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## Artistic Control after Death

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# ARTISTIC CONTROL AFTER DEATH

Eva E. Subotnik\*

*Abstract:* To what extent should authors be able to control what happens to their literary, artistic, and musical creations after they die? Viewed through the lens of a number of succession law trends, the evidence might suggest that strong control is warranted. The decline of the Rule Against Perpetuities and rise of incentive trusts reflect a tightening grip of the dead hand. And yet, an unconstrained ability of the dead to determine future uses of literature, art, and music is a fundamentally troubling notion. This Article evaluates the instructions authors give with respect to their authorial works against the backdrop of the laws and policies that govern bequests more generally. In particular, it considers the enforceability of attempted artistic control through the imposition of a fiduciary duty. In balancing the competing interests, this Article considers the demands of both state trust laws and federal copyright policy. In the end, this Article argues that authorial instructions must yield to the needs of the living. Such a view requires that, to the greatest extent possible, some living person(s) be authorized to decide how works of authorship are used—even if that means overriding artistic control by the dead.

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## INTRODUCTION

“So what’cha what’cha what’cha want, what’cha want?”<sup>1</sup> In 2014, what Monster Energy Company wanted was to limit its damages for using Beastie Boys songs in its “Ruckus in the Rockies” promotional video.<sup>2</sup> That was not, apparently, what the jury wanted, for it awarded the hip-hop group \$1.2 million in damages.<sup>3</sup> An interesting, if not dispositive, aspect of the litigation was what deceased Beastie Boy Adam “MCA” Yauch wanted. Yauch, who had died from cancer in 2012 at the age of forty-seven,<sup>4</sup> prescribed in his will that “[n]otwithstanding anything to the contrary, in no event may my image or name *or any music or any artistic property created by me* be used for advertising

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1. BEASTIE BOYS, *SO WHAT’CHA WANT* (Capitol Records 1992).

2. *See* *Beastie Boys v. Monster Energy Co.*, 66 F. Supp. 3d 424, 427–28 (S.D.N.Y. 2014).

3. *Id.* at 435.

4. RJ Cubarrubia, *Adam Yauch’s Will Prohibits Use of His Music in Ads*, ROLLING STONE (Aug. 9, 2012), <http://www.rollingstone.com/music/news/adam-yauchs-will-prohibits-use-of-his-music-in-ads-20120809> [<https://perma.cc/SX94-WA4B>]; *Beastie Boys Co-Founder Adam Yauch Dead at 47*, ROLLING STONE (May 4, 2012), <http://www.rollingstone.com/music/news/beastie-boys-co-founder-adam-yauch-dead-at-48-20120504> [<https://perma.cc/7LH4-CRQV>].

purposes.”<sup>5</sup> Underscoring their apparent importance to him, Yauch had actually penned the italicized words onto the face of his will.<sup>6</sup>

At the time the will was offered for probate, commentators identified several complexities raised by this provision, such as its application to works that were jointly owned and the scope of the words “advertising purposes.”<sup>7</sup> Indeed, the court in the *Monster Energy* trial excluded the will from evidence essentially on these grounds and also out of concern that the admission of such a spectral statement might sway the emotions of the jury.<sup>8</sup> But even unmoored from the context of that litigation, the Yauch will constitutes a bold dead-hand maneuver—an attempt to direct the exploitation of copyright interests from beyond the grave. It is not clear, however, that society should countenance such an attempt.

In order to appreciate why one might be skeptical of such an attempt, it is first necessary to take a step back. The very nature of culture as an amalgam of art, music, literature, and numerous other inputs that should be permitted to develop freely has great appeal. It is for this reason that many commentators criticize the current regime of intellectual property rights.<sup>9</sup> They see these rights as artificially hamstringing the ability of cultural participants to engage fully with the world—to the detriment of society and future generations.<sup>10</sup> Some have even labeled intellectual

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5. Will of Adam Yauch, at 8, ¶ 6 (N.Y. Surr. Ct. June 6, 2001) (emphasis added).

6. *Id.* For a photographic copy of this portion of Yauch’s will, see *infra* at section I.D. Yauch’s words were also invoked in another contemporaneous litigation. See Jon Blistein, *Beastie Boys Settle Lawsuit over ‘Girls’ Toy Commercial*, ROLLING STONE (Mar. 18, 2014), <http://www.rollingstone.com/music/news/beastie-boys-settle-lawsuit-over-girls-toy-commercial-20140318> [<https://perma.cc/942G-S8X7>] (discussing lawsuit over GoldieBlox’s use of Beastie Boys song in ad).

7. *E.g.*, Wendy S. Goffe, *Part of Beastie Boy Adam Yauch’s Will, Banning Use of Music in Ads, May Not Be Valid*, FORBES (Aug. 13, 2012), <http://www.forbes.com/sites/deborahljacobs/2012/08/13/part-of-beastie-boy-adam-yauchs-will-banning-use-of-music-in-ads-may-not-be-valid/> [[perma.cc/SUF3-DAKD](https://perma.cc/SUF3-DAKD)].

8. Transcript of Trial at 411–13, *Beastie Boys v. Monster Energy Co.*, 66 F. Supp. 3d 424, 427–28 (S.D.N.Y. 2014) (No. 12 Civ. 6065) (excluding the will under Federal Rule of Evidence 403).

9. *See, e.g.*, Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 521–22 (2007) (arguing that “the role of copying in the creative process” is not sufficiently appreciated in legal, “author-centric conceptions” of creation).

10. *Cf. id.* at 480 (“[C]opyright doctrine does not adequately accommodate the varied ways in which many artists actually create works.”). Importantly, such rights affect not only uses that directly compete with the initial creator, but also adaptive and scholarly uses that seek merely to build upon earlier works or to chronicle social developments. *See* Copyright Act of 1976, 17 U.S.C. § 106(2) (2012) (setting forth the derivative work right under copyright law).

property rights holders as “stewards” of culture, in addition to being “owners,”<sup>11</sup> because of their vast power as cultural gatekeepers.

As the initial stewards of their own work, authors do not always make farsighted decisions.<sup>12</sup> Irving Berlin was wildly successful in harnessing the financial power of the copyright system.<sup>13</sup> But Berlin was shortsighted in refusing to permit his music to be quoted in a seminal treatment of the relevant musical form.<sup>14</sup> Specifically, Alec Wilder, in his comprehensive analysis of American popular song, was able to obtain most of the permissions he needed.<sup>15</sup> But his book will forever contain a glaring gap for readers and scholars with respect to Berlin’s works.<sup>16</sup>

Scholars and other commentators have likewise documented decisions by authors’ successors that appear out of step with the public interest.<sup>17</sup> For example, James Joyce’s successor-in-interest, his grandson, has become persona non grata in many circles for his stringent management of Joyce’s copyrights.<sup>18</sup> President Warren G. Harding’s successors also clamped down on the scholarly use—forty years after his

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11. See, e.g., Shubha Ghosh, *Managing the Intellectual Property Sprawl*, 49 SAN DIEGO L. REV. 979, 1007 (2012) (arguing that intellectual property owners “are just stewards for a broader class of users, . . . [including] consumers, future generations, and constituents that rely on property but may not have not [sic] a direct ownership stake”); Roberta Rosenthal Kwall, *The Author as Steward* “For Limited Times,” 88 B.U. L. REV. 685, 704 (2008) (reviewing LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007)) (underscoring that “copyright ownership involves duties to the public as well as rights in the work”).

12. For an arguable example, see *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (pursuing copyright claims against biographer’s use of unpublished letters).

13. See generally *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts & Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. 272 (1995) (prepared statement of Mary Ellin Barrett, daughter of Irving Berlin) (arguing in favor of copyright term extension).

14. See ALEC WILDER, *AMERICAN POPULAR SONG: THE GREAT INNOVATORS, 1900–1950*, at 91 (James T. Maher ed., 1990).

15. See generally *id.* However, in at least one unsuccessful instance, an unnamed composer actually pleaded with the rights-holding publisher on Wilder’s behalf, to no avail. *Id.*

16. *Id.* at 91; cf. Book Note, 94 HARV. L. REV. 1518, 1518 (1981) (reviewing FAIR USE AND FREE INQUIRY: COPYRIGHT LAW AND THE NEW MEDIA (John Shelton Lawrence & Bernard Timberg eds., 1980)) (placing some of the responsibility on “the scholar’s own publisher, who would insist that he obtain (and pay for) permission from the copyright owner”).

17. E.g., RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 144–47 (2010); Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 258–59; Robert Spoo, *Ezra Pound’s Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1822–27 (2009); Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 123–24 (2015).

18. E.g., MADOFF, *supra* note 17, at 144–46; Desai, *supra* note 17, at 258–59; Spoo, *supra* note 17, at 1825–27; Subotnik, *supra* note 17, at 123.

death—of Harding’s love letters to his paramour that might have revealed her German allegiances during World War I.<sup>19</sup>

Such control by authors and other rights holders is tolerated—albeit with resistance<sup>20</sup>—because the compensating benefits are deemed worth it. Those benefits primarily consist of upfront incentives to create expressive works in the first place. But a fundamentally different calculus is raised by attempts, such as by Yauch, to control the uses of works after one’s death. To begin with, in many instances, valuable works are jointly owned. This means that other individuals or entities may have legal rights in the works.<sup>21</sup> Nevertheless, when the court asked the Beastie Boys’ counsel whether Yauch’s will could block the living co-owners’ rights to license the group’s music in advertising, counsel responded, “I believe it can.”<sup>22</sup> This response, perhaps tendered in an off-handed fashion, cannot be right as a matter of law. There is no reason why a deceased co-owner would have more power to control exploitation than he did while alive.

Even where joint ownership is not an issue, however, there are significant reasons to be wary of permitting a deceased author to dictate how his successors can use the materials that he created—and, *a fortiori*, of permitting successive owners to so dictate. While attempted restraints on advertising uses might not tug at the heartstrings with respect to our cultural policies, they may cause significant hardships for an author’s beneficiaries. Moreover, given the special and undeniable interest

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19. Jordan Michael Smith, *The Letters That Warren G. Harding’s Family Didn’t Want You to See*, N.Y. TIMES MAG. (July 7, 2014), <https://www.nytimes.com/2014/07/13/magazine/letters-warren-g-harding.html> [<https://perma.cc/J8K8-3NL4>] (describing successful lawsuit by Harding family in 1964 to prevent biographer Francis Russell from using the letters). “The Harding family feared that publishing them would further tarnish Harding’s legacy and hurt the entire family. To the dismay of many historians, a settlement was reached in which the Harding family, who owned the copyright to the letters, agreed to donate them to the Library of Congress in return for a guarantee that they remain sealed for 50 years.” *Id.*; see also JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 135–38 (1999); Jennifer Schuessler, *Warren G. Harding’s Racy Love Letters Unsealed*, N.Y. TIMES (July 29, 2014), [http://artsbeat.blogs.nytimes.com/2014/07/29/warren-g-hardings-racy-love-letters-unsealed/?\\_r=0](http://artsbeat.blogs.nytimes.com/2014/07/29/warren-g-hardings-racy-love-letters-unsealed/?_r=0) [<https://perma.cc/27PM-R7T7>].

20. See, e.g., Spoo, *supra* note 17, at 1828 (noting the “simple intuition” that “[h]eirs (and even authors) might not be the best stewards of literary legacies”).

21. See, e.g., 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:7 (2015) (footnotes omitted) (“As a co-owner in the whole, each joint author may utilize the work him- or herself without the other’s permission and indeed over the other author’s objection.”).

22. Transcript of Trial at 403, *Beastie Boys v. Monster Energy Co.*, 66 F. Supp. 3d 424 (S.D.N.Y. 2014) (No. 12 Civ. 6065).

society may have in these assets,<sup>23</sup> other restrictions, like bans on quotations or adaptations, or the ordered destruction of works, might cause significant social harm. If enforced, these control mechanisms mean that the public has to contend not only with a long postmortem copyright term but also with circumstances in which uses of copyrighted works are foreclosed—even if no living right holder objects. Furthermore, as authors become increasingly savvy about their intellectual property holdings, there is reason to suppose that this sort of attempted control will become more routine.

Viewed through the lens of general succession law trends, the evidence might suggest that strong control is warranted.<sup>24</sup> The weakening of the Rule Against Perpetuities, the emergence of incentive trusts, and the continued availability of conditional bequests and honorary trusts all portray a dead hand whose clasp is growing ever tighter.<sup>25</sup> At the same time, other trends in trust modification and termination law bespeak increasing protectiveness of the interests of living successors.<sup>26</sup> And courts have long refused to enforce testamentary provisions that are capricious or socially harmful.<sup>27</sup>

This Article makes two principal points. First, it argues that cloaking authorial instructions in the garb of a fiduciary duty should by no means guarantee their enforceability. Second, it argues that the enforceability of such instructions should be guided by federal copyright policy. That policy, while favoring postmortem copyrights, nevertheless should be interpreted to disfavor attempts to strip living successors—including fair users—of the power to make autonomous decisions about copyrighted works.<sup>28</sup> To the contrary, as will be demonstrated, federal copyright policy militates in favor of ensuring, to the greatest extent possible, that at least one living person be in a position to make decisions about works still under copyright—even if that means overriding the author's wishes.<sup>29</sup>

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23. *E.g.*, SAX, *supra* note 19, at 46–47, 100–01; Desai, *supra* note 17, at 262–68; Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 813, 832 (2005).

24. *See, e.g.*, Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 640 (2004) (“[U]nder the American approach . . . the donor’s intent controls.”). Throughout this Article, I refer to donors as testators or settlors, depending on the context. The fundamental regard for the donative intent of each is an established principle of American succession law.

25. *See infra* section II.C.

26. *See infra* section II.C.

27. *See, e.g.*, *infra* note 135 and accompanying text.

28. *See infra* note 355 and accompanying text.

29. *See infra* section III.C.

This Article proceeds as follows. Part I outlines the various means by which authors communicate their wishes for the works they have created. Part II situates postmortem artistic control within the types of control decedents seek to exert more generally. It considers the policy justifications for—and for interfering with—dead-hand control in other contexts. Part III applies the lessons from that general exploration to the artistic realm and balances the interests involved, arguing why certain kinds of artistic instructions should or should not be enforced.<sup>30</sup> It concludes that, to comport with federal copyright policy, aggressive authorial instructions must yield to the needs of the living to the maximum extent possible. This is particularly true where authors seek to bar entire categories of uses of their works and where, on balance, enforcement is likely not needed to protect against the premature destruction of the work by the author. As one distinguished commentator aptly stated, “In the end, death is the determining factor: death means the final abdication of power. No matter what we wish, in dying we relinquish control over ourselves and our work.”<sup>31</sup>

## I. MEANS OF EXERTING ARTISTIC CONTROL AFTER DEATH

Considering the circumstances, dead authors are a prolific group. While the creation of new works of authorship is clearly foreclosed after death, previously authored works often come to light, or are re-packaged in different ways, after authors die. On the one hand, many unknown artists gain widespread public attention only following their deaths.<sup>32</sup> For example, the enormously influential play *Woyzeck*, written by the German dramatist Georg Büchner in the mid-1830s, stayed in relative obscurity for almost eighty years following Büchner’s death at a young

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30. Admittedly, I leave for another day an examination of the estate tax implications of the analysis and proposal I offer in this Article.

31. Roxana Robinson, *Burn Your Letters?*, NEW YORKER: PAGE-TURNER (May 22, 2013), <http://www.newyorker.com/books/page-turner/burn-your-letters> [https://perma.cc/2QY8-S7NQ] (“Maybe the real question is not, ‘Should we restrict our letters after we die?’ but ‘Should we sit down at this desk and start making sentences?’ That’s the biggest risk.”). Robinson is the current president of the Authors Guild. See *Board of Directors*, AUTHORS GUILD, <https://www.authorsguild.org/who-we-are/board-directors/> [https://perma.cc/82G9-HMNL].

32. See, e.g., Randy Kennedy, *The Heir’s Not Apparent: A Legal Battle Over Vivian Maier’s Work*, N.Y. TIMES (Sept. 6, 2014), <https://www.nytimes.com/2014/09/06/arts/design/a-legal-battle-over-vivian-maiers-work.html> [https://perma.cc/FY8Q-JTX4] (describing posthumous rise to prominence of street photographer Vivian Maier); John Williams, *Lucia Berlin’s Rowdy Life Is Reflected in a Book of Her Stories*, N.Y. TIMES (Aug. 16, 2015), <http://www.nytimes.com/2015/08/17/books/lucia-berlins-roving-rowdy-life-is-reflected-in-a-book-of-her-stories.html> [https://perma.cc/9E67-A9WN] (describing posthumous rise to prominence of writer Lucia Berlin).



age until its first staging in 1913.<sup>33</sup> On the other hand, recent years have seen the posthumous publication of works by American luminaries like Laura Ingalls Wilder,<sup>34</sup> Ernest Hemingway,<sup>35</sup> and Theodor Seuss Geisel,<sup>36</sup> whose talents were appreciated during their own lifetimes.<sup>37</sup>

The choices about how and when to edit and publish these works are left in the hands of the living—either transferees of these rights during the author’s lifetime or her at-death successors.<sup>38</sup> This is because, to state the obvious, authors largely are not in a position to control their works or their reputations after they die. Nevertheless, certain authors attempt to influence, if not outright control, the treatment of their works after their deaths.<sup>39</sup> This Part surveys the ways authors seek to exert such control, which are not mutually exclusive.

33. Robert Scanlan, *Coiled Razor Wire and Shards of Glass*, AMERICAN REPERTORY THEATER, <http://americanrepertorytheater.org/inside/articles/coiled-razor-wire-and-shards-glass> [<https://perma.cc/GNZ8-BGS9>].

34. Ruth Graham, *Those Happy Golden Years*, SLATE (Nov. 7 2014), [http://www.slate.com/articles/arts/books/2014/11/little\\_house\\_nonfiction\\_laura\\_ingalls\\_wilder\\_s\\_memoir\\_pioneer\\_girl\\_reviewed.html](http://www.slate.com/articles/arts/books/2014/11/little_house_nonfiction_laura_ingalls_wilder_s_memoir_pioneer_girl_reviewed.html) [<https://perma.cc/3NNS-NB27>] (reviewing *Pioneer Girl*, Wilder’s “first-person, nonfictional account of 16 years of her childhood,” which was first published about eighty-five years after Wilder wrote it).

35. Hemingway’s *A Moveable Feast* was first published posthumously in 1964. A much more recent version, published in 2009, which caused great controversy over its revised portrayal of Hemingway’s second wife, was edited by her grandson. See A. E. Hotchner, *Don’t Touch ‘A Moveable Feast,’* N.Y. TIMES (July 19, 2009), <http://www.nytimes.com/2009/07/20/opinion/20hotchner.html> [<https://perma.cc/J4VX-GJF3>]; Motoko Rich, *‘Moveable Feast’ Is Recast by Hemingway Grandson*, N.Y. TIMES (June 27, 2009), <http://www.nytimes.com/2009/06/28/books/28hemingway.html> [<https://perma.cc/8WHZ-GPVE>].

36. See discussion *infra* section I.B.

37. See R. Anthony Reese, *Public but Private: Copyright’s New Unpublished Public Domain*, 85 TEX. L. REV. 585, 597 (2007) (collecting other notable examples).

