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Two Comparative Perspectives on Copyright's Past and Future in the Digital Age

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TWO COMPARATIVE PERSPECTIVES ON COPYRIGHT'S PAST AND FUTURE IN
THE DIGITAL AGE

TIMOTHY K. ARMSTRONG

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TIMOTHY K. ARMSTRONG*

I. INTRODUCTION

The rules of intellectual property have muscled their way into everyday life over the past generation. A host of unremarkable human behaviors—turning on a computer,¹ listening to a song,² telling a friend about a news story,³ watching

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¹ See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-19 (9th Cir. 1993) (reasoning that loading a copy of computer operating system from hard drive into RAM memory, an essential process that occurs automatically upon startup, creates a "copy" of the operating system that infringes if unlicensed); 17 U.S.C. § 117(a)(1) (2012) (recognizing statutory exception to software copyright owners' rights for copies made as an "essential step" in a computer's ordinary operation). The fact that a statutory exception is necessary to permit a computer to be powered up speaks volumes about the scope of rights that copyright holders enjoy under the interpretation given to the statute by cases like *MAI Systems*. Nevertheless, the United States government has sought to export the *MAI Systems* rule by including provisions in recent copyright treaties specifying that temporary reproductions in computer memory constitute "copies" of the underlying works. BLAYNE HAGGART, *COPYRIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM* pp. 112, 122-23, 249 (2014).

² Streaming a song over the Internet potentially implicates a copyright owner's exclusive performance and distribution rights, as well as its rights to digital audio transmission of a work. See 17 U.S.C. § 106(3)-(4), (6) (2012). Downloading a song for later playback may implicate the reproduction right, but not the performance right, under the reasoning of cases such as *United States v. ASCAP*, 627 F.3d 64, 71-75 (2d Cir. 2010). In addition, the temporary RAM copies that necessarily accompany decompression of a digital work in the course of playback would be potentially infringing under the reasoning of cases such as *MAI Systems* cited above, although the downloader of an authorized copy from a service such as Apple's iTunes surely acquires (at a minimum) an implied license to make such temporary RAM copies as are necessary to consume the work.

³ See Jeena Moon, *The "Hot News" Misappropriation Doctrine, the Crumbling Newspaper Industry, and Fair Use as Friend and Foe: What is Necessary to Preserve "Hot News"*, 28 *CARDOZO ARTS & ENT. L.J.* 631, 640-41 (2011) (describing past attempts by Associated Press to compel bloggers to pay licensing fees for quoting from AP news stories).

television,⁴ and even brewing a cup of coffee⁵—all involve activities now potentially regulated by copyright law.⁶ Furthermore, the penalties for triggering one of copyright law’s hidden trip-wires in everyday life are severe, including money damages that may far exceed the actual harm to a copyright holder⁷ and are imposed

⁴ Compare *American Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (finding infringing a system designed to permit users to watch recordings of television broadcasts) with *Fox Broad. Co. v. Dish Network, LLC*, 114 U.S.P.Q.2d 1100 (C.D. Cal. 2015) (finding noninfringing a system that enabled similar uses) and *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (same) and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 467 U.S. 417 (1984).

⁵ In 2014, the manufacturer of the popular Keurig line of home coffee makers announced that future versions of its product would be designed to function only with officially licensed coffee pods and would not work with third-party products. See Karl Bode, *Keurig Will Use DRM In New Coffee Maker To Lock Out Refill Market*, TECHDIRT, (Mar. 3, 2014) <https://www.techdirt.com/articles/20140227/06521826371/keurig-will-use-drm-new-coffee-maker-to-lock-out-refill-market.shtml> [<http://perma.cc/EYV9-XN3M>]. The company reversed course the following year in the face of public ridicule and consumer complaints. See Karl Bode, *Keurig CEO Sort Of (But Not Really) Apologizes For Company's Ridiculous Foray Into Obnoxious Coffee DRM*, TECHDIRT, (May 8, 2015) <https://www.techdirt.com/articles/20150508/06582730934/keurig-ceo-sort-apologizes-companys-ridiculous-foray-into-obnoxious-coffee-drm.html> [<http://perma.cc/XSR4-TTXN>]. Although Keurig’s manufacturer abandoned its plan to use technology to control which coffee pods consumers could use in its devices, its failed attempt broke no new legal ground. Manufacturers of several other consumer products have sought to employ various mechanisms to limit interoperability with competing manufacturers’ products. The strategy carries potential legal force because a competitor who designs a product to bypass the authentication mechanism risks violating the anticircumvention rules established by the Digital Millennium Copyright Act of 1998 (“DMCA”). See 17 U.S.C. § 1201(a) (2012). The case law suggests that manufacturers have sought to use the DMCA to ward off competition in connection with a wide assortment of consumer goods, although the courts have rebuffed the worst attempts. See *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir.), *reh’g denied*, 431 F.3d 1374 (Fed. Cir. 2005) (data tape storage libraries); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004) (printer toner cartridges); *Chamberlain Group v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (garage door openers).

⁶ PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* p. 336 (Princeton University Press 2014) (“What seemed to most people like normal private activity—browsing, downloading, mailing friends—turned out to be infringement.”); see also, e.g., JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 1* (2011) (“On any given day, . . . even the most law-abiding American engages in thousands of actions that likely constitute copyright infringement”); *id.* at 2-4 (imagining a typical day in the life of a fictional university professor, by the end of which the professor would have accrued over \$12 million in potential statutory damages and possible criminal liability for copyright infringement based on unremarkable everyday actions); DEBORA J. HALBERT, *THE STATE OF COPYRIGHT: THE COMPLEX RELATIONSHIPS OF CULTURAL CREATION IN A GLOBALIZED WORLD 4* (2014) (“[T]he state becomes an advocate for a specific political economy of intellectual property that has ramifications for the free flow of information, access to knowledge, and the future of innovation. Intellectual property has always been, but has now more visibly become, an issue of social justice.”); HAGGART, *supra* note 1, at 4 (Copyright has become “a law that directly affects the daily lives of billions of individuals and strikes at the very heart of the global economy and democratic society.”).

⁷ See 17 U.S.C. § 504(c)(1) (2012) (authorizing award of statutory damages in an amount not less than \$750 and up to \$30,000 for each copyrighted work infringed); 17 U.S.C. § 1203(c)(3) (2012) (authorizing awards of statutory damages for violations of the Digital Millennium Copyright Act). In the context of internet file-sharing, the statutory damages provisions have often been applied to yield awards of damages far exceeding the plaintiff’s actual injury. See, e.g., *Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013) (finding that award of \$22,500 for each of 30 songs defendant infringed, for a total of \$675,000, did not offend due process principles); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012) (rejecting defendant’s constitutional challenges

despite innocent intent.⁸ Small wonder that proposals to further expand intellectual property rules have sparked recent public opposition both in the United States⁹ and abroad.¹⁰

Peter Baldwin's *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* and Blayne Haggart's *COPYFIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM* illuminate how copyright law arrived at its present state and occasionally hint at a more hopeful future. Both books adopt a comparative approach, contrasting developments in several nations. Baldwin's *THE COPYRIGHT WARS* extends the comparison across a lengthy span of history, while Haggart's *COPYFIGHT* examines a single recent period in close detail. Baldwin's book, grandiose in its ambition, reflects copious documentary research, including careful parsing of never-enacted legislative proposals from many nations. He argues that, contrary to our conventional understanding, contemporary copyright debates do not rest on uniquely modern concerns, but rather reflect still-unresolved conflicts that have echoed again and again through the long history of copyright law. Haggart's nimbler book derives from dozens of interviews with negotiators and participants in recent international copyright debates, focusing on the implementation of the two WIPO Internet treaties¹¹ of 1996 in the United States, Canada, and Mexico. Haggart's thesis is that, in setting global copyright policy, the United States exercises less hegemonic influence than is conventionally believed. He argues for a renewed focus in copyright research on particular characteristics of different countries at the

to award of \$9,250 for each of 24 songs defendant infringed, totaling \$222,000); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (affirming award of \$22,500 in damages for defendant's infringing download of 30 songs—at \$750 per song, the statutory minimum).

⁸ See, e.g., *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963) ("The imposition of liability . . . even in the absence of an intention to infringe or knowledge of infringement, is not unusual."); *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931) ("Intention to infringe is not essential under the act.").

⁹ In late 2011 and early 2012, technology and public interest advocacy groups organized protests against then-pending legislation (the so-called "Stop Online Piracy Act" or "SOPA"; and the still more cumbersome titled "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act," whose acronym, the "PROTECT-IP" Act, was commonly further shortened to "PIPA") that would have expanded the scope of potential liability for linking to foreign web sites where copyright-infringing material may be located. The protests culminated in a massive "internet blackout" on January 18, 2012, in which many of the most trafficked sites on the web "went dark" for a day and encouraged their readers to contact Congress to oppose the SOPA and PIPA legislation. The resulting flood of complaints led Congress to withdraw both bills in late January. See BILL D. HERMAN, *THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY* 194–200 (2013); BALDWIN, *supra* note 6, at 296-97.

¹⁰ The Anti-Counterfeiting Trade Agreement (ACTA), a multilateral intellectual property treaty negotiated in conditions of unusual secrecy, provoked a strong backlash that ultimately led to the treaty being voted down by the European Parliament. See HERMAN, *supra* note 9, at 174–76; Symposium, *Understanding the Global Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 35 SUFFOLK TRANSNAT'L L. REV. 515 (2012); Hilary H. Lane, *The Realities of the Anti-Counterfeiting Trade Agreement*, 21 TUL. J. INT'L & COMP. L. 183 (2012); BALDWIN, *supra* note 6, at 358-59. The Mexican Senate also voted to reject ACTA in 2011 after holding multiple public hearings and issuing a scathing report condemning both the substance of the treaty and the secretive conditions surrounding its negotiation. See *infra* notes 312-316 and accompanying text.

¹¹ More formally, the WIPO Copyright Treaty, (Dec. 20, 1996), S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 121; and the WIPO Performances & Phonograms Treaty, (Dec. 20, 1996), S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 203.

national level that create a space for policy autonomy and counterbalance the United States' demands for ever-stricter copyright protection.

The two volumes complement one another in ways their authors almost certainly did not anticipate, with each partly redressing the occasional weakness in the other. Baldwin's insistent search for historical parallels to today's controversies, although generally insightful, leads him to overlook at least one clear break in continuity that differentiates modern copyright debates from those that came before—even though the conditions before and after that break are faithfully recounted in *THE COPYRIGHT WARS*. In contrast, Haggart's focus on the modern era yields a more accurate accounting of the copyright interests now in play and the ways those interests depart from past patterns. In general, Haggart appears to have a clearer understanding of copyright's effect on technological innovation. Although Haggart takes pains not to overstate his case, however, *COPYFIGHT* nevertheless seems eager to put a hopeful gloss on some fairly ambiguous and equivocal developments to imply broader consequences from what even Haggart's own research suggests may be isolated and atypical recent events. Here, Baldwin's deeper historical perspective cautions against over-reading a handful of recent developments against copyright's longer trend line, and suggests that future policy alternatives remain far less “up for grabs” than Haggart believes. Each book individually makes a welcome and highly valuable contribution to the literature on copyright, and these contributions are amplified when the two are considered together.

Parts II and III of this review examine Baldwin's and Haggart's books, respectively, in greater depth, with comparative and concluding observations to follow in Part IV.

II. “COPYRIGHT” VERSUS “AUTHORS' RIGHTS”: A 300-YEAR PHILOSOPHICAL DUEL

Peter Baldwin's *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* seeks to demonstrate that battles over copyright in the digital era represent mere echoes of a much older “clash of civilizations”¹² over the nature of artistic creation. That battle may find its contemporary expression in debates over Internet file-sharing, but its roots, Baldwin shows, reach back into eighteenth-century arguments over the public interest in art and literature, the role of creative individuals in cultural development, and the nature of private property itself. Baldwin's impressive research (documented in over one hundred pages of notes) weaves together topics as diverse as Roman and feudal property theory, the laws of divorce and inheritance in Napoleonic France, the freewheeling postbellum American pirate publishing industry, filmmaking in Nazi Germany, global trade agreements, the remaking of the European political system after the fall of the Berlin Wall, and the digital revolution. Baldwin's prose is lean and witty, and he has a keen eye for the absurdities that copyright's history supplies in abundance. The story of copyright is, at bottom, a story of art, money, and power; and even readers who are ultimately not persuaded by Baldwin's broader historical thesis may find themselves chuckling at the cavalcade of avaricious publishers, feckless romantics, scheming heirs,

¹² BALDWIN, *supra* note 6, at 16.

murderous despots, faithless spouses, partisan zealots, hucksterish impresarios, canny statesmen, and cyber-utopian anarchists who populate his account.

