NOTES

A PORTRAIT OF THE ARTIST'S HEIRS IN MEDIATION: ADR TECHNIQUES TO PREVENT AND RESOLVE DISPUTES FOLLOWING AN AUTHOR'S DEATH

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I. INTRODUCTION[1]

If an author's work is powerful enough, or popular enough, it's likely that at some point someone will want to write about her. For scholars embarking upon these projects, the author's body of published work can provide insight into her psyche, but correspondence and other unpublished materials can also be valuable. Copyright law covers all of these materials, and when the author dies, she can bequest her copyright as she would the rest of her estate (if she hasn't transferred it during her lifetime).[2] The recipient of these copyrights may now treat the copyrights as her own, as though she produced the copyright-protected work herself. In addition to granting publishing rights in the copyrighted material to publishers (to print and sell copies of the works), these new copyright holders (be it the author during her lifetime or the author's heirs) field requests from different types of people for permission to use the copyrighted work.

Heirs are within their rights to refuse permission to use the materials in question, and if any requester were to use this material *without* permission of the heir, such a use might be an infringement of the copyright (depending on the use). The fair use provision of

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[1] A note on terminology: for clarity, this Note will refer to the original people who have written the copyrighted material as 'authors', whomever the author disposes the copyright to as 'heirs', and individuals seeking copyrighted material as 'scholars'.

[2] *See infra* Section II.B.

the Copyright Act allows for use of copyrighted material by non-holders, but most uses are granted exclusively to the copyright holder.[3] Certain authors' heirs are notorious for their efforts to frustrate scholarship about their ancestors by refusing permission to quote from copyrighted material.[4] Some heirs even act outside their rights as copyright holders and go so far as to destroy or otherwise withhold the only physical copies of unpublished material to which they own the copyrights: Evelyn Waugh's son Auberon charged incredibly high permission fees for quoting his father's published and unpublished work, and barred Waugh's would-be biographer Martin Stannard from writing an introduction to Waugh's *The Loved One*.[5] Valerie Eliot, widow of and literary executor to T.S. Eliot, blocked access to correspondence and other material, stopping anyone from reading or quoting it.[6]

Heirs do not always take a passive approach in this restraint by simply refusing every permission request; sometimes they will actively seek out scholars or other users of the copyrighted material in question and claim that the users are infringing. Sometimes this is accurate, sometimes it is not.[7] In this scenario, sometimes the threat of a lawsuit for copyright infringement is enough to cause a scholar to cease their use.[8] Heirs are able to make these claims because they can put their money with their mouth is; if their relative is a literary figure important enough to warrant scholarly work, it's not unreasonable to suggest that the author was successful enough to finance copyright infringement litigation.[9] This steady stream of income can create a power imbalance where heirs have the resources to use the courts against scholars and academics who lack the same finances. The largest biography advance payment will never stand up against decades of large royalties for works in the canon by an author like John Steinbeck, for example.[10]

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3 *Id.*

4 *See* D.T. Max, *The Injustice Collector*, NEW YORKER (Jun. 11, 2006), https://www.newyorker.com/magazine/2006/06/19/the-injustice-collector [https://perma.cc/3GZ7-4RYU]; Leo Robson, *Bitter Feuds, Buried Scandal: The Contested World of Literary Estates*, NEW STATESMAN (Jan. 2, 2019), https://www.newstatesman.com/culture/2019/01/bitter-feuds-buried-scandal-the-contested-world-of-literary-estates [https://perma.cc/BR3V-G6Z7].

5 Robson, *supra* note 4.

6 *Id.*

7 *See infra* Section II.C.

8 *Id.*

9 *See infra* Section III.A.

10 *Id.*

The current Copyright Act guarantees copyright protection of new works for seventy years after the author's death, all but guaranteeing that the heirs will benefit from its protection for far longer than the original author will. Not only is this long grant of protection in tension with the original motivations for the Copyright Act, but this post-mortem term can also lead to a situation where heirs can wield the copyright in a manner at odds with the way an author might have wanted.[11] An author may donate her letters to a museum in the hope that it will encourage scholarship about her work after her death, only for her heir to withhold permission to reproduce those letters when a scholar comes to consult them for a biography.

While it's true that the fair use provision allows for certain uses to be made without needing permission from the heirs, the current case law surrounding fair use is vague or inconsistent at best and influenced by concerns outside of copyright at worst. As a result, fair use fails to be a reliable option for scholars who are denied permission to use copyrighted material. Further, fair use doctrine is of no use to a scholar who is unable to access material from which she might quote in the first place. If a scholar can't read the text in the first place, there can be no use of it (fair or otherwise).

These shortcomings—the overly long term of copyright and the unclear fair use doctrine—both lead to scenarios where a scholar's use of materials that might assist her scholarship can be frustrated. This undermines the original motivation of the Copyright Act, to promote learning. The current state of copyright law is unlikely to change, though. In addition to the arduous nature of amending such a substantial piece of legislation, not every author will think that current copyright law leads to this same frustration of their intent and must be changed. Franz Kafka, for example, famously wished for his manuscripts to be burned after death,[12] and would likely not be upset by any heir making efforts to stop scholars from reading or writing about them. Given the difficulty in the process, and differing opinions of how copyright law should change, it's unlikely that any solution proposed would appease everyone or happen quickly.

Litigation can exacerbate the issues the Copyright Act has; an heir can use the threat of litigation that only she can afford to scare a scholar away from using material. Even if a scholar has the funds

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11 *See infra* Section II.B.

12 Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 265 (2017).

to pursue litigation and claim that the use is fair, current issues with the fair use doctrine make that a risky endeavor. One way to curtail these issues might be to implement the ADR techniques of arbitration and mediation. Both techniques present attractive alternatives: arbitration offers a third-party adjudicator for a much more affordable cost, and mediators utilize several different techniques to identify and 'reframe' the beliefs of the parties to help them come to a mutually beneficial result. Neither option will present a one-hundred-percent-effective method of dispute resolution (for example, an heir who is dead set against allowing use of certain material may never be convinced otherwise) but if an author can compel her heirs to enter arbitration or mediation to solve copyright disputes before entering litigation, there is a greater chance that a deal might be struck for use of or access to the disputed materials. Not only would this promote more scholarship, but it would also serve to support two elements of copyright law currently being stifled: author control and scholarship. An author would be able to exert more control over copyright for its duration and would be able to limit any behavior by her heirs that would be in opposition with her own wishes for her legacy.

This Note proposes using ADR to avoid situations where an author's heirs are able to hold these rights hostage. The note will first outline the background of the scenario, both the status of copyright law as well as an example of the type of issues that arise. The note will then outline the ways in which ADR can be beneficial if applied, before outlining the ways in which ADR can be implemented.

II. BACKGROUND INFORMATION

To fully understand the benefits of ADR it is necessary to understand the conflicts between scholars and heirs that will most benefit from its implementation. First, it is important to know what types of materials scholars and other individual want to use when they create new works about famous authors. Then, we will examine what rights the Copyright Act grants in these materials to the authors who create them, as well as the legislative intent that motivated and has shaped the Act. We'll see that the current iteration of the Act grants rights for a period of time long past the author's death, in some instances giving the heirs the benefit of exclusive rights longer than the author ever got to enjoy them. Af-

ter that, we will see some notable examples of the extreme behavior that heirs have exhibited to make sure that their predecessor's work is not misused in scholar's hands, before discussing how that behavior may conflict with the way the author might have wanted her work to be perceived post-mortem. Finally, we'll see the way the fair use doctrine intends to address these issues, before identifying the doctrine's shortcomings.