38. There is no doubt that some of those choices would make their associated authors blanch. See, e.g., Claudia La Rocco, *Review: ‘On Writing,’ a Charles Bukowski Collection of Rants and Musings in Letters*, N.Y. TIMES (Aug. 9, 2015), [http://www.nytimes.com/2015/08/10/books/review-on-writing-a-charles-bukowski-collection-of-rants-and-musings-in-letters.html?\\_r=0](http://www.nytimes.com/2015/08/10/books/review-on-writing-a-charles-bukowski-collection-of-rants-and-musings-in-letters.html?_r=0) [<https://perma.cc/W3RB-GYWL>] (discussing the steady publication of books by Charles Bukowski following his death in 1994). As La Rocco puts it, “It’s hard to imagine Bukowski putting much stock in the choices made in his absence: ‘Writers have to put up with this editor thing; it is ageless and eternal and wrong,’ he wrote.” *Id.*

39. Of course, not all creators seek to remain involved. Author Neil Gaiman said:

I love copyright—I love the fact that I can feed myself and feed my children with the stuff I make up. On the other hand, copyright length right now is life plus 75 [sic] years, and I don’t know that I want to be in control of what I’ve created for 75 years after I’ve died! I don’t know that I want to be feeding my great-grandchildren. I feel like they should be able to look after themselves, and not necessarily put limits on what I’ve created, if there’s something that would do better in the cultural dialogue.

Neil Gaiman & Kazuo Ishiguro, *“Let’s Talk About Genre”: Neil Gaiman and Kazuo Ishiguro in Conversation*, NEW STATESMAN (June 4 2015), <http://www.newstatesman.com/2015/05/neil->

Novelist Roxana Robinson offers three explanations for authors' attempted restrictions on material:

[O]ne, that it's private, and its release would violate the privacy of someone still living. Another, that it would reveal behavior or information that would embarrass the writer or her friends, and invite disapprobation. A third, particularly important for a writer, is that the work is unsuccessful or unfinished, unprepared for scholarly scrutiny.<sup>40</sup>

While it is often difficult, if not impossible, to know precisely why any given author tries to control his or her works after death, the examples that follow appear to reflect these and other reasons.

#### A. *Outright Testamentary Gifts*

An author's ability to control aspects of her post-death legacy derives from her rights to control her tangible and intangible works. Tangible materials, like unpublished manuscripts, canvases, or diaries, pass to her successors as personal property. With respect to intangible copyright interests, which now generally last for the life of the author plus seventy years,<sup>41</sup> authors and subsequent owners may likewise transfer ownership by will, trust, or intestate succession.<sup>42</sup>

In many cases, an author's specifications as to the future uses of her tangible or intangible assets are manifested solely through the kinds of dispositions she makes in her will. A specific gift of these interests may suggest that the author was thinking particularly about who would control them after her death. A residuary gift, by contrast, need not even identify the interests.<sup>43</sup> This is because a residuary clause functions as a catch-all bequest of every property interest not otherwise disposed of.<sup>44</sup>

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gaiman-kazuo-ishiguro-interview-literature-genre-machines-can-toil-they-can-t-imagine [https://perma.cc/T2QF-6B4P]. Many thanks to Betsy Rosenblatt for this reference.

40. Robinson, *supra* note 31.

41. Copyright Act of 1976, 17 U.S.C. § 302(a) (2012).

42. *Id.* § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

43. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 374 (9th ed. 2013) (distinguishing among specific, general, and residuary gifts).

44. See *id.*; David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1412 (2009) ("Although the ownership of copyrights in valuable works by famous authors is usually established at the time of death when other assets are divided, ownership of the copyrights of more ordinary people is less likely to be determined upon death. Thus, such rights likely pass with the residue of the estate.").

Residuary gifts can cause great mischief for this very reason: most people may have a general sense of the balance of their property not specifically devised in the earlier parts of a will. But they may have a less concrete sense of the incorporeal assets, like intellectual property rights, that will also be caught by and passed through a residuary clause.<sup>45</sup> Thus, where an artist bequeaths a painting she painted (and to which she retained copyright) to Beneficiary X, while making Beneficiary Y her residuary beneficiary, Beneficiary X will own the tangible work while Beneficiary Y will own the copyright in that work.<sup>46</sup>

Both specific and residuary gifts of these interests can be seen as expressive acts by the author-testator,<sup>47</sup> and indeed, they can instantiate great power in their recipient. But such gifts are different in kind from gifts that are intertwined with restrictions on how rights or works can be exploited in the future.<sup>48</sup>

### B. *Leading by Example*

Some authors die having expressed preferences through the examples they set during their own lives.<sup>49</sup> Playwright and novelist Thornton Wilder was not the kind who left instructions.<sup>50</sup> In their absence, his first generation of successors—“those closest to the flame,” as his nephew and literary executor Tappan Wilder put it—“typically and understandably adopted the default position of continuing to honor, with rare exceptions, the policies of the departed. Two examples of Thornton Wilder’s policies that were largely followed: not publishing or

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45. See, e.g., Telephone Interview with Neil J. Rosini, Entm’t Lawyer, Franklin, Weinrib, Rudell & Vassallo, P.C. (June 29, 2015) (on file with author) (Mr. Rosini is an entertainment lawyer focusing on intellectual property matters).

46. See 17 U.S.C. § 202; Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 143–44 (2006).

47. See David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 85 (2012).

48. *Id.* at 64 n.17; accord Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1329 (1999) (favoring the ability of “property owners to designate their successors” but disfavoring their “superintend[ence] [over] their successors’ behavior”); Subotnik, *supra* note 17, at 118–24 (highlighting this distinction and arguing that it is often imprecise to label outright testamentary gifts of copyright interests as a species of dead-hand control).

49. Cf. *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 253, 256 (N.Y. 1968) (putting great stock in Ernest Hemingway’s “words and conduct” during life in adjudicating state common-law copyright claims).

50. Email from Tappan Wilder, Literary Ex’r and Managing Member, Wilder Family LLC, to Eva E. Subotnik, Associate Professor of Law, St. John’s Univ. Sch. of Law (Feb. 17, 2017, 21:10 EST) (on file with author).

performing excerpts of his works or allowing musical adaptations of key dramas or stage adaptations of key novels.”<sup>51</sup>

Another example is Theodor Seuss Geisel, the author of the Dr. Seuss books, who left behind nearly complete drafts for a children’s book that he never published during his lifetime.<sup>52</sup> After the drafts were discovered in 2013, a Random House employee who had worked directly with Geisel was charged with bringing the book to publication.<sup>53</sup> While Geisel had not left explicit instructions—indeed, it is unknown why he chose not to publish the book during his lifetime<sup>54</sup>—the employee relied on artistic choices made by Geisel while still alive.<sup>55</sup> These included referencing instructions for coloring in works that Geisel gave when he was too ill to work; piecing the text together by taping pages up on a wall (as he was wont to do); consulting the works he had published around the same time; and “follow[ing] his method of picking hues from a chart . . . and marking up each page like a paint-by-numbers project.”<sup>56</sup>

### C. *Discussions with the Living*

Still other authors attempt to exert some artistic control by having discussions with their future successors or in ways that are operative during their own lifetimes. For example, Edward Mendelson, literary executor for the W. H. Auden estate, knew the poet in life. Before he died, Auden said to him, “You must use your judgment” in making decisions about licensing and publication.<sup>57</sup> Renowned children’s book author Maurice Sendak opted for a similar approach with his executor

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51. *Id.* The second-generation successors, by contrast, selectively permit these and other activities to shed more light on the writer’s life and work. These later successors “care about the flame but are not slaves to it.” *Id.*; see also Tappan Wilder, *Thornton Wilder for the Twenty-First Century*, in THORNTON WILDER: NEW PERSPECTIVES 3, 4–6 (Jackson R. Bryer & Lincoln Konkle eds., 2013); Telephone Interviews with Tappan Wilder, Literary Ex’r and Managing Member, Wilder Family LLC (July 3, 2014 and July 15, 2014) (on file with author). I am very grateful to Tappan Wilder for so generously and helpfully speaking with me on this topic.

52. Alexandra Alter, *Dr. Seuss Book: Yes, They Found It in a Box*, N.Y. TIMES (July 21, 2015), [https://www.nytimes.com/2015/07/22/books/dr-seuss-book-a-discovery-in-a-box-and-then-a-reconstruction.html?\\_r=0](https://www.nytimes.com/2015/07/22/books/dr-seuss-book-a-discovery-in-a-box-and-then-a-reconstruction.html?_r=0) [<https://perma.cc/XJB2-57RU>].

53. *Id.*

54. *Id.*; see also Maria Russo, *Dr. Seuss’ ‘What Pet Should I Get?’*, N.Y. TIMES (July 21, 2015), <https://www.nytimes.com/2015/07/26/books/review/dr-seuss-what-pet-should-i-get-review.html> [<https://perma.cc/E5VV-Z4F2>] (reviewing DR. SEUSS, WHAT PET SHOULD I GET? (2015)).

55. Alter, *supra* note 52.

56. *Id.*

57. See Interview with Edward Mendelson, Literary Ex’r for W. H. Auden, in New York, N.Y. (May 15, 2014) (on file with author). I am very grateful to Edward Mendelson for the information he provided to me in this regard.

Lynn Caponera, his former housekeeper and caretaker. Sendak informed Caponera that it would be her responsibility to pare down the belongings in his house in order to transform it into a museum:<sup>58</sup>

“He said, ‘Lynn, you’ll know what to keep and what not to,’” said Ms. Caponera . . . “And I thought, ‘Oh my God, I don’t know, it’s too much.’ But he was right. I am very, very aware of the things that meant the most to him.”<sup>59</sup>

Taking a different tack, Kurt Vonnegut wrote letters that actually attempted to ensure the free use of his works by the letters’ recipients. Specifically, approximately ten years before his death, Vonnegut sent one scholar of his work a letter granting him “unrestricted permission to quote anything I ever said or wrote, at any length, and without notice or compensation.”<sup>60</sup> The failure to obtain such a letter caused significant problems for a biographer after Vonnegut’s death.<sup>61</sup>

Institutional loyalties can sometimes be a driving force for authors. Justice Hugo Black, not long before his death in 1971, instructed his trusted secretary via memorandum that

I do not believe that my personal notes on and for Court conferences should be left in the official files or made public. . . . If you have any questions about what are conference notes to be burned and what are not, . . . Hugo, Jr. will tell you what to do, which is to destroy them all.<sup>62</sup>

Justice Black expressed concern that publication of his papers would both present a skewed historical record and impede free discussion among the Justices.<sup>63</sup> While Justice Black, as he neared death, wanted immediate action taken (and some was taken while he was still alive),

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58. Sendak provided that his house in rural Connecticut was to be used as a study center and museum. Will of Maurice Sendak, at 4–5, ¶ 5.B.1(b) (Feb. 6, 2011); *id.* at 5, ¶ 5.B.3(b); *see also* Randy Kennedy, *Sendak’s Estate: Debating Where the Things Go*, N.Y. TIMES (Dec. 1, 2014), <https://www.nytimes.com/2014/12/02/books/maurice-sendaks-estate-debating-where-the-things-go.html> [https://perma.cc/2HZ4-BRGL]. I thank Philip Nel for making Sendak’s will publicly available. *See* Philip Nel, *Maurice Sendak’s Will*, NINE KINDS OF PIE: PHILIP NEL’S BLOG (June 10, 2015), <http://www.philnel.com/2015/06/10/sendakwill/> [https://perma.cc/BZQ4-KYNS].

59. Kennedy, *supra* note 58.

60. Craig Fehrman, *The Last Word*, NEW REPUBLIC (Oct. 12, 2011), <https://newrepublic.com/article/96122/vonnegut-shields-and-so-it-goes-estate> [https://perma.cc/CX4D-82C4] (internal quotation marks omitted).

61. *Id.*

62. *See* SAX, *supra* note 19, at 100 (quoting TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS 303 (1988) (internal quotation marks omitted)). Justice Black had instructed his son Hugo, Jr. similarly. *Id.*; *see also* HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 250–55 (1975).

63. *See* SAX, *supra* note 19, at 100–02.

his successors continued the destructive activity after his death in accordance with his instructions.<sup>64</sup>

In other instances, the destructive orders seem to reflect the author's view that the works are unfinished or imperfect or would in some way compromise his hoped-for artistic legacy. Vladimir Nabokov, who died in 1977, "left instructions . . . to burn the 138 handwritten index cards that made up the rough draft of his final and unfinished novel, *The Original of Laura*."<sup>65</sup> Nabokov had been "feverishly" working on the draft while terminally ill in a hospital in Lausanne.<sup>66</sup> As things looked increasingly grim, he "had a very serious conversation with his wife, in which he impressed upon her that if *Laura* remained unfinished at his death, it was to be burned."<sup>67</sup> Nabokov's wife did not adhere to these instructions and, three decades later, his son decided that Nabokov, if alive, would not oppose the work's publication since it "had survived the hum of time this long."<sup>68</sup> (Of course, this was the case only because Nabokov's successors had failed to carry out his instructions.) Nabokov's son underscored that his father "did *not* desire to burn *The Original of Laura* willy-nilly, but to live on . . . to finish at least a complete draft."<sup>69</sup>

The poster child for such instructions is Franz Kafka. Kafka issued both written and oral instructions to his close friend Max Brod to destroy all of his unpublished writings,<sup>70</sup> which included the manuscripts of *The Trial*, *The Castle* and *Amerika*—instructions that Brod did not follow.<sup>71</sup> Specifically, at his death, Kafka left behind two letters, one of which instructed Brod as follows: "Everything I leave behind me . . . in the way of diaries, manuscripts, letters (my own and others'), sketches, and so

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64. *Id.* at 100–01. For a critique, see Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1672 (2013) ("[J]udicial papers should be treated as governmental rather than private property, just as presidential papers are.").

65. *The Original of Laura by Vladimir Nabokov*, KNOPF DOUBLEDAY PUBLISHING GROUP, <http://knopfdoubleday.com/nabokov/> [<https://perma.cc/AS3Y-LSHW>].

66. Dmitri Nabokov, *Introduction to VLADIMIR NABOKOV, THE ORIGINAL OF LAURA (DYING IS FUN)* xi, xvi (Dmitri Nabokov ed., 2013).

67. *Id.* at xvi–xvii.

68. *Id.* at xviii; see also Aleksandar Hemon, *Hands Off Nabokov*, SLATE (Nov. 10, 2009), [http://www.slate.com/articles/arts/books/2009/11/hands\\_off\\_nabokov.1.html](http://www.slate.com/articles/arts/books/2009/11/hands_off_nabokov.1.html) [<https://perma.cc/JG4R-4BV8>] (disapproving of the decision to publish the work).

69. Nabokov, *supra* note 66, at xvii.

70. See SAX, *supra* note 19, at 46.

71. See Strahilevitz, *supra* note 23, at 830–31; Nili Cohen, *The Betrayed(?) Wills of Kafka and Brod*, 27 L. & LITERATURE 1, 12–13 (2015).

on, to be burned unread.”<sup>72</sup> But Kafka and Brod had also had conversations in which Brod informed Kafka that he could never bring himself to adhere to Kafka’s verbally expressed requests in that regard.<sup>73</sup> This has led to much speculation about what Kafka really wanted because, knowing Brod’s response ahead of time, Kafka nevertheless declined to leave the task to some other party.<sup>74</sup>

Although Kafka had studied law, he did not, apparently, seek to execute a legally binding will.<sup>75</sup> Rather, as Nili Cohen points out, in forgoing testamentary formalities, “it would appear that Kafka imposed upon his friend a moral, not a legal, obligation.”<sup>76</sup> In that way, he differed from the next group of authors.

#### D. *Specific Instructions in a Will or Trust*

Exhibiting the most naked attempts to exert post-death control, authors have included particular instructions in their testamentary instruments—with varying levels of success. Authors sometimes try to require their successors to consult with one another. Pulitzer Prize winning poet James Merrill, who died in 1995, started by giving his literary executors “full power and authority to edit . . . my literary papers . . . and to make proper arrangements for publication . . . as they may consider wise or expedient.”<sup>77</sup> Immediately after this broad grant, however, Merrill provided that the literary executors “shall consult with the head of the Department of Special Collections of the Olin Library System of Washington University” presumably about these very same matters.<sup>78</sup>

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72. LAW, LANGUAGE, AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD 1–5 (William R. Bishin & Christopher D. Stone eds., 1972) (quoting Max Brod, *Postscript to the First Edition* (1925) of FRANZ KAFKA, THE TRIAL 326–35 (Modern Library ed. 1956)) [hereinafter Bishin & Stone]; cf. Judith Butler, *Who Owns Kafka?*, 33 LONDON REV. BOOKS 3, 8 (Mar. 3, 2011), <http://www.lrb.co.uk/v33/n05/judith-butler/who-owns-kafka> [<https://perma.cc/AQ3V-YY5B>] (“And yet the letter [to Brod] makes a demand to destroy the writing, which would logically entail the nullification of the letter itself, and so nullify even the command that it delivers.”).

73. See SAX, *supra* note 19, at 46; Cohen, *supra* note 71, at 7.

74. SAX, *supra* note 19, at 46–47; Cohen, *supra* note 71, at 7; see also Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299, 330 (1991).

75. Cohen, *supra* note 71, at 4. *But see* Bishin & Stone, *supra* note 72, at 6 (suggesting that Kafka’s instructions could have constituted a valid holographic will under the prevailing law).

76. Cohen, *supra* note 71, at 4.

77. Will of James I. Merrill, at 13, ¶ 19.A (Sept. 30, 1994). I am very grateful to J. D. McClatchy and Stephen Yenser, co-literary executors for the James Merrill estate, for providing me with the relevant provisions of Merrill’s will and with helpful background information about the Merrill estate.

78. *Id.*

Even that kind of innocuous-sounding instruction can lead to litigation. Maurice Sendak, for example, named a “literary advisor” who was to be consulted by his executors before making decisions about certain literary matters, though he gave the executors ultimate say.<sup>79</sup> Sendak also stated that it was his “wish that the MAURICE SENDAK FOUNDATION INC. make arrangements with THE ROSENBACH MUSEUM AND LIBRARY for the display of” his artwork “upon such terms and conditions and at such times as shall be determined by the [Foundation] in consultation with [The Rosenbach].”<sup>80</sup> This provision formed part of the basis of a lawsuit by the Rosenbach, which claimed that the Foundation had failed to seek out or heed its input.<sup>81</sup>

Beyond these arguably milder forms of attempted control, authors have also sought to gain a more substantial reach. Perhaps reflecting a desire for privacy, some instructions concern access to or destruction of the author’s works. Merrill, for example, instructed the Department of Special Collections “in its discretion [to] permit access . . . to my notebooks and journals prepared subsequent to 1980 only after fifteen (15) years from the date of my death.”<sup>82</sup> Sendak, in his will, “direct[ed] my executors to destroy, immediately following my death, all of my personal letters, journals and diaries.”<sup>83</sup>

Lest one think—based on the foregoing discussion—that issuing such instructions is the province solely of male authors, Willa Cather provides a ready counterpart.<sup>84</sup> During life, she “took obsessive care over [her

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79. Will of Maurice Sendak, at 11–12, ¶ 13.B (Feb. 6, 2011). These matters included the “sale or licensing of any copyrights,” the “[a]rrangements and contracts for publication of [his] work,” the “granting or withholding of permissions for the use of any of [his] work,” and the “preservation or destruction of drafts of [his] drawings, illustrations and writings.” *Id.*

80. *Id.* at 5, ¶ 5.B.3(b).

