Authorship Without Ownership: Reconsidering Incentives in a Digital Age

Diane Leenheer Zimmerman

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AUTHORSHIP WITHOUT OWNERSHIP:
RECONSIDERING INCENTIVES IN A
DIGITAL AGE

Diane Leenheer Zimmerman*

INTRODUCTION

Media gurus refer to ours as the Digital Age. Like every major technological change—the invention of the printing press, the invention of movies and of broadcast technology—the advent of digital technology does not merely enable easier transmission of creative and informational works, but changes the conditions under which they are produced, and even transforms to some degree the nature of what is being produced.

On the one hand, the radical diminution in the cost of producing and distributing new copies of works in digital form would seem to benefit both authors and audiences; on other hand, what is so easily produced and distributed is also cheaply and easily copied. Copyright no longer seems up to the job in a digital environment of mediating between the interests of producers of works in getting paid for them and of their consumers in gaining access at a reasonable cost to what is produced. The ease with which works can be multiplied digitally has led copyright owners and legislators to look for other ways to control access and use, including through legalization of restrictive, unilaterally-imposed contract restrictions and statutory protections for users.

* Professor of Law. New York University. For the impetus to explore this topic, I want to credit my former student, Alan Toner, who earned his LL.M. at NYU in 2000. Alan’s student paper on the Street Performer Protocol sparked my interest in alternatives to intellectual property for the internet. The author would like to thank the participants in the DePaul University College of Law Center for Intellectual Property Law & Information Technology Conference on the Many Faces of Authorship: Legal and Interdisciplinary Perspectives and in the Second Annual IP Scholars Conference, held at Cardozo Law School for their invaluable comments on the earlier versions of this paper. Special thanks go to the many friends and colleagues who read subsequent drafts with great care and perceptiveness. In particular, I would like to credit the contributions, on the legal side, of Yochai Benkler, Lillian Bevier, Rochelle Dreyfuss, and Wendy Gordon, and, on the literary side, of Rachel Burma, and of Professors Elaine Freedgood and Kristine Garrigan. They have improved the piece immeasurably. This Article could not have been written without the great assistance of Gretchen Feltes of the NYU Law Library and my research assistants, Francois Chaptel de Chanteloup and Poonam Gupta. I would also like to acknowledge the generous support of the Filomen and Max D’Agostino Research Fund at New York University for its help in completing this project.
of such “self-help” technologies as encryption and watermarking. Others, either deeply skeptical about the workability or desirability\(^1\) of what is commonly called “paracopyright” law,\(^2\) or entranced by the potential of the Internet to allow users, unencumbered by copyright, to exchange masses of information cheaply and quickly,\(^3\) have looked in the opposite direction, asking how restrictions on the transfer and copying of digitally encoded information products can be reduced to optimize sharing and free exchange or to avoid negative spillovers from protective legislation.

Even the most adamant spokesmen for the “information wants to be free” school when pushed, however, admit that artists do not eat air, and that, absent a sizable trust fund (and maybe even with one), creators need or would like, when possible, to earn an income from what they produce. To put that in traditional copyright terms, artists will not produce an optimal level of new works without adequate economic incentives. Thus, whatever the philosophical bent of those who are skeptical of the “more legislation” approach, the question all must answer is how (and even whether) adequate incentives can be provided in an environment where the possibility of massive copying eludes the copyright owner’s control.

One suggestion that has long made the rounds is that authors could give away their content for free and make their money selling ancillary services that are not easily duplicated by digital copyists.\(^4\) This is the business model followed by some purveyors, like Red Hat, of open source software, and may well turn out to be the model of choice in many circumstances. In the past couple of years, however, some interesting and fairly concrete alternative proposals have surfaced that aim to provide direct, rather than indirect, compensation for a crea-

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\(^4\) An important proponent of this approach is Esther Dyson. See Esther Dyson, Intellectual Property on the Net, at http://www.eff.org/Publications/Esther_Dyson/ip_on_the_net.article (last visited Feb. 1, 2003).
tor's work when it is circulated on line. Perhaps it is a function of the age group that is most Internet-literate, but the majority of these proposals deal with digital music. Teenagers and college students love to share digital music through peer-to-peer networks, either downloading, or just listening to, it without the permission of, or payment to, any copyright owner. It has recently occurred to some that, even if they would prefer to bypass the recording industry, it might be appropriate (and in the listeners’ own self-interest) to “thank” their favorite musicians for what they produce with some money.

Some proposals would allow fans to target voluntary payments to specified artists, while others would pool contributions for subsequent distribution to all current artists in a particular category (for example, composers or performers of a particular kind of popular music). Another approach involves a system of micropayments that would also be voluntary but that, once the listener opted in, would automatically be charged for each individual download. The names of these schemes, or protocols as they are known—Tipster, for example, or Potlatch—reflect the “altruistic” or communitarian bent of their proponents. Because the audience for music is so large, and each “use” comparatively small, it is unclear, however, whether these schemes of micropayments, even if they work for the production of music, could be generalized to support other, longer works with different use patterns.

Quite a different approach would replace the current commercial copyright industries that fund the production and distribution of works with “angels” drawn from among an artist’s fans. The Fairshare Protocol foresees the fans of a particular artist or performer banding together to contribute support for new works, with the understanding that, in return, they might share in the artist’s profits from subsequent voluntary donors.


6. Hapgood, supra note 3 (noting that voluntary payments could be targeted to specific artists or to categories of artists); Smiers, supra note 3 (suggesting that specific kinds of artists could be supported by payments, disassociated from the use of specific works).

7. J. Carrico, Potlatch Protocol: A Decentralized Architecture for Gift Economics (Mar. 2001), at http://www.potlatch.net/protocol.0l.html (last visited Feb. 1, 2003). The Potlatch Protocol would allow users to issue the equivalent of an IOU for each time, to give one example, they listen to a music file. The IOUs, representing a small amount, could be aggregated by the artist or by a third party, and when they reach a significant enough figure, would be presented for payment.

8. Ian Clarke, FairShare—Rewarding Artists without Copyright (Jan. 2, 2002), at http://freenet-project.org/cgi-bin/twiki/view/Main/FairShare (last visited Feb. 1, 2003). For a similar proposal,
All of these are intriguing, but the focus of this Article will be on a rather different, and to this author more appealing, approach exemplified by the Street Performer Protocol. The Street Performer Protocol is a quite thoroughly worked-out scheme that seems intuitively better suited than voluntary tips, micropayments, or shareholder models as a way for audiences to fund complex, labor-intensive works such as novels or other kinds of books.

The authors contemplate a menu of options available to artists. What each have in common is that a release price will be set for a work, and that it will be made available in digital form, without (or largely so) copyright restrictions, once members of the public voluntarily contribute sufficient funds to meet the asking price. An author might set up her own website and announce her book project directly to her public. Usually, although not necessarily, the author might begin by posting a chapter or two to give readers the flavor of what is to come. A running record of the amount contributed to date would appear on the website.

Recognizing that payment directly to the author could be problematic, John Kelsey and Bruce Schneier suggest alternatively that a “publisher” could hold the money and also be responsible for either releasing the work when the dollar target is hit, or returning it if the author does not provide the book or if insufficient donations are received. The publisher might or might not also perform traditional editorial roles, such as acting as a “selector” of works to be offered to the public. A third possibility would be the use of a trusted third party, a “banker,” whose sole role would be to hold the donors’ funds in escrow until the terms of the agreement are met, or the transaction fails. Although enough money could be collected for an entire work


10. The Protocol’s authors do not expect their system to be the only way new works could be financed. They clearly anticipate some level of government funding to provide support, as well as sites paid for by advertising so that the content is free to the user. In the latter case, the authors suggest that copyright enforcement be limited to stopping commercial sites from downloading the material and trying to resell it. Id. at 5.

11. A variant of this system is often used now by traditional publishers of mysteries and thrillers who commonly append the opening chapter from the author’s next book at the end of the volume. Just to give one example, the paperback version of Patricia D. Cornwell’s All that Remains (first published in hardcover in 1992) by Avon Books in 1993 ends with an excerpt from Cornwell’s next book, Cruel and Unusual.

12. If the book is not forthcoming by the agreed-upon date, the payments would either be returned to the donors, or, by pre-arrangement, would be donated to some other beneficiary.
to be released at one time, the protocol assumes it more likely that a lengthy work, such as a novel, will be released chapter by chapter. The work, once paid for, will then reside in the public domain.

A number of features of the Street Performer Protocol make it especially intriguing. First of all, something very similar to it has actually been tried. This is essentially the system (without, of course, donation to the public domain) used by author Stephen King for the initial circulation of his short story, Riding the Bullet, and later to release the first six chapters of his novel, The Plant. King used Amazon.com to collect one dollar or more from each prospective reader for every chapter she actually downloaded. Once seventy-five percent of those who downloaded the previous chapter paid for it, he promised to release the next one. King claims to have gotten the idea from the “honor system” used by newspapers in New York City early in the twentieth century, although his approach suggests some more immediate inspiration from the Kelsey and Schneier proposal.

Admittedly, the King experiment was not an unmitigated success, at least from the audience’s point of view. By the time six chapters had been released, it appeared that either (or both) the readers and author were losing interest in the work. Publication ceased, and the hardcore fans (who had paid out seven of the thirteen dollars the

Street Performer Protocol, supra note 9, at 9. The banker has no role other than as stakeholder for the parties.


15. Midway through the publication. King started to ask two dollars per person per chapter downloaded, an increase he justified by pointing to the increased length of the later chapters, King Closure. N.Y. Times, Dec. 1, 2000, at A36, available at http://www.nytimes.com/2000/12/01/opinion/01FR13.html (last visited Apr. 10, 2003). King’s approach differs from those proposed by Kelsey and Schneier, and by OpenCulture. See infra notes 21-24 and accompanying text. He released each chapter before being paid for it, but told the readers that he would not release the next until a sufficient portion of them had paid for the prior release. How significant the difference between the two methods of timing payments is unclear. It may often be necessary, especially for unknown writers, to release a chapter or two before anyone will pay for the rest. Hence, there may not be a major practical difference between the two schemes.


17. According to King, newsboys at the time were often blind, and had to rely on the public's conscience to pay for the newspapers people took. King, supra note 14.

18. Exactly what happened is difficult to discern. Although with time far fewer than seventy-five percent of downloaders paid. King himself says that he does not know if the problem was “cheating” or simply casual downloading by those who browsed, but did not ultimately read, the
whole book was to have cost) have been waiting since the end of 2000 for the rest of the work to appear. The book, nevertheless, is reported to have brought in more than $700,000 for the sections King did provide, almost half a million of it pure profit.

A somewhat broader test of the approach taken by the Street Performer Protocol is promised soon if a group called OpenCulture gets itself up and running. The intent of OpenCulture is to pay writers and composers to create a digital library of free books and music. Donations by the public, made through OpenCulture, would be used to pay authors the prices they set for their work; in turn, the authors must agree to release their works upon payment, subject to a permanent, free-use license that runs to the public at large. Although authors may, if they choose, release an entire book at one time, OpenCulture expects that less well-known writers will publish a chapter or two at a time. Payments, because they go to creating a digital “free library,” will be tax-deductible (and hence non-refundable).

The obvious question is whether an approach similar to that advocated by the Street Performer Protocol could actually be a realistic way to finance the production of something as complex as a book. If it could work, many of the problems caused by troublesome legislation, such as the Digital Millennium Copyright Act (DMCA) or the later releases. *Stephen King E-Book Earnings Lag*, USA TODAY, Sept. 21, 2000, available at http://www.usatoday.com/life/cyber/tech/review/crh539.htm (last visited Feb. 1, 2003).


21. The mailing list part of the website, http://www.openculture.org, [hereinafter Open Culture] refers to an expectation that operations will begin by “later this year.” The group was approved by the Internal Revenue Service as a public charity in September, 2001. *Id.*

22. Apparently not all the details of the agreement that authors will be asked to sign have been worked out at present, but some form of public use arrangement is contemplated. OpenCulture, *Frequently Asked Questions*, at http://www.openculture.org/About/faq.html (last visited Feb. 1, 2003) [hereinafter Open Culture, *Frequently Asked Questions*]. Whether or not a “permanent” license, or a donation to the public domain, is entirely feasible under current law is a question that is not considered in any of the protocols. See infra text accompanying notes 24-27. Donors to the project have a slight edge over the public at large, because they get access to the work two weeks before it is made generally available. OpenCulture, *The OpenCulture Process*, at http://www.openculture.org/sponsors/how.html (last visited Feb. 1, 2003) [hereinafter Open Culture, *The Open Culture Process*].


Uniform Computer Information Transactions Act (UCITA), or by the intrusive policing of individual activity on the Internet, could be avoided. The question remains, however, whether any more than an eccentric or two would actually be willing to write for an up-front payment and give up any further ability to control or profit from the work's distribution. What mechanics of payment and distribution, if any, would make such a scheme feasible? How could authors ensure that they will get their price, while at the same time giving the audience reasonable assurances that they will end up with a finished work—rather than being left at the end, like Stephen King's loyal fans, with half a book? Are there conditions other than the exchange of cash, and the reasonable assurance that a product will be forthcoming, that are necessary preconditions for this type of on-line publishing without copyright to work?

The possibility is intriguing, and in thinking about it, I began to wonder whether one might not learn something interesting about how feasible an approach like that of the Street Performer Protocol or its close kin actually is, not from looking at how newspapers were sold by blind news boys, but from the conditions of production of books, particularly fiction, during the nineteenth century in Great Britain. Although nothing, at first glance, could seem more unlikely than pairing Internet publishing and book publishing in the nineteenth century, the parallels between the two situations are actually rather striking.

Although they were less dramatic in nature than the advent of the Internet, enormously important technological changes in mass communications occurred in the nineteenth century that had a profound


27. The choice to focus on the novel is guided in part by the need to place reasonable limits on the material that must be considered. It is also influenced by the fact that, by the 1830s, novels had replaced poetry as the most important form of literature produced by British writers, and remained so for the rest of that century. See Kathleen Tilton, Novels of the Eighteen Forties 13 (1954) (noting that novels became the dominant literary form of the period); John Sutherland, Victorian Fiction: Writers, Publishers, Readers 151-52 (1995) (pointing out that between 1837 and close of the century, the percentage of books published in Britain that were novels rose from twelve percent to twenty-five percent). The century also, of course, produced large numbers of authors working in other forms. Biographies, histories, works of criticism and moral and political treatises abounded. According to one scholar of the era, "Of the roughly 45,000 books published in England between 1816 and 1851, well over 10,000 were religious works, far outdistancing the next largest category—history and geography—with 4,900, and fiction with 3,500." R.K. Webb, The Victorian Reading Public, in From Dickens To Hardy 205, 205 (Boris Ford ed., 1958). Nevertheless, it is indicative of the popularity of the novel that about a third of the collection of books available from Mudie's, the powerful circulating library, were novels. Guinevere L. Grist, Mudie's Circulating Library and the Victorian Novel 38 (1970). For a discussion of the Victorian literary scene as a whole, see generally G.D. Klingopoulos, The Literary Scene, in From Dickens To Hardy, supra, at 56-116.
impact on the production and distribution of new works. Decreases in the price of paper and in the cost of printing radically transformed the publishing industry from a handicraft to an inexpensive industrial process.\footnote{Illustrations became easier to produce with better printing techniques and the advent of photography made visual representation even easier. \textit{Richard D. Altick, The English Common Reader: A Social History of the Mass Reading Public 1800-1900}, at 30 (1957).} Without new and expanded audiences, however, no need for this increased capacity would have existed, so audiences had to be created and, once produced, new works had to be written to satisfy them. Both additional conditions were fulfilled, with the result that the nineteenth century gave birth to the professional author and to widespread literacy.