A. *What Scholars Want*

Scholars interact with an author's work in many ways when completing their scholarship. If the scholar is writing a biography of the author, she may be interested in reading correspondence, rough drafts, memos, or other material that was produced by the author but not necessarily intended to be published for public consumption. Ian Hamilton intended to write a biography of J.D. Salinger and found correspondence of Salinger's that gave some insight into his thoughts and the people with whom he shared them.[13] It also gave a sense of the historical figures that Salinger corresponded with (such as Judge Learned Hand).[14] Similar unpublished materials by other authors have been donated to archives and museums.[15] The authors can register the copyright to them, as Salinger did, and the museums that own the physical letters may impose procedures that must be completed before scholars access and quote from them.[16]

If a scholar is producing an analytical piece that dissects the author's body of work (rather than only describing the author's life), she may want study and quote from published material produced by the author. The use of this published material can increase the impact of the discussion, as it gives potential readers easy access to the work that is being discussed. In fact, a book about an artist that does not include any examples of the artist's work might not be well-received critically or commercially. As Katrina Strickland correctly notes, "an art book without images of the

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13 Salinger v. Random House, Inc., 811 F.2d 90, 92–93 (2d Cir. 1986).

14 *Id.* at 92.

15 *Id.* at 93 ("Ian Hamilton located most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives").

16 *See infra* Section II.B.

artist's work is severely hobbled."[17] If a scholar is attempting to quote an author's already published material, there is a good chance that permission would be granted by the company that publishes the work, rather than the author (or her heirs).[18] Generally speaking, the author grants publishers a wide range of exclusive rights necessary to publish material without fear of competition, and the right to quote works for use in this manner is sometimes included in those grants.[19]

An individual may also be interested in the dramatic rights to an author's work. Amateur artists may be interested in adapting an author's work into song or into a theatrical piece and would have to get permission from the copyright holder in order to do so (dramatic rights are generally reserved from the rights granted to publishers).[20] The issue of a scholar not being able to use to the work produced by the subject can also be present in dramatic works. Several biographical movies (dubbed 'biopics') have been made about musicians without including any of the musician's notable works, and reviewers almost always comment on this fact as a detrimental element of the movie.[21]

In all cases, permission to use must either be granted by the copyright holder or else the use must be considered 'fair'.

B. *Copyright Law*

Copyright law grants the owner of a copyright the exclusive right to reproduce, distribute, and display the specific work, among other rights.[22] Copyright law's foundation comes from the United States Constitution, which grants Congress the power "[to] promote the Progress of Science and useful Arts, by securing for lim-

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17 KATRINE STRICKLAND, AFFAIRS OF THE ART: LOVE, LOSS AND POWER IN THE ART WORLD 194 (2013).

18 *See infra* Part III.

19 *See infra* Section II.B.

20 *Id.*

21 Jochan Embley, *Can You Ever Really Make a Music Biopic Without the Music?*, EVENING STANDARD (Jan. 13, 2021), https://www.standard.co.uk/culture/music/music-biopics-no-music-b854553.html [https://perma.cc/PGH9-YG5W] (discussing the merits of *Stardust* and *Jimi: All Is By My Side*, biopics of David Bowie and Jimi Hendrix that did not feature music performed by the artist subject).

22 17 U.S.C. § 106.

ited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23]

An author's work is protected by copyright law once it is "fixed in any tangible medium of expression,"[24] but when an author sells a finished work for publication, she will transfer to the publisher certain rights (generally the exclusive rights to publish the work in certain formats and in certain territories) while retaining the copyright itself.[25] This way the copyright remains under the author's ownership, but the publisher controls the right and manner in which to publish and distribute the copyrighted work. In this scenario, any party interested in quoting from a published work (e.g., a scholar who wanted to quote from *The Great Gatsby* in her biography of F. Scott Fitzgerald) would have to seek permission to reprint from the publisher. Major publishers have infrastructure in place to field and grant these requests, either through a website portal or an e-mail address.[26]

Copyright law applies to "extremely varied types of work."[27] The Copyright Act was amended in 1976 and now states that protection is granted to works upon their creation rather than upon their publication.[28] The current copyright statute protects "original works of authorship fixed in any tangible medium of expression."[29] This means as soon as an author writes words on a page, that work is protected by copyright. The statute does include some limitations on the exclusive rights granted, such as the fair use provision which states that "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."[30]

The increase in material covered under the 1976 Copyright Act means that "everything from the author's personal correspondence and snapshots to the great American novel that she has left

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23 U.S. CONST. art. I, § 8, cl. 8.

24 17 U.S.C. § 102.

25 *Copyright Management for Authors,* CORNELL UNIVERSITY LIBR., https://copyright.cornell.edu/authors [https://perma.cc/BLA2-KNP3] (last visited Nov. 19, 2021).

26 *See e.g.*,, *Permissions,* PENGUIN RANDOM HOUSE, https://permissions.penguinrandomhouse.com/ (last visited Nov. 19, 2021) [https://perma.cc/58QL-TS3Z]; Permissions, CURTIS BROWN, LTD., https://curtisbrown.com/permissions/ (last visited Nov. 20, 2021) [https://perma.cc/3XFS-9XQ6].

27 Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J. L. & TECH. 77, 91.

28 *Id.* at 89.

29 17 U.S.C. § 102.

30 17 U.S.C. § 107.

behind" are now given copyright protections.[31] These personal copyrighted materials are not always published professionally, so a party interested in including this material in a work of scholarship would not always be able to seek permission from an established publishing house. In that scenario, such person would need to be granted permission from the author or, if the author has passed away, the author's heir.[32] It's possible that unpublished materials might physically be owned by someone other than the copyright holder; a museum or collector may own the letters or manuscripts while the author's heir owns the copyright in the text of the letters. Anyone who wanted to quote from these letters would need physical access to the unpublished material in order to read them, as well as subsequent permission from the copyright holder to reproduce text from the material.

Currently, the term of copyright lasts for the lifetime of the author of the copyrighted material and for 70 years after the death of the author,[33] but the term has not always been so long. The Copyright Act of 1790, the country's first copyright statute,[34] provided for a much shorter term of fourteen years from the title's recording "in the clerk's office as herein directed", subject to a renewal term of an additional fourteen years if the author survives the original term.[35] The Copyright Act of 1909 doubled both the initial term and renewal term to twenty-eight years, and removed the contingency that the author must survive the initial term in order to renew.[36] One reason for this modification was to increase the likelihood that copyright ownership would last at least for the author's lifetime.[37] The 1976 Copyright Act extended the term and guaranteed protection during the author's lifetime.[38] The 1976 Act extended the term to last "the life of the author and fifty years after the author's death."[39] The Sonny Bono Copyright Term Extension Act ("CTEA") further extended this to the current term of seventy years following the author's death.[40]

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31 Subotnik, *supra* note 27 at 91.

32 *See infra* Part III.

33 17 U.S.C.A. § 302.

34 Subotnik, *supra* note 27 at 88.

35 1 Stat. 124, ch. XV, § 1, 3 (1790).

36 An Act to Amend and Consolidate the Acts Respecting Copyright, 35 Stat. 1075, Ch. 320, §§ 23, 24 (1909).

37 Subotnik, *supra*, note 27 at 89.

38 *Id.*

39 90 STAT. 2573, § 302.

40 112 STAT. 2827 § 102.

For the author who lives a long, fruitful life, this lengthy copyright term allows for the heir to enjoy the fruits of the authors work for an amount of time comparable to that of the author's life. However, if an author were to meet her untimely death at the young age of thirty, like Sylvia Plath,[41] heirs would be able to dispose of the copyright more than twice as long as the author was alive. In fact, even if an author lived a long life their heirs might hold the copyright to the authors work for a disproportionate amount of time.

Many authors in the canon wrote their first novel when they were in their thirties and forties[42], and some, like John le Carré, continued producing works into their late eighties.[43] To take John le Carré as an example, he wrote his first novel, *Call for the Dead*, at thirty[44] and died at the age of eighty-nine. That gave him fifty-nine years to enjoy the benefit of his copyright (under American copyright law), whereas his heirs would get to enjoy the success from that copyright longer than John ever would. Further, not all authors produce their first novels as early as thirty, and eight-nine is a relatively advanced age to live to see.[45] All that to say, the current copyright scheme allows for heirs to enjoy the benefits of copyright longer than the individuals to whom those rights were originally granted.