81. See Peter Dobrin, *Rosenbach Sues Sendak Foundation over Rare Books*, PHILA. INQUIRER (Nov. 10, 2014), [http://articles.philly.com/2014-11-11/news/56395085\\_1\\_sendak-items-rosenbach-museum-the-rosenbach](http://articles.philly.com/2014-11-11/news/56395085_1_sendak-items-rosenbach-museum-the-rosenbach) [https://perma.cc/STF7-GEQ5]. The complaint also alleged that the estate had not turned over the multimillion-dollar rare book collection that Sendak gave outright to the Rosenbach in his will. *Id.* However, the litigation has apparently settled. See Peter Dobrin, *Settlement Reached in Rosenbach’s Maurice Sendak Lawsuit*, PHILA. INQUIRER (Nov. 29, 2016), [http://www.philly.com/philly/columnists/peter\\_dobrin/Settlement-in-Sendak-lawsuit-.html](http://www.philly.com/philly/columnists/peter_dobrin/Settlement-in-Sendak-lawsuit-.html) [https://perma.cc/STF7-GEQ5].

82. Will of James I. Merrill, at 13, ¶ 19.C (Sept. 30, 1994).

83. Will of Maurice Sendak, at 1, ¶ 2 (Feb. 6, 2011).

84. Another possible counterpart is Harper Lee. According to one journalist, Lee’s will banned any additional film remakes of *To Kill a Mockingbird*. See Billy Heller, *My Encounter with the Reclusive Harper Lee*, N.Y. POST (July 13, 2015), <http://nypost.com/2015/07/13/my-encounter-with-the-reclusive-harper-lee/> [https://perma.cc/524N-5JBU]. It is not possible, however, to substantiate the claim. See Jennifer Crossley Howard, *Judge Seals Harper Lee’s Will From Public’s*



books'] presentation: quibbling with publishers over margin widths, forbidding excerpts for anthologies and banning movie adaptations."<sup>85</sup> This desire for control carried over into her will, in which she forbade the publication of her letters and the adaptation of her works into other media.<sup>86</sup> One scholar has "called Cather's late-life obsession with privacy an 'enduring mystery,'"<sup>87</sup> but for a time it was speculated by some that it reflected a desire to prevent the dissemination of information about her sexuality.<sup>88</sup> The ban on adaptations may have been based on her unhappiness with particular adaptations.<sup>89</sup>

While Cather, "realizing the complexity and difficulty of dealing in rights with respect to literary property," gave great discretion to her trustee in making the relevant decisions, that discretion applied only to the exploitation of intellectual property rights that she had not forbidden.<sup>90</sup> The most she would yield with respect to the proscribed uses was in explicitly declining to charge her fiduciaries "with the duty of bringing legal proceedings to restrain the unauthorized use[s]" and

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*Scrutiny*, N.Y. TIMES (Mar. 4, 2016), [https://www.nytimes.com/2016/03/05/books/judge-seals-harper-lees-will-from-publics-scrutiny.html?\\_r=0](https://www.nytimes.com/2016/03/05/books/judge-seals-harper-lees-will-from-publics-scrutiny.html?_r=0) [<https://perma.cc/WZ5Y-VGL3>].

85. Jennifer Schuessler, *O Revelations! Letters, Once Banned, Flesh Out Willa Cather*, N.Y. TIMES (Mar. 21, 2013), <http://www.nytimes.com/2013/03/22/books/willa-cather-letters-to-be-published-as-an-anthology.html> [<https://perma.cc/YT4B-9ZZD>]; accord Andrew Jewell & Janis Stout, *Introduction to THE SELECTED LETTERS OF WILLA CATHER* vii, viii (Andrew Jewell & Janis Stout eds., 2013).

86. Willa Cather's will provides:

I direct that my Executors and Trustee shall not lease, license or otherwise dispose of the following rights in literary properties written by me, viz: dramatization, whether for the purpose of spoken stage presentation or otherwise, motion picture, radio broadcasting, television and rights of mechanical reproduction, whether by means now in existence or which may hereafter be discovered or perfected; and I further direct that neither my Executors nor my Trustee shall consent to, or permit, the publication in any form whatsoever, of the whole, or any part of any letter or letters written by me in my lifetime, nor the use, exploitation or disposal of any other right therein.

Will of Willa Cather, at 4–5, ¶ 7 (Apr. 29, 1943); see also *Intellectual Property: The Willa Cather Trust*, WILLA CATHER FOUND., <https://www.willacather.org/about/permissions/intellectual-property> [<https://perma.cc/96MR-QE5K>] [hereinafter Willa Cather Trust IP Policy] (discussing the terms of Willa Cather's will and the Willa Cather Trust's intellectual property policy). I am very grateful to Andrew Jewell for his explanation of how Willa Cather's will has been construed over time.

87. Schuessler, *supra* note 85 (quoting Guy Reynolds, an English professor at the University of Nebraska and board member of the Cather Foundation).

88. *Id.* More recently, other scholars have offered alternate interpretations. Janis Stout has argued that the privacy provisions may have "had less to do with any sexual secrecy than with Cather's overwhelming depression" during the relevant period of time. *Id.* Stout and Jewell also suggest that "Cather's testamentary restriction on the publication of her letters . . . instead was an act consistent with her long-held desire to shape her own public identity." Jewell & Stout, *supra* note 85, at viii.

89. Schuessler, *supra* note 85 ("My decision about dramatization,' [Cather] wrote after a disappointing 1934 adaptation of 'A Lost Lady,' 'is absolute and final.'").

90. Will of Willa Cather, at 5, ¶ 9 (Apr. 29, 1943).

instead “leav[ing] it to the sole and uncontrolled discretion of my Executors and Trustee . . . whether to proceed by legal action to prevent the exercise of any of such rights.”<sup>91</sup> This provided some leeway to depart from her instructions.

Cather’s instructions were given effect for six decades to prevent even scholarly quotation of her letters, leading to much paraphrasing—some of it divergent from the original text.<sup>92</sup> These prohibitions expired in 2011 upon the death of Cather’s nephew and second executor; at that point, her copyrights passed to a new trust, the Willa Cather Trust, which has taken a less stringent approach to uses of her works.<sup>93</sup> For their part, the editors of a new anthology of Cather’s letters admit that “in producing this book . . . we are defying Willa Cather’s stated preference that her letters remain hidden from the public eye.”<sup>94</sup> But publication, they argue, “will do nothing to damage her reputation” and instead will “provide insights into her methods and artistic choices” and reveal her to be “a complicated, funny, brilliant, flinty, sensitive, sometimes confounding human being.”<sup>95</sup>

As with Cather’s prohibition on adaptations, some instructions reflect great concern over the form or context in which a work might appear—perhaps on the basis of an author’s artistic vision. Tennessee Williams “expressly direct[ed]” his fiduciaries, among other things, to uphold his command that “no play which I shall have written . . . be changed in any manner . . . except for the customary type of stage directions.”<sup>96</sup> Other instructions reflect an aversion to the uses of one’s works for advertising or other commercial purposes. As mentioned earlier, Adam Yauch’s will provided that “[n]otwithstanding anything to the contrary, in no event may my image or name *or any music or any artistic property created by me* be used for advertising purposes.”<sup>97</sup> Such a deep-seated philosophy on this issue is not unusual among musicians. Jim Morrison of The

91. *Id.* at 5, ¶ 7; *see also* Jewell & Stout, *supra* note 85, at ix.

92. Joan Acocella, *What’s in Cather’s Letters*, NEW YORKER: PAGE-TURNER (Apr. 9, 2013), <http://www.newyorker.com/books/page-turner/whats-in-cathers-letters> [https://perma.cc/W92N-3H4M]; *see also* Hermione Lee, *Willa Cather: A Hidden Voice*, N.Y. REV. BOOKS (July 11, 2013), <http://www.nybooks.com/articles/2013/07/11/willa-cather-hidden-voice/> [https://perma.cc/W92N-3H4M] (book review).

93. Schuessler, *supra* note 85; *see also* Willa Cather Trust IP Policy, *supra* note 86.

94. Jewell & Stout, *supra* note 85, at ix.

95. *Id.* at ix–x.

96. LUCY A. MARSH, PRACTICAL APPLICATIONS OF THE LAW: WILLS, TRUSTS AND ESTATES 18 (1998) (quoting Will of Tennessee Williams, at Article VIII). Many thanks to Thomas Simmons for pointing me to this source.

97. Will of Adam Yauch, at 8, ¶ 6 (N.Y. Surr. Ct.) (June 6, 2001) (emphasis added).

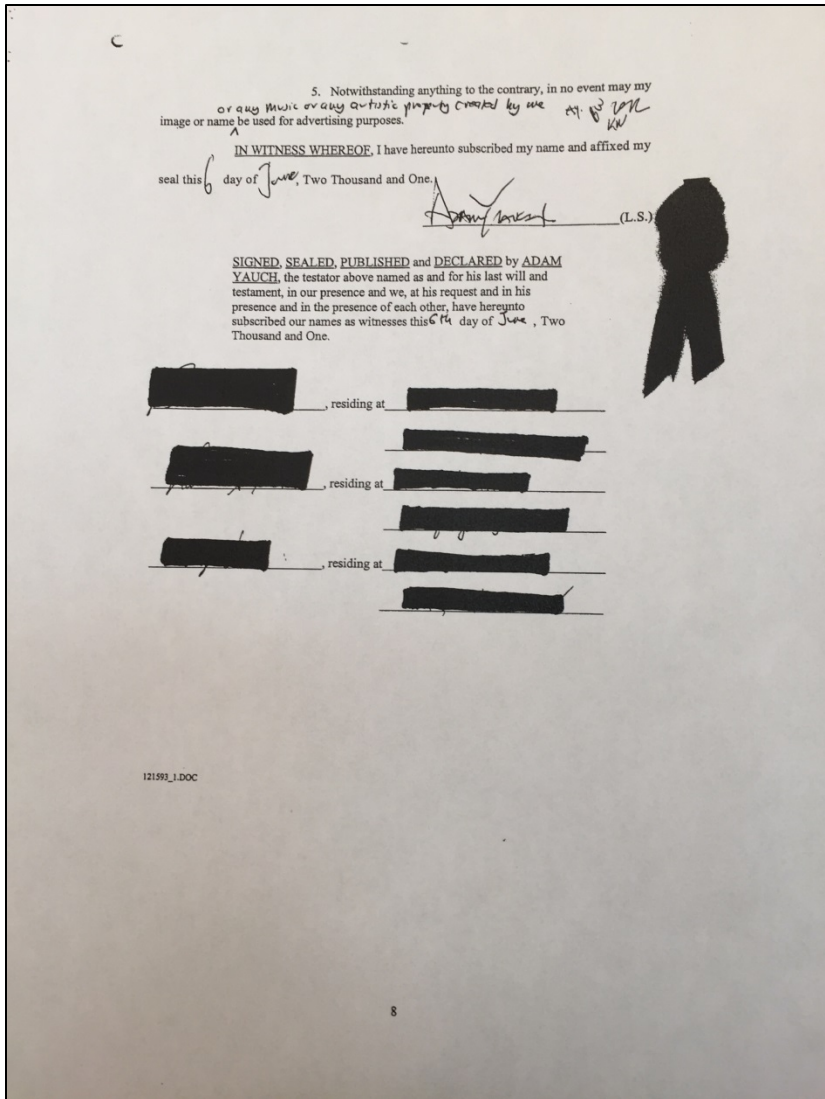
Doors expressed outrage over a deal in the works that would have resulted in an ad to the effect of “Come On Buick, Light My Fire.”<sup>98</sup> It was, in part, an attempt to preserve Morrison’s artistic legacy on this front that prompted his bandmate John Densmore to put the kibosh on plans to use The Doors’ music for a Cadillac commercial—a deal worth fifteen million dollars—many years later after Morrison’s death.<sup>99</sup>

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98. JOHN DENSMORE, *THE DOORS: UNHINGED: JIM MORRISON’S LEGACY GOES ON TRIAL* xiii–xv, 68–69 (2013).

99. *Id.* at 9–11, 28, 80. For an account of the agreements, and the disputes, among the bandmates, see Geoffrey R. Scott, *What Do Jim Morrison, Kurt Cobain, Elvis Presley, and Utagawa Toyoharu Have in Common? Protecting Artistic Legacy in the United States and Japan: A Comparison of U.S. Legal Principles and Iemoto Seido of Japan*, 26 *CONN. J. INT’L L.* 161, 168–80 (2010).

**Figure 1:**  
**Relevant Page from Adam Yauch's Will**<sup>100</sup>



Political concerns seem to drive yet others. The Austrian writer Thomas Bernhard had a deeply complicated relationship with his homeland, including its “legacy of guilt and liabilities as well as a proud

100. As a courtesy, I have redacted the names and addresses of the three witnesses.

tradition of cultural achievement.”<sup>101</sup> Bernhard apparently saw in death an opportunity to achieve his “posthumous literary emigration.”<sup>102</sup> His will provided:

[N]othing I published during my lifetime, or any of my papers wherever they may be after my death, or anything I wrote in whatever form, shall be produced, printed, or even just recited within the borders of the Austrian state, however that state defines itself, for the duration of the legal copyright.

I emphasize expressly that I do not want to have anything to do with the Austrian state and that I reject in perpetuity not only all interference but any overtures in that regard by this Austrian state concerning my person or my work. After my death, not a word shall be published from my papers, wherever such may still exist, including letters and scraps of paper.<sup>103</sup>

Despite this impassioned articulation, Bernhard’s successors allowed the production of his plays in Austria ten years after his death.<sup>104</sup> They were persuaded that denying multiple generations of his countrymen access to his performed works would ultimately cause the death of those works.<sup>105</sup>

#### *E. Structure of Instructions*

If an author’s restrictions merely constitute a condition on the gift itself, it is not clear that the sorts of instructions just described would accomplish the desired goal. For example, a bequest to one’s spouse of “my copyrights so long as they are not exploited in the context of advertising” would convey a fee simple determinable.<sup>106</sup> In such a case, the author-testator—in actuality, his estate—would retain a reversionary interest (a possibility of reverter).<sup>107</sup>

So if, for example, the spouse violated the condition and used the copyrights in advertising, the copyrights would revert to the estate and, if the spouse were the sole beneficiary or heir, she would own the rights in fee simple and could do with them as she pleased. Even if the author-testator had successfully devised the residue of his estate to someone

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101. GITTA HONEGGER, THOMAS BERNHARD: THE MAKING OF AN AUSTRIAN ix (2001).

102. *Id.* at 306 (quoting HANS HÖLLER, THOMAS BERNHARD 7 (2d ed. 1993)).

103. *Id.* at 305–06.

104. *Id.* at 306.

105. *Id.*

106. DUKEMINIER & SITKOFF, *supra* note 43, at 836.

107. *Id.*

else—say, Alma Mater University—that party would then own the copyrights outright following the spouse’s violation of the condition. No doubt, in the latter case, the surviving spouse would think twice about violating the condition. Nevertheless, the point is that in structuring the gift in this way, some living person(s) or extant organization(s) (or their successors)—or a combination thereof—would ultimately be able to make autonomous decisions about the works until the copyright term expired.

Furthermore, an instruction that is precatory is, by its very nature, not binding on the fiduciary. Thus, a mere request or hope expressed in a testamentary instrument that the fiduciary will exploit the author’s copyrights in a particular way would not be enforceable.<sup>108</sup> Nor would an instrument that fails to meet the basic requirements of a properly executed will or trust.<sup>109</sup>

For these reasons, authors may attempt to exercise control by framing their artistic instructions, like Yauch did, as a duty imposed upon a fiduciary, whether an executor or a trustee. In his case, the instruction appears in the part of the will where Yauch sets out the powers that he conferred upon his executor, whom he named as his wife in the first instance.<sup>110</sup>

In order to accomplish what Yauch apparently sought to do, imposing a fiduciary duty makes sense. Fiduciaries—whether personal representatives (that is, executors or administrators) or trustees—owe duties in the execution of their charges.<sup>111</sup> With respect to the duty of loyalty, this means administration of the trust “solely in the interests of the beneficiaries.”<sup>112</sup> With respect to the duty of prudent

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108. For an interesting account of the role that the gender of the testator plays in crucial drafting choices, see Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN’S L.J. 1 (2007).

109. Deborah Gordon has described a particular means of leaving instructions or expressing preferences—what she terms “letters non-testamentary,” Deborah S. Gordon, *Letters Non-Testamentary*, 62 U. KAN. L. REV. 585, 588–89 (2014), which include the more familiar “letter of wishes.” *Id.* at 615–16. These are non-binding letters written by a decedent to accompany a formal testamentary instrument for a variety of reasons. *Id.* at 629–30.

110. Will of Adam Yauch, at 1, ¶ 5 (N.Y. Surr. Ct.) (June 6, 2001). As is the case for many wealthy, privacy-seeking testators, Yauch’s will poured all of his assets into an inter vivos trust that he had created. *Id.* at 1, ¶ 2; see also DUKEMINIER & SITKOFF, *supra* note 43, at 466 (describing use of pour-over wills and trusts and the relative privacy they afford). The trust instrument is not publicly available, so it is impossible to know whether Yauch instructed his trustees similarly.

111. See UNIF. PROB. CODE § 3-703(a) (UNIF. LAW COMM’N 2010) (subjecting personal representatives to the same “standards of care applicable to trustees”).

112. UNIF. TRUST CODE § 802(a) (UNIF. LAW. COMM’N 2000); accord RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. LAW INST. 2007).

administration—the care norm—a trustee is to “exercise reasonable care, skill, and caution” in “administer[ing] the trust as a prudent person would, by considering the purposes” and “terms” of the trust.<sup>113</sup> Above all, a fiduciary must administer the estate or trust “in accordance with its terms and purposes.”<sup>114</sup> Accordingly, exploitation of the decedent’s copyrights in violation of the prescribed terms would seem to constitute a breach of fiduciary duty.<sup>115</sup>

Kate O’Neill offers another relevant example with respect to the intellectual property left behind by J.D. Salinger. Salinger, who died in 2010, had created a literary trust in 2008 to hold his copyrights and, likely, his manuscripts and other writings.<sup>116</sup> O’Neill suggests that actions taken after his death by the trustees, his wife Colleen and son Matthew,<sup>117</sup> so far signal that they intend to continue Salinger’s stringent position on exploitation of his copyrights and publicity rights.<sup>118</sup> O’Neill writes:

[W]e can only speculate about the extent of the trustees’ discretion and how they may ultimately manage Salinger’s literary assets. [There are] . . . rumors that the trust directed the trustees to “wait a number of years” before publishing anything new. As to previously published work, some journalists speculated—shortly after Salinger’s death—that the trustees might be tempted by a proposal to license a movie based on [*The Catcher [in the Rye]*] because of the possibility that the federal tax on Salinger’s estate, which was zero in 2010, might be increased retroactively. That no longer seems likely, and there is no indication that a movie deal is in the works. At best, we can see that Salinger shielded his work and his person from public scrutiny in death as he had in life, and so far, the trustees

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113. UNIF. TRUST CODE § 804; accord RESTATEMENT (THIRD) OF TRUSTS § 77(1)–(2).

