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# From Temporary Incentive to Perpetual Entitlement: Historical Perspective on the Evolving Nature of Copyright in America

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From Temporary Incentive to Perpetual Entitlement:  
Historical Perspective on the Evolving Nature of Copyright in America

From Temporary Incentive to Perpetual Entitlement:  
Historical Perspective on the Evolving Nature of Copyright in America

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
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by

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## **Abstract**

The original purpose of copyright legislation was to grant a temporary economic monopoly to an author of a creative work. This monopoly is meant to incentivize authors to contribute to the public good with works that promote progress in science and art. However, increases in the scope and duration of copyright terms grant overly broad protections and controls for copyright owners, while advances in technology have provided the public with the potential for near-limitless access to information. This creates a conflict between proprietary interest in creative works versus the public's right and ability to access same. Efforts to balance these competing interests must consider the history and changing role of copyright in America, the role of the public domain, and how real property and intellectual property are defined in a digital world.

## **Table of Contents**

### **Chapter 1**

**The Purpose of Copyright.....1**

**Copyright: Origins and Evolutions.....5**

**20th Century Expansions.....16**

### **Chapter 2**

**Normative Futures and Public Domains Access.....23**

**A Generative System.....29**

**Fair Use.....36**

**Protecting the Public Domain.....43**

**Conclusions.....48**

**Bibliography.....52**

## Chapter 1

### The Purpose of Copyright

Copyright is an important concept in modern society. Its presence determines in part what movies, music, and books audiences encounter throughout their lives, as well as how they encounter those creative works. But the purpose of copyright itself is commonly misunderstood, as there are many who believe that the primary purpose of copyright is a protection for authors against those who would steal their work.<sup>1</sup> However, while this belief may influence how copyright is used by authors, publishers, and audiences today, it is not the original stated legal purpose. The stated purpose of copyright, dating back to the U.S. Constitution, is instead to promote the public good by advancing knowledge, which is done through incentivizing authors with an exclusive, though temporary, privilege of copyright.

In his essay “How to Make Wealth,” computer programmer and essayist Paul Graham posits that the biggest incentive for technological progress is simply employing the rule of law to allow those who innovate in areas of creative expression to keep the fortune they amass from the market demand for such innovation.<sup>2</sup> Arguing for the advancement of society, then, the American government has long endorsed the practice of granting a copyright, or the exclusive privilege of duplication and distribution in the marketplace, to the authors of such works, so as to “promote the progress of science and the useful arts,” in the language of the United States Constitution.<sup>3</sup>

However, one of the key components of this system of incentives, namely innovation, suffers when the privileges granted by copyright legislation are too broad. This thesis will first

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<sup>1</sup> L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users Rights* (Athens, GA: The University of Georgia Press, 1991).

<sup>2</sup> Paul Graham, *Hackers and Painters: Big Ideas from the Computer Age* (Sebastopol, CA: O’Reilly Media, 2004). Graham’s example is specifically in regards to software code.

<sup>3</sup> U.S. CONST, art. I, § 8, cl. 8.

argue that privileges granted by recent copyright legislation are too broad in scope, duration, and proprietary control, which leads to interminable economic monopolies on certain creative works, and that a brief overview of copyright law in American history demonstrates that this is in conflict with the stated purpose of copyright throughout the previous two centuries. Second, this thesis will illustrate how these privileges are now coupled with legislative and technological regulations meant to limit access to information, so that copyright owners are able to sustain business practices without fear of competition from the public domain and disruptive innovators. Ultimately, this thesis will argue that future innovation in science and the useful arts is endangered if automatic technological regulation of activities through appliancized devices, and laws that buttress such regulation, supplants an individual's property rights and fair use rights in engaging with intellectual property and creative works in a generative manner.

The stated purpose of copyright, to advance the public good through progress in science and art, has shifted towards the current reality of copyright as a complete proprietary control over how creative works are accessed and used. With digital technologies, copyright owners now have the ability to determine how creative works are accessed and used even after a purchase is made, which confounds and possibly infringes the property rights of the user. Increased control also allows entrenched business interests to unilaterally determine that the creative expression of an individual author is derivative of a work under copyright, so that disruptive competition is again stymied, and the First Amendment rights of that individual potentially infringed upon.

As the First Amendment of the United States Constitution guarantees, Congress shall pass no law abridging the freedom of speech. Unfortunately, American laws regarding copyright have expanded the scope, duration, and control of copyright so as to endanger freedoms of political and creative expression through the increasingly broad legal interpretations of what

constitutes a derivative work. Copyright, as defined by Howard Abrams in his article “The Historic Foundation of Copyright Law,” is “the exclusive right to manufacture, distribute, and sell copies of the work in question.”<sup>4</sup> That definition, as well as the language of early American copyright laws, makes clear that copyright is meant to limit the actions of publishers. However, recent changes in the scope of copyright, as well as advances in technology, have allowed almost any individual to act as a publisher online of works that are intended to be transformative, but are often found by the courts to be derivative and in breach of statutory copyright protections.

This is also exacerbated by two competing legal perceptions on copyright. One perception views the public’s interest as paramount, and treats copyright as a monopoly granted for a limited time to an author. This limited time was originally 14 years, with an option to renew a copyright term for an additional 14 years. The other perception is of copyright as an essential natural property right, with the act of creation granting the author protection by excluding others from exploiting his property. This perception has led to copyright terms that can now last up to 95 years, and is at direct odds with the intentions of the Framers of the Constitution.

The intentions of the Framers should be taken into account when considering contemporary legal interpretations for the Constitution. As Robert Bork states in his book *The Tempting of America*, the only valid way to interpret the Constitution is through those intentions, from which judges should seek “enlightenment from the structure of the document and the government it created.”<sup>5</sup> Based on the language present in the first article of the United States Constitution, which states that the primary objective of copyright is “to promote the Progress of

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<sup>4</sup> Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright," *Wayne Law Review* 29 (1983): 1119-1191.

<sup>5</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990): 165



Science and the useful Arts,”<sup>6</sup> it seems clear the intention of the founding fathers, particularly James Madison of Virginia, in drafting a copyright clause, was to simultaneously champion the theory of public benefit from intellectual works and to discourage monopolies. Again, those monopolies discouraged often take the form of publishers, but the point is confounded when any modern individual has all the technological power of an 18th century publisher in their own home. The primary goals behind copyright legislation were not just to protect the rights of authors through incentive, but also to advance public knowledge, so that a monopoly was in effect granted to authors for a limited time.

The copyright clause in the United States Constitution was a near copy of the language of Britain’s Statute of Anne. The stated purpose for the clause in the Constitution itself makes it clear that the public good is the primary impetus for copyright legislation, but the founders did not necessarily believe that such a goal was incompatible with incentives made for authors. As James Madison explains in *The Federalist Papers*. “The Public good fully coincides...with the claims of individuals.”<sup>7</sup> Thomas Jefferson also made a similar point in a letter from 1813, in which he stated, “Society may give exclusive right to the profits arising from [intellectual property], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done...without claim or complaint from anybody.”<sup>8</sup>

Many authors, including Lawrence Lessig, Glynn Lunney, and William Fisher, have since argued that if the government wants to serve the public good in learning and improving upon the past, then copyright, if it existed at all, should be brief and narrow, encouraging even

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<sup>6</sup> U.S. CONST, art. I, § 8, cl. 8.

<sup>7</sup> As quoted in Diane Leenheer Zimmerman, "The Statue of Anne and its Progeny: Variations Without a Theme," *Houston Law Review*, 47 (2010): 965-1011, p. 987

<sup>8</sup> Thomas Jefferson to Isaac McPherson, 13 Aug. 1813, in *The Founders’ Constitution* ed. by Philip B. Kurland and Ralph Lerner, 5 vols. (Chicago: University of Chicago Press, 1987) 3:42

geniuses to develop newer work after such a term expires.<sup>9</sup> Further, an argument for natural rights and creative control is moot if any copying of the work in question does not impede the creator's own use of that work. Even judicial opinions have historically favored public good over author's rights. "The copyright law ... makes reward to the owner a secondary consideration."<sup>10</sup>

Copyright is frequently discussed in the extant literature as it relates to the competing notions of incentives and access. In his article "Reexamining Copyright's Incentives-Access Paradigm," Glynn Lunney notes that incentivizing authors to produce new works must in some way, most often economically, limit the ability of the public to access such works.<sup>11</sup> Lunney and others have argued in the literature concerning copyright legislation that such incentives and proprietary protections provided to authors since the original copyright statute in 1790 are unwarranted, and are at best "superficially attractive"<sup>12</sup> in justifying the expansion of copyright. But in order to best understand the current protections afforded to copyright owners, it is necessary to first briefly recap the history of copyright law in America, tracking the major changes made to copyright's scope and duration.

## **Copyright: Origins and Evolutions**

Statutory copyright itself was born with the Statute of Anne in Great Britain, the first statute to provide copyright protections by the government instead of by private parties. Enacted

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<sup>9</sup> Lessig, arguing against copyright term expansions in the Supreme Court case of *Eldred v. Ashcroft*, prepared a brief signed by seventeen economists, including Ronald Coase, James Buchanan, Milton Friedman, Kenneth Arrow, and George Akerlof, stating that extending the terms of existing copyrights would do nothing to increase incentives to create. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York, Penguin: 2006): p. 166

<sup>10</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)

<sup>11</sup> Glynn S. Lunney Jr., "Reexamining Copyright's Incentives-Access Paradigm," *Vanderbilt Law Review* 49 (1996): 483-656.

<sup>12</sup> *ibid*, p. 655

by Parliament in 1710, its full title was “An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasors [sic] of such Copies during the Times therein mentioned.” This was originally done because it was seen as important for government to offer some form of exclusive rights in expressive works. Otherwise, the argument goes, without any kind of financial incentive, the literary world would remain stagnant, as authors would fear that others, primarily publishers, would reap the benefits of their intellectual labor by freely copying literary works. As the preamble to the Statute of Anne asserted, “Printers Booksellers and other Person have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed reprinted or published Books and other Writings without the consent of the Authors or Proprietors of such Books and Writings to their very great Detriment and too often to the Ruin of them and their Families...”<sup>13</sup> A tad hyperbolic, to be sure, but in an age before digital distribution, the high cost of printing, binding, and distributing led to a concentration of those capabilities in the hands of a few publishers. In Britain at the time of the Statute of Anne’s passing, royal entitlements also concentrated this power even more, so that in effect the Stationer’s Company held a monopoly on the book trade.

