
DEATH IN COPYRIGHT: REMARKS ON DURATION

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ABSTRACT

*This Essay is an inquiry into the role of death in copyright law. I argue that the role of the author's death in measuring copyright duration is intelligible as an indication of the way in which copyright law construes the formation of the right, and thus the juridical relation between author and work. Through the principle of independent creation, the originality doctrine posits an irretrievably personal link between author and work, and it is this link that accounts for the relevance of the author's death in our conceptualization of copyright duration. In short, the theory of originality entails a theory of duration. By way of conclusion, I deploy this convergence of originality and duration, authorship and death, as a springboard to deepen our appreciation and to reevaluate fundamental aspects of the foundational opposition between Lord Mansfield and Justice Yates in the classic case of *Millar v. Taylor*.*

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I. RIGHTS-BASED MINIMALISM AND DURATION: A PERSONAL LINK

Professor Wendy J. Gordon's *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*¹ is a pioneering example of rights-based minimalism in North American intellectual property scholarship. The work challenges the assumption that rights-based discourse in intellectual property theory and practice is necessarily or inherently maximalist. Gordon deploys John Locke's theory of property to demonstrate that, adequately formulated, rights-based discourse posits not only the legitimacy but also the limitation of the rights it vindicates. In the copyright context, this means, in essence, that the theory of the author's entitlement is simultaneously a theory of the public domain. The very considerations vindicating the grant of copyright inform the affirmation of lawful unauthorized copying—the public domain—as fundamental to copyright theory and practice.

Albeit drawing on philosophical sources and methodologies different from those invoked and deployed in Gordon's *A Property Right in Self-Expression*, my own work falls squarely within the tradition of rights-based minimalism. Gordon finds herself at home in Locke's foundational propositions that labor is at the root of property and that, to sustain the legitimacy of private appropriation of the commons, the property-acquiring laborer must leave "enough and as good" for others. I am more comfortable with Immanuel Kant's view that right is a radically intersubjective category and with his related formulation of a work of authorship not as a thing—whether intangible or otherwise—but as a communicative act. Of course, one could devote endless and fruitful hours identifying and elaborating distinctions and cleavages between Lockean and Kantian sensibilities. No amount of elaboration, however, would undo the affinity of these sensibilities in Gordon's work and in my own as instances of rights-based copyright minimalism.

The first course in intellectual property theory I ever took as a law student was an all-too-brief, two-week intensive seminar taught by Gordon as a Distinguished Visitor at the University of Toronto Faculty of Law in 1996, scarcely three years after the publication of her *A Property Right in Self-Expression*. In retrospect, I cannot help but observe that the paper I wrote for that class was the earliest iteration of the kinds of arguments and concerns that nourished the core of my *What's Wrong with Copying?* twenty years later.² I know of no more succinct way to capture, acknowledge, and celebrate the depth of the debt that, as a copyright scholar, I owe to Gordon.

In addition to a rights-based minimalist impulse, there is another feature that my *What's Wrong with Copying?* shares with Gordon's *A Property Right in Self-Expression*. Bluntly put, neither work presents a rights-based account of copyright duration. To be sure, both works reference duration, but neither develops its necessity in copyright law with sufficient granularity or specificity—certainly not in respect to the role of the idea of death in copyright

¹ 102 YALE L.J. 1533 (1993).

² See generally ABRAHAM DRASSINOWER, *WHAT'S WRONG WITH COPYING?* (2015).

duration. Accordingly, I want here to posit a theory of duration in the tradition of rights-based minimalism.

This Essay is an inquiry into the role of death in copyright law. I argue that the role of the author's death in measuring copyright duration is intelligible as an indication of the way in which copyright law construes the formation of the right, and thus the juridical relation between author and work. Through the principle of independent creation, the originality doctrine posits an irretrievably personal link between author and work, and it is this link that accounts for the relevance of the author's death in our conceptualization of copyright duration. In short, the theory of originality entails a theory of duration. By way of conclusion, I deploy this convergence of originality and duration, authorship and death, as a springboard to deepen our appreciation and to reevaluate fundamental aspects of the foundational opposition between Lord Mansfield and Justice Yates in the classic case of *Millar v. Taylor*.³

II. COPYRIGHT'S SPECIFIC CONCERN WITH DEATH

Patent duration is measured quantitatively. In Canada, for example, a patent subsists for twenty years from the date the application is filed.⁴ Thus, a patent lasts for a set number of years, and this number is the same for all patentees.

Trademark duration, too, is measured quantitatively. In Canada, a trademark registration lasts for fifteen years.⁵ While a trademark registration may be renewed indefinitely every fifteen years, the term of a trademark, like that of a patent, is nothing other than a number of years—a quantitative category.

But copyright duration is not—at least not exclusively—a quantitative category. In Canada, for example, a copyright subsists for fifty years after the death of the author.⁶ Thus, while a copyright lasts for a set number of years, this number is not the same for all authors. Something other than number or quantity alone goes into the determination: the death of the author.

What, then, accounts for this peculiarity of copyright law? To put it otherwise, what is it about copyright that summons mortality so deeply into its essence? Two observations about the nature of the question are in order at the outset. First, I am not raising an historical question. Copyright duration has not always been measured through a life-plus model.⁷ But this incontestable historical fact does

³ (1769) 98 Eng. Rep. 201; 4 Burr. 2303.

⁴ Patent Act, R.S.C. 1985, c P-4, s 44.

⁵ Trademarks Act, R.S.C. 1985, c T-13, s 46(1).

⁶ Copyright Act, R.S.C. 1985, c C-42, s 6.

⁷ Article 7 of the 1908 Berlin revision of the Berne Convention for the Protection of Literary and Artistic Works was the first to posit the now-globally prevailing life-plus (*post mortem auctoris*) model as an international norm. Berne Convention for the Protection of Literary and Artistic Works art. 7, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3. For a brief history of duration in the United States, see Pamela Samuelson, *Notice Failures Arising from Copyright Duration Rules*, 96 B.U. L. REV. 667, 667-80 (2016). On duration in Canada, see

not affect the nature of the inquiry I want to pursue. Telling the story of how the author's death entered into copyright law does not in and of itself resolve the question of why it did so any more than the history of duration is an account of its juridical meaning. In other words, the study of how duration came to have the meaning that it has is not the same as the study of its meaning. The former study mandates analyses of historical processes, while the latter requires analyses of juridical texts. For similar reasons, analyses of duration from the point of view of economics, politics, and/or society are not particularly well suited to explore and set forth what we can learn about copyright as a conceptual juridical whole from one of its distinctive features. Economic analysis of the efficiency function of duration, for example, is not the same as analysis of duration as a specifically legal category.

