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The Ever-Whirling Cycle of Change: Copyright and Cyberspace

Michael J. Remington[1]

From the American Revolution to the present day, change has been a salient factor of the American psyche. Americans have confronted, and indeed embraced, change. Alexis de Tocqueville suggested almost a century and a half ago that Americans are constantly modifying or abrogating their laws, but they "by no means display revolutionary passions."[2] The Framers wrote into constitutions procedures for their amendment, and the constitutional grant of authority to legislative bodies, including the

[1] Michael J. Remington (B.S. (1967) and J.D. (1973) University of Wisconsin) is a partner and co-chair of the Intellectual Property Group of Drinker Biddle & Reath LLP. A version of this paper was presented in the form of opening remarks to the Conference on Intellectual Property in the Digital Environment, University of Wisconsin-Madison, Madison, Wisconsin on May 7, 2001. The author would like to thank Lisa Livingston, Laura (Lolly) Gasaway, and Robert W. Kastenmeier (for whom the author worked for eleven years) for stimulating this article. Gratitude is also expressed to Professor Leo Raskind and Janet Fries, Esq., for their insightful comments on an earlier draft of the article. All errors, omissions, and inconsistencies are the author's own. Because this paper was initially presented at the University of Wisconsin, with its references to J. Willard Hurst, Robert W. Kastenmeier, Tammy Baldwin, Frank Lloyd Wright, David Ward, Jack Kilby, John Kidwell, and Frank J. Remington, it has a distinctly "Badger" gloss. Due recognition should also be directed at individuals like Howard Coble, who currently chairs the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, and who graduated from the University of North Carolina School of Law.

[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 255-56 (Vintage Books 1990) (1839).

United States Congress, invited elected representatives to face new problems and to adapt to changing societal conditions.[3] The judicial branch was given authority to resolve cases and controversies and to construe statutes and later claimed judicial supremacy over the constitutionality of statutes. Although our society has been marked by violence in specific sectors (most notably race relations, crime, labor management relations, and, most recently, terrorism), Americans pay homage to peaceful order. "Desirable stability [is] seen as involving opportunity for orderly change."[4]

Few areas of law reflect change more dramatically than copyright law, which mirrors transformations in American society. The shifting patterns in the fabric of copyright law are a systematic response to new threads of creative expression, technologies of reproduction and distribution, and receptions of copyrighted works by the public. The law contains provisions to accommodate maps, charts, books, photographs, piano rolls, broadcast radio and television, cable and satellite retransmissions, musical works and sound recordings, architecture, the visual arts, computer software, semiconductor chips, digital audio recording technology, and the Internet. Although many changes are legislated based on what elected officials believe to be in the best interests of the nation, other refinements are constructed through judicial decision-making and the common law. The fabric has stood the test of time, but is frayed in certain places.

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[3] As regards copyright law, Congress is authorized "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

[4] JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 58 (1977).

One's perspective on change, and the response of lawmakers and judges to it, depends on whether one stands close to it or views it from afar. In a Pulitzer Prize-winning book of nonfiction, a masterpiece about Darwinian evolution, Jonathan Weiner captures the essence of perspective:

> If we look at the billowing smoke of a volcano from close up, we see intense and rapid motion, enormous and dangerous turbulence. If we look at the eruption from far (a safe distance that puts it almost to the horizon), the smoke seems to hang in the air almost motionless: we have to watch a long while to see any change at all. The evolution of life turns out to be rather like the eruption of a volcano. The closer you look, the more turbulent and dangerous the action; the further you remove, the more the living world seems fixed and stable, hardly moving at all.[5]

The law is the same as the volcano. Many of us have a tendency, almost a death wish, to stand too close to the rim. From a distance, the law is evolutionary, not revolutionary.

An understanding of copyright law requires comprehension of statutory text. Language is inherently imprecise and legislators are not able to anticipate the future. A statute is nothing more than "an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and

[5] JONATHAN WEINER, THE BEAK OF THE FINCH: A STORY OF EVOLUTION IN OUR TIME 111 (1995).

groping efforts . . . ."[6] In addition, an understanding of statutory text is necessarily interpretative. There is no interpretation without an interpreter, and the interpreter is affected by the historical situation.[7]

All human beings are affected by change, some as routine as night and day, heat and cold, noise and silence. Some of us adapt to change better than others. Some contribute to a mutating society more than their compatriots. A year ago, Jack Kilby won the Nobel Prize for Physics for inventing—along with Robert Noyce—an integrated circuit that was made of silicon and etched into a single chip on a substrate without need to connect the parts with wires. According to press reports, Kilby was almost embarrassed by "all the fuss" in Stockholm. He indicated that the praise he was receiving reminded him of the story of the beaver that was gnawing on a branch just below the Hoover Dam: "Someone came along and looked at this massive structure and said, 'Did you build that thing?' And the beaver answered, 'Well, it's kind of based on an idea of mine.'"[8] Irrespective of Kilby's modesty, without the integrated circuit, we would not have experienced the information revolution, personal computers, cellular phones, Blackberries, satellites, the Internet, Napster, Gnutella or Morpheus. And the digital era has not only stimulated changes in copyright law, but also has raised serious questions about the very role of copyright in a digital world, even raising the question: is copyright dead?

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[6] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

[7] *See, e.g.*, United Steel Workers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

[8] T.R. Reid, *Chip Inventor Gets Nobel*, WASH. POST, Dec. 11, 2000, at A23.

Kilby and Noyce co-invented the integrated circuit in 1958, accelerating the digital revolution brought to the world stage by the first commercial computers, built shortly after World War II, based primarily on vacuum tubes. These computers were so expensive that only the government or the largest corporations could consider owning one. Integrated circuitry enabled individuals to own their own computers, which have become home appliances.

Any analysis of changes in copyright law must be based on a "before" and "after." One is tempted to choose 1958 as the critical year, but because the personal computer was not available to consumers until the mid-1970s, 1976 is a convenient choice to benchmark the beginning of the digital era. Copyright lawyers know another reason for this choice—enactment of the towering achievement that was the Copyright Revision Act of 1976.[9]

I.

What has changed? These three words pose a difficult question worthy of a book-length response. Any answer requires an understanding of powerful societal trends, blinding technological changes, complex economic developments, and responsive political, regulatory and judicial reactions. A good answer could chart the course of future directions. A converse question could easily be posed: what has not changed? An answer to this question would require an entirely different response, one no doubt much shorter.[10]

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[9] Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2451 (1976) (general revision of copyright law).

[10] Items on the "what has not changed" list include Article I, Section 8 of the Constitution, the separation of powers, the strong institutional role of the Federal judiciary, and the leadership of the Copyright Office of the United States.

Fourteen significant changes can be identified, roughly one every two years since 1976, an enormously rapid pace of change by any historical standard.