The Statute of Anne had the stated purpose of promoting learning, but was in actuality more a trade-regulation statute to break the monopoly of the Stationer’s Company for printing and selling books. “By providing coverage that was narrow (owners were protected only against unconsented wholesale reproduction of books) and of brief duration, proprietors would get enough protection to make the publishing business attractive but not so much that they could damage the public welfare through sustained high prices or lengthy periods of control.”<sup>14</sup> Such

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<sup>13</sup> Great Britain, *Statutes at Large*, 8 Anne, c. 19 (1710)

<sup>14</sup> Zimmerman (2010), p. 974

lengthy periods of control are exactly what ends up happening with American copyright legislation, although it takes several hundred years to get to that point.

Opinions about copyright in the American colonies during the latter half of the 18th century were heavily informed by an admiration for and jealousy of Britain's literary heritage. The early patriotic view, as expressed by Bugbee, was that the “dignity of the young republic required a crown of literary achievement.”<sup>15</sup> In trying to foster an environment for such literary achievement, then, early American intellectuals such as Thomas Paine argued for legislative action that would create stronger financial incentives for the creation and controlled distribution of intellectual works. In his *Letter to the Abbe Raynal*,<sup>16</sup> Paine stated “that the state of literature in America must one day become a subject of legislative consideration. Hitherto it hath been a disinterested volunteer in the service of the Revolution, and no man thought of profits; but when peace shall give time and opportunity for study, the country will deprive itself of the honour and service of letters, and the improvement of science, unless sufficient laws are made to prevent depredation on literary property.” And when such legislation was eventually passed, much of it was founded on the example set by British copyright law and the Statute of Anne in particular.

Other American citizens who were early champions for copyright included Andrew Law and Noah Webster, although these two gentlemen were not necessarily interested in securing copyright protection for their fellow man. Instead, both of these men sought private copyrights, and petitioned the Connecticut legislature for such. Law received a private copyright for a collection of psalmody in October, 1781, while Noah Webster specifically made request “for a

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<sup>15</sup> B.W. Bugbee, *The Genesis of American Patent and Copyright Law*, (Washington, D.C.: Public Affairs Press, 1967): p. 104

<sup>16</sup> Full title: *Letter to the Abbe Raynel, on the Affairs of North America; in which the Mistakes in the Abbes Account of the Revolution of America are Corrected and Cleared up (1782)*, collected in *Political Works of Thomas Paine (London, 1817)*

law to secure to me the copy-right of my proposed book”<sup>17</sup> on October 24, 1782. The proposed book was Webster’s Dictionary, titled *The Grammatical Institute of the English Language*, a work of such monumental undertaking that to deny it statutory protection would have bordered on cruel.

The petitions for private copyright eventually led to a general copyright statute in Connecticut, passed in January, 1783. This “Act for the Encouragement of Literature and Genius” in turn set a precedent that the other states eventually followed, again with help from the direct petition of Webster, who engaged in a long series of correspondence with James Madison throughout the years. In a letter dated July, 1784, Webster wrote to Madison with the request that Madison would consider adopting a copyright statute in Virginia. “*The Grammatical Institute of the English Language* is so much approved in the Northern States, that I wish to secure to myself the copyright in all.”<sup>18</sup> He goes on to write that the periods of statutory protection in states with a general copyright law ranged from 14 to 20 years, with some (like Connecticut), offering to renew statutory protection for an additional 14 years. He also notes the inherent reciprocity common to all these statutes: “[A]ll give the inhabitants of other States, the benefit of the laws, as soon as the State where the author is an inhabitant shall have passed a similar law.” But again, Webster’s notion to pass a general copyright law was secondary to his own personal interest: “[I]f the Legislature shall not think proper to pass a general Law; be pleased to present a petition in my name for a [particular] law securing to me & my heirs & assigns the exclusive right of publishing & vending the above mentioned works in the State of Virginia for the term of twenty years - or for such other term as the Legislature shall think proper.” It is possible that from this correspondence, Madison began to see the benefits of a general copyright statute in encouraging

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<sup>17</sup> Bugbee (1967) p. 107

<sup>18</sup> Letter from Noah Webster to James Madison, Hartford, Connecticut (1784), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org)

authors to create and publish intellectual works such as Webster's book, for the Virginia Act was passed on October 17, 1785, with a statutory term of 21 years. This act also set penalties for the breach of copyright at double the value of copies reprinted without permission.

Eventually, each state had passed laws granting statutory protection with New York being the last on April 29, 1786. Several of these state statutes on copyright were passed in response to the Continental Congress' resolution "recommending the several States to secure to the Authors or Publishers of New Books the Copyright of such Books."<sup>19</sup> Eight of these state statutes directly defined the purpose and reason for copyright. The purpose was to secure profits for the author, and the reason for that was to encourage authors to create new works that would encourage learning. If this is interpreted literally, then access to those works, provided that access did not infringe on an author's ability to sell his own works, would be supremely important. But as Patterson states, the pragmatic reason was more simply to prevent piracy of printed works and provide order for the book trade.<sup>20</sup> However, eventually the author's rights must give way to the paramount rights of society, so that any monopoly on copyright must be limited in term.

The states could have theoretically continued to grant the security of copyright on a case-by-case basis, as was done for Webster and Law. Instead, the path was set for a national law that would define the statutory copyright terms afforded to any man seeking them. As Madison stated in his *Federalist Papers*, "The states cannot separately make effectual provision for [copyright]." A national consensus would have to be met, and so it was as the Constitutional Convention in Philadelphia began in May, 1787. Its fifth written proposal was to protect the works of authors

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<sup>19</sup> U.S. Copyright Office, *Copyright Laws of the United States of America 1783-1862*, 1 (1962)

<sup>20</sup> Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press, 1968): p. 183

and inventors, and this was unanimously accepted. On August 18, 1787, two sets of proposals regarding intellectual property were introduced at the Convention to revise the Articles of Confederation. The first was from James Madison, with nine proposed Congressional powers and the other by Charles Pinckney of South Carolina, who proposed 11 Congressional powers. There is some speculation that Pinckney possibly copied Madison in some of his proposals. His own contributions centered on patents, specifically the creation of a Federal power to issue patents of invention.<sup>21</sup> But it would be several more years before a Federal law was enacted regarding copyright, and the law passed separated the protections afforded to literary works versus inventive works.

On January 28, 1790, Aedanus Burke of South Carolina presented “a bill for securing the copy-right of books to authors and proprietors,”<sup>22</sup> which is notable for separating legislation having to do with inventive property versus literary property. Several different forms of bills for both patent and copyright made the rounds of legislature before President Washington signed a bill into law on May 31, 1790, providing a legal basis for a Federal copyright system, with a 14 year statutory term and the option to renew for an additional 14 years. Although this Federal copyright act was a step beyond private copyrights, the statutory protections it afforded were not granted automatically, as they are today. Instead, the act of 1790 stated that an author seeking statutory protection for his work was to deposit a copy of it with the clerk of the district court where he lived, in addition to sending a second copy to the U.S. Secretary of State within six months. The law also removed limitations on the author’s ability to set a market price for his work, which had been a standard part of copyright legislation previously, beginning with the Statute of Anne. On June 14, 1790, John Barry registered *The Philadelphia Spelling Book*,

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<sup>21</sup> Bugbee (1967) p. 126

<sup>22</sup> Bugbee (1967) p. 138

*arranged upon a plan entirely new*, with the District Court of Pennsylvania, making it the first book to receive statutory protection under the new law.

It is worth noting that while the second section of the Federal Copyright Act defined a potential infringement of a copyright as selling a work which infringed a copyright, this did not apply to foreign works, as section five explicitly permitted the piracy of such. “That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.”<sup>23</sup> So Americans were free to copy and distribute the literary works of Britain and other nations without remunerating the authors. This makes clear the nationalistic tenor towards copyright at the time, and the patriotic interest in developing an American literary canon, but not necessarily a global literary canon.

In fact, a lack of official recognition for foreign copyrights existed for another century in America. According to historian James Barnes, the issue of international copyright was of little concern to America in the years following the Napoleonic wars, and most literature was imported from England.<sup>24</sup> But since this importation was initially of physical books bought from English publishers, there was obviously less of an impetus to create any statutory protections for the intellectual works themselves. Manuscripts from England did begin to find their way into pirated published books in America, though, and a fervor started to grow for the creation of an Anglo-American copyright treaty.

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<sup>23</sup> Library of Congress: 1 Stat. 124 (1790) Sec. 5 Copyright Act, New York. Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org)

<sup>24</sup> James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854*, (Columbus: Ohio State University Press, 1974): p. 49



However, American citizens seeking reform to copyright legislation in the 19th century still tended to be motivated by national, not international, interests. On February 3, 1831, “An Act to Amend the Several Acts Respecting Copyright” was signed, and it extended the term of copyright for American authors from 14 to 28 years with an option to renew for an additional 14. Also, if the author died, his widow or children could apply for the extension. Congressman Guilian C. Verplanck, who was considered a member of the American literati, was instrumental in the drafting and passage of this law. Another member of the House of Representatives, William W. Ellsworth, who also championed the term extensions present in the act, likely did so not entirely for patriotic reasons, but for familial ones. Ellsworth was married to the eldest daughter of Noah Webster, a man who had sought copyright protections for his spelling books since 1783, and continued to do so more than 50 years later. While waiting on the President’s signature of the passed bill, Webster wrote, “This law will add much to the value of my [literary] property,”<sup>25</sup> demonstrating the source of his own, chiefly financial, interest in statutory copyright protection.

Court decisions at the time also solidified the treatment of copyright as a statutory protection. Specifically, the landmark case of *Wheaton v. Peters*<sup>26</sup> firmly established the principle of copyright as a statute. The origin of the case was a dispute between two men, Richard Peters and Henry Wheaton, over the right to publish the decisions of the U.S. Supreme Court. Peters succeeded Wheaton as reporter for the United States Supreme Court in June 1828. He planned to publish, or more accurately re-publish, court decisions that were reported by his predecessors, including Wheaton. Wheaton and his publisher, Robert Donaldson, filed a bill in the Pennsylvania Circuit Court against Peters and his publisher, John Griggs, seeking an

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<sup>25</sup> Barnes (1974) p. 51

<sup>26</sup> *Wheaton v. Peters* 33 U.S. (8 Pet.) 591 (1834)

injunction. Judge Joseph Hopkinson delivered the opinion in circuit court that because Wheaton had not secured statutory protection for his previous publishing of court decisions, he was not entitled to government protection now.