Speaking historically, even if we were swayed by the observation that the life-plus model was not there from the very outset and thus that its status as a fundamental aspect of copyright law was not unequivocal, we could hardly avoid noting that the first of all copyright terms made reference to the author's death.⁸ Under the Statute of Anne, copyright lasted for a period of fourteen years from the date of publication and then for another fourteen years if the author was still alive.⁹ The renewal for the second fourteen-year term could take place only if the author's death had not intervened.¹⁰ Even before the life-plus model became the worldwide norm, the copyright term invoked the death of the author. No parallel invocation of the death of the inventor is present in what is widely recognized as the world's first patent statute, the Venetian Act of 1474, or in the subsequent history of patent duration.¹¹ Thus, even if the distinctive presence of death in copyright has a history, it has nonetheless been there from the very outset. In any case, even if it were true that the author's death was not there from the very outset, it would certainly be an exaggeration to suggest either that we could not study its juridical meaning or that its status is therefore less than fundamental. We would certainly draw no such inference (nor should we!) about the fundamental status of fair dealing or fair use in copyright law from the view that neither may have been explicitly present in its initial iterations.¹²

generally David Lametti, *Coming to Terms with Copyright*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 480 (Michael Geist ed., 2005).

⁸ See An Act for the Encouragement of Learning 1709, 8 Ann. c. 21 (Gr. Brit.).

⁹ See *id.* §§ 2, 11.

¹⁰ See *id.*

¹¹ See Ikechi Mgbeoji, *The Juridical Origins of the International Patent System: Toward a Historiography of the Role of Patents in Industrialization*, 5 J. HIST. INT'L L. 403, 413-14 (2003).

¹² See generally Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, in *THE COPYRIGHT PENTAGON: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 93 (Michael Geist ed., 2013); R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES* 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006). On fair

Second, just as I am not raising an historical question about duration in general or about the role of death in duration in particular, I am also not raising a question about the appropriate number of years of copyright duration. That is, I am distinguishing between an inquiry into why copyright duration is limited by reference to the author's death and an inquiry into how long copyright duration should be. I am interested in the former line of inquiry. More specifically, I want to broach the twofold fact that (a) copyright is not perpetual, and (b) its duration is measured not quantitatively but by reference to the author's death. To put it otherwise, whereas a right in fee simple is perpetual and a patent right is limited quantitatively as a right for a number of years, a copyright is (a) unlike a fee simple because it is of limited duration and (b) unlike a patent right because it is limited through reference to the author's death.¹³ Copyright duration is not only a quantitative category but also an existential one, and it is its character as an existential category that I seek to explore.

Thus, the question I raise is neither historical (how did the author's death come to figure in copyright law?) nor quantitative (how many years should copyright last?). It is rather a conceptual question about what we can learn about the specificity of copyright as a juridical order from the distinctive way in which it posits its duration. I argue that the presence of death in duration evidences the personal nature of the link between author and work in copyright law, and that, contrary to widely established assumptions and practices, this link mandates that an author's copyright end with her death. The mortal life of the author's personality—and not the history of its emergence or the arithmetic of its efficiency function—is at stake in copyright duration.¹⁴ To understand the role of death in copyright is to refuse the pretense of the author reaching from her grave.

To be sure, the observation that the presence of death in copyright indicates the personal link between author and work, and thus the limitation of copyright duration to the life of the author, is not new.¹⁵ My point here is to show that the

use/fair dealing as integral to copyright, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose . . ."); *CCH Canadian Ltd. v. Law Soc'y*, 2004 SCC 13, para. 48, [2004] 1 S.C.R. 339, 364 (Can.) ("[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence.").

¹³ For an effort to distinguish between the patent and copyright terms, yet without reference to the presence of death in copyright duration, see Eric R. Claeys, *Intellectual Property and Practical Reason*, 9 JURISPRUDENCE 251, 268-71 (2018).

¹⁴ For a view that the personal focus on the author's death has an incentive function, see Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1798-805 (2012).

¹⁵ See, e.g., Lionel Bently, Lecture, R v. The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 99-100 (2008) ("The creative link between an author and

role of death in copyright is already contained in the copyright concept of originality, and thus that it brings sharply into relief (a) the specificity of copyright vis-à-vis property (possession) and patent (invention) and (b) the symmetry between the formation (originality) and termination (duration) of the right in copyright law.

III. THE CONVERGENCE OF ORIGINALITY AND DURATION

The observation that the author's death captures something about the specificity of copyright is as good a starting point as any. This observation suggests that we should set out by ascertaining other distinctive features of copyright law that highlight its specificity. The role of death in copyright would thus become intelligible through an articulation of the conceptually recognized, established, and distinctive aspects of copyright law as they relate to each other.

Among features distinctive of copyright, we can hardly fail to identify the principle of independent creation. Independent creation is both a threshold requirement for copyright protection to arise and a fundamental aspect of infringement. That is, independent creation has a critical role both in the formation of the right and thus in the definition of the wrong that violates the right. As a threshold requirement informing the formation of the right, independent creation is a constitutive dimension of originality—the *sine qua non* of copyright protection. An original work is an independently authored work, a work that has not been copied from another. In addition, the principle of independent creation is operative in the definition of the creativity aspect of the originality requirement. In the United States, an original work is a work that is not copied from another *and* that displays a modicum of creativity.¹⁶ Similarly, in Canada, originality means not copied from another work *and* displaying skill and judgment.¹⁷ Because a work must exhibit creativity, it cannot be a mere mechanical arrangement or reproduction of facts. An alphabetically arranged white pages phone directory, for example, does not merit copyright protection. To put it otherwise, an original work is a work that is copied neither from another work, *nor from the world*. The concept of independent creation captures both

her work may justify protection during that author's life, but thereafter an earlier author's claim should readily give way to the needs of subsequent authors. In fact, rather like legal conceptions built around personality or reputation, such as rights of privacy, and the tort of defamation, it is difficult to see how the ideology of authorship points to any post-mortem term, or, if so, what duration any such term should have." (footnotes omitted); Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 254.

