

COPYRIGHT'S

KNOWLEDGE PRINCIPLE

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This Article argues that copyright jurisprudence has lost sight of the knowledge principle at the heart of the Constitutional justification for copyright. The Framers envisioned the objective of copyright as promoting the advancement of knowledge for a democratic society by increasing access to published works. Under what is best termed the “knowledge principle,” access to existing knowledge is a necessary condition for the creation of new knowledge. Copyright jurisprudence has largely protected the interests of producers—from early booksellers to modern Hollywood film companies—failing to notice the central role of access to works as a necessary pre-condition to the creation of new works. The realities of the digital era further hinder the functioning of this mechanism. Ownership of copies of texts has morphed into a limited right of possession of digital files. Public libraries can no longer fulfill their mission of maximizing the circulation of materials in order to spread available knowledge among citizens. This Article proposes an alternative model to the conventional copyright theories, focusing on the critical role that access to knowledge resources plays in the dynamic processes at work in the production of knowledge and the creation of new works. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for the purposes of learning and education. These “fair access” rights serve to realign copyright with its Constitutional justification, and more importantly serve to support the knowledge creation process for the future of our democratic society.

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INTRODUCTION

DATELINE: New York City, December 12, 2050.

Visitors can now see how information used to be published and circulated to the public at large by viewing the “New York Public Library Museum” exhibit, which opened today. Public libraries disappeared after the Great Recession of 2008-2018, as the explosion in the use of e-readers like the now antiquated Kindle or Nook made sustaining buildings and staff financially untenable in the face of reduced demand. The project of digitizing all extant print materials was completed shortly afterwards. In contrast to today’s OogleWorks-managed, cloud-based licensing operation, which rents time-limited access to digitized works for reading (formerly books), viewing (movies), or listening (music), the Museum harkens back to a time when there was free access to information by members of the public regardless of means, and when the public itself could own, share, and circulate information.

This vision of the near future is becoming real.¹ Copyright jurisprudence has lost sight of what is best termed the “knowledge principle,” which lies at the heart of the Constitutional justification

¹ See *The State of America’s Libraries: Long-term pain persists, with minimal relief*, AM. LIBR. ASS’N (2011), <http://www.ala.org/news/mediapresscenter/americaslibraries/libraryfunding>; Stacey von Winckelmann, *The American Public Library System: A Case Study of Public Libraries in the twenty-first Century* (July 20, 2011) (unpublished M.A. thesis, Leiden University), available at http://www.academia.edu/888046/The_American_Public_Library_System_A_Case_Study_of_Public_Libraries_in_the_twenty-first_Century; Celeste Bruno, *With Demand Growing, Libraries Face Fiscal Pressure*, 27 MUN. ADVOC. 15 (2012), available at http://www.mma.org/resources-mainmenu-182/doc_view/769-with-demand-growing-libraries-face-fiscal-pressure; Mike Shatzkin, *It Will Be Hard To Find A Public Library 15 Years From Now*, THE SHATZKIN FILES BLOG (Apr. 8, 2011, 5:53 PM), <http://www.idealogue.com/blog/it-will-be-hard-to-find-a-public-library-15-years-from-now/>. John Tehranian claims that “[D]igital fences have begun to dot the online landscape, bringing a new enclosure movement to our cyber commons every bit as significant as the eighteenth-century edition.” John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, UTAH L. REV. 537, 539 (2007). See also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 34-37, 40-41 (2003).

for copyright.² The Framers envisioned the objective of copyright as promoting the advancement of knowledge for a democratic society by increasing access to published works.³ The meaning of “advancement of knowledge” in this context is of critical importance to a thriving democratic society and is examined in this Article through the lens of copyright’s knowledge principle. In so doing, this Article reframes copyright theory and jurisprudence to focus on society’s interest rather than producers’ interests.⁴

The knowledge principle holds that access to existing knowledge is a necessary condition for the creation of new knowledge.⁵ Even more simply, knowledge must be acquired first before it can be advanced. For example, a scientist must access

² The copyright power reads, “to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings” “Science” in colonial times referred to knowledge. U.S. CONST. art. I, § 8. In the colonial era, the term “Science” was associated with knowledge, whereas “the Arts” referred to innovation and patents. JANICE MUELLER, *PATENT LAW* 32 (3rd ed. 2009). See also Edward Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 763, 781 (2001). The first U.S. copyright statute of 1790 referred to the “encouragement of learning,” following the title of the world’s first copyright statute, the Statute of Anne in Britain in 1710. See 1 Stat. 124 (1789-1790); Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.). See also WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 38-39 (2009) (referring to Lord Macaulay’s speech about public good being the “bounty of genius and learning” and further characterizing copyright monopoly as a tax on society whose rate should be justified by an increase in the bounty of genius and learning); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 42, 44 (1993) (discussing the priority given to encouragement and learning and Locke’s memo advocating limited terms from monopoly of printing); Isabella Alexander, *All Change for the Digital Economy: Copyright and Business Models in the Early Eighteenth Century*, 25 BERKELEY TECH. L.J. 1351, 1373 (2010) (discussing Samuel Johnson arguing for abridgements as not prohibited by the Statute of Anne because they benefit learning and knowledge); Jessica Litman, *Readers’ Copyright*, 58 J. COPYRIGHT SOC’Y U.S.A. 325, 335 (2011).

³ See *supra* note 2 and accompanying text.

⁴ The Framers saw the creation and dissemination of copyrighted material as the method to accomplish copyright’s end—the “advancement of knowledge” for society, not for authors or publishers. Jessica Litman notes “Congress, for its part, once took some care to paint copyright laws as designed to benefit the public rather than the authors and publishers who would enjoy the profits flowing from the temporary copyright monopoly.” Litman, *supra* note 2, at 327; see also *infra* Part III.A.

⁵ ZOHAR EFRONI, *THE ACCESS-RIGHT: THE FUTURE OF DIGITAL COPYRIGHT LAW* 7 (2011) (“We acquire knowledge through experiencing and experimenting as well as by observing and learning from others.”)

the existing knowledge in her field before she can carry out research to create new knowledge. The knowledge principle is the fundamental mechanism by which knowledge is created, produced, and disseminated in society. Knowledge is held by private and public universities, corporations, and public libraries.⁶ Public libraries' mission of promoting access to knowledge regardless of wealth or status is uniquely aligned with the values of a democratic society, and thus is the institutional focus of this inquiry.

Copyright in the digital era diminishes the ability of public libraries to provide public access to knowledge resources.⁷ Ownership of digital copies of texts, still referred to as books, has morphed into limited rights of possession. This is a sea change from our traditional conception of information as something which, once acquired in its published format, can be enjoyed, transferred or shared.⁸ Under the first sale doctrine of copyright, the publisher may not insist upon permission for further sale or transfer of a book.⁹ For example, you might give your purchased copy of the popular novel *The Help* to your sister to read after you finish with it. A few weeks later, she includes it with some other books in a neighborhood garage sale. In this example, at least three persons will have enjoyed the opportunity to read the novel. Over time, this number could increase many times over, limited only by the inevitable decay of the material comprising the book. Through public libraries, many people have the use of the same physical book.

Digital copies of the same book are treated differently. First, you need an e-reader, like a Nook or a Kindle, to be able to purchase a digital copy of *The Help*. Then, an end-user license agreement contains certain restrictions on that purchase so that you do not have the same access privileges that you have with the print

⁶ See Madison. Also check, Fritz Machlup, *The Production and Distribution of Knowledge in the U.S.* (1962)

⁷ This refers to the embodiment of copyrighted material in digital rather than print form. See David Vinjamuri, *Why Public Libraries Matter: And How They Can Do More*, FORBES (Jan. 16, 2013), <http://www.forbes.com/sites/davidvinjamuri/2013/01/16/why-public-libraries-matter-and-how-they-can-do-more/> (describing the current “technology trap” in which publishers require libraries to purchase a “license made to resemble a book purchase,” the restrictions on which threaten to limit the abilities of libraries to provide for future patrons).

⁸ The owner of a copy of a print book is free to use it as they wish.

⁹ See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

version.¹⁰ For example, you are only permitted to read the digital copy on your e-reader, and you are generally prohibited from transferring the copy to anyone else.¹¹ If you want to sell the Nook to another person, you may not transfer your collection of books to that person; rather, she must purchase his own collection of books from Barnes and Noble.¹² In the digital era, the first sale doctrine has disappeared.¹³

Why is this scenario a problem for society? The social value of copyright is the promise of the advancement of knowledge and the encouragement of learning in order to support a thriving democratic society.¹⁴ Copyright's original rationale was—and continues to be—aligned with the values of a democratic society, namely social mobility, civic participation, and economic productivity, all of which rely on vibrant, robust knowledge systems.¹⁵ In the near future, digital content will be by and large

¹⁰ See *Amazon Kindle Terms of Use*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib/178-4801626-6304458?ie=UTF8&nodeId=200506200 (last visited Aug. 21, 2013); *Nook Terms of Service*, BARNES & NOBLE, <http://www.barnesandnoble.com/u/Terms-of-Service-NOOK-Simple-Touch/379003279/> (last visited Aug. 21, 2013) (demonstrating license restrictions between e-reader manufacturer and publisher like DVD players).

¹¹ *Amazon Kindle Terms of Use*, *supra* note 10; *Nook Terms of Service*, *supra* note 10.

¹² *Nook Terms of Service*, *supra* note 10. There have been recent reports that Barnes & Noble may sell its business, raising other questions about the digital rights in the books purchased by its customers. See Julie Bosman, *Fork in the Road for Barnes & Noble*, N.Y. TIMES, July 9, 2013, http://www.nytimes.com/2013/07/10/business/fork-in-the-road-for-a-bookseller.html?_r=0.

¹³ HarperCollins informed its library customers that they no longer had the right to unlimited check-outs for the digital text. Each purchase would be limited to twenty-six check-outs then expire. See Josh Hadro, *HarperCollins Puts 26 Loan Cap on Ebook Circulation*, LIBR. J. (Feb. 25, 2011), http://www.libraryjournal.com/lj/home/889452-264/harpercollins_puts_26_loan_cap.html.csp. See also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 175 (2001).

¹⁴ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75-76 (1967).

¹⁵ See, e.g., Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001); Martin Dewhurst, Bryan Hancock & Diana Ellsworth, *Redesigning Knowledge Work*, HARV. BUS. REV. (Jan.-Feb. 2013), <http://hbr.org/2013/01/redesigning-knowledge-work/ar/1> (noting that in the modern knowledge economy, "competitive advantage is increasingly coming from the particular,

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the only kind of content available.¹⁶ If current doctrinal trends continue, the restrictions on access to digital content will result in less accessibility to knowledge resources than in the print era. The disappearance of the first sale doctrine in the digital era greatly impacts the mission of public libraries to maximize the circulation of materials in order to spread the availability of knowledge among citizens.¹⁷

Publishers may impose downstream limitations on usage of digital copies of text.¹⁸ Publishers are not required to license

duplicate know-how of a company's most skilled people" and observing that some firms are investing in training and apprenticeship programs, while others are redefining jobs to spread tasks from experts to other employees); Marco R. della Cava, *Retrain Your Brain from "Left" to "Right" to Fit into New Economy*, USA TODAY, July 14, 2009, http://usatoday30.usatoday.com/life/lifestyle/2009-07-13-right-vs-left-brains_n.htm (observing that economic recovery is contingent on "right brain" innovations and creativity); Jeanne Meister, *Job Hopping Is the "New Normal" for Millennials*, FORBES (Aug. 14, 2012), <http://www.forbes.com/sites/jeannemeister/2012/08/14/job-hopping-is-the-new-normal-for-millennials-three-ways-to-prevent-a-human-resource-nightmare/> (noting that millennials can expect to have 15 to 20 jobs over the course of their working lives and addressing challenges for employers investing in job-hopping employees).

¹⁶ There is significant information available on the internet for "free" (as long as you have an internet connection). Much of the information freely available is marketing material intended to induce purchases of goods and services, as well as opinion related information for advocacy purposes. This information is useful for markets and free speech but does not advance learning or promote progress as defined in this Article. The value of that information is proven by fact that it is protected by copyright, and often found on the internet behind pay walls. As further evidence that the valuable information is not freely available on the Internet, Google spent millions of dollars to digitize information not available freely on the Internet. Finally, libraries would not have spent time and resources battling for more access to information if it was freely available on the Internet. *See infra* note 322. It is also important to remember that librarians serve an important role as curators of that information.

¹⁷ *Mission & Priorities*, AM. LIBR. ASS'N, www.ala.org/aboutala/missionpriorities (last visited Aug. 21, 2013) (stating that the mission of the American Library Association is "to enhance learning and ensure access to information for all"); *E-content: The Digital Dialogue*, AM. LIBR. ASS'N, (2012), ALA President Molly Raphael notes that as more content is delivered digitally, fair and reasonable access to digital information is threatened by the publishers' practices of locking down books, and locking out readers.

¹⁸ The digital copy will be accompanied by digital locks, licensing restrictions, and the force of the anti-circumvention provisions of the Digital

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digital content to public libraries, and a large percentage of publishers have refused to do so.¹⁹ Moreover, publishers have begun to attach “check out restrictions” on digital material.²⁰ Once a copy of a digital book has been checked out for a limited number of times, the library must then purchase another digital copy.²¹ It is not difficult to see that the volume of material that a library can afford to purchase (if even made available by publishers) will decrease in the digital era.

Copyright commentary has failed to notice the central importance of access to works—ALL works—as a necessary precondition to the creation of new works.²² The scholarly literature has discussed at great length authorship and the production of copyrighted works.²³ There has been no serious discussion, however, about the specific processes necessary to produce knowledge.²⁴ Copyright jurisprudence has conflated the creation

Millennium Copyright Act of 1998 (“DMCA”). Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (enacted H.R. 2281) (1998).

¹⁹ Barbara Stripling et al., *ALA, Future of Libraries, Digital Content, and Ebooks*, AM. LIBRS. MAG., <http://www.americanlibrariesmagazine.org/article/ala-future-libraries-digital-content-and-ebooks> (last visited Aug. 21, 2013); *Message from the Director: Digital Demand Drives Change at Your Library*, CINCINNATI LIB., http://www.cincinnati.library.org/news/2013/directormessage_winter.html (last visited Aug. 21, 2013).

²⁰ Hadro, *supra* note 13.

²¹ Citation from libraries about effects of 1201 on digital resources. More cites on nexus between education and participation in democratic society.

²² The scholarly commentary focuses on the fair use doctrine; however, fair use does not provide access to ALL of the work. It is a doctrine developed in the nineteenth century to provide some space for follow-on producers to distribute content that re-used some portion of an earlier published work. *See infra* notes 357-63 and accompanying text. Michael Madison notes that fair use jurisprudence has evolved in a way that makes it even more challenging for purposes of education and learning, “courts perform legal contortions to persuade themselves that verbatim reproductions of copyrighted works are transformative.” Michael Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 830 (2010).

²³ Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 2 DUKE L.J. 455 (1991).

²⁴ A few scholars have questioned the lack of inquiry into the creative processes associated with copyright. This article, however, focuses not on creativity as the process underlying copyright but knowledge production. *See, e.g.*, Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1152-1154 (2007); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999 (2011); Jessica Silbey, *Harvesting Intellectual Property*:

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function with the distribution function, and neglected to understand the knowledge principle of copyright entirely.²⁵ In so doing, it lost sight of its original justification, confusing means (authors and publishers interests) with ends (society's interest in the advancement of knowledge).

This Article also reframes the conventional copyright debate from one of rights versus utilitarian theory to one of pro-expansion versus pro-restraint of copyright's distribution right. Copyright jurisprudence and modern copyright theory are best understood as rationalizing the competing economic interests of expansion versus restraint in the distribution of copyrighted works.²⁶ Both of the dominant doctrinal camps—pro-restraint and pro-expansion—neglect the critical role that access to existing knowledge plays in the creation of new knowledge, and most importantly, to the advancement of knowledge in society.²⁷

Pro-restraint scholars have criticized the expansion of copyright for the past two decades.²⁸ They have argued that the

Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators, 86 NOTRE DAME L. REV. (2011), Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

²⁵ The Supreme Court in *Eldred v. Ashcroft* assumed the linkage between "the incentive to profit from the exploitation of copyrights" and the "public benefit [...] resulting in the proliferation of knowledge." *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (internal citation omitted). Litman notes that there is little legal scholarship about how the works created and distributed in the copyright ecosystem are used by the public. Litman, *supra* note 2, at 339.

²⁶ See *infra* notes 324-26, and accompanying text.

²⁷ See *infra* Part III.A. This Article reframes the dominant narrative of copyright, as grounded in either rights or utilitarian theory. The theoretical bases debated in contemporary copyright are not found at the time of the creation of copyright in late seventeenth and early eighteenth century England. The historical context of copyright reveals the underlying rationale for copyright as one of restraint on concentration of economic power – the struggle between London booksellers and the British Parliament in the late seventeenth century. This restraint-expansion tension continues through the history of copyright jurisprudence.

²⁸ Glynn S. Lunney, *The Death of Copyright*, 87 VA. L. REV. 813 (2001); Edward C Walterscheid, *Musing on the Copyright Power: A Critique of Eldred v. Ashcroft*, 14 ALB. L.J. SCI. & TECH. 309 (2004); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 486-87 (2004).

fair use doctrine needs to be retrofitted for the digital era.²⁹ Fair use means that a portion of a work may be re-used without authorization of the copyright holder. By definition, fair use is not consistent with the knowledge principle, which requires access to ALL of the relevant material.³⁰ Also, there is no *ex ante* certainty for the user. Each case is decided on its particular facts, so a great deal of litigation is necessary to rely on the doctrine.³¹ For example, licensing restrictions prohibit a library from making digital materials available for its users after a fixed number of checkouts.³² Fair use would not shield a library that violated those restrictions in order to make a digital copy of a college preparatory manual available to an economically disadvantaged urban high school student.

Pro-expansion scholars contend that the idea-expression doctrine in copyright adequately protects the value of new creation.³³ The idea-expression doctrine means that a subsequent creator can use the *ideas* in the copyrighted material, just not the particular expression of the ideas contained in the material.³⁴ The methodological problem with this doctrine is that no one knows what is on the “idea” side (unprotected) versus the “expression” side (protected) until there has been litigation. More importantly, this doctrine does not address the importance of access to the work in the first place (both the ideas and the expression). As discussed below, the Digital Millennium Copyright Act passed in 1998³⁵, the

²⁹ See PATRY, *supra* note 2, at xxiv, vxv, 125-28; Jaszi, *supra* note 23, at 455; Litman, *supra* note 2, at 343-44; Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 82-83 (2001).

³⁰ Parody represents the exception to the partial amount rule. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 983 (2006).

³¹ See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 185, 187 (Penguin 2004). Lawrence Lessig famously said that “fair use in America simply means the right to hire a lawyer to defend your right to create.” *Id.*; see also Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 350-52 (2012) (Horowitz explains why the fair use doctrine is plagued with uncertainty).

³² Hadro, *supra* note 13.

³³ PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 14-15 (rev. ed. 2003).

³⁴ 1-2 NIMMER ON COPYRIGHT § 2.03.

³⁵ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (enacted H.R. 2281) (1998).

“DMCA,” empowers content producers to enforce digital locks that they install on their content.³⁶ Under current law, users cannot break those locks, even for purposes of the fair use doctrine or the idea-expression doctrine.³⁷ Both doctrinal camps neglect the critical role of access to existing knowledge as a pre-condition to the creation of new knowledge.