1. Gordon Moore's wheel of technological change accelerates.

In 1965, Gordon Moore of Intel predicted that the number of transistors capable of being placed on an integrated circuit would double every eighteen months.[11] In what is now known as "Moore's Law," he forecast that this trend would continue through 1995, but it has lasted far longer. As a result of technological advances in integrated circuitry, the rate of change can be shown quantifiably to be spiraling upwards in the digital environment, to be evident in other technologies dependent on integrated circuitry, and to result in substantial price reductions for consumers along the technology curve. We see new technologies at competitive prices almost daily in wireless communications, online service, peer-to-peer computing, and home entertainment, to name a few.

The problems we face today, although daunting, will soon be replaced by the challenges of tomorrow. Moore made no attempt to predict substantive change, knowing full well that these changes are not generally predictable. Recent history offers us some salient lessons. Prior to the effective date (January 1, 1978) of the Copyright Act of 1976, the videocassette recorder ("VCR") was a mere curiosity. Ten years later, the world population of VCRs stood at one hundred million or so, becoming one of the

[11] Moore, who worked with Robert Noyce, made his now-famous observation in 1965. Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, ELECTRONICS, Apr.19, 1965, *available at* http://www.intel.com/research/silicon/moorespaper.pdf (last visited Mar. 2, 2002).

most popular home appliances of the 1980s.[12] Peer-to-peer computing has been around for twenty to thirty years, but nobody at the start of the Millennium predicted the phenomenon.[13] Satellite dishes were not considered to be consumer goods in the 1970s; large C-Band dishes became somewhat popular in the 1980s; and then small KU-Band (pizza) dishes burst on the scene.

When Congress legislates, it often attempts to accommodate technological developments that may occur in the future. The Copyright Act is technology-neutral and forward-looking. In reality, however, there is a stark reality and recognition by policymakers that anticipating the future is a "real swamp."[14]

2. "Frank Lloyd Wright, I can't believe your song is gone so soon."[15]

Frank Lloyd Wright in his "Testament" spoke of the inexorable law of change, by way of which the very flow of human

[12] JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE VCR WARS 9 (1987).

[13] Michael J. Remington, *Napster and the Digital Age: The Future of Copyright Law*, NATIONAL CENTER FOR THE PUBLIC INTEREST, Volume 5, Number 4 (April 2001), *available at* http://www.dbr.com/file/Remington_Napster.pdf (last visited Mar. 2, 2002).

[14] *Copyright and Technological Change: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 23 (1983) (statement of Benjamin M. Compaine) [hereinafter *Hearings on Copyright and Technological Change*]; *see also* Robert W. Kastenmeier, *Copyright in an Era of Technological Change: A Political Perspective*, 14 COLUM.-VLA J.L. & ARTS 1, 4 (1989).

[15] Paul Simon, *So Long, Frank Lloyd Wright*, *on* BRIDGE OVER TROUBLED WATER (Columbia Records 1969).

life provides fresh inspiration, and compels creativity.[16] He also spoke of the relationship between change and governance: "the genius of our democracy still lies hidden in the eternal law of change: growth, our best hope, consists in understanding at last what other civilizations have only known about and left us . . . ."[17] We hardly learned the tune.

Wright, hardly a progressive thinker, knew that change increases the creativity, and marketability, of human expression.

Technological growth has quantifiably benefited the U.S. copyright industries, with these benefits flowing to the entire country. For the past two decades, the U.S. copyright industries have been one of the fastest growing segments of the U.S. economy. Between 1977 and 1999, the value added to the GDP by the copyright industries increased by a whopping 360%.[18] The real annual growth rate of the core copyright industries (after being adjusted for inflation) has been more than twice the growth rate of the economy as a whole. In 1999, total copyright employment grew to 7.6 million workers from 3.0 million in 1977.[19] Foreign sales and exports continue to grow rapidly. The public benefits from a cornucopia of literary, entertainment, musical, and artistic products.

However, an analysis of the economics of the copyright industries shows an increasing concentration of corporate as compared to individual creative interests. Profits only trickle down to authors and artists. The majority of authors and artists are not

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[16] *See* FRANK LLOYD WRIGHT, A TESTAMENT (1957).
[17] *Id.* at 255.
[18] Stephen E. Siwek, *Executive Summary, Copyright Industries in the U.S. Economy—The 2000 Report*, ECONOMISTS INCORPORATED 3 (2000), *available at* http://www.iipa.com/copyright_us_economy/ (last visited Jan. 31, 2002).
[19] *Id.* at 4.

wealthy. They struggle from hand to mouth, sometimes day to day. Although artists' choices are broadened by new technologies, particularly regarding the distribution of their works, they still urgently need copyright law to protect their property rights and encourage their creativity. An examination of copyright legislation enacted after 1976, reveals a somewhat disturbing trend. We see express diminutions in authors' rights. We can identify increases in legal protection in response to increased threats of copying, but upon close examination, these protections chiefly benefit corporate copyright *owners* and only restore some of the protections that authors once enjoyed rather than augmenting their rights. Even with rights, authors suffer when faced with disproportionate economic power.

Wright also spoke of the relationship between change and governance. Copyright remains largely a self-executing statute. The Copyright Office, in the Library of Congress, continues to play a central leadership and administrative role. As compared to the past, new assignments of authority are directed at government entities in the executive branch: the Office of the United States Trade Representative (with its trade portfolio); and the Office of the Under Secretary for Intellectual Property in the U.S. Department of Commerce (which oversees the U.S. Patent and Trademark Office, but also plays an important role within the executive branch regarding intellectual property policy matters); and the U.S. Customs Service (importation enforcement). Even the U.S. Sentencing Commission, in the judicial branch of government, has held hearings and developed guidelines for copyright infringement offenses. The Copyright Office itself recently received a congressional augmentation of authority over

intergovernmental and international copyright matters,[20] based on the need to provide information to federal departments and to participate in meetings of international governmental organizations and meetings of foreign government officials. Through this legislation, Congress recognized the importance of understanding the activities and initiatives of other countries. Today, government copyright resources are far different than what they were in 1976.[21]

3. The Pentium shades the banyan tree.

Computer technology operates in a cyberspatial economy without borders. The clothes we wear, the food we eat, and the automobiles we drive are products of the global economy. Environmental degradation, child labor and drug abuse are global problems. Globalization both creates and attempts to resolve these problems. The shade of the banyan tree will continue to provide a hospitable environment for local markets, but the Internet offers merchants the opportunity to sell their wares across countries and continents.

The challenge of global-village governance lies in the participation of as many parties as possible. Technology does not solve conflicts; people do. A transformation has occurred not only in cyberspace, but also in world commerce, transportation and information. As Professor Lessig observes, "we stand on the brink of being able to say, 'I speak as a citizen of the world,' without the

[20] Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-158, § 8, 110 Stat. 1388 (1996).

[21] One institution created by the 1976 Act, the Copyright Royalty Tribunal, suffered a rough birth, a difficult maturation period, and then an early death at the hands of the Congress in 1993. *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2308 (1993).

ordinary person thinking, 'what a nut.'"[22] The world's multilateral organizations like the World Trade Organization, the United Nations, the World Intellectual Property Organization (an arm of the United Nations), the World Bank, and the International Monetary Fund, among others, allow the world's leaders to search for global solutions. In a world dominated by national, and geographical, sovereignty, a unilateral search for transborder solutions by only one country is doomed to fail, or at best have only short-term, partial effects. Unilateral action is just that – the act of one party.