The case was appealed, and the Supreme Court decided in January, 1834, that opinions of the court could not be copyrighted. Justice John McLean, in delivering the opinion of the majority, stated, “It may be proper to remark, that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”<sup>27</sup> The majority held that there was no common law copyright at the federal level, nor the state level (Pennsylvania), nor even in England. The second main point of the case was that requirements for securing copyright under the Copyright Act were mandatory and must be strictly followed to ensure statutory protection.

Dissenting opinions in the case stressed that an author should have natural rights that automatically protect his property as a matter of justice and equality. So the premises of the majority and dissenters were at polar opposites, with the majority emphasizing the interest of the public, and the dissenters that of the individual author. In the end, copyright was ultimately defined as a statutory grant of a monopoly for the benefit of the author, and not a product of common law. This case set the assumptions for copyright in America as favoring the public domain and the public’s right to access over the author’s interests, although those were not excluded entirely. What authors were primarily protected from before that, and what was misunderstood as common law, was the unauthorized publication of an unpublished manuscript, which is more a right to privacy than a copyright. The court also referred directly to the decision

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<sup>27</sup> (33 U.S. (8 Pet.) 591, 668) However, marginal notes, abstracts, index notes, and other intellectual works created by the court reporter or others could indeed be copyrighted.

in England's House of Lords in 1774 as the ruling precedent, and declared that by the statute of 1790, Congress did not affirm an existing right, but created a right.

The Supreme Court's decision in *Wheaton v. Peters* made it difficult for those arguing for an international copyright agreement, since the Federal government was unlikely to grant statutory protection to foreigners, and thus any previously published foreign manuscripts were fair game for American publishers. Still, in the fall of 1837, a select committee of six in the Senate was formed by Senator Henry Clay of Kentucky to discuss the issue of securing copyrights for foreign works. Clay wanted an international copyright agreement, but President James Buchanan was against it, with a stated reason that would surely have made Webster bristle: "But to live in fame was as great a stimulus to authors as pecuniary gain; and the question ought to be considered, whether they [British authors] would not lose as much of fame by the measure asked for, as they would gain in money."<sup>28</sup> The implication was clear: American authors should be financially incentivized with statutory protection, but foreigners should be happy just to be known by the American public.

Other prominent opponents of international copyright, such as author P.H. Nicklin, made the argument that British books were more expensive than American pirate versions, and thus an unfair financial burden on American citizens.<sup>29</sup> In his book "Remarks on Literary Property," Nicklin wrote that "...an immense amount of capital is employed in publishing books, in printing, in binding, in making paper and types, and stereotype plates, and printing presses, and binders' presses and their other tools; in making leather and cloth, and thread, and glue, for binders; in copper plates, in copyrights, and in buildings in which these occupations are conducted."<sup>30</sup>

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<sup>28</sup> *Register of Debates in Congress* 24th Cong. 2nd Sess., XIII (2 February 1837), pp. 670-1

<sup>29</sup> The American book trade, like other businesses, also suffered as a result of a national depression from 1837-1843.

<sup>30</sup> P.H. Nicklin, "Remarks on Literary Property," (1837)

Nicklin's knowledge of publishing came from his long-term business relationship with the firm of Carey & Lea, a Philadelphia publisher that thrived from the reproduction of English works. Nicklin's rhetoric may have emphasized the public good by keeping prices low, but like Webster, his own financial self-interest played a role in his position on international copyright.

Senator Clay introduced a copyright bill that would include an Anglo-American copyright agreement three times between 1838 and 1842, but each was unsuccessful in securing congressional support. By 1842, it was clear that an international copyright agreement would not be passed any time soon, despite the efforts of authors like Charles Dickens, who toured America in 1842 in part to promote the cause. While some derided Dickens for being insensitive to the economic plight of Americans during the then-current depression, Senator Clay remarked that American publishers of foreign works were disingenuous about the costs of remunerating Dickens and other popular British authors: "[The book printers] bring forward highly exaggerated statements both of the extent of Capital employed and the ruin that would be inflicted by the proposed provision for Foreign authors."<sup>31</sup>

The Copyright Act was revised again in 1870,<sup>32</sup> but its major change to existing law was that the Librarian of Congress was made the official copyright officer, and two copies were required to be filed with this person no later than ten days after publication in order to secure statutory copyright protection. This Copyright Act still allowed for the free publication of foreign works. This changed in 1891, thanks in part to efforts by the Authors' and Publishers' Copyright Leagues. Congress introduced a provisional statute to copyright law giving the protection of copyright to the works of foreign authors and artists. By that time, American authors and publishers had their own concerns about the strength of American copyright abroad, and several

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<sup>31</sup> Barnes (1974) p. 73

<sup>32</sup> Act of July 8, 1870, c. 230, 16 Stat. 198

European nations were prepared to “extend reciprocal protection to the productions of Americans.”<sup>33</sup> Clearly, it took the threat of a negative economic impact abroad for American copyright holders to acquiesce to an Anglo-American copyright treaty.

More than 200 copyright bills had been introduced in Congress by 1904, prompting the Register of Copyrights to state, “The [copyright] laws as they stand fail to give the protection required, are difficult of interpretation, application, and administration, leading to misapprehension and misunderstanding, and in some directions are open to abuses.”<sup>34</sup>

Unfortunately, this was not about to change anytime soon, and the copyright laws of the 20th century would prove to be even more misunderstood than those of the 18th and 19th centuries.

## **20th Century Expansions**

The Copyright Act of 1909<sup>35</sup> established a term of twenty-eight years with a like renewal term, for a total fifty-six year term limit on copyright. This act also furthered the scope of the statutory protections and limited monopolies provided by law, with copyright holders granted the exclusive right to publish or re-publish, translate, adapt, or perform intellectual works. An earlier form of the bill included a common law clause ““that subject to the limitations and conditions of this Act copyright secured hereunder shall be entitled to all the rights and remedies which would be accorded to any other species of property at common law,”<sup>36</sup> but this was not enacted in the law itself. However, before publication, the author of a copyrightable work now explicitly

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<sup>33</sup> G.H. Putnam, *The Evolution of the Copyright Law*, (Gramercy Park, N.Y.: National Arts Club, 1909):4

<sup>34</sup> U.S. Copyright Office Bulletin No. 8, *Copyright in Congress 1789-1904*

<sup>35</sup> Act of March 4, 1909, c. 320, 35 Stat. 1075, 17 U.S.C § 1 et. seq.

<sup>36</sup> R.R. Bowker, *Copyright, its History and its Law: Being a Summary of the Principles and Practice of Copyright with Special Reference to the American Code of 1909 and the British Act of 1911*, (Boston: Houghton Mifflin, 1912): p.44

received common law protection and could seek damages by civil action from any unauthorized publisher. In addition, the Copyright Act of 1909 allowed for advertising labels and merchandise tags to be copyrighted as well. All of these amendments to copyright law have encouraged the point of view that copyright is an entitlement or natural right, and not a privilege granted by the state. The view of copyright as a natural right of man has also led to cultural shifts that helped to change the legal definition of trademarks to include intellectual property rights. These shifts have traditionally aided publishers and corporations more than individual authors, which is at direct odds with the intentions of the Constitutional Framers in limiting monopolies.

The Copyright Act of 1909 still required affirmative notice on the part of the author to gain statutory protection, but this changed as the view of copyright as entitlement gained in popularity throughout the 20th century. Authors who publish today, under the 1976 act, enjoy automatic statutory protection, for a term of life plus 50 years. The Act also created a 75 year statutory term for anonymous works, pseudonymous works, and works made for hire, so that an individual seeking to reproduce a creative work would have to prove that it was in the public domain, but potentially be unable to identify who owned the copyright. These changes to copyright had the unintended consequence of automatically providing statutory protection to authors who are not motivated by incentives. As Brad Greenberg points out in his comment on instant authorship<sup>37</sup>, returning to a system where authors must opt-in to receive a copyright on works would unnecessarily hinder authors who are incentivized by the current regime. However, if an author chooses an option of copyleft, creative commons, or some other form of copyright opt-out, there is no hindrance to them doing so, financial or otherwise. And there is potential for abuse in either an opt-in or opt-out copyright system, at least in terms of the continually shifting

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<sup>37</sup> Brad A. Greenberg, "More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age." *UCLA Law Review* 59, no. 4 (2012): 1028-1074.

balance between legislation and expectation of statutory protections. As authors are further incentivized, they “respond to continually increasing expectations, which Congress supports through periodic expansion of copyright.”<sup>38</sup>

And that periodic expansion continued with the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, through which Congress lengthened statutory protection to a term of life of the author plus 70 years.<sup>39</sup> Publishers and corporations that solicit works made for hire gained even greater statutory protection of intellectual property, with terms lasting as long as 95 years. The combination of longer terms, automatic statutory protection, and broader rights of monopolistic exploitation has thus led to an “evolution of copyright from little more than a prohibition on literal duplication to broader and more sophisticated concepts of intellectual plagiarism.”<sup>40</sup> This is most evident in the last century in how the terms of art used in defining the role of copyright in America have changed. Fair use, a concept which is derived from the idea of copying a significant portion of the original work for non-commercial use, is often inexorably linked by copyright law to the concepts of plagiarism and piracy. Although it is unethical to plagiarize another work by copying a whole or part of the work without citation, legal protections against plagiarism must be balanced against whether a work is strictly copied, derivative of an original work, or so transformative of another work as to be fairly interpreted as an original work itself. If this spectrum is properly considered, then copyright laws will protect only fixed creative works from undue duplication, and not grant any author or copyright owner a monopoly on ideas expressed creatively. Such a cultural monopoly would be anathema to the

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<sup>38</sup> *ibid.*, p. 1072

<sup>39</sup> Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827,

<sup>39</sup> 2827 (amending 17 U.S.C. § 302)

<sup>40</sup> Abrams (1983), p.1133

stated goals of copyright law, where the stated purpose is only to provide a trade regulation for a temporary economic monopoly.