This Article proposes an alternative model to the conventional copyright theories, focusing on the critical role that access to knowledge resources plays in the dynamic processes at work in the production of knowledge and the creation of new works. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for the purposes of learning and education. This Article will show that these “fair access” rights foster a healthy, vibrant knowledge creation process, thus promoting the democratic values underlying copyright’s justification.³⁸

[add here para(s) about connection between democratic values, public libraries and copyright. add Samuelson manuscript about democracies and knowledge]

Part I of this Article claims that copyright is justified by society’s interest in the advancement of knowledge and learning. The historical context of copyright, its birth story in Britain, then its adoption by the fledgling United States, demonstrate that in order to achieve its public good—namely, the advancement of knowledge and learning—policymakers created a private means to incentivize the dissemination of books or works of knowledge. The policymakers’ concern was the societal effects stemming from the monopoly privilege exercised by the book publishers in the

³⁶ See *infra* notes 312-15 and accompanying text. Siva Vaidhyathan notes that the Clinton Administration’s report titled “Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, referred to as the “White Paper,” published in 1995, which served as the blueprint for the DMCA, referred to fair use as a “tax” on owners of copyrighted material. See VAIDHYANATHAN, *supra* note 13, at 159.

³⁷ See Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201 (generally referred to as the “anti-circumvention provisions” of the Act).

³⁸ A recent article about rising inequality in the U.S., especially compared with other industrialized countries, notes that “[I]n a globalized, high-tech world in which education has become the central determinant of economic success, it is hardly surprising that the prosperity of American children is more dependent on the prosperity of their parents than that of children in most other advanced countries.” See Eduardo Porter, *Inequality in America: The Data is Sobering*, N.Y. TIMES, July 30, 2013.

distribution of books, referred to at the time as “monopolies of knowledge.”³⁹ Part II argues that copyright jurisprudence – *print to digital* – is best understood as rationalizing the competing economic interests associated with the distribution of copyrighted works. It also advances the hypothesis that as copyright became associated with the goal of maximizing the dollar value of the commodities benefiting from its protection, it became disconnected from its original justification – the advancement of knowledge – as judges and commentators alike confused the means of copyright with its end.

Part III.A presents the conventional accounts of copyright. Neither of these conventional theories sufficiently understands the critical role that access to knowledge resources plays in the creation function of copyright. The semantic expansion of copyright from book production to cultural production, and the concomitant emphasis on the dollar value of copyrighted commodities, has distracted scholars from the focus of copyright's effect on the advancement of knowledge in society.⁴⁰ Finally, Part III.B sketches a theory that directly addresses the advancement of knowledge and learning in society as the public interest of copyright. It recognizes the dynamic character of the knowledge production process, incorporating the principle that the creation of new knowledge relies on access to existing knowledge. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for the purposes of learning and education.

PART I. KNOWLEDGE

The birth story of copyright in England and the republic of the United States share an important attribute – struggle against concentration of power by the British crown.⁴¹ In 1695, the British

³⁹ See *infra* note 98 (Locke/Rose).

⁴⁰ Cf. Michael Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 828-29 (2010).

⁴¹ Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, GEO. L. J. (forthcoming 2013) (manuscript at 2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138479. In democracies knowledge flourishes, in authoritarian regimes it is constrained. *Id.* In the late 1600's the British House of Lords was struggling with the crown for sharing of political power; the American forefathers had fought a war for independence from the British crown. *Id.*

Lords eliminated the crown's monopoly in publishing as "injurious to learning," and in 1709 established the world's first copyright act with the objective of "the encouragement of learning."⁴² Nearly one hundred years later, the American colonies fought for independence and the right to establish an independent republic founded on democratic values.⁴³ For their time, it was progressive, if not radical, to propose greater liberty and participation for [some of] its citizens in their social, political and economic lives.⁴⁴

The right to participate in the realms of the social, political, and economic life of society is meaningless without access to knowledge.⁴⁵ In the print era, the constraint on society's access to knowledge has been the distribution of books. As the British Lords recognized in their seventeenth-century struggle with the crown, publishers needed an incentive to invest in the uncertain market of books.⁴⁶ In the early days of the American republic, advancement of knowledge was recognized as the means for fostering political and economic participation of the individual citizen, and at the same time furthering the prosperity of the nation. Our modern democratic society has been defined by its ability to offer citizens the opportunity for social mobility, civic participation and economic productivity, all of which rely on robust knowledge systems.⁴⁷

⁴² ROSE, *supra* note 2, at 33, 36, 46

⁴³ American history source.

⁴⁴ American history source.

⁴⁵ Benjamin Franklin and/or Thomas Jefferson source.

⁴⁶ "[T]he basic essential to publishing was the stationer's copyright, which protected the publisher in getting a return on his capital investment. Without this, any arrangement for publishing would have been too risky a venture." Lyman Ray Patterson, Copyright in Historical Perspective 46 (Vanderbilt University Press, 1968).

⁴⁷ Stephen Colbran and Anthony Gilding, *MOOC's and the Rise of Online Legal Education*, ". . . the capacity to create and apply knowledge defines the post-industrial digital economy...sustainable prosperity depends on society's capacity to create and apply knowledge to solve problems." 63 J. LEGAL EDUC. 405 (2014).

A. Copyright's Public Good

This Article asserts that the advancement of knowledge in our democratic society is *the* public good that justifies copyright.⁴⁸ The original US copyright statute limited the subject matter to maps, charts, and books, all of which supported the goals of education and advancement of knowledge.⁴⁹ As discussed below, copyright jurisprudence, as well as Congressional action, has broadened both the scope of the right and the subject matter of copyright to include photography, music, film, and even software.⁵⁰ By the twentieth century, copyright policy had become characterized by a concern for cultural production reflecting the broader scope of protection afforded to copyrighted goods in the private market.⁵¹

Copyright accounts generally begin with the uncritical (unchallenged) assumption of the linkage between copyright policy on the one hand, and creativity and cultural production on the other.⁵² Scholars often assert that copyright's purpose is to promote creativity and production of cultural goods, without looking closely at the constitutional language at work.⁵³ A closer examination of the Copyright Clause, however, reveals the intent

⁴⁸ See Samuelson, *supra* note 41; EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 125-26 (2002); MUELLER, *supra* note 2, at 32; Litman, *supra* note 2, at 327 (citing *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 485 (2d Cir. 2004), which mentions the “benefits derived by the public from the labors of authors” but fails to specify what those benefits are).

⁴⁹ Act of May 31, 1790, Ch 15, 1 Stat 124, *see generally* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND L REV. 1, 7 (1987).

⁵⁰ See *infra* Part II.

⁵¹ See Litman, *supra* note 2, at 325 (stating that copyright “confer[s] strong, enforceable, assignable rights on creators and the entities that make investments in their work.”). Supreme Court jurisprudence has reiterated the public interest served by the granting of certain private rights in the writings of authors. *Id.* at 336. See also Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 215-16 (1983).

⁵² See Cohen, *supra* note 24, at 1163 (“Creativity is universally agreed to be a good that copyright law should seek to promote, . . .”). Cohen refers to the “cultural production of knowledge” but her article does not focus on knowledge as an input or output of the copyright system, but rather the broader inquiry of cultural production encompassing all of the subject matter of contemporary copyright. *Id.* at 1164. Cf. Madison, *supra* note 22 at 824 (Madison argues that the “concept of knowledge should be rehabilitated as an anchor for copyright [rather than creativity].”)

⁵³ See e.g., Samuelson, *supra* note 41 (manuscript at 2); Madison, *supra* note 22 at 824, 827.

to promote the progress of knowledge (in colonial times, “science” meant “knowledge”).⁵⁴ There is *no* reference to the broader scope of culture or creativity. It has been imputed.⁵⁵ Books are associated with learning; the expansion of subject matter of copyright over the past two hundred years to include film, music, visual arts, and more, led courts and scholars to uncritically broaden the term.⁵⁶ Scholars have largely neglected to analyze the implications of this semantic expansion for the societal objectives of copyright.⁵⁷

This Article focuses its inquiry narrowly on books—also referred to herein as works of knowledge—and the dynamic processes at work between copyright and its original intent: encouragement of learning and the advancement of knowledge. This Article contends that this process is dynamic and contingent, rather than static and transcendent.⁵⁸ These dynamic processes comprise “the knowledge production process,” which is a cyclical process.⁵⁹ Knowledge resources (existing knowledge) form the inputs of the processes of learning and the creation of new knowledge.⁶⁰ New knowledge constitutes an output of the knowledge-production process, then an input back into the

⁵⁴ See *supra* note 53; see *supra* note 2.

⁵⁵ See Madison, *supra* note 22 at 824 (In response to question of how did copyright become a law of creativity, Madison responds that “the ideology of creative authorship developed among nineteenth-century critics who advocated for expanded legal protection for authors.”) Cf. Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1 (2012).

⁵⁶ In a report called *IP Myths v. Facts*, the Global Intellectual Property Center, a part of the U.S. Chamber of Commerce, claims that stronger intellectually property rights promote innovation and creativity whereas weaker rights will threaten the same. *IP Myths v. Facts*, GLOBAL IP CENTER (Jan. 5 2010), <http://www.theglobalipcenter.com/ip-myths-v-facts/>. No empirical support is provided. See also Madison, *supra* note 22, at 828-29.

⁵⁷ Scholars have focused on the creativity narrative which maps to the expansion of copyright’s subject matter from books and learning to music, plays, film and even software. See, e.g., Cohen, *supra* note 24 at 1151 (“Creativity is universally agreed to be a good that copyright law should seek to promote...”); Horowitz, *supra* note 31 at 333 (claiming that the goal of copyright is to promote expressive works).

⁵⁸ See *infra* Part III.B; Niva Elkin-Koren, *Cyberlaw & Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 243 (1996); see also Cohen, *supra* note 24 at 1179.

⁵⁹ See *infra* Part III.B.

⁶⁰ In the education system, this is represented by textbooks and other sources of knowledge that are used to teach students about existing knowledge.

processes of learning and creation of new knowledge, and so on.⁶¹ Those who become educated by the knowledge production process are able to then contribute to the same process. They are learners and creators. Just like the education of our children, or the proof of a scientific method, access to knowledge supports the pursuit of education and knowledge, as well as the knowledge production process itself. The progress of knowledge occurs through the discovery and sharing of existing knowledge, referred to herein as “knowledge resources.” The pool of knowledge resources accessible to all citizens, regardless of wealth or status, for the purposes of learning and education is referred to herein as the “intellectual commons” of the knowledge ecosystem.

A healthy knowledge ecosystem supports the creation and dissemination of knowledge necessary for the progress of further knowledge. It includes the knowledge infrastructure, but also refers to the dynamic processes of knowledge production. Knowledge production processes occur as knowledge resources are created and distributed in the spatial context of the individuals within the knowledge institutions. Creation of knowledge occurs through learning first, creation second.⁶² Knowledge production relies on the feedback loop of creation and distribution of works of knowledge. Copyright theory has treated the production function as exogenous, or in words of one scholar, “transcendent and absolute.”⁶³ In contrast, this Article claims that the knowledge production process is tangible and concrete. If we thought the process of educating our children was beyond comprehension, or extending beyond the limits of ordinary experience,⁶⁴ we would not invest enormous sums in resources, such as teachers and books.⁶⁵ Common sense dictates that if you want a child to learn, you need to give him or her access to materials that will aid the education process.

⁶¹ Education methodology source.

⁶² General Education methodology source.

⁶³ Cohen, *supra* note 24, at 1165. *See also* Jessica Litman, *Public Domain*, 39 EMORY L.J. 965, 1023 (1990) (“The vision of authorship on which it is based – portraying authorship as ineffable creation from nothing – is both flawed and misleading, diserving the authors it seeks to extol.”)

⁶⁴ The Merriam-Webster dictionary definition of “transcendent” is “exceeding usual limits; extending or lying beyond the limits of ordinary experience; being beyond comprehension;”

⁶⁵ In 2008-09 total spending by school districts was approximately \$610.1 billion, Nat’l Ctr. for Educ. Statistics, U.S. Dept. of Educ., NCES 2012-001, Digest of Education Statistics Table 191 and Chapter 2.

The scientific method illustrates the relationship between the scientist and knowledge.⁶⁶ A scientist does not assume a principle works unless it has been tested and supported by empirical data. For example, a scientist working at a university research center accesses the knowledge resources contained in the knowledge ecosystem by interactions with his or her colleagues at the center, as well as the myriad of other institutions that the university collaborates with. When the scientist learns about a colleague's discovery at another institution, then goes back to her laboratory and begins a new experiment which leads to her own discovery, the knowledge production process is functioning. The knowledge principle represents this process as it maximizes access to knowledge resources. Scholars have not examined or explained the effect of copyright jurisprudence on this process. This blind spot carries over to copyright jurisprudence, where doctrines developed without an understanding of how they affected the learning and creation function of copyright. As discussed below, these doctrines, properly understood, really concern the distribution function of copyright.

"Access" as used herein has a very expansive meaning. It is concerned with the quality and quantity of access as a three dimensional subject. Access is about control over the work by the user. Here, the focus is not on the alienation of the work, but what the possessor of the work can do with it while the work is in her possession. In the case of a book, it is about the control over decisions regarding the time and place to read the book. That control allows the reader the freedom to choose the optimal conditions for absorbing and understanding the contents of the book that will fulfill her personal objectives in obtaining the book in the first place. In the case of education and research, it is easy to understand why more freedom in the selection of time and place for the reader (as student and/or researcher) will positively affect that reader's ability to succeed as a student or scholar.⁶⁷ The reader may want to benefit from reading the book aloud to other students or researchers to benefit from their reactions and understanding of the material. They may need additional time to

⁶⁶ Source describing the scientific method.

⁶⁷ See Cohen, *supra* note 24 at 1180, 1194. Cohen critiques contemporary theory that presumes access to extant cultural resources regardless of their location in space and time. *Id.* She emphasizes assessing copyright to the extent that it renders inputs to the creative process available to creators. *Id.*

take notes on the material to aid in the understanding of the material.

In society, knowledge is held by institutions, including universities (public and private), corporations (for profit and non-profit), and public libraries.⁶⁸ Collectively, these institutions are referred to as the “knowledge infrastructure.” These institutions can be distinguished for purposes of the knowledge production process by varying incentive structures and general missions of purpose towards the sharing of knowledge.⁶⁹ Public libraries represent the single institution dedicated to the sharing of knowledge without regard to affiliation or economic means.⁷⁰

Public libraries have warned that trends in copyright would reduce access to information and increase the digital divide among income classes.⁷¹ Libraries understood the implications of this trend toward limited rights of possession on access to knowledge, particularly for the less advantaged members of society.⁷² Libraries focused on the objectives of copyright to encourage

⁶⁸ Although individuals also hold knowledge, knowledge is most concentrated (and circulated) within institutions.

⁶⁹ On two ends of the spectrum are the public libraries and corporations; the former existing solely for the spread of knowledge in society, and the latter focused on the interests of its shareholders or board. For the profit-making corporation, there will likely be an inverse relationship between the sharing of its proprietary knowledge and its profit-making goals. In between those two institutions lie academic institutions. Traditionally their mission has been the advancement of knowledge, but this may be in conflict with a trend toward monetizing its research.

⁷⁰ Universities require special affiliation to access their knowledge resources, for example credentials as a professor or a student at the particular institution. There are network effects of this affiliation, as typically universities have agreements where resources may be shared between them. Corporations are even less transparent. Their competitiveness often relies on the secrecy of their knowledge resources. They are unlikely to enter into sharing agreements or make their resources available to the public. Public libraries, on the contrary, have had the mission to make knowledge resources available as widely as possible.

⁷¹ See, e.g., *New ALA Report Explores Challenges of Equitable Access to Digital Content*, AM. LIBR. ASS'N (May 23, 2012), <http://www.ala.org/news/press-releases/2012/05/new-ala-report-explores-challenges-equitable-access-digital-content>; *E-content: The Digital Dialogue*, AM. LIBR. ASS'N, (2012); *The Digital Divide & Information Equity: Challenges & Opportunities for Libraries in the Twenty-first Century*, AM. LIBR. ASS'N (Jan. 14, 2001), <http://www.ala.org/aboutala/governance/officers/past/kranich/mw2001>.

⁷² *The Digital Divide & Information Equity*, *supra* note 74.

learning, and their mission to provide access to knowledge as widely as possible.⁷³ For public libraries, access is about the broad circulation of materials among patrons, including the right to lend material to other libraries (increasing circulation) and to archive materials (protecting access for posterity). Libraries attempted to counter the shift towards reduced access by compelling producers to permit more use of the digital works, on par with pre-digital use.⁷⁴ However, they failed.⁷⁵ They did not have the right model or strategy.⁷⁶ Their solution had little hope of adoption. They failed to understand that copyright jurisprudence was misaligned with those objectives. They relied on conventional copyright theory where creation of the copyrighted work has not been a central concern; and thus, access to copyrighted works is poorly understood as a mechanism in the creation function of copyrighted works.⁷⁷ As a result, society faces the prospect of a significant decline in the availability of knowledge resources as the shift from print to digital dissemination of copyrighted content is completed.⁷⁸

⁷³ See, e.g., *Strategic Plan: 2011-2015*, AM. LIBR. ASS'N, <http://www.ala.org/aboutala/strategicplan> (last visited Aug. 21, 2013); Anne K. Beaubien, *ARL White Paper on Interlibrary Loan*, ASS'N RES. LIBRS., <http://www.arl.org/focus-areas/court-cases/2040> (last visited Aug. 21, 2013).

⁷⁴ See *infra* note 322, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

⁷⁵ See *infra* note 322.

⁷⁶ Libraries have relied on the traditional arguments that a liberal fair use doctrine will solve the problems of access in the digital era. As discussed in Part III.A, the fair use doctrine and public domain concept do not support access to ALL the material, and have the methodological problem of being decided after the use has occurred. See, e.g., *Principles & Strategies for the Reform of Scholarly Communication I*, ASS'N C. & RES. LIBRS., <http://www.ala.org/acrl/publications/whitepapers/principlesstrategies> (last visited Aug. 21, 2013) (observing in 2003 that “powerful commercial interests have successfully supported – and are continuing to advocate – changes in copyright law that limit the public domain and significantly reduce principles of fair use, particularly for information in digital form”).

⁷⁷ Cf. Carol C. Henderson, *Libraries as Creatures of Copyright*, AM. LIBR. ASS'N, <http://www.ala.org/advocacy/copyright/copyrightarticle/librariescreatures> (last visited Aug. 21, 2013) (“What librarians seek as copyright law and related rules are being reshaped for the digital age is to maintain for users, and for libraries and educational institutions acting on their behalf, their rights to at least the same extent as they have enjoyed them in the analog environment.”)

⁷⁸ See Vinjamuri, *supra* note 7.

To understand how this misalignment occurred, it is necessary to travel in time back to the pre-copyright era of seventeenth-century England. The birth story of copyright in England, and subsequently the United States, explains the lack of attention to the creation function of copyright. Copyright first appeared in 1710 as the Statute of Anne in Britain.⁷⁹ Its aim was never to solve a creation problem, i.e. the writing of books, or in modern copyright terms, the “authorship of works.”⁸⁰ Statutory copyright was a political compromise for the British book publishers (mostly London booksellers) that had enjoyed an absolute monopoly on the publishing and distribution of books for nearly 150 years.⁸¹ This monopoly had derived not from parliamentary power, but royal power.⁸² The political regime of the Licensing Act and the economic regime of statutory copyright were about the question of copying and distributing books.⁸³

B. Anglo-American Copyright's Birth Story

Britain's Statute of Anne established the world's first copyright statute in 1710.⁸⁴ The statute proclaimed its objective in its title: the encouragement of learning.⁸⁵ The United States followed the British model, adopting a nearly mirror image statute in 1790.⁸⁶ US copyright, however, is also derived from a direct Constitutional power found in Article I, Section 8.⁸⁷

By the late 1600s, the House of Lords was pressing the crown to share political and economic power.⁸⁸ The crown had established a large number of economic monopolies as a method of

⁷⁹ Statute of Anne, *supra* note 2.

⁸⁰ Craig Joyce, *L. Ray Patterson*, 11 J. INTELL. PROP. L. 239, 244 (2003) (citing L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND L REV. 1, 607 (1987)); KAPLAN, *supra* note 15, at 75.

