Copyright on Steroids: In Search of an End to over Protection

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Articles

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Deborah Kemp*

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I. INTRODUCTION

This Article takes the viewpoint that copyright law is overprotective of the copyright holder to the detriment of social progress. Since 1978, federal statute has exclusively regulated U.S. copyright. Copyright protection has steadily grown since enactment of the first copyright statute some 200 years ago. The implied constitutional purpose for authorizing Congress to enact copyright statutes is to balance the author's right of exclusivity against the public's right of access to communicative content. When law is required to balance competing interests, it fluctuates in degree of protection, favoring one side or the other at any moment in time. An examination of copyright history reveals few moments when the law protected the public's right to access and reduced the author's right to limit access, while author protection has increased steadily since enactment of the Copyright Act. Managing protection in the face of new copying techniques, from printing press to copying machine, has continually challenged Congress and courts. The Internet is the newest technology that enables massive copying and challenges some of the basic premises of copyright. Copyright scholars advocate respect for the sharing of intellectual property as the path of progress, while Congress and courts enforce an increasingly author-protective copyright regime.

1. 17 U.S.C. § 301 (2008) (proclaiming that copyright is exclusively regulated by federal statute and preempting any state law that regulates the same rights).
2. An Act for the Encouragement of Learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, 1 Stat. 124 (1790).
3. The more common term for intellectual property protected by copyright is "information." That term implies factual material, whereas copyright covers most forms of communication that are "fixed in any tangible medium of expression," 17 U.S.C. §102. This includes entertainment media, which is not generally referred to as "information." So it is more inclusive of copyright construct to refer to the intellectual property covered by copyright as "communication."
4. See infra Part III.
For example, a group of publishers sued Google when it sought to make library books available free online.\(^8\) It is difficult to imagine anything more valuable to social progress than universal access to all of the out-of-print books, non-copyrighted books, and as many other books as Google can put online. Online sharing of communicative content is conducted on a massive scale, as evidenced by the massive sharing of music on sites like Napster and Grokster, both of which were sued by the music industry. Copyright protects much of the content, and sharing copyrighted material without permission is infringement. The copies of the original are not tangible in the traditional sense and there are no limits on their reproduction.

Copyright must balance competing interests to promote both creative production and social progress through its dissemination. The law gives monopoly protection to the creator to inspire him or her to produce and to make the creations available to society, thereby contributing to the constitutional goal of social progress through promotion of science and the useful arts.\(^9\) An imbalance in the copyright law, either too much or too little protection, may result in reduced progress. Modern copyright policy is so protective of the copyright owner that it reduces availability to those in society who would benefit from access and would make productive uses of the copyrighted work. Society can regain the balance through awareness and action by both legislatures and courts. Congress and the courts should examine the economic and developmental

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impact of the current copyright scheme and study the law’s relationship to
economics, incorporating current social scientists’ wisdom about human
motivation. Congress and the courts should adjust copyright law to reflect
the social change that occurs because of the Internet and digital communications.\textsuperscript{10}

Part II of this Article summarizes the purpose of copyright. In spite of
innumerable legal articles asserting that copyright, at least in music, is overly
protective, not all people are convinced that the law leans in favor of the
copyright owner.\textsuperscript{11} This Article lays the foundation for the case of overprotection
by reviewing the purpose of copyright. Part III details the historical expansion of
copyright in both legislative and judicial law application; while few argued that
copyright was overprotective twenty-five years ago, the seeds of overprotection
existed almost from its inception two hundred years ago. Part IV explains
traditional and modern socioeconomic theories that justified copyright
development and that now support its contraction; the basic property based
economic theory may still be viable, but application of social economics is
necessary to restore a balance. Part V suggests steps that Congress, the courts,
and the public may take to bring copyright back into balance. As a result of the
copyright scheme itself and partisan influence on those who manage the
copyright regime, the scales of copyright justice are uneven.

II. THE PURPOSE OF COPYRIGHT

A. Promote Progress by Rewarding Creative Production

Copyright policy balances two potentially conflicting viewpoints. The U.S.
Constitution provides, “The Congress shall have Power... To promote the
Progress of Science and useful Arts, by securing for limited Times to Authors

\textsuperscript{10} See generally FRIEDMAN, supra note 6 (noting how Internet communication is changing the world).
The book contains numerous anecdotes where information is readily exchanged through the Internet, making
the individual a more vital part of social progress. \textit{Id}.

protective of the author’s rights). The arguments for changing this system to one based on the life of the author
can be summarized as follows:

(1) The present 56-year term is not long enough to insure an author and his dependents the fair
economic benefits from his works. Life expectancy has increased substantially, and more and
more authors are seeing their works fall into the public domain during their lifetimes, forcing
later works to compete with their own early works in which copyright has expired.

(2) The tremendous growth in communications media has substantially lengthened the commercial
life of a great many works. A short term is particularly discriminatory against serious works of
music, literature, and art, whose value may not be recognized until after many years.

(3) Although limitations on the term of copyright are obviously necessary, too short a term harms
the author without giving any substantial benefit to the public. The public frequently pays the
same for works in the public domain as it does for copyrighted users at the author’s expense. In
some cases the lack of copyright protection actually restrains dissemination of the work, since
publishers and other users cannot risk investing in the work unless assured of exclusive rights.

\textit{Id}.
and Inventors the exclusive Right to their respective Writings and Discoveries."\textsuperscript{12} On one side is the interest in the free flow of information, and on the other is the interest in monopoly rewards\textsuperscript{13} for one's original works.\textsuperscript{14} On one side is the societal, perhaps public, interest in progress,\textsuperscript{15} and on the other is the private property interest in receiving a reward for one's contributions to social progress; the constitutional grant of an exclusive right to one's intellectual property for a limited time.\textsuperscript{16} Thus, the law bases copyright on economic assumptions about incentive through property ownership,\textsuperscript{17} the assumption that the owner's right to exclude others from access will inspire sharing the work in exchange for profit/prestige. If the law provides too little incentive through reward, presumably people will stop creating. If the law provides too much reward or protection, presumably the public will stop paying and therefore will stop benefiting from the newly discovered or created work, and progress will decelerate. Essentially, copyright law should strike a balance between providing enough protection to encourage people to create and not providing so much that it discourages those who would create new works from doing so.

The thoughts of the founding fathers can be gleaned through their writings from the late Eighteenth Century,\textsuperscript{18} which scholars have reviewed in recent years. Thomas Jefferson and James Madison wrote letters to one another and to others explaining their viewpoints on granting protection through copyright and patent.\textsuperscript{19}

\textsuperscript{12} U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{13} Id. Copyright is a legally sanctioned monopoly, because it gives an exclusive right in exchange for divulging to the public socially valuable intellectual property. Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104 COLUM. L. REV. 272, 339-343 (2004).
\textsuperscript{14} See 17 U.S.C. § 102(a) (2008). "Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Id.
\textsuperscript{15} The term "progress" is not defined in the U.S. Constitution, Article I, Section 8, which provides authority for Congress to make intellectual property laws. The dictionary describes "progress" as "a forward or onward movement (as to an objective or to a goal) ... gradual betterment ... the progressive development of mankind ... ." NEW COLLEGIATE DICTIONARY 920 (G. & C. Merriam Co. 1976).
\textsuperscript{16} See U.S. CONST. art. I, § 8, cl. 8. What constitutes a limited time has been the subject of some litigation. See, e.g., Eldred v. Ashcroft, 537 U.S. 186 (2003) (considering the constitutionality of the Copyright Term Extension Act).
\textsuperscript{17} See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (William Benton 1952) (1776) (arguing that a free market economy best promotes social progress, relying on an individual's self interested activities). Thomas Jefferson did not think of copyright as a property right in the same vein as tangible property. See JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND, at ch. 2, para. 12 (2008) ("Inventions then cannot, in nature, be a subject of property.").
\textsuperscript{18} See generally BOYLE, supra note 17, at 21-22 (noting Jefferson viewed copyright not as natural law, but as social or positive law). See also John Mark Ockerbloom, Thomas Jefferson's Copyright Term, BOOK PEOPLE, Feb. 11, 1999, http://onlinebooks.library.upenn.edu/webbin/pbarchive?year=1999&post=1999-02-11$Z (summarizing Jefferson's viewpoint on a limited copyright monopoly); Mike Masnick, On the Constitutional Reasons Behind Copyright and Patent, TECHDIRT, Feb. 21, 2008, http://www.techdirt.com/articles/20080222/0202523202.shtml (discussing skepticism of Jefferson and Madison about there being any protection for inventions and books and contemplated a very circumscribed monopoly grant); O. Lee Reed & E. Clayton Hipp, A "Commonest" Manifesto: Property and the General Welfare, 46 AM. BUS. L.J. 103, 105 (2009) (noting that while private property rights are the foundation of the U.S. constitutional government, "in the final analysis the property system serves the general welfare"). The founders saw no reason to deprive the public of access to any writings unless it was being done to promote progress in science and the useful arts. Id.
\textsuperscript{19} See Nachbar, supra note 13.
While, today, copyright material is called intellectual property, these constitutional framers did not consider copyright a property right per se. Instead, they considered it a monopoly, what they referred to as a necessary evil, granted in a very limited manner purely to provide incentive to the author to create. \textsuperscript{20} Today's copyright protection goes far beyond its original form of a limited monopoly for purposes of author incentive only.

Congress has enacted copyright laws premised on a virtually universal assumption that monetary incentive encourages creativity. \textsuperscript{21} This is apparently true, even if not all creativity is driven by monetary incentive. \textsuperscript{22} But, during the legislative process, lawmakers listen to special interests, which may at times skew the economic balance of the competing interests. \textsuperscript{23} This is what has occurred since enactment of the 1909 Act. \textsuperscript{24} However, since enactment of the 1976 Copyright Act (1976 Act), lobbying efforts have been skewed toward special interests, thereby tipping the economic balance. Instead of promoting creativity, these laws now promote marketing. In turn, users of the copyrighted information challenge the selfishness of marketers, not the creative process of making the original work.

\textbf{B. Four Stories}

Four anecdotes illuminate the problem. The first two stories come from Lawrence Lessig's book, \textit{Free Culture}. First, the American Society of Composers, Authors, & Publishers brought a copyright infringement suit against the Girl Scouts of America for singing copyrighted songs around campfires. \textsuperscript{25} While the story does not involve the Internet, it illustrates the law's
overprotection of copyright where the owner is not actually the creator. Second, a student at Rensselaer Polytechnic Institute (RPI) created a search engine for the RPI network.26 “He was a kid tinkering with a Google-like technology at a university where he was studying information science, and hence, tinkering was the aim.”27 Music files comprised one-quarter of the files the search engine listed.28 The Recording Industry Association of America (RIAA)29 sued the student, claiming he was engaging in Internet piracy and willfully violating copyright law.30 The RIAA demanded $15 million but settled for his $12,000 in savings.31 The expense of defending a lawsuit in the U.S. legal system made it prohibitive for the student to contest the lawsuit.32

Third, Jessica Litman, a prolific copyright law scholar33 and astute observer of human behavior, wrote about her child’s third grade teacher, who supervised two Internet activities involving downloading copyrighted material.34 One activity required students to access Internet sites in order to write science reports.

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26. Id. at 48-52.
27. Id. at 50.
28. Id.
29. The RIAA is a group of recording companies which owns copyrights in many songs. It received these copyrights from the musicians the recording companies represent. It writes no songs.
30. LESSIG, FREE CULTURE, supra note 6, at 51. Statutory damages for willful infringement are $150,000 per infringement. 17 U.S.C. § 504 (c)(2) (2009).
31. Id.
32. Id. at 51-52. The family’s lawyer explained to them that it would cost at least $250,000 to defend the suit and even if they won, they would not receive back any of their costs. So he settled and is now an activist. Lawrence Lessig mentioned the morality issue, arguing that the RIAA is acting immorally. Id. This glitch in the legal system’s procedural law is something Congress could repair through new legislation.
33. Jessica Litman has written on copyright law for over the past two decades. See Jessica Litman, Billowing White Goo, 31 COLUM. J.L. & ARTS 587, 587 (2008) ("[W]e seem willing to tolerate a huge expansion in the scope of copyright rights—most of that expansion, by the way, has been non-statutory—but unwilling to countenance a similar expansion in the scope of fair use."); Jessica Litman, Lawful Personal Use, 85 TEX. L. REV. 1871, 1872 (2006) ("The contours of lawful personal use are fuzzy as well as contested."); Jessica Litman, Sharing and Stealing, 27 HASTINGS COMM. & ENT. L.J. 1 (2004) (arguing that the law characterizes activity as stealing that information users classify as sharing); Jessica Litman, War Stories, 20 CARDOZO ARTS & ENT L.J. 337 (2002) (arguing that copyright law should provide new tools for resolving the wars between copyright holders and users); Jessica Litman, Information Privacy/Information Property, 52 STAN. L. REV. 1283 (2000) (arguing for privacy as a property right); Jessica Litman, Reforming Information Law in Copyright’s Image, 22 U. DAYTON L. REV. 587, 591 (1997) ("Copyright, in short, is too limited a prism through which to focus the many conflicting interests that make up our information law."); Jessica Litman, Revising Copyright Law for the Information Age, 75 OR. L. REV. 19, 19 (1996) ("Current copyright law is based on a model devised for print media, and expanded with some difficulty to embrace a world that includes live, filmed and taped performances, broadcast media, and, most recently, digital media. . . . The suitability of that model for new media is much more controversial."); Jessica Litman, Mickey Mouse Emeritus: Character Protection and the Public Domain, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 431 (1994) ("[C]opyright already gives more than enough protection to the characters embodied in works of authorship."); Jessica Litman, Copyright as Myth, 53 U. PITT. L. REV. 235, 237 (1991) ("[A]uthors believe in the popular copyright myth, rather than the copyright law, because the actual copyright law is less hospitable than the myth to the authorship process. Authors necessarily incorporate others’ work into their own in the creative process . . . . The copyright law . . . might stifle that process."); Jessica Litman, The Public Domain, 39 EMORY L.J. 965 (1990) ("A broad public domain protects potential defendants from incurring liability through otherwise unavoidable copying. It protects would-be plaintiffs by relieving them of the impossible and unwelcome obligation to prove the actual originality of all elements of their works. It protects the copyright system by freeing it from the burden of deciding questions of ownership that it has no capacity to answer.").
34. Jessica Litman, Sharing and Stealing; supra note 33, at 23-24.
The other activity was downloading and copying onto CDs the students' favorite classroom songs.35

When my son's teacher downloads information from the Internet and shares it with her students, that's the sort of thing the law is supposed to encourage; when she downloads music from the Internet and shares it with her students, that's the sort of thing the law is supposed to prevent. The law treats the two acts differently because facts are in the public domain, while music is someone's property. Information cannot be owned, we're told, because, unlike music, facts aren't original. From my son's teacher's point of view, though, what she's doing is the same: she's sharing.36

The fourth anecdote is about plagiarism. Universities teach students what plagiarism is, explaining intellectual property ownership to a generation of individuals that think copying and pasting is writing a paper.37 The millennial generation has lost the distinction between what is yours and what is mine, in

35. Id. The substantially whole passage is reproduced here, because it is a simple and astute description of the copyright schism between the law and the individual user:

When my son was in the third grade, one of his assignments required him to conduct research on the flora, fauna, and climate of the alpine tundra. His teacher didn't send him to look it up in books—indeed, the school library didn't have a lot of information to offer on the alpine tundra. My son's teacher sent him to look it up on the Web.... At the end of the school year, this teacher said goodbye to the class and presented all of the students with a souvenir: A home-burned CD full of Room A-9's favorite songs.... My son's elementary school teacher had downloaded them from the Internet herself so the class could enjoy them....

