

Part III, Chapter 8

Uncopyright and Open Copyright*

For better or (more likely) worse, copyright now automatically encumbers every new fixed work of authorship.¹ Copyright kicks in as soon as anyone writes an essay, doodles a sketch, or bangs out an email. A copyright's holder need not register the work² or put notices on copies of it³ to qualify for copyright's power to restrict unauthorized uses.⁴

If you want to play it safe, you should thus probably assume that some sort of copyright claim binds every fixed work.⁵ Even very old works often come with modern copyright strings attached. Consider, for instance, John Stuart Mill's classic work, *On Liberty*. Though the book originally issued in 1859, and has long since fallen into the public domain, my library's copy includes a notice reading, "Copyright 1978 by Hackett Publishing Company, Inc." Presumably, that copyright covers only the editor's introduction and selected bibliography. Yet Hackett's overbroad notice doubtless discourages some people—especially those who know little about copyright law—from

* Much of the material in this chapter comes from a reworked passage of Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 801-03 (2001). The material on blockheaded authors made up part of *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VANDERBILT J. ENT. & TECH. L. ___ (2008) (invited) (forthcoming). I first wrote about "We Celebrate Your Birthday," at, *A Free Birthday Song*, Agoraphilia, November 11, 2006, at <http://agoraphilia.blogspot.com/2006/11/free-birthday-song.html>.

¹ The copyright notice requirement was largely struck from the Copyright Act by the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988), effective March 1, 1989.

² 17 U.S.C. § 408(a) ("[R]egistration is not a condition of copyright protection."). *But see id.* § 411(a) (providing that copyright owner cannot in general bring suit for infringement before having at least applied for registration), § 412 (limiting some remedies in some cases to registered works).

³ *Id.* § 401(a) (providing merely that such notice "may be placed on publicly distributed copies" of a work).

⁴ *But see id.* § 401(d), 402(d) (providing that attaching notice of copyright on published works will generally bar a defense of innocent infringement in mitigation of actual or statutory damages); § 405(b) (describing limits to liability of innocent infringer of a copyrighted work published before March 1, 1989 without an attached copyright notice).

⁵ For a call to reverse that presumption by re-imposing copyright registration requirements, see Chris Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

reproducing even the free parts of *On Liberty*.⁶

In that and other ways, copyright policy currently fails to admit to its limitations. Cautiously presuming that copyright covers every fixed work, and duped by inflated copyright notices, we fail to fully enjoy our rights to the public domain. We should aspire to a more open copyright system, one that encourages both the creation of new works and the liberation of extant ones. For that, we need a way to signal, clearly and reliably, when a work has escaped the bounds of copyright. We need, in other words, an *uncopyright* notice.

A. The Uncopyright Notice

The Copyright Act provides that copyright holders can brand their works with "Copyright," or "Copr.," in lieu of the copyright symbol, "©."⁷ An *uncopyright* notice would naturally read "Uncopyright" or "Uncopr." The uncopyright symbol? A "©" overlaid with a backslash, per the international iconography of things forbidden. In cases where such graphics prove too troublesome, the cents character in parentheses—"¢"—would do nicely.⁸ Table __ illustrates the parallels.

Copyright	Uncopyright
Copr.	Uncopr.
©	©
(c)	(¢)

Table __: Copyright and Uncopyright Notices

Where will uncopyrighted works come from? Some will come from clearly unprotected parts of the public domain. The worthy Project Gutenberg, for instance, offers favorite old texts on the web, unencumbered with copyright restrictions, in an easily-accessed format.⁹ New works, too, might carry "(¢)" marks, put there by authors eager to help build the public domain.¹⁰

⁶ For a fuller description of the problem, and some proposed cures, see Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026 (2003).

⁷ 17 U.S.C. § 402(b) (1).

⁸ That some uncopyrighted works might come with common law or technological protections that require payment prior to accessing the works makes use of a monetary symbol all the more (critics would no doubt say "all too") appropriate.

⁹ See <http://www.gutenberg.org/wiki/Main_Page>.

¹⁰ Among the many licenses it offers, Creative Commons includes a "Public Domain Dedication." See <<http://creativecommons.org/licenses/publicdomain/>>. I salute that effort, but here offer a more direct approach to the problem.

B. Blockheaded Authors

Granted, not every author will want to forego copyright's privileges. Perhaps only very few will. Every little bit helps, though, and over time even a trickle of uncopyrighted works might fill an ocean of information. But why would anybody author a work for the public domain?