114. UNIF. TRUST CODE § 801; accord RESTATEMENT (THIRD) OF TRUSTS § 76 (“The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.”).

115. It is true, however, that to the extent the authorial instructions are deemed to create what is known as an honorary trust, the “honorary trustee [would be] at liberty to perform or to terminate the interest and distribute the corpus to residuary legatees or heirs whenever she pleases.” Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 91 (1999); see also discussion *infra* at section II.C.1.

116. Kate O’Neill, *Copyright Law and the Management of J.D. Salinger’s Literary Estate*, 31 CARDOZO ARTS & ENT. L.J. 19, 28 (2012).

117. *Id.*

118. *Id.* at 28–29. Salinger, as is well known, was fiercely protective of his work. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 70–71 (2d Cir. 2010); *Salinger v. Random House, Inc.*, 811 F.2d 90, 92–94 (2d Cir. 1987).

seem to be following his example. This could be because the trust so directs them, because they choose to do so in deference to his memory, or due to personal reasons.<sup>119</sup>

In the remainder of this Article, I contextualize and evaluate the sorts of control mechanisms described up to this point.

## II. CURRENT VITAL SIGNS OF DEAD-HAND CONTROL

A number of questions emerge in the wake of this survey of methods by which authors attempt to control the fates of their works after their deaths. Most particularly, if a fiduciary disregards an artistic instruction—to disallow quotations, to wait a number of years before publishing new editions, to exploit copyrights solely in a non-advertising context, to refuse to license adaptations, etc.—should he be liable for such action? Relatedly, if a fiduciary adheres to these instructions, could he nevertheless still be liable for a breach of fiduciary duty? How willing should courts be to modify or terminate such provisions? In order to address these questions, this Part considers both the justifications for long-term post-death controls over property more generally and the corresponding justifications for interfering with such controls. It also evaluates relevant legislative and judicial activity outside of the realm of intellectual property. In Part III, I will apply the lessons from this exploration to the particular context of artistic instructions.

### A. *Justifications for Dead-Hand Control*

The Restatement (Third) of Property underscores that U.S. “law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”<sup>120</sup> Indeed, “[p]roperty owners have the nearly unrestricted right to dispose of their property as they please.”<sup>121</sup> Over time, commentators have assembled a bustling laundry list of justifications for this general principle of testamentary freedom, including that it comports with natural law, generates wealth accumulation, promotes industry and

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119. O’Neill, *supra* note 116, at 30.

120. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003); *see also id.* § 10.1 (“The donor’s intention is given effect to the maximum extent allowed by law.”).

121. *Id.* § 10.1 cmt. a.



productivity, fosters happiness, reinforces family ties, and provides the simplest solution for disposing of property at an owner's death.<sup>122</sup>

Daniel Kelly, for example, draws upon an economic or functional approach to testamentary freedom, which “emphasizes the ‘social welfare’ of the parties and seeks to determine how the law can create the best incentives for the donor, donees, and other parties that a donor’s disposition of property may affect.”<sup>123</sup> He argues that “effectuating a donor’s ex ante interests is often consistent with maximizing social welfare” largely for the reasons just listed.<sup>124</sup> And, he extends this analysis in support of trust law—the primary vehicle for facilitating dead-hand control—which historically has revolved around the intent of the settlor.<sup>125</sup> By contrast, Kirsten Rabe Smolensky emphasizes the dignity or autonomy interests of the dead as a basis for according what she terms “posthumous rights.”<sup>126</sup>

While such attempts to mount a unified theory in favor of testamentary freedom are helpful, a discrete set of considerations is raised by the prospect of allowing individuals not only to dispose of their property at death but also to prescribe enforceable instructions as to its treatment over time—that is, by the prospect of dead-hand control.<sup>127</sup> Specifically, a number of the aforementioned justifications for plain-vanilla testamentary freedom are less persuasive as bases for dead-hand control. In their seminal article, Adam Hirsch and William Wang argue, for example, that premising such control on the fostering of family ties among remote family members who do not know each other is not persuasive.<sup>128</sup> Likewise, the notion that an ancestor possesses knowledge superior to that of the state concerning the needs of his descendants—the

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122. E.g., Edward C. Halbach, Jr., *Succession—Its Past, Future and Justification*, in DEATH, TAXES AND FAMILY PROPERTY 3, 5 (Edward C. Halbach, Jr. ed., 1977); Tritt, *supra* note 46, at 117. “A compelling argument in favor of [testamentary freedom] is that it accords with human wishes.” LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955).

123. Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1135 (2013).

124. *Id.* at 1137.

125. *See id.* at 1134 (collecting sources).

126. Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 774–75 (2009) (adopting an “Interest Theory” approach “because it acknowledges that the dead can have interests that survive death”).

127. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 711 (9th ed. 2014) (describing dead-hand control as arising “when death does not result in a clean transfer to living persons that permits them to do with the money as they please”); *supra* note 48 and accompanying text.

128. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 15–16 (1992).

“father knows best” hypothesis<sup>129</sup>—is less compelling when the ancestor is not a parent, but a great-great grandparent.<sup>130</sup> And it can hardly be said that giving effect to long-ago created future interests (or analogously imposed restrictions<sup>131</sup>) is the simplest method for disposing of property.<sup>132</sup> What remains, Hirsch and Wang submit, is the productivity-incentive justification, which can—in theory—justify the enforcement of future interests or like mechanisms to the extent that their availability stimulates the amassing of greater fortunes by donors.<sup>133</sup>

Writing separately, Hirsch has also addressed the particular context of bequests that have as a goal something other than the financial welfare of individuals.<sup>134</sup> He points out that testators sometimes have purposes in mind that fall in between, on the one hand, charitable purposes (favored under the law) and, on the other, capricious or detrimental purposes (disfavored).<sup>135</sup> The middle category includes “bequests for an amalgam of purposes perceived neither to help nor to harm the public.”<sup>136</sup> Arguably, many of the artistic restrictions described above would fall into that middle category<sup>137</sup> because they appear to be about more than the mere financial betterment of the beneficiaries. Rather, the decedent authors seem to have a particular purpose—an artistic purpose—in mind.

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129. *Id.* at 12.

130. *Id.* at 15. Along similar lines, Joshua Tate argues that incentive trusts might be justified on the father-knows-best principle where the beneficiaries are known to the settlor. Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 485–86 (2006).

131. *See generally* Molly S. Van Houweling, *The Dead Hand of Copyright* 13–31 (Oct. 7, 2014) (unpublished manuscript) (on file with author) (discussing a range of non-possessory use restrictions and limitations thereon).

132. Hirsch & Wang, *supra* note 128, at 15.

133. *Id.* at 16; *accord* Tate, *supra* note 130, at 486; *cf.* Hirsch, *supra* note 115, at 52 (“[T]he opportunity to make bequests for purposes may be of no small interest and concern to testators.”).

134. *See generally* Hirsch, *supra* note 115; *see also* Richard C. Ausness, *Non-Charitable Purpose Trusts: Past, Present, and Future*, 51 REAL PROP. PROB. & TR. J. 321 (2016).

135. Hirsch, *supra* note 115, at 34; *see also* Tamara York, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, 1997 DET. C.L. MICH. ST. U. L. REV. 861, 878–79 (“Where the testator’s provision is merely capricious and the performance . . . will benefit no one, the courts will not compel its execution, despite the wishes of the testator.”).

136. Hirsch, *supra* note 115, at 34.

137. *See supra* section I.D. It is not entirely clear whether, in Hirsch’s terminology, the gifts covered by the artistic restrictions described in section I.D. would best be described as *bequests to persons*, with a use-restriction tacked on, or as what Hirsch conceives of as classic *bequests for purposes* (and if the latter, whether they would be deemed bequests for “social” or “personal” purposes). *See* Hirsch, *supra* note 115, at 51–52 (discussing the distinctions). If they are bequests to persons, he argues, the restrictions would more likely be enforceable. *Id.* at 102.

Hirsch argues that bequests for purposes are also justified on the productivity-incentive thesis. In particular, testators gain personal satisfaction from directing their wealth at projects they care about,<sup>138</sup> including those that are very personal in nature—such as preserving one’s memory or providing a reminder that one was here.<sup>139</sup> These sorts of bequests may also reflect our emotional ties to our property: “just as we wish to provide for loved ones after we are gone, so may we strive to ensure, for similar if not identical reasons, that treasured objects are protected.”<sup>140</sup>

David Horton develops these themes in arguing that dead-hand control provides a valuable means of self-expression, which allows the testator to communicate how he wishes to be remembered.<sup>141</sup> The case that animates Horton’s article is that of deceased Chicago dentist Max Feinberg, who, as he grew older, “became preoccupied with the high rate of intermarriage among young Jews and with his own family’s gravitation toward other cultures and traditions.”<sup>142</sup> Shortly before his death, Feinberg “insert[ed] a restriction into his trust: ‘A descendant of mine . . . who marries outside the Jewish faith . . . shall be deemed to be deceased for all purposes of this instrument . . . .’”<sup>143</sup> When, two decades later, Feinberg’s grandchildren grew disenchanted with the “Jewish clause,” they challenged its validity in court.<sup>144</sup> The Illinois Supreme Court unanimously upheld Feinberg’s wishes.<sup>145</sup> Horton favors such enhanced willingness to effectuate testamentary provisions—to which he

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138. Hirsch, *supra* note 115, at 53 (noting that, in comparison to the case for bequests to persons, “when a testator makes a bequest for a social purpose, her utility may derive from a more diffuse association with the undefined group that benefits”).

139. *Id.* at 56.

140. *Id.* at 57; see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (discussing the sorts of “objects [that] are closely bound up with personhood”).

141. Horton, *supra* note 47, at 78; see also Hirsch, *supra* note 115, at 53–54. Horton, while recognizing the distinction between outright dispositions at death and dead-hand control, would extend this justification to both. See Horton, *supra* note 47, at 63–64 & n.17, 78 (distinguishing between posthumous conditions and bequests for purposes, on the one hand, and mere distributional choices, on the other).

142. Horton, *supra* note 47, at 62.

143. *Id.* (citation omitted).

144. *Id.*

145. *In re Estate of Feinberg*, 919 N.E.2d 888, 905–06 (Ill. 2009). In effect this is so, although the facts were complicated and also turned on his surviving wife’s exercise of a power of appointment. See *id.* at 892. For more discussion of this kind of restriction, see *infra* notes 208–11 and accompanying text.

would sometimes afford First Amendment protections<sup>146</sup>—because of their expressive nature: they serve as “a ringing declaration of [a testator’s] core beliefs.”<sup>147</sup>

This expressiveness can turn up in more ordinary contexts. For example, Horton invokes a hypothetical (originally formulated by John Langbein<sup>148</sup>) about a long-term IBM employee who instructs his trustees not to sell his large block of IBM stock because of his high esteem for, and loyalty to, the company.<sup>149</sup> Horton argues that a chief reason to uphold such a bequest is its communicative dimension—it allows the employee to express himself and to comment on his life.<sup>150</sup>

Each of these justifications—serving as an incentive to productivity, providing personal satisfaction, preserving one’s memory, reflecting emotional ties to one’s authored works, and constituting a means of self-expression—could plausibly justify dead-hand control over intellectual property, as an initial matter. Nevertheless, it is clear that there are real costs associated with dead-hand control. As I discuss next, these costs counsel in favor of caution and, in some cases, regulation by the state.<sup>151</sup>

### B. *Justifications for Regulating Dead-Hand Control*

Hirsch and Wang reasonably contend that “[a]s a matter of public policy, lawmakers should consider not only for how long but also *in what ways* a testator proposes to control property after her death.”<sup>152</sup> This begs the question: when is regulation of control by a dead hand warranted? Commentators have carved up the landscape along various dimensions. One approach would consider, qualitatively or categorically,

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146. Horton, *supra* note 47, at 89. Horton acknowledges that state interference with these provisions does not amount to suppression in the sense that it denies the testator or settlor the ability to speak. *Id.* at 67, 98, 101. Nevertheless, he argues that at least some restrictions do trigger First Amendment scrutiny because “the ultimate distribution of a decedent’s property and testamentary self-expression are more tightly entwined than they first seem.” *Id.* at 67.

147. *Id.* at 66.

148. See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1112–13 (2004) [hereinafter Langbein, *Mandatory Rules*]; John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 664 (1996) [hereinafter Langbein, *Uniform Prudent Investor Act*].

149. Horton, *supra* note 47, at 107–08.

150. See *id.* Horton also argues that expressive values help explain the contexts in which courts do and do not permit a testator’s purpose to be upheld. See *id.* at 103–04.

151. See Hirsch & Wang, *supra* note 128, at 17; Horton, *supra* note 47, at 102; Kelly, *supra* note 123, at 1138.

152. Hirsch & Wang, *supra* note 128, at 4; see also Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL., PHIL. & ECON. 91, 96–98 (2005) (addressing this distinction).

the proposed form of control. Hirsch and Wang, for example, distinguish among restrictions on the subsequent use, investment, or distribution of property.<sup>153</sup>

Use restrictions, because they “can directly impair the value of property,” are “powerful and draining,”<sup>154</sup> “resulting [in the] suboptimal use of resources.”<sup>155</sup> These sorts of restrictions stand in contrast to distribution restrictions—that is, imposed allocations among groups of beneficiaries—which have wealth consequences that derive from more nebulous transaction costs and risk-aversion considerations.<sup>156</sup> Accordingly, a stronger “case can be made for regulating use restrictions more stringently than distribution restrictions.”<sup>157</sup>

With respect to investment restrictions, Hirsch and Wang argue that “[w]hen a testator places a future interest in trust, beneficiaries and society both profit by the property’s enhanced marketability.”<sup>158</sup> Given evidence of risk aversion in most people, instructions to a trustee to diversify trust investments would likely accord with the preferences of most beneficiaries, and should be enforceable.<sup>159</sup> “By contrast, were the testator (perversely) to mandate investment concentration, thereby heightening risk, most beneficiaries would likely agree that dead hand control was worth paying to avoid.”<sup>160</sup> Accordingly, “[d]iminished value

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153. Hirsch & Wang, *supra* note 128, at 4. The first two categories, use and investment, are more salient for present purposes.

154. *Id.* at 50. Hirsch and Wang, it must be said, do repeatedly acknowledge the existence of use restrictions aimed at shaping the use of a particular asset rather than constraining the beneficiaries’ behavior for their own benefit. *Cf. id.* at 21 n.76 (“The testator’s concern, in other words, might not be (only) that the *beneficiary* use his inheritance in a certain way, but that *Blackacre itself* be used in a certain way.” (emphasis in original)). Accordingly, “[f]or a few testators, . . . particular pieces of property may have sentimental value, which could increase their subjective preference for a legal use restriction and compensate to some degree for its added social cost.” *Id.* at 20–21.

155. *Id.* at 22; *accord* Rakowski, *supra* note 152, at 104. Hirsch and Wang posit this justification for intervention whether the utilitarian maxim is wealth maximization or a broader view of social welfare enhancement. Hirsch & Wang, *supra* note 128, at 24.

156. Hirsch & Wang, *supra* note 128, at 50. “While the prospect of arbitrariness provides a rationale for their limitation, intergenerational distribution restrictions also bring benefits in the form of increased wealth conservation. Viewed broadly, distribution restrictions appear less burdensome than restrictions that funnel wealth into the provision of specific goods and services.” *Id.*

157. *Id.* Hirsch and Wang suggest several possibilities, such as including specific durational limits under the Rule Against Perpetuities aimed at use restrictions; rendering them unenforceable after a certain period; imposing additional estate tax consequences; or facilitating modification. *See id.* at 51.

158. *Id.* at 52.

159. *See id.* at 31.

160. *Id.* at 32. Hirsch and Wang do acknowledge that restrictions to preserve certain assets might be imposed out of sentimental attachment. *Id.* at 28 n.105.

and arbitrariness would continue to justify the regulation of such trusts.”<sup>161</sup> These points together accord with Hirsch’s separately articulated view that bequests for purposes that are socially injurious justify intervention.<sup>162</sup>

Smolensky, who, as previously mentioned, largely favors posthumous rights on dignity and autonomy grounds, also recognizes the need for limits. “[I]nterests that ‘can no longer be helped or harmed by posthumous events,’ such as a secret desire for personal achievement, die upon the death of the interest-holder.”<sup>163</sup> Her preferred limitations—based on trends she identifies in the case law—would consider the impossibility of giving effect to the right,<sup>164</sup> the importance of the right,<sup>165</sup> the passage of time,<sup>166</sup> and the degree of conflict of interest between the living and the dead.<sup>167</sup>

Another tack would divide the world of regulatory justifications along the dimension of time into two camps, *ex ante* and *ex post*.<sup>168</sup> For Daniel Kelly, for instance, only *ex ante* bases are justifiable from an economic perspective because *ex post* considerations do not take into consideration the “donor’s happiness during life, the donor’s incentive to work, save, and invest, and the structure and timing of a donor’s gifts.”<sup>169</sup> If donors sense that courts will not effectuate their intent, he argues, they will be less likely to work and save in the first place, and they will have less to pass on at death.<sup>170</sup> Furthermore, donees as a class will suffer under *ex post* meddling, even if it appears rational to do so in a given case, because donors will be less inclined to generate and pass on the same amount.<sup>171</sup>

161. *Id.* at 52.

162. Hirsch, *supra* note 115, at 70, 83.

163. Smolensky, *supra* note 126, at 771–72 (quoting Joel Feinberg, *Harm and Self-Interest*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 45, 64–65 (1980)).

164. *Id.* at 775.

165. *Id.* at 781.

166. *Id.* at 789.

167. *Id.* at 791.

168. Binaries are common in this area of scholarship (as in so many others). *See, e.g.*, Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 *STAN. L. REV.* 1189, 1257 (1985) (distinguishing between social and economic justifications for regulation of dead-hand control).

169. Kelly, *supra* note 123, at 1129. Kelly acknowledges that while his view privileges *ex ante* considerations as a basis for interfering with testamentary freedom, that is a different question from “whether intervention is socially desirable.” *Id.* at 1157 n.205.

170. *Id.* at 1151, 1167.

171. *Id.* at 1167–68.

Kelly therefore deems only the existence of imperfect information, negative externalities, and intergenerational equity concerns as legitimate bases for intervening in donative transfers at death because these take into account the donor's ex ante perspective.<sup>172</sup> It should be noted, however, that the first of these exceptions threatens to swallow the rule because, by definition, testators are always acting with imperfect information.<sup>173</sup> In any event, Kelly would rule out as illegitimate both intervening to maximize the donees' ex post interests and downplaying what are perceived as idiosyncratic preferences by donors.<sup>174</sup> "In short, the living may themselves benefit if the law allows a certain degree of dead hand control."<sup>175</sup>

In highly influential scholarship, John Langbein has colorfully argued that the "characteristic sphere for the application of the anti-dead-hand rule has been the fringe world of the eccentric settlor: the crackpot who wants to brick up her house, or build statues of himself, or dictate children's marital choices."<sup>176</sup> Langbein maintains that the most persuasive basis for interfering with dead-hand control is "fundamentally a change-of-circumstances doctrine":

The living donor can always change his or her mind, as he or she observes the consequences of an unwise course of conduct, or as other circumstances change, but the settlor who is deceased or who, though living, occupies a decedent-like relationship to the trust by having made the trust's terms irrevocable cannot.<sup>177</sup>

While this view in some respects could accord with Kelly's preferred basis for regulation (an ex ante perspective that accounts for, say, imperfect information at the time of drafting), it is clear that Langbein's focal point is the welfare of the beneficiaries. Ultimately, he posits, restraints on dead-hand control largely reflect the principle that trusts must be for the benefit of the beneficiaries:

The rule against capricious purposes deals with the easy cases ('caprice' means whim or sudden fancy), but leaves the

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172. *Id.* at 1128.