¹⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). On the global significance of *Feist*, see generally Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949 (2002) (discussing *Feist* as "landmark decision" and "legal 'bomb'"); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1078-81 (2003).

¹⁷ *CCH Canadian*, 2004 SCC at para. 16, [2004] 1 S.C.R. at 352 ("What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment.").

these moments in a single formulation. A work of authorship is a work that owes its origin to authorship, not to copying—whether copying in the sense of reproduction of another work or copying in the sense of mere fact collection.

I have lingered for a moment on the principle of independent creation because, like death in duration, it differentiates copyright from patent law. Indeed, independent creation alerts us to the specificity of copyright vis-à-vis patent, to the specificity of copyright more generally and to the distinctive way in which copyright inherently links the formation and the termination of the right—that is, originality and duration.

Patentable inventions and copyrightable works share the feature that neither can be copied from another invention or work, but this does not mean that an inventor's invention and an author's work are the same thing. Patent and copyright protect distinct subject matters. In respect to the originality requirement, independent creation denotes the nature of authorship as distinct from that of inventorship. At least in principle, it differentiates between authors and inventors and thus between works and inventions. Of course, both authors and inventors are creative—at least in some colloquial sense. Just as authors create poems or songs, so too do inventors create mousetraps or medications. But this colloquialism need not obscure the crucial, yet simple, observation that, juridically speaking, we routinely differentiate authoring a poem from inventing a mousetrap. The inventor's ingenuity is just not the same as the author's creativity, any more than a mousetrap is a work of authorship. To author is not to invent, and to invent is not to author.¹⁸ Independent creation thus differentiates copyright from patent by denoting the specificity of the act involved in authorship as distinct from inventorship.

At the same time, the principle of independent creation differentiates copyright and patent in yet another way. Independent creation refers not only to the threshold requirement of originality but also to the defense of independent creation, whereby a copyright defendant is not held liable for infringement upon a showing that the substantial similarity or even identity between his work and the plaintiff's work is not the result of copying but is rather a mere coincidence. There is no such thing as copyright infringement in the absence of copying. That is, as distinct from the situation in patent—where independent invention does not operate as a defense—no copyright liability arises when the defendant shows that the otherwise-actionable similarity is rather the result of independent creation. One might say that every copyright infringement case enacts an opposition between rival explanations of the substantial similarity that gives rise

¹⁸ On the copyright/patent distinction, see generally Wendy J. Gordon, *How Oracle Erred: The Use/Explanation Distinction and the Future of Computer Copyright*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 375 (Ruth L. Okediji ed., 2017); Pamela Samuelson, *Strategies for Discerning the Boundaries of Copyright and Patent Protections*, 92 *NOTRE DAME L. REV.* 1493 (2017). See also DRASSINOWER, *supra* note 2, at 85-110; Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 *CONN. L. REV.* 439, 441 (2003).

to the infringement case. The plaintiff invariably argues that the similarity is the result of copying by the defendant. (This is what it means to be a copyright plaintiff.) And it is always open to the defendant to reply, at least where the facts permit it, that the similarity is but a mere coincidence, an instance of independent creation. A copyright infringement case is thus by definition an encounter between copying and independent creation, actionable and nonactionable similarity. “I am by no means a copycat,” we can hear the defendant say. “On the contrary,” she adds, “I have quite literally done either exactly what the plaintiff did or something substantially similar to what he did.”

Indeed, precisely because the defense of independent creation is the defendant’s way of showing that she has done just what the plaintiff did, the defense not only avoids liability but also amounts to a finding that the defendant, too, has done what needs to be done to generate a copyright. Show me a defendant who has successfully argued independent creation, and I will show you a defendant who is an author in his own right. Nor can it be otherwise. The principle of independent creation cannot be merely a defense. Because it establishes the defendant’s independent authorship, it thereby establishes the defendant’s own copyright.¹⁹

This, again, is in sharp contrast to the situation in patent, where (a) there is no such thing as a defense of independent invention and where, even if there were, (b) it would be hard to see how it could possibly justify granting of another patent over the very same preexisting invention. An invention is, by definition, something that is not already available to the public.²⁰ That someone independently repeats a previously available invention does not render that putative invention any less previously available—that is, something that could meet the definition of an invention. In other words, even if patent law were to adopt a *defense* of independent invention, this would not amount to an adoption of independent invention as a *principle* giving rise to the independent inventor’s own patent. Even if exempted from liability, independent repetition of what is already available is not any less a repetition. Unlike the copyrightability of an independent act of authorship, it is not the independence of the inventor’s act but rather the novelty of its result that grounds a finding of patentability.

Unlike in patent law, then, in copyright law two identical independently created works give rise to two independent copyrights. The principle of independent creation means, *inter alia*, that textual identity between the work of *A* and the work of *B* is not juridical identity. While the works look the same, they are not juridically the same. The originality of a work is none other than its origin or source, such that two seemingly identical texts are juridically different

¹⁹ *Feist*, 499 U.S. at 345-46 (“Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.” (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936))).

²⁰ Patent Act, R.S.C. 1985, c P-4, s 28.2(1)(a) (Can.).

because they in fact embody two distinct acts of independent authorship. Copyright law focuses not on the work as such, conceived as an object independent of its author, but rather precisely as the *work* of an author, conceived as the act performed by the agent who is its origin. This is why a single text can house multiple works. In a word, textual identity is not originaive identity. We might say that the work is not so much the pattern of ink that houses it but rather the address that originates in its author and moves toward her audience. Independent creation thus puts before us a distinctive interplay of identity and difference that asserts a juridical difference in spite of a physical identity. The question is not about what a work looks like but rather about where it comes from. Because the principle of independent creation in copyright law focuses on the origin of the work (i.e., originality), it is perfectly capable of rendering a physical or empirical identity as a juridical difference. No such possibility can arise in patent law because patent law focuses not on the independence of the inventor's act but rather on its result as an independent (albeit intangible) object.