The plan of Baldwin's book is largely chronological, with periodic deviations from a strictly linear ordering to allow related concepts to be considered together. His first chapter sets forth the two competing theories of the role of authorship that he labels "authors' rights" and "copyright," summarizing the most salient characteristics of each—no small feat in itself, given the differing philosophical roots, moral imperatives, and practical implications that characterize each of the two strands of thought. Then begins the deep dive into the past that will eventually lead the reader back to the surface near the end of the book. Baldwin's book is a story of how the "authors' rights" and "copyright" perspectives shared many common points of view in the eighteenth century (Chapter 2), then began following very different paths in the nineteenth century (Chapter 3). The gap between the two systems widened into a chasm over most of the twentieth century, reaching its furthest point in the decades immediately following the Second World War (Chapters 4–6). Then something unusual happened: beginning in the last few decades of the twentieth century, the gap between the two systems rapidly closed—driven by new international agreements and a remarkable policy *volte-face* by the United States, then the world's leading copyright exporter (Chapters 6–7). As the twenty-first century dawned, however, the appearance of harmony dissolved under the ruthless disintermediating logic of the digital communications revolution, ushering in the era of renewed conflict in which we now reside (Chapter 8).

Readers who have followed any of this history from the "copyright" perspective, especially those who believe in the importance of preserving the public domain against excessive proprietary encroachment, will find reading Baldwin's book to be a little like watching a documentary about a doomed military mission, or a reenactment of the last hours of a sunken ocean liner: we know this is a story that doesn't end well. It is a testament to Baldwin's skill that his book maintains its clinical distance and historical perspective even while reporting on ever-more-alarming events; but make no mistake: this is a book about the decline and fall of copyright. A well-told disaster epic, but a disaster story all the same.

Baldwin's overarching thesis—raised early in the book, if largely sidelined for three hundred pages thereafter—is that contemporary debates over copyright in the digital era raise fewer novel issues than their participants commonly assume. Historians like Baldwin profess to be "allergic" to claims that 'Everything Is Different This Time.'¹³ To the contrary, Baldwin asserts, we are rehashing many of the same debates our forebears had. When law professor and public-interest advocate Lawrence Lessig clashed with the late Motion Picture Association of America (MPAA) lobbyist Jack Valenti before Congress over consumers' rights in recordings they had purchased,¹⁴ their respective positions and supporting arguments would

¹³ BALDWIN, *supra* note 6, at 320.

¹⁴ See Digital Media Consumers' Rights Act of 2003: Transcript of Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce, (May 12, 2004), at 45:

Mr. STEARNS: Does the consumer have the right to make a single copy of a DVD and a CD for his own fair use, yes or no?

Mr. LESSIG: Can I say "absolutely yes"?

....

have been instantly recognizable to British parliamentarians Thomas Babington Macaulay and Thomas Noon Talfourd, who waged a spirited public debate on copyright in the House of Commons in the 1830s and 1840s.¹⁵ As Baldwin wrote, “Chronologically blinkered as we all are, the digital generation thinks it is fighting for the first time a battle that, in fact, stretches back three centuries.”¹⁶ Even the features we might view as hallmarks of modern copyright discourse—arguments over the disruptive force of technology, information overload, collective authorship, and the value of a free flow of information—all find grounding in past debates.¹⁷ The goal of illuminating parallels between contemporary and past conflicts animates Baldwin’s analysis and gives *THE COPYRIGHT WARS* its strength and structure. Unfortunately, as discussed below, it also accounts for the book’s single greatest flaw. First, however, I will examine Baldwin’s argument.

A. Authors’ Rights versus Copyright

By Baldwin’s reckoning, we are currently embarking on the fourth century of a titanic debate over two competing visions of the role of the arts and artists in society. On one side stand those who believe that art is an extension of the personality of the artist who created it. The work continues to reflect on the artist even after it has been sold and published; the work is, in a legal sense, a small piece that has been detached from the artist and released into the world, yet remains connected with the artist by invisible bonds. Because of the intimate connection between artist and work, the artist deserves not only pecuniary remuneration, but ongoing control over how the work is used. If a songwriter objects to her song being played at campaign rallies for a political candidate she dislikes, or a playwright objects to his play being performed by nonwhite actors, adherents of this view maintain that the creator’s wishes should prevail.¹⁸ Baldwin quotes the views of French jurist Bernard Edelman on the shared, unified interest of the creator and her creation: “Since the work embodies the author’s personality, harming it also attacks its creator.”¹⁹ So powerful are creators’ interests, in this view, that they should enjoy even the ability to rewrite their own histories, withdrawing works they no longer endorse (or now find embarrassing or inconvenient) from public circulation in order to protect their own reputations.²⁰

Mr. VALENTI: No, he does not under the law.

Id.

¹⁵ BALDWIN, *supra* note 6, at 109-12. Lessig’s position is Macaulay’s, and Valenti stands in for Talfourd in the referenced exchange. The difference being that in the House of Commons, Macaulay’s view prevailed. *See also infra* notes 63-66 and accompanying text.

¹⁶ BALDWIN, *supra* note 6, at 13.

¹⁷ *Id.* at 320-24.

¹⁸ *See id.* at 1-2. Baldwin offers several illustrative examples of attempts by creators (some successful, some not; some flowing from seemingly benign motives and some from reprehensible ones) to exercise ongoing control over how their works are used. The celebrated *Asphalt Jungle* case, long a fixture of copyright casebooks in the United States for its treatment of the *droit moral* under French law, is recounted in some detail in BALDWIN, *supra* note 6, at 47-50.

¹⁹ *Id.* at 45.

²⁰ *Id.* at 34-35; *see also id.* at 240-41 (from ‘this perspective, authors’ preferences outweigh “[a]ll other considerations—whether public preference or historical accuracy”).

On the other side stand those who believe that there is no art without an audience, whose views also demand consideration. Art both reflects and drives culture, and is enmeshed inextricably in the society that nurtured the artist. That society—not just the gaggle of artists who happened to produce individual expressive works—has a collective stake in its own patrimony and may assert interests that compete with, or even sometimes trump, the artist's own. The value of art arises from its capacity to inspire, inform, entertain, and enlighten. Creators deserve rights in their creations not for their own sake, but because doing so improves the culture of which they are a part. Where granting rights in an artist's work furthers the public interest, rights should be granted; where it does not, rights should be limited. The law's ultimate goal is the enlargement of the public sphere; remunerations and royalties given to artists may be justified to, but only to, the extent that they contribute to that goal.

Baldwin labels the former perspective “authors’ rights” and the latter “copyright.” The legal regimes that have grown up under each approach feature both commonalities and striking differences. Highlighting the differences between the two is a task that occupies all of Baldwin's first chapter, and indeed continues throughout the book. To briefly summarize several of the contrasts between the two philosophies that are explicated in Baldwin's account:

Issue	Authors' Rights	Copyright
Origin of rights	Natural law	Positive law
Protections for authors	Strong	Moderate
Term of protection	Long or perpetual	Limited
Objective	Quality of works	Availability of works
Alienability of rights	Limited	Full
Protected interests of public	None	Substantial
Philosophical basis	Romanticism	Enlightenment; Postmodernism
Most controversial aspect	Moral rights	Work made for hire
Cultural values	High culture Elitist Exclusive Individualist	Mass education Populist Democratic Collectivist
Typified by	France; Germany; United States (today)	Great Britain; United States (past)

For adherents of the authors' rights viewpoint, control over one's artistic creations is a basic human right arising from principles of natural law. This view finds expression in, for example, the Universal Declaration of Human Rights, which proclaims that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is

the author.”²¹ Because authors’ rights are grounded in notions of personhood and natural law, their underlying rationale suggests that they are inalienable; one can no more sell an aspect of one’s personality than one can sell oneself into slavery.²² The same logic suggests that authors’ rights should be effectively unending. Plato and Aristotle may be gone, but their works endure, and therefore so does the unbreakable connection with the works’ creators that the authors’-rights philosophy exists to protect. In practice, the laws in authors’ rights jurisdictions do not always live up to these ideals; even in France and Germany, copyrights eventually expire. But the underlying natural law principles upon which authors’ rights rest suggest that rights should be very strong, inalienable, and perpetual.

The copyright viewpoint rejects natural rights in favor of a more limited set of property interests grounded in positive law. Rights under copyright laws exist solely by legislative sufferance. In enacting copyright statutes, legislatures act from a desire to benefit not only authors, but also the public at large, whose interests lie in the widespread availability of an inexpensive assortment of expressive materials. Copyright legislation therefore necessarily represents a balancing of competing demands, with the claims of both authors and audiences recognized as legitimate.²³ Achieving the proper balance entails tradeoffs: authors need rights lest the fear of piracy dissuade them from creating expressive works (and thereby deprive society of the works they would have created), but those rights must be subject to limitations that promote “the Enlightenment ideal of an expansive public domain”²⁴ (such as the familiar “fair use” rule in the United States). Rights must last long enough to ensure authors a fair return, but not so long as to deprive the public of the benefits afforded by free access to its own cultural commons. Thus, perpetual protection, of the sort that the authors’-rights logic supports, is off the table.²⁵ To maximize the public availability of works, authors should be able to assign their rights by contract to publishers, whose mass dissemination capabilities will presumably exceed authors’ own. Because copyright understands rights as primarily commercial rather than

²¹ Universal Declaration of Human Rights Art. 27(2) (1948); *see also* HAGGART, *supra* note 1, at 204 (identifying this provision as the international basis for Mexican copyright law). *But cf.* BALDWIN, *supra* note 6, at 325 (“Despite the claims that property is based on natural rights, in practice its possession hinges entirely on the rights granted owners in statute.”).

²² BALDWIN, *supra* note 6, at 44-45.

²³ This perspective, too, is enshrined in international law. *See, e.g.*, WIPO Copyright Treaty, pmbl., (Dec. 20, 1996), S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 121 (“Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”); HAGGART, *supra* note 1, at 117. Nevertheless, Baldwin reports, European observers seem to be puzzled by the tendency in United States copyright scholarship to treat authors’ and audiences’ interests as antagonistic and the law as the product of “a tense negotiation.” BALDWIN, *supra* note 6, at 16. The authors’ rights framework essentially recognizes only the author’s interests as legitimate. Europeans recognize that “the public eventually benefits when authors are treated well,” *Id.*, but that is merely a happy side effect and emphatically not the purpose of the law from Europeans’ point of view.

²⁴ BALDWIN, *supra* note 6, at 11.

²⁵ Expressly so, in the case of the United States, whose Constitution authorizes the creation of intellectual property rights only for “limited times.” U.S. CONST. art. I, § 8, cl. 8.

personal in nature, even corporate bodies should be able to claim copyrights in the works produced by their employees under the work-for-hire rule.²⁶

Each side finds in the other much to dislike. Advocates of the copyright system argue that, by providing incentives that are sufficient (but not greater than necessary) to induce authors to create, copyright promotes creativity and economic efficiency and ultimately feeds the public domain to the benefit of all. To its detractors, however, copyright is “philistine and commercial, treating noble creation as a mere commodity.”²⁷ Advocates of the authors'-rights perspective celebrate its power to shield creators against crass economic exploitation based upon “eternal verities of natural rights.”²⁸ To its critics, however, the authors'-rights approach coddles artists, disserves the public, ossifies cultural development, and dampens innovation.²⁹

The strongest difference between the two perspectives concerns the treatment of what have come to be known as the “moral rights” of authorship. Because the authors' rights perspective treats works as extensions of their creators' personalities, it provides many sorts of protections for works that collectively aim to ensure that the works reflect favorably upon their creators. These include: (1) the author's right to be named as the creator of a work and to remove her name from a work she no longer wishes to be associated with (known generally as the rights of attribution and non-attribution, respectively); (2) the rights to choose whether to disclose a work to the public or to withdraw a previously disclosed work (known respectively as the rights of disclosure, and withdrawal or repenting); and (3) the right to insist that a work be presented unchanged in a manner of the author's choosing (known as the right of integrity). These rights are known as moral rights not because of any concern over morality as such, but merely to differentiate them from the economic rights that are the core concern of copyright.³⁰ A further moral right straddles the line with economic rights: many jurisdictions give authors the right to share in the proceeds of any re-sales of their works (which may become quite substantial for works of fine art that appreciate in value over time), known variously as the resale royalty right or the *droit de suite*.³¹

Moral rights fit comfortably within the authors' rights philosophy, but coexist uneasily with copyright principles. Baldwin's book selects four nations as his exemplars for each of the two competing perspectives: Great Britain and the United States as illustrative of the Anglo-American copyright philosophy (with other onetime colonies of the British Commonwealth making a few appearances), and France and Germany as representing the authors' rights philosophy of Continental Europe (again, with occasional detours to other jurisdictions, most prominently Italy). Baldwin writes that “[t]he Trans-Atlantic spat over authors' rights is thus part of a broader quarrel that has long pitted the Continent against the Anglo-Saxon

²⁶ See BALDWIN, *supra* note 6, at 22-28 (discussing several differences between the authors' rights and copyright perspectives).

