derivatives” (ND) variants, or to designated Invariant Sections of documents licensed under the GFDL. See *supra* notes 116, 128–30 and accompanying text.

²⁷¹ 17 U.S.C. § 203(a) (2006).

²⁷² In general, open-content licenses do not constitute “transfers of copyright ownership” as that term is defined in 17 U.S.C. § 101, because they are, by their terms, nonexclusive—that is, the licenses do not preclude the author from licensing the same rights in the work to other licensees. Nonexclusive licensing arrangements fall outside the definition of “transfers of copyright ownership” in § 101, but are expressly made subject to the statute's termination provision in § 203(a).

²⁷³ As noted above, the statute's termination provisions do not apply to works made for hire—for example, a work prepared by an employee within the scope of employment. § 203(a); see also *supra* notes 200, 243 and accompanying text. In the specific context of FOSS, this limitation on the scope of the statute's termination provision may be highly relevant, in view of the growing number of technology firms whose employees participate in open-source software development as part of their employment. See DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 92 (2006) (“No longer just an ad-hoc collection of individual volunteers, most of the participants in the Linux ecosystem are paid employees of Fortune 100 tech firms.”).

²⁷⁴ See 17 U.S.C. § 203(b).

²⁷⁵ See *id.* § 203(b)(1).

²⁷⁶ Additional counterarguments against this plain-language reading of the statute are considered *infra* Part IV.A.

Recent case law, although not directly on point, nevertheless provides support for this reading of the statute. In *Jacobsen v. Katzer*,²⁷⁷ Jacobsen released copyrighted software code under the so-called Artistic License,²⁷⁸ a FOSS-type license²⁷⁹ that permitted copying, modification, and reuse of the software subject to attribution and copyleft conditions.²⁸⁰ Katzer copied Jacobsen's code into his own software without complying with the terms of the Artistic License,²⁸¹ and Jacobsen sued for copyright infringement.²⁸² Katzer argued, and a federal district court agreed, that his breach of the terms of the Artistic License gave rise to liability, if at all, only for breach of contract, not for infringement of copyright in Jacobsen's software.²⁸³ Reversing, the Federal Circuit held that the Artistic License was a valid copyright license and that if the licensee failed to honor the conditions stated in the license, then the licensee could no longer claim to be entitled to exercise the rights granted therein.²⁸⁴ Although the Court of Appeals' opinion considered only the terms of the Artistic License, its reasoning has been thought to validate the enforceability of other open-content licenses as well.²⁸⁵ If open-content

²⁷⁷ 535 F.3d 1373 (Fed. Cir. 2008).

²⁷⁸ The language of the applicable version 1.0 of the Artistic License is available at The Perl Foundation, Artistic License 1.0, http://www.perlfoundation.org/artistic_license_1_0 (last visited Mar. 30, 2010).

²⁷⁹ Revision 1.0 of the Artistic License was not approved by either the FSF or OSI. See *supra* note 48 (noting those organizations' lists of software licenses that have been found compatible with their respective principles). Subsequent revisions brought the license into compliance with both the FSF's and OSI's principles. See The Perl Foundation, Artistic License 2.0, http://www.perlfoundation.org/artistic_license_2_0 (last visited Mar. 30, 2010). This later revision of the license was not at issue in *Jacobsen v. Katzer*. Nevertheless, even the earlier version of the Artistic License was clearly aimed at building a commons of freely reusable expressive works, and in that sense it may be recognized as a FOSS-type license notwithstanding its deviations from some of the principles enunciated by the FSF and OSI.

²⁸⁰ This is a slight, but inconsequential, oversimplification. The actual conditions attached to the Artistic License 1.0 are quoted in the court's opinion. See *Jacobsen v. Katzer*, 535 F.3d 1373, 1380 (Fed. Cir. 2008).

²⁸¹ *Id.* at 1376–77.

²⁸² *Id.* at 1375–76.

²⁸³ See *Jacobsen v. Katzer*, No. 06-CV-01905, 2007 WL 2358628 (N.D. Cal. Aug. 17, 2007), *rev'd*, 535 F.3d 1373 (Fed. Cir. 2008). Interpreting open-content licenses as imposing mere contractual obligations has been recognized as problematic on several fronts, ranging from the difficulty of demonstrating assent by the licensee, to problems involving the existence of consideration, to the difficulty of ascertaining damages in the event of breach where the underlying work was given away for free. See, e.g., Asay, *supra* note 95, at 285–86; González, *supra* note 47; Kumar, *supra* note 50, at 16–24; Wacha, *supra* note 95, at 457–59, 481–83. *But cf.* Gomulkiewicz, *supra* note 73, at 346 (“There seems to be a mistaken belief that things are either licenses or contracts when, in fact, most of the time, they are both contracts and licenses—that is, contracts that contain licenses.” (footnotes omitted)).

²⁸⁴ See *Jacobsen*, 535 F.3d at 1381–83; see also, e.g., Gomulkiewicz, *supra* note 73, at 340–43 (describing the case); Michael J. Madison, *Notes on a Geography of Knowledge*, 77 *FORDHAM L. REV.* 2039, 2056–57 (2009) (same).

²⁸⁵ See, e.g., Baker, *supra* note 95, at 787 (labeling *Jacobsen* a “landmark case”); Gomulkiewicz, *supra* note 73, at 346 (noting that *Jacobsen* confirmed the enforceability of FOSS licenses and the availability of injunctive relief in the event of breach); Vetter, *supra* note 85, at 2089–90 (“If the district court’s analysis in *Jacobsen v. Katzer* had remained, it would have undermined a foundational premise of FOSS licenses.”).

licenses are valid and enforceable as licenses under copyright law, however, then there would appear to be little justification for declining to apply the provision of the Copyright Act governing termination of such licenses.