⁸¹ ROSE, *supra* note 2, at 43, 47.

⁸² *Id.* at 12. Starting with Henry VIII the royals were concerned with the adverse effects of rogue, dissenting publications and worked with a special club of booksellers (publishers) to censor texts. *Id.*

⁸³ Joyce, *supra* note 83, at 242, 244.

⁸⁴ Statute of Anne, *supra* note 2.

⁸⁵ *Id.*

⁸⁶ Act of May 31, 1790, ch. 15, 1 Stat. 124 (codified as amended at 17 U.S.C. §§101-1332 (2010)).

⁸⁷ U.S. CONST. art. I, § 8.

⁸⁸ PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY 34-35 (2002).

revenue collection.⁸⁹ A growing faction of the House of Lords became concerned about the anti-competitive effects of these monopolies, including the printing of books.⁹⁰ A special club of printers belonging to the Stationers Guild had enjoyed the exclusive right to print books.⁹¹ They had enjoyed this privilege (in one form or another) for nearly 150 years.⁹² The Guild had perpetual rights in the books they published.⁹³ Authors had neither statutory nor common-law rights.⁹⁴ They were usually paid a one-time fee, like any other commodity, and then the publisher enjoyed a perpetual monopoly on the publishing rights of the manuscript.⁹⁵

During this period, Parliament had begun wresting control of these monopolies from the crown.⁹⁶ Initially, Parliament had agreed to maintain the printing monopoly through a renewable Licensing Act.⁹⁷ The printers had to return to Parliament periodically for its renewal, but they essentially continued to have perpetual rights in the books they published, and could exclude any non-member of the Guild from publishing any book.⁹⁸ John Locke had campaigned against renewal of the Licensing Act in the late 1600s.⁹⁹ Writing to his friend and Member of Parliament, Edward Clarke, Locke expressed his concern over the monopoly power exercised by the Stationer's Guild over the ancient author, and argued that it was "very unreasonable and injurious to learning."¹⁰⁰

In 1693, the House of Lords blocked renewal of the Licensing Act.¹⁰¹ They reported that it "subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary and

⁸⁹ *Id.*

⁹⁰ ROSE, *supra* note 2, at 32; Joyce, *supra* note 83, at 242-43.

⁹¹ ROSE, *supra* note 2, at 31-32.

⁹² ROSE, *supra* note 2, at 43. The printing press dates back to the Gutenberg press in 1440. *Id.* It arrived in Britain shortly thereafter. *Id.* Across Europe and England royal authorities and papal authorities became concerned about the potential (and real) threat of an uncontrolled press as the voice of dissent. *Id.* So they moved to control its use first by imposing censure regulations, then in England, the crown found it more efficient to censure through the economic monopoly of the Stationer's Guild.

⁹³ *Id.* at 25.

⁹⁴ *Id.*

⁹⁵ *Id.* at 44.

⁹⁶ *Id.* at 33-34.

⁹⁷ *Id.* at 32.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 31-32.

perhaps ignorant licenser; destroys the Properties of Authors in their Copies; and sets up many Monopolies.”¹⁰² This fear of “monopolies of knowledge” as injurious to the public interest in learning is significant and noteworthy. It mirrors the same concern of the US constitutional framers in the next century.¹⁰³ The printers belonging to the Guild were furious, but stymied in their efforts to continue their monopoly.¹⁰⁴

For the period from 1695–1710, there was no Licensing Act and no special protection for book publishers.¹⁰⁵ Anyone could publish freely. During that fifteen-year period, the printers belonging to the Stationers Guild realized they were not going to be able to get Parliament to renew their special monopoly. The House of Lords decision in 1693 to not renew the Licensing Act was to London book publishers what the *Sony v. Universal* decision of the Supreme Court in 1984 was to the Hollywood film producers.¹⁰⁶ The Guild needed a new strategy. Prominent authors, including Wordsworth and Defoe, had championed greater rights for authors.¹⁰⁷ As long as book publishers could secure rights from authors, it was clever strategy to support their efforts. Authors became the “cover”—literally and philosophically—to advance the publishers’ interests.

After several failed efforts, the publishers presented Parliament with a new act that included the granting of rights to authors.¹⁰⁸ Parliament made two significant changes. The publishers’ plan for “perpetual” rights in each book, similar to their past practice, was reduced drastically to a fourteen-year term.¹⁰⁹ Also, the references to “property” and “rightful owners” in the title of the act were removed, but the reference to “encouragement of learning” was retained.¹¹⁰ The title changed from “A Bill for Encouragement of Learning and for Securing Property of Copies of Books to Rightful Owners thereof” to “A Bill for Encouragement of Learning by

¹⁰² *Id.* at 32.

¹⁰³ Litman, *supra* note 2, at 335.

¹⁰⁴ ROSE, *supra* note 2, at 34

¹⁰⁵ *Id.* at 33-34.

¹⁰⁶ Content producers feared that the courts would expand *Sony* to a personal use exemption to copyright. See *infra* Part II.C.

¹⁰⁷ ROSE, *supra* note 2, at 34-41.

¹⁰⁸ *Id.* at 43.

¹⁰⁹ *Id.* at 45.

¹¹⁰ *Id.* at 46.

Vesting the Copies of Printed Books in Authors or Purchasers of Such Copies during Times Then Mentioned.”¹¹¹

This political compromise meant that publishers would be able to resume the special protection they had enjoyed under the Licensing Act, with two modifications. First, this special protection would be limited to a short period of fourteen years, rather than an indefinite period under the Licensing Act.¹¹² Second, publishers were now required by law to contractually obtain rights from the author.¹¹³ In 1710, the British Parliament adopted the Statute of Anne.¹¹⁴

The book publishers did not concede defeat. Between 1710 and 1774, they attempted to convince the courts to recognize a “perpetual” right in literary property based on a common law right rooted in principles of natural justice.¹¹⁵ It was a colorful battle engaging some of the greatest minds of the day, including the “father” of Anglo-American jurisprudence William Blackstone. The series of decisions became known as the Battle of the Booksellers.¹¹⁶ Blackstone argued *Millar v. Taylor* on behalf of London publishers arguing for perpetual common law right.¹¹⁷ He is rightfully attributed with being a primary author of the book publishers’ “natural rights”-based argument for a perpetual right to literary property.¹¹⁸ Chief Justice Mansfield of the King’s Bench held in favor of the plaintiffs, finding that there was a common law perpetual right in literary property.¹¹⁹ In *Donaldson v. Becket*,¹²⁰ the London book publishers sued a rogue Scottish publisher who refused to recognize *Millar*.¹²¹ Judge Blackstone now sat on the King’s Bench, and also found for a common law right in literary property.¹²² This decision was appealed to the highest court, which in 1774 was the House of Lords (comparable to the US

¹¹¹ *Id.*

¹¹² *Id.* at 47.

¹¹³ *Id.* at 46-47.

¹¹⁴ Statute of Anne, *supra* note 2.

¹¹⁵ *Id.* at 67.

¹¹⁶ *Id.* at 67.

¹¹⁷ See generally *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769).

¹¹⁸ ROSE, *supra* note 2, at 90-91.

¹¹⁹ *Id.* at 67.

¹²⁰ 1 Eng. Rep. 837 (1774).

¹²¹ Four years following *Millar*, The Scottish Court of Session ruled that there was no common law right in literary property in its opinion *Hinton v. Donaldson*. See ROSE, *supra* note 2, at 67.

¹²² ROSE, *supra* note 2, at 98.

Supreme Court in that period).¹²³ The House of Lords reversed the King's Bench decision, placing Judge Blackstone on the losing side.¹²⁴

Contemporary scholars, especially legal scholars, have misreported what happened (and what did not happen) in the *Donaldson* decision.¹²⁵ There was no reported opinion typical of the times.¹²⁶ As scholar Mark Rose has pointed out, a great deal of confusion occurred in the aftermath of that decision.¹²⁷ Some modern commentators have overstated what occurred, hailing the decision as a promulgation that the utilitarian approach (i.e., limited copyright) prevailed over the natural rights (i.e., unlimited copyright) approach to copyright.¹²⁸ There is no direct evidence to support that contention. Rather, as Professor Rose notes, it was simply a political act where the House of Lords affirmed the same judgment that it had held eighty years earlier when blocking the renewal of the Licensing Act in the late 1600s.¹²⁹ The power of the book publishers was too great, and did not serve the public interest. The House of Lords recognized that the public interest, namely the encouragement of learning, was served by the production and dissemination of books.¹³⁰ It also recognized that the capital investment required for such activities, and the uncertainty associated with the marketing of books (compared to other "necessary" commodities), required the state to support some measure of monopoly.¹³¹ That measure of monopoly necessary to incentivize the production of books, namely the printing, marketing and distribution of books, would be difficult to estimate with precision. It is clear, however, that in the judgment of those Lords acting in 1709 (during the negotiation and passage of the Statute of Anne), and those Lords who decided *Donaldson v.*

¹²³ *Id.* at 102-03.

¹²⁴ *Id.* at 85, 142.

¹²⁵ See JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 470 (2011); ROSE, *supra* note 2, at 102.

¹²⁶ ROSE, *supra* note 2, at 102.

¹²⁷ *Id.* at 98-99.

¹²⁸ *Id.* at 48.

¹²⁹ *Id.* at 108.

¹³⁰ This is the author's analysis based on the actions of the House of Lords to retain the title "encouragement of learning" and drastically reducing the scope of the monopoly to the publishers.

¹³¹ citation about risk too great for book sellers without protection. Patterson.

Beckett in 1774, the amount of the monopoly should be much smaller than the publishers desired.¹³²

The American framers adopted a similar view as the House of Lords in Britain that copyright was the solution to the problem of distribution of works of knowledge, rather than creation of those works.¹³³ It was the London publishers or “book sellers” that had enjoyed absolute rights to the distribution of their commodities—books—for nearly two hundred years.¹³⁴ Authors had few, if any rights during that period.¹³⁵ Nevertheless, they wrote books and sought out publishers to distribute them. The political solution called for limiting the absolute right to the publisher by emphasizing the ultimate purpose of the creation and distribution of works of knowledge in society—the encouragement of learning—or as used herein, “the advancement of knowledge.”¹³⁶ In the same fashion as their British cousins, the Framers crafted a private right of action to achieve a public good, not a private right of action to bestow a private benefit.

Part II surveys the development of modern copyright jurisprudence through the lens of copyright’s original justification—the advancement of knowledge. The interests associated with copyright industries have largely persuaded courts and legislature to see the dollar value of copyrighted commodities as the measure of copyright’s value to society.¹³⁷ This misalignment of means and ends has created the fallacy that more protection means more social value. Part III examines the implications of this fallacy for the interests of society.

PART II. DOCTRINE

The explanatory thread that connects the birth of copyright to its present stage is the story of the interests associated with the distribution function of copyright.¹³⁸ This trend in copyright

¹³² *Id.* at 47.

¹³³ Joyce, *supra* note 83, at 244.

¹³⁴ ROSE, *supra* note 2, at 12.

¹³⁵ *Id.* at 12, 18, 22; Lyman Ray Patterson, *Copyright in Historical Perspective* 5 (Vanderbilt University Press 1968)

¹³⁶ ROSE, *supra* note 2, at 47.

¹³⁷ See *infra* Part II.

¹³⁸ Joyce, *supra* note 83, at 244.

jurisprudence is explored in Part II. Copyright industries—first publishers, then film, music and software as well—expanded the initial narrow, brief right of protection into a broader right, which in the digital era approaches a perpetual right in their “property.” Modern copyright theory developed in later stages of the jurisprudential timeline of copyright, when intellectual property generally, became more significant to the US economy.¹³⁹ This paralleled the technological revolution of the latter part of the twentieth century.¹⁴⁰

As we cross into the digital era of the twenty-first century, copyright has reached an inflection point paralleling the British contest over concentration of economic power in 1690 and 1774.¹⁴¹ In contemporary US copyright, the landmark 1984 case of *Sony v. Universal*¹⁴² in the US Supreme Court can be viewed as a similar exercise of restraint against concentration of economic power. By the late twentieth century, the economic interests included not only book publishers, but a host of other “content” producers including film, music and software industries. These industries rallied to reestablish their influence in the decades following that decision.¹⁴³ These efforts paralleled that of the London publishers in the late seventeenth to late eighteenth century in England. Just as the London publishers attempted to reassert their economic power in the courts following their defeat in the House of Lords, the contemporary content industries in the United States strove to reassert their perceived loss of economic power through the courts and legislature.

In the wake of copyright's birth, book publishers began to push for an expansion of the narrow, limited right granted by the Statute of Anne. This initial effort attempted to circumvent the statute by recognizing a pre-statutory right in literary property grounded in natural rights theory. As discussed above, the series of decisions referred to as the Battle of the Booksellers culminated in a final decision that the only rights that existed were in the statute.¹⁴⁴

¹³⁹ Litman, *supra* note 2, at 340.

¹⁴⁰ See *infra* Part II.C.

¹⁴¹ See Joyce, *supra* note 83, at 242-43; ROSE, *supra* note 2, at 34, 93. The House of Lords' decision not to renew the Licensing Act in 1690, and its 1774 *Donaldson* decision ruling against a perpetual right of copyright weighed against economic concentration.

¹⁴² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁴³ JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

¹⁴⁴ See Rose, *supra* note 2, at 102-03.

Interests associated with expansion of the right were left with two possible strategies: (i) convince the legislature to expand the statute; and (ii) persuade the courts to interpret the statute expansively. They pursued both.

Copyright jurisprudence is best rationalized on an axis between restraint and expansion. The first century of American jurisprudence—1790 through the early 1900s—followed two doctrinally divergent paths: the traditional approach of restraint that followed the British sensitivity toward copyright’s public interest in expanding the works of knowledge to the public, and the pro-expansion approach sympathetic to those commercial interests who sought to protect their investment.¹⁴⁵

Early copyright shifted the analytical focus of follow-on works from contributing to the public good of copyright to a concern with incentives for investment in the first-mover investor work. In the 1868 decision of *Daly v Palmer*, a dispute between two competing theatre productions presaged the twentieth century move from literal to non-literal protection of copyright—a significant leap for the interests of the first-mover investor.¹⁴⁶ Feeling no constraint by literal infringement, the judge found infringement where the only similarity between the plays was the theme of a railroad rescue scene—even the details of the scenes varied.¹⁴⁷ The New York judge transparently supported the commercial interests of the first-mover investor.¹⁴⁸

Modern copyright sanctified the doctrinal expansion from literal to non-literal protection of copyrighted material. As seen in the next section, the fledgling film industry of the early twentieth century faced hold up problems when playwrights began to apply the *Daly* reasoning.¹⁴⁹ Judge Hand reacted to this over-reaching with the development of categories of reasoning and analysis—categories that appealed to legal minds, but intensified the indeterminacy problem for the creation function of copyright.¹⁵⁰

In the digital-transition era, the transformation of copyrighted material from print to digital format raised the commercial stakes. Personal reproduction (and distribution) of copyrighted material

¹⁴⁵ See *supra* note 188

¹⁴⁶ *Daly v. Palmer*, 6 F. Cas. 1132 (C. C. S. D. N. Y. 1868) (No. 3,552).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *infra* notes 272-75 and accompanying text. (Hand’s analysis of Nichols)

¹⁵⁰ See *infra* Part II.B.3.

became feasible. The Supreme Court's decision in *Sony* approving unauthorized reproduction of television programming by consumers under the fair use doctrine alarmed the industry.¹⁵¹ In the wake of the Internet revolution, the content industries worked to reform digital copyright to protect their interests.¹⁵² Content producers achieved greater control in the downstream distribution of digital content; however, the tension between copyright and its public good objective—encouragement of learning and advancement of knowledge—has increased.

A. Early Copyright Jurisprudence: Literal Copyright

1. British pro-restraint approach

Copyright jurisprudence in Britain from 1710 to 1790 predated US copyright by nearly a century. Early British decisions on translations and abridgements demonstrated a favorable attitude toward re-use of earlier copyrighted material as supplying the public with more useful works of knowledge.¹⁵³ Analytically, the British considered the translation or abridgement as a new work capable of independent copyright, thus not infringing the earlier work.¹⁵⁴ Such activity was looked on favorably, and even lauded.¹⁵⁵ These British decisions showed a sensitivity and appreciation for the contribution of later works to the education and learning of society—consistent with the stated objective of the establishment of copyright in the Statute of Anne.¹⁵⁶

From its inception, copyright jurisprudence was concerned with the distribution function of copyright. Early British cases rationalized their liberal or indulgent approach toward re-use of copyrighted works as aligning the distribution function of copyright with its objectives of advancement of knowledge and encouragement of learning.¹⁵⁷ A common scenario giving rise to

¹⁵¹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁵² See generally, LITMAN, *supra* note 146.

¹⁵³ See *infra* Part II.A.1.

¹⁵⁴ ROSE, *supra* note 2, at 133; KAPLAN, *supra* note 14, at 16-17.

¹⁵⁵ KAPLAN, *supra* note 14, at 22; Samuelson, *supra* note 41 (manuscript at 2).

¹⁵⁶ KAPLAN, *supra* note 14, at 10-11.

¹⁵⁷ *Id.* at 17 (Professor Kaplan quotes Lord Mansfield in his famous decision *Sayre v. Moore* (1785) where the court favored the follow-on work so

(continued next page)

disputes between publishers involved abridgements. In the classic abridgement case *Gyles v. Wilcox*,¹⁵⁸ decided in 1740, the publisher of Sir Matthew Hale’s *Pleas of the Crown* had pursued an infringement action against the publisher of an abridged version called *Modern Crown Law*.¹⁵⁹ In finding no infringement, Lord Chancellor Hardwicke said, “abridgements may with great propriety be called a new book, because not only the paper and print, but the invention, learning and the judgment of the author is shown to them.”¹⁶⁰ As Professor Kaplan noted, Lord Mansfield, in the 1785 map case of *Sayre v. Moore*, stated a concern with supporting the endeavors of follow-on creators whose improvements on earlier works benefits society.¹⁶¹ This sentiment supported the general rule on abridgements finding no infringement.

2. American pro-expansion framework

In a trio of cases, *Gray v. Russell*, *Emerson v. Davies*, and *Folsom v. Marsh*, Justice Story laid the groundwork for a reversal of the earlier British approach.¹⁶² He set an alternate direction for copyright jurisprudence, which contrasted with those decisions of his period that followed the eighteenth century British jurisprudence.¹⁶³ Justice Story selectively relied on British precedent that allowed him to fashion a different rule that also yielded a different outcome—one that favored first-mover investors and the commercial interests invested in the first publication of material.¹⁶⁴

In a fact pattern very similar to the British abridgement cases, Justice Story found an abridgement of George Washington’s

that “the world may not be deprived of improvements, nor the progress of the arts be retarded.”)

¹⁵⁸ 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130).

¹⁵⁹ ROSE, *supra* note 2, at 51; KAPLAN, *supra* note 14, at 10-11.

¹⁶⁰ KAPLAN, *supra* note 14, at 10-11.

¹⁶¹ *Id.* at 11, 16-17 (Kaplan also discussed two other British abridgement opinions where the court found no infringement); Samuelson, *supra* note 33 (manuscript at 2).

¹⁶² KAPLAN, *supra* note 14, at 27-29.

¹⁶³ KAPLAN, *supra* note 14, at 27-29.