Globalization did not occur overnight. The lumbering, stable, and subdivided Cold War system that dominated the world of international affairs since 1945 was gradually replaced by a swift-moving, dynamic, interconnected system that took root with the fall of the Berlin Wall in 1989. Thomas L. Friedman explains: "[g]lobalization involves the inexorable integration of markets, nation-states and technologies to a degree never witnessed before—in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, and deeper and cheaper than ever before, and in a way that is also producing a powerful backlash from those brutalized or left behind by this new system."[23] The horrific destruction of the World Trade Center can be considered as not only an attack on the United States but also as a backlash against the world's trading and information system. Worrisome indeed.

Copyright law and globalization share defining technologies: digitalization, computerization, satellite communications, television broadcasting, and the Internet.

[22] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 226 (1999).
[23] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 7-8 (1999).

Copyright, with its emphasis on copying, distributing, reproducing, performing, displaying, transmitting and making available, met globalization in its infancy. Congress reacted. In 1988, after almost a century of procrastination, the United States joined the Berne Convention for the Protection of Literary and Artistic Works. That Cold War relic, the Universal Copyright Convention, was left to wither on the vine. At the instigation of the U.S., in 1995, Berne formed the basis for GATT TRIPs (Trade Related Aspects of Intellectual Property Rights). In 1996, a WIPO Diplomatic Conference in Geneva, Switzerland, negotiated two new "Internet Treaties": the WIPO Copyright Treaty ("WCT") and the WIPO Performers and Phonograms Treaty ("WPPT"). In 1998, the United States enacted changes in U.S. copyright law needed to allow the U.S. to join the Internet Treaties. With recent approval of the EU Copyright Directive and Gabon's accession to the WCT, entry into force of the WCT occurred on March 6, 2002.[24] The WPPT, which recently obtained the requisite number of signatories, does not lag far behind, and goes into effect on May 20, 2002.[25]

Whether the multilateral institutions in place on the world stage will fulfill their assigned roles to the satisfaction not only of the member states but the citizens of the world is an open, thorny question. In the United States, we see significant mistrust of the

[24] Press Release, WIPO, 30th Accession to Key Copyright Treaty Paves Way for Entry Into Force (Dec. 6, 2001), *available at* http://www.wipo.org/pressroom/en/releases/2001/p300.htm (last visited Mar. 22, 2002).

[25] Press Release, WIPO, 30th Accession Paves Way for Entry Into Force of WPPT in May 2002 (Feb. 21, 2002), *available at* http://www.wipo.org/pressroom/en/releases/2002/p302.htm (last visited Mar. 22, 2002).

ceding of national sovereignty to multilateral institutions. The present Bush Administration walked away from the World Conference Against Racism, pulled out of the Kyoto environmental protocol, and the Congress has not seen fit to ratify the International Criminal Court. The political question often asked on the Senate floor—are we ready to trust the United Nations—is met with more "nays" than "ayes."

Even in copyright, where global institutions are deemed to be in America's best interests, trouble is brewing. Unilateral copyright measures in derogation of Berne standards are taken by nations, including the United States. In the Fairness in Music Licensing Act (of 1998), Congress expanded a statutory public performance liability exception to include an exception for public performances of nondramatic music received on radios or televisions by businesses that meet the statute's square footage and equipment requirements.[26] A WTO arbitration ruling held the U.S. in violation of its TRIPs obligations, and the Congress has not taken curative action.[27]

4. The "celestial jukebox"[28] plays all day, every day, everywhere.

Copyright law has always dealt with copying; but no one would contest the proposition that digital technologies make copying, transmitting, performing and displaying far easier, far less

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[26] Fairness in Musical Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827, 2830 (codified at 17 U.S.C. § 110(5)(B)).
[27] For further information, *see* the website of the United States Trade Representative, *at* http://www.ustr.gov/enforcement/update.html (last visited Mar. 2, 2002).
[28] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 236 (1994).

expensive, and much more difficult to control and detect. Digitalization, the accessibility (*i.e.*, low price) of the personal or laptop computer, wireless communications, satellites and broadband bring copyright to the fore, as never before, and challenge its very roots. The "celestial jukebox" (Professor Paul Goldstein's phrase) places copyright in a new, and perhaps ultimate, phase in its long trajectory.[29] Napster is a result, but not the end, of the drama. A seemingly endless stream of peer-to-peer services like Aimster, Gnutella, Bearshare, Morpheus or KaZaA appear on stage. A recent survey by *Webnoize* of almost 4200 college-age music listeners revealed that a large percentage (63 percent) would continue to access MP3 music files.[30] Digital technologies also create a huge zone of "innocent" infringers (that term is used in a non-copyright sense), be they service providers, telephone companies, printers, virtual photofinishers, or American households.[31] The law aside, the celestial jukebox, by making reproductions, distributions and performances virtually free, is eliminating the right to be remunerated.

From an economic perspective, the costs of copying are decreasing and the costs of enforcement are increasing. All

[29] *Id.* Professor Goldstein presents an optimistic view of the digital revolution and its impact on authors, distributors and users.

[30] Webnoize Research Report, Napster University: From File Swapping to the Future of Entertainment Commerce (Spring 2000), *reported in* Mary Hillenbrand, *Music Downloaders Willing to Pay* (June 8, 2000), E-Commerce Times, *at* http://www.ecommercetimes.com/perl/story/3512.html.

[31] Professor Randall Davis asks: "How can digital information be distributed, yet controlled, when households routinely have the ability to copy and redistribute vast amounts of it easily?" Randall Davis, The Digital Dilemma: Intellectual Property in the Information Age, Opening Statement at the National Research Council Public Briefing (Nov. 3, 1999), *available at* http://www4.nationalacademies.org/news.nsf/ (last visited Mar. 2, 2002).

property rights are difficult to enforce; but copyright is particularly so. Low copying and high enforcement costs affect the economic incentive of the copyright equation.[32] Copyright owners feel that they must react. Among their reactions are to seek increased copyright protection from lawmakers, to ask for enforcement support from governmental agencies, to criminalize serious copyright infringement, to augment damages and penalties, to enforce rights through deterrent ("big case") lawsuits, to promote anti-circumvention technologies and then to seek statutory protection for those technologies, and to realign the balance at the intersection of ownership of intellectual property and the exercise of market power.

5. "A little money, that's what I want."[33]

Money talks. Copyright is not only about control, it is also about cold, hard cash.[34] Economic return on investments is expected by the copyright industries. At root, copyright is about individual authorship, but it is also increasingly big business. It can cost millions of dollars to conceptualize, effectuate, produce, finalize, and finally market a creative work such as a computer software program or a motion picture. With the economic success of the U.S copyright industries, investments in industry sectors increase. Today, entertainment and software companies are much more prevalent on the *Fortune 500,* or indeed the *Fortune 50,* list. They comprise a prominent place on the New York Stock

[32] RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 342-351 (1988).
[33] Berry Gordy Jr. and Jane Bradford, *Money (That's What I Want), on* THE COMPLEAT BEATLES, VOLUME ONE, 1962-1966 (Cherry Lane Music Co. 1981).
[34] *See, e.g.,* GOLDSTEIN, *supra* note 28, at 7-8.