Samuel Johnson claimed, "No man but a blockhead ever wrote, except for money."¹¹ He would doubtless have said the same about the other media—music, painting, motion pictures, computer software, and so forth—that copyright now covers. Regardless of how they express themselves, savvy authors demand remuneration for their creative labors. Copyright helps to ensure that they get it.

And, yet, "blockheaded" authors exist. Some percentage of authors will at least sometimes share their expressive works for very little or no pay. We can even imagine an author, eager for attention or burning with artistic passion, willing to pay others to experience her masterpieces. We might not always understand what motivates such authors (though we should call them "blockheads" with affection, only; they are seldom fools). We need only observe that, as Johnson himself impliedly recognized, non-monetary incentives sometimes suffice to inspire authorship.

Blockheaded authors, like any authors, face fixed and marginal costs. Blockheaded authors do not rely on copyright law to recoup those expenses, however. Instead, they subsidize the costs of creating and distributing their works, paying for them out-of-pocket and then, typically, releasing them to the public. Blockheaded authors effectively pay to satisfy their own demand for their own works, in other words, solipsistically supplying a market comprising a single consumer. Rather than tracking the average revenue generated by blockheaded authors' works, therefore, we should track the average subsidy for blockheadedness. Figure [[cite]] does so with curve marked "AS," for "aggregate subsidy," showing how it might relate to a blockheaded author's production and distribution costs.

¹¹ JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 641 (Everyman's Library 1993) (1791).