This distinctive interplay of identity and difference gleaned from the principle of independent creation is also present, though in reverse form, in copyright duration. On the one hand, the copyright term is the same for all authors. In Canada, as we noted, it is life plus fifty years.²¹ At the same time, however, precisely because it is measured not as a set number of years but through the author's death, the copyright term for each author turns out to be a different number of years. Like a text housing different works, the copyright term houses different numbers of years. Thus, the term of two identical, yet independently created, works may vary widely depending on the relative timing of the death of each author.

To be sure, in the interplay of identity and difference that duration features, it is the legal identity (i.e., the author's death) that houses physical or empirical differences (i.e., numbers of years). By contrast, in the interplay of identity and difference featured in independent creation, it is the physical identity (i.e., a single text or pattern of ink) that houses legal differences (i.e., multiple works). But we should not permit this apparent reversal to obscure the convergence that informs the interplay of identity and difference traversing both duration and independent creation as distinctive aspects of copyright law. Independent creation and duration respectively preside over the formation and termination of the right at issue in copyright law. Thus, one would suspect that sustained scrutiny of any homology between these two aspects of copyright, particularly when relations between identity and difference are involved, is bound to be particularly illuminating. What, then, is it that manifests itself both in independent creation and duration through the interplay of identity and difference in each?

At stake in both independent creation and duration is a distinctive relation between author and work, rights holder and subject matter. This relation is

²¹ Copyright Act, R.S.C. 1985, c C-42, s 6.

specifically characteristic of copyright law. Returning briefly to the distinction between novelty in patent and originality in copyright will help make this clear. The patent inquiry into novelty is about the relation between the patent applicant's invention and other preexisting inventions. That is, it is about the relation between the applicant's invention and the prior art, between present and past. To make out the claim that his invention is novel, the applicant will have to make out the claim that his invention embodies something previously unavailable to the public. This previous unavailability is at least in part what constitutes its novelty, its departure from the past. As we noted, the definition of an invention as something previously unavailable is what precludes the independent inventor, unlike the independent author, from claiming that independent invention should generate a second patent alongside the first patent over the same subject matter. The second comer, albeit independent, is not an inventor because what he has to offer is already available; it lacks novelty. Timing is of the essence of novelty.

Copyright, by contrast, has nothing to do with novelty. This is vastly evident in the venerable idea/expression dichotomy, which teaches both that copyright protects expression but not idea and, thus, that copyright arises regardless of the novelty, or lack thereof, of the idea expressed. Copyright protects not what is said but how it is said—not content (i.e., idea) but form (i.e., expression).²² Copyright's indifference toward novelty is also evident in the principle of independent creation, which, as we just noted, teaches that an independent copyright arises (even) in respect of (seemingly) preexisting or anticipated expression that, as such, clearly lacks novelty.

This copyright-specific situation, in which multiple original works exist as the same text, further entails the observation that copyright law does not protect works as objects of ownership. If works were owned as objects, independent creation would amount to a trespass on the first author's proprietary entitlement. This entitlement would, in a manner reminiscent of patent but not of copyright, amount to an insistence that timing is of the essence of originality. But that is clearly not the case: as the principle of independent creation teaches, a subsequent independent author is still equally an author. Albeit subsequent, his work exists as copyright subject matter—it exists not as an object purportedly identical to a preexisting object but as a singular act of authorship in its own right. Thus, it turns out that copyright's distinctive indifference toward the novelty of a work is also an indifference toward what we might regard as the objectivity of the work. Further elaboration of this indifference to the objectivity

²² See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (indicating that where defendant takes only “most general statement of what the play is about,” there is no liability, “since otherwise the playwright could prevent their use of his ‘ideas,’ to which, apart from their expression, his property is never extended”); accord *Moureau v. St. Vincent*, [1950] Ex. C.R. 198, 203 (Can.) (“It is . . . an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas His copyright is confined to the literary work in which he has expressed them.”).

of the work will help delineate more clearly the nature of copyright subject matter, its specificity vis-à-vis patent subject matter, and the distinctive role of death in copyright duration.

To begin with, there can be no doubt that a copyright is not a property right over the pattern of ink we call a text or over a book conceived as a physical object. If that were the case, copying someone else's text verbatim using one's own ink and paper could not amount to copyright infringement. Simply put, using one's own ink and paper is not a defense to copyright infringement because infringement is not conversion of someone else's property in the ink and paper. Viewed as copyright subject matter, a book is not a thing; it is not its material embodiment. It is not ink and paper. But nor can copyright be grasped as a property right over a work conceived as some kind of metaphysical object (i.e., an intangible "thing") subject to proprietary entitlement. That, as we just noted, would be inconsistent with independent creation in that it would render independent repetition of the work as an instance of trespass to the author's (metaphysical) chattel. Imagining the work as a metaphysical chattel is tantamount to finding copyright infringement in the absence of copying. By declaring itself indifferent to novelty, copyright originality in fact focuses itself not on a thing but on an act of origination. Two seemingly identical works are distinct as independent acts of authorship. The condition for the possibility of regarding an identical yet independently created work as a different work deserving of an independent copyright is none other than a construal of the work as an act. The objectivist illusion of identity fostered through the construal of the work as an object thus dissolves in and through the focus on independent acts of origination. Copyright law is indifferent to the objectivity of the work because, unlike patent law's construal of inventions, it regards works as acts, not objects—whether tangible or otherwise.

Of course, this constitutive indifference to objectivity is by no means an assertion of the work as merely subjective. It is not as if copyright law regards a work as subsisting solely in an author's imagination. How could that be? On the contrary, precisely as an act of authorship, a work is addressed to others. It expresses ideas. It inspires other works. It invites responses. Expression, to put it differently, is always expression toward another.²³ Yet at the same time, this movement from self to other, from author to public, does not culminate in the appearance of an object independent from its maker, a would-be objectified work independent of its author. To author a work is not to manufacture an object.