¹⁶⁴ *Id.* at 27. Professor Kaplan notes that Justice Story was a “chief American expositor and reinterpreter of English copyright doctrine.” *Id.*

biography infringing.¹⁶⁵ Justice Story did not buy the “new book” rationale, and was not sensitive to the “contribution to the benefit of society” rationale.¹⁶⁶ Rather, he was sympathetic to the “taking” rationale of the first-mover investor.¹⁶⁷ He developed an alternate framework supportive of the commercial interests associated with first-mover investors in the exploitation of copyrighted assets.¹⁶⁸ His analytical move was to view the follow-on work as a “taking,” rather than a “new work.”¹⁶⁹ This significant philosophical difference reflects the growing importance and influence of the commercial interests associated with the first-mover investor in copyright—the content producer claiming the earlier copyright. In Story’s time, these interests were those of book publishers, who had invested in the printing and distribution of the earlier work, and believed an unlawful taking had occurred when the follow-on work re-used some of its content.¹⁷⁰

Justice Story is famous for being the father of the “fair use” doctrine of copyright. In his famous opinion cited for that doctrine, *Folsom v. Marsh*, Justice Story did not use the term “fair use.”¹⁷¹ He merely articulated a factor test for determining if re-use is infringing or excused, but that factor test would later be coined as the “fair use” test.¹⁷² *Folsom v. Marsh* is part of a trio of Story decisions that articulated a departure in infringement analysis from the earlier British approach.¹⁷³ Instead of an indulgent,

¹⁶⁵ *Id.* at 28.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 27-28.

¹⁷⁰ *Id.* at 22. Professor Kaplan notes that British doctrine had begun to question the “indulgent attitude toward using other people’s works [as] increasingly out of keeping with the realities of the market.” *Id.*

¹⁷¹ See generally *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

¹⁷² These uses are determined on a fact-specific basis by weighing four factors: (1) the purpose and character of the “fair use,” (2) the nature of the copyrighted work, (3) the impact of the use on the market of the rights holder, and (4) the amount and substantiality of the portion of the work used. It is a standard, not a rule that must be applied by the court subsequent to the “use” of the work by the party claiming the privilege. In his opinion *Lawrence v. Dana*, Judge Clifford, relying particularly on *Folsom v. Marsh*, coined the term “fair use.” *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136). The fair use factor test has been codified in the 1976 Copyright Act.

¹⁷³ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

liberal approach toward re-use of material as benefiting society, Story viewed the re-use in commercial terms, and he analyzed how it impacted the investment decisions of those investing in the early distribution of copyrighted works.¹⁷⁴ As Professor Kaplan noted, there was a “reshuffling of doctrine” in the nineteenth century—the shift in the indulgent attitude toward re-use of material associated with eighteenth century copyright jurisprudence.¹⁷⁵

Folsom v. Marsh concerned the abridgement of George Washington’s biography.¹⁷⁶ Instead of applying the classic abridgement rule favoring follow-on works, Justice Story took the opportunity to fashion a new rule, really a new standard or test.¹⁷⁷ He relied most heavily on brief dicta by Lord Cottenham in his *D’Almaine v. Boosey* opinion about the appropriate approach to re-use of prior work.¹⁷⁸ Justice Story relied on Lord Cottenham’s musing about whether the question of legitimate re-use was not a matter of the quantity taken, but the value of the earlier work.¹⁷⁹ Story did not focus on the contribution of the follow-on work to the public good because his property approach of looking at re-use of material as a “taking” meant that market impact on earlier work was the priority.¹⁸⁰

Although the fair use doctrine in the twentieth century became the touchstone for pro-restraint forces, it is more properly viewed in its historical context as moving copyright from pro-restraint to pro-expansion.¹⁸¹ As discussed below, its methodological approach does not support the knowledge production processes, which require ex ante certainty with respect to access to the knowledge resources of the intellectual commons.¹⁸² Justice

¹⁷⁴ John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005).

¹⁷⁵ KAPLAN, *supra* note 14, at 22.

¹⁷⁶ *Folsom*, 9 F. Cas. at 345; KAPLAN, *supra* note 14, at 27-28.

¹⁷⁷ *Id.*

¹⁷⁸ *Folsom*, 9 F. Cas. at 348. In the British decision *D’Almaine v. Boosey*, the adaption of a musical score for a different purpose was found to be infringing. *D’Almaine v. Boosey*, 1 Y. & C. Ex. 288, 160 Eng. Rep. 117 (1835).

¹⁷⁹ *Folsom*, 9 F. Cas. at 348. In dicta, Lord Cottenham discussed whether British doctrine had not been concerned about the quantity or quality of the work, but rather the overall work. He ultimately dismissed the case as not one of equity but law. The plaintiff passed away shortly after and the case was not pursued. *D’Almaine*, 160 Eng. Rep. at 122-23.

¹⁸⁰ *Folsom*, 9 F. Cas. at 342.

¹⁸¹ Tehranian, *supra* note 117.

¹⁸² See *infra* Part III.B.2.

Story's balancing test relied on each judge subjectively determining how much weight to allocate to any particular factor.¹⁸³

Judge Story's pro-expansion approach to copyright was still limited to the literal elements of copyright. Even if the whole of the book was not re-used, it was the text or literal elements of the text that were re-used. The next move in the expansion of the protection right included non-literal elements in the "taking" analysis, which evolved into the modern "substantial similarity" doctrine. The 1868 district court decision *Daly v. Palmer*¹⁸⁴ signaled the shift in doctrinal development. Modern fair use doctrine evolved as the scope of copyright expanded from literal to non-literal elements of the work, developing into a doctrine that can be seen as a brake on over-reaching by first-mover investor.

3. Emergence of non-literal protection

Justice Story's jurisprudence represented a pro-expansion shift away from the American line of cases following the British approach of pro-restraint.¹⁸⁵ His decisions, however, still involved copying of the literal elements of the copyrighted material. The next pro-expansion move in copyright was the protection of non-literal elements of the copyrighted work. By the early second half of the nineteenth century, the economic interests associated with copyright had evolved from exclusively books to include dramatization of written works—plays.¹⁸⁶

Only a short period after the Story decisions, New York district judge, Samuel Blatchford, took the pro-expansion path that Justice Story had charted even further. In 1868, one theatre producer sought to enjoin another theatre producer from producing a popular

¹⁸³ *Id.*

¹⁸⁴ *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

¹⁸⁵ In *Wheaton v. Peters*, the Supreme Court followed the British precedent of *Donaldson v. Beckett*, holding that there was no independent common law right in literary property. *Wheaton v. Peters*, 33 U.S. 591 (1834). In *Stowe v. Thomas*, Judge Grier, followed British precedent that a translation was not infringing. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514). It was a case of first impression in the U.S. regarding the rights of a copyright owner (Harriet Beecher Stowe) in a translation of its work (German translation of *Uncle Tom's Cabin*). *Id.* at 201. Quoting William Blackstone, the plaintiff's attorney argued that natural rights of the author should lead the court to enjoin the translation. *Id.* at 202 n.2.

¹⁸⁶ KAPLAN, *supra* note 14, at 30-31.

competing play in New York City.¹⁸⁷ The two plays, called *Under the Gaslight* and *After Dark* involved significantly different plots, dialogue, and character.¹⁸⁸ The only similarity was that both contained a “railroad scene.”¹⁸⁹ The characterization of the railroad scene also differed—in one case it involved a woman being rescued, and the other, a man being rescued.¹⁹⁰ The location of the rescue varied as well.¹⁹¹ Nevertheless, the judge who decided *Daly v. Palmer*¹⁹² cited Judge Story’s opinions, as well as the British precedent, *D’Almaine*, and found infringement.¹⁹³

Reading the opinion, there is ample reference to the commercial success of the first play, and particularly to the audience’s enjoyment of the “railroad rescue” scene.¹⁹⁴ The court reasoned that if an element of the second work (e.g. railroad scene) elicits similar emotions or sensations as a similar (i.e. non-literal) element in an earlier work, then the second work can be infringing of the rights holder in the first work, and subject to injunctive relief.¹⁹⁵ Just like Judge Story, the court focused more on the “taking” than the value of the “new work” and its potential benefit to the public good.¹⁹⁶ The scope of “copy” in the statute has become very broad, broader arguably than even William Blackstone could have envisioned or hoped for one hundred years earlier.¹⁹⁷

The increasing economic stakes associated with copyright drove this shift in focus of infringement analysis. The earlier pro-restraint bias toward follow-on works as contributing to purposes of copyright was replaced by one favoring the first-mover investor in the copyrighted asset. As Kaplan noted:

¹⁸⁷ *Daly*, 6 F. Cas. at 1132-33.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1134.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1132.

¹⁹³ *Id.* at 1134.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1138-39.

¹⁹⁷ In 1869, T.W. Clarke wrote in the *American Law Review* an article criticizing the *Daly* decision for injecting a property approach into copyright jurisprudence. KAPLAN, *supra* note 14, at 32 (“Mr. T.W. Clarke lamented that this ‘is the first decision which has established a property in incident.’”).

An indulgent attitude toward using other people's works seemed out of keeping with the realities of the market. The business of publishing and distributing books had become bigger, more competitive, more impersonal; the stakes were higher, the risks more serious. In this atmosphere, there would be even greater anxiety about marking out the metes and bounds of literary ownership, and courts might be expected to respond to arguments about protection of investment.¹⁹⁸

In the early twentieth century, Justice Holmes and Judge Hand would take copyright in the direction that Judge Story was headed, and that the *Daly* court had pushed even further toward favoring the protection of investment in first-mover investor's copyrighted assets. Judge Hand's jurisprudence reified this broader non-literal scope of copyright while moving to limit its reach with the fashioning of another doctrine, known in modern copyright jurisprudence as the idea-expression dichotomy. This represents the re-conceptualization of copyright from the early British approach focused on the contributions to society's storehouse of knowledge to the modern American approach of the protection of the interests of investment.

B. Modern Copyright Jurisprudence – Print Era

Copyright jurisprudence was at an adolescent stage at the turn of the twentieth century. The expansion of copyright in the twentieth century occurred alongside the increasing commercialization of industries that benefited from and relied upon the protection that copyright afforded in the marketplace. By the end of the nineteenth century, not only were books, maps, and charts covered, but also music, dramatizations (theatre productions), and translations.¹⁹⁹ Industries such as theatre and music, which had not been included in the copyright regime at its inception, were prime beneficiaries of the system at the turn of the twentieth century.

The chief actor in the story of modern copyright jurisprudence is Judge Hand, but Justice Oliver Wendell Holmes' earlier

¹⁹⁸ KAPLAN, *supra* note 14, at 22.

¹⁹⁹ 17 U.S.C. § 101

influence on copyright generally, and on Judge Hand in particular, is significant.

Justice Holmes expanded the subject matter and commercial stakes of copyright. His decisions reified the concept of originality in copyright as a very low threshold, favorable to the first-mover investor in copyrighted material.²⁰⁰ Judge Hand constructed a personal framework for copyright which became the twentieth century modern copyright jurisprudence standard.²⁰¹ He is credited with the development of modern copyright's concepts of originality, substantial similarity, and idea-expression dichotomy.²⁰² Judge Hand's colorful and poetic writing belies a keen awareness of the commercial stakes at issue in the contests that came before him. He could move in one direction, then cleverly pivot 180 degrees with the poetic cover of his opinions. In his early decisions as a district court judge, particularly in the two music cases, Judge Hand moves copyright in a pro-expansion path, further reversing the earlier British approach of pro-restraint.²⁰³

In his next phase, while sitting on the Second Circuit, Judge Hand refines the substantial similarity analysis by creating the idea-expression doctrine to push back on the potentially infinite reach of the substantial similarity's elasticity.²⁰⁴ In the film cases, Judge Hand shifts direction by finding some limitations on the extensive scope of protection found in his music decisions, and by making new law on remedies.²⁰⁵

The result of the evolution of Hand's doctrines is indeterminacy, which has had adverse implications for the public good of copyright.²⁰⁶ Each of these analytical categories shares a common methodological bias. They are applied with *ex post*, rather than *ex ante* reasoning to draw appropriate lines between

²⁰⁰ KAPLAN, *supra* note 14, at 41.

²⁰¹ KAPLAN, *supra* note 14, at 41. Madison notes that Judge Hand's abstractions test for the idea-expression dichotomy is "the most famous (if still unclear) analytic tool in this area..." Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1689 (2004).

²⁰² KAPLAN, *supra* note 14, at 41.

²⁰³ *See infra* Part II.B.2.

²⁰⁴ *See infra* Part II.B.3.

²⁰⁵ *Id.*

²⁰⁶ Indeterminacy refers to the lack of coherency in the doctrinal outcomes. Many copyright scholars have noted the indeterminacy problem in copyright doctrine. *See infra* Part II.B.

competing economic interests. Ex post reasoning relies on subjective factor analysis of the specific facts of the dispute.²⁰⁷ In contrast, ex ante reasoning relies on bright-line rules that can predict outcomes prior to an actual dispute.²⁰⁸ The methodological distinction between ex ante and ex post reasoning is significant because the ex post approach has led to an indeterminacy problem in copyright, as outcome is less predictable. Scholars have largely neglected the effect of this methodological indeterminacy on the creation function of copyright.²⁰⁹

1. The Romantic Movement and its influence on copyright

A significant movement of the nineteenth century that would affect the later course of copyright jurisprudence was the Romantic Movement in literature and philosophy.²¹⁰ Oliver Wendell Holmes, Chief Justice of the Supreme Court in the late nineteenth and early twentieth century, was an avid adherent of the movement.²¹¹ The main tenet carried over to the law from this movement was the notion that originality in art is represented by the individual's reaction to nature. It can also be referred to as the

²⁰⁷ Ex post reasoning functions by weighing various factors as they are applied to the specific facts of the case.

²⁰⁸ Ex ante reasoning operates by applying a general rule to behavior. For example, a criminal law that mandates anyone under the age of 21 is prohibited from drinking alcohol is predictable in its application. Once one's age is verified, the outcome is clear.

²⁰⁹ See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008); JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1997); TARLETON GILLESPIE, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* (2007); DEBORA J. HALBERT, *RESISTING INTELLECTUAL PROPERTY LAW* (2005); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001); Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257 (2006).

²¹⁰ KAPLAN, *supra* note 14, at 34-35, 43, 117; Jaszi, *supra* note 23, at, 459-60; see also Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"*, 17 EIGHTEENTH-CENTURY STUD. 425, 428-30 (1983-1984) (detailing the Romantic conviction that the "author-genius was someone who created something entirely new and unprecedented.).

²¹¹ Justice Holmes draws from Romantic theory in his famous opinion, *Bleistein v. Donaldson Lithographing Co.*, where he states that "The copy is the personal reaction of an individual upon nature. Personality always contains something unique." 188 U.S. 239, 250 (1903).

“sole genius” theory.²¹² This Romantic genius philosophy informed three core constructs of modern copyright jurisprudence: originality, authorship and substantial similarity doctrine of infringement.

Judge Hand, also an adherent of Romantic philosophy, reified Justice Holmes’ idealization of Romanticism into his own personal conception of copyright’s definition of originality. Romantic philosophy infused the concept of “Author” and “Authorship” with an unassailable character of ownership. Since Romantic philosophy assumed that the work reflects the unique perspective of the individual author, any similarity to preceding works is dismissed as irrelevant.²¹³ It corresponds with the expanding scope of protection that copyright affords in the marketplace. By the turn of the century, copyright applied not only to books, but dramatizations (plays), music, and was about to apply to film.²¹⁴ Investors in these industries wanted more certainty with respect to their copyrighted material (read: assets).²¹⁵ Certainty was increased if they could be assured that the title in their asset could not easily be challenged. If the originality of the work, or even the sole ownership of the work, could be challenged, then the return on their investment would be diluted. The jurisprudential trend toward unassailable originality and bias against the collective nature of creativity benefited their interests.²¹⁶ Romantic theory aligned, if indirectly, with the interests of the first-mover investor who

²¹² Jaszi, *supra* note 23, at 483.

²¹³ See *infra* Part II.2.

²¹⁴ Act of Mar. 4, 1909, Ch 320, 35 Stat. 1075-1088 (repealed 1978).

²¹⁵ Investors were happy for the courts to rely on Romantic theory to support a broad protection right in the non-literal aspects of the copyrighted works (read: assets). Both Justice Holmes and Judge Hand were influenced by the monetary stakes of copyrighted works. In his landmark decision *Bleistein v. Donaldson Lithograph Co.*, Justice Holmes commented that “[C]ertainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use – if the use means to increase trade and to help to make money.” 188 U.S. 239, 251 (1903). As scholar Siva Vaidhyanathan notes Justice Holmes had experienced frustration failing to prevail in copyright cases of his own. See VAIDHYANATHAN, *supra* note 13, at 95. Vaidhyanathan also quotes Judge Hand, “While the public taste continues to give pecuniary value to a composition of no artistic excellence, the court must continue to recognize the value so created.” *Id.* at 105.

²¹⁶ Investors had to be aware of other similar works in the marketplace. This explains Hollywood’s extensive licensing system. See Horowitz, *supra* note 31 at 338 (“Above all, the copyright holder wants a reliably valid entitlement.” Horowitz goes on to note how originality is a very “permissive” standard).

avored certainty in the title to their asset. Doctrinally, Judge Hand's jurisprudence sanctified copyright's shift from protection of the literal to non-literal elements of the prior work that began in the late nineteenth century with *Daly v. Palmer*.²¹⁷

The next section examines several of Judge Hand's decisions that shaped modern copyright jurisprudence. In his early music decisions, Judge Hand moves copyright in a pro-expansion path, further reversing the earlier British approach of pro-restraint. However, in later cases involving film, Judge Hand reacts to possible over-reaching by first-mover investor by constructing new categories to be considered in the substantial similarity analysis, as well as remedies analysis to limit the liability of the follow-on investor.

2. Originality and substantial similarity: the music cases

Judge Hand developed a personal vision of copyright that largely became the blueprint for copyright jurisprudence in the modern age of print copyright. One of the hallmarks of Judge Hand's jurisprudence is that the originality of the prior work was presumed, rather than proven.²¹⁸ The salient characteristic of Judge Hand's approach is malleability—by the court—but its strength is also its limitation: its subjectivity and indeterminacy.

In 1910, Judge Hand, then a district judge in New York, authored the opinion *Hein v. Harris*,²¹⁹ which resolved a dispute between dueling music publishers. The earlier publisher's song was called "I Think I Hear a Woodpecker Knocking at my Family Tree," while the later publisher's song was called "The Arab Love Story."²²⁰ The major issue in the case was the question of the originality of the earlier song.²²¹ The defendant pointed to several songs preceding the plaintiff's song that were very similar.²²² Judge Hand dismissed this argument, on the basis that borrowing in general from another style is not enough.²²³ He noted that "the right of the author of a musical composition is not affected by the fact that he has borrowed in general from the style of his

²¹⁷ *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

²¹⁸ *See infra* Part II.B.

²¹⁹ 175 F. 875 (C.C.S.D.N.Y. 1910), *aff'd*, 183 F. 107 (2d. Cir. 1923).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

predecessors.”²²⁴ He went on to say those notes borrowed “becomes his own, even though strongly suggestive of what has preceded”²²⁵

In *Hein*, Judge Hand developed his substantial similarity doctrine of infringement.²²⁶ Judge Hand cited no legal authority.²²⁷ Rather, the opinion contains a detailed comparison of the elements of each song, which reads more like the work of a music critic than a district judge.²²⁸ Between the two songs at bar, the words were different, and the musical composition was not identical.²²⁹ Judge Hand noted other differences, such as the keys, and fact that not all notes were identical.²³⁰ However, certain notes of the melody were similar.²³¹ Judge Hand noted, “[t]he quantity of the notes is not precisely similar; but when they are played in succession it would take the ear of a person skilled in music to distinguish between them.”²³² It was sufficient that in his opinion, the similarity between the songs was recognizable to “the ears of all.”²³³ Here, Judge Story’s analytical approach is at work, as well as *Daly*’s reliance on *D’Almaine*: is the similarity sufficient to uphold the plaintiff’s claim of a “taking?” The logic of the case is that the defendant’s song followed the plaintiff’s song in time, it was similar, and therefore it infringed.