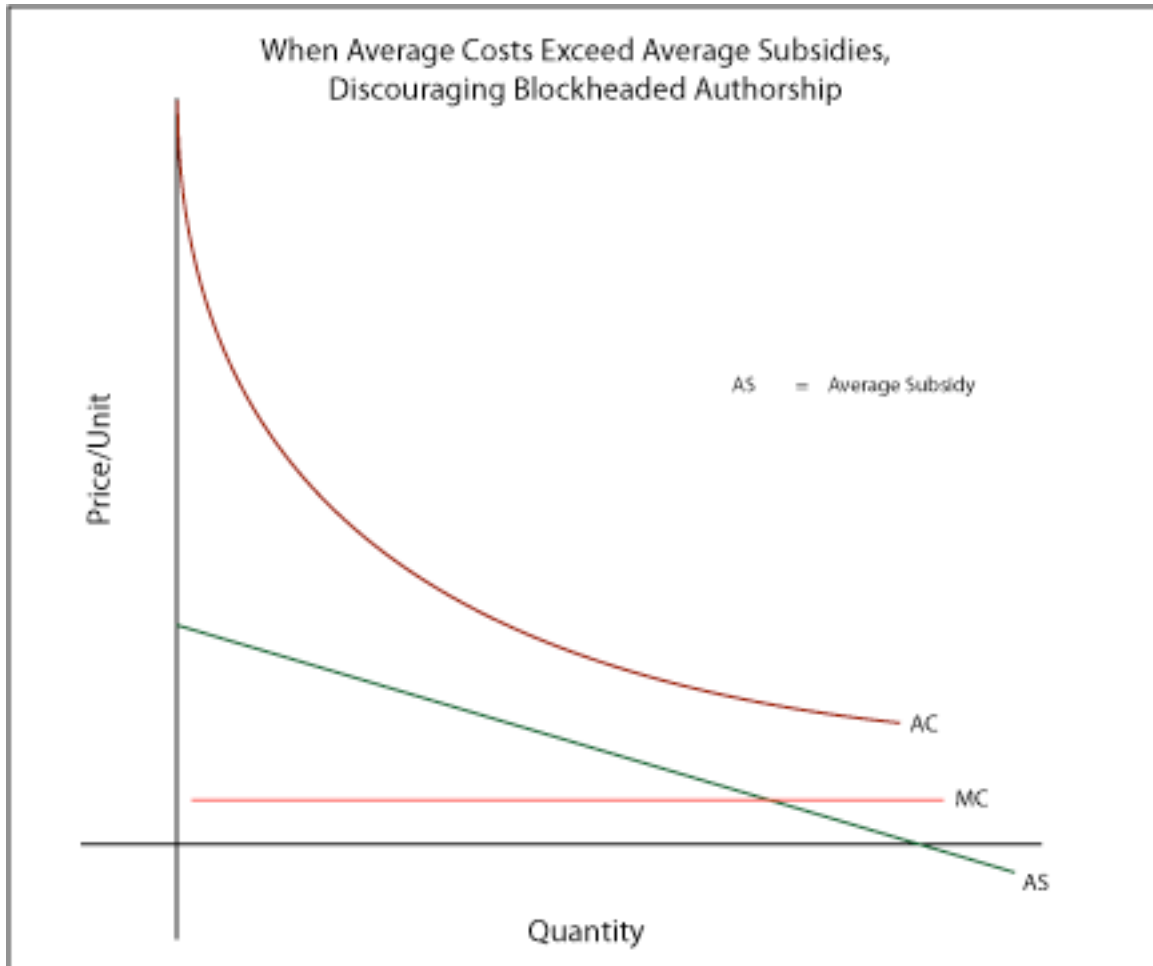


Figure 4

As did the initial picture of copyism's specter,¹² figure [[cite to above figure]] portrays a sort of tragedy. It shows what happens when the costs of creating and distributing a fixed work exceed the subsidy that its blockheaded author would have paid: the work goes unproduced. Thus, for instance, has many a wannabe rock star lacked sufficient funds to cut a single. The tragedy portrayed in figure [[cite to above figure]] goes beyond mere artistic frustration, however. Assuming that a blockheaded author's creations would have found some willing audience, no matter how small, that author's silence represents a lost opportunity to increase human happiness.

More and more often, non-monetary incentives suffice to stimulate authorship. Thanks to the same technological magic blamed for summoning the specter of copyism, authors find it increasingly cheap—in terms of money, time, and effort—to produce and distribute expressive works. Whereas it once took many thousands of dollars to record and nationally distribute a new song, for instance, it now takes only a couple of thousand

¹² See *supra*, Chapter 1.C.2.

dollars to get a computer, music production software, and an internet connection.¹³ Now, almost anybody with a dream and guitar can get a clean shot at the world's ear.¹⁴ Figure [[cite to below figure]] illustrates that effect, charting how technological progress has lowered the average and marginal costs of supplying the market with original expressive works.