173. Kelly himself recognizes this inevitability in the will or trust drafting context. *Id.* at 1160.

174. *Id.* at 1165. Kelly and Hirsch share common ground here. See Hirsch, *supra* note 115, at 78 ("[A] testator's motives for 'capricious' purpose bequests may well prove substantial after all—no less so than those underlying other ones of the 'normal' variety.").

175. Kelly, *supra* note 123, at 1185.

176. Langbein, *Mandatory Rules*, *supra* note 148, at 1111. As he predicted, however, "the benefit-the-beneficiaries rule [may also] set limits upon a more common form of settlor direction, the value-impairing investment instruction." *Id.*

177. *Id.*; accord STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 70–71 (2004).

underlying policy unexpressed. By refashioning the rule to spell out that a valid trust must benefit the beneficiaries, the Third Restatement and the [Uniform Trust] Code articulate the policy that has been at work in these cases. . . . [A] trust must advance “the interests of the beneficiaries of the trust.”<sup>178</sup>

For that reason, with respect to his previously discussed example of the IBM employee’s instruction to retain stock,<sup>179</sup> Langbein himself would strike such a provision under the benefit-the-beneficiaries rule.<sup>180</sup> This is because “[m]odern portfolio theory instructs us that the investor who diversifies thoroughly virtually always improves the odds of doing better than a one-stock portfolio, regardless of what the stock is.”<sup>181</sup>

There has not, however, been universal approval of the benefit-the-beneficiaries restriction on trust investment. Significantly, Jeffrey Cooper has taken it to task and argued that “[r]ather than a simple update of a single rule of trust law, the benefit-the-beneficiaries rule is a distinctly modern doctrine that combines selected strands of multiple traditional rules of trust law.”<sup>182</sup> He argues that the benefit-the-beneficiaries rule represents a drastic departure from settled law favoring the intent of the settlor, especially in the area of investment directives.<sup>183</sup> Thus, he would be more willing to uphold the IBM stock retention directive where the settlor is acting less out of loyalty than out of a conviction that under-diversification would maximize investment returns.<sup>184</sup> Nevertheless, even Cooper acknowledges that there are circumstances in which testamentary intent may be overridden,

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178. Langbein, *Mandatory Rules*, *supra* note 148, at 1108 (quoting *Colonial Trust Co. v. Brown*, 135 A. 555, 564 (Conn. 1926) (internal quotation marks omitted) (footnotes omitted)); *accord* John H. Langbein, *Burn the Rembrandt? Trust Law’s Limits on the Settlor’s Power to Direct Investments*, 90 B.U. L. REV. 375, 377, 383 (2010) [hereinafter Langbein, *Burn the Rembrandt?*] (“What the Restatement (Third) of Trusts and the Uniform Trust Code have done in articulating the benefit-the-beneficiaries standard is simply to clarify that long implicit principle.”).

179. *See supra* notes 148–50 and accompanying text.

180. Langbein, *Burn the Rembrandt?*, *supra* note 178, at 386.

181. Langbein, *Mandatory Rules*, *supra* note 148, at 1113 (citing RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmts. e, g, at 19–24, 25–28 (AM. LAW INST. 1992)); *id.* (“Failure to diversify imposes upon the portfolio what is called uncompensated risk, risk that can be costlessly avoided by spreading the investment across many asset classes and many distinct security issues.”); Langbein, *Uniform Prudent Investor Act*, *supra* note 148, at 646–49; *see also* Langbein, *Burn the Rembrandt?*, *supra* note 178, at 387.

182. Jeffrey A. Cooper, *Shades of Gray: Applying the Benefit-the-Beneficiaries Rule to Trust Investment Directives*, 90 B.U. L. REV. 2383, 2386 (2010).

183. *Id.* at 2393, 2395.

184. *Id.* at 2397; *see also* Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1175 (2008).



including rare cases in which public policy dictates as much.<sup>185</sup> He seems to favor continued judicial balancing of the interests, which could, in principle, result in a ruling contrary to the settlor's intent.<sup>186</sup>

A few things might be said at this juncture. Hirsch and Wang's concerns about use and investment restrictions<sup>187</sup> could readily map onto many of the authorial instructions described above.<sup>188</sup> A prohibition on adaptations, for example, could be considered a restriction on the use of an authored work or, additionally, a restriction on investment to the extent that the fiduciary is hindered from exploiting the work's full economic value. Smolensky's categories are also useful here:<sup>189</sup> while impossibility would not typically be relevant, the importance of the right, the passage of time, and the seriousness of the conflict between the living and the dead would all seem to be so, with one caveat discussed below.<sup>190</sup>

For his part, Kelly acknowledges that giving effect to a donor's *ex ante* interests will not *always* maximize social welfare. He admits, for instance, that sometimes "effectuating a donor's interests may conflict with maximizing social welfare, i.e., restricting testamentary freedom may decrease the donor's utility, but the decrease might be outweighed by an increase in the donee's utility."<sup>191</sup> In addition, while he does not view the discounting of idiosyncratic instructions as a cogent reason for intervening, he would justify intervention to the extent that those same instructions caused negative externalities,<sup>192</sup> a situation that may occur with artistic restrictions. Finally, while taking opposite positions on the benefit-the-beneficiaries rule, Langbein and Cooper both acknowledge the need for room to deviate from testamentary intent.<sup>193</sup> Langbein's prism suggests that if constraints are justified in this context, it will often

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185. Cooper, *supra* note 182, at 2391 ("Courts traditionally have set aside trust investment directives on public policy grounds solely when the settlor attempts to mandate a degree of waste that a well-ordered society cannot tolerate.") (citations and internal quotation marks omitted).

186. *Id.* at 2400.

187. *See supra* notes 153–61 and accompanying text.

188. *See supra* section I.D.

189. *See supra* notes 163–67 and accompanying text.

190. *See infra* notes 316 and 318 and accompanying text.

191. Kelly, *supra* note 123, at 1157 n.205. In a seemingly related vein (Kelly acknowledges that the issues are related, *id.*), Kelly distinguishes economic from social desirability, and he acknowledges that the dictates of one might diverge from the other. For example, he seems to concede that "[f]rom an *ex post* perspective, restricting testamentary freedom in order to maximize the donees' interests would be socially desirable." *Id.* at 1167.

192. *Id.* at 1169.

193. *See supra* notes 176–81, 185–86 and accompanying text.

be the beneficiaries' interests—and not society's interests more generally—that will provide the constraints.<sup>194</sup> Cooper, by contrast, would justify incursion into testamentary intent primarily where society's interests are at stake<sup>195</sup> as well as to further the settlor's ultimate goals.<sup>196</sup> In many instances of authorial control, all of these are the very interests that hang in the balance.

### C. *Legal Treatment of Dead-Hand Control*

It remains to consider the current state of the law. As a starting point, the Restatement (Third) of Property provides that “American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.”<sup>197</sup> It sets out a non-exhaustive list of such circumstances:

Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations.<sup>198</sup>

Since the legal landscape covered by this motley group is vast, in this section I will focus on trends of note, which point toward both more and less deference to testamentary intent.

#### 1. *Enhanced Deference to Testamentary Intent*

A number of recent trends point in the direction of enhanced deference to testator intent, which would potentially favor posthumous artistic control. One of the most prominent trends is the scaling back of the once mighty Rule Against Perpetuities (“RAP”). The RAP limits

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194. *See supra* notes 178–81 and accompanying text.

195. Cooper, *supra* note 182, at 2391.

196. Cooper, *supra* note 184, at 1170, 1213.

197. RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

198. *Id.* The Uniform Trust Code and Uniform Probate Code are to similar effect. *See* UNIF. TRUST CODE § 404 (UNIF. LAW. COMM'N 2000) (“A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.”); UNIF. PROB. CODE §§ 2-201 to -214 (UNIF. LAW COMM'N 2010) (elective share rights for surviving spouses); *id.* §§ 2-901 to -905 (Rule Against Perpetuities); *id.* §§ 3-801 to -816 (creditor rights).

trust duration to roughly one hundred years.<sup>199</sup> But it has now been abolished in approximately twenty-one jurisdictions.<sup>200</sup> In these states, settlors of trusts are free to micromanage the vesting of property interests indefinitely.<sup>201</sup> While the reasons for this shift are complex and include competition among states to lure wealthy trust business,<sup>202</sup> the upshot is increased deference to long-dead settlors.

Another trend is the apparent uptick in so-called “incentive trusts,” that is, trusts that “attach fixed conditions on distributions . . . that leave less discretion to the trustee.”<sup>203</sup> Ranging from “provisions requiring the beneficiaries to graduate from college, achieve a certain grade point average, or earn a certain amount of income in order to qualify for distributions from the trust,” these sorts of clauses have seemed to gain traction.<sup>204</sup> Some incentive trusts even feature moral or religious or family-oriented goals established by the settlor.<sup>205</sup> By their nature, these sorts of restraints raise the very real possibility that the trusts will prove inflexible as circumstances develop.<sup>206</sup> Nevertheless, given the types of the goals they set out to accomplish, a case can be made that courts should be less willing to modify or terminate these sorts of trusts.<sup>207</sup>

While the marketing and terminology of incentive trusts is relatively new, courts have long enforced certain conditions to the receipt of funds by beneficiaries.<sup>208</sup> Such conditions have been used, for example, to

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199. See, e.g., DUKEMINIER & SITKOFF, *supra* note 43, at 880.

200. Horton, *supra* note 47, at 64 n.18 (assembling jurisdictions as of 2012).

201. *Id.* at 64 (“Settlors in these [non-RAP] states can now write their estate plans on a canvas the size of eternity.”).

202. See generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1314–16 (2003); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373–78 (2005); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2100–05 (2003).

203. Tate, *supra* note 130, at 448.

204. *Id.*

205. See, e.g., *id.* at 458 (“[C]ommon provisions offer a financial incentive for a beneficiary who leaves the workplace to stay at home with young children or marries a stay-at-home parent.”). One amusing provision would distribute “\$10,000 upon the first marriage of each descendant of mine, provided that the new spouse has never gone to law school.” *Id.* at 457–58 (internal quotation marks omitted) (quoting John J. Scroggin, *Family Incentive Trusts*, J. FIN. SERV. PROF’LS, at 74, 87 (2000)).

206. *Id.* at 449.

207. *Id.* at 491.

208. Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in DEATH, TAXES AND FAMILY PROPERTY 119, 120 (Edward C. Halbach, Jr. ed., 1977) (agreeing but also acknowledging that courts, by longstanding tradition, will not uphold “conditions which are criminal, tortious, or otherwise contrary to public policy”).

encourage the marriage of a beneficiary to a spouse of a particular religion.<sup>209</sup> These have been upheld particularly where the condition is viewed merely as a partial restraint upon marriage (rather than as a restraint on marriage altogether or on religious practice).<sup>210</sup> Commentators have taken opposing views on the enforceability of these sort of conditions.<sup>211</sup>

Another visible trend reflecting deference to testators is the rise of “honorary trusts,” which allow decedents to designate property for particular non-charitable purposes that provide no benefit to an ascertainable human beneficiary. Classic examples include cemetery upkeep and the care of beloved pets.<sup>212</sup> Early on, the legal status of these sorts of bequests was uncertain because they did not name a human beneficiary with legal standing to enforce the trust’s terms—a stalwart requirement for an enforceable trust.<sup>213</sup> Subsequently, however, the Restatement of Trusts in 1935 explicitly blessed the concept of an honorary (or intended) trust, which is not actually an enforceable trust but is rather “treated as a power, which the intended trustee may carry out if she so chooses; otherwise, the residuary legatee or heirs can sue for a resulting trust to recover the corpus of the bequest.”<sup>214</sup> Thus, under contemporary common law principles, the intended trustee can care for Fido if she wishes although she cannot be compelled to do so.<sup>215</sup> Additionally, most states have enacted an array of specific laws, which

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209. See, e.g., *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 826–32 (Ohio Ct. Com. Pl. 1974) (construing a will that imposed a requirement that the putative beneficiary marry “a Jewish girl whose both parents were Jewish” in order to receive his bequest); *In re Estate of Keffalas*, 233 A.2d 248, 250–51 (Pa. 1967) (upholding bequests “on condition that such child marry one of ‘true Greek blood and descent and of Orthodox religion’”).

210. *Shapira*, 315 N.E.2d at 829; *Keffalas*, 233 A.2d at 250; accord *Jones*, *supra* note 208, at 126–27. On the validity of bequests conditioned on specific religious practice, see Smolensky, *supra* note 126, at 793 n.135.

211. Compare Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315 (2011) (largely favoring enforcement of such conditions), with Sherman, *supra* note 48, at 1329 (arguing that “[t]estamentary conditions calculated to restrain legatees’ personal conduct should not be enforced”).

212. E.g., *In re Searight’s Estate*, 95 N.E.2d 779, 781–82 (Ohio Ct. App. 1950); Frances H. Foster, *Should Pets Inherit?*, 63 FLA. L. REV. 801, 816–17 (2011); Hirsch, *supra* note 115, at 45.

213. Hirsch, *supra* note 115, at 42–44 (describing the varying treatment of such bequests by nineteenth century courts). They were also problematic under the Rule Against Perpetuities, *id.*, particularly in the case of pets, because pets could not serve as “measuring lives,” Foster, *supra* note 212, at 817.

214. Hirsch, *supra* note 115, at 44–46; accord RESTATEMENT (THIRD) OF TRUSTS § 47 (AM. LAW INST. 2003).

215. E.g., *Searight’s Estate*, 95 N.E.2d at 782.

diverge from traditional trust requirements, to further ensure the carrying out of these sorts of bequests.<sup>216</sup>

## 2. *Decreased Deference to Testamentary Intent*

At the same time, however, there are also trends pointing away from deference to testamentary intent, which would potentially disfavor posthumous artistic control.<sup>217</sup> Indeed, some have suggested that the rise of the perpetual trust (that is, the decline of the RAP) has required corresponding flexibility elsewhere.<sup>218</sup> One area where this loosening of testamentary control is most prominent is in the realm of trust termination and modification.

Once upon a time in the United States,<sup>219</sup> it was difficult to modify the terms of a trust or terminate it altogether. In the leading case of *Clafin v. Clafin*,<sup>220</sup> the settlor had established a trust to pay one of his sons ten thousand dollars periodically and the balance when he turned thirty.<sup>221</sup> Clearly chafing at the fact that his brother had received property outright when he had not, the beneficiary (not yet twenty-five) brought a lawsuit to obtain the principal.<sup>222</sup>

In rejecting this request, the Supreme Judicial Court of Massachusetts struck a longstanding blow for testamentary freedom. While acknowledging that the beneficiary's "interest in the trust fund is vested and absolute, and that no other person has any interest in it,"<sup>223</sup> the Court nevertheless deferred to the wishes of the settlor. It reasoned that this

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216. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (2010) (honorary trusts for pets); *id.* § 8-1.5 (trusts for cemetery purposes); UNIF. TRUST CODE §§ 408–09 (UNIF. LAW. COMM'N 2000); Foster, *supra* note 212, at 835. These approaches are meant to reassure testators such as Leona Helmsley, whose \$12 million bequest to her beloved Maltese dog, Trouble, caused much of the same. See, e.g., Foster, *supra* note 212, at 802. But they should also reassure more ordinary folk, since "[a]ccording to recent studies, 27% of American pet owners who have wills include their pets in their wills." *Id.* at 811.

217. See, e.g., Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 216 (2011); Kelly, *supra* note 123, at 1129 (arguing that factoring in ex post considerations is increasingly common); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).

218. See Dukeminier & Krier, *supra* note 202, at 1331.

219. The treatment here has long diverged from that in the United Kingdom, which long ago broadened courts' powers to modify or terminate trusts at the behest of the beneficiaries. *E.g.*, *Saunders v. Vautier*, (1841) 49 Eng. Rep. 282 (Ch.); Kelly, *supra* note 123, at 1176–77; Tate, *supra* note 130, at 466.

220. 20 N.E. 454 (Mass. 1889).

221. *Id.* at 455.

222. See *id.*

223. *Id.*

was not a situation in which the trust was merely passive,<sup>224</sup> contravened a rule of law or public policy, or had seen its mission accomplished.<sup>225</sup> Indeed, with respect to the latter, it was precisely this scenario that the settlor had anticipated.<sup>226</sup> Interestingly, aside from paying deference to testamentary intent, the Court apparently still felt the need to speak to the objective merits of the provision, noting that “there is not the same danger that [the beneficiary] will spend the property while it is in the hands of the trustees as there would be if it were in his own.”<sup>227</sup>

The *Claflin* doctrine (or rule), as it came to be known—that is, the idea that “a trust cannot be terminated [or modified] prior to the time fixed for termination, even if all the beneficiaries consent, if termination [or modification] would be contrary to a material purpose of the settlor”<sup>228</sup>—was widely adopted in other jurisdictions.<sup>229</sup> Robert Sitkoff, departing from the thrust of Langbein’s approach, has argued that the settlor, rather than the beneficiaries, is the principal to whom the trustee is an agent.<sup>230</sup> An upside to *Claflin*, he suggests, is that it “helps align the interests of the settlor and the trustee.”<sup>231</sup>

More recently, however, law reformers have advocated for increasing flexibility with respect to trust modification and termination.<sup>232</sup> Specifically, the Uniform Trust Code (“UTC”),<sup>233</sup> codified in 2000, and some states have eased the ability of beneficiaries to modify or terminate a trust.<sup>234</sup> The UTC distinguishes between two types of triggering events. First, where all of the beneficiaries consent, courts may modify or even terminate a trust as long as that action would not be “inconsistent with a material purpose of the trust.”<sup>235</sup> While this

224. In the words of the court, a “dry trust,” meaning trustee had no duties other than to hold the property. *Id.*

225. *Id.* at 455–56.

226. *See id.* at 456.

227. *Id.*

228. Tate, *supra* note 130, at 468. John Langbein, as part of his systematic effort to highlight the ways in which trust law has always been “beneficiary-regarding,” Langbein, *Burn the Rembrandt?*, *supra* note 178, at 385, applies that approach to material purpose doctrine as well. “Under the material purpose doctrine, the court asks whether a disputed trust term has a purpose that is material to the best interests of the beneficiaries of that trust.” *Id.* at 382.

229. Tate, *supra* note 130, at 468; *see also* Alexander, *supra* note 168, at 1204.

230. Sitkoff, *supra* note 24, at 624, 648.

231. *Id.* at 659.

232. *See id.* at 660.

233. *See* UNIF. TRUST CODE (UNIF. LAW. COMM’N 2000).

234. *See, e.g.*, CAL. PROB. CODE § 15403(b) (West 2017); Horton, *supra* note 47, at 77 (arguing that this trend reflects “a concern that stems, in part, from a desire to minimize economic waste”).