²³ See *Donoghue v. Allied Newspapers, Ltd.* [1938] 1 Ch 106 at 110 (Eng.) (“[T]hat in which copyright exists is the particular form of language by which the information which is to be conveyed is conveyed. If the idea, however original, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture, then there is no such thing as copyright at all. It is not until it is (if I may put it in that way) reduced into writing or into some tangible form that there is any copyright, and the copyright exists in the particular form of language in which, or in the case of a picture the particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or to look at it.”).

While it is addressed toward others, it cannot separate itself entirely from its author so as somehow to hover rootless or circulate disembodied. In accordance with the principle of independent creation, it bears ineradicably the imprint of its origin(ality), its connection to the author to whom it owes its origin. The poem I authored is mine, not as a sequence of words *belonging* to me—for otherwise another’s independent repetition of that sequence would amount to infringement—but as a sequence of words *expressed* by me. As copyright subject matter, the poem is not an owned object but an expressive act.

A work cannot preexist its authorship as it is from authorship that it originates. Yet it is equally true that, as copyright subject matter, a work cannot exist beyond the authorship to which it owes its origin. The fundamental principle of independent creation teaches that a work is not a self-subsisting object. The work cannot subsist as an owned object beyond the act of authorship that constitutes it any more than it can preexist that very act. The work *is* that act, at once addressed to the public and irretrievably connected to its author. A book is not a thing but a communicative act. A work is a site of relations between author and public, a communicative nexus or nodal point gathering speaker and audience. Copyright subject matter is, precisely as such, equally and necessarily inseparable from both. It is as irretrievably connected to those it addresses as to whom it owes its origin.

This irretrievable connection of author and work already places before us the constitutive role of duration in copyright law. More precisely, it intimates why duration appears existentially rather than quantitatively, under the rubric of mortality rather than number. Briefly put, precisely as an act and not a thing, a work of authorship is not separable from its author in the same way that an object is separable from its owner. Consider the matter through a brief comparison of duration in copyright law and the rule against perpetuities in property law.²⁴ In property law, the rule against perpetuities entails the death of the property right-holder’s right but not of the right itself. To put it otherwise, the perpetuity precluded is not that of the right, but rather of the holder of the right.²⁵ The right itself is perpetual, persisting through an infinite succession of transfers from one rights holder to her successors. The connection between subject and object—between owner and subject matter owned—is radically impersonal. Nothing about the subject matter is specifically connected to its owner. Nothing about the owner is necessarily connected to her owned content. On the contrary, we might say that the entire point of the property right is precisely its impersonality. Its subject matter both preexists and subsists its owner. That which can be owned

²⁴ On the rule against perpetuities, see generally BRUCE ZIFF, *PRINCIPLES OF PROPERTY LAW* 278-88 (6th ed. 2014); W. Barton Leach, *Perpetuities in a Nutshell*, 51 *HARV. L. REV.* 638 (1938).

²⁵ As Leach put it, “The Rule against Perpetuities is a rule invalidating interests which *vest* too remotely. Indeed, it is often called the rule against remoteness of vesting. It is *not* a rule invalidating interests which *last* too long.” Leach, *supra* note 24, at 639.

is precisely that which can be separated from its owner.²⁶ The rule against perpetuities is but an aspect of this impersonality, of the radical separateness of subject and object of ownership, owner and owned content, or holder of the right and the right itself. The owner is but a temporary holder of a perpetual interest: the owner is dead; long live the owner!

Things are and must be otherwise with the death of the author. Her office, we might say, is not alienable. No one but she can hold it. Unlike the ownership of an object,²⁷ there is no such thing as the authorship of a work that does not involve its particular author. Authorship neither is nor can be indifferently anyone's. This impossibility cannot be at all surprising. The principle of independent creation teaches precisely that even identical texts bear the distinctive imprint of their respective authors. Unlike an object, which can be indifferently owned by you or me, a work of authorship—even if identical to another—cannot have been authored by anyone else. Whereas proprietary subject matter preexists its owner, copyright subject matter owes its origin to its author. Whereas proprietary subject matter is radically indifferent to the subjectivity of its owner, copyright subject matter is radically indifferent to the objectivity of the work. The separateness of owner from owned object contrasts sharply with the inseparability of author from authored work.

That I captured a previously unowned fox on unowned land makes it mine,²⁸ to be sure, but capture does not make me its only possible owner. You could have captured that very same fox first or I can in any case sell it to you. Moreover, were I to sell it to you, I would thereby place myself in the very same position with respect to the fox that you had been in prior to my selling it to you. That is, I would become a complete stranger to the proprietary subject matter over which I hold a right by virtue of having captured it. But I could never become a complete stranger to the copyright subject matter over which I hold a right by virtue of having authored it. This is true even if I transfer the copyright to another. And it is true not because copyright subject matter is intangible, and thus not the kind of subject matter of which I can ever be deprived in the requisite proprietary sense, but rather because, from the standpoint of copyright law, a work's originality (i.e., its authorship) is literally inalienable. It could never be

²⁶ On the "separability" thesis, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 111 (1997) ("Only those 'things' in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.").

²⁷ On the idea of ownership as an exclusively held transferrable prerogative, see Christopher Essert, *The Office of Ownership*, 63 U. TORONTO L.J. 418, 419 (2013) (arguing that ownership functions as office held by owner whose position may be transferred to another); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 76-78 (2008) (arguing for "exclusivity model" that maintains owner as "exclusive agenda setter" for property, as opposed to "boundary approach," which emphasizes right to exclude others).