²⁷ *Id.* at 15.

²⁸ *Id.*; see also *id.* at 17 (noting that European observers commonly refer to what they call “the ‘producer's copyright,’ an instrument of industrial policy corresponding to the Americans' fondness for competition”).

²⁹ *Id.* at 15.

³⁰ *Id.* at 29-36, 146-53.

³¹ *Id.* at 29.

world, or more narrowly, the French against the Americans.”³² Despite overall expansion of the authors’-rights viewpoint over time, Baldwin finds, “these disputes persist even today.”³³

B. From Harmony to Discord: Copyright in the 18th and 19th Centuries

An argument that the United States and France are locked in battle over authors’ rights naturally invites the question: compared to what? Compared, Baldwin answers, to a state of relative harmony that existed in the 18th century, when both copyright law and America itself were new. Copyright legislation of that era rested upon premises that were very broadly shared among Britain, France, Germany, and the United States. Baldwin writes:

Everywhere, legislators sought to curb publishers’ privileges and vest rights to works instead in their authors. All regarded works as property justified by natural rights because of the authors’ labor. Authors, all agreed, were entitled to benefit when they sold their works to publishers.³⁴

Eighteenth-century copyright laws also shared the goal of a “swift and efficient transfer of works into the public domain.”³⁵ Therefore, copyright terms were short, relative to contemporary standards: 14 years in Britain and the U.S., and 5-10 years following the death of the author in France.

Publishers, however, agitated for longer and stronger rights in order to ward off competition from the cheaper editions that inevitably appeared once a book’s copyright expired. This sparked what became known as the “Battle of the Booksellers” in Britain and the United States—a moment that is pivotal in Baldwin’s account (and which is invoked by analogy frequently throughout *THE COPYRIGHT WARS*) because it marked the first clear philosophical divergence between Continental and Anglo-American law. In Britain and the United States, the Battle of the Booksellers ended with a decisive rejection of a “natural law” approach to copyright, inaugurating a very long period of resistance in those countries to arguments predicated upon authors’ inherent rights in their works. In contrast, natural rights arguments took firm root on the Continent, setting the stage for the transformation of French and German law over the ensuing century and a half.³⁶

In the 16th and 17th centuries, publishers (such as Britain’s Stationers Guild—later the Stationers Company) benefited from royal privileges granting them the exclusive rights to print works within a given territory. This state of affairs was not wholly satisfactory to the publishers: they faced ongoing competition from other publishers’ editions imported from outside the territory covered by their privilege, as well as arguments with authors over whether new editions of previously published

³² BALDWIN, *supra* note 6, at 22.

³³ *Id.* at 52.

³⁴ *Id.* at 53.

³⁵ *Id.* at 53-54.

³⁶ *Id.* at 54.

works required new permission from (and compensation to) the author.³⁷ Seeking to strengthen their own position, publishers on both sides of the Channel began to argue that authors held “a common law or natural rights claim to their works in perpetuity”—rights to which they, the publishers, succeeded by assignment from the author.³⁸ This view made the royal privileges conferred upon the publishers effectively unnecessary: publishers succeeded to authors’ own natural, inherent rights in their works.

Authors, of course, were happy to agree with publishers that their rights were natural, inherent, perpetual, and not created by royal decree—the same as real property.³⁹ They were probably less enamored of the publishers’ next rhetorical move, which was to argue that, because authors’ rights were like any other form of property, those rights necessarily were fully alienable, and publishers themselves stepped into the authors’ shoes when they purchased a work.⁴⁰ Yet, even as they argued for authors’ perpetual rights based upon natural law, publishers undermined their own claims of complete alienability of rights, for “assignees could never pretend to the same ineffably personal connection with the work” that they insisted authors had.⁴¹

Others rejected the argument that principles of natural law justified extending strong rights to authors (and, by extension, their assignees). Rival publishers, particularly those who specialized in producing cheaper unauthorized editions of works, saw the “natural rights” argument as simply the self-interested, self-serving rationalizations of the grasping monopolists higher up the food chain. These smaller publishers, along with some jurists and legal philosophers, argued that it was instead up to the state to decide whether and how to grant rights to authors—a question that ought to be guided not only by concern for authors, but also by the interests of the public in education and entertainment. Those who rejected the natural-rights argument also argued that the value of expressive works arose only when they were disseminated; unpublished manuscripts brought their creators neither pecuniary reward nor popular acclaim.⁴² Thus, as Baldwin summarizes the terms of the debate:

The fundamental dispute that was to run throughout the copyright wars for the following three centuries emerged early. Was there something natural and inherent in authors’ claims to their works? Could authors, and by assignment their publishers, therefore demand perpetual rights or extensive protection, much as homeowners could over their houses? Or were literary property rights a mere grant of a

³⁷ *Id.* at 54-55.

³⁸ BALDWIN, *supra* note 6, at 56.

³⁹ *Id.* at 57-60.

⁴⁰ *Id.* at 61, 67 (“[i]n selling his work, the author put the bookseller ‘in his own place.’”).

⁴¹ *Id.* at 62. Thus, neither side in the “Battle of the Booksellers” appeared to understand its own long-term interests: authors argued for strong property rights even though these rights would redound ultimately to the benefit of their assignees, and publishers argued for rights based on characteristics that were intrinsic to authors’ personalities even though this introduced a conceptual distinction between authors’ and publishers’ interests.

⁴² *Id.* at 62-65.

temporary monopoly, resting on society's judgment of what authors deserved?⁴³

Although the Court of King's Bench in 1769 accepted the publishers' arguments that their common-law rights of copyright continued to exist independently of the 1710 Statute of Anne (the precursor of modern copyright statutes),⁴⁴ the publishers' victory was short-lived. Just five years later, the House of Lords' celebrated decision in *Donaldson v. Beckett* firmly rejected a natural-rights theory of perpetual literary property. Authors' common-law rights were extinguished once they elected to publish their works—after that point, the authors' interests in mass dissemination (and mass royalties) had to be balanced against “the social benefit of diffusing knowledge,” which “ought to be as free and general as air or water.”⁴⁵ Thus, the Lords declared, booksellers could not succeed to any form of perpetual literary property that authors might have enjoyed before publication; instead, they received only the limited 14-year term of protection provided under the statute. Sixty years later, the United States Supreme Court agreed with *Donaldson's* rejection of natural rights, declaring in *Wheaton v. Peters* that authors had only those rights in published works that Congress had elected to provide as a matter of statute.⁴⁶ Anglo-American copyright law thus stood united in the view that copyright was a government grant, not a natural right; and that in electing to grant authors rights in their works the government was free to impose conditions that would benefit the broader public, such as a relatively short term of protection. A shared “utilitarian vision of promoting the common good of learning and enlightenment by rewarding the creator justly, but temporarily”⁴⁷ led to the enactment of statutes on both sides of the Atlantic that aimed to serve the “general social interest of enlarging the public domain.”⁴⁸

For a time, even Continental copyright laws followed the Anglo-American model. The French revolutionaries, building off a 1777 decree that had declared that assignees could hold only temporary (not perpetual) rights in literary works, enacted statutes in 1791 and 1793 that followed the example of the Statute of Anne and the *Donaldson v. Beckett* decision. The French statutes conferred express rights on authors, but only for a period that was temporally limited, not perpetual. The revolutionaries' goals, similar to those expressed in both Britain and the United States, were to feed the public domain and spread knowledge by ensuring public access to “multiple editions and lower prices” for popular works. Conferring property rights on authors also strengthened their hand as against publishers, whose monopolies offended revolutionary sensibilities; as Baldwin puts it, “[p]roperty made

⁴³ *Id.* at 64-65.

⁴⁴ BALDWIN, *supra* note 6, at 65-67.

⁴⁵ *Id.* at 68. The quotation from the statement of Lord Camden was echoed many years later by Justice Brandeis, who famously wrote that “the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.” *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

⁴⁶ 33 U.S. (8 Pet.) 591, 661 (1834) (“Congress, then, by [the Copyright Act of 1790], instead of sanctioning an existing right, . . . created it.”); BALDWIN, *supra* note 6, at 71-72.

⁴⁷ BALDWIN, *supra* note 6, at 69.

⁴⁸ *Id.* at 72-73.

the author an equal citizen with all the other independent owners who, in the French social imagination, constituted society's backbone."⁴⁹

The German territories took a different approach, guided by the lingering influence of Roman thinking (which resisted treating intangible goods as a form of property) and later by the writings of philosophers Immanuel Kant and Johann Gottlieb Fichte. German thinking treated publishers as the contractual agents of authors, not as holders of property rights of their own. Presaging the later development of personality-based theories of authors' rights, German thinking generally viewed rights in literary works as personal to their creator, and not assignable as other forms of property were.⁵⁰

Contradictions between literary property and ordinary property, which the German approach largely sidestepped, began to pull Continental authors'-rights law in a very different direction from Anglo-American copyright law. Identifying the precise nature of literary rights proved increasingly important as copyright laws expanded to cover more categories of works and to provide more types of rights, however, because of the very different consequences for authors and publishers of the competing characterizations. As applied to expressive works, "property" is a metaphor, but an imperfect one—there are many respects in which expressive works were "commonly recognized as different"⁵¹ from other forms of property. First, if publishers were the "purchasers" of literary works, then why should they not be entitled to dispose of their property however they chose, irrespective of the wishes of the author who sold it to them? Could not a publisher change the work, alter or destroy it, give it a new title, or even replace the author's name with their own? If not, why not? Did not limiting the publisher's rights as a purchaser call into question the "property" metaphor upon which authors and publishers alike had insisted the century before? Second, to the extent literary property was treated as analogous to ordinary property, then why should the owner's rights not last forever? Requiring copyrights to expire after a certain time, as even Continental laws mandated, appeared to stand in considerable tension with the principle that literary works were a form of property.⁵² These were the debates that preoccupied copyright law in the 19th century, and the very different answers that gradually emerged on the Continent and in the English-speaking nations offered a stark preview of the deeper schisms still to come.

Early on, British law developed one way to differentiate literary rights from other forms of property, to wit, the principle that rights in a literary work were separate from rights in the physical objects (*e.g.*, books) in which the work was contained.⁵³ Cleaving rights in "works" from rights in physical articles was an essential step in copyright's evolution, Baldwin writes, for "[o]nly by fundamentally separating the work as an object from its intellectual content could the author retain rights to something that, in its physical incarnation, he had evidently released" to the publisher and the world.⁵⁴ That legal distinction solved one problem while

⁴⁹ *Id.* at 73-76.

⁵⁰ *Id.* at 76-80. Vestiges of this early approach survive today in the German rule that authors' literary rights are inalienable; publishers receive only contractual use rights. *Id.* at 146.

⁵¹ *Id.* at 83.

⁵² *Id.* at 95-96.

⁵³ This distinction is preserved today in 17 U.S.C. § 202 (2012).