Copyright law, then, was not intended to treat ideas as property, nor grant proprietary interest in such. No common law recognizes the creative interest of the author, and statutory protection is only granted to the copyright holder. So when a publisher is the owner of a copyright, authors do not receive creative interest protections, and do not possess any legal rights to determine how their ideas are used. An author's economic and creative interests are thus stymied. Despite the stated goals of the founding fathers in drafting American copyright laws for the promotion of learning, copyright itself is basically no more than a trade-regulation device designed to protect against competing economic exploitation of intellectual property. As Patterson states, one of the greatest ironies of copyright law is that "in a society where there was no freedom of ideas, copyright protected only against piracy; in a society where there is freedom of ideas, copyright protects against plagiarism."<sup>41</sup> And legal protection of ideas, or intellectual property, unnecessarily restricts not just access to those ideas, but also the freedom of expression that exists as a principle of liberty in America.

This threat to freedom for expression answers the question of why changes in copyright law is an issue relevant to communication scholars. As Stephen A. Smith states in "The Import of Three Constitutional Provisions," the Constitutional Framers were committed to the discovery and production of new ideas, and intended a wide diffusion of ideas and knowledge.<sup>42</sup> Madison even wrote in his "Essay on Monopolies" that government should have "a right to extinguish the monopoly [of patents and copyrights] by paying a specified and reasonable sum."<sup>43</sup> And this

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<sup>41</sup> Patterson (1968) p. 225

<sup>42</sup> Stephen A. Smith, "Promoting Political Expression: The Import of Three Constitutional Provisions," *Free Speech Yearbook*, 27 (1989): 1-32.

<sup>43</sup> As quoted in Smith (1989): p. 24



proposed governmental protocol to extinguish a copyright is contrasted by the “crown copyright” of Britain and its commonwealth nations.

Crown copyright, a result of legislation regarding copyright in Britain in 1911, 1956, and 1988, grants the British government a perpetual common law copyright for works created or published under the direct supervision of the Crown.<sup>44</sup> Such a system allows for the government to potentially censor and control perceived seditious ideas. However, in America, with the decision of *Wheaton v. Peters* that prevented a copyright from being attached to the opinions of the court, the function of copyright was shown not as an instrument of control, but for the spread of knowledge and ideas, which is anathema to the near-perpetual statutory protections granted to publishers in this country today.

Another frustrating aspect of extended statutory protection for economic reasons is that the limits on freedom of expression and creativity do not generally result in an economic boon for copyright holders. As Justice Breyer remarked in a dissenting opinion during the case of *Eldred v. Ashcroft*, close to 98 percent of copyrights are worthless after about half a century<sup>45</sup>, so to continue to grant statutory protection to those works is an unnecessary impediment to public access. And an impediment to public access is an impediment to learning, the most clearly stated purpose of all American copyright legislation for more than 200 years.

Unfortunately, it is difficult to prove that the public’s need to access works is endangered by overly-broad copyright protections. When Congress is lobbied by corporations seeking ever-greater terms of copyright, this does not appear to overtly interfere with the production of new

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<sup>44</sup> Ted Tjaden, "Chapter 4: The Impact of Crown Copyright on Access to Law-Related Information" in *Access to Law-Related Information in Canada in the Digital Age*. (University of Toronto, 2005)

<sup>45</sup> Greenberg (2012), p. 1072

works or create undue monopolization.<sup>46</sup> Therefore, each new piece of copyright legislation continues to expand the term of copyright, as well as ensuring a system where an author is legally entitled to the full value associated with an authored work. However, public access is not the only risk associated with broad copyright terms. There is also the possibility that broad copyright terms do not “promote the progress of science and the useful arts.”

Lunney argues that the variety of new works of authorship that comes as a result of broad copyright protections is not inherently valuable to society. From a legal and economic perspective, there must be justification for devoting resources towards creating and enforcing statutory copyright protections, since society does not benefit from the production of additional works created because of an inability to access existing works that would serve the same purpose. Under the current system of copyright, those who unlawfully access or distribute copyrighted works are infringing the statutory copyright of an author and are subject to fine or imprisonment.

Granting a right to access and use materials that would otherwise result in infringing an author’s copyright is the ostensible purpose of the fair use doctrine. But William Fisher, in his article “Reconstructing the fair use doctrine,” states that there is an incoherence in how fair use is used in legal settings.<sup>47</sup> Similar to Lunney, Fisher argues that copyright’s present legal form is economically inefficient, and that the courts can best improve that efficiency through a revised litmus test for whether a use of a copyrighted work is considered fair or not. The crux of Fisher’s litmus test is that a producer of a work which has been infringed must prove “substantial harm”<sup>48</sup> resulting from the infringement. However, this substantial harm is too broadly defined, so that an

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<sup>46</sup> Lunney (1996), p. 655

<sup>47</sup> William Fisher III, “Reconstructing the Fair Use Doctrine,” *Harvard Law Review* 101, no. 8 (1988): 1661-1795.

<sup>48</sup> *ibid.*, p. 1782

application of fair use in legal doctrine would remain unpredictable even with Fisher's suggested changes.

The continuing role of copyright in America is more predictable, at least in general terms. It is unlikely that legislation will be passed that curtails existing statutory protections or decreases copyright terms. If anything, history shows that these elements will only increase, with the resulting feedback loop creating a greater sense of copyright as entitlement or a natural right, rather than a statutory right with the original intention of temporarily incentivizing authors with the right to exclusively copy their works for financial gain.

Another factor that must be considered is the continued advance of technology, which will continue to undermine copyright's promise of exclusivity in distribution. Writing about copyright in 1962, Lyman Ray Patterson wrote, "Technology outpaced the law."<sup>49</sup> That statement is even more relevant in today's world, where instant authorship and digital copying and distribution of almost any possible intellectual expression is the norm.

There is no doubt that the Internet provides an efficient platform for the instantaneous worldwide publication of an intellectual work. As the architecture of the Internet exists today, there is no distinction made between whether information that is shared is subject to copyright or not. But that may not always be the case, and future research should consider what the implications are for changes in the law that will impede the Internet's ability to share all information without prejudice, or to impose stricter punishments for those who promote the free flow of information without regard to copyright. As Lawrence Lessig states, "The law's role is less and less to support creativity, and more and more to protect certain industries against

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<sup>49</sup> Patterson (1968), p. 214.

competition.”<sup>50</sup> But protecting against competition creates the very problem that copyright was originally meant to eliminate: the danger of a permanent monopoly on information by limited proprietary interests. This is how changes made to copyright law may ultimately disregard the original purpose of copyright, and the next chapter explains what the potential normative future of copyright might be.

## **Chapter 2**

### **Normative Futures and Public Domains Access**

The ability to instantaneously distribute information or ideas without restricting access to the same at their point of origin is one of the great gifts of technology and the Internet in particular. But the notion behind that technology is not itself new. In a letter to Isaac McPherson from 1813, Thomas Jefferson stated, “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”<sup>51</sup> Short of competing for profits with the original author of a fixed intellectual work, then, no law on copyright should infringe on an individual’s ability to use or access a copyrighted work in any way he or she may see fit. This was the intention of the Constitutional Framers in drafting a copyright clause, and it is what should continue to motivate legislators and the courts in determining what is the appropriate scope, duration, and control of copyrights in America today.

The changing nature of America’s economy over the past several decades serves as one reason for the continuing changes to copyright law in that same time span. As economic scholars

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<sup>50</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York, Penguin: 2006): p. 17

<sup>51</sup> Thomas Jefferson, vol. 6 (Andrew A. Lipscomb and Albert Ellery Bergh, eds., 1903), 330, 333-34

have shown, in the past half a century the United States has shifted its economic focus from service industries to information and cultural industries.<sup>52</sup> The development and widespread adoption of the Internet has aided in this paradigm shift, which is felt in information economies such as the financial sector and software development, and in the cultural economies of music, film, and literature. As Yochai Benkler states in his book *The Wealth of Networks*, “The basic output that has become dominant in the most advanced economies is human meaning and communication.”<sup>53</sup> Benkler also notes that the Internet could serve as a networked public sphere, with the potential for all human artistic and informational expression freely available to anyone that can access the network. No further changes to the Internet’s architecture are necessary for it to exist as a complete cultural commons, although explicitly positioning it as such undermines existing legal doctrines of copyright and intellectual property. However, the rights of humans to freely access this cultural commons should be more important than the economic interests of a handful of managed firms that traffic in copyrighted information. Therefore, the rule of law must be used to protect the advantages granted by the Internet’s open architecture, rather than used to cripple that architecture for proprietary interests.

This is not to say that the government should no longer grant the limited monopoly of copyrights, but there should be a balance between reward and entitlement closer to the original length of 14 years, rather than the current length of close to a century. And after a copyright expires, creative works and copyrights should enter the public domain, a concept that was created as an outcome of England’s case of *Donaldson v. Beckett* in 1774, wherein legal control of creative works by a particular party (in short, a monopoly) expires and culture passes into

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<sup>52</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven, CT: Yale University Press, 2006): p. 32

<sup>53</sup> Benkler (2006), p. 32

what Lawrence Lessig refers to as a “competitive context, not a context in which the choices about what culture is available to people and how they get access to it are made by the few despite the wishes of the many.”<sup>54</sup> Diversity in choice provided by the Internet is beneficial for society, as it provides consumers with the opportunity to choose content actively rather than accept limited offerings by distribution channels such as an FM radio station, movie chain rental store like Blockbuster, or Barnes & Noble. In this way, a healthy public domain encourages cultural diversity, which John Stuart Mill observed in *On Liberty* as having cumulative effects: the more choices individuals have, the more they must personally decide what to think, developing what he called “mental and moral faculties.”<sup>55</sup>

The idea of the public domain has always been present in the United States of America, with the Constitution drawing a distinction between actual property and intellectual (creative) property. For actual property, the Fifth Amendment includes a “Takings Clause” that requires the government to pay “just compensation” for the privilege of taking someone’s property. On the other hand, the Constitution requires that creative property must be released into the public domain after a “limited time” (again, the original statutory provision was 14 years), with no compensation for what a copyright holder might perceive as a taking of personal property. But increasing copyright term limits, as well as the high burden of entry into illegal publication for those who would flaunt copyright, has kept copyright holders satisfied despite the distinction between how the government treats these two kinds of property. However, the Internet and digital technologies have since minimized or outright removed many of the architectural burdens on publication and redistribution, to the point where a digital copy might be an actual tangible

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<sup>54</sup> Lessig (2006), p. 71

<sup>55</sup> John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green, 1869)

property, but its physical presence is so miniscule and so easily copied that it is rarely thought of as a real object or subject to limitations on duplication.