Termination of an open-content license would have effects on the underlying project that, while difficult to predict, are unlikely to be salutary. Consider an example from the FOSS world: software development has been recognized as an irreducibly complex process insofar as the production of software works exceeding a certain (and comparatively rudimentary) level of complexity is a challenge beyond any individual developer.²⁸⁶ To make all but the simplest programs, therefore, multiple programmers must collaborate. When they do so within the hierarchical structure of a single firm, no copyright issues arise from one programmer's reuse of another's work because the employer holds the copyright to each employee's contributions under the work made for hire rule.²⁸⁷ In contrast, contributors to FOSS projects must coordinate their activities outside any single hierarchical structure.²⁸⁸ Open-content licenses make such coordination lawful; they substitute for the hierarchical structure of a firm by allowing each contributor to the project to adapt and reuse code contributed by earlier contributors. Each FOSS work, in other words, is protected by not one copyright, but many: each contributor's contributions are individually protected from the moment of fixation, but then licensed for free reuse by members of the public.²⁸⁹ If any of those underlying licenses is terminated, however, then the project may be effectively stymied, for the creation of further derivative works based upon the terminating author's contribution would be prohibited.²⁹⁰

Although the FOSS community has never experienced an instance of license termination, one recent case did raise the possibility that code contributed to a FOSS project long ago was not validly licensed. The essence of the complaint in *SCO v. IBM* was that IBM had contributed code to the Linux kernel that was actually copyrighted by plaintiff SCO.²⁹¹ SCO's case foundered when a district court found that it did not actually own the code in which it claimed copyright.²⁹² While the case was pending, however, it appeared that Linux software developers would have to review an indetermi-

²⁸⁶ See WEBER, *supra* note 9, at 59 ("there are inherent limits to software that can be built by one or two people").

²⁸⁷ 17 U.S.C. § 201(b) (2006).

²⁸⁸ See WEBER, *supra* note 9, at 62–65.

²⁸⁹ See Vetter, *supra* note 68, at 81 (describing the "web of license interdependency" among contributors to a FOSS project).

²⁹⁰ See § 203(b)(1).

²⁹¹ See Kerry D. Goetsch, Recent Development, *SCO Group v. IBM: The Future of Open-Source Software*, 2003 U. ILL. J.L. TECH. & POL'Y 581, 583–84 (2003); Zittrain, *supra* note 9, at 266–67.

²⁹² See *SCO Group v. Novell, Inc.*, No. 2:04CV139DAK, 2007 WL 2327587, at *35 (D. Utah Aug. 10, 2007). On March 30, 2010, following a trial, a jury found that the terms of the parties' asset purchase agreement did not result in a transfer of copyright in the underlying code to SCO. *SCO Group, Inc. v. Novell, Inc.*, No. 2:04-CV-139 TS, Special Verdict Form Mar. 30, 2010 (copy on file with the Harvard Journal on Legislation).

nate portion of the millions of lines of code that made up the Linux kernel, extract any portions of the code copyrighted by SCO, and write noninfringing replacement code—a potentially daunting prospect.²⁹³ The termination provisions of the Copyright Act, however, make every FOSS contributor another potential SCO: contributors may revoke permission, years after the fact, to copy and reuse their contributions, thereby potentially requiring significant re-engineering of open-content projects.

Several factors likely contribute to explaining why the Copyright Act's termination provisions have gone largely unrecognized as a source of potential trouble within the open-content community thus far. First, too little time has passed to make termination an immediate and concrete threat. To take a purely hypothetical example, consider a FOSS work licensed under the GPL and released on August 25, 1991.²⁹⁴ The earliest possible date for termination of the license for that work under § 203 would be August 25, 2026, thirty-five years after the date of the grant. The latest possible termination date would be August 25, 2031, forty years after the grant.²⁹⁵ Notice of termination would have to be served between August 25, 2016 and August 25, 2029.²⁹⁶ Thus, even the very earliest works issued under open-content licenses will not become subject to possible termination until several years from now. Nevertheless, the mere possibility of future termination likely conflicts with user expectations in the open-content community, which presume that the licensed works will remain available for free use in perpetuity.²⁹⁷

Second, termination may be viewed as less of a threat within the open-content community because contributors to that community who act from a desire to build a commons of freely reusable expressive works are thought not to be likely to change their minds and seek to reacquire proprietary rights in their works.²⁹⁸ Not all open-content contributors share that motive, however,²⁹⁹ and it is naïve to assume that none of the millions of individuals who have contributed to open-content projects will ever become interested in recapturing copyright rights. Furthermore, it is not only the contributors'

²⁹³ See Vetter, *supra* note 68, at 81 & n.62 (noting that even this alternative would leave downstream users of the kernel in a potentially vulnerable position).

²⁹⁴ FOSS aficionados will recognize August 25, 1991 as the date of the first public announcement by programmer Linus Torvalds of the project that became the Linux operating system. See KELTY, *supra* note 10, at 215.

²⁹⁵ See generally *supra* note 244 and accompanying text.

²⁹⁶ To be more precise, the notice must be served no earlier than ten years before the earliest available date in the five-year termination window and no later than two years before the latest possible termination date, but in no event may the licensor provide less than two years' notice. See generally *supra* note 245 and accompanying text.

²⁹⁷ See *supra* notes 74–76, 120–29, 134–42 and accompanying text.

²⁹⁸ This may be especially true for partisans of the “free software” side of the “free and open-source” conceptual divide. See *supra* note 47. Those who see the avoidance of proprietary entanglement as a moral imperative may understandably be less likely to depart from that position than those who view commons-based peer production in more technical terms.

²⁹⁹ See *supra* note 153 and accompanying text.

own wishes that must be considered, for the termination power expressly extends to the contributors' statutory heirs,³⁰⁰ who may or may not share the contributors' views as to the importance of a vibrant informational commons.

Finally, the possibility of termination may simply be perceived as a risk about which little can be done under the present state of the law. Open-content licenses preserve a commons of informational works because it is well settled (as *Jacobsen* illustrates) that the author of a work may attach enforceable conditions to authorized uses of the work.³⁰¹ There is no comparably settled doctrine, however, in favor of the making of a permanent and non-terminable license of rights under copyright. The statute, to the contrary, expressly circumscribes private action to create a non-terminable license.³⁰² Further, judicial skepticism toward the nearest existing analogue—copyright abandonment³⁰³—may reveal much about the limited opportunity available for open-content advocates to leverage existing law. Or, to adapt an analogy frequently deployed in commentaries on the FOSS phenomenon, the “legal jujitsu”³⁰⁴ that sustains the open-content commons requires something to push against; when the issue is the creation of a perpetual, non-terminable license, that “something” may be absent.