When an elementary school teacher helps her class to download information about the animals that inhabit the tundra, we all agree that that's admirable. When she teaches the class to download "Put a Little Love in Your Heart," at least some of us would argue that that's reprehensible. Collecting information on the Internet is "learning." Posting information on the net is "sharing." Try exactly the same thing with recorded music and it's "stealing."... The law treats the two acts differently because facts are in the public domain, while music is someone's property. Information cannot be owned, we're told, because, unlike music, facts aren't original. From my son's teacher's point of view, though, what she's doing is the same: she's sharing. From her point of view, there's no reason to think that it would make intuitive sense that downloading information to share with her students would be good, while downloading music to share with her students would be bad.

Id.

36. Id. (citations omitted). In fact, the fair use exception that allows copying of works of authorship considers the type of work being copied, among other things. 17 U.S.C. §107 (2006). There are four criteria that must be considered by the court when it is deciding whether a certain otherwise infringing use of a work is a fair use: (1) purpose of the use, (2) nature of the work, (3) amount of work taken, and (4) effect of the use on the market for the work. Id. Note that not all uses of copyrighted works, even for research purposes, are necessarily fair. One does not know whether a use is fair until one is sued for copyright infringement, defends by claiming fair use, and the court determines that the use was not an infringement, but was fair. Because of the expense of having to defend one's use as fair, many people simply avoid using copyrighted works for any reason, even for educational purposes. This is the chilling effect of the copyright law's burden of proof scheme.

37. At California State University, Fresno, two professors have developed a learning module that acquaints students with what plagiarism is and gives practical advice on how to avoid plagiarizing. Many students do not even know that cutting and pasting from an article they accessed online is an infringing use of the work and is plagiarism. If they do know, many fail to see why it is illegal in academics to engage in such copying. Plagiarism is a hot topic in academics currently. See, e.g., University of Oregon, Academic Integrity—Citing Sources, http://libweb.uoregon.edu/guides/plagiarism/students/ (last visited on Mar. 26, 2010) (on file with the McGeorge Law Review).
part because digital communication has blurred formerly clear boundaries of intellectual property ownership.

The legal property ownership concept does not serve the social utility. These four stories involve new, if not productive, uses of copyrighted works. Yet all four instances are categorized as infringement, arguably to the detriment of social progress. First, forbidding girl scouts to sing songs they know when sitting around a campfire is socially repressive. Second, forbidding use of a valuable communication tool that enables free exchange of information is socially undesirable. Third, similar to the first situation, music appreciation and sharing is a social function. Thus, copyright law makes a socially desirable activity more difficult to do, and in some instances, almost impossible. This is not promoting progress. Fourth, incorporating others' ideas into one's work can be considered scholarship that promotes social progress. The distinction between ideas that may be freely copied, and the expression of the ideas (which is now very easy to lift verbatim), is reduced in this digital environment. Whether or not the words were actually copied, the original communicator deserves attribution without regard to copyright law. Social and biological scientists have studied the sharing phenomena in human populations. The rest of the population does not make the same distinctions that lawyers make.

C. Music and Derivative Works Problems

The legislative and judicial expansion resulting from the ease of copying music has had a far-ranging—and possibly inappropriate—effect on copyright doctrine. Historically, contributory infringement and vicarious liability doctrines were construed narrowly to punish an intentional infringer. Recently, however, courts find third parties have more responsibility to the copyright owner than is merited by their relationship. This Article suggests such expansion of contributory liability is beyond any purpose that might have been reasonable in the past.

38. RICHARD DAWKINS, THE SELFISH GENE (2d ed. 1989) [hereinafter SELFISH GENE] (explaining altruism among social animals); BENKLER, WEALTH OF NETWORKS, supra note 6; (discussing the increasingly powerful effects of sharing-based production of information goods on the global economy, personal autonomy and development, and the distribution of political power); Lawrence Lessig, Does Copyright Have Limits: Eldred v. Ashcroft and its Aftermath, in OPEN CONTENT LICENSING: CULTIVATING THE CREATIVE COMMONS 219 (Brian Fitzgerald ed., 2007) (describing a vehicle for those who wish to share works of authorship when the law has no option).

39. See Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2d Cir. 1971) (acknowledging the requirement of active participation and direct financial benefit in order to establish contributory liability).

40. See Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) (finding the owner of a commercial space was liable for copyright infringement because the owner should have known the vendors were selling bootleg music).
Music is an intrinsic part of human society. Presumably people will continue to make music without copyright incentive, although eliminating the monetary reward may negatively affect the quality of the music produced and the methods of distributing musical works. Because the law’s ultimate goal is to promote progress, it should give no more protection to the authors than is necessary to inspire them to create. This situation is analogous to that in England in 1662 under the Stationers’ Act, where the copyright belonged to the printers and distributors, not to the authors. Even today, when law gives the individual creator the copyright, the musicians transfer their copyrights to the equivalent of the printers and distributors—the record companies.

Modern law prohibits many creative uses of copyrighted works through derivative works rights and through secondary liability doctrines. First, derivative works are often productive uses of a prior work, so making them less protected is desirable for progress. Second, the law holds parties liable for copyright infringement when they do not even engage in copying. This protection has less to do with inspiring authors to create than it does with protecting businesses in their copyright ownership. The businesses are not the authors, just the holders of the authors’ copyrights.

Theoretically, a writer, artist, or composer wanting to profit from marketing his or her novels, paintings, or songs would prefer that the law be extremely protective of his or her intellectual property to maximize the profit on the creative investment. However, creative output often derives from earlier works.


42. See Mark F. Schultz, Live Performance, Copyright, and the Future of the Music Business, 43 U. Rich. L. Rev. 685, 686 n.2-3 (2009) (“It is commonplace wisdom that most musicians make their money on tour, and popular commentators regularly proclaim that the era of copyright is over and the era of live performance is at hand.”).

43. Eldred v. Ashcroft, 537 U.S. 186, 210-12 (2003). The Court summarized Lawrence Lessig’s Progress Clause arguments regarding the Copyright Term Extension Act (CTEA):

Petitioners contend that the CTEA’s extension of existing copyrights . . . fails to “promote the Progress of Science”. . . . [P]etitioners contend that the CTEA’s extension of existing copyrights does not “promote the Progress of Science” as contemplated by the preambular language of the Copyright Clause. . . . [T]hey maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of “limited Times” must be “determined in light of that specified end.” . . . The CTEA’s extension of existing copyrights categorically fails to “promote the Progress of Science,” petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.

Id. The Court gave Congress broad authority to interpret the Constitution’s copyright clause, applying the rational relationship test to review the CTEA. Id.

44. See Masnick, supra note 18 (discussing Jefferson and Madison’s skepticism about there being any protection for inventions and books and noting that they contemplated a very circumscribed monopoly grant); Ockerbloom, supra note 18 (recalling Thomas Jefferson’s views that the government should give no more protection to inventors and authors than that which is necessary to provide incentive to create, such as enough to recoup costs only).

45. Licensing Act of 1662, 14 Car. 2 ch. 33 (Eng.) (also known as the Stationer’s Act).


47. See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930) (discussing how the idea/expression dichotomy in dramatic works permits copying themes).
If the creator of those earlier works utilizes extreme protection, a new creator will not be able to use the earlier work to derive new works. The law assumes that increasing the author’s primary motivation for creating will maximize her financial wealth, but wealth production will decrease if creativity cannot thrive. The creator needs access to prior art in order to build creatively. The present broad protection might be reasonable if the owner were the artist or individual creator of the work. However, often the owner is a corporation that uses its resources to lobby Congress for favorable laws and diligently pursues its rights in court through highly skilled counsel.

The introduction of new technology throughout copyright’s history has challenged copyright norms. Copyright protection is increasing for a number of reasons: the power of the corporate copyright owners to influence Congress; the belief that if some protection creates incentive, more protection will increase incentive; and the belief that copyright is like real property and that its value lies in the private right to exclude others from access. Digital technology and the Internet have together contributed to a brave new world that both Congress and the courts should embrace by limiting the power of copyright law to stifle the progress of science and the arts.

III. HISTORICAL EXPANSION

The reach of copyright’s breadth is expanding in three areas: length of protection, categories of works protected, and breadth of protection. Both

48. See Zechariah Chafee, Jr., Reflections on the Law of Copyright: I, 45 Colum. L. Rev. 503, 511 (1945) (“The world goes ahead because each of us builds on the works of our predecessors. ‘A dwarf standing on the shoulders of a giant can see farther than the giant himself.’”); see also Nichols, 45 F.2d at 121-22 (Learned Hand discusses the idea/expression dichotomy in dramatic works, saying it permits copying themes). Parts or aspects of a work, such as a play, can be taken for use in another work (another dramatization even), because the amount taken has to be substantial to be infringing. This has become one of the factors considered for fair use: “Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out.” Id. at 121.

49. See Bohannan, supra note 7, at 567 (arguing that courts should emphasize public interest in copyright cases and that the courts have become too protective of private property copyright in the owner); see also Lessig, Free Culture, supra note 6, at 229-30 (reminiscing about errors in argument in Eldred v. Ashcroft, 537 U.S. 186 (2003)). Eldred was represented by Lawrence Lessig, a law school professor, brilliant, but not trained to scrap, who was out maneuvered by the attorneys for the MPAA. Lessig wrote that he believed the case could have been won had he argued what the judges were seeking in order to prove the MPAA arguments wrong. Id. An example of legislation that is in part the result of effective lobbying by the MPAA, among other entertainment associations, is the DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Kellen Myers, The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties, 61 Fed. Comm. L.J. 431, 438 (2009).

50. Perceived threats to authors’ rights have been considered throughout the history of copyright as new technology has forced the law to adjust. It started with the printing press. See generally infra Part III.A.2.

51. Litman, Billowing White Goo, supra note 33, at 587 (“[W]e seem willing to tolerate a huge expansion in the scope of copyright rights—most of that expansion, by the way, has been non-statutory—but unwilling to countenance a similar expansion in the scope of fair use.”).

Congress and the federal courts are responsible for maintaining the balance in copyright law. The Constitution authorizes Congress to make law. The powers of statutory interpretation and judicial review authorize the courts to decide how the law is applied to a particular case and to invalidate statutes that are unconstitutional. As will be shown in the information provided in this section, both Congress and the courts have participated in the expansion of copyright since its inception.

The copyright tradition recognized in the U.S. originated in England as a protection for publishers in their exclusive rights to print and sell books. It was later recognized as an author's right to prohibit others from copying and selling illicit copies of books. The U.S. Constitution recognizes the concept of an author's ownership of his work as a federal right. In both England and the U.S., courts adopted judicial doctrines from common law to address the issues copyright lawmakers faced for each new technology. The 1976 Act, the most

53. See U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."). The federal judiciary's powers are primarily to interpret the U.S. Constitution and the federal statutes. Its application of common law to resolve legal problems has been controversial through the years. The 1976 Copyright Act abolished common law copyright in 17 U.S.C. § 301 (2006). Nevertheless, the federal courts resort to common law doctrines while engaging in statutory interpretation. For instance, the expansion of secondary liability doctrines into copyright law, as derived from common law, is problematic. When Justice Holmes adopted the secondary liability doctrine of contributory infringement into copyright law in the early 1900s, the courts still applied common law doctrines in federal law decisions. See Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911). Now the 1976 Act has abolished common law copyright. See 17 U.S.C. § 301 (2009).

54. Judicial review is itself a judicially created doctrine that the Supreme Court recognized early on. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178, 180 (1803) (determining that the Judiciary Act was unconstitutional because Congress did not have constitutional authority to enact such legislation).

55. JOSEPH LOEWENSTEIN, THE AUTHOR’S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 42 (2002). Authorship has not always been viewed as a proprietary interest. Early writing was not regularly attributed to one person. The Bible, especially the Old Testament, was written by several people.

56. See Copyright Act 1709, 8 Ann., c. 19 (Eng.) ("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.").


58. Whether copyright is wholly statutory or is a natural property right protecetable under common law has been debated in England and in the U.S. In England, an early case granted perpetual protection to publishers who had acquired publication rights. See Millar v. Tayler, (1769) 98 Eng. Rep. 201, 202 (K.B.) (finding that the monopoly right to publish is perpetual). It was later decided that the statutory limit on the length controlled and the natural right of common law would not apply. See Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 843 (H.L.) (finding no perpetual copyright); see also Paula Baron, The Moebius Strip: Private Right and Public Use in Copyright Law, 70 ALB. L. REV. 1227, 1239-40 (2007) (reviewing the debate between natural right and legislatively created monopoly right and the debate between monopoly and property).