Before the advent of digital distribution, audiences had to rely primarily on the physical redistribution of used books if they wanted to read a work that was out of print and therefore difficult to access. Books tend to go out of print very quickly, most within the space of a year, and of books published between 1927 and 1946, only 2.2 percent were in print at the turn of the 21st century.<sup>56</sup> Although not a perfect system, one of the ways that books are guaranteed a second life even when out of print is the first sale doctrine. The first sale doctrine is a result of the Supreme Court case *Bobbs-Merrill v. Straus* (210 U.S. 339 (1908)), wherein the court decided that “[O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.” (id at 350). At least for printed works, then, this doctrine aids in the spread of culture and access to creative works, and the limited monopoly of copyright does not grant the owner absolute control over pricing and dissemination of a work.<sup>57</sup>

Laws such as the first sale doctrine apply only to physical goods, which are not easily copied, and not to digital works, which are easily duplicated, but perhaps not legally so.<sup>58</sup> Today, digital duplication could easily supplant the first sale doctrine as a way to keep all culture and creative expression constantly “in print,” but copyright owners have legitimate concerns about

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<sup>56</sup> R Anthony Reese, “The First Sale Doctrine in the Era of Digital Networks,” *Boston College Law Review* 44 (2003): 593 n. 51.

<sup>57</sup> An exception to the first-sale doctrine is that owners of phonorecords or other musical artifacts are forbidden from renting it to the public for “commercial advantage” without the permission of the owner of the copyright. 17 U.S.C. § 109(b). Also see H.R. Rep. No. 987, 98th Cong., 2d sess. (1984).

<sup>58</sup> Sherwin Siy, “Copies, Rights, and Copyrights: Really Owning Your Digital Stuff,” *Public Knowledge*, June 27, 2013, accessed July 4, 2013, <http://www.publicknowledge.org/copiesrightscopyrights>

what this perpetual second life would do to the market for creative works. As Brewster Kahle, creator of the Internet Archive (archive.org) states, there are about 26 million known different titles of books, 3 million recordings of music, and close to 2 million movies that have ever been released. And as large as those numbers are, it is the belief of Kahle that “universal access to all knowledge is within our grasp,” and everything ever meant for distribution could be made available to anyone in the world (with Internet access).<sup>59</sup> This is the ideal of the cultural commons, a universal database free to use and transform in ways that serve the public good. But this universal access would have to come at the price of changes in copyright laws that are opposed by owners benefiting from the current system.

The punitive measures imposed for breaking copyright laws afford copyright owners extreme measures of control in ensuring the continuation of the current system. Those who dissent face potentially tragic consequences. A recent example is the case of Aaron Swartz, who was partially responsible for the creations of RSS, Creative Commons, and was the cofounder of Demand Progress, a technology policy activist group. Swartz committed suicide in January, 2013, while facing charges that could have resulted in 35 years in jail and a \$1 million fine for “allegedly hacking into a Massachusetts Institute of Technology network and downloading millions of scholarly articles from the JSTOR subscription service.”<sup>60</sup> Swartz wanted to make the articles available free of charge as an act of nonviolent protest against current copyright laws.

“New technology, instead of bringing us greater freedom, would have snuffed out fundamental rights we'd always taken for granted,” Swartz said in a 2012 condemnation of the

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<sup>59</sup> Brewster Kahle, “A Free Digital Library,” *TED Talks*, December 2007, accessed August 15, 2013, [http://www.ted.com/talks/brewster\\_kahle\\_builds\\_a\\_free\\_digital\\_library.html](http://www.ted.com/talks/brewster_kahle_builds_a_free_digital_library.html)

<sup>60</sup> Grant Gross, “Lawmakers Pledge to Change Hacking Law During Swartz Memorial,” *PC World*, February 5, 2013, accessed August 10, 2013, <http://www.pcworld.com/article/2027149/lawmakers-pledge-to-change-hacking-law-during-swartz-memorial.html>



Stop Online Piracy Act,<sup>61</sup> and this quote sums up the 26 year-old's stance on information's role in society: it should be free and made readily available to all who want access to it.

Swartz was prosecuted under the Computer Fraud and Abuse Act, which does not differentiate between malicious crimes committed for profit and the liberation of information into the public sphere, according to Chris Soghoian, a technologist and policy analyst with the American Civil Liberties Union's speech, privacy and technology project.<sup>62</sup> Swartz's case was the most prominent recent example of broadly-defined laws being used to protect the copyrights of moneyed interests at the expense of the public dissemination of information.

Before digital technologies made such public dissemination as simple as cut and paste, court decisions favored the public's ability to literally cut and paste fixed creative works as a way to disseminate information. In a case that came before Bobbs-Merrill, that of *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894), the court determined that the owner of a particular copy had the "right to repair" and sell damaged books, which required duplicating damaged portions to make the work complete again.

Similarly, in *Kipling v. G.P. Putnam's Sons*, 120 F. 631 (2d Cir. 1903), the court decided that owners of a copy of a work could rebind and combine books into new anthologies and sell those copies. These cases all indicate that the most important aspect to the court was not the mechanical act of reproduction, but what would happen to the market. If the number of copies hasn't increased, according to these rulings, then there is no harm to the copyright holder.

From this, Sherwin Siy, the VP for legal affairs for the Public Knowledge group, proposes the hypothetical device of a fax-shredder that would create a telecommunicated copy of

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<sup>61</sup> Verena Dobnik, "Reddit Co-founder Dies Weeks Before Trial," *Stuff*, January 14, 2013, accessed July 18, 2013, <http://www.stuff.co.nz/technology/8174527/Reddit-co-founder-dies-weeks-before-trial>

<sup>62</sup> Dobnik, "Reddit Co-founder Dies."

a document as it destroys the original fed into the machine.<sup>63</sup> This device could potentially bring the publishing platform of the Internet and digital distribution back to a system similar to the one of paper printing and distribution, but this again represents an artificial limitation on what technology is capable of doing in regards to access. It is an interesting thought experiment, but ultimately misguided to create technologies that seek to enforce outdated laws, rather than modifying the laws to support the potential of technology for sharing and access.

### **A Generative System**

In direct opposition to the potential artificial monopoly of current technology to match outmoded publishing platforms is a completely open architecture that would allow for a universal cultural commons. The open architecture of the Internet and personal computers are, in the words of Harvard Internet Law professor Jonathan Zittrain, “solutions waiting for problems,” with no embedded functionality.<sup>64</sup> They are completely open and initially unregulated pieces of technology. In short, they are *generative*, a word Zittrain uses to describe what he views as a combination of adaptability and accessibility, the most important qualities of the Internet as originally designed. In Zittrain’s book *The Future of the Internet*, he compares examples of generative technology with applanicized technology, devices and systems that are meant to be used in a predetermined way that cannot be easily changed by the end user. Zittrain states that “the more useful a technology is both to the neophyte and to the expert, the more generative it

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<sup>63</sup> Incidentally, not unlike how transporter technology works in the science fiction series *Star Trek*.

<sup>64</sup> Jonathan Zittrain, *The Future of the Internet - and How to Stop It* (New Haven, CT: Yale University Press, 2008): p. 12

is,” with his primary example being the pencil, which is easy to master but difficult to leverage into an artistic career.<sup>65</sup>

Other factors contributing to something’s generativity are adaptability, accessibility, and transferability, but all of these factors also contribute to the double-edged sword of generativity, in that the systems it helps to create challenge and ultimately threaten existing systems that enjoy legal protection, such as owners of copyrighted works which are easily duplicated using generative PCs. Technology companies that were initially in the business of manufacturing and selling generative devices have changed their business model to create appliancized devices that allow for more economic growth, as is the case with Apple. Today, the iPhone is an appliancized device that does not allow the free movement of digital files through the system, nor can just anyone develop and install third-party software on it. This is in stark contrast to the company’s line of personal computers dating back to the Apple II, which allowed innovation and free movement of personal files by any end user.<sup>66</sup> The focus on creating appliancized devices endangers the right of access to intellectual and creative works by end users, which ultimately threatens the advancement of the cultural commons.

In much the same way as the terms are used for machines, *generative* networks foster innovation and disruption from all corners, while an *appliancized* network incorporates powerful existing features but regulates to the point that future surprise innovations are improbable, if not impossible. The Internet, with its lack of centralized global control, is a perfect example of a generative network, and that is the type of system that benefits everyone.

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<sup>65</sup> Zittrain (2008), p. 72

<sup>66</sup> Similar points were made by Jonathan Zittrain in his article “A Fight Over Freedom at Apple’s Core,” *Harvard Law School*, February 4, 2010, accessed August 15, 2013, <http://www.law.harvard.edu/news/2010/02/04-zittrain-apple.html>

“Generative systems are powerful and valuable, not only because they foster the production of useful things like browsers, auction sites, and free encyclopedias, but also because they can allow an extraordinary number of people to express themselves in speech, art, or code and to work with other people in ways previously not possible,” states Zittrain.<sup>67</sup> Therefore, generative systems work as cultural enhancers that utilize a society’s cognitive surplus in meaningful ways. Generative systems and the users who participate in them constantly refine and add value and novelty to the system, so that participation is creative and contributory, and not merely consumptive.

In addition, appliancized devices hurt not only the advancement of the cultural commons, but they also infringe on the property rights of individuals when new copyright regulations grant corporations proprietary interest in the objects they sell even after they are sold. In downloading many programs and files legally today, users often must agree to the End User License Agreement (EULA), which states “This software is licensed to you, not sold.” However, U.S. copyright statute 109 prohibits renting software, even though in the case of *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010), a man was held liable by the court for reselling software that he himself had bought second-hand and never installed on his own computer, so he had never even agreed to the EULA. What the courts have essentially empowered software companies to do is determine what is the legal use of software “licensed” to a user, so not only is there no right of first sale, but the interaction of the user with the software is subject to copyright infringement even if there is no duplication of the work in question.