At the time, however, our current, author-centered view of copyright, although it had begun to evolve, was not at all firmly embedded in the actual practices of the publishing industry. Copyright was an important economic protection for the industry that disseminated written work but its role in the lives of most authors was comparatively insignificant. Typically, writers were paid up-front for their work and, as a normal part of the bargain, were required to turn over all further interest in their copyrights to their publishers. Interestingly, serial publication, the method adopted by King and suggested by the Street Performer Protocol and OpenCulture as a good way to release longer works, is also the one that became a primary method for issuing new books for the last two-thirds of the nineteenth century in Britain as well.

The nineteenth century model has one other interesting feature from the vantage of a twenty-first century observer: its extraordinary success. The conditions just described—including lack of authorial interest in copyright—turned out to be entirely compatible with the period in English literary history when the novel was at its pinnacle of success and vibrancy. Publishing thrived, and many great writers emerged. John Sutherland, who has extensively studied the production of fiction in nineteenth century Britain, estimates that between 1837 and 1901, approximately 50,000 novels were published there.\footnote{\textit{Sutherland, supra note 27}, at 151.} This means that the some 3500 novelists of the Victorian period were averaging 17 novels a piece.\footnote{\textit{Id.} at 152.} While most are forgotten, Charles Dickens, Anthony Trollope, the Bronte sisters, William Thackeray, and George Eliot—to name but a few—continue to be read today and are deemed masters of their form. None of this would have been possible, of course, in the absence of a second factor: the availability of a
large and devoted audience for the works that new writers and new technologies produced.

The objective of this Article is to bring together the scholarship on the production and distribution of fiction in nineteenth century Britain with the concerns of modern intellectual property to see whether the history of that earlier era might help us to deal with the problems of protecting and incentivizing authors in the Digital Age. The Article will take up two sets of related questions. The first are addressed specifically to the issue of copyright: its function in the production of printed books in the nineteenth century and electronic ones today. Whatever the significance of formal copyright to the disseminators of books in that earlier era, how important was it for authors and how great or small a role did it play in what and how much they produced? What were the financial arrangements under which authors wrote? What importance, if any, did copyright continue to have for a writer once she entered into a contract with a publisher?

The second set of issues to be explored does not bear directly on the role of copyright but rather concerns itself with the noncopyright aspects of marketing and selling new works. The nineteenth century British were enormously successful in figuring out how to do this when the possibility of a mass audience began, for the first time, to seem realistic. Lessons from their experience may be pertinent as we explore alternative ways to distribute new works in today’s new circumstances as well. Assuming, as the new protocols do, that electronic publishing no longer requires the intervention of the traditional copyright industries or, indeed, of traditional copyright, readers or the authors still need to find one another. Even if authors are willing, as the protocols suppose, to write for a set fee rather than royalties, how best can members of the public be convinced to pay it to them, especially if the author in question is new and untried? The second half of this Article, therefore, looks to the nineteenth century, and what has been learned about it by literary scholars, for insights on how to build markets in the face of dramatic technological and social change.

Among the aspects of this question that will be examined is the role that distribution format played in the success of new works. Both the King experience and the Street Performer Protocol seem intuitively to have gravitated toward the idea of issuing long works on line in parts—also the favored format for initial publication of novels during

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31. This issue is taken seriously by the drafters of the Street Performer Protocol as well. They discuss a range of models that could be used to pay for new work, including advertising-supported sites, ones assembled by editors who sort through and select the most promising works, and payment through government patronage. Street Performer Protocol, supra note 9.
most of the nineteenth century. Is the similarity fortuitous, or are there substantive reasons why two such different eras might hit upon the same approach to publication? If substantive reasons do exist, then the nineteenth century experience may help us understand the advantages of this format (as well as any possible drawbacks of it).

The project undertaken in this Article—an attempt to learn from the past—will hopefully be useful, even if one remains skeptical—or at least agnostic, as this author is—about whether, in the end, more than a tiny proportion of readers will ever want to get their books online in digital form. The concern that animates this Article is not whether e-books are the true wave of the future, but rather how best to exploit the market potential that might exist, while avoiding, to the greatest extent we can, the ugly underbelly of traditional copyright enforcement in this nontraditional mode of communication.

II. A Little Bit of the History

The novel was not a nineteenth century invention. Daniel Defoe produced works of fiction that are recognizably novels in the seventeenth century. Henry Fielding, Tobias Smollet, and Samuel Richardson wrote popular and important works of sustained fiction in the eighteenth century. But, in that earlier period, the audiences for these books were comparatively small. Through the end of the eighteenth century, literacy was largely confined to the comparative

33. One scholar has written of novelists in the eighteenth century in England:
In spite of the low general level of education, there was evidently by this time a good potential demand for reading-matter if only the bookseller could offer the right material . . . . He was on fairly safe ground where the newest form of literature, the novel, was concerned. “Novels,” so it was said in 1757, “are a petty light summer reading, and do very well at Tunbridge, Bristol, and other watering-places; no bad commodity either for the West India trade.” Richardson and Fielding had a large public eagerly awaiting another Pamela or Joseph Andrews. As novels increased in number so did the new circulating libraries, and, a point of the first importance to the book trade, the reading habit spread to women. The £1,600 which Millar paid Fielding for Tom Jones and Amelia turned out to be a most remunerative investment. Here at last was a type of publication which would appeal to all classes, rich or poor, learned or ignorant.
34. One expert estimates that in the late eighteenth century, literacy in Britain was still at about the same level it had been in Elizabethan times. ALTICK, supra note 28, at 30. Although education for the poor had been a popular idea in the Tudor period, it fell out of political favor after the English Civil War and the Restoration. Id. at 30-31. The ability to read, therefore, was rare among farmers or among working class or poor persons in the late eighteenth century. Id. at 39-41.
few in the upper and "commercial middle classes." As a result, authorship was not a profession; writers could survive economically only on private wealth or through patronage, augmented perhaps by eking out a living as a "Grub Street" journalist. Even if the number of prospective readers had been larger, however, the cost of paper and the slowness and costliness of early printing methodologies would have kept the price of books high and the numbers of potential purchasers low. The main market for books was the circulating library. A circulating library bought a comparatively small number of volumes and then "rented" them to readers, who either could not, or would not, come up with enough cash to purchase their own copies. The influence of circulating libraries encouraged publishers to produce books in a standard format known as the three-decker. This three-volume set could be lent by the library more profitably in indi-
individual parts, while at the same time allowing library members to spread out the cost of reading an entire book. Furthermore, three people, rather than one, could be reading various sections of a single copy of any given work at the same time.\textsuperscript{41} This system did not require a very large base of readers to sustain itself.

It required new printing technologies, changes in taxation practices, and the evolution of mass literacy, however, to sustain the kind of revolution in literary production that occurred in the nineteenth century.\textsuperscript{42}

Literacy had to be pushed for by religious and other early "public interest" groups who took as their mandate the lobbying for and provision of education for the working class and the poor.\textsuperscript{43} No public funding of elementary education was available in Britain until 1832.\textsuperscript{44} Furthermore, punitive stamp and paper taxes kept the cost of reading matter artificially high for the first half of the century.\textsuperscript{45}

Finally, changes in the technology of book production that made it feasible to produce for a mass audience were essential before something recognizable as the modern publishing industry could emerge. Through the end of the eighteenth century, books were printed on cumbersome wooden presses, with the type set and inked by hand. Bookbinding was largely done as individualized custom work performed by a separate set of artisans.\textsuperscript{46} The process would have

\begin{footnotesize}
\footnote{41. Id. at 38-40.}
\footnote{42. Although precise figures are not available, Altick's interpretation of the available data is that, by the late eighteenth century, reading was largely a skill of the middle and upper classes. Some tradesmen and artisans were also literate, but, other than that, the remaining population could not read. Literate persons, he says, were concentrated in urban areas, whereas the bulk of the population lived in rural areas or small towns. Altick, supra note 28, at 65. In contrast, by 1841, studies show that sixty-seven percent of men and fifty-one percent of women in England and Wales were able to sign the marriage register, from which it was assumed that they could read. This figure reached ninety-seven percent for both sexes by the end of the nineteenth century. The methodology used may have overstated the degree of literacy, but clearly it did increase markedly over the course of the century. Id. at 170-71.}
\footnote{43. Evangelical religious groups and political radicals were responsible for the earliest efforts to spread literacy among the poorer members of society. Law, supra note 35, at 8-9.}
\footnote{44. Id. Altick points out that the amount of funding for public education during the first four decades after public support began was woefully inadequate. Government funds were intended to aid private and religious schools in teaching poor children, but the combination of public and private resources was insufficient. Altick, supra note 28, at 144-55. The beginning of a system of national schools run by the government dates only to 1870. Id. at 171.}
\footnote{45. Stamp taxes were imposed on publications containing "news or comment on news," as an indirect form of censorship. Also, duties were levied against paper for printing from the late eighteenth century through 1861. Law, supra note 35, at 9-10. An often overlooked economic impediment to reading was the expense (and lack of adequacy) of lighting in the home for much of the century. Altick, supra note 28, at 92-93.}
\footnote{46. D.F. McKenzie, Introduction to The Book Trade and Its Customers, 1450-1900, at xiv-xv (Arnold Hunt et al. eds., 1997); see generally Eiluned Rees, Art and Craft: Bookbinding in the}
seemed familiar to a printer who had worked centuries before with Gutenberg. The industrial revolution, however, transformed publishing in the first decades of the nineteenth century. One scholar wrote; "The first thirty-five years of the nineteenth century introduced more radical changes in book production that the preceding 350."

For the first time, it became possible to manufacture paper in huge quantities and cheaply, rather than in a maximum quantity of no more than a few thousand sheets at a time. The wooden printing press was replaced in rapid succession by the iron press, and soon thereafter, by cylindrical steam presses. Stereotyping was not new to the nineteenth century, but it only came into widespread use in conjunction with these other developments. Using molds to print pages meant that they could be stored intact and used to run off new editions as needed; previously, quantities well in excess of immediate need had to be run off and stored because, once the printing was complete, the type would be disassembled and re-used for other works. New technology also made it cheaper to use illustrations, and of course, photographic processes began coming into use as early as the second quarter of the century. Bookbinding could now be done on a mass production basis and became an integral part of the production of the book. Publishing was less and less in the old model where the lines separating publisher, printer, and bookseller were indistinct and wavering. Publishing houses were instead evolving into a recogniza-

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47. ERICKSON, supra note 36, at 27-28.
49. Id. at 56. Iron presses could print over a larger surface than wooden ones. Id. at 57. Steam-powered cylindrical presses by 1816 could produce six times as many copies per hour as the iron hand presses could. Id. at 56. Steam presses apparently did not come into widespread use, however, until the 1840s. ALTICK, supra note 28, at 262.
50. PATTEN, supra note 48, at 57. Patten notes that, prior to the nineteenth century, the Stationers' Company followed restrictive practices that made it difficult to use stereotyping. Id.
51. Id. at 57-58.
52. See generally Potter, supra note 46, at 161-74.
53. Id. at 165.
ble modern form as acquirers, publicizers and wholesalers of books, often leaving the printing and retailing to specialists.66

Although these changes in technology, at the remove of two hundred years, may not seem as dramatic as the emergence of the Internet, they were in fact the preconditions that enabled print to emerge as a medium of genuinely mass, rather than elite, communication, and the professional writer to gain acceptance as a member of a recognized occupational class. Thus, in important ways, changes in the techniques for promulgating expressive works in the nineteenth century generated its own revolution in communications.

III. THE ROLE OF COPYRIGHT IN THE PRODUCTION OF FICTION, THEN AND IN THE FUTURE

The great upsurge in book publishing was intertwined with developments in the law of copyright, and to a real extent was reliant on it. But the nature of that reliance is complex. Some important distinctions must be laid out at the beginning to make the relevance of this history to contemporary proposals for non-copyright solutions to digital publishing intelligible.

Legal regimes providing exclusive control over the dissemination of particular works have conferred economic advantages and—arguably—created necessary incentives for the publishers of books at least since the sixteenth century.57 To put a book into circulation requires the publisher to make significant investments. He must offer some payment to an author (if the work were a new one); buy, or pay for the use of, skilled labor, printing equipment, and paper; provide storage for inventory; and transport and market the finished volumes.58 That it was not economically feasible to invest this much in the printing and dissemination of books without protection from piracy (i.e., competition) was asserted by the publishing industry well before the passage of the Statute of Anne and is a claim that continues generally, although not entirely, to go unquestioned by legislators and scholars.59

56. JOHNS, supra note 55, at 59; Potter, supra note 46, at 162. Potter writes that printing and binding eventually were combined in single firms, but that consolidation of these functions was not firmly in place until late in the nineteenth century. Id. at 171.

57. Incentive for purposes of this Article is used to indicate a reward without which the desired level of an activity would not occur. This use of the term is common in intellectual property. An economic advantage that flows from special circumstances or from legal protection can make an activity more profitable without being a necessary precondition for the activity to occur.

58. Bookbinding was done separately, often to the specifications of the purchaser. See supra text accompanying notes 46, 54.

59. Among the best-known skeptics about the need for copyright, or at least for extensive numbers of rights or long duration, are current Supreme Court Justice Stephen Breyer and econ-
This Article simply takes as a given that copyright was important to the health and expansion of the publishing industry in nineteenth century Britain; certainly, as will be shown, publishers were careful whenever possible to acquire the copyrights of authors they published.60

The fact that copyright was important to nineteenth century publishers, however, tells us very little about the importance of copyright to successful on-line publishing. Much of what the traditional publishing industry does in the production of hard copy is irrelevant in the on-line context. Electronic publishing is not capital-intensive in the way print is; it needs no large investments in printing plants, paper, binderies, warehouses, or shipping facilities. Once a work is produced, the costs of reproducing and distributing it on line approach zero. Many of the kinds of expensive activities needed to bring a printed book from the manuscript stage and into the hands of readers can, therefore, be bypassed when the work is in digital form. This fact is, of course, what has created the appealing possibility that animates the various protocols discussed at the start of this Article: the hope that artists, such as writers or musicians can now appeal directly to the public for support of their work, without the intermediation of the organized copyright industries61 and the loss of control this may entail.