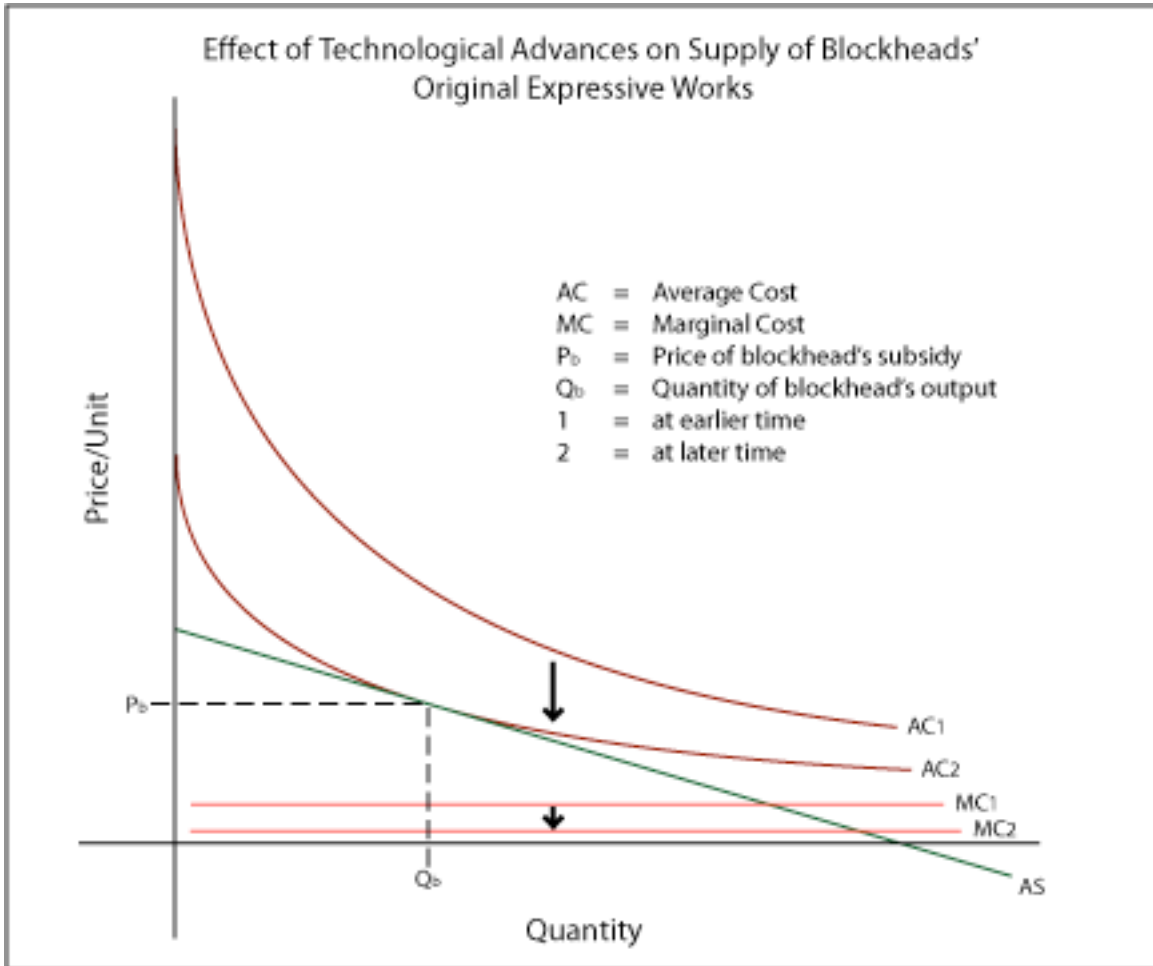


Figure [[cite]]

Figure [[cite to above]] also illustrates how reductions in the costs of producing and distributing original expressive works encourage blockheaded authors to create. A blockheaded author with an average subsidy curve (AS) that passes above the author's average cost curve (AC) will find it worthwhile to pay the subsidy price (P_b) to produce a

¹³ See David Byrne, *The Fall and Rise of Music*, WIRED, Jan. 2008, at 124, 127.

¹⁴ It offers an attractive target; even I admit to drawing a bead on it. See <<http://www.tomwbell.com/music.html>> (offering some of the author's original musical compositions and sound recordings).

particular quantity of the work (Q_b). Overall welfare increases because the blockheaded author relishes self-expression and non-authors win access to an original expressive work. Figure [[cite to above]] does not include a demand curve illustrating how much those non-authors would pay—be it in in currency, time, or effort—to access the blockhead's work. You could draw that sort of curve almost anywhere on the graph, however. So long as it *somewhere* exceeds their very low marginal costs of accessing the work, consumers will enjoy a surplus.

So understood, and holding all else equal, the willingness of blockheaded authors to subsidize the production and distribution of expressive works will tend to render copyright's legal restrictions inefficiently over-protective. In a relatively primitive world, such as the United States in the late 1700s, we might find that non-monetary incentives do not stimulate an adequate supply of expressive works. Copyright, by helping to ensure that authors get paid for their expressions, can help to remedy that market failure. So, at least, the Founders evidently thought.¹⁵ As technology advances, however, and the costs of supplying original expressive works drops, the number of authors for whom the lucre of copyright proves a necessary stimulus also drops.¹⁶ Thanks to decreases in the costs of creating original expressive works, authorship need not entail crushing debts. Thanks to the very low marginal costs of reproducing and distributing such works, moreover, a relatively few blockheaded authors can entertain very large market.

Those technological and economic trends tend, over time, to cure the same market failure targeted by copyright policy. They ensure that non-monetary incentives will suffice to stimulate an increasing amount of authorship, and that blockheaded authors will thus supply more and more of the market's demand for expressive works. At some limit, for some works, copyright law will eventually prove superfluous, and its burdens exceed its benefits. Volunteer programmers might, for instance, supply computer operating system software free of charge.¹⁷ Generally, then, as methods for producing and distributing expressive works grow increasingly efficient, they tend to tip copyright policy into inefficiency, making it more restrictive than necessary or proper for promoting the general welfare.

C. A Free Birthday Song

Allow me to demonstrate how blockheadedness can stimulate the creation and distribution of an original expressive work. In this particular case, love provided the

¹⁵ See U.S. CONST., art I, § 8, cl. 8.

¹⁶ That is not to say that copyright has nothing to offer authors driven by non-monetary incentives. Authors who seek fame may, in particular, find copyright useful. It is only to say that, even for such authors, copyright may offer more privileges than necessary.

¹⁷ With regard to Linux operating system software, of course, they already have. See, e.g., Jem Matzan, *The Gift Economy and Free Software*, June 05, 2004, at <<http://www.linux.com/articles/36554>>.

incentive. Though certainly very popular, "Happy Birthday to You"¹⁸ carries with it copyright's limitations.¹⁹ The law does not bar anyone from singing the song in private, of course, nor for only an audience of family and friends.²⁰ But I decided that it does make "Happy Birthday to You" an ill-fitting anthem to celebrate my the existence of my wife, an extraordinarily original and freedom-loving woman. I thus wrote for her an alternative song: "We Celebrate Your Birthday." After I sang it for her, accompanied by our kids, I cast the song into the public domain, hoping that others might sing it for their own beloveds and thereby indirectly honor my own.