C. *Heirs Withholding Materials*

Some of these heirs become very protective of this copyright, and one of the most notorious of these protective heirs was James

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41 Dan Chiasson, *Sylvia Plath's Last Letters,* NEW YORKER (Oct. 29, 2018), https://www.newyorker.com/magazine/2018/11/05/sylvia-plaths-last-letters [https://perma.cc/D27G-PFDC].

42 Sam Tenhaus, *How Old Can a Young Writer Be?,* N.Y. TIMES (June 10, 2010), https://www.nytimes.com/2010/06/20/books/review/Tanenhaus-t.html [https://perma.cc/QE38-FRBA].

43 Alison Flood, *Final John le Carre Novel, Silverview, to be Published in October*, GUARDIAN (May 19, 2021, 9:00 am) https://www.theguardian.com/books/2021/may/19/final-john-le-carre-novel-silverview-to-be-published-in-october [https://perma.cc/U29G-958W].

44 Eli Keren, *What is the Best Age to Write a Novel?*, CURTIS BROWN CREATIVE (June 20, 2016), https://www.curtisbrowncreative.co.uk/what-is-the-best-age-to-write-a-novel/ [https://perma.cc/ZN8R-HXP8].

45 Jared Ortaliza et al,, *How Does U.S. Life Expectancy Compare to Other Countries?*, HEALTH SYSTEM TRACKER (Sept. 18, 2021), https://www.healthsystemtracker.org/chart-collection/u-s-life-expectancy-compare-countries/#item-life-expectancy-september-2021-update-chart-1 [https://perma.cc/KA8T-2PY2].

Joyce's grandson, Stephen James Joyce.[46] After James Joyce's death, Harriet Shaw Weaver controlled his literary estate, while Joyce's wife, Nora Joyce, received the royalties.[47] When Nora passed away, her children, Giorgio and Lucia, became beneficiaries of her estate.[48] Giorgio, Stephen's father, allegedly was more interested in the proceeds generated by Joyce's work, and left management of the estate to others.[49] By 1982 Stephen had negotiated with other family members to obtain a fifty percent stake in the estate, increased to seventy-five percent after Giorgio and his second wife had passed away.[50] Eventually, the remaining beneficiaries under the estate became burnt out by the effort and emotion that went into managing the estate and sold their shares to Stephen.[51] By 2000, Stephen completely controlled Joyce's estate.[52]

With Stephen handling Joyce's estate, the relationship between him and Joyce scholars "[went] from awkwardly symbiotic to plainly dysfunctional."[53] Stephen took pride in his contentious relationship with Joyce scholars, stating, "We have proven that we are willing to take any necessary action to back and enforce what we legitimately believe in . . . [w]hat other literary estate stands up the way I do? It's a whole way of looking at things and looking at life."[54] He was particularly disdainful of the scholars' claim that they have added to Joyce's legacy.[55] Instead, Stephen believed that the academia surrounding Joyce's work has scared readers away from Joyce's novels undeservedly.[56] Stephen didn't mince words with regards to scholars, and claimed they were "rats and lice—they should be exterminated!"[57]

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46 *See generally* Tim Cavanaugh, *The Portrait of the Old Man as a Copyright Miser*, L.A. TIMES (June 5, 2007, 12:00 AM), https://www.latimes.com/opinion/la-oew-cavanaugh5jun05-story.html [https://perma.cc/N9PE-A7CB]; *see generally* Max, *supra* note 4; *see generally* Robert Spoo*, Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs,* 56 UCLA L. REV. 1775 (2009).

47 Max, *supra* note 4.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 Max, *supra* note 4.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 Max, *supra* note 4.

Motivated by a desire to put a stop to work that violates the Joyce family's privacy or is in other ways disreputable, Stephen's efforts ranged from reasonably understandable, such as a blanket refusal to grant permission to copy from any of Joyce's unpublished letters, to extremely particular, like his refusal to grant permission to a scholar whose work was going to be published by Purdue University because Stephen felt Purdue's mascot, the "Boilermakers", was objectionable.[58] In addition, Stephen has blocked several public readings of James Joyce's work and has obstructed new editions of Joyce's work. In one instance, Stephen had threatened Adam Harvey, a performance artist who had quoted a portion of *Finnegan's Wake*, by telling Harvey he had likely infringed upon the copyright, only for Harvey to find out later than under British law his performance would have been protected.[59]

Refusing permission is not the only way an heir might seek to impede a scholar's work; she might act outside of the exclusive rights granted by the Copyright Act and impede access to the actual physical materials that scholars wish to copy. After all, a scholar can't copy that which a scholar cannot read in the first place. Stephen's efforts to protect his grandfather's legacy most likely involved both methods; not only did he refuse to grant permission to copy, but some scholars worry that Stephen had gone so far as to obtain original physical copies of Joyce's correspondence from the National Library of Ireland and destroy it, thus preventing any scholar or curio from reading or writing about it.[60]

D. *Tension Between Generations*

Some authors may be pleased with the extent to which that authors' heirs exert their control over the author's writing, be it by refusing permission to quote from copyrighted work or by withholding or destroying unpublished material. Franz Kafka and Vladimir Nabokov both wished for their incomplete works to be destroyed after their deaths.[61] Though their instructions to dispose of their materials weren't completely followed,[62] they might have

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58 *Id.*
59 *Id.*
60 *Id.*
61 Subotnik, *supra* note 12 at 265.
62 *Id.*

been pleased had their heirs been as protective (or destructive) of their manuscripts and letters as Stephen James Joyce was of his grandfather's. Indeed, James Joyce was "a strict guardian of his own image"[63] and by limiting the extent to which scholars could use Joyce's work in new ways, Stephen can be said to be carrying out his grandfather's wishes.

However, it may not be every author's wish for their work to be so protected. Ezra Pound, a twentieth-century poet and critic, was so disillusioned by the way copyright law allowed authors and heirs to hold literature captive that he proposed his own variation of copyright law which sought to allow the public the ability to use copyrighted material to a greater extent.[64] Predictably, the Ezra Pound Literary Property Trust, administered by New Directions Publishing Corporation, has been very generous in granting scholars permission to quote from Pound's letters and manuscripts, both published and unpublished.[65]

Not all authors have been so vocal about how they wish their legacy to unfold, and certainly not all of them sought to propose copyrights statutes. Nevertheless, certain literary estates, like Pound's literary trust, have encouraged scholarly use of the author's materials; W.B. Yeats's estate, for example, is another literary estate that has gladly allowed scholars to read and quote from the author's unpublished materials.[66] It's not hard to imagine that these actions on behalf of these literary estates were motivated by pro-academic mindsets held by the authors during their lifetimes. Even if an author wasn't explicit about the way her work should be handled post-mortem, some scholars have wondered if difficult heirs are acting at odds with the beliefs and opinions held by the authors during the authors' lifetimes: Lorenz Hart's biographer, Frederick Nolan, expressed that he found it difficult to imagine that Hart himself would have restricted Nolan's use of Hart's material the way that Hart's sister-in-law had.[67] In fact, even James Joyce, who so valued his privacy, once told his translator, "I've put in so many enigmas and puzzles that it will keep the professors busy for centuries arguing over what I meant, and that's the only

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63 Max, *supra* note 4.

64 *See generally* Spoo, *supra* note 46.

65 *Id*. at 1827.