This began with the notion that copyright ownership was rightly characterized as a "natural right" rather than as a privilege, a notion that arose fairly early on in the history of copyright. It began as a rhetorical turn initiated by the Stationers in order to regain the benefits of their original privilege in the two founding court cases in copyright law, Millar v. Tayler and Donaldson v. Beckett. Although it was still relatively uncontroversial to refer to copyright as a species of monopoly throughout the late eighteenth century, the issues raised by these cases led to the "seminal" debate in intellectual property. This debate was centered on the question of whether, at common law, authors and their assigns enjoyed perpetual rights over their own creations. This debate over the "true" nature of copyright—a privilege or a right—raged in the first half of the nineteenth century.

Id. The debate also occurred in the U.S. See Wheaton v. Peters, 33 U.S. (7 Pet.) 591 (1834) (finding that the statute controls over common law copyright). Courts continued to apply common law and to recognize common law copyright until 1978 when the 1976 Copyright Act went into effect. Section 301 provided for abolition of
recent comprehensive copyright statute, has expanded copyright in the three ways stated above. First, it protects all works fixed in a tangible medium of expression and provides a nonexclusive list of types of works—many more types of works than the original U.S. copyright statute’s protection of books, maps, and charts. Second, an amendment to the 1976 Act extended the length of protection to the life of the author plus seventy years, or ninety-five years for non-author copyright holders, much longer than the original fourteen years. Third, the 1976 Act lists types of copying that are permissible under the statute, effectively limiting many judicially permitted uses of copyrighted works.

The following section reviews legislative and judicial expansion of copyright protection in more detail.

A. Legislative Historical Expansion

U.S. copyright derives from English law. Most nations have domestic copyright law, but just as they have other cultural values, they have other concepts of copyright. The laws of the World Trade Organization (WTO) members are increasingly uniform, probably because international trade in any common law copyright that might overlap the copyright statute’s rights. A dual system still exists in trademark law which is permitted to be regulated both federally and by individual states, through the common law of unfair competition as well as through state statutes. See Cornell University Law School, Legal Information Institute, Trademark, http://topics.law.cornell.edu/wex/Trademark (last visited Sept. 7, 2010) (on file with the McGeorge Law Review) (“Unregistered trademarks may also be protected at the state level by statute and/or common law.”).

59. 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, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”) (emphasis added)). The Internet is intangible. The fixation problem is that the copyright concept is based on tangible property legal and economic theory.

60. Copyright Act 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.).


62. Id.

63. 17 U.S.C. §§ 106-118 (2006). Prior to enactment of the 1976 Act these protections had been judicially created as a sort of equitable measure to balance the competing interests in copyright.

64. See generally William F. Patry, The Fair Use Privilege in Copyright Law (1985). For instance, de minimus copying, taking less than a substantial amount of another’s work, was not infringement. Now, one has to prove it is fair use.

65. See, e.g., Susan P. Liemer, How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright, 5 J. MARSHALL L. SCH. REV. INTELL. PROP. L. 1 (Fall 2005). Liemer compares European copyright provisions to protect the artist’s name and integrity of the work and finds that value lacking in U.S. copyright law. Id. Liemer’s “moral rights” really are not moral in the English sense. The term derives from the French term droit moral, which refers to a societal interest in works of art. The right of attribution is to prevent the artist’s name from being on a work of art that is not hers or has been altered. This recognizes the artist’s interest in preserving her reputation. The right of integrity allows the artist to prevent the destruction or alteration of the work of art. This allows the artist to maintain aesthetic control over the work of art. These are personal rights of the artist and do not transfer when ownership of the work transfers. They do not follow ownership of the copyright either.

technology and intellectual property is so prevalent. The English Parliament established copyright in the Seventeenth Century in response to the invention of the printing press, which enabled mass copying of printed works. The initial protection was a monopoly granted not to the authors but to the book printers. The Licensing Act of 1662, or the Stationers' Act, created a business monopoly for some book printers, providing for a registry of licensed books that the Stationers' Company, a group of printers, administered. It was not a reward to the artist, because it had no provision for recognition of the artist. Thus, the assertion that copyright was created to protect the artist and promote her continued creativity, a justification which is used today to expand the scope of copyright, is without support in the first instance of copyright.

That original purpose of copyright was short-lived. The Licensing Act lapsed and in 1710 Parliament enacted the Statute of Anne, which recognized that the author owns the copyright and may transfer it to the publisher. The value of the author's ownership is twofold. First, it provides an economic incentive to create and to share works of authorship. Second, it permits the author to maintain the integrity of his or her work and to prohibit others from stealing not just the work but also the author's reputation. The 1710 Act also established a fixed term of protection for copyrighted works. The statute prevented a monopoly by the booksellers and created a public domain for literature by limiting the duration of copyright. Copyright protected written works and did not include other audio and visual forms of art. The statute permitted the author to assign the copyright to a third person, and the author often did assign it to a bookseller or publisher. In

67. The first English copyright was a private monopoly granted to the Stationer's Company to print books, apparently in the 1500s. See Lyman Ray Patterson, Copyright in Historical Perspective 28-77 (1968). The Copyright Act of 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.), granted copyright to authors of books.

68. Licensing Act of 1662, 14 Car. 2 ch. 33 (Eng.). The Licensing Act of 1662 gave exclusive permission to print and sell writings to the stationers. The subsequent Statute of Anne was a trust-busting law. It gave the right to copy and sell writings to the authors who then could sell those rights to a publisher of the author's choosing. This broke the Stationer Company's monopoly.

69. Id.

70. Id.

71. Copyright Act 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.).

72. See Leimer, supra note 65, at 14-16. The Statute of Anne and the U.S. Constitution gave authors a property right in the work they created for a limited time. They focused on the goal of increasing knowledge for the public welfare. They provide an economic incentive, but little protection for the integrity of the work or of the author's reputation. England also had the Engravers' Act of 1735 that covered visual arts. It differed from copyright under the Statute of Anne. It recognized the creative process, the labor to create the work of art, and protected the right of attribution and of integrity. So it protected reputation and economic interests. Under the U.S. copyright system, the artist has no right to protect her work from the public misuse of it once the work is sold. See 17 U.S.C. § 109 (2006) (first sale doctrine).

73. Copyright Act 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.) (giving copyright for fourteen years, renewable for fourteen more if the author was alive upon expiration).

74. The term "public domain" refers to availability of works for unrestricted use by others. It derives from the property concept of the commons, property that is unowned, or owned by the general public. See generally Reed & Hipp, supra note 18 (arguing that private property serves the public welfare).

75. Id.

76. Copyright Act 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.). In the U.S., it was called the first sale doctrine and is codified in 17 U.S.C. § 109 (2006). "[T]he owner of a particular copy . . . is entitled, without the
summary, the stationers' copyright was a purely economic incentive to copy and sell. It was a perpetual monopoly. The Statute of Anne gave the author ownership and limited the length of the right.

The U.S. Constitution gives Congress power to grant copyrights and patents for limited times. Courts also recognized and applied common law copyright to resolve some copying cases. Common law copyright is a property right based on natural law, whereas the statutory copyright is more properly viewed as a government-created monopoly. Under the common law, copyright existed in perpetuity.

There was some overlapping of protection, which led to unclear doctrines. Since the Statute of Anne and the U.S. Constitution's provision for copyright were enacted almost three hundred years ago, Congress has revised U.S. law to broaden the scope of copyright, to change the term of copyright protection, and to include new technologies and types of works within the copyright regime. The following sections summarize these expansions.

1. Length of Time

The term of protection for copyrighted works has only lengthened. This seems logical since human life expectancy has increased, justifying a longer period of time during which to recoup one's investment in creation. But, two points belie the apparent logic. First, copyright's length has increased over threefold, while the life expectancy has at most doubled. Hence, the increased length of copyright is not justified by humans living longer. Second, the newest statute, the 1976 Act, eliminated the requirement for registration. This action

authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . .” Id.

77. U.S. CONST. art. I, § 8, cl. 8 (“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.”).

78. See H. R. REP. No. 94-1476 (accompanying 17 U.S.C. § 301 (2006)) (preempting common law copyright). “By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship.” Id.

79. Id. Later the report mentions the perpetuity of protection under common law:

Enactment of section 301 . . . would also implement the “limited times” provision of the Constitution, which has become distorted under the traditional concept of “publication.” Common law protection in “unpublished” works is now perpetual, no matter how widely they may be disseminated by means other than “publication”; the bill would place a time limit on the duration of exclusive rights in them.

Id.

80. Id. (discussing how the common law interpretation of “publication” had distorted the Constitutional provision of “limited times”).

81. See Copyright Timeline, supra note 5. Major revisions to broaden the scope of the original Copyright Act of 1790 occurred in 1831, 1870, 1909, and 1976. Id.

82. Jordan M. Blanke, Vincent Van Gogh, “Sweat of the Brow,” and Database Protection, 39 AM. BUS. L.J. 645, 650 (2002) (the 1909 revisions “provided copyright protection for all the writings of an author,” and extended the length of the second renewal term [from fourteen] to twenty-eight years, thus authorizing copyright protection for a period of fifty-six years.”).

has effectively removed most works from the public domain regardless of age. The first copyrights in Britain and the U.S. granted rights for fourteen years and the copyright was renewable for another fourteen years. In the U.S., formal registration was necessary before the copyright could exist federally. Works not protected by copyright were in the public domain and available for all uses, except to the extent common law copyright was recognized to protect the work. Even at the time of the first statute, U.S. courts used common law copyright, which could be transferred and had perpetual existence.

Forty years later, in 1831, Congress extended the term of protection for copyrighted works to twenty-eight years, with the possibility of a fourteen-year extension. "The extension applied to both future works and those current works that were protected in the first fourteen years.

84. See Christopher Sprigman, Reform(alizing) Copyright, 57 STAN. L. REV. 485, 488 (2004). Beginning with the 1976 Act, then, the United States moved from a "conditional" copyright system that premised the existence and continuation of copyright on compliance with formalities to an "unconditional" system in which a reduced set of voluntary formalities plays only a minor role. Richard Epstein has aptly characterized these changes as "copyright law . . . flipped over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not." Id.

85. An Act for the Encouragement of Learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, 1 Stat. 124 (1790) (the Act was modeled on Britain’s Statute of Anne (1710)). The 1790 Act declared that entitled persons were to have "the sole right and liberty of such book or books, or the copy or copies of such book or books, for the term of fourteen years" Id. Now, U.S. copyright is available for foreign works and can be held by non-American authors.

The works specified by sections 102 and 103, when published, are subject to protection under this title if (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party . . . or (2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party . . . .


86. See Sprigman, supra note 84, at 487. From the first copyright statute in 1790, Congress required that authors register their copyrights, give notice (by marking published copies with an indication of copyright status such as the "©" symbol, as well as other information about copyright ownership), and (perhaps most importantly) renew their rights after a relatively short initial term by reregistering their copyright. Failure to comply with these requirements either terminated the copyright (in the case of nonrenewal) or prevented it from arising in the first place.

Id.

87. See H. R. Rep. No. 94-1476, 17 U.S.C. § 301 (2006) (explaining the abolition of common law copyright (a dual system) to embrace a single system of statutory copyright from the moment of "creation"). "Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain." Id.

88. See supra note 79 (discussing common law copyright).

89. Natural law is a general term that encompasses rights that derive from unnamed sources, very much like common law. See Association of Free Countries, Inherent Rights, http://freecountries.org/inherent-rights.html (last visited Mar. 26, 2010) (on file with the McGeorge Law Review) ("Inherent rights are those that are automatically ours as part of our birthright. Most of these rights apply in relation to all other individuals, including organizations, governments, etc. Some of these rights only apply in relation to governments. Many of the latter category would be in the Bill of Rights or similar provisions. . . . Inherent Rights are the most fundamental and universal rights under Natural Law . . . .").

90. See An Act to Amend the Several Acts Respecting Copyrights (1831), reprinted in 8 MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT app. 7-49. Congress claimed that it extended the term in order to give American authors the same protection as those in Europe. It said it was necessary to be in compliance with the World Intellectual Property’s (WIPO) standards. See Copyright Timeline, supra note 5. This is the same
whose copyright had not expired. The 1976 Act lengthened it to fifty years plus the life of the author, or seventy-five years for copyrights owned by non-authors, as works for hire. In 1998, the Sonny Bono Copyright Term Extension Act (CTEA) extended the copyright term another twenty years.

Lawrence Lessig, a constitutional law professor at the time, argued that the CTEA violated the First Amendment and the Progress Clause, which grants Congress the authority to make copyright law for the progress of science and the useful arts. The logic of Lessig’s argument is as follows. The Progress Clause is based on economics; it inherently limits congressional authority to grant copyright protection in two ways: first it limits time, and second it requires that any congressional action under it be to promote progress. The Progress Clause provides an incentive for creators to create. While the CTEA allowed the extension of already existent copyrights, the extended time was not given to provide incentive, but was more of a post hoc reward. But the Constitution does not authorize Congress to regulate copyright for reward after the publication. So Lessig argued that the extension was not within Congress’ authority.

Since the Constitution provides that copyright protection is granted for “limited times,” the constitutionality of the CTEA was ultimately challenged in *Eldred v. Ashcroft*. A number of economists and law professors submitted amicus briefs in support of Eldred’s and Lessig’s positions on the CTEA’s constitutionality, arguing that the CTEA would have a detrimental impact on

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justification given for the Copyright Term Extension Act (CTEA) in 2001. The copyright statute was next overhauled in 1870. See PATRY, COPYRIGHT LAW, supra note 24, at 43.

91. *See* Copyright Timeline, *supra* note 5. This is true of the CTEA also and the argument that it was applying retroactively was rejected by the U.S. Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186, 218-219 (2003).


95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*


100. 537 U.S. 186 (2003).


“It is highly unlikely that the economic benefits from copyright extensions under the CTEA outweigh the costs.”

“The CTEA provides at most a very small benefit to innovation.”

“The CTEA’s longer copyright for new works provides at most a very small additional incentive.”

“The CTEA’s extension of copyright in existing works provides no significant incentive to create new works.”

“The CTEA increases the social cost of monopoly.”