Exchange, among mutual fund offerings, and in retirement plans. Stock analysts assess prospective returns on investment and, predictably, investors develop concomitant expectations of profitable returns. Piracy, if unchecked, affects the bottom line.

A full-length novel by a famous author, a compact disc by a popular artist, or a song by a well-known songwriter often command advances on royalties. Even without an advance, once the work arrives in the marketplace, it is sold in thousands, sometimes millions, of copies, which are sold at an infinitely lower price than a solitary work. The digital environment permits consumer costs to be reduced to pennies per individual use, and stimulates the growth of subscription services for a monthly fee. Unless authors sign away all their rights, they are compensated with a royalty stream calculated on the basis of sales. They too have an expectation of return on investment (in their time and creativity), and may too be affected by the economic erosion caused by piracy.

And, many of the best things in life are free or close to free. Internet teaching aids, online libraries and museums, advertisement-supported over-the-air television and radio broadcasting, are among the "good deals" of the information economy. The First Amendment protects the free and open exchange of ideas, stimulates debate and fuels a knowledge-based economy; so do elements in copyright law like "fair use" (with its protection of criticism and parody), the originality requirement, and the idea-expression dichotomy. Not surprisingly, when supporters of the public commons meet proponents of the "everything has a price" world, sparks fly.

6. Educational institutions gush the knowledge economy's "oil"; libraries hold the "reserves."

Lest one become too alarmed about the "dark side" of the digital economy, it offers tremendous advantages to the public at large. The computer is the most versatile of educational tools. College dorm rooms come equipped with T-1 lines, and students invariably are provided Ethernet connections. Moreover, advances in information technology affect the way professors and students relate to the classroom and the way researchers and students use library resources. Classrooms are not necessarily the place where knowledge is delivered. They become the place where knowledge is reflected upon. In the apt words of former University of Wisconsin-Madison chancellor and current head of the prestigious American Council on Education, David Ward, "universities have always been seen as being ivory towers, but now we are becoming something like an oil well in the knowledge economy."[35] The contrast could not be greater between white, shiny ivory and grimy, combustible black oil.

As a society, we have moved from the Chautauqua tent to snail-mail correspondence courses to live television broadcasts of educational classes to the new world of distance education. As noted in a recent Copyright Office report, "[d]istance education in the United States is a vibrant and burgeoning field [that] has become the focus of great creativity and investment, attracting

[35] Michael Penn, *Conversations with David Ward*, ON WISCONSIN 20, 22 (Winter 2000), *available at* http://www.uwalumni.com/onwisconsin/Winter00/ward2.html (last visited Mar. 2, 2002). The American Council on Education is this country's oldest and most prestigious association of institutions of higher learning.

national attention not only within the educational community but from the general public and in Congress."[36] By 2002, the number of students taking distance education courses will represent close to fifteen percent of higher education students. A typical student in these classes is 34 years old, already employed and has previous college credits. More than one-half are women.[37] How to promote distance education through digital interactive networks, while maintaining a balance between the rights of copyright owners and the needs of users of copyrighted works is currently before policymakers. A consensus has developed that the copyright law should be amended in several important regards.[38]

Libraries play a key role in forming an educated citizenry by making information available to the general public and also through their association with educational institutions.[39] The first major urban public library in the United States opened its doors on the bottom floor of a Boston school in 1854. Andrew Carnegie donated money from his personal fortune between 1906 and 1915 to build over 600 library buildings in cooperation with local governments. Today, the physical library continues to exist, although access to its collections does not require patrons to walk through the doors. The Library of Congress, under the strong

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[36] COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (May 1999), *available at* http://www.loc.gov/copyright/docs/de_rprt.pdf (last visited Mar. 2, 2002).
[37] *Id.* at 19-20.
[38] The Technology, Education, and Copyright Harmonization Act of 2001 passed the U.S. Senate on June 7, 2001. *See* S. Res. 487, 107th Cong., 1st Sess. (2001). The bill is progressing through the U.S. House of Representatives and is expected to become law.
[39] *See* Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115 (2000).

leadership of Dr. James Billington, and with the strong support of the Congress, has taken a lead on the establishment of the National Digital Library[40] currently making available with certain restrictions more than 7 million digital items from more than 100 historical collections.

7. "All politics is local"[41] comes to copyright law.

In the old (pre-1976) days of copyright law reform, almost all the lawyers and lobbyists seemed to know each other. A secret handshake was reserved for those who had worked on copyright law revision. At the time, a small handful of trade associations sought seats at committee hearings. A political realization certainly existed that the public was important, but the public advocates were few and far between. For example, educators and librarians were represented by an "ad hoc" committee. Rhoda Karpatkin, the head of Consumer's Union, was appointed to the Commission on New Technological Uses of Copyrighted Works ("CONTU"). A few years later, she expressed the view that she had devoted enough time to copyright issues. Copyright politics was national.

By 1980, a fear was being expressed that "consumer politics" could pose an insidious threat to copyright: " . . . put in electoral terms, on most copyright issues the overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners, are on the other side

[40] For more information about the National Digital Library, *see* http://memory.loc.gov/amme (last visited Jan. 31, 2002).
[41] TIP O'NEILL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME *xv* (1994).

of the argument."[42] At that time, the political wind of public opinion was blustery and variable, certainly not worthy of a weather advisory. With the impending convergence of copyright and consumer goods (such as the VCR, PC and the satellite dish) in the American household—consumers prompted by trade associations or manufacturers—made their views increasingly known on Capitol Hill and in the district offices of their representatives. Individuals used tools of modern communications to marshal their forces, often, however, in an uncoordinated manner. By the mid-1980s, talk radio even focused on copyright. New trade associations and coalitions, including one devoted to "home recording rights," tapped into industry and the citizenry. Even librarians, educators and researchers mobilized politically, hired lawyers and lobbyists, created arms of their organizations to focus on copyright, and harnessed the salient fact that their membership was national with voters in every congressional district. By the 1990s, copyright law professors were loosely organized through a listserv to file amicus briefs in selected cases and made their political views known.[43] Today, if a "hot" copyright issue arises (like Napster), the process of enduring long lines to enter a congressional hearing room can be a arduous undertaking akin to sneaking into a rock concert.

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[42] Stephen Stewart, *International Copyright in the 1980s*, 28 BULL. COPYRIGHT SOC'Y OF U.S. 351, 369-70 (1980-1981). In 1982, then-Register of Copyrights David Ladd noted that "[e]very session of Congress since 1976 has been vexed with copyright issues of great moment, often with political strife of unprecedented scope and intensity." David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT. SOC'Y 421, 423 (1983).