66 *Id.*

67 Subotnik, *supra* note 27 at 79.

way of insuring one's immortality," suggesting that he envisioned that scholarship of his work would keep his legacy alive.[68]

While it's difficult to know exactly what an author's wishes are during her lifetime, it has been made clear by numerous academics that the vice-like grip that certain authors' heirs have on the authors' unpublished materials holds a threat to public interest.[69] The Copyright Act grants exclusive rights in authors' works both published and unpublished and allows heirs to control how such materials are disposed of, but it's extremely unlikely that *all* authors would want their heirs wielding the sword of litigation threats against *everyone* who wishes to use their work for creative, critical, or scholarly purposes. Further complicating this idea is the suggestion that authors who would welcome widespread use of their works after they pass away might still want their heirs to benefit financially from the work they produce and would prefer not to leave their copyrights to the public domain.

It's unlikely that copyright law will be amended anytime soon in a way that will achieve a goal of both limiting copyright duration while allowing heirs to receive the benefits of copyright. Not only has the copyright statute only been amended a handful of times during its existence, but there is also evidence that the latest copyright term extension was funded by powerful lobbyists for the entertainment industry.[70] Critics of the CTEA have derisively referred to it as the "Mickey Mouse Protection Act", suggesting that the act's true intention was to protect Mickey Mouse from entering the public domain.[71]

Though there are several different schools of thought with regards to copyright's current length, it is undeniable that the original intention behind a copyright statute suggested a much narrower view of what it was supposed to cover than what the current copyright law actually does. The U.S. Constitution states that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

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68 Max, *supra* note 4.

69 Subotnik, *supra* note 12 at 256 (citing Deven R. Desai, The Life and Death of Copyright, 2011 WIS. L. REV. 219, 258–59; Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1822–27 (2009); Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 123–24 (2015).

70 Subotnik, *supra* note 27 at 91.

71 Michael Bradford Patterson, *To Speak, Perchance to Have a Dream: The Malicious Author and Orator Estate as a Critique of the Digital Millennium Copyright Act's Subversion of the First Amendment in the Era of Notice and Takedown*, 22 J. INTELL. PROP. L. 177 at 188 (2014).

the exclusive Right to their respective Writings and Discoveries", and it is this clause that provides the power to enact the Copyright Act.[72] It's useful to note Professor William Patry's interpretation, based additionally on the preamble to the initial copyright act, that "Science" as used in the Constitution refers to the eighteenth century usage which incorporated all forms of "learning".[73]

Though the original rationales for copyright were that authors deserve to have the result of their efforts protected and that such protection would encourage authors to create works beneficial to the public, Professor Patry criticizes the current copyright term length that has extended so far past the death of the author as being motivated by "a very small group: children and grandchildren of famous composers whose works are beginning to fall into the public domain, thereby threatening trust funds".[74] Now, after copyright protection has promoted creation of work, potentially a great, great, great-grandchild of that author will still hold the copyright to the created work.[75] With that copyright, the heir in question has the exclusive rights to dispose of the material as she sees fit.

While it seems entirely justifiable that a creator should be able to do what she wants with her work, it is harder to justify the work being controlled by such a distant relative of the creator. In that scenario, someone who in all likelihood never met the creator is able to take actions that would stifle scholarship by denying scholars the ability to use the copyrighted material. An individual to whom the drafters of the Constitution had never considered granting ownership would take actions that undermine the very purpose the drafters had in mind. This is especially alarming when that heir is acting at odds with the true intention of the creator.

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72 U.S. CONST. art. I, § 8, cl. 8.

73 William Patry, *Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997).

74 *Id.* at 911, 932.

75 *Id.* at 931–32 ("For an author who dies at age seventy-five and has children who have children at twenty-five, protection will be passed on as follows: 1971, author born; 1996, child born to author; 2021, grandchild born; 2046, author dies; 2056, great-grandchild born; 2071, author's child dies; 2081, great, great-grandchild born; 2096, author's grandchild dies; 2106, great, great, great-grandchild born; 2116, protection ends. In 2116, the author's child will have been dead for forty-five years; the author's grandchild will have been dead for twenty years; the great-grandchild will be sixty years old; the great, great-grandchild will be thirty-five years old, and the great, great, great-grandchild will be ten years old.").

E. *Fair Use*

Scholars can still include copyrighted material in their scholarship, so long as the use is deemed 'fair' in accordance with the fair use provision of the Copyright Act. The fair use provision of the copyright statute states that "fair use of a copyrighted work . . . is not an infringement of copyright".[76] This provision states that certain uses, such as those "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research", even if done by persons other than the copyright holder, will not be considered copyright infringements.[77] In addition to those broad categories, the statute also gives factors that can be weighed to determine whether a use in question is considered fair. The factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[78]

The statute also confirms that use of a copyrighted-but-unpublished work can still be considered 'fair', so long as "such a finding is made upon consideration of all the above factors."[79] The issue with the current fair use provision is that these factors, when taken alone, are not entirely clear. Further complicating this, while there are several judicial opinions ruling on fair use issues, these decisions have failed to clarify what falls under the statute as thoroughly as scholars have hoped.[80]

In *New Era Publications Int'l, ApS v. Carol Pub. Grp.*, 904 F.2d 152 (2d Cir. 1990),[81] the court ruled in favor the Carol Publishing Group and found that their author's use of L. Ron Hub-

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[76] 17 U.S.C. § 107.

[77] *Id*.

[78] *Id.*

[79] *Id.*

[80] *See, e.g.*, Rebecca F. Ganz, *A Portrait of the Artist's Estate as a Copyright Problem*, 41 LOY. L. A. L. REV. 739 (2008); *see also* Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CALIF. L. REV. 369 (2001); *see also* Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 CARDOZO ARTS & ENT. L .J. 19 (2012).

[81] New Era Publications Int'l v. Carol Publishing Grp., 904 F.2d 152 (2d Cir. 1990).

bard's work in an unflattering biography of him was fair use.[82] Jonathan Caven-Atack was a former member of the Church of Scientology until he became disillusioned by the Church's actions towards dissident members.[83] In 1983, he resigned from the Church and began researching the Church and its founder L. Ron Hubbard.[84] *A Piece of Blue Sky: Scientology*, *Dianetics and L Ron Hubbard Exposed* painted an unfavorable portrait on both subjects, and quoted from a large number of Hubbard's written material, with quotes being included both in the beginning of chapters and throughout the body of the text.[85] New Era Publications International, ApS, which held the exclusive right to license L. Ron Hubbard's work, brought suit to enjoin publication of the book, claiming the book infringed upon their copyright.[86] The district court analyzed the factors listed in the fair use provision and entered judgement in favor of New Era Publications and enjoined publication of the biography.[87] Carol Publishing appealed the decision, and the Second Circuit Court of Appeals eventually reversed the lower court's decision and held that the use of quotations was fair.[88]

An earlier case, *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.),[89] also involved the use of an author's work in a biography based on the author's life, but the court held that the use of the author's text was an infringement of the copyright and use of it was enjoined.[90] One notable difference between the two cases is that, where *New Era Publications* involved a biographer's use of his subject's published works, *Salinger* concerned the use of the subject's *unpublished* letters of correspondence. The case concerned a biography of J.D. Salinger written by Ian Hamilton that was to be published by Random House.[91] Hamilton had informed Salinger in 1983 that he was pursuing a biography and requested Salinger's cooperation.[92] Salinger refused, stating that it was his wish for his biography to be written after his death.[93] Hamilton continued his

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82 *Id.* at 153.
83 *Id.* at 154.
84 *Id.*
85 *Id.*
86 New Era Publications Int'l v. Carol Publishing Grp., 904 F.2d 152, 154 (2d. Cir. 1990).
87 *Id.* at 154–55.
88 *Id.* at 161.
89 Salinger v. Random House, Inc., 818 F.2d 252 (2d Cir. 1987).
90 *Id.* at 100.
91 *Id.* at 92.
92 *Id.*
93 *Id.*

work on the biography and read several unpublished letters that Salinger had written to friends and other literary and historical figures, most of which were found in the libraries of Harvard, Princeton, and the University of Texas.[94] Hamilton completed all library procedures necessary to access the letters, and by 1986 had finished a draft of his biography titled *J.D. Salinger: A Writing Life*.[95]