²⁸ See *Pierson v. Post*, 3 Cai. 175, 179 (N.Y. Sup. Ct. 1805).

the case, for example, that Nietzsche authored Hegel's *The Phenomenology of Spirit* or that Hegel authored Nietzsche's *On the Genealogy of Morals*. In fact, through the fundamental principle of independent creation, copyright law tells us unequivocally that even if Nietzsche were to author the same text as *The Phenomenology of Spirit*, the result would be Nietzsche's *The Phenomenology of Spirit*, not Hegel's. In short, the personal character of the author/work relation in copyright law is distinct from the impersonal character of the owner/object-of-ownership relation in property law. Just as a work is not a chattel, authorship is not first possession, and copyright is not property.²⁹

The author/work relation is "personal" in the sense that it is nonproprietary, but it is not so in the sense that it is psychologically subjective, interior, private, or constitutive of the self so as to be akin to some kind of exteriorized body part. To bring into relief the personal character of the author/work relation is by no means to suggest that only diaries featuring intimate content meet the originality requirement! Rather, the point is that the concept of the work as a communicative act entails that the author/work relation is framed not as a relation between a subject and an object, owner and owned content, but as a relation between an agent and an act—in a word, a relation between an author and a work of authorship. Nor is copyright "personal" in the sense that it is nontransferable. Because a work of authorship is not a separable chattel, its author does not *alienate* title but rather *authorizes* copies of her work. As the Canadian Copyright Act puts it, copyright is "the sole right to produce or reproduce the work" and "to authorize any such acts."³⁰ Authors authorize. In short, the copyright marketplace is best understood under the trope of agency rather than property. The inseparability of author and work—and hence the distinctiveness of the copyright marketplace from the property marketplace—entails a reformulation of its fundamentals in a manner consistent with the subject matter at issue.

In this vein, it can come as no surprise that, whereas the rule against perpetuities seizes the mortality of a rights holder as an occasion to affirm the separateness and, thus, the infinite duration, of the property right, copyright duration seizes the mortality of an author as an occasion to affirm the ultimate inseparability and, thus, the finitude, of the copyright. The death of the property owner announces not the expiration of the right but rather the accession of another to her office. By contrast, the death of the author announces the death of the right. It announces not the accession of another to the author's office, but rather the accession of the work itself to the public domain: the author is dead; long live the public domain!

The principle of independent creation thus places before us (a) the inherent connection or ultimate inseparability of author and work; (b) the proposition

²⁹ For a study of duration on the assumption that an equivalence or analogy of property and copyright is viable, see generally Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77 (2015).

³⁰ Copyright Act, R.S.C. 1985, c C-42, s 3(1).

that, precisely because it is inseparable from the author, the copyright in a work is limited by reference to the author's death; and (c) the observation that the concept of duration (and thus perhaps more generally of the public domain) arises not against but through study of the link between author and work. The theory of originality thus entails a theory of duration. More precisely, the radically personal link between author and work formulated in and through the principle of independent creation entails the proposition that the death of the author spells the birth of the public domain. Duration, not perpetuity, truly affirms and recognizes the specificity of the link between author and work as a matter of copyright law. In short, because copyright law construes author and work as inseparable, the death of the author—her final separation from the work—cannot help but evoke the death of the right. Where the author is absent, the public is sovereign.

IV. BEYOND THE MANSFIELD/YATES DEBATE

That the theory of originality entails a theory of duration permits us to reevaluate certain aspects of the foundational juridical debates surrounding the enactment of the Statute of Anne, the world's first copyright statute.³¹ The classic opposition between Lord Mansfield's judgment and Justice Yates's dissent in *Millar v. Taylor* enacted, inter alia, a debate about the meaning of the publication of a work of authorship at common law.³² The debate proceeded on the shared assumption that a prepublication right (i.e., a right of first publication) existed at common law; that is, publishing an unpublished work in the absence of authorization was wrongful.³³ Lord Mansfield and Justice Yates, however, formulated the nature of the prepublication right differently, with the result that they also grasped the meaning of publication differently. As we shall presently see, this difference in their understandings of publication is also a difference in their construals of duration.

For Justice Yates, the prepublication right was a right with respect to the manuscript, not the work. An author could retain legal control of her work only so long as the work remains ensnared, so to speak, in the ink and pages that embody it.³⁴ To put it otherwise, the author's prepublication right was but an

³¹ An Act for the Encouragement of Learning 1709, 8 Ann. c. 21 (Gr. Brit.).

³² I develop here aspects of the "literary property debate" I traversed in *What's Wrong with Copying?* See DRASSINOWER, *supra* note 2, at 153-63. Mark Rose's account remains the indispensable, canonical account of the paradigmatic literary debate on property. See generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 67-142 (1993); BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 9-42 (1999).

³³ *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 230; 4 Burr. 2303, 2356 (opinion of Yates J., dissenting).

³⁴ See *id.* (arguing that authors hold sole dominion over their literary composition "no longer than while it is in manuscript").

incident of her property right in the manuscript. It followed that to publish a work was necessarily to place it in the public domain.³⁵ This was not because the author gave up rights previously held with respect to her work by publishing it. The point was not that copyright expired upon publication but rather that there was no such thing as copyright at common law. Thus, while Justice Yates at times construed publication as abandonment of rights in respect of the work or as a gift to the public, it is more precise to formulate his position as the becoming explicit, through publication, of the proposition that there were no entitlements to a work—whether published or unpublished—at common law. Through publication, the author makes it possible for others to access, copy, and disseminate the work without interfering with her property right in the manuscript. For Justice Yates, this meant both that (a) copyright was and must have been a statutory creation, not a common law right, and that (b) its duration was specified in the terms of the statute.³⁶ Yet while Justice Yates thus formulated a theory of duration, there was nothing in his formulation that accounted for the presence of the author's death in copyright law.

Seemingly, Lord Mansfield was acutely aware that to posit an author's common law right of first publication as a property right in her manuscript was to give up the conceptual possibility of common law copyright. But he was also aware, and no less acutely, that recognizing common law copyright requires more than positing the work as some sort of metaphysical chattel in respect to which its author holds property rights. That is, Lord Mansfield knew very well that, at common law, the idea of an intangible object of ownership could not possibly resolve the conundrum posed by Justice Yates. Assume for a moment that the author's object of ownership is not the physical manuscript but the intangible work. It is this shift from manuscript to work that permits us to say that when the author sells the physical book she does not part with the work. But it is still not any easier to see what in the author's ownership of the intangible work prevents a buyer of the book from copying her own lawfully acquired copy. Nothing she can do with the physical book, including copying it, would *as a matter of property law* amount to a conversion of the intangible work. Conversion requires depriving the owner of the object of ownership, but once the work is posited as intangible, the author cannot be deprived of the work. One can hardly fail to appreciate the irony here: precisely because it is posited as intangible, the work cannot be converted.³⁷ To put it otherwise, copyright subject matter overflows the conceptual resources of property as a legal category.

