BOOK

A UNIFIED THEORY OF COPYRIGHT[†]

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Edited by Craig Joyce[**]

TABLE OF CONTENTS

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EDITOR'S NOTE

The present issue of the *Houston Law Review* is, fundamentally, a "legacy book." It represents the reflections of my great friend, L. Ray Patterson, over many years of study on a subject we both loved: the law of copyright. Ray worked on this book primarily in the period immediately preceding the important copyright legislation enacted by Congress in 1998, and then intermittently afterwards.

Essentially, then, *A Unified Theory of Copyright* is a meditation on copyright from its inception in England in 1556 through its development in the United States to 1997. Despite the valiant collaborative efforts of the Honorable Stanley F. Birch, Jr., of the United States Court of Appeals for the Eleventh Circuit in Ray's last years, the book remained unfinished when Professor Patterson died in 2003. Both Judge Birch and I thank Jessica Litman of the University of Michigan Law School and David Shipley of the University of Georgia School of Law for their assistance in locating various drafts of the manuscript.

In editing *A Unified Theory of Copyright* for publication, I have not attempted to "co-author," in the traditional sense, with Professor Patterson or Judge Birch. It was my honor to co-author with Ray twice during our long friendship: *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989), and *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003). I have taken here certainly no more, and I hope less, liberty than he and I agreed upon for our prior collaborations. The Judge must, of course, be excused of transgressions that were mine alone.

Chiefly, my effort has been limited to clarifying the expression of Professor Patterson's and Judge Birch's ideas, polishing as required by the state of the manuscript, and assuring that Ray's vision for the work, as expressed to me in our numerous conversations concerning its contents, would emerge intact despite what little I did here. I have, in a few instances, taken the liberty of adding asterisked footnotes (e.g., "1.*"), to alert the reader to late scholarship by Professor Patterson more fully addressing matters discussed in the book.

I express my profound gratitude both to Judge Birch and to the Patterson family, particularly Ray's beloved wife, Laura Davis Patterson, for entrusting me with this responsibility. I

hope I have discharged it adequately, and I trust Ray would be pleased to see his "last will and testament" on copyright finally in print.

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PREFACE

This book is about the relationship between copyright law and the right to learn. It examines and endeavors to reconcile the two existing and conflicting theories of copyright law: the natural law proprietary theory and the statutory grant-monopoly theory. In a free society, the necessity for informed citizens and consumers is fundamental. Uninhibited access to information—and the ability to process it critically—is central to our nation's way of life, both politically and economically.

The founding generation of the nation recognized this crucial concern throughout their deliberations. They committed us to the progress of learning and the free flow of ideas in the texts of the Constitution and its First Amendment:

> The Congress shall have Power . . . *To promote the Progress of Science* and useful Arts, *by securing for limited Times to Authors* and Inventors *the exclusive Right to their* respective *Writings* and Discoveries.
>
> United States Constitution, Article I, Section 8, Clause 8 (emphasis added)

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .
>
> United States Constitution, Amendment I

When, however, access to learning is controlled by copyright entrepreneurs seeking profit, the right of access is placed in jeopardy. The marketing monopoly that inheres in copyright represents a conflict between two fundamental tenets of American society: free speech and free enterprise. For much of our history, this conflict was resolved by a simple requirement: the author had to publish his or her work—that is, make it accessible to the public—before being entitled to copyright protection. The cost of a book was a minimal tax on learning, justified by the cost of publication. Once the copyright owner sold the book, his or her control of access was lost. The buyer could resell the book—or give it away or discard it—without interfering with the copyright holder's monopoly. And once a book was on the library shelf, it was freely accessible to any library patron.

This protection for access, however, was eliminated in the 1976 Copyright Act, when Congress removed publication as a condition for copyright. Today, there are only two such conditions: an original work and the fixation of that work in a tangible medium of expression. The occasion for the change in copyright law, of course, was the development of new communications technologies—television and the computer. It is

not clear, however, that Congress was aware of the fundamental nature of the change; and it is certain that Congress did not foresee the development of the Internet, a problem with which it is presently concerned.

Given the profit potential for these forms of communication and the fact that Congress—as a leading copyright scholar, Prof. Jessica Litman, has amply demonstrated—depends upon the copyright industry to write copyright bills, there are two immediate dangers. One is that Congress will be induced to provide answers without knowing the questions. To put the point another way, Congress may find itself providing answers for only *one* question: how to enable copyright holders to gain—and enhance—profit from cyberspace. The other danger is that industry-prepared legislation will tend toward commercializing constitutional rights, which is the equivalent of censorship.

The copyright industry, however, does not limit its lobbying efforts to the halls of Congress. Strategic copyright litigation is a form of lobbying the judiciary, at which copyright owners have been very successful. They have managed, for example, to persuade some courts to render ineffective Congress's effort to protect the citizen's right of access to copyrighted material—the fair use doctrine.

The contemporary revolution in communication technologies has its historical counterpart in developments in fifteenth and sixteenth century England caused by William Caxton's introduction of the printing press. Apparently, the tendency is to assume that copyright, the answer to an old communications revolution, can be applied with little change to a new one. The assumption is naïve for scholars, but self-serving for publishers in view of the benefit to them that copyright has provided under the guise of an author's right.

Our basic point is that any revolution calls for the reallocation of legal rights and duties—thus it requires a return to fundamentals. In the case of copyright, a return to fundamentals in turn requires an understanding of copyright history. The fact is that publishers, who created copyright as their property (and without regard for authors) lost their proprietary claim upon the enactment of the first copyright statute in England three centuries ago. That act vested initial ownership of copyright in the author and enabled a publisher to become an owner only as the author's assignee. The publishers sought to regain their proprietary claim by litigation, arguing in court that the author had a copyright at common law by reason of natural law and could assign a perpetual copyright to the

publisher. Their efforts ultimately failed, but their present-day American successors continue the effort.

The relevant point for modern times is that the publishers' struggle to make copyright solely a proprietary right for the benefit of authors as creators and publishers as assignees resulted, in the United States, in constitutional provisions to protect the right to learn and the right of free speech. Understanding how and why this occurred is important for the interpretation of contemporary copyright law in light of these protections provided by the Copyright Clause and the First Amendment.

The understanding is easy to grasp because the two constitutional provisions have a common origin in English history, and because we have for the Copyright Clause an annotation in English law, both statutory and judicial. The reason for this happenstance is simple: the title of the Statute of Anne, the first English copyright act, is the source of the language in the Copyright Clause. That statute was given its definitive interpretation by the House of Lords in a decision rendered before American Independence and followed by the U.S. Supreme Court in its first copyright case, *Wheaton v. Peters*.

Some of the ideas contained in this book—for example, the idea that copyright is more usefully viewed as subset of public domain law rather than as a subset of property law—will not be well received. Indeed, there are too many diverse groups with a vested interest in copyright for there to be universal approval of any idea that purports to take into account the public interest. Even so, we believe that the ideas we present are supported by history and will withstand the test of reason and logic.

The test is important because we have endeavored to craft a work that will provide an understanding of the law of copyright and its critical role in our modern society. In an effort to harmonize the two existing philosophies of copyright with the Constitution, and to reconcile them with each other, we have proposed a new paradigm for resolving copyright disputes—a unified theory of copyright. If the reader becomes better informed and, as a result, a more critical student of the law of copyright, we will have achieved our purpose.

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CHAPTER 1. INTRODUCTION AND OVERVIEW

The purpose of this book is to propose a new theory of copyright. The purpose of this chapter is to sketch the ideas that led to the proposed theory. We begin with a little-known but telling incident that suggests a major reason why a new copyright theory is needed—a theory in contradistinction to the present copyright law, which legitimates the efforts of copyright owners to limit access to learning for the many in the interest of profit for the few.

The U.S. Supreme Court's first copyright case, *Wheaton v. Peters* (1834),[1] provides the incident. The action was one in which the third Reporter of the Court, Henry Wheaton, sued the fourth, Richard Peters, for copyright infringement. The central issue in the case was whether law reports are copyrightable. Elijah Paine, one of Wheaton's lawyers, argued that they were. As proof, he cited "the great price of law reports in England," pointing out that only one person published the reports, that there were never contemporaneous editions, and that the proprietors of such reports exhausted sales of each edition before printing another. "Why is this? Who prevents enterprize and cupidity from participating in this field?" he asked, and answered his questions with another: "What can it be except the copyright?"[2] The success of the English practice, of course, depended upon the right to control access to the law, and Paine's argument may have influenced the Court in a way he did not intend: the Court rejected the English practice and held that its opinions could not be copyrighted.

A century and a half later, a latter-day set of publishers[3] sought judicial approval for the use of copyright to monopolize access to motion pictures, a product vested with somewhat less public interest than the law. This modern effort to expand the copyright monopoly by judicial action reached the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* (1984).[4] In *Sony*, movie studios sued a manufacturer of videotape recorders (VTRs) for copyright infringement because the VTRs

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1. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

2. *Id.* at 613. All materials quoted in this book are reproduced without correction from the original documents.

3. Here and in the following pages, we use the term "publishers" generically to refer to copyright owners, either as assignees from authors or as employers of authors under the "work made for hire" doctrine. *See* 17 U.S.C. § 101 (2006) (defining "work made for hire"). Throughout the work as edited, citations to Title 17, where appropriate, have been updated to the current edition of United States Code.

4. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

could be used to videotape motion pictures off-the-air. The plaintiffs' purpose was not to prevent the manufacture or sale of VTRs, but to obtain a ruling that would enable the studios to impose a pay-per-use fee in the form of a compulsory license in order, as the Supreme Court said in a patent case, to gather "great profits in small payments."[5]

The studios' claim was that the right of viewers to videotape copyrighted motion pictures off-the-air would bring financial ruin to the industry. The Supreme Court, noting the efforts of patent and copyright owners to expand their statutory monopolies to the limits of the law and beyond, permitted access to publicly broadcast motion pictures by allowing a person to videotape the motion picture for later viewing.

The subsequent development of the business of renting and selling videotapes of copyrighted motion pictures proves that the *in terrorem* arguments used by the publishers in *Sony* were in error. But they were not new. In the 1640s, for example, as part of their plea to Parliament to enact press control legislation to protect their copyrights, English booksellers had claimed that, without such laws, "many Pieces of great worth and excellence will be strangled in the womb"[6]—an *in terrorem* argument with an emotional base to serve as a substitute for sound reasoning (as such arguments usually do).

The strangled-in-the-womb argument merits close examination for the same reason it tends to be effective. Copyright law in large measure determines what we may know. The implied threat is that, without copyright, the reservoir of recorded knowledge will diminish, if not evaporate entirely. The modern version of this argument is that copyright law must give the copyright owner the right to control access to the work after it is sold, as well as before. Thus, without so stating, publishers today claim that modern copyright law must provide protection against the customer's use, as well as against the competitor's pirating. Such a copyright gives the copyright owner the power to deny the right to read, and thus to deny the right to know. Faced with this prospect, we should note the words of George

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5. *See* Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 513–14 (1917) ("It was not until the time came in which the full possibilities seem first to have been appreciated of . . . gathering great profits in small payments . . . that it came to be thought that the 'right to use . . . the invention' of a patent gave to the patentee or his assigns the right to restrict the use of it to materials or supplies not described in the patent and not by its terms made a part of the thing patented.").

6. The Company of Stationers' Petition to Parliament (Apr. 1643), *reprinted in* 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554–1640 A.D. 587 (Edward Arber ed., 1875) [hereinafter 1 ARBER].

Washington concerning the significance of this right. They are as true today as in 1790, when Washington addressed them to Congress just prior to the enactment of the first national copyright statute:[7] "Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionably essential."[8]

At the time of the first President's message, knowledge was conveyed only by the spoken or printed word. Copyright facilitated the right to know because the conditions of protection were the *creation* of a new work[9] and its *publication* to users. Today, "the measures of government receive their impression . . . immediately from the sense of the community" in a way beyond all imagination in Washington's eighteenth century, including by radio, television, and computer, all of which are now under the copyright umbrella. Consequently, with new technologies, copyright has come to pervade every facet of our lives: educational, cultural, and economic.

With these developments, too, have come changes in the rules of copyright law, so that copyright now shadows our every move. Copyrighted writings—books, articles, essays—are the tools of the learning trade for students, teachers, and scholars; copyrighted databases are the tools of professionals, accountants, scientists, lawyers, and librarians, and of their patrons; copyrighted want ads are used by job seekers; copyrighted newspapers and copyrighted baseball, football, and basketball games on television are the means by which most fans enjoy the sport of their choice.

Technology is the cause for the spread of copyright but profit is the motivation, and the opportunity for profit endangers any right that may be an obstacle. The public's right to know is one such obstacle for copyright entrepreneurs. Indeed, copyright can be so profitable, and the right to learn and know is so

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7. Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831). During the period of the Confederation, twelve of the thirteen states (all except Delaware) had enacted copyright statutes, which are reprinted in COPYRIGHT OFFICE, BULLETIN NO. 3, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1–21 (rev. 1963).

8. SPEECHES OF THE AMERICAN PRESIDENTS 8 (Janet Podell & Steven Anzovin eds., 2001).

9. We use the term "new works," here and hereafter, not in the sense of "novelty" as required by the Patent Act, *see* 35 U.S.C. § 102, but to reference "original works of authorship" as required by § 102 of the Copyright Act (and the Copyright Clause of Article I, Section 8 of the U.S. Constitution).

fundamental, that the threat of the former to the latter calls for reenergizing the constitutional limitations the Framers imposed on copyright. To quote again from George Washington:

> To the security of a free constitution [knowledge] contributes in various ways—by convincing those who are intrusted with the public administration that every valuable end of government is best answered by the enlightened confidence of the people and by teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of society; to discriminate the spirit of liberty from that of licentiousness—cherishing the first, avoiding the last—and uniting a speedy but temperate vigilance against encroachments, with an inviolable respect to the laws.[10]

If Washington was right—and, having been present at the creation of American copyright law, we may justly assume his grasp of the subject—there can be little doubt of the need for constitutional protection of the right to know. Already, no less a modern-day oracle of copyright than the Supreme Court has ruled that there is a constitutional right to use uncopyrightable material contained in a copyrighted work[11]—a ruling that implements the Court's repeated dicta that copyright is primarily to benefit the public, not the author (or publishers).[12]

On this latter point, however, there is a disparity between what the Supreme Court itself says and what many lower courts do in favoring the copyright owner's interest in controlling, over the public's interest in having, access to copyrighted materials. The reason for this difference almost is surely the core problem that has emerged with extension of copyright to new communications technologies. It is the conflict between two basic policies of American society: free speech and free market.

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10. SPEECHES OF THE AMERICAN PRESIDENTS, *supra* ch. 1, note 8, at 8.

11. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363–64 (1991) (refusing to extend copyright protection to a "collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality").

12. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994) ("We have often recognized the monopoly privileges that Congress has authorized . . . are limited in nature and must ultimately serve the public good."); *see also Feist*, 449 U.S. at 349 (noting that the primary objective of copyright is to serve the cause of promoting the broad public availability of literature, music, and other arts); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (same); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (same).

Free speech, as we use the term, encompasses the right to read as well as the right to publish, the right to hear as well as the right to speak. Although the Supreme Court has not developed the hearer's right as fully as it has the speaker's, like any court it can deal only with issues that are brought before it. The Court's lack of opportunity to rule on the hearer's First Amendment right is no reason for denying it. Thus, if we assume that the goal of free speech is an informed citizenry, free speech encompasses the right of access as a matter of irrefutable logic.

Free speech thus accommodates both the speaker and the hearer, the first having a right to influence opinion by disseminating the expression of his or her ideas, the second having a right to examine the expression that, by reason of its dissemination, influences its audience. It follows, then, that the right to hear or read does not come into play until the right to speak or print has been exercised, for there is no reason to examine that which has not been published—that is, made public.

The free market right is the right to sell one's product free of governmental control or predatory competitive practices, at a price the market will bear. Unlike free speech, however, the free market is not protected by the Constitution and has required statutory protection. Antitrust laws, for example, protect competition, the essence of the free market.

Paradoxically, copyright is a monopoly—the copyright holder has the exclusive right (among others) to sell copies of a copyrighted work without competition—and so is anti-free market. Being anti-free market, copyright also may be said to be anti-free speech. But we have not suffered the normal consequences of these facts in the past because of the limitations on the monopoly. The short copyright term meant that there were more books in the public domain (free for all to publish) than were under copyright; and because copyright does not protect ideas, the number of copyrighted books on a given topic provided a competitive check on prices.

When the market changes, however, the opportunity for new profit arises. The new profit depends upon longer and greater control of access. The copyright term now approximates three or four generations, publication is no longer a condition for copyright, and television and the computer enable the copyright holder to bypass the wholesaler and sell directly to the consumer. Because the entrepreneur seeks to control the conduct of the buyer in regard to the product sold—usually, by contract—the focus of concern for copyright holders has shifted from the wholesaler to the actual consumer.

When the product for the market consists of recorded information, knowledge, and learning, the law of self-interest mandates that the marketer's desire for profit override the consumer's right to know; and the tendency is to claim the right to profit, even if it entails controlling access by licensing use of the knowledge contained (as witness, for example, the publishers' efforts to privatize copyright law with expansive copyright notices in books and shrink-wrap licenses for computer programs).

The publishers' claim of the need for greater copyright protection because of television and the computer has a certain plausibility. Analysis, however, reveals the need to be less than the proponents claim, for it turns out to be a disguised plea for a legal guarantee of profit. Television, for example, survived for some thirty years unhampered by the lack of copyright protection, and the grant of copyright for live television broadcasts in the 1976 Act meant that the formerly complementary interests of free speech and free market became competing, and ultimately conflicting, interests. For the problem becomes the allocation of rights between the entrepreneur and the customer.

The problem of allocating rights between publishers and their customers is not new, and indeed, was present when Anglo-American copyright law began as a trade copyright in mid-sixteenth century England. The solution then favored the publisher (or bookseller) as copyright owner—not surprisingly, because publishers developed copyright for themselves, not for authors. But there was another, special circumstance reinforcing the publishers' interest at the time of copyright's creation, namely, the interest of the government in controlling the output of the press—a desire that led, under the so-called "stationers' copyright," to legal protection for the publishers' proprietary trade rights in perpetuity. This solution, however, was not in the public interest, for it made copyright both a device of monopoly for the book trade and an instrument of censorship by the government. When the government's interest in censorship disappeared in the late eighteenth century, the early solution, which had benefited the publisher to the exclusion of all others except the government, was abandoned.

The succeeding solution (the 1710 Statute of Anne) was more in the public interest, for it made copyright a statutory grant with conditions to be fulfilled in order to secure the monopoly privilege: a new work had to be written, the work had to be published before it received copyright protection, and the protection was limited to at most twenty-eight years, a term

markedly short of perpetuity. No one should be surprised that the new solution was not to the liking of publishers, who sought to overturn it. When Parliament rejected their overtures and refused to make the changes they sought—primarily an extension of the copyright term—the publishers turned to the only remaining forum for change: the courts.

Anyone seeking to use the judiciary to defeat a legislative purpose embodied in a statute needs a good theory for doing so, and the publishers developed one. It was that, in addition to the statutory copyright (which was available only when the work was published), the author was entitled to a "common law copyright" under natural law from the moment of creation. The publishers' motive was made clear by the fact that this natural law copyright would exist in perpetuity and could be assigned to the publisher. The judicially created common law copyright, in short, was intended to reinstate the perpetual trade copyright that the copyright statute had eliminated.

The publishers succeeded in the King's Bench,[13] but they suffered reversal and defeat in *Donaldson v. Beckett* (1774) in the House of Lords, which in its judicial capacity held that, while the author does have a common law copyright in works that he or she creates, such a right exists only until the work is published.[14] Upon publication, the author exchanges the common law copyright for the statutory copyright, with all its conditions and limitations.

We can assume that the timing of these events in England—just prior to the American Revolution—provided the Framers with an unusually sophisticated understanding of copyright, evidence of which is the fact that twelve of the thirteen states enacted copyright statutes prior to the drafting of the Constitution. A part of this understanding would have been the danger to free speech that the unlimited natural law copyright posed. This would explain why the Framers rejected that copyright and adopted the limited statutory copyright for the United States. This is the copyright that the Copyright Clause empowers Congress to grant, as the limitations on Congress's constitutional copyright power make clear. And it is these limitations that foreclosed a potential conflict with the First Amendment, which was to be drafted and adopted shortly thereafter.[15] By constitutional mandate, statutory copyright is

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13. *See* Millar v. Taylor, (1769) 98 Eng. Rep. 201, 257–62 (K.B.).

14. Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 847 (H.L.).

15.* *See generally* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I,*

limited to one's own writings made accessible to all by publication, which is "the exclusive Right" that Congress can grant to authors.[16]

This was the American solution to the free speech dangers that copyright poses, which survived and served satisfactorily for almost two hundred years, from the 1790 Copyright Act to the 1976 Copyright Act, when Congress expanded its copyright power by legal fictions and abandoned the constitutional solution to extend copyright to new communications technologies. Thus, in 1976 Congress rejected publication as a condition for copyright and provided copyright protection from the moment an original work of authorship is fixed in a tangible medium of expression, a return to the common law copyright based on natural law that the House of Lords rejected in 1774 and an adoption *sub silentio* of the natural law property theory of copyright that the Supreme Court rejected in 1834.[17]

There is a lesson here: when Congress ignores the constitutional limitations on its copyright power, it places free speech at risk.

If the inevitability of conflict with First Amendment rights that this change created is not immediately apparent, it becomes so when one recognizes that publishers have used the change to claim the monopoly right not only to sell knowledge in the form of a copyrighted book, but also the monopoly right to license the use of the knowledge in the book after they have sold it, if that use involves copying.[18] Thus, despite the language in § 107 of the Copyright Act supporting the proposition that the making of multiple copies for classroom use typically is a fair use and not an infringement of copyright, courts have held copyshops liable for copyright infringement for providing a copying service to enable teachers to make use of this right.[19]

Section 8, Clause 8 of the U.S. Constitution, 52 EMORY L.J. 909 (2003).

16. L. Ray Patterson, *Copyright and "the exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 1, 25–26 (1993).

17. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 625 (1834).

18. For example, see the copyright notice of the Association of American Publishers, which reads in full as follows: "© 1995 by Association of American Publishers, Inc. All Rights Reserved. No Part of this report may be used or reproduced in any manner whatsoever without express permission from the Association of American Publishers, Inc., 71 Fifth Avenue, New York, NY 10003-3004." The AAP ignored both 17 U.S.C. § 102(b), declaring facts uncopyrightable, and *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 363–64 (1991), which holds that there is a constitutional right to use uncopyrightable material contained in a copyrighted work.

19. *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1383 (6th Cir. 1996).

The anomaly requires explanation, which is as complex as the anomaly is simplistic. There is the prominence of the free market system, and there is the fact that concrete economic rights almost always prevail over abstract constitutional rights such as the right to know, both of which reflect the dominance of the proprietary culture in American law. The proprietary culture is thus fertile soil for natural law theory and often has been used as a justification for expanding copyright. The sweat-of-the-brow doctrine—a pure natural law concept that survived for some seventy years after its creation in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.* (1922),[20] until the Supreme Court declared it to be unconstitutional in *Feist Publications, Inc. v. Rural Telephone Service, Inc.* (1991)—proves the point.[21] But it was not until television and the computer gave rise to new markets—or potential markets—that the desire for additional copyright protection reached epic proportions, with increased judicial support for the natural law copyright, albeit perhaps unwittingly. The result is that the natural law property right theory of copyright now is being used to override the constitutional limitations on copyright as the grant of a limited statutory monopoly.

Given the context of American society in which the free market system has made the United States the world's premiere economic power, the judicial (and congressional) embrace of the natural law copyright is not surprising. And indeed, given the fact of a two-century span of economic growth based on plenary property rights of all kinds, the copyright that served so well as a limited property right—a statutory grant that required publication—could be viewed as an aberration. Consequently, to take advantage of the free market proprietary culture, copyright owners had only to convince judges that copyright was their property to secure judicial support for whatever market they could capture. This was so even if their new market operated contrary to users' rights granted by the copyright statute in the form of the fair use right, and in violation of traditional property rights in that it imposed a license for the use of books the copyright holder already had sold. Thus, the copyright owners' claim that they have a right to be paid when the purchaser of a book copies pages from that book ignores the right of fair use and overrides the purchaser's property rights in the book. The result: a scheme of economic censorship requiring pay-per-use.

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20. Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83, 88 (2d Cir. 1922).

21. *See Feist*, 399 U.S. at 359–60.

The user's claim that the right to read is superior to claims to property rights that exceed statutory limits inevitably is a victim of the proprietary culture, especially when judges do not perceive the right in fundamental terms. And some judges, persuaded that any user could read if he or she were willing to pay a license fee, missed the point, viewing pay-per-use as merely a manifestation of the copyright holder's property right. The point missed is that the free market system and its foundation, property rights (given so much credit for the success of the United States as a world economic leader), are grounded ultimately in the right of free speech. Thus, reflection will reveal that without free speech, a free market could not exist. There is, then, reason to pause when the free market threatens its very foundation.

Despite the First Amendment and the constitutional mandate that copyright promote learning, copyright holders view their marketing rights as being absolute, so that they can exact a price for any and all access to the information, knowledge, and learning they control. Thus, the conflict between free speech rights and free market rights emerges. The jurisprudential basis for this conflict, which to this point we have suggested but not stated, is the dual theory of copyright: that copyright is the natural law proprietary right of creators, and that copyright is the grant of limited statutory monopoly. The former is a free market concept, the latter a free speech concept.

Obviously, both theories cannot be correct. The problem to which this book is directed is finding a basis for a *unified theory of copyright* that encompasses the best features of both.

We start with the point that the identification of copyright as a component of intellectual property—which includes patents and trademarks as well—is misleading. The majestic sound of the phrase "intellectual property" implies that copyright is a subset of property law, but meriting a special reward superior to other property. The source of this notion is equity, which is more useful in correcting wrongs than in allocating rights. Natural law, for example, is an equity-based theory, but when applied to copyright, the result is rights for the copyright owner and duties for everyone else.

This is why equity is not a good basis for a legal concept governing rights in learning materials, which are vested with so large a public interest. Logically, such rights must be limited to the right of distribution, but the notion that copyright is a reward to the author for creating a work is a basis for enlarging the rights. Indeed, copyright is not a reward to the author for creating a work, but to him (or his or her successor in interest)

for distributing it. The creation of a work is a condition to limit the monopoly and to protect the public domain, a conclusion supported by the rule—until the 1976 Copyright Act—that publication was a condition for copyright, which could be lost by an improper copyright notice. The source of the argument that copyright exists to benefit the author is eighteenth century English publishers, who made it up after the limited statutory copyright of the Statute of Anne had replaced their perpetual trade copyright. Their goal was to have courts treat copyright as a subset of property law as a means of enhancing their monopoly, and the author was their foil.

Moreover, the reward-for-the-author theory ignores the fact that, in creating a work, the author harvests his or her materials from the public domain, a point that finds expression in the rule that copyright does not protect ideas. When viewed in this way, copyright is less a subset of property law than a subset of public domain law, which becomes clear when one realizes that all writings fall into one of two categories: those that are copyrightable and those that are not. Writings in this latter category are in the public domain. Although often unrecognized, among the key purposes of copyright is the protection and enrichment of the public domain—a point proved by the Copyright Clause, two critical limitations of which (leaving aside for the moment the "Writings" requirement) protect public domain works from being captured by copyright (if not "Author[ed]") and ensure that all copyrighted works eventually fall into the public domain (after "limited Times" of protection).

When one understands the role of copyright in protecting and enriching the public domain, it becomes apparent that while copyright continues to have a proprietary base, that base should not be in the nature of fee simple property. A more appropriate proprietary base for copyright is as an *easement*, a proprietary concept of shared rights. Indeed, as we will show, copyright makes the most sense when viewed as a temporary marketing easement in material taken from the public domain, which leaves room for an easement of use by those to whom copies of the works are marketed.

With this background, it is useful to determine what copyright theory should do. In general, theory provides the context for decisionmaking. The copyright context for this purpose is the allocation of rights in the transmission (that is, the publication) of copies of protected works and the use of the works themselves as the materials of learning. The central issue, then, is the proper relationship among the rights of authors to create, copyright owners to transmit, and users to use such

materials—all matters to be decided in the context of the general welfare, as established by public domain and free speech concerns.

The essential problem is that the task of allocating rights among these groups—creators, distributors, and users—disqualifies fee simple property as a basis for copyright theory because fixed proprietary rights are too rigid and arcane. Easement theory, on the other hand, provides a great contrast, for its important characteristics are that it is both flexible and familiar. As such, it provides a culture for analysis and decisionmaking that allows the decisionmaker to process information according to its content instead of by rigid rules for allocating appropriate rights.

We develop these ideas in the final chapter of this book, and note here only why the easement theory works and the fee simple property theory does not. The former is a basis for allocating rights, the latter a basis for asserting rights. It is this difference that explains why the Copyright Clause requires the easement theory of copyright.

The plan of this book is to show that the theory of copyright we propose is in fact the U.S. constitutional theory of copyright adopted from England, but never articulated. Our thesis is that the copyright issues lawmakers face today in extending copyright to new communications technologies are essentially the same ones that English lawmakers faced in the eighteenth century when determining the proper scope of copyright protection under the first copyright statute, the Statute of Anne—the source of the ideas and language used by the Framers of the Copyright Clause. The issues then, as now, were the proper limits of protection to avoid censorship, to protect the public domain, and to benefit the author. The answers the English gave have withstood the test of time. The great secret of American copyright law is that the Framers adopted those answers and embodied them in the Copyright Clause. They remain as valid today as in 1789.

We start in Chapter 2 with an examination of the Copyright Clause and its origins, and then discuss in Chapter 3 the current copyright statute (the 1976 Act) as the latest comprehensive product of almost two hundred years of copyright legislation. In Chapter 4, we discuss the problem of understanding copyright. In Chapter 5, we discuss copyright and free speech rights, and in Chapter 6 we discuss the right of fair use, a right that we argue is necessary for the constitutionality of the 1976 Act. The subjects of Chapters 7 and 8 are copyright defenses and remedies and their role in the corruption of the constitutional concept of

copyright. In Chapter 9, we discuss the need for a new theory of copyright, and in Chapter 10, we present that theory.

Throughout the book are several core ideas that it will be useful to identify here. Perhaps the most important is the role of copyright in protecting the public domain. The corollary of this idea is that copyright has a limited, albeit important, role in benefiting the copyright holder: to protect the exclusive right to publish—that is, to market—the copyrighted work. This means that there is a difference between the copyright and the work, and that copyright protects only the transmission of copies of works, not their content.

This follows from the fact that Congress cannot, under the Copyright Clause, give the author the ownership of his or her work, but only the exclusive right to market it. The property right that is copyright, then, is necessarily a limited right, because copyright cannot constitutionally inhibit the public's right to know and learn. This is one reason why copyright is most wisely treated as an easement.

The complexity of the topic means that there is some repetition as these ideas occur throughout the book. If unduly so, we apologize. But there are times when style must be subordinate to understanding. Perhaps repetition will be preferable to taxing the reader's system of recall, especially with unfamiliar expressions of old ideas. For we contend that the ideas presented here are not new, but instead have been lost in the grab for power and profit that the extension of copyright to new communications technologies has generated.

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CHAPTER 2. THE COPYRIGHT CLAUSE AND COPYRIGHT HISTORY

2.1 Introduction

The Copyright Clause of the U.S. Constitution reads as follows: "The Congress shall have Power . . . *To promote the Progress of Science* and useful Arts, *by securing for limited Times to Authors* and Inventors *the exclusive Right to their* respective *Writings* and Discoveries."[1]

It is a curious provision. For one thing, notwithstanding George Washington's sage comments about the promotion of knowledge, the founders probably had much more pressing matters to deal with than protecting the writings of authors. For another, the Clause provides limitations on, as well as the grant of, congressional power. The limitations indicate the importance attached to learning in the new nation by manifesting the three critical copyright policies of the framing generation: the advancement of learning (the purpose of congressional power to create copyright law is to "promote the Progress of Science"); the protection of the public domain (copyright can be granted only for "limited Times"); and the publication of works to create public access thereto (the "exclusive Right" in question is that of

1. U.S. CONST. art. I, § 8, cl. 8 (emphasis added). The order of words is important here: "Science and useful Arts," "Authors and Inventors," "Writings and Discoveries." Since at least *Graham v. John Deere Co. of Kansas City*, the Supreme Court has proceeded on the view that in eighteenth century usage, "Science" referred to the writings of authors and "useful Arts" to the discovery of inventors. Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 5 (1966).

"Authors" of "Writings"). Such policy limitations characterize no other grant authorizing Congress to act, which may explain why they have received less attention than they deserve in terms of protecting and benefiting the public interest.

The subtleties of the Framers' policies, however, suggest why the Copyright Clause merits more study than its few words otherwise might seem to require. Why was the Clause included in the Constitution? Where did it come from? What did it mean?

As to the first question, history provides answers, yielding three reasons for giving Congress the copyright power. First, as the result of decades of controversy over the "great question of literary property" in England, the House of Lords in 1774 rendered its landmark copyright decision *Donaldson v. Beckett*,[2] and in the 1780s much legal literature focused upon copyright. Second, during the period of Confederation, Noah Webster personally lobbied throughout the new nation for state copyright statutes to protect his (soon to be) almost universally adopted guide to the spelling of American English.[3] Third, primarily as a result of Webster's efforts, Congress in 1783 passed a resolution recommending to the states that they enact copyright legislation.[4] Twelve of them did, although not in identical language, and all of the statutes were modeled on the Statute of Anne of 1710,[5] as was the first federal copyright act in 1790.[6] The resolution proposing the creation of a national copyright power was drafted by a committee of three, chaired by James Madison, whose role in the Constitutional Convention is well known.

As to the second question—where the Copyright Clause originated—we can be confident that the source of its language was the title of the Statute of Anne, the enactment of which had precipitated the events leading to the *Donaldson* case. A simple comparison between the wording of the Copyright Clause (quoted above) and the Statute's title (see below) proves the point.

To answer the third question (as to meaning), however, we must examine copyright history for some 150 years before and 64 years after the Statute of Anne was enacted, until 1774, when *Donaldson* gave that act its definitive interpretation. Because the

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2. Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 839 (H.L.).

3.* For a chronicle of Webster's efforts, see Craig Joyce, *"A Curious Chapter in the History of Judicature":* Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 335–41 (2005).

4. Resolution of the Continental Congress Respecting Copyright (May 2, 1783), *reprinted in* COPYRIGHT OFFICE, BULLETIN NO. 3, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1 (rev. 1963).

5. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

6. Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831).

English statute is the source of the Copyright Clause, this history tells us what the Clause meant when it was adopted and, by inference, what it means today.

2.2 The Source of the Copyright Clause

The Copyright Clause may be the only provision of the Constitution for which we can identify a specific origin. There is strong textual evidence that the source of the Clause is the title of the Statute of Anne of 1710, the first English copyright act, which reads: "An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned."[7] Although not as eloquent as the Copyright Clause, this language expresses the same ideas: the purpose of copyright (the encouragement of learning); the beneficiaries of copyright (authors or their assigns); the subject matter of copyright (copies of books); a condition precedent (the printing of the book); and a condition subsequent (during the times therein mentioned).

Because the Statute of Anne is the source of the language in the Copyright Clause, it is significant that the Statute marks the dividing line between the early copyright of the book trade in England—known as the "stationers' copyright" (a trade copyright) because the Stationers' Company, the London Company of the book trade, created it—and modern copyright. The difference in the bases of the two copyrights is that the stationers' copyright was a private law proprietary right of the publishers not available to authors that existed in perpetuity, whereas modern copyright is a statutory grant to authors limited to a term of years.[8]

The Stationers' Company was so important in the development of copyright that it is appropriate to digress for a moment to discuss it.[9] The Stationers' Company was one of the famous London Companies, each of which controlled a particular trade (in this instance, the book trade). A London Company can be analogized to a labor union that included the employers as well as the employees. For example, membership in the Stationers' Company included booksellers (that is, publishers), printers, and bookbinders. The booksellers became the dominant

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7. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

8. The current copyright statute, however, employs a legal fiction. An employer is deemed to be the author if an employee creates a work in the course of employment. This is the work-for-hire doctrine. 17 U.S.C. § 201(b) (2006).

9. For a complete history, see generally CYPRIAN BLAGDEN, THE STATIONERS' COMPANY 31–33 (1960).

force in the Company, which explains the term "booksellers' monopoly" used during the controversy over the passage and interpretation of the Statute of Anne. Authors, not being members of the book trade, were not eligible for membership in the Stationers' Company, and because the stationers' copyright was limited to members, authors could not even own the copyrights in their own works.

The importance of understanding the stationers' copyright—which existed for more than a century and a half—is that it was used as a model (with modifications) for the statutory copyright of the Statute of Anne, which in turn provided the model for the U.S. Copyright Act of 1790. The stationers' copyright is thus a direct antecedent of the American copyright. The tendency in copyright jurisprudence, however, has been to ignore it. There has been little, if any, understanding of: (1) why Parliament changed a perpetual property right into a limited grant; and (2) why publishers attempted to override the Statute of Anne by judicial decision. The short answer in both cases is "monopoly." The limited-term statutory copyright could not support the booksellers' closed monopoly of the book trade, the kind that the perpetual stationers' copyright sustained and protected. Accordingly, the publishers sought to supplant the limited statutory copyright and reinstate the perpetual stationers' copyright in the form of a perpetual common law copyright based on natural law.

2.3 The Stationers' Copyright

Copyright developed in England because the printing press made possible the book trade—an economic opportunity for booksellers, but a political threat to the sovereign. The creation of a new church that destabilized organized religion explains why the stationers' copyright was both an instrument of economic monopoly and a device of censorship, and why its existence coincided with the period of press control and governmental censorship in England. These policies were brought about by Henry VIII's break with Rome in the 1530s, not long after Martin Luther nailed his Ninety-Five Theses to the church door in Wittenberg in 1517. Luther's recusancy, in turn, followed shortly after Gutenberg's invention of the printing press, which was introduced into England by William Caxton in 1476.

The confluence of political and religious unrest in a despotic society with a new means of mass communication by dissidents meant that censorship and press control were inevitable. The new means of communication—the printing press—resulted in

the rise of a new industry—the book trade—that provided the economic impetus for monopoly; and monopoly became the handmaiden of press control by the Crown. Given, however, that business is business, the publishers as entrepreneurs probably had little concern for censorship except to the extent that cooperation with the censoring authorities would benefit them financially.[10]

On the other hand, because the members of the book trade controlled the new press, the government was happy to co-opt them for the purpose of controlling the press's capacity to publish (to use the language of the censorship acts) seditious, schismatical, or heretical materials.[11] This is substantially what occurred when, in 1557, the Catholic Queen Mary (and King Philip) granted the guild of stationers a charter creating the Stationers' Company and effectively made the booksellers the Crown's policemen of the press.[12]

The charter gave the stationers not only the right to control the number of presses, but also the right to burn offending books—an indication of the seriousness attached to control of the press's output and a right that is, arguably, the precedent for the arsenal of potent remedies available against infringers in the current copyright statute. The Protestant Queen Elizabeth renewed the stationers' charter shortly after her accession to the throne, for the religious unrest continued.[13] In due course (and as described hereinafter), the charter was buttressed by the Licensing Acts of the late sixteenth and early seventeenth centuries—and enforced with vigor by the Star Chamber. Thus, the symbiotic relationship of press and government survived.

The stationers' copyright was the basis of the monopoly of the book trade that censorship required, but it left publishers free to create a system for maintaining order among themselves as to who was entitled to print what.[14] The cartel-like system that developed was the registration of the title of a manuscript, called

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10. As Arber said, "So we must think of these printers and publishers as caring chiefly for their crowns, half-shillings and silver pennies. They bore the yoke of licensing as best they could, but only as a means to hold themselves harmless from the political and ecclesiastical powers. Their business was to live and make money; and keen enough they were about it." Edward Arber, *Introduction* to 2 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON: 1554–1640 A.D. 11 (Edward Arber, ed., 1875).

11. Licensing Act, 1662, 14 Car. 2, c. 33 (Eng.).

12. The Charter of the Company of Stationers of London (May 4, 1557), *reprinted in* 1 ARBER, *supra* ch. 1, note 6, at xxviii–xxxii.

13. Queen Elizabeth's Confirmation of the Charter (Nov. 10, 1559), *reprinted in* 1 ARBER, *supra* ch. 1, note 6, at xxxii.

14. *See* Ordinances of the Stationers' Company, 1678–1682 A.D., *reprinted in* 1 ARBER, *supra* ch. 1, note 6, at 3–26.

a "copie," in the register book of the Company. The first stationer to register the title acquired the exclusive right to publish the registered work in perpetuity.

The jurisprudential nature of their copyright probably was not a concern of the stationers, but this practice at least indicates that they considered it to be property in the form of a written manuscript that they owned. Thus, entries in the stationers' register initially took the form of "entered for his copie"—and, later in the seventeenth century, "copie right." How title to the "copie" was acquired was not a matter of interest to the Company, which limited its concern to its own power and the welfare of its members, not of authors. Milton's sale of the copyright in *Paradise Lost* (1667), however, shows that as the book trade developed, the booksellers were willing to pay authors—but not to allow them the ownership of the copyright.

2.4 The Printing Patent

To appreciate the nature of the stationers' copyright as private property, it is useful to compare it with a competing copyright: the printing patent, a grant of the sovereign under the royal prerogative. As a direct grant from the sovereign, the printing patent was superior to the stationers' copyright and, in cases of conflict, preempted it. Despite its prominence in the sixteenth and seventeenth century, however, the printing patent had no lasting effect on the development of copyright law. It was merely one example of an exclusive right for a trade or manufacture—here, of printed matter—protected by letters patent that the sovereign sold from time to time as a means of raising funds for the royal exchequer.[15]

The effect of letters patent was, of course, to create monopolies, the resentment of which led eventually to the Statute of Monopolies in 1623.[16] That enactment marks the divergence of copyright from patent, after which the law for each proceeded along separate paths of development. For the Statute of Monopolies specifically exempted printing patents (and patents for the manufacture of gunpowder) from its operation.[17] Apparently, the Crown's authority to grant printing patents continued until the time of William and Mary, who are said to have granted the last one just prior to 1694, the date of the

15. Indeed, a patent for the printing of playing cards was the subject of *Darcy v. Allein (The Case of Monopolies)*, (1603) 77 Eng. Rep. 1260, 1260 (K.B.).

16. Statute of Monopolies, 1623, 21 Jac., c. 3 (Eng.).

17. Presumably, this was because the religious controversy continued. The English Civil War (1642–1651) occurred within two decades.

demise of the final Licensing Act[18]—an indication of how long the stationers' copyright and the printing patent coexisted. Because both were rights for the "manufacture" of books, the latter is highly useful in understanding the former.

A stationers' copyright was the right to print, i.e., to manufacture, a copyrighted book in perpetuity, the source of the right being ownership of the copie or manuscript, apparently without regard to how ownership was obtained. On reflection, there seems nothing unusual about this indifference. Presumably the Hatters' Company, for example, was not concerned with the ownership of the material the members used to make hats. The stationers' copyright thus was analogous to a manufacturing right. Its subject could as well have been widgets as books insofar as the stationers were concerned, assuming a market for widgets.

The printing patent was the exclusive right to print or manufacture, and to sell copies of, a particular book for a period certain purchased from the sovereign. The subject of printing patents tended to be books with a big market: the *ABC* book (the first book of Elizabethan school children), the catechism, the Bible, and law books. Clearly, the printing patent had no relationship to authorship per se, and neither did the stationers' copyright. This perhaps is the most significant point shown by the comparison. Thus, the early copyright was what today we would call industrial, rather than intellectual, property.

There was, however, a difference between the industrial property that was the stationers' copyright and the printing patent copyright issued by the Crown. While the stationers' copyright was a plenary property right, the printing patent was a property right created by a license purchased from the sovereign, and hence was limited in both time and scope. On the other hand, the stationers' "copie right" was protected by nothing but private law—that is, by ordinances of the Stationers' Company.[19]

The stationers were conscious of this point, because although their charter empowered them to enact ordinances for themselves, it meant that the legal basis for their copyright was weak. Thus, despite their monopoly, the stationers desired always to strengthen support for their copyright with public law. Not surprisingly, they sought such support continually from the time they received their royal charter, relying on—and always manipulating—the Crown's desire to control the output of the press. Their success took the form of Star Chamber decrees of

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18. Licensing Act, 1662, 14 Car. 2, c. 33 (Eng.).

19. For a discussion of the ordinances, see *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 203–04 (K.B.).

censorship, which made the publication of a work contrary to the stationers' copyright as illegal as a publication without the imprimatur of the licensor.

2.5 Copyright and Censorship

There were Star Chamber decrees of press control in 1566, 1586, and 1637, each of which increasingly supported the stationers' copyright. The most notable of these decrees was the last one, the Star Chamber Decree of 1637,[20] which existed for only three years because of the demise of the Star Chamber in 1640. Never hindered by political loyalty to the Royalists, however, the stationers during the Interregnum sought new censorship legislation from Parliament, thereby providing the occasion for John Milton's anticensorship tract, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).[21] Parliament, however, was not to be deterred. In 1643, 1647, and 1649,[22] it passed three ordinances of censorship—all of which suffered the same fate as the Star Chamber Decrees had upon the Chamber's demise, when Charles II returned from his travels to occupy the throne in 1660.

The Star Chamber Decree of 1637, however, was revived in the form of the Licensing Act of 1662,[23] the most important act of censorship in the history of Anglo-American copyright. Although the Licensing Act contained sunset provisions, it was renewed continually until 1694, when it lapsed for the last time. The importance of the 1662 Licensing Act is that, as the predecessor of the Statute of Anne, it apparently provided the drafters of the first true copyright statute their baseline for determining what provisions the new act should, and should not, contain.[24]

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20. Star Chamber Decree of 1637, *reprinted in* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 243–53 (1968).

21. *See* JOHN MILTON, AREOPAGITICA: A SPEECH TO THE PARLIAMENT OF ENGLAND FOR THE LIBERTY OF UNLICENSED PRINTING 52 (C.W. Crook ed., Ralph, Holland & Co. 1905) (1644) ("We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks.").

22. An Ordinance for the Regulating of Printing (June 14, 1643), *reprinted in* 1 ACTS AND ORDINANCES OF THE INTERREGNUM 184–86 (Charles Firth & Robert Rait eds., 1911); An Ordinance Against Unlicensed or Scandalous Pamphlets, and for the Better Regulating of Printing (Sept. 30, 1647), *reprinted in* 1 ACTS AND ORDINANCES OF THE INTERREGNUM 1021–23; An Act Against Unlicensed and Scandalous Books and Pamphlets, and for Better Regulating of Printing (Sept. 20, 1649), *reprinted in* 2 ACTS AND ORDINANCES OF THE INTERREGNUM 245–54. In addition, Orders of the Lord Protector were issued in 1655. Orders of the Lord Protector (Aug. 28, 1655), *reprinted in* WILLIAM CLYDE, THE STRUGGLE FOR FREEDOM OF THE PRESS: FROM CAXTON TO CROMWELL app. E (1970).

23. Licensing Act, 1662, 14 Car. 2, c. 33 (Eng.).

24. The Statute of Anne used the stationers' method of obtaining copyright

2.6 The Stationers' Copyright and the Public Domain Problem

So far as we know, the term "public domain" was foreign to the stationers' vocabulary. Given the modern meaning of the term, it is easy to see why. The public domain defines material that everyone—and thus no one—owns. The stationers' copyright defined the ownership of a "copie." Because this ownership existed in perpetuity, there was no room for the public domain. Under the stationers' regime, every printed book in England was under a copyright that was owned by a member of the Company.

There were two exceptions—the printing presses at the universities (Oxford and Cambridge) and the printing patent (as discussed above, a copyright granted by the sovereign in the exercise of the royal prerogative)—but apparently neither exception was of much concern to the stationers. The important concern was the sovereign's interest in press control, which meant that the sovereign's interest in preventing the development of a public domain was congruent with that of the stationers, albeit for different reasons. The stationers' concern was economic, the sovereign's political.

Strictly speaking, of course, the public domain is not inconsistent with a regime of censorship, for the licensor's imprimatur is required no matter who printed, or had a right to print, a book. Even so, the existence of a public domain would have been a bother. Government officials clearly thought it a great convenience to have the stationers' copyright as an adjunct of the licensor's imprimatur. Otherwise, the decrees and acts of censorship would not have made the printing of a book in violation of the stationers' copyright an offense under the licensing laws.

The most persuasive evidence of the convenience of a perpetual copyright (and thus no public domain) for a despotic government intent on controlling the output of the press is the fact that as soon as the government's reason for (and thus interest in) censorship ceased, the public domain developed.

Not many historians have treated the Glorious Revolution of 1688, which assured the Protestant Succession to the English throne, as a significant event in copyright history. But it was. For

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(registration in the Stationers' register book), but it both required that the book be printed and negated other undesirable features of the stationers' copyright, such as the limiting of copyright to members of the Company. One undesirable feature of the Licensing Act was that it subjected foreign books to censorship regulations. The Statute of Anne provided that nothing in the act "shall be construed to extend to prohibit the Importation[,] vending[,] or selling of any Books . . . printed beyond the Seas." Statute of Anne, 1710, 8 Ann., c. 19, § 7 (Eng.).

without that development, the religious conflict that threatened the Crown surely would have persisted. The official motivation for censorship would have continued, and we can assume that the legal support for the trade copyright would have been perpetuated. As it was, the end of religious strife meant the end of censorship. Thus, in 1694, only six years after the Glorious Revolution, the last licensing act was allowed to lapse for the last time, finally bringing an end to press control. Given the vested interest of the monopolists, six years was a very short period, because upon that lapse, public law support for the perpetual stationers' copyright ceased as well.

The result was the creation of the public domain for literature, an event of enormous importance in Anglo-American history but one that has received little recognition, perhaps because the creation occurred by default.

From the perspective of American copyright law, it may be fortunate that the end of censorship in England did not happen earlier. As it was, the English experience with a state religion and censorship was removed almost a century from the adoption of the U.S. Constitution. An earlier end to the controversy in England might have meant an abridgment of the invaluable historical record that, in due course, would inform the drafting of the Copyright Clause—and the First Amendment.

2.7 The Statutory Copyright

The design of the Statute of Anne—trade regulation—reflected the resentment of the oppressive monopoly that the stationers' copyright sustained more than the policy of censorship that supported it. By the time the Statute of Anne was enacted, the government's primary motivation for press control—religious controversy that threatened the Crown—no longer existed. But the vice of the book trade monopoly—high prices—was, like the stationers' copyright that had sustained it, perpetual.

The publishers apparently appreciated the potency of the resentment against their monopoly, as indicated by their plea for new legislation after the final demise of the Licensing Acts. Their argument was that a renewal of governmental press regulation was necessary for good governance. In view of their past successes, the error was a natural one, but their arrogance proved to be costly. It took them sixteen years to get Parliament to enact copyright legislation.

Moreover, the stationers had to change tactics to succeed. Their ultimate tactic was to deflect attention away from the reality that they sought copyright as a publishers' right (the

purpose of the old stationers' copyright) and to plead for copyright protection for authors (an entirely new concept). The statute also, however, was designed to protect authors' assigns, meaning the publishers. Thus, one of the great canards of all history (at least, insofar as the Statute of Anne's publisher proponents were concerned) is that the new act was advanced primarily to create an "author's copyright" for the benefit of authors.

In fact, the Statute of Anne created an author's copyright only in that it made the author—who had not been eligible for the stationers' copyright—the initial owner of the statutory copyright in newly published works. The booksellers, of course, had a continuing and important role to play, for execution of the two conditions precedent—creation and publication—required both an author and a publisher. As an analysis of the statute as a whole reveals, however, the drafters intended the new enactment to serve as a trade regulation act that would at least mitigate against a recurrence of the booksellers' monopoly of the book trade.[25]

There is no reason to believe that the drafters of the Statute of Anne thought in terms of protecting the public domain. But to the extent the copyright monopoly was limited, the public domain was protected. Thus, the act made copyright available only for new books newly published, and limited protection to two terms of fourteen years each, the second of which was available only to the author and only if the author was living at the end of the first term. The prices of books were to be controlled if they became too expensive (the officials to whom complaint could be made were those who had served as licensors under the Licensing Acts); and copies of published books were to be supplied to nine different libraries. The only benefit unique to the author was the right to the renewal term if the author were then still living. It is reasonable to conclude that this benefit was intended by the drafters of the Statute as an additional hindrance to the booksellers' monopoly: if the author died during the first term of copyright, the book would go into the public domain at the end of fourteen, rather than twenty-eight, years.

The new statutory copyright did not, as the stationers' copyright had, provide protection before publication. Rather, it denied protection both before publication and after the statutory term. The first hiatus provided a reason for the common law

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25. *See* Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 227–28 (1966) (analyzing the purpose of England's original copyright statute).

copyright. The second hiatus protected the public domain, which had two enormously important consequences—one political and one economic.

The political importance of the creation of the public domain is that it marked the definitive end of governmental censorship. As two and a half centuries of English history suggest, a government seeking to control the output of the press will not tolerate either a public domain for writings or a copyright that is independent of the censors. The message that the Statute of Anne conveyed was two-fold: (1) that copyright is a conditional right requiring the creation of a new work, as distinguished from an unconditional right facilitating the continued exploitation of old works; and (2) that the public domain is more important to learning than copyright, under which even new writings henceforth would be subject to the copyright holder's marketing control only for short periods of time, not in perpetuity.

The requirement of a newly authored work meant that statutory copyright could not be used to continue indefinitely the booksellers' ownership of materials already in the public domain. The limited term of copyright meant that all new works thereafter protected under statutory copyright would eventually, and having at least in small measure enriched their authors, become freely available in the public domain rather than remaining subject to the publishers' further monopoly ownership. Herein lies the genius of the Statute of Anne: it protected the public domain, at the expense of publishers, even as it benefited authors.[26]

The economic consequence of the public domain was that it shifted the basis of copyright from the manufacture to the writing of books, from printing and publication to authorship. An industrial property based on sweat-of-the-brow was in theory replaced by an intellectual property based on creative energy and imagination.[27] Had the booksellers achieved their eighteenth century goal—a return to the stationers' copyright in the form of a judicially created common law copyright—they would have

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26. Perhaps we should not be surprised. If true, the traditional attribution of the Statute's authorship to Jonathan Swift redounds greatly to his credit.

27. The shift has been seldom recognized. There seem to be two reasons. First, there is a lack of awareness of the stationers' copyright, so there is no reason to recognize the shift; and secondly, the terms often associated with copyright—author's right, property right, natural law right—derive from the eighteenth century as a result of the booksellers' efforts to override the limitations of the Statute of Anne with the author's common law copyright based on natural law. Thus, the booksellers managed to obscure the fact that copyright was designed by stationers to protect the publisher who printed and distributed books, not to protect the author who wrote them.

ended the public domain and secured the right to hold all copyrights forever.

2.8 The Battle of the Booksellers: Natural Law v. Positive Law

Clearly, Parliament had not given the booksellers what they wanted in the Statute of Anne. Because the new copyright act did not fully satisfy their desires, the publishers simply ignored it and proceeded with business as usual. Indeed, there was little need for them to change those practices for twenty-one years, because the Statute of Anne continued the old stationers' copyright for that period of time.[28] Thus, it was 1731 before the booksellers took action, when they returned to Parliament for new legislation to enable them to continue their old copyrights. This time, they failed utterly, and it was then that they turned instead to the judicial arena in an effort to destroy the public domain by securing creation by the judges of a perpetual common law copyright. Their effort came to be known as the "Battle of the Booksellers."

The booksellers' strategy was simple, sophisticated, and almost successful. It was to obtain their goal by indirection—in military terms, by attacking the flanks rather than proceeding with a frontal assault. The stalking horse was the author, and the tactic was to convince courts that the Statute of Anne was intended only to provide a statutory remedy for violation of the author's supposed continuing rights under common law. The sole jurisprudential vehicle available to legitimate their goal—overriding the statute—was natural law. And because the Statute of Anne was positive law, the issue was joined. The Battle of the Booksellers was a battle between natural (or common) law and positive (or statutory) law. In the end, both types of law were employed to create a dual—and faulty—foundation for copyright law. The relevance of the Battle of the Booksellers for contemporary copyright issues, then, is that it created the theoretical incoherence that continues to plague the law of copyright.

At first glance, it seems odd that the booksellers would argue that the author had a common law copyright based on natural law, because in doing so they seemed to be arguing against their own interest. There were, however, two reasons for the strategy. First, the Statute of Anne did not deal with ownership of a work before publication, which provided a reason for recognizing the author's common law copyright. Second, the author's ownership

28. Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.).

of copyright was the least of their concerns, for commercial custom dictated that the author assign the copyright to the bookseller, and booksellers controlled the custom. Their primary goal was to destroy the public domain by reviving the stationers' perpetual copyright. In pursuit of this goal, they created and contributed to a fund for litigation,[29] they brought cases in Chancery to obtain injunctions,[30] and then, having succeeded in this endeavor, they proceeded to the common law courts. Although at least one common law case was dismissed for collusion, the Chancery precedents ultimately served them well in achieving their goal in the King's Bench in 1769.

A. The Millar *Case.* In *Millar v. Taylor* (1769), the copyright of the work at issue (James Thomson's *The Seasons*) had expired under the Statute of Anne, but the court ruled three to one that an author also had a common law copyright in perpetuity under natural law—a right that he could assign to the bookseller.[31] Noting that "[i]f the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff," Justice Willes[32] said the author's title to the copy depended upon two questions: "1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law: 2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19."[33]

Justice Yates dissented and voted in favor of the statutory copyright, presumably because he recognized the booksellers' goal of destroying the public domain. Thus, Yates phrased the issue differently, stating that the question before the court was:

> [W]hether, after a voluntary and general publication of an author's works by himself, or by his authority, the author has a sole and perpetual property in that work; so as to give him a right to confine every subsequent publication to himself and his assigns for ever.[34]

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29. *See* 17 PARLIAMENTARY HISTORY OF ENGLAND 1086 (1813) (noting that the booksellers had raised a fund of over £3000 to file suits in Chancery "against any person who should endeavor to get a livelihood as well as themselves").

30. *See* Millar v. Taylor, (1769) 98 Eng. Rep. 201, 208–09 (K.B.) (discussing unreported Chancery cases in which preliminary injunctions were issued).

31. *Id.* at 205–06.

32. The English practice is for judges to render individual judgments seriatim, each writing his or her own opinion rather than joining one written by another judge. *See* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINANCY 116 (1995).

33. *Millar*, 98 Eng. Rep. at 206 (Willes, J.).

34. *Id.* at 229 (Yates, J.).

Two of the three majority judges, Justices Willes and Aston, argued that the ordinances of the Stationers' Company, the various decrees and acts of censorship, and injunctions from Chancery proved the existence of the common law copyright, arguments that were rebutted by the dissenter, Justice Yates. Lord Mansfield, however, was more sophisticated. He believed that "[t]he regulations, the ordinances, the Acts of Parliament, the cases in Westminster-Hall, all relate to the copy of books after publication by the authors."[35] He then argued that the author's copyright before publication existed because "it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication."[36] In short, the common law was natural law jurisprudence, and a common law copyright was consistent with that jurisprudence.

B. The Donaldson *Case.* The majority in *Millar* thus gave the booksellers precisely what they sought. But *Millar* was not appealed. It lasted as precedent for only five years before the House of Lords overruled it in *Donaldson v. Beckett* in 1774.[37] Sitting in their judicial capacity, the Lords directed the judges of the common law courts to advise them on the issue.[38] By a vote of twenty-two to eleven,[39] the Lords followed the advice of the common law judges and held that the author did possess a common law copyright in his or her writings, but that the common law right was lost upon publication. Thereafter, the

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35. *Id.* at 252 (Mansfield, J.).

36. *Id.*

37. Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.).

38. In total, five questions were posed. The first three were:

> I. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published and sold the same without his consent? II. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition; and might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author? III. If such action would have lain at common law, is it taken away by the statute 8th Ann; and is an author, by the said statute, precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby?

Id. at 846. Respectively, the Lords answered in the affirmative 10-1, 7-4, and 6-5 (although the multiplicity of reports of the decision renders all such counts problematic). Two additional questions posed by Lord Camden, who opposed the booksellers' position, were: "IV. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law? V. Whether this right is in any way impeached, restrained, or taken away by the statute 8th Ann?" *Id.* at 847.

39. PARLIAMENTARY HISTORY OF ENGLAND, *supra* ch. 2, note 29, at 1003.

author had only such rights as the Statute of Anne granted. In so ruling, the Lords adopted the positive law theory of copyright and saved the public domain. But the Lords' ruling also meant that the natural law theory remained viable, by reason of their compromise[40] recognizing the author's ownership of, or "common law copyright" in, the manuscript prior to publication.

2.9 Postscript: The Booksellers' Copyright Bill

The Lords rendered the *Donaldson* decision on February 22, 1774. In the House of Commons six days later, "Mr. Alderman Harley presented a Petition from the booksellers of London and Westminster, on behalf of themselves and others, holders of Copy-Right . . . ."[41] The purpose of the bill was to extend the term of copyright. The main argument in support of the bill was that, in reliance on *Millar*, the booksellers had expended large sums of money for perpetual copyrights.

The proceedings on the Booksellers' Copyright Bill are interesting because they reveal the booksellers' ulterior motives in seeking recognition of an author's common law copyright based on natural law. Having lost in the courts, they dropped all pretense that copyright was primarily to benefit authors rather than themselves. Their argued reliance on *Millar* did not explain, as the proceedings showed: (1) why they apparently disregarded the Statute of Anne altogether by not even bothering to register their copyrights; (2) why they limited attendance to their copyright auctions to London booksellers, excluding the country booksellers; or (3) why the London booksellers raised a fund of £3000 to seek injunctions in Chancery against offenders of their perpetual copyrights.[42] This conduct made the motives of the booksellers transparent, and resentment against their monopoly was sufficient to defeat the bill.

2.10 The Constitutional Concept of Copyright

As this arcane history teaches us, there is a constitutional concept of copyright that the Framers embodied in the Copyright Clause, the framework for which is three constitutional policies:

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40. That the ruling constituted a compromise is obvious. The only basis for recognizing the author's common law copyright before publication was Lord Mansfield's position that the common law was natural law jurisprudence. On the other hand, one might well ask, if the common law recognized the copyright before publication, where was the right and justice in taking it away upon publication?

41. PARLIAMENTARY HISTORY OF ENGLAND, *supra* ch. 2, note 29, at 1077.

42. *Id.* at 1086.

the promotion of learning, the protection for the public domain, and the publication of works to ensure public access.

The key to the constitutional copyright is "the exclusive Right" that Congress is empowered to secure in authors. Apparently, most lawmakers have assumed that the phrase embraces plenary proprietary rights, which are deemed appropriate for creators because the creators (and their publishers) say so. Because such an approach endangers all three copyright policies contained in the Constitution, this view is suspect and should be subject to examination.

There are, we suggest, three steps to determining precisely what the phrase "the exclusive Right" means: (1) determine what the phrase meant in the eighteenth century; (2) determine if the meaning is consistent with the constitutional policies; and (3) determine if the meaning is appropriate for inventions—to which the phrase also applies—as well as writings.

There is simply no question that, in the eighteenth century, "the exclusive Right" meant the right to publish, that is, to reproduce copies for sale. Given the fact that the exclusive right was to last only for a limited time, the meaning clearly is consistent with promoting learning, protecting the public domain, and requiring publication to ensure public access: publication is both a necessary and a sufficient condition for all three policies. Finally, the dual application of the exclusive right to both inventions and writings suggests that the exclusive right can only be the right to market—specifically, in the context of copyright, the right to publish the writing of authors.

A test for the validity of this analysis is to determine how a broader meaning for "the exclusive Right" of authors would affect the other constitutional policies such a right protects and the reason it is afforded. A broader definition of the exclusive right would mean a right that protects the contents of the work as well as the right of exclusive publication. But then copyright would constitute not only ownership of the right to publish a work, but also the ownership of the contents of the work itself.

The effect of this definition of copyright would be to make the exclusive right of the author superior to either the promotion of learning or the protection of the public domain. The copyright monopoly would thus far exceed the exclusive right merely to market the work for a relatively brief period of time. Copyright would cease to be a limited statutory monopoly and instead become a proprietary monopoly, with the rules of property law serving as a substitute for reason in the resolution of issues in

the creation and acquisition of knowledge. That is the very goal that publishers have sought since the Statute of Anne.

Unequivocal acceptance of a proprietary copyright, however, would require that Congress do one of two things: either grant to authors the ownership of their work, not simply the right to market it; or sanction the federal courts' use of state common law to create a federal common law copyright based on natural rights. The result would be a copyright composed of two different bodies of law. Because this would require that federal courts combine federal statutory law with state common law to create a copyright far in scope beyond the power granted to Congress by the Copyright Clause, such action would be unconstitutional.

Indeed, this was precisely the strategy of the publishers in nineteenth century America, where that plan was rebuffed by the Supreme Court in *Wheaton v. Peters* in 1834, just as it had been in England in *Donaldson v. Beckett* in 1774.[43] The definitive nature of the two rebuffs, however, has receded from public consciousness over the years because of the continuing presence, both in decided cases and in the literature of the law, of the so-called "common law copyright." The error, originating in *Donaldson* and exploited to this day by the publishers, was the assumption that the "common law copyright" was indeed a copyright. But it was not. For whereas true copyright is the exclusive right of *continued* publication, the "common law copyright" was only a right of *first* publication—that is, the right of initial disclosure to the public of a theretofore private manuscript.

The notion of common law copyright, however, has long served the publishers' purpose because it implies that the author in fact owned the work that he or she created, not just its first embodiment in the manuscript and the right upon publication to sell further copies in the marketplace. The importance of recognizing—and adhering to—the constitutional concept of copyright, then, lies not just in observance of the Constitution's command (as if that were not enough). Such faithfulness also is good policy, because the constitutional concept of copyright precludes copyright as a substitution for a proprietary monopoly that threatens the promotion of learning and the public domain by enabling publishers to usurp and exaggerate the author's rights for the benefit of the publisher's purse.

43.* For a fuller discussion of the *Wheaton* case, see generally Joyce, *supra* ch. 2, note 3.

CHAPTER 3. THE 1976 COPYRIGHT ACT AND ITS INTERPRETATION

3.1 Introduction

The Copyright Act of 1976, the fourth major revision of the copyright statute since 1790, is the most revolutionary and

arguably the most misread.[1] The reason for the first characterization is the Act's dramatic reduction of the traditional panoply of preconditions for copyright protection—a work of original authorship, fixed in a tangible medium of expression, plus publication, notice, registration, and deposit—to merely the first two. The reason for the second characterization is that the 1976 Act, like its predecessors only more so, is a regulatory statute that continues to be read as being proprietary.

The grant of rights in § 106, for example, includes the exclusive right (subject to limitations) to reproduce the work in copies and also to distribute copies to the public.[2] These rights can be viewed as being independent of each other, in which case they are treated as being proprietary in nature. This is because, under the law of property, one has the exclusive right to control the copying of one's work without regard to its distribution. Or the rights can be read as being interdependent, in which case they are treated as being regulatory. This is because the exclusive right to copy is then regulated, in the sense that it is limited to the "right to copy for public distribution" in order to promote learning.

The argument for the latter view is undergirded by both the Copyright Clause and the structure of the statute. Most courts, however, tend to give the statute a proprietary reading that is inconsistent with its regulatory structure. Two reasons explain this anomaly. One is that busy judges have little time to study a complex statute as a whole, so they limit themselves to the particular provisions relevant for the issue at hand. The other reason for the misreading is that publishers, taking advantage of the fact that people process information according to culture rather than content, have managed to create a proprietary culture of copyright as private property. If copyright is private property, it is unfair for one to copy it without permission, despite the fact that the statute says that such copying can be a fair use. Thus, as property, copyright is deemed to be devoid of public interest, although it is a statutory grant to serve a public purpose.

Supporting the proprietary view is the idea that the creation of a new work is a condition for copyright because one is deemed

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1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–805 (2006)).

2. Section 106 also protects the rights to reproduce and distribute a work publicly in the form of "phonorecords," but phonorecords are nothing more than copies in the specialized context of sound recording works. 17 U.S.C. § 101 (2006). For simplicity, we use the term "copies" throughout.

to own what one creates. This idea, however, is a simplistic natural law concept that confuses the ownership of a work, which Congress cannot grant under its copyright power, with the ownership of a copyright, which Congress can grant. The point is that Congress is constitutionally mandated to regulate the copyright that it grants. Courts interpreting the copyright statute should deem themselves bound by the same limitations the Copyright Clause imposes on Congress in enacting the copyright statute.

In this chapter, we discuss briefly the statutory development of copyright, describe the 1976 Act, and conclude with a brief comment on interpretation of the statute.

3.2 The Statutory Development of Copyright

The 1790 Copyright Act has evolved through three major revisions[3] (and many amendments) into the 1976 Copyright Act, which alters the theory of copyright protection. The 1976 Act rejects publication and the traditional statutory formalities as preconditions for copyright, and instead vests copyright from the moment an original work of authorship is fixed in a tangible medium of expression. The evolution began with the amendment of 1802, which added prints and engravings to the list of works—books, maps, and charts—that could be copyrighted.[4] In the 1831 revision, Congress added musical compositions,[5] followed in further amendments by dramatic compositions[6] in 1856 and photographs in 1865.[7] The second major revision, in 1870, added works of art generally,[8] and the third major revision of U.S. copyright, in 1909, provided copyright protection for "all the writings of an author."[9]

Constant through all these changes were what may be called the three pillars of nineteenth century copyright: (1) publication as a condition precedent for copyright; (2) copyright formalities; and (3) congruent economic exploitation rights limited according to the nature of the work, namely, publication rights for books,

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3. The revisions were by Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; by Act of July 8, 1870, ch. 230, §§ 85–111, 16 Stat. 198, 212–16; and by the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

4. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171.

5. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436.

6. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138–39.

7. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540, 540.

8. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

9. Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076 (codified as amended at 17 U.S.C. § 4 (1976)).

copying rights for works of art, and performance rights for dramas and musical compositions.

A. Publication. A condition precedent until the 1976 Act, publication was the traditional quid pro quo for copyright because it assured public access to copyrighted materials, a step necessary to fulfill the learning purpose of copyright. The importance of publication, however, has been obscured by two factors. One is that its importance is a truism. People tend not to take truisms seriously, even if in fact they are true. The other factor contributing to publication's obscurity has been the argument that the purpose of copyright is to encourage creation, not distribution—that without copyright, authors will not create. This, of course, is nonsense. Publishers distribute even works that are not protected by copyright, as the number of editions of such public domain works as Shakespeare's plays attests. The irony is that publishers make the "creation, not distribution" argument whenever they seek to replace the statutory copyright with the natural law copyright for the very purpose of further enhancing their control over the distributing and marketing of copyrighted works.

B. Copyright Formalities. An important characteristic of copyright statutes prior to 1976 was the requirement of compliance with the historic copyright formalities: notice, registration, and deposit. Thus, to secure copyright protection, the copyright claimant had to publish the work with notice,[10] register publication of the work,[11] and deposit copies of the work, all in the manner prescribed by statute.[12]

The status of the formalities was at issue in *Wheaton v. Peters*, where the plaintiffs claimed them to be discretionary.[13] The Supreme Court disagreed, holding that they were mandatory because they were conditions precedent and subsequent,[14] and that, absent compliance in strict accordance with statutory requirements, there was no copyright. The formalities, in short, were misnamed: they were duties of substance, not form. This remained the law until the 1976 Act, when Congress provided

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10. Copyright Act of 1909 § 9, 35 Stat. at 1077 (codified as amended at 17 U.S.C. § 10 (1976)).

11. Copyright Act of 1909, § 10, 35 Stat. at 1078 (codified as amended at 17 U.S.C. § 11 (1976)).

12. Copyright Act of 1909 §§ 12–13, 35 Stat. at 1078 (codified as amended at 17 U.S.C. §§ 13–14 (1976)).

13. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 607 (1834).

14. *Id.* at 664–65.

that neither deposit[15] nor registration[16] is a condition of copyright protection—following which, in further amendments under the Berne Convention Implementation Act of 1988, Congress made the notice discretionary rather than mandatory.[17]

C. Economic Exploitation. Economic exploitation was the reason for developing copyright in the first place and continues to be its growth motivation. Thus, publishers early on recognized that the most efficient means of economic exploitation of books was the exclusive right to print and sell them. For prints and engravings, efficient marketing requires the right to copy and to sell copies, which explains why the exclusive right to copy was first granted in conjunction with copyright for these works.[18] For dramas and musical compositions, the most important means of economic exploitation is performance, a right granted for dramas in 1856[19] but not for musical compositions until 1895[20] (although musical compositions themselves were given copyright protection in the 1831 Revision Act).[21] As a general proposition, then, the copyright owner was given a right to publish a book, copy a work of art, and perform dramas and musical compositions.

The nineteenth century constants of copyright—publication, formalities, and congruent economic rights—began to change in the early twentieth century, when the 1909 Act altered the economic exploitation scheme by giving the copyright owner the right to "print, reprint, publish, copy and vend" all copyrighted works.[22] This change paved the way for even more major changes in the 1976 Act: elimination of publication and the formalities as conditions for copyright, as well as the inclusion of provisions that accord the copyright owner the right to generic economic exploitation for copyrighted works generally (to reproduce the work in copies, to prepare derivative works, and to distribute, perform, and display the works publicly).[23]

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15. Copyright Act of 1976, Pub. L. No. 94-553, § 407(a), 90 Stat. 2541, 2579 (codified as amended at 17 U.S.C. § 407(a) (2006)).

16. Copyright Act of 1976 § 408(a), 90 Stat. at 2580 (codified as amended at 17 U.S.C. § 408(a) (2006)).

17. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, sec. 7, § 401, 102 Stat. 2853, 2857 (codified as amended at 17 U.S.C. § 401 (2006)).

18. *See* Act of Apr. 29, 1802, ch. 36, §§ 2–3, 2 Stat. 171, 171–72.

19. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

20. Act of Mar. 2, 1895, ch. 194, 28 Stat. 965.

21. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436.

22. Copyright Act of 1909, Pub. L. No. 60-349, § 1(a), 35 Stat. 1075, 1075.

23. Copyright Act of 1976, Pub. L. No. 90-553, § 106, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 106 (2006)).

The importance of the nineteenth century constants of copyright in limiting the copyright monopoly, however, did not become apparent until they were discarded and copyright began to overflow its constitutional banks. With the nineteenth century copyright constants in place, a failure to publish (and thus provide public access) meant that there was no copyright protection; a failure to comply with the formalities upon publication meant that the work proceeded immediately into the public domain without ever obtaining statutory copyright; and the congruent economic rights benefited copyright owners without enabling them to control uses of copyrighted works that did not interfere with their marketing rights (a situation which would then have inhibited, and currently does inhibit, the progress of learning).

The nineteenth century constants thus minimized the need for copyright defenses; and indeed, one of the less salutary legacies of the disappearance of the constants is underdeveloped copyright defenses. Now that the constants have been removed, the need to develop copyright defenses emerges, a point with which we deal in Chapter 7. For the present, we turn to the 1976 Copyright Act.

3.3 The Structure of the 1976 Copyright Act[24, 25]

Viewing the 1976 Copyright Act[26] as a whole enables one to see that a piecemeal inspection is misleading. Section by section, the primary purpose of the statute seems to be to protect the copyright holder's ownership of the work. Viewed in its entirety, however, the statute's focus is the regulation of the copyright holder's monopoly. Put otherwise, the concern of the 1976 Act is not ownership of a work, but rather ownership of the bundle of rights which enable the copyright holder to exploit the work.

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24. The 1976 Act has been amended frequently, the most significant amendment being the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. Despite the amendments, the structure of the statute remains the same. Because structure is our focus here, we do not deal with the amendments not relevant to that immediate concern.

25.* Two further major revisions of the 1976 Act—the Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998), and the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998)—were enacted by Congress subsequent to the last revision of this portion of the manuscript by Professor Patterson. These developments are discussed at length in L. Ray Patterson, Eldred v. Reno*: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223 (2001) and L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33 (2002).

26. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–805 (2006)).

Thus, the statute provides the rights of copyright in one section and limits those rights in several succeeding sections (Chapter 1, Subject Matter and Scope of Copyright);[27] it specifies who owns copyright and how it is transferred (Chapter 2, Copyright Ownership and Transfer); it limits the copyright term and allows the author to terminate assignments of copyright (Chapter 3, Duration of Copyright); prior to amendment, it required formalities, and still encourages them (Chapter 4, Copyright Notice, Deposit, and Registration); and it defines infringement and provides for remedies (Chapter 5, Copyright Infringement and Remedies).[28] In short, the copyright statute regulates the rights it grants.

3.4 Chapter 1 of the 1976 Act: Subject Matter and Scope of Copyright

Chapter 1 contains definitions, the subject matter of copyright, the conditions for copyright protection, the types of copyrightable works, the scope of copyright protection, the rights of the copyright owner, and the limitations on, and the scope of, those rights.

A. The Subject Matter of Copyright and Copyright Conditions. A statutory monopoly ordinarily is a monopoly for marketing that is not conditioned upon the creation of the work to be marketed. In this respect, the copyright statute is different: it grants copyright on condition that it will protect an original work of authorship fixed in a tangible medium of expression. The two conditions precedent for the copyright monopoly—the creation and the fixation of an original work—reflect the Copyright Clause's requirement that Congress recognize copyright only for the writings of authors.

B. The Types of Copyrightable Works and the Scope of Copyright Protection. The requirement of originality may be satisfied by: a creative work (e.g., a novel or drama); a derivative work (e.g., a motion picture based on a novel); or a compilation, which may be either a compilation of data (e.g., a directory) or a collective work containing independently copyrightable works (e.g., an anthology of short stories). Thus, there are only three

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27.* In the 2006 edition of the Code, the rights are specified in § 106 of Chapter 1 and the limitations thereon in §§ 107–122, as well as in self-contained § 106A (concerning rights of attribution and integrity in certain works of visual art).

28. The remaining chapters of the 1976 Copyright Act, and the non-copyright-based ("para-copyright") chapters added to Title 17 since 1976, are of little interest for our purposes.

types of copyrightable works, a point that relates to the scope of copyright protection.

Because originality is a constitutional condition, it follows that copyright protection extends only to the original components of a work. Copyright thus cannot constitutionally protect unoriginal components even in a creative work—for example, a Shakespeare sonnet used in the love scene of a modern novel. This means that the scope of copyright protection for the three types of works necessarily varies according to their original content.

This is a prime example of the regulatory effect of the copyright statute. A derivative work copyright protects only the original contributions of the derivative work author; a compilation work copyright protects only the original contributions of the compilation work author.[29] And because the only originality necessary for a compilation copyright is selection, coordination, or arrangement, a compilation copyright protects the work as a whole, but not the contents of the compilation separate and apart from the compiled work. In short, the conditions for copyright determine the scope of copyright protection.

Courts that do not apply this rule invariably provide copyright protection for uncopyrightable (i.e., public domain) material that may be included in the compilation.[30] Such courts miss the point that the compilation copyright requires originality in selecting, coordinating, or arranging materials, not for creating them; and while the compilation copyright protects the compilation as a whole (as the product of the compiler's selection, coordination, or arrangement), it does not protect the contents of the compilation itself.[31] The point is underscored by the fact that if the contents are independently copyrightable (for example, as an anthology of short stories), the compilation is called a collective work and the contents are protected by their own copyright.

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29. 17 U.S.C. § 103 (2006).

30. The prime example of this is *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1224 (8th Cir. 1986), in which confusion led the court to provide copyright protection for court opinions by reason of the way they were arranged. *See* L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 809–13 (1989) (analyzing *West Publishing*).

31. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (observing that "[o]riginality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author" (citing Patterson & Joyce, *supra* ch. 3, note 30, at 800–02)).

The regulatory scheme extends also to what is not copyrightable. In § 102(b), Congress explicitly provided that copyright protection cannot extend to ideas, procedures, processes, systems, method operation, concepts, principles, or discoveries;[32] and in § 105, Congress provided that copyright protection is not available for any work of the U.S. Government.

C. The Rights of the Copyright Owner. Section 106, as originally enacted in 1976 and effective January 1, 1978, provides to the copyright holder five rights (since augmented by a sixth), subject to limitations defined in the remaining sections of Chapter 1. The five rights are to reproduce the work in copies, to prepare derivative works, to distribute the work publicly, to perform the work publicly, and to display the work publicly. The most recently recognized right, added by amendment in 1995, relates to the transmission of digital audio recordings.

While § 106 specifies the rights, the existence of these rights is subject to § 102(a) (fixed original work of authorship), § 102(b) (no protection for ideas), § 103 (limited protection for compilations and derivative works), and § 105 (copyright not available for works of the U.S. Government). Copyright, then, never protects public domain material, which may be in the public domain because it is unoriginal, is § 102(b) material, or is a § 105 work of the U.S. Government, or because it was once the subject of a copyright that is now expired.

D. The Limitations on the Rights of the Copyright Owner. There are sixteen sections limiting the rights of the copyright owner: ten designated as limitations and six defining the scope of the rights.

The sections designated as limitations are limitations on the rights granted by § 106. For example, § 107, "Limitations on exclusive rights: Fair use," is a limitation on all of the copyright owner's rights and is applicable to all copyrighted works. The sections designated as "Scope" redefine the exclusive rights of § 106 as applied to the particular type of work that is the subject of that section. For example, § 114, "Scope of exclusive rights in sound recordings," provides that protection for recordings extends only to the sounds as recorded, not to an imitation of the sounds when the imitation is independently produced. The section thus redefines the right of the copyright owner of sound

32. Section 102(b) generally is viewed as a codification of the ruling of *Baker v. Selden*, 101 U.S. 99, 102 (1879). Whether or not that view is, strictly speaking, correct, the importance of the protection provided to the public domain by § 102(b) is beyond doubt.

recordings insofar as the rights to reproduce in copies and to prepare derivative works are relevant. To make a statutory grant of rights and to define the limits and scope of those rights in the same statute is, of course, the essence of regulation.

The variations in the scope of copyright protection are a manifestation of the principle of unequal copyright protection, and are part of the regulatory scheme that carefully calibrates the rights. The relevant point is that one whose use of a copyrighted work is not within the scope of the copyright owner's rights cannot be guilty of infringement. A copyright holder has no exclusive right, for example, to read a book or to sing a song in the shower. And anyone can imitate the recordings of a musical composition precisely by creating his or her own recording because the scope of the copyright owner's rights do not extend so far.

The limitations on the copyright holder's rights present a more complex problem. This is because the statute grants rights to users that overlap rights otherwise reserved to the holder—for example, reproducing the work in copies. The most important example of these limitations is the fair use right, to which all rights of copyright and all copyrightable works are subject.[33]

The important point is the relation of the fair use section to other sections that are also limitations on the rights of the copyright holder—for example, § 108, "Limitations on exclusive rights: Reproduction by libraries and archives." Viewed logically, § 108 and the other sections of limitation are safe harbor provisions.[34] This means that if one's use of a work falls within the provisions of a particular section, there is no infringement and no need to resort to fair use. On the other hand, if the conduct exceeds the parameters of a particular section, the use is not necessarily an infringement because it may be a fair use. Any other interpretation would mean that particular rights effectively circumscribe—if not eliminate—the general right of fair use, which would change the regulatory scheme of the statute. Thus, it is only when the conduct exceeds the parameters of particular sections that one need consider the fair use right.

The safe harbor concept is important because not all copyrighted works are entitled to the same scope of copyright protection. The existence of a safe harbor is thus to be

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33. *See* H.R. REP. NO. 94-1476, at 72 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5686 ("[T]he same general standards of fair use are applicable to all kinds of uses of copyrighted material . . . .").

34. As to § 108, there is proof of this point in § 108(f)(4), which provides that nothing in the section shall affect the right of fair use. 17 U.S.C. § 108(f)(4) (2006).

determined by the applicable section, for example, the § 110 limitations on exclusive rights in the classroom, and what is fair use is to be determined on a case-by-case basis in light of the four statutory factors in § 107.[35]

E. Compulsory Licenses. A compulsory copyright license can be defined as a statutory right to use another's copyright subject to the conditions in the statute. The use of the copyright involves the use of the work, but without copyright, there would be no need for the license. Accordingly, the license fee is for the use of the copyright, not the work.

The first compulsory license was the compulsory recording license for musical compositions in the 1909 Act. Section 1(e) of that statute provided that once the copyright owner of a musical composition recorded the composition, anyone else could record it by paying the statutory licensing fees.[36] This license has been carried over into the 1976 Act.[37]

The 1976 Act also extended the compulsory license to jukeboxes[38] and cable television,[39] and it is now applied to superstations and satellite retransmissions.[40] In addition, there are compulsory licenses for ephemeral recordings[41] and for noncommercial broadcasting stations.[42] In theory, a compulsory license limits the monopoly of copyright and prevents monopolistic control of the dissemination of copyrighted materials. But this is true only when the compulsory license is required of competitors. The extensions of the licensing power, compulsory or otherwise, to individual users is an exponential increase in the copyright holder's monopoly that enhances the profit potential enormously.

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35. *See* H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 ("[T]he doctrine is an equitable rule of reason . . . and each case raising the question must be decided on its own facts.").

36. Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075–76 (codified as amended at 17 U.S.C. § 115 (1976)).

37. Copyright Act of 1976, Pub. L. No. 94-553, § 115, 90 Stat. 2541, 2561 (codified as amended at 17 U.S.C. § 115 (2006)).

38. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 116, 90 Stat. 2541, 2562 (codified as amended at 17 U.S.C. § 116 (2006)) (now a negotiated license).

39. Copyright Act of 1976 § 111, 90 Stat. at 2550–51 (codified as amended at 17 U.S.C. § 111 (2006)).

40. *See* 17 U.S.C. §§ 119, 122 (2006) (general retransmissions and so-called local-to-local retransmissions, respectively).

41. 17 U.S.C. § 112(e) (2006).

42. 17 U.S.C. § 118 (2006).

F. The Author's Moral Right in Works of Visual Art. A new feature of American copyright is the statutory recognition of the author's moral right in works of visual art,[43] prompted by the adherence of the United States to the Berne Convention. The moral right is not a right of the copyright owner, but of the creator of the work—a personal right that enables the author to protect the integrity of the work and his or her reputation in conjunction with it. A feature of copyright in European countries, moral rights have been given only limited recognition in the United States, presumably because such rights are inalienable personal rights of the author to which the property right of the copyright holder may be subject. Moral rights, for example, might give the author of a novel the right to reject a movie producer's film treatment of the novel, although the producer had purchased the right to make the novel into a film. This fact probably explains why the statute limits the moral right to works of visual art, reflecting the disagreement as to the desirability of the doctrine between authors as creators and copyright holders as entrepreneurs.

3.5 Chapter 2 of the 1976 Act: Copyright Ownership and Transfer

Chapter 2 provides that copyright vests initially in the author or authors of a work, that the copyright may be transferred in whole or in part, and that the transfer must be in writing. The important provisions of Chapter 2, however, are the work-for-hire doctrine, the distinction between ownership of the copyright and ownership of the material object in which a work is embodied, and the termination right (a right that exists also, with reference to transfers of different vintages, in Chapter 3).

A. The Work-for-Hire Doctrine. The work-for-hire doctrine is a legal fiction. It provides that the employer or other person for whom an author prepares the work is the author for purposes of copyright.[44] The parties, however, may change this result by an agreement in writing. But the definition of a "work made for hire" in § 101 provides that, as to various specified kinds of commissioned works, the parties must agree in writing if a work of the type listed is to be a work for hire.[45]

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43. 17 U.S.C. § 106A (2006).
44. 17 U.S.C. § 201(b) (2006).
45. 17 U.S.C. § 101 (2006).

Arguably, the work-for-hire doctrine, which made its first appearance in the 1909 Act,[46] is beyond the constitutional authority of Congress. But it has become enormously important by reason of copyright protection for works that are created by the cooperative effort of many persons—for example, motion pictures and television broadcasts. Consequently, despite the fact that it takes a leap of faith to treat a corporate entity as an author, the Supreme Court is not likely to reject the doctrine as being unconstitutional.[47]

Even so, the use of a legal fiction to make a communications conglomerate an author may be relevant for purposes of implementing constitutional copyright policies. Thus, to the extent a legal fiction interferes with the constitutional policy that copyright promote learning, it should be modified in application. For example, the extension of copyright to live television broadcasts—which are accessible only at the will of the copyright owner—should be subject to a broader fair use right than is copyright for printed works. Indeed, *Sony Corp. of America v. Universal City Studios, Inc.* (1984) can be seen as an example of this point because it held that the videotaping of entire copyrighted motion pictures off-the-air is a fair use.[48]

B. The Distinction Between the Copyright and the Work. Section 202 of the 1976 Act provides that the ownership of a copyright (or of any of the exclusive rights under a copyright) is distinct from ownership of any material object in which the work is embodied. The implication is that ownership of the copyright does not mean ownership of the work. In fact, the U.S. Supreme Court so held as early as 1852,[49] and repeated the holding in 1907.[50]

The two decisions, however, seem to have been forgotten and their rulings ignored. Even so, the point that ownership of the copyright does not imply ownership of the work is both sound and

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46. Copyright Act of 1909, Pub. L. No. 60-349, § 62, 35 Stat. 1075, 1087–88 (codified as amended at 17 U.S.C. § 101 (2006)).

47. Indeed, it passed on the opportunity to do so in *Community for Creative Non-violence v. Reid*, 490 U.S. 730, 752 (1989), perhaps deferring to its own *sub silentio* pre-1909 Act recognition of the doctrine in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248–49 (1903).

48. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 (1984).

49. *See* Stephens v. Cady, 55 U.S. 528, 530 (1852) ("The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence.").

50. *See* Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 298 (1907) ("It is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection.").

important, because Congress cannot constitutionally grant ownership of the work. Apart from the fact that ownership of the work would entail ownership of the ideas in the work contrary to the First Amendment, Congress can grant only rights to which a work is subject. The point is that no one—not even the author—owns the work, just as no one can own the air we breathe. Thus, the copyright owner does not own the work, but merely rights to which the work is subject. This view is supported by the third unique aspect of Chapter 2, the termination right.

C. The Termination Right(s). The human author of a work (but not the fictional author of a work under the work-for-hire doctrine) has a right to terminate any assignment of the copyright or any right thereunder if made on or after January 1, 1978 (the effective date of the 1976 Act) between the thirty-fifth and fortieth year after the grant (although in practice the statutory provisions for so doing make such terminations enormously complex and relatively rare).[51]

This provision has its origin in the Statute of Anne, the model for the 1790 Copyright Act. The English statute provided two copyright terms of fourteen years each, the second being available only to the author and only if the author were living at the end of the first fourteen-year term.[52] American copyright statutes continued the two copyright terms, which were treated as separate estates, until the 1976 Act. The provision of that act for an author's (or heir's) right of termination may be viewed, at least in this respect, as a return to the earlier scheme of copyright.[53]

3.6 Chapter 3 of the 1976 Act: Duration of Copyright

The Statute of Anne in 1710 changed the stationers' trade copyright, which did not require publication and was perpetual, by making publication a condition for copyright protection and limiting the maximum possible duration of copyright to two terms of fourteen years each. In most instances, that span would

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51. 17 U.S.C. § 203 (2006). Terminations of pre-1978 grants are possible under similar, but not identical, provisions of §§ 304(c) and (d). Under § 304(c)(3), the five-year termination window opens upon expiration of the fifty-sixth year of the copyright. *See also* 17 U.S.C. § 304(d) (2006) (concerning terminations of grants expiring on or before the effective date of the CTEA).

52. Statute of Anne, 1710, 8 Ann., c. 19, § 11 (Eng.).

53. The point is demonstrated by the story of Margaret Mitchell, who assigned to a motion picture company both the initial and renewal terms of the copyright of *Gone with the Wind*. Her death during the first term of copyright terminated the assignment of the renewal term. At the end of that term, the copyright returned to the author's heirs.

not have exceeded the remaining life of the author. A similar scheme was adopted by the United States in the 1790 Act.

After two and a half centuries of experience with these changes, however, Congress, wittingly or not, returned to the stationers' trade copyright as a model in the 1976 Act. It granted copyright protection for unpublished works as soon as they became fixed. Furthermore, it extended the archetypal term of copyright—protection for an author whose identity is known, working alone, and not for hire—to the life of the author plus fifty years, now seventy years, after the 1998 Copyright Term Extension Act (CTEA). This term of protection is the equivalent of three generations, or perhaps now four. While a copyright for multiple successive generations is not perpetual, it feels very much like a way-station on the road to infinity—and thus presents a problem, in view of the constitutional requirement that copyright be granted only "for limited Times." When it provided copyright protection for unpublished works, Congress also acted to preempt so-called "common law copyright" under state law in favor of the copyright statute.[54]

The important points in Chapter 3 of the statute thus relate to the preemption of state law to make copyright the exclusive domain of federal law and to the duration of copyright protection, a term that varies according to circumstance.

A. The Preemption of State Law. When Congress granted copyright protection from the moment of fixation, it also preempted state law for protection "equivalent to" copyright, ostensibly to eliminate the dual copyright system—the common law copyright under state law and the statutory copyright under federal law—that had prevailed in the United States from the beginning of the nation. The term "ostensibly" is appropriate because there was no dual system to be eliminated. The state "common law copyright" was a copyright in name only, for it was nothing more (or less) than a right of the first publication. Once a work was published, either it was protected by the federal copyright statute or it was lost forever to the public domain. Unfortunately, but presumably necessarily because the Copyright Clause does not contemplate copyright other than for "Writings," Congress left untouched whatever state law protections may exist for unfixed works.

B. The Copyright Terms. The historic two-term scheme of protection for copyrights was rejected in the 1976 Act and by the

54. 17 U.S.C. § 301 (2006).

CTEA in favor of a single term for the life of the author plus seventy years (where there are joint authors, the term is measured by the longest-lived of them)—or in certain instances, either ninety-five years from the date of publication or one hundred twenty years from the date of creation, whichever occurs first.[55] Which of these two alternatives applies in any given instance depends upon whether the human author is identified, because if he or she is not identified, there is no measuring life to which to add the seventy years. Thus, the ninety-five or one hundred twenty year term applies to anonymous works and pseudonymous works and of course to works made for hire, as to which the human author-in-fact is known but is denied copyright ownership, by virtue of a legal fiction, in deference to the corporate author-in-law.

3.7 Chapter 4 of the 1976 Act: Copyright Notice, Deposit, and Registration

Copyright notice, deposit, and registration are the formalities that formerly were conditions for copyright protection. The 1976 Act continued them as mandatory requirements, although not as conditions for copyright.[56] Congress, however, further changed the law relating to the formalities with amendments made by the Berne Convention Implementation Act of 1988. Today, notice is discretionary, deposit may be required, and registration is a condition for most, but not all, infringement actions. Registration is not required for Berne Convention works other than those protected by U.S. copyright independently of Berne. Registration may be made after the infringement occurs, but if a copyright owner waits until then, he or she forfeits the right to both statutory damages and attorney's fees, which are otherwise available.[57]

One of the practical consequences of the elimination of formalities as conditions for copyright protection is that the copyright owner cannot lose the copyright prior to the end of its term, short of abandonment. When this fact is combined with the extension of copyright to an original work of authorship as soon as it becomes fixed, it becomes apparent that statutory copyright is omnipresent in American life. Every note, letter, diary entry, grocery list, and student theme (assuming originality!) is

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55. 17 U.S.C. § 302 (2006).

56. Copyright Act of 1976, Pub. L. No. 94-553, § 407(a), 90 Stat. 2541, 2579, (codified as amended at 17 U.S.C. § 407(a) (2006)).

57. 17 U.S.C. § 412 (2006).

protected by copyright automatically, a result of using natural law ideas in drafting the copyright statute. The paradox is that the natural law expansion of copyright calls for increased regulation in order to ensure the constitutionality of the expansion.

3.8 Chapter 5 of the 1976 Act: Copyright Infringement and Remedies

Copyright infringement is a violation of one of the rights of the copyright owner, and both the legal and beneficial owners of the copyright (or of an exclusive right under the copyright) have standing to sue.[58] In 1990, Congress amended the copyright statute to make states as well as their instrumentalities, officers, and employees liable for copyright infringement, despite the Eleventh Amendment to the U.S. Constitution. In 1996, the Supreme Court indicated unmistakably that the Eleventh Amendment means what it says: federal courts do not have jurisdiction to hear suits against states by individuals.[59] Presumably, the provisions making states subject to suit for copyright infringement are no longer viable.[60]

The remedies available against infringers are extensive. They include injunctive relief; impoundment of offending articles; either actual damages and profits, or statutory damages; costs; and attorney's fees.[61] Moreover, a copyright infringement may be a criminal offense.[62] The major issue in regard to remedies, however, is the courts' use of the injunctive power. The U.S. Supreme Court, in an implied rebuke to courts for the promiscuous granting of copyright injunctions, has suggested that such relief is not always appropriate.[63]

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58. 17 U.S.C. § 501 (2006).

59. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

60. *See* Chavez v. Arte Publico Press, 59 F.3d 539, 547 (5th Cir. 1995) (holding that amendments to the Copyright Act abrogated state immunity), *vacated*, 517 U.S. 1184 (1996).

61. 17 U.S.C. §§ 502–505 (2006).

62. *See* 17 U.S.C. § 506 (2006) (providing that the court may order "forfeiture and destruction or other disposition" of infringing articles upon criminal conviction). The extensive nature of the damages provisions is reminiscent of the book-burning privileges given to members of the Stationers' Company in their charter, which authorized them to stamp out offending presses as a means of controlling the press in England. The charter was granted by Phillip and Mary. Mary was not called "Bloody Mary" for nothing: in service of her desire to reestablish Roman Catholicism as the official religion of England, she burned recusants at the stake.

63. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, n.10 (1994) ("[C]ourts

The important jurisprudential issue in regard to copyright injunctions is whether the source of a court's power to grant such injunctions is the copyright statute or the court's inherent power. Clearly, a court can enjoin the future infringement of existing copyrighted works; the question is whether a court can also enjoin the infringement of works not yet created. Congress did not give courts the power to grant copyright injunctions until 1819.[64] It seems clear that in view of the conditions for and limitations on copyright, the courts' copyright injunctive power is derived from the statute, not their inherent power.[65]

3.9 Chapters 6, 7, and 8 of the 1976 Act: Other Provisions

Chapter 6 of the Copyright Act concerns manufacturing requirements (defunct since 1986) and the importation of copies of copyright works. Chapter 7 regulates the operations of the Copyright Office, an arm (unlike the Patent and Trademark Office) of the legislative branch of the Federal Government. Chapter 8 governs the determination of royalties due to copyright owners under the compulsory licenses. None of these provisions, each interesting in its own way, is pertinent here.[66]

3.10 Interpreting the 1976 Copyright Act

The most striking feature of the 1976 Copyright Act is its highly structured nature, which is made necessary by its three-fold purpose: to create, to grant, and to limit proprietary rights in learning materials. The result is a complexity that would seem to make interpretation of the 1976 Act a forbidding task. When, however, the statute is placed in the context of its ultimate source—the policies of the Copyright Clause—the task becomes more tractable. The three policies—the promotion of learning, the protection of the public domain, and the publication of works—suggest two rules that will simplify interpretation: (1) the copyright is to be distinguished from the work; and (2) not all

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may also wish to bear in mind that the goals of copyright law . . . are not always best served by automatically granting injunctive relief . . . .").

64. Act of Feb. 15, 1819, ch. 19, 3 Stat. 481.

65. *See* Kristina Rosette, Note, *Back to the Future: How Federal Courts Create a Federal Common-law Copyright Through Permanent Injunctions Protecting Future Works*, 2 J. INTELL. PROP. L. 325, 336 (1994) ("[A] court's authority to issue copyright injunctions is wholly statutory.").

66. In addition to the provisions of the Copyright Act itself, which forms Chapters 1 through 8 of Title 17, Congress has added to that title a total of five chapters (and counting) enacted not under the Copyright Clause but under the Commerce Clause. Like Chapters 6 through 8 of the Copyright Act, these "para-copyright" provisions may be ignored for present purposes.

copyrights are created equal. To demonstrate Congress's reliance on these two propositions, we review some of the rules of the 1976 Act that reflect them.

Section 202 of the Copyright Act makes clear that there is a distinction between the copyright and the work, and thus it requires that ownership of the copyright be distinguished from the ownership of the material object in which the work is fixed. Ownership of the manuscript, for example, does not include ownership of the right to reproduce the manuscript, and the sale of a painting effects the transfer of the canvas rather than the underlying work.[67] In short, the statute grants only rights to which the work is subject; it does not grant ownership of the work itself.

The importance of this distinction between the work and the copyright emerges upon realization of the fact that differentiation between the use of the copyright and the use of the work is required for proper administration of the constitutional copyright policies. If copyright is to promote learning, the learner must be able to use the work without fear of being sued for transgressing the copyright. The distinction between the use of the copyright and the use of the work is thus an aid to users of copyrighted works as well as to courts in assessing claims of infringement. The point can be summed up in a simple statement: one infringes the copyright, not the work.

Consider the following applications of the principle. The premise of § 103, "Subject matter of copyright: Compilations and derivative works," is that some types of copyrighted works—adaptations of prior works and works that compile preexisting material (a category sufficiently broad to comprehend both data and previously copyrighted works no longer in copyright)—contain public domain material, which cannot be protected by copyright. But unless we distinguish the copyright from the work, copyright protection for the work will protect all the contents of the work.

Indeed, the same problem could arise (and with respect to all types of works, whether second or first generation literary works, musical works, etc.) under § 102(a), "Subject matter of copyright: In general," at least as to such components as ideas and systems rendered noncopyrightable by § 102(b). Again, the potential for confusion is dispelled when one recognizes that the copyright

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67. H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5739–40 (describing the effect of *Pushman v. N.Y. Graphic Society, Inc.*, 287 N.Y. 302 (1942), on the interaction between provisions of § 202 and the provisions of §§ 204(a) and 301).

holder does not own the work or all the contents thereof, but rather only the copyright in the work—i.e., the right to use the work subject to conditions prescribed by Congress in securing the copyright that it may, but need not, grant under its constitutional power.

To cite but one more example: the rights granted under § 106—the rights to reproduce, to disseminate publicly, etc.—are subject to the limitations imposed by Congress in §§ 107–122. Clearly then, the grant of rights in copyright is a lesser grant than the grant of a plenary right of ownership in the work itself.

The "not all copyrights are created equal" principle serves a purpose similar, and complementary, to the "distinction between copyright and work" principle—that is, to keep the copyright monopoly within constitutional bounds. Thus, authors of predominantly creative works are entitled to more rewards than authors of derivative and compilation works. The latter authors serve a useful function, in that they can and often do make a significant contribution to the advancement of learning. But their contributions are limited, in that they are based on matter which their authors did not create and for which they do not merit the fullness of the copyright monopoly. By contrast, § 102 protects the substance of the expressive output of authors of creative works, whether they be original verse, song, or art.

Moreover, various types of works protected by the Copyright Act, under both §§ 102 and 103, are subjected to limitations that other types of works are not. Whereas literary works, for example, are protected against reproduction and adaptation generally, sound recordings are protected against duplication, but not against simulation, under § 114. Rights in pictorial, graphic, and sculptural works, computer programs, and architectural works similarly are subjected to particularized limitations in §§ 113, 117, and 120 respectively.

These examples make the point that the most useful rules for interpreting the copyright statute are that: (1) there is a distinction between the copyright and the work; and (2) not all copyrights are created equal. These rules in turn reflect the nature of copyright as a regulatory monopoly, an idea important for protecting the free speech values of the Copyright Clause that complement the free speech and free press components of the First Amendment.

3.11 Copyright as a Regulatory Monopoly

The propositions that copyright protects only rights to which a work is subject, and that not all copyrights are created equal,

are components of a regulated copyright monopoly, which is reflected in the highly structured pattern of the 1976 Act. The most important consequence of the regulatory nature of copyright, however, seems to have been ignored: copyright holders have duties as well as rights.

The essence of property generally is the right to exclude its use by others. This seems to be why the notion that copyright is a proprietary monopoly obscures the fact that copyright holders have duties as well as rights. An analysis of the copyright statute reveals the error, for analysis shows that copyright holders do have duties. The clearest example, perhaps, is the compulsory license, a statutory duty to allow another to exercise a right otherwise reserved to the copyright holder. What is true for the compulsory license also is true for all of the limitations on the copyright holder's rights, the most important of which is the fair use doctrine. The language of § 107—"fair use . . . is not an infringement of copyright"—must mean that fair use is a user's right that copyright holders have a duty to respect, just as users have a duty to respect the copyright holder's marketing rights.[68]

The most important duty of the copyright holder, however, may be an implied duty to be fulfilled in the exercise of a right. That implied duty is the protection of the public domain. Thus, one can claim copyright only for original works of authorship and cannot claim protection for ideas, procedures, processes, and so forth. No one is entitled to copyright protection for previously copyrighted material that is incorporated into a new work. A copyright holder cannot use copyright to deny access to publicly disseminated material so as to inhibit, rather than promote, learning. And in due course, all private ownership of all rights in all works must be surrendered to the public through expiration of the statutory term of protection. If the copyright claimant were not regulated in such ways, through rigorous enforcement, the public domain would be profoundly at risk.

The recognition of duties of the sort just described is contrary to the rights-oriented nature of the legal system. But then, copyright is contrary to principles of property. For copyright is the grant of proprietary rights in recorded knowledge and exists to serve the public interest over the copyright holder's interest.

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68. 17 U.S.C. § 107 (2006).

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CHAPTER 4. UNDERSTANDING COPYRIGHT

4.1 Introduction

Understanding copyright law is difficult because Congress uses the regulatory model of copyright to enact, and some courts use the proprietary model of copyright to interpret, the copyright statute. To demonstrate the practice of these courts, we cite arguments made in three cases based on the premise that copyright is a marketing monopoly, which the courts rejected in favor of the premise that copyright is a plenary property right.

One argument was that copyright should not be used to prevent the subject of a news story broadcast on television from purchasing a videoclip of the story from an independent source when the broadcaster erases the videotape of the newscasts on a weekly basis.[1] Another was that copyright should not protect the page numbers of published reports of court opinions, which themselves are not subject to copyright.[2] The third was that copyright is not intended to require a corporate subscriber who pays $2400 a year for three subscriptions to a scientific journal to pay a license fee if an employee scientist copies an article from the journal for research.[3]

The courts rejected all of these arguments and, in doing so, created judicial rules contrary to the copyright statute. Copyright subsists only in works fixed in a tangible medium of expression,[4] but the first case continued copyright protection after all copies were destroyed. Copyright is available neither for law[5] nor for

1. Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1498 (11th Cir. 1984).

2. West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986).

3. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

4. *See* 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed . . . .").

5. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) (holding that no Reporter of the Court "can have any copyright in the written opinions delivered by this court; and

works of the U.S. Government,[6] but the second case subjected law—including federal judges' opinions, which are works of the U.S. Government—to copyright protection. The copyright statute gives the copyright owner the right to sell or lease copies to the public—not both as to the same copy[7]—but the third case gave copyright owners a right to license the use of copies they had sold.

Such disparity between statutory language and judicial rulings indicates the difference between copyright as a marketing monopoly and as a proprietary monopoly. The structure of the copyright statute tells us the legislative view: copyright is the grant of a highly regulated and statutory monopoly for marketing copies of the work. Consequently, a copyright owner who destroys all copies after having made the work public (and receiving a profit from its use) should not be able to claim that another improperly uses the copyright in a work to which the copyright owner no longer provides access. Neither should a copyright holder be empowered to use page numbers to capture public domain material as a reward for publishing it. Nor should such a person be able to require the subscriber to a scholarly periodical to pay a license fee for using the periodical according to the purpose for which it was purchased.

The judicial response to these points can be explained only by the courts' deep-seated conviction that copyright is a proprietary monopoly—that is, a plenary property right. As such, the reasoning goes, a copyright gives the copyright holder the rights to: (1) prevent another from using the work even after having destroyed all copies of it; (2) obtain proprietary control of public domain materials as a reward for packaging and selling them; and (3) control the purchaser's use of a copy of a work that has left the stream of commerce.

The proprietary view enabled the courts referenced in the suits above to provide the copyrighted works what might be termed "class treatment." Class treatment, no doubt, facilitates the administration of copyright law. Although the proper application of the copyright statutes requires that copyright infringement be proved as to each work alleged to be infringed—that is, on a work-by-work basis[8]—the courts seem to have

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that the judges thereof cannot confer on any reporter any such right").

6. 17 U.S.C. § 105 (2006).

7. 17 U.S.C. § 106(3) (2006).

8. This follows from the fact that the scope of copyright protection varies with the amount of originality that a particular work contains. *See* 17 U.S.C. §§ 102(a), 103 (2006). And this, of course, is the lesson (or, at least, *one* of the lessons) of *Feist Publications,*

assumed that it would be a waste of judicial resources to require the copyright owner to pursue each independent claim when a pattern of consistent conduct already related to a particular class of works, such as television newscasts, law reports, or scholarly journals. Requiring the television station to file an action regarding each news story videotaped from its daily newscasts, or that West Publishing sue for each page number taken from its reports, or that the publisher sue for each article copied from a periodical, is to provide copyright protection at retail when wholesale protection is more efficient—even if, as it may well be, also unconstitutional.

Apart from the fact that efficiency as a canon of statutory construction in this instance threatens free speech rights, the desire for efficiency causes courts to lose sight of the truly important point. Copyright decisions, more than most, tend to have a legislative effect that is magnified when courts give copyright class treatment. This is because copyright holders generally plan their litigation carefully as strategic moves, with an eye to establishing precedents that particular courses of conduct are infringing in order to create judicial copyrights. Thus, to hold that the sale of clips from newscasts that otherwise are no longer available constitutes an infringement is to create a judicial copyright for works that are no longer marketable; to hold that the copying of court opinions from copyrighted volumes is infringement creates a judicial copyright that protects judicial decisions; and to hold that a subscriber must pay a license fee to copy for research purposes an article from a journal for which payment already has been made creates a judicial copyright beyond the constitutional power of Congress to grant. In each of these instances, the copyright holder need only cite judicial decisions, rather than provisions of the copyright statute, to obtain compliance from would-be users.

The judicial error in succumbing to the publishers' strategy is two-fold: (1) courts tend to rule as if their decisions affect only the parties in the case; and (2) they tend to assume that the legislative effect of their decisions is irrelevant because copyright is proprietary rather than regulatory in nature.

Both notions are fallacious, the first because a ruling for the parties serves as precedent, the second because the statute provides only for a regulatory copyright. And here we see a consequence of courts using the proprietary model to interpret a statute based on the regulatory model of copyright. Presumably,

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Inc. v. Rural Telephone Service Co., 499 U.S. 340, 363–64 (1991).

the different approaches are explained in part by the fact that Congress enacts the copyright statute as a whole and courts administer it piecemeal. A decision requiring the application of § 111 of the copyright statute, for example, does not require a court, at least necessarily, even to consider § 107.

One casualty of the resulting confusion is the user's First Amendment right of access to learning materials. The reason is that copyright law entails a conflict between two fundamental policies of American society: free markets and free speech. The former gives the copyright owner the proprietary right to control, while the latter gives the user the political right to obtain, access to learning materials. Thus, as the Supreme Court has said, "[T]he limited [copyright] grant is a means by which an important public purpose may be achieved[:] . . . to give the public appropriate access to [the author's] work product."[9] The regulatory copyright protects—but the proprietary copyright destroys—the right of access, because the only rational justification for the proprietary copyright is the pay-per-use practice. The right to be paid for each use of a copyrighted work is a right to deny access to the work, and this claim is a major point of contention that has generated considerable tension.

To resolve this tension, courts will find copyright fundamentals as defined by the Copyright Clause to be helpful. In this chapter, we consider the following fundamentals: (1) the purpose and function of copyright; (2) the subject matter of copyright; (3) the ownership component of copyright; (4) the relationship among copyright rights; (5) the different kinds of copyright; and (6) the constitutional limits on Congress's power to enact copyright legislation.

4.2 The Purpose and Function of Copyright

There is an interrelationship between purpose and function in copyright law that often escapes judges, as suggested by Joseph Story's famous characterization of copyright as the "metaphysics of the law."[10] Briefly, one can say that the purpose of copyright represents the goal, and the function the means of implementing that goal. Therefore, the purpose is dominant, the function subservient. The primary goal of copyright is the promotion of learning, which requires three actors: authors to create the material to be learned; publishers to disseminate that

9. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

10. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (referring to both copyrights and patents).

material; and users to learn from that material. Thus, the goal of learning determines the function of the statutory rules: to define the allocation of rights among three groups in order to encourage the creation, dissemination, and use of copyrighted works without encroaching unduly on the public domain.

This statutory function explains why the regulatory model is preferable to the proprietary model. The regulatory model protects the public interest with rules to accommodate the different interests of authors, entrepreneurs, and users in a complementary way. The proprietary model of copyright defeats the public interest because it protects only the copyright holder's property, and thereby creates an adversarial relationship between copyright holders and users.

4.3 The Subject Matter of Copyright

The constitutional subject matter of copyright is materials for learning. This is what vests copyright with its overriding public interest and makes the proprietary model particularly inappropriate. Part of the problem, however, is that courts have trivialized copyright by extending it to protect all manner of works, from casual doodles to ornamental aspects of useful articles, that are insignificant in light of copyright's purpose and function.[11] Because copyright protects such objects only as items of commerce (not as works of learning), there is a cross-fertilization effect that reduces the status of learning materials to that of mere commodities for the marketplace, which is consistent with the efforts of copyright holders to extend the reach of copyright beyond the marketplace to the classroom, the library, and the home.

The point here should be readily apparent. The proprietary copyright can become, all too quickly, a device used to inhibit rather than to promote learning. This follows from the fact that the proprietary copyright constitutes a major threat to all three constitutional policies of copyright: the promotion of learning, the protection of the public domain, and the encouragement of publication to provide public access.

These policies mean that the administration of copyright law requires, as does all law, compromise between competing interests. The cost of books, for example, can be said to inhibit

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11. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 221 (1954) (Douglas, J., concurring) (recognizing that modern copyright protects, albeit ill-advisedly, "statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays").

learning, but publishers must charge for books they publish in order to stay in business. Moreover, the fact that many publishers do remain in business means that there are many books, new and used, at many different prices. We note, however, that the availability of used books no longer subject to the copyright owner's vending right is secure only because the Supreme Court, in an early twentieth century case, employed the regulatory model of copyright to rebuff efforts of publishers to extend their control over books to the right to control the resale of books.[12]

Understanding the situation just described enables one to appreciate that the purpose of copyright—the promotion of learning—is in danger of becoming a legal fiction by reason of the trivialization of copyright. Having granted plenary protection to a Betty Boop doll, courts tend to provide similar protection to learning materials. The difference is that the extension of proprietary copyright to knick-knacks protects primarily against competitors; the extension of the same copyright to learning materials is used to protect the copyright holder against users. The purpose of copyright (the promotion of learning) thus becomes subordinated to its function (the marketing of works).

4.4 The Ownership Component of Copyright

One major obstacle to understanding copyright law may well be confusion as to what the copyright holder owns: the work, the copyright, or both. For the most part, the issue has not been articulated, and the answer often has been assumed to be both the work and the copyright. This conclusion is largely a byproduct of the trivialization of copyright discussed above. Whether one owns only the copyright or also the baby doll object that is the subject of the copyright is not an issue on which the world turns. But the same issue as to learning materials is somewhat more consequential. This is why the cross-fertilization effect—the nonthreatening assumption that the copyright owner owns the doll begets the highly consequential conviction that the copyright owner likewise owns the book—is harmful. But the claim that the copyright holder owns the book, although in remission in the United States during the nineteenth century, reaches back to eighteenth century England.

The origin of the claim was the short-lived common law copyright of *Millar v. Taylor* (1769), which was based on

12. *See* Bobbs-Merrill Co. v. Straus, 219 U.S. 339, 350–51 (1908).

ownership of the work.[13] The reasoning goes something like this: copyright is an author's right by reason of creation, which means that the author owns the work created; therefore, he or she conveys that ownership when he or she conveys the copyright, so that the assignee also owns the work.[14] After the House of Lords in *Donaldson v. Beckett* (1774) overruled *Millar*, the "common law copyright" that survived was terminological: it was only the right of first, not of continued, publication.[15] There is, however, much in a name, and the common law copyright of *Millar v. Taylor* survived to undermine the statutory copyright.

The partial survival of the *Millar* common law copyright is due to the fact that it was a natural law concept, based on the notion that the author owned what he or she created and thus owned the work. Despite their source—an overruled and discredited case—the ideas embodied in the *Millar* common law copyright survive because of the equity they supposedly represent. There is, however, more equity for the publisher than the author, for the main feature of the natural law copyright is its lack of constraints. For example, it exists in perpetuity, a feature of more benefit to the corporate publisher than to the human author, to say nothing of the detriment to the individual user.

In *Wheaton v. Peters* (1834), the U.S. Supreme Court followed the lead of the House of Lords in *Donaldson* by rejecting the unconstrained *Millar* natural law copyright and limiting copyright to a statutory grant for the protection of published works. Lower courts, however, particularly in recent years, have not always followed the Supreme Court's lead and have created confusion in the law because of their use of natural law ideas to give effect to a statutory monopoly. A prime example is the fair use doctrine, a natural law concept that now has been

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13. *See* Millar v. Taylor, (1769) 98 Eng. Rep. 201, 224 (K.B.) (Aston, J.) ("I confess, I do not know, nor can I comprehend any property more emphatically a man's own . . . than his literary works.").

14. *See id.* at 206 (Willes, J.) ("If the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff."). Therefore, the plaintiff's counsel argued "that the author has a perpetual property in the style and ideas of his work; and therefore that he or his assigns will be for ever intitled to the sole and exclusive right of it." *Id.* at 230 (Yates, J.).

15. *See* Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 846–47 (H.L.) (interpreting the Statute of Anne as superseding common law for perpetual copyright). Clearly, the *Millar* "common law copyright" was an afterthought, for it was not put forth as a legal concept until after the creation of the statutory copyright by the Statute of Anne—which undermined the booksellers' monopoly, as discussed *supra* in Chapter 2, and resulted in their unwonted creativity in *Millar*.

incorporated into the copyright statute itself.[16] One of the great ironies of copyright law may be that the statutory fair use doctrine, originally intended to limit, has since been used to enhance, the copyright monopoly.

As the fair use example demonstrates, the use of natural law ideas to administer a statutory monopoly is an important factor creating confusion in copyright law. Thus, copyright owners and courts enamored (the latter, perhaps unthinkingly) of the proprietary copyright model tend to act and rule as if copyright does entail ownership of the work. The actions and rulings, of course, are wrong, but they have consequences as if they were right. Thus, a fault in theory is magnified when used to resolve problems. In this instance, the faulty theory has two effects: (1) it obscures the distinction between the work and the copyright, and therefore between the use of the work and the use of the copyright; and (2) it obscures the fact that there are different kinds of copyright (for creative works, derivative works, and compilations), with the result that not all copyrighted works are created equal.

On the first point, if copyright entails ownership of the work—as the proprietary model based on the natural law copyright implies—the distinction between the work and the copyright is irrelevant. But if copyright consists only of rights to which the work is subject under the regulatory model, the distinction is very significant. For example, copying the work for personal use would be classed as a use of the work; copying the work to sell it would be a use of the copyright.

On the second point, the failure to distinguish between different copyrights means that all copyrights are treated as entailing all rights of the copyright owner. If one owns the copyright, it is thought, one must be entitled to all the rights of copyright regardless of the nature of the work. This is not so. Although each copyrighted work is required constitutionally to be an original work of authorship (and thus should be determined by a court to be such), the one-copyright syndrome leads to the class treatment of copyrighted works in litigation. This happens, for example, when a court grants a permanent injunction to protect future works, thereby relieving the copyright owner of compliance with any of the conditions for copyright, even though those conditions are mandated by the Constitution.

Our argument is that an understanding of copyright requires an understanding of why no one can own the work, a

16. *See* 17 U.S.C. § 107 (2006).

point obscured by the tendency to equate the identification of authorship of a work with ownership of the work. There are two reasons this is error: one legal and the other theoretical.

The legal reason begins with the proposition that ownership of the work would give the owner the right to exclude, which in turn would vest in the owner the power of censorship. But such ownership could vest only by reason of a statute enacted by Congress—and it would be in disregard of the First Amendment, the free speech values in the Copyright Clause, and the Takings Clause of the Fifth and Fourth Amendments. The first two provisions limit the power of Congress to the power to legislate ownership only of the copyright (not the work), in order to protect freedom of the press. The impact of the third provision is indirect. One of the purposes of copyright is to protect and enlarge the public domain by reason of the "Writings" and "limited Times" requirements in the Copyright Clause. But if the copyright owner owned the work, arguably the limited term of copyright would constitute a taking of property without due process.

The theoretical reason is the impossibility of owning something that is a metaphysical entity with no existence apart from the mind of the creator. A work of original authorship is an intangible creation existing only in the mind of the author until it is fixed in a copy. This explains: (1) why the Copyright Clause empowers Congress to grant copyright only for "Writings"; (2) the justification for the longstanding tradition that copyright protect only the published book; and (3) why the current copyright statute requires fixation as a condition for copyright. Thus, it is only a copy, not the work itself, that the law can protect. If the author, for example, lost the only manuscript of his or her novel, the novel would exist only in the author's mind, and copyright protection would be neither needed nor available.

The fact that one cannot own the work is manifested in the regulatory copyright model, under which the copyright holder can own only the rights that the copyright statute grants. Congress constitutionally cannot confer ownership of the work, and indeed it has never attempted to do. All copyright statutes in the United States—from the Copyright Act of 1790 through the Copyright Revision Acts of 1831, 1870, 1909, and 1976—deal only with rights to which a given work may be subjected for a limited period of time. This is persuasive evidence that the copyright owner does not own the work, only the limited rights that the copyright statute provides.

4.5 The Relationship Among Copyright Rights

The grant-of-rights section in the 1976 Act represents a significant change from prior statutes and therefore a new challenge to understanding. The 1790 Act provided essentially one right—the right to publish a work—although the statute named the rights as those "to print, reprint, publish or vend."[17] The 1909 Act included the same rights in the same words, with the addition of the right to "copy." The general rights of copyright in the 1976 Act have grown to six: (1) to reproduce the work in copies; (2) to prepare derivative works; (3) to distribute copies publicly; (4) to perform the work publicly; (5) to display the work publicly; and, in the case of sound recordings only, (6) to perform the work publicly by means of a digital audio transmission.[18] The challenge to understanding is the relationship of these component rights: Are they part of a single whole and thus interdependent, or are they separate rights that are independent of each other?

The six rights are stated in § 106, which indicates that the rights are "exclusive," but also that they are "[s]ubject to [the limitations in] sections 107 through 122."[19] If a right is subject to limitations, it may be exclusive of others, but only to the extent that parameters provided by Congress allow—and that is not the stuff of a "monopoly," as normally understood in the realm of proprietary rights. Additionally, while the language of rights is read as limiting the rights of users, it is just as logical to read the Copyright Act as providing that the stated rights are exclusive of any other rights that might be claimed by the copyright owner. Indeed, this reading is consistent with the Supreme Court's definition of copyright as "a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections."[20]

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17. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124. The language was copied from the Statute of Anne, which reflected customs in the Stationers' Company. In addition to the "copie right" of the bookseller or publisher, the stationers also had recognized a "printer's right" of the printer, which was the right to print a particular work, whoever owned the copyright. The custom was to print only a limited number of books in one edition, usually 1250 copies. If this edition sold out, the "copyright" owner would want to reprint it. Under the stationers' copyright, which existed in perpetuity, the right to reprint would not have been necessary. Presumably, however, when the Statute of Anne was drafted, the booksellers did not want the customs of the Stationers' Company, e.g., the printer's right, to interfere with the copyright, which they would own by assignment. This would explain the tautological language of the statute—"print, reprint, publish or vend."

18. 17 U.S.C. § 106 (2006).

19. *Id.*

20. Dowling v. United States, 473 U.S. 207, 216 (1985).

The grant-of-rights section is the epitome of regulation because the copyright holder has only the rights granted. Thus, this section is the most persuasive evidence of Congress's use of the regulatory model for copyright. The larger question, however, remains: whether the rights granted are interdependent or independent in nature. More particularly for present purposes, the question is whether the right to reproduce copies in § 106(1) is independent of the right to distribute copies to the public in § 106(3). Whatever answer one gives to the question, understanding copyright requires that one understand what the drafters did in this section. They distinguished the two steps of publication as two separate rights: the right to reproduce the work in copies and the right to distribute those copies to the public.

The advantage of this change to copyright owners is obvious. If the copyright owner has the right to reproduce the work in copies without regard to distribution, the right to copy the work is independent of any other right. If this is so, any person who makes a copy uses the copyright, and the copyright owner is entitled to exact a tribute in the form of a license fee for the purpose.

Arguably, this interpretation is as disadvantageous to the user's right to learn as it is advantageous to the publisher's right to profit—and the resulting imbalance is reason to consider whether the recognition of an independent right to copy is of dubious constitutionality. This is not the place to provide the answer, but analysis serves the useful function of enhancing one's understanding of copyright and thus improving one's ability to assess arguments for and against the constitutionality of dividing the single right of publication into two rights.

Whether one interprets the rights as being interdependent or independent will be determined by whether one accepts the proprietary or the regulatory model for copyright. The proprietary model means that question is irrelevant, because one can do with his or her property as one wishes. The statement of rights, in this schema, functions merely to provide a statutory remedy for violation of the defined rights. Under the regulatory model, however, the rights to reproduce in copies and to distribute the copies to the public are interdependent. The right to distribute copies to the public is a limitation on the right to reproduce in copies.

Publishers, of course, interpret the right to reproduce in copies as an independent right so that they can license the user's copying from a work for personal purposes. Courts that accept their interpretation, knowingly or not, amend § 106(1) to read as

follows: "To reproduce the work in copies in whole or in part or to license others to do the same." The problem with this reading of § 106(1) is that it is inconsistent with § 106(3), which grants the right to sell or license a copy of the work, but not both.

The major reason for interpreting the rights to copy and to distribute the copies as being interdependent is that, if they are independent, the result is an enlargement of the copyright monopoly far beyond the constitutional power of Congress. This is because the broad interpretation of the rights as being independent of each other provides six copyrights for every copyrighted work, a radical expansion of "the exclusive Right" that Congress is empowered to grant. The result is to subordinate the constitutional policy of promoting learning to proprietary interests and, as the statute is written, also to make rules inconsistent with each other. If the right to reproduce the copies is an independent right, it negates the public limitation on the right to distribute copies, and a user would be precluded from making a copy and distributing it privately (for example, to a class of students). Such a rule would be inconsistent with the language of § 107, which indicates that, typically, the reproduction of multiple copies for classroom use will be a fair use.

Moreover, the exclusive right of the copyright owner to reproduce the work in part adds a right to the six rights that is not in the statute. If Congress had meant to give the copyright owner the exclusive right to reproduce the work in part, it would have been a simple matter to say "to reproduce the work in whole or in part in copies or phonorecords." But Congress did not do this in § 106, and it passed up another opportunity in § 101 when it defined "copies" as "material objects, other than phonorecords, in which a work is fixed by any method." Congress easily could have said "in which a work is fixed in whole or in part," but it did not. Thus, in the House Report, Congress said, "As under the present law, a copyrighted work would be infringed by reproducing it in whole or *in any substantial part* . . . ."[21] "Substantial part," of course, is not merely "in part." On the contrary, Congress knew full well how to use the phrase "in whole or in part," as demonstrated by its use of that phrase in providing that a copyright may be transferred "in whole or in part" in § 201(d)(1).[22]

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21. H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675 (emphasis added).

22. 17 U.S.C. § 201(d)(1) (2006).

4.6 The Different Kinds of Copyright

The complexity of copyright law derives in part from the variety of works that can be copyrighted[23] and the number of ways in which a work can be exploited.[24] By disregarding matters of form, however, we can reduce the variety of works to three types (creative works, compilations, and derivative works) and the ways of exploitation to three (by public distribution, by public performance, and by public display). In broad terms, then, we can say that the copyright statute provides for a subject matter copyright and a marketing copyright.

The subject of interest at this point is the marketing copyright, which has received little recognition. Traditionally, there are two ways of marketing (i.e., commercially exploiting) copyrighted works—by publication and by performance—thereby giving rise to the publication copyright and the performance copyright. A new method of exploitation is the transmission of works, including public domain materials, that has given rise to the transmission copyright.

The printing press that facilitated the reproduction of books for the market is, obviously, the source of the traditional publication copyright. The performance copyright (the right to perform drama and musical compositions), is, however, almost as old as the publication copyright, at least in inchoate form. In eighteenth century England, the right to perform a drama was held to be protected by the common law copyright,[25] a rule that continued in the United States until the 1976 Act.[26] The performance right for dramas, however, was given statutory recognition in the United States in the middle of the nineteenth century by an amendment to copyright law that granted the right to perform dramas publicly;[27] and the public-performance-for-profit right was granted for musical compositions in the latter part of that century.[28] Congress continued both rights in the 1909 Act and provided them full recognition by making the rights available for all appropriate works in the 1976 Act.

The 1976 Act recognizes a third way to market a work—by transmitting it—and that recognition has given rise to the transmission copyright. Apparently, the impetus for this

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23. 17 U.S.C. § 102(a) (2006) (listing eight types of works).

24. 17 U.S.C. § 106 (2006) (giving the copyright owner six rights).

25. *See* Macklin v. Richardson, (1770) 27 Eng. Rep. 451, 451–52 (Ch.).

26. Copyright Act of 1976, Pub. L. No. 94-553, §§ 106(4), 301, 90 Stat. 2541, 2546, 2572 (codified as amended at 17 U.S.C. §§ 106(4), 301 (2006)).

27. Act of Aug. 18, 1856, c. 169, 11 Stat. 138.

28. Act of Jan. 6, 1897, c. 4, 29 Stat. 481.

development was the desire of sports entrepreneurs who broadcast sporting events on live television to use copyright to provide a remedy against one who pirated the broadcast signals. A careful reading of the relevant statutory language shows that the provisions were tailored for that purpose, but courts have not limited their rulings to the language. And new meaning for the transmission copyright has resulted from the rise of computers, which can transmit material instantaneously, simultaneously, and widely. The most prominent examples of this use are Westlaw and Lexis, which transmit court opinions over which the transmitters—contrary to both the Constitution and the copyright statute—claim copyright. The marketing copyright thus creates a problem when the copyrighted work—whether it is published, performed, or transmitted—contains public domain material, because it subjects public domain material to copyright protection. The significance of this point becomes clearer in light of copyright history.

The original English copyright, the stationers' copyright, was a pure marketing copyright, because it was not available to the author and it was not conditioned upon the creation of an original work of authorship. Thus, it gave the bookseller as copyright owner the exclusive right to publish (i.e., to print and sell) copyrighted books. As a marketing copyright, however, the stationers' copyright resulted in an opprobrious monopoly of the book trade. This was so, in part, because the right was limited to members of the Company, but also, in part, because of the major characteristic of the marketing copyright: it was unrelated to the author of the work.

The Statute of Anne made the author a part of the copyright equation and, in so doing, substituted the subject matter copyright for the marketing copyright. The statutory solution to the marketing copyright monopoly was to allow the author to be the initial copyright owner, and to give the author the copyright only for newly composed books (and then only for a limited term). The basis of copyright was changed from a marketing right created by the Stationers' Company, based on possession of the "copie" (or manuscript), to a right conferred by statute on the author, based on the creation of a work. Thus, copyright was transformed from a right that rested on a marketing base to one premised on a subject matter base, for it was the subject matter—a newly composed book—that determined the right to copyright.

The most important result of the subject matter copyright was the protection of the public domain that emerged with the demise of censorship. The necessary predicate to enactment of

the Statute of Anne was the Glorious Revolution (1688) that ensured the Protestant Succession to the English throne. Thereafter, it was no longer necessary to use copyright as a means for suppressing heretical, schismatical, seditious, or offensive books, for which the marketing copyright was ideal. Under the new statutory copyright (1710), which required the writing of a new work, all other books that had been printed prior to the Statute's enactment, or on which the copyright had expired, could be published by anyone free of charge. Moreover, the copyright on newly composed books would last at the most for twenty-eight years. All of these were developments of momentous consequence.

The subject matter copyright created by an eighteenth century English Parliament is relevant to contemporary copyright law because the latter is being threatened by the rise of a new marketing copyright: the transmission copyright. The problem is that the marketing copyright provides protection on an all-or-nothing basis. One does not, for example, buy part of a book or, usually, perform part of drama, and for transmission, the fee for receiving material is not discounted because some of the material may be in the public domain. Because history tells us that it was necessary to destroy the original marketing copyright in order to create the public domain, one lesson for today may be that the rise of a new marketing copyright constitutes a threat to the public domain. Just as the stationers' marketing copyright of publication was made possible by the new technology of the printing press, the marketing copyright by transmission has been made desirable by the new communications technologies of television and the computer.

To see the threat that the transmission copyright poses, it is necessary to understand that the essential difference between the subject matter copyright and the new transmission copyright is the service each provides. The subject matter copyright provides access to newly created works. The transmission copyright provides access primarily to public domain materials, as witness the computer databases that transmit legal opinions or consist of library catalogues. In short, the transmission copyright is a utilitarian copyright that preempts, but adds nothing to, the public domain. Its main vice is that it gives rise to the notion that the copyright owner owns the public domain work that is being transmitted.

4.7 The Constitutional Dimensions of Copyright

The constitutional dimensions of copyright are commensurate with the public interest—the grant to creators ("Authors") of the right of public dissemination ("exclusive Right") of an original work ("Writing") for a prescribed period ("limited Times") to promote learning ("the Progress of Science"). Congress has stretched the dimensions with legal fictions—through the work-for-hire doctrine, for example, and copyright for electronic signals if they are recorded as they are broadcast—because, we can assume, of new markets for new types of works. In doing so, Congress has treated the constitutional dimensions of copyright as being the market or potential market for copyrighted works, as exemplified by the grant in the 1976 Act, as originally enacted, of five rights to the copyright owner that are in effect five different copyrights (now six).

We mention this development not to question Congress's power to enact copyright legislation, but to make two other points. The first point is fundamental. It is that, however broadly Congress stretches its copyright power, the constitutional policies should be preserved and protected. Copyright should not be used to inhibit learning, should not be allowed to intrude upon the public domain, and should be employed to benefit the author in preference to the entrepreneurial entity that disseminates copies of the work.

Copyright for television newscasts illustrates the problem. Because those newscasts—vested with a public interest—are not published and made available to members of the public, copyright protection for such works should not be the same as protection for a published novel. In short, not all copyrighted works are equal because not all copyright works serve the same public interest. The amount of protection to which a given work is entitled, then, should depend upon the compatibility of that protection with the public interest as measured by the constitutional policies of copyright.

The second point is that implementing this proposition is enormously difficult because copyright law exists on four levels: constitutional law, statutory law, judicial law, and customary law. The most important of these—constitutional law—seems to be the most ignored, for the largest body—customary law created by copyright holders—is deemed to be unrelated to the limits on Congress's power to enact the public law of copyright. For example, copyright holders warn users with extralegal copyright notices saying that no one may copy any portion of the book for any purpose by any means at any time without the written

consent of the copyright holder. The general ignorance of the populace about copyright law, and the *in terrorem* effect produced by the threatened copyright sanctions, give efficacy to this private law, although it is directly contrary to the copyright statute and the constitutional policies of copyright.

The success of copyright holders in pressing their claims beyond the law—and, in many instances, receiving the support of courts in doing so—seems attributable primarily to the idea that the policies of the Copyright Clause are irrelevant for private lawmakers. The naïveté of this notion is that it ignores the role of private lawmakers in our legal system. When the subject of that private law is information vital to the welfare of both individuals and society at large, the folly of freeing private lawmakers from the restraint of constitutional policies should be apparent.

The agent of change in this regard must be judges, for it is court rulings that ultimately sustain or reject the rules of private law. Once judges recognize that the only cost to copyright owners as private lawmakers for adhering to the constitutional policies of copyright is the loss of monopoly rights to which copyright owners are not entitled, they will be less reluctant to implement the needed change. Once judges recognize the benefit to society at large of requiring copyright owners to comply with the constitutional policies of copyright in their dealings with the public, they will embrace the change.

The constitutional dimensions of copyright return us to the purpose and function of copyright and the fundamentals of implementation. The common thread of those fundamentals is the distinction between the work and the copyright—a distinction that is necessary if copyright is to fulfill its contradictory goal of promoting learning and rewarding authors. Thus, we must separate the work and the copyright to understand the implications of the subject matter of copyright, the relationship of copyright rights, the ownership component of copyright, and the different kinds of copyright.

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CHAPTER 5. COPYRIGHT AND FREE SPEECH RIGHTS

5.1 Introduction

Our argument here is that there can be no complete understanding of copyright law without an understanding of its relationship to the First Amendment,[1] arguably the single most important provision of the U.S. Constitution. In pedagogical terms, the relationship is that the Copyright Clause protects the right to teach (by publishing original works of authorship) and the First Amendment protects the right to learn (by reading the published works) in cases where the copyright owner wishes to deny access to the work.

The basic issue is whether publishers shall have the power to use or misuse copyright to ration learning for the sake of increased profits. The following incident gives the issues concrete form.

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1. For subsequent commentary by Professor Patterson on the subject of this chapter, see L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003); L. Ray Patterson & Stanley F. Birch, Jr., *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1 (1996).

By letter of March 1, 1993, the Copyright Compliance Office of the Association of American Publishers (AAP) informed a copyshop that it had "without prior permission, made multiple copies of excerpts of copyrighted works for distribution to students in course anthologies."[2] Advising that this copying was an infringement of copyright, the letter requested the copyshop to sign an enclosed agreement stating that it would not commit such acts again and to pay a penalty of "$2,500 to help defray the costs of the AAP's copyright enforcement program in this matter and to impress on your business the need to operate in compliance with controlling law."[3] The letter contained a promise not to sue for infringement if the copyshop complied with its conditions.

One of the supposed offenses of the copyshop was distributing copies after permission was requested, but before it was granted. And one of the works alleged to have been infringed—a drama, "The London Merchant" by George Lillo, copied from the *Signet Book of 18th & 19th Century British Drama*—was not, and had never been, protected by American copyright, the "controlling law."

If the actor in this scenario had been the U.S. Secretary of Education, a court surely would have concluded that the menacing letter violated the free speech rights of the professors and students for whom the copyshop made the copies. Why, then, should a powerful trade association not be held accountable on similar grounds? The traditional answer—that the AAP is not a governmental agency—is hollow in view of the facts that: (1) the impact is the same as if a government agent had been the actor; (2) the private individual as actor assumed a law enforcement role; and (3) the actor purported to act under the authority of laws enacted by Congress.[4]

The short answer to the question is that the relationship between copyright and free speech rights has not become a part of legal culture. The primary reason almost certainly is that judges view copyright against the backdrop of property law. As one court said, "The first amendment is not a license to trammel on legally recognized rights in intellectual property."[5] Such a position almost forecloses a recognition that copyright and the

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2. The letter is printed in L. Ray Patterson, *Copyright and "the exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 1, app. (1993).

3. *Id.* at 47.

4. Patterson & Birch, *supra* ch. 5, note 1, at 2.

5. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979).

First Amendment can, and are intended to, work in concert. While copyright protects the author's exclusive right to publish his or her writings, the First Amendment protects the citizen's right to read those writings as published.

Given the importance of learning to a free society, it is surprising that the relationship between copyright and free speech rights was so long ignored almost completely in the jurisprudence of both. There are, we think, several reasons to explain this anomaly. One is that learning about the common origin of the First Amendment and the Copyright Clause (namely, the press control policies of despotic English sovereigns concerned about religious differences that threatened the Crown)[6] has not become a part of copyright culture. A related reason is that the absence of this learning obscures the historic role of copyright as a device of censorship in the English control of the press. This in turn precludes the recognition of copyright as an intrusion into the public domain, which the demise of censorship in England created. Another reason for delay in the development of copyright/free speech interface is that First Amendment jurisprudence, a relatively recent development in terms of U.S. history, emphasizes the right to speak or print rather than the right to hear or read. And finally, copyright as private property is deemed to involve minimal public, and no free speech, concerns.

The thesis of this chapter is that the proprietary copyright has a major—and adverse—impact on the right of the people to know, and that this impact has increased with the extension of copyright (historically limited to the printed word) to modern communications technologies. Indeed, when the First Amendment and the Copyright Clause were adopted, books were the only form of mass communication and copyright was available only when the book was published—an act that protected the right of people to know, because publication put access to the book beyond the copyright owner's control.[7] Publication thus ensured public access to the writings of authors, consistent with the constitutional goal that copyright promote learning—a goal also protected by the First Amendment. Consequently, continued ignorance of the interrelationship of copyright and free speech will prove to be a costly luxury that demeans the First Amendment and undermines its protections.

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6. *See* PATTERSON, *supra* ch. 2, note 20, at 114–42.

7. Not until the 1976 Copyright Act did publication cease to be a condition for the copyright of books.

New technologies provide new means of mass communication that differ from publication in one vital aspect. Modern media enable the copyright owner to control access to the communicated material, both before and after it has been communicated. The television broadcaster decides what shall be seen and heard, and for how long it shall be seen and heard. The owner of a computer database requires the purchase of a password and charges for access, often for materials taken from the public domain.

The development of communications technologies, then, has provided new means by which to exploit information and the need of the people to know. This development poses the threat of economic censorship, for the constant factor in copyright law has been the motive of economic gain. Books are published to be sold for profit, as are television broadcasts and computer databases, although the method of sale is different. The sale of a book provides the purchaser with a physical object to be used as one's own, to gain the knowledge it contains at one's leisure; television and computers, by and large, enable copyright holders to sell access to the contents on a limited basis for a limited time. The essential difference in merchandizing—control of access by a central authority—is the essence of censorship.

This situation provides the core question of copyright for new technologies: how can we balance the public's right of access to information and the entrepreneur's need to profit for providing the information? The danger is the temptation to provide the answers without understanding the questions. We must remember that the content of all copyrighted works, whether data in a database or the plot of a drama or novel, is harvested from the public domain. We must remember, as well, that the right to control access to learning for purposes of profit is also the right to deny access and forego the profit. The copyright owner's control of access, even to material gathered from the public domain, currently is exercised in gross, so to speak, without any for-profit limitation, as was the exclusive right to publish.[8] Thus, it is important to begin with an understanding of the reason for the problem.

In the past, the copyright entrepreneur as publisher sold books (copies of the copyrighted work) at wholesale, relying on

8. The copyright owner, of course, had to publish—and thus provide access—in order to gain a profit. The best known example of the for-profit limitation was in the 1909 Act: the copyright owner of a musical composition had the exclusive right only to perform the composition "publicly for profit." Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075–76 (codified as amended at 17 U.S.C. § 115 (1976)).

book stores as retailers. Modern technology no longer requires the sale of a book because it enables the copyright holder to provide access to the copy by computer as a service. The copyright entrepreneur thus can operate on a retail basis by selling and reselling access as a service directly to the consumer. Controlling use by a competitor, which copyright was designed to do, is different from controlling use by a consumer, which copyright was not designed to do.

Traditionally, copyrighted works of limited access have been dramas or motion pictures, i.e., original works of authorship that were performed, not published. The material to which new technology limits access, however, is as likely to be public domain and factual material as original works, for the value of the access that new technology provides is speed and convenience. And if one is selling access to view materials rather than copies of the materials themselves, two problems emerge: (1) What happens to the requirement of originality, which protects the public domain?; and (2) what happens to the public's right of access to both copyrighted materials (because access can be viewed as the quid pro quo for the grant of the monopoly) and public domain materials (which cannot legally be subjected to the copyright monopoly)?

On the first point, we assume that an access service provides access primarily to public domain materials because such a service is primarily utilitarian in nature and newly created original works of authorship rarely have immediate utility. Thus, the importance of originality recedes into the background. The prime example is legal databases, the materials of which—court opinions, statutes, etc.—are in the public domain, but which entrepreneurs treat as protected by copyright. One need only read Westlaw's copyright notice to appreciate the problem.[9] On the second point, copyright is a reward to the author for providing new works, not for packaging public domain material; and indeed, one purpose of copyright is to protect the public domain.

In this chapter, we assume the right of public access as a matter of sound policy in order to use copyrighted materials for their constitutional purpose of promoting learning. The premises

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9. "Copyright is not claimed as to any part of the original work prepared by a U.S. government officer or employee as part of that person's official duties. All rights reserved. No part of a Westlaw transmission may be copied, downloaded, stored in a retrieval system, further transmitted, or otherwise reproduced, stored, disseminated, transferred, or used, in any form or by any means, except as permitted under the terms of the Subscriber Agreement wherein you obtained access or with prior written permission. . . ."

are as follows: (1) the right of free speech includes the right of access to copyrighted materials; (2) there are free speech values in the Copyright Clause itself; (3) to protect the constitutional policies of copyright in today's world, we need to return to first principles; and (4) the problem of how to accommodate the public's right of access and the copyright owner's right to profit can best be resolved by recognizing that copyright law is public, not private, law. Finally, we can recognize that copyright permits an incursion into the public domain for public purposes more important than the private purposes that are touted as necessary to induce the creation of copyrighted works.

5.2 The Free Speech Right of Access

The proposition that First Amendment free speech rights include the right to hear and read, as well as the right to speak and print, is so obvious that only a lawyer would even question the point. Of what value is speech if it cannot be heard, or printing if it cannot be read? The Supreme Court has considered the issue and reached the common sense conclusion that the right to speak and print, without a right of the audience to hear and read, would be meaningless.[10]

The question, then, is whether the Supreme Court should recognize a right of access to *copyrighted* materials under the First Amendment.[11] Apart from the fact that the Court has recognized a constitutional right to use uncopyrighted material in copyrighted compilations,[12] there are four reasons that, we believe, call for an affirmative answer: (1) the constitutional purpose of copyright is learning; (2) copyrighted works may contain public domain materials; (3) the government creates copyright and the conditions for copyright protection; and (4) the Copyright Clause contains free speech protections.

A. Copyright Exists to Promote Learning. On the first point, it is easy to dismiss the promotion of learning as the purpose of

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10. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866–67 (1982).

11. Such a right, of course, would apply only to works made public and would impose on the copyright owner only a duty not to inhibit access beyond a reasonable price. Because copyright owners normally provide access for a fee (reflecting that copyright is a tool of business), arguably the effect of recognizing a constitutional right of access to copyrighted works would affect primarily copyright owners who wish to license the use of copyrighted works in pursuit of profits far beyond the reasonable profit that serves as an incentive. On occasion, there may be a copyright owner who wishes to suppress the work for political or religious reasons.

12. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

copyright. The goal is too amorphous to be meaningful, it may be thought, and so if copyright must promote learning, protection for writings should be limited to works such as literature and fine art, as Congress attempted to do in the 1870 Copyright Revision Act.[13] This interpretation of the purpose of learning in the Copyright Clause, however, is too narrow, because it ignores the origins of that purpose in the title of the Statute of Anne. The context of the language in the statute's title was a society that, only a few years before its passage, had been relieved of the yoke of censorship.

The purpose of censorship is to ration knowledge. To censor is to ration access to materials in order to inhibit and to control learning in two ways. One way is to control the publication of materials to be learned; the other is to prevent critical evaluation of the materials that are published. Learning encompasses access to the materials both for acquiring knowledge and for evaluation. That the two purposes normally will be performed by different persons—the first by students, the second by scholars—is irrelevant, as indicated by the fact that both purposes are given preference in fair use assessments by § 107—comment, criticism, teaching, scholarship, and research—without differentiation.[14]

There are, then, two kinds of learning. One is the traditional acquisition of new knowledge by a study of the materials; the other is the critical evaluation of the materials to determine if they are sound. Access is necessary for both types of learning. And as we have seen, the private copyright of the book trade (the stationers' copyright) had been used as a device of censorship to control access for both purposes for almost a century and half before it was succeeded by the statutory copyright.

The contemporary copyright probably is used for censorship purposes most often to control access without regard to acquiring knowledge or evaluating materials, for the concern is money rather than politics. Contemporary copyright holders avoid the charge of censorship, however, because the common view is that one does not censor one's own writings. Apart from the fact that the public may be given access to copyrighted materials in order to shape public opinion—which is reason enough to deny the right to control access beyond the marketplace—copyright is not

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13. *See* Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (providing copyright for "models or designs intended to be perfected as works of the fine arts").

14. The full list provided by the statute is: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research." 17 U.S.C. § 107 (2006). While each use is subject to the four-factor analysis provided by the remainder of the statute, the specification of these uses as examples indicates a congressional judgment that usually they will be likely to pass such muster.

limited to one's own writings. The copyright holder may be, and usually is, either an employer or an assignee of an author, and not infrequently a communications conglomerate with enormous power to influence public opinion. Thus, the act of Congress in providing users the fair use right to copy copyrighted material for evaluation is more important than the words of the statute make apparent.

Moreover, when we consider copyright's purpose as the encouragement of learning in the context of the copyright history that produced the Statute of Anne, it is clear that the intention was to prevent the use of copyright to inhibit any type of learning, whether gaining new knowledge or evaluating old. A copyright to promote learning cannot properly be used for any type of censorship, and the requirement of publication as a condition for copyright protection was an implementation of the goal of public access both to acquire and to evaluate learning. So understood, the learning purpose of copyright reflects a concrete goal—the prohibition of copyright censorship—unrelated to the content of the copyrighted material.

B. Copyrighted Works Often Contain Public Domain Material. On the second point, copyright for works containing public domain materials is a practice with a long tradition, although the term "compilation copyright" seems to be of recent origin.[15] Ancient lineage is not always to be venerated, however. The compilation copyright was and is a threat to the public domain, and therefore to learning, because the only originality it requires is selection, coordination, or arrangement. This danger explains why Congress provided that the compilation copyright does not protect the contents of the compilation,[16] and why the Supreme Court in *Feist* reemphasized that originality is a constitutional requirement for copyright and ruled that there is a constitutional right to use uncopyrightable materials contained in a copyrighted compilation.[17] Thus, the "constitutionalization"

15. One of the earliest cases involving a compilation copyright is *Emerson v. Davies*, 8 F. Cas. 615, 618–19 (C.C.D. Mass. 1845) (No. 4436).

16. 17 U.S.C. § 103 (2006); *see also Feist*, 499 U.S. at 348 (limiting the protection afforded to a phone directory compilation to those contents containing original expression); Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480 (7th Cir. 1996) (holding the protection afforded a copyright compilation in a cookbook does not extend to the listing of ingredients, which lacks the element of originality). If the compilation is a collective work containing independently copyrightable works, each work is entitled to its own copyright independent of the compilation copyright. 17 U.S.C. § 103(b) (2006).

17. *Feist*, 499 U.S. at 347–49.

of copyright[18] avoids corruption of the policies that both the Copyright Clause and the First Amendment require.

C. Copyright Is a Creation of the Federal Government. The third reason for recognizing a constitutional right of access to copyrighted material is the role of the government in the copyright scheme. Congress, and only Congress, was empowered by the Framers to enact copyright legislation—that is, to create the rights and conditions necessary to exercise the rights of copyright. The use of the power is a matter of congressional discretion, but that discretion must be exercised within the confines of the relevant constitutional provisions: the Copyright Clause and the First Amendment. These limitations mean, as both the Supreme Court and Congress have stated, that copyright legislation does not protect preexisting rights but rather creates new rights.[19] Otherwise, the constitutional power to grant copyright would be subject to extraconstitutional constraints, which would be contrary to the rule of law.

In exercising its power under the Copyright Clause, however, Congress in the 1976 Act empowered copyright holders to control access to materials of learning by granting copyright protection from the moment of fixation. Congress thereby discarded publication as a condition for copyright that for almost one hundred ninety years ensured public access to copyrighted materials. This is why the First Amendment is relevant: the question is whether the First Amendment now protects the right of access that formerly was protected by the copyright statute.

To put the point another way: Congress in enacting copyright legislation cannot constitutionally deny an author copyright protection for his or her original writings because of its content, but can Congress constitutionally enact a statute that empowers authors or copyright owners to deny access to their published writings? Recall that without the copyright statute, authors would have no control over their writings once they are made public. This suggests that the answer is "no," that Congress cannot vest in copyright owners the power to deny access to published copyrighted materials. The theory is that such writings influence ideas and that any law which facilitates a denial of

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18. In this respect, *Feist* did nothing new. The Court had recognized the constitutional requirement of originality—and the concomitant doctrine that non-original materials cannot be protected by copyright law—more than a century before. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); Baker v. Selden, 101 U.S. 99 (1880); The Trade-Mark Cases, 100 U.S. 82 (1879).

19. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834); H.R. REP. NO. 60-2222, at 9 (1909).

access would be equivalent to a law abridging the free speech right to access. We consider, then, the relevance of the First Amendment to copyright.

D. Copyright and the First Amendment Are Mutually Relevant. The First Amendment's relevance to copyright lies in the fact that nothing in the Copyright Clause prevents Congress from enacting a content-based copyright. The language of the Clause empowers Congress to deny copyright protection for works of original authorship that do not promote learning and are, to return to the press control terminology in sixteenth and seventeenth century England, heretical, seditious, schismatical, or offensive.[20] Indeed, it was the English practice of suppressing such material that led to the First Amendment, the primary safeguard against such legislation in the United States. A content-based copyright thus is contrary to free speech rights, and courts have held, for example, that pornographic material, if original and fixed, is entitled to copyright protection.[21] It is clear, then, that the First Amendment is relevant to copyright in that it can be used to limit Congress's copyright power.

If the First Amendment is relevant to the Copyright Clause, the Copyright Clause should be relevant to the First Amendment to the extent that the subject of both is the same: communication by both speech and writing. If this is not so, the government arguably can do indirectly under the Copyright Clause what it cannot do directly under the First Amendment, which is to enact a statute enabling copyright holders to regulate both speech and press. The Copyright Clause, then, is relevant to the First Amendment in that it protects the right of access to learning materials, both those copyrighted and those in the public domain—the first, at least historically, by requiring publication as a condition for copyright, the second by freeing it from any control by anyone.

5.3 The Free Speech Protections in the Copyright Clause

The relationship of the Copyright Clause to the First Amendment, in fact, is found in the free speech protections of the Copyright Clause. They are convincingly stated, but their message emerges clearly only in light of the history of publishers

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20. An early case that denied copyright protection to a newspaper on the ground that it did not promote the progress of science is *Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2872).

21. Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 858 (5th Cir. 1979).

as agents of press control for the government in Elizabethan and Jacobean England. For it is the common origin of the First Amendment and the Copyright Clause that makes clear the purpose of the constitutional policies: to protect free speech rights by preventing copyright from being used as a device of censorship and to do so in a manner consistent with the promotion of learning. The limitations disenable Congress from granting a copyright that would effectively give recipients the privilege of plenary control over all learning in our society.

Consider that the censorship regimes in England suppressed learning, supported perpetual copyright as a device for this purpose, and denied the bookseller a *right* to publish. This history explains why the Copyright Clause empowers Congress to grant "the exclusive Right" contemplated by the Framers only to promote learning, only for limited times, and only to an author for original writings, thereby protecting and enlarging the public domain. In 1787, the only exclusive right for authors that made sense was the exclusive right to publish, and a plenary right to publish was, of course, contrary to a regime of press control. Each constitutional policy of copyright, in short, is contrary to censorship. Taken together, they can be said to be protections for free speech that complement First Amendment rights: the promotion of learning requires the access that free speech rights guarantee.

5.4 A Return to First Principles

The major obstacle to a return to first principles may well be the trivialization of copyright, to which Justice Douglas objected in 1954 when he noted that copyright had been granted for "statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays."[22] A legal culture in which copyright may be accorded to such inconsequential articles of commerce creates an obstacle to decisionmaking based on first principles. Such mindless trivialization of copyright severs that body of law from its U.S. constitutional moorings to become only an economic right, the primary purpose of which is to produce a profit for the copyright owner, any impediment to which is wrong.[23]

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22. Mazer v. Stein, 347 U.S. 201, 221 (1954) (Douglas, J., concurring).

23. For example, if a copyright owner can increase profit by licensing the copying of excerpts from copyrighted books for classroom use, this is a right recognized despite statutory language strongly suggesting this type of copying normally will be a fair use.

The problem in combating the trivialization of copyright law is two-fold. On the one hand, we do not want to tie the hands of Congress by limiting its power to secure copyrights by reading an eighteenth century document literally. On the other, we do not want to forfeit the wisdom manifested in the policies the document enshrines—wisdom gained by the Framers from a past not then distant from them, and relevant to us yet today. The task is to ascertain the wisdom contained in the document's limitations and to continue to implement those limitations despite the publishers' determination to accrue ever greater profits.

We can, perhaps, best approach the problem in terms of purpose (the goal) and function (the means of implementing the goal), which we can discern easily for copyright law. The purpose is to benefit the public by encouraging the dissemination of learning materials, a purpose defined by the Constitution; the function is to protect the materials disseminated as a means of implementing the purpose, a function also defined by the Constitution (original writings and limited times) and the copyright statute (specified rights granted to the copyright owner with respect to specified works).

The essential task is to define the right to, and the scope of, protection in a manner consistent with the Constitution, so that the function does not override the purpose. The problem is that the dissemination function, which promotes learning, is what enables the copyright owner to gain a profit. This is why, over the years, the tendency has been to emphasize the function at the expense of the purpose, a tendency demonstrated by the expansion of the duration of copyright in the 1976 and 1998 Acts to a minimum of three generations. After fifty-six years (the maximum possible period of protection, assuming renewal, under the 1909 Act), a monopoly on the distribution of works previously protected can add little, if anything, to the store of learning. In such circumstances, the publisher, not the public, becomes the prime beneficiary of copyright.

When any body of law undergoes such a major transformation in function that its purpose is turned on its head, the time has come to return to first principles. We deal with three such principles. The first is that copyright entails constitutional rights; the second is that copyright is a monopoly granted primarily to serve the public interest; and the third is that copyright is public, not private, law.

A. Copyright Entails Constitutional Rights. That copyright entails constitutionally guaranteed rights is a truism obscured by

lack of attention. One reason for this lack of attention is the fiction that copyright cannot be a law regulating the press because its subject is private property in a free market. The fiction will not withstand analysis, because it assumes that the privatization of the right of censorship for economic purposes is not censorship. But to the extent that copyright holders negate the right of fair use, they exercise the power of censorship under a federal law.

That copyright is a species of positive law that the Constitution empowers Congress to enact does not alter the fiction, but instead is cause to understand that the limitations in the Copyright Clause itself serve to protect free speech rights—and that the Copyright Clause is complementary of, not contradictory to, the First Amendment. Indeed, for that proposition we have contemporary validation from the Supreme Court itself in *Feist*.[24]

The argument against the interrelationship of the First Amendment and the Copyright Clause is that copyright entails only the author's own speech, not a proper subject for First Amendment concerns. Indeed, copyright has been said to protect the author's free speech rights. But the position is supported only by the use of fallacies, two of which we discuss now.

First, as suggested above, the author is not the only person whose free speech rights are involved. For example, as to works made for hire, the copyright owner is not the author but the employer (often a media conglomerate); and a compiled work protected by the compilation copyright often contains public domain materials.

Second, the subject matter of copyright is information and learning, which implicates the right of citizens to know. This right is protected by both the First Amendment and the Copyright Clause. Thus, if the copyright owner is given the power to ration knowledge—for example, by licensing access to the information contained in copyrighted works—copyright overrides the goals of both the First Amendment and the Copyright Clause in that the former is intended to protect the right to learn and the latter to implement the right to learn.

The degradation of copyright is not due so much to the publishers' blackened hearts as it is to their cupidity fed by legal fictions. A corporation employing an author becomes the author of that person's creations, electronic signals recorded as they are broadcast over the airwaves become a writing, and the act of

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24. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

compiling public domain material results in a work of authorship—these, perhaps, are the most notable fictions. Such fictions make it necessary to remind ourselves, if we are to utilize the wisdom manifested in the constitutional policies of copyright, that we are dealing with constitutional rights. Legal fictions may facilitate the function of copyright, but they should not be allowed to override the purpose of copyright—the promotion of learning—which is a right the Constitution protects for the American people by preventing Congress from enacting a law to control the press.

B. Copyright is a Limited Monopoly to Serve the Public Interest. Legal fictions in copyright have two effects. First, they expand the copyright monopoly. Indeed, and obviously, that is their main purpose. The second effect of the fictions is more subtle. Their use encourages the substitution of the word "property" for the word "monopoly" as a description of copyright. This latter point merits some consideration, even if the consideration involves inference and surmise.

First, we note that as a matter of policy, lawmakers do not wish to be seen using fictions to expand a monopoly. The fictions are used only to protect the author's property, or so it is claimed. The cynicism involved here must be given at least a patina of rationality, and that patina is provided by the fact that, as a monopoly, copyright is viewed as only a *little* monopoly—which, of course, is what property is. The author is given a monopoly of his or her book, which, at least at first glance, poses no danger to the welfare of society in view of the number of books available. Consequently, copyright is viewed as being no more monopolistic than any other property—for example, an automobile—that the owner can exclude others from using.

There are two points to be made here. One is that, unlike automobiles, books are not fungible. A novel by Jacqueline Suzanne is a poor substitute for one by Faulkner or Hemingway. Indeed, the ultimate justification for copyright is that the copyrighted work is an original work that is *not* fungible.

In view of the trivialization of copyright, however, the second point is more convincing. That point is that a lot of little monopolies result in one big monopoly. If, for example, a trade association controls all the copyrights of all books, clearly it can monopolize the book trade without hindrance. This, of course, was the situation with the Stationers' Company in England, whose heritage of monopolistic control influenced the legislative

and judicial treatment of copyright law for many years, beginning with the Statute of Anne.[25]

The concern for copyright as a monopoly in this country seems to have begun to fade in the early years of the twentieth century, after the enactment of the 1909 Copyright Revision Act.[26] The major factor in this change in attitude probably was the development of new technologies, particularly the motion picture.[27] We see evidence of this lack of concern in Judge Learned Hand's opinions in the 1920s, almost contemporaneously with the invention of the motion picture soundtrack; and it was these decisions that gave us the sweat-of-the-brow doctrine that the Supreme Court held unconstitutional in *Feist*.[28] Because natural law was the basis of the sweat-of-the-brow doctrine, courts—wittingly or not—began to treat copyright as merely a form of property, and the proprietary concept of copyright became a substitute for the regulatory concept.

The more copyright came to be viewed as merely another species of private property, the less it came to be viewed as involving the public interest. The irony is that the proprietary concept of copyright has contributed to a situation in the United States today that is analogous to the situation in England when the Stationers' Company ruled the book trade. The parallel between the Elizabethan trade copyright and modern copyright is seen in the fact that copyright today has become primarily an instrument of media conglomerates to protect their property. This concentration of copyrights represents a return of copyright to its historical role as an instrument of monopoly and, unfortunately, a potential device of censorship. Although today the censorship is primarily economic, it should be noted that economic censorship easily and readily can become political censorship, if politics threaten the profit to be gained.

Protection against this danger is found in the limitations that transformed the stationers' trade copyright in England into the statutory copyright as a limited monopoly to serve the public interest. That copyright is indeed a monopoly to be limited is the second of the first principles to which U.S. law should return.

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25. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

26. Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075.

27. The 1909 Act was amended in 1912 to provide copyright protection for motion pictures. Act of Aug. 24, 1912, Pub. L. No. 62-803, 37 Stat. 488.

28. The sweat-of-the-brow doctrine usually is traced to Hand's district court opinion in *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 935 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922).

C. Copyright Entails Duties for the Copyright Owner. The third, and perhaps most important, first principle to which we need to return is that copyright entails duties for the copyright owner. Historically, these duties existed in the form of conditions precedent and subsequent, both of which were necessary to secure and retain copyright. Thus, to obtain copyright, one had to create and publish an original work with notice, and then register the copyright and deposit copies of work with the statutorily designated governmental agency (in 1790, the Secretary of State's office, and currently, the Copyright Office in the Library of Congress). To retain the copyright, the owner had to renew it.

These explicit duties existed because the English experience demonstrated that copyright as a perpetual and unlimited monopoly harms society. Thus, the conditions for securing copyright were consistent with its societal purpose of learning: the creation of an original work, which contributed to learning; publication, which ensured access to that learning; notice, which allowed the reader to know what works were not protected by copyright (and therefore in the public domain to be used without limitation); and the deposit of copies, which together with registration ensured a public record of, and access to, the new learning. Moreover, the copyright term was limited so that the work would go into the public domain after a reasonable time (sooner if copyright was not renewed, later if it was, but in any event in a period measured both by the author's need and the public's good).

Taken together, the purpose of the conditions for copyright—to ensure that copyrighted works promote learning—was the basis for an implied duty of the copyright owner. Stated affirmatively, that duty was to provide public access for the copyrighted work; stated negatively, the duty was not to inhibit public access to the unpublished work. The duty was implied rather than express because the expressed duty to publish a work in order to secure copyright made a statement of the implied duty to provide access unnecessary.

Today, however, only two conditions for copyright remain, and the only express statutory duties are to create an original work of authorship and to fix it in a tangible medium of expression. The question, then, is whether the enhancement of the copyright monopoly creates a need to make express the duty of the copyright owner not to inhibit access. Our conclusion is "yes." The reason is that the erstwhile duties of the copyright owner were an implementation of the constitutional policies of copyright. With the elimination of notice, deposit, and

registration as conditions for copyright protection, these policies are left largely unprotected. The best way to protect them is to recognize the copyright holder's duty to do so by providing access without the necessity for a license, thereby protecting the public domain.

The question is how best to implement this duty of the copyright owner. The answer to that question involves two steps. The first is to recognize that private copyright law sometimes may have the impact of, and should be treated as, public law; the second is to develop copyright defenses. We deal with the first step in the next section, and the second step in Chapter 7.

5.5 Copyright as Public, Not Private, Law

The nature of copyright law as public or private law has not received much, if any, attention, but it is a topic that merits consideration—and one that is more complex than may at first appear. Clearly, the common view is that a contract—whether negotiated or a contract of adhesion—is private law, and that a statute, in contrast, is public law. But what about a judicial decision that binds only the parties to the case? Presumably, the doctrine of stare decisis places the judicial decision in the category of public law.

The more logical test, however, is the impact of any given rule on whom and on what. Private law is an agreement between the parties that controls their conduct because they have agreed that it shall do so. Thus, the impact of private law is limited to the parties. Public law is a rule made by a public lawmaker—legislator or judge—that controls the conduct of persons for the benefit of society without their agreement. Public law thus has an impact on all persons within the jurisdiction of the lawgiver.

Justice Holmes, in describing copyright as property, gave an apt description of copyright law as public in 1908:

> [Copyright] restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which . . . hardly can be conceived except as a product of statute, as the authorities now agree.[29]

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29. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

We have here an example of Holmes's dictum that the life of the law is experience, not logic. Experience shows us that the practical test that distinguishes public and private law is not its source, but its impact. If a copyright owner can use copyright law to restrain the conduct of one person a thousand miles away, he or she can use it to restrain the conduct of a thousand persons one mile away. The impact of a judicial decision creating such an outcome is a determination of law that affects the members of the public no less than a statute.

Two examples demonstrate the point: (1) a copyright notice that claims the exclusive right to copy opinions of judges of U.S. courts despite § 105;[30] and (2) a copyright holder's assertion that a teacher may not make multiple copies of his or her copyrighted work for classroom use despite the language of § 107.[31]

The long-arm characteristic of copyright law is justified by the notion that copyrighted works can be infringed with ease and without detection. The premise is that any copying by anyone is an infringement, but the premise is faulty. An individual's copying for his or her own personal use is not infringement; if the copying is by a competitor and is infringement, it is not committed with any more ease than any other tort, nor is detection that difficult. The faulty premise, then, does not justify pronouncements by copyright owners that chill the rights of others to use copyrighted material. The issue is whether there is to be a remedy for the harm generated by such statements.

To put the point succinctly, is the copyright holder's statement of a rule of law that contradicts a statutory rule to be viewed as merely a private statement or instead as a statement of public law? The issue is whether private statements of public law should be treated as public law as if made by the legislature.

The fact is that copyright owners have come to treat the copyright statute as a delegation of lawmaking power to them, and they use that power to control the constitutional rights of others. Our point is that the private pronouncements by copyright owners of what the law is should not be protected from standards of fairness by the cloak of private law. They should be subjected to the standards applicable to public law, including the standard that a law shall not regulate either speech or the press. In short, the time has arrived to recognize the interrelationship of copyright and free speech rights.

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30. *See supra* ch. 5, note 9 (providing the Westlaw notice).

31. *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

Thus, we come directly to the significance of the issue. If a copyright owner is making public law by private pronouncements, he or she is performing the role of a public legislator and should be subject to the restraints, including that of the First Amendment, under which the public legislator acts. The question is not so much whether the pronouncements of copyright owners are public law, but whether they should be treated as public law for the purpose of protecting the rights of the public in relation to copyrighted materials. The argument here is that copyright law, whether in the form of statutory law or private pronouncement, should be treated as public law because of its impact on the lives of all citizens.

To some, the idea may appear to be revolutionary, and we concede that it is different. But when change is suggested, one test of the desirability of the change is a cost-benefit analysis. What is the cost to the persons who are adversely affected? What is the benefit to the persons whose interests are served? In this situation, the cost to the persons adversely affected—copyright owners—is only that they speak the truth and abide by the law. The benefit to the persons whose interests are served—the public—is that their constitutional right of access to copyrighted materials for learning is protected. The analysis speaks for itself.

5.6 Copyright and Free Speech Rights

The tension between copyright and free speech rights generally has been ignored because copyright is viewed as a subset of property law, and normally the control of one's property does not interfere with another's constitutional rights. Part of the problem is that the concentration on the right to print and speak—rather than to read and hear—gives the impression that copyright is consistent with, and indeed implements, the rights of free speech. This view is sound, but too limited, for it ignores the right to know, which is the essence of free speech rights if they are to be meaningful. This follows from the fact that to censor is to control what one can know—that is, to control access to information, knowledge, and learning—which is precisely what the First Amendment protects against.

The First Amendment was, of course, directed to Congress, and the argument has been that the action of copyright owners is not the action of the government. But copyright owners can act only by reason of statutes that Congress enacts, for the Supreme Court long ago ruled that copyright owners have only such rights

as Congress grants them.[32] To give the copyright owner the power to do what an agent of the government cannot—that is, control access to published works—is to make an end-run around the First Amendment. It allows Congress to do indirectly what it cannot do directly.

The drafters of the Statute of Anne, familiar with and experienced in the ways of the controllers of the press (including publishers), resolved the problem of copyright and censorship simply and directly. They limited copyright protection to printed books and, to emphasize the anticensorship role of copyright, stated its purpose to be the encouragement of learning. The United States adopted this protection against copyright as a device to regulate the press and, following the English lead, limited copyright protection to published works.

The solution benefited both the publisher and the public. The publisher had the exclusive right to sell the book to gain a profit, and the public could use the book for learning. Thus, efforts to control access to information, knowledge, and learning were limited by economic interest and the lack of subsequent control. The publisher had to provide people with books they would purchase, and control of the purchaser's use of the book was lost with the sale.

The mechanics of copyright, then, minimized the problem of copyright as a law regulating the press. But while this system was in effect for books, a different system for musical compositions developed as a result of the performance right, which entailed considerations different from the publication right. Copyright owners of music were given the right to license the performance of their compositions. The lucrative nature of such a licensing system was not lost on book publishers. Consequently, when the 1976 Copyright Act was drafted, copyright owners laid the groundwork for creating a licensing system for the use of books they sold. The key to their plan was to have Congress divide the publication right (which included the right to copy and sell books) into two steps—the right to copy the book, and the right to distribute the book—as separate rights. This placed publishers in a position to claim that their copyright was infringed anytime the purchaser of a book copied an excerpt from the book.

Licensing the public performance of music is considerably different from licensing the private copying of excerpts from books one has purchased. Music may be good for the soul, but

32. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834).

learning is necessary to earn a living. To license the use of books is to censor learning, which inevitably limits the citizen's role in a free society. The surprising thing is not that publishers make, but that some courts have validated, the claim to license the use of books on the library shelf. The question is why.

The answer begins with the point that the removal of publication as a condition for copyright changed the copyright equation. The economic interest of the publisher is no longer limited to selling copies of books. It has come to include also selling the right to copy excerpts from the books sold—that is, licensing the use of the books for their intended purpose. Control of the purchasers' use of books thus has become the goal of the book trade.

The effort to control, by economic censorship, the peoples' right to know is so manifestly contrary to the guarantees of the First Amendment that the reason for the publishers' success must have an emotional, as opposed to a rational, basis. That basis must be the same as the basis for emotion in the law generally: namely, a sense of justice or equity. In this instance, the emotional basis is the romantic notion of the author—for example, that the starving author is entitled to a reward for his or her efforts. The Supreme Court succumbed to this error when, in a case expanding copyright to statuettes used as lamp bases, it said: "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."[33]

The emotional basis for this pronouncement is revealed by the fact that statuettes of Balinese dancers as lamp bases do not constitute a significant service to society. But the romantic notion of the author does not allow for such quibbles. Thus, it is necessary to dispel the romantic notion of authorship, which is faulty in two respects. First, not many authors suffer through sacrificial days. Second, most of the rewards go to the publisher as distributor, not to the author as a creator. There is, in short, no rational basis to explain why the publisher, as surrogate for the author, should be entitled to rewards beyond those of any other manufacturer and merchant.

Emotional reasons, however, are more powerful and persistent than intellectual reasons. To remove the emotional basis of copyright, it is necessary to dispel the notion that authors create something new and original, which is a fiction fostered by authors and encouraged by their keepers. Authors invade the public domain to gather and recycle material they use

33. Mazer v. Stein, 347 U.S. 201, 219 (1954).

in the creation of their works. To paraphrase Newton, if authors are more prolific than their predecessors, it is because they have a larger public domain to graze upon.

In terms of equity, authors are due no more homage than the craftsman who makes fine furniture. The difference is that authors, being wordsmiths, can with the aid of publishers express their arguments more forcefully and widely than the furniture maker. The irony is that control of the media, which the First Amendment protects, is what enables publishers to undermine the First Amendment with their claims of the right to license the information, knowledge, and learning they distribute through the media.

The point here is not to demean authors, but to suggest that a more realistic view of authors is necessary to remove them as a foil for booksellers and balance the equities between the publishers and the public. The right of the people to learn and to know far exceeds the right of publishers to windfall profits, a point the Supreme Court has recognized time and again with its dictum that copyright is primarily for the public interest and only secondarily for the author's interest.

CHAPTER 6. COPYRIGHT AND FAIR USE

6.1 Introduction

The thesis of this chapter is that Congress intended the fair use doctrine to provide the public with protection against the publishers' plan to ration learning by controlling access to copyrighted materials in order to charge pay-per-use fees.[1]

The predicate for the plan was the elimination of publication as a condition for copyright, one of the two most important changes in the 1976 Copyright Act. The other was a corollary of that change: the codification of the judicial fair use doctrine.[2] If one accepts the stated purpose of copyright—the promotion of learning—and agrees that the elimination of publication as a condition for copyright threatens that purpose, the constitutional dimensions of statutory fair use become apparent. Fair use

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1.* For subsequent commentary by Professor Patterson on the subject of this chapter, see L. Ray Patterson & Christopher M. Thomas, *Personal Use in Copyright Law: An Unrecognized Constitutional Right*, 50 J. COPYRIGHT SOC'Y 475 (2003).

2. If pressed for a third, we would nominate the codification of the idea/expression doctrine, derived from *Baker v. Selden*, in § 102(b). Baker v. Selden, 101 U.S. 99, 101–03 (1879). In § 102(b), Congress sought to protect against the expropriation of facts, ideas, etc., from the public domain for private ownership. In § 107, it provided for use by others even of copyrighted expression. In approving Congress's decision to prolong the duration of subsisting and future copyrights in *Eldred v. Ashcroft*, the Supreme Court referred to the idea/expression and fair use doctrines as copyright's "built-in free speech safeguards." Eldred v. Ashcroft, 537 U.S. 186, 219–21 (2003).

protects the public's First Amendment right of access, formerly protected by publication as a condition for copyright.

Despite the importance of the fair use doctrine, the U.S. Supreme Court has noted that it has become "the most troublesome in the whole law of copyright."[3] The purpose of this chapter is to explain why and to demonstrate that this need not be so. For the first purpose, we examine the origins of fair use and the reasons for its troublesome nature. For the second, we provide a framework for analyzing § 107, the Copyright Act's fair use provision.

6.2 The Original Concept of Fair Use

In codifying the fair use doctrine, Congress returned to the case that created it: *Folsom v. Marsh*, an 1841 decision by Justice Joseph Story of the U.S. Supreme Court, riding circuit (as justices then did).[4] That opinion merits examination because the failure to understand it is the source of the contemporary confusion about copyright.[5]

In *Folsom*, the charge was that the Rev. Charles Upham had infringed Jared Sparks's biography of George Washington. Upham's two-volume work, entitled *Life of Washington, in the Form of an Autobiography*, was a narrative in which Washington was made to tell the story of his life by means of correspondence inserted into the narrative. The letters inserted were alleged to infringe correspondence contained in Sparks's twelve-volume work, which contained a one-volume biography of Washington and eleven volumes of Washington's letters. Upham's work of 866 pages contained 353 pages of letters taken from the 7000 pages of Sparks's work, but Upham had not copied anything from Sparks's biography of Washington.

Thus, the controversy in *Folsom* was between two authors about the scope of copyright. To appreciate the full import of the case, one must examine the copyright statute that was in effect when the case was decided. In 1841, the governing law was the Copyright Revision Act of 1831, under which copyright protection for books was very narrow: copyright protected only the

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3. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam)).

4. Folsom v. Marsh, 9 F. Cas. 342 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901).

5. *See* L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. INTELL. PROP. L. 431 (1998).

published book, and only as it was published.[6] This explains why another author could abridge or translate[7] a copyrighted book without infringing its copyright. While other works could be infringed by copying, books could be infringed only by printing, publishing, or importing copies.[8]

The 1831 Act reflected the distinction between the copyright and the work. The use of the work by a second author—abridgment or translation—was not a use of the copyright, because the second author created a new work and was entitled to a copyright for publishing it. But however many new works resulted from abridging or translating a work, many persons would deem the copying involved to be unfair. While they might admit that it would be reasonable for an author to use *part* of another's work in creating his or her own work, they would argue that it is not reasonable for the second author to use the entire work for that purpose because he or she would then be using the copyright.

This, at least, seems to have been the thinking of Justice Story when he created the fair use doctrine. He held, in effect, that the second author had the right to use part of another's work in creating a new work, but not the whole work (which would be tantamount to using the copyright). Partial use of a work by a rival author could be a fair use of the copyright, but the entire use of the work could not.

We now turn to the opinion itself. Justice Story said "that a fair and bona fide abridgment of an original work, is not a piracy

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6. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436.

7. In *Stowe v. Thomas*, the court held that the defendant's German translation of Harriet Beecher Stowe's English language work, *Uncle Tom's Cabin* (1852), did not infringe her copyright because the defendant did not use the same "language in which the conceptions of the author are clothed." Stowe v. Thomas, 23 F. Cas. 201, 206–07 (Grier, Circuit Justice, C.C.E.D. Pa. 1853) (No. 13,514). The decision in *Stowe* prompted creation of a statutory right to control translations in 1870. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212. Congress in due course recognized a fairly broad adaptation right, which it protected in § 1(b) of the 1909 Act and now, more comprehensively still, in § 106(2) of the 1976 Act. Act of Mar. 4, 1909, Pub. L. No. 60-349, § 1(b), 35 Stat. 1075, 1075 (codified as amended at 17 U.S.C. § 106(2) (2006)).

8. Section 1 of the 1831 Act afforded copyright to the author of "any book or books, map, chart, or musical composition" and also to any author "who shall invent, design, etch, engrave, work . . . any print or engraving." Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436. The rights of copyright consisted of "the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut, or engraving." *Id.* Section 7 of the statute made it an infringement for anyone to "engrave, etch, or work, sell, or copy" any print, cut, engraving, map, chart, or musical composition. Act of Feb. 3, 1831, ch. 16, § 7, 4 Stat. 436, 438. Section 6 of the statute, however, made it an infringement to "print, publish, or import" a book or books. Act of Feb. 3, 1831, ch. 16, § 6, 4 Stat. 436, 437. Thus, copying books was not an infringement under the 1831 Act, so long as one did not plan to market the copies.

of the copyright," and that the question was "whether such a use, in the defendants' work, of the letters of Washington" was a piracy of Sparks's work.[9] He discussed the copyrightability of the letters, concluding that they were copyrightable, that the plaintiffs were proper assignees of the copyright, and that defendant's work was not a fair abridgment.

There are three points of special interest about the opinion. The first is that Justice Story used a natural law theory of copyright in creating the fair use doctrine. Referring to the publication of the Duke of Wellington's dispatches, he said: "It would be a strange thing to say, that compilation involving so much expense, and so much labor to the editor, in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor."[10] Sparks's work, of course, was a compilation of letters collected and arranged through much labor and expense. But they were not original writings by Sparks, whose own writing, the biography of George Washington in the first volume, had not been copied.

Second, Story enlarged the copyright monopoly by laying the predicate for eliminating the then-extant fair abridgment doctrine and substituting fair use. He said, consistent with natural theory, that one can infringe a copyright by taking merely a portion of a work, either by duplication or by imitation:

> It is certainly not necessary, *to constitute an invasion of copyright*, that the whole of a work should be copied, or even a large portion of it, in form or in substance. . . . *The entirety of the copyright* is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.[11]

In this passage, Story says that the copying could be in form (by duplication) or substance (by imitation). He thus rejected the notion that copyright protected a work only as it was published. He also recognized, however, that the publication of a work, not its copying, was the operative act of infringement. Without publication, it made no difference whether copying was by duplication or imitation.

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9. *Folsom*, 9 F. Cas. at 345.

10. *Id.* at 347; *see also* Leon v. Pac. Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937) (stating that rearranging a directory and then publishing it is not "fair use"); Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83, 88 (2d Cir. 1922) (asserting that all that is needed for a work to be copyrightable is for it to be at least an "industrious collection").

11. *Folsom*, 9 F. Cas. at 348 (emphasis added).

Third, Story treated what came to be known as "fair use" as a function of copyright, making fair use relevant only if one is exercising a right of the copyright owner. He said:

> I have no doubt whatever, that there is an invasion of the plaintiffs' copyright . . . But if the defendants may take three hundred and nineteen letters, included in the plaintiffs' copyright, and exclusively belonging to them, there is no reason why another bookseller may not take other five hundred letters, and a third, one thousand letters, and so on, and thereby the plaintiffs' copyright be totally destroyed.[12]

Thus, fair use was originally intended to protect the *copyright*, leaving protection of the work as incidental to this purpose. The wrong, in short, was not the copying of the letters per se but the publishing of them, which was an invasion of the copyright that might "totally destroy[ ]" it.

Justice Story then summarized the question to be decided and succinctly provided guidelines for determining how much the second author could take from the first author's work:

> The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs. . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[13]

Story's summary and guidelines reflect copyright as a natural law property right. The message they convey is that the property must be protected.

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12. *Id.* at 349.

13. *Id.* at 348. We have it on the authority of the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994), that § 107 of the Copyright Act of 1976 faithfully reflects the three considerations listed in *Folsom*. The first statutory factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," is said to draw on Story's formulation, "the nature and objects of the selections made." *Campbell*, 510 U.S. at 578 (quoting *Folsom*, 9 F. Cas. at 348). The second factor, "the nature of the copyrighted work," is referenced by *Campbell* to the words "value of the materials used." *Id.* at 586 (quoting *Folsom*, 9 F. Cas. at 348). The third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," is derived from Story's fuller expression, "the quantity and value of the materials used." *Id.* (quoting *Folsom*, 9 F. Cas. at 348). The fourth factor, "the effect of the use upon the potential market for or value of the copyright work," clearly is based on *Folsom*'s concern regarding "the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.* at 590–91; *Folsom*, 9 F. Cas. at 348.

Thus was created the "fair use" doctrine to supplant the abridgment doctrine. Although apparently no court used the term "fair use" for some years after *Folsom* was decided,[14] the doctrine itself seems to have been well established by 1879, when Eaton S. Drone defined it in his classic treatise as follows:

> It is a recognized principle that every author, compiler, or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication. The recognition of this doctrine is essential to the growth of knowledge; as it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors. The law, therefore, wisely allows a "fair use" to be made of every copyrighted production . . . .[15]

This passage makes an important point that is consistent with *Folsom*: the fair use doctrine as a function of copyright enabled one author to exercise the right of another author in making use of that author's work, and was relevant only for this particular scenario. This limited role of fair use is manifested by the requirement typically imposed by the courts that the second work be "transformative" of the first.[16] Put simply, the second author is expected to use the material he or she takes from the first author's work to create a new work. Presumably, this is the justification for allowing copying that otherwise might have no purpose other than piracy.

A corollary of fair use as a function of copyright is that there is a difference between using the copyright of a work and using the work itself. The former may be an infringement of copyright; the latter cannot be.

Thus, long after the fair use doctrine was created, the rule was that an individual was entitled to copy messages from a book for his or her own personal use. In 1888, less than ten years after Drone's treatise was published, Justice Brewer of the U.S. Supreme Court on circuit ruled:

> [T]he effect of a copyright is not to prevent any reasonable use of the book which is sold. I go to a book-store, and I buy

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14. *See* Lawrence v. Dana, 15 F. Cas. 26, 61 (Clifford, Circuit Justice, C.C.D. Mass. 1869) (No. 8136) ("Examined as a question of strict law, apart from exceptional cases, the privilege of *fair use* accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication . . . .") (emphasis added).

15. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 386–87 (1879).

16. *See Campbell*, 510 U.S. at 579 (stating that whether the copyrighted material was used to create a new or different work is important in determining whether the use falls within the fair use doctrine).

> a book which has been copyrighted. I *may use that book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put it upon the market, for in so doing I would infringe the copyright*.[17]

In this passage, Justice Brewer clearly recognized the distinction between the work and the copyright for, as he explained, "the title to the books carries with it the right to use them."[18] The significance of this point is that one did not use the copyright until he or she published the copied work, because publication, not copying, was the exclusive right of the copyright owner, making publication the operative act of infringement.

The original concept of fair use, then, was a simple one: one author can use portions of a copyrighted work for creating his own because, as Drone said, "[I]t would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors."[19] It will be helpful now to determine why the Supreme Court calls this simple doctrine "the most troublesome in the whole law of copyright."[20]

6.3 Reasons for the Troublesome Nature of Fair Use

There are two reasons for the conceptual muddle that is fair use today: (1) *Folsom* created fair use as a natural law concept; and (2) the 1909 Act confused *Folsom*'s distinction between the use of the copyright and the use of the work.

A. Folsom *and the Natural Law Copyright.* One of Justice Story's most famous comments in *Folsom* is that copyrights (and patents) are the "metaphysics of the law."[21] He would appear, however, to have been largely the author of his own misery. To achieve the result he desired, Justice Story treated the statutory grant copyright as a natural law copyright. Surely, he knew the difference. He had been a member of the Supreme Court when it decided *Wheaton v. Peters* less than ten years earlier, rejecting the natural law theory (fully argued by Wheaton's lawyers,

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17. Stover v. Lathrop, 33 F. 348, 349 (Brewer, Circuit Justice, C.C.D. Colo. 1888) (emphasis added).

18. *Id.*

19. DRONE, *supra* ch. 6, note 15, at 386.

20. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam)).

21. Folsom v. Marsh, 9 F. Cas. 342, 344 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901).

including Daniel Webster) in favor of the statutory grant theory.[22] In *Folsom*, however, the gulf between the equity Story sought and the law he was duty-bound to administer proved so wide that it could not be crossed with reason alone, which may explain the frustration implied in his "metaphysics" comment.

The gulf existed because statutory copyright is the grant of a limited statutory monopoly, while the natural law copyright is an unlimited common law monopoly. The statutory copyright requires an original work, whereas the natural law copyright requires only a work that is the result of effort (for example, compiling and arranging letters). The essential difference between the two copyrights thus is philosophical: the statutory copyright operates to benefit the public directly and the author indirectly; the natural law copyright exists to benefit the author directly and the public indirectly. If copyright is seen as a monopoly to benefit the public, it is reasonable that the protection be limited to the work as published and that abridgment not be regarded as an infringement of this right; if copyright is intended primarily to benefit the author, such an abridgment is wrong. Justice Story took the latter view, and his natural law reasoning has proved to be a basis for confusion as to the modern-day meaning of fair use.

The fair use doctrine as a natural law concept served to enhance the limited copyright monopoly because it gave support to the concept of copyright as a plenary property right and caused courts to ignore the constitutional fences enclosing the copyright domain. As a natural law concept, copyright applied to both the copyright and the work. Thus, the author was deemed to own the work under the natural law and the copyright under the statute. The ownership of the work was justification for subordinating the statutory limitations to the author's interest, which is what Story did in *Folsom*.

Recall that the fair abridgment doctrine did not entail the use of the copyright because it did not entail a right of the copyright owner. The copyright owner did not have an exclusive right to abridge the work any more than he or she had the exclusive right to translate the work. The operative word here is "exclusive," for the author always could abridge or translate his or her own work and be entitled to a new copyright for doing so. Prior to the fair use doctrine, when another author used the work for either of these purposes, the issue was piracy or not, as in *Folsom*. Either one used the copyright or one did not. There was

22. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

no rule against the use of the work because the right to do so fulfilled the major purpose of copyright: the promotion of learning.

The fair use doctrine, of course, involved a use of the work as well as the copyright, and it served a two-fold purpose. It protected the author as copyright owner in preventing the use of too much of the work, and it benefited the author as creator in enabling him or her to use the work of another to create a new work. The goal of fair use, in short, was to limit harm to the copyright, not to prevent use of the work. To operate properly, however, Justice Story's creation in *Folsom* required the continued understanding of a distinction that has since suffered much corruption.

B. Confusing the Use of the Copyright with the Use of the Work in the 1909 Act. The fulcrum for distinguishing between the use of the copyright and the use of the work has a precise locus: the limited rights of the copyright owner. If the copyright owner has only the right to publish a book, one who merely copies passages from it uses the work, not the copyright. The operative act of infringement is not the copying, but the publishing. This was the situation prior to the 1909 Act. If one published copies of a competitor's book or even a substantial portion of it, he was guilty of copyright infringement because he used the copyright. One who copied but did not publish, or intend to publish, was using the work but not the copyright. Recall Justice Brewer's comment that one could copy passages from a book at will but could not duplicate the book and put it on the market.

Whether one uses the copyright in the work or the work itself, however, the use usually involves copying. Thus, if the copyright owner has the exclusive right both to copy *and* to publish the work, the basis for distinguishing the use of the copyright and the use of the work is blurred, if not eliminated. Copying without publication becomes infringement. This is what happened as a result of the 1909 Act, which for the first time ostensibly gave the copyright owner of a book the exclusive right to copy as well as to publish it.

The right to "copy" a work first appeared in the 1802 amendment to the 1790 Act. Its purpose there was to provide copyright protection for prints and engravings.[23] The right to copy, to put the matter otherwise, entered the copyright statute as a term of art indicating a right available only for works of art.

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23. Act of Apr. 29, 1802, ch. 36, § 3, 2 Stat. 171, 171–72.

The premise for the distinction was that one *publishes* books but *copies* works of art. This explains why, until the 1909 Act, all copyright acts maintained the distinction between the right to "copy" works of art and the right to "print and publish" books.[24]

The current confusion as to the nature of fair use can be traced to the language of § 1(a) of the 1909 Copyright Act, in which the rights of the copyright owner were specified as the rights to "print, reprint, publish, copy, and vend" any copyrighted work. The right to copy a book is much broader than the right to publish it. For example, one may copy a chapter from a book, but seldom would one publish only that chapter. Thus, if a copyright owner's "exclusive right" can prevent copying a chapter from his or her copyrighted book, the copyright monopoly has been expanded exponentially. This is what occurred when the 1909 Act was interpreted to make unpermitted copying an operative act of infringement on a par with unpermitted printing.[25]

There is, however, substantial evidence that in the 1909 Act Congress did not intend to expand the monopoly by making the right to copy a generic right. For one thing, the copyright holder's right to copy the book was a redundancy, because the exclusive right to publish the book necessarily included the exclusive right to copy it for that purpose. A competitor who copied intending to publish without permission was guilty of piracy. Additionally, there is evidence in House Report 2222 on the 1909 Act that Congress intended to continue the law as it had been. The Report states:

> Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word "copy," practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.[26]

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24. *See generally* Patterson, *supra* ch. 1, note 16 (discussing the analogous distinction between ownership of a work and ownership of the exclusive right to publish a work).

25. The cases on this point are not helpful because the unpermitted copying almost always was accompanied by printing and publication. The exception was *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), which held that the defendant had infringed by making a limited number of copies of a choral arrangement, including copyrighted songs, on a school copier for church and school performance. One of the first major efforts to make copying an operative act of infringement—which failed—was *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

26. H.R. REP. NO. 60-2222, at 4 (1909).

This language indicates an intent to continue the extant rule, not to make a fundamental change in the law.

Nevertheless, the word "copy" came to be treated as a generic term, and copying became the operative act of infringement. The importance of the distinction between the use of the copyright and the use of the work was lost. The fact that the copyright owner was assumed to own both seemed to make the distinction irrelevant. And the fact that defendants in copyright cases rarely were individuals making personal copies contributed to the irrelevance of the distinction. Moreover, the rarity of an action against an individual made any such case especially influential when a court ruled against the defendant.[27] Thus, under the 1976 Act, the right to reproduce the work in copies became the basis for an argument that the copyright owner's right to copy is absolute, eliminating the right of personal use. The propriety of such use had been unquestioned throughout the nineteenth century, when an individual had the right to copy passages from a book at will so long as he or she did not put the copy on the market.[28]

6.4 The Fair Use Doctrine Codified as a Right

In the House Report on the 1976 Act, Congress averred: "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[29] Paradoxically, however, this language, while intended to aid courts in the application of fair use, misled them. The inference drawn from it was that judicial precedent for judicial fair use was a sure guide for statutory fair use, which it was not. If we can assume that Congress codified fair use to keep the enlarged copyright monopoly within constitutional boundaries, the comment endorsing judicial fair use in fact had the opposite of its intended effect: it did not narrow, but further enlarged, the copyright monopoly.

The irony here is that, in this respect, the House Report reflected an unsuspected truth. The creation of the fair use doctrine in 1841 was meant to afford the author greater protection by enlarging the copyright monopoly. The codification of the fair use doctrine in 1976, although intended to give the public greater protection by narrowing the copyright monopoly,

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27. Presumably for lack of better authority, courts, academics, and lawyers have cited *Wihtol* at least 230 times.

28. *See* Stover v. Lathrop, 33 F. 348, 349 (Brewer, Circuit Justice, C.C.D. Colo. 1888).

29. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N 5659, 5680.

was given the same effect by suggesting the use of precedent from judicial fair use, rather than simply reading the statute for what the statute itself said.

The use of old precedent to interpret a new statute had the effect one would expect. When applying the statute, courts preferred the precedent to the words of the statute. The error is one that has a simple solution: to read and give meaning to the words of the statute when applying it.

6.5 Reading and Applying the Fair Use Statute

The words of § 107, the current fair use statute, are simple and clear, but apparently their context is not. Contrary to a common view, the context is not prior fair use decisions, but the copyright statute itself. Thus, to apply the fair use statute in a manner consistent with its goal of narrowing those provisions of the statute that would otherwise provide an overbroad copyright monopoly, one needs to begin with three basic propositions: (1) there are different kinds of copyrighted works and different kinds of fair use; (2) the application of fair use in any situation depends upon the kind of work being used and the kind of use being made of the work; and (3) there is a distinction between the work and the copyright, and thus between the use of the work and the use of the copyright. The end result is that, as the House Report on the 1976 Act concludes, fair use must be determined on a case-by-case (or work-by-work) basis, a view in which the Supreme Court concurs.[30]

A. Three Types of Copyrightable Works: Creative Works, Compilations, and Derivative Works. The copyright statute provides for three types of copyrighted works in which the plaintiff may claim rights: (1) the § 102(a) creative work; (2) the § 103 compilation; and (3) the § 103 derivative work. These works contain variable amounts of copyrighted material. Because fair use applies only to the copyrighted material in a copyrighted work, it is useful to emphasize that the type of work is an important factor in applying fair use. The fair use of a compilation of uncopyrightable data or U.S. Government documents will differ from the fair use of a creative novel. To put the point simply, fair use is a limitation on the copyright owner's rights, and those rights exist only for original expression. Therefore, to the extent that the plaintiff's work is not original,

30. *Id.*; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (noting that the fair use doctrine "calls for case-by-case analysis").

the work is in the public domain and free for all to use without limitation.

1. Creative Works. Creative works are works of imagination—literature, art, and music—rather than of mere assimilation, such as anthologies and databases, printed and electronic. Creative works are the paradigm of copyrighted works and reflect the romantic notion of authorship that copyright owners have used over the years to argue for the expansion of the copyright monopoly. The success of the argument is suggested by the fact that few people appreciate the reality that, in terms of economic impact, creative works probably are the least important class of copyrighted works.

2. Compilations. Compilations are of two types: databases and collective works. The former consists of data, the latter of independently copyrightable works, such as anthologies of poems, short stories, or dramas. The author of a compilation often contributes very little in the way of creativity; indeed, the copyright statute requires originality only in the compiler's selection, coordination, or arrangement of the materials in order to trigger protection.

3. Derivative Works. Derivative works are those that are based on another work. The classic example is the motion picture based on a novel. Thus, a derivative work is a transformation of a work from one form to another. While the transformation may entail as much originality as the creation of the original, the derivative author is entitled to copyright protection only for his or her contributions.

B. Three Kinds of Fair Use: Creative, Personal, and Educational. There are also three kinds of fair use by the defendant: (1) creative fair use; (2) personal fair use; and (3) educational fair use. The purpose of each of these uses differs. Creative fair use involves the use of copyrighted material in another work in creating one's own work; personal fair use involves the use of a copyrighted work for learning or entertainment; and educational fair use involves the use of copyrighted works for teaching, scholarship, or research. As a general proposition, creative fair use involves a competitive use of the copyright; personal and educational fair uses involve only a use of the work.

1. Creative Fair Use for Authoring New Works. Creative fair use is the use by one author of another author's work in

creating his or her own new work. It is the earliest—and, during the nineteenth century, was the only—form of fair use. This is the point that the passage from Drone's treatise makes clear, because "it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors. The law, therefore, wisely allows a 'fair use' to be made of every copyrighted production . . . ."[31]

The use of another's work to create one's own means also the use of the copyright of that work. This is because the new work utilizes, and therefore interferes with, a right reserved to the copyright owner—for example, to sell copies of the work. If one author abridged another author's work, he or she would interfere with the author's right to sell the unabridged work; and such use of the work would be so extensive as to constitute also a use of the copyright. This, of course, is the problem that Justice Story sought to resolve in *Folsom*, and it is when the use of a work extends to the use of the copyright that creative fair use comes into play. The essential question always is how much of an intrusion on the copyright of the original work will be fair.

2. Personal Fair Use for One's Own Learning or Enjoyment. The limitation of fair use to competing authors meant that the personal use of copyrighted works was not limited by the fair use doctrine. Indeed, in the nineteenth century, personal use was beyond the scope of copyright law, as Justice Brewer informed us in *Stover v. Lathrop* (1888):

> I may use the book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put it on the market, for in doing so I would infringe the copyright. But merely taking extracts from it, merely using it, in no manner infringes the copyright.[32]

Personal fair use now has been generally recognized, a step made desirable, if not necessary, by the increased copyright monopoly of the 1976 Act. Thus, personal fair use is a use of the work by an individual for his or her learning (for example, scholarship or research under § 107) or for entertainment (for example, taping a copyrighted motion picture off-the-air for later viewing, as permitted by *Sony Corp. of America v. Universal City Studios, Inc.* (1984)).[33]

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31. DRONE, *supra* ch. 6, note 15, at 386–87.

32. *Stover*, 33 F. at 349.

33. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984) (observing that allowing distributors of recording devices to be held liable for copyright

Except for personal fair use, one could read his or her book, but not copy excerpts from it. Copyright owners in effect would be empowered to ration learning by imposing a levy on individuals for using copyrighted books for their intended purpose—learning or entertainment—for which, indeed, they were purchased in the first place. Thus, personal fair use promotes the ultimate goal of copyright law as manifested in the learning policy of the Copyright Clause: a society of informed citizens capable of self-government. The important point, however, is that once the use has been determined to be a personal use, to subject the use to the four-factor test undermines this goal.

3. Educational Fair Use for Classroom Teaching or for Research and Scholarship. Educational fair use is like personal fair use in that it is a new type of use to protect the educational process against an enlarged and expanded copyright monopoly. The difference is that Congress expressed more concern for educational than for personal fair use, as shown by four provisions of the copyright statute to protect educational fair use. Most prominent, of course, is the use of works for "teaching (including multiple copies for classroom use)" as an exemplar of fair use in the preamble (or introductory paragraph) of § 107.[34] The other three provisions are the first of the four fair use factors, § 107(1), which distinguishes between commercial and nonprofit educational use (a superfluous distinction unless it implies special protection for educational use); the limitations on library photocopying, which can be overridden by fair use, in § 108(f)(4); and the good faith defense for employees of nonprofit educational institutions, libraries, and archives contained in § 504(c)(2) (which shows special concern that copyright not be used to interfere with the educational process).

4. The Distinction Between Using the Copyright and Using the Work. Copyright law has a purpose and a function. The purpose, defined by the Copyright Clause, is to promote learning; the function, implemented by the copyright statute, is to protect the economic interest of copyright owners. Thus, it is easy to see that copyright law involves a conflict between two policies of American society: free speech and the free market. This conflict means that copyright must be a compromise. The ultimate issue of that compromise is the determination of the appropriate line of

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infringement would be outside the "limits of the grants authorized by Congress").

34. 17 U.S.C. § 107 (2006).

demarcation between copyright owners' proprietary rights and the public's constitutional right of access.

That line is the line that distinguishes the copyright and the work, because it is this line that provides the basis for distinguishing between the use of the copyright (which represents the owner's economic interest) and the use of the work (which represents the public's right of access). This is the role of the fair use doctrine.

A use of the copyright always involves a use of the work, but a use of the work does not necessarily involve a use of the copyright. The line separating the two is economic impact. The use of the copyright will always be presumed to have an economic impact, which is why the subject of fair use is the use of the copyright. The personal or educational use of the work, in and of itself, will seldom have an economic impact, which is why such uses can always be presumed to be fair and why the copyright owner's right to copy cannot be absolute under the Constitution or the Copyright Act. Finally, this is why it is necessary to distinguish between the use of the copyright and the use of the work when applying the fair use doctrine.

C. Applying the Four Statutory Factors with Discretion, Depending on the Type of Work and the Kind of Use. To apply the four fair use factors, one must interpret them, which is difficult because they have no substantive content. To say that one should consider the purpose of the second work, the nature of the first, the substantiality of the taking, and the present and potential market impacts of the taking to determine fair use does not prescribe the kind of works, the permissible quantum of borrowing, or what markets are relevant. This means that the factors are subject to almost any interpretation consistent with the interest of the interpreter.

One argument is that all four factors must be applied to all uses of all copyrighted works. Such an interpretation, however, means that fair use enhances, rather than diminishes, the copyright monopoly. Thus, the more uses that are subjected to scrutiny and the greater the number of factors to be complied with, the more likely the use is to be held infringing rather than fair. The factors cease to be measures to guide use and become tests to be passed.

The other argument is that the factors are to be applied according to the purpose of the defendant's use (creative, personal, or educational) and the nature of the plaintiff's work (creative, compilation, or derivative). Indeed, this is what the first two factors suggest. Thus, commercial use is equivalent to

creative use, which makes the other factors—the nature of the plaintiff's work, including its character as a creative use, compilation, or derivative work; the amount used; and the market effect—relevant. But if the defendant's use is a personal or educational fair use, the other factors are irrelevant. Thus, a normal personal or educational use does not interfere with the sale of the work, which is what makes the nature of the work, the amount used, and the market effect irrelevant.

Which position is more sound, of course, depends upon whether the copyright owner's right to copy is an absolute or a predicate right, as discussed above. This indicates the importance of the correct interpretation of §§ 106(1) and 106(3). The most persuasive reason supporting the predicate right interpretation, perhaps, is that Congress codified the fair use doctrine to limit the copyright monopoly. To interpret the copyright owner's right to copy as being absolute enhances the copyright monopoly. A part of this pattern of enhancement is the insistence that all four statutory factors apply to all types of copyrightable works and all kinds of fair use.

An interpretation that gives a statute the opposite effect of that intended is not one which serves the public interest. For this reason alone, it is sound to conclude that if the nature of the use is commercial, the other three factors are relevant (particularly where the plaintiff's work was creative). But if the use is a personal or educational use, there is no further issue to be decided, which makes the other factors irrelevant.

6.6 Constitutional Considerations

When new technologies provide new ways for businesses to profit, the law usually develops accordingly and rules emerge to protect the new profit. Consider, for example, the development of the printing press in sixteenth century England, which gave rise to copyright. As this experience demonstrates, new rules to protect new businesses tend to be strict and unyielding in favor of the entrepreneur because of the uncertainties generated by charting a new course. Once the course is well established, a reassessment often occurs and the strict rules are modified to accommodate the public interest as well as the entrepreneur. That pattern can be seen in the development of Anglo-American copyright, which began as a plenary proprietary monopoly but, after some hundred and fifty years, was changed into a limited statutory monopoly without any change in the relevant technology.

Copyright law, and in particular the fair use doctrine, today is being challenged by emerging technologies that provide the

opportunity for new and greater profit. The question is whether judges will succeed in meeting the challenge to keep copyright within its constitutional boundaries. The answer to that question will be found in the perspective from which courts view the problem. Is this a problem of fairness in the use by a defendant of plaintiff's property (the property perspective)? Or is it a problem of preventing, in the words of John Milton, knowledge, truth, and understanding from becoming mere commodities for the marketplace (the learning perspective)?[35]

The answer is some of both. But as a practical matter, in litigation the property perspective almost always displaces the learning perspective. In a seeming contest of rights between two parties, the issue is viewed as one of private interests operating independently of the public interest. That perception has considerable merit, in that protecting private interests does serve the public interest. The extent to which such a perspective is valid in a particular case, however, depends in large part upon the subject matter of the litigation. When the subject matter is truth, learning, and knowledge, the public interest becomes more important than the private interest. Even so, this is a difficult perspective to maintain in the context of a private dispute between two parties. One of the purposes of constitutional provisions is to ensure that the public perspective not be lost.

No provisions of the Constitution are more important for this purpose than the First Amendment and the Copyright Clause. Awareness of this point, however, is obscured because the former denies Congress the power to make any law regulating the press, while the latter ostensibly empowers Congress to do just that. This latter point seldom has been acknowledged, probably because the idea of a conflict between two constitutional provisions is anathema to the legal mind. But a statute that empowers publishers to exercise plenary proprietary rights in published learning materials is a statute regulating the press. That it is *favorable* to the press is a matter of indifference from a constitutional standpoint.

The major reason that copyright has not been deemed to be inconsistent with free speech rights is two-fold: first, copyright is limited constitutionally to one's own writings; and second, traditionally those writings had to be published to merit copyright protection. Thus, under the Constitution, Congress has the power to secure to authors the exclusive right to their writings when the author provides public access—that is, publishes them.

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35. MILTON, *supra* ch. 2, note 21, at 52.

Indeed, the right of access to knowledge, truth, and learning is so important to the welfare of society that it can be classed as a civil right comparable to the right to vote, because the former is a necessary condition for the meaningful exercise of the latter.

The right of access is the indispensable point of intersection between free speech rights and copyright, a truism that is demonstrated by the fact that control of access is the essence of censorship. This is why, so long as publication was a condition for copyright, there was no issue of free speech rights. Simply put, there was no issue of access. The 1976 Act's elimination of publication as a condition for copyright, without more, would have generated serious First Amendment problems, which explains why Congress codified the fair use doctrine.

The fair use section is the provision of the 1976 Act that is most surely necessary for that statute to be constitutional. Without fair use, Congress, by granting copyright protection from the moment of fixation, would have exceeded the limits of its constitutional power to grant authors "the exclusive Right" to their writings—that is, the right (and only the right) to publish them. Without the fair use doctrine, copyright upon the fixation of a work (which may include public domain material) would give the copyright owner the right to control access, and the Copyright Act would become just one large statute regulating the press.

The limitations on copyright in the statute that make copyright a regulatory concept serve to prove the point. For Congress to provide by statute the conditions upon which a university library may copy published materials for its patrons is clearly to regulate the press, in favor of the press and to the detriment of the public. This explains why Congress provided in § 108 that nothing in that section affects the right of fair use. Thus, it is of enormous significance that the only general limitation on the copyright owner's rights applicable to all copyrighted works is the right of fair use. If that right is given a narrow, crabbed interpretation, the 1976 Copyright Act becomes a statute contrary to the First Amendment.

This, of course, is why fair use has constitutional dimensions. This is why courts should interpret the right of fair use in light of the Copyright Clause and the constitutional policies of copyright: that copyright shall not be used for censorship purposes; that copyright protects the public domain; and that copyright exists to benefit the author, not the publisher. As the Supreme Court has long recognized, Congress may benefit the author with the monopoly of copyright only in a manner that is congruent with the public interest.

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CHAPTER 7. COPYRIGHT DEFENSES

7.1 Introduction

The purpose of this chapter is to explain why copyright defenses are underdeveloped and why they need to be better developed. The reasons require one to consider copyright over its two hundred year existence in the United States. Today, the only requirements for copyright protection are an original work of authorship and the fixation of that work in a tangible medium of expression. During the nineteenth century, and indeed until the 1976 Act, copyright protection required the creation and fixation of a new work, its publication, and compliance with the statutory formalities of notice, registration, and deposit. Another requirement, not usually identified with the formalities but of the same character with respect to continuing the copyright for a second term, was renewal of the copyright in order to obtain the additional twenty-eight years of protection.

The nature of the statutory formalities was an issue in *Wheaton v. Peters* (1834) because Wheaton appeared not to have complied with all of them—although on remand it turned out that he had—which compelled his lawyers to argue that the formalities were discretionary, not mandatory.[1] The Court disagreed, ruling that the formalities were conditions precedent

1. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 664–65 (1834). For a detailed discussion of the *Wheaton* case, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1351–86 (1985).

and subsequent and could not be waived. The premise for the Court's conclusion was that copyright is a monopoly necessary for the public interest, which, if not limited, could become harmful to the very interest it is supposed to serve. The copyright formalities, then, were more than a matter of form. They were substantive provisions that were protective limitations. If the author published a work without complying with the formalities, the work went into the public domain immediately rather than at the end of the copyright term which would otherwise have been available.

It is easy to see that the conditions of publication, notice, registration, deposit, and renewal minimized the need to develop copyright defenses. The conditions, in and of themselves, were significant constraints on the copyright monopoly. Each condition in fact was a copyright defense, for the failure of any one of them meant that the work would make an early entrance into the public domain.

The view of copyright holders was that the formalities unfairly deprived authors of their copyrights, but the view was more a matter of self-interest than reason. For one thing, the formalities were relatively (if not optimally) simple and easy to comply with, and in any event constituted a small price to pay for the monopoly of copyright. Furthermore, the loss of the copyright did not deprive the copyright holder of the right to sell the work, but only of the *exclusive* right to sell the work, which was not all bad. Few manufacturers have, as do publishers, the exclusive right to sell a product unhindered by competition in its sale. The loss of this anomalous right in a free market society was not a tragedy to anyone except the copyright claimant.

The anti-formalities view, however, ultimately prevailed. The 1976 Act requires neither publication nor any of the formalities as a condition for initial copyright protection, and renewal is no longer necessary for the continuation of copyright. Consequently, copyright holders are in the happy situation of having the copyright monopoly expanded by the removal of restraints that existed in the public interest for almost two hundred years. The result is part of a pattern by reason of which today copyright automatically covers every original writing, including notes, love letters, diary entries, memoranda, grocery lists, and so forth. The copyright holder cannot lose the copyright (at least, involuntarily) before the end of the copyright term, and copyrights now last for multiple generations.

In practical terms, these developments mean that the copyright statute has been transformed from a statute to protect the public against the copyright monopoly, to a statute to protect

the copyright monopoly against the public, with predictably unfortunate results. One example is the rise of what may be called "ghost copyrights," moribund monopolies that litter the landscape of learning and that, for the user, can turn into economic land mines. Moreover, the change has come about despite the U.S. Supreme Court's continual assertion that copyright exists primarily to protect the public and secondarily to protect the author.[2]

The statutory changes, however, did not amend the Copyright Clause. The constitutional limitations on Congress's copyright power remain in force. Logically, then, courts should interpret the statute in light of the limitations in the Copyright Clause with which Congress must comply in order to enact copyright laws. Indeed, arguably this is the only way to protect the constitutionality of the current copyright statute. Enhanced development of copyright defenses will facilitate the task.

This development will require courts to shed their bias against copyright defendants, evidence of which (together with a correction in one instance of such bias) may be found in a recent Supreme Court case involving attorney's fees. Under § 505 of the copyright statute, a court may "award a reasonable attorney's fee to the prevailing party," a provision that different circuit courts formerly interpreted differently.[3] Some courts treated plaintiffs and defendants alike, with an even hand; other courts employed a dual standard. These latter courts generally awarded attorney's fees to prevailing plaintiffs as a matter of course, but they awarded fees to prevailing defendants only if they could show that the original suit was frivolous or brought in bad faith.[4]

In *Fogerty v. Fantasy, Inc.* (1994), the Supreme Court ruled in favor of the even-handed approach and, in so doing, recognized the important role that copyright defendants can have in the administration of copyright law.[5] Noting that "it is peculiarly

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2. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

3. 17 U.S.C. § 505 (2006).

4. The judicial bias against copyright defendants reflected in the dual standard approach seems to have been characteristic of circuits where the copyright industry is concentrated. These were the Second, Seventh, and Ninth Circuits, whose major cities—New York, Chicago, and Los Angeles—are the heart of the copyright industry. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 521 n.8 (1994). The Third, Fourth, and Eleventh Circuits, whose major cities—Philadelphia, Richmond, and Atlanta—are outside the centers of the copyright industry treated copyright plaintiffs and defendants with an even hand. *See id.*

5. *Id.* at 534–35.

important that the boundaries of copyright law be demarcated as clearly as possible," the Court concluded that "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright."[6]

This dictum illustrates why the development of copyright defenses is particularly important today. The expansion of the copyright monopoly threatens "the policies of the Copyright Act." Sound copyright decisions giving effect to the constitutional policies of copyright are the last line of defense.

7.2 Copyright Defenses

Copyright defenses have not been a subject of much scholarly investigation or judicial analysis. Most copyright treatises devote more discussion to fair use as a defense than to all other defenses combined, although fair use is best seen as an affirmative users' right. And most cases treat defenses offered by a putative infringer as if he or she were guilty and deserved an adverse judgment. Our approach, then, is analytical, not precedential. For present purposes, we treat copyright defenses as being of two types: statutory and judicial. We also exclude discussion of fair use and the First Amendment, which are the subjects of separate chapters.

A. Statutory Defenses. The statutory defenses relate to the conduct of a defendant and follow from the statutory definition of an infringer as "[a]nyone who violates any of the exclusive rights of the copyright owner."[7] An infringer of copyright, then, is one who without permission copies or adapts a work, publicly distributes copies, performs or displays the work, or in the case of a sound recording, publicly performs the work by means of a digital audio transmission.[8] Therefore, the statutory defenses to copyright infringement are negative: no copying, no adaptation, no public distribution, and so on through the § 106 catalogue.

These statutory defenses, presently available under the 1976 Act, focus on the conduct of the defendant–user. But in eliminating the formalities as conditions, that statute eliminated

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6. *Id.* at 527.

7. 17 U.S.C. § 501(a) (2006).

8. For a fuller listing of these rights, see 17 U.S.C. § 106 (2006). Section 501 also makes an infringer of anyone who either usurps the author's moral rights with respect to certain works of visual art under § 106A or imports copies or phonorecords of works in violation of § 602. 17 U.S.C. § 501(a) (2006).

core protections against the copyright monopoly that served as statutory defenses. The difference between a formality and a condition is that the former can be excused, while the latter cannot. This is why if American copyright had been a judicially created common law right based on the natural law rights of the author, rather than a statutory grant, the conditions either would have been an anomaly or would not have existed at all.[9] Conditions as to notice, registration, and deposit are not appropriate to sustain a claim invested by natural law, for the author's natural law rights cannot properly require any condition other than the creation of a work. That was essentially the position of the plaintiff in *Wheaton*. The Court agreed with the conclusion but not the premise, for it held that U.S. copyright is not a natural law right but the grant of a limited statutory monopoly. Therefore, the required formalities were conditions essential to obtain and exercise the monopoly. This was the law for almost two centuries. If any one of the conditions failed to be met, the copyright was either stillborn or lost.

The salutary role of the copyright conditions as protectors of both the public domain and the rights of users was lost amid the claim that the primary purpose of copyright law is to protect the author's (read publisher's) property. If one accepted this view, conditions were a means of depriving the unwary author of his or her justly earned copyright, a view that gave conditions a bad name because they were destructive of the author's property. The most famous example, perhaps, was Oliver Wendell Holmes, Sr.'s loss of the copyright to *The Autocrat of the Breakfast Table* because the publisher failed to affix the copyright notice to installments published in the *Atlantic Monthly* magazine.[10] Such occurrences no doubt had a large role in eliminating copyright formalities, a change that gave rise to the need for the development of judicial copyright defenses.

B. Judicial Defenses. Historically, the existence of the formalities also inhibited the development of what may be described, albeit with a certain liberty in the nomenclature, as judicial defenses: lack of originality and merger, and copyright misuse, estoppel, and abandonment.[11] Logically, these defenses

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9. The point is proved by the provisions of the Berne Convention, which requires signatories to protect copyright as a natural law right. This explains the provisions of the Berne Convention Implementation Act of 1988, in which Congress amended the 1976 Copyright Act to eliminate the formalities as prerequisites to protection. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 9, 102 Stat. 2853, 2859.

10. Holmes v. Hurst, 174 U.S. 82, 83, 89 (1899).

11. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)

can be based on the work, the conduct of the copyright claimant, or the conduct of the copyright defendant.

When the issue is lack of originality or merger,[12] the issue relates to the work rather than to conduct, for it is an analysis of the work that determines the conclusion. If the copyright claimant's expression is insufficiently original or the expression too closely encapsulates a nonprotectable idea, there can be no copyright protection.

Copyright misuse, estoppel, and abandonment all are directed to the conduct of the copyright holder. Thus, an example of copyright misuse is the use of an overbroad copyright notice, while copyright estoppel typically concerns a misrepresentation of the nature of the work. The difference between the two defenses seems to be that copyright misuse provides a sanction against the copyright holder only in regard to the defendant and does not affect the copyright otherwise, whereas copyright estoppel invalidates the copyright. Abandonment is deliberate conduct of the copyright holder that results in a loss of the copyright.

The conduct of an alleged infringer that gives rise to an affirmative defense is the act of violating one of the § 106, § 106A, or § 602 rights (reproducing the work in copies, etc., transgressing the very limited moral rights afforded in the United States to authors, or impermissibly importing copies of the work).

Generally, a copyright defense based on the defendant's conduct involves a simple inquiry. The defendant either did or did not commit the act of infringement in violation of one of the subject rights. Proof may sometimes be difficult, as when the similarity of two works lies more in their ideas than in their expression, but giving effect to the defense is not intellectually challenging. Similarly, defenses based on the work—lack of originality or merger—are relatively simple. Often, one need only compare the work claiming copyright with preexisting works to determine whether there is sufficient originality of expression to

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(lack of originality); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 707–08 (2d Cir. 1992) (merger); United States v. Loew's Inc., 371 U.S. 38, 49–50 (1962) (misuse by antitrust); Saxon v. Blann, 968 F.2d 676, 680 (8th Cir. 1992) (misuse by unclean hands); Chi-boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1228–29 (7th Cir. 1991) (estoppel); Bell v. Combined Registry Co., 397 F. Supp. 1241, 1249 (N.D. Ill. 1975) (abandonment), *aff'd*, 536 F.2d 164 (7th Cir. 1976).

12. A copyright registration certificate constitutes prima facie evidence "of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c) (2006). This shifts the burden of proof to the defendant.

warrant protection. Proof, in short, is by example, and if the relevant examples are provided, the conclusion is foregone.

Copyright misuse, estoppel, and abandonment, however, are more complex in nature because they relate to the conduct of the plaintiff, which may, and often does, involve motive. Here, we see one of the subtle effects of copyright conditions. As long as conditions were a part of copyright law, courts did not have to be concerned with motivation, because either the book was published with notice or it was not. Why this was so was irrelevant. Consequently, when the conditions were eliminated, there was no tradition for examining the conduct of the copyright claimant, and indeed, the very fact that the conditions were eliminated was a factor favorable to the plaintiff in copyright infringement actions. Why would Congress eliminate the conditions if they served a useful purpose? Moreover, the statutory presumption given to copyright registration—"prima facie evidence of the validity of the copyright and of the facts stated in the certificate"[13]—was a clear signal that the copyright claimant was to be favored in litigation.

The soft intellectual foundation for copyright defenses suggests that it will be useful to escape rules by moving to a higher level of abstraction and dealing with the principles underlying copyright defenses.

7.3 Principles for Copyright Defenses

Ultimately, the development of judicial copyright defenses depends upon three ideas: (1) copyright requires an original work of authorship; (2) the copyright monopoly is limited in scope; and (3) the copyright monopoly is a privilege requiring a quid pro quo. The first principle gives rise to the originality requirement; the second, to merger, misuse, and estoppel; and the third, to abandonment. Thus, while the focus of statutory defenses is the conduct of the user, the focus of judicial defenses may be the work or the conduct of the copyright claimant.

The originality principle relates to the work; the limited scope principle relates to the conduct of the copyright claimant; and the quid pro quo principle relates to the rights of users of copyrighted works. All copyright defenses thus relate to the work, the conduct of the copyright owner, or the rights of users. These three principles, then, encompass all judicial copyright defenses. Our argument is that a plaintiff's violation of these

13. 17 U.S.C. § 410(c) (2006).

principles gives the defendant a good defense, whatever the specific facts.

A. The Originality Principle. Although originality is a constitutional requirement for copyright, courts sometimes treat it in a casual manner. One reason for this may be that courts tend to assume that the existence of copyright is proof of originality, overlooking the fact that copyrighted works may contain unoriginal material that is not protected, as is true particularly in the instance of compilations and derivative works. Another reason may be the use of outmoded precedent decided prior to the 1976 Act, when publication was a condition of copyright. If copyright protected the published book, it protected the book as published, which meant that it was assumed to protect all the material in the book. Thus, it was not necessary to parse the contents to determine what was and what was not original.

In the wake of passage of the 1976 Act, copyright no longer requires publication, only the creation and fixation of an original work of authorship. This requirement makes clear what was not clear before, namely, that the requirement of originality applies to all components of the work. Indeed, the Supreme Court in *Feist* ruled that in an infringement action, the plaintiff must prove the taking of original material. It follows, then, that the defense of lack of originality has a significant role to play in future copyright litigation.

B. The Limited Scope Principle. The scope of copyright is limited as to subject matter (original material), time (stated term), and conduct (reproduction and public distribution of copies, etc.). Because the copyright and the copyrighted work are under the control of the copyright holder, it is his or her conduct that most often threatens the limited scope principle. Examples include overreaching copyright notices,[14] shrink wrap licenses denying any right of fair use,[15] and licenses restricting licensees from creating their own works independently.[16] The term generally applied here is misuse of copyright, a species of conduct closely related to copyright estoppel. The difference between the

14. The following notice provided by the Association of American Publishers makes the point: "© 1995 by Association of American Publishers, Inc. All Rights Reserved. No part of this report may be used or reproduced in any manner whatsoever without express permission from the Association of American Publishers, Inc., 71 Fifth Avenue, New York, NY 10003-3004."

15. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1448–50 (7th Cir. 1996).

16. Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 972–73 (4th Cir. 1990).

two defenses is that the former relates to the untoward activity of the copyright holder in relation to customers, and the latter to such behavior in relation to the work. This, however, seems too fine a distinction to be of much use conceptually. There is no reason why both types of defendant misbehavior cannot be treated under the rubric of "copyright misconduct" whenever the attempt is to expand the copyright monopoly beyond its lawful limits as determined by the copyright statute.

The reason for copyright misconduct—an actor's extralegal assertion of rights—is to privatize copyright law in order to enlarge the monopoly in a way that is forbidden to Congress by the Copyright Clause. The issue for courts to decide is one of law: Shall a copyright owner be allowed to use private law to override the copyright statute and extend the copyright monopoly beyond the legal limits decreed by Congress acting under the Copyright Clause of the U.S. Constitution?

C. The Quid Pro Quo Principle. The quid pro quo principle is that, in return for the monopoly of copyright, copyright owners have a duty to provide something in return. Traditionally, that something was an original work, and the principle was implemented by the requirement of publication. Because publication is no longer required, the principle is expanded to include the duty not to frustrate the constitutional purpose of copyright—the promotion of learning—by inhibiting public access to the copyrighted work. Without the expansion of the quid pro quo principle, contemporary copyright is arguably, in some instances, unconstitutional.

The quid pro quo principle, of course, is contrary to the rights-oriented nature of the American common law system and its counterpart, the free market system. Before one rejects the idea as counterintuitive, however, one should understand that copyright as a monopoly is inconsistent with both. First, the grant of rights for one is a denial of rights for all others. Thus, if copyright is a proprietary monopoly, the owner has a right to deny the most important right in a free society: access to information and learning materials. Second, if a free market system is a competitive system, copyright as a monopoly is within, but not a part of, the system. While there may be competition between different copyrighted works, there is no competition with respect to a specific copyrighted work.

The quid pro quo principle has two appropriate rules: (1) copyright owners shall not abuse their monopoly by charging excessive prices; and (2) copyright owners shall not use copyright to inhibit public access after removing works from the market.

As to the first rule, it is useful to remember that monopoly prices are an inherent problem of copyright. They are one of the reasons that the Statute of Anne contained price control provisions. The argument against this notion of price control is the free market system. But that is the point. As stated above, copyright is not a part of the free market system. Rather, it is a monopoly *within* that system. The best evidence of this is the decline in the price of reports of Supreme Court decisions after the *Wheaton* ruling that opinions of the Court were not subject to copyright.

The second rule relates to conduct that constitutes abandonment. With the expansion of the copyright monopoly to every original work that is fixed and the endurance of that monopoly for three generations or more, abandonment is a concept that will become increasingly important in protecting the public domain. The lengthy term and the comprehensive coverage of modern copyrights will result inevitably in ghost copyrights that stalk the public domain for decades, if not eons, thereby impeding the progress of learning.

There are three issues relative to abandonment: (1) What is abandoned?; (2) what constitutes abandonment?; and (3) what is the effect of abandonment? As to the first issue, it is important to understand that it is the copyright that is abandoned, not the work. Thus, the copyright owner loses only his or her exclusive rights and is no longer a monopolist as to that particular work. As to the second point, there are two types of conduct by the copyright owner that will result in abandonment: destruction of all copies of the work, or failure to use the copyright. Thus, there may be complete abandonment if the copyright owner destroys any and all copies before publication of the work, or partial abandonment if the copyright owner simply ceases to use the copyright thereafter. This is related to the third point regarding the effect of abandonment. If a copyright owner destroys all copies, the work enters the public domain without limitation. If the owner ceases to utilize the copyright any longer, that fact becomes a fair use factor creating a presumption of fair use.

The value of the principles recited above is that they provide a broader base for developing rules to resolve important issues of information control in a free society. Copyright is not—and we cannot afford to let it become—the private domain of copyright owners who claim that anyone who makes any use of a copyrighted work is a poacher. Access to the learning fields should be available on a reasonable basis to all who wish to toil there. Such access can be assured only by copyright defenses that locate the appropriate line of demarcation between the

proprietary rights of copyright owners and the learning rights of users. These principles, however, serve only as a starting point for developing copyright defenses.

7.4 The Development of Copyright Defenses

The need for the development of copyright defenses can be stated simply: they are necessary to keep the copyright monopoly within its constitutional boundaries. The devaluation of the statutory formalities has removed the fences that kept the public domain beyond the reach of the copyright monopoly. Without the development of compensatory defenses such as merger, copyright misconduct, and abandonment, the danger is that the public domain will be taken over by copyright.

The constitutional dimension of judicial defenses means that fundamentals to develop those defenses will be helpful. The relevant fundamentals for this purpose are: (1) the nature of copyright as property; (2) the nature of copyright infringement; (3) the nature of copyright defenses; and (4) the context for copyright defenses.

A. The Nature of Copyright as Property. The first step in developing judicial copyright defenses that will serve as limitations on the monopoly is to understand that the treatment of copyright as a plenary property right has hindered their development. The term "intellectual property" makes the problem plain, for it suggests an analogy to real or personal property, by reason of which the use of a copyrighted work is analogous to a trespass or conversion that must be excused. There are, however, three weaknesses of such an analogy.

First, it often is said that copyright as intellectual property differs from other types of property because use does not consume the product. But, of course, this is true of trespass to land, for real property is not consumed no matter how often trespass occurs. Nor does the conversion of personalty result in a destruction of the property. What is affected in both instances is title. Trespass may result in an easement to the harm of the title, and conversion may result in a change of possession that threatens the title of the true owner.

This explains the second weakness of the analogy. Unlike trespass and conversion, the use of the copyrighted work in no way affects title, for an infringer does not threaten the ownership of the copyright.

The third weakness of the analogy is that a copyrighted work is designed, so to speak, for a use that is analogous to

trespass or conversion, as the case may be. Thus, the subject of copyright—an original work of authorship—is intended to be used by others. Indeed, most often that is its very purpose, even if the use involves copying.

The real difference, then, between copyright as property and other types of property is that copyright is primarily a right of use shared by the owner with others, but for different purposes. The owner's right of use is to sell copies of the work; the user's right is to use the copy for learning. By analogizing copyright to other types of property, copyright holders have managed to obscure this point and leave the impression that no one has any rights in regard to copyrighted works except copyright holders themselves. This, however, would mean that their rights are absolute, even as against the non-owner author/creator, which they are not, as demonstrated by both the beneficial owner concept[17] and the author's inalienable termination right.[18]

The question, then, is the line of demarcation between the owner's rights of use and the user's rights of use. A rational line can be drawn only if courts recognize the two domains involved: the proprietary domain of the copyright owner and the public domain from which the proprietary rights are carved. The fact that the law empowers an author to withdraw material from the public domain and monopolize its use does not mean that the monopoly is without limitation. This follows from the fact that the copyright monopoly must allow for the use of the work by others, a principle shown by the fact that the copyright owner is given only the right to distribute the work to the public, and to perform and display the work publicly.[19]

There is, in short, a distinction between the work and the copyright, obviously a recurrent theme of this book. The work is what it is: a novel, a painting, a poem, or a database. The copyright consists of the statutorily designated rights (with their statutorily designated limitations) to which the copyrighted work is subject.

It is the rights, not the work, which the copyright holder owns. The copyright in a database, for example, gives the copyright owner no exclusive right to data or other uncopyrightable material in the database. Perhaps this point becomes clearer in light of the fact that when the copyright ends, the erstwhile copyright holder no longer owns any exclusive

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17. *See* 17 U.S.C. § 501(b) (2006) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement . . . .").

18. 17 U.S.C. § 304(c) (2006).

19. 17 U.S.C. § 106(3)–(5) (2006).

rights, but the work itself continues to exist without change. Thus, the copyright holder never owned the work, because copyright is only a series of specified rights to which a given work is subject for a limited period of time, after which the work enters the public domain.

The merit in so defining the scope of copyright is to make clear that copyright law is intended to protect the public domain for the user as well as the proprietary domain for the copyright owner. The practical value of this point is that it makes apparent the distinction between the use of the work and the use of the copyright. As the Copyright Act provides, "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer *of the copyright* . . . ."[20] This definition of infringement means that the distinction between the use of the work and the use of the copyright is essential to determining whether there has been an infringement. The basic issue in all copyright defenses is whether the use of the alleged infringer was a use of the work or a use of the copyright. One does not infringe the work; rather, one infringes the copyright in the work.

In sum, copyright as property is a series of intangible rights that should not be confused with the work that is the subject of those rights.

B. The Nature of Infringement. The second step in the development of copyright defenses is to determine who must defend against what—that is, who is an infringer and what is infringing conduct? The elegantly simple statement of the copyright statute in § 501 that "[a]nyone who violates any of the exclusive rights of the copyright owner" is an infringer hides a complex structure of ideas. Because copyright is a series of rights to which a given work is subject, copyright infringement has three components: the work, the right, and the conduct. A work is what it is; a right is what the statute says it is; and infringing conduct is the unpermitted exercise of a right belonging to the copyright owner.

The unanalyzed issue is whether to define the infringement in terms of the work, the right, the conduct that constitutes the violation, or all three. Traditionally, courts have used only the right and the conduct for this purpose, as demonstrated by the formula for determining infringement: a valid copyright (the right) and copying (the conduct). But different types of copyrighted works receive varying degrees of protection, which

20. 17 U.S.C. § 501(a) (2006) (emphasis added).

explains why the Supreme Court recently insisted that the plaintiff prove the defendant copied *original material* from the work.[21] The effect of this pronouncement is to add the work to a formula that had been limited by most prior courts to the right and the conduct.

The Supreme Court's requirement of the three components for determining infringement is sound for any number of reasons, including its own too long forgotten prior pronouncements.[22] Chief among the good reasons, however, are these. First, the rights of the copyright owner are generic, in that they are rights that everyone has in regard to uncopyrightable works. Second, the scope of copyright protection varies for different kinds of works. And third, the violation requires a consideration of whether the conduct in regard to the particular work involved is forbidden (or is instead permitted, as for example by fair use). In short, infringement is to be determined on a work-by-work basis.

Unfortunately, some courts treat copyrighted works as members of a class. This treatment is a (or perhaps *the*) major impediment to the development of copyright defenses, because such cases result in legislative-type rules that tend to foreclose litigation. The Second Circuit, for example, held that a researcher in the laboratory of a for-profit corporation was guilty of infringement for copying articles from a scientific journal, although the corporation paid some $2400 annually for three subscriptions to the journal.[23] The result was a legislative rule in the form of a judicial opinion. The court treated scientific journals as members of a class of copyrighted works entitled to blanket protection against all copying, just as if it were land entitled to blanket protection against trespassers.

The court thus gave the copyright owners what they wanted: judicial treatment of copyrighted works as a class that results in a judicial copyright.[24] The principle intended to avoid this result—that copyright is the grant of a limited statutory monopoly based on conditions—has been eroded by the elimination of the conditions that were designed to limit the monopoly. That is why it is important that copyright defenses be developed.

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21. Feist Publ'ns, Inc. v. Rural Tel. Serv., Inc., 499 U.S. 340, 347 (1991).

22. *See id.* at 346 (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).

23. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 914–15, 931 (2d Cir. 1994).

24. The contemporary goal of publishers is similar to that of the booksellers in eighteenth century England in their efforts to secure judicial rulings to override the Statute of Anne with the common law copyright. In both instances, the efforts can be characterized as attempts to capture copyright law and make it the private domain of copyright owners.

C. The Nature of Copyright Defenses. The third step in developing copyright defenses is to understand them. There are two kinds: negative and affirmative. A negative defense denies the alleged conduct (defendant did not copy plaintiff's material); an affirmative defense justifies it (defendant had a right to copy the material). Negative defenses tend to be generic (e.g., the statute of limitations); affirmative defenses tend to be unique (e.g., plaintiff copyright holders' responsibility not to misuse copyrights to expand their monopoly beyond its statutory bounds and thereby restrict the corollary rights of defendant users).

The components of defenses are the same as the components for copyright infringement—the work, the right, and the conduct—but in different relationships. What is the right of the user? What is the work that is protected? What is the conduct of the copyright owner? As these components suggest, affirmative defenses will relate to the right of the defendant user as determined by answers to questions about the rights of the plaintiff owner, the nature of the copyrighted work, or the conduct of the owner. Does the plaintiff have a right to copyright protection where the idea and the expression merge? Is the copyright work a creative work, or is it a compilation or derivative work? Has the plaintiff misused the copyright in an unlawful attempt to expand the copyright monopoly?

D. Copyright Defenses and Users' Rights. As the Supreme Court said in *Fogerty*, copyright defendants have an important role in defining the boundaries of copyright.[25] What the Court did not say is that copyright defenses can be viewed usefully as statements of users' rights. If the merger doctrine applies, for example, the user has as much right to use the work as the would-be copyright holder. Copyright misconduct will give rise to rights for the user that did not exist before. And if the copyright holder abandons the copyright, the user has a right to treat the work as being in the public domain.

The obstacle to this view is the notion of copyright as a common law right based on the natural law right of the author who creates the work. But the common law copyright is a judicial creation derived from the historical precedent of the publishers' trade copyright used to monopolize the book trade and censor published books for the benefit of a state religion.

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25. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("[A] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.").

We have recounted how natural law ideas were used to rewrite this history, but we have not yet made the critical point: namely, that the so-called natural law right of authors *to profit from their works* was used to displace the natural law right of users *to learn*. As Holmes said, "[W]e need education in the obvious more than investigation of the obscure."[26] The "obvious" here in need of study is the impact of the efforts of copyright holders to sell recorded knowledge as a commodity.

Copyright holders have co-opted natural law ideas in support of their position. Users have capitulated without dissent, perhaps because they are not, as the copyright holders are, a well-organized interest group. But if authors as copyright holders have a natural law right to protect their right to earn, their customers have a natural law right to protect their right to learn.

Herein lies the insidious impact of natural law on copyright. It creates an uneven playing field. And herein lies the importance of developing copyright defenses. They provide the means for identifying the rights of users—and the identification of the rights of users is the condition precedent for protecting them.

26. Oliver Wendell Holmes, Jr., Address Before the Harvard Law School Association of New York: Law and the Court (Feb. 15, 1913), *in* THE ESSENTIAL HOLMES 145, 146 (Richard A. Posner ed., 1992).

CHAPTER 8. COPYRIGHT REMEDIES

8.1 Introduction

Copyright remedies in the Copyright Act of 1976 provide for statutory damages, shift attorney's fees, and authorize nationwide injunctions, all of which provide an unusually potent arsenal for the protection of a limited statutory monopoly granted in the public interest. But that, as the saying goes, is only the beginning.

In § 503, the Act empowers courts to impound "all copies or phonorecords claimed" to be infringing, as well as all "articles by means of which such [infringing] copies or phonorecords may be reproduced."[1] As part of a final judgment or decree, "the court may order the destruction" of the offending materials, including "articles by means of which" the infringing copies or phonorecords "may be reproduced."[2]

The judicial power over copyrights and infringers, however, does not end with the imposition of civil penalties under § 503. Under § 506 (covering criminal offenses), "[a]ny person who willfully infringes a copyright shall be punished . . . if the infringement was committed . . . for purposes of commercial advantage or private financial gain,"[3] and upon conviction the

1. 17 U.S.C. § 503(a) (2006).

2. 17 U.S.C. § 503(b) (2006).

3. 17 U.S.C. § 506(a) (2006); *see also* 18 U.S.C. § 2319 (2006) (providing for draconian penalties, including up to ten years of imprisonment for certain offenses).

court shall "order the forfeiture and destruction . . . of all infringing copies or phonorecords."[4] Further, under § 509, "[a]ll copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use [as part of a criminal infringement] . . . may be seized and forfeited to the United States."[5]

If we substitute, in the relevant places, "books" for "copies or phonorecords" and "printing presses" for "means . . . [of] reproduc[tion,]" it becomes clear that the present copyright statute may be used to inhibit rather than promote learning. The power to imprison a printer for infringing copyrighted works (which may contain uncopyrightable material), and to seize offending books (which already have been sold) from the school room, the library, and the home, truly are remarkable powers in a free country.

Presumably, Congress's intent in granting these remedies was to enable copyright owners to protect their "property." But if the primary purpose of §§ 503, 506, and 509 is to protect property, the effect of applying them is press control. Thus, statutory provisions empowering U.S. courts (at the behest of copyright owners) to imprison unruly printers and seize and destroy copies of recorded learning arguably are laws "abridging the freedom . . . of the press"[6]—and whether they are such is an important question.

Moreover, the copyright owner's property is granted by Congress acting under the Copyright Clause, which defines the limits of that property. A more interesting question, then, is whether these remedial sections of the statute violate the Copyright Clause itself. That clause empowers Congress to grant a remedy for copyright infringement only by implication. There is a good argument that the implied power does not encompass penalties in the form of statutory damages, the judicial seizure and destruction of books, or the imprisonment of printers.

Whatever the answer, questions as to whether these extraordinary remedies abuse the First Amendment and the Copyright Clause merit examination in light of a remarkable fact: they create a partnership between copyright owners and the government similar to that in England during the reign of censorship and press control. Contemporary copyright remedies parallel remedies made available to copyright owners in the

4. 17 U.S.C. § 506(b) (2006).
5. 17 U.S.C. § 509(a) (2006).
6. U.S. CONST. amend. I.

decrees and acts of censorship in sixteenth and seventeenth century England as a quid pro quo for their service in policing unruly printers. Antecedents of the current provisions of U.S. law appeared as early as 1557, when Philip and Mary granted the Stationers' Company a charter that empowered the stationers to seize and burn books and imprison offending printers.[7] These remedies were deployed also in subsequent censorship decrees and acts in England and in copyright statutes in the United States.

Excessive protection for American copyright holders is thus more a product of history than logic. This is why understanding the historical development of copyright remedies is important. It tells us how a sixteenth century proprietary monopoly to control the press in an autocratic society has been revived to become a twentieth century property right that can be used to control the press in a free society.

8.2 The Historical Development of Copyright Remedies

The seizure of unlawful books for burning, statutory damages in the form of fines, the sharing of recovery with the government in qui tam actions, and imprisonment of printers all were remedies for the infringement of copyright made available in 1557 in the Stationers' Charter, which Philip and Mary granted to co-opt the publishers as a policeman of the press. Thus, the charter gave stationers the power:

> to make search whenever it shall please them in any place . . . for any books or things printed, or to be printed, and to seize, take, hold, burn, or turn to the proper use of the foresaid community, all and several those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation, made or to be made . . . .[8]

Moreover, the stationers were given the authority to imprison without bail for three months those who did the illegal printing. Miscreants were to be fined one hundred shillings, one half thereof to the Queen and the other half to the Master, Keepers or Wardens of the Stationers' Company. The qui tam remedy is perhaps the best evidence of a partnership between the government as a licenser and the publishers as copyright owners. As long as press control and censorship were governmental policies, this remedy remained available.

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7. 1 ARBER, *supra* ch. 1, note 6, at xxviii–xxxii.
8. *Id.* at xxxi.

Star Chamber Decrees were issued in 1566, 1586, and 1637 to implement the provisions of the charter, the decrees being successively more comprehensive and oppressive. The most oppressive of the lot, the 1637 Decree, lasted only three years because of the demise of the Star Chamber in 1640. But it was revived in the form of the Licensing Act of 1662.[9] We can assume that it was the English experience with this statute that led to the adoption of the First Amendment of the U.S. Constitution, and we can be sure that it influenced the development of copyright. The 1662 Act was the predecessor of the Statute of Anne, and there is substantial internal evidence that its copyright provisions were the model for the statutory copyright.

The title of the Licensing Act of 1662 states its purpose: "An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses."[10] As the title indicates, much of the statute was devoted to regulating the number of, and controlling, printing presses, but its relevance for copyright is its copyright provisions. The statute provided that no one should print or cause to be printed:

> any heretical seditious schismatical or offensive Bookes or Pamphlets wherein any Doctrine or Opinion shall be asserted or maintained which is contrary to Christian faith . . . or which shall or may tend or be to the scandall of Religion or the Church or the Government or Governors of the Church State or Common wealth or of any Corporation or particular person or persons whatsoever nor shall import publish sell or [dispose] any such Booke or Bookes or Pamphlets nor shall cause or procure any such to be published or put to sale or to be bound stitched or sowed togeather.[11]

The conditions for printing books were two: (1) the title was to "be first entred in the Booke of the Register of the Company of Stationers of London," with exceptions for documents that posed no threat; and (2) the book was to "be first lawfully licensed and authorized to be printed" by persons designated for that purpose, such as the Archbishop of Canterbury or the Bishop of London.[12]

The Act specifically protected the stationers' copyright by making it an offense to print or import "any Copy or Copies Booke or Bookes" that any person had the right solely to print,

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9. Licensing Act, 1662, 14 Car. 2, c. 33 (Eng.).
10. *Id.*
11. *Id.* (alteration in original).
12. Licensing Act, 1662, 14 Car. 2, c. 33, § 2 (Eng.).

inter alia, by "vertue of any Entry . . . made in the Register Booke of the said Company of Stationers."[13] The penalty was the confiscation of the infringing books and a "penalty and forfeiture of Six shillings eight pence" for each book, half to the King and half to the proprietor who sued.[14] If the proprietor did not sue within six months, half of the penalty was available if suit commenced within one year.[15] The statute also contained provisions for search and seizure of offending books.[16] Offending printers were to be "disenabled from exercising" their trade for three years for a first offense, and to be fined, imprisoned, or given other corporal punishment, "not extending to Life or Limb," for the second offense.[17]

The Act contained a sunset provision. It was, however, reenacted several times, until 1694, when its final lapse marked the end of press control in England and removed the public law support for copyright. The publishers' disappointment at this blow to their monopoly is indicated by their petitions to Parliament urging new legislation on the ground that censorship is necessary to good governance. The sovereign, however, was no longer interested. The religious controversy in England had made the government's partnership with the publishers beneficial to the government in the first place, but the Glorious Revolution of 1688 effectively ended that controversy by ensuring the Protestant Succession to the throne.

The publishers finally had to settle for the Statute of Anne, but there is substantial internal evidence that the trade copyright protected by the Licensing Act was the model for the new statutory copyright. This, of course, is not surprising, in that the new statute was enacted to fulfill the basic copyright function of the Licensing Act without, however, employing copyright as a device of censorship and an instrument of monopoly. The Statute of Anne's anticensorship and antimonopoly provisions required the publication of a new writing as a condition for copyright, vested initial ownership of copyright in the author, substituted a limited-term copyright for the perpetual copyright, protected specifically the importation of books, and contained price control provisions.

Except for the power to search for illegal presses and to imprison unruly printers, the Statute of Anne adopted the

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13. Licensing Act, 1662, 14 Car. 2, c. 33, § 5 (Eng.).
14. *Id.*
15. *Id.*
16. Licensing Act, 1662, 14 Car. 2, c. 33, § 14 (Eng.).
17. Licensing Act, 1662, 14 Car. 2, c. 33, § 15 (Eng.).

remedial provisions of the Licensing Act, but as modified for a copyright statute: the seizure of infringing copies (instead of unlicensed books) and the imposition of statutory damages (instead of fines). The qui tam action, indeed, was retained.

A unique feature of the Statute of Anne, which reflected the pattern of the Licensing Act, was a lack of congruence between the rights of copyright and the acts of infringement. Thus, the new statute gave the copyright proprietor only two rights: to print and reprint books. But it gave the proprietor the right to sue for four acts of infringement: the printing, reprinting, selling, or importation of the books. The significance of this anomaly for American copyright is discussed below.

8.3 The Development of Copyright Remedies in the United States

A. From 1790 to 1909. The U.S. Copyright Act of 1790,[18] a virtual copy of the Statute of Anne (which had the advantage of being readily available precedent), adopted the English statutory remedies with but one significant change. The American statute gave the author of an unpublished manuscript a cause of action against one who published it without permission. Because the Statute of Anne had not provided such a right, obviously it offered no remedy for the violation thereof. Unable to follow the English lead in this instance, Congress simply made the remedy for the newly created right "all damages occasioned by such injury."[19]

The 1790 Act followed the Statute of Anne's pattern of a lack of congruence between the rights and the infringing acts and remedies. The grant of rights was to print, reprint, publish, and vend the work; infringement was to do any of these acts without permission, or to import the book. The remedies—forfeiture and destruction of the offending copies, and a penalty of fifty cents per page to be recovered in a qui tam action—were available whether the infringement was unlawful printing or unlawful importation. This pattern was continued in the 1802 amendment of the 1790 Act, which added copyright protection for prints.[20]

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18. Act of May 31, 1790, ch. 15, 1 Stat. 124.

19. Act of May 31, 1790, ch. 15 § 6, 1 Stat. 124, 125.

20. *See* Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (granting to "every person, being a citizen of the United States, or resident within the same, who shall invent and design, engrave, etch or work . . . any historical or other print or prints, shall have the sole right and liberty of printing, re-printing, publishing, and vending such print or prints"). Infringement was to "engrave, etch or work . . . or in any other manner copy or sell . . . [or] print, re-print, or import for sale . . . ." Act of Apr. 29, 1802, ch. 36, § 3, 2 Stat. 171, 171–72. The remedies were forfeiture to the proprietors of the plates used to make the sheets and all sheets made for destruction, and one dollar for each print to be

The pattern's significance, however, did not become apparent until the 1831 Revision Act, which added musical compositions to the stable of copyrightable works. There was one section granting rights for all copyrightable works, but two infringement/remedial sections: one for books, another for prints, maps, charts, and musical compositions. Books could be infringed by printing, importing, or selling them, but the other works could be infringed also by copying.[21] This lack of congruence between rights and remedies meant that the remedies could be used to enlarge the scope of the copyright monopoly beyond the rights granted. But the independent treatment of remedies also enabled Congress to shape the remedies according to the method for marketing a work, which restrained the scope of the monopoly. Thus, the fact that to copy a print was infringement did not mean that to copy a book was an infringement, assuming that the copy was not for sale.

The pattern of the 1831 Act was continued, not surprisingly, in the 1870 Revision Act. That act greatly enlarged the subject matter of copyright and provided a laundry list of copyrightable works,[22] all of which, however fell into three categories: literary works, works of art, and dramas.[23] One infringed a book by publishing it; one infringed a work of art by copying it; and one infringed a drama by performing it. The result was three types of copyrights—a publishing copyright for books, a copying copyright for works of art, and a performing copyright for dramas—each of which was defined by the infringing acts and accompanied by particularized remedies.

Thus, to infringe a book was to publish, import, or sell it, and the remedy was the forfeiture of all infringing copies and "such damages as may be recovered in a civil action."[24] To infringe a work of art was to copy, print, publish, import, or sell it, and the remedy was forfeiture of plates and sheets, plus one

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recovered in a qui tam action. *Id.*

21. *See* Act of Feb. 3, 1831, ch. 16, § 7, 4 Stat. 436, 438 (providing that a person has infringed a copyright if he or she should "engrave, etch, or work, sell, or copy . . . or . . . print or import for sale . . . publish, sell, or expose to sale, or in any manner dispose of" the copyrighted work).

22. *See* Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (listing as copyrightable works "any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts").

23. The 1856 Amendment provided copyright protection for the performance of dramas. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138. The 1865 Amendment provided copyright protection for photographs, prints, and engravings. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

24. Act of July 8, 1870, ch. 230, § 99, 16 Stat. 198, 214.

dollar for every sheet of a print and ten dollars for every copy of a painting or statue, to be recovered in a qui tam action. To infringe a dramatic composition was to perform it, and the remedy was damages along with the cost of suit, the damages to be "not less than one hundred dollars for the first, and fifty dollars for every subsequent performance."[25]

Copyright infringement as a crime, so prominent in the acts of censorship and decrees, had disappeared from the Statute of Anne and, at least until the end of the nineteenth century, from American copyright statutes. It reappeared, however, in the 1897 Act, which extended the performance right (formerly limited to dramas) to musical compositions. The statute provided that "[i]f the unlawful performance . . . be willful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year."[26] The amendment continued statutory damages as in the 1870 Act, and for the first time made injunctive relief a remedy in a copyright statute.

Except for the power of search and seizure, the Licensing Act remedies all were used in some form in nineteenth century American copyright statutes: impoundment and destruction for prints; statutory damages for works of art and the performance of dramas and musical compositions; and criminal penalties for the performance of dramas and musical compositions.

B. The 1909 Copyright Act. The 1909 Copyright Revision Act, the third major revision after the 1790 Act, contained the impounding and destruction of copies and plates, as well as the criminal offense remedies that had first appeared in the Stationer's Company Charter in 1557. It also provided for injunctive relief, either actual damages and profits or statutory damages, and attorney's fees.

All of these remedies had been in U.S. copyright statutes, with one major difference: they had been allocated according to the nature of the work. The 1909 Act changed the allocation. It did not define infringement, and regardless of how a work was marketed, all remedies applied by reason of § 1(a). This section gave the copyright owner the exclusive right "[t]o print, reprint, publish, copy, and vend"[27] with respect to "all the writings of an

25. Act of July 8, 1870 § 101, 16 Stat. at 214.

26. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

27. Copyright Act of 1909, Pub. L. No. 60-349, § 1(a), 35 Stat. 1075, 1075 (prior to 1976 amendment).

author."[28] The statute also granted the specific right to translate or make other versions of literary works;[29] to deliver in public for profit a "lecture, sermon, address, or similar production";[30] to perform a drama publicly;[31] and to perform musical compositions publicly for profit.[32]

The important change, however, was the extension of the *right to copy*, which had been limited to works of art, to *all* copyrighted works. The right to reproduce a work in copies had been in the statute since the 1802 amendment, when it was granted for prints and engravings, but it had continued to be limited to works of art until the 1909 Act. That act did not define infringement, only the remedies for infringement—and the nature of the work infringed ceased to be relevant. Consequently, the word "copy," which had been a word of art protecting only works of art, became a generic term, with the result that one could now infringe a book by copying it. The expansion of the copyright monopoly, then, proceeded from a change in the infringement/remedial section, which was to have enormous and unforeseen consequences in the exponential increase in the scope of the copyright monopoly.

The lack of foresight here can be explained easily. One who published a book had, of course, to copy the book to do so. The grant of the right to copy a book, then, was seen by the 1909 Act's drafters as a gratuitous change without any substantive consequences. The point overlooked is that one can *publish* only an entire book, but one can *copy* a part of the book. The right to copy thus became the key to the expansion of the copyright monopoly under the 1909 Act, and, more importantly, under the 1976 Act. This background explains why publishers claim that

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28. Copyright Act of 1909 § 4, 35 Stat. at 1076.

29. *See* Copyright Act of 1909 § 1(b), 35 Stat. at 1075 (entitling copyright holders "[t]o translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art").

30. Copyright Act of 1909 § 1(c), 35 Stat. at 1075.

31. *See* Copyright Act of 1909 § 1(d), 35 Stat. at 1075 (entitling copyright holders "[t]o perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever").

32. This section also provided for the compulsory recording license for musical compositions. Copyright Act of 1909 § 1(e), 35 Stat. at 1075–76.

the latter's § 106(1)—the right to reproduce the work in copies—is the right to copy in whole or in part. This claim, in turn, is the foundation of their pay-per-use licensing scheme.

C. The 1976 Copyright Act. The 1976 Act consolidated the power of copyright owners by granting them five exclusive rights (subsequently amended to include a sixth) and giving them remedies—including criminal penalties—that are almost exactly the same as in the Licensing Act of 1662. The 1909 Act presumably is the direct source of the remedies. Its drafters probably were not familiar with the English statute, but knowledge of that statute was not necessary for modern lawmakers to adopt its remedies. Both the basic goal of the 1976 Act and the obstacles to achieving that goal were similar to those of the 1662 Act. Similar problems often result in similar solutions, and they did so in this instance despite the passage of some three centuries. Indeed, the passage of time probably contributed to the acceptance of the remedies because their evils were no longer a part of memory.

The goal of both statutes was (and is) absolute control of the marketing of works; the obstacles were (and are) the competitor and the consumer. The difference is that, in England, the publishers' concern was competitors who threatened their monopoly, while the government's concern was consumers who threatened religious doctrine. When religious doctrine became safe, the government's interest in the consumer ceased, censorship ended, and protection for the copyright monopoly was over. The copyright statute that replaced the Licensing Act purposely gave copyright owners only limited protection against competitors, and no protection at all against consumers. This was because their control of marketing under the Licensing Act had been all too successful, and their monopoly had become a menace to the cause of learning.

New communications technologies of the twentieth century, however, changed the conditions for marketing copyrighted works. The ease of reproduction by photocopying machines facilitated the use of books by consumers. But it also created a potential new market for publishers. The reasoning, apparently, was that photocopying facilitates the use of books, entitling the publisher to be compensated for each use of this new convenience to the user. That the claim was based on the unproven premise that the copying diminished sales was deemed to be irrelevant in view of the enormous potential profit that pay-per-use presented. And the fact that pay-per-use empowered publishers to license the use of books after they had left the marketplace was deemed

to be merely a way of doing business, which, in their view, made the First Amendment irrelevant.

This cavalier attitude toward free speech rights was justified by the difference between the government's licensing system in seventeenth century England and the publishers' licensing system in twentieth century America. The English licensed books before they were published; contemporary publishers seek to license the use of books after they have been published. The difference, of course, is that one denies access before publication, while the other controls access after publication. The result is that discrimination based on the ability to pay may well become a substitute for the long-time solution to this problem: free lending libraries. Any licensing scheme is a threat to such libraries, which highlights the important point. The fact of licensing is more important than the time of the licensing. That the 1976 Act uses the same remedies as the 1662 Licensing Act supports the conclusion.

There is a very subtle point here. The need for similar remedies in statutes three centuries apart arises from the fact that licensing, whether it occurs before or after publication, is counterintuitive. Thus, it is counterintuitive for a government to deny its citizens the right of access to materials of their religion, and it is counterintuitive for a publisher who has sold a book to require the purchaser to pay for using the book.

The point is this: rules of law that are counterintuitive are rules of overprotection that require strong remedies. It is not a coincidence that the 1897 Act, which gave the copyright owner the right to perform a musical composition publicly for profit, made infringement a criminal offense. After all, why should a performer have to pay the songwriter for singing a song, the very purpose for which the song was published? Neither was it a coincidence that in the 1909 Act, when copyright owners were given the right to copy (not merely publish) books, the full panoply of Licensing Act remedies was employed. Why should a publisher have a right to prevent a person from copying passages from his or her own copy of a book?

8.4 The Impact of Remedies

Copyright remedies have constitutional implications. But before considering those implications, it will be useful to consider the impact of the remedies.

A. Statutory Damages. Statutory damages enable a plaintiff who has suffered no harm to obtain substantial damages

from a defendant who has done no wrong. And because such damages provide for overcompensation, their main effect is overprotection. This is why statutory damages enable publishers to induce potential defendants to comply with their demands, even if the demands are unlawful.[33]

Except for history, statutory damages probably would not be available, for they are a modern version of the qui tam action created when copyright served the government in preference to the public or even the publisher. The antecedent of statutory damages thus suggests that the creation of private power to penalize infringers is not wise because the power can be used to chill the right to read, surely a right protected by the First Amendment. A court's discretion to impose punitive damages as the case warrants might be a sounder approach than the use of statutory damages, which press control precedent has given us.

B. Attorney's Fees. The fee-shifting provisions in the copyright statute are contrary to the general American practice that the parties to litigation pay their own attorneys. Apparently, the 1909 Act was the first copyright statute to make attorney's fees available as a copyright remedy. It contained two such provisions. The first was in § 1(e), which provided the compulsory license for recording musical compositions. If the manufacturer failed to pay the royalties, the court was authorized to award "a reasonable counsel fee."[34]

The second provision was broader. Section 40 of the statute provided: "[I]n all actions, suits, or proceedings under this Act, except when brought by or against the United States or any

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33. *See, e.g.*, Letter from Association of American Publishers to Bel-Jean Copy/Print Center (Mar. 1, 1993), *in* Patterson, *supra* ch. 1, note 16, at app. (showing an example of statutory damages being used in an attempt to force a copyshop to comply with publishers' demands). Said the letter, apparently because permission was not sought prior to making the copies: "While we appreciate that you seek permission in some instances, as evidenced above, *it is imperative* that permission be both sought and obtained prior to each instance of copying multipage excerpts of copyrighted material." *Id.* at 45 (emphasis added). The letter also said:

> [T]he scope of the infringement identified above, committed in the face of the widely publicized decision in Basic Books v. Kinko's, warrants a payment of $2,500 to help defray the costs of the AAP's copyright enforcement program in this matter and to impress on your business the need to operate in compliance with controlling law. Once the signed agreements are returned with your check, we will deliver, by returning a copy fully executed by the AAP, a promise by the AAP on behalf of itself and the publishers identified above not to undertake litigation by reason of the excerpts referred to in this letter.

Id. at 47. Among the excerpts "referred to in this letter" were three dramas from a book entitled *Signet Classic Book of 18th & 19th Century British Drama*, which were never protected by U.S. copyright law. *Id.* at 44.

34. Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1076.

officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."[35] House Report 2222 on the 1909 Act says of this provision only that "[t]his section further provides that the court may award to the prevailing party a reasonable counsel fee as part of the costs."[36] The legislative history thus contains no reason for the remedy, but it neatly fits the pattern of copyright penalties and the qui tam actions from seventeenth century England. The question is whether they are more effective in protecting the legitimate interests of the copyright owner or in acting as an *in terrorem* device enabling copyright owners to coerce innocent users into complying with their unlawful demands—for example, the payment of a license fee for copying that is a fair use.

C. Injunctive Relief. The nationwide copyright injunction[37] is a most potent weapon, seemingly reminiscent of the powers of a despotic Queen bent on stamping out the printing of heretical, seditious, schismatical, and offensive materials. We cannot, however, blame the copyright injunction on Mary. In 1819, Congress granted federal courts the copyright injunctive power, seemingly without any prior precedent. Until that statute, courts apparently had no power to grant such injunctions.[38]

The need for congressional action to enable courts to grant copyright injunctions is persuasive evidence that the source of the copyright injunctive power is the copyright statute. Today, however, courts use their inherent power to grant injunctions to prevent the infringement of future works. Of course, if a court has inherent power to grant copyright injunctions, it has the power to enjoin the infringement of future as well as existing copyrights. However, when a work has yet to be created, the use

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35. Copyright Act of 1909 § 40, 35 Stat. at 1084.

36. H.R. REP. NO. 60-2222 (1909).

37. The statute provides:

> (a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.
>
> (b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person.

17 U.S.C. § 502 (2006).

38. *See* Stevens v. Gladding, 58 U.S. (17 How.) 447, 455 (1854) ("There is nothing . . . which extends the equity powers of the courts to the adjudication of forfeitures.").

of the extraordinary injunctive remedy would appear to be premature, especially in view of the other remedies available.

Moreover, in protecting future works, courts have to rely on natural law concepts of the common law, whereas copyright is a statutory, not a common law, right. Arguably, a court should not be free to enjoin allegedly infringing conduct in disregard of the terms of the statute merely because it perceives the conduct to be wrong—for example, because the defendant may be getting a "free ride." Equity is not a tool for overriding the copyright statute.

As a statutory right, copyright requires conditions precedent—an original work of authorship fixed in a tangible medium of expression—which are both constitutional and statutory. A copyright injunction, then, should respect those conditions and statutory requirements. Otherwise, we have the anomaly of judicially created common law copyrights that provide copyright protection—in the case of a permanent injunction, permanent protection—for works without requiring the claimant to comply with any of the terms of the copyright statute. The judicial copyright, then, is a throwback to the natural law theory of copyright, in disregard of both the Copyright Clause of the Constitution and the copyright statute, as if *Wheaton v. Peters* has been overruled.[39]

D. Impoundment, Seizure, and Destruction of Copies and Means of Reproduction. Discussion of these extraordinary remedies need not detain us. Apparently, they are seldom used. The important fact is their existence, not their use. For if Congress gives the courts the power to impound, seize, and destroy copyrighted books, as well as printing presses, it must be because copyright is an important property right. Thus, the value of the remedies to publishers and the harm of the remedies to the public welfare is their reinforcement of the proprietary culture of copyright: copyrighted books are property, the protection of which is so important that it is a matter of high public policy.

This brings us to the important point. Except for actual damages, each of the copyright remedies is an extraordinary remedy usually reserved for economic predators. Publishers, however, would make the consumer an economic predator. Their argument seems to be that the remedies are necessary because thousands of individuals copying passages from their works cost them thousands of dollars. But this argument is a confession that

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39. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661–62 (1834) (holding that copyrights exist only by virtue of statute).

the solution is a system of information control. If one is in the business of selling recorded information, to change the business into one of selling access to that recorded information after it has been sold is necessarily to engage in censorship.

Thus, copyright remedies appear innocent enough until one realizes that they protect a regime of information control—a form of censorship—in the guise of property rights. Not until one examines copyright remedies in light of their origin does one recognize the unfortunate reality: the remedies have been used to transform copyright from a law to provide market protection for original works of authorship in the interest of learning into an instrument of information control in the interest of profit.

8.5 The Constitutional Implication of Remedies

The constitutional implication of remedies can be stated simply. Remedies facilitate the actions of copyright holders in doing what Congress cannot: censoring the use of learning materials.

History tells us that the power of Congress to grant to authors "the exclusive Right" to their writings is the power to give authors the exclusive right to publish their works. Persuasive evidence of this point is that, until the 1976 Act, publication was a condition for copyright protection in every copyright statute Congress had ever enacted, beginning in 1790. As late as 1954, the Supreme Court explained: "Congress may *after publication* protect by copyright any writing of an author."[40] Today, "the exclusive Right" reasonably can be read to mean the right to *market* copyrighted works, because in the eighteenth century publication was understood as the *means* of marketing books.

Whatever the method of marketing copyrighted works, however, copyright is not to be used to inhibit the right to learn. That is the teaching of the Copyright Clause, which limits the power of Congress. This limitation should be recognized as extending to remedial as well as substantive rights, for clearly Congress cannot use remedial rights to do what it cannot accomplish with substantive rights. That is, Congress cannot empower publishers to trample on the First Amendment right of the people to learn for the sake of windfall profits gained from licensing the use of books they have sold.

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40. Mazer v. Stein, 347 U.S. 201, 214 (1954) (emphasis added).

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CHAPTER 9. THE NEED FOR A NEW THEORY OF COPYRIGHT

9.1 Introduction

Copyright is the grant of a statutory monopoly that serves the interest of three groups: authors, who create works; publishers, who disseminate copies of the works created; and customers, who purchase copies and use the works for learning and entertainment. Copyright law thus has three components: rights, remedies, and defenses. Authors need rights to protect themselves when creating new works; publishers need remedies to protect themselves when distributing the copies; and customers need defenses to protect themselves against accusations of infringement when using the work.

The three sets of rules serve the public interest because, properly balanced, they keep the copyright monopoly within its constitutional boundaries. If, however, the rules become unbalanced—as when the rights are too expansive, the remedies are overprotective, and the defenses are underdeveloped—copyright tends to threaten constitutional rights, if not become unconstitutional.

The key to maintaining the proper balance is theory, which is "a hypothesis propounded or accepted as accounting for the known facts."[1] But sound theory for copyright is lacking because two theories support different concepts of protection: the natural law proprietary theory and the statutory grant monopoly theory.

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1. The full definition is as follows:

> A scheme or system of ideas or statements held as an explanation or account of a group of facts or phenomena; a hypothesis that has been confirmed or established by observation or experiment, and is propounded or accepted as accounting for the known facts; a statement of what are held to be the general laws, principles, or causes of something known or observed.

THE OXFORD ENGLISH DICTIONARY 902 (2d ed. 1989).

The natural law theory is that copyright is a proprietary monopoly; the statutory theory is that copyright is a marketing monopoly.

The difference is significant. To treat copyright as a proprietary monopoly is to imply that the copyright owner's control may extend beyond the sale of the copy; to treat copyright as a marketing monopoly is to imply that the copyright owner's control of a copy ends when that copy is sold. In terms of infringement, the issue is whether the operative act shall be copying alone, or whether it shall be the copying and selling of the copy. The former alternative gives substance to the copyright holder's claim of the right to license the use of copies (for example, books owned by the user) because the monopoly for all copies continues unmodified until the end of the copyright term, wherever they may be located. The latter alternative denies any rational argument for such licensing, because the monopoly ends for copies that have been sold.

The respective arguments make it obvious that the natural law theory is less compatible with a balancing of the three copyright interests—author, publisher, and user—than the statutory theory. The purpose of this chapter is to show why this is so and why a sound theory of copyright is needed.

9.2 The Use of Copyright Theory

Copyright theory has two primary uses, one that is obvious and one that is not.

The obvious use is to define the limits of copyright for the three parties that copyright serves. The theory that copyright is a statutory grant to provide a market monopoly, for example, defines what the author can do with a copyrighted work (sell copies exclusively for a limited time), the limits of the entrepreneur's control of the work for distributing copies (the market itself), and the user's right to use the work after it has left the market (any use that is noncompetitive). In contrast, the natural law copyright has no term limit, no market boundary, and no protection for the user.

The unobvious purpose of theory is to provide insights about copyright. Thus, when one considers the impact of copyright on learning, it becomes apparent that learning is a process as well as a product and that a proprietary copyright can be used to control the latter in a way that defeats the former. The copyright holder, for example, may decide to deny access to the copyrighted material, a decision easy to implement if the copyright owner can

control any copying of copies that users have purchased or if the material is in a computer database.

The point is that the copyright holder can exercise information control, and will do so when the copyrighted materials are controversial or erroneous. Indeed, the two qualities often characterize one work, either because of ignorance (an essay on why the U.S. Government suppresses the truth about UFOs) or prejudice (a book claiming that foreign immigration is a menace to American society).

A copyright law that protects copyright holders against accountability for material that may shape public opinion by empowering them to exercise information control simply revives copyright's censorship role that was so pronounced in seventeenth century England. To avoid this result, Americans have both the First Amendment and the Copyright Clause, which tell us that copyright is not for information control, but rather to allow (not merely provide) access to copyrighted materials. In a free society, the people need to be able to assess the accuracy of copyrighted materials—which include *all* original writings by virtue of § 102(a) of the 1976 Act—and to protect themselves against errors they may contain. Learning, in short, encompasses not only reading, but also inquiry and research.

The public impact and the complexity of copyright law create a burden for theory that is as heavy as it is important. Without theory, the significance of the limits of copyright tends to be overlooked, for copyright provides protection for knick-knacks as well as books. And because there is little, if any, learning to be gained from door knockers, fish bowls, ashtrays, and similar objects, overprotection for them creates no concern about the freedom to learn. But once knick-knacks have overprotection, the next step is to transfer that overprotection to learning materials.

9.3 The Two Theories of Copyright

Because the natural law proprietary theory and the statutory grant or marketing monopoly theory are in competition for dominance and have disparate consequences, it will be useful to examine each in some detail.

A. The Natural Law Proprietary Theory of Copyright. The natural law theory of copyright is both trite and banal. It violates a fundamental precept of a natural law right, which is that it be exercised without infringing the rights of others, such as the rights of life, liberty, and learning.

The term "trite" implies the lack of intellectual content, of which the natural law copyright is substantially devoid. It has only one condition (creation of a work by either intellectual or sweat equity), and no limitations (it exists in perpetuity and copying alone is the operative act of infringement). Indeed, the goal of publishers in eighteenth century England was to strip the statutory copyright of both its conditions and its limitations by substituting for Parliament's copyright the natural law copyright as a judicial creation. Had the publishers succeeded, presumably we would have no requirement that copyright promote learning or that it protect the public domain by the requirement of new works and limited times, because the natural law copyright is dedicated to the individual's interest, not the public's.

The term "banal" means a lack of concern for the rights of others. The natural law copyright is banal because it is an amoral doctrine that enables copyright holders to make parasitic use of public law. Under it, the creator's ownership of his or her creations—which can be assigned—gives him or her the right to use property rules to profit forever, regardless of the cost to society. The natural law copyright thus embraces both the work and the copyright, which removes any limit on the copyright holder's control of access to copyrighted works. Under the natural law copyright, then, holders use the public law to serve their private interest, sharing copyrighted works or secreting them, as they please, in disregard of the public interest.

There are two natural consequences of the overbroad natural law proprietary copyright that merit discussion: censorship and destruction of the public domain.

1. The Proprietary Copyright and Censorship. The purpose of the natural law proprietary copyright is to protect the property of the copyright owner. When the subject of protection is learning, control of the learning process becomes an adjunct of property protection. This of course is censorship, which for whatever reason protects from scrutiny materials of learning unless the copyright right owner consents, usually for a fee. That the censorship is economic censorship means only that it is objective in nature, for the concern is not the content of the material but payment for its use. Thus, whether the materials contain truth or falsity is beside the point. The lack of concern for content means only that property replaces politics as the justification for information control.

Indeed, this is the primary, and perhaps the only, difference between today's economic censorship and the political censorship that preceded it in England. The Tudors and Stuarts used

copyright to protect the populace from heretical, seditious, and schismatical material. The Framers, drawing upon that experience, incorporated those lessons into the Copyright Clause and the First Amendment.

2. The Proprietary Copyright and the Public Domain. The natural law proprietary copyright is a threat to the public domain for obvious reasons. It does not require an original work of authorship and its monopoly lasts in perpetuity. Thus, the proprietary copyright makes no contribution to the public domain, and may even be used to usurp works in it. Once a work is protected by the natural law copyright, it is lost to the public domain forever. These consequences flow in part from the fact that copyright as a proprietary monopoly is treated as a subset of property law. But whether the "copyright is only property" syndrome is a cause or a result is not clear.

The dominant characteristic of property is the right to exclude others from its use. But copyright, vested as it is with a large public interest, does not fit easily into the property mold. Reflection shows that copyright as a subset of property law requires exceptions to property principles. Although the government cannot take one's property without process and compensation, the government automatically terminates each copyright at the end of the period allocated for its duration.

Arguably, too, the proprietary nature of the rights afforded by copyright law is consumed by the limitations which Congress has placed upon them. Such limitations include the user's right of fair use, the competitor's right to a compulsory license, and the other exceptions to the copyright owner's rights contained in §§ 107 through 122 of the Copyright Act. The fallacy is that the compulsory licenses and limitations provide protection for—if not the public domain—the right of access, the primary value that the public domain represents. There is, however, a good argument that compulsory licensing is a sophisticated form of censorship and that the limitations, being very narrow, merely enhance the copyright monopoly, for the inference they support is that the copyright owner's rights, beyond the narrow limitations, are plenary in nature.

B. The Statutory Grant Theory of Copyright. In contrast to the proprietary theory, it is logical to treat the statutory grant copyright as a subset of public domain law. This is because, without the statute, publication of the author's writings would consign them firmly to the public domain, as the Supreme Court decided long ago in *Wheaton v. Peters*. Indeed, this may very well

be the reason the Framers included the Copyright Clause in the U.S. Constitution. Recall that only thirteen years before the Constitution was drafted, the House of Lords had held, in *Donaldson v. Beckett*, that common law protection failed upon publication and that only a statute—the Statute of Anne—protected the author's published writings.

The new federal government was a government of delegated powers. Without express authority, the national legislature could not protect published works, thus relegating that function to the states. But as noted in the Federalist Papers, that regime was incapable of providing national protection. The evidence was the state copyright statutes passed during the period of the Confederation, most of which required reciprocity as a condition for protecting the writings of authors from other states.

Copyright as a subset of public domain law, however, is not a part of the copyright canon. Presumably, there are two reasons for this. First, to treat copyright as a subset of public domain law is not to the advantage of publishers, who have been the primary copyright theorists from the time of the Statute of Anne in England; and second, the law of the public domain is not well developed.

Although public domain law remains underdeveloped, it is grounded in both the First Amendment and the Copyright Clause. The first protects the public domain from invasion by law, because Congress cannot make any law regulating the press. The second protects the public domain from invasion by copyright claimants, because it requires original writings for copyright and limits the term thereof.

The core proposition of public domain law—that everyone, and thus no one, owns materials in the public domain—is the basis for the principles that form its structure: (1) the materials of the public domain consist of information, knowledge, and learning; (2) public ownership of these materials protects access and is a necessary condition for a free and democratic society; (3) public domain material often is used to create works of authorship, for example, compilations; (4) an original work of authorship can be subjected to a limited private monopoly for a limited period of time in order to encourage public access in the public interest; and (5) the expiration of the copyright monopoly frees the work itself of constraints on its use by anyone, whether the former copyright holder or the public. The first two principles, of course, are grounded in the First Amendment, the last three in the Copyright Clause.

The difference between the natural law proprietary copyright and the statutory grant copyright demonstrate why the latter is preferable to the former for the promotion of learning. A proprietary copyright invades the process of learning because it protects the product from comment and criticism. A statutory grant copyright protects the process because it protects the product only for marketing purposes.

Thus, the two theories provide two different results. The proprietary theory gives the copyright owner a vested interest in the material, whether it contains the wisdom of the ages or faulty knowledge productive of erroneous learning. The statutory theory provides leeway for comment and criticism to allow the user to make this determination. The issue is not the copyright holder's exercise, but the existence, of the power, for the choice is between a proprietary or free market of ideas.

9.4 Copyright Theory and New Technologies

The concern about copyright theory is two-fold: first, defective rules in copyright law have contributed to, if not produced, defective copyright theory; second, this theory in turn will be a source of more faulty rules as the copyright umbrella is extended to cover the markets for new communications technologies.

The problem of defective theory, then, is especially important as copyright law is extended to the products of new technologies. A defective law for printed works is bad enough. But if those same defects are incorporated in the law of copyright for electronic transmission, the defects are magnified. Either we must abandon the constitutional copyright policies, or we must establish a new theory of copyright consistent with those historic policies that can satisfy *both* the Constitution and modern communications technologies. The point is sufficiently important to discuss.

The contemporary counterpart of the printing press that gave rise to the publication copyright is the computer that has given rise to the transmission copyright. The similarities of these two types of copyrights, which span four centuries, exist because human nature is slow to change. The printing press, like the computer today, was at the time of its invention a new means of communication, the difference between the two being in method and speed. The printing press produced works in printed copies to be distributed in permanent form. The computer produces words in electronic copies to be distributed in ephemeral form. The distribution of books from the printing press was

publication; the distribution of information by the computer is transmission.

The similarities go deeper. The material initially used for publication in the early days of the press already was in existence (like the Gutenberg Bible), just like the materials used for transmission by the computer. And just as monopolistic control over the publication of material prevented the development of the public domain then, monopolistic control over the transmission of materials threatens the existence of the public domain now.

The solution to the monopoly problem of the publication copyright was to require the creation of a new work as a condition for the monopoly and to constrain the monopoly in both scope (the exclusive right to publish the work) and time (the limited term). The question is whether this solution is appropriate for the transmission copyright.

Generally, the answer is "no," but this is because the earlier solution has been corrupted by legal fictions promoted by publishers using the natural law theory. Thus, the creation of a new work now encompasses the mere collecting and assembling of public domain materials. The scope of the monopoly has been extended far beyond the right of publication and the term of twenty-eight years.

The partial statutory grant monopoly, in short, has become a plenary proprietary monopoly. To bring the transmission of materials under the umbrella of this bloated monopoly is to threaten the public domain by empowering entrepreneurs to gather public domain materials, place them into a database, and license their use. The right to transmit public domain materials inevitably will give rise to the claim of ownership of the material.

The seriousness of the consequences of the transmission copyright for all citizens calls urgently for renewed analysis in terms of both copyright law and Congress's constitutional power to grant copyright. Prior to the Statute of Anne, a perpetual copyright was available for any writing, no matter who wrote it or when. The Statute of Anne reformed this promiscuous basis for copyright by requiring the publication of an original writing and granting copyright for only a limited term—a condition precedent and condition subsequent that resulted in the creation of the public domain. These conditions were transplanted into the Copyright Clause of the U.S. Constitution, where they served the basic purpose of copyright: the promotion of learning without censorship by the copyright holder or the government. In the United States, this purpose was further assured by requiring

publication as a condition precedent for copyright, which protected copyright from coming into conflict with the Free Press Clause of the First Amendment.

Besides providing a device for censorship, the transmission copyright embodies all of the features of the natural law copyright that make that copyright an unacceptable monopoly. Thus, the transmission copyright protects a service, not a product, a sweat-of-the-brow characteristic; in practice, it is not subject to any conditions; it requires class treatment of the works transmitted; and it is de facto perpetual in nature, because no copyright claimant is going to delete copyrighted materials from the transmission on an on-going basis, even though, in theory, such materials must eventually pass into the public domain. In short, the transmission copyright, in protecting a service rather than a work, leaves the transmitter free to gather and transmit public domain materials as if they were the property of the copyright claimant.

Because it is a product of the ambiguity in copyright theory generated by the presence of natural law theory in competition with statutory grant theory, the transmission copyright represents the sum of the reasons for the need for a new copyright theory. Both the natural law proprietary and the statutory grant theories preclude a rational solution for the transmission copyright because they are product-based and the transmission copyright is service-based. Thus, if copyright is to provide protection for the electronic transmission of data in the computer age, a new theory is needed unless we are to forfeit the constitutional protections of copyright.

9.5 The Need for a Sound Theory of Copyright

The faulty state of copyright theory can be traced to the notion that copyright was designed to, and does, protect the interests of the author—that is, the understanding that copyright is a natural law property right. It is this idea that has provided the equitable base for what is arguably the most harmful and dangerous idea in copyright jurisprudence: that the act of copying alone is the operative act of infringement. The harm is that the idea interferes with learning; the danger is that it gives copyright owners the power of censorship.

Yet, the danger of this idea to the natural law right of the people to learn is not readily apparent until one recognizes that it provides publishers with the claim of a right to tax the use of books they have sold, and to do so in perpetuity. Thus, given the state of copyright law today, the copyright holder has only to

publish a new edition with minor changes in order to continue copyright protection.

The ultimate vice of the natural law proprietary copyright is that it obliterates the distinction between the competitor who pirates a work for the market and a user who purchases a copy of the work to learn. The user who copies the work for research or scholarship becomes as much a pirate as the competitor who makes copies of the work to sell. And given the vested interest that this situation creates for copyright owners, it is obvious that nothing short of sound copyright theory can change it.

CHAPTER 10. A UNIFIED THEORY OF COPYRIGHT

10.1 Introduction

A legal theory provides a framework for analysis. To be useful, it must be consistent, coherent, and congruent: consistent in its parts, coherent as a whole, and congruent with the public interest. We need not revisit the point that, by these measures, copyright theory is lamentably lacking by reason of its dual nature, which prevents it from doing what copyright theory should: enable a decisionmaker to allocate rights and duties among creators, entrepreneurs, and users in a manner that serves the public interest in the creation, transmission, and use of knowledge.

The unusual aspect of this dictum is the inclusion of duties in the copyright equation. The reason that duties are important in this context is that copyright law is based on a tripartite relationship of author, publisher, and user. While a two-sided relationship may involve only rights of one party and duties of the other, a three-sided relationship changes the equation so that all the parties have duties to each other: the author and the publisher have reciprocal duties; both have duties to respect the rights of the user; and the user has a duty to respect the rights of the author and the publisher.

This is not the usual analysis, both because the issue typically arises in litigation, which is bilateral in nature, and because publishers are assignees of authors. The assignor–assignee relationship gives the impression that copyright law entails only a bilateral relationship between author and user, which enables the publisher to reap the benefit of the equity due to the author.

The tripartite relationship, however, makes apparent this usurpation of equity, and that in turn makes apparent the defects of treating copyright as either the statutory grant of a monopoly or a natural law property of the creator. As to the statutory grant theory, courts have difficulty maintaining the limits of the grant, as the long-lived (and unconstitutional) sweat-of-the-brow doctrine proves. As to natural law property, courts have difficulty in recognizing the rights of users, both because users seldom have advocates and because the most fundamental characteristic of property—the right to exclude—is enhanced when the property is "natural," that is, acquired by creation rather than transfer.

While copyright is a form of property, it is in no sense natural; indeed, it is more of a quasi-property right than a plenary one. The question, then, is whether there is a property concept that is more appropriate for copyright as a limited property right than are fee simple rules developed for real property. Such a concept would be a quasi-property right because copyright entails limited rights recognized for a limited time among creators, entrepreneurs, and users—complex relationships that require a concept of adaptability.

The proprietary concept that has this characteristic is the *easement*, a concept of inclusion, not exclusion—and it is this variation on the property scheme that leads to the conclusion that copyright is best treated as quasi-property in the form of an easement. There is, in fact, a good case to be made that the easement concept is not only consistent with, but may even be required by, the Copyright Clause of the Constitution.

One advantage of the easement theory is that it makes irrelevant the origin of copyright as the source of theory—creation by an author or grant by a legislature—which too often produces a tail-wagging-the-dog situation. This is because the legislative grant can be said to be based on the equity that is the basis of natural law, which serves as a rationale for enhancing copyright. The error is in assuming that the use of natural law as the motivation justifies treating the final product (despite its statutory limitations) as a natural law concept.

The advantage of easement theory is that it combines the natural law and statutory grant theories so that neither is dominant. Thus, copyright as an easement can be used to protect the author's rights, but also to limit those rights in order to protect the rights of others. The essence of the easement theory, then, is this: it requires that rights in copyright law be defined for the purpose of regulation in terms of the public interest

rather than in the private interest of the author, the publisher, or the user.

We state the easement theory of copyright and then test that theory in light of the following factors: (1) the condition precedent for copyright; (2) the core right of copyright; (3) the purpose and function of copyright; and (4) the core principles of copyright. We conclude by relating the easement theory to the purpose and function of copyright.

10.2 Copyright as an Easement

Copyright is a series of rights to which a given work is subject for a limited period of time and which are allocated among authors, publishers, and users. Authors own copyrights as creators, publishers own copyrights as assignees to distribute copies of the work, and users both own the copy of the work they purchase and have the right to use the work for its intended purpose.

Each of these rights limits the rights of others, which comports with the easement concept as an intangible right to make a limited use of property other than one's own that varies according to a justified need. The easement serves as a utilitarian premise to define (and thus to allocate) rights for authors, entrepreneurs, and users. The ultimate test of the easement theory, however, is whether it provides a sound basis for ensuring fairness to the three affected parties. The argument here is that it does, and that it does so for the reason that copyright as a proprietary concept or a statutory monopoly does not.

The proprietary theory leads to the fallacy that copyright includes both ownership of the work and the copyright holder's right to exploit the work in specified ways. If the use of the copyrighted work is subject to exclusive rights that extend beyond the marketing of the work, there is little, if any, reason to distinguish the right from the work. This, of course, means that any distinction between the use of the copyright and the use of the work is irrelevant.

This distinction is important, however, if copyright is to promote learning. No one "owns" a work, once created. The work itself exists in the public domain, owned—if by anyone—by the public itself. The Copyright Clause contemplates, and the Copyright Act recognizes, rights only to *use* the work but not to *own* it. Everyone is free to use the work, subject only to the rights created by the limited monopoly that is copyright law.

In short, the distinction between the use of the copyright and the use of the work provides the bounds of the so-called "copyright monopoly." Often and erroneously, the fact that Congress recognizes these rights is taken to mean that such "monopolies" are consistent with public policy *without regard to the vital limitations* that Congress placed upon them in creating them. This misconception causes the intended bounds of the monopoly to fade from view. Publishers reinforce this process by the use of natural law ideas to claim ownership of the work to promote property rights over the monopoly limitations. The monopoly, then, becomes merely a minor variation on the proprietary theme. Copyright as an easement, being more privilege than right, enables courts to avoid the ownership-of-the-work fallacy and thus to avoid one route for overriding both the constitutional rights of users and the statutory duties of copyright holders.

Properly understood, copyright is in fact an exemplar of the easement concept, a point best demonstrated by *International News Service v. Associated Press* (1918), a copyright decision without a copyright.[1] Famous for establishing the misappropriation rationale of unfair competition, the case is an example of the copyright easement theory in application.

The action was by a news-gathering agency against a competitor for appropriating and distributing its news dispatches, which were copyrightable but not copyrighted under the formalities-based legislation of the day. Had the news dispatches been copyrighted, INS's unpermitted uses of them would have infringed AP's copyright. Probably, the remedy would have been a permanent injunction, to prevent any copying by the defendant, which would have discouraged copying by anyone, including individuals.

Unhindered by the rules of copyright law, however, the Supreme Court ruled in a common sense fashion, deciding that: (1) news of the day could not be owned as property against the public; (2) the news dispatches were subject to a quasi-property right between competitors; and (3) AP was entitled to an injunction, to prevent INS from taking the news dispatches, only until their value as news had passed. When analyzed in terms of easement theory, the rulings of the Court are these: (1) news is in the public domain; (2) a reporter of news is entitled to a temporary easement against competitors for expressing and

1. Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

publishing the reports; and (3) members of the public have an easement to use published news reports.

The important learning to be had from the *INS* case is that public domain materials may be used to create works subject to copyright, whether a novel, a drama, or a news dispatch. It is this role of public domain materials in the creative process that presents the continuing issue in copyright: What shall be the allocation of rights for the use of public domain material among the creator, who transforms the public domain material, the distributor, who disseminates the transformed material, and the consumer, who purchases a copy of the transformed material and uses the underlying information? Because the essence of an easement is shared rights, easement theory is the proper vehicle for making this determination in order best to serve the public interest in the creation, transmission, and use of learning materials.

Copyright as an easement, then, is appropriate because an easement's function is to adjust rights between property owners and users. An easement is a right, varying with the facts of the particular case, to make use of property other than one's own. Thus, easements may be held by different persons, and the same property may be subject to many easements. More than one person, for example, may have an easement of ingress and egress over the same land. And because "easement" is a legal concept without independent content, it provides flexibility that may be used to adjust rights between property owners and users as the facts of the occasion demand. Thus, a copyrighted work is a work subject to easements in the form of reasonable use, which can be employed to analyze the issues, and reach common sense results, unhampered by general property principles.

The utility of easement theory is well demonstrated by the fact that leading copyright cases of the U.S. Supreme Court—*Wheaton v. Peters* (1834);[2] *Baker v. Selden* (1879);[3] *Sony Corp. of America v. Universal City Studios, Inc.* (1984);[4] *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991);[5] and *Campbell v. Acuff-Rose Music, Inc.* (1994)[6]—can be analyzed and understood in terms of easement theory.

Wheaton holds that copyright is not a perpetual natural law property right but a statutory grant, the enjoyment of which

2. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).
3. Baker v. Selden, 101 U.S. 99 (1879).
4. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
5. Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
6. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

requires strict compliance with statutory conditions—in short, a temporary easement. *Baker* holds that copyright does not extend to ideas, which means that the copyright owner cannot own the work, for the easement extends only to the expression of ideas. *Sony* tells us that an individual has a personal use easement and can copy a copyrighted work for its intended purpose (in *Sony*, a motion picture for entertainment). *Feist* teaches that copyright requires originality and does not extend to the unoriginal use of data, which means that the easement is a reward commensurate with merit. And *Campbell* holds that one author may use another author's work in creating his or her own, thereby recognizing an easement for the creation of a new work.

These holdings not only are consistent with easement theory, but also are inconsistent with property theory. Property is not normally subject to statutory limits, as in *Wheaton*; property rules do not normally deny rights to parts of the property, as in *Baker*; property is not generally subject to use by others without permission, as in *Sony*; the ownership of property is not normally based on the creation of an original work, as in *Feist*; and property is not normally subject to use by a competitor without permission, as in *Campbell*.

These proprietary anomalies disappear when we treat copyright law as a series of easements: the copyright owner's easement for marketing a copyrighted work, the author's fair use easement in creating a new work, and the user's easement for personal use of a copyrighted work for learning. But the true value of easement theory is that it enables decisionmakers to analyze copyright problems rather than legal rules. For example, if the copyrighted book is long out of print or exorbitantly priced, the problem is how to prevent copyright from inhibiting rather than promoting learning. The answer is that the copyright holder's marketing easement is variable according to whether the marketing is consistent with copyright policy.

Easement theory frees courts to examine the conduct of the parties in light of the purpose of copyright, so as to assess the proper allocation of rights as to a particular work in a common sense fashion consistent with the copyright statute and the Copyright Clause. For an easement, being more a privilege than a right, does not imbue the holder with the notion of power that legal rights normally carry.

We now examine why copyright as an easement is consistent with: (1) the condition precedent for copyright; (2) the core right of copyright; (3) the core principles of copyright; and (4) the purpose and function of copyright.

10.3 Easement Theory and the Condition Precedent for Copyright

The condition precedent for copyright is the creation of an original work of authorship. The effect of the condition is to limit the availability of the copyright monopoly. This is because ideas (the basic component of copyrighted works) are in the public domain, and to subject them to private use requires a justification: elaboration through the addition of original expression that results in a work of authorship. But because an original work of authorship requires the use of public domain material, it merits only a temporary marketing easement. The point is amply proved by the fact that copyright is subject to a limited term, to limited rights, and to the sharing of those limited rights with others. Copyright as property, then, can most usefully be viewed as an easement that requires originality as a justification because the public domain must be protected and preserved.

10.4 Easement Theory and the Core Right of Copyright

While the current Copyright Act lists six exclusive rights of the copyright holder,[7] the core right of copyright is the right to reproduce in copies the work created by an author. For one must copy a work to adapt it, to distribute copies of the work to the public, to perform or display the work publicly, or in the instance of sound recordings, to perform the work publicly by means of a digital audio transmission.

If copyright were a paradigm of property, one would expect the right to copy, in all of the various forms above, to be absolute and unlimited. But it is not, for the copyright statute specifically provides that others may copy the work as a matter of fair use,[8] and, by implication, for private distribution, private performance, and private display.[9]

Instead, the copyright owner's right to copy a work is a right to copy the work *in order to sell it*. Others have the right to copy it *in order to use it*, which is a right less expansive but no less important than that of the owner. Both owner and user, in short, are easement holders with copying easements of varying scope for different purposes. The result is warranted because the copyright statute grants the copyright owner an easement for the

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7. 17 U.S.C. § 106 (2006).

8. *See* 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

9. *See* 17 U.S.C. § 106(3)–(6) (2006) (noting that these sections are only applicable to performances, distributions, and displays made to the public).

use of public domain materials, but only to serve the public interest.

10.5 Easement Theory and the Core Principles of Copyright

There are two core principles necessary for the proper administration of statutory copyright: (1) there is a distinction between the work and the copyright; and (2) not all copyrights are created equal.

The proprietary theory, however, renders both principles irrelevant. For if copyright is a property right based on the fact of creation, the work and the copyright coexist and any distinction between them is irrelevant. Similarly, if copyright is a natural law right, all copyrights are created equal, because natural law does not distinguish manual and derivative effort from mental and original effort. But if copyright is a series of statutory rights that end at a time certain while the work continues to exist, the distinction between the work and the copyright is manifest. And if the copyright statute provides copyright for works of varying degrees of protection, it follows logically that not all copyrights are created equal.

Congress embodied these two principles in the copyright statute. The distinction between the copyright and the work, for example, is the basis of § 106, which defines copyright as a series of rights to which the copyrighted work is subject. Because these rights expire even though the work continues to exist, they must be in the nature of easements in that they are separate from the work. The point is exemplified by the fact that one does not infringe the work; rather, one infringes the copyright.[10] Thus, an infringement of a copyright is a violation—that is, an unpermitted use—of one of the rights of the copyright owner, not a use of the work. This is why the use of a work—which may mimic one of the rights of the copyright owner—is the exercise of a right and not an excused infringement.

The second principle—that not all copyrights are created equal, and thus result in different easements—is exemplified by § 103. That section provides copyright protection for derivative works and compilations, which may (and usually do) contain public domain materials. The statute provides that copyright protects only the original components of those works. Thus, copyright is an intangible right involving various uses to which a

10. 17 U.S.C. § 501(a) (2006) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author, as the case may be.").

work may be subjected, depending upon the nature of the work and the purpose of the use. This formulation is a good description of an easement.

Our contention is that the proprietary theory of copyright should not be used to invalidate the two core principles of copyright just stated.

10.6 Easement Theory and the Purpose/Function of Copyright

The fact that copyright theory is a flimsy structure comes as no surprise to anyone familiar with copyright history, which has been plagued with self-serving ideas promoted by publishers to protect their interest. Because the law of copyright is of so little interest to the public (a great irony in view of the impact of copyright law on every aspect of daily life), the publishers' ideas all too often have been accepted without critical examination.

The relevance of this point is that modern developments in communications technology provide publishers an opportunity to continue the campaign to shape copyright law in their own interest, not the public's. This was the same opportunity presented by the invention of the printing press and used by the publishers to such great effect in sixteenth century England. Publishers have a right, of course, to promote their ideas of copyright to their advantage, but no right to have those ideas accepted by default.

Lest history repeat itself, it is useful to understand that the communications upheaval of the late twentieth century generated by television and the computer is no less revolutionary than that of the mid-sixteenth century, generated by the printing press. But likewise, current developments present no less a danger that modern-day publishers' self-interested assertions will again be accepted by default, and against the public interest, due to a continued lack of sophistication regarding the true legal theory underlying copyright.

The key to the similarity of the two eras is that the inventions in both centuries were and are merely new processes for transmitting learning. The lesson from the similarity is that the publishers' concern with the new invention of the printing press was the same as it is today: to control the process in order to profit from the product. The Stationers' Company was a closed organization that controlled the printing presses, a goal in which the government concurred. The censorship decrees limited the number of presses and, among other provisions, empowered the stationers to search out and destroy illegal presses.

The contemporary analogue is the effort of copyright holders to control the process created first by television and now by the computer with its miraculous Internet capacities, which arguably are much more consequential. While Congress's role in this effort is not as direct as that of the English monarchs, it nevertheless is present in the form of legislation that implements the will of copyright holders. This is demonstrated by the transmission copyright and exemplified by copyright protection for live television broadcasts. The transmission copyright was created through the use of legal fictions—for example, that a recording of electronic signals as they are being transmitted over the public airwaves is a writing. But if a football game were a "Writing[ ]" within the meaning of the Copyright Clause, a transmission copyright would not be necessary to protect its broadcast: if one unlawfully transmits the televised production of a play (undoubtedly a writing), one infringes the drama, not the broadcast.

The more important point, however, is that the communications revolution is so important that it requires a return to fundamentals. The right place to start is the purpose of copyright. Constitutionally, copyright has only one purpose: to promote learning. But it has multiple functions to fulfill that purpose: to encourage the creation, dissemination, and use of learning materials. Creation and dissemination long have been recognized as functions of copyright. The missing function has been the use of copyrighted materials. The necessity of that function's inclusion within the equation, however, follows from the fact that, without the use of copyrighted works, copyright becomes an end in itself and the promotion of learning a fortuitous feature of the monopoly.

The absence of a general consciousness of the importance of the use of copyright materials is due to the prominent role of publishers in the development of copyright law. For to the extent that one of the functions of copyright is to encourage use, the copyright owner's right to charge for uses is diminished.

Despite its lack of recognition, however, use as a critical function of copyright is supported by substantial evidence. There is, for example, the narrow scope of copyright in the nineteenth century, when a book was protected only for publication and only as it was published, thereby allowing any other use of the book, short of marketing it. The right of use also was protected by the first sale doctrine, which exhausted the copyright owner's exclusive right to sell a particular copy after the first sale of that copy. But perhaps the most persuasive evidence of the right of use is that Congress—to compensate for enhancing the copyright

monopoly—codified the fair use doctrine in the Copyright Act of 1976, thus assuring individuals an affirmative right to use copyrighted works.

Although copyright's protection of the right of use is clear upon study and reflection, publishers have been unrelenting in their efforts to subvert this right. Paradoxically, the major reason for this effort is that the expansion of the copyright monopoly has made that law counterintuitive. While most people will agree that an author should be rewarded for his or her efforts, they also will agree that it makes little sense for one who pays nontrivial sums to purchase an annual subscription to a scholarly magazine also to have to pay a license fee to copy an article in that same journal.[11] The wonder increases when one realizes that the author is not paid for the publication of the article, much less any royalty for its reproduction by a subscriber to the periodical. The irony is that, although the author is *not* rewarded for intellectual creativity (the constitutional condition for copyright), the publisher *is* rewarded, contrary to the Constitution, for its sweat-of-the-brow effort.

In retrospect, it seems clear that natural law theory is the reason for the counterintuitive nature of copyright, because natural law provides no limitations, only the condition of creation. Having achieved substantial success in this effort—shown by the judicial treatment of copyright as a plenary property right—the publishers' resulting problem is to consolidate and protect their gains.

For this purpose, the publishers have resorted to private law. Consequently, their current campaign is to privatize copyright law. Examples of this effort are overbroad copyright notices, shrink-wrap licenses, and the omnipresent "FBI Warning" on videotapes of motion pictures. Thus, even though the statutory copyright notice is limited to the word "copyright" (or a symbol or abbreviation), the name of the copyright owner, and the date, and the notice no longer is required by law, publishers print copyright notices saying that no one may copy any portion of the book by any means at any time without the written permission of the copyright owner. The shrink-wrap license is a unilateral, adhesion contract with neither bargain nor agreement. And we may reasonably assume that the Federal Bureau of Investigation has more important matters to attend to than serving the motion picture industry as its copyright police.

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11. *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 916 (2d Cir. 1994).

As these examples suggest, the advantage to copyright holders of privatizing copyright law is that it makes other rules of law—rules of contract, rules of property, rules of procedure, and criminal law—relevant to the protection of copyright. "Freedom of contract," for example, is so sacred a shibboleth in American law that usually courts will enforce an alleged agreement even if they must use legal fictions to do so (as in the case of a unilateral adhesion contract without consideration).

The problem with privatizing copyright law is that private law is limited to the interests of the parties, so that courts usually deem its consequences for the public to be irrelevant except as to illegal contracts. Thus, the purpose/function of the subject matter—whether a car, a piece of land, or a book—is of no legal import. Herein lies the difference between copyright as property and other types of property. For the subject matter of copyright is the materials of learning, which have significant consequences for the welfare of society.

The point is shown by the fact that copyright law, as presently understood and applied, often seems to present a conflict between free market rights and free speech rights. Needless to say, copyright owners promote the view that the free market for copyright promotes free speech, even as they stifle it. But as is often the case, the analysis is flawed by the omission of a basic fact. Copyright is not a subject for the free market. Copyright is a monopoly, and monopolies suppress uncompensated uses by non-owners. The issue is the extent to which monopoly rights granted to the few by statute shall be allowed to override free speech rights guaranteed to all by the Constitution. The answer lies in conditioning the rights granted through the imposition of appropriate limitations.

The merit of the easement theory by now should be apparent, but it may be well to elaborate. For this reason, we return to history. Recall that, at the inception of this body of law in sixteenth century London, copyright holders (the stationers) under royal charter were concerned with the protection of the process (printing) in order to profit from the product (books), with a resulting opprobrious and unacceptable monopoly. The seventeenth century parliamentary solution provided by the first statutory copyright act was to limit copyright protection to the product.

With new forms of technology in the twenty-first century and the possibilities of future products for human communication seemingly boundless, efforts to protect the process must arise anew. When copyright is treated as a plenary property right, the tendency is to extend the protection beyond the property to the

process as a matter of equity, as witness the sweat-of-the-brow copyright.

Recognizing the easement theory may not eliminate, but it will certainly minimize, this danger. For if the copyright holder has only an easement, there is no basis in equity for extending protection to the process. Thus, easement theory removes the fee simple-like proprietary basis for copyright that enables publishers to override the public interest by ignoring constitutional protections for the people.

10.7 Conclusion

Justice Story's famous lament in *Folsom* that copyrights are the "metaphysics of the law"[12] has been echoed by modern judges, most notably Justice Blackmun dissenting in *Sony*.[13] Justice Blackmun erred, as did his nineteenth century predecessor, in attempting to employ natural law to administer statutory law, although apparently neither was aware of the source of his frustration. Similarly, few today are conscious that this source of confusion continues to plague copyright law. Fewer still are aware that the same confusion will persist until the idea that copyright is a plenary proprietary right ceases to be a part of the copyright culture.

The replacement concept—that copyright is an easement—passes the tests of a useful theory. Thus, copyright as an easement is the basis for consistent ideas, advancing the interests of authors, publishers, and users alike; it is the basis for the coherence of these ideas, which limit the rights of each party and thus protect not only copyrighted works but also the public domain; and it is the basis for congruence with the public interest, because it provides the theoretical means to apply copyright law in service of the promotion of learning. Recognizing the easement theory of copyright will enable decisionmakers to allocate rights and duties among creators, entrepreneurs, and users in a manner that serves the public interest in the creation, transmission, and use of knowledge, while at the same time maintaining a harmony consistent with the Constitution's mandate.

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12. Folsom v. Marsh, 9 F. Cas. 342, 344 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901) ("Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law.").

13. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 475 n.27 (1984) (Blackmun, J., dissenting) (echoing Story's observation that fair use poses an "intricate and embarrassing questio[n]").

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