Upon being presented with a galley proof of the biography, Salinger registered seventy-nine of his unpublished letters for copyright protection and instructed his lawyer to formally object to Random House's publication of the biography pending removal of the references to Salinger's unpublished material.[96] Random House produced several amended drafts which replaced many of the direct quotations with paraphrases of Salinger's letters, but Salinger was not swayed and sued both Ian Hamilton and Random House seeking an injunction against publication of the biography.[97] Though the District Court found that the use of the letters was fair, the Appellate Court placed special emphasis on the fact that the letters were unpublished.[98] An earlier precedent set by *Harper & Row* "[gave] special weight to the fact that the copied work [was] unpublished when considering the second factor, the nature of the copyrighted work" and considered the remaining statutory factors before finding that the work was not fair and ruling in Salinger's favor.[99]

While the decision in *New Era* ruled in favor of scholarship, and recognized that "biographies in general, and critical biographies in particular, fit 'comfortably within' these statutory categories 'of uses illustrative of uses that can be fair,'"[100] the decision upholds the requirement that each fair use case includes a "case-by-case determination whether a particular use is fair".[101] This requirement of a case-by-case determination is a reflection of how vague the standards set out in the statute are, and even the U.S. Copyright Office website states that "the outcome of any given case depends on a fact-specific inquiry . . . there is no formula to

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94 *Id.* at 92–93.

95 *Id.* at 93.

96 Salinger, 811 F.2d at 93.

97 *Id.* at 93–94.

98 *Id.* at 95.

99 *Id.* (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985)).

100 New Era Publ'ns Int'l, ApS v. Carol Publ'g. Grp., 904 F.2d 152, 156 (2d Cir. 1990) (quoting Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987).

101 *Id*. at 155.

ensure that a predetermined percentage or amount of a work . . . may be used without permission."[102] If a judicial opinion that determines a fair use of copyrighted material is so fact specific that it can't suggest what future use might be considered fair, it is difficult for scholars to gage whether the work they intend to include will require permission from the copyright holder. A use that one court may deem fair does not guarantee that another court will find a similar use fair (or even that the same court will find a similar use fair), and any challenged use by a scholar might involve a lengthy trial that seemingly could go either way. This unreliability diminishes the usefulness of the fair use doctrine.

Additionally troubling is the legacy of the *Salinger* case, which would cause fair-use analysis to include a blend of copyright law and privacy concerns. One key difference between the material at the center of *Salinger* and that at the center of *New Era* is that the *Salinger* letters were previously unpublished. The *Salinger* court followed precedent set by *Harper & Row* and paid special attention to the fact that the materials were unpublished when considering the second factor, stating that there would be a "diminished likelihood that copying will be fair use when the copyrighted material is unpublished".[103] The analysis of the second factor, 'Nature of the Copyrighted Work' did not proceed much further; the fact that the letters had been previously unpublished meant that "the second factor weigh[ed] heavily in favor of Salinger"[104] and ultimately was deemed unfair.[105]

Though the Copyright Act would later add an additional line that seemingly allowed for the possibility of fair use of unpublished work[106], critics of the act still decry the "baleful effect on copyright doctrine and publishing practice" that Salinger's copyright infringement case had, and the way it "unduly narrowed the fair use defense".[107] Professor Katie O'Neill, in her article *Copyright Law and the Management of J.D. Salinger's Literary Estate* criticized the *Salinger* decision as having been unduly influenced more by J.D.

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102 *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Dec. 2021), https://copyright.gov/fair-use/ [https://perma.cc/GR5J-JE9P].

103 Salinger, 818 F.2d at 97.

104 *Id.*

105 *Id.* at 100.

106 Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (adding to 17 U.S.C. § 107(4) (2006) the sentence: "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

107 Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 CARDOZO ARTS & ENT. L. J. 19, 32 (2012).

Salinger's highly publicized desires for privacy, rather than any specific claims that the fair use infringed on the rights granted by the Copyright Act.[108] Even after Congress's inclusion of the amended sentence of §107, "scholars continue to debate the intersection of a writer's copyrights, privacy interests, and fair use".[109] Suddenly, a statute that encouraged greater scholarship while still respecting an author's right to monetize their work (and encouraging such writers to do so) was being influenced by and enforcing the author's privacy concerns—something completely outside the realm of the Copyright Act. The *Salinger* decision also highlighted the imbalance of power that exists in these disputes. On one side of the case, you have a literary icon known for, and protecting, his private life. On the other, you have a biographer whose stature couldn't possibly compare. It is frankly not surprising that the court was so swayed by Salinger's desire to protect one of the most notable aspects of his personality.

The current state of the Copyright Act has flaws that are shown when a scholar's efforts to write about an artist are frustrated by the subject's heirs, by refusal of permission to quote or otherwise. The Act currently allows an individual who is not the originally intended beneficiary of copyright law to seemingly undermine the very justification for the law's existence, while fair use provision, which ostensibly bridges the gap between encouraging scholarship and protecting author's copyright interests, is too vague or corrupted to be of real use. Even if fair use did work perfectly, it would still not be able to help a scholar unable to access the physical letters or other unpublished materials (either because such items have been destroyed or are being kept by heirs)—legal protection of fair use of text in no means guarantees or provides access to the text in the first place. By looking to ADR, however, there exists a possibility of interactions outside the bounds of copyright.

III. Discussion

The term ADR includes several different means of resolving disputes without pursuing litigation, including mediation, arbitra-

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108 *See generally id.* ("In my view, Salinger's chief reason for suing was to protect his personal interests, rather than his commercial interests. Neither defendant's work threatened Salinger's actual or potential royalties, but the first would have exposed some of his personal correspondence").

109 *Id.* at 32.

tion, and negotiation.[110] While negotiating can be the first process attempted, mediation and arbitration are the most common methods used.[111] Negotiation is actually a large part of book publishing already.[112] The disputes between heirs and scholars concern reproductions of the author's text, and in many situations use of the text is granted to interested parties by the heirs in exchange for a fee and pursuant to some sort of licensing agreement.[113] Many literary agencies and publishing houses have infrastructures set up to consider and approve these licenses.[114] Some of the disputes discussed in this article arise when a copyright holder refuses to grant these permissions.[115] Given that the disputes arise when negotiation has already been attempted, or the copyright holder has refused to come to the table and consider a permission request, it is unlikely that 'negotiation' will be a viable ADR technique. Adding a third party to the discussions, as mediation and arbitration do, might help discussions.[116] This section will consider the benefits of mediation and arbitration to solve these disputes. First, we will discuss the strategies mediators use for challenging each party's mindsets to make everyone more receptive to compromise and resolution, before explaining the financial benefits to both mediation and arbitration, and then finally explaining the benefit that a third-party adjudicator like an arbitrator can add to the dispute.

A. *Mediation*

Mediation exists in a similar space to negotiation. It involves two people coming together to discuss a solution that does not revolve around one position being *correct* (i.e., that one position fol-

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110 *Alternative Dispute Resolution,* LEGAL INFO. INSTITUTE, https://www.law.cornell.edu/wex/alternative_dispute_resolution [https://perma.cc/PJ5Y-VCM5] (last visited Nov. 20, 2021).

111 *Id.*

112 Rachel Kramer Bussel, *How Literary Agents Negotiate the Best Terms for Their Authors*, FORBES (Mar. 2, 2020, 11:20 AM), https://www.forbes.com/sites/rachelkramerbussel/2020/03/02/how-literary-agents-negotiate-the-best-contract-terms-for-their-authors/?sh=1cbb278f3520 [https://perma.cc/VH3Q-F245].