Fourteen years after *Hein*, Judge Hand delivered another music publishing opinion, *Fisher v. Dillingham*,²³⁴ which also raised the originality question. Judge Hand did not dismiss originality out of hand; he just made it irrelevant because the test is so weak for the plaintiff to meet. *Fisher* involved the claim that a few notes used as an *ostinato* in both pieces infringed the earlier work’s

²²⁴ *Id.* at 877.

²²⁵ *Id.*

²²⁶ See generally *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 876. For example, in this first paragraph of the opinion, Judge Hand speaks of the “songs written in the same measure, called ‘common time’ . . . in the minor mode . . .” *Id.* He discusses all seventeen bars of the music noting similarities and differences. *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* Judge Hand wrote, “It is true that the keys are different; but this is a distinction which is of no consequence to the ears of all but those especially skilled in music . . .” *Id.*

²³⁴ 298 F.145 (S.D.N.Y. 1924).

copyright.²³⁵ The defendant argued that the plaintiff's piece was not original, and presented several examples of how the plaintiff's piece borrowed from the public domain.²³⁶ Judge Hand destroyed this argument with the simple assertion that even if the plaintiff's work drew on works in the public domain, it was still possible that the plaintiff's work was original because it was the "spontaneous, unsuggested result of the author's imagination."²³⁷ This unprovable claim resonates with Romantic philosophy. Judge Hand supported the contention that the plaintiff's work was original by relying on the theory that two similar works could co-exist in copyright.²³⁸ He spent the large majority of the opinion discussing two bases of support for this theory.²³⁹ After citing cases, he included lengthy academic discussion by treatise writers of the period.²⁴⁰ Hand concluded that even a minor variation on a public domain work is copyrightable.²⁴¹ Judge Hand never considered that the defendant may have also been original in his creation.²⁴² As seen in the infringement analysis below, Judge Hand did not apply the same reasoning to support the defendant's contention that he independently created the notes.

Once originality was met in *Fisher*, Judge Hand easily found enough similarity in the eight notes that comprised the ostinato to meet the infringement test.²⁴³ "The argument is a strong one. Not only is the figure in each piece exactly alike, but it is used in the same way; that is, as an "ostinato" accompaniment"²⁴⁴ Interestingly, Judge Hand spent significant space in the opinion disclaiming an inference that the defendant knowingly pirated the work from the plaintiff.²⁴⁵ This was Judge Hand's (in)famous statement about unconscious copying.²⁴⁶ The defendant claimed no knowledge of the earlier work (including the infringing notes),

²³⁵ *Id.* at 147.

²³⁶ *Id.* at 148.

²³⁷ *Id.* at 149.

²³⁸ *Id.*

²³⁹ *Id.* at 149-52

²⁴⁰ *Id.* at 149-52.

²⁴¹ *Id.*

²⁴² *Id.* at 152.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* He says his mind may have played a trick on him. *Id.* He cannot see "how else to account for a similarity, which amounts to identity." *Id.* Then no problem finding plaintiff's piece original in spite of similar prior art. *Id.*

and the plaintiff did not prove access or actual copying.²⁴⁷ Judge Hand did not challenge the defendant's intent, but rather comforted himself with idea that the defendant unconsciously was aware of the infringing notes and re-used them in his piece.²⁴⁸ To assuage the defendant, he spoke highly of his reputation and accepted that he may have "unconsciously copied the figure."²⁴⁹ There would seem to be little limit to the inference of intent to copy as long as the judge found sufficient similarity and "value" between the follow-on work and the earlier work.²⁵⁰

A third opinion reflects the malleability of the jurisprudential framework in the hands of Hand. In 1936, Judge Hand, sitting on the Second Circuit, authored the *Arnstein v. Edward B Marks* opinion.²⁵¹ In this case, originality was not disputed.²⁵² Like Hand's prior opinions, there was extensive discussion about the reputation of the composers and a dissection and comparison of the elements of the respective pieces of work.²⁵³ Hand went out of his way to note that *Hein* does not apply because the court was incorrect to imply that independent creation was not a defense to infringement.²⁵⁴ Then what about *Fisher*? Certainly Fisher seemed to have good argument that he independently created the work. Hand was very sympathetic to the defendant in *Arnstein*. He carried out a very subjective (if not of questionable relevance) discussion of the reputations of the composers.²⁵⁵ The plaintiff argued that collaborators of the defendant had access to plaintiff's song.²⁵⁶ Hand disposed of this argument with the statement that those collaborators had so little talent they could not have composed the song at issue.²⁵⁷ Would that not support the opposite argument of stealing someone else's work? In the facts before him, Judge Hand decided to make some space for similar works where it favors the defendant.²⁵⁸

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ 82 F.2d 275 (2d Cir.1936).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 276.

²⁵⁸ *Id.*

The consistency in Hand's opinions is his overwhelming commitment to the unassailable nature of originality. In the music cases, Hand developed the originality concept embedded with Romantic philosophy—a subjective response to nature and unique to the creator. Of course, the same credit is not given to the defendant's work. His work is judged by a different standard: similarity (in the mind of the judge) to the prior work.

Substantial similarity is the doctrinal cover for *Daly* reasoning. The first-mover is granted the presumption of originality.²⁵⁹ In Judge Hand's early decisions, substantial similarity has a broad, possibly infinite reach.²⁶⁰ Any recognizable similarity between the plaintiff and defendant's expression is enough to find liability.²⁶¹ It is clear that Hand used a different standard for "originality" than for "copying."²⁶² Analytically, Hand had reversed the British approach, which saw follow-on works that re-use prior work as potentially benefiting the public good of advancing the knowledge and education of society.²⁶³ Hand's approach is to analyze the commercial benefits and costs of his decisions, responding to the perceived interests of the litigants before him.

On the Second Circuit, Judge Hand moved in a different direction, developing doctrines to rein in the potentially infinite reach of substantial similarity. His entire analysis relied on ex post reasoning: the weighing of the facts to subjectively determine outcome.²⁶⁴ The subjectivity in this methodological approach leads to a significant indeterminacy problem. As discussed below, the knowledge production process flourishes with ex ante rules that support predictability in outcome.²⁶⁵

In the film cases, discussed below, the plaintiffs pushed to expand these flexible boundaries of protection. Judge Hand reacted against such "over-reaching" by developing other devices,

²⁵⁹ *Daly v. Palmer*, 6 F. Cas. 1132 (C.C. S. D. N. Y. 1868) (No. 3,552). The defendant attempted in vain to show that the "railroad rescue" scene had been used before the plaintiff's copyright. *Id.* at 1134.

²⁶⁰ This is the author's analysis based on the *supra* discussion of Judge Hand's approach in *Hein* and *Fisher*.

²⁶¹ See *supra* discussion of *Hein* and Judge Hand's remark that the similarities were "recognizable to the ears of all."

²⁶² Judge Hand clearly applied a different standard to similarity of plaintiff's work to preceding works than similarity between plaintiff's work and defendant's work. See discussion *supra* notes 229-53 and accompanying text.

²⁶³ See *supra* Part II.A.1.

²⁶⁴ See *infra* notes 229-53 and accompanying text.

²⁶⁵ See *infra* Part III.B.

relying on ex post reasoning to resist such perceived “over-reach”: doctrines of idea-expression and remedies.²⁶⁶

3. Idea-expression doctrine: the film cases

Nichols v. Universal involved the plaintiff playwright Anne Nichols, claiming that her play, *Abie’s Irish Rose*, was infringed by the defendant, Universal Pictures Corp, in their production of the film *The Cohens and The Kellys*.²⁶⁷ The plaintiff had prepared, in the words of the opinion, “an elaborate analysis of the two plays, showing a ‘quadrangle’ of the common characters, in which each is represented by the emotions that he discovers.”²⁶⁸ Judge Hand viewed his objective as deciding whether the infringing portion of the follow-on work should be determined to be “expression,” and thus protectable, or merely an “idea,” and not protectable.²⁶⁹

The playwright plaintiff relied on *Daly v. Palmer* to argue that the filmmakers infringed her copyright.²⁷⁰ The plaintiff’s case seemed to be as strong as *Daly*, but Judge Hand did not feel comfortable with that outcome. Hand probably sensed the implications for investment in follow-on works if the first-mover investor could push the boundaries of protection so far. He engaged in a detailed textual analysis of the play, delving deeply into the plot structure and character development, similar to Judge Samuel Blatchford in *Daly v. Palmer*.²⁷¹ Rather than attack originality directly, Hand developed a theory to support this outcome of no infringement.²⁷² Certain elements of a story were

²⁶⁶ In his 1939 opinion, *Sheldon v. MGM*, Judge Hand found liability on the part of the film producer although arguably the materials originated in the public domain *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939). Here Judge Hand limited the liability of the defendant, reducing significantly the damages, by creating new norms in copyright. In earlier copyright cases like *Daly v. Palmer*, the defendant was enjoined from distributing the work. Judge Hand drew lines between competing economic interests that arguably satisfied both parties. Professor Kaplan criticizes Judge Hand for not considering originality in the *Sheldon* case. KAPLAN, *supra* note 14, at 1-2.

²⁶⁷ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

²⁶⁸ *Id.* at 122.

²⁶⁹ *Id.*

²⁷⁰ KAPLAN, *supra* note 14, at 47.

²⁷¹ *Nichols*, 45 F.2d at 120-21.

²⁷² *Id.*

so common and generic that they did not warrant protection.²⁷³ This theory makes economic sense, as it places a limit on the first investor such that a subsequent investor has room to develop its asset. Following Judge Hand's jurisprudence, Judge Yankwich coined the phrase "scenes a faire" to refer to stock elements that are so common and generic as to not warrant protection.²⁷⁴ These were tools for the jurist to fashion an outcome on the "idea" side of the idea-expression dichotomy without having to attack originality.

Judge Hand and Justice Holmes took copyright in a counter-intuitive direction with respect to originality or novelty. Originality was something presumed, rather than proven. The first-mover investor could assert *prima facie* evidence of originality by merely asserting the copyright. As any copyright lawyer knows, there is no process whereby the Copyright Office determines originality or, in the parlance of patent law, novelty. Hand was transparent about the ambiguity of this line drawing.²⁷⁵ In his famous, often-quoted statement, he says, "Nobody has ever been able to fix that boundary, and nobody ever can."²⁷⁶ Judge Hand replicates Judge Story's *ex post* approach to reuse of prior works in the line drawing analysis of substantial similarity and idea-expression.²⁷⁷

Substantial similarity infringement analysis must do the work that originality has been forbidden to do. The result is indeterminacy, and adverse implications for the public good of copyright. For copyright's implications for knowledge and education, it means there is no certainty of access to copyrighted material for the researcher or student. This indeterminacy problem can be rationalized if the main purpose of the jurisprudence is to navigate reasonable outcomes among competing economic interests on an *ad hoc* basis. If this is the doctrine that society relies upon to ensure access to knowledge resources, namely copyrighted works of knowledge, then it poses serious problems. The result is indeterminacy, and adverse implications for the public good of copyright.

²⁷³ *Id.* at 122. "There are but four characters common to both plays, the lovers and the fathers." *Id.* In response to detailed comparative analysis of the plays, Judge Hand said, "the adjectives are so general as to be quite useless." *Id.*

²⁷⁴ *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (S.D. Cal. 1942).

²⁷⁵ *See Nichols*, 45 F.2d at 121.

²⁷⁶ *Id.*

²⁷⁷ There are no *ex ante* "bright-line" rules for determining whether infringement has occurred.

The next section begins with the relatively famous modern Supreme Court case, *Sony v. Universal*.²⁷⁸ The context of this case is important. The second half of the twentieth century saw the technological revolution of digital media. During the digital transition phase, physical copies of media products were delivered in digital format. These formats like floppy disks, CDs, and DVDs revolutionized the delivery method of entertainment products. The potential financial impact of the unauthorized reproduction of these digital products alarmed the content industry.²⁷⁹ This fear over potential financial losses drove their feisty battle with Sony to compel VCR manufacturers to integrate copy control measures in their machines.²⁸⁰ As discussed below, the close decision by the Supreme Court in favor of Sony represents the zenith of the fair use doctrine.²⁸¹ In the wake of that decision, the industry worked vigorously to shape copyright law to protect their interests in the face of pure digital transmission of copyrighted materials, where the stakes would be even higher.²⁸² In the view of copyright holders, especially those in the well-funded and powerful film and music industries, the limiting doctrine of “fair use” threatened to swallow up the whole.²⁸³ The content producers—led by the film and music industries, as well as publishing and later software—strove to reverse this trend. That effort resulted in the passage of Section 1201 anti-circumvention provisions of the Digital Millennium Copyright Act (“DMCA”) in 1998.²⁸⁴ The threat of

²⁷⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁷⁹ Mainstream cite on reaction of content industry to digital piracy. RIIA

²⁸⁰ *Id.*

²⁸¹ *See infra* Part II.C.

²⁸² *See infra* Part II.C.

²⁸³ Testifying before Congress in support of the DMCA, Richard Parsons, CEO of TimeWarner argued that piracy on the Internet was “an assault on everything that constitutes cultural expression of our society.” He went on to claim that in the absence of the protections that the content industry requested, “culture would atrophy...[T]he country will end up in a sort of cultural Dark Ages.” GILLESPIE, *supra* note 213 at 108. Siva Vaidhyathan notes that the Clinton Administration’s report titled “Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, referred to as the “White Paper,” published in 1995, which served as the blueprint for the DMCA, referred to fair use as a “tax” on owners of copyrighted material. *See* VAIDHYANATHAN, *supra* note 13, at 159. Essentially the DMCA closed the “fair use” loophole.

²⁸⁴ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (enacted H.R. 2281) (1998).

commercial piracy and the significance of the industries' interests to the economy convinced policymakers to pass the DMCA.²⁸⁵

The DMCA represented the success of industry to protect their interests.²⁸⁶ Pro-restraint doctrines of the twentieth century of fair use and first sale are swallowed up by the statutory act.²⁸⁷ Critics have railed against these effects since the passage of the Act, to little avail.²⁸⁸ This Article argues against the approach of attempting to retrofit digital copyright (read: DMCA) with print-era fair use. Fair use is a doctrine concerned with the distribution of content, not its creation. A defendant raises the defense of fair use to claim that its distribution of copyrighted material should not be infringing (or alternatively, infringing but without liability because of the fair use defense).²⁸⁹ This defense only applies when the creation of the content has already occurred. To advance the public good of copyright, namely encouragement of learning and advancement of knowledge, then access to ALL material is required ex ante to the creation process, rather than a portion of it ex post to the creation process. A researcher, student, or scholar cannot rely on the fair use doctrine to determine if its use of the material for learning would be non-infringing. In fact, it probably will not be non-infringing, as it requires access to all the material not some uncertain portion of the material. As discussed in Part III, if the researcher, scholar, or student creates something from that use, then she will still be subject to the doctrines concerned with distribution.²⁹⁰ As discussed in more detail below, the focus of this inquiry is making space for copyright to advance knowledge and learning, rather than reforming the distribution function of copyright.

²⁸⁵ LITMAN, *supra* note 146.

²⁸⁶ Litman, *supra* note 2, at 346.

²⁸⁷ Tehranian, *supra* note 1, at 537, 538, 539.

²⁸⁸ Tushnet, *supra* note 30, at 1011-14 (Noting that the effect of the DMCA provision on libraries is that "the value of making works widely available, for edification and enlightenment without overt transformation, is lost.) The effort by public libraries to persuade the Copyright Registrar to grant a broad fair use exception to the 1201 provisions of the DMCA failed. *See infra* note 322. Mainstream cite of criticism of DMCA (Peter Jaszi of American U law school started a movement called Digital Future Coalition in 1995 to either defeat 1201 or revise it with a fair use carve out.) "to no avail" can also be cited to the libraries' failure to amend 1201 for fair use.

²⁸⁹ Copyright Act of 1976, 17 U.S.C. § 107.

²⁹⁰ *See infra* Part III.B.2.

C. Back to the Future—Digital Transition and Pure Digital

Technological advancement in the latter half of the twentieth century posed some serious challenges to the business models of copyright industries, particularly film, music, and publishing. The photocopier was viewed by the publishing industry as a giant infringement machine.²⁹¹ The transformation of content to digital form, but still packaged as a physical, portable commodity is referred to herein as the “digital transition” period of copyright. Common contemporary examples include the CD format in music and the DVD format in film. Before CDs and DVDs, there were audio and videocassette tapes. Responding to market demand, the consumer electronic industry produced players and recorders to the consuming public. Unlike the print era where consumers relied on content producers to produce and distribute the content, the digital transition era meant that consumers could become producers and distributors of copyrighted material in their own right. Not surprisingly, the content industry became concerned that consumers could make multiple copies of content, thus depriving them of future sales. The pro-restraint camp of copyright saw this as legitimate fair use, whereas the pro-expansion adherents viewed this activity as illegal copying.

This technological shift forced the courts to address several issues: (1) what constitutes a copy for purposes of the Copyright Act; (2) to what extent would the terms of the license agreement drafted by the copyright owner trump copyright law; and (3)

²⁹¹ See Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 COPYRIGHT SOC'Y U.S.A. 545, 546 (2006); *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). There were some early struggles between publishers and libraries over permitted use that would not be infringing. As the photocopier became available to corporations and to the consuming public, publishers began to fight back. Publishers resisted the libraries' call for some fair use guidelines until they feared a worse outcome by the courts. At the time, it was still the print era and libraries merely wanted assurance that they could print copies either for inter-library loan or for archival purposes. The 1976 Act for the first time codified fair use, and included some specific provisions benefiting libraries. Copyright Act of 1976, 17 U.S.C. § 108 (2011). With respect to the public, publishers were forced to accept a compromise whereby printing companies would post copyright notices, but not be liable for the potential infringement of their customers. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

assuming a copy has been made, and infringement liability would follow, would the accused infringer be excused from copying for personal use under the fair use doctrine of copyright? The content industry favored the broadest interpretation of its protection right. For the film and music industries, that meant that unauthorized personal use copying constituted infringement, and for the software industry, any use of the computer program inconsistent with the license agreement should trigger liability and injunctive relief.²⁹² Four decisions, two by the Supreme Court and two by circuit courts, defined the legal boundaries posed by these questions. The Supreme Court decisions, *Sony v. Universal*²⁹³ and *MGM Studios Inc. v. Grokster*,²⁹⁴ addressed the question of copying and fair use in the film and music context. The circuit court decisions, *ProCD v. Zeidenberg*²⁹⁵ and *MAI v. Peak*,²⁹⁶ addressed the question of copying and the enforceability of license agreement restrictions in the software industry context. As discussed below, *Sony* appeared to signal an indulgent view toward personal use copying as permissible under fair use.²⁹⁷ *Grokster* pushed back the pendulum toward a stricter view of permissible fair use even for personal copying.²⁹⁸ This perceived setback by *Sony* and possible uncertainty of *Grokster* for the industry was remedied by the passage of the DMCA in 1998.²⁹⁹ For the software industry, *MAI v. Peak* and *ProCD* represented clear victories. *ProCD* held that license restrictions on use were enforceable.³⁰⁰ *MAI* held that the automatic copying of the software program by the computer represented copying for purposes of the Copyright Act (thus requiring authorization by the

²⁹² Mainstream cite on software industry and film/music industries support of broad infringement.

²⁹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁹⁴ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

²⁹⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

²⁹⁶ *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

²⁹⁷ *Sony*, 464 U.S. at 417.

²⁹⁸ *Grokster*, 545 U.S. at 913.

²⁹⁹ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (enacted H.R. 2281) (1998). As discussed *infra*, in the pure digital stage of dissemination, the content industry can exercise full control of the dissemination of its content, allowing for no leakage by the fair use or first sale doctrines.

³⁰⁰ *ProCD*, 86 F.3d at 1455.

copyright holder).³⁰¹ Although criticized by commentators, this judicial approach was reaffirmed by the recent Ninth Circuit decision *Vernor v. Autodesk*.³⁰² Both questions: (i) Does the automatic copying by a computer constitute copying? *and* (ii) Do the provisions of a license agreement trump copyright doctrine's doctrine of first sale? were answered by the courts in the copyright holders' favor.