3. *Termination of Dedications to the Public Domain*

The same logic may suggest trouble for an author's attempt to abandon copyright and dedicate a work to the public domain, particularly via specialized copyright licenses.³⁰⁵ When copyright rights attach automatically upon fixation and formalities are irrelevant, it is quite possible that a court may construe an author's post-fixation dedication of the work to the public domain as a “nonexclusive grant of a transfer or license or copyright or of any right under a copyright”³⁰⁶ that is necessarily subject to the statute's termination provisions. This interpretation would allow the author to terminate her abandonment of copyright and recapture proprietary rights in the work.

This issue remains underexamined in the literature to date.³⁰⁷ Nearly a generation ago, Professor Robert Kreiss examined the interplay of the stat-

³⁰⁰ See *supra* note 253 and accompanying text.

³⁰¹ See *supra* note 61 and accompanying text.

³⁰² See 17 U.S.C. §§ 203(a)(5), 304(c)(5) (2006); see also *supra* notes 255–56 and accompanying text.

³⁰³ See generally *supra* Part III.A.2.

³⁰⁴ BENKLER, *supra* note 11, at 65. See generally *supra* note 99 and accompanying text.

³⁰⁵ See generally *supra* Part III.A.3.

³⁰⁶ 17 U.S.C. § 203(a).

³⁰⁷ See FISHMAN, *supra* note 182, § 6.02[4] (suggesting that terminating one's own abandonment of copyright may be possible, but that users of the work who believed it to be in the public domain should prevail on an equitable estoppel defense to any infringement claim); Phillip Johnson, “*Dedicating*” *Copyright to the Public Domain*, 71 MOD. L. REV. 587, 608–09 (2008) (also suggesting that dedications to the public domain are revocable by licensor subject to estoppel defenses).

ute's termination provisions and the doctrine of copyright abandonment.³⁰⁸ Professor Kreiss, however, viewed the issue in a seemingly idiosyncratic context, asking whether the exclusive licensee of a copyrighted work (rather than the author of that work) could somehow "abandon" copyright in the work as a means of thwarting the licensor's power to terminate the license.³⁰⁹ Professor Kreiss reasoned that the licensee had no power to "abandon" rights it did not actually hold and that the licensee's purported abandonment of copyright in the work would not prevent the licensor from recovering those rights via the termination provisions. This possibility, although seemingly plausible given the breadth of the statutory termination clause, would surely surprise members of the public who had relied on the licensee's truthful statements that "we hold the exclusive rights to this work, and we hereby dedicate said work to the public domain."³¹⁰

The point is not that members of the public would necessarily be liable for copyright infringement in the event of termination of an author's dedication of a work to the public domain. Perhaps accused infringers could prevail under an estoppel theory.³¹¹ Or perhaps they could argue that construing the statute to allow recapture of proprietary rights in a work previously in the public domain is unconstitutional.³¹² The point, rather, is that under the currently existing provisions of the Copyright Act, there appears to be little the author can do *ex ante* to make her own dedication of a work to the public domain perpetual and irrevocable.

Although private parties may be statutorily disabled from crafting licensing instruments that avoid the Copyright Act's termination provisions, there are some possible arguments that courts might employ to effectuate a licensor's intent in making a non-terminable grant. As discussed below, however, these arguments may not fully match the force of the argument for termination of an open-content license based on the statute's literal text.

IV. CONSTRUING LICENSES TO AVOID TERMINATION

Siegel and Shuster gave up the legal right to control Superman and received \$130.³¹³ Linus Torvalds did the same with the Linux operating system and received zero dollars.³¹⁴ What separates the two scenarios, beyond the obvious, is the absence in the latter of any recognizable form of coercion. An author's voluntary selection of an open-content license cannot plausibly

³⁰⁸ See Kreiss, *supra* note 256.

³⁰⁹ See *id.* at 87–90.

³¹⁰ See *id.* at 112.

³¹¹ See *supra* note 307.

³¹² See *Golan v. Holder*, 611 F. Supp. 2d 1165 (D. Colo. 2009); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); *cf. infra* note 336 and accompanying text.

³¹³ See *supra* note 233 and accompanying text.

³¹⁴ See *supra* note 9 and accompanying text.

be analogized to a transaction in which a powerful licensee pressures an author into an unremunerative exchange. The Copyright Act's termination provisions were enacted to strengthen authors' resistance to such pressures, and courts may rightly question why the statute should be applied in circumstances, such as open-content licensing, where these pressures are manifestly absent.

A. *Modifying Copyright Abandonment*

Professor Lydia Pallas Loren recently made a cogent and forceful argument that Creative Commons licenses should not be subject to termination.³¹⁵ Professor Loren noted that allowing a licensor to "terminate" a Creative Commons license and recapture full ownership of copyright in the licensed work would be unjust in two distinct respects. First, it would flout the intent of the author as expressed at the time the work was created.³¹⁶ Second, it would unfairly surprise members of the public who reasonably relied on the author's assurances that the content was free to copy.³¹⁷ Professor Loren concluded that the courts should craft a new doctrine of limited copyright abandonment that would preclude application of the Copyright Act's termination provisions to grants that are (1) overt, (2) clear, and (3) to the public.³¹⁸ Although Professor Loren focused her analysis on the Creative Commons family of licenses, the definition she proposed to employ for limited copyright abandonment would apply equally to other open-content licenses (or, indeed, to an author's express abandonment of copyright in a work).

Nevertheless, it may be a mistake to rely too heavily on the courts to create a novel doctrine of limited copyright abandonment. Precedent is against it, as Professor Loren recognized.³¹⁹ A number of considerations, moreover, may make the courts less inclined to resist the force of stare decisis here.

First, although permitting termination of a Creative Commons license would be inconsistent with the intent of the author at the time of publication, the statute's termination provisions make the author's original intent non-dispositive: they allow authors to change their minds (by forbidding waiver

³¹⁵ See Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 *GEO. MASON L. REV.* 271 (2007).

³¹⁶ See *id.* at 297 (arguing that when an author elects to "select[] a semicommons status for his work" rather than full copyright protection, "the law should recognize the binding nature of that commitment.").

³¹⁷ See *id.* at 295 ("When a work is marked with a notice that it is licensed under a Creative Commons license, the public is informed that instead of the default rules of copyright law, some uses that copyright law would prohibit are instead permitted.").

³¹⁸ *Id.* at 323–24.

