Speaking from the Grave. Should Copyright Listen?

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Eva E. Subotnik, *Artistic Control After Death*, 92 **Wash. L. Rev.** (forthcoming 2017), available at SSRN.

Should authors be able to control the use of their work after they die? It's a question that touches deep personal and public concerns. It resonates with longstanding debates in literary studies over the "death of the author" and "authorial intent," and is an issue that Professor Eva Subotnik tackles in her latest article, *Artistic Control After Death* (forthcoming in the Washington Law Review).

Currently, U.S. copyright expires 70 years after the author's death so that control of an author's copyrights extends far into the future. Long after an author creates a work, often decades after publication and the work's integration into artistic or literary culture, under the law, heirs and literary estates have the power to exercise control over the work's continued use and dissemination.

This enduring control may be troublesome for reasons related to the special contours of intellectual property shaped by both private rights of exclusion and public rights of access to culture and knowledge. The longer that exclusive control over works is exercised into the future, the slower the public domain is enriched to promote the constitutional prerogative of "progress of science and the useful arts" through copyright.

This is not just a problem of copyright duration, which has continued to lengthen since its U.S. origins of fourteen years in 1790. It is also a problem for an author's purposes and hopes for a work, which can shift over a lifetime with changes to cultural production, aesthetics, and business practices, to say nothing of personal predilections and personality.

Many authors (e.g., J.D. Salinger) are deeply attached to their works and exercise particularized and sometimes parent-like control during their lifetimes. Others are more liberal with copying and transformation by fans and other noncommercial or noncompeting uses (e.g., J.K. Rowling and Neil Gaiman).

Upon death, how much should authorial intent and past practices guide the living who now own the copyrighted works? How should authorial intent as opposed to the concerns of the living (be they monetary, reputational, charitable, or cultural concerns) shape the stewardship of inherited copyrighted works? These questions become particularly acute in the context of authors who have left specific instructions and for works that remain unpublished or unfinished.

Professor Subotnik's article addresses just this debate in the contemporary context of extended copyright terms and copyright heirs' legal rights and obligations. This article couldn't be more timely given concerns raised over the estates of Harper Lee and Prince. Both Harper Lee and Prince intentionally left work unpublished, work that contemporary audiences would love to read and hear. Harper Lee's agent and lawyer in control of Lee's finances for some time published the work under suspicious circumstances. The book received negative reviews and arguably affected Harper Lee's literary reputation, although it certainly enriched her heirs. Many recordings in Prince's musical estate remain unreleased as his heirs debate what to do. How should copyright law resolve these tensions?

Professor Subotnik's contribution introduces to the intellectual property literature the rich debate in trusts and estates law concerning "dead hand control" of assets through trust instruments and fiduciary relations. In trusts and estates law, this debate has long raged: how much can grantors of property control its use after their deaths, especially in light of changing circumstances, both societal and personal?

For someone (like me) who knows next to nothing about trusts and estates law, but regularly follows developments in copyright law, the article is informative and provocative. The article does not propose a balancing test, but rather a rule. Professor Subotnik argues that enforceability of post-mortem instructions over copyrighted work should be guided by federal copyright policy, which favors the living, even if that means overriding the author's wishes. She makes an especially strong case for this rule "where [the] authors seek to bar entire categories of uses of their works and where … enforcement [of post-mortem instructions] is … not needed to protect against the premature destruction of the work by the author." This rule would arguably support the publication of Harper Lee's prequel to **To Kill a Mockingbird** and of Prince's unreleased recordings, despite the sequestration of both during the authors' lifetimes.

Subotnik's article proceeds in three parts. It begins by recounting the diverse ways authors control their work through their heirs, by means of formal mechanisms (residuary gifts, wills, and trusts) and informal mechanisms (leading by example and discussions with the living). This part is full of engaging accounts from various authors' estates as Professor Subotnik digs into the literary history and details of famous authors.

Animating this first part is a photograph of the will of Beastie Boys' Adam Yauch, displaying his hand-written directive that "in no event may my image or name or any music or any artistic property created by me be used for advertising purposes." A year after Yauch's death, the remaining Beastie Boys invoked this directive to enjoin the toymaker Goldiblox from using the 1987 Beastie Boys song "Girls" in an advertisement that celebrated young girls as aspiring engineers. The toymaker altered the lyrics of the song to describe the company's mission ("Girls to build a spaceship / Girls to code the new app / Girls to grow up knowing / That they can engineer that").

Surely, this kind of social commentary and transformation of "Girls" is fair use under copyright law (the 1994 Supreme Court case of Campbell v. Acuff Rose strongly suggests as much). And yet because of Yauch's will, and the devoted heirs of Yauch's musical copyrights, the lawsuit persisted until Goldiblox withdrew the commercial. Is this what someone like Yauch intended? The legal and ethical ambiguity surrounding such instructions, in light of copyright's purposes of promoting cultural conversations consistent with First Amendment principles, leads us inevitably to a discussion of what to do.

In the second part of the paper, Subotnik discusses the debates within trusts and estates law about the proper extent of dead-hand control. Arguments for control include natural law, incentivizing wealth accumulation, promoting industry and productivity, self-expression and personal satisfaction, and reinforcing essential relationships. These mirror arguments from an author-centered view of copyright, contending that moral rights, personal control, and private incentives are critical to the making and dissemination of creative work.

Arguments in favor of diminishing post-mortem control include changed circumstances, intergenerational equity, imperfect information, negative externalities, and the welfare of the beneficiaries. These arguments reflect concerns in copyright doctrine (and in intellectual property doctrine generally) that dead-hand control not fetter IP's mission of enriching science and art for the benefit of society and the public domain. Authors' rights are an intermediary step and can be trumped by the ultimate goal of society-wide human flourishing.

Subotnik concludes by embracing the "benefit the beneficiaries" rule, highlighting the policy of benefiting the living in both trust and intellectual property law. Subotnik persuasively argues that living decision-makers should be given more deference to manage artistic assets. If our concern is whether the work will be read, viewed, or put in contexts in which it can be maximally appreciated – all copyright interests to be sure – "[t]here is no reason to think that a dead author is in a better position to track a work's success in the marketplace and ensure its place in history than are the living."

And when the author's wishes were to restrain use of the work – quashing its enjoyment by audiences as well as its financial benefits for heirs – post-mortem instructions are antithetical to copyright interests of dissemination and cultural progress. "[Indeed] an author's stringent controls on access and use of copyrighted materials can sound a death knell for a work" if not also an author's continued literary existence. And so Professor Subotnik puts a thumb on the scale for heirs to override authorial control.

Subotnik provides one caveat, however: when there is a risk that artists will destroy works before their deaths out of fear their heirs won't shepherd the work as desired, following post-mortem instructions makes better sense. Because society has an interest in preserving work – unpublished or published, personal documents of all sorts (letters and journals) – dead-hand guided preservation, which could last up to 70 years after death, is better than the alternative. Given that the public interest never dies, but authors do, I applaud this conclusion. Eventually the work will enter the public domain, and then dead-hand control ends.

Of course, control by heirs (as opposed to dead authors) is not necessarily in the public interest. But by favoring freer use by the living, Professor Subotnik refers to living successors as well as living audiences and fair users. Indeed, this article ably engages various interdisciplinary dimensions (of literary studies, trusts and estates, and intellectual property) relying on important prior work by Deven Desai, Ray Madoff, and Robert Spoo, whose scholarship grounds these debates in the public interest and social welfare. Subotnik's contribution enriches these debates and should guide future policy in this area.

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