113 *Permission: What Is It and Why do I Need It?*, STANFORD LIBRARIES, https://fairuse.stanford.edu/overview/introduction/permission/ [https://perma.cc/6RFQ-JZVY] (last visited Nov. 20, 2021).

114 *Permissions, supra* note 26.

115 Max, *supra* note 4 ("[Stephen] rejects nearly every request to quote from unpublished letters. Last year, he told a prominent Joyce scholar that he was no longer granting permissions to quote from any of Joyce's writings.").

116 *Alternative Dispute Resolution, supra* note 110.

lows the law more closely). As a result, mediation could be a useful tool both in instances where negotiations have fallen apart and where there is a disagreement over fair use. If a scholar has approached an heir (or an heir's literary agent)[117] and has begun negotiations for a license for the use of certain material, or even just physical access to the material, but those talks have stalled or become derailed, entering into mediation in the middle might help to bring the conversation to a productive and lucrative conclusion. Likewise, if a scholar has used a certain amount of text under the belief that the use would qualify as fair use, but the heir strongly challenges this idea and threatens litigation, a mediator might be able to help the two parties come to an agreement that would allow the scholar to use the material.

Mediators are trained in negotiation and in bringing opposing parties together to attempt to work out a solution.[118] Rather than hearing evidence, mediators work with each party separately after each party has had the opportunity to present their case.[119] The mediator can work with each side and help each party understand the positions of the opposite side. One of the key methods a mediator uses to help parties come to an agreement is the idea of 'reframing' one's beliefs.[120] Sometimes, a party's 'core beliefs' are so set and resistant to reframing that, without help, an agreement can't be reached.[121] When a scholar or an heir are discussing use of an author's material or correspondence, an example of a core belief might be the heir's fear that the scholar is simply trying to capitalize on the heir's ancestor and will completely disrespect the author and embarrass the family. Likewise, a scholar's core belief might be that the heir is being tightfisted and shortsighted and is unwilling (or unable) to see the genius in the work of scholarship being produced. Both of those core beliefs are likely to be at least partially untrue, and certainly make it impossible (or unlikely) for the parties to ever come to terms. Mediators use three strategies for dealing with these stubborn beliefs: 'reality testing', 'communi-

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117 *See infra* Section IV. A.

118 *Alternative Dispute Resolution, supra* note 110.

119 Michael Roberts, *Why Mediation Works*, MEDIATE (Aug. 30, 1999), https://www.mediate.com/articles/roberts.cfm [https://perma.cc/W9VH-PL26].

120 David A. Hoffman & Richard N. Wolman, *The Psychology of Mediation*, 14 CARDOZO J. CONFLICT RESOL. 759, 764 (2013). ("It is the mediator's job to step into the rapid-fire, information-processing moment, make his or her best evaluation as to the meaning of the communication or behavior and, if there is a mismatch, correct the interpretation by "reframing" the event for the parties.").

121 *Id.* at 767.

cations about intentions', and 'options to address parties' beliefs.'[122]

'Reality testing' is an attempt to "'complexify' each party's understanding of the past", and essentially use a respected outside party to challenge a participant's preconceived notions.[123] For example, the heir could be shown a review or analysis of the scholar's previous works in order to see that the scholar has produced worthwhile and enlightening scholarship, rather than simply producing tawdry, muckraking tabloid articles. Similarly, the scholar could be shown articles concerning previous embarrassing articles written about the author, in order to see the outcome the heir is afraid will happen again.

'Communications about intentions' involves the mediator asking one party to state their perspective, and then asking the other party to repeat it back to the first party.[124] The mediator then asks the first party if the second party correctly understood their position, with the parties repeating this until each one feels she has been understood.[125] Here, the scholar could fully explain why they need to read any material in the heir's control, and why they feel that the use shouldn't concern the heir. Using this technique, Carol Shloss, an academic interested in materials in Stephen James Joyce's possession, might have explained how she believed the thesis of her book might have been an opinion shared by James Joyce in an attempt to assuage Stephen's fears.[126]

The final option is for mediators to assist the parties in coming up with options "that address the parties' core beliefs—even if those beliefs are antagonistic".[127] Here, the mediator helps each party come up with an option to offer to the other party to assuage

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122 *Id.* at 768.

123 *Id.*

124 *Id.*

125 *Id.* ("In some cases, the parties are in such fragile shape that they cannot engage in this exercise-articulating the other person's perspective is too threatening. In those cases, it may help for the parties to hear the mediator explain, in a nonjudgmental manner, each party's perspectives. The mere act of hearing the mediator explain, with compassion and understanding, each party's experience, fears, intentions, and beliefs can sometimes help the parties open their minds and hearts to another perspective").

126 Max, *supra* note 4 (Carol Shloss began researching the life of James Joyce's daughter, Lucia, and eventually formed the opinion that Lucia was not schizophrenic, as was the impression during her lifetime, but rather "a frustrated genius". James purportedly "had never accepted that his daughter was mentally ill." Like many scholars, Schloss had a contentious relationship with Stephen James Joyce regarding Lucia's medical records, to which Stephen believed he held the copyright).

127 *Id.*

their concerns. For example, the scholar may offer a provision where she shows the heir a draft of the portions of her work that use the requested material, with a promise to listen to any concerns the heir might have about her use before the scholarship is published. The tools that the moderator uses here might help to bridge a gap between two parties that otherwise would have been insurmountable.

In addition to the substantive benefits of mediation that allow for conflict resolution, mediation also boasts practical applications. One of the foremost benefits of mediation is the relative inexpensiveness of either process when compared with litigation. A study in 2013 estimated that a civil case can cost up to $100,000.00 if it goes to trial.[128] One of the suits filed by Stephen James Joyce ended up costing the estate hundreds of thousands of dollars, even though the estate won the case.[129] To put it in comparison, Sheryl Mintz Goski, a mediator who handles copyright disputes, lists an hourly fee of $315.00.[130] Another mediator, Karen L. Keyes, a mediator who works for Arlington Collaborative Law PLLC, suggests that the majority of cases resolve after four to eight sessions of approximately two hours each session.[131] At the rate that Ms. Goski charges, a mediation of the length Ms. Keyes suggests would cost both parties a total of $10,800.00—a far cry from the cost of a full-blown trial.

A lower cost option evens the playing field in a dispute like this and suggests a greater opportunity to resolve the dispute. When litigation is the only option, only those with sufficient funds might be able to take advantage of it; the heir might be the only party able to do so. For example, Gail Knight Steinbeck, one of John Steinbeck's heirs, testified in court that she receives between $120,000.00 and $200,000.00 annually from royalties of John Steinbeck's works.[132] Similarly, sources close to the Joyce estate

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128 Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Feb. 26, 2013), https://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access [https://perma.cc/384U-U4ZR].

129 Max, *supra* note 4.

130 Sheryl Mintz Goski, MEDIATE, https://www.mediate.com/member/Sheryl-Mintz-Goski/32646 [https://perma.cc/B3QW-77CC] (last visited Feb. 12, 2021).

131 Karen Keyes, *Mediation and Duration: Factors to Consider*, ARLINGTON COLLABORATIVE L. PLLC, https://www.arlingtoncollaborativelaw.com/family-law-services/mediation/mediation-duration/ [https://perma.cc/DZA3-E5V2] (last visited Nov. 21, 2021).

132 Martin Macias, Jr, *Ninth Circuit Tosses $8M Award in Decades-Long Steinbeck War*, COURTHOUSE NEWS SERV. (Sept. 9, 2019), https://www.courthousenews.com/ninth-circuit-tosses-8m-award-in-decades-long-steinbeck-war/ [https://perma.cc/72EE-8YEK].

claimed that the estate generated close to half a million dollars in royalties annually.[133] Alternatively, an advance for a scholar's biography of a famous author is difficult to predict, but when asked by about the average payday that a writer will receive, literary agent Kate McKean gives the range of "$5,000.00 to $50,000.00".[134] These estimations are also based on a variety of different factors. Additionally, advance payments are usually paid in installments.[135] It's unlikely that a biographer in the researching stage of her book will have received all the money that she will be paid by the time the book is published. Given this, it's not surprising that Brenda Maddox, writing a biography of James Joyce's wife, offered to delete the offending section of her book rather than face legal action.[136] With mediation offering resolution at a fraction of the price, it's more likely that the disputing parties would actually have the opportunity to meet and resolve the issue, rather than the heir threatening litigation that only she could afford to pursue.