³¹⁹ See *supra* note 208 and accompanying text.

of termination rights)³²⁰ and permit parties other than the author (if the author is dead) to decide whether termination occurs.³²¹

Second, the reliance argument—that members of the public, having reasonably relied on the provisions of the author’s Creative Commons grant, are entitled not to have the grant terminated—is ultimately circular, because the public’s reliance is reasonable only if the grant is not subject to termination in the first instance. A court might just as readily reason that when members of the public receive a grant of rights under an open-content license, they do so with express statutory notice that all such grants are terminable and can have no reasonable basis for relying on the license being permanent.

Third, although Professor Loren correctly notes that the termination provisions seem to apply most naturally to arm’s-length transactions between two named parties, rather than an author’s release of rights to unknown (and unknowable) members of the public,³²² the statutory text imposes no requirements as to the form of the parties’ transaction.³²³ Indeed, the statute is conspicuously broad; the termination power extends to any “exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright.”³²⁴ As one court recognized, “common sense, good business judgment and even a modicum of legal intuition dictate that a transfer should clearly name the transferee, [but] neither the statute nor the case law require it.”³²⁵

In sum, although a new doctrine of limited copyright abandonment may avoid the risks that the termination provisions presently pose to users of works distributed under open-content licenses, it is far from clear that existing doctrine is sufficiently flexible to accommodate such a development. As an alternative, however, the courts may be able to justify limits on termi-

³²⁰ See R. Anthony Reese, *Are Creative Commons Licenses Forever?: Authors’ Termination Rights and Open-Content Licensing* (Aug. 31, 2009) (unpublished manuscript at 15, on file with author) (noting that the “statute’s policy is clearly to allow the author . . . to change her mind, terminate [a] transfer, and attempt to resell the recaptured rights,” and that “it is not clear that the same policy should not apply in the Creative Commons situation”).

³²¹ See *supra* notes 252–54 and accompanying text.

³²² See Loren, *supra* note 315, at 319 (noting that Creative Commons licenses “do not contain an execution date (nor do they contain a signature)” and do not identify licensees to whom termination notices would need to be sent). This characteristic typifies open-content licenses, which do not mimic the form of arm’s-length transactions. See *supra* notes 30–33 and accompanying text.

³²³ Professor Anthony Reese has also highlighted sound policy justifications against limiting the scope of authors’ termination rights to those grants signed by the author. See Reese, *supra* note 320, manuscript at 9–13.

³²⁴ 17 U.S.C. § 203(a) (2006); see also *id.* § 304(c) (termination power reaches “the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it”).

³²⁵ *Sunham Home Fashions, LLC v. Pem-Am., Inc.*, 2002 WL 31834477, at *7 (S.D.N.Y. Dec. 17, 2002), *aff’d*, 83 Fed. App’x 369 (2d Cir. 2003). It would be odd, as well, to hold nonexclusive licenses to a higher standard of formal regularity than actual transfers of copyright ownership.

nation of open-content licenses by analogy to the abandonment provisions of the Patent Act.

B. *Patent Abandonment and the Copyright Act*

The first person who “invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor,”³²⁶ so long as the invention is useful,³²⁷ novel,³²⁸ and nonobvious,³²⁹ and so long as none of a series of statutory exceptions bars the issuance of the patent.³³⁰

Although inventors may patent their discoveries, they are not obliged to do so. Nearly two centuries ago, the Supreme Court recognized an inventor’s right to “abandon his invention, and surrender or dedicate it to the public.”³³¹ This right also has been expressly recognized in the patent statutes continuously since 1839.³³² It is recognized today in § 102(c), which bars an award of patent if the inventor “has abandoned the invention.”³³³ The touchstone under § 102(c) is whether the inventor clearly intended to dedicate the invention to the public.³³⁴ Thus, under the Patent Act, inventors may expressly relinquish rights in their inventions for the benefit of the public—either expressly under § 102(c) or by taking any of the other actions that the statute specifies as barring patentability.³³⁵ The result in either case is that the invention enters the public domain and may not thereafter be patented.³³⁶

Given that the Patent Act and the Copyright Act are two different statutes, the presence of clear avenues of abandonment in the one may not necessarily say much about the apparent lack of similar provisions in the other. On multiple occasions, however, the Supreme Court has suggested that the

³²⁶ 35 U.S.C. § 101 (2006). Although the words “first person” do not appear in § 101, this is the practical effect of § 102(f) (2006), which bars the award of a patent to a person who “did not himself invent the subject matter sought to be patented.”

³²⁷ *Id.*

³²⁸ *Id.* § 102(a), (e)–(g).

³²⁹ *Id.* § 103(a).

³³⁰ *See id.* § 102(b)–(d).

³³¹ *Pennock v. Dialogue*, 27 U.S. 1, 16 (1829); *see also Kendall v. Winsor*, 62 U.S. 322, 329 (1858).

³³² *See* Patent Act of 1839, ch. 88, § 7, 5 Stat. 353, 354 (entitling applicant to patent “except on proof of abandonment of such invention to the public”).

³³³ § 102(c). The phrasing of this provision, although grounded in Supreme Court decisions like *Pennock*, is infelicitous; it would be more precise to say that the inventor has “abandoned” her *right to obtain a patent* on the invention. *See, e.g., ALAN L. DURHAM, PATENT LAW ESSENTIALS: A CONCISE GUIDE* 123 (2004).

³³⁴ *See, e.g., Moore v. United States*, 1977 U.S. Ct. Cl. 578 (1977).

³³⁵ *See supra* note 330 and accompanying text. For example, an inventor might achieve the same result as an express abandonment of the invention under § 102(c) simply by failing to submit a patent application for more than one year after offering the invention for sale to the public, which would bar patentability under § 102(b).