“The CTEA reduces innovation by restricting the production of new creative works that make use of existing materials.”
the economic growth of society. However, the Supreme Court disagreed and upheld the CTEA’s constitutionality. As a result, neither Mickey Mouse nor Robert Frost’s New Hampshire poetry collection became available for the public to use freely.

Finally, until the 1976 Act, copyright required registration before the federal courts would recognize it. Common law copyright, on the other hand, required no formalities, but it was perpetual. The drafters of the 1976 Act compromised by abolishing common law copyright, while preserving its lack of formality by eliminating the need to register one’s copyright. Without formalities like registration, under the 1976 Act, potential users were not put on notice of limitations on the copyright owner’s rights, the expiration date of a copyright, and more.

2. Types of Works

Copyright has also expanded to protect a greater variety of works. When the English Parliament first created copyright, it gave publishers rights in printed books. When Congress first codified copyright in the U.S., it protected charts, books, and maps. Subsequent legislative amendments listed more types of

Id.

102. Id.
104. See LESSIG, FREE CULTURE, supra note 6, at 214 (“In 1998, Robert Frost’s collection of poems New Hampshire was slated to pass into the public domain. Eldred wanted to post that collection in his free public library.”).
105. See Sprigman, supra note 84, at 487.

The need for section 412 arises from two basic changes the bill will make in the present law.

(1) Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way.

(2) The great body of unpublished works now protected at common law would automatically be brought under copyright and given statutory protection. The remedies for infringement presently available at common law should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.

Id.

107. See Sprigman, supra note 84, at 487-88 (suggesting that the U.S. should readopt basic formalities of registration and renewal to resolve the problem of copyright being effectively perpetual).
108. See Harper & Bros. v. Kalem Co., 169 F. 61, 64-65 (2d Cir. 1909). The Supreme Court opinion in this case has provided guidance for subsequent cases considering secondary liability for copyright infringement, including: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003); and A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Even in Kalem, the Court remarked on the expansion of copyright, particularly in regard to the types of works protected. Kalem Co. v. Harper Bros., 222 U.S. 55 (1911); see also Blanke, supra note 82, at 650-651 (reciting the year and statute for additional works as they became covered: prints and engravings (1802); musical compositions (1831); public performance of dramatic works (1856); photographs (1865); paintings, drawings, and statues (1865)).
109. Copyright Act 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.).
110. An Act for the Encouragement of Learning, by securing copies of maps, charts, and books, to the
works. The Second Circuit summarized the expansion in Kalem Co. v. Harper Bros.\textsuperscript{111}

The first copyright law of 1790 . . . included maps and charts as well as books. In 1802 . . . copyright was extended to engravings, etchings, and prints. In 1856 . . . it was extended in the case of copyrighted dramatic compositions to the right of publicly performing the same. In 1870 . . . it was extended to paintings, drawings, chromos, statues, models, designs, photographs, and the negatives thereof, and authors were also allowed to reserve the right to dramatize their works. In 1891 . . . authors and their assigns were given the exclusive right to dramatize their copyrighted works.\textsuperscript{112}

The 1909 Copyright Act expanded the types of works protected, including all works of authorship.\textsuperscript{113} The list in the 1976 Act is inclusive, so types of works not mentioned could be included in copyrightable works. Musical composition was thoroughly considered,\textsuperscript{114} but newer technology has again made it difficult for the law to balance the competing rights of the composer against the public interest in access to music in its various forms.\textsuperscript{115} Music is unique because it is manifested in

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\item Harper & Bros. v. Kalem Co., 169 F. 61, 64-65 (2d Cir. 1909).
\item Id.
\item Copyright Act of 1909, 35 Stat. 1075 (1909).
\item See Copyright Timeline, supra note 5; H.R. REP. NO. 60-2222, at 7 (1909) Congress addressed the difficulty of balancing the public interest with proprietor's rights:
The main object to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.
\item See generally Lynda J. Oswald, International Issues in Secondary Liability for Intellectual Property Rights Infringement, 45 AM. BUS. L.J. 247, 252-79 (2008) (discussing peer-to-peer file sharing internationally); Ponte, supra note 6, at 332-53 (discussing RIAA's attempts to fight music file sharing); Robert Sprague, Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century, 44 AM. BUS. L.J. 127, 131 n.19 (2007) (discussing Chevrolet's marketing technique asking blog users to make commercials from existing music); Ponte, supra note 6, at 518-59 (arguing that digital sampling does not lend itself to current copyright law); O. Lee Reed, What Is “Property”? 41 AM. BUS. L.J. 459, 496 (2004) (“Nonowners . . . violate the boundaries of an owner's copyright in order to hear music, that is, they abridge the exclusive right of property.”); Jeff Sharp, Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Enables Digital Content Owners to Circumvent Educational Fair Use, 40 AM. BUS. L.J. 1, 54 (2002) (discussing Napster's peer-to-peer file sharing of music); Stephanie Greene, Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law, 39 AM. BUS. L.J. 57, 61, 67 (2001) (discussing how users of Napster downloaded even after the judgment, and artists appreciate the distribution ease of the Internet); Lee B. Burgunder, Reflections on Napster: The Ninth Circuit Takes a Walk on the Wild Side, 39 AM. BUS. L.J. 683, 702 (2002) (reviewing Napster and identifying copyright law problems when addressing peer-to-peer file sharing). The strongest proponents of copyright in musical works are the music industry heads, not the.
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so many forms: written composition, live performance, and various recording media. It is so intrinsically part of human social life that it is present during many ordinary activities, such as eating in a restaurant, riding in an elevator, and waiting for a telephone conversation.\(^{116}\)

As long ago as the turn of the last century, the courts faced the problem of having to interpret a new copyright statute in light of even newer technology that had not been contemplated at the time the statute had been enacted. Courts were liberal in their interpretation of copyrightable subject matter until, in the 1908 case of \textit{White-Smith Music Publishing Co. v. Apollo Co.}, the Supreme Court halted application of copyright to works not mentioned in statute.\(^{117}\) \textit{White-Smith} dealt specifically with player piano rolls, which the federal statute did not mention.\(^{118}\) It was a new technology that enabled music to be played without a person actually touching the keys. The Court refused to recognize copyright protection for music stored on perforated music rolls that were placed into player pianos and caused the piano to produce music as the rolls unwound.\(^{119}\) Later copying machines were also an issue, because the 1909 Act did not list the copies those machines produced as protected by copyright.\(^{120}\) In \textit{Williams \& Wilkins Co. v. United States}, a majority of the Court was unable to come to a consensus on what to do when there is a new technology enabling copying, and the statute could not keep up as new technology developed.\(^{121}\) It happened again with computer programs, just after passage of the 1976 Act.\(^{122}\) The 1976 Act attempted to address new technology problems by providing copyright protection for all works “fixed in any tangible medium now known or later developed.”\(^{123}\) Even

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\(^{116}\) See generally Ponte, \textit{supra} note 6 (laying out an overview of traditional copyright principles focusing on music). For example, musical scores beat out musical recordings.

\(^{117}\) See \textit{209 U.S.} 1, 18 (1908). Copyrighted songs reproduced on player piano rolls were not protected under the copyright law because the copyright statute did not list them as a form of copy. \textit{Id.} The 1976 Copyright Act included language to allow courts to find copyright in new forms of copies that had not existed at the time the statute was passed. See \textit{17 U.S.C. §102(a)} (2008) (“Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

\(^{118}\) The 1909 Copyright Act had just been enacted when the Supreme Court decided the case.

\(^{119}\) \textit{White-Smith}, 209 U.S. at 18 (“As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.”). Justice Holmes would depart from this line of reasoning in \textit{Kalem Co. v. Harper Brothers}, 222 U.S. 55 (1911). Although he disagreed with the Court’s logic in \textit{White-Smith}, he declined to dissent. \textit{Id.} at 20. (“[A]nything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose.”). His concurring opinion in \textit{White-Smith} reveals his property oriented analysis of copyright.

\(^{120}\) Williams \& Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), \textit{aff’d by an equally divided Court}, 420 U.S. 376 (1975).

\(^{121}\) 420 U.S. 376 (1975).


\(^{123}\) 17 U.S.C. §102 (2006). This would presumably include computer programs. Nevertheless, the 1976 Act was quickly amended to specifically include computer programs. \textit{See supra} note 122.
with the inclusive language, the 1976 Act was amended to specifically list more works within a few years of becoming effective in 1978.\textsuperscript{124}

The 1976 Act lists types of works, presumably by way of illustration. It lists "literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works."\textsuperscript{125} The statute provides that the list is inclusive.\textsuperscript{126} An inclusive list would ensure that courts will recognize copyright in new technology not specifically listed in the statutory list.\textsuperscript{127} Two other types of works listed as warranting protection in the 1976 Act are compilations and derivative works.\textsuperscript{128} The protection for them is also an expansion of types of interests that are protected, which is appropriately discussed in the next section.\textsuperscript{129}

Copyright development is tied to inventions, such as the phonograph, camera, player piano, copying machine, and videocassette recorder, which inspired statutory regulations and judicial interpretations.\textsuperscript{130} The types of works that could be copied increased as sounds could be stored on vinyl disks, pictures on photograph paper, and videos on tape. New machines enabled copying: cameras, VCRs, photocopiers, and CD burners. In response, the types of works protected by copyright also increased.

In the last twenty years, copying technology has moved from being stored on tangible products, such as vinyl, paper, and tape, to being stored digitally, first on

\textsuperscript{124} See, e.g., Pub. L. 105-304, § 502, 112 Stat. 2905 (1998), codified at 17 U.S.C. § 1301(a)(2). See generally H.R. REP. NO. 94-1476 (1976) ("The history of copyright law has been one of gradual expansion in the types of works accorded protection . . . ."). Boat hulls were added to Title 17 as part of the Digital Millennium Copyright Act. The legislation is in response to the Supreme Court decision in Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 168 (1989). By offering patent-like protection for ideas deemed unprotected under the present federal scheme, the Florida statute conflicts with the "strong federal policy favoring free competition in ideas which do not merit patent protection." Id. The Court held that a state law protecting boat hull designs from copying was preempted by the federal patent law, so if the boat hull design was not patentable, it was able to be copied. Id.


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, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

\textsuperscript{126} Id.

\textsuperscript{127} See H.R. REP. NO. 94-1476 (1976) ("This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be . . . .")

\textsuperscript{128} 17 U.S.C. § 103(a) (2006) ("The subject matter of copyright as specified by section 102 includes compilations and derivative works.").

\textsuperscript{129} See infra Part III.A.3.

\textsuperscript{130} See, e.g., Copyright Act 1709 (Statute of Anne), 8 Ann., c. 19 (Eng.). The Statute of Anne was created to regulate copying and distributing copies of books through use of the printing press. Id.
vinyl disks, then on computer memories, then on Internet web sites.\textsuperscript{131} Technological innovation has substantially increased the ease of communicating digitally copied information.\textsuperscript{132} While new technology has expanded copyright throughout history,\textsuperscript{133} this newest technology is a somewhat different breed in two aspects. First, digital copying occurs at rates far beyond the ability of any copying technology thus far. Second, the technology is intangible, so the requirement of being fixed in a tangible medium must be reinterpreted.\textsuperscript{134}

Congress passed the Digital Millennium Copyright Act (DMCA) to regulate copyright on the Internet.\textsuperscript{135} The DMCA provides a safe harbor for Internet Service Providers (ISPs) that store and transmit copyrighted data.\textsuperscript{136}

### 3. Limitations of Copyright Protection

Copyright is an exclusive right to make and market copies of protected works for the time specified.\textsuperscript{137} Issues about other uses of copyrighted works constantly arise.\textsuperscript{138} The 1976 Act clarified the parameters of protection. It gave the copyright owner exclusive rights to make copies, make derivative works, distribute copies by sale or lease, perform the work publicly, and digitally transmit the works.\textsuperscript{139} The rights are not absolute, but are subject to limitations listed in the Act.\textsuperscript{140}

\begin{itemize}
  \item \textsuperscript{132} \textit{FRIEDMAN, supra} note 6 (recalling the author's discovery that India uses advanced technology to service the U.S. and to communicate as an advanced technological nation).
  \item \textsuperscript{133} See Copyright Timeline, \textit{supra} note 5. The 1790 Act protected maps, charts, and books. The 1909 Act protected all works of authorship, including music. The 1976 Act protected works of authorship in technologies now known and later developed and unpublished works. \textit{Id.}
  \item \textsuperscript{134} 17 U.S.C. § 102 (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, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). The Internet is a medium from which works of authorship may be "perceived, reproduced, or otherwise communicated," but the medium lacks tangibility. \textit{Id.}
  \item \textsuperscript{135} Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The Act had multiple purposes: (1) to implement the WIPO treaties, (2) to limit liability of ISPs, (3) to permit computer copying when done as part of a repair work, (4) to provide miscellaneous provisions on ephemeral recordings, and (5) to protect boat hull designs. \textit{See THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, U.S. COPYRIGHT OFFICE SUMMARY (1998), available at http://www.copyright.gov/legislation/dmca.pdf.}
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} See U.S. CONST. art. I, § 8, cl. 8.
  \item \textsuperscript{138} \textit{See generally PATRY, FAIR USE PRIVILEGE, supra} note 64 (providing cases on abridgements, de minimis copying, fair use, substantial similarity, and more).
  \item \textsuperscript{139} 17 U.S.C. § 106 (2006). Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
    \begin{enumerate}
      \item to reproduce the copyrighted work in copies or phonorecords;
      \item to prepare derivative works based upon the copyrighted work;
      \item to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
      \item in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
      \item in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial,
The limitations on the exclusive rights of the copyright holder include fair use, first sale doctrine, library photocopying, computer programs, private performances, and some digital transmissions. They are affirmative defenses that may be raised in an infringement suit. The limitations on the exclusive rights set forth in section 102's broad language of copyright infringement require judicial interpretation to determine whether the infringing act is permitted under one of the exclusions. The person who wishes to make use of the copyrighted work may refrain from using the work or may use the work and wait to be sued. If sued, the person will then see if the court finds that his or her use falls within the statutorily permitted fair use or any of the other limitations on the exclusive copyright. Because of the expense of defending a lawsuit, many people who would make productive and creative uses of a copyrighted work that may indeed be fair will not do so.