But, even if the interests of traditional publishers are discounted in this new medium, how necessary does copyright remain to authors? After all, central to the various protocols that have been discussed is the hope that a lump sum payment can be substituted for copyright, with the author retaining no further rights against the public. Authorship, although it does not require the capital investment of traditional publishing, is not cost-free. One might predict, therefore, that, even if the apparatus of the publishing industry is no longer a prerequisite to the dissemination of new works, the economic protections offered by copyright will nevertheless remain an important part of the incentives that motivate authors to produce new works. In actual fact, however, the role that most legal incentives play in artistic and literary production is complex. The nineteenth century both demonstrates that com-

60. In the instances when they did not buy the copyright outright, it is often clear that the publisher saw an economic advantage in not doing so. In some instances, of course, the desire to keep a popular writer happy might also lead to compromises on the subject of copyright acquisition. See infra notes 69-93 and accompanying text.

61. By this term, I mean entities like publishing houses and record companies that have traditionally provided the means by which an artist's work is disseminated to the public.
plexity and casts doubt on any assumption that authorship and ownership must go hand in hand.

To begin, it is abundantly clear that a lot of authors who have little hope of finding a market for their writings (and whose copyrights are, as a result, virtually worthless), both then and now, write anyway—although their numbers and output are undoubtedly affected by the need of many to find alternate ways to earn their bread. Poets in the nineteenth century provide an excellent example to illustrate the point. Poetry had been highly popular in the early decades of the century, but it fell out of favor with the public by the 1830s, to be replaced by the novel as the form of literature in greatest demand. At that point, instead of being paid by publishers for their work (and their copyrights), poets were asked to underwrite the cost of publishing what they wrote. Lee Erickson observes that, as a result of this change in tastes, poetry for the last two-thirds of the century became “a gentleman’s avocation,” an activity engaged in only by those, like Robert Browning, with an independent source of income, or those who, like William Wordsworth, were already very well-established. Others could not foot the up-front costs of publishing. Nevertheless, a glance through any anthology of Victorian poetry will quickly demonstrate that the practice of poetry did not wither away, even though the economics of its production, from the point of view of the poet, became decidedly unfavorable. Clearly, the promise of financial returns was not the central motivating force behind the continuing

62. Even Charles Dickens, who was to enjoy both popular and financial success as a writer, was willing to support himself by doing other work and by contributing articles without pay for the simple pleasure of seeing them in print. Patten says that Dickens published a number of sketches in Monthly Magazine from 1833 to 1835, without receiving remuneration for them. PATTEN, supra note 48, at 15-16. This experience did, however, launch Dickens’s literary career, Patten says, and by 1835, the Evening Chronicle agreed to pay him a separate fee for the writing he did for it (Dickens was employed at the time by the Morning Chronicle). Id. at 17.

63. For example, Byron’s Corsair sold 20,000 volumes in just two weeks at a time when books cost the equivalent of twenty-five dollars in modern currency. ERICKSON, supra note 36, at 23. Erickson says that the “boom” in the poetry market ended, however, in the 1820s. Id. at 24.

64. Poet John Clare had to abandon writing and publishing poetry because he could not support himself with it by the 1830s. Id. at 57. Tragically, Clare was hospitalized for insanity in 1837—a partial result, some speculate, of the decline in the sales of his work. THE OXFORD COMPANION TO ENGLISH LITERATURE 201-02 (Margaret Drabble ed., 1985).

65. Erickson notes that Robert Browning was able to write poetry even though he made little if anything for his efforts because he was independently wealthy. ERICKSON, supra note 36, at 6. In this, Erickson says, Browning was like the majority of poets of his time. Id. at 34. The shift in what was rewarded, however, did influence some writers to change to other media. Sir Walter Scott, who enjoyed extraordinary remuneration for his writings, responded to changing tastes and the changing economics of publishing by moving away from poetry and toward the novel. Id.
practice of the art of poetry during that era (or, for that matter, our own).

Having made the point that artistic production is not only, and perhaps not even primarily, about money, it is nevertheless unlikely that writers will devote themselves as fully to authorship as a profession if they cannot profit from the value that others place on their work. But whether this means that the optimal production of new works by authors is dependent on copyright is, as it turns out, a matter on which the English experience of the nineteenth century is genuinely enlightening. The truth is that from the time the "professional" author came into widespread existence until close to the end of the century, for all practical purposes, statutory copyright was of little importance to authors.

This is true despite the much-touted advantages that copyright was alleged to give them. On the surface, formal copyright was said to be primarily about protecting authors. Ownership of the right was, by statute, first vested in the author of a work; the gradual extension of the term of copyright that occurred in the nineteenth century, too, was explained as a necessary protection for authors. In actual fact, however, the only significant source of rights for the author for most of the century was from the common law. Common law copyright was what induced publishers to pay authors because they were subject to legal action if they printed a manuscript without first obtaining the rights to it from the author or her assigns. Statutory copyright did not even kick in until publication. Upon finding a publisher for a work, the standard practice for any but the most exceptional writer was to transfer all interest in the copyright for a lump sum, and walk off with no further interest in the profits from its exploitation.

During most of the century, an outright grant meant just that: a permanent transfer. If the contract did not provide for it, the law had no mechanism for returning to the author any part of the copyright.

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66. By professional author, I mean one who lived on what he or she earned from writing, rather than off of her inheritance or someone else's patronage.

67. Prior to the advent of statutory copyright in Britain, authors were sometimes able to maintain control over their works by obtaining a patent from the crown. They would then take on the job of printing and distributing their work themselves, often by subscription. Arnold Hunt, Book Trade Patents, 1603-1640, in The Book Trade and its Customers 1450-1900, supra note 46, at 31-34. Ultimately, however, the Stationer's Company was able to stave off competition from authors for its control of the publishing business, in part through the strength it gained by its role in helping to effectuate the then-prevailing program of British government censorship. Id. at 35.

68. Erickson, supra note 36, at 60-61; Seville, supra note 36, at 149. Both authors affirm that this practice continued throughout most of the century. See also Susan Eilenberg, Mortal Pages: Wordsworth & the Reform of Copyright, 56 ELH 351, 372-73 n.27 (1989).
term, however, much it might be lengthened over time.\(^6\) In this regard, English copyright law actually reduced, rather than increased, the amount of protection given to authors. Prior to 1814, protection was provided for a term, with the possibility of a renewal, or second term if the author was still alive when the first term ended. Rights to the work were supposed to reverted to, or be reinvested in, the author at the beginning of the second term.\(^7\) When the law was rewritten in 1814, the duration of a copyright was changed to the longer of either twenty-eight years or the length of the author’s life. The elimination of the renewal term removed the mechanism for returning the copyright to the author, and no alternative was put in its place.\(^7\) In 1842, a new act further lengthened the duration of the copyright either to the life of the author plus seven years or to forty-two years (whichever was longer). But, it failed to provide an author who sold all her rights early in the term an opportunity under the law to recapture them if the work turned out to have a longer and more valuable life than anticipated at the time of the original sale.

Thus, although the 1842 Copyright Act’s chief sponsor claimed that his major objective was to honor and protect authors and their heirs,\(^7\)...

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69. Copyright law in the United States retains to this day mechanisms for returning the copyright to the author after a passage of time. The termination of transfers provisions in sections 203 and 304 of the 1976 Act allow authors and their successors to void contracts after a period of time and regain control of their copyrights.

70. The Statute of Anne, 8 Ann., c. 19 (1709) (Eng.), created an initial term of fourteen years, with the right to renew for an additional fourteen years if the author was still living. The statute provided in section 11 that “after the expiration of the said term of 14 years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living ....” Seville, supra note 36, at 225. How valuable this right was to an author is unclear. In Carnan v. Bowles, 2 Bro. C.C. 80 (1786), for example, an author who had sold “all his interest in the copyright” of a work at the beginning of the first term was found to have conveyed by this language not merely the first fourteen years but also the author’s contingent interest in the renewal term. In 1814, the copyright term was lengthened to twenty-eight years with an extension for the life of the author if he or she was alive at the end of the initial term. Copyright Act of 1814, 1814, 54 Geo. III. c. 156 (Eng.). No possibility of reversion was provided. The history of reversion under English copyright law is reviewed in Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 647-48 (1943) (finding that an author could also assign her contingent future rights to renewal along with her rights to the initial term under U.S. law as well).

71. A limited reversionary interest subsequently reappeared in Britain as § 5(2) of the Copyright Act of 1911, 1 & 2 Geo. 5. c. 46 (Eng.). This provision permitted an author’s estate to recover rights assigned by the original owner of the copyright twenty-five years after the author’s death. Reversionary rights disappeared again when the Act was revised in 1956. Section 5(2) is discussed at length in Chappel & Co., Ltd. v. Redwood Music Ltd., [1981] R.P.C. 337 (H.L. 1980).

72. Serjeant Talfourd was the originator of the 1842 Copyright Act. Seville, supra note 36, at 1. Seville writes that Talfourd was primarily motivated by his belief in the social importance of literary works and their creators. He wanted a life term to recognize the importance of the author, and a post-mortem period of protection to satisfy “the author’s natural desire to provide for his family and heirs.” Id. at 19. The view that the primary goal of the 1842 Act was the
and the poet Wordsworth called the 1842 Act (for which he lobbied) "a general measure of justice for all authors & for all time," the gradual lengthening of the copyright term in the nineteenth century really did little directly to further the author's interests. Wordsworth, for example, seemed to have ignored the fact that most authors did not own any interest in the copyrights in their works, and that any profits from extending the copyrighted life of extant works with unusually enduring value flowed only to the publishers. Because publishers could not accurately predict which would be the rare work that would enjoy a long shelf-life, the years tacked on to the copyright were added economic insurance for them. But the longer term was unlikely to affect more than marginally the prices offered to any but the most successful author for rights to a new manuscript. To the extent that a book sells at all, most exhaust their markets in a matter of a few years; thus, the acquisition of the exclusive right to publish it for decades would add little if any value, prospectively, to the average manuscript.

reward and encouragement of authors can also be found in modern writings. See, e.g., Woodmansee, supra note 36, at 146-47.

73. Seville, supra note 36, at 214 (quoting Paul M. Zall, Wordsworth and the Copyright Act of 1842, in PROCEEDINGS OF THE MODERN LANGUAGE ASSOCIATION OF AMERICA 70, 135-44 (1955)).

74. See Erickson, supra note 36, at 60-61.

75. From hints that exist, one might infer that others involved in the passage of the statute understood fully what Wordsworth did not: that publishers were the intended beneficiaries of the term extension. Seville, supra note 36, at 115, n.43 (recalling an anecdote told by author Thomas Moore to illustrate the improbability that authors would get much of value from the legislation).

76. A rational publisher clearly will not pay the author much, if anything, for future profits it does not expect will ever be realized. But even if the publisher and author could accurately anticipate that a particular novel would be one of those rare productions that would continue to sell for the duration of the statutory copyright term, once anticipated future profits are reduced to present value, the amount that the copyright "tail" would add to the price the author is paid for sales expected in the initial years diminishes as the term lengthens. To give a modern example. William Landes, in a recent article, pointed out that, using a ten percent discount rate, the present value of the right to receive one dollar a year in royalties for twenty-eight years is $9.31, whereas extending the term for an additional forty-two years would add only sixty-eight cents to the price. William M. Landes, Copyright, Borrowed Images, and Appropriation Art: An Economic Approach, 9 GEO. MASON L. REV. 1, 11 n.34 (2000). See also William M. Landes & Richard Posner, Economic Analysis of Copyright, 17 J. LEGAL STUD. 325, 363 (1989) (pointing out that the present value of the expectation that a work will still bring in substantial profits in its hundredth year "will be virtually zero"): Breyer, supra note 59, at 324 ("If . . . an author knew that his book would sell continuously for seventy-six years, an increase from fifty-six to seventy-six years of protection . . . would lead to an increase in the present value of a manuscript of only 3.6 percent (assuming a discount rate of five percent.").

77. This point is made by Justice Breyer in the modern context in his dissent in Eldred v. Ashcroft, ___ U.S. ___, 123 S. Ct. 769, 804 (2003). He notes that only two percent of existing copyrights retain any economic value fifty-five to seventy-five years into the term of protection in the United States. In his 1970 article, Justice Breyer cited statistics from the U.S. Copyright
The only way a typical author could hope to benefit from any windfall generated by the lengthening of the copyright term, therefore, was either never to transfer his or her intellectual property rights or for the author or his heirs or assigns to buy them back from the publisher at some later date if the work in question still generated enough of a return to make the purchase worthwhile. The first option seems to have been available infrequently, and the second was often unsatisfactory from the author's perspective. A careful review of publishing practices during most of the nineteenth century, therefore, leads inexorably to the conclusion that Wordsworth's enthusiasm for strengthened copyright as an agent of the author's welfare flowed more from romantic than realistic premises.\footnote{Wordsworth believed that writers could not be respectable unless they had property they could leave to their heirs. In the author's case, the survival of literary rights would serve the function that land traditionally had served in British society. See Erickson, supra note 36, at 60-61; Eilenberg, supra note 68, at 352-53.}

In truth, the practice of transferring the full copyright to the publisher ab initio was established tradition well before the beginning of the nineteenth century, and authors (unless they were exceptional) probably had never had much choice in the matter. Eighteenth century writers who attempted to keep their copyrights, it is said, were either unable to find a publisher at all or, if they did, were exposed to punitive actions by the publishing establishment for their temerity.\footnote{According to Eilenberg:

Any work whose copyright the author retained was liable not to be published, the booksellers customarily refusing to publish anything to which they could not secure the copyright and sometimes actively interfering with the sale of works whose copyrights were kept from them. But authors rarely tried to circumvent booksellers. In 1736, the Society for the Encouragement of Learning had been established to provide an alternative to the booksellers: the society would support the costs of printing and reimburse itself from the profits of selling the book, while the author would retain the copyright. But the best-known authors of the day refused to have anything to do with such a scheme, and after a few years of unrewarding and unremunerative work, the society disbanded. Eilenberg, supra note 68, at 372-73, n.27.}

Martha Woodmansee points to another failed attempt at bypassing the publishers, this one in Germany:

\footnote{In 1772 ... the poet Friedrich Gottlob Klopstock unveiled a scheme to enable writers to circumvent publishers altogether and bring their works directly to the public by subscription. His aim, he wrote, was to ascertain whether it might be possible by arranging such subscriptions for scholars to become the owners of their writings. For at present they are so only in appearance: book dealers are the real proprietors, because scholars must turn their writings over to them if they want to have these writing printed . . . .}
The practice of outright transfers continued unabated throughout most of the nineteenth century.