³³⁶ *See Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (“Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”).

two statutes are joined by common purposes and should be interpreted harmoniously with one another. Indeed, the Court has twice read the Copyright Act as if it included language that actually appears in the Patent Act.³³⁷

In *Sony Corp. of America v. Universal City Studios, Inc.*,³³⁸ the Court considered whether Sony, the manufacturer of the “Betamax” video cassette recorder (“VCR”), was contributorily liable for incidents of copyright infringement that occurred when Betamax owners recorded copyrighted television programming without permission. To answer that question, the Court (per Justice Stevens) shifted the rhetorical landscape from copyright law to patent law, based on their “historic kinship.”³³⁹ The Patent Act, the Court observed, implicitly excused the sale of “a staple article or commodity of commerce suitable for substantial noninfringing use”³⁴⁰ from the scope of liability for patent infringement. The Court adopted this rule as a matter of copyright law, despite the absence of any comparable language in the text of the Copyright Act.³⁴¹ Because the Betamax VCR was capable of at least two non-infringing uses (authorized recording and “time-shifting,” which the Court determined to be a fair use even if unauthorized),³⁴² it qualified as a “staple article of commerce.” Therefore, the Court concluded, “Sony’s sale of such equipment to the general public does not constitute contributory infringement of respondents’ copyrights.”³⁴³

Twenty years after *Sony*, the Court again considered the issue of secondary liability for the manufacturer of a copying technology. The question in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*³⁴⁴ was whether the producers of the Grokster and Morpheus file-sharing software programs were secondarily liable for copyright infringements by users of those programs. Lower courts, relying on *Sony* and then-existing doctrines of secondary liability, held that they were not.³⁴⁵

³³⁷ The Court’s analytical approach in these cases might readily be criticized, of course. See, e.g., WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 183–85 (1999) (arguing that different statutes are essentially the products of different authors writing for different audiences, and should not be interpreted as the work of a single creator); Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 981–82 (2007) (criticizing Court’s borrowing of patent concepts when construing the Copyright Act).

³³⁸ 464 U.S. 417 (1984).

³³⁹ *Id.* at 439.

³⁴⁰ 35 U.S.C. § 271(c) (1982).

³⁴¹ *Sony*, 464 U.S. at 442. The Court held that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.” *Id.*

³⁴² See *id.* at 443–47 (noting approval or acquiescence by many large copyright holders in public taping of their broadcasts), 447–55 (finding “time-shifting,” or the recording of a broadcast for a single viewing at a later time, to be noninfringing under fair use doctrine).

³⁴³ *Id.* at 456.

³⁴⁴ 545 U.S. 913 (2005).

³⁴⁵ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1162–66 (9th Cir. 2004), *rev’d*, 545 U.S. 913 (2005).

The Supreme Court responded by borrowing a new theory of liability, nowhere stated in the Copyright Act, from the patent statute. The Patent Act includes a provision stating that “[w]hoever actively induces infringement of a patent shall be liable as an infringer.”³⁴⁶ The Court, per Justice Souter (writing for three Justices), declared that:

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.³⁴⁷

Read broadly, *Sony* and *Grokster* supply a possible answer to the argument that partial or total abandonments of an author’s copyright interests are necessarily impermanent. Copyright and patent, the argument would go, are closely related.³⁴⁸ If Congress, in drafting the Copyright and Patent Acts, omitted provisions in one statute that nevertheless appear relevant to the other, the courts should not lightly presume that the difference in language reflects a difference in legislative intent. Rather, courts should (as the Supreme Court did in both *Sony* and *Grokster*) consult the purposes behind the statutory language in one statute and ask whether the purpose justifies reading the other statute in a parallel fashion.

The Patent Act’s abandonment provisions exist to protect, in the Supreme Court’s words, “the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public.”³⁴⁹ Copyright policy provides no basis to deny authors the opportunity to confer a similar public benefit. An abandoned invention irrevocably enters the public domain and cannot thereafter be withdrawn.³⁵⁰ The same consequence should follow an author’s decision to grant rights in her work to the public, whether partial (under an open-content license) or *in toto* (via abandonment). If we recognize authors’ rights to permit free copying and modification of their works, it should follow that those rights can be made (as they are under the patent statute) permanent, irrevocable, and not subject to termination.

There is reason to doubt, however, whether the courts will read the Patent Act’s abandonment provision into the Copyright Act in the same way that *Sony* and *Grokster* imported some of the patent statute’s liability provisions. In both *Sony* and *Grokster*, the Copyright Act was silent on the question before the court, and the question was whether the court would fill this

³⁴⁶ 35 U.S.C. § 271(b) (2006).

³⁴⁷ *Grokster*, 545 U.S. at 936–37.

³⁴⁸ *Grokster*, 545 U.S. 913; *Sony*, 464 U.S. 417.

³⁴⁹ *Kendall v. Winsor*, 62 U.S. 322, 329 (1858).

³⁵⁰ See *supra* notes 331–36 and accompanying text.

gap by referring to language in the Patent Act.³⁵¹ A court may be less willing to borrow language from the Patent Act where the effect is not to fill in a gap, but rather to displace language (to wit, the termination provisions) that actually appears in the Copyright Act. Furthermore, patent abandonment is a component of a larger regime that places the burden of seeking protection squarely on the inventor.³⁵² It makes sense to extend binding force to an inventor's decision to abandon an invention (or to take one of the other steps that negates patentability) in a regime that makes the inventor's action determinative of the invention's legal status; where protection exists automatically irrespective of the author's conduct, as in copyright, courts may be less inclined to attach permanent and irreversible consequences to the author's statements. Finally, absent an authoritative construction of the statute from the Supreme Court, lingering uncertainty as to the proper judicial construction of the copyright statute and whether the courts will permit termination, may itself chill the use of open-content licenses in the interim. The better alternative, therefore, may be to seek a statutory amendment.

V. REFORMING COPYRIGHT TO PRESERVE OPEN CONTENT

Congress, seemingly acting from a praiseworthy desire to benefit authors, unwittingly created an obstacle to the ability of authors purposefully to expand the commons through the use of open-content licenses. The statutory termination provisions, which were designed to remedy unremunerative transfers, may apply by their terms even to licensing arrangements that pose none of the risks that moved Congress to act. With the courts ill-positioned to remedy the problem, it makes sense to seek legislative action to place a firmer legal footing under open-content projects.

The termination provisions, as with much of the remainder of the Copyright Act, presuppose a production scheme in which authors' proprietary interests dominate; indeed, Congress justified the termination provisions precisely because they further authors' interests in capturing the economic returns for their work.³⁵³ The statute's baseline assumption that all authors wish to capture the full economic value of the works they produce has been placed in doubt by the success of the open-content movement.³⁵⁴ That move-

³⁵¹ See *supra* notes 341, 347 and accompanying text.