However, the 1976 Act's derivative works protection is problematic. Some commentators question the breadth of its express protection. The current

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graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id. The legislation might be increasing the protection through the list of exclusive rights. In addition, judicial interpretation of the limitations, above identified as sections 107 through 122, makes copyright broader and more protective. An example from earlier case law that is rarely considered any longer is from a Judge Learned Hand decision, Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930) (holding that the idea/expression dichotomy in dramatic works permits copying themes), where a movie and a play were quite similar. Judge Hand conceded that they were similar and that the movie probably was influenced by the play. But he found no infringement because the copying that was done was of what he deemed to be public domain—scenes a faire—ideas and not expression. Now recall that Mickey Mouse derives from Steamboat Willie, which was a parody of Buster Keaton's character Steamboat Bill. MARION MEADE, BUSTER KEATON: CUT TO THE CHASE 182 (1995).

140. 17 U.S.C. §§ 107-22 (2006) (Other sections either provide additional rights or that provide additional exceptions to the exclusive rights, but they are not discussed here).
141. Id. § 107.
142. Id. § 109.
143. Id. § 108.
144. Id. § 117.
145. Id. § 110. The sections of greater interest are sections 107, 108, 109, and 117. Additionally, amendments to the Act, like the DMCA, have created more rights and limitations.
146. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), codified in part at 17 U.S.C. § 512 (2006). The Act provides a safe harbor for ISPs who are not inducing infringement. The courts are directed to consider various factors in deciding whether the safe harbor protects the ISP or not. Id. § 512 (a) (1)-(5).
147. See PATRY, FAIR USE PRIVILEGE, supra note 64, at 477-79 (concluding that fair use is an affirmative defense).
148. Id.
150. See LESSIG, FREE CULTURE, supra note 6, at 25-27. Lessig describes how Japanese manga or comics follow doujinshi tradition of permitting others to copy characters and stories small changes are made. This is illegal under U.S. and Japanese copyright law to the extent it is substantially similar and a derivative work. But it is permitted and creativity thrives through it. There is also the free software movement, where a programmer puts her code on the Internet and others work on it and make more programs or improve the one submitted. See Free Software Foundation, About, http://www.fsf.org/about/ (last visited Mar. 27, 2010) (on file with the McGeorge Law Review).
judicial interpretation of derivative work protection does not reflect the idea that one builds on previous works to make a new work. Congress should clarify this definition to help both the copyright-owner and the user of the copyrighted work. Mixing music and making visual collages are creative activities that are difficult to perform without violating copyright under the current system. The resulting works are generally considered derivative works and, as such, are infringing uses of the copyrighted works used. Further, since registration is no longer required, obtaining permission to a particular work can be impossible.

B. Judicial Historical Expansion: Secondary Liability

Courts participate in the expansion of copyright through statutory interpretation and the application of common law doctrines. Courts have expanded copyright, and correspondingly decreased the public domain, through narrow interpretations of the statutory limitations on the copyright owner’s exclusive rights. Unfortunately, courts are applying secondary liability doctrines, derived from the common law, to hold liable those who did not actually copy the protected work. While it is common for courts to apply common law where statutes fail to provide resolution, this practice is arguably not appropriate in the field of copyright law.

1. Preemption

Both common law and statutory copyright were recognized in the U.S. at the time of the first copyright statute. Common law copyright, recognized by some courts, derived from natural law concepts and was therefore perpetual. When common law copyright was accepted, it was an easy matter for the courts to apply common law when the federal copyright statutes failed to provide adequate instruction. It is questionable how much should still be permitted since the 1976 Act preempted common law copyright. Nevertheless, in Sony Corp. v. Ponte, supra note 6 (arguing that digital sampling is more of a derivative works problem and that music is more accessible online due to peer-to-peer file sharing sites). If the doujinshi tradition were recognized in U.S. copyright law, the building of new musical compositions by combining parts of others would be permitted as a creative or productive use.

151. See Ponte, supra note 6 (arguing that digital sampling is more of a derivative works problem and that music is more accessible online due to peer-to-peer file sharing sites). If the doujinshi tradition were recognized in U.S. copyright law, the building of new musical compositions by combining parts of others would be permitted as a creative or productive use.

152. 17 U.S.C. § 103 (2006) ("The subject matter of copyright . . . includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."); see also H.R. REP. NO. 94-1476 (1976) (describing the legislative intent of the statute). "A 'derivative work,' on the other hand, requires a process of recasting, transforming, or adapting 'one or more preexisting works'; the 'preexisting work' must come within the general subject matter of copyright set forth in section 102 [of Title 17], regardless of whether it is or was ever copyrighted." Id. The report acknowledges that some copying of the protected work may be fair use, but the fair use defense is prohibitively expensive for an artist to test in court. Id.


154. See supra note 53 and accompanying text.

155. Id.

Universal City Studios, the Supreme Court embraced the use of two secondary liability doctrines that had developed prior to the 1976 Act's express preemption of common law copyright. Section 301 of the 1976 Act states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—(1) subject matter that does not come within the subject matter of copyright . . . including works of authorship not fixed in any tangible medium of expression; or . . . (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright . . . .

The rights within the general scope of copyright are copying, publicly performing, and publicly displaying. Secondary liability doctrines includes both contributory infringement and vicarious liability. The 1976 Act says nothing about whether the copyright-holder can hold a non-infringer liable for someone else's infringing activity. Is holding a party other than the actual infringer liable for copyright infringement preempted when the statute does not make such activity an infringement? Or is application of common law secondary liability acceptable because the 1976 Act does not explicitly cover that type of infringement? Is enforcement of secondary liability an exclusive right within the general scope of copyright? It is not clear under the 1976 Act whether these applications constitute common law copyright. Courts have continued to apply

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Report agrees that preemption is complete, it leaves the possibility of the federal Congress supplementing the copyright statute. *Id.* "The preemptive effect of section 301 . . . is limited to State laws . . . there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause . . . ." *Id.* The House Report does not consider the work of courts in interpreting the federal statutes—the act of judicial interpretation—which at times invokes common law doctrines to resolve legal issues. *Id.* This might be how the courts justify application of secondary liability doctrines, which derive from common law principles in copyright law.

158. See *generally* Oswald, *supra* note 115 (recognizing that secondary liability might be preempted).
160. *Id.* § 106.
162. *But see* 17 U.S.C. § 512 (2006). Section 512 purports to limit liability of ISPs that comply with the requirements such as take downs and notices. ISPs are secondarily liable for their users' actual copyright infringement. So by implication, Congress recognizes and adopts secondary liability doctrines as part of copyright law.
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secondary liability doctrines in copyright without questioning whether the rights might be preempted by statute.163

The problem arises for courts whenever a new technology that enables copying is introduced. Considering the development of copyright law, holding the manufacturer of the new technology liable for third-person copying is a simple next step. Consider five technologies from the past that enabled copying and the judicial and legislative responses. First, recall that copyright started as a result of a new technology that enabled copying, the printing press. Second, the Supreme Court decided that the maker of player piano rolls that enabled some pianos to play copyrighted songs was not liable for copyright infringement to the song owner, because the technology was not mentioned in the copyright act as a type of copying that is prohibited.164 Third, a divided Court upheld educational use of copying machines as a type of fair use.165 Fourth, Congress amended the 1976 Copyright Act to recognize copyright in computer programs, even though they lack fixation in a tangible medium of expression at times.166 Fifth, the Supreme Court decided that the maker of video tape recording machines was not liable for copyright infringement to the owners of the movies and programs that owners of the machines were copying.167

In the above five situations, the manufacturer of the technology was not liable unless it also copied. Courts are continually faced with having to decide whether to extend copyright beyond what the statute says. The trend now is to expand secondary liability, holding more remote parties liable as if they actually copied themselves.168

2. Foundation Cases on Secondary Liability and Sony

Music is universal to human culture and is a constantly evolving form of language and expression. As such, judicial concepts of music as property have profoundly influenced secondary liability doctrines in copyright,169 and the

163. See, e.g., Grokster, 545 U.S. 913; Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), reversed 545 U.S. 913 (2005); In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003); A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
165. 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).
168. See supra notes 160-163 and accompanying text.
majority of secondary liability cases involve music and video pictures. Following history, one can trace the evolution of secondary liability in copyright through music cases and two Supreme Court opinions that involve videos.

Courts have responded to internet dissemination of copyrighted works by expanding judicial doctrines beyond congressional provisions to prohibit online copying activity. The recent digital file sharing cases are actually the progeny of music and movie infringement cases, stemming back to principles first established in White-Smith. In White-Smith, the Court followed an English decision that considered music rolls and held the maker was not an infringer. The Court emphatically rejected applying common law doctrines to resolve the copyright law problem. The copyright-holder argued, “One who, like the appellee, sells the musical composition is a contributory infringer ....” Throughout copyright history, plaintiffs have argued that copyright law should protect rights recognized in patent law and contributory infringement derived from patent law.


172. Congress has created broad copyright protection to prohibit infringement over the Internet and appears to also support the courts in providing broad secondary liability protection in the absence of clear legislation. For example, Congress enacted a statute to protect Internet Service Providers (ISPs) from infringement liability for infringing works that are placed in the website by users. The ISPs would be liable for the users' infringement under a secondary liability theory, since the ISP did not do the actual copying or posting. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). Courts impose secondary liability for copyright infringement without statutory dictation, although Congress implicitly recognized secondary liability in the DMCA when it set parameters for ISPs, which enable users to share copyrighted works, to be statutorily liable. Id.

173. See supra note 170 and accompanying text (discussing early cases involving contributory infringement before digitization and the Internet).


175. Id. at 8-9.

Mr. Charles S. Burton and Mr. John J. O'Connell for appellee: Copyright is strictly statutory in the United States. If a common law right ever existed it was taken away by the statute of Anne, and that statute and those amendatory of it are now in England the only source of an author's right. There never existed any common law right of copyright in the United States. Copyright in this country is the creature of statute pure and simple.

Id.


177. Copyright doctrines, particularly judicially created ones, are at times adopted from patent law. In both of its secondary liability cases since passage of the 1976 Act, the Supreme Court has incorporated patent doctrines into copyright law. In Sony, the Court looked at patent law to recognize contributory infringement. Sony Corp. v. Universal Studios, 464 U.S. 417, 434-35 (1984) (“The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the Patent Act expressly brands anyone who 'actively induces infringement of a patent' as an infringer [and used the staple article of commerce doctrine].”). In Grokster, the Court adopted patent's inducement theory of liability. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 937 (2005). The Court said, “For the same reasons that Sony took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its
Three years later, the Supreme Court applied common law principles to impose secondary liability in *Kalem Co. v. Harper Brothers*, a case that involved enabling others to publicly display a copyrighted movie. Kalem sold copies of an unauthorized movie it had made from the story of Ben Hur to jobbers who showed the film in movie theaters. Kalem argued that it was the jobbers who publicly displayed the infringing work and that Kalem had only provided the ability to infringe. Justice Holmes resolved the controversy by applying what he called "principles recognized in every part of the law." While
the term “contributory infringement” is absent from Justice Holmes’ opinion, it had been used in the lower court opinion which the Supreme Court affirmed. The term “principles recognized in every part of the law” probably refers to common law. The Court has relied on *Kalem* in its two recent contributory infringement cases.

The *Kalem* Court justified secondary liability, stating, “In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer.” The Supreme Court, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* later referenced language from *Kalem* to justify broader secondary liability for inducing others to directly infringe the copyright. The Court used Justice Holmes’ logic as the basis for today’s readily imposed contributory infringement, or secondary liability.

*Sony Corp. of America v. Universal Studios* was the Supreme Court’s next big case on secondary liability after *Kalem*. The Court held, in 1984, that while...
contributory infringement may exist, Sony was not liable as a contributory infringer for copying done by purchasers of Sony’s video copying machine, the Betamax. The Court traced the development of secondary liability from Kalem and found a good summary of the doctrines in a 1972 Second Circuit case, Gershwin Publishing Corp. v. Columbia Artist’s Management, Inc. In Gershwin, the court recognized the dual strain of secondary liability doctrine: contributory infringement and vicarious liability for copyright infringement.

The Sony Court noted a distinction from Gershwin, which establishes two lines of liability: the dance hall cases gave rise to liability because the defendant hired the infringer to entertain by use of infringing music, while the landlord-tenant cases did not give rise to liability because the landlord did not hire the infringer to infringe for the entertainment of third party customers. Thus, application of the doctrines actually derives from Gershwin rather than from Sony.

The Kalem decision and its progeny establish that contributory infringement was broadly accepted as a cause of action in copyright law. If that is so, then Congress was free to codify it in the 1976 Act, as it did with the fair use doctrine, the first sale doctrine, the derivative works right, and others in the new copyright.

188. Id. at 456. Compare the activity to that in Kalem, 222 U.S. 55. Sony advertised the VCR for copying. Sony sold the machine for the purpose of copying. Sony induced users to copy when it taught its sales people to show the customers how to record television shows. Yet Sony was not held liable as a contributory infringer, since the machine was also able to be used for noninfringing purposes. That is the distinction between Sony and Kalem. That distinction has been abandoned in cases involving peer-to-peer file sharing. The peer-to-peer file sharing sites are capable of noninfringing uses.

189. 443 F.2d 1159 (2d Cir. 1971).