At common law, the idea that the work is intangible cannot, without more, account for the postpublication persistence of an author's rights with respect to the work. At most, that idea translocates the problem. If, following Justice Yates,

³⁵ See *id.* at 234; 4 Burr. at 2364 (“[W]hen the author makes a general publication of his work, he throws it open to all mankind.”).

³⁶ See *id.* at 232-34; 4 Burr. at 2360-64.

³⁷ See *R. v. Stewart*, [1988] 1 S.C.R. 963, 964 (Can.) (“Since there is no deprivation, there can be no conversion.”).

we posit the prepublication right as a property right in the physical manuscript, we are left with the mystery of trying to think through how a book buyer's use of her own lawfully acquired chattel (i.e., the physical book) can be a conversion of an author's chattel (i.e., a manuscript). If, alternatively, we decide to posit the prepublication right as a property right in the intangible work, we are left with the equally challenging mystery of trying to think through how a book buyer's use of her own lawfully acquired chattel can be a conversion of an author's work that, because it is intangible, cannot be converted. The options are equally unpromising. Justice Yates explicitly argued that the property in the manuscript could not account for an author's copyright. But nor can positing property in the work as a metaphysical object do so. In neither case can the concept of an object of ownership—whether tangible or otherwise—account for the subsistence through publication of an author's right in respect of his work. Publication places the work in the public domain regardless.

Thus, in order to account for the postpublication persistence of the right, Lord Mansfield posited not only that (1) there is a common law right of first publication and that (2) this right is "incorporeal" in the sense of "detached from the manuscript, or any other physical existence,"³⁸ but also, and crucially, that (3) the right is an exclusive right held by the author to communicate her work to the public—in a word, *to publish the work*.³⁹ He called this right the property of an author in the "copy" of her own work. He described it as follows: "I use the word 'copy,' in the technical sense in which that name or term has been used for ages, to signify *an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters*."⁴⁰ This right is a "property" of sorts, yet only in a peculiar sense, as it is, in Lord Mansfield's characterization, an "incorporeal" property that is incapable of being stolen and that is subject to being violated only by another's printing and publishing of an author's work without her consent.⁴¹ The exclusivity of the performance of the act of publication is the "property" Lord Mansfield described.

It is precisely the eccentricity of the "copy" as a peculiar form of property that permitted Lord Mansfield to elucidate the persistence of the right through publication. The subject matter of an author's "copy" is neither a thing that an author can transfer to another nor a thing of which the author can be deprived. Indeed, it is not a thing at all—whether tangible or otherwise. It is rather the

³⁸ *Millar*, 98 Eng. Rep. at 251; 4 Burr. at 2396 (opinion of Lord Mansfield CJ).

³⁹ *Id.* ("The property in the copy . . . is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever.")

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.* ("The property thus abridged is equally incapable of being violated by a crime indictable. In like manner, it can only be violated by another's printing without the author's consent: which is a civil injury. . . . No action of detinue, trover, or trespass *quare vi et armis*, can lie; because the copy thus abridged is equally a property in notion, and has no corporeal tangible substance.")

author's exclusive prerogative to speak in her own voice, to communicate her work to the public, to publish her work. This is why, as Lord Mansfield well knew, to transfer a copyright is not to hand over a chattel but rather to authorize another to speak on one's behalf. Only the author's authorization, in other words, can possibly entitle another to perform the act that the author has the sole right to perform. It follows that having access to the work because it has been published does not entitle another to abrogate for himself an author's exclusive prerogative in respect of her work. On the contrary, because publication is not authorization, the author retains through publication the sole right to print and publish the work. Properly understood, the right of *first* publication is thus a sole right of publication *simpliciter*. "But the same reasons hold," Lord Mansfield wrote, "*after* the author has published."⁴² It is specifically as an author exclusively entitled to communicate her work, not as an owner of a tangible or intangible object, that an author can claim rights over her work even after making it available to the public.

But what, then, can be said about duration on this basis? From the standpoint of the theory of duration, Lord Mansfield's tour de force may appear problematic, at least at first sight. Bluntly put, the problem is that Lord Mansfield's formulation of the author's common law "copy" was designed to vindicate the perpetuity of common law copyright. Lord Mansfield's was not a theory of copyright but a theory of *perpetual* copyright. Indeed, it was precisely in dissenting from the affirmation of perpetual copyright that Justice Yates formulated the theory of statutory, and thus limited, copyright. We thus seem caught between (a) Justice Yates's limited statutory copyright, for which the insistent presence of the author's death is irremediably mysterious, and (b) Lord Mansfield's perpetual common law copyright, for which the insistent presence of the author's death is an error to be repudiated. In neither case, that is, do we have a theory of duration formulated in and through the mortality of the author. In short, neither Lord Mansfield nor Justice Yates could find death *in* copyright.

Returning, once again, to the meaning of publication in copyright law will help us sharpen and, I hope, resolve this difficulty. One can readily identify at least two copyright meanings of "publication" operative in the Mansfield/Yates debate. First, there is publication in the sense of making the work available to the public. This is a movement from the unpublished to the published that ordinarily takes place through the agency of an author. Let us call this publication "disclosure." Second, there is publication in the sense of making the work public; that is, in the sense of an author's abandonment of any exclusive rights she may otherwise have over the work. Let us call this publication "abandonment." The Mansfield/Yates debate was about whether disclosure necessarily entailed abandonment. Justice Yates argued that, absent statutory intervention, it most certainly did. Lord Mansfield argued that it most certainly did not.

⁴² *Id.* at 252; 4 Burr. at 2398 (emphasis added).

With the distinction between disclosure and abandonment in mind, two further observations are apposite. First, copyright theory of any kind must be a theory of how disclosure can take place in the absence of abandonment. One might even venture that copyright theory *is* a theory of that distinction. It must answer the question: How is it possible to disclose a work of authorship while retaining rights to it?