"We Celebrate Your Birthday"²¹

We celebrate your birthday! [clap]
 We wish you life, love, and play! [clap]
 We celebrate your birthday! [clap]
 For you, dear ____, we say, "Hooray!"

The tune, for each line, runs in 4/4 time thusly: D for 1/16th; G for 3/16ths; A for 1/16th; G for 3/16ths; F for 1/4; A for 1/16th; and B flat for 3/16ths. Those notes put it in the key of B flat major, but you can transpose it however you see fit. If you want to hear a performance, you can download an MP3²² or AIF (iTunes)²³ file of me and the kids singing the song.

I will not defend "We Celebrate Your Birthday" as great art. Neither, though, did it prove effortless to create. The old standard, "Happy Birthday to You," boasts of several catchy features, after all: a bouncy, easy melody; simple and appropriate lyrics; and room for any name. I tried to satisfy those same criteria in "We Celebrate Your Birthday." I leave it to you to judge the results. Because I cast it into the public domain, you can feel at complete liberty to sing "We Celebrate Your Birthday" to your own friends and family. I think my own birthday girl would *love* that.

D. Towards an Open Copyright System

U.S. Copyright law too much resembles a roach motel: Expressive works check

¹⁸ It allegedly ranks as the most popular song of all time. *See* <http://en.wikipedia.org/wiki/Happy_Birthday_to_You>.

¹⁹ Or at least the *threat* of those limitations; for a detailed analysis of the song's copyrighted status, see Robert Brauneis, *Copyright and the World's Most Popular Song* (draft of March 14, 2008) at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1111624.

²⁰ Such a performance would not have qualified as a public one, and thus would not fall within the copyright holder's rights. *See* 17 U.S.C. § 106(4).

²¹ Uncopyright 2006-07, Tom W. Bell.

²² *See* <http://www.tomwbell.com/music/Celebrate_Your_Birthday.MP3>.

²³ *See* <http://www.tomwbell.com/music/Celebrate_Your_Birthday.aif>.

in, but they don't check out. But even that gives present policies too much credit. Expressive works don't come looking for the Copyright Act's shelter; they get it by default. Most authors freely choose to enjoy copyright's privileges, granted. Many probably wish it offered even better security against unauthorized copying. But even a haven can become a trap if it offers no freedom of exit. Recognizing uncopyright as an alternative to copyright, (¢) as a counterpart to ©, would help make copyright policy more balanced, air, and open.

Uncopyrighted does not necessarily mean unprotected. Common law or technological protections might limit the use of certain uncopyrighted works, as when trade secrets safeguard a customer list or when watermarks hinder re-use of an image. Even in those sorts of cases, however, users would benefit from knowing that copyright does not lurk in the background.²⁴ More importantly, someone who comes across a work unprotected by copyright, common law, or technological tools—a work found in the commons—would want very much to know that fact. The rest of us would want her to know it, too, so that she might fearlessly pick up the work and put it to good use. Attaching an uncopyright notice to such works would encourage the recycling of them.

We can best promote "the progress of science and useful arts" by developing new and better alternatives to copyright. By opening a clearly marked exit to the public domain, an open copyright system would stimulate the development of common law and technological tools for protecting expressive works. Those devices, insofar as they reward the creation, reproduction, and distribution of fixed expressive works, will help to ease the statutory failure that now afflicts copyright policy. Ultimately, we may even find that non-statutory protections for expressive works suffice to render copyright superfluous. Thus might *uncopyright* open the way to *no* copyright.

²⁴ Granted, an uncopyright notice might lead to confusion if attached to a work that reenters copyright due to the vesting of a contingent reversionary interest, or due to the curing of copyright misuse. That argues against using uncopyright notices little more than the marginal problem of expired copyrights argues against using copyright notices, however, and good faith reliance on an erroneous uncopyright notice might go towards mitigating the penalties for infringement. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 at 13-279 through 82 (1999) (describing scope and effect of innocent infringement defense) [[need to update cite]]. *See also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.06, at 124.15 through 124.16 (1999) (describing how innocent infringer might have laches defense) [[need to update cite]].