In *Sony v. Universal*, a close five to four decision, the Supreme Court found that the VCR manufacturers were not liable for contributory infringement on the theory that their machine had "substantially non-infringing uses."³⁰³ Specifically, the Court found that time shifting by consumers to watch television programs were a "fair use."³⁰⁴ The film industry was not happy with this decision. The content industry responded to their loss in *Sony* by working on two fronts, judicial and legislative, to regain control over the dissemination of their content.³⁰⁵ The software industry led the charge on the former, and the film, music and publishing industries on the latter.³⁰⁶ In the 1980s, the Internet had not become mainstream, but the content industries understood its potential to dwarf the adverse effects of the personal recording

³⁰¹ *MAI*, 991 F.2d at 518-19.

³⁰² *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

³⁰³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984). *Sony* involved the innovative technology of the 1980's -- the videocassette recorder -- that allowed consumers to record television programs for later viewing. *Id.* at 417. Tapes of these programs (including films broadcast on television) could be duplicated and distributed. As a result, the industry wanted the manufacturers to accept controls such that consumers would pay for their use. *See, e.g.*, Alexis C. Madrigal, *The Court Case that Almost Made it Illegal to Tape TV Shows*, THE ATLANTIC (Jan. 10, 2012, 8:35 AM), <http://www.theatlantic.com/technology/archive/2012/01/the-court-case-that-almost-made-it-illegal-to-tape-tv-shows/251107/>; *Retrospective: Betamax & Copyright Infringement*, IP LUSTITIA (July 3, 2013), <http://www.ipiustitia.com/2013/07/retrospective-betamax-and-copyright.html>; Eduardo Porter, *Copyright Ruling Rings with Echo of Betamax*, N.Y. TIMES, Mar. 26, 2013, <http://www.nytimes.com/2013/03/27/business/in-a-copyright-ruling-the-lingering-legacy-of-the-betamax.html?pagewanted=all>. However, the consumer electronics industry resisted such demands. The result was litigation all the way to the Supreme Court. *See Sony*, 464 U.S. at 417. The VCR manufacturers were sued on the theory of contributory infringement, which rested on direct infringement by consumers. *Id.*

³⁰⁴ *Sony*, 464 U.S. at 455.

³⁰⁵ GILLESPIE, *supra* note 213 at 168; LITMAN, *supra* note 146.

³⁰⁶ Software Publishers Assn; amici briefs in *ProCD v Zeidenberg*; *MAI v Peak*; and *Vernor v. Autodesk*.

machines. Anticipating the inevitable transition to “pure digital,” content industries laid the groundwork, judicially and legislatively, for greater protection over the electronic dissemination of their content.³⁰⁷ The degree of control achieved was significantly greater than seen in the print era, and harkens back to the efforts of the London booksellers during the eighteenth century to reinstate their former control over distribution of copyrighted content.³⁰⁸

The content industry developed a strategy to gain greater control over copyrighted content by convincing Congress that their interests were co-extensive with society's interest in the copyright system. Beginning in the print era, copyright became increasingly associated with the valuation of copyrighted commodities.³⁰⁹ Copyright industries believed their interest in maximizing the dollar value of copyrighted commodities defined the goal of the copyright system. With the rise in fashion of the economic analysis of the law, scholars began to reflexively assume the connection.³¹⁰

Content industries, particularly the film industry, had a legitimate fear of digital commercial piracy. Digital commercial piracy refers to the reproduction of unauthorized copyright content for sale to public (such as unauthorized DVDs).³¹¹ Rather than focus narrowly on those perpetrators, the content industry found it much more effective (read: lucrative) to broaden the scope of their remedy to reach all unauthorized use, even the type of use sanctioned by *Sony*.³¹² Thus, the challenge of technology became an opportunity to eliminate the leakage from copyright protection posed by the fair use and first sale doctrines. Content producers were never fans of first sale doctrine, as it represented lost revenue. Working with the Clinton administration in the 1990s, a White Paper was commissioned that ultimately supported industry efforts to amend copyright to regain control directly over content.³¹³ These recommendations evolved into the 1201 anti-circumvention

³⁰⁷ GILLESPIE, *supra* note 213, at 175-78; LITMAN, *supra* note 146.

³⁰⁸ See *supra* Part I.B.

³⁰⁹ See *supra* note 318. (investors/holmes/hand on economic stakes)

³¹⁰ Jaszi, *supra* note 23, at 458 n.10.

³¹¹ MPAA source.

³¹² VAIDHYANATHAN, *supra* note 13, at 158-59.

³¹³ BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.txt>.

provisions of the 1998 DMCA.³¹⁴ These provisions make the breaking of digital locks on digital content illegal for any purpose, including fair use, first sale, or to extract the “ideas” from the “expression.”³¹⁵ In the “pure digital” era (content delivered electronically, i.e. “streaming content”), the positive law affords no exceptions for fair use or first sale for any purpose, including learning and education.³¹⁶

In retrospect, *Sony* represents the nadir of the fair use doctrine and the modern pro-restraint movement of copyright. Over twenty-five years have passed since the *Sony* decision, and nearly fifteen years since the DMCA was enacted.³¹⁷ Fair use has disappeared with respect to pure digital content (i.e., the electronic dissemination of content).³¹⁸ The pro-expansion forces have

³¹⁴ 17 U.S.C. § 1201 (2011).

³¹⁵ In response to cries from some quarters for a robust fair use exception at least comparable to print, a small concession was made in granting certain, limited powers to the Copyright Office. *Id.* § 1201(a)(1)(C) (2011).

³¹⁶ To understand the publishers’ actions and how they differ from the pre-digital world of a physical copy of a hardcover book, it is important to understand how the 1201 regime functions. The 1201 regime includes the 1201 provisions of the DMCA, as well as licensing restrictions based in contract and digital rights management technology to physically (and legally) lock up the content by the publisher (rights holder). Working together, the 1201 regime provides all the tools necessary for the publishers to impose a “pay for use” business model on libraries (and society). See Tushnet, *supra* note 30, at 982. The technology offers publishers the practical ability to begin implementing a more refined fee based distribution system for its product, information resources. Just as HarperCollins declared that the library would no longer have unlimited expiration rights to a digital book, a digital publishing vendor could begin to offer different price points for digital books based on time or other measures of use. See Hadro, *supra* note 13. Publishers have begun to develop the tools and the market power to distribute digital books mainstream. Blockbuster and Netflix have begun to offer consumers choices of time restricted viewing, such as a 24 hour period, 7 day period, or “purchase” option (meaning indefinite possession not freely transferable). See, e.g., *Most Economical Movie Rental Options for Your Family*, CBS BOSTON (Apr. 18, 2011, 7:17 PM), <http://boston.cbslocal.com/2011/04/18/most-economical-movie-rental-options-for-your-family/>; *Terms & Conditions*, BLOCKBUSTER ON DEMAND, <http://www.blockbuster.com/terms> (last visited Aug. 21, 2013) (§ 3 discusses time restrictions on viewing). Each of these choices offers the “use” of the film or video at different price points.

³¹⁷ The Supreme Court decision, *Sony v Universal* was decided in 1984; the Digital Millennium Copyright Act was passed in 1998.

³¹⁸ Since the enactment of the DMCA in 1998, there have been five rulemaking exemptions granted by the Librarian of Congress (on the recommendation of the Copyright Registrar). None of the 1201 exemptions granted have included

(continued next page)

prevailed in the distribution function of copyright. Unfortunately, there has been little attention to the effect of this shift on the knowledge creation process.

All copyright jurisprudence is rooted in a distribution function analysis of competing content producers' interests. The Supreme Court created the first sale doctrine hailed by the pro-restraint camp because a reseller, the Macy's corporation, stood up to a publisher, Bobbs-Merrill, arguing that it had the right to decide the price of the book it sold.³¹⁹ Fair use developed from the jurisprudence of Judge Story over whether a subsequent publisher of George Washington's biography could include material from another publisher's earlier publication.³²⁰ Judge Hand developed the idea-expression doctrine to prevent a playwright from claiming that a film producer's work copied the earlier play.³²¹ As discussed earlier, Judge Hand preferred this approach to addressing the messier question of the originality of the earlier work. To the extent that any of this jurisprudence has benefited the creation function of copyright, the production of new works, is conjecture. Courts are not charged with that inquiry, and Congress has failed to address it.

Starting in the 1990s, public libraries warned that trends in copyright would reduce access to information and increase the digital divide among income classes.³²² Libraries understood the implications of the trend toward limited rights of possession on access to knowledge, particularly for the less advantaged members of society.³²³ They focused on the objectives of copyright to encourage learning, and their mission to provide access to

electronic disseminated content (e.g. streamed content). The electronic dissemination of content is referred to herein as the "pure digital" stage of copyright. There is no fair use or first sale exemptions to Section 1201 for electronic dissemination of content. For the five rulings: *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260 (Oct. 26, 2012) (codified at 37 C.F.R. § 201.40 (2012)); 75 Fed. Reg. 43,825 (July 27, 2010); 71 Fed. Reg. 68,472 (Nov. 27, 2006); 68 Fed. Reg. 62,011 (Oct. 31, 2003); 65 Fed. Reg. 64,556 (Oct. 27, 2000).

³¹⁹ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

³²⁰ *See supra* Part I.A.2.

³²¹ *See supra* Part II.B.3.

³²² *See supra* note 50; GOLDSTEIN, *supra* note 33, at 172.

³²³ *See, e.g., Principles & Strategies for the Reform of Scholarly Communication 1, supra* note 79.

knowledge as widely as possible.³²⁴ For public libraries, access is about the broad circulation of materials among patrons, including the right to lend material to other libraries (increasing circulation) and to archive materials (protecting access for posterity). Libraries attempted to counter this shift by compelling producers to permit more use of the digital works, on par with pre-digital use; however, they failed.³²⁵ The libraries did not have the right model or strategy.³²⁶ They failed to understand that copyright jurisprudence was misaligned with those objectives.³²⁷ They relied on conventional copyright theory where creation of the copyrighted work has not been a central concern; and thus, access to copyrighted works is poorly understood as a mechanism in the creation function of copyrighted works.³²⁸

In the next section, contemporary theoretical models are analyzed according to their fidelity to the original objectives of copyright, namely encouragement of learning and the advancement of knowledge.³²⁹ The conventional copyright models account for access. However, their proxies for access functioned indeterminately in the print era, and their function for the digital era is quite dim.³³⁰ How would one of the British Lords of 1710 or one of the US Constitutional framers react to the rationales presented for modern day copyright? The answer to that rhetorical question, as argued in this Article, is that they would have no idea what had happened. Copyright lost its bearings.³³¹

³²⁴ See, e.g., *Strategic Plan*, *supra* note 76; Beaubien, *supra* note 76.

³²⁵ See *infra* note 322 and accompanying text. (5 rulemaking sessions)

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See *infra* Part III.A.1.

³²⁹ Peter Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1042 (2007).

³³⁰ See *infra* Part III.A.

³³¹ How did a limited right of fourteen (14) years for literal infringement of a work, i.e. a book, expand to a right of one hundred (100) plus years that could be enforced well beyond the literal copying of the book, to some elastic definition of “substantial similarity”? (Not to speak of their surprise at seeing films, music, photographs and software as part of the modern copyright regime.). See LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 3 n.7 (2007); Litman, *supra* note 2, at 326 (noting that until the late twentieth century, copyright discourse focused on public’s interest in access, citing a 1961 report by the Copyright Registrar).

PART III. THEORY

A. *Contemporary Copyright*

Students, researchers, and especially libraries need rules that give them ex ante certainty for access to knowledge resources. The semantic expansion of copyright from book production to cultural production, and the concomitant emphasis on the dollar value of copyrighted commodities, has distracted scholars from the focus of copyright's effect on the advancement of knowledge in society.³³² This section examines the deficiencies of the current models of copyright in the digital era for advancing copyright's interest in learning and education. Specifically, it assesses how the educational and learning needs of the three hypothetical individuals, Juan, Sheila and Frank, would be treated under each model.

The two dominant camps hold divergent views on the ideal model for the copyright regime. Neither model addresses the knowledge principle whereby access to knowledge is a necessary pre-condition to the creation of new works. The pro-restraint camp largely relies on the "traditional incentives" approach, which characterizes copyright as balancing protection for authors to encourage production with access to the works for the benefit of society.³³³ The pro-expansion camp is identified with a "property rights" approach that eschews the balance paradigm for greater (if not absolute) protection right for the copyright holder.³³⁴ This

³³² In his landmark decision *Bleistein v. Donaldson Lithograph Co.*, Justice Holmes commented that "[C]ertainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use – if the use means to increase trade and to help to make money." As scholar Siva Vaidhyanathan notes Justice Holmes had experienced frustration failing to prevail in copyright cases of his own. See VAIDHYANATHAN, *supra* note 13, at 95.

³³³ Robert C. Denicola, *Access Controls, Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to Preserve Noninfringing Use*, 31 COLUM. J.L. & ARTS 209, 211-12 (2008); William W. Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 1, 7-8 (Stephen R. Munzer ed., 2001); Glynn S. Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996).

³³⁴ See *infra* Part III.A.2.

model draws on both natural rights theory and a particular economy theory known as price discrimination.³³⁵ The “traditional incentives” model favors greater access to copyrighted goods for the creative benefit of consumers (also referred to as “users”).³³⁶ The “property rights” model treats access as endogenous to the market function; the market will allocate copyrighted goods most efficiently.³³⁷

The pro-restraint camp has largely focused on the fair use doctrine to remedy the adverse effects of the expanded protection right on the public interest of access to copyrighted works. They argue that a more liberal approach to fair use would expand the public domain of copyright, benefiting consumers and users.³³⁸ There is little inquiry, however, to the causal processes at work, and more importantly the more critical question of access to knowledge for learning. The knowledge creation process is missed altogether.³³⁹ Access to knowledge has been conflated with the concept of consumption of cultural goods. As discussed below, the retrofitting of digital copyright with the fair use doctrine is not consistent with the knowledge principle, and thus will not further the interests of copyright in the advancement of knowledge in society.³⁴⁰ Fair use is a doctrine that courts have invoked to solve competing interests in the distribution function of copyright.³⁴¹ The doctrine is not directly concerned with the creation function of copyright, and ignores completely the knowledge principle. Access to *all* works is necessary for purposes of learning and education; fair use was never intended to further that purpose.

The pro-expansion camp relies on the idea-expression doctrine to justify the effects of the 1201 regime.³⁴² As long as copyright protects expression but leaves ideas free for others to use,

³³⁵ *Id.*

³³⁶ *See infra* Part III.A.1.

³³⁷ *See infra* Part III.A.2.

³³⁸ *See, e.g.,* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1123-28 (2007); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1510-18 (2007).

³³⁹ *See* JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008); JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1997); GILLESPIE, *supra* note 213; HALBERT, *supra* note 213; VAIDHYANATHAN, *supra* note 13; Sunder, *supra* note 213.

³⁴⁰ *See infra* Part III.A.1.

³⁴¹ Jaszi, *supra* note 23, at 458-59.

³⁴² GOLDSTEIN, *supra* note 33, at 14-15.

creativity will flourish by the creation of new copyrighted works.³⁴³ As discussed below, this argument suffers from serious flaws.³⁴⁴ First, there is the methodological problem of ex post uncertainty. There is no certainty that a subsequent author is free to use the ideas until a court has litigated the issue. Second, in the digital era, content producers are not required to give permission to new authors to access existing works to “learn” and/or “use” the ideas of such work.³⁴⁵ Third, the 1201 regime does not consider the effect of the market distribution effects on the knowledge production process. If inequality continues to grow in access to knowledge resources, society will suffer the consequences of declining knowledge production. Like fair use doctrine, idea-expression doctrine is not consistent with the knowledge principle. Judges developed these doctrines to address competing interests of distributors of copyrighted material, rather than creation of new knowledge.³⁴⁶

The following section sketches a new theory to directly address society's interest in the advancement of knowledge and learning as the public good of copyright. Public libraries need the ability to make knowledge resources available for individuals like Frank, Juan, and Sheila to meet their educational and learning goals. This Article proposes an alternate model to the conventional copyright theories, focusing on the critical role that access to knowledge resources plays in the dynamic processes at work in the production of knowledge and the creation of new works. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for purposes of learning and education.

1. Traditional incentives model and the fair use doctrine

Pro-restraint scholars who follow the “traditional incentives” model refer to the “delicate balance” embodied in copyright law and policy between protecting the rights of the content producers on the one hand, and ensuring the access and availability of the

³⁴³ *Id.*

³⁴⁴ See *infra*

³⁴⁵ In print copyright, new authors can access the work at the library without payment. If they re-use protected expression, the copyright holder must initiate legal action. In digital copyright, new authors can only access the digital work if the copyright holder gives them permission ex ante.

³⁴⁶ Jaszi, *supra* note 23, at 458-59.

works to the public on the other.³⁴⁷ This sounds like a very appealing proposition; however, a few points require attention. First, scholars generally ascribe this maxim to the Constitutional underpinnings of copyright.³⁴⁸ They note the “utilitarian” rationale implicit in the language referring to “limited times” to “promote the progress of Science.”³⁴⁹ Their translation is somewhat loose, as the constitutional clause never refers to “incentives to produce.”³⁵⁰ This is the modern gloss on the language consistent with the rise of significant copyright industries in the twentieth century. Second, the term “to produce” is used loosely. There are two distinct functions associated with copyright: the creative function and the distribution function. Rarely does the literature focus on this distinction, or more importantly, its doctrinal and theoretical implications. Third, the second half of the paradigm associated with “access to copyrighted works” is treated as an abstract concept rather than a tangible, concrete reality by the traditional incentives model and its jurisprudence.³⁵¹ Scholars and jurists have been satisfied with an abstract model rather than a tested theory.

This protection-access paradigm has been rationalized by traditional monopoly economic theory. This school of thought recommends setting the right level of protection at where the deadweight inefficiencies associated with monopoly power are minimized.³⁵² Access plays a role in reducing these inefficiencies, especially to lower-value users.³⁵³ Access to copyrighted works through secondary markets and fair use doctrine reduce these inefficiencies caused by the monopoly.

The weaknesses of this analysis are at the theoretical and empirical level. The extent to which the operation of these doctrines, namely first sale and fair use, have successfully minimized monopoly inefficiencies has not been tested. Even so, fair use is not sufficient to meet the needs of society to access

³⁴⁷ See Jenny Lynn Sheridan, *Does the Rise of Property Rights Theory Defeat Copyright's First Sale Doctrine?*, 52 SANTA CLARA L. REV. 297, 305-06 (2012) and accompanying citations.

³⁴⁸ Cite example of scholars

³⁴⁹ Cite example of scholars; Constitution

³⁵⁰ See *supra* notes 52-57 and accompanying text. (Part IA2nd para)

³⁵¹ See *infra* Part I.A.1.

³⁵² See William A. Landes & Richard A. Posner, *An Economic Analysis of Copyright law*, 18 J. LEGAL STUD. 325 (1989).

³⁵³ *Id.*

knowledge in the knowledge production process. By its very definition, fair use (as well as the public domain concept) does not include access to all works—even at its broadest definition.³⁵⁴

Adherents to the Traditional Incentives model advocate a more liberal judicial approach to fair use in order to expand the public domain of works.³⁵⁵ They believe that this will result in more access to works, more creativity, and more cultural production.³⁵⁶ This claim is unproven, but more importantly, misunderstands the heritage of the doctrine. Judges developed fair use to reverse the early British rule of an indulgent attitude towards use of existing material in the production of abridgements.³⁵⁷ These judges never intended fair use to advance the interests of copyright in learning and education, which would require access to ALL copyrighted work. The fair use doctrine is limited by its methodology. Fair use is an ex post standard that is generally limited to a small portion of the copyrighted material.³⁵⁸ There is no ex ante certainty that a judge would find any portion of a copyrighted work to be non-infringing.³⁵⁹ Certainty only comes when a court finds that the re-use (i.e. after the use has occurred) is non-infringing under the fair use doctrine.