In most cases, an up-front payment for all rights was probably a reasonable arrangement, whether viewed prospectively or retrospectively. Although the reading public devoured novels in the nineteenth century, most works, individually, sold only modest numbers of volumes and then faded away. If the author and publisher made what seemed to both as a fair sum on the transaction, no one was likely to be offended that the publisher, and not the author, held the copyright for its duration because the "tail" of the ownership right had little prospective value to anyone.

For authors whose works turned out to be immensely popular, of course, the situation might be different. These authors (and there were never many of them) might understandably feel distress if they saw what was, to them, an unjustified disparity between the price they were paid for their copyrights and the amount of money that the publisher subsequently earned from exploiting them.80

These issues might be resolved in a number of ways. Authors who developed a following might find that a lower payment for an early work would be balanced by more generous fees for later ones.81 Because publishers had an interest in keeping their most popular writers happy, "bonuses" over and above the initial agreed-upon price were sometimes also offered if a work was an unexpected success.82 And there was always the possibility that a successful author would gain

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This experiment in collective patronage did not have the direct impact on the structure of the book trade that Klopstock had hoped it might. Subscription was simply too demanding of the time and resources of writers for many other writers to follow his example. And readers had already become accustomed to purchasing their reading matter from the booksellers. This arrangement had the advantage of enabling them to browse before buying and to await the reaction of other readers and the reviews. Furthermore, publishers' names had become an index of quality, a means of orientation for the reader in the sea of published matter.

Woodmansee, supra note 36, at 47-48.

80. One example is provided by Robert Patten, who found that Dickens sold his copyright in Sketches by Boz to publisher John Macrone. Macrone paid Dickens £450 for it, and subsequently earned £4000 in profits from the work before selling off the copyright to another publisher for an additional £2000. PATTEN, supra note 48, at 37-38.

81. Anthony Trollope was paid £250 for the outright transfer of The Three Clerks in 1857: the book was extremely successful, and although he got nothing more from it, three years later, he was able to command £2500 for Orley Farm. JOHN SUTHERLAND, VICTORIAN NOVELISTS & PUBLISHERS 137-38, 141 (1976) [hereinafter VICTORIAN NOVELISTS].

82. Dickens's remuneration for Pickwick Papers was voluntarily increased by his publishers. Chapman and Hall, from the initially agreed upon £14 3s. 6d. per installment, to £100 per installment once it became apparent how phenomenally successful the work was with the public. The publishers wanted Dickens to stay with them and to write them a new novel. Id. at 68-70. Similarly, although George Eliot agreed to give Blackwood's Adam Bede for £800, the book was so...
the eventual bargaining power to hold on in the contract to some current or future interest in her work, or have the financial wherewithal to buy back their copyrights at a future date.\footnote{This leverage was highly dependent on the author's popularity. Weedon points out that Wilkie Collins, for example, made a point of retaining his copyrights, but as he fell in popularity, they became less and less valuable; ultimately, in ill health and in need of cash, he sold them to a publisher. Alexis Weedon, \textit{From Three-Deckers to Film Rights: A Turn in British Publishing Strategies, 1873-193}, 2.1 BOOK HIST. 188, 190 (1999).}

Arrangements that kept an interest in the copyright for the author were not without their own set of problems, however. A reasonably prudent author would, therefore, be unlikely to base her decision about creating and publishing new works on the likelihood of retaining some of the long-term benefits that copyright could provide. Reacquiring copyrights at a later date might, for instance, mean that the author would repay to his publisher a substantial part of what he had received for the copyright in the first instance, but without having enjoyed a share of the earnings generated by the work in the interim.\footnote{John Sutherland notes that Bentley's publishing house made a practice of offering to sell back copyrights to its successful authors, including Dickens, Charles Reade, and Bulwer Lytton, but on terms that would require the author to return to the publisher most of what he or she originally had been paid. \textit{VICTORIAN NOVELISTS}, supra note 81, at 60. Bentley gave Lytton £1100 for the copyright to \textit{The Last Days of Pompeii}, a book that was extremely profitable to the publisher, and subsequently asked for £750 to reconvey to the author a part interest in its copyright and those of two other novels. \textit{Id.}}

An established author might also be able to "lease" her copyright to a publisher for a term of years, rather than selling it outright. Here, too, however, the benefits were uncertain. A publisher who was reasonably aggressive could "work" the copyright in the first few years of its existence to sop up most of the market for the serial version, for the expensive three-decker that sold largely to libraries, and for the subsequent cheap edition that would be marketed to individual buyers.\footnote{As one scholar notes: "Selling and reprinting novels in different editions at different prices was one way in which popular fiction was made available to the public . . . . \[I\]t kept the market fresh and encouraged different market sectors to buy the novel." Weedon, supra note 83, at 191-92. When Charles Reade gave his publisher, Richard Bentley, rights for two years in his novel \textit{It's Never Too Late to Mend}, he discovered, however, that by the end of that period, the publisher had produced two editions of the novel in a three-part set, sold 9,000 more in yet a cheaper edition, and 58,000 more in a still cheaper version. The publisher also brought out an illustrated version in the same time period. Sutherland remarks: "Not surprisingly the author felt that this cascade of editions exhausted the subsequent value of the copyright . . . . On his part Bentley could undoubtedly claim that he had launched Reade's career . . . ." \textit{VICTORIAN NOVELISTS}, supra note 81, at 87-88. Not all agreements, certainly, resulted in the author coming up short, but the point is that even fairly sophisticated and successful writers could find it difficult to hold
A third possibility was to share ownership of the copyright with the publisher—commonly referred to as the “half-profit” system. This meant that the author also shared the cost of publishing and marketing the work along with the profits. This system could be quite advantageous for very popular authors. That should not be taken to mean, however, that the majority of authors who signed such agreements either wanted to do so, or got greater benefits as a result from the copyright. Actually, in many instances it was the publishers who pushed for this arrangement because it meant they could pay the author nothing, or very little, for the work until all the expenses had been accounted for and a stream of pure profit had been generated.

Most writers who had any option in the matter shied away from these contracts out of a lively (and apparently realistic) fear that they would be cheated by their publishers, who were suspected of manipulating the numbers in their own favor. Author and wag Douglas Jerrold is said to have quipped that the nice thing about the half-profits system was that “it never leads to a division between the author and publisher.” Trollope, throughout his long and successful career, assiduously avoided half-profit arrangements in favor of the greater certainty of a lump sum payment up front for his work.

Despite the fact that few authors enjoyed any longitudinal benefits from copyright until the nineteenth century was almost at an end, the striking thing about nineteenth century publishing was that it

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86. PLANT, supra note 33, at 410. Plant wrote that this system was used by John Murray III, for example, to compensate Sir Austen Henry Layard for his nonfiction book, Nineveh and Its Remains, in 1848. Plant said that the arrangement “brought its author about £1,500 a year for some years instead of the lump sum of £200 which he had been willing to take.” Id. Dickens was able to negotiate, as he became more successful, for his preferred form of payment: a lump sum up-front, followed by a share of the profits. VICTORIAN NOVELISTS, supra note 81, at 80.

87. VICTORIAN NOVELISTS, supra note 81, at 89. Sutherland examines the issues surrounding half-profit contracts extensively as does Patten in his study of Charles Dickens. Id. at 88-94; PATTEN, supra note 48, at 24-25.

88. VICTORIAN NOVELISTS, supra note 81, at 90; PATTEN, supra note 48, at 25. By the end of the century, royalty contracts, giving the author a payment for each volume of a work sold, had become the standard method of payment; in contrast, this method was adopted in Europe fairly early in the nineteenth century. Balzac, for example, reportedly “began his career on a royalty basis, getting two francs per volume for every copy printed.” PATTEN, supra note 48, at 230. Patten notes, however, that, ironically, Balzac later abandoned the royalty system, and began to sell his copyrights outright. Id.

89. See supra note 79-87. The Society of Authors, founded in 1884, worked hard to educate its members about the superiority of royalty contracts over lump-sum and shared-profit arrangements with their publishers. THE OXFORD COMPANION TO ENGLISH LITERATURE, supra note 64, at 917. Royalty contracts provided authors with a continuous stream of income as long as the publisher continued to sell the work in question. Publishers did not like the switch; they claimed that they were the risk takers now and that authors did not share in those risks.
worked extraordinarily well for authors of fiction. At the top, highly successful writers made large sums of money. Dickens, whose expenses were high and who was always operating under perceived economic pressure, nonetheless earned significant enough sums from his books to die leaving an estate of £93,000.\\(^90\) Many other less successful authors than Dickens earned payments in the four figures for each novel.\\(^91\) And, according to Guinevere Griest, “[T]he ordinary, ‘respectable man of letters’ could ‘command an income and a position quite equal to those of the average doctor or lawyer.’”\\(^92\) Even writers specializing in what we might now dismissively call pulp fiction were able to earn £20 to £30 by producing works to be serialized in provincial newspapers, amounts that, as one scholar notes, look small only when compared with the large payments made to luminaries like Wilkie Collins or Trollope.\\(^93\)

Putting these pieces together, a series of tentative conclusions can be reached. First of all, one must distinguish clearly between the benefits of copyright and the need for economic reward. What seems clear is that, for authors, copyright is far from a necessary precondition for the continuing production of new works. Otherwise, it would be difficult to explain why some people—like the nineteenth century poet—would continue to write when he knows that his work will not sell. And it would be hard to understand how the richest period in the production of English-language fiction could occur in a period during which the vast majority of authors received little, if any, benefit beyond an initial payment from the copyrights in their work. With that experience in mind, it can hardly seem far-fetched to suppose that a writer in the twenty-first century could operate effectively in an environment that allows her to set a price on her work, and, upon receipt of it, give up future rights to restrict its acquisition or use by the general public.

\[\\text{Authors, however, did not agree. Many felt that they were being exploited by the publishers and they lobbied for better conditions. Their complaint was not without foundation: publishers’ shared-profit ledgers were not always accurate; copyrights were sometimes undervalued; and the lump-sum payment given for a copyright was not the best way to sustain a writing career. So the Society of Authors urged its members to hold out for royalty agreements—a form that had become increasingly common since the 1850s—as it provided a more regular income for their writing.}\\]

\[\\text{Weedon, } \textit{supra note 83, at 188, 190.}\\]

\[\\text{90. } \textit{Victorian Novelists, } \textit{supra note 81, at 23.}\\]

\[\\text{91. Wilkie Collins, for example, was offered £5000 for } \textit{Woman in White} \text{ by the literary magazine, The Cornhill. Law, } \textit{supra note 35, at 161.}\\]

\[\\text{92. Griest, } \textit{supra note 27, at 4.}\\]

\[\\text{93. Law, } \textit{supra note 35, at 160-61.}\\]
But the analysis, were it left at this point, would, I think, be misleading. The insights into authors’ incentives that can be gleaned from the nineteenth century, as noted earlier, are complex. On the one hand, the experience of that era provides fresh evidence for a phenomenon that generation after generation has been able to observe: creative people will continue to produce new work, even when they have little realistic hope of ever being paid anything for it. On the other, it does not suggest that artists and authors are indifferent to money. Rather, writers are impelled by a variety of incentives, including the dream that, if they just hang on a little longer, they will finally be “discovered.”

Once an audience for an individual’s work develops, the question of compensation becomes more fraught. Authors who might previously have been willing to labor in obscurity, or even to dip into their own pockets to have their work published, will expect that, if others are willing to pay for access to their work, they will be compensated relative to the size of the market for it. Publishers in the nineteenth century compensated authors with a fixed sum, based on their best guess and business judgment about the likely size of the potential purchasing audience. The new protocols promote the making of a similar bargain, but this time directly between the author and his readers. So far, so good.

The difficulty, I think, comes in with the part about abjuring copyright entirely. The Street Performer Protocol, for example, would avoid the problems of the inefficient underutilization of works and intrusive policing that are current features of copyright on line by having authors, in return for their up-front payment, inject their work into the public domain. The final shape of the plan for building OpenCulture’s digital library is still evolving, but it seems also to contemplate little, if any, retention of long-term economic control by participating authors. It must be said that a single, up-front payment in lieu of further rights worked so well for most authors in the nineteenth century that the idea of a sale that exhausts all further rights seems at first glance to be an entirely sensible compromise.

But upon further examination, a more nuanced arrangement might work better for everyone, for reasons that will be explained. Both

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94. See supra notes 62-65 and accompanying text.
95. Street Performer Protocol. supra note 9, at 1.
96. The posting on OpenCulture’s website says that the entity has not “reached a final decision” on whether or not its authors will have rights to control the making of derivative works. It adds that “there may be an optional license in which you would specifically give up this right. There are benefits and risks either way.” OpenCulture. supra note 21, at 4-5.
today and in the nineteenth century, a variety of potential markets exists for any given work. One of the interesting aspects of the history of novel publishing in the Victorian era was the degree of success enjoyed in exploiting successive markets for a single book. Admittedly, all these involved print and hard copy, but the point remains that good sales in the first publication format often seemed to create a demand for the work in other forms. Typically, a new novel would appear first as a serial, then as an expensive three-decker, and then in the form of cheap reprints (and often even cheaper editions sold in bookstalls at railway stations) for direct sale to the public. Finally, the novel might reappear in a collected edition of the author’s works. The availability of a work in one format did not dry up subsequent markets, but rather, in many cases, seemed to fuel them. The price a publisher would pay an author would be influenced, therefore, not just by the profits anticipated from the initial publication, but also in part by the value, if any, expected from future publication of the work in these other formats.

Similarly, a work first made available today on line may have subsequent markets in hard-copy formats, as well as in a variety of digital and nondigital derivative works. But the on-line purchaser of an e-book who, unlike a nineteenth century publisher, will have little or no interest in these other markets and no expectation of benefitting from them, cannot be expected to factor them, as a publisher might, into the price they are willing to pay. If an author tries to set her reserve price for the release of an e-book with these contingencies in mind, it is likely that her readers will never come up with enough cash to get the work released in its initial form. Furthermore, forcing the author to make an uncorrectable up-front guess about the future value of a given work could, on occasion, lead to costly mistakes. It is not self-evident, therefore, that the best way to deal with the problem of digital copying is to expect the author to eschew copyright altogether, particularly in relation to non-electronic media.