190. Most of the scholarship in the aftermath of Sony concentrated on its interpretation and application of the fair use doctrine, which had been codified in 17 U.S.C. § 106. The Sony Court reviewed prior cases on secondary liability. See Sony, 464 U.S. at 438 n.18-19. In the dance hall cases the courts found contributory infringement when the dance hall or race track hired the infringer to entertain by use of infringing music. Those cases were compared to the landlord-tenant cases where there was no liability, presumably due to less ability to control the direct infringer’s behavior because the landlord did not hire the infringer to infringe for the entertainment of third party customers. See id. at 428 n.18. The Court cited the so-called “dance hall” cases as Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc., 554 F.2d 1213 (1st Cir. 1977), KECA Music, Inc. v. Dingus McGee’s Co., 432 F. Supp. 72 (W.D. Miss. 1977), and Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929). The difference in the earlier cases involved inducing the infringement, or at least actually knowing that that was the purpose of the activity. In the landlord-tenant cases, the landlord merely rented space to an infringer, but the landlord did not hire the infringer to infringe for the entertainment of third-party customers. See id. at 428 n.18. The Court cited the so-called “dance hall” cases as Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc., 554 F.2d 1213 (1st Cir. 1977), KECA Music, Inc. v. Dingus McGee’s Co., 432 F. Supp. 72 (W.D. Miss. 1977), and Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929). The difference in the earlier cases involved inducing the infringement, or at least actually knowing that that was the purpose of the activity. In the landlord-tenant cases, the landlord merely rented space to an infringer, but the landlord did not hire the infringer to infringe for the entertainment of third-party customers. The dancehall cases used both contributory infringement and vicarious liability that is reflective of an employer-employee relationship. See Famous Music Corp., 554 F.2d 1213; KECA Music, 432 F. Supp. 72; Dreamland Ball Room, 36 F.2d 354. So the dancehall cases were more employer-employee relationship, and the Court cited the Second Circuit’s articulation of that distinction in Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963). In Shapiro a retail store owner commissioned the infringer to sell infringing music. The store owner was held liable. Then in Gershwin there was a twist on the roles. The direct infringer hired the contributory infringer to manage the concerts. The Second Circuit again found that was more like dancehall cases than landlord-tenant cases. Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2d Cir. 1971).

191. Sony, 464 U.S. at 437. The Court defined contributory infringement: “[T]he ‘contributory’ infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.” Id.

But Congress did not include secondary liability, neither contributory infringement nor vicarious liability, in the 1976 Act. While defendants often claim that the actual copying was fair use in contributory infringement cases, rarely in music sharing cases do the courts find that the infringers' sharing of music and videos is fair. It is referred to as piracy.

3. Modern Applications of Secondary Liability

The Ninth Circuit has expanded the secondary liability doctrines. First, in Fonovisa, Inc. v. Cherry Auction, Inc., an owner of a swap meet business that rented spaces to lesee sellers was held secondarily liable for its lessees' copyright infringement. Some of the lessees were selling bootleg music CDs. The Ninth Circuit found Cherry Auction vicariously liable because it exercised control over the leased spaces and it directly benefited financially, the two requirements of vicarious liability for copyright infringement. This is an expansion of the vicarious liability concept, first, because Cherry Auction's control was not over the infringing activity but only over the physical space that the infringing lessees used. It is an expansion, second, because the financial benefit was not through commissions paid to Cherry Auction by the lessees but from general admission and parking fees charged to customers who might buy at the swap meet. The holding expanded the requirement of direct financial benefit. The Ninth Circuit found Cherry Auction contributorily liable, because it had knowledge of the infringing activity and materially contributed to it. Before that time, the Second Circuit had held that landlords who received profit from renting space and did nothing more to share in or to control the actual infringer's activity would not be secondarily liable. Thus, Fonovisa also expanded contributory liability.

The Internet is the newest technology that enables copying. It differs from the previously mentioned technologies in that prior copying was done with tangible machines, whereas the Internet is not a tangible machine. It does, however, enable copying on the largest scale to date. Congress passed the DMCA to regulate the Internet and created a series of safe harbor provisions that delineated for ISPs how to avoid secondary liability for copyright infringement.

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193. See supra text accompanying notes 139-147.
194. The Seventh Circuit is even more liberal in its application of secondary liability to peer-to-peer file sharing. See In re Aimster Copyright Litigation, 334 F.3d 643, 649 (7th Cir. 2003) (criticizing the Ninth Circuit's decision in Napster for requiring actual knowledge of the music sharers' copying).
195. 76 F.3d 259 (9th Cir. 1996).
196. Id. at 264.
197. Id.
198. Id.
199. See, e.g., Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2d Cir. 1971). CAMI knew the songs that were to be performed, advertised them, and so materially contributed to the local musicians' actual infringement. The requirement of active participation and direct financial benefit were acknowledged in the case. Id.
committed by their users. Peer-to-peer file sharing is a new use of the Internet that was introduced after the DMCA and involves massive online copying activity. Courts impose secondary liability to hold the website creators liable for the copying and sharing done by Internet users.

In Religious Technology Center v. Netcom On-Line Communication Services, Inc., an ISP posted possibly infringing material on the site and did not remove the material when requested to do so. The court reasoned that if it were to impose liability, it must be through secondary liability doctrines. The district court refused to grant summary judgment on behalf of the ISP, holding that under proper facts the ISP could be contributorily and vicariously liable for copyright infringement, although it was not vicariously liable in this case. An ISP might be more similar to the landlord than to the owner of a dancehall. If so, this case is also an expansion of the secondary liability doctrines.

Subsequently, peer-to-peer file sharing became popular. The Ninth Circuit has decided two music file sharing cases, one of which Supreme Court reversed. In A&M Records, Inc. v. Napster, Inc., the Ninth Circuit found Napster both contributorily and vicariously liable for its users’ copyright infringement. Napster was the first peer-to-peer file sharing case. The Ninth Circuit cited Gershwin for its definitions of vicarious and contributory copyright infringements. The court relied on both Religious Technology and Fonovisa for its interpretation of the doctrines. Contributory infringement requires “knowledge of the infringing activity” and that the defendant “induces, causes or materially contributes to the infringing conduct of another.” Napster had knowledge of the illegal use, but it did not induce or advertise use of the website; it was passive, but the court imposed liability anyway. Vicarious infringement is where one has “the right and ability to supervise the infringing activity and a direct financial interest in such activities.” The Napster court found that the elements of

201. See generally In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
203. Id.
204. Id. at 1369.
205. Id. at 1377. The DMCA was enacted shortly after the case, which was cited with approval.
206. 239 F.3d 1004 (9th Cir. 2001).
207. 443 F.2d 1159 (2d Cir. 1971).
209. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).
210. Napster, 239 F.3d at 1011-22, 1028
211. Id. at 1162.
212. Id.
vicarious infringement were satisfied. Yet, Napster exercised no supervision over the activities of its users and merely acted as a conduit through which songs were shared. Also, it was a free service, so it clearly derived no financial benefit from the infringers’ sharing activities. Nonetheless, the Ninth Circuit extended the secondary liability doctrine to impose liability.

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,* the Ninth Circuit found the music file sharing providers not liable for contributory and vicarious copyright infringement. The defendants did not maintain an online server from which they could obtain knowledge of what the users were doing. The defendants had no site from which to contribute to the users infringing activity. The Ninth Circuit “decline[d] to expand contributory copyright liability.” The defendant had no ability to supervise the infringers, so there was no vicarious infringement either. In essence, the Ninth Circuit acknowledged that copyright infringement in music was occurring on a large scale, but it declined to continue to expand the secondary liability doctrines further than it had already done in *Fonovisa, Religious Technology,* and *Napster.*

The Supreme Court vacated and remanded the Ninth Circuit’s judgment in *Grokster.* The Court adopted patent law’s inducement cause of action into secondary liability for copyright infringement causes of action. It suggested that courts examine other evidence, such as the defendant’s business plan, to determine intent to induce infringement. The Court departed from its *Sony* standard that if the technology was capable of noninfringing use, then the manufacturer of the machine should not be held contributorily or vicariously liable for the users’ direct infringements. Peer-to-peer file sharing sites are capable of noninfringing uses and may have become valuable communication technologies. The holding indicates that the law will protect owners’ rights to exclude even though to do so may unreasonably deter the progress of science and

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213. Id. at 1022, 1024.
214. But see *Napster,* 239 F.3d at 1023 (possible future revenue satisfies direct financial benefit requirement for vicarious liability for copyright infringement). The *Napster* holding was criticized in a Seventh Circuit case authored by Richard Posner. See In re *Aimster Copyright Litigation,* 334 F.3d 643 (7th Cir. 2003). The Seventh Circuit found a similar music sharing service liable for both contributory and vicarious copyright infringement. The Supreme Court in *Grokster* followed the Seventh Circuit logic more closely. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,* Ltd., 545 U.S. 913 (2005).
215. 380 F.3d 1154 (9th Cir. 2004), vacated and remanded, 545 U.S. 913 (2005).
216. 380 F.3d at 1160. The court recited three elements necessary for contributory infringement: (1) direct infringement, (2) knowledge of the infringement, and (3) material contribution to the infringement. Id.
217. Id. at 1163.
218. Id. at 1163-64.
219. Id. at 1164.
220. Id. at 1166.
222. Id. at 936. The Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” Id. at 919.
223. See *Grokster,* 545 U.S. at 934-35.
the useful arts by prohibiting even noninfringing uses of peer-to-peer file sharing sites.

IV. LAW AND ECONOMICS

Law is a social science related to religion, philosophy, sociology, anthropology, and economics. Legal scholars, judges, and legislators consider economics when analyzing law. The premise that law should reflect current economic science is assumed to be true herein. The field of economics has begun to consider the social value of some human behaviors that were not previously considered in classic economic theory. This section briefly summarizes traditional economic theory as it relates to copyright, then discusses newer economic thinking that supplements and changes traditional economic justification for copyright.

A. History of Economics: Property, Selfishness, and Sharing

Copyright’s economic justification is based on the legal concept of property developed centuries ago. The Greeks embraced, and Aristotle explored, the concept of private property. Property is associated with ownership, often analogized to a bundle of rights. John Locke relied on concepts of private property and the commons to fashion his economic theories. Adam Smith also recognized private property as intrinsic to social order.

The right to exclude others is the hallmark of property ownership. Intellectual property law reflects traditional property concepts, especially in its recognition of the copyright owner’s right to exclude others from access to original works of authorship. But unlike a landowner who may want to physically exclude others from access to his or her property, a copyright owner wants to share his or her works of authorship with others. The copyright owner wants to produce social wealth by sharing and to receive remuneration and/or recognition for her sharing.

224. There is a school of jurisprudence called law and economics. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2003) (advocating a strong private property protection for copyright and finds peer-to-peer sites secondarily liable for their users’ infringements). See In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).


227. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (William Benton 1952) (1776) (arguing that a free market economy best promotes social progress, relying on individuals' self-interested activities).

228. See Reed & Hipp, supra note 18, at 104 (“Property, the right of boundaries and exclusion, finds itself championed again today as a quintessential bulwark of individual American freedoms.”).

229. The Constitution gives motivation to create the exclusive right to one’s own works, however it omits the next necessary step. Once there is a protectable right to one’s creative work, the motive to get
If one can show that protecting business' exclusive rights to the copyrighted work is beneficial to the progress of science and the useful arts, then Congress and the courts' adherence to the private property right to exclude others is justified. However, knowledge, aesthetics, and entertainment are communications based and are meant to be shared, not exclusive to the owner. The private property right to exclude is limited in the Constitution and given only to the extent that in so doing progress is promoted. Sharing property is implicit in the purpose of the protection. "[P]rivate property rights protect individual liberty."  

B. Magic, Law, and Marketing

The following story reflects a purpose for intellectual property protection. A man planted seeds in the ground where he had previously buried uneaten fish remains. The crops planted in that particular spot grew much better than the crops in the rest of the garden. The man noticed the connection between fish remains and better crops. He capitalized on this knowledge by marketing the technology to his group members, not by simply telling them, but through a profit/prestige producing mechanism—magic. He created and marketed a fertility ritual which involved burying fish heads in the soil where planting would occur in the spring. The successful fertility ritual rewarded the discoverer with profit/prestige and the group with prosperity. Today, magic has been replaced by the 1976 Copyright Act and judicial interpretation of copyright.

Both the discoverer and the society prosper from use of the knowledge—the intellectual property. If the farmer with the fish fertilizer technology had kept his discovery secret, neither he nor his group would have benefited. If he had just told the group about it, all may have benefited, but he would not have obtained the profit/prestige that would motivate him to continue his technological explorations.

prestige/profit from sharing is strong. While U.S. law tends to emphasize monetary incentive, it also recognizes the importance of protecting the integrity of works of art, a sort of prestige protection. Benjamin G. Damstaedt, Limiting Locke: A Natural Law Justification for the Fair Use Doctrine, 112 YALE L. J. 1179, 1179-80 (2003) (describing the long history of the judiciary "using natural law justifications in intellectual property cases"). "A fundamental difference between tangible goods and intangible goods, however, is that intangible goods are nonrivalrous, which means that they can be used by an infinite number of people in an infinite number of ways without harming the use value of any other person, including the initial producer." Id. at 1181-82.


231. See Armen A. Alchian, Property Rights, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS: PROPERTY RIGHTS 422 (David R. Henderson ed., 2008), available at http://www.econlib.org/library/Enc/PropertyRights.html. At the end of the article there is Property Rights for “Sesame Street” by Janet Beales Kaidantzis. It is about getting children to share and like themselves by awarding private property rights over toys. The child who is secure in her ownership of her toy is more likely to share, because she wants to be nice and she is sure the law will protect her right to refuse to share at any time. Does this work for intellectual property? The law protects the creator’s private property, giving assurance that she has the right to the profit/prestige that she can obtain by “being nice” and sharing her creative output. The law is doing this poorly right now. The child/creator is not sure of her rights under the current system. The story has been used in other contexts. See BRYCE WILKINSON, A PRIMER ON PROPERTY RIGHTS, TAKINGS AND COMPENSATION 11 (2008) (using an illustration of property rights for Sesame Street).
The institution of law and its protection of intellectual property is modern society's replacement for primitive society's institution of magic to protect intellectual property. The right to seek profit/prestige is the protection copyright bestows. Government has institutionalized "the magic." Copyright promotes the progress of science and the arts by giving the discoverer the power to obtain profit/prestige through the exclusive right to the copyrighted work. If others want a copy of the protected work, they have to pay (the profit). The owner of the copyrighted work develops a reputation (the prestige) through widespread use of the work. The protection is increasingly institutionalized, whereas the discovery or creation remains, in most instances, at an individual level. Congress responds to institutions' lobbying and gives more protection, but it does not benefit the individual creator. Thus, creative individuals seek new marketing techniques to satisfy their drive for profit/prestige.  

C. Modern Economics: The Selfish Gene and Sharing

Consider a beehive as a model of community wealth production for economic purposes. People share when it helps the hive, sometimes even though it may cost some personal wealth. People engage in wealth-producing activities that do not directly increase their personal wealth, especially not to the exclusion of others. Economic philosophy, based on private property ownership and incentive to produce for profit/prestige, does not recognize this behavior.  