235. UNIF. TRUST CODE § 411(b).

provision gives leeway to courts to make amendments, Joshua Tate nevertheless sees some continuing vitality for settlor intent because the settlor's "material purpose" will trump any proposed changes.<sup>236</sup> Accordingly, the Restatement (Third) of Trusts goes even further in facilitating opportunities for modification or termination.<sup>237</sup> It explicitly allows courts to balance the settlor's purposes against the beneficiaries' reasons for seeking the change.<sup>238</sup>

Second, even without unanimous consent by the beneficiaries, the UTC permits courts to make changes in the face of unanticipated circumstances—under the equitable deviation doctrine.<sup>239</sup> Specifically, courts "may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."<sup>240</sup> The need to "further the purposes of the trust" might once again seem to prioritize the settlor's objectives, especially because the provision continues on to state that "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention."<sup>241</sup> Nevertheless, since the modification and termination provisions are mandatory by nature,<sup>242</sup> settlor intent is inherently downplayed.<sup>243</sup>

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236. Tate, *supra* note 130, at 470.

237. It provides that "the beneficiaries cannot compel [a trust's] termination or modification . . . after the settlor's death, [except] with authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose." See RESTATEMENT (THIRD) OF TRUSTS § 65(2) (AM. LAW INST. 2003). The beneficiaries must be unanimous in their consent to the modification or termination. *Id.* § 65(1).

238. Tate, *supra* note 130, at 473. And, it reflects a vast shift in thinking from the Restatement (Second) of Trusts, which had provided—in accordance with *Clafflin*—that "[i]f the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination." RESTATEMENT (SECOND) OF TRUSTS § 337 (AM. LAW INST. 1959); *id.* § 167 cmt. b (rejecting as a basis for deviation "merely [that] such deviation would be more advantageous to the beneficiaries than . . . compliance").

239. The Restatement (Third) of Trusts also has an equitable deviation provision similar to that of the UTC. See RESTATEMENT (THIRD) OF TRUSTS § 66 (2003). This doctrine has a long history, stemming back at least as far as a trust set up by Joseph Pulitzer. See *In re Pulitzer's Estate*, 249 N.Y.S. 87, 89–91 (Surr. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932).

240. UNIF. TRUST CODE § 412(a). The UTC also provides that a "court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." *Id.* § 412(b). This also reflects the principle that trusts (and their terms) "must be for the benefit of [their] beneficiaries." *Id.* § 412 cmt.

241. *Id.* § 412(a); see also Sitkoff, *supra* note 24, at 661 ("[T]hese liberalizations are designed to advance the settlors' probable intent."); Tate, *supra* note 130, at 471.

242. UNIF. TRUST CODE § 105(b)(4).

243. This is because such provisions cannot be overridden by contrary instructions in the trust. Tate, *supra* note 130, at 471. In this way, while trust law was historically "regulated by merely

A final trend of note is the shift toward the benefit-the-beneficiaries rule, the theoretical underpinnings of which were discussed above.<sup>244</sup> Although still controversial, the UTC states that “[a] trust and its terms must be for the benefit of its beneficiaries.”<sup>245</sup> So far, seventeen jurisdictions have adopted some version of this rule,<sup>246</sup> and the “benefit-the-beneficiaries” rule is made mandatory under the UTC.<sup>247</sup> While the application of this provision is still unfolding, it has been suggested that “it may empower courts to strike down any clause that could reduce the value of the trust.”<sup>248</sup> For these reasons, David Horton has argued that “the future of trust law appears to revolve around preserving and enhancing the value of the corpus, leaving less and less space for testamentary individualism.”<sup>249</sup>

### III. ENFORCEABILITY OF POSTMORTEM ARTISTIC CONTROL

We come to the heart of the matter. In some cases, analyzing the enforceability of postmortem artistic control is straightforward. Taking it from the top,<sup>250</sup> the ability to dispose of one’s copyrights and tangible works by choosing one’s successors is, at this point in time, well-accepted as a legal matter.<sup>251</sup> I have argued elsewhere that such a policy does not in and of itself typically offend dead-hand control sensibilities.<sup>252</sup> Likewise, the law obviously cannot—and should not—prevent authors from setting examples through their own artistic

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default rules of law,” Cooper, *supra* note 182, at 2385, the UTC assembled a number of mandatory “intent-defeating rules that restrict the settlor’s autonomy.” See Langbein, *Mandatory Rules*, *supra* note 148, at 1105–06; cf. Ian Ayres, *Valuing Modern Contract Scholarship*, 112 *YALE L.J.* 881, 886 (2003) (remarking on the UTC’s marked shift in including an array of mandatory rules).

244. See *supra* notes 178–83 and accompanying text.

245. UNIF. TRUST CODE § 404; see also RESTATEMENT (THIRD) OF TRUSTS § 27(2) (AM. LAW INST. 2003) (specifying that a “private trust, its terms, and its administration must be for the benefit of its beneficiaries”).

246. Horton, *supra* note 47, at 77 n.116 (setting forth jurisdictions).

247. UNIF. TRUST CODE § 105(b)(3).

248. Horton, *supra* note 47, at 77.

249. *Id.*; see also *id.* at 65 (“[T]he contours of testamentary freedom have become longer but thinner: the dead may be able to control their property forever, but they have less actual control over their property.”).

250. See *supra* Part I.

251. See *supra* section I.A. But see generally Desai, *supra* note 17 (arguing against the contemporary U.S. policy of postmortem copyrights). It is worth noting that the law on postmortem rights of publicity is still unfolding. *E.g.*, Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 *CONN. L. REV.* 301, 315–17 (2011); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 *GEO. L.J.* 185, 203–04 (2012).

252. See *supra* note 48 and accompanying text.



activities or from speaking with future successors or users about the posthumous exploitation of their works. While difficult moral and ethical issues surround the question of whether successors should carry out the wishes of deceased authors in these contexts,<sup>253</sup> they remain just that: issues to be decided largely without legal ramifications.

But with respect to the legal treatment of will or trust provisions that purport to wield artistic control, the analysis is different. The question is whether authors (and, *a fortiori*, subsequent owners) can validly bind their fiduciaries with respect to the treatment of literary property.<sup>254</sup> This question, in turn, raises at least two sets of issues. The first is whether such instructions ought to be enforceable under state law—the system primarily charged with administering testamentary intent. The second is whether, above and beyond enforceability under state law, federal copyright policy ought to weigh in the balance, if not outright preempt state law on this front. Answering these questions obviously has great significance not just for the private parties involved, but also for the public.

#### A. *Reasons to Enforce Postmortem Artistic Control*

An argument can be made that the ability to control one's works during the postmortem portion of the copyright term provides added inducement for the sort of productivity that is relevant to authors, namely, with respect to the production of creative works. In particular, the artistic instructions described above may facilitate the sorts of post-death projects that provide great inspiration and personal satisfaction to authors during life.<sup>255</sup> Just as with large charitable donations by the

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253. Compare SAX, *supra* note 19, at 44 (acknowledging the internal conflicts faced by successors but arguing that absent “special circumstances”—for example, the author left no doubt about his wishes and was unable to perform the destructive act himself—the “grounds favoring preservation ought to prevail”), and Bilder, *supra* note 74, at 329–31 (arguing that, with the passage of time, such expressed wishes are a poor guarantor of authorial intent), with MILAN KUNDERA, TESTAMENTS BETRAYED: AN ESSAY IN NINE PARTS 268–69 (Linda Asher trans., 1995) (“[P]ublishing what the author deleted is the same act of rape as censoring what he decided to retain.”).

254. For her part, Kate O’Neill suggests that such control is largely permissible:

[T]he writer is in the best position to protect personal interests posthumously, if she chooses to do so, by selection of and directions to a trusted literary executor or trustee. Nothing prevents trustees from denying access to materials in their control and avoiding copyright issues altogether (unless such behavior would constitute mismanagement or possibly waste of the trust assets). In addition, the trustees may exploit the value of the copyrights in the works. Provided that the trust grants them the power, they may, if they so choose, license derivative works to the creators of their choosing and attach whatever contractual controls they negotiate.

O’Neill, *supra* note 116, at 41.

255. See *supra* notes 134–40 and accompanying text (describing view of Hirsch).

wealthy, ensuring that a work of art, music, or literature will be exploited in just the ways chosen by the author can serve to preserve the author's memory or provide a reminder that she was here.<sup>256</sup> Furthermore, an author may have substantial emotional ties to her works and, as is the case with other property, she may be comforted knowing that those works will remain protected according to her vision<sup>257</sup> and that privacy interests contained therein will not be compromised.<sup>258</sup>

These possibilities can each be squared with the productivity-incentive justification for dead-hand control, which is the most persuasive justification for some commentators.<sup>259</sup> From that perspective, courts should be wary of interfering with authorial control by routinely preferring the ex post desires of the beneficiaries (or society at large) over the ex ante wishes of authors.<sup>260</sup> As Steven Shavell puts it, "individuals who desire dead hand control will in fact suffer utility losses when they are alive, assuming that they anticipate that property will not be used in the way they want when they are dead."<sup>261</sup> These utility losses could, theoretically, translate into less lifetime creativity by authors, which would be detrimental to society.

Effectuating artistic instructions may also uphold expressiveness and autonomy/dignity values in and of themselves.<sup>262</sup> In a number of instances described above, authorial instructions can be characterized, in David Horton's phrasing, as "*self-regarding*. [Decedents] do not just

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256. *See id.*; cf. PAUL K. SAINT-AMOUR, THE COPYRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 128 (2003) ("Copyright may or may not contribute to the 'immortality' of an author after death; its more important and preposterous function is to make the author feel immortal before death.").

257. *See supra* note 140 and accompanying text. Plato, of course, equated authoring works to giving birth to children, which would explain the protective instinct. *See* PLATO, SYMPOSIUM 56–57 (Alexander Nehamas & Paul Woodruff trans., 1989). *See generally* M.H. ABRAMS, THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION (1953) (establishing the Romantic conception of the artist as creator).

258. Hirsch, *supra* note 115, at 76.

259. *See supra* note 133 and accompanying text (describing view of Hirsch and Wang).

260. Kelly, *supra* note 123, at 1175–76; *see also supra* notes 169–75 and accompanying text (describing view of Kelly).

261. SHAVELL, *supra* note 177, at 68; cf. William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 104 (2005) ("A restriction prohibiting disgraceful uses of the decedent's identity . . . can provide a sense of comfort to the celebrity that after death her heirs will not disgrace her image or reputation and will take reasonable steps to prevent others from doing so.").

262. *See supra* note 126 and accompanying text (describing view of Smolensky); *supra* notes 141–50 and accompanying text (describing view of Horton).

provide for their loved ones; they also comment on their lives.”<sup>263</sup> For example, instructions that a fiduciary is not to authorize derivative works, allow publication of unfinished works, or permit uses of works in advertising can bespeak an artist’s views of himself and his own literary creations. Lior Strahilevitz would even extend these expressive interests to destructive orders by an author-testator.<sup>264</sup> By enforcing such orders with respect to one’s unfinished works, he argues, a court can assist an author like Kafka, who “may wish to send a message to the public that he is not the type of artist who will tolerate, let alone publish, inferior works.”<sup>265</sup>

This very self-expressiveness is arguably all the more pronounced in the case of Adam Yauch’s will. The handwritten nature of the restriction, added to the typed text, certainly suggests that this provision was of particular importance to Yauch.<sup>266</sup> Arguably, these are interests that should be honored until copyright law no longer permits an author or his successors to enjoy that degree of control—that is, for seventy years following his death.

Moreover, effectuating artistic control accords with the view of the settlor as principal<sup>267</sup> and with certain trends in the law, as discussed

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263. Horton, *supra* note 47, at 107. Horton contrasts this to John Langbein’s preferred characterization of settlors as “beneficiary-regarding.” *Id.* at 106–07; *see also* Langbein, *Mandatory Rules*, *supra* note 148, at 1112 (“Trust law’s deference to the settlor’s direction always presupposes that the direction is beneficiary-regarding.”); Langbein, *Burn the Rembrandt?*, *supra* note 178, at 385 (same).

264. *See* Strahilevitz, *supra* note 23, at 833.

265. *Id.* Strahilevitz advances several other arguments in support of a court’s enforcement of a destruction directive: that the foreknowledge of enforcement will serve as an *ex ante* incentive to authors to undertake “high-risk, high-reward projects”; that, as an economic matter, an author “is in the best position to determine which of his works should form his artistic legacy”; and finally, that disregarding the order would amount to compelled speech, with possible First Amendment implications. *Id.* at 830–35.

266. New York, it should be noted, is particularly rigid when it comes to adherence to testamentary formalities, and so, as an initial matter, Yauch’s handwriting on the will raised questions. Under black letter law, no effect could be given to writing—including attempted amendments to the text—added after execution of the will. N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(1)(B) (2010) (“No effect shall be given . . . to any matter preceding such signature which was added subsequently to the execution of the will.”). Any such attempts would simply be disregarded. For that reason, the drafting attorney testified that Yauch’s handwritten words were inserted prior to the execution of the will, Attorney Affidavit, *In re* Will of Yauch, No. 2012/2934 (N.Y. Surr. Ct. Aug. 8, 2012)—a representation that the probate court accepted, Decree Granting Probate, *In re* Will of Yauch, No. 2012/2934 (N.Y. Surr. Ct. Sept. 27, 2012). It is possible, however, that had the Surrogate’s Court not accepted this proffered explanation, Yauch’s alteration nevertheless would have been accepted because it was initialed by Yauch and his three witnesses. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a)(1)(B) (2010); *In re* Will of Litwack, 827 N.Y.S.2d 582, 583–84 (Surr. Ct. 2006).

267. *See supra* notes 230–31 and accompanying text (describing view of Sitkoff).

above.<sup>268</sup> The increasing opportunity to dictate property distributions perpetually, to graft explicit conditions affecting highly personal choices onto a trust instrument, and to have one's wishes voluntarily carried out by a donee even where basic trust requirements have not been met all seem to indicate an enhanced tolerance by society for dead-hand control. It is also less costly, from a certain perspective, for fiduciaries to simply follow the instructions they are given rather than engage in a searching inquiry about what to do.<sup>269</sup>

Furthermore, certain kinds of instructions, such as a thoughtfully constructed moratorium on access or publication (to protect privacy interests of the still living) or a direction that certain parties consult with one another, seem reasonable. At the very least, it is hard to argue that such light-touch artistic restrictions are capricious or wasteful such that they should be stricken as socially harmful.<sup>270</sup> Importantly, these sorts of restrictions do not deny living successors the opportunity to make decisions about the exploitation of works—or at least not for too long, if the moratorium is reasonable in length. And without such enforcement, authors may well destroy works themselves.<sup>271</sup>

Milder forms of artistic control also square with the sorts of instructions that courts typically enforce in this arena. By way of context, courts in the past did take a dim view of testators' pet projects they deemed too eccentric. In a number of cases, decedent authors left money in trust for the purpose of having a trustee or executor publish and circulate their writings. For example, in *Wilber v. Asbury Park National Bank & Trust Co.*,<sup>272</sup> the testator instructed in his will that \$15,000 be expended to type, edit, and distribute his manuscript, "Random Scientific Notes Seeking the Essentials in Place and Space."<sup>273</sup> The court refused to permit the executor to do so, finding the writings "irrational, unintelligible, and of no scientific or other value," and that their distribution would be "a waste of money."<sup>274</sup>

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268. See *supra* section II.C.1.

269. Cooper, *supra* note 184, at 1182–83.

270. See discussion *infra* at notes 292–98 and accompanying text.

271. Cf. Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675, 706 (1993) ("[T]he threat that copyright would not protect creations from being used in foreseen but unintended ways could discourage creative effort.").

272. 59 A.2d 570 (N.J. Ch. 1948), *aff'd sub nom.* *Wilber v. Owens*, 65 A.2d 843 (N.J. 1949).

273. *Id.* at 572.

274. *Id.* at 578–79. The court did, however, find evidence of a general charitable intent—to advance education, *id.* at 583–84—which enabled it to apply the cy pres doctrine and direct the money, in trust, to Princeton University. *Id.* at 584–86. In another older case, the court found that a trust had been created, but it was evidently too put off by the decedent's works to hold it charitable

More recently, however, in *Rosser v. Prem*,<sup>275</sup> a court upheld a bequest that created a trust for the purpose of publishing the testator's book, entitled *Linda*, which dealt with the death of her daughter from cancer at a young age.<sup>276</sup> In response to the charge that *Linda* was "worthless,"<sup>277</sup> the court held that the purpose of addressing a topic such as bereavement was acceptable and that the court was not supposed to "review it as might a critic for *The New York Times Book Review*."<sup>278</sup>

A final, perhaps surprising, reason to enforce particularized instructions—from the perspective of society—is that such enforcement would also logically extend to instructions by authors that their successors deal liberally with their works. For example, an author might be particularly inclined to support educational uses of her works. On that basis, authors could theoretically instruct their fiduciaries to allow all educational or scholarly uses of their works without payment along the lines Kurt Vonnegut attempted through his get-out-of-litigation-free letter.<sup>279</sup> "Here, paradoxically, the dead hand's clasp can play a constructive role by refusing to yield to the narrow interests of subsequent *living hands*."<sup>280</sup> If all authorial instructions were deemed unenforceable, then such instructions would fail too.

#### B. *Reasons to Deny Postmortem Artistic Control*

There are many reasons to put one's copyright interests into a trust. Primary among such reasons is the ability to consolidate the strands of a copyright in one place—and in the hands of a trusted manager—while still benefiting multiple beneficiaries.<sup>281</sup> But conveying one's wishes to a trustee (or executor) about how and when to license adaptations, for example, is a different proposition from creating an enforceable duty in that regard. There are limits on the duties that one can impose upon a fiduciary. As John Langbein points out, there is no obligation to transfer

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or honorary in nature. See *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625, 629 (Conn. 1956) ("[A] reading of the article which [the testator] called 'Prenatal Psychisms and Mystical Pantheism' is a truly nauseating experience in the field of pornography. The trust is invalid as being contrary to public policy.").

275. 449 A.2d 461 (Md. Ct. Spec. App. 1982).

276. *Id.* at 461–62.

277. *Id.* at 468–69.

278. *Id.* at 470–71 (holding the "trust created by [testator's] will is charitable and capable of being carried out by the trustee").

279. See *supra* note 60 and accompanying text.

280. Hirsch & Wang, *supra* note 128, at 51–52 (emphasis in original).

281. See Tritt, *supra* note 46, at 172 n.298.

property using a trust.<sup>282</sup> But a “transferor who chooses to use the trust form . . . must accept that minimum regime of fiduciary obligation that defines a trust.”<sup>283</sup> And, as discussed, fiduciary obligations are also incumbent upon executors.<sup>284</sup>

Many of the authorial restrictions outlined above<sup>285</sup> raise the types of red flags that justify interference with testamentary intent. For example, prohibitions on publication, on the creation of adaptations, on advertising uses, or on exploitation within geographic areas, or instructions requiring the destruction of works, are the sorts of use restrictions that have the potential to “clog[] alienability”<sup>286</sup> and “directly impair the value of property,”<sup>287</sup> causing harm to society as a whole.<sup>288</sup> It is hard to argue that instructions such as these are capricious, exactly,<sup>289</sup> because authors who specify very particular treatments of their work are often clear-headed, if passionate, when formulating their prescriptions.<sup>290</sup> Yet, the ordered destruction of works or total ban on certain uses bespeaks the type of waste that has prevented courts from enforcing instructions in other settings.<sup>291</sup>

The leading case is *Eyerman v. Mercantile Trust Co.*,<sup>292</sup> in which the testator directed her executor to raze her home, sell the land, and transfer the proceeds to her residuary beneficiaries.<sup>293</sup> Refusing to enforce the

282. Langbein, *Burn the Rembrandt?*, *supra* note 178, at 380.

283. *Id.*; *see also id.* at 382–83.