97. The successive markets for works are discussed in Altick, supra note 28, at 297-300; Erickson, supra note 36, at 162; Griest, supra note 27, at 44, 48; Victorian Novelists, supra note 81, at 38.
98. Printed books may appear in both hard-cover and paper-back versions and in collected-works formats.
99. A right to control derivative works (that is, transformations based on the original) began to develop in the nineteenth century, but really came into its own in copyright in the twentieth century.
100. Interestingly, OpenCulture seems to be wrestling now with many of these issues. One open question is whether a prospective maker of a derivative work would need the author’s permission. The organizers also recognize that works may sell in hard copy as well as in digital form, and say: “We don’t want to stop folks from being able to provide the service of selling
The point is not that authors need legal rights that entitle them to every possible opportunity to collect rents. Rather, I rely for this conclusion on the admittedly anecdotal, but abundant, evidence about the circumstances that created hard feelings between authors and their publishers in the nineteenth century.

Although there is little suggestion that, for the vast majority of authors, the payment of a lump sum for all rights to their work was a source of dissatisfaction, difficulties were most likely to arise when, over time, the most successful of them began to see a gross disparity between what they were originally paid and what their publishers and assigns ultimately were able to earn from marketing their work.

Dickens, for example, initially agreed to write the installments of The Pickwick Papers for £418. At the time, he was a relatively unknown writer without a large following. When it became clear that the serialized novel was a phenomenal success, the publishers, to keep their valuable property happy, voluntarily added on to his compensation two bonuses totaling £2500. The publishers, however, earned £14,000 from the work. This, and comparable early experiences, led Dickens to expend much energy over the years in squabbling with his publishers and attempting to gain more favorable terms for himself. Some flavor of his attitude can be gleaned from a letter Dickens wrote to another author in 1848 in which he complained: “I am not rich, for the great expenses of my position have been mine alone from the first, and the Lion’s share of the great profits has been gorged by the booksellers.”

Publishers who valued their ongoing relationship with an author might try a variety of techniques to keep an author happy, but in the end, many of that small coterie of successful authors preferred to use their strengthened bargaining power to retain partial or future rights in their work. As far as I have been able to tell, the issue was money—not merely the desire to earn enough to live on, but enough to avoid the demoralizing sense of unfairness that came from seeing the fruits of their labor generate unexpected profits for publishers that the author’s contract did not entitle him to share.

hard copies of works for a reasonable price. Our intent is to stop greedy pirates from profiteering from an artist’s work without an arrangement with that artist.” OpenCulture. Frequently Asked Questions. supra note 22. Exactly how much control the author will retain, and in what form, is, however, unclear.

101. Erickson, supra note 36, at 159.
102. The history of Dickens’s relations with his various publishers is recounted in Patten, supra note 48.
103. The letter was written to D.M. Moir, and is quoted in Patten, supra note 48, at 196-97.
Translating this into a modern context, an author can probably come to terms with setting a price at which she is economically and psychologically comfortable about releasing her work in digital form to the public for nonprofit use and distribution. But if the author abandons her copyright entirely, and then finds that others are able to generate significant profits from her work, either by exploiting it digitally or in other media, she is likely to feel dissatisfied with a bargain that leaves her no share in this bounty. In turn, this dissatisfaction could affect the level of production of new works. The strength or importance of this demoralization effect on incentives is difficult to evaluate empirically; it could be significant or it could turn out to be a problem only at the margin. However, taking a risk that the disincentive effect will turn out to be significant is difficult to justify. Abandoning copyright altogether is not a necessary precondition for achieving a rational solution to unconsented copying in the on-line environment.

Realistically, most of the problem in regulating the on-line distribution of works would disappear if authors, upon payment of an adequate sum, were simply to grant a license running to the public that allows not-for-profit digital copying and distribution.

Such a license might even permit a would-be distributor to charge for any services that made the work more readily available to the public (for example, by providing it accompanied by a review for which they might charge, or by grouping and maintaining “selected” works on a website and charging a membership fee). The viability of such an arrangement would depend on whether it would be possible to distinguish charges for value-added activities from any charges attributable to distributing the work itself.

A public license for digital free use and distribution would accomplish the goals of the various plans and protocols. It would eliminate the need for the intrusive and cumbersome measures now in use to police and prevent unmetered distribution. And the public would be able to enjoy more of the Internet’s potential for the spontaneous, cheap and easy communication of information. On the other hand, if someone were able to come up with a way, in the face of such a public license, to charge people for access to an author’s work, the advan-

104. There is considerable effort needed to design a website and to maintain a library of works in a form readily accessible to the public. This contribution needs to be subsidized in some way. OpenCulture, for example, plans to take ten percent of all donations for authors’ works and apply that to pay its operating expenses. OpenCulture, *Frequently Asked Questions*, supra note 22.

105. The author raises this possibility without taking a position on whether or not it would be workable.
tages, from the author’s and the public’s perspective, of requiring authors to eschew copyright protection altogether are not self-evident.\textsuperscript{106}

Furthermore, this limited license leaves open the opportunity for novelists who first publish digitally to exploit any new markets that may open to them.\textsuperscript{107} The e-book is unlikely to displace the printed book; film and theater remain potential outlets for derivative works based on the original. Arguably, the protections offered by copyright remain important (and far less problematic) for the exploitation of the work in these media.

Finally, another point that needs to be considered is whether or not new legislation would be required to make possible even a permanent nonprofit public use license, much less a limited or total disclaimer of copyright. Under current law, copyright vests automatically upon the fixation of a work in tangible (including digital) form; while no reason exists to believe that an author could not agree to give up her rights to that copyright voluntarily by contract or alienation, it is unclear how an interest can validly be granted to the public at large, except perhaps through a legally established trust. And if such a “donation” were made, the termination provisions of the Copyright Act of 1976 seem to require that the author or her statutory successors be allowed to change course and recapture the rights thirty-five to forty years after the initial grant. In most cases, of course, nothing of worth will remain to recapture, but the objective of removing the encumbrances of copyright could be defeated if an exceptionally valuable work could be retrieved from a free distribution regime at this time.

\section*{IV. Selling Fiction—To the Victorians and the Techies}

With the addition of some important nuance and limitations, the experience of the nineteenth century suggests that authors could indeed thrive in a system that puts copyright largely, if not entirely, out of the picture. But the success story of English authorship during the period did require other forms of support for innovation so that novelists would enjoy a sustainable market for what they had to offer. A look at the complex set of arrangements on which the professional novelist depended in the nineteenth century may shed light on

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106. The Street Performer Protocol actually acknowledges this point. It suggests that, as an alternative, a work could be provided without charge on a site paid for by advertising. Copyright in such a case might be retained, but only insofar as it would be used to prevent others from copying from the site and attempting to resell the content. \textit{Street Performer Protocol, supra} note 9, at 5.
\end{flushleft}
whether authors can make writing pay when the distribution is via the
Internet.

We turn, therefore, to an exploration of the conditions that sup-
ported the emergence in nineteenth century Britain of the profes-
sional author.

A. Two Caveats

1. Paying for “Free” Goods

At the outset, two important differences between the nineteenth
century print market and twenty-first century market for digital works
must be acknowledged. First, when an individual purchaser bought a
book in any form during the nineteenth century, he paid for compara-
tive exclusivity of access to it. A purchaser might decide to lend out
his copy to a friend, or share it with his family, but paying was the
general precondition for obtaining one’s own copy of the work. Even
unlicensed copies produced by pirates were paid for by their end
users. If works on line are released in the manner suggested by the
various protocols, it would mean that modern readers in substantial
numbers would be asked to pay for something that, if they guess right
and exhibit a bit of patience, would very shortly be available to them
for free. How likely is it that people will routinely agree to pay for the
production of what will, in the end, be largely or wholly a public
good?

The question, on a practical level, of whether people will voluntarily
pay for e-books when they know that their contributions also support
hundreds, if not thousands, of free riders, must be examined using a
different set of tools from the historical ones employed in this Article.
A nineteenth century analogy, as far as I know, does not exist.

We do know, however, that people contribute to public television
and radio, nonprofit theater groups, museums, and a wide variety of
other cultural activities that could probably not survive without their
voluntary support, even though in those cases, too, they cannot ex-
clude those who never pay a cent. In recent years, economists—puz-

108. Lending libraries continued to supply many readers with books they could not afford to
buy, but, as has been pointed out, the library copies were quite expensive (typically costing a
guinea and a half, an amount that could have been paid by only a handful of individuals). This
pricing system allowed publishers, and by extension, writers, to be compensated indirectly for
the extra usage. In turn, borrowers paid the libraries a guinea a year for a time-limited form of
access to a variety of books. See infra note 114. Public libraries did not begin in Britain until the
second half of the nineteenth century, and their numbers grew slowly. By 1886, for example,
only two of London’s sixty-seven parishes had established such libraries. Griest, supra note 27,
at 81. Griest notes that, at a time when Mudie’s was adding 170,000 new volumes a year to its
collection, “the entire stock of the Liverpool Free Library totaled only 49,277 volumes.” Id.
zled by the willingness of individuals to contribute to the production of public goods—have confirmed the importance of altruism, reputational enhancement, and the donor's assessment of his own long-term self-interest as factors that explain the robustness of this phenomenon.109

For purposes of this Article, therefore, I feel justified in assuming that, given the right set of circumstances, enough individuals could be convinced to ante up the necessary cash to make a donation-based system at least plausible. If I am correct, however, it will be doubly important to understand with a fair degree of precision exactly what might constitute "the right circumstances." There, the nineteenth century experience is enlightening.

2. Audience Size

A second major caveat relates to the potential audience size. At least one precondition for the success of fiction writers in nineteenth century Britain will not be easy to recreate. It was a nation of voracious readers. The explanations for that fact vary, but undoubtedly one must include on the list the relative paucity of competing alternatives in an era before film, radio, television, and the DVD. Thus, the sheer vitality of the Victorian literary market is unlikely to be reproducible on the Internet. To the extent that proportionately fewer people consume books and poetry, and that other media compete successfully for large portions of their attention, no protocol can change those fundamentals, and the amount of money available to pay authors will consequently be reduced.

B. Building a Paying Audience

1. What Factors Generated Public Interest in Acquiring Fiction in the Nineteenth Century?

Even if audience size and overall demand level cannot be duplicated under modern conditions, the nineteenth century experience is nonetheless rich in clues about how to maximize the audience for new

109. The arguments and the economic literature are reviewed in Glynn S. Lunney. The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act, 87 Va. L. Rev. 813, 861-68 (2001). Lunney says that, in addition to the three rationales given above for why volunteers might support the production of public goods, some persons get satisfaction from participating in informal groups that produce such goods, and others simply derive satisfaction from supporting this kind of work. A particularly interesting study of the phenomenon of voluntary production of public goods in the context of the development of open source software was done by Josh Lerner and Jean Tirole. Josh Lerner & Jean Tirole. The Simple Economics of Open Source, 52 J. Indus. Econ. 197 (2002).
literary works that may exist online; success, it seems, is dependent on a complex interplay between publicity, format, and price.

Publicity is the most obvious. The attention of readers must be captured, and to accomplish that, they must have ways of learning about what is available. Nineteenth century publishers recognized that markets were not spontaneously generated, and they relied heavily on both advertising and reviewers to bring in new readers for the works they published, irrespective of the form in which this occurred. Serial publication turned out to be well situated to exploit the opportunities for free publicity because reviewers tended to critique each part successively, rather than, as would be true for a traditional book, writing about the entire work in one article. Publishers also promoted their wares heavily themselves by inserting advertisements for them on the covers and flyleaves of other books when they were sold to the public. Publishers also commonly produced their own "house" magazines, in which fiction was serialized, to keep their authors' and their own names before the public.

Other conditions that brought together new authors and their audiences in the nineteenth century, however, evolved as technology and literacy did, and emerged largely through a process of trial and error. As was noted earlier, at the beginning of the century, when novels were still expensive to produce and the percentage of the population that was literate was comparatively small, circulating libraries were the main customers for books. Individual readers rented volumes from these commercial libraries rather than purchasing their own copies. The libraries could be relied upon to buy enough copies of books in their costly three-decker format to make small print runs profitable for publishers. Although these conditions allowed pub-

110. See PATTEN, supra note 48, at 67; VICTORIAN NOVELISTS, supra note 81, at 37-39 (pointing out that one reason publishing houses often operated their own magazines in which they serialized fiction was that the magazines themselves were a form of advertisement for the publishing house, for other works, and for subsequent editions of the serialized work in volume form); ALTICK, supra note 28, at 292-93 (discussing successful promotional schemes of publishers of "penny dreadfuls," including appending the first installment of a new work at the end of another to act as a "teaser").

111. ERICKSON, supra note 36, at 5; PATTEN, supra note 48, at 67.

112. Id.

113. LAW, supra note 35, at 12, 25.

114. Mudie's allowed its subscribers to borrow books, one volume of a three-decker at a time, for a total annual fee of one guinea. AMY CRUSE, THE VICTORIANS AND THEIR READING 312 (1935); GRIEST, supra note 27, at 79. Griest points out that only fairly well-to-do families could make use of this form of access. She mentions an estimate in 1872 that not more than 60,000 of the 4.6 million families in Great Britain could pay this rate. Id.

115. According to Griest, a book in three-decker format was considered to have had decent sales if five hundred copies were purchased. Id. at 59. Daniel Barrat puts the profitable level of
lishing to be modestly profitable, they were not sufficient to allow for the emergence of a "scribbling class" of professional authors who could support themselves by their pens, rather through patronage or inherited wealth.

The possibilities provided by expanding literacy and cheaper publishing technologies are what combined to upset the comfortable balance between the publisher and library. Ultimately, these new elements tempted publishers to try to build a mass audience of readers who bought, rather than borrowed, what they read. In the period of experimentation that ensued, new ways to market literature emerged that favored authors in ways that the earlier, safer way of marketing publications could not.

sales at 750 copies, whereas Law says sale of 1000 copies was considered to constitute a decent run. Daniel Barrett, *Play Publication, Readers, and the "Decline" of Victorian Drama*, 2.1 BOOK HISTORY 173, 175 (1999); Law, supra note 35, at 11. If sales typically fell in the range indicated by these sources, it would mean that the publishing industry was able to operate profitably with sales levels of the sort more common today among the notoriously unprofitable university presses. The profitability of these books varied according to sales, but Griest relates a report by Anthony Trollope to his son that can be taken as a fair indication of the economics. Trollope (who had bought his son an interest in a publishing house) said that the paper, printing, and advertising costs for a run of 600 copies of a three-volume novel could, in 1876, be expected to be about £200. If 550 copies then were sold to libraries at a discounted price of fifteen shillings, the author and publisher would be left with about £212 in profits. Griest, supra note 27, at 59. If a book were truly successful (selling, say, 1500 copies), well over £500 profits could be expected. Id. at 59-60.