⁵⁴ BALDWIN, *supra* note 6, at 85.

introducing others: if authors owned rights in their works even after selling their manuscripts, what did the authors retain? Debates over what attributes, if any, remained with authors even after they had relinquished control of their works to assignees provided an opportunity for new personality-based theories of authors' rights to take hold. Even in Britain, statutes began to recognize non-economic rights in authors' works: Baldwin describes the creation of a rudimentary moral right of integrity in the Engravers Act of 1735, which forbade not only exact copies but reproductions featuring only minor alterations to expressive works, and a clear adoption of an attribution right in the 1862 Fine Art Copyright Act.⁵⁵ British case law, too, began to recognize integrity interests of authors in their works, as illustrated by the common-law development of a "fair abridgment" doctrine extending authors' control to inexact copies of their works.⁵⁶

Baldwin finds evidence of a clear divergence between 19th-century British and Continental European views on the issue of literary property in the form of two debates that occurred nearly contemporaneously: the French parliament's consideration of a strong authors'-rights bill introduced by deputy Alphonse de Lamartine in 1841, and the British parliament's consideration of a series of proposals to strengthen copyright protection introduced by MP Thomas Noon Talfourd between 1837 and 1842. Although both sets of bills failed, they had very different consequences for their respective jurisdictions: the ideas underlying Lamartine's proposal came to be broadly accepted on the Continent, while the decisive rejection of Talfourd's proposals colored both British and American thinking for over a century.⁵⁷

In France, Baldwin describes Lamartine as "in thrall to the idea that authors had natural property rights to their works," which he personally believed should endure in perpetuity, although the bill he proposed was more circumspect.⁵⁸ Lamartine's proposal combined proposals on copyright duration (which he suggested extending from ten to fifty years after the author's death) with new rules on the descent and inheritance of literary rights. Supporters of the proposal declared literary works to be the purest and "most personal" form of property insofar as it existed solely because of the exercise of the author's will and remained intimately (and, some argued, inalienably) connected with the author. But French parliamentary deputies objected to Lamartine's ideas, noting that lengthy, inheritable terms for literary property impaired the public availability of works which existing French law sought to assure. Instead, Lamartine's bill would essentially leave works in the hands of authors' families, heirs, and creditors, who might decide to suppress the work or to offer it in editions that the authors themselves would not have approved of. Seeking a compromise that would allow the bill to pass, Lamartine accepted a plan to "rein in the work's full alienability" because of the work's intensely personal connection with its creator. Under the proposed compromise, the economic interests in a work would for the first time be divided from authors' ongoing rights to control how their work was used, based upon what

⁵⁵ *Id.* at 90. The Engravers Act also prefigured the modern idea/expression dichotomy in copyright by forbidding the holder of rights in any particular illustration to preclude other illustrations of the same underlying subject. *Id.* at 86–87. This principle, too, survives today. See, e.g., 17 U.S.C. § 102(b) (2012); *Baker v. Selden*, 101 U.S. 99, 102 (1879).

⁵⁶ BALDWIN, *supra* note 6, at 90–91.

⁵⁷ *Id.* at 98–101, 109–12.

⁵⁸ *Id.* at 98.

Lamartine labeled “*considérations morales*.” The authors’ heirs and creditors could succeed to the author’s economic, but not moral interests.⁵⁹

Although even this compromise was too radical a change for then-existing French law, as it set the terms of debate for a century thereafter. Lamartine and his supporters lost the battle, yet in some sense won the war. Gradually, driven partly by the influence of the Romantic movement and its “celebration of heroic creators,”⁶⁰ the arguments articulated by Lamartine and his supporters began to be accepted in French case law, which carved out new non-economic protections for authors. The notion that authors enjoyed inalienable moral rights in their work that survived even the author’s own death swiftly became an accepted part of French jurisprudence, although it required the better part of a century for them to be enacted into statutory law.⁶¹ Only “faint echoes” remained in Europe—voiced by relatively marginal figures such as French anarchist Pierre-Joseph Proudhon (of “property is theft!” fame)—of the once-strong principle that copyright law should serve public ends.⁶²

Meanwhile, across the Channel, British parliamentarians took up a series of proposals by jurist Thomas Noon Talfourd “to strengthen and lengthen copyright.”⁶³ In Parliament and the press, heated debates ensued over the nature of literary property: whether it was a natural right inherent in the concept of authorship, or whether it was a limited power granted on behalf of the public who was its ultimate beneficiary. This was the backdrop for Baron Macaulay’s famous characterization of copyright as a form of monopoly and “a ‘tax on readers for the purpose of giving a bounty to writers.’”⁶⁴ Towering establishment figures like Macaulay, not just a proletarian rabble, spoke for the interests of a reading public in wider access to cheaper editions of popular works.⁶⁵ Talfourd’s proposal to extend the British copyright term to sixty years following the death of the author was pruned back to life-plus-seven in the face of opposition from Macaulay and others. Later attempts to revive Talfourd’s arguments in hearings before the British Copyright Commission in the 1870s yielded still another defeat, with the Commission rejecting radical reform in favor of maintaining copyright’s focus on the needs of the public.⁶⁶

In nineteenth-century United States, a minimalist approach to copyright (and intellectual property in general) was publicly justified as “a purposeful attempt to jumpstart a new, more enlightened and democratic polity.”⁶⁷ United States law had consistently denied all protection to foreign authors and inventors, whose works as a result were widely copied. Channeling Macaulay, American civic leaders rejected foreign authors’ demands for copyright protection as an attempt to impose “a tax on knowledge,” and argued that American democracy itself—based as it was on

⁵⁹ *Id.* at 98-102.

⁶⁰ BALDWIN, *supra* note 6, at 94; *see also id.* at 130-31.

⁶¹ *Id.* at 103-06. Baldwin finds that the French debate was little influenced by German thinking on authors’ rights, of which the French deputies appear to have been “largely ignorant.” *Id.* at 103. German theorists nevertheless were busily developing a robust personality-based theory of protecting authors’ rights, which would come to influence Continental thinking greatly in the twentieth century. *Id.* at 106-09.

⁶² BALDWIN, *supra* note 6, at 122-24.

⁶³ *Id.* at 110.

⁶⁴ *Id.*

⁶⁵ *Id.* at 125.

⁶⁶ *Id.* at 110-12, 244-45.

⁶⁷ *Id.* at 114.

principles of widespread (if still far from universal) suffrage and mass public education—depended for its efficacy “on affordable and easily available literature.”⁶⁸ Disregard of foreign copyrights served domestic economic interests as well, as the United States mass-market publishing industry swiftly outgrew its British counterpart, which remained focused on satisfying the relatively modest needs of British libraries.⁶⁹ Foreign authors (most famously Charles Dickens, who offended his American hosts during his tour of the United States in 1842 by angrily condemning the rampant piracy of his works), and even a few American ones, argued that common decency required the United States to bring its copyright laws up to international standards. Economic injury, not moral suasion, finally brought the American publishing industry around: when British publishers produced cheap, unauthorized copies of Harriet Beecher Stowe’s antislavery bestseller *Uncle Tom’s Cabin* to meet surging domestic demand, it gave the Americans “a taste of their own medicine, highlighting the advantages of international [copyright] agreements.”⁷⁰ The United States finally extended protection to works of foreign authors in the Copyright Act of 1891.⁷¹

The signal development of the nineteenth century, in Baldwin’s account, was the formation of the Berne Union in 1886—a seismic event whose aftershocks still reverberate today. Berne’s origins lay in the International Literary Congress, which was held in Paris in 1878 and dominated by representatives of Continental European nations. (The British attended with some reluctance, and the United States boycotted the event.) The attendees overwhelmingly reflected the authors’-rights end of the spectrum of global thinking—all agreed that literary rights “were not a concession of law but a form of property given by nature,” with only the British delegates demurring from this characterization as inconsistent with domestic statutory and case law.⁷² Reflecting a pattern that would later be followed with

⁶⁸ BALDWIN, *supra* note 6, at 114; *see also id.* at 161 (quoting an 1873 report of the Congressional Committee on the Library declaring international copyright protection to be “a hindrance to the diffusion of knowledge among the people and to the cause of universal education”); *see also id.* at 162 (quoting an 1891 statement by U.S. Senator Richard Coke, of Texas, warning that international copyright laws would create “an embargo on the spread of intelligence, on the diffusion of literature, on the spread of education among our people”). Indeed, even some European thinkers accepted that the benefits of an educated citizenry outweighed authors’ legitimate interests in exclusive rights. *See id.* at 112, 124-25. Even philosopher John Locke, whose writings are often said to underlie natural-rights arguments for property, “favored a limited copyright term, believing that a perpetual property right in books threatened to harm the spread of learning.” *Id.* at 55-56; *see also* HAGGART, *supra* note 1, at 66 (copyright laws both in the United States and internationally fitted “within traditions of republican political thought that viewed the circulation of information and ideas as a positive social good—indeed, as a prerequisite of democratic culture.”) (quoting Joe Karaganis, *Disciplining Markets in the Digital Age*, in *STRUCTURES OF PARTICIPATION IN DIGITAL CULTURE* 222, 228 (2007)).

⁶⁹ BALDWIN, *supra* note 6, at 115-19.

⁷⁰ *Id.* at 121.

⁷¹ *See* Act of March 3, 1891, ch. 565, § 13, 26 Stat. 1106, 1109 (generally conditioning protection for foreign authors on their home jurisdiction’s reciprocal protection of United States works). Even this accommodation to foreign authors was accompanied by a provision aimed at protecting the American publishing industry: copyright protection attached only to works physically produced in the United States. *Id.* § 3, 26 Stat. at 1107.

⁷² BALDWIN, *supra* note 6, at 84. As noted previously, Anglo-American copyright law in this era remained resolutely focused on enlarging the public domain, and rejected the natural-law theory on

debates over ACTA and the Trans-Pacific Partnership,⁷³ the like-minded nations of the International Literary Congress sought to memorialize their shared viewpoints in a new treaty. The result was the 1886 Berne Convention,⁷⁴ which “standardized the treatment of works in foreign countries and set minimum levels of domestic legislation that member nations were encouraged and sometimes required to meet.”⁷⁵ Those minimum levels were, by Anglo-American standards, quite high, and came to include requirements of robust protections for authors’ moral, not just economic, interests in their works. Over time, “the maximalist position prevailed.”⁷⁶

The effect of the Berne Union was to produce pressure for a constant one-way upward ratcheting of authors’ rights in every country that joined. First, because the authors’-rights philosophy defines only the interests of authors as relevant, it contains no built-in limiting principle that may offset authors’ demands for ever-stronger protection. Second, on a more practical level, Berne membership creates in every nation a constituency of authors demanding that the nation match the highest levels of protection available elsewhere in the world: “If protection was better abroad, why should domestic authors settle for less?”⁷⁷ As later revisions to the Berne Convention expanded authors’ control over derivative works, extended copyright to new forms of expression, and curtailed or eliminated formalities (such as notice) for copyright protection, these changes too came to propagate through the copyright laws of member countries.⁷⁸ In consequence, copyright has only expanded, in every direction, in the Berne Union nations: it covers more works, provides more exclusive rights, and lasts longer than ever.⁷⁹ Most remarkably, copyright has continued to grow even while ordinary property has shrunk, with property owners compelled to accept greater limitations on their freedom of action to serve countervailing social policies.⁸⁰

Berne’s maximalist view of copyright led to a century-long boycott by the United States, which did not formally join the Berne Union until March 1, 1989.⁸¹ Britain, for its part, found itself torn between a desire to secure additional protections for British authors on the Continent, and its disinclination further to antagonize the

which the Continental approach to authors’ rights rested. *See supra* notes 45-48, 63-66 and accompanying text.

⁷³ *See infra* notes 270-273 and accompanying text.

⁷⁴ Convention for the Protection of Literary and Artistic Works, *opened for signature* (Sept. 9, 1886), 6 U.S.T. 2731.

⁷⁵ BALDWIN, *supra* note 6, at 154.

⁷⁶ *Id.* at 156.

⁷⁷ *Id.* at 156. So powerful is this demand that it has even led the most-developed nations to adopt levels of protection that exceed Berne’s already high requirements. *See infra* notes 121-126 and accompanying text.

⁷⁸ BALDWIN, *supra* note 6, at 156.

⁷⁹ *See id.* at 128 (“By the cusp of the twentieth century, then, all nations had significantly expanded authors’ rights in increasingly different ways.”); *see also id.* at 247 (noting that duration of copyright in every country has been repeatedly increased over the past 300 years); *see also id.* at 303-04 (finding similar effects producing constant upward pressure on copyright rights within the European Union); HAGGART, *supra* note 1, at 96 (copyright has “increased in strength and scope” for over 200 years).

⁸⁰ BALDWIN, *supra* note 6, at 4 (“Intellectual property has in fact come to be treated *more* favorably than its conventional cousins.”); *id.* at 6-7, 128, 398-405.

⁸¹ *See* Berne Convention Implementation Act, Pub. L. No. 100-568, § 13(a), 102 Stat. 2853, 2861 (1988) (codified at note following 17 U.S.C. § 101 (2012)); Baldwin, *supra* note 6, at 160-61.

still-hostile United States and its large audience of English-speaking readers. Britain's response, in Baldwin's view, was essentially to join Berne on a purely *pro forma* basis while the British "fought a rearguard battle . . . to delay, dilute, and deflect the full consequences of their membership."⁸² In addition, the Anglo-American nations began developing new legal mechanisms to offset the rising strength of authors' rights and restore the law's focus on the public interest. These included judge-made doctrines limiting owners' powers to prevent certain types of socially valuable uses of their works (known as "fair use" in the United States and "fair dealing" in Britain and the Commonwealth),⁸³ and compulsory licensing mechanisms permitting even unauthorized uses upon payment of a specified compensation to the copyright holder.⁸⁴ Because these doctrines were inconsistent with the maximalist view of authors' rights, they never really took hold on the Continent, but did serve to offset at least some of the Berne Convention's constant pressure for ever-stronger authorial control.⁸⁵

C. Of War and Trade: Copyright in the 20th Century

By the early 1900s, with authors' economic rights in their works secured by statute in much of the world, attention began to turn increasingly to protecting authors' non-economic interests in their works (even as authors' economic rights continued their unstoppable expansion). In Baldwin's account, two forces combined most strongly in the latter half of the twentieth century to increase overall levels of protection for both economic and moral rights. At first, in the decades immediately following the Second World War, Europeans reacted avulsively to any ideas that carried even the faintest whiff of fascist ideology—a reaction that appears to have doomed any expressions of concern for the interests of the public in copyright law, yet

⁸² *Id.* at 154; *see also id.* at 159-60 (illustrating how British post-Berne laws, such as the 1911 copyright act, adhered to the letter of the Convention while simultaneously gutting its spirit). In contrast, Haggart's analysis treats Britain as generally supportive of Berne due to the mass copying of British works in other countries. HAGGART, *supra* note 1, at 73.