[43] *See, e.g.*, An Open Letter to Senator Hatch, Senator Leahy, Representative Carlos Moorhead, the Honorable Ron Brown and Vice-President Al Gore (Jan. 1996), *available at* http://www.clark.net/pub/rothman/boyle.htm (last visited Mar. 2, 2002).

The Internet may be the greatest democratic development of all time. Cyberspace offers a favorable environment for political activities, and facilitates direct communications with Members of Congress who have readily embraced the medium. Over one hundred have joined the Internet Caucus. The MP3 movement is fundamentally a grass-roots revolt. Overnight, Napster made almost seventy million people aware of copyright law. Just visit the Napster website which implores Napsterites to make their views about copyright known to Congress. Members of the House and Senate Judiciary Committees individually have received tens of thousands of letters and e-mails.[44]

When Walt Whitman was asked for a cure for the evils of democracy, he replied that more democracy was needed. He described democracy as law, literature and libraries, explaining that the fruition of democracy "remains unwritten, because that history has yet to be enacted."[45] He was right. Copyright today is subjected to far more democracy than ever before in history. Its history lies in the future. Importantly, copyright is holding its own in terms of its political legitimacy and public acceptability. However, citizen confidence in the law is not guaranteed. We are reminded of the sage and lasting words of Alexander Hamilton, "no laws have validity or binding force without the consent or approbation of the people."[46] Copyright owners and authors and their representatives cannot afford to take the law for granted.

[44] Unpublished Remarks of the Honorable Tammy Baldwin to Conference on Intellectual Property in the Digital Environment, *supra* note 1.
[45] WALT WHITMAN, *Democratic Vistas, in* THE PORTABLE WALT WHITMAN, 317, 748 (Mark Van Doren ed., Penguin Books 1977).
[46] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 162 (1969); *see generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

8. *Towards a "civil procedure" of copyright lawmaking?*

When and where the burgeoning economic influence of the copyright industries meets the countervailing democratization of copyright law, we see the turbulence of Weiner's volcanic lava flow as it enters the sea. This confluence is a primal area for the evolution of copyright law. The Copyright Act of 1976 was subjected to hundreds of days of public hearings, extensive Copyright Office studies and mark-ups held pursuant to publicized notice.[47] The political process was "relatively" open (although it was not a town meeting). Oversight—Congress in its investigative and educational role—was the norm throughout the 1970s and 1980s, as were numerous study commissions and field hearings.

In the 1980s Chairman Kastenmeier endorsed Professor David Lange's proposal for the establishment of a "civil procedure" for copyright law reform—a methodology imposing the legislative equivalent of a "due process" approach, including a burden of persuasion to be shouldered by proponents of change and a series of questions.[48] The goal of the test was to ensure the rationality, consistency and integrity of the Act. In a changing environment, the Kastenmeier test was refined over time and applauded by numerous legal scholars.[49] Who else? Most

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[47] 133 CONG. REC. H1293 (daily ed. Mar. 16, 1987) (remarks of Robert W. Kastenmeier).

[48] *See Hearings on Copyright and Technological Change*, *supra* note 14, at 57-58, 65-68; *see also* Leo J. Raskind, *Grading the Performance of a Legislator*, 55 LAW & CONTEMP. PROBS. 267, 275-276 (1992).

[49] *See, e.g.*, Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532 n. 17 (2000), *available at* http://www.law.berkeley.edu/journals/btlj/articles/15_2/lemley/lemley.htm (last

lobbyists seeking amendments to the Copyright Act hated the test because it was so hard to satisfy.

Today, the Kastenmeier test is a historical footnote. The legislative process has gravitated towards closed-door private sector negotiations resulting in less commitment to public scrutiny and hearings. Amendments for which little or no public notice has occurred have been added to the law.[50] Public legislative oversight (with its goal of Member education), although now enjoying a renaissance, withered temporarily at a time of extensive Member turnover, and changed political party control.

The more extensive the societal changes, the more ill-fitting is the mantle to be worn by this country's leaders, and the greater the need for understanding complex issues. The exercise of government power on behalf of the public is rooted in large part in citizen trust in our institutions. If elected officials employ a defective process and reach results that are neither rational nor acceptable to the public, the legitimacy of laws and even institutions of government may be called into question.

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visited Mar. 2, 2002); Letter from Pamela Samuelson, Law Professor, University of California at Berkeley, to Representative Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property (Oct. 23, 1997), *available at* http://www.arl.org/info/frn/copy/psamlet.html (last visited Mar. 2, 2002); *see also* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (the legislative process should be designed to produce "rational lawmaking"). The federal courts have shown signs of scrutinizing the rationale articulated by lawmakers to justify their legislative goals and the means to achieve these ends. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

[50] *See* Work-for-Hire Amendment in the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, Div. B, § 1000(a)(9) [Title I § 1011(d)], 113 Stat. 1536, repealed in Pub. L. No. 106-379, § 2(a), 114 Stat. 1444 (2000).

The Kastenmeier test may be gone, but the legacy of fairness and the quest for rational, workable laws do live on in the hands of today's copyright legislators. The House Judiciary Subcommittee on Intellectual Property under the able leadership of Chairman J. Howard Coble (R-N.C.) remains a remarkably bipartisan body—similarly, the Senate Judiciary Committee—for intellectual property issues. Bipartisanship breeds consensus and compromise, which combine to promote balance in the law.

9. *"Terminator" talk, "Rambo" lobbying.*

The Golden Rule and political adage, treat people as you would yourself like to be treated, is increasingly violated in the copyright world. Why? Perhaps personalities play a role. This much is known. For most people, change creates anxiety. Anxiety fosters fear and fear often leads to irrational behavior. In addition, power and money tap into our moral insecurities, contributing to an erosion of good manners and civil behavior. In any event, copyright law has become increasingly subject to mean-spirited, acrimonious discourse. "Terminator talk" decreases trust, and erodes the integrity and honesty that undergird the system of justice on which the legal (and lobbying) profession reposes.[51]

The Clinton Administration's Commissioner of Patents and Trademarks was routinely maligned in public and the press as a "czar of intellectual property policy."[52] His "white paper" report on the National Information Infrastructure was not only characterized as a "landgrab," his integrity was impugned by his

[51] Jerome Shestack, Reflections on Lying and the Honest Lawyer (2001) (unpublished manuscript).

[52] Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1996), *at* http://www.wired.com/wired/archive/4.01/white.paper_pr.html.

characterization as "a former copyright industry lobbyist"[53] (most members of the public do not think highly of lobbyists). His German heritage was even questioned. According to newspaper reports, goaded into action, he vented his spleen against some of his tormentors, stating in private about one of them that he would "rip [his] throat out" and "chase [him] to the ends of the earth."[54]

Moreover, the integrity and intellects of copyright law professors who file briefs against copyright owner interests are challenged with their characterization as a Chinese Cultural Revolution "gang." Members of Congress and their staffs are labeled by lobbyists in derogatory terms (even unprintable swear words) behind their backs, and sometimes to their faces. Members blast back. "Rambo" litigation tactics that have become the bane of the trial bar have spread to the copyright lobbying world.