In addition to the relative affordability, mediation offers a quicker resolution than litigation; it generally takes less time to resolve disputes than litigation does.[137] Not only is the approximately 32-hour time frame that Ms. Keyes suggests[138] a brief period of time, but the availability of such a quick resolution can be helpful when issues over use of authors material come to light soon before the scholarship is set to be published. Publishers have set release deadlines for their books, and those books must be marketed at printed[139]. Disrupting this schedule might be costly, so a publisher might relish the opportunity to suggest remedies in mediation for acceptance or denial *before* the effort has made to implement the remedy. For example, when considering the Salinger biography was being published, Random House attempted to appease Salinger by paraphrasing from his letters rather than quoting

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133 Max, *supra* note 4.

134 Kate McKean, *An Agent Explains the Ins and Outs of Book Deals,* ELECTRIC LIT (Sept. 20, 2019), https://electricliterature.com/an-agent-explains-the-ins-and-outs-of-book-deals/ [https://perma.cc/DLN2-32YP].

135 Kristin Nelson, *Payment Schedules,* PUB RANTS (Mar. 24, 2008), https://nelsonagency.com/2008/03/payment-schedules/ [https://perma.cc/BS3Z-SSVS].

136 Max, *supra* note 4.

137 *See generally, Measuring the Costs of Delays in Dispute Resolution,* AM. ARBITRATION ASS'N., https://go.adr.org/impactsofdelay.html [https://perma.cc/2NUW-PNJE] (last visited Nov. 21, 2021).

138 Keyes, *supra* note 131.

139 *See, e.g., A Guide to the Publishing Process*, BLOOMSBURY, https://www.bloomsbury.com/us/discover/bloomsbury-academic/authors/a-guide-to-the-publishing-process/ (last accessed Feb. 12, 2021) [https://perma.cc/792N-R4QN].

outright.[140] This concession was not satisfactory to Salinger, and he continued with his lawsuit.[141] In a mediation setting, this suggestion could have been posed to Salinger *before* putting in the effort to edit the book, thus avoiding the wasted time and effort Random House put into the option with which Salinger was not satisfied. Additionally, the presence of a mediator working toward a mutually acceptable decision might foster a counter suggestion by the heir that actually would satisfy both parties.

B. *Arbitration*

Mediation, being a cousin to negotiation, essentially works with the idea that a deal can be made. Sometimes, though, the parties are so contentious that a deal is completely off the table. Joyce is a great example of this; his comments about scholars show that he was hostile to their intentions and would be unlikely to ever come to terms with them.[142] Unwillingness to make a deal may not solely be on the heir's side; the scholar might steadfastly believe that her use of the work is fair and not infringement and may believe that they don't need permission from the heir. In certain works, the scholarship may be so unflattering to the subject that there is no deal that would ever be reached given the circumstances. Arbitration might be a better alternative to mediation in these situations.

A key difference between arbitration and mediation is that arbitration involves the third party making the decision for the parties, rather than helping parties come to an agreement.[143] In a scenario where the two parties are so at odds that a deal is unreachable, it could be helpful to have a third party make the decision. Additionally, judgments by arbitrators are binding.[144] This might motivate parties to make sure that the issue is fully discussed; if the parties know the decision is final, they will leave no stone unturned when discussing. Between mediation and arbitration, arbitration is more formal, and more closely emulates the ex-

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140 Salinger v. Random House, Inc., 811 F.2d 90, 93 (2d Cir.).

141 *Id.*

142 Max, *supra* note 4.

143 *Comparison Between Arbitration & Mediation,* FINRA, https://www.finra.org/arbitration-mediation/comparison-between-arbitration-mediation (last visited Feb. 12, 2021) [https://perma.cc/WTN6-TCSD].

144 *Learn About Arbitration*, FINRA, https://www.finra.org/arbitration-mediation/learn-about-arbitration (last visited Feb. 12, 2021) [https://perma.cc/JF6J-PWQ9].

perience of going to court.[145] It might be the more attractive option for a rightsholder who would just as soon file a lawsuit. It involves aspects similar to that of a trial but in a more pared down form (limited discovery and simplified rules of evidence).[146] Arbitrators can have related backgrounds to the issue at hand that help them more accurately issue judgment, so parties disputing a copyright issue could hire an arbitrator with a copyright background.[147]

IV. PROPOSAL

Mediation and arbitration offer alternatives to litigation, and in doing so offer opportunities to work around some of the limitations of current copyright law. If an author were able to compel an attempt at mediation on her heirs, this would extend the influence of the author on the copyrighted material. Now, instead of the heir having full control over the copyright, the author's intentions would be guiding some of the actions the heir takes after the author's death. Mediation and arbitration give fair use disputes another venue outside of the court system, away from the vague standards and doctrine influenced by privacy concerns. Mediation and arbitration have these benefits and more, and there are efforts an author can make to bind their heirs to ADR, as well as steps that the heirs and scholars can take to initiate ADR on their own—but how? This section will detail strategies that organizations in the publishing industry can implement to advise authors on these opportunities for ADR, as well as steps that heirs and scholars can take after an author's death to make use of ADR before a dispute becomes unmanageable.

A. *Proper Counsel on ADR Possibilities*

Before authors or heirs can implement ADR options, they must be properly counseled. Simply put, they need to know of the option's existence. In addition to legal counsel, many authors have literary agents who facilitate the sale of their written material to publishers and who can also take varying levels of involvement in

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145 *Alternative Dispute Resolution*, LEGAL INFO. INST., (last visited Nov. 20, 2021) https://www.law.cornell.edu/wex/alternative_dispute_resolution [https://perma.cc/UJ89-ZCUZ].

146 *Id.*

147 *Id.*

other aspects of their client's professional life.[148] Agents generally "represent the interest of writers to publishers . . . in deal making and negotiations".[149] In addition to facilitating the sale of manuscripts to publishers, agents will take on a variety of other tasks for their clients.[150] Felicity Blunt describes her job as "part lawyer, part accountant, part counsellor and part editorial sounding board."[151] If these agents know of the existence of ADR options, they can suggest them to their clients as they plan their estates. To this end, literary agents are assisted by organizations such as the Association of American Literary Agents.[152] The AALA "regularly holds panels, educational programs, and social events to help its members maintain and broaden their professional skills . . . [and] keep their members and their clients informed of developments in publishing."[153] Were the AALA to organize ADR-centered educational programming, more agents would be aware of this viable option to suggest to their clients as they plan their estates or face these disputes. With greater visibility to the representatives of authors, it's more likely that arbitration and mediation will be entered into this area.

B. *Efforts taken by Authors During Their Lifetime*

When authors are aware of the ADR option, they can take steps to compel ADR to resolve disputes over their copyrights. Copyright law allows for the transfer of copyright "in whole or in part by any means of conveyance or by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession".[154] This allows authors to transfer copyright, in addition to ownership of any letters or unpublished material, via will and then place arbitration or mediation clauses in their wills that force any disputes over the copyright to be handled via ADR before litigation. Professor Eva Subotnik, in her article

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148 *What is a Literary Agent?*, PENGUIN U.K. (last visited Feb. 12, 2021), https://www.penguin.co.uk/articles/company/getting-published/what-is-a-literary-agent.html [https://perma.cc/G94W-QF57].