⁸³ BALDWIN, *supra* note 6, at 135-38. After over a century of development as judge-made law, the fair use doctrine was recognized by statute in the United States in the Copyright Act of 1976, although it remains mostly judge-made in practice. *See* 17 U.S.C. § 107 (2012).

⁸⁴ BALDWIN, *supra* note 6, at 138-41. In the United States, for example, songs that have been once recorded with the composer's authorization may be recorded (i.e., "covered") by anyone else upon payment of a compulsory licensing fee under the conditions specified in 17 U.S.C. § 115 (2012); *see also* BALDWIN, *supra* note 6, at 143 (summarizing history of sound recording compulsory licensing).

⁸⁵ BALDWIN, *supra* note 6, at 137-38, 140-41. Even today, the EU Copyright Directive establishes a ceiling, rather than a floor, for "fair dealing" rights: it enumerates several possible circumstances in which nations may permit copyrighted works to be used without authorization, but all are optional save one. The only copyright exception the EU requires member states to recognize ("shall be exempted") is an exemption for "transient and incidental" electronic copies created as "an integral and essential part of a technological process," such as the copies made by servers situated between an internet user and a site she has requested to view. *See* Directive on the harmonisation of certain aspects of copyright and related rights in the information society, 2001/29/EC, O.J. L 167, Art. 5 (2001); BALDWIN, *supra* note 6, at 138. As already mentioned, even this solitary, exceedingly narrow, mandatory copyright exemption may go too far for the United States' government's liking today. *See supra* note 1.

oddly seems not to have extended to the fascists' simultaneous embrace of moral rights. Then, in perhaps the most dramatic about-face in copyright history, the United States transformed itself in a short span of time from a weak opponent to an enthusiastic proponent of strong international copyright protection. As the century drew to a close, American economic might was joined to the cause of embedding strong copyright protections in international law, backed for the first time by the threat of trade sanctions for nations whose copyright laws fell short. Meanwhile, even as it took steps to force its trading partners to strengthen their own copyright regimes, the United States itself took an ill-considered leap into unknown territory, enacting what has come (even if it was perhaps not originally intended) to be history's first-ever restriction on accessing expressive works in digital form even for non-infringing purposes.

Baldwin illustrates how French and German legal thinking struggled, in the late nineteenth and early twentieth centuries, to reconcile the law's recognition of copyright rights as a form of property with their intuition, based on natural-law principles, that authors should enjoy continuing control even over works they had sold. French law recognized that all citizens, not just authors, enjoyed general rights deriving from personhood—rights “to name, reputation, honor, privacy, and the like.”⁸⁶ It was only a small conceptual leap to conclude that treating expressive works in certain ways could impair these personality-based interests of their authors regardless of who held the property rights in the work. In Germany, even authors' economic rights were declared to be inalienable; it was therefore an easy matter to accommodate inalienable moral rights.⁸⁷ Germany enacted statutory protections for moral rights earlier than France did, with “new laws on literature and music in 1901 and on art and photography in 1907” limiting the powers of copyright holders (such as publishers, creditors, and other transferees) to use works in ways that their authors objected to.⁸⁸ Similarly, if more gradually, French courts began to separate authors' economic and moral interests in their works, and to hold the latter to be inviolable and inalienable regardless of what happened to the former.⁸⁹ By the 1930s, strong moral rights protections existed throughout Western Europe.

Then the war came. Baldwin devotes a full chapter to the surprising roles fascist ideology filled in copyright history: first in cementing moral rights protections as a matter of international law, and then in launching them into the stratosphere as postwar European governments competed to see who could most thoroughly repudiate any lingering vestige of the fascists' professed (if imaginary) concern with the literary needs of the common *volk*. The chapter on fascism, regrettably, proves to be one of the less satisfying parts of *THE COPYRIGHT WARS* for a variety of reasons. First, Baldwin's choice of France and Germany as his exemplars of the authors'-rights perspective pays few dividends here; as his discussion makes clear, the real action lay elsewhere (primarily in Italy which, remarkably, continued to pass new copyright laws even as the war raged). Second, France, it need hardly be noted, had more urgent concerns during the war years; if either the Vichy regime or *La Résistance* devoted a moment's thought to copyright policy, Baldwin does not say.

⁸⁶ BALDWIN, *supra* note 6, at 145.

⁸⁷ *Id.* at 145-46.

⁸⁸ *Id.* at 157.

⁸⁹ *Id.* at 145-53.

Third, although German lawmakers debated an assortment of copyright proposals before and during the Nazi era (the banality of evil, indeed!), none was enacted; and by the time any consensus had begun to form on the proper scope of authors' rights, Germany, too, had far bigger troubles it had created for itself.

After Mussolini's Italy enacted a strong moral rights statute in 1925, the Italians trumpeted their accomplishment as a reflection of the glory and global influence of Italian culture and "a signal cultural milestone."⁹⁰ When the Berne Conference met in Rome three years later to consider revisions to the Berne Convention, the Italian delegation argued forcefully (with vigorous support from other Continental nations) for the addition of language mandating similar protections for moral rights in all members of the Berne Union. The proposal met with a chilly reception from Britain and the Anglophone nations, but the Italian delegate skillfully threaded a rhetorical needle: he argued that, in truth, moral rights were already effectively protected in the English-speaking countries, if not by copyright, then by other forms of law.⁹¹ Thus, no new legislation would be needed to bring the Anglophone nations' laws into compliance with a new moral rights provision in Berne. This proved satisfactory to the proposal's detractors, and fascist Italy succeeded in enshrining moral rights protections in international copyright law.⁹²

Hitler's Third Reich offered less substantive law but a characteristic surplus of bombast. In what would prove to be the death knell for a balanced approach to copyright on the Continent, the Nazis articulated a communitarian, public-interested rationale for protecting authors' rights. In some respects, they were only expanding on principles inherited from the Weimar Republic—for example, Germany's 1933 implementation of the 1928 Berne revisions celebrated not a Romantic vision of heroic individualism, but a collective society working to better itself through the creation of works that venerated German culture. The Nazi era took these principles and extended them still further in the service of collective social ends. As Baldwin describes the idealized vision underlying German copyright proposals in this era:

The Nazi author should cultivate not a walled-off garden for the few but a public park for all. Creator and community were inherently intertwined . . . [b]y protecting the author, the folk protected itself.⁹³

⁹⁰ *Id.* at 166. Although Baldwin links these expressions of cultural pride to the "vibrantly modernist and avant-garde" Italian fascists, who "saw themselves as rejuvenating moribund Italian culture, with its glorious past, slothful present, and neglected future," BALDWIN, *supra* note 6, at 168, the fact that virtually the same thinking underlies similar policies in present-day Mexico offers the possibility of a more benign explanation than the one Baldwin gives. *Cf. infra* note 303 and accompanying text.

⁹¹ BALDWIN, *supra* note 6, at 167. In the United States, for example, concern with authors' reputations and the integrity of their works may find protection under contract or trademark principles. *See, e.g.,* Gilliam v. American Broad. Cos., 538 F.2d 14 (2d Cir. 1976). Defamation law, too, stepped in to fill the moral rights gap in Anglophone nations. BALDWIN, *supra* note 6, at 167. Britain in 1952 took the position that its domestic laws already adequately protected moral rights and that further legislation was unnecessary. BALDWIN, *supra* note 6, at 225-26.

⁹² BALDWIN, *supra* note 6, at 167-68.

⁹³ *Id.* at 173.

The idea that works must confer a social benefit was not an abstract ideal, but an indispensable requisite of protection; “[a] work that set itself against the community,” in the “community’s” view, risked suppression.⁹⁴ Rights existed to protect not the honor of the author, but of the work itself—with “honor” understood in a social, collective sense of how well the work promoted the German community’s officially sanctioned self-image.⁹⁵ Creators, of course, recognized the Third Reich’s putative encouragement of artistic creation for the sham it was, fleeing Nazi terror in vast numbers and leaving Germany “a cultural desert.”⁹⁶

Substantive German copyright law actually changed very little in the 1930s, and not at all during the war years.⁹⁷ Legislative proposals were drafted and debated, but none passed before the Third Reich crumbled. Baldwin devotes close attention to the competing plans, but gleans little of value from them. Nazi thinkers, both building on and repudiating their Weimar-era forebears, generally conceptualized authors’ rights as serving collective ends, saw creativity as embedded in an underlying social milieu rather than as an individualistic exercise, supported compulsory licensing to foster greater public access to expressive works, enlisted state authorities to preserve their own favored vision of artistic integrity, and favored limiting rights to flesh-and-blood individuals rather than commercial enterprises.⁹⁸ These proposals differed only in degree, not in kind, from reforms considered before the war in France, Belgium, Italy, Romania, Norway, and Denmark.⁹⁹ But, in an unfortunate parallel, the significance of which would not be lost on postwar European copyright reformers, “[t]he emphasis in Nazi ideology on public access echoed the Anglo-American copyright tradition’s populist approach.”¹⁰⁰ Although the Nazis’ proposed copyright revisions did not stray far from the mainstream of prewar

⁹⁴ *Id.* at 177.

⁹⁵ *Id.* at 176-77. Nazi law enlisted state bureaucrats to police the integrity of creative works, rather than leaving such decisions to the author; again emphasizing the collective, communal lens through which they viewed the creative enterprise. *See id.* at 181.

⁹⁶ BALDWIN, *supra* note 6, at 174. German fascism differed from Italian fascism in that it was extremely culturally conservative. Hitler declared all modernist art to be degenerate. *Id.* at 171. And the Nazis were routinely “burning books and murdering and exiling authors” as well as maintaining “official patronage and censorship.” *Id.* at 190. Nazi rhetoric celebrated a vision of authorship that excluded many flesh-and-blood authors; they embraced “the creative personality—as long as he was a good Nazi and an Aryan.” *Id.* at 196. The Nazis’ refusal to treat all authors alike—by denying copyright protection to Jewish authors, for example—also revealed the hollowness of their pro-author rhetoric. *Id.* at 214-15.

⁹⁷ BALDWIN, *supra* note 6, at 183-186.

⁹⁸ *Id.* at 170-83. Film as an artistic medium posed a special challenge to German law, as it has for many other authors’-rights countries. The Romantic movement’s celebration of individualistic, personal creativity makes a poor fit with collective cultural endeavors such as film that depend upon input from many creators. Furthermore, films are costly to create, and producers ordinarily require exclusive rights in the finished product to justify their investments even if they themselves made no creative contributions to the work. German law resolved the tension by recognizing the producer as the holder of the copyright in the film but making her a trustee of the individuals who actually exercised creative control over the work. *See* BALDWIN, *supra* note 6, at 187-91. Problems of this sort pose fewer thorny issues in Anglo-American jurisdictions, which apply the work made for hire rule to vest copyright ownership in the movie studio who contracted for the work to be created. *See, e.g.,* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (recognizing studio as sole author of film under work made for hire rule).

⁹⁹ BALDWIN, *supra* note 6, at 192-95.

¹⁰⁰ *Id.* at 197.

European thought, and their actual substantive law never matched their rhetoric, their populist rhetoric alone proved unbearably toxic in the postwar years.

After the war, the European democracies competed to see who could most ostentatiously disavow all the trappings of the fascist ideology, which had laid waste to the Continent. Any policy that carried with it a hint of association with the Nazis was doomed; instead, reformers strained to adopt the opposite policy. Baldwin's analysis, however, demonstrates the selective amnesia of postwar copyright reformers; for their zealous embrace of authors' moral rights had its closest parallel in the successful efforts by the fascist government of Mussolini's Italy to enshrine strong moral rights protections in the Berne Convention during the Rome Conference of 1928.