Even the terms of the debate are changed and charged with a doomsday edge, fear tactics, and overstatement. "Copyright is dead." "This is the end of Western civilization." "The war against fair use is being fought." "Congress has been bought by Hollywood interests." "Copyright is copywrong." "Monopolists." "Greedy pigs." "Liars." "On the take." Overblown rhetoric is a far cry from pre-1976 and the days of Chairman Kastenmeier who once adjourned a hearing to allow a witness—the former chair of the Copyright Royalty Tribunal who had engaged in inexcusable behavior that later caused her to resign—to compose herself and maintain her dignity.[55]

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[53] *Id.*

[54] Ruth Larson, *Patent Chief Accused of Furious Threats; Critical Opinion Article Sparked Dispute*, WASH. TIMES, Feb. 20, 1996, at A6; *see also* James Boyle, Letter to the Editor, WASH. TIMES, Mar. 6, 1996, at A16.

[55] *See generally* Robert Cassler, *Copyright Royalty Tribunal: Balancing the Record*, 41 J. COPYRIGHT SOC'Y U.S.A. 217 (1994); *see also Copyright Royalty*

The prevalence of overblown political rhetoric does not signify the absence of many decent people in the copyright equation, or in copyright leadership positions. It simply means that the challenge of achieving mutual understanding and reaching common ground is greater than it need be.[56]

10. *Paracopyright, pseudocopyright, and metacopyright.*[57]

The Copyright Act of 1976 that became effective on January 1, 1978, was a slim, trim hundred-odd pages with eight unified chapters. With enactment of the Digital Millennium Copyright Act in 1998, Title 17 doubled the size of the 1976 Act and was ten times the size of the 1909 Act. Increasing the pre-existing text by approximately twenty percent, the DMCA added a new Chapter 12 (with its provisions on anticircumvention and copyright management information) and Chapter 13 (boat hull protection). With its own remedies, standards for liability, limitations and exemptions, Chapter 12 is considered separate from the corpus of copyright law, thereby bringing forth the notion of "paracopyright."[58] Others have been blunter in their characterizations of the DMCA as a "technology control law" and not copyright at all.

Tribunal and U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 4 (1985) (the proposition in the text is based on the author's recollection and is not reflected in the printed hearing record).

[56] *See, e.g.*, Gasaway, *supra* note 39, at 161.

[57] Peter Jaszi, Is This the End of Copyright As We Know It?, Address to Nordinfo Conference, Oct. 9-10, 1997, in Stockholm, Sweden; Nordiskt Forum för bibliotekschefer 58-67 (NORDINFO 1998).

[58] David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y U.S.A. 401, 405 (1999).

The "paracopyright"—then called *sui generis*—trend started in 1984, when after six years of consideration about what protection should be accorded semiconductor mask works, Congress determined that a new and freestanding Chapter 9 should be appended to the Act.[59] Based on a feeling that "copyright is not a large circus tent equipped to cover diverse and unrelated rings,"[60] Congress drew a line in the sand for products and works that may have useful or utilitarian applications. The Chip Act was the first new form of statutory intellectual property created by Congress since the creation of a statutory system for trademarks, represented by the Trademarks Acts of 1870, 1871 and 1876.

In short order, Congress subsequently added a Chapter 10 to Title 17 through enactment of the Audio Home Recording Act ("AHRA").[61] Unlike the Chip Act, the AHRA is considered substantively to be part of the Copyright Act. However, the AHRA is unique in certain regards: it permits manufacturers to sell digital audio recorders; it compensates copyright owners for revenue lost through home taping; and it affords immunity to home tapers who make copies without commercial motivation.

In 1994, Congress added Chapter 11, captioned "unauthorized fixation and trafficking in sound recordings and music videos."[62] The so-called "bootlegging" statute introduced

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[59] Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, Title III, 98 Stat. 3347 (codified as amended at 17 U.S.C. § 901-914 (2001)).

[60] *See, e.g.*, Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 465 (1985); *see also* H. Rep. No. 98-781, 98th Cong., 2d Sess. 5-7 (1984).

[61] Audio Home Recording Act of 1992 ("AHRA"), Pub. L. No. 102-563, 106 Stat. 4248 (1992).

[62] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4974 (codified at 17 U.S.C. § 1101 (2001)).

the European doctrine of neighboring rights to U.S. copyright law. Enacted as part of a "fast-track" (no amendment) trade bill, Chapter 11 is not a model of concise and clear legislative drafting. One respected commentator accuses Congress of "sloppiness" in comparison to earlier enactments.[63]

Each of the new chapters represents a different balance between the proprietor's rights and users' privileges. They differ on fundamental notions of "fair use," terms of protection, criminal penalties, innocent infringement, copyright royalty administration, and the constitutional clause in which they purport to be rooted.

Today, a new Chapter 14, for databases, is waiting in the wings. This measure, characterized by Professor Peter Jaszi as "pseudocopyright," relies on a "misappropriation" approach for data protection.[64] Ever since the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,[65] and implementation of the EU Database Directive in 1996, proponents of U.S. database protection have put forth proposals in the U.S. Congress. During the past five years, supporters and opponents have waged numerous battles on issues of constitutionality, retroactivity, and fair use for educators, researchers and historians.

Another trend, some would say a radical change, involves the displacement of copyright's core balance by utilizing contract law to allocate rights and privileges in information. Called "metacopyright" by Professor Jaszi,[66] the theory is rooted in a decision of the Seventh Circuit Court of Appeals, *ProCD, Inc. v.*

[63] MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8E.03(c)(5) (2001), LEXIS, Copyright Law Treatises & Analytical Materials, Matthew Bender.
[64] Jaszi, *supra* note 57.
[65] Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
[66] Jaszi, *supra* note 57.

Zeidenberg,[67] in which the court held enforceable restrictive terms and conditions in "shrink-wrap" agreements. Today, we see the ascendancy of "shrink-wrap" and "click-on" licenses everywhere in electronic commerce and even in traditional over-the-counter sales. These licenses contain a garden variety of differing provisions relating to "fair use" (most exclude it), backup and archival copying (limited user rights), and transfer of copies via "first sale" (generally prohibited). *ProCD* represents a substantial change in copyright jurisprudence; nonetheless, it is not the last word, either judicially or legislatively. The conclusion of the "metacopyright" tale has yet to be completed.

11. *The architecture of "code is law."*[68]

Constitutions, treaties, statutes, regulations, the common law, all combine to create a legal structure for human behavior. That structure extends to administrative decision-making as well as discretionary decisions made by the police and prosecutors, and various other functionaries in the justice system.[69] The structure builds substance. Architecture similarly channels individual activities in a physical world by creating an extraordinary array of constraints on our ability to move freely. Just think about sidewalks, highways, stoplights, front doors, hallways, and

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[67] ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
[68] Lessig, *supra* note 22, at 3.
[69] *See, e.g.*, Frank J. Remington, *Criminal Justice Research*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 7, 15 (1960). Recognition of this fact does not require a decreased commitment to the legislative process but does lead to a recognition of its limitations. *See* EDWARD L. KIMBALL, FRANK J. REMINGTON: CONTRIBUTIONS TO CRIMINAL JUSTICE 39 (1994). Frank Remington is the author's father.

windows. Architecture is not always static. Stoplights are programmable and environmental conditions (heat, light and air conditioners) can be regulated to meet different needs. Nothing new here, although lawyers and law professors were slow to recognize the relationship.