When software companies sue a user for what they determine is not a normal use, the abnormal use might really be a result of the essential step defense, which is just the court’s way

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<sup>67</sup> Zittrain (2008), p. 42

of saying it is okay for a computer to make copies of a program or file automatically for the necessity of viewing that file (17 U.S.C. § 117). After all, it is difficult to create a digital recording in such a way as to make it impossible to copy or redistribute, since the recording must at some point “generate an unencrypted stream of data that can be interpreted by a sound system or screen.”<sup>68</sup> Again, this demonstrates the difficulty with treating digital files as real property, since the architecture of a personal computer automatically duplicates that property as a necessary step for access. Copyright owners such as software companies are then able to abuse this fact to seek an injunction if they are upset with how a user interacts with their software.<sup>69</sup> This was demonstrated in the case of George Hotz, an American hacker known for unlocking the iPhone and allowing it to be used with any wireless carrier. When Hotz similarly gained root access to his Sony Playstation 3 video game system and published the results, Sony sued him for breach of the Digital Millennium Copyright Act and Computer Fraud and Abuse Act, which have such broad language as to prevent a user from gaining unauthorized access to devices they have purchased.<sup>70</sup> The DMCA is ostensibly meant to protect copyrights, and in fact doubled the length of the federal copyright statute, but it was also a partially reworked piece of legislation meant to control access.<sup>71</sup> The DMCA thus allowed for an individual to be prosecuted for attempting to circumvent any access control on a piece of technology, independent of whether the technology controls access to copyrighted materials. In short, Hotz was found in violation of

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<sup>68</sup> William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford, CA: Stanford University Press, 2004): p. 87

<sup>69</sup> MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928 (9th Cir. 2010).

<sup>70</sup> Nilay Patel, “Sony Follows Up, Officially Sues Geohot and Fail0verflow Over PS3 Jailbreak,” *Engadget*, January 12, 2011, accessed July 8, 2013, <http://www.engadget.com/2011/01/12/sony-follows-up-officially-sues-geohot-and-fail0verflow-over-ps/>

<sup>71</sup> Title I of the DMCA was initially the “WIPO Copyright and Performance and Phonograms Treaties Implementation Act of 1998,” and stated that “no person shall circumvent a technological measure that effectively controls access.” Noted in Fisher (2004), p. 93

contributory copyright infringement for modifying the property he owned, even though he did not unlawfully duplicate copyrighted materials.

The ultimate result of creating and enforcing copyright laws that limit the actions of the individual in regards to manipulation of property, then, is to regulate the individual and censor both artistic and economic expression. For the benefit of empowering individuals and society to create better innovations and means of communication, laws like the DMCA and CFAA should be abolished to make way for an open public sphere made possible by generative systems.

A generative system is never complete, but it is possible to interrupt it, usually as a result of increased regulation, which occurs as a means of legally protecting interests that are challenged by generative systems. As Benkler writes, “Information, knowledge, and culture are central to human freedom and development,” but these elements of the cultural commons are not so relevant to organizations whose primary concern is economic growth.<sup>72</sup> Instead, these organizations favor *sustaining* innovations over *disruptive* innovations.

Sustaining innovations to technologies and markets do what is already being done, but better, while “disruptive” innovations offer advantages only to emerging markets. Since this is not the demand of mainstream consumers, and thus not financially dominant, industries are not quick to adopt disruptive innovations, nor show “*downward* vision and mobility,” according to Clayton Christensen, author of *The Innovator’s Dilemma*.<sup>73</sup> Again, Apple’s applanicized devices (such as the iPod and iPhone) are a good example. The initial development of and widespread adoption of mp3s as the popular form for listening to music, enabled by the ubiquitous file-sharing program Napster, was a disruptive innovation to the music business in the late 90s and

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<sup>72</sup> Benkler (2006), p. 1

<sup>73</sup> Clayton Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Cambridge: Harvard Business School Press, 1997)

early 2000s, but Apple's development of devices that could access a proprietary music retailer, iTunes, was a sustaining innovation. While users are able to connect iPods to PCs and transfer their own files to the device, iPods themselves can only directly access music files acquired through iTunes. Zittrain's warning on the subject is clear: "People do not buy PCs as insurance policies against appliances that limit their freedoms, even though PCs serve exactly this vital function."<sup>74</sup>

Copyright holders aligned with organizations like the RIAA and MPAA would prefer legal interpretations that regarded any digital transfer of a file as reproduction and not distribution. This would put a halt to the legal sale of any used media, and force every user to purchase digital media from the initial copyright holder. But increasingly, consumers don't purchase copies, they purchase access. So should users have the right to trade or sell this access to one another? Extrapolating from this idea of complete economic control of a creative work by a copyright holder, Siy notes, "We can imagine a system where you can pay one amount to read a book, another to have the ability to flip back a few pages, another amount to search the text, another amount to be able to cut and paste from it, and so on. Such a system seems at best tedious and at worst dystopian, but it's within the realm of technological possibility."<sup>75</sup> That sort of extreme hypothetical situation echoes what author Chuck Klosterman refers to as a technocratic police state, which he suggests people would be unable to resist if restrictive technology is the only available technology. "We've ceded control to the machines. The upside is that the machines still have masters. The downside is that we don't usually like who those

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<sup>74</sup> Zittrain (2008), p. 59

<sup>75</sup> Siy, "Copies, Rights, and Copyrights."

masters are.”<sup>76</sup> And while Klosterman’s role as a cultural essayist draws a more populist crowd than the academics who write about copyright, there are similarities in the theories about overly-broad copyright protections and what those mean for access of creative works.

The undermining of the first sale doctrine through technology and license agreements not only impedes access to creative works, it also emphasizes how creative property is distinct from property. With real property, one has ownership of a particular object, like a house, but not ownership of every recurring instance of a house. In copyright law, a "work" is the creative thing that the author made, and a "copy" of a work is a physical material object that embodies the copyrighted work, whether that is paper, CD, or the digital code defining a particular instance of a work. But with digital code, the physical object itself is so negligible, and the ability to duplicate it so easy, that many people view creating additional copies as a moral right, even if the law does not allow it. This is supported by polls of United States citizens cited by economist William Fisher, showing that between 40 and 56 percent of respondents believe file sharing of copyrighted materials is not immoral and that eventually the law would reflect that.<sup>77</sup>

So, on one side of the debate about copyright are corporate structures that seek greater legal protections against what they see as the threat of communication technologies which allow potentially unrestricted access to information and creative property. Those opposed to that theory include activists (such as Swartz) who believe that the rights of humanity to access information are instead threatened by draconian copyright laws. Either way, most forms of creative expression are now infinitely shareable goods thanks to the ability to digitally duplicate information at low-to-no cost. These infinitely shareable goods are, in the words of Yochai Benkler, nonrival resources that are not endangered, and are in fact emboldened, by social

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<sup>76</sup> Chuck Klosterman, *I Wear the Black Hat: Grappling with Villains (Real and Imagined)* (New York: Scribner, 2013): p. 270

<sup>77</sup> Fisher (2004), p. 3



sharing. However, information that is positioned as a nonrival cultural resource is also, consequently, a nonrival economic good. As Benkler states, from the point of view of society, enforcing copyrights leads to “inefficient underutilization of copyrighted information.”<sup>78</sup> However, one of the supporting arguments for copyright law that has existed since at least the framing of the United States Constitution is that authors might not contribute to the public sphere of knowledge if their natural rights are not protected. So a balance must be struck between protection for authors and the public’s right to freely access information, and in legal settings this balance has traditionally been the domain of fair use.

### **Fair Use**

The creation of increasingly broad protections for copyright may incentivize authors to contribute to the public sphere of knowledge, but certain protections also stifle creativity and artificially limit that same public sphere. This is the case with derivative rights, which grant copyright owners a monopoly not just on their own works, but also on works deemed to be transformations of the original work. With these protections, an author is assured that someone trying to adapt their book into a movie, for example, must seek that original author’s permission before doing so. Which at one end of the spectrum seems fair, but at the other end, derivative rights threaten even the notion of quoting passages from one book in a new one by defining all such “cutting and pasting” as transformative of the first book, and therefore subject to regulation and possible injunction. This leaves open the interpretation of contemporary copyright as a system that can be abused to limit or otherwise regulate free speech, since it could be seen as an infringement of copyright to even respond to an original work.

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<sup>78</sup> Benkler (2006), p. 36

Those who argue against the possibility of such a totalitarian interpretation of copyright regulations might point to fair use as a safe harbor for what are currently understood as unregulated uses of a fixed creative work, such as reading or reselling in the case of a physical book. Others could point to the legal maxim “De minimis non curat lex,” which roughly means “the law doesn’t care about little things,” as a supposed driving force for how the law will choose to deal with copying or quoting an insignificant amount of a work protected by copyright. But with the Internet, where every use of any copyrighted work automatically produces a copy, access is no longer “de minimis,” and what were previously unregulated actions such as reading or sharing are subject to regulatory restrictions. This is where fair use comes into play, but as Lessig states, “Before the Internet, reading did not trigger the application of copyright law...The right to read was effectively protected before because reading was not regulated.”<sup>79</sup> The increase of regulations to keep up with technology puts a greater burden on the defense of fair use for what should remain unregulated activities. And copyright protections for things like software and ebooks (as opposed to physical books) assume that any use of them is transformative because a copy is made, and therefore subject to regulation.