Despite these contradictions, embracing the cause of strong moral rights protections served a number of needs for postwar European copyright reformers, of which repudiating the terror of the Nazi era was only a part. Because moral rights were strongly individualistic and rooted in a Romantic vision of heroic creators, they also served to differentiate the nations of Western Europe from the faceless collectivism of the Soviets whose puppet states now perched on their eastern doorstep. Because moral rights were inalienable and perpetual, permitting authors to exercise ongoing control over how their works were used, they simultaneously served as a rebuke to the exploitative materialism and lowbrow coarseness of American popular culture.¹⁰¹

The governing international agreements changed little at first. Rejecting proposals to enshrine stronger protections for moral rights in international law, the delegates to the 1948 Berne Conference in Brussels chose only to add a new resale royalty or *droit de suite* right, and to lengthen the minimum term of copyright protection to fifty years after the death of the author.¹⁰² Further Berne revisions in 1967 and 1971 permitted (but did not require) perpetual protections for moral rights, added a disclosure right, and required all Berne Union nations to provide adequate moral rights protections during an author's lifetime (with the thornier topic of postmortem protections left to individual nations to resolve).¹⁰³

Postwar France and Germany, however, shared none of the international community's hesitancy and incrementalism, instead racing to enact their own strong moral rights laws. Even as they codified a century's worth of developments in the case law, French jurists insisted that their new statutes created no rights but merely recognized those pre-existing and inalienable rights that nature itself bestowed upon all authors.¹⁰⁴ France's 1957 moral rights statute divided authors' "material" interests (which were assignable and lasted for the full Berne term of fifty years postmortem) from their "immaterial" rights, which were perpetual and inalienable. After the author's death, the law mandated that an author's moral rights passed to her heirs, who "were to follow—forever—the author's presumed wishes" regarding uses of the author's works.¹⁰⁵ "If the author's assignees or heirs flagrantly abused their powers," the French government was empowered to step in to protect the

¹⁰¹ *Id.* at 200-02.

¹⁰² *Id.* at 202-03.

¹⁰³ *Id.* at 203.

¹⁰⁴ *Id.* at 204-05.

¹⁰⁵ BALDWIN, *supra* note 6 at 206.

deceased author's reputation.¹⁰⁶ And the law countenanced few exceptions to authors' rights for fair uses.¹⁰⁷

In West Germany, copyright reformers dusted off failed authors' rights proposals advanced during both the Weimar era and the Third Reich, which they now updated "to fit the postwar spirit, focusing on authors and ignoring the audience."¹⁰⁸ The result was the new German copyright law of 1965, which required strong protections for the author's attribution, disclosure, integrity rights, and created new rights of withdrawal or repenting along with a resale royalty or *droit de suite* right. Although these rights lasted only as long as the copyright in the author's work (and thus were not, as in France, perpetual), they were inseparable from the author herself—the moral rights could not be assigned or inherited. Unlike both the Nazis and the French, postwar Germany gave state authorities no role in protecting authors' reputations. Most important of all, the 1965 German law adopted a copyright term of 70 years after the death of the author—an even longer term than Berne required. This would come to define the global gold standard of protection in decades to come.¹⁰⁹

This further strengthening of authors' rights in France and Germany left the gap between Continental and Anglo-American copyright laws wider than ever. The United States remained defiantly outside the Berne Union, although American publishers were beginning to push more strongly for the nation to join the international copyright system. Others resisted calls for the United States to adhere to international standards, noting the risks strong copyright protection posed to research and the dissemination of knowledge, while still others simply rejected any suggestion that the United States should become even a little bit more like France.¹¹⁰ The work made for hire rule, as much a settled part of the American legal tradition as the integrity right in Continental Europe, was also thought to be in jeopardy if the United States joined Berne.¹¹¹ "When American authors and their allied publishers smugly portrayed the Berne Union as the quintessence of advanced thought," Baldwin writes, "they were easy prey for skeptics."¹¹²

After drifting very far apart by the 1960s, the Continental and Anglo-American systems began moving back together—slowly at first, then with increasing speed in the final decades of the twentieth century. Some of the movement came from Europe, which came to accept the traditional Anglo-American work made for hire

¹⁰⁶ *Id.* at 207. Further showing the impossibility of dividing moral rights protections from the legacy of fascism that reformers were seeking to repudiate, French law on this point gave the state essentially the same responsibilities that the Nazis did. *See supra* note 95 and accompanying text.

¹⁰⁷ *Id.* at 208.

¹⁰⁸ *Id.* at 209.

¹⁰⁹ *Id.* at 209-13, 247. On the Berne Convention's creation of pressure for ever-stronger copyright protections, *see supra* notes 77-80 and accompanying text.

¹¹⁰ *Id.* at 214.

¹¹¹ BALDWIN, *supra* note 6, at 217-18.

¹¹² *Id.* at 215. Existing United States law also fitted well with American economic needs. The domestic manufacturing requirement that had been a condition of American recognition of foreign copyrights since 1891 provided jobs for American workers, and industries that depended on aggregating multiple creators' contributions, such as the film industry, remained hostile to the principle that each creator enjoyed strong and inalienable rights under principles of natural law. *Id.* at 214-17; *cf. supra* note 71.

rule for works, such as software and film, whose production required coordinating the efforts of multiple contributors.¹¹³

By far the greatest legal change, however, came from the United States, which within a few decades transformed itself from a skeptic to a true believer, and indeed became the world's foremost international copyright evangelist. Berne proponents, long marginalized, came to dominate policymaking in the United States. Their influence is easily seen in the landmark U.S. Copyright Act of 1976,¹¹⁴ which took many significant steps toward Berne compliance, each of which tended to increase copyright protection and correspondingly to diminish the public domain. The 1976 Act lengthened U.S. copyright terms from a maximum of 56 years to fifty years after the death of the author (precisely the term, then and now, mandated by Berne), and eliminated the former requirement that only published works were eligible for federal copyright protection. The 1976 Act did not eliminate formal requirements such as notice and deposit of copies with the Library of Congress, but it did permit deficient formalities to be cured during a specified period following publication of the work.¹¹⁵

Continental-style moral rights protections, however, remained a harder sell; they fitted poorly with the prevailing conception of copyright in the United States as an economic tool to induce creative production. The disclosure right stood on fairly firm ground; unauthorized disclosure of an author's work would likely constitute copyright infringement. But the other moral rights found protection only by analogy to other legal doctrines in Anglo-American law. Authors' integrity interests received some protection through the expansion of copyright's derivative works right, and they could reserve what amounted to an attribution right via contract; but the right of repenting was largely ignored (although, to be fair, even many European nations recognized no such right).¹¹⁶

Yet the introduction of Continental thinking into Anglo-American copyright ideology, coupled with the economic imperative of serving the sizable European market, eventually led even the traditionally skeptical Anglophone nations to enact stronger moral rights protections. Britain did so in 1988, although this was done without much enthusiasm; Britain's historic commitment to do as little as possible to

¹¹³ *Id.* at 220-25, 315-16.

¹¹⁴ Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified in scattered sections of 17 U.S.C.).

¹¹⁵ BALDWIN, *supra* note 6, at 219. Baldwin recognizes that while the 1976 Act took some steps that moved U.S. law further away from full Berne compliance, these steps were relatively minor compared with the generally pro-Berne direction of the legislation. The 1976 Act, for example, eliminated perpetual common-law copyright protection for unpublished works, instead supplying federal protection upon fixation of the work and preempting the state copyright laws which would otherwise have governed. *Id.* at 220; *see also* 17 U.S.C. § 102(a) (2012) (fixation); 17 U.S.C. § 301(a) (preemption) (2012). Similarly, the fair use principle (disfavored in Continental jurisprudence) was expanded in the 1976 Act through extension to unpublished works—first implicitly, then later explicitly through a statutory amendment made to overturn an unfavorable Supreme Court construction of the original language. *Compare* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 550-54 (1985) (reasoning that scope of fair use protection is narrower with respect to unpublished works), *with* Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified at 17 U.S.C. § 107) (clarifying that courts are to apply same standards to evaluating fair uses of both published and unpublished works). *See also* BALDWIN, *supra* note 6, at 220.

¹¹⁶ BALDWIN, *supra* note 6, at 225-30.

implement its Berne Convention obligations remained resolute.¹¹⁷ In the United States, state-level protections for moral rights were followed by a federal statute in 1990, which for the first time recognized the attribution and integrity rights, but only for some expressive works.¹¹⁸

In the late twentieth century, the rising importance of intellectual property exports in the American economy led the United States to consider a move that past generations would have seen as heresy: to wit, full membership in the Berne Union. American policy, which had accommodated itself to the interests of United States publishers for most of the nation's history—first by avoiding any legal commitments that would have inhibited the free reproduction of foreign works, then by mandating that foreign works be printed in the United States in order to receive copyright protection here—now accommodated itself again to the interests of American media companies by demanding greater protections for American works overseas. American publishers came to see the Berne Convention's requirement of strong rights and lengthy terms as advantages rather than detriments. Adherence to Berne also served the United States' interest in ongoing negotiations with trading partners, who had resisted American demands for stronger copyright protections by noting that the United States itself remained outside the international copyright system. The United States finally became a member of the Berne Union in 1989,¹¹⁹ making several conforming changes to its laws that, individually and in the aggregate, tended to privilege authors and publishers at the expense of the public domain.¹²⁰

Although the Berne Convention itself called for a minimum copyright term of fifty years after the author's death, the underlying natural-rights logic on which it rested supported perpetual rights: if rights in real property, for example, could endure forever, why should the same not be true of intangible property? France had already adopted perpetual protections for moral rights, and Germany had lengthened its copyright term well beyond the Berne minimum.¹²¹ Adherence to the Berne Convention in the United States brought increased pressures—mostly from the publishers who stood directly to benefit—to lengthen copyright terms still further.¹²²

Baldwin finds unimpressive the economic rationale for longer copyright terms. He writes:

As late as the early twentieth century, before the lockstep assumption that longer terms demonstrated progress and enlightenment, it was still argued that the higher the average educational level, the shorter terms should be.¹²³

¹¹⁷ *Id.* at 230-35; *see also id.* at 234 (“At best Britain thus instituted the bare minimum of Berne’s moral rights.”).

¹¹⁸ *Id.* at 235-36, 239-40; *see also* 17 U.S.C. § 106A (2012).

¹¹⁹ *See supra* note 81 and accompanying text; BALDWIN, *supra* note 6, at 256 (“The Americans were hoisted by their own petard. Seeking strong international protection for intellectual property, they could not neglect at home what they demanded abroad.”); *id.* at 278 (noting that joining Berne Union gave the U.S. credibility to demand stronger protections from other nations).

¹²⁰ BALDWIN, *supra* note 6, at 256-60.

¹²¹ *See supra* notes 105, 109 and accompanying text.

¹²² BALDWIN, *supra* note 6, at 241.

¹²³ *Id.* at 242.

The logic was that a more literate public would naturally demand more books, leading to increased sales and decreasing the amount of time authors would require to recoup the full value of the investment they had made in producing the work. Lengthening the copyright term had the effect of increasing the period during which rights holders could extract additional rents for works already in existence, but proponents offered no persuasive evidence that longer terms would lead to the production of additional works in the future. To the contrary, significant effects on future expressive output would be unlikely given how little the additional future revenue stream would be worth when discounted to present value. Lengthening terms also gave authors' future heirs an effective veto over cultural development.¹²⁴

Despite these considerations, copyright terms again lengthened in the 1990s, with most developed nations matching the life-plus-70-year term that Germany had adopted in 1965. The European Union mandated life-plus-70 for all European nations in 1993, and the United States followed suit in the Sonny Bono Copyright Term Extension Act of 1998.¹²⁵ When it came to term extension, "American authors and disseminators saw eye to eye—the public be damned."¹²⁶

Term extension was politically uncontroversial in Europe, but the Sonny Bono Act was a step too far for supporters of copyright's "traditional concern with the public domain" in the United States.¹²⁷ The result was the lawsuit that eventually reached the Supreme Court as *Eldred v. Ashcroft*.¹²⁸ The Court's rejection of Eldred's constitutional challenge to the Sonny Bono Act was effectively foreordained, Baldwin writes, from the moment the United States committed itself to joining the Berne Union. For most of the United States' history, copyright had been justified not as primarily concerned with private property but with the public good. Authors were entitled to only such rewards as were necessary to induce them to create, and no more. Berne, however, changed the equation: "the public good grew less important. Europe's property-dominated rhetoric crept in, and the very logic of encouraging authorial creativity subtly shifted."¹²⁹ The logic of authors' rights underlying the Berne Convention suggested that authors could never be rewarded too richly for exercising their creative faculties: if a little reward was good, more was always better. "In other works, the more reward, the more good. This was a long way from the enlightened—and socially efficient—vision of the founding fathers."¹³⁰ In *Eldred*, the Supreme Court began to abandon the principle that incentives should be limited to the minimum necessary to induce authorial creation, and to treat copyright much more as an inherent natural property right for authors; notions anathema to pre-Berne United States copyright jurisprudence, but long accepted in Europe.¹³¹

¹²⁴ *Id.* at 242-43.