232. See Bohannan, supra note 7, at 567 (describing how courts can rebalance the imbalance created by Congressional action).

233. One attempt to put control back in the hands of the creators is the Creative Commons registration system, developed by Lawrence Lessig and colleagues. A person who has created a work of authorship, while automatically protected by copyright, may choose to eschew some of the copyright rights by opting for a Creative Commons designation. See Creative Commons, About, http://creativecommons.org/about (last visited Mar. 28, 2010) (on file with the McGeorge Law Review). Choose from four designations and combinations thereof. Mark the visual manifestation of the work with CC designation instead of the standard ©. Choose BY to have users of your work give you credit for the original work. Choose SA to have users only use your work if they also let their work be used the same way. Choose NC to allow only noncommercial uses of your work by others. Choose ND to prohibit others from using your work to make derivative works. Id. Most people who use Creative Commons want others to use their works to make derivative works, so the ND designation is less popular. A few scholars have explored the enforceability of Creative Commons licensing. See generally Severine Dusollier, The Master's Tools v. The Master's House: Creative Commons v. Copyright, 29 COLUM. J.L. & ARTS 271 (2006); Zachary Katz, Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing, 46 IDEA 391 (2006); Niva Elkin-Koren, What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons, 74 FORDHAM L. REV. 375 (2005); Adrienne K. Goss, Note, Codifying a Commons: Copyright, Copyleft, and the Creative Commons of Private Ordering in Facilitating a Creative Commons, 82 CHI.-KENT L. REV. 963 (2007).

234. See BERND HEINRICH, BUMBLEBEE ECONOMICS (1979). A Google search of bees and economics revealed beehive behavior applications to human society by scientists, economists, and school teachers. There is a role play exercise for first graders to learn economics that involves learning about bees and exploring the community and the roles people take to produce wealth for the community just as bees do for the hive. Dawkins, the biologist, in The Selfish Gene talked about the genetic predisposition of bees to be communal and to engage in self-destructive behavior for the good of the hive, such as stinging and dying. DAWKINS, supra note 38, at 172 ("kamikaze behavior and other forms of altruism").

is possible that the file-sharing craze is a human drive to share not for individual wealth, not for attainment of profit/prestige, but to share in aesthetic enjoyment of music. The drive to share music has resulted in productive use of technology, the file sharing sites originally created by college students.\(^2\)

Biologist Richard Dawkins explored altruistic behavior among community animals.\(^2\) He found that animals share when it is beneficial to do so. They share within their own genetic groups, because that guarantees that the “selfish” genes will continue to exist.\(^2\) Animals also share outside their kin groups, which does not guarantee survival of the source genetic group. Charles Darwin called sharing outside one’s kin group “reciprocal altruism,” and Dawkins developed from it the concept of delayed reciprocal altruism, which is seen in human populations.\(^2\) The “selfish” gene is preserved by the individual returning the favor, perhaps at a time when help is desperately needed.\(^2\) It appears that evolution has favored sharing in animal communities under appropriate circumstances.

Dawkins described an altruistic social scenario.\(^2\) He labeled three types: the Cheat, the Grudger, and the Sucker.\(^2\) The Cheat takes but does not give or share. The Grudger gives or shares, but not to the Cheat if he has previously been taken advantage of by a Cheat.\(^2\) The Grudger will also remember those who gave to or shared with him and continue to give to or share with them in the future.\(^2\) The Sucker will give to or share with everyone.\(^2\) Dawkins noted from these observations that evolution will result in survival of the Sucker and the Grudger, but not the Cheat. Dawkins believed that this evolutionarily preferred altruistic behavior is present in human populations.\(^2\) The inference from Dawkins’ work, regarding the phenomena of intellectual property sharing when the law does not require one to do so, is because humans are evolutionarily prone to share in order to benefit the group, and thereby to benefit one’s own selfish gene.

In terms of copyright, this explains the reason artists are willing to share their works even though the law permits them to deny access to the works. Dawkins’ theory of delayed reciprocal altruism can explain the decision to share. For example, when an artist shares his music without copyright protection, he is doing an immediate financial disservice to himself, as is the Sucker in Dawkins’ observations and theory. But the sharing behavior will increase the number of consumers who have heard of the artist, and they will attend the artist’s paid


\(^{237}\) *Dawkins*, supra note 38, at 184-88.

\(^{238}\) *Id.*

\(^{239}\) *Id.* at 183.

\(^{240}\) *Id.* at 186.

\(^{241}\) *Id.* at 184-86.

\(^{242}\) *Id.* at 184-85.

\(^{243}\) *Id.*

\(^{244}\) *Id.* at 185.

\(^{245}\) *Id.* at 184.

\(^{246}\) *Id.* at 187-88.
performances. The benefit in the future is worth the economic costs in terms of current return. This is an example of delayed reciprocal altruism.

1. Sharing Phenomena: Benkler, Friedman, Lessig

Yochai Benkler, a law professor at Harvard, has described the sharing activity and has proposed adoption of an economic theory that embraces this human behavior.\(^{247}\) The goal of the behavior is to produce wealth for the group as well as the individual. In *Sharing Nicely*, he observed two practices where wealth is produced through sharing: carpooling and donating computing power for the search for extraterrestrial intelligence (SETI).\(^{248}\)

In his book, *The Wealth of Networks*, Benkler wrote about the “economics of information production.”\(^{249}\) It costs nothing to produce information, even though the paper, CD, or vinyl disc on which it is embodied has a small cost.\(^{250}\) He showed that in fact information production comes less from the exclusive right as from the incentive based system that is the foundation of the copyright and patent systems.\(^{251}\) For instance, news stories are works of authorship and are protected by copyright. But the newspaper business does not rely on copyright to help it make a profit; newspaper revenue is primarily from advertising.\(^{252}\) He examined how information has been created and communicated historically, as technology has developed for information delivery, using music distribution, clearly a controversial subject currently.\(^{253}\) Before recording devices were invented, music enjoyment and innovation “was something people did in the physical presence of each other.”\(^{254}\) It involved individuals as producers and innovators. The introduction of the phonograph resulted in a change in how music was enjoyed and produced. A recording industry developed which embraced copyright’s incentive through exclusive rights to market economic model.\(^{255}\) Digitization and the Internet have made music production less reliant on “commercial, concentrated business models,” as is exemplified in the entertainment industry.\(^{256}\) The cultural shift is returning to individual producers and innovators.\(^{257}\)

With the aid of the Internet, research is cheaper. With the aid of digitization, making copies and transporting them to consumers is cheaper.\(^{258}\) Obtaining music
for listening is cheaper. The newer social practices are not market oriented. "We now have the basic elements of a clash between incumbent institutions and emerging social practice."\(^{259}\) Creation and distribution systems that are less market oriented and involve more sharing of information are increasing. Benkler concluded the chapter with advice on how to deal with the "new modes of production,"\(^{260}\) generally suggesting the law adjust to address the social change.\(^{261}\)

Thomas Friedman, in his book, *The World Is Flat,*\(^{262}\) tracked the social impact of the Internet on business, the global economy, and democracy. Information is far less proprietary than it was in the industrial period.\(^{263}\) Sharing of information has increased as the Internet has made individual creativity more easily marketed.\(^{264}\) The worldwide availability of communication media empowers the individual to institute social change. The free software movement is a reflection of a changed value system involving sharing information.\(^{265}\)

Information is marketed by individuals to individuals without the formalities that institutional market models impose.\(^{266}\) The economic presumption of value in exclusivity has been turned on its head and now value is in accessibility, or inclusivity, if you will.

The networked information economy improves the practical capacities of individuals along three dimensions: (1) it improves their capacity to do more for and by themselves; (2) it enhances their capacity to do more in loose commonality with others, without being constrained to organize their relationship through a price system or in traditional hierarchical models of social and economic organization; and (3) it improves the capacity of individuals to do more in formal organizations that operate outside the market sphere.\(^{267}\)

These human behaviors, enhanced by the Internet, are profoundly changing society. The Internet has democratized the world.\(^{268}\) Benkler sees this social

\(^{259}\) *Id.* at 56.

\(^{260}\) *Id.* at 58.

\(^{261}\) *Id.* ("We must understand these new modes of production. We must learn to evaluate them and compare their advantages and disadvantages to those of the industrial information producers. And then we must adjust our institutional environment to make way for the new social practices made possible by the networked environment.").

\(^{262}\) *Friedman,* supra note 6.

\(^{263}\) *Benkler,* *Wealth of Networks,* supra note 6, at ch. 1 (noting that proprietary concerns have traditionally been less important in intellectual property than in goods production industries).

\(^{264}\) *Id.*

\(^{265}\) *Id.*

\(^{266}\) *Id.* ("The result is that a good deal more that human beings value can now be done by individuals, who interact with each other socially, as human beings and as social beings, rather than as market actors through the price system.").

\(^{267}\) *Id.* New marketing strategies are responding to this social change.

\(^{268}\) *Id.* "The networked information economy also allows for the emergence of a more critical and self-reflective culture. In the past decade, a number of legal scholars—Niva Elkin Koren, Terry Fisher, Larry Lessig, and Jack Balkin—have begun to examine how the Internet democratizes culture." *Id.* This is what Benkler calls nonmarket behavior. Two systems analysts could revamp copyright law based on individual behavior. See

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change as a sort of revolution with tension from the old guard, and he illustrates the premise with an examination of copyright tension.\textsuperscript{269}

Lessig identified the "copyright wars,"\textsuperscript{270} which is an effort by the video and audio recording industries to ensure that they will continue to sell digitally encoded cultural products as packaged goods.\textsuperscript{271} The DMCA and the assault on peer-to-peer technologies are the most obvious in this regard. The recording industry is using copyright law to secure the economic returns demanded by the manufacturers and marketers of musical and visual information. To the extent the law hampers free access to content, it curtails individual freedom to produce information, knowledge, and creative works. When, as perhaps now, the law is so restrictive that it punishes creative or productive uses of the content, the balance between providing incentive to create and protecting the communication that promotes progress is lost.\textsuperscript{272} The more repressive the copyright regime becomes, the more those who the law is designed to protect and provide incentive for move away from use of and respect for the law. Legal scholars do not lead the sharing movement; they merely document it and design alternative types of protection, like the free software movement and Creative Commons. Individuals have more power in the digital age to change culture, which Benkler called "nonmarket social behavior."\textsuperscript{273} He noticed the beginning of a "political countermovement" was spearheaded by the computer community, students, and engineers. They are the wealth producers in today's society. They require access to each other's works of authorship in order to continuously improve technology and art.\textsuperscript{274}

\textsuperscript{269} BENKLER, WEALTH OF NETWORKS, supra note 6, at ch. 1. Benkler quoted James Boyle on his observation of the government's increasing protection of copyright and contrasted that with the legal literature during the last twenty years on the need for a more accurate intellectual property construct. He mentions David Lange, Pamela Samuelson, James Boyle, Jessica Litman, and Lawrence Lessig.

\textsuperscript{270} See M.J. Stephey, Lawrence Lessig: Decriminalizing the Remix, TIME, Oct. 17, 2008, available at http://www.time.com/time/business/article/0,8599,1851241,00.html (reviewing LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008)). "According to Lessig, the war began during the fall of 1995, when members of the "content industry" (read: media giants) began to grasp the implications of digital technology on copyright enforcement." Id.

\textsuperscript{271} Id.

\textsuperscript{272} Id. (discussing James Boyle's work). More generally, information, knowledge, and culture are being subjected to a second enclosure movement, as James Boyle has explored in depth. See Duke Law School, James Boyle's Intellectual Property Page, http://www.law.duke.edu/boylesite/ (last visited Mar. 28, 2010) (on file with the McGeorge Law Review) (listing Boyle's scholarly work). In Chapter 1, Benkler observed a social phenomenon where we have moved away from the "industrial information economy" that was prevalent until the twenty-first century, into a "networked information economy." He explained that information production and its communication grew during the twentieth century, as did the population and political entities. Tools of mass communication were "mechanical presses, the telegraph, powerful radio and later television transmitters, cable and satellite, and the mainframe computer." BENKLER, WEALTH OF NETWORKS, supra note 6, at ch. 1.

\textsuperscript{273} BENKLER, WEALTH OF NETWORKS, supra note 6, at ch. 1.

\textsuperscript{274} Id. Only recently have we begun to see a politics of information policy and "intellectual property" emerge from the combined input of computer engineers, college students, and activists concerned with the global poor; a reorientation of traditional media advocates; and a very gradual realization by high-technology firms that rules pushed by Hollywood can impede the growth of computer-based businesses.
Increased protection is not supported empirically. One study over the past 150 years showed that when a country with an already developed patent system increased the patent protection, the country's patent production decreased. Increasing protection deters social progress. The man who discovered the valuable information about fertilizing soil to grow better crops did not have to make that information available to his colleagues to gain more wealth. He could obtain wealth by growing more crops and establishing a marketing system whereby he sold his crops to his colleagues. But he chose to share the knowledge. Richard Dawkins sought an explanation for observed altruistic behavior among community animals. He documented a genetic predisposition for altruistic behavior.

2. Sharing Promotes Progress

Creators can recoup their investment and make a profit by exercising exclusive control. But they need to be able to stand "on the shoulders of giants" to continue to make progress. The creator cannot create in a void but must use past information to produce new intellectual property. Current law thwarts the creative process. The extension of the copyright term and the derivative works right preclude use of past work in a creative way. The exclusive right of the original copyright owner to make derivative works prevents the creation of works that build on the original copyrighted work. As long as the copyright exists, ninety-five years or indefinitely for works whose date of creation is unknown, the law may prohibit builders of creativity from using those works for any kind of productive works, even for those that clearly benefit society.