These increased regulations for digital media in turn lead to the creation and enforcement of penalties for their infringement. For example, the RIAA successfully lobbied the Tennessee legislature in 2011 to make it illegal for users to willingly share their passwords with each other for streaming entertainment services like Netflix and Rhapsody, with infringements that can lead to felony charges and jail time.<sup>80</sup> Again, the initial intent of copyright as a limited monopoly to sell a fixed work is subverted to allow copyright owners powers of coercion in determining how

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<sup>79</sup> Lessig (2006), p. 107

<sup>80</sup> Mike Masnick, “RIAA Wants to Put People in Jail for Sharing their Music Subscription Login with Friends,” *Techdirt*, June 2, 2011, accessed August 1, 2013, <http://www.techdirt.com/articles/20110602/03411914517/riaa-wants-to-put-people-jail-sharing-their-music-subscription-login-with-friends.shtml>

intellectual property is accessed. Rick Falkvinge, an advocate for changes in information policy, also makes note that the law is not too far removed from the dystopic short story “The Right to Read,” by Richard Stallman, about a University student who cannot afford the reading license that is mandated by the state as necessary to pick up a book.<sup>81</sup>

The difference between Stallman’s story and Tennessee’s password law is that while reading a physical book remains an unregulated activity, accessing (and thus creating a copy of) digital information is increasingly regulated. So the scope of control that a copyright owner has increases, and rights for the consumer such as the first-sale doctrine continue to fall by the wayside. This makes regulation of access the de facto norm, and increases the strain on fair use as a defense for what should be unregulated activities. This is a problem, but it might be a problem that could be kept in relative check if human agents were always in charge of determining what is or is not fair use. However, as Lessig states, rules of copyright law are increasingly built into the architecture of delivery systems for copyrighted content, so that code, devoid of the ability to determine nuance for fair use, can unfairly or inaccurately restrict access.<sup>82</sup> Lessig’s example for this is the permissions function on devices like Adobe’s ebook reader, which allows only a certain amount of copies to be printed or digital duplicated, and so should more accurately be called controls rather than permissions. For a new e-book purchased on the device, these limitations on permissions are justified and within the rights of the copyright owner, but the same limitations are automatically placed on works in the public domain. Further, methods of encryption do not dissolve when a copyrighted work passes into the public domain,

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<sup>81</sup> Rick Falkvinge, “Stallman’s ‘The Right to Read’ Becomes Dreaded, Insane Reality,” *Infopolicy*, June 3, 2011, accessed August 1, 2013, <http://falkvinge.net/2011/06/03/stallmans-the-right-to-read-becomes-dreaded-insane-reality/>

<sup>82</sup> Lessig (2006), p. 109

so the duration of entitlement ensured by encryption is indefinite.<sup>83</sup> The problem is that the default setting for access to content is one of limitations and controls, instead of defaulting to open access unless information is proven to be under copyright.

Despite the systems for control programmed into the code of appliancized devices like the Adobe ebook reader, the code itself is not absolute. It is still possible for human programmers to hack software, essentially enabling programs to do what they were not initially intended to do, such as allow infinite copying of an e-book. So while code may be a stopgap measure for staunching the flow of information, in many situations hackers have proved that code may be circumvented, and that if anyone has the power to copy and disseminate intellectual property in a digital format, ultimate control of digital copies does not exist. Nor should it, as the ethos of generative systems holds. What is good for individuals and the expansion of the cultural commons is good for the collective of humanity, but not necessarily good for existing copyright owners. Thus, copyright owners have petitioned the government for increased legal protection, in the form of laws such as the DMCA, when code fails as an effective means of control.

As Lessig describes the DMCA, this specific law is “*legal code* intended to buttress *software code* which itself was intended to support the *legal code of copyright*.”<sup>84</sup> But in a curious twist, it does this not by regulating copyrighted works themselves, instead regulating the devices that are used to hack code that regulate copyrighted works. This is how George Hotz was prosecuted for hacking his iPhone and Playstation 3. Hotz may have been able to defend as fair use his hacking of these devices under copyright law, but when he breached the DMCA, he was charged with circumventing copyright *protection systems*, not copyright itself. In another case, Princeton academic Ed Felten of Princeton led a group of computer scientists in removing the

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<sup>83</sup> Fisher (2004), p. 152

<sup>84</sup> Lessig (2006), p. 116

digital watermarks placed on music by the RIAA in the form of SDMI (Secure Digital Music Initiative), but renounced the \$10,000 reward offered by the RIAA so he could instead publish the results. The RIAA threatened legal action under the DMCA, but Felten's own declaratory judgment suit alleged that such action would violate the First Amendment. The RIAA then issued a statement that it was alright to publish the results. Fortunately, at least in this case, the U.S. Department of Justice has assured researchers like Felten that the DMCA may not be used to limit free speech in this way, although future interpretations of the law might not be so lenient to the free speech of academic researchers.<sup>85</sup>

Copyright owners empowered by the increased scope of copyright law have even less reason to show leniency to copyright infringements on the Internet, coupled with a greater ability to detect those same infringements. Since networked personal computers create copies of everything as an essential step of running software, every action the user makes is subject to regulation. So, a curious dichotomy arises: personal computers serve a vital function of allowing unrestricted access to the generative system that is the Internet. But at the same time, activities that were unregulated when performed offline are now potential breaches of copyright when enacted online. "Misuse is easier to find and easier to control," states Lessig.<sup>86</sup> Again, the original intent of copyright was only to grant a limited monopoly for a brief period of time, but today its scope and duration has ballooned to the point where the monopoly is no longer limited, and ownership of a copyright extends to derivative interpretations of a fixed work.

For those who own copyrights, then, there is the possibility of unprecedented control over innovation and creativity for society as a whole, and this is exacerbated by the concentration of the media into fewer and fewer distinct entities. As Senator John McCain stated in 2003, "five

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<sup>85</sup> Fisher (2004), p. 97

<sup>86</sup> Lessig (2006), p. 120

companies control 85 percent of our media sources,”<sup>87</sup> a result of deregulation of media ownership in the early 1990s. Theoretically, this integration could still result in meaningful creation of intellectual works, albeit under the ownership of an elite few. But in all likelihood, this integration affects creativity in a negative manner, as large media conglomerates attempt to repurpose existing intellectual properties rather than foster new or innovative ones. Again, this is the lesson from Christensen’s *The Innovator’s Dilemma*, where large traditional firms find it rational to ignore disruptive technologies that compete with their core business. These large firms find it more profitable to produce sustaining innovations or creative works that do not venture too far outside of what is already being produced. It is then left to independent agents to produce truly disruptive and innovative creative works, but this is increasingly difficult to do in a media landscape with such a small amount of true competition, and where every action of creativity or media interaction is subject to regulation.

Independent agents who want to create outside of traditional firms and publishing houses do have the option to potentially reach a mass audience by using online service providers like YouTube and Amazon, but this option comes with its own set of problems. Amazon’s CreateSpace ebook publishing service allows authors to quickly bring their books to the marketplace, but claims of trademark or copyright infringement, even false ones, will result in Amazon just as quickly removing those books from the service. This was the case with M.C.A. Hogarth, a woman who wrote an ebook, *Spots the Space Marine*, which Amazon took down after the U.K. company Games Workshop claimed to have a trademark right to the term “space

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<sup>87</sup> FCC Oversight: Hearing Before the Senate Commerce, Science and Transportation Committee,

<sup>87</sup>108th Cong., 1st sess. (22 May 2003) (statement of Senator John McCain)

marine.”<sup>88</sup> In fact, this trademark was registered to prevent competition in the games marketplace, but Games Workshop believed that its expansion into ebooks about its own space marine characters expanded proprietary interest in the term to literature. This is even more disturbing when one considers that the term “space marine” has been used in science-fiction since at least 1932, with the *Amazing Stories* tale “Captain Brink of the Space Marines.”<sup>89</sup> It was only through the help of the Electronic Frontier Foundation that Hogarth was able to convince employees at Amazon that the trademark infringement claim was bogus and have her book reinstated.

The larger issue at play is that although creators do have more platforms today for distributing creative and intellectual work, these platforms are compromised by laws that favor increased regulation of creative content and presume that independent creators are infringing on the proprietary rights of existing firms. Therefore, even the most liberal service providers would prefer to remain neutral in disputes of ownership, and will defer to removing offending content at the first sign of a cease and desist letter. Again, this is an even bigger problem when coupled with the fact that there are less and less large media conglomerates for an author to solicit on the path to traditional publication, and without competition between many firms, innovation suffers as corporations choose to play it safe.

For the good of the public at large and the continuation of cultural innovation through creativity, it is necessary for copyright owners and corporations to change and adapt to the open structure of the Internet, not to seek regulation that continues to protect their proprietary interests. These proprietary interests should not be abandoned entirely, but they must be balanced

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<sup>88</sup> Corynne McSherry, “Trademark Bully Thwarted: Spots the Space Marine Back Online,” *Electronic Frontier Foundation*, February 8, 2013, accessed August 7, 2013, <https://www.eff.org/deeplinks/2013/02/trademark-bully-thwarted-spots-space-marine-back-online>

<sup>89</sup> Cover viewable online at <http://pulpcovers.com/captain-brink-of-the-space-marines/>

with citizens' rights to access creative and intellectual works. Further, proprietary interests defined by law should consider just what kinds of property are being protected.

### **Protecting the Public Domain**

Zechariah Chafee stated in a lecture on copyright from 1945 that objections to intellectual property indicate a general distaste for private property, but he also acknowledged that differences among types of property should result in differences in their treatment by law. Building from that, David Lange noted in 1981 that the expanding scope of intellectual property interests through changes in copyright law should be offset by a purposeful expansion of individual rights in the public domain.<sup>90</sup> Whether this is a job best suited for private organizations or the government is up for debate, but legal realists have stated that any property rights must be created in a way that balances public and private interests. To this effect, several organizations, both public and private, are currently engaged in contributing to an open universal generative network and cultural commons. Among these are Google with its controversial Google Books scanning project, and the partnership of major research institutions that contribute to the non-profit HathiTrust project.

But it has not been strictly the purview of organizations to expand the cultural commons and ensure that the culture of the past is available to the citizens of today. Private agents, acting without commercial interest, have used the low-cost publishing platform of the Internet to distribute public domain works. One such agent is Eric Eldred, a retired computer programmer who, in 1995, uploaded the works of Nathaniel Hawthorne to a server, in an example of what

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<sup>90</sup> David Lange, "Recognizing the Public Domain," *Law & Contemporary Problems* 44 (1981): 147-178.



Lessig calls a “noncommercial publication of public domain works.”<sup>91</sup> Eldred even added annotations and contextual images, so that his contribution to the public domain was transformative of the original works. He enjoyed the project, and continued adding other authors to his online archive, until his planned addition of Robert Frost’s collection of poems *New Hampshire* was inhibited by Congress’ decision in 1998 to expand the duration of copyright again through the Sonny Bono Copyright Term Extension Act.

The example of Eric Eldred and his efforts to enrich the public domain points to the harm that is caused by unrestricted extensions of copyright. While certain copyrights, such as those held by the estate of Robert Frost, may continue to be profitable to their owners, the vast majority hold no commercial value, and are therefore much more likely to disappear from the public consciousness entirely. It is only within the safety of the public domain that those works would ever be able to find a meaningful second life as noncommercial publications uploaded and shared by concerned citizens.