³⁵² See *supra* notes 326–30 and accompanying text.

³⁵³ See *supra* notes 261–62 and accompanying text.

³⁵⁴ Professor Reese has argued that this is not so and that it is perfectly foreseeable that authors may wish temporarily to permit reuse of their works by open-content projects, then later recapture and market the rights in their contributions. See Reese, *supra* note 320, manuscript at 19 (“Interpreting Section 203 to apply to Creative Commons licenses thus seems largely consonant with the policies that section implements.”). Professor Reese and I simply read the record differently. Particularly where the governing licensing instruments include express representations to licensees concerning the permanence of the grant (see *supra* notes 74, 77, 120, 140, 215, 224–26 and accompanying text) and the open-content community has apparently taken these provisions at face value (see *supra* notes 75–76, 122, 147 and accompanying text), Professor Reese seems to endorse a simple bait-and-switch, permitting licensors

ment arose only after the enactment of the Copyright Act of 1976, however, and it seems impossible that Congress could have intended, in 1976, to squelch the commons-based peer production phenomenon that would later arise.³⁵⁵ The risks that the statute's termination provisions pose to open-content projects are unintended consequences, not conscious purposes, of the enacted text.³⁵⁶ Updating the statute to eliminate those unintended consequences would be conceptually valuable insofar as it would recognize, in positive law, the changes in the baseline assumption of proprietary production that have occurred since 1976.

Comprehensive copyright reform—a top-to-bottom statutory rewrite of the sort Congress is presently debating for the Patent Act³⁵⁷—is surely not in the cards at present for political reasons. Although Professor Pamela Samuelson has launched a worthwhile project aimed at sketching the broad contours of a future model copyright law, even she concedes that the effort is not presently politically feasible.³⁵⁸ The existing copyright regime supports concentrated, profitable, and politically influential industries,³⁵⁹ and Congress perceives the existing structure of intellectual property law as defining an area of American competitive advantage in global trade.³⁶⁰ Sweeping re-

years after the fact to renege on their own assurances of a perpetual grant and demand compensation from users of the licensed works. To put it another way, Professor Reese and I agree that current law seems to permit termination of an open-content license even where the terms of the license provide for a perpetual grant. We differ insofar as I regard this as a flaw, not a benefit, of the current statutory regime. (I would, of course, have no objection to authors making a limited-term grant of rights in their works to the use and benefit of the public where the temporary nature of the grant was apparent on the face of the license, nor to the application of the termination provisions to a license that was silent as to its intended duration. Nevertheless, it is not difficult to imagine variations on the latter scenario that would present a more troubling case for termination, as where the licensor by its conduct induces the licensee to believe that the license is perpetual.)

³⁵⁵ See *supra* notes 50–53 and accompanying text (summarizing history of open-content licenses, the earliest of which was promulgated long after 1976).

³⁵⁶ See *supra* notes 236–40 and accompanying text (noting that the termination provisions were intended to counteract licensees' superior bargaining power and to remedy unremunerative transfers).

³⁵⁷ See H.R. 1260, 111th Cong. (2009); S. 515, 111th Cong. (2009). A comprehensive patent reform bill passed the House in 2007, but legislative efforts have remained largely stalled since that time. See H.R. 1908, 110th Cong. (2007).

³⁵⁸ See Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 556.

³⁵⁹ See, e.g., Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861 (1987) (noting that language used in the Copyright Act of 1976 frequently “evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines”); *id.* at 879 (questioning whether it makes sense to refer to “legislative intent” in view of the industry-driven negotiated drafting process); see also LANDES & POSNER, *supra* note 34, ch. 15 (discussing roles of interest groups in influencing copyright legislation); NETANEL, *supra* note 156, at 184–85 (noting the relative absence of representatives of the public interest in the copyright legislative process).

³⁶⁰ See, e.g., S. REP. NO. 104-315, at 9 (1996) (emphasizing risks to U.S. competitiveness if duration of existing copyrights was not extended); Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 120 n.9 (1999) (noting that this perspective is broadly shared among developed nations).

visions that might affect the economic or competitive interests of market incumbents, accordingly, are unlikely at present. This places some of the more far-reaching copyright reform proposals that have been articulated—such as curtailing copyright holders’ power to control derivative works,³⁶¹ drawing other bright-line boundaries that limit the scope of copyright holders’ rights as against members of the public,³⁶² or resuscitating statutory formalities³⁶³—off the table almost irrespective of their merits in supporting a sustainable commons. It is also probably too much to expect Congress to revisit the statutory termination regime itself, in view of the effects that amendments to this portion of the statute would have on both authors and publishers, although it seems quite debatable whether the termination regime has in fact accomplished its purpose.³⁶⁴

More narrowly targeted statutory reform, however, may enjoy better prospects.³⁶⁵ The unintended threats that the statute’s termination provisions pose to open-content licensing schemes may be remedied without affecting the remainder of the statute. Statutory amendments to protect open-content projects from the risks of termination might take two forms. Congress might amend the statute’s termination provisions to exclude certain transfers and licenses from their scope, much as the statute presently excludes works made for hire and transfers by will.³⁶⁶ In the alternative, Congress might empower a government agency to promulgate exceptions to the statute’s termination regime, much as the Librarian of Congress presently enjoys the power to craft exceptions to the statutory anticircumvention provisions of the Digital Millennium Copyright Act.³⁶⁷

³⁶¹ See Derek Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345 (2008).

³⁶² See David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139 (2009). In view of the influence that copyright holders presently exercise in the legislative process, see *supra* note 359, it seems unlikely that any bright-line copyright “metes and bounds” would be drafted in a way that expands, rather than curtails, the scope of uses for which members of the public do not require the copyright holder’s permission.

³⁶³ See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

³⁶⁴ See Samuelson, *supra* note 358, at 566–67 n.101; see also *supra* note 266 and accompanying text.

³⁶⁵ In the present political climate, the likelihood of enacting any proposed copyright amendment likely varies inversely to its perceived effects on the existing balance of power as between publishers and users of expressive works. See Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 27, 357 (1989) (“Every proposal to change the status quo has received opposition from some camp on the ground that it would remove a perceived advantage enjoyed under current law.” (footnote omitted)). But see Samuelson, *supra* note 358, at 556 (“Even modest reform efforts . . . have encountered difficulties in reaching consensus.”). This Article’s focus on incremental reforms tailored to the specific problem at hand carries no implication that more far-reaching copyright revisions are in any way normatively undesirable, only that they are unnecessary to solve the termination problem for open-content licenses.