284. *See supra* section I.E.

285. *See supra* section I.D.

286. *See Hirsch & Wang*, *supra* note 128, at 22.

287. *See id.* at 50.

288. *See supra* notes 154–57 and accompanying text (describing view of Hirsch and Wang). Indeed, these sorts of instructions may constitute a counterexample to Hirsch’s separately articulated claim that bequests for purposes often “enhance the value of property in the testator’s hands without compromising . . . the efficiency of the use of resources.” Hirsch, *supra* note 115, at 68.

289. As the Restatement puts it:

A clear line cannot be drawn . . . between objectives that are capricious—or ‘frivolous’ or ‘whimsical’—and those that are not. A purpose is not capricious merely because no living person benefits directly from its performance, if it satisfies a desire that many (even if not most) people have with respect to the disposition of their property . . .

RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (AM. LAW INST. 2003); *cf.* Cooper, *supra* note 184, at 1169–70; Cooper, *supra* note 182, at 2397.

290. *See, e.g.*, KUNDERA, *supra* note 253, at 258 (disputing the notion that “wanting to destroy one’s own work is a pathological act”).

291. *See, e.g.*, Hirsch, *supra* note 115, at 83 (“Courts should overturn bequests for purposes when they tend to the injury of society.”).

292. 524 S.W.2d 210 (Mo. Ct. App. 1975).

293. *Id.* at 211.

provision on public policy grounds,<sup>294</sup> the court noted that this was not a situation in which the testator had attempted to make a specific, if idiosyncratic, gift of property; rather, the gift she had apparently wanted to convey was one of cash.<sup>295</sup> Because the enforcement of the will would have wreaked harm upon the testator's neighbors and the public, and actually would have resulted in fewer funds for her residuary beneficiaries, the court refused to enforce the terms of the will.<sup>296</sup> This was so even though the court acknowledged that the testator would have been freer to destroy her home while alive.<sup>297</sup> In short, these restrictions seemed designed to benefit no one and yet were harmful to all involved.<sup>298</sup>

It is true that other courts have on rare occasion enforced equivalent destructive instructions.<sup>299</sup> In *National City Bank v. Case Western Reserve University*,<sup>300</sup> for example, the court found that the testator's instructions to her executors—to raze her house and to sell the land—were not “repugnant, contrary to public policy, nor capricious” because they reflected her concerns about the changing nature of her neighborhood from residential to commercial and her desire to have her home remain residential.<sup>301</sup> But, rather than actually ordering compliance with these instructions, the court authorized the executors to sell the house to an historical society with a restrictive covenant preventing the house's use for commercial purposes.<sup>302</sup>

Aggressive artistic control measures may also create the problems associated with investment restrictions.<sup>303</sup> Sentencing a work to remain exclusively in one medium or prohibiting advertising uses for the duration of the copyright term prevents fiduciaries from taking

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294. *Id.* at 217.

295. *See id.* at 212.

296. *Id.* at 214.

297. *See id.* at 214–15. The intuition is that the instinct to preserve property while one is alive normally counteracts such eccentric behavior. *Id.* at 215; accord RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (AM. LAW INST. 2003) (“Although one may deal capriciously with one's own property, self-interest ordinarily restrains such conduct.”).

298. *Eyerman*, 524 S.W.2d at 217; accord *In re Will of Pace*, 400 N.Y.S.2d 488, 492–93 (Surr. Ct. 1977) (invalidating instruction directing trustee to demolish two houses on public policy grounds).

299. *See, e.g., In re Estate of Beck*, 676 N.Y.S.2d 838, 841 (Surr. Ct. 1998) (declining to vitiate testamentary instruction based on “anemic” public policy grounds).

300. 369 N.E.2d 814 (Ohio Ct. Com. Pl. 1976).

301. *Id.* at 818–19.

302. *Id.* at 819.

303. *See supra* notes 158–61 and accompanying text (describing view of Hirsch and Wang).

advantage of remunerative investment opportunities that may present themselves down the road. Authors, like other testators, draft their testamentary instructions with imperfect information and in circumstances that can change after their deaths.<sup>304</sup> Artistic restrictions therefore may also fail to accommodate the need to adjust investment strategy should the beneficiaries require an influx of funds for problems that arise after the author's death, such as health issues. Likewise, a ban on publication of works that are embodied in a single or limited number of physical copies runs the risk that valuable manuscripts, notebooks, and canvases could become inadvertently destroyed, damaged, or lost, depleting their value to the beneficiaries and society at large. For all of these reasons, enforcement of such provisions could violate the benefit-the-beneficiaries principle that has gained traction in recent years.<sup>305</sup>

As described earlier, the modern portfolio theory basically instructs that a prudent investor should diversify investments.<sup>306</sup> To the extent that a fiduciary adheres to the rigid restrictions imposed by an author to keep works cloistered, that action would seem to violate the spirit, if not the letter, of the modern portfolio theory. It is true that this requirement is a default rule that can be overridden with proper drafting.<sup>307</sup> Trustees can, and should, consider an "asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the

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304. See *supra* notes 176–81 and accompanying text (describing view of Langbein).

305. See *supra* notes 176–81, 245–49 and accompanying text. An issue that may readily present itself is that such restraints may hamstring successors from paying off any estate tax liability, which is based upon the author's gross estate regardless of the artistic restrictions imposed. See Revenue Act of 1962, 26 U.S.C. § 2033 (2012) ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."); Goffe, *supra* note 7. There has been a robust discussion in the literature on this point with respect to the estate tax consequences of rights of publicity that successors do not plan to exploit. See, e.g., Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 7–9 (2009) (discussing the debate and collecting sources).

306. See *supra* notes 179–81 and accompanying text. A classic case illustrating this principle is *In re Estate of Janes*, 681 N.E.2d 332 (N.Y. 1997). In that case, former state senator Rodney Janes was survived by his seventy-two year old wife. *Id.* at 334. At his death in 1973, his \$3.5 million estate was heavily invested in Kodak stock. *Id.* (Janes had represented the Rochester area and therefore may have attached sentimental, in addition to financial, value to his Kodak holdings. See *DUKEMINIER & SITKOFF, supra* note 43, at 626 n.62.) The stock, consisting of 13,232 shares, had a date-of-death value of \$135 per share, totaling roughly \$1.8 million. *Janes*, 681 N.E.2d at 334. By 1980, with only about 2,000 shares sold, the share price had fallen to approximately \$47 and the remaining shares were worth \$530,000. *Id.* at 335. The New York Court of Appeals held that the trustees had violated their duty of prudence by failing to diversify the trust holdings. *Id.* at 338–39.

307. E.g., N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(a), (b)(3)(C) (2010); UNIF. PRUDENT INV'R ACT § 1(b) (UNIF. LAW COMM'N 1995); accord Cooper, *supra* note 184, at 1180; Langbein, *Mandatory Rules, supra* note 148, at 1112.



beneficiaries.”<sup>308</sup> Such assets have typically included farmland or a controlling interest in a family business,<sup>309</sup> but there is no reason why they could not also include copyright interests. Still, courts are wary of such purported dispensations, and they will typically not discharge a trustee from the duty to diversify without explicit authorization to that effect in the trust instrument.<sup>310</sup> Furthermore, at least according to Langbein, the benefit-the-beneficiaries principle acts as an outer boundary on a settlor’s ability to depart from default rules.<sup>311</sup>

Perhaps enforcement of aggressive authorial restrictions could actually be consistent with the benefit-the-beneficiaries principle: consider a case in which departure from the instruction would produce a work of such inferiority that it would cause a precipitous decline in the value of the trust’s other holdings, resulting in financial harm to the beneficiaries. In general, however, it is hard to imagine such a case. For example, it is nearly impossible to conjure up a scenario in which the trustees’ licensing of a movie version of *The Catcher in the Rye* yielded less overall value to the beneficiaries than a decision to heed Salinger’s (possible) wishes to restrict *Catcher* to book form.<sup>312</sup> At the very least, it would seem reasonable to let living decision-makers conduct the

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308. UNIF. PRUDENT INVESTOR ACT, § 2(c)(8).

309. See, e.g., *In re Trust Created by Inman*, 693 N.W.2d 514, 520 (Neb. 2005) (farmland); *Wood v. U.S. Bank*, 828 N.E.2d 1072, 1079 (Ohio Ct. App. 2005) (stock).

310. See, e.g., *McGinley v. Bank of Am.*, 109 P.3d 1146, 1154 (Kan. 2005) (“We . . . hold that through the express provisions of Article VIII.A, as drafted by [settlor’s] own counsel, she reduced the Bank’s responsibilities contained in the prudent investor rule . . . .”); *Wood*, 828 N.E.2d at 1077–78 (deeming a general authorization to “retain any securities in the same form as when received” insufficient to override the normal duty to diversify).

311. Langbein, *Mandatory Rules*, *supra* note 148, at 1112; see also *id.* at 1114–15 (arguing that departure from the diversification duty is permissible when the trust is one of several for the beneficiaries or constitutes a tiny fraction of the funds available to them; in light of tax consequences; or when trust assets are being held for programmatic purposes rather than for financial investment). But see *Cooper*, *supra* note 184, at 1192 (arguing that the latter distinction is “artificial”).

312. One counterexample that comes to mind is a counterfactual scenario in which Harper Lee mandated that her *Go Set a Watchman* manuscript never be released during her lifetime or following her death. If her fiduciaries ignored this instruction and published it anyway, it is at least plausible that the depiction of Atticus Finch espousing racist views in his later years might have reflected back on the idealistic picture of Atticus in *To Kill a Mockingbird* (1960) and weakened the demand for the earlier book. See generally Michiko Kakutani, *Review: Harper Lee’s ‘Go Set a Watchman’ Gives Atticus Finch a Dark Side*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/11/books/review-harper-lees-go-set-a-watchman-gives-atticus-finch-a-dark-side.html> [<https://perma.cc/BT4Y-LX5D>].

cost/benefit analysis of whether to go ahead with the particular adaptation.<sup>313</sup>

Regulating aggressive artistic instructions can often be squared with the *ex ante* approach favored by Daniel Kelly because in many (if not all) cases, deviation from the author's instructions could be premised upon imperfect information, negative externalities, or intergenerational equity concerns.<sup>314</sup> That is, by prohibiting for long stretches of time uses of expressive works that the living do not themselves object to, an author can cause harm to her beneficiaries or members of society.

Intergenerational equity problems may also arise. Consider a case like that of Thomas Bernhard, who attempted to ban the publication and performance of his work in Austria.<sup>315</sup> Had his instruction been enforced, it would have greatly reduced future generations' access to his work. This is because, by curtailing the access of those members of current generations with the greatest likelihood of interest in his work, his restrictions might have relegated his work to obscurity by the time the copyright expired.<sup>316</sup> In these respects, despite the legally recognized importance of postmortem copyright interests, the degree of conflict between the needs of the living and the dead may be significant.<sup>317</sup> Indeed, these conflicts suggest the legitimacy of intervening not only when a substantial period of time has passed<sup>318</sup> but even when the author's death—and social interest in the work—is fresh.

Trends toward easier modification and termination of trusts are also relevant here. As mentioned, trusts traditionally could not be amended if such action would frustrate a material purpose of the settlor, even if all

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313. As John Langbein puts it, in the example of the instructions issued by the former IBM employee, to adhere to those stock retention instructions would not be rational:

It presupposes that a now-deceased former employee of IBM (an immense, publicly-traded company, which is followed by dozens of professional securities analysts, and which operates in rapidly changing technology-based fields) possesses material information or insight of enduring value that the securities markets have mispriced.

Langbein, *Burn the Rembrandt?*, *supra* note 178, at 392; *cf.* Hirsch, *supra* note 115, at 85 (“Knowledge of society and its culture is what makes bequests for social purposes judicious; and this too is bound to erode as time wears on. In due course, a bequest for a social purpose may grow archaic, betraying a sort of moral eccentricity.”).

314. *See supra* notes 169–75 and 191–92 and accompanying text (describing view of Kelly).

315. *See supra* notes 101–05 and accompanying text.

316. *Cf.* Desai, *supra* note 17, at 264–68 (drawing upon intergenerational equity concerns to argue against a system of postmortem copyrights); *see generally* Michael J. Madison, *Knowledge Curation*, 86 NOTRE DAME L. REV. 1957 (2011).

317. *See supra* notes 163–67 and accompanying text (describing view of Smolensky).

318. *See supra* notes 163–67 and accompanying text.

of the beneficiaries consented.<sup>319</sup> More recently, as discussed,<sup>320</sup> there has been a movement toward greater leeway for change. In some cases, all the beneficiaries may consent to a modification of the author's instructions. In such cases, courts may modify the terms as long as that action would not be "inconsistent with a material purpose of the trust."<sup>321</sup> Admittedly, however, an author's instruction may well be a "material" element of the trust and therefore an insurmountable hurdle under the UTC.

But modification may still be possible. As noted, the Restatement (Third) of Trusts further loosens the UTC's approach in allowing a court to modify if "it determines that the reason(s) for termination or modification outweigh the material purpose."<sup>322</sup> This would permit a court to balance the needs of the living against those of the dead. Even under the UTC's approach, modification may still be available. Specifically, under equitable deviation principles, courts "may modify the administrative or dispositive terms of a trust . . . if, because of circumstances not anticipated by the settlor, modification . . . will further the purposes of the trust."<sup>323</sup>

In many cases, as mentioned, the unanticipated needs of the beneficiaries to exploit copyrights—or of users to access or make use of copyrighted works—with freer range may justify an amendment to the terms of the trust. Furthermore, such adjustment could also "further the purposes of the trust"<sup>324</sup> if it enhances both the economic returns to the beneficiaries (whose welfare the author presumably cared greatly about) and the author's artistic legacy. The changes should, of course, "be made in accordance with the settlor's probable intention"<sup>325</sup> to the greatest extent possible. So, for example, if it was clear that the author wished to prohibit all adaptations to other media, but was particularly concerned about film adaptations, a court could require fiduciaries to be more searching in the case of a proposed film adaptation.<sup>326</sup>

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319. *See supra* notes 228–29 and accompanying text.

320. *See supra* notes 232–43 and accompanying text.

321. UNIF. TRUST CODE § 411(b) (UNIF. LAW. COMM'N 2000).

322. RESTATEMENT (THIRD) OF TRUSTS § 65 (AM. LAW INST. 2003).

323. UNIF. TRUST CODE § 412(a).

324. *Id.*

325. *Id.*

326. In addition, it seems likely that authorial instructions would be characterized as administrative, rather than dispositive, in nature. *See* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b (2003). If so, they could also be adjusted under the UTC provision that a "court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." UNIF. TRUST CODE § 412(b).

C. *Federal Copyright Policy Disfavors Such Control*

What should tip the balance for courts and fiduciaries faced with these dilemmas? Gareth Jones, in his classic essay, argued that “[p]ublic policy is an ‘unruly horse’” and that “courts should hesitate to extend the boundaries of public policy in order to strike down restraints [in trusts] which they deem to be offensive.”<sup>327</sup> But public policy guided by federal copyright policy is a different story. Copyright policy provides a highly relevant boundary line.

While an in-depth exegesis of the various justifications for federal copyright policy is beyond the scope of this Article,<sup>328</sup> there are, in brief, utilitarian, natural rights, and personhood theories.<sup>329</sup> It is generally agreed, however, that the overall goal of copyright law is to maximize the storehouse of human knowledge by providing limited exclusive rights to authors.<sup>330</sup> As will be shown in this section, permitting authors to dictate the uses of their works from beyond the grave generally runs counter to that goal. For this reason, federal copyright policy should weigh against the enforcement of post-death instructions in situations in which authors seek to bar entire categories of uses of their works and in which, on balance, enforcement is likely not needed to prevent the premature destruction of works by an author.

Under a utilitarian approach, it is of course conceivable that foreknowledge that one can control his or her works after death serves as an upfront incentive to creation. (Indeed, the very term—life of the author plus seventy years—might serve as a structural incentive to this effect.<sup>331</sup>) While it is impossible to know how widespread such a sentiment might be, it is likely to be weak as a driving force given how few authors, relatively speaking, seek to impose the sorts of restraints discussed in this Article. In addition, while the proposition that would-be authors are inspired to create by the prospect of providing for multiple

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327. Jones, *supra* note 208, at 128–29.

328. Such discussion can readily be found elsewhere. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 37–70 (2003); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517 (1990).

329. *E.g.*, ROBERT BRAUNEIS & ROGER E. SCHECHTER, *COPYRIGHT: A CONTEMPORARY APPROACH* 8–13, 20–22 (2012).

330. *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

331. Copyright Act of 1976, 17 U.S.C. § 302(a) (2012).

generations of loved ones is consistent with copyright as an economic driver,<sup>332</sup> the same cannot be said of the present context. For here, authors often seek to wield their copyrights not as a potential means to provide for their successors, but as a tool to control the exploitation of their works after death—and in some instances, to deprive successors of monetary returns. Such attempts are not in line with accepted copyright principles but are more reflective of moral rights, which are distinctly downplayed in American copyright law.<sup>333</sup>

If one does not focus on the point of creation, but rather on the downstream treatment of works already created, the utilitarian calculation weighs even more heavily in favor of regulating dead-hand control—in most cases. Even if one accepts the economic efficiencies entailed by having one clear right holder owning and managing an asset,<sup>334</sup> those efficiencies—as they pertain to that right holder—end when the right holder dies. There 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.<sup>335</sup> Anthony Reese has pointed out, with respect to cultural preservation goals, that

[p]erhaps most importantly, copyright law has promoted the production and circulation of copies of copyrighted works. . . . It turns out that distributing a work in multiple copies to a variety of owners can be one of the best mechanisms to help ensure that the work will survive into the future.<sup>336</sup>

By contrast, an author's stringent controls on access and use of copyrighted materials can sound a death knell for a work.

There are, however, utilitarian reasons to enforce some strains of dead-hand control. Provisions that appear to be aimed at protecting

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332. See Subotnik, *supra* note 17, at 99–103 (arguing that the desire to provide financially for generations of one's loved ones is compatible with longstanding intuitions that permeate succession law more generally).

333. E.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1992–93 (2006); Carl H. Settlemyer III, Note, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2306 (1993). Indeed, the primary exception to this characterization is the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2012), which does afford certain authors rights to claim authorship of, and to prevent the intentional distortion or mutilation of, works of visual art. See *id.* § 106A(a). However, these moral rights are available only for the life of the author (in the case of newly created works). *Id.* § 106A(d)(1).