Research by Paul J. Heald at the University of Illinois emphasizes the loss to the cultural commons caused by excessive copyright terms. Heald used a webscript to crawl the online bookseller Amazon, showing that there were as many newly-published books available from the 1910s as there were from the 2000s, and that the number of newly-published books from the 1850s (close to 80) was twice that of books from the 1950s (under 40). As Heald puts it, “Copyright correlates significantly with the disappearance of works rather than with their availability. Shortly after works are created and proprietized, they tend to disappear from public view only to reappear in significantly increased numbers when they fall into the public domain

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<sup>91</sup> Lessig (2006), p. 154

and lose their owners.”<sup>92</sup> Heald’s research also suggests that the commercial lifespan for most creative works is brief, so that publishers are deterred from releasing books again until they are in the public domain.

So if publishers do not reissue books that are not currently in the public domain, and copyright terms continue to be extended indefinitely, what happens to intellectual and creative works without commercial value from 1923 onwards? If no one digitizes or otherwise copies those works, it is possible that existing copies will rot away. This fate is an even greater threat for film on nitrate-based stock, which, if not transferred to safety stock, will gradually dissolve over time. And this would mean the loss of basically any film produced before 1952.

Part of the problem with current copyright laws is that copyrights are granted automatically and remain in effect by default for close to a century. As Lessig states, the consequence of this is that we live in a “permission society” for accessing creative works.<sup>93</sup> It is necessary to identify the owner and gain permission to build upon his or her work, a task that is made unnecessarily difficult by having no central copyright registry. Copyright has expanded in scope to such a degree that it is also necessary and prudent to weaken the regulation of copyright in order to strengthen cultural creativity. “Never has copyright protected such a wide range of rights, against as broad a range of actors, for a term that was remotely as long,” as Lessig states.<sup>94</sup>

Eldred, with the help of Lessig and the law firm of Jones, Day, Reavis and Pogue, attempted to bring those sweeping rights back into balance with the public domain by filing a

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<sup>92</sup> Rebecca J. Rosen, “The Hole in Our Collective Memories: How Copyright Made Mid-Century Books Vanish,” *The Atlantic*, July 30, 2013, accessed August 3, 2013, <http://www.theatlantic.com/technology/archive/2013/07/the-hole-in-our-collective-memory-how-copyright-made-mid-century-books-vanish/278209/>

<sup>93</sup> Lessig (2006), p. 187

<sup>94</sup> Lessig (2006), p. 126

lawsuit in 1999. This suit asked the federal district court in Washington, D.C., to declare the Sonny Bono Copyright Term Extension Act unconstitutional, under the claims that extending existing terms violated the Constitution's "limited times" requirement, and that extending terms by another twenty years violated the First Amendment.<sup>95</sup> Lessig and company lost the case, partly as a result of how representatives of certain popular copyrighted works frame the argument of legal proprietary interest in intellectual works as a form of moral guardianship.

Representatives for the estate of Dr. Seuss, for example, argue that if that author's works were in the public domain, transformative works of stories such as "The Cat in the Hat" could be used to "glorify drugs or to create pornography."<sup>96</sup> Meanwhile, the estate of George Gershwin argues that it should continue to have a monopoly on the rights to the play "Porgy and Bess" because it has the moral duty to refuse to license it to anyone who does not cast African-Americans in the roles. Implicit in both of these arguments is the idea that the public is not to be trusted with certain intellectual property, which should remain under exclusive control in perpetuity. Lessig describes this assumption as a result of the blind acceptance of the idea of property in American culture. "[W]e don't even question when the control of that property removes our ability, as a people, to develop our culture democratically."<sup>97</sup> While a copyright is in effect, its owner has an economic monopoly on that intellectual work, but that monopoly should not last forever, and it should not impede radical interpretations or derivations of the original work anyway (even interpretations dealing with potentially sensitive issues like drugs and race), as such limitations clearly violate the freedom of speech granted by the First Amendment.

Another argument against the CTEA is the extension of copyrights ostensibly seeks to rectify problems of the past that are no longer possible to fix. The stated purpose of copyright in

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<sup>95</sup> Lessig (2006), p. 164

<sup>96</sup> Lessig (2006), p. 166

<sup>97</sup> Lessig (2006), p. 187

the Constitution is to “promote the progress of science and the useful arts,” but the effect of that promotion can only be considered in the present. No amount of copyright extension will further promote science and art in the year 1923. If Congress wants to increase the term of copyright, then, it only makes sense to make a new term of copyright applicable to present and future intellectual works, not those from the past. As Lessig states, “No matter what we do today, we will not increase the number of authors who wrote in 1923.”<sup>98</sup> So if that is the case, then why do corporate interests continue to lobby for extensions of copyright?

Corporations and other owners of profitable copyrights are not strictly motivated by the desire to protect their content. Instead, copyright term extensions are a way to assure that nothing else enters the public domain, which, for owners of copyrighted material, potentially serves as just another source of competition for audience attention. But the public domain is even more dangerous than another commercial competitor, because it has no commercial interests of its own. And since commercial and noncommercial material share the common delivery system that is the Internet, a strong public domain has a distinct advantage over copyrighted content that requires additional permissions to access, distribute, and transform works. For that reason, many corporate owners of valuable copyrights would prefer that no other intellectual works ever enter the public domain, with 1923 as the current bulwark. “As a good Republican might say, here government regulation is simply getting in the way of innovation and creativity. And as a good Democrat might say, here the government is blocking access and the spread of knowledge for no good reason,” writes Lessig, describing the importance of changing copyright’s strictures in a political context.<sup>99</sup>

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<sup>98</sup> Lessig (2006), p. 207

<sup>99</sup> Lessig (2006), p. 177

It is also important to note that works in the public domain are not valueless, and there are organizations which still profit from them. The difference between works in the public domain and those under copyright is only that there is no monopoly on who is able to legally profit from their distribution. As described earlier in this thesis, there is no copyright on the opinions of the Supreme Court, and anyone can freely access them through a library. However, Lexis and Westlaw also have electronic versions of case reports available to their service subscribers, and they can charge users for the privilege of gaining access to court opinions. This is one example of how a free market decides what the value of content is without the burden of excessive regulation and interminable monopolies.

## **Conclusions**

As this thesis has shown, governments, private interest groups, authors, and representatives of the public have engaged in arguments about the proper role and implementation of copyright for hundreds of years, and it does not seem as though the debate will subside any time soon. Ever since the invention of the printing press made the technologically-assisted transmission of information an enterprise ripe for profit, these parties have argued about just who should reap that profit. Beginning with the Statute of Anne, copyright legislation has typically been enacted as a means of suppressing monopolistic practices regarding information while still incentivizing authors to add to the public sphere of knowledge. In America, the founding fathers made explicit in the Constitution the notion that copyright was meant primarily to “promote the progress of science and the useful arts,” and subsequent iterations of copyright law express the same goals.

But while the ostensible goals of copyright have remained the same, changes in technology continue to necessitate changes in copyright legislation, as new forms of expression such as film and sound recordings enter the marketplace alongside the maps, charts, and books that were the initial recipients of U.S. copyright protections. In addition, advances in technology having to do with digital reproduction and the communication standards made possible by the Internet simultaneously create potential for generativity and disruption. The generative power of the Internet benefits the learning capabilities of end users who engage with copyrighted material, but at the same time disrupts traditional distribution models and potentially endangers the market advantage previously enjoyed by copyright owners. For this reason, corporations that own valuable copyrights want to staunch this disruption with greater regulation of how audiences interact with creative works, including legal sanctions for activities that were previously unregulated, such as the mere act of reading.

A realistic assessment of the current legal landscape must grant that existing power structures will continue to petition Congress for increased proprietary control of creative works, and receive it. Corporations will also continue to develop new appliancized devices that strictly regulate access to content, coupled with legislation like the DMCA that prevents the manipulation of these devices to allow greater access by the user. The irony, then, is that these corporate interests want to infringe on the property rights of individuals who own these devices for the sake of enforcing supposed property rights in the intangible ideas that are communicated through these devices. And if appliancized devices that strictly regulate access become the standard, and there is every reason to suspect that they might, then concepts such as fair use will fall by the wayside as software code is increasingly expected to determine what is or is not a legal means of access to information.

The disruption of traditional distribution models by digital technologies has not only stretched the fair use doctrine to the point of breaking, but these technologies have also confused the notion of owning an iteration of a work versus owning the copyright in that work, impeding previous users rights such as the first sale doctrine. Some individuals and organizations view their ownership of a copyright as a natural right that extends to control over just how every iteration of a work is used or accessed. However, it is important not to lose sight of the fact that Congress' grant of a copyright is a privilege that carries with it an obligation to society to promote learning. Therefore, copyright owners should be prepared to enjoy the benefits of a temporary economic monopoly only if they also realize that it is impossible to simultaneously hold a cultural monopoly where only those who seek permission to engage in regulated versions of activities like reading may gain access to information.

Instead, a free market for creative and intellectual works should be the default setting for the effective spread of culture. In order to continue to “promote the progress of science and the useful arts,” monopolies should be granted to authors of new works. However, these monopolies, called copyrights, should be temporary and not subject to automatic unlimited extension. This is in line with the founders' intentions for copyright, and is the most effective way to encourage public benefit from the dissemination of intellectual and creative expression, which is the primary purpose of such monopolies. If, instead, there are excessive rewards granted by copyright monopolies, such as monopolies that can extend up to four human generations, then private control will totally eclipse social benefit, and limited monopolies will transform into absolute monopolies that will guarantee a profit even if the copyright owner must sue the customer in order to receive it. Granting such complete proprietary control of interminable copyrights to private ownership undermines the stated purpose of all copyright legislation, and

diminishes the public's ability to educate itself. And while there is benefit in incentivizing authors with temporary economic monopolies, the words of John Milton may best express the ultimate danger of locking down the marketplace of ideas:

*Truth and understanding are not such wares as to be monopolised and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the Land, to mark and license it like our broad cloth, and our woolpacks.*<sup>100</sup>

Instead, it is in the best interests of society, economically and intellectually, to implement any new copyright legislation with the same integrity and sense of purpose that was intended by the framers of the Constitution, such that individuals may be rewarded for their intellectual efforts, but not interminably, and not at the expense of the public's ability to educate itself.

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<sup>100</sup> John Milton, "The New Inquisition," from the *Areopagitica*, collected in *English Prose Vol. II. Sixteenth Century to the Restoration*. Henry Craik, ed. (1916) Retrieved from <http://www.bartleby.com/209/417.html> on September 10, 2013



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