116. According to Altick, between 1828 and 1853, the average price of a complete book had dropped in price by forty percent. Altick, supra note 28, at 294. One factor in the lowering of prices was the loss by publishers of the fight to prevent cut-price booksellers from operating. Id. at 304-05. In the latter half of the century, prices for fiction were also reduced by the availability of the so-called "railway novels," cheap reprints that sold for six shillings each, and by fiction available in weekly miscellanies and in newspapers selling for a penny or two a copy. Id. at 294-300, 301-02. Newspapers came down sharply in price once the various taxes on them were finally removed. In 1850, a daily paper cost five pence. Id. at 348. When the last duty—that on paper—was eliminated in 1861, daily newspapers dropped in price to a penny each. Id. at 354. For a discussion of the cost of books in Britain over the century, see generally id. at 260-364.

117. By highly favorable, I mean that the system allowed for the development of authorship as a professional endeavor, in which thousands of writers could live on what they earned from their books. A scholar of nineteenth century serial fiction would rightly point out, of course, that serialization placed severe demands on its practitioners and could be an extremely stressful way to write. Elizabeth Morrison, for example, notes that:

The serial mode imposed particular demands on writer and publisher. Magazine editor and popular author George Manville Fenn was reported in 1885 to have said that the novelist writing for serial publication had to produce six to twenty "strong sensations," one for each installment.

Elizabeth Morrison, *Serial Fiction in Australian Colonial Newspapers, in Literature in the Marketplace: Nineteenth-Century British Publishing and Reading Practices* 306 (John O. Jordan & Robert L. Patten eds., 1995). See also Erickson, supra note 36, at 166 (discussing the psychological pressures on novelists using the serial format). Although Dickens and Thackeray managed to write their works as publication was occurring, not every author fell up to the demand of doing so. Trollope preferred to finish and revise an entire novel before
Although the guinea-and-a-half three-decker continued to be sold to circulating libraries like Mudie's through much of the century,' the secret of selling new works directly to readers turned out to be serial publication—issuing works in sequential parts on some fairly regular schedule. The hope was that members of the public (who rarely bought three-deckers because of the high out-of-pocket cost') would be willing to do so on the installment plan, spreading the total cost over a period of several months. The reliance of nineteenth century publishers on serial publication is intriguing, considering the way in which the designers of the Street Performer Protocol, the founders of OpenCulture, and author Stephen King have all gravitated toward it as an appealing model for issuing new works.

Serial publication in the nineteenth century took three main forms—the so-called book in parts, serialization in literary magazines, and serialization in cheap weeklies and newspapers.

The initial experiment in mass marketing through serial publication was with the so-called book in parts, although, strictly speaking, it may be inaccurate to refer to it as an “experiment;” its actual birth seemed more a matter of pure fortuity. Interest in the form was jump-started by the remarkable success of Dickens's *Pickwick Papers*.

The work did not start out, however, with a plan to issue a new novel in segments. Rather, the publisher planned to publish a series of

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118. Mudie's was the most important and famous of the commercial circulating libraries that operated in Britain during the nineteenth century. It began operation in 1842, and survived into the 1930s. GRIEST, supra note 27, at 3.
119. Griest reports the following. I assume ironic, commentary on the effect on prospective individual purchasers of the high price of three-deckers:

> At the end of the century a writer for the *Spectator* claimed he personally knew of only two instances in which three-deckers had been bought on their first appearance: a man in Calcutta, eager to know whether Disraeli had anything to reveal, purchased *Endymion*; and a young man had sent a three-decker to his fiancée, who had been “inconsolable because Mudie had not sent her the new novel.”

Id. at 2.
121. See supra notes 13-20 and accompanying text.
122. A book in parts was one that was issued in stand-alone and comparatively inexpensive segments over a period of time (say, for example, twenty weeks). Sutherland points out that books had been published in parts since the seventeenth century; thus the form was not original to the nineteenth century publisher although it had tended to be used mostly for non-fiction and older works that were being reissued. SUTHERLAND, supra note 27, at 88.
123. See, e.g., ERICKSON, supra note 36, at 161: PATTEN, supra note 48, at 45.
sporting prints, issued in a number of small, paper-wrapped volumes that would sell for a shilling each. Dickens was engaged to supply some text only to give “continuity” to the illustrations. But the illustrator committed suicide shortly after the series began, and the text quickly became the main attraction. As Dickens developed his story, the series became a literary sensation, its sales jumping from an initial four hundred copies per part to as many as forty thousand copies of some of the later sections.

Dickens continued to publish freestanding books in parts with great success throughout his career, and (perhaps as a result) the format has attracted considerable attention in the scholarly literature. But literary historians have actually shown that, comparatively speaking, few of Dickens’s contemporaries and their publishers actually used this format as a way to introduce new works. As a practical matter, the book-in-parts format was significant only for novelists (similar to King) who already were known authors with a fairly stable public demand for their new work.

By the 1850s, therefore, the serial publication of novels had largely shifted away from individual books in free-standing segments to novels that appeared by the installment in monthly “shilling” periodicals or (increasingly over time) in weekly miscellanies and penny newspapers. Serial publication of this sort was so successful that it

124. Scholars point out that many books in numbers attracted their audiences more by their illustrations than through their text. Altick, supra note 28, at 265.
125. Feltes, supra note 82, at 1; Altick, supra note 28, at 279.
126. Feltes, supra note 82, at 2.
127. Cruse, supra note 114, at 151.
128. Id.
129. He did not publish exclusively in parts, however. Several of his books first appeared in serialized form in periodicals. Great Expectations, for example, was introduced in the magazine All the Year Round. Sutherland, supra note 27, at 38.
130. Id. at 87-106 (discussing publication of serialized novels in Victorian England). According to Sutherland, the book-in-parts format was more commonly used to reissue older, better known works than to introduce new ones. Id. at 90. He found that, even in the early days of the shilling-part serial, only about fifteen new books a year might be published in the format. Id. at 87.
131. Erickson, supra note 36, at 158-60).
132. Victorian Novelists, supra note 81, at 20-21. Examples of some of the best-known were The Cornhill Magazine and Macmillan’s Magazine. Id. at 55. Many were actually owned by publishing houses. Id. at 55-56. Both Macmillan’s and Blackwood’s are examples of such publishing house vehicles. For a history of Blackwood’s (which published George Eliot and Charles Reade, among its best-known authors), see generally David Finkelstein, The House of Blackwood: Author-Publisher Relations in the Victorian Era (2002).
133. A form intermediate between the monthly and the newspaper was the weekly miscellany. These contained fiction and other material designed to instruct or amuse. The format was originally constructed in this way to avoid having to pay the steep taxes on traditional newspapers that endured in Britain through the first sixty decades of the nineteenth century. Law, supra
remained the dominant form in which new works of fiction made their appearance for the rest of the century.\textsuperscript{134}

Why in parts? And why in periodical form?

2. Why in Parts?

As to the first, it has been noted already that traditional books, published as three-deckers, were priced in Britain at a level that put them out of the reach of any but the wealthiest individual.\textsuperscript{135} In fact, novels and other books were far more costly in England at the time than they were in the United States and elsewhere.\textsuperscript{136} But, even if the total cost of a book remained high,\textsuperscript{137} individuals, as has already been noted,

\textsuperscript{134} Id. at 22. The most famous of these miscellanies was probably \textit{All the Year Round}, edited by Charles Dickens and used by him to serialize several of his own novels. \textit{Id.} at 183. Dickens did much to make fiction appearing in a weekly "respectable." By 1870, these weeklies had supplanted the monthlies in popularity. \textit{Id.} at 28-30, 186. Gradually the weekly miscellanies were overtaken in popularity as a source of fiction by weekly newspapers. The main explanation for the ultimate dominance of the newspaper is price. The gradual reduction and repeal of the so-called taxes on knowledge (stamp taxes on news publications and duties on paper and advertising) that began in the 1830s and was completed in 1861 greatly reduced the cost, and increased the numbers, of newspapers. \textit{Id.} at 29-31; \textit{Altick, supra} note 28, at 354-55. Also, newspapers had more room for advertising than did either the monthly magazines or the weekly miscellanies (which typically limited advertisements to their paper wrappers, or to inserts). \textit{Law, supra} note 35, at 30. Newspapers obtained about half to three-fifths of their revenue from advertising. \textit{Id.}

\textsuperscript{135} Id. at 300-01. "Britain in 1865 . . . " notes Sutherland. "was still the dearest country for new novels. And yet the novel and novelist prospered there as nowhere else in the world." \textit{Victorian Novelists, supra} note 81, at 19.

\textsuperscript{136} Id. at 183, 186, 191-93. Tillotson's Fiction Bureau played an important role in this development, buying serialization rights to new works, and then supplying them to several local newspapers around the country simultaneously. \textit{Id.} at 67. Furthermore, weeklies began to attract more respectable writers, such as Dickens, Collins, Mary Elizabeth Braddon, and Thomas Hardy (he published \textit{Tess of the D'Urbervilles}, for example, in a weekly called \textit{The Graphic}). \textit{Id.} at 183, 186, 191-93. Tillotson's Fiction Bureau played an important role in this development, buying serialization rights to new works, and then supplying them to several local newspapers around the country simultaneously. \textit{Id.} at 67.

\textsuperscript{137} Id. at 23-24. Furthermore, weeklies began to attract more respectable writers, such as Dickens, Collins, Mary Elizabeth Braddon, and Thomas Hardy (he published \textit{Tess of the D'Urbervilles}, for example, in a weekly called \textit{The Graphic}). \textit{Id.} at 183, 186, 191-93. Tillotson's Fiction Bureau played an important role in this development, buying serialization rights to new works, and then supplying them to several local newspapers around the country simultaneously. \textit{Id.} at 67.

\textsuperscript{134} In the 1850s, "quality fiction" tended to be published in monthly magazines and popular and more low-brow material in the weeklies. \textit{Altick, supra} note 28, at 360. Altick notes that the masses turned to the weeklies for escapist fiction and sensational works popularly known as "penny bloods." \textit{Id.; see also Law, supra} note 35, at 20-23. Over time, this distinction between fiction for the elite and for the "hoi polloi" began to blur somewhat as famous writers, like Wilkie Collins, turned to writing novels of sensation such as \textit{Woman in White}. \textit{Id.} at 23-24. Furthermore, weeklies began to attract more respectable writers, such as Dickens, Collins, Mary Elizabeth Braddon, and Thomas Hardy (he published \textit{Tess of the D'Urbervilles}, for example, in a weekly called \textit{The Graphic}). \textit{Id.} at 183, 186, 191-93. Tillotson's Fiction Bureau played an important role in this development, buying serialization rights to new works, and then supplying them to several local newspapers around the country simultaneously. \textit{Id.} at 67. This seems to have been more a function of how the book trade chose to operate, rather than as a result of the costs associated with printing and marketing the works. Altick writes that the guinea and a half book persisted not because it was necessary to charge that much, but because the publishers could count on selling them to the circulating libraries. "Publishers could afford to be indifferent to the fact that they had priced their wares out of the individual buyer's range; so long as libraries took a substantial part of an edition, their profit was safe." \textit{Altick, supra} note 28, at 263.

\textsuperscript{135} Id. at 300-01. "Britain in 1865 . . . " notes Sutherland. "was still the dearest country for new novels. And yet the novel and novelist prospered there as nowhere else in the world." \textit{Victorian Novelists, supra} note 81, at 19.

\textsuperscript{136} Sutherland describes the period from 1840 to 1860 as one in which various efforts were made to surmount the barriers imposed by the high price of books: "In [that] period . . . four major breaches were made in the established system which opened an enlarged supply of fresh, quality fiction to literate, but not necessarily wealthy, classes of the population. These were: part-publication, the 'Leviathan' circulating library, the prompt collective reissue and magazine serialization." \textit{Id.} at 20-21.
turned out to be willing to buy them when they could spread the cost of doing so over twenty installments, rather than paying in one lump sum.\textsuperscript{138} Part publication, theorize some scholars, had other benefits as well. It created a “habit” of reading among its audience and of seeking out new installments.\textsuperscript{139} Regular appearance of the parts, coupled with the use of various dramatic devices designed to build up anticipation,\textsuperscript{140} seems to have kept readers engaged with successful works over the time it took to publish them, as well as to create an appetite for the steady consumption of other, similar works.\textsuperscript{141} As already noted, the appearance of reviews of each successive part of a novel seemed also to play a role in keeping reader interest high.\textsuperscript{142}

The appeal of the format was not only to readers. It inured to the benefit of publishers as well. Part publication allowed publishers, like readers, to spread their costs over time by spacing out payment for the acquisition and printing of a new manuscript.\textsuperscript{143} Each successive segment could be funded from a continuous income stream generated by the sale of the previous installment, and might be augmented as well by the sale of advertising to accompany each part. Authors could also

\textsuperscript{138} An outlay of a guinea-and-a-half at one time was an enormous sum for most individuals, whereas a shilling per part was affordable to many. Sutherland, supra note 27, at 106. Altick notes, however, that in addition to spreading out the cost over time, the total outlay for a book in numbers actually was lower than for a three-decker. Had Pickwick been published as a normal book, he points out, it would have been likely to cost thirty-one shillings and six pence; instead, the total cost of all the parts came to twenty shillings. Altick, supra note 28, at 279.

\textsuperscript{139} Patten, supra note 48, at 54, 67.

\textsuperscript{140} See, e.g., Morrison, supra note 117, at 306 (noting the need to produce a “strong” sensation for each installment).

\textsuperscript{141} Tillotson argues that serial publication had a special narrative quality that explains its appeal to authors:

Serial publication gave back to story-telling its original context of performance, the context that Chaucer, for example, knew and exploited (the units of his narrative are often like serial instalments, and his confiding yet reserved relation with his audience is often like Thackeray’s). The creative artist, as R. G. Collingwood has said, requires an audience whose function is not merely receptive but collaborative, even “concreative”. “It is a weakness of printed literature that this reciprocity between writer and reader is difficult to maintain.” Thanks partly to serial publication it was less difficult in the nineteenth century than now, and the novelists, especially Dickens, drew some of their strength from it.

\textsuperscript{142} According to Patten, “[O]riginal serial fiction encouraged multiple reviews, which in turn stimulated more buyers.” Patten, supra note 48, at 67.