When we approach the architecture of the Internet, we see similarities. To date, the general view of cyberspace is that governments should stay out of the way. The architecture of the Net was developed through collaboration of the government, universities, software programming and private industry. Its early days reflected a spirit of openness and cooperation. A strong, revolutionary fervor exists among Netizens that the Internet should be allowed to develop further without any government regulatory intervention.[70] Many industry players also feel that electronic commerce, really still in its infancy, should also be promoted with a minimum of government regulation. Taxation should be avoided (for the moment). The vast democratic forums of the Internet should not be subjected to government supervision and regulation. According to the U.S. Supreme Court, "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[71]

Preservation of Internet freedom is the hopeful part. However, cyberspace is changing, in part because copyright owners are not willing to waive their property rights. Nor are the authors. The heady days of the new colony have confronted the reality of economic power and lawmaking. Three reactions are already identifiable. First, as discussed above, some of these laws

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[70] John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1994), *at* http://www.wired.com/wired/archive/2.03/economy.ideas.html.
[71] Reno v. ACLU, 521 U.S. 844, 885 (1997).

regulate and protect the very code that created the freedom of the Net. For example, the DMCA creates civil and criminal penalties for the anticircumvention of any effective technological protection measure installed to restrict *access* to a copyrighted work; prohibits the *manufacture* of any device, creation of any program, or the offering of any service designed to defeat a technological protection measure; and protects copyright management information from modification or deletion. Second, short of law reform, large companies can exercise market power in such a way as to maximize their rights and perhaps implicate competition laws and policies (see below). Third, through a combination of a lawful waiver and competition policy approval, the architecture of the Net could be manipulated so that code, not human beings, administers the copyright law. In this regard, according to Professor Lessig, the system forfeits its balance. He warns that "it is not a great time, culturally, to come across revolutionary technologies. For we are no more ready for this revolution than the Soviets were ready for theirs."[72] Only time will tell. We only know that change is in the air, and the result will be global.

12. *Monopoly Board "Chance" Card: "Pay Antitrust Penalty, $1 Million per Day."*[73]

The success of the digital economy requires a balance between intellectual property rights and competition policy. On one side of the scale are property rights--in the form of copyrights

[72] Lessig, *supra* note 22, at 234; *see also* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 177-79 (2001).

[73] Danny Hellman, Cartoon, "Mr. Moneybags?," TIME, Nov. 3, 1997, at 35, *available at* http://www.dannyhellman.com/pages/billgates.html (last visited Mar. 2, 2002).

(and also patents and trademarks) and their underlying policies as incentives to promote creativity. On the other side are policies of open, fair marketplace competition set forth in the antitrust law and also in limitations to the intellectual property laws themselves. Today, as never before with such huge monetary stakes in the results, the legal system is primed to delineate the competitive reach of statutory entitlements, thereby setting the boundaries of competition.[74]

The success of the microprocessor and related technological advances brought rise to multinational digital powerhouses such as Intel, Microsoft, and Sony. These companies were figments of investors' imaginations in 1976. Today, they are high flyers on Wall Street, but also showcased in antitrust caselaw and business headlines.

Although Intel avoided antitrust liability for its alleged monopoly in microprocessors, it did sign a consent decree with the Federal Trade Commission.[75] In the Microsoft antitrust litigation, to no avail, Microsoft placed significant emphasis on its argument that a copyright owner is able to preclude unauthorized adaptation of its copyrighted work.[76] Microsoft further argued that a

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[74] Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857 (2000); *see also* Apple Computer, Inc. v. Microsoft Corp., 799 F. Supp. 1006, 1026 (N.D. Cal. 1992), *aff'd in part and rev'd in part*, 35 F.3d 1435 (9th Cir. 1994).

[75] Agreement containing Consent Order, *In re Intel Corp.* (No. 9288), *available at* http://www.ftc.gov/os/1999/9903/d09288intelagreement.htm (last visited Mar. 2, 2002); *see also* Robert B. Kobak, Jr., *Antitrust Treatment of Refusal to License Intellectual Property*, LICENSING J. 1, 6-7 (Jan. 2002).

[76] On appeal, short shrift was made of this argument: "Microsoft's primary copyright argument borders upon the frivolous . . . . That is no more correct than the proposition that use of one's personal property, such as a baseball bat,

copyright infringement could occur if use exceeds the scope of a license.[77] Nice try, but no cigar. To the neutral observer, these arguments lay open the Darwinian ecosystem of antitrust and copyright law.

The even busier three-way traffic interchange of technology with copyright and antitrust laws is manifested by two key concepts: access and control. Judicial opinions differ as to whether industries dominant in their fields should be allowed to dominate access to and control of their intellectual property.[78] Enacted in 1998, the DMCA combats copyright piracy by prohibiting unauthorized access to protected digital works and the manufacture of devices or programs designed to circumvent technology protections for copyrighted works. The DMCA does *not* contain broad antitrust waivers for dominant companies to engage in standards setting activities with their competitors. This will be an important subject of future legislation, regulatory inquiry and controversy.[79]

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cannot give rise to tort liability." United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001).

[77] *See* Microsoft's Proposed Conclusions of Law at Part III, United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.C. Cir. 2000).

[78] *See* Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451 (1992); *In re* Indep. Serv. Orgs. Antitrust Litig. 203 F.3d 1322 (Fed. Cir. 2000); Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999).

[79] The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice have commenced a series of hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy." For more information about these hearings, *see* http://www.ftc.gov/opa/2002/01/iphearings.htm (last visited Mar. 2, 2002).

13. *Sovereign immunity: "turbulent past, enigmatic present, uncertain future."*[80]

When the Copyright Act of 1976 was enacted, without express statutory language, it was thought that state government entities (including public universities and schools) that infringed the copyrights of others could be sued and found liable for monetary damages. In response to shifting sands in constitutional jurisprudence and a written Copyright Office recommendation to the Congress, the Act was later specifically clarified by enactment of the Copyright Remedy Clarification Act of 1990 to ensure that this was the case.[81] Over two centuries of American history, Congress has had an excellent track record in terms of its respect for constitutional parameters. Not so, in the area of state sovereign immunity, as it took the Supreme Court only a short time to strike-down this congressional attempt to clarify the law. By a razor-thin margin, in *Seminole Tribe of Florida v. Florida,*[82] the High Court held that Congress cannot expand the jurisdiction of the federal courts beyond the bounds of Article III. The die was cast for copyright law when the Court continued to develop its Eleventh Amendment jurisprudence by finding unconstitutional statutes in two areas of intellectual property law: patents and trademarks.[83] The Court found that the Congress had not shown a pattern of state

[80] Paraphrase from Chavez v. Arte Publico Press, 59 F. 3d 539, 541 (5th Cir. 1995) (Chavez I).
[81] Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (codified as amended at 17 U.S.C. § 511(a) (2001)).
[82] Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996).
[83] *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (patents); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (trademarks).