334. E.g., William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003).

335. See *supra* note 313 and accompanying text.

336. R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUS. L. REV. 287, 296–97 (2012).

privacy interests, as seen in Willa Cather's, James Merrill's, and Maurice Sendak's wills (and those of so many others), likely reflect heartfelt sentiment on the part of the decedent.<sup>337</sup> While copyright law may not have incentivized the creation of letters or analogous personal documents,<sup>338</sup> society has an interest in preserving many of these items. If an author feels uncertain about her ability to protect the privacy interests of herself or other individuals mentioned therein, she may well destroy the works rather than take a chance on controlled release.<sup>339</sup> Such permanent destruction can harm cultural preservation goals,<sup>340</sup> even if copyright policy does not formally extend to privacy-protecting purposes.<sup>341</sup> This is why, as stated at the outset, copyright policy is consistent with enforcing authorial instructions such as reasonable moratoria on access or publication—that is, in contexts in which it is likely that, without such enforcement, authors would destroy their own works.

Turning to other justifications for copyright, while society accepts an author's ability to clamp down on uses of her works during her own lifetime through the exercise of copyrights, it does so over the grave reservations of many. But at least with respect to living authors, there are potentially compensating benefits to ease those reservations. Natural rights and personhood theories counsel in favor of a large measure of respect for an author's wishes because it was, after all, the author herself who labored on and invested her person into the work.<sup>342</sup> Support for those theories may in turn encourage more creativity in the first place.<sup>343</sup> Furthermore, there is a plausible basis for extending natural rights and personhood justifications for copyright to the upholding of an author's

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337. See *supra* section I.D.

338. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1117 (1990) (discussing “writings prepared for private motives”).

339. See SAX, *supra* note 19, at 47; Strahilevitz, *supra* note 23, at 846, 849; Settlemyer, *supra* note 333, at 2293 n.10, 2342 n.229.

340. On these goals, see generally Madison, *supra* note 316, and Reese, *supra* note 336.

341. See generally Deidré A. Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?*, 20 UCLA J.L. & TECH. 1 (2016).

342. A postmodernist critique might, of course, take issue with this description. And, in any event, fair use remains an outlet regardless of the author's wishes. See Copyright Act of 1976, 17 U.S.C. § 107 (2012).

343. See generally Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012) (arguing that personhood-regarding aspects of intellectual property law can be reconciled with utilitarian aspects); cf. Settlemyer, *supra* note 333, at 2292, 2293 n.10 (arguing that an author's right to suppress her work while alive because of privacy concerns advances copyright's distributional goals).

choice of successor.<sup>344</sup> But those justifications are on much shakier ground when it comes not merely to enforcing a choice of successor but specifications as to how living successors may exercise their inherited rights.<sup>345</sup>

Additional facets of copyright policy both downplay the notion that the author occupies a privileged perch with respect to postmortem decision-making and emphasize the role of the living on that front. First, the copyright termination provision deprives the author of the right to select her post-death terminating agents and instead supplies a list of statutory heirs to perform that function.<sup>346</sup> Because the exercise of termination rights has the potential to adjust the exploitation and visibility of the work in the marketplace, the dethroning of the author in this context is quite remarkable and telling.

Second, the well-recognized “orphan works” problem reflects the need for more unfettered use by the living. “Works are said to be ‘orphans’ when a prospective user has made a diligent, but unsuccessful, search to identify and locate the copyright owner.”<sup>347</sup> Describing the many ways in which orphan works can stymie “important, productive projects, many of which would be beneficial to our national heritage,” former Register of Copyrights Marybeth Peters stated the following:

The Copyright Office finds such loss difficult to justify when the primary rationale behind the prohibition is to protect a copyright owner who is missing. If there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous potential waste. The outcome does not further the objectives of the copyright system.<sup>348</sup>

While congressional action to address the orphan works problem has yet come to fruition, this statement of policy could be applied to the problem addressed in this Article. Specifically, when authors place fundamental uses of copyrighted materials out of reach for any living

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344. See Subotnik, *supra* note 17, at 109–10, 113–16.

345. Cf. Desai, *supra* note 17, at 244–54 (arguing against natural rights and personhood bases for system of postmortem copyrights); Kwall, *supra* note 333, at 2003 (proposing a system of moral rights “limited to the life of the author”).

346. See generally 17 U.S.C. § 203. This is generally the case unless the author dies without a spouse, child, or grandchild alive at the vesting period. See *id.* § 203(a)(2)(D).

347. Pamela Samuelson, *Notice Failures Arising from Copyright Duration Rules*, 96 B.U. L. REV. 667, 680 (2016).

348. See, e.g., *Promoting the Use of Orphan Works: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 18, 19–20 (2008) (prepared statement of Marybeth Peters, Register of Copyrights), <http://www.copyright.gov/orphan/orphan-hearing-3-10-2008.pdf> [<https://perma.cc/N9RR-KEF8>].

user following their deaths, they have effectively created a problem akin to the orphan works problem. They have made a living rights holder non-locatable by being non-existent. Put another way, they create a one-way system in which rights holders can never license, but only sue. For that reason, an author's attempts, while alive, to subject her copyrights to similarly stringent constraints—such as by transferring them into a highly inflexible irrevocable trust—should likewise be frowned upon.<sup>349</sup>

Federal copyright laws can direct the interpretation of state law instruments when they run counter to federal policies. In some cases preemption by the federal statute is explicit. For example, “an agreement to make a will or to make any future grant” will not constitute a valid waiver of copyright termination rights.<sup>350</sup> Even where the statute is not explicit, federal policies play a role. For example, a license by one co-owner of copyright that purports to be exclusive will be deemed non-exclusive as to the other co-owners by virtue of federal law unless the other co-owners have agreed.<sup>351</sup> On the patent side, the Supreme Court recently affirmed a judge-made rule rendering a contract unenforceable that provided for the payment of patent royalties following the end of the patent term.<sup>352</sup> While recognizing the impaired right to freedom of contract that its rule entailed,<sup>353</sup> the Court upheld a policy view that “when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public.”<sup>354</sup>

In short, copyright policy should be interpreted to provide that, to the greatest extent possible, the living make decisions about the fate of copyrighted works. Importantly, this means that living users should be able to rely upon fair use no matter what instructions an author has

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349. See *infra* section III.D.4. Of course, if a trust were given flexibility to address unanticipated circumstances, it could actually serve as a solution to the orphan works problem by consolidating the copyright interests in one place. See *supra* note 281 and accompanying text. Many thanks to Thomas Simmons for emphasizing this latter point.

350. 17 U.S.C. § 203(a)(5).

351. See, e.g., *Corbello v. DeVito*, 777 F.3d 1058, 1065 (9th Cir. 2015) (noting that a “third party [licensee]’s right is ‘exclusive’ as to the assigning or licensing co-owner, but not as to the other co-owners and their assignees or licensees” unless the co-owners have consented); *Davis v. Blige*, 505 F.3d 90, 101 (2d Cir. 2007) (“Accordingly, a co-owner cannot unilaterally grant an exclusive license.”).

352. *Kimble v. Marvel Entm’t, LLC*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2401, 2406 (2015).

353. *Id.* at 2408.

354. *Id.* at 2407. It must be acknowledged that in upholding the rule from *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), the Court’s driving concern in *Kimble* appeared to be stare decisis rather than patent policy. See *Kimble*, 135 S. Ct. at 2406.



imposed.<sup>355</sup> It also means that copyright policy should weigh against the enforcement of post-death instructions in situations where authors seek to bar entire categories of uses of their works and where, on balance, enforcement is not likely to be needed to prevent the premature destruction of work by the author. Under this view, reasonable moratoria on access or publication, or required consultations by particular parties as to contemplated uses, would be consistent with copyright policy. By contrast, the enforcement of total prohibitions on publication, on the creation of adaptations, on advertising uses,<sup>356</sup> or on exploitation within geographic areas would not be consistent with federal copyright policy. Nor would the enforcement of instructions requiring the destruction of physical works that embody the only copies of the intangible work of authorship.

#### *D. Handling Particular Kinds of Instructions*

In this final section, I suggest steps for dealing with stringent authorial instructions—that is, where authors seek to bar entire categories of uses of their works and where, on balance, enforcement does not appear needed to protect against the premature destruction of the work by an author. With respect to the latter consideration, one would expect that authors would more readily destroy letters and diaries in the face of anticipated non-enforcement by fiduciaries. By contrast, it seems less likely that they would destroy manuscripts or unfinished canvases in such circumstances.<sup>357</sup> While case law development by the courts will be needed to craft workable operating rules, the framework offered here should not open the floodgates to expensive litigation. After

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355. Kate O'Neill argues that, to the extent J.D. Salinger's trustees "feel legally or emotionally obligated to enact Salinger's preferences" by filing "copyright infringements to suppress works that are critical or disrespectful of Salinger or his work," their "fiduciary obligations ought not to trump a user's legitimate fair use defense." O'Neill, *supra* note 116, at 37. This is almost certainly correct in view of the supremacy of federal law.

356. One might question whether permitting advertising uses "promote[s] the Progress of Science and useful Arts," the goals of the copyright system. U.S. CONST. art. I, § 8, cl. 8. This is a fair point. Nevertheless, it is difficult to predict the ways in which uses of works contribute to the development of knowledge and culture. Cf. Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 936 (2014) (discussing this leap of faith made by the copyright system). Use in advertising is one possible way.

357. *But see* POSNER, *supra* note 127, at 716 ("[O]ne reason to think [that postmortem artistic control] should be obeyed is that otherwise authors might destroy their [unpublished] manuscripts prematurely.").

all, it is only the rare breed of author who seeks to exert strong artistic control after death.<sup>358</sup>

1. *Fiduciary Intends to Comply*

A fiduciary is a living person, so the concerns driving this Article are not strictly speaking triggered when an executor or trustee affirmatively seeks to adhere to an author's instructions. It should be recalled, however, that a fiduciary can be prevented from carrying out whimsical or wasteful commands.<sup>359</sup> As argued above, however, it is probably only in very unusual cases that authorial instructions could fairly be described as sufficiently capricious.<sup>360</sup> It is more likely that the allegation would be waste. In such cases, the fiduciary could be liable for a breach of duty to the beneficiaries for carrying out the author's instructions without prior court authorization.<sup>361</sup>

Therefore, if the executor or trustee plans to execute the author's instructions, courts should entertain lawsuits by the beneficiaries to modify the restrictions. Such lawsuits are particularly relevant in the case of instructions that proscribe uses of works, like adaptive uses or uses in particular contexts (such as in advertising or in certain geographical places), or that order the destruction of works embodying the sole tangible copy of the intangible expressive work. The fiduciary should then be obligated to demonstrate that the benefits flowing from adherence to the instructions outweigh the financial harms to the complaining beneficiaries.<sup>362</sup> One possible way to make this

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358. Although, as mentioned in the Introduction, as authors become increasingly sophisticated about their intellectual property assets, there is reason to suppose that this sort of attempted control will become more frequent.

359. See, e.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) ("To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy."); see also RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (AM. LAW INST. 2003) (noting that, "in a trust that has definite or ascertainable beneficiaries, a provision intended to allow property to be used for a capricious purpose is to that extent invalid"). The existence of capricious provisions would therefore not compromise the validity of the entire trust; rather, just those provisions would be unenforceable. *Id.*; see also *id.* § 76 cmt. b(1) (2007).

360. See *supra* notes 289–91 and accompanying text.

361. Langbein, *Mandatory Rules*, *supra* note 148, at 1116–17 ("In the event that the trustee determines that the direction to retain the asset is not in the interests of the beneficiaries, the trustee has a duty to resist the direction. If the trustee adheres to the trust term in such circumstances, the trustee risks liability to the beneficiaries for breach of trust.")

362. For example, consider once again the counterfactual scenario raised in note 312, *supra*, in which Harper Lee mandated that her *Go Set a Watchman* manuscript never be released during her lifetime or following her death. If we adjust the example and this time imagine that her fiduciaries seek to uphold the instruction and refuse publication, they might argue that the depiction of Atticus

demonstration is to identify at least one beneficiary who steadfastly wishes to heed the author's instructions. For, as Eric Rakowski notes, "a person's relatives or friends may derive satisfaction from observing his wishes once he is dead."<sup>363</sup>

## 2. *Fiduciary Does Not Intend to Comply*

If the fiduciary seeks to depart from the author's instructions—presumably out of a concern that adhering to the instructions would result in a breach of his or her duties,<sup>364</sup> or out of a meta-level appreciation of the social consequences of adherence—the fiduciary should apply to a court for guidance, and courts should be lenient in permitting modification.<sup>365</sup> Copyright's goals are particularly relevant here because the living legal owner of the interests is being prevented from exploiting them fully. (These goals should also weigh in the balance in assessing the fiduciary's failure to pursue lawsuits against those who breach the author's stated wishes.) If the beneficiaries themselves feel some loyalty to the deceased author's wishes, that should be taken into account.<sup>366</sup> The more likely scenario, of course, is collusion between the fiduciary and the beneficiaries to sidestep the author's instructions without the blessing of a court.<sup>367</sup> Advocates for authors' rights in this area have voiced this particular concern.<sup>368</sup> While one is sympathetic to the living author who hopes to assemble stakeholders to stand up for her wishes after her death, this possibility of

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Finch espousing racist views would depress the demand for *To Kill a Mockingbird* and that *Go Set a Watchman* should therefore not be released.

363. Rakowski, *supra* note 152, at 101.

364. RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. b(1) (2007) ("Because of this combination of duties, the fiduciary duties of trusteeship sometimes override or limit the effect of a trustee's duty to comply with trust provisions . . ."); *see also id.* § 66(2) (2003).

365. Langbein, *Mandatory Rules*, *supra* note 148, at 1117 ("Procedurally, the appropriate step would be for the trustee to petition the court to modify the direction, consistent with the benefit-the-beneficiaries standard.").

366. *Cf.* Cohen, *supra* note 71, at 14 ("Could Kafka's heirs (assuming a proper will) have required Brod to burn Kafka's works immediately after his death, or would Brod's unequivocal opinion have sufficed to convince the court that these indeed were an asset whose destruction would be immoral because of their cultural value (which would be revealed to the entire world only afterwards)?").

367. Adam Hirsch has noted this possibility in the context of honorary trusts. *See* Hirsch, *supra* note 115, at 97.

368. *See Literary Legacies: Executors, Duty, the Law—and a Proposal*, 3 COMPLETE REV. Q. (Nov. 2002), <http://www.complete-review.com/quarterly/vol3/issue4/litlegs.htm> [<https://perma.cc/664G-7HTR>].

tacit agreement among the stakeholders may simply be unavoidable as time passes.

### 3. *Author Prescribes Liberal Treatment of Works*

In contrast to the treatment of restrictive instructions, federal copyright policy should not put up roadblocks to authors seeking to dedicate their work to the public domain or to otherwise facilitate public access to, or use of, it. Accordingly, copyright policy should be viewed as consistent with attempts by authors to guarantee liberal licensing or unpaid uses of their works following their deaths. In many instances, such impulses will likely manifest themselves in the creation of charitable organizations to carry out these purposes. Maurice Sendak, for example, made clear in his will that he wanted part of his property to be operated by his Foundation as a museum and study center and “to be opened to the general public.”<sup>369</sup> In other cases, however, an author might try to insist upon such treatment outside of the charitable context, as did Kurt Vonnegut.<sup>370</sup> Such instructions should generally be upheld.<sup>371</sup>

### 4. *Author Attempts Equivalent Control During Life*

One theme that permeates the case law and literature in this area is whether the fact of a decedent’s death should matter to the enforceability of her wishes regarding her property.<sup>372</sup> If a person, while alive, can destroy her property, why should the law prevent her from doing so after her death? This line of inquiry applies equally to assessing authorial control over expressive works.

Nevertheless, this Article proposes that the role of third-party fiduciaries should be similar whether the author is dead or alive. Imagine that, for some reason, an author transferred her copyrights into an irrevocable inter vivos trust (managed by a third-party trustee) with the same aggressive instructions as those discussed throughout this Article.<sup>373</sup> In such a case, one might at first take the position that, by

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369. Will of Maurice Sendak, at 4–5, ¶ 5.B.1(b) (Feb. 6, 2011).

370. See *supra* note 60 and accompanying text.

371. Cf. Hirsch, *supra* note 115, at 105 (“Yet another possibility would be to grant standing to persons who benefit indirectly from a purpose bequest.”).

372. E.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 215 (Mo. Ct. App. 1975); Hirsch, *supra* note 115, at 74–75; Jones, *supra* note 208, at 126; Smolensky, *supra* note 126, at 787; Strahilevitz, *supra* note 23, at 839–41.

373. Such cases are likely to be extremely rare.

definition, a living author is a living person and so a decision to transfer copyright assets in this way fully constitutes a decision by the living that should be upheld. Furthermore, there might be a particularly compelling case to be made that upholding such a decision respects a living author's natural rights and personhood interests in a way that distinguishes this context from that of a dead author.<sup>374</sup> And yet, analogous and overriding policy concerns regarding the ability of subsequent rights holders to account for changed circumstances and to make autonomous decisions about the works would arise.<sup>375</sup> Courts and fiduciaries should therefore enjoy equal flexibility in such cases as in postmortem cases.

##### 5. *Subsequent Owner Issues Instructions*

The reasoning underpinning this Article's proposal to loosen the enforcement of rigid instructions imposed by authors themselves applies *a fortiori* to instructions imposed by copyright successors.<sup>376</sup> Whatever special relationship exists in such circumstances between owner and asset,<sup>377</sup> that relationship is usually one step removed from the regime that led to the work's creation. Accordingly, the costs of enforcement in such circumstances likely outweigh the benefits.

## CONCLUSION

This Article has argued that, to the extent authors attempt to bind their successors' ability to exploit copyright interests (or related tangible

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374. See *supra* note 342 and accompanying text.

375. One possible distinction between this context and the postmortem context exists in jurisdictions that permit a settlor to revoke an otherwise irrevocable trust as long as all of the beneficiaries consent. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 7-1.9 (2010); UNIF. TRUST CODE § 411(a) (UNIF. LAW. COMM'N 2000). At least in theory, this ability by the living to take account of changed circumstances alleviates the principal concerns that animate this Article (and use of a *revocable* inter vivos trust would alleviate them entirely because a revocable trust is by its nature revocable by the living).

376. To the extent that the deceased authors themselves did not prescribe the following treatment, these might serve as examples. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring) (describing Margaret Mitchell estate's objection to uses of *Gone With The Wind* that refer to miscegenation or homosexuality); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 325 (2006) (noting that "[t]he George Gershwin Trust closely controls casting of *Porgy and Bess* by stipulating that in certain performances, characters in the opera that are black must be cast with black singers").

377. Margaret Radin's very invocation of a "portrait" as a quintessential personhood-infused object suggests that owners of tangible works subject to copyright may (like the authors of the underlying copyrighted expression) also have personal stakes in those works. See Radin, *supra* note 140, at 959; see also Desai, *supra* note 17, at 254.

property), such control should largely not be enforced where authors have proscribed entire categories of uses and where enforcement is not generally needed to prevent the premature destruction of works by authors. Trust law principles provide flexibility on this front, and federal copyright policy should weigh in favor of access to, use of, and preservation of works for the benefit of the living. Gregory Alexander perhaps said it best when he linked the difficulties in confronting coherently these sorts of tensions to “our own ambivalent feelings about social versus individual control over disposition of property.”<sup>378</sup> In some ways, this Article has advocated inching toward his “incremental” proposal that we “enrich legal doctrine by treating no single actor’s intent as capable of trumping the intentions of all other actors with respect to the disposition of a given asset.”<sup>379</sup> The treatment of attempted artistic control after death offers a reasonable place to let the living have their say.

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378. Alexander, *supra* note 168, at 1263.

379. *Id.* at 1266.