¹²⁵ BALDWIN, *supra* note 6, at 247-48. Baldwin traces the Europeans' fondness for the life-plus-70 rule not only to the demands of authors for ever-greater protection, but also to the principle that the state should provide for the needs of authors' heirs for two generations—a vestige of Europe's historically greater emphasis on "families, lineages, and inheritances" as compared with American rhetoric of upward mobility and self-reliance. *Id.* at 255. Regardless, the policy consequences on both sides of the Atlantic were the same.

¹²⁶ *Id.* at 248.

¹²⁷ *Id.* at 248.

¹²⁸ 537 U.S. 186 (2003).

¹²⁹ BALDWIN, *supra* note 6, at 250.

¹³⁰ *Id.* at 251.

¹³¹ *Id.* at 251-52.

“[F]rom the 1990s on, European-style property rhetoric sounded more often in America.”¹³²

Term extension, and the other legal changes that the United States made to bring its laws into conformity with the Berne Convention's requirements, all tell a different story for Baldwin than the conventional narrative suggests. He writes:

Copyright's evolution is often told as a story of American cultural hegemony. In fact, the opposite is more plausible. True, moral rights were only partly taken on board in the Anglophone nations. But in other, more important respects, the Continental approach triumphed: the abolition of formalities, the extension of terms, and most fundamentally, the shift of copyright's philosophical underpinnings from statute back toward natural rights. Authors were now to be rewarded as deserving property owners, not incentivized for reasons of social utility.¹³³

Having internalized the tenets of authors'-rights ideology, the United States set about exporting them. In the 1990s, in a series of multilateral trade agreements, the United States successfully insisted that foreign nations bring their copyright laws up to the standards America had recently embraced. In 1994, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (more commonly known as TRIPS) required stronger intellectual property protections overseas as a price of freer access to the U.S. market, and the two WIPO internet treaties of 1996 added new regulations of digital technologies on top of expanded copyright rules.¹³⁴ All these international agreements fitted a common pattern: in each case, they required smaller, less developed countries (who tended to be net importers of copyrighted works) to adopt the high standards of copyright protection that had (very recently, in the case of the United States) come to prevail among developed nations. As Baldwin writes, “[t]he international trade treaties of the 1990s . . . subjected most countries to the strict standards of the First World and deprived the not-yet-industrialized economies of a means to modernize that Europe, the United States, and later much of Asia had already exploited.”¹³⁵ As already noted, the United States had grown its domestic publishing industry, among others, through the purposeful disregard of other nations' intellectual property rights.¹³⁶ Now, however, it moved to block smaller nations from following the same path to prosperity. By integrating requirements for strong intellectual property protections into WTO trading rules, the TRIPS agreement gave developed countries a new mechanism to compel compliance by smaller countries: now, smaller countries risked jeopardizing their access to the

¹³² *Id.* at 253.

¹³³ *Id.* at 260-61; *see also id.* at 303 (“The now dominant First World consensus held that works were property and deserved thick protection. This position was more of a change for the Americans (and to a lesser extent for the British) than for the Continentals.”).

¹³⁴ *Id.* at 264.

¹³⁵ BALDWIN, *supra* note 6, at 275.

¹³⁶ *See supra* note 69 and accompanying text; BALDWIN, *supra* note 6, at 276.

United States and other large world markets if they failed to strengthen intellectual property protections sufficiently.¹³⁷

In the 1996 WIPO treaties, the United States again demanded new protections from its trading partners, this time to protect technological measures employed to protect works published in digital form against circumvention. The 1994 White Paper that the Clinton Administration produced expressly adopted a European, author-centric approach to international copyright: it “explicitly rejected the nineteenth-century belief that the public good lay in cheap and widespread access to works . . . Copyright protection should instead be bolstered to stimulate high-quality content.”¹³⁸ And in a sign of how far the Administration wished to move the law towards requiring compensation even for educational uses, “libraries were told to expect curtailment of the very base of their lending, the first sale principle. Instead, they should explore institutional licenses, with fees per reader.”¹³⁹ Even some European nations balked at the wholesale abandonment of any concern for the public interest that the Clinton Administration championed, and the WIPO treaties ultimately did not go as far as U.S. negotiators wished. Nevertheless, the 1996 treaties reflected “the emergent, Berne-based, Euro-American consensus that intellectual property was much like conventional property, that owners deserved strong protection, and that exceptions to exclusive authorial rights should be strictly limited.”¹⁴⁰

The internationalization of America’s newfound love of copyright is one of the two major themes explored in the last third of Baldwin’s book. The other is the digital revolution, which created both new problems and (as is often overlooked) new opportunities for content creators and brought new interested parties into copyright’s ever-widening debate. Baldwin writes that, at least in the United States, “[o]pen access activists, who had battled the content industries unaided at first, gradually discovered a pleasant coincidence of interests with the internet and high tech sectors.”¹⁴¹ For the first time in decades, the digital era supplied a countervailing force to offset the content industries’ push for ever-stronger copyright protection. But while the advent of the internet and the era of mass digitization have “changed everything,” in Baldwin’s words, they have not changed the actual policies pursued by developed nations, which remain committed to a Berne-driven expansion of copyright and opposed to legal changes that would legitimize uses of the internet that the content industries disfavor. As Baldwin writes, “[r]ather than exploring licensing, allowing untrammelled access tempered by statutory royalties, or other

¹³⁷ BALDWIN, *supra* note 6, at 278 (“Access to the United States—on most metrics still the world’s largest market—was the quid offered in return for a quo of strict protection for American products abroad.”); *see also* HAGGART, *supra* note 1, at 69 (“Now-‘developed’ countries like the United States may have industrialized through the free appropriation of other countries’ ‘intellectual property,’ but TRIPS makes it impossible for today’s developing countries to take the same path.”).

¹³⁸ BALDWIN, *supra* note 6, at 280.

¹³⁹ *Id.* at 280. Although the White Paper was simply an aspirational policy statement and not a regulation with the force of law, the views it expressed have become the law in some instances. *See, e.g.,* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (rejecting argument that copyright’s first sale doctrine permits transfer of digital work from one owner to another).

¹⁴⁰ BALDWIN, *supra* note 6, at 282. On the ways in which the final text of the two 1996 WIPO treaties deviated from American negotiating demands, *see* Baldwin, pp. 282–83.

¹⁴¹ *Id.* at 264.

legal novelties, the US and the EU have dragged the Berne template of exclusive authorial property rights awkwardly into the digital age.”¹⁴² Indeed, even principles regarded as fairly well settled in the offline space, such as the first sale rule and private copying for personal use, have been limited in the digital world—a consequence of content providers’ ceaseless demands for ever-stronger protection.¹⁴³

Philosophical support for a reconsideration of copyright rights also arrived in the late twentieth century with the rise of the postmodernist aesthetic. Postmodernism savagely critiqued the Romantic image of authorship that lay at the heart of the Berne Union’s ideology, of noble creators laboring in solitude to express their personal genius to the benighted masses. To the contrary, the postmodernists maintained, authorship was an inherently social process involving recombining and repurposing existing cultural artifacts, with every generation retelling stories and reusing ideas that came before. Every author was “the product of his society and age . . . who created using other authors’ materials.”¹⁴⁴ Works themselves were cultural artifacts whose meaning “hinge[d] as much on how it was received, understood, and reused by others as on the author’s intentions—however those might be interpreted.”¹⁴⁵ These new understandings challenged the authors’-rights philosophy that had barely begun to root itself in United States law: if works are inherently collective exercises that rest upon a chain of cultural antecedents extending endlessly into the past, their meaning culturally determined and always contingent, then what can core moral rights notions such as “attribution” and “integrity” possibly mean? How can a right of withdrawal coexist with the indestructibility of information that the Internet was engineered to ensure? The combination of the digital revolution and the postmodernist rethinking of the nature of authorship posed questions that Continental authors’-rights philosophy remains hardly able even to discuss, much less to answer.¹⁴⁶

The two sets of legal and technological developments sketched out above—America’s growing international insistence on strong protections, reflected in the 1994 TRIPS agreement and the 1996 WIPO internet treaties, as well as the new challenges posed by the explosive popularity of digital media and the Internet—finally collided with the passage in the United States of the Digital Millennium Copyright Act of 1998.¹⁴⁷ Ostensibly written to implement the requirements of the 1996 WIPO treaties in U.S. law, the DMCA actually went well beyond what those treaties required.¹⁴⁸ The DMCA, however, broke even more new ground than Baldwin acknowledges. What is actually described in *THE COPYRIGHT WARS* is something of an idealized vision of what the DMCA was meant to do, in the words of its proponents. The book’s seeming acceptance at face value of assurances offered at the time the bill was enacted, even those that events have since revealed as baseless,

¹⁴² *Id.* at 265.

¹⁴³ *Id.* at 267-68.

¹⁴⁴ *Id.* at 270; *see also, e.g.*, Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 966, 1007-12 (1990) (“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”).

¹⁴⁵ BALDWIN, *supra* note 6, at 270.

¹⁴⁶ *Id.* at 269-73.

¹⁴⁷ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹⁴⁸ BALDWIN, *supra* note 6, at 283.

may lead informed readers to come away from this portion of the book unsatisfied. There are no major blunders to be found, but a set of curious omissions and misplaced emphases nevertheless detract from the overall discussion; a flaw shared in some measure even by Haggart's generally more skeptical account of the same events.¹⁴⁹

As Baldwin tells it, the DMCA as originally introduced in Congress was severely overbroad; the draft bill “initially forbade any unauthorized use of protected works, including fair use.”¹⁵⁰ Legislative concern that “[i]ndiscriminate protective technologies might block even lawful access,” however, led Congress to add new protections to the bill: it clarified that circumvention for the purpose of making a copy of the work was governed by ordinary copyright law (including, presumably, fair use and other defenses), and made a “[s]eries of compromises” that ultimately yielded “a moderated version of the maximalist agenda that the Clinton Administration had originally taken to [WIPO].”¹⁵¹ The extent to which subsequent court decisions have undone this “moderation” of the legislation and restored a meaning far closer to its original, extreme form receive a mention that seems quite cursory in proportion to its importance.¹⁵²

For Baldwin, the interesting part of the story of the DMCA is what it reveals about the long-standing political and economic power of the copyright industries and the rising strength of technology suppliers and Internet communications companies. The final version of the DMCA gave content suppliers one thing they wanted—legal rules prohibiting the use of or trafficking in devices that would circumvent technological measures protecting their works—but simultaneously took away something else from them, namely, the right to sue online service providers whose users posted infringing content (or search engines that helped such content to be located once posted).¹⁵³ By “open[ing] a large loophole in rights holders’ hopes of controlling works on the web,” the DMCA presaged “the coming power of the internet industrial complex that would burst into public view fifteen years later.”¹⁵⁴ Copyright thus became part of an intra-state “civil war in California,” pitting Hollywood against Silicon Valley.¹⁵⁵ The DMCA gave both sides of the “civil war” something to cheer: “Did big media win as the DMCA imposed stringent anti-circumvention provisions on the use of content? Or did the software, electronics, and Internet industries get their way with generous safe-harbor provisions, permitting them to transmit content without policing infringement?”¹⁵⁶

¹⁴⁹ See *infra* notes 262-264 and accompanying text.

¹⁵⁰ BALDWIN, *supra* note 6, at 283; see also *id.* at 284-85 (“[t]he Judiciary Committee’s version had flatly prohibited all circumventing of technological protection”).

¹⁵¹ *Id.* at 286.

¹⁵² *Id.* at 287.

¹⁵³ *Id.* at 286.

¹⁵⁴ *Id.* at 287.

¹⁵⁵ *Id.* at 291-95.

¹⁵⁶ BALDWIN, *supra* note 6, at 294. This framing constrains the discussion in ways that Baldwin appears not to recognize, however. If it is too soon to declare a winner in California’s copyright civil war as Baldwin suggests, it is surely not too soon to declare ordinary consumers and the public interest to be the losers. So completely has the authors’-rights philosophy displaced concern with the public good, leaving only the competing property interests of this or that industry group, apparently, that the notion that citizens not part of either industry nevertheless have a stake in copyright policy passes all but unnoticed in the discussion.