The most popular concept with the traditional incentives adherents is that of the “public domain.” The copyright statute does not define public domain law, and there is no consensus on definition among scholars.³⁶⁰ The Copyright Office notes that

³⁵⁴ See *supra* note 174 (fair use factors listed).

³⁵⁵ Michael Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L. Rev. 1525 (2004), arguing for a more robust approach to the fair use analysis than the traditional four factor test in the context of peer to peer file sharing. See also, Lawrence Lessig, Code and Other Laws of Cyberspace 175 (2006); Pamela Samuelson, The Copyright Grab, *Wired*, Jan. 1996, at 191.

³⁵⁶ Litman, *Public Domain*, *supra* note 65.

³⁵⁷ See *supra* Part II.A.

³⁵⁸ See Tushnet, *supra* note 30, at 992, 994. Courts still follow the four factor test set out by Judge Story in 1841. Reproduction of the whole amount of the work is generally not permitted. *Id.* Parody represents the exception to the partial amount rule. It took a Supreme Court decision to uphold that limited exception to the exception. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). See Horowitz, *supra* note 31 at 348-50 (“Though these ‘fuzzball factors of fair use’ are meant to clarify the meaning of fairness..., if anything they do the opposite...”)

³⁵⁹ See Horowitz, *supra* note 31 at 348-50.

³⁶⁰ Cohen, *supra* note 24, at 1175 (“Surprisingly little scholarly effort has been devoted to determining where the public domain is...the public domain is a topological impossibility: a legally constructed space to which everyone is

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“public domain is not a place.” Further, their definition only refers to works that are no longer under copyright protection. It does not include portions of copyrighted works available to the public under the doctrines of fair use or idea-expression.³⁶¹ It is an abstract concept without tangible means of supporting the interests of learning and education. The chimera of the public domain lies in its abstractness. Julie Cohen has noted that public domain is a troublesome concept with a serious access problem itself.³⁶² “The public domain is a metaphor for the public’s dominion, and dominion without access is very odd sort of dominion indeed.”³⁶³ Public domain is viewed indirectly like a shadow. In a pure digital era, copyright holders have the legal and technical ability to lock content so that the public domain treatment of works becomes less possible.³⁶⁴ The availability of the public domain is disappearing like a shadow at high noon.³⁶⁵ If it is challenging to determine the boundaries of an intangible copyright (compared to the metes and

presumed to have access. Reification of this space enables copyright jurisprudence to avoid coming to grips with the need for affirmative rights of access to unowned expression within the spaces where people actually live.”). Ann Bartow, *Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access through Changing Technologies*, 62 OHIO ST. L.J. 821 (2001). At a minimum, it means unprotected works. Prior to 1976 that definition included works whose term had expired, works that had not been renewed, or works where formalities had not been met. The 1976 and 1998 copyright statutes extended the copyright term, established a unitary term, and dispensed with the formalities requirement. These actions by definition decreased the public domain but empirical evidence is lacking to the magnitude.

Some scholars believe that public domain should include “public domain” treatment of protected works, essentially encompassing not only unprotected works but also fair use and first sale treatment of protected works. For example, a book whose copyright has expired would be considered public domain under the minimum standard. The re-sale of a copyrighted book under first sale or the use of excerpts of a copyrighted book for fair use purposes such as commentary or teaching represents “public domain” treatment of protected works. Even under the minimum definition there would be consensus that increasing copyright term and abolishing formalities of copyright registration has served to shrink the public domain (i.e., decreasing number of unprotected works in the public domain).

³⁶¹ *Definitions*, COPYRIGHT, <http://www.copyright.gov/help/faq/faq-definitions.html> (last visited July 8, 2014).

³⁶² See Cohen, *supra* note 24, at 1175.

³⁶³ *Id.*

³⁶⁴ *Digital Rights Management (DRM) & Libraries*, AM. LIBR. ASS’N, www.ala.org/advocacy/copyright/digitalrights (last visited July 8, 2014);

³⁶⁵ See Litman, *Public Domain*, *supra* note 65, at 993.

bounds of a real property space), it is even more challenging to find the access point to the public domain.

How would fair use work to solve the educational needs of Frank, Juan, or Sheila, who seek access to learning materials from their local public libraries? Several problems ensue. For Sheila, her library does not have a certain digital resource, and they would like to borrow a copy from another branch. In Frank's case, his library has the resource, but can only make it available for a few hours because of budget cuts. This is not sufficient time for Frank to learn the material. In the print era, public libraries are free to borrow print materials from other libraries or make copies available without authorization from the publisher.

Suppose that the public library asks an attorney whether they can make the materials available under fair use. This would entail breaking the digital locks and violating the license agreements. The purpose is only for the learning and education needs of these individuals. Could the attorney comfortably give them an answer? In this case, yes, and that answer would be a resounding "no."³⁶⁶ Does the abstract concept of public domain help them meet the educational and learning goals of these individuals? Again, the answer is no. Public libraries attempted to convince the Copyright Registrar that a special fair use exemption to the DMCA 1201 provisions should be granted to them, but this attempt failed.³⁶⁷

2. Property rights model and the idea-expression doctrine

The property rights model for the digital era of copyright is best described by Paul Goldstein in his treatise, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, first published in 1994.³⁶⁸ Professor Goldstein stated that "[t]he logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works."³⁶⁹ To stop short of these ends would deprive producers of

³⁶⁶ See Vaidhyanthan, *supra* note 13, at 175.

³⁶⁷ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556 (Oct. 27, 2000) (codified at 37 C.F.R. pt. 201). The Copyright Registrar rejected the request by the American Library Association (in conjunction with four other major national library associations) for an exception to the "anti-circumvention" restrictions of Section 1201 of the DMCA. *Id.* Their final ruling was issued on October 27, 2000. *Id.* [add court cases on DVD software Ed Felten case]

³⁶⁸ GOLDSTEIN, *supra* note 33, at 199-200.

³⁶⁹ *Id.*

the signals of consumer preference that trigger and direct their investments.”³⁷⁰ In this treatise, the copyright model that Goldstein favored supported maximal control of the copyrighted work for the rights holder (or the corporate assignee).³⁷¹ Professor Goldstein’s pluralist model relies on consequential and non-consequential theories as justification for strong property rights: (1) natural rights, and (2) price discrimination theory, a strand of economic theory associated with Harold Demetz.³⁷² Why property rights adherents invoke these rationales may be debated. The implication for doctrine, however, has had the effect of rationalizing the diminishment—if not elimination—of the print era “limitation” doctrines of fair use and first sale in the digital era of copyright.³⁷³

Adherents of the natural rights theory rationale for promoting strong protection rights for authors refer to John Locke’s seventeenth century theory of private property.³⁷⁴ Locke’s theory on private property did not directly address intellectual property, but real property.³⁷⁵ In fact, Locke had lobbied against booksellers’ efforts to renew the Licensing Act in the pre-copyright regime.³⁷⁶ As one commentator has noted, “Modern

³⁷⁰ *Id.*

³⁷¹ *Id.* In his treatise, he celebrated the potential of the Internet to transform the dissemination of content through the direct dissemination of digital content to the consumer’s home. *Id.* In the early 1990’s this was still a “plan” rather than a “reality.” In 1994, Goldstein was concerned that the Sony decision had drawn an invisible line of immunity around the private home; investment in the infrastructure to realize this transformative potential could be jeopardized if content owners did not believe they could recoup their investment. *Id.* Goldstein suggested the metaphor of the “celestial jukebox” to represent the virtual machine that would connect a user with digital content. *Id.* In Goldstein’s words, it took the “power of a television set, radio, CD player, VCR, telephone, fax, and personal computer” and connected the user at home, office, anywhere to the content they desired. *Id.*

³⁷² *Id.* These two bases for the pro-expansion camp have significantly different philosophical roots. They make similar bedfellows as the Republican Party’s social and fiscal conservatives. Their interests are aligned with respect to certain outcomes.

³⁷³ GOLDSTEIN, *supra* note 33, at 216 (in his famous quote Professor Goldstein called for the extension of rights “into every corner where consumers derive value from literary and artistic works.”).

³⁷⁴ ROSE, *supra* note 2, at 5; Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law 1900-2000*, 88 CAL. L. REV. 2187, 2201 (2000).

³⁷⁵ ROSE, *supra* note 2, at 5.

³⁷⁶ *Id.* at 32.

commentators who would venture so far beyond the boundaries of Locke's thought, into the abstractions of intellectual property, thus ought to leave his name behind."³⁷⁷ Of course, invoking such an influential philosopher adds weight to their argument. Many will not look more closely. It is more likely that John Locke would support greater access rights than the current paradigm provides.³⁷⁸

A more accurate spiritual forefather of the natural rights view of a stronger protection right would be William Blackstone, and his vigorous defense of a perpetual common law right in literary property.³⁷⁹ As discussed above, Blackstone's bookseller clients were attempting to circumvent the effect of the statutory copyright regime of limited terms enacted in 1710 with the Statute of Anne.³⁸⁰ Blackstone's lawyering efforts were briefly successful with the King's Bench decision of *Millar v. Taylor*, finding a perpetual common law right of literary property.³⁸¹ The House of Lords, however, overturned that decision in the subsequent case of *Donaldson v. Beckett*.³⁸²

Natural rights theory can coherently justify the creation side of copyright, as compared to the economic theories, which justify the distribution function. The problem arises from the assumptions underlying the theory. If copyright is based on an analogy to real property, both of those theories implicitly recognize limitations on the protection right.³⁸³ If it is based on Romantic philosophy, however, there is a justification for granting the sole genius that created something out of thin air absolute dominion over that creation.³⁸⁴ If it were only so. If any author had to defend her work as exclusively independent, with no dependency on any prior work, let alone prove her genius, there would be very few works meriting such an honor. It has about as much foundation as belief that romantic love survives indefinitely.

³⁷⁷ Tom Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 3-4 (Adam Thierer & Clyde Wayne Crews eds., 2002).

³⁷⁸ *Id.*

³⁷⁹ ROSE, *supra* note 2, at 88-89.

³⁸⁰ Statute of Anne, *supra* note 2.

³⁸¹ *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769).

³⁸² *Donaldson v. Beckett*, 17 Cobbett's Parl. Hist. 953 (1813).

³⁸³ Mark Lemley, *Property, Intellectual Property and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005).

³⁸⁴ Jaszi, *supra* note 23, at 459-60; *see also* Woodmansee, *supra* note 214, at 428-30 (detailing the Romantic conviction that the "author-genius was someone who created something entirely new and unprecedented.).

Conversely, natural rights theory could be invoked to reduce the protection right of the putative author. If the named author had to prove originality in her work similar to the novelty concept in patent law, she would be vulnerable to assertions that works in the public domain preceded her work.³⁸⁵ Paul Goldstein spoke wondrously of the imagination and creativity in the works *Appalachian Spring*, *A Sun Also Rises*, and *a Citizen Kane*.³⁸⁶ Scholar Mark Rose humorously rebutted such an assertion of genius and creativity, noting the debt owed to others not claimed in the formal authorship.³⁸⁷ As Jessica Litman put it so well, “the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.”³⁸⁸ Other works influence and inspire creativity. To what extent any work is novel or original is a matter of degree.

Pro-expansion adherents following the economic model of price discrimination found early support in Judge Easterbrook’s trend setting opinion, *ProCD, Inc. v. Zeidenberg*.³⁸⁹ Price

³⁸⁵ Litman, *The Public Domain*, *supra* note 65, at 1011-12 (“Were we to take the legal concept of originality seriously, we would need to ensure that authors’ copyrights encompassed only those aspects of their works were actually original. We could not draw the boundaries of an author’s property in the contents of her work until we had dissected her authorship process to pare the preexisting elements from her automatic recasting of them. I argued earlier that such a dissection would be impossible in practical terms. If it were possible, I am confident that authors would not welcome it.”)

³⁸⁶ GOLDSTEIN, *supra* note 33, at 76.

³⁸⁷ Mark Rose, *Mothers and Authors: Johnson v. Calvert and the New Children of our Imagination*, 22 CRITICAL INQUIRY 613, 629, 631 (1996). William Patry discusses this discrepancy, “Here are a few salient facts about the works in question: (1) *Appalachian Spring* was composed by Aaron Copland. The work was a collaboration with ballet great Martha Graham, who wrote the narrative underpinning of the ballet – the story of a wedding in rural Pennsylvania...(2) The novel, *A Sun Also Rises*, written by Ernest Hemingway, was not only influenced by Hemingway’s prior reading of a manuscript version of F. Scott Fitzgerald’s *The Great Gatsby*, but Fitzgerald, a far more experienced writer, heavily edited Hemingway’s book before publication. (3) Describing *Citizen Kane*, Orson Welles’ classic motion picture as being created out of thin air is most shocking of all, given its nature as a roman a clef of the life of William Randolph Hearst and other figures.” See PATRY, *supra* note 2, at 66.

³⁸⁸ LITMAN, *supra* note 146, at 966.

³⁸⁹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-50 (7th Cir. 1996). (Judge Easterbrook waxed poetically about the benefits of price discrimination to encourage a monopolist copyright producer to increase its production by the opportunity to price differentiate. Easterbrook enforced a software license

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discrimination theory argues that a monopolist will increase its output beyond the amount expected in the traditional monopoly model if it can discriminate between value preferences of users.³⁹⁰ Perfect price discrimination requires that the producer have perfect information of the value preferences of all customers and can enforce the price discrimination.³⁹¹ The most persuasive critique of the price discrimination model is that even if it works on the drawing board, it does not work in the real world.³⁹² Consumers do not have an incentive to reveal their true valuations, diminishing the possibility of maximizing output as promised by the model.³⁹³

In our current environment, the infrastructure is in place for producers to practice imperfect price discrimination in the production and distribution of digital works. The promise of the model—optimal allocation of product—is not possible, even in theory. Imperfect price discrimination will exacerbate wealth distribution effects. Publishers' only rational choice for distinguishing price among users will be measurements like time and page use. Lower value users who might have accessed a work for free at the public library—or for significantly less through a secondary market—will find those options disappearing as the digital publication of works becomes more of a closed “pay for use” access model. While copyright industries have relied on the promise of perfect price discrimination to justify the diminishment, if not elimination of first sale and fair use in digital copyright, the reality of imperfect price discrimination results in the worst of both worlds.

The property rights model treats access as either taken care of by the market or dismissed as not an important value of the system. The former approach is generally more consistent with the price discrimination rationale, and natural rights more consistent with

agreement that charged a higher price for commercial use than personal use of the same program).

³⁹⁰ Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 869 (1997).

³⁹¹ *Id.* at 870.

³⁹² *Id.*

³⁹³ Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 639 (2007). Why would a wealthy person pay more for a digital book just because they can afford to? This is the classic problem identified by commentators. *Id.* Consumers do not have an incentive to reveal their true price preferences. *Id.*

the latter view. Price discrimination economic theory is transparently concerned with the distribution function of copyright. Its analysis is post-creation of the work, and attempts to rationalize more protection and fewer limitations on the copyright holders' (read: producer, investor, distributor) ability to exploit the value of the work. The goals of learning and advancement of knowledge are strikingly absent from both branches of the property rights model.

Doctrinally, the property rights adherents would point to the idea-expression doctrine as providing sufficient protection for the circulation of ideas necessary to promote creativity.³⁹⁴ The basic tenet of the doctrine is that only "expression" is protected, and "ideas" are free to use.³⁹⁵ Even the greatest legal minds admit that there is no way to know proactively whether a party's intended "use" is on the side of angels, an "idea," or the side of devils, an "expression."³⁹⁶ Heralded by the property rights adherents as the most important (if not only) legitimate limitation on rights holder, it is also another doctrine rooted in the distribution rubric of copyright. The idea-expression doctrine is not consistent with the knowledge principle, which maximizes access to knowledge resources for the purposes of learning and education, as a precondition to the creation of new knowledge.

What would be the fate of Juan, Sheila, and Frank in the property rights model? How would the idea-expression doctrine help them? In the digital copyright model, the content has been protected by digital locks and licensing restrictions.³⁹⁷ Only users with authorization from the content holder can access the "ideas." Content producers have not been willing to grant special access to public libraries for purposes of learning and education.³⁹⁸ In their view, public libraries represent another commercial channel to maximize the revenue from their copyrighted goods.³⁹⁹ The

³⁹⁴ GOLDSTEIN, *supra* note 33, at 14-15.

³⁹⁵ 1-2 NIMMER ON COPYRIGHT § 2.03.

³⁹⁶ As Judge Hand remarked, "nobody has even been able to fix that boundary [between idea and expression] and nobody ever can." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121(2d Cir. 1930).

³⁹⁷ *Digital Rights Management (DRM) & Libraries*, AM. LIBR. ASS'N, www.ala.org/advocacy/copyright/digitalrights (last visited July 8, 2014).

³⁹⁸ Barbara Stripling et al., *ALA, Future of Libraries, Digital Content, and Ebooks*, AM. LIBRS. MAG., <http://www.americanlibrariesmagazine.org/article/ala-future-libraries-digital-content-and-ebooks> (last visited Aug. 21, 2013);

³⁹⁹ See DMCA rulemaking 2000 testimony by publishers; also commission on Section 108.

property rights model does not consider the market distribution effects of its absolute protection model. As the digital divide deepens, the knowledge principle will be further stymied, resulting in a weakening of the knowledge production system. This creates greater strain on the fabric of the democratic system as more individuals are left behind.

Mark Rose has stated that “copyright is an institution built on intellectual quicksand.”⁴⁰⁰ Scholars have noted the flawed doctrinal categories and incoherency of copyright jurisprudence, but they have neglected the relationship between the original justification for copyright encouragement of learning and advancement of knowledge—and copyright jurisprudence.⁴⁰¹ This missing piece has been access to knowledge, not as a peripheral benefit of the system, but as a central piece of the healthy functioning of the knowledge ecosystem and the knowledge infrastructure of society. With an unhealthy ecosystem, the infrastructure weakens, and eventually the creation and distribution functions will suffer as well.

B. The Future of Copyright

1. Monopolies of knowledge

This Article contends that favoring the interests associated with the distribution function, to the point of choking off access to works of knowledge, will adversely affect the creation of works of knowledge. The knowledge production function relies upon access to existing works of knowledge.⁴⁰² Access to the full work is required—not merely a part of the work that is indeterminate. Contemporary copyright has lost sight of the public interest justification for Anglo-American copyright. The “public interest” has been reduced to an economic analysis of the monetary value of copyright commodities, or an abstract discussion of implications of current copyright doctrine on potential expression.⁴⁰³ This Article refocuses the public interest on the implications of contemporary

⁴⁰⁰ ROSE, *supra* note 2, at 142.

⁴⁰¹ Cf. Jaszi, *supra* note 23, at 456. (“I analyze the incoherencies of copyright doctrine from several external perspectives – most notably, modern literary theory.”).

⁴⁰² See *supra* Part I.A.

⁴⁰³ DRAHOS & BRAITHWAITE, *supra* note 91, at 211.

copyright jurisprudence on the same concern that the early British Lords and the Constitution framers were concerned with—the “advancement of knowledge” without producing “monopolies of knowledge.”⁴⁰⁴

Returning to our original question: how does copyright affect access to works of knowledge for purposes of creating new knowledge? Assuming current trends in positive copyright law and financial support for public libraries continue, unequal access to the knowledge infrastructure will increase with negative implications for the knowledge ecosystem, and democratic society generally. Returning to our three types of individuals with education and learning needs: this thought experiment assumes some undefined time in the future when current trends have continued to digitize copyrighted material, and public libraries have continued to be impacted by the Great Recession of 2008. Sheila, a high school student living in West Chicago, is trying to access materials to prepare for college entrance examinations. Frank, a middle-aged construction worker in Philadelphia, is attempting to re-train for a new career as a technician in the telecommunication sector. Juan is an entrepreneur hoping to learn programming language to design and manage his website. All three share the lack of access to traditional sources of information—universities or corporations. The only knowledge infrastructure institution available to them is the public library.

