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# Copyright Fiduciaries: Problems and Solutions

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Andrew Gilden & Eva E. Subotnik, *Copyright's Capacity Gap*, 57 **U.C. Davis L. Rev.** \_\_ (forthcoming, 2023), available at [SSRN](https://ssrn.com/abstract=4588888) (Aug. 9, 2023).

In this forthcoming article, Andrew Gilden and Eva Subotnik begin an important conversation about an underexplored area of copyright law. Their focus is copyright law's inconsistent treatment of mental capacity. Under copyright law, copyright authors can produce valuable copyrighted work but those same authors may lack the legal capacity to make decisions about if, when, or how to exploit that work. For example, children and people with mental illness or disability can be copyright authors, but they cannot license that work (or refuse to license it) without a legally competent surrogate. The authors explain that this inconsistency leads to injustices for which they offer reforms.

The article starts with the engaging example of the Britney Spears' 13-year conservatorship, controlled by her father, which from the age of 26 prevented her from making decisions about her life and career. All the while, Spears wrote and performed her songs, building a multimillion dollar portfolio over which she had no control. She was the author of her music, but she had no control over it because she lacked the legal capacity to form binding contracts, or so said a court. She resisted the conservatorship without success for over a decade. The article is full of many other such examples, including of teenage authors, elderly creators, and authors with mental illnesses.

The article argues that this "capacity gap" between authorship and control is a problem from within copyright law as a matter of doctrinal consistency and from a fairness perspective of avoiding exploitation. It further argues there is something unique about copyright law's capacity gap because, unlike a usual trust situation when assets are transferred to a competent person upon incapacity, in a copyright situation the incapacitated person can produce new wealth while being subject to the control of the trustee or conservator. As the authors say "this dynamic creates unique opportunities and incentives for abuse" and undermines copyright law's solicitude for authors' wellbeing.

Both Gilden and Subotnik teach trust and estates, and so they are a great pair to explore the intersection of fiduciary law with intellectual property. Both have focused recent writing on problems that arise for copyright authors after death, in, for example, what Gilden calls the "[social media afterlife](#)" and what Subotnik has recently called "[dead-hand guidance](#)" in a "preferable testamentary approach for artists." This new article is about authors still creating, some with cognitive disabilities and others who are simply young. Fiduciaries encourage valuable artistic productivity, for the fiduciaries' benefit and audiences, no doubt. But it is at best debatable, according to all the examples the article provides, whether the rate and nature of artistic production is in the best interest of the authors.

The article explains that this conflict between author and fiduciary undercuts the utilitarian justification for U.S. copyright law, which focuses on increasing productivity and the financial incentive of copyright's exclusive rights. As explained, copyright is available to those lacking legal capacity to be incentivized, which challenges the law's carrot-stick mechanism for creative production; moreover, the copyright incentive is possibly working on what the article calls the "wrong" people who do not have the authors' or the audiences' best interest in mind. The capacity gap also quite clearly undercuts the personhood theory of copyright law, in which the author's dignitary interests are paramount and protected through

authorial control over the work. By situating the copyright's capacity gap within several major theoretical justifications for copyright law, the article adds to the rich scholarship on copyright's evolution from its origins to its contemporary manifestations.

This article has many virtues. It teaches those of us in the intellectual property field a lot about critical features of trust and estate law, which frequently intersect with copyright law, in particular, and with which I'd surmise most of us are fairly unfamiliar. It weaves the two fields in an elegant and clarifying manner and is rich with contemporary examples in which the capacity gap problem arises. These examples would be wonderful classroom discussion topics for those of us teaching in either legal field. The article also engages recent copyright law scholarship concerning alternative IP theories and IP's failure to protect marginalized authors, advancing these burgeoning fields within IP law. And it provides concrete guidance and reform suggestions to limit the risks of exploitation and abuse that can emerge from copyright's capacity gap.

The last part of the paper titled "Minding the Gap" will be most interesting to practicing lawyers, administrators, and authors. It harnesses some existing mechanisms within the Copyright Act (such as termination of transfers) and of the Copyright Office (registration and recordation) offering some clear-eyed and reasonable first steps toward addressing problems arising from copyright law's capacity gap. I would not be surprised to see this article cited and used for reason of its last section alone. Overall, the article is insightful and its topic important. It is a commendable contribution to copyright literature.

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