\textsuperscript{143} For publishers, too, serial publication was useful. Writers could be paid for their work in installments, with (hopefully) enough income generated by the sales and advertising in the prior installment to pay for the next. Patten, supra note 48, at 67. Sutherland notes that the highest prices novelists were paid for their work came from using the novel-in-numbers format. Dickens earned up to £10,000 working this way, and Thackeray “topped out at £6000 for The Virginians.” Sutherland, supra note 27, at 106.
be paid by the installment, and generally were.\textsuperscript{144} Although the purchase price of a manuscript is often discussed in the literature as if it were a single lump sum, closer investigation reveals that authors were typically paid the agreed-upon amount in increments over the time it took the book to be serialized.\textsuperscript{145}

Finally, authors, like publishers and readers, found that serial publication was beneficial. Because it was profitable, publishers were willing to “risk” higher levels of compensation for their authors.\textsuperscript{146} Also, it was soon discovered that serial publication did not absorb the full market among the public for a given book. Somewhat surprisingly, a successful serialization seemed to strengthen the subsequent market for the book in other formats such as cheap reprints and in collections.\textsuperscript{147} This, too, made the payment of a higher price for a promising


\textsuperscript{145} Thackeray, for example, was paid upon publication, for each installment of \textit{Vanity Fair} rather than upon delivery. \textit{Victorian Novelists, supra} note 81, at 101-02. Sutherland refers to the arrangement as “a common enough safety net” for the publisher. \textit{Id.} Dickens was paid by the installment for \textit{Pickwick}. \textit{Erickson, supra} note 36, at 159. See also Patrick Leary, \textit{supra} note 144, at 105, 107 (1994) (noting that this was the usual arrangement). Erickson points out that some got no money until the publisher decided that enough profit was being made by the work (presumably this would have been a problem for less powerful authors who wrote on a shared profits system), and of course publication of the work might be discontinued at any time. \textit{Erickson, supra} note 36, at 166.

Intriguingly, another advantage that both publishers and authors reportedly thought they got from the publication of novels in serial form was help in reducing the risk to the value of the work from piracy. \textit{Tillotson, supra} note 27, at 29-30. The reasons for this belief are not entirely clear, but perhaps they thought that readers whose appetite for a story had been whetted by the initial installments would be more likely to pay for immediate access to each successive one—a result that could be expected to undercut at least somewhat the market for pirated copies that would, inevitably, be issued after some delay. A similar benefit would not be likely for the Internet publisher. Significant delay is not a factor in Internet piracy; copies can be made and distributed quickly. Nevertheless, serial issuance might build up audience anticipation and increase the willingness of readers to contribute to the author’s asking price, lest the next segment not be released.

\textsuperscript{146} In the middle decades of the century, many of the periodicals were actually produced by the publishers themselves. \textit{Victorian Novelists, supra} note 81, at 38. \textit{See also Finkelstein, supra} note 132, at 8-9, 96-97. Blackwoods was one of the earliest publishing houses to start its own magazine, and it continued publishing it into the twentieth century. Although not extremely profitable, the publishing house thought of the magazine as a way to keep up its visibility with the public and to promote its authors (whose works would subsequently appear in volume form). \textit{Id.} at 96. The association between publishing houses and literary periodicals meant that the editors of these journals tended to have the wherewithal to pay authors handsomely, often in four-figure sums. \textit{Sutherland, supra} note 27, at 55-56.

\textsuperscript{147} Sutherland notes, for example, that \textit{Great Expectations} appeared first as a serial in \textit{All the Year Round}, and then went through five editions in a year, including the sell-out of 3750 copies printed in three-decker form. \textit{Sutherland, supra} note 27, at 38. A contemporaneous observer wrote of publication in periodicals: “It is the general belief of the trade that a book will sell as many copies if it first appears in a periodical as if it does not. If this view is correct—and it cannot be very far from correct—an author who can publish first in a periodical gets a double
book more attractive to publishers. But even those novelists whose work rarely made it into hardcover or railway editions could extract respectable pay simply because publishers had to offer it to get enough product to fill the monthlies, miscellanies, and newspapers that depended on serial fiction. As a result of serialization, proportionately large numbers of writers were induced to devote themselves to the production of book-length fiction, and a surprising number were able to earn a living wage by doing so. By the latter part of the nineteenth century, serialization was recognized by the authors themselves as the single most valuable use of their work.

Obviously, however, writing serial novels could be a stressful experience that put a high premium on writing quickly and delivering copy punctually. Publishers worried then, as the protocol designers do now, that, like the King fans, readers could end up with a half-finished market." Henry Holt. Some Practical Aspects of the Literary Life in the United States; and Especially as It Is at Present Injuriously Affected by the Absence of an International Copyright, 48:216 New Englander & Yale Rev. 12, 168 (1888). Graham Law points out, however, that many novels appeared in newspapers and then died, never making it to book form and into copyright libraries. Law, supra note 35, at 13.

148. Indication has already been given of the amounts earned by the most popular writers. Leavis says that less successful novelists could often get £50 to £100 for their work from publishers. Q.D. Leavis, Fiction and the Reading Public 307 (1932). This figure seems consistent with sums reported by Law for minor novelists, received from newspapers for serialization rights to their works. He reports, for example, that in 1858 and 1859 David Pae (whose novels often appeared only as serials, and were not republished as books) received £21 from the Glasgow Times for Lucy, the Factory Girl, and thirty guineas from North Briton for The Heiress of Wellwood. Law, supra note 35, at 160. Law goes on to add: "These are by no means trivial sums, especially when we consider the number both of the serials Pae was producing and of the Scottish journals in which they were published. Despite the fact that few of his works appeared in volume, this must have allowed Pae to make a comfortable living by his pen . . . ." Id.

149. An American publisher, Henry Holt, writing in the nineteenth century gave what must have been a fairly accurate description of the serial novelist in Britain as well as the United States:

[A]uthors are sometimes hard up. Consequently novel writers are very apt to want pay for their novels before they have finished them. So they sometimes sell them to magazine even before they have begun to write them. If the author keeps well, and no accidents happen, and the flow of inspiration is steady, he may get through with such a story all right. Though even then the early part of his work cannot have the benefit of the afterthoughts during the progress of it, or of revision of the early part to make it better develop the conclusion . . . . This is not the worst of it, however. Health is not absolutely reliable, accidents do happen, inspiration is unsteady. But the weekly or monthly appearance of the periodical is a fixed certainty, and publication day is apt to come sometime when the author is dull, or anxious, or ill.

Holt, supra note 147. at 166-67.

150. Kelsey and Schneier suggest that this problem will be kept in check by the risk of reputational damage, but can also be warded off by interposing a "publisher" to act as a manager of the publication. The protocol does not, however, say much about how a publisher would induce a laggard author to produce in a timely fashion, or indeed at all, other than by withholding the money paid by the public until the part is complete. Street Performer Protocol, supra note 9, at 7.
ished book—or with such a delay between installments that they simply lose interest in the work. Some attempted to impose stiff contract terms intended to forestall the risk of delay or failure to produce. The fact that payment was by the installment probably helped considerably to induce the author to produce the next segment at the proper time. Clearly, however, what any publisher could do, faced with a recalcitrant author, would be limited. Although works were certainly discontinued by the publisher or editor because they were deemed to be failures, I cannot estimate how often willing publishers found themselves without copy because the author was late in producing a segment, or simply abandoned the work entirely. But the literature reviewed for this Article, at least, does not suggest that abandonment of a work by the author was a common occurrence. I found only a few references to specific cases where the author was either late or stopped writing a novel altogether. When this did happen, health and family emergencies were typical explanations.

Elizabeth Gaskell, to give one example, died before writing the last installment of Wives and Daughters, and it is said that her editor at The Cornhill had to finish it.

3. Why in Periodicals?

The reasons that serial publication in periodicals ultimately replaced free-standing books in parts was again a function of economics, both in terms of price to the consumer and of the competitive advantage from the publisher’s perspective of bundling a wide variety of

151. Schmidt notes that authors could create risks for publishers by overcommitting themselves from a desire to make more money, and then being late with their installments. She quotes from a letter by a publisher, admonishing a tardy author, and emphasizing that “punctuality in publishing periodicals is a great essential of success.” Barbara Quinn Schmidt, Novelists, Publishers, & Fiction in Middle-Class Magazines: 1860-1880, 17:4 VICTORIAN PERIODICAL REV. 142, 144 (1984). To avoid this problem, publishers might, for example, prohibit an author from working on anything else until a contracted-for novel was completed. VICTORIAN NOVELISTS, supra note 81, at 56.

152. Tillotson says that Dickens temporarily suspended his writing of both Pickwick and Oliver Twist in 1837 when his sister-in-law died, and Thackeray’s Pendennis ceased publication for three months in 1849 when the author fell seriously ill. TILLOTSON, supra note 27, at 39.

153. Walter Pater began publishing Gaston de Latour in Macmillan’s and stopped without published explanation part way through. Laurel Brake, Star Turn? Magazine, Part-Issue, and Book Serialisation, 34 VICTORIAN PERIODICALS REV. 208, 226, n.3 (2001). Brake suggests that, to the extent that parts were erratically produced or ceased to be produced, that fact was less noticeable, and less serious for the publisher, once serialization in periodicals became the norm. [M]agazine serialisation may be more supportive to irregular serials: authors are less exposed when a part is missed, or the author cannot keep up the pace, or even gives up entirely: the magazine continues to appear and the absence of the part is countered by the “presence” of other letterpress and likely not to be mentioned.

Id. at 225.
materials together in this format. It has also been suggested by some students of the period that authors themselves preferred to publish in periodical format, not only because it paid comparatively better, but also because it offered the opportunity for a different form of professional interaction. At least at the more prominent publications, authors now dealt with editors who were often authors in their own right and who could mediate between the writer and the publisher. It has been suggested that this development further "professionalized" writing and increased its respectability as a way to earn a living.

The economic advantages to publishers of periodical publication versus producing books in parts were numerous. First, periodicals were cheaper to produce than individually-bound segments of books in parts. This is suggested by the fact that each section of a free-standing serialized book typically cost one shilling per part, whereas a weekly paper or miscellany carrying serialized novels typically sold

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154. Spencer Eddy makes the point about remuneration by quoting from a letter written by George Eliot to the Rev. Charles Bray in 1859:

> Do you see how the publishing world is going mad on periodicals? If I could be seduced by such offers, I might have written three poor novels and made my fortune in one year. Happily I have no need to exert myself when I say, "Avoid thee, Satan!"

Satan, in the form of bad writing and good pay is not seductive to me. SPENCER L. EDDY, THE FOUNDING OF THE CORNHILL MAGAZINE 21 (1970). Later in the book, he relates that when George Smith, the founder of The Cornhill, was negotiating with Trollope for what became Framley Parsonage, Trollope noted that the largest sum he had received for a novel up to then was £500; Smith, Eddy says, offered him double that sum to write a book for his magazine. Id. at 38.

155. Robert A. Colby, Tale Bearing in the 1890s: THE AUTHOR and Fiction Syndication, 18 VICTORIAN PERIODICALS REV. 2, 5 (1985) (quoting the writers' magazine as estimating serial rights to be worth five times as much to an author as book rights).

156. Dickens edited both Household Words and All the Year Round. PATTEN, supra note 48, at 462-64. Thackeray was the first editor of The Cornhill. EDDY, supra note 154, at 8-9; R.G. Cox, The Reviews and Magazines, in FROM DICKENS TO HARDY, supra note 27, at 195.

157. ERICKSON, supra note 36, at 172. Erickson says that this modality made being a writer both "more respectable and more popular." Id.

158. George Eliot, for example, published Middlemarch as an eight-part book in parts in 1872, with each part selling for five shillings. SUTHERLAND, supra note 27, at 104. The book only sold about 6000 copies. Daniel Deronda was published the same way in 1876, and sold about the same number. According to Sutherland, Eliot's publishers, by the end of the 1870s, concluded that her copyrights were worthless to them because of how expensive the books were to produce. Id.

159. The popular monthly periodicals were comparable in price to the parts of books in numbers. With the advent of The Cornhill and Macmillan's Magazine, the price of monthlies geared to the upper and middle classes dropped from as much as half a crown to a shilling an issue. ALTICK, supra note 28, at 358-59. However, unlike the books-in-numbers, an issue of a periodical offered the reader a wide range of reading material, and not merely the current installment of a novel.
for only one or two pennies per issue.\textsuperscript{160} Among the things that made periodicals cheaper were increased mechanization,\textsuperscript{161} the gradual elimination of stamp and paper taxes, and the reduction in the cost of making the paper used to print them.\textsuperscript{162} Newspapers in particular could also further decrease their cost to consumers by selling a large amount of advertising and scattering it throughout their pages (a strategy less readily available to the monthlies\textsuperscript{163}).

Second, periodicals provided a safety net that was not available to the publisher of books in parts. In the case of the latter, if the reader lost interest in a work half-way through its publication, she would not be likely to buy the subsequent releases. As a result, publishers of new books in parts inevitably faced the risk, in bringing out a work, that they would end up with little or no profit—or, even worse, lose money.\textsuperscript{164} And their dependence on the work of a single author increased the level of anxiety about what would happen to the overall investment if the author did not write the next installment on time or at all. Periodicals, by virtue of the fact that they contained the works of many people,\textsuperscript{165} were less likely to lose their audience if a particular novel failed to capture the public imagination, or if an individual author faltered now and then.\textsuperscript{166} The Cornhill, for example, often serial-

\textsuperscript{160} The low price of papers devoted solely to entertainment and serial fiction in the 1840s and 1850s gave rise to the sobriquet “penny dreadful” for the sensational and escapist fiction the less elevated of them published. \textit{Id.} at 291-92; \textit{Dalziel, supra} note 35, at 13.

\textsuperscript{161} \textit{Altick, supra} note 28, at 357.

\textsuperscript{162} \textit{Id.} at 306.

\textsuperscript{163} Monthlies (and some weekly miscellanies) were intended to be bound into volumes each year, and thus could use advertising only on the covers or on inserts that could be removed from the issue before binding. \textit{Law, supra} note 35, at 30; see also \textit{Schmidt, supra} note 151, at 142. Apparently, the publishers also sold these bound versions. \textit{Id.} (noting that Volume I of The Cornhill is reported to have sold 5104 copies in the first seven years of the journal’s existence).

\textsuperscript{164} In their contract with Thackeray for the publication of Vanity Fair, Bradbury and Evans retained the right to cancel the serial publication of the book if it was not successful. They came close to doing so after issuance of the third part. \textit{Victorian Novelists, supra} note 81, at 101. According to Lee Erickson, it was hard to predict whether or not a work would sell until at least four parts were issued, with the result that nervousness about a work’s success led to the cancellation of a number of books at an early stage in publication. Thus the decision to publish in that format involved serious financial risks. \textit{Erickson, supra} note 36, at 158. For example, Frederic Montagu’s \textit{Mrs. Trollope Refuted: Mary Ashley or Facts upon Factories} ceased to appear after two installments, rather than after the ten that had been planned. \textit{Sutherland, supra} note 27, at 91.

\textsuperscript{165} O.D. Leavis has written that: \textit{Blackwood’s, Fraser’s, the Cornhill, Macmillan’s, Dickens’ All the Year Round} \textit{[gave]} better value and soon d[rove] the monthly numbers out of the field. All these were as popular as the substantial story magazines of the Strand class are to-day (it was worth the Cornhill’s while to offer the comparatively unknown Trollope £1000 for a suitable serial, which as \textit{Framley Parsonage} established him as a novelist) . . . . \textit{Leavis, supra} note 148, at 153.