³⁶⁶ See *supra* note 243 and accompanying text.

³⁶⁷ See 17 U.S.C. § 1201(a)(1)(B)–(D) (2006); Armstrong, *supra* note 130, at 8 n.28 (noting limited reach of DMCA exemptions approved by Librarian to date).

Complicating either approach will be the need to protect open-content licenses against termination, while not preventing authors who made unremunerative bargains from exercising their termination rights. The foregoing discussion suggests two conceptual constructs upon which Congress might draw to ensure that any open-content termination exception does not swallow the general rule. First, Professor Loren's proposal for a modified doctrine of copyright abandonment, while perhaps ill-matched to existing precedent, nevertheless draws a useful line: she proposes to exclude licenses that overtly and clearly grant rights to the public from the operation of the statute's termination provisions.³⁶⁸ Second, the very brief statutory provision on patent abandonment also limits the reach of intellectual property rights in circumstances where the author clearly intended to give up the right of proprietary exploitation.³⁶⁹

To consider one possibility, Congress might add the following provision as a new paragraph 203(a)(6) of the statute:

No abandonment by an author of any of the exclusive rights comprised in a copyright, in whole or in part, including under the terms of nonexclusive licensing instruments that grant such rights to unnamed licensees, shall be subject to termination under this section.

Limiting the exception to abandonments "by an author" would ameliorate the risk, identified by Professor Kreiss, that certain actions by downstream licensees may permanently restrict authors' rights.³⁷⁰ The words "including" and "in whole or in part" are aimed at assuring the permanency of dedications to the public domain and at allowing partial abandonments.³⁷¹ The reference to "unnamed licensees" is one way of distinguishing what Professor Loren refers to as grants "to the public" from more conventional transfers (such as in the Superman case) from one party to another; other language might certainly be chosen to effectuate a similar distinction. The reference to "abandonment" may be thought to introduce ambiguity, but the legislative history should simply clarify that the concept is drawn from the Patent Act.³⁷² Adding a new termination exception for open-content licenses

³⁶⁸ See *supra* note 318 and accompanying text; see generally *supra* Part IV.A.

³⁶⁹ See 35 U.S.C. § 102(c) (2006). See generally *supra* notes 331–34 and accompanying text.

³⁷⁰ See *supra* notes 242, 308–10 and accompanying text.

³⁷¹ The Copyright Act's definition of "including" should suffice to ensure that the proposed exception, although meant to reach open-content licensing arrangements, is not confined to that context. See 17 U.S.C. § 101 ("The terms 'including' and 'such as' are illustrative and not limitative."). See generally *supra* Part III.B.3.

³⁷² It should not be necessary to add a definition of "abandonment" to the Copyright Act; after all, the Patent Act's abandonment provision does not define the term, either. Cf. 35 U.S.C. § 101. The courts are accustomed to filling in statutory gaps of this sort in copyright cases. See 1 PATRY, *supra* note 157, § 2:1 ("[C]ritical components of copyright law are judge-made. . . . [T]he Act is a mixture of statutory and common-law features.").

may, of course, require Congress to make conforming amendments elsewhere in the statutory text.³⁷³

Would this amendment upset the existing balance of power as between authors and publishers? It is difficult to see how the amendment would give an unscrupulous licensee any new power to “game the system” to its own advantage.³⁷⁴ The worst apparent risk is that a licensee might pressure an author to release her work under an open-content license (or to the public domain) at the expiration of a defined initial period of exclusive license to the licensee.³⁷⁵ If the licensee enjoys a period of exclusive use of the work, and the work then becomes available to the public, the original licensee may continue exploiting the work without fear of termination under the amendment proposed above. But the public at large would enjoy precisely the same privilege following the expiration of the exclusive license. Thus, not only does the licensee not gain a greater advantage under this arrangement, it actually yields a benefit to the commons—precisely the reason why it makes sense to protect such licenses from termination.

As an alternative to crafting its own termination exception for open-content licenses, Congress might delegate that task to a federal agency.³⁷⁶ For example, consider the following proposed new § 203(a)(6):

The Librarian of Congress, upon recommendation of the Register of Copyrights, shall promulgate annually a listing of licensing instruments that it finds to grant copyright rights to the public at large, and such licensing instruments shall not be subject to termination under this section.

³⁷³ For example, the phrase “otherwise than by will” in 17 U.S.C. § 203(a) might be amended to read “otherwise than by will or as provided below.”

³⁷⁴ See Menell & Nimmer, *supra* note 255 (suggesting this test as a touchstone to govern judicial interpretations of the existing termination provisions).

³⁷⁵ For example, a license of the general form “exclusively to Licensee for a period of thirty-four years, thence to the public domain.” The period of exclusive license would have to be shorter than the thirty-five-year duration that marks the opening of the statutory termination window, otherwise the licensee gains no ability to alter the existing termination regime by this route. (This arrangement, of course, presents a variation on Professor Kreiss’s hypothetical in which a downstream licensee aims to dedicate the licensed work to the public domain as a means of avoiding termination. See Kreiss, *supra* note 256.)

³⁷⁶ For a regulatory system of such complexity and economic scope, copyright is unusual in that it has remained largely unaffected by the post-New Deal expansion in the power of administrative agencies. See Litman, *supra* note 365, at 356–57 (noting lack of support at the time of the Copyright Act of 1976 for proposal to extend substantive copyright rulemaking responsibilities to an administrative agency). Indeed, a large part of the complexity of the Copyright Act of 1976 stems from its inclusion of exceedingly detailed and complicated technical provisions that might be better handled by administrative regulation. See Samuelson, *supra* note 358, at 558 (recommending “an administrative process” to address “future advanced technology questions” as a means of “getting rid of some of the clutter in the existing statute”). Proposals to increase the role of administrative agencies recur often in contemporary copyright scholarship. See, e.g., Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 *CARDOZO ARTS & ENT. L.J.* 1 (2005); Jason Mazzone, *Administering Fair Use*, 51 *WM. & MARY L. REV.* 395 (2009).