Soon—in what Baldwin somewhat oddly portrays as a move of calculated opportunism—technology companies began to echo public interest advocates' calls for “open access and free-flowing information.”¹⁵⁷ Their calls to rein in copyright restrictions were roundly rejected by the courts, which shut down the popular Napster file-sharing service, then the decentralized peer-to-peer software programs that had arisen to replace it.¹⁵⁸ When a pattern of court decisions almost entirely favorable to the content industries failed to improve their economic fortunes, the content industries turned to litigation against their own would-be customers, filing thousands of lawsuits against “downloading teenagers, college students, and single mothers, not just large-scale pirates.”¹⁵⁹ These efforts, whatever their legal impact, were “dismal public relations failures,”¹⁶⁰ and appear to have demonstrated only that it is not possible to sue people into liking you: the music industry shrunk by 40 percent from 1999 to 2012 before beginning a slight rebound.¹⁶¹

Technology companies were not the only new voices to oppose the constant expansion of copyright rights as the twentieth century drew to a close. Although they had taken comparatively marginal roles in prior debates, by “the late twentieth century, libraries, colleges, and research institutions had also become major players” in the setting of copyright policy.¹⁶² Furthermore, as Baldwin writes:

Beyond libraries and universities lay the grassroots open access movement—a wildfire of popular opposition, nourished by belief in the common good, defiant of the ideology of intellectual property, spread via the web, and whipped to combustion by the copyright industries' overreaching claims.¹⁶³

Changing policy, however, proved more difficult. Although proposals were periodically introduced in Congress to narrow the DMCA or to protect users of so-called “orphan” works (works whose current copyright owners could not be identified), none was enacted.¹⁶⁴

Europe greeted the digital era differently. The fact that Europe already had well-developed cultural industries and very high levels of copyright protection meant

¹⁵⁷ *Id.* at 293.

¹⁵⁸ *Id.* at 295; *see also* *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹⁵⁹ BALDWIN, *supra* note 6, at 308.

¹⁶⁰ *Id.* at 292; *see also* HAGGART, *supra* note 1, at 65 (recording industry's litigation campaign against file-sharing was “largely a public-relations disaster” that “led more and more people to become interested and involved in copyright policymaking.”).

¹⁶¹ BALDWIN, *supra* note 6, at 295. Other copyright-dependent industries have fared slightly better, with commercial publishing, newspapers, and film seeing less harm from file-sharing than the music industry; and still other industries, including gaming and scientific publishing, have profited in the digital era. *Id.* at 295-96.

¹⁶² *Id.* at 297-98.

¹⁶³ *Id.* at 298.

¹⁶⁴ *Id.* at 299-300. The first substantive amendment to the DMCA was enacted too late to be mentioned in Baldwin's book, and was much narrower and more technical in scope than the unsuccessful proposed reforms Baldwin discusses. *See* *Unlocking Consumer Choice and Wireless Competition Act*, Pub. L. No. 113-144, 128 Stat. 1751 (2014) (codifying DMCA exemption previously issued by Librarian of Congress permitting consumers to “unlock” mobile wireless devices for use on wireless networks other than the network operated by the seller of the device).

that its laws and institutions underwent fewer wrenching changes in the late twentieth century than did the United States.¹⁶⁵ Europe adopted a life-plus-70 copyright term in 1993 with none of the controversy that surrounded the Sonny Bono Act in the United States five years later (and, after all, life-plus-70 had been the law in Germany for nearly thirty years before becoming the European standard).¹⁶⁶ But while the advent of the Internet and the influence of the postmodernist movement prompted an ongoing reassessment of the value of traditional copyright principles in the United States, Europe remained committed to the same vision of strong authorial rights that had animated Continental policy since the 1800s.¹⁶⁷ Europe's implementation of the 1996 WIPO internet treaties largely mirrored the U.S. DMCA (while omitting the DMCA's safe harbor protections for technology providers whose users infringed) and gave even less consideration to the question whether anticircumvention rules would curtail users' rights.¹⁶⁸

D. Copyright in the Digital Millennium

The Internet revolution sparked an unusual copyright rebellion that began in the United States and gradually spread overseas. Proponents of copyright's traditional concern with the public domain and access to knowledge, who had found themselves on the losing end of nearly every public policy battle since the United States began moving toward Berne Union membership in the Copyright Act of 1976, gained new allies and even began winning occasional battles in the early twenty-first century. As Baldwin recognizes, what makes this battle so unusual is that its "reform" wing is, in desired outcome if not in partisan orientation, conservative; today's copyright reformers seek to restore the core concern with the public good that animated copyright law for most of United States history and to return the law to its original purpose.¹⁶⁹ Moreover, the role of digitization is itself a contested issue in the new millennium, with some arguing that the existence of a seamless, nearly cost-free global distribution platform shatters copyright's assumptions about the need to provide financial incentives for publishers to disseminate expressive works, and others responding that the true genius of the internet lies in its capacity to erect billions of tiny tollbooths where every use of every work can be individually licensed and their authors paid.¹⁷⁰

Baldwin's thesis, explored in some depth in Chapter 8, is that we have seen all of these debates before. The "millennial, sometimes apocalyptic, tenor of today's discussion" belies the fact that *every* change in the social or technological conditions

¹⁶⁵ BALDWIN, *supra* note 6, at 302, 303 ("The Europeans had already largely instituted what the United States now sought to emulate.").

¹⁶⁶ *Id.* at 248, 304.

¹⁶⁷ *Id.* at 305-06; *see also id.* at 306 ("Europe bravely reaffirmed inherited aesthetic certainties just as digitality, leaching away authorial integrity and coherence, blurred the line between creator and audience.").

¹⁶⁸ *Id.* at 307-13.

¹⁶⁹ *Id.* at 299; *see also id.* at 326 (noting that, before reversing in the 1990s, "[t]raditionally, American priorities favored the public domain, not authors."). Copyright as a political issue cuts across the left-right spectrum to which American political observers are accustomed. *See id.* at 396.

¹⁷⁰ *Id.* at 318.

of access to expressive works “has provoked grumbling from cultural conservatives, fearful lest the masses use their newfound enlightenment for their own purposes—as well as overjoyed optimism from reformers, delighted at similar prospects.”¹⁷¹ Generations past have faced their own problems of information overload, their own debates over whether authors’ core interests lie in greater financial reward or greater mass exposure of their works, and their own disagreements about whether the audience’s own interests (and their occasional collaboration in the creation of expressive works) stand on equal footing with those of traditional creators. All those debates, in Baldwin’s view, are simply being reworked and recombined in the modern era, much as the postmodernist aesthetic portrays authorship itself as an exercise in remixing cultural antecedents.¹⁷²

The contemporary era, however, has introduced new variations on the old themes. Now, the notion of authorship as a collaborative, social process is no longer just an abstract literary critique of the Romantic vision that underlies the Berne Convention; real-world examples abound of group-produced works that use the Internet to aggregate the efforts of far-flung contributors around the globe. “The audience does not just consume culture but creates it too,” and “[c]onsumer and author seem to meld.”¹⁷³

So far, however, these changes in the world have had little visible impact on the law. The United States remains wedded to strong protections for authors’ rights which, not coincidentally, redound to the nation’s competitive advantage in international trade. “In legal terms, the rights holders’ position in the digital age remained broadly what it had been since the eighteenth century.”¹⁷⁴ What has changed, in Baldwin’s view, is that consumers, the technology and internet industries, and a cadre of supporting academics have mobilized to defend a traditional vision of copyright in the new millennium: “[t]he content industries’ extreme position was met by the audience’s equally uncompromising insistence that digitality had changed the rules.”¹⁷⁵

Given that Baldwin seems to have some sympathy with those combating the overreach of the content industries—activists who can plausibly claim intellectual kinship with such figures as Baron Macaulay and Daniel Webster—his descriptions of them seem surprisingly pejorative. The “grassroots movement” that has “organiz[ed] to defend the public domain,” in his view, consists of “[d]igital anarchists,” “[d]igital guerrillas,” “pirates, thieves, [and] civil disobedients.”¹⁷⁶ Some of this colorful rhetoric is surely supplied to enliven the potentially dry subject of peer-to-peer file-sharing. But content-industry lobbyists pressuring Congress to pass ever-stricter protections for copyright holders could scarcely have crafted a less nuanced rhetorical bogeyman. Similarly, Baldwin’s assertions that social norms (especially among the young) that favor file-sharing have actually impeded

¹⁷¹ BALDWIN, *supra* note 6, at 320.

¹⁷² *Id.* at 319-24.

¹⁷³ *Id.* at 327, 328.

¹⁷⁴ *Id.* at 330.

¹⁷⁵ *Id.* at 331; *see also id.* at 332-36.

¹⁷⁶ *Id.* at 334-36. In what was perhaps intended as a self-deprecating note, Baldwin expresses particular disdain for the “salaried intelligentsia” whose advocacy on behalf of “the digital ideology” came at no personal cost. *Id.* at 375; *see also id.* at 377 (“Independent authors were angered by their salaried peers’ sellout to what they saw as the false idols of open access.”).

enforcement of the law¹⁷⁷ ring hollow in light of the nearly unblemished string of victories the content industry has amassed in file-sharing litigation.¹⁷⁸ That the music industry continued to shrink *despite* one court after another working to shore up its pre-internet business model would make an interesting subject for examination, but the concerns of THE COPYRIGHT WARS appear to lie elsewhere.

Baldwin regains his footing when his attention turns to developments in Europe. The more developed European nations remain firmly committed to an expansive view of intellectual property. Europeans' historical view of artistic creation as the noblest of human endeavors, entitled to at least equal (if not greater) stature compared with ordinary property, remained largely untouched by the digital revolution. The fact that the largest and most visible technology providers in the internet era were United States companies allowed Europeans to join a reflexive, perpetual undercurrent of anti-Americanism to the cause of defending authorial privileges—even though the primary beneficiaries of Europe's strong copyright laws are multinational media conglomerates mostly also based in the United States.

The debates over copyright that the technological era provoked in the United States were slower to arrive in Europe. The EU directive enacted in 2001 to implement the 1996 WIPO Internet treaties did not provoke anywhere near the same level of controversy as the U.S. DMCA statute. As before, figures situated relatively on the fringe of European political thought articulated arguments in favor of the public interest in copyright. Baldwin writes that:

In the United States, many voices resisted thick protection: digital anarchists, librarians, researchers, law professors, and Silicon Valley's magnates. But in Europe the main opposition was heard from shrill and narrow, single-issue pirate parties that arose to fight only this battle.¹⁷⁹

The pirate parties' public profiles rose considerably following a widely publicized law-enforcement raid on the popular Pirate Bay web site in Sweden in 2006. The Swedish pirate party won 7% of the vote in Swedish parliamentary elections the following year, and German pirate parties also began enjoying some electoral successes.¹⁸⁰

The pirate parties' views alienated both the European political right, who "were outraged at the pirates' attempts to justify digital theft as a blow for the public interest," and the political left, who "remained very traditional in their high-culture, print-based attitudes and their suspicion of mass media and pop culture as Trojan horses for American vulgarity."¹⁸¹ "Typically beholden to parties of the left and self-

¹⁷⁷ See BALDWIN, *supra* note 6, at 336 ("democracies could not enforce laws that were broadly out of tune with social mores"); *id.* at 337-38 ("During the nineteenth century Americans had found it politically impossible to impose copyright on foreign books. Now it was becoming similarly difficult to enforce old-fashioned strictures on the new digital cornucopia.").

¹⁷⁸ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

¹⁷⁹ BALDWIN, *supra* note 6, at 340; *cf. supra* note 62 and accompanying text.

¹⁸⁰ BALDWIN, *supra* note 6, at 340-42.

¹⁸¹ *Id.* at 342, 343.

professedly eager to welcome new entrants in pursuit of egalitarianism and democracy," Baldwin notes dryly, "European intellectuals and artists of a certain age nonetheless discovered that they did not actually favor free downloads."¹⁸²

Nevertheless, the notion that "culture and knowledge were public goods whose value increased the more they were shared,"¹⁸³ a wholly conventional viewpoint well within the historic mainstream of intellectual property thought in the United States and the United Kingdom, began to win some converts on the Continent as well. "Received opinion gradually acknowledged that the Anglophone copyright tradition did not just do the content industries' bidding but also defended an expansive public domain."¹⁸⁴ German and Dutch research institutes, a few German courts, and even some younger French lawyers, began to articulate reasons for reining back authors' rights, which had only expanded on the Continent for over two hundred years.¹⁸⁵

France appears to have struggled the most to adapt its laws and cultural institutions to the realities of the technological era. France's so-called DADVSI bill in 2006 (*Le