infringing activities or an absence of state remedies that would have justified the enactment of such laws. The lower federal courts were left to enforce the Court's judgment, and enforce it they did as applies to copyright law.[84]

Founded on the ancient principle that the king can do no wrong, the judicial doctrine of sovereign immunity strikes one as static and staid. Nothing could be further from the truth. In a changing society and vibrant economy, the extent of "the judicial power of the United States" determines whether a private citizen can make a state obey, through the threat of monetary damages, other provisions of the Constitution and laws enacted pursuant to Article I. States too have a stake in the outcome. They are substantial owners of intellectual property. One interesting aspect of the Court's new federalism in its jurisprudence is that Congress must look to the adequacy of a state's own remedies with regard to due process deprivation claims. How should Congress accomplish this inquiry? Through hearings? Through reports of the General Accounting Office?[85] Legislative findings? How does the Court's requirement of "congruence" and "proportionality" factor in to the congressional analysis? Other questions abound.

14. *Don't sit on Bob Kastenmeier's three-legged stool!*

When at the helm of the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice,

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[84] *See, e.g.*, Chavez v. Arte Publico Press, 204 F. 3d 601 (5th Cir. 2000) (Chavez II); Rodriguez v. Texas Comm'n on the Arts, 992 F. Supp. 876, 878 (N.D. Tex. 1998).

[85] U.S. GENERAL ACCOUNTING OFFICE, INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS (Sept. 2001), *available at* http://www.gao.gov/new.items/d01811.pdf (last visited Mar. 2, 2002).

Chairman Kastenmeier used to talk about the triumvirate of copyright players—authors, distributors (including publishers), and users (including libraries which promote users' interests)—and warned that a certain equilibrium was necessary to maintain the balance of the three-legged stool.[86] If the rights, privileges and interests of the three groups were kept in mind, according to Kastenmeier, the requisite balance promised in the constitutional grant of authority to the Congress, and elected officials, to promote the progress of science and the useful arts could be accomplished.

Even before the digital era, the creative and personal use (one leg) of copyrighted works could come into conflict with the wishes of distribution interests (another leg) to control commercial use or to receive transmission rights at low costs. For example, a historian would feel free to quote others liberally but would not want to be quoted extensively without compensation. In the post-digital era, members of these three groups frequently change positions. Users become authors, and vice versa. Both may become distributors of their own works or works of others peer-to-peer merely by turning on their computers.

To further complicate matters, the growth of distribution interests in the information society has been phenomenal. The 1976 Act was held up for resolution of issues related to cable television, but who could have predicted and resolved satellite

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[86] *See* Robert W. Kastenmeier, *Foreword* to L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT ix, xi-xii (1991). For more information about Bob Kastenmeier and the instrumental role that he played in the development of U.S. copyright law, *see Copyright and Legislation: The Kastenmeier Years*, 55 LAW & CONTEMP. PROBS. (L. Ray Patterson and David Lange, special eds.) (1992). The entire issue is devoted to the good reasons to count Representative Kastenmeier among the greatest legislators the field of copyright has ever produced.

carriage (distant and local-to-local), interactive Webcasting, streaming, the entry of local and long distance carriers, wireless and broadband. Printers and photofinishers fall in the distribution zone. Copyright owners themselves, like motion picture companies, publishers and the major record labels, are not ready to cede distribution to others. But, in the Internet space, almost anyone can be a distributor.

The user's position, to have access to a wide variety of materials at the lowest possible price, has remained fairly consistent. So has that of the author, who responds to economic incentive and wants to be rewarded for creativity. The development of a vibrant, competitive, and sometimes destructive, distribution zone has made the three-legged stool very unsteady. It will not carry much weight today.[87] In any event, the three-legged stool approach was a departure from the traditional, European view of copyright as being binary between authors and users (be they distributors or consumers). Today Europeans complain about their binary world becoming more like the American one. Maybe a new piece of furniture is in the making.

II.

Late in the Sixteenth Century, Edmund Spenser wrote of the "ever-whirling wheele—Of change, the which all mortall things doth sway."[88] If Spenser could see change today, he would be blinded by its velocity. In the apt words of Professor John Kidwell, "it is certainly true that the last thirty years represent a

[87] *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (2001).
[88] EDMUND SPENSER, THE FAIRIE QUEENE, Book VII, Canto VI, Stanza 1 (A.C. Hamilton ed., Longman 1980) (1596).

wild ride for those interested in intellectual property."[89] This article identifies changes in copyright law from the pre-digital to the post-digital eras, this time period being measured in decades, not centuries. Fourteen points are discussed, but debate could continue through the night into the dawn with additional points added.[90]

Several threads emerge. American society is built on change: societal, technological, economic, cultural and legal. Americans generally adapt to a changing society and feel that change is good. The perception of change is a salient part of American society. The lesson of the towering achievement that was the Copyright Revision Act of 1976 is that the task once done, even if well done, is not over.

Our country has, in many instances, adopted a blind faith in technology. Americans tend to deify technology as a vindication of our culture and also as a security blanket. One only has to read advertisements in the mass media. According to Intel, "with

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[89] John Kidwell, *If I had Kept a Diary About Copyright Law . . .*, 27 GARGOYLE 25 (University of Wisconsin Law School alumni newsletter) (Winter 2000-01). Professor Kidwell's "diary" provided much food for thought for this article.

[90] On January 8, 1918, President Woodrow Wilson delivered what became known as the Fourteen Points address. ARTHUR S. LINK, WOODROW WILSON: A BRIEF BIOGRAPHY 128-131 (1963). Wilson later added five additional Points. *Id.* at 136.

In February 2002, the U.S. Supreme Court granted a petition for certiorari of a decision of the U.S. Court of Appeals for the District of Columbia Circuit in Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (holding constitutional the Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(d), 112 Stat. 2827 (1998)). The issues before the Court will be the meaning of the constitutional requirement that copyrights endure for "limited Times," the scope of congressional power to extend the copyright term of protection for existing works, and the relationship between copyright and the First Amendment. Depending on how the Court rules, an additional "point" may arise.

technology in the classroom, anything is possible." Businesses are implored by Microsoft to act rapidly: "A company wonders if last night's groundbreaking idea can be implemented before the competition's." But every technology has a dark and disorderly side. Witness the shocking events of September and October 2001: the use of commercial airlines to destroy skyscrapers; the distribution of anthrax spores through the mails and office air systems. Technology does not solve problems, people do. Technological change, unless channeled into a system of law (in the broadest sense of the word), will not achieve its desired results or will have unintended consequences. With time to reflect, we are left with a general recognition that the rule of law works, and as we examine the dynamics of technological and legal change together, we find that the promotion of science and the useful arts, if sometimes precarious, can be achieved. Copyright law has survived enormous recent changes somewhat the worse for wear, but invariably rising to its challenges. We should admire copyright's resiliency and flexibility in a changing world and take heart that lawmakers and the public they represent will do the same.