This provision would involve the federal copyright agencies in formulating a list of licenses that are not subject to termination. The agencies would be required to undertake notice-and-comment rulemaking, but not to hold hearings,³⁷⁷ essentially the same procedure as currently applies to the triennial DMCA exemptions.³⁷⁸ The reference to a required finding that a license “grant[s] copyright rights to the public at large” is again meant to aid in identifying the particular licenses that are to be excluded from the operation of the statute’s termination provisions (which would continue to apply to traditional arm’s-length transactions between named parties) and to provide enforceable standards to guide the agency’s rulemaking discretion. The agency might initially draw upon lists of open-content licenses that are maintained by private bodies, although it surely should not limit itself to those lists in view of the somewhat different purposes the termination exemptions are meant to serve.³⁷⁹

Clarity and flexibility would be the most obvious advantages of an administrative regime to promulgate exceptions to the statute’s termination provisions for open-content licensing. Consulting the agency’s list of non-terminable licenses would provide advance assurances to licensees that contributions to an open-content project would remain in the commons in perpetuity. Furthermore, as licensing instruments continued to evolve, the list of non-terminable licenses could expand as well.

Would an administrative exemption process for open-content licensing upset the existing statutory balance? Every delegation of rulemaking authority presents some risk of regulatory capture, and it is possible, albeit unlikely, that the Librarian’s power might be subject to abuse. For example, suppose the Librarian interceded on behalf of a powerful movie studio to declare non-terminable a license, like Siegel and Shuster’s, upon which the studio had built a lucrative franchise.³⁸⁰ The amended statute’s reference to licenses that “grant copyright rights to the public at large” ought to ensure that such a misapplication of the agency’s power does not survive judicial review. Remaining issues—such as the inevitable lag between the promulgation of a new open-content license and its recognition as such by the Librarian or the effects of the Librarian’s removal of a previously recognized license from the non-terminable list—could probably be handled within the confines of the administrative process without judicial intervention.

³⁷⁷ See generally 5 U.S.C. § 553 (2006).

³⁷⁸ See *supra* note 367 and accompanying text.

³⁷⁹ FSF and OSI, for example, maintain lists of licensing instruments that are believed to be compatible with those organizations’ governing philosophies, see *supra* note 48, but there is no persuasive reason to limit the termination exemption to licenses that happen to appear on either organization’s list. The original version of the Artistic License, for example, would make a prime candidate to be protected against termination, even though neither FSF nor OSI approved it. See *supra* note 279 and accompanying text.

³⁸⁰ See *supra* Part III.B.1 (discussing the Superman case).

VI. CONCLUSION

For the open-content movement, termination is a problem worth solving. Open-content advocates have skillfully leveraged copyright concepts to create a vibrant and growing commons of freely reusable creative works of many types—a grand achievement given the proprietary production paradigm implicit in the language and structure of the Copyright Act. The new open-content commons rests upon a set of remarkable licensing instruments that use the architecture of control as a means to create freedom. That freedom, however, finds itself imperiled by other provisions of the statute, provisions that have been insufficiently scrutinized to date for their possible effects on the open-content commons. If applied according to their literal terms, these statutory clauses cloud the question whether the open-content commons is sustainable. The issue has not yet been adequately presented due to the lapse of insufficient time. Fewer than thirty-five years (the statutory minimum) have elapsed since the widespread adoption of open-content licensing arrangements. Absent preventive action, however, termination problems may substantially complicate open-content projects in the future.

The natural inclination for open-content advocates would surely be to seek to solve the problem through skillful redrafting of the governing licensing instruments. The CC0 license, while not without flaws, reflects the best recent thinking in this regard; it recognizes its own potential infirmity under existing law and supplies an alternative means to effectuate the licensor's intent.³⁸¹ The same statutory provisions that create the termination problem in the first place, however, simultaneously limit the curative power of private drafting arrangements. Because the statute expressly overrides licensing agreements that purport to limit or deny authors' termination rights, the simplest and most direct private responses to the risk of termination are effectively off the table. Furthermore, although some courts have suggested that licensors can postpone the termination issue by relicensing their own prior grants of rights,³⁸² requiring open-content licensors to (for example) continually execute new instruments that supersede their own prior grants of rights to the public would provide, at best, a cumbersome way of avoiding the termination problem.

Judicial action, too, may be inadequate to the task. On the one hand, courts do carry substantial policymaking responsibilities in copyright matters, certainly more so than in other areas that are nominally governed by statute.³⁸³ On the other hand, ours is a textualist age, and judges have warned (in other contexts) against looking outside the enacted text to ascertain Congress's intent.³⁸⁴ A court presented with an actual attempt to terminate an

³⁸¹ See *supra* notes 221–29 and accompanying text.

³⁸² See *supra* note 255.

³⁸³ See, e.g., Armstrong, *supra* note 130, at 32–36.

³⁸⁴ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF

open-content license may perceive the absurdity of the request, may be cognizant of the absence of any possible overreaching by the licensees, and may even regret the harm to the information commons that would surely follow were the request to be granted; yet, the court may nevertheless believe itself obliged to honor the statute's command that any "exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright"³⁸⁵ is terminable by the author or her heirs. That leaves remedial legislation as the best, and likely only viable, alternative to cure the termination problem for open-content licenses.

Legislative recognition of the effectiveness and permanence of open-content licensing arrangements would place a safety net under the emerging information commons. It would validate commons-based peer production as an alternative mode of creating value entitled to stand on equal footing with the institutional monopolies of copyright. It would confirm, as a matter of statutory law, what has been clear in the marketplace for many years—that open-content works include mature products perfectly capable of competing alongside copyrighted proprietary works on their merits. It would align the law with the reasonable expectations of authors (numbering in the millions in the United States alone) who write open-source software, contribute photos to Flickr, add content to Wikipedia or its sister sites, build architectural edifices in Second Life, or write weblogs, all while expecting and intending that their contributions will forever remain available for others to enjoy. Finally, it would signal the United States' intent to remain in the innovation vanguard, while doing nothing to reduce the effectiveness of the ordinary copyright regime for authors and publishers who choose that alternative. For all these reasons, the better course would be for Congress to provide a statutory exception to the Copyright Act's termination provisions for open-content works.

INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 20 (Amy Gutmann ed., 1997) ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.").

³⁸⁵ 17 U.S.C. § 203(a) (2006).