\textsuperscript{166} \textit{Brake, supra} note 153, at 225.
ized two novels at the same time, and included in any given issue essays, shorter works of fiction, illustrations, and poetry.\textsuperscript{167}

But more to the point, the periodicals developed an audience loyalty of their own by offering a mix or bundle of content with appeal superior to that of a free-standing novel. As one scholar put it, the periodicals gave the public “better value and [they] soon [drove] the monthly [books in] numbers out of the field.”\textsuperscript{168} Readers could choose to mix their fiction with political commentary and criticism, or with household hints and humor. Even if fiction was the dominant element in the periodical, what attracted the audience was the entire package of works that were obtained for a single price and the idea that what would appear would adhere to reasonably predictable patterns.

The empirical evidence suggesting how beneficial bundling can be as a model for distributing information products has been reinforced in recent years by the work of economists who study markets for content. They have demonstrated that, when content is bundled, the shape of the demand curve for the entire package of content actually becomes more favorable than it would be for each good in the bundle considered separately.\textsuperscript{169} Or to put it somewhat differently, consumers value bundled information goods more highly than the sum of the average value they place on the individual components of the bundle.\textsuperscript{170}

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\begin{itemize}
\item \textsuperscript{167} See Eddy, supra note 154; Victorian Novelist, supra note 81, at 23-24. See also R.G. Cox, supra note 156, at 188, 194, 198 (describing the varied content of literary periodicals generally). Cheaper periodicals also benefitted from this strategy, using a different content mix. Periodicals such as the London Journal and Family Herald offered readers, along with novels and short articles, such matter as recipes and “handy hints.” Dalziel, supra note 35, at 23.
\item \textsuperscript{168} Leavis, supra note 148, at 153. Brake notes that, because periodicals have an audience of their own, and a battery of other contributors, serialized novelists appeared in a context that shared (and presumably diluted) the risks. Brake, supra note 153, at 224.
\item \textsuperscript{169} Yannis Bakos & Erik Brynjolfsson, Aggregation and Disaggregation of Information Goods: Implications for Bundling, Site Licensing and Micropayment Systems, in Internet Publishing and Beyond: The Economics of Digital Information and Intellectual Property 117-20 (Brian Kahin & Hal R. Varian eds., 2000). The authors state: “[T]he seller will earn higher profits by selling a single bundle of 20 goods than by selling each of the 20 goods separately.” Id. at 120.
\end{itemize}
That the strategy of bundling was a success for novelists is evident from the numbers of copies of serial-carrying periodicals that were sold. Although circulation figures for the nineteenth century cannot always be accurately determined, some numbers do crop up in the literature. The more literary among the periodicals generally sold less robustly than those appealing to broader popular taste. Nevertheless, The Cornhill is reported to have started out with an amazing sale of 110,000 copies of its first issue before dropping in the next 2 years to a circulation of about 70,000 per issue and tapering down to about 25,000 by the end of the 1860s. According to Q.D. Leavis, Macmillan's at its peak enjoyed sales of about 90,000 copies per issue. Among the weeklies, All the Year Round, under Dickens's highly successful editorship, sold in the range of 100,000 copies per issue.

Among publications with true mass appeal, by contrast, were The Family Herald, with an estimated circulation of 300,000, and The London Journal, reported to have approached a circulation of a half million. Later in the century, as fictional works began to be published in local and regional newspapers (often appearing simultaneously in several) the reach of serialized books becomes harder to estimate, but it seems to have remained substantial. Graham Law estimates, for example, that in syndication Mary Elizabeth Braddon's novel, Taken at the Flood, in 1873 sold a quarter of a million copies per part; Walter Bessant's All Sorts and Conditions of Men, which appeared a decade later, enjoyed sales of 350,000 copies per installment.

C. Learning from Experience: Marketing Fiction on the Internet

The experience in marketing fiction in the Victorian era suggests that a number of considerations other than copyright need to be taken into account by those in the twenty-first century who hope to rationalize the process of Internet publishing. Although the nineteenth century gives substantial support to the idea that authorship does not

171. Law, supra note 35, at 125-26; Altick, supra note 28, at 391.
172. Cheap fiction outsold the more elevated stuff by a considerable margin. Figures from a leading Manchester book dealer in 1859 show sales of 6000 copies a week of publications carrying the so-called “penny dreadfuls.” as compared with 250 a month for serial parts of Dicken’s novels, and 200 of those by Bulwer-Lytton. Webb, supra note 27, at 217.
173. Law, supra note 35, at 24-25.
174. Leavis, supra note 148, at 153. Law also points out, however, that by the 1880s, the very popular monthlies of the 1860s had diminished circulations, with The Cornhill falling to about 12,000, and Fraser’s to 500 in 1879, shortly before it folded. Law, supra note 35, at 27.
175. Law, supra note 35, at 27.
176. Dalziel, supra note 35, at 23.
177. Law, supra note 35, at 131.
depend very heavily on ownership, it also suggests that very few au-
thors will be able to sell themselves to their public electronically with-
out having to deal with the apparatus of editors and even agents that
exist in the world of hard copy. The services of traditional publishers
will diminish in importance in an environment where the costs of mak-
ing and distributing anything after the first copy approaches zero, but
a set of services ancillary to the cost of producing the work will never-
theless need to be incurred to match readers willing to pay with au-
thors willing to write.

In many ways, the model of the Victorian serializing periodical is
suggestive about how this match might be made. First of all, the suc-
cess of the periodical (compared with the book in parts) as a way to
sell novels suggests that it is an uphill battle to develop an audience
for free-standing books that are written by any but the best-known
authors. Merely offering a novel on line, unless the author is a Dick-
ens or a King is likely to result in few people reading it, much less
paying for it. What made the writing of fiction a paying proposition
for the average novelist in the nineteenth century was the discovery
that audiences were more likely to be attracted by the work if it were
incorporated into a larger bundle of content. The availability of the
bundle reassured paying readers that even if they disliked a particular
offering, they would nevertheless find other things to their taste incor-
porated in the same package. People did continue to buy stand-alone
books, but more typically they seemed to do so only after the reputa-
tion of the author or book was made in the periodical form. Elements
of this strategy may well be adaptable to Internet publishing.

For example, donors—particularly those being asked to pay for
what Kelsey and Schneier refer to as “alternative or ‘marginal’
works”178—may respond more favorably to the idea of supporting
publication if their support funds a bundle of new works, and not
merely some specific, and possibly not very strong, novel. It may even
be possible to ask a pool of donors to fund the project of releasing a
bundle of works by paying an annual “subscription” fee, thereby cut-
ting down on the risks and unpredictability of donations, as well as the
work needed to coax the audience to pay smaller sums on a more
frequent basis. This approach would be similar to that currently used
to sell magazine subscriptions179 and to generate annual budgets for
cultural institutions.

179. Nineteenth century periodicals apparently also had “subscribers.” but at this point I have
not been able to learn much about the details of how distribution took place and how many
copies went directly to individual users who subscribed in the modern sense of that term. Altick
Second, history suggests that authors on the whole do better if they are not required to connect directly with their readers, but rather can rely on the good offices of an editor and a "brand." Intermediaries—and by this, I mean not simply those who supervise such mechanics as collecting and safeguarding donations—may turn out to be crucial because success seems to require the intervention of trusted "selectors." These are the editors and vehicles that come to stand as reliable markers of a certain taste, and which act as guarantors of quality or style for a public with enormous competing claims on its attention. Some of this function can of course be supplied by advertising and by reviewers, but it seems likely that the vision of the author, free to find her audience without maneuvering through a labyrinth of agents and editors, will prove to be just that for most—a fantasy.

This suggests that authors may also not have the freedom envisioned by the various alternative protocols to set their own reserve prices for their work. If it needs to be sifted through the on-line equivalent of an editorial staff that may bundle it or at least must invest in publicizing the work, authors will still be faced with the need to convince a gatekeeper that their work is "worth" supporting. In turn, the editor may take control of setting a price, either to increase the likelihood of a payback for her own added efforts in merchandising the work, or as part of the process of deciding how to share out the contribution of donors for the production of an entire bundle of works. Editors, too, maybe needed to help improve the quality of the works themselves. This may not be the nirvana of independence about which writers dream, but if the nineteenth century is any guide, the benefits of giving up control outweigh the benefits of going it more or less alone.

As for the role of publication in serial form, it is more difficult to assess how the nineteenth century experience might translate to the Internet. Although promulgators of alternatives to copyright on the web suggest that authors may be able to draw in readers by offering a

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refers to informal networks of families who banded together in the early part of the century to subscribe to and share newspapers. Altick, supra note 28, at 323. But a quotation later in the book suggests that, aside from Sunday newspapers that were delivered to their homes, the majority of readers bought periodicals from news and book stalls. Id. at 373. Individuals could read periodicals in "newsrooms" as well as at libraries. Id. at 342-43. It is likely that subscriptions were entered by the newsrooms and circulating libraries and that booksellers could be depended upon to take a regular number of copies of each issue of the periodicals they carried.

180. The use of a "publisher" who serves editorial functions as well as holding donations and releasing works at the appropriate time is just one of several models contemplated by Kelsey and Schneier; the argument in this Article is that, for any but the most famous, it is the only model with a chance of succeeding in introducing work of less well known authors. Street Performer Protocol, supra note 9.
part free as a teaser, and then selling the rest of the work segment by segment, how much this will contribute to the likelihood of success is hard to tell. Certainly, serial publication *per se* was not the winning idea of the nineteenth century. Serialization worked in part because novels produced in that form were either heavily advertised by their publishers, favorably reviewed by critics, or contained in publications with their own independent following—or all three at once. Without comparable kinds of support, new novels are likely, more often than not, to drown unnoticed in the vast undifferentiated sea of Internet content.

Serial publication may, however, intuitively be the right choice, in part if it leads to more attractive models of price-setting, and in part because it may cut down the risk to authors of spending a lot of time producing work that no one is willing to read.

Although modern social conditions relating to literacy and expendable income in the United States may be very different from those of Victorian Britain, the role of cost to consumers remains an issue that on-line authors need to consider. For one thing, it is widely recognized that individuals generally are quite reluctant to pay for the content they obtain from the Internet. One might expect, therefore, that the success or failure of a scheme that depends on voluntary payments by readers for new literary works will turn out to be quite sensitive to price.

Those who would demur if asked to donate ten dollars or fifteen dollars toward the cost of a whole novel by a new writer might turn out to be more willing to risk fifty cents or a dollar for a segment of it. After all, even a well-known writer like King chose to sell his book for a dollar a chapter, rather than attempting to extract at once the price of thirteen dollars he expected for the whole thing. Furthermore, the annoyance, if any, of knowing that one's support for the production of a book will benefit unknown numbers of free-riders may be lessened if the out-of-pocket cost at any one time of being an altruist is not very high.

Furthermore, the financial and emotional cost of authoring a new work may be kept in check by serializing and selling it piecemeal. If a

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181. Shapiro and Varian give the example of Informatics' Electronic Library, which intended to sell subscriptions at fairly low prices directly to student users. Among the reasons the authors note for this approach being unsuccessful is the vast amount of free information already available on line and the fact that parents typically said, if you need information for a paper, go to the library. As a result, the only successful option was to sell site licenses to libraries and schools and hope that a market among individuals might eventually arise if they found the bundle of information so desirable that they wanted to get it at home. *Shapiro & Varian, supra* note 170, at 49-50.
project is not a success, the author may be able to stop working on it early, as opposed to producing the whole thing and then finding that it is a failure.\textsuperscript{182} Certainly, publishers pulled unsuccessful works midstream in the Victorian era. The problem, of course, will sometimes be in weighing the benefits of discontinuing against the negative impact of a decision on the author’s or editor’s reputation when a minority of readers who would have read the whole work are left disappointed.\textsuperscript{183} Bundling, as mentioned earlier, may ameliorate this problem, but the tension may not ever be wholly resolved.

Lastly, there may be less well-recognized advantages to the public of having books published in serial form. Whatever pressures the format may create for authors, many scholars argue that the serial form enhanced the reading experience of the nineteenth century public. Serial fiction excelled at creating a sense of anticipation and involvement in the reader so that the close of each segment could be used to build excitement for the next. The serial novel was a part of the reader’s life over a period of weeks or months, and therefore is likely to have played a different, and perhaps more engaging, role in the imaginative life of the reader than does a self-contained book that can be consumed in its entirety over the course of a couple of evenings.\textsuperscript{184} As our experience with such media as television has shown, this form of story-telling continues to appeal to modern audiences. Perhaps serialization of written works could help recapture some of the excitement the novel held for nineteenth century readers and actually help convince a sizable number of people that it is worth their while to support its production.\textsuperscript{185}

V. Conclusion

However important copyright has been in the history of modern modes of mass communications, the attempt to apply it to the digital world may well turn out to exact too high a price to other values like privacy or the ability to engage in browsing or fair use to warrant its continuation there. For this reason, those interested in promoting intellectual production in this new environment clearly need to think about creative alternatives that might serve the purposes of traditional

\textsuperscript{182} I thank my colleague Yochai Benkler for this insight.

\textsuperscript{183} The Stephen King experience, related earlier in this Article, demonstrates the problem. \textit{See supra} notes 13-20 and accompanying text.

\textsuperscript{184} This point is made by Tillotson. \textit{See supra} note 141.

\textsuperscript{185} Whether or not serialization would be effective without modification in the style of contemporary writers is uncertain, however. Victorian authors who used the form often tweaked their novels to provide the requisite suspense or drama. \textit{See supra} note 117.
copyright without the drawbacks that the regime poses in the on-line environment. Current proposals that would substitute voluntary payment schemes to authors for the traditional legal rights under copyright are intriguing, and I believe, promising.

This Article examines the general approach that has been proposed by Kelsey, Schneier, and others in the light cast by the surprisingly pertinent experience of nineteenth century British authors. The insights gleaned from the experience of an earlier century suggest that copyright, from the author's perspective, is not an essential precondition for the production of new works and that alternative schemes of compensation may well be able to provide what authors need. On the other hand, the same historical precedent cautions against naively supposing that any but the most unusual subset of successful authors could hope to be paid for what they produce, absent a sophisticated system for vetting and publicizing Internet-published works. This Article suggests that one promising model could be framed on the example of the Victorian periodical which provided serialized novels, other books, and a variety of miscellaneous content, under editorial supervision, to the public on a dependable schedule and at a reasonable fixed price. It concludes, with some regret, that the vision of authors "finding" their audience without the intervention of outside tastemakers to vet their work is a romantic ideal that even the Internet cannot realize. Authorship without ownership may turn out to be a plausible vision of the digital future; it is unlikely, however, that the same can be said for authorship without editorship.