149 *Id.*

150 *Id.*

151 *Id.*

152 *What is AALA?,* ASS'N OF AM. LITERARY AGENTS, https://aalitagents.org/ [https://perma.cc/ZKM7-6CR7] (last visited Feb. 12, 2021).

153 *Id.*

154 17 U.S.C.A § 201(d)(1).

Artistic Control After Death, suggests the use of a transfer of copyright in fee simple determinable as a method to impose restrictions on future beneficiaries of copyright.[155] Professor Subotnik's suggestion is made in the context of artists attempting to limit the use of their copyrighted material in advertising.[156] If an author were instead inclined to instruct her heirs on the method used to solve disputes, she could transfer a copyright to her heirs with the caveat that any heir must first pursue arbitration or mediation to resolve a claim of copyright infringement. As Professor Subotnik points out, such a disposition must include granting the reversionary interest to a third party to make the ADR clause truly effective.[157] Otherwise, if the heir refuses to use ADR, the copyright would revert back to the estate and might pass through intestate succession back to the troublesome heir.[158] As Professor Subotnik suggests, a reversionary interest into an entity like an author's alma mater (or, even more cunningly, into the public domain), might convince any heirs to follow the author's wishes, lest they lose the opportunity to receive royalties (or even allow for all materials to be made available to the public for free).[159] This solution could also work with regards to unpublished materials—the author could either grant the material to museums or archives outright or grant these institutions a reversionary interest that would vest if the heirs were to ever deny scholars access to the materials without engaging in ADR to resolve the disagreement.

Professor Subotnik also suggests imposing a fiduciary duty upon a trustee in order to ensure that these instructions are followed.[160] The copyright provision that allows for testamentary grants of copyright also allows for copyrights to be granted "by any means of conveyance,"[161] and an author could transfer of copyright to an *inter-vivos* trust or a limited liability corporation. Such a trust instrument can include a clause that designates that arbitration and mediation must be attempted with regards to any future infringer. With a trust, the author can designate the beneficiaries (e.g., her children if she wishes for the book's proceeds to support them), while designating separate trustees to administer the copy-

155 Subotnik, *supra* note 12 at 272.

156 *See generally* Subotnik, *supra* note 12.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 273.

161 17 U.S.C.A § 201(d)(1).

right.[162] As Professor Subotnik states, "above all, a fiduciary must administer the estate or trust 'in accordance with its terms and purposes'".[163] A designated trustee then would be duty-bound to follow a clause demanding infringement concerns be handled with ADR rather than litigation. Further, if an author were to designate trustees that were not related to her, the potential trustee might not be tempted by familial loyalty and privacy concerns to withhold material in the first place, thus avoiding any need to litigate or mediate.[164]

In addition to compulsory measures, authors could still make known their wishes for the administration of their lives' work, including their desire for ADR to solve all disputes.[165] In the event that a lawsuit between heirs and scholars does move forward, the presiding judge can still suggest or order mediation and arbitration between the parties to see if a resolution can be made.[166] If the author has made it known during her lifetime that she would prefer her copyright issues to be mediated or arbitrated, the judge might be more inclined to order such a course of action.

C. *Efforts Taken by Scholars and Heirs After Author's Death*

Even if the author hasn't taken efforts to include language that compels their heirs, ADR can still be implemented to avoid conflicts. Literary agents frequently represent the author's estate and heirs after the author has passed away,[167] and would most likely be aware of people infringing on the client's copyrighted material. If the agent senses a brewing confrontation that might be resolved via litigation, they might instead suggest mediation or arbitration. Such an option would still be in the copyright holder's

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162 Ian Weinstock, *Personal Trusts Under New York Law,* LEXIS NEXIS (Mar. 11, 2016), https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/personal-trusts-under-new-york-law [https://perma.cc/7SDL-SVSA].

163 Subotnik, *supra* note 12, at 273*,* quoting UNIF. TRUST CODE § 801; *accord* RESTATEMENT (THIRD) OF TRUSTS § 76 ("The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.").

164 *See supra* Section II.C.

165 *See generally* Subotnik, *supra* note 12.

166 *See* Jim Wagstaffe, *Court-Ordered Alternative Dispute Resolution,* LEXISNEXIS (June 22, 2018), https://www.lexisnexis.com/authorcenter/the-journal/b/pa/posts/court-ordered-alternative-dispute-resolution (discussing the court's power to require parties to consider or participate in ADR) [https://perma.cc/55J7-6VSY].

167 *See, e.g., Estate Representation*, WRITER'S HOUSE, http://www.writershouse.com/estate-representation [https://perma.cc/6SD3-NAFA] (last visited Feb. 12, 2021).

best interest given the aforementioned costs and may be more in line with wishes expressed by the author during their lifetime (as mentioned above). Similarly, scholars often have literary agents of their own.[168] If those agents see their clients' attempts at accessing deceased authors' material frustrated, they might suggest that their clients attempt mediation with the obstructing literary executor. A suggestion of mediation might create an option where none would have existed earlier (due to the prohibitive costs, as described above).

Likewise, even if a lawsuit occurs and a settlement is achieved, mediation and arbitration clauses can be included in any settlements to avoid further lawsuits over the settlement agreements. Another famous example of copyright disputes resulting in settlement agreements are the disputes between John Steinbeck's heirs over his copyrights.[169] Despite settlement agreements being reached, the heirs continued to sue over various interpretations over these settlements.[170] An arbitration clause in the 1974 agreement of the Steinbeck heirs might have saved at least thirty-five years of litigation.

D. *Issues*

Issues do remain. It may be hard to get the disputing parties to the table. Particularly in disputes between heirs and scholars, the heirs may be hard to motivate to mediate if they truly have no interest in allowing the deceased author's work to be used for scholarly purposes. Without any legal right to the work, it might be difficult for the scholars to fight against a particularly stubborn heir. Furthermore, arbitration and mediation clauses entered into wills and agreements may prove useless if the wills and agreements themselves are challenged in courts and invalidated. There is also no guarantee that mediation would be successful—it's possible that the parties come to mediation and still don't see eye to eye, and that the heir decides to sue. Even with all of these issues, ADR presents a possible way forward for copyright disputes. Even if not all are successful, any opportunity for two parties to come together

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168 *Agents Specialising in Biography*, WRITER'S SERV.'s, https://www.writersservices.com/directory_agents_specialism/906 [https://perma.cc/3CSB-UTZA] (last visited Feb. 12, 2021).

169 *See* Kaffaga v. Est. of Steinbeck, 938 F.3d 1006 (9th Cir. 2019), *cert. denied,* 141 S. Ct. 236 (2020).

170 *Id*.

and attempt to resolve is a step towards copyright's goal of scholarship.

V. Conclusion

Current copyright law's term extends for a period of seventy years after the authors death, which gives heirs control over the author's material longer than she ever had. Not only does the current term stand at odds with the original justification for copyright law, which was to protect authors' works and encourage scholarship, but it also leads to a possible scenario in which the heir exploits the copyright in a manner contrary to the author's wishes for her own legacy. A lengthy copyright term gives the heirs the ability to hold material hostage and deny permission to scholars who may be interested in using the work for their own scholarship. Though the fair use provision of the Copyright Act allows for certain uses of the copyright to be deemed non-infringements, the current doctrine is not specific enough to be useful, and controlling decisions are influenced by privacy concerns that copyright is not intended to protect.

ADR presents a possible way past these issues. The relative affordability of mediation, and the communication it fosters, present more of an opportunity for disputes between heirs and scholars to be resolved compared with litigation. Likewise, arbitration offers a cheaper alternative to litigation that still involves a third party resolving the dispute. If an author takes certain steps, she can compel ADR upon her heirs, which increases the likelihood that resolution will take place outside litigation, and in doing so can exert control after her death. Not only does this give more power to the individual that copyright law was intended to protect, but it seeks to support copyright's other goal: to foster scholarship.