Second, once we frame the distinction between disclosure and abandonment in the context of duration, we can see that these two meanings of publication in fact arise as two stages in the juridical life of a work subject to copyright. Disclosure is the first stage. Assuming there is such a thing as copyright and that, therefore, disclosure does not amount to abandonment, we find at this stage published works with respect to which authors hold rights. Abandonment is the second stage. We now find published works that once were, but are no longer, subject to copyright. It is as if the disclosed works become, by virtue of the passage of time specified in duration, abandoned. To put it differently, it is as if copyright postpones for limited times (measured by reference to the author's death) the abandonment of a published work. The ultimate destiny of a work is to be in the public domain. Copyright is but a postponement of this destiny.⁴³

If we adopt Justice Yates's standpoint, we can assert—as if by statutory fiat—that disclosure must eventually give way to abandonment. But we cannot explain why the postponement of abandonment is to be measured through the author's death. Death would remain an unintelligible vestige—an undigested and indelibly recurrent aspect of the statutory text.

Things are not any more promising, at least not to begin with, if we adopt Lord Mansfield's standpoint. Indeed, as we have noted, Lord Mansfield framed his account of the distinction between disclosure and abandonment as an argument for perpetual copyright. He explained that a work of authorship can be disclosed, yet not abandoned, by construing it as a communicative act, as the speech of an author. Once publication is regarded as speech, rather than as the release of an object—whether tangible or otherwise—from the author's grasp, then the fact that the author has spoken does not entail that she has thereby abandoned her speech or any rights therein. In short, Lord Mansfield's point was that nothing about an author's exercise of her exclusive right to publish can possibly deprive her of that right. Why would it? We may be tempted, of course, to follow some kind of untested intuition that, indeed, the first exercise of the

⁴³ Historically speaking, this becomes even clearer when the initial distinction between unpublished works (subject to perpetual copyright) and published works (subject to limited duration) is collapsed into a single limited copyright term applicable to both unpublished and published works. This transition took place in the United States in 1976. Copyright Act of 1976, Pub. L. No. 94-553, § 202, 90 Stat. 2541, 2568-69 (codified as amended at 17 U.S.C. (2018)). Canada and the United Kingdom followed suit in the mid-1990s. See Copyright Modernization Act, S.C. 1997, c 24, s 23 (Can.); The Duration of Copyright and Rights in Performances Regulations 1995, SI 1995/3297, art. 2, ¶¶ 5-7, 10 (UK). As a result, the very act of authorship—not that of publication—now entails the termination of the rights attendant therein. Authorship, not publication, brings death in its wake.

right deprives the author of the right—in other words, that disclosure amounts to abandonment. But we have this intuition, Lord Mansfield would warn us, only because we suffer from the illusion that publication is something we do with a thing (whether a manuscript or a metaphysical chattel) that we somehow hand over to the public in some exercise of waiver or abandonment. But publication is not the release of a thing to the public. On the contrary, once we correctly see publication as a communicative act, there is nothing in performing it that somehow transfers to others the author's exclusive rights in respect of her work. That I have spoken does not mean that you can hitherto speak for me.

The trouble is that Lord Mansfield's forceful distinction between disclosure and abandonment, by appeal to the concept of the work as speech, now threatens to become, as indeed it did in Lord Mansfield's hands, a theory of perpetual copyright. For what could the passage of time possibly do to an author's exclusive juridical authority to speak (i.e., to publish) her own work? The theory of disclosure without abandonment thus becomes a theory of perpetuity—a manifesto, so to speak, to abandon abandonment.

Yet Lord Mansfield cannot have it both ways. He sought to assert the nonproprietary nature of the entitlement in order to avoid the unassailable stronghold Justice Yates constructed out of his theory of publication as the release of a thing—whether tangible or otherwise. Lord Mansfield thus asserted an irreducibly personal, nonproprietary link between author and work construing publication as a communicative act that, as such, did not entail abandonment of any rights in respect of the work by virtue of publication. But by the same token, Lord Mansfield cannot also assert the perpetuity of the right and, thus, its subsistence beyond the life of the person to whom it owes its origin. The equivocations respecting the formulation of an author's "copy" as a peculiar form of "property" cannot undo the force of the conclusion that, once he had posited the personal link between author and work to account for disclosure without abandonment, Lord Mansfield had also in effect posited the limited duration of the right. It cannot be otherwise. Once the right is seen to arise from and inhere in the author, it must thereby also be seen to expire with the mortal life from whence it came and from which it is inseparable. Its death is but an incident of its origin(ality).⁴⁴

⁴⁴ By laying bare the inseparability of author and work, the principle of independent creation anchors an interpretation of the recurrent and virtually universal incidence of the word "death" in the statutory text. Historically speaking, to be sure, death in copyright has coexisted with copyright terms expiring both before and after the author's death. On the one hand, the Statute of Anne initially granted a term of fourteen years from publication with a possibility of renewal so long as the author had not died in the interim. On the other hand, the current copyright term in most countries extends for a number of years beyond the author's death. But the logic of independent creation is compatible with neither option because neither is consistent with the inseparability of author and work. This need not be the end of the story, as there may be logics or imperatives other than independent creation animating the statute. Of course, this would prompt an investigation of the intelligibility of pluralist readings of the

To be sure, nothing in the passage of time per se could possibly erode an author's exclusive prerogative to publish her own work. But the point is not that the passage of time per se erodes the author's authority over her work. It is rather that, in the absence of propertization of her speech, the author's juridical authority as a speaker cannot survive her own death. If Lord Mansfield posits the author as proprietor, he cannot forestall Justice Yates's construal of publication as abandonment. But if he posits the author as speaker, he cannot hold on to the perpetuity of her copyright. As I noted above through the analysis of the principle of independent creation, the theory of originality is *eo ipso* a theory of duration. In the eyes of copyright law, an author is someone who shall have been dead.

statute. Regardless of that investigation, however, it must be the case that what is good for the goose is good for the gander. Those seeking to extend the copyright term beyond death by appealing, for example, to the incentive function of that extension must acknowledge the possibility that efficiency arguments may equally mandate shortening the copyright term to a time before death.