Each of them has found it challenging to access the materials they need in their local public library. Sheila’s neighborhood libraries have closed, and the downtown libraries have limited hours. She works after school and only has evenings to commute to the library. She has tried twice, and found the material unavailable, as the library has limited digital copies available. The more affluent suburbs have maintained their libraries by raising local funds. Sheila is not a resident, and cannot access their digital material unless she travels to their local library and works on their premises. She will still be limited by the number of hours the library will permit her use. Frank is fortunate to live in Philadelphia, where he can travel to find a library with resources. Nevertheless, he has faced significant delays to his requests for materials because of the limited amount available and the high demand for the materials. Juan lives in San Jose, California. His public library has also been affected by shrinking budgets and

⁴⁰⁴ See *supra* Part I.B.

available materials. He has been told that local tech companies occasionally offer free seminars on computer programming. He is on a waiting list for an Oogleworks seminar.

Starting in the 1990s, public libraries warned that implementation of the DMCA would result in less copyrighted material available to those least advantaged in society.⁴⁰⁵ They predicted that this would increase the digital divide among income classes.⁴⁰⁶ Libraries attempted to counter this shift by compelling producers to permit more use of the digital works on par with pre-digital use, but they failed.⁴⁰⁷ In the print and ink era, the work was accessible and reproducible. If the copyright holder believed that unauthorized use constituted infringement, she needed to bring legal action against the user. This paradigm shift means that the copyright holder no longer needs to initiate action against an alleged infringer. In the example of the book, e-books are delivered directly to the user, wrapped in encryption technology that controls the uses of the book by the user. The user cannot photocopy a page of the book to use for traditional “fair use” purposes. Also, the user cannot choose to transfer the copy of the book to a third party. Content owners have conflated unauthorized use with infringement. Judicial construction of the DMCA has largely supported the content producer’s position.⁴⁰⁸

Juan, Sheila and Frank are at the mercy of the content producers. Shrinking public budgets have meant that those with access to information through private and public universities or corporate resources have become more privileged in society, and those without those connections become even less privileged. For many people living in urban and rural environments, the public libraries will have closed, while others will have reduced hours and fewer licensed copies of the materials needed by individuals like Sheila, Frank or Juan to achieve their educational goals.

How would each of the prevailing copyright schools of thought respond to Juan, Sheila or Frank? The “traditional incentives” group would continue to argue that if digital copyright is amended to insert an affirmative fair use right for users, then all would be well. Doctrinally, they would argue that this would logically

⁴⁰⁵ The Digital Divide & Information Equity, *supra* note 74; GOLDSTEIN, *supra* note 33, at 172.

⁴⁰⁶ *The Digital Divide & Information Equity*, *supra* note 74; GOLDSTEIN, *supra* note 33, at 172.

⁴⁰⁷ See *supra* note 322.

⁴⁰⁸ Tushnet, *supra* note 30, at 1013.

expand the public domain, and that would benefit society. Now, what about our particular individuals' needs?

Assuming for the moment that creating an affirmative fair use right is politically feasible, it is still unsatisfactory. Fair use fails to meet the needs of these individuals. They need access to ALL the knowledge resources related to their educational objectives. Although as of 2013, courts have not decreed a defined percentage of material permissible for fair use, it has been acknowledged that it is not all of the material.⁴⁰⁹ It is probably closer to 10–20 percent of the material.⁴¹⁰ More importantly, there is no guaranteed-permissible amount. A user is subject to challenge by the copyright holder, and must prepare for expensive litigation. This has already had a chilling effect on libraries.⁴¹¹ As discussed in Part II, indeterminacy and high transaction costs marred fair use in the print era. Fair use was not useful means for education and learning in the print era and, it is not useful in the digital era of copyright either.

Such a proposal is also politically infeasible, for one main reason—legitimate fear of commercial piracy.⁴¹² If users had a broad fair use right—which essentially would mean that reverse engineering of digital locks on copyrighted material were permissible, subject to later challenge by copyright holder—it would be very difficult for the copyright holder to track the abusers and enforce their lawful rights.

The property rights groups would have two possible responses, depending on whether they tended more toward natural rights theory or economic price discrimination theory. The former's response would generally be "it's not our problem; we have the rights because they are based on natural law." If society needs access, society can pay for it. Distribution should be the

⁴⁰⁹ Brief of Appellees at 14–16, *Cambridge Univ. Press v. Becker*, Nos. 12-14676, 12-15147 (11th Cir. filed Apr. 18, 2013), 2013 WL 1790921 (noting that federal district court found fair use where average length of excerpts university used in its online course material was 10.1% of publisher's copyrighted works); *see also* *Cambridge Univ. Press v. Becker*, F. Supp. 2d 1190 (N.D. Ga. 2012); *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

⁴¹⁰ *Id.*

⁴¹¹ *Digital Rights Management (DRM) & Libraries*, AM. LIBR. ASS'N, www.ala.org/advocacy/copyright/digitalrights (last visited July 8, 2014); Barbara Stripling et al., *ALA, Future of Libraries, Digital Content, and Ebooks*, AM. LIBRS. MAG., <http://www.americanlibrariesmagazine.org/article/ala-future-libraries-digital-content-and-ebooks> (last visited Aug. 21, 2013).

⁴¹² Mainstream article about digital piracy concerns of content industries.

responsibility of government—they can pay for those who cannot afford it.

As discussed above, this argument ignores the collective nature of original works.⁴¹³ If a natural rights adherent had to prove a work's originality and be subject to challenge similar to a patent, the tables would be turned.⁴¹⁴ Suddenly, his or her rights would be significantly diminished. In addition, many have argued that natural rights, just like real property, should be subject to qualification or exception for the public interest.⁴¹⁵

For the economic price-discrimination adherent, their response would be that the market would take care of the access issue. In pure price discrimination theory, this may be sound. Unfortunately, as even the price discrimination theorists acknowledge, pure price discrimination does not occur in the real world.⁴¹⁶ Imperfect price discrimination is actually practiced. Falling back on the similar back-up as natural rights, they would argue it is the government's responsibility to subsidize use for the less advantaged.

The problem with property rights theorists is that they neglect the possibility that less access means less learning, which may lead to less growth in society as a whole. Economists like to argue that their focus is on growth of the pie, and it is someone else's job to think about redistribution.⁴¹⁷ The implicit assumption is, "do not interfere with our activity, (i.e. taxes or regulation) because that will interfere with growth." Presumably, the least advantaged in society should rely on private charity. Interestingly, economists see the societal advantage of "public" investment in physical infrastructure, roads, ports, bridges and so on.⁴¹⁸ Without the physical infrastructure built over the twentieth century, the United States would not have been able to grow into the global commercial powerhouse that it did. The same need for infrastructure investment exists for the education and learning of

⁴¹³ LITMAN, *supra* note 146, at 966.

⁴¹⁴ Litman, *The Public Domain*, *supra* note 65, 1011-12.

⁴¹⁵ See GOLDSTEIN, *supra* note 33, at 203-04.

⁴¹⁶ Yoo, *supra* note 405, at 639 ("The absence of any reliable way to determine the aggregate marginal value that consumers place on a public good makes it all but impossible to determine the optimal level of production for any public good.").

⁴¹⁷ General article about economic policy and its normative goals

⁴¹⁸ Same as above related to specific goals of public infrastructure investment.

all segments of the population. This need has actually intensified in the twenty-first century with increased mobility, digital communication and reduced workplace security.

There is an acknowledged incoherency in traditional copyright jurisprudence.⁴¹⁹ This Article argues that that this incoherence is derived from copyright's focus on the distribution function, or the competing interests of producers of copyrighted materials. Current doctrine and theory are inadequate to address the constitutional justification for copyright, namely promoting the advancement of knowledge. Whether or not incentives theory can ever be proven or the incoherency of authorship and originality is ever remedied, the thesis of this Article remains valid.⁴²⁰ Creators need access to knowledge resources to sustain a healthy knowledge ecosystem. Content producers will suffer as the damage to the knowledge ecosystem becomes more pronounced. Less access to knowledge for learning and education means less knowledge creation, and less distribution of knowledge. This results in a dysfunctional knowledge ecosystem, and a fragile knowledge infrastructure. If, however, social mobility falters, civic participation becomes anemic, economic productivity falls, the fabric of the democratic state frays.⁴²¹

⁴¹⁹ See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (“[the fair use] doctrine is not only inconsistently applied, it lacks coherent justificatory theory to guide its application.”). Commentators often refer to the “uncertainty” or “indeterminacy” of copyright doctrine. If the doctrine was more coherent, outcomes would be more predictable. Litman, *The Public Domain*, *supra* note 65 (“[T]he boundaries of copyright are inevitably indeterminate”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 161-74 (2009); LESSIG, *supra* note 31 (“The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in this open.”); David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (Winter-Spring 2003) (“Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.”); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1686-92 (1988).

⁴²⁰ These include the questions of whether creation is motivated extrinsically by incentives, or intrinsically by human need, and whether authors should bear the burden of proving originality.

⁴²¹ Elkin-Koren, *supra* note 58, at 260. More access to information expands opportunities for participation in social and political life. Eduardo Porter, *Inequality in America: The Data Is Sobering*, N.Y. TIMES, July 30, 2013, <http://www.nytimes.com/2013/07/31/business/economy/in-us-an-inequality-gap->

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The next section sketches a new framework for the creation side copyright that places the access function central to copyright's role in the knowledge production ecosystem, thus sustaining a healthy knowledge infrastructure for society. Individuals like Sheila, Frank and Juan would have access to the knowledge resources that they need to meet their educational objectives. Public libraries would have the right to every copyrighted material, and the ability to provide it to any citizen—regardless of wealth or status—for the purpose of learning and education. Citizens' ability to create new knowledge strengthens, and in so doing, fosters the values of our democratic society, namely social mobility, economic productivity and civic participation.

2. Towards a “Fair Access” Rights Framework

Copyright policy should ensure that all citizens of a democratic society are able to access the intellectual commons for purposes of learning and education. This policy would be consistent with the origins of Anglo-American copyright, and more importantly, support the present needs of our twenty-first century democratic society. The “access rights” model adheres to the knowledge principle, and has the following features and characteristics. First, it recognizes that individuals must access knowledge (read: learn) before they can create new knowledge. Second, learners and creators, participating in the knowledge production process, do not distinguish between copyrighted and non-copyrighted knowledge resources (referred to herein as the “intellectual commons”). Third, the knowledge production process applies to all individuals in society, not to any category or class of persons. Fourth, the contingent, dynamic and collaborative nature of the knowledge production process means that the particular spatial circumstances of the learner and creator are critical to their potential success as a learner and a creator. Fifth, it assumes that the copyright distribution right is constant, subject to rights of access for purposes of learning and education.⁴²² In our hypothetical, the

of-sobering-breadth.html?_r=0; Moises Velasquez-Manoff, *The Great Divide: Status & Stress*, OPINIONATOR (July 27, 2013, 2:30 PM), <http://opinionator.blogs.nytimes.com/2013/07/27/status-and-stress/>.

⁴²² The jurisprudential story examined in Part II explains the development of the distribution function of copyright from the print era through the digital era, including the periods of digital transition and pure digital. In the pure
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model would guarantee Sheila, Juan and Frank the ability to access the materials they require for their learning needs. If they re-used any portion of those materials to distribute new material, then they would be subject to existing rules of copyright jurisprudence.

Conventional copyright has been grounded in rationales of promoting creativity, expression, and production of copyrighted goods or some combination of thereof.⁴²³ The access rights model is grounded in the rationale of promoting knowledge in society. The model is not in direct conflict to any of the other theories, and can operate alongside them—as long as the other theories do not violate the knowledge principle. The model can be justified under consequential and non-consequential theories. This model seeks to foster the ability of the individual to fulfill her potential as a learner and creator, and in so doing, maximizes social welfare. The spatial circumstances of the individual learner and creator are the most significant factors in determining an individual's ability to participate fully in the knowledge production system. It directly affects the individual's ability to access the intellectual commons for the purposes of learning existing knowledge and creating new knowledge.

Julie Cohen has called attention to the literature's lack of inquiry in the processes involved in the creation of copyrighted works.⁴²⁴ Professor Cohen's inquiry addresses the broad scope of cultural production, which represents the whole of copyright subject matter in contemporary society.⁴²⁵ Cultural production represents not only works of knowledge, but also works of entertainment, as the reach of copyright has expanded enormously

digital era, copyright holders enjoy broad protection rights no longer subject to the print era doctrines of fair use and first sale. Once the digital content is encrypted, end users' limited possession rights of the content are proscribed by the copyright holder. They cannot sell, give away, or otherwise transfer the digital book to a third party. They cannot extract a portion of the digital book for re-use (they could write it down). Works of knowledge in the digital era are encrypted and access is far more limited than in the print era.)

⁴²³ See *supra* note 47; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37-165 (2003).

⁴²⁴ Cohen, *supra* note 24, at 1186. Cohen refers to social and cultural theory where the creative process is seen as a dynamic, collaborative and contingent process, rather than a static, transcendent and absolute one of traditional legal theory. *Id.* at 1179. She notes that the latter approach represents legal scholar's myopic tendency to restrict themselves to the lens of liberal political theory. *Id.* at 1154.

⁴²⁵ *Id.*

since its birth.⁴²⁶ The scope of this inquiry is narrower: it is concerned with a subset of cultural production—knowledge production. The access model follows Cohen's direction that both processes of knowledge production and cultural production are not static, transcendent or absolute, but rather dynamic, contingent and collaborative.⁴²⁷ Accesses to inputs, knowledge inputs and creative inputs drive both processes. Professor Cohen insightfully noted that "overly broad copyright exacerbates the structural effects of unequal access to cultural resources by placing additional obstacles in the path to cultural participation. Narrower copyright avoids this risk in some cases, and also works in the opposite direction. In removing obstacles to cultural participation, narrower copyright broadens and deepens a society's capacity for cultural progress."⁴²⁸ Similarly, the structural effect of obstacles to individuals in the knowledge production process significantly impedes the progress of society—the progress that copyright was intended to achieve.

In her normative insights, Professor Cohen suggests that copyright will function better with bright-line rules.⁴²⁹ Applying her insight to the knowledge production process, a bright line rule that benefits education and learning is proposed. This Article proposes a model that builds on Cohen's work, and focuses on the knowledge systems sustained by the creation process, or as referred to herein, the "intellectual commons." Cohen refers to the "artistic and intellectual commons" as the subset of culture that copyright is concerned with.⁴³⁰ The intellectual commons represent a subset of Cohen's concept of the "cultural landscape," concerned with knowledge resources. Cultural landscape refers to all cultural resources, whether they are proprietary or public domain, as they are fixed in a spatial context and available to situated users for creative purposes.

In the ideal model, access to the intellectual commons allows for the freedom of movement of knowledge resources, and in turn, positively stimulates the processes of knowledge production, participation and transmission that leads to more production of knowledge resources. The dynamic model works like a feedback

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 1198.

⁴²⁹ *Id.* at 1204. Professor Cohen notes the weak linkage between the public domain concept and the creative process. *Id.*

⁴³⁰ *Id.* at 1153.

loop, where more access and flow within the intellectual commons leads to a healthier and more robust intellectual commons. Restrictions on access and flow impair the knowledge production processes, and ultimately impair the state and welfare of the intellectual commons itself. Less restriction on access sustains a virtuous cycle of a robust knowledge production function and a healthy intellectual commons.

Public libraries play a critical role in the access function of the knowledge production of the intellectual commons. Libraries' interests are aligned with the collaborative-contingent theory of knowledge production. Libraries as an institution are best positioned to sustain the flow and movement of knowledge resources for the benefit of the intellectual commons. Libraries would circulate the texts and other materials that contain and incorporate the knowledge of the commons that need to be circulated to advance the education and knowledge of society.⁴³¹ The libraries' mission is to extend information resources to the public, without regard to status or income.⁴³² Public libraries serve the values of a democratic society, and are a critical instrument in the fulfillment of the goals of the copyright system, namely promoting the advancement of knowledge.⁴³³

A possible mechanism for implementing the access model into copyright policy would be an amendment to Section 108 of the Copyright Act. The amendment would grant libraries a non-waivable first-sale right to all copyrighted material, in any form—including digital content. Public libraries would have the right to acquire any copyrighted material for their institution either directly from the content producer, or if the content producer was unwilling to do so, directly from the Library of Congress. This would serve to expand access to the intellectual commons through a new "fair access" doctrine, exercisable by the public library system. Further work needs to be done to develop the structure of this proposal and

⁴³¹ See, e.g., *Open Scholarship*, ASS'N RES. LIBRS., <http://www.arl.org/focus-areas/open-scholarship> (last visited Aug. 21, 2013); Press Release, ALA President Barbara Stripling Unveils "Declaration for the Right to Libraries" (Aug. 5, 2013), available at <http://www.ala.org/news/press-releases/2013/07/ala-president-barbara-stripling-unveils-declaration-right-libraries>.

⁴³² *Mission & Priorities*, *supra* note 17; *Strategic Plan*, *supra* note 76.

⁴³³ Elkin-Koren, *supra* note 58, at 266-67. The dissemination of information by digital access has threatened the ability of public libraries to make information widely available. *Id.*

to consider alternative approaches. The amendment must recognize the publishing industry's concerns that access to digital works could subsume the private market, as the lines between the two have blurred with remote access and electronic delivery of digital books.

Throughout the history of the United States, respected leaders including Thomas Jefferson, Benjamin Franklin, successful industrialist-turned-philanthropist Andrew Carnegie, and President Franklin Delano Roosevelt all acutely understood the critical role of public libraries in the service of democratic values and a healthy, productive society.⁴³⁴ Investment in libraries has served our country well, transforming it from a nineteenth century agrarian society to a twentieth century industrial society. Now, at the beginning of the twenty-first century, in the middle of the transformation to an advanced information society competing with emerging nations like China, it seems more important than ever to remember the voices from our past.

CONCLUSION

Significant change in copyright policy will not occur until scholars as well as thought leaders in both higher education and public libraries recognize that the copyright paradigm of the print era will not address access to knowledge in the digital age. Knowledge creation requires access to texts in order to educate oneself, as well as the opportunity to contribute new texts. Authors are readers, and readers are authors.⁴³⁵ Understanding the

⁴³⁴ Franklin D. Roosevelt noted that "Libraries are ...essential to the functioning of a democratic society...libraries are the great symbols of the freedom of the mind." See SIDNEY H. DITZION, *ARSENALS OF A DEMOCRATIC CULTURE* (1947). Thomas Jefferson wrote to a friend, John Wyche, in 1809, "I have often thought that nothing would do more extensive good at small expense than the establishment of a small circulating library in every county, to consist of a few well-chosen books, to be lent to the people of the country under regulations as would secure their safe return in due time." See Vinjamuri, *supra* note 7.

⁴³⁵ Cohen, *supra* note 24, at 1179. Cohen refers to creative process noting that a creator must first be a user of artistic and cultural goods before becoming (potentially) a creator. *Id.* The tight linkage between copyright and creativity, however, both fuels romantic author narratives and justifies drawing firm distinctions between authors, on the one hand, and consumers, imitators, and improvers on the other. *Id.* Those distinctions dominate the current landscape of copyright law; they undergird broad rights to control copies, public renderings,

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misalignment between copyright's justification and its modern theoretical foundations requires a closer look at the knowledge production process necessary for the creation function of copyright. A new paradigm for copyright theory recognizes the role of public libraries in actualizing access to texts in order to achieve the public good of copyright—the “progress of knowledge” and “encouragement of learning.”

and derivations of copyrighted works and expansive readings of the rules that create liability for technology infringers. *Id.*

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