Society is willing to have some market inefficiency in exchange for promoting progress. "[W]e are willing to have some inefficient lack of access to information every day, in exchange for getting more people involved in information production over time." In order to facilitate others to be able to use

275. Id. at ch. 2, n.5. Benkler asserts that most information and innovation comes from "nonmarket sources—both state and nonstate—and market actors whose business models do not depend on the regulatory framework of intellectual property." Id. Newspapers are the example he uses for copyrightable content that does not rely on copyright protection to get value out of their works. Id.
276. DAWKINS, THE SELFISH GENE, supra note 38, at 166-68.
277. Id. In some animals that have a propensity to live in groups, he calls the phenomena "You scratch my back, I'll ride on yours." A prey animal in a herd will try to stay in the middle because he is less likely to be preyed upon that way. "But in real life there are cases where individuals seem to take active steps to preserve fellow members of the group from predators." Id. Dawkins' logic is that the altruistic gene is inherited, that humans are biologically predisposed to be altruistic, to share for the group's profit/prestige, as well as their own as individuals.
278. Chafee, supra note 48.
279. Sprigman, supra note 84, at 522-523 (noting that copyright term is effectively perpetual).
281. BENKLER, WEALTH OF NETWORKS, supra note 6, at ch. 2. The author has made an online version of the book available under a Creative Commons Noncommercial Sharealike license. It can be accessed through.
and not to assert exclusive rights, we now need a mechanism to notify potential users who wish to share. Creative Commons enables creators to dictate the extent of protection they wish to claim. It is a promising solution.

### 3. Things We Share Without Copyright

Benkler examined the “economics of information production.” He acknowledged that profit/prestige drives people to provide the best art, innovations, and scientific breakthroughs. But he noted that most of our basic science comes from scientists working in nonprofit institutions and volunteers write most of our computer software.

Judicial opinions and statutes are not copyrightable. The copies can be sold, but the one who markets them does not have an exclusive right to market those works. Some judicial opinions are excellent works of authorship. The realization that the information in the opinions is important to the public dictated that the writings not be exclusive. The judge is not directly motivated by profit/prestige, but the work nonetheless promotes social order.

Profit/prestige does not directly motivate works for hire either. Factual information is shared without copyright. A large amount of software is created without claim to copyright. The online encyclopedia Wikipedia has been produced without claims of copyright.

Copyright is not a natural law right that is self-evident. Jessica Litman’s son’s teacher did not distinguish between works of fact and works of entertainment when she gave digitized intellectual property to her students. The law makes a distinction between the copyright protections assigned to each. Yet the teacher, as a human being, sees little difference between information and entertainment until society tells her to put a different value on each. As seen in

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282. See supra note 233.
283. BENKLER, WEALTH OF NETWORKS, supra note 6, at ch. 2.
284. Id. at ch. 2, pp. 3-5.
285. Id.
286. Callaghan v. Myers, 128 U.S. 617, 647 (1888) (“[T]here can be no copyright in the opinions of the judges . . . .”); Banks v. Manchester, 128 U.S. 244, 253-54 (1888) (“Judges . . . can . . . have no pecuniary interest . . . in the fruits of their judicial labors. . . . [F]rom the time of the decision in the case of Wheaton v. Peters . . . no copyright could, under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties.”); Wheaton v. Peters, 33 U.S. 591, 668 (1834) (“The court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”).
the case of judicial opinions, free software, factual works, and others, creativity occurs with or without copyright protection.

V. HOW TO FIX THE LAW: RETURN TO PROGRESS

The steady march toward increased protection is now harmful. I do not download songs from file sharing sites. I also do not show videos with courtroom scenes when I am teaching trial procedure. While it might be fair use to do so, the expense of defending if the RIAA or MPAA decides to sue me is greater than my dedication to my teaching mission. This is unfortunate for my students. The law has a chilling effect on the exercise of my First Amendment freedom. The current copyright procedure system inhibits the progress of science and the useful arts.

Most creative content is now free from restrictions of law. Digital transmission of material on the Internet makes the copyright protection model in the statute antiquated. There is a schism between the value that Internet users produce and the law that would allow an overly zealous music or video copyright owner to inhibit creation of works of authorship.

Copyright overprotection developed incrementally over a period of about twenty-five years. The balance in copyright can also be regained in the same manner. The following are suggestions for courts and Congress to use as they work to regain balance in copyright, promote progress, and protect private property.

A. Step 1: Rebalance the Public Interest

YouTube is an Internet service that allows users to share videos. Its site contains both original videos posted by the creators and copied videos posted by users without permission of the copyright owners. Viacom, owner of the

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289. LESSIG, FREE CULTURE, supra note 6, at 7.
290. See Sprigman, supra note 84, at 515. "[U]nconditional copyright also burdens potentially valuable transformative uses by raising the cost of using commercially valueless source material as building blocks for derivative works that take the original, improve on it, and find a market for the final product." Id. Productive uses of a copyrighted work are possible derivative works that would have their own copyright but need permission from the original copyright owner to use the original work. Sometimes the owner does not give permission, sometimes the owner cannot be found, and sometimes the owner is not able to be identified.
291. BENKLER, WEALTH OF NETWORKS, supra note 6, at 38.
292. See YouTube, http://www.youtube.com/ (last visited Mar. 28, 2010). See also Daniel Lyons, Old Media Strikes Back, NEWSWEEK, Mar. 2, 2009, at 13, available at http://www.newsweek.com/id/185790. Hulu is a new video site that shows more TV shows than YouTube. It is becoming more popular with those who want the video capability in order to watch TV anywhere, anytime. Hulu was founded by NBC and Fox. It is a better moneymaker than YouTube is. Hulu’s competitor is not YouTube, but cable companies. "Movies and TV shows are flooding onto the Internet, not just through Hulu but through upstarts . . . as well as established players like CBS . . . and ABC . . ." Id. The companies rely on ad revenue. Id. This is similar to how television financed itself. The advertisers realize that the entertainment from actually syndicated shows is worth a lot more in sales than the home videos that are dominant on YouTube.
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copyrights in many entertainment videos, filed suit against Google, the current owner of YouTube, in 2007.293

The use of Youtube and Google does not directly induce copyright infringement. They admittedly do harbor substantial amounts of copyrighted material on their sites without permission from the copyright holders. But their purpose, their business plan, does not include users illegally sharing copyrighted works with one another. Google was created as a massive search engine. YouTube was created to allow friends and artists to share home and artistic videos with one another. The infringing use of YouTube is incidental to its original purpose. This is a good case to begin reestablishing copyright balance because the public interest strongly outweighs the fear of infringement.

Although Congress should enact law that protects the public interest (defined in this article as the public having reasonable access to information), recent legislation protects private interests of authors and those who market the authors' works to a great extent, resulting in the public's right of reasonable access being injured. Congress has not acted to reestablish a balance between the interests of the private owner and the public desirer of access. Unfortunately, courts are also extending protection afforded to the private interest of the author and those who market the author's works. However, while the courts protect the public's interests through the Constitution, they do not make law that benefits those who happen to have lobbied the hardest for a statute. Therefore, the courts are our best alternative to reestablish the lost balance in public interest.

B. Step 2: Interpret Statutes Narrowly and Use Constitutional Purpose as a Guide

Courts should follow the literal language of the 1976 Copyright Act as amended. Courts should narrowly interpret the statute, while paying attention to the Constitution's implicit protection of the public interest. This is the province of the courts when legislation addresses private special interests without sufficient heed to the public welfare.294 Christina Bohannan advocated this judicial behavior as a way to lessen the impact of an over-zealous legislature, which is often swayed by special interests more than the public interest.295


294. See Bohannan, supra note 7, at 568-70 (describing copyright's "stated public interest purpose").

295. Id. (arguing that courts should emphasize public interest in copyright cases and that the courts have become too private-owner protective).
Create bright line rules indicating what Internet copying activities are fair use. If sites that carry interfaces that permit massive downloading are not secondarily liable, the actual copiers must be the defendants. The courts should stop punishing an activity that has economic value in communications. The fair use factors should provide guidance for those who want to use works productively, even if people can access these works free on the Internet. Finally, putting the RIAA and MPAA on notice to what uses are fair uses of the Internet may deter some expensive litigation.

C. Step 3: Resist the “Tortization” of Copyright Law

Remove secondary liability when it is not statutorily provided. Contributory infringement and liability for inducing another to infringe are statutorily provided in patent law. If patent statutes provide for such a liability, and copyright law does not, then we can adopt this liability into copyright law through the use of common law reasoning. This step is difficult for courts to take since the doctrine of stare decisis requires them to follow Supreme Court precedent, which has expanded the secondary liability doctrines as applicable to copyright.

The Supreme Court in Grokster suggested that courts should review the accused infringer’s business plan to determine whether it should be liable for infringement. This suggests that the courts should examine the intention of the accused infringer, which is gleaned from circumstantial evidence. That is an intentional tort analysis, not statutory interpretation. The 1976 Act does not authorize courts to ignore the language of the statute and incorporate common law into the decision of what constitutes copyright infringement. Any judicial application of law beyond the statute itself in copyright should only be an interpretation of whether the statute is being applied constitutionally, which only allows activities that “promote the Progress of Science and of useful Arts.” Utilization of economic theory on human motivation for the purpose of promoting progress is acceptable if it serves to clarify the constitutional requirement to promote progress.

D. Step 4: Educate Ourselves, the Courts, and Students

Business law professors should teach about change in intellectual property and society. The world is getting flatter. It will not go back to a tangible property ownership construct. A paradigm shift has occurred; society has incorporated behavioral changes in individual information acquisition. The law must change to reflect it. Professors should teach students how to function in an atmosphere of social change and how to contribute to its development.

298. See generally FRIEDMAN, supra note 6 (noting how Internet communication is changing the world).
Pay attention to economists and social scientists that have looked at progress and wealth production holistically. Insights from the influential economists should be used for guidance when considering the wisdom of continually expanding copyright protection. The social scientists understand the function of copyright and the need for the law to limit the copyright for the sake of socio-economic progress.

Examine what scholars are saying. Here are four examples.

1. Lawrence Lessig, a law professor, has written extensively on copyright and the Internet sharing phenomena. An online video recorded him discussing the tension between creativity and law. He ended by appealing to our parental sensitivities. He argued the law is making "ordinary people live life against the law and that's what we are doing to our kids." He said we should do better with our understanding of this new technology. He identified a time when there was what he called a "read-write culture." Then, with new technology and growth of copyright protection, a read-only culture developed. Now the new use of technology is once again creating a read-write culture. This is a major social change that the law has yet to reflect.

2. Thomas Friedman’s concepts in The World Is Flat reveal the democratization of the information highway, in which progress is occurring phenomenally faster as a result of the easy availability of information.

3. John Tehranian has coined the term “copyright panic” to describe the current situation in judicial interpretation of secondary liability for copyright infringement. He describes the expansion of secondary liability doctrine beyond its original parameters to address the new technology that has the courts in a panic. However, Congress is the source of copyright law, not the courts, and courts should only interpret the statutes. He described how Grokster would not be applicable to cases where there is not “direct evidence of unlawful purpose,” and that Sony may protect such a situation, which is unlike the music file sharing cases.

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299. Lessig, supra note 236. This Article argues that remixing is a productive use of copyrighted material and might be a fair use. If it is done on the Internet it is trespass and illegal. The result of the inflexibility of the law is that two divergent views have developed. We have effectively alienated our children who reject the idea of copyright altogether. Lessig believes the solution is not with Congress or the courts; he thinks private actions by artists and businesses are necessary to effect the change. See id.

300. Lessig, supra note 236.

301. Lessig, supra note 236.

302. Bartholomew & Tehranian, supra note 131.

303. Id. at 1364.

304. Id. at 1375.

305. See id. at 1383-85. Secondary liability, particularly contributory infringement, has changed since Sony. The fact that Sony’s staple article of commerce itself does not infringe on copyrights is not a defense to
4. Yochai Benkler has combined law, economics, and observation of human activity to argue that a sharing culture exists among humans.\textsuperscript{306} The phenomenon is consistent with the sharing, whether it is slavishly copied copyrighted songs or creative remixes of copyrighted works in an entertaining fashion, which occurs frequently in chat rooms on the Internet. It also occurs in videos shared on YouTube.

E. Step 5: Enforce and Encourage Private Voluntary Sharing to Promote Progress

Progress may be promoted by upholding extrajudicial and extra-legislative agreements as acceptable for owners to market their works. Creative Commons is an effective way for the socially conscious creator to give back to the public some of his exclusive rights granted by the 1976 Act.

Remixing music has brought the problem of derivative work protection into the limelight. Remixing music involves creating a new musical composition by arranging small portions of numerous musical works digitally. It is cost prohibitive to obtain permission from the numerous musicians whose works may be part of the new composition. In addition, many works are not registered, so finding the musician or artist to obtain permission may not be possible. Creative Commons is designed to give the owners the ability to claim less copyright. Creative Commons licensing is a potentially contractual solution to the lack of notice and formality created by the 1976 Act. It allows the copyright owner to give away some of her bundle of rights, often in exchange for the ability to use another’s work in the same manner as she would allow others to use her work. This system permits progress through productive uses of one’s work without having to litigate and have the court decide whether a use is fair. This system should be promoted and recognized in legislation and judicial decisions.

VI. CONCLUSION: WELCOME TO THE BRAVE NEW WORLD

Some of the best legal minds have written about the current copyright imbalance, particularly about the sharing of copyrighted works over the Internet. This Article summarized some of their thoughts, particularly ones that seem insightful of human motivations that gave rise to copyright and to those that have given rise to sharing copyrighted works.

\textsuperscript{306} Benkler, Sharing Nicely, supra note 235.
Law is merely a social institution that reflects and enforces social values for the sake of maintaining order. The current protection scheme for intellectual property in the U.S. is maintaining an unjust imbalance. Blame the economists who failed to realize that social animals share property for the community benefit. Blame the legislatures that paid heed to special interests and enacted legislation that does not actually serve the constitutional purpose for copyright. Blame the courts that insist on incorporating common law into case consideration where the statute itself does not promote the court’s concept of justice. Blame the Internet for being a technology enabling copying beyond what the current legal construct on copying can address. Change is due. The previous section identified steps that can be taken to effect some necessary change.

The beehive model for promoting development of intellectual property is consistent with the Constitution’s promotion of science and the useful arts by granting exclusive rights to their works for a limited time. Removal of the publisher as the owner of the works is consistent with individuals using the Internet to market their creations. Congress and the courts can now examine how individuals promote progress and can adjust the law on copying to properly reflect the individual’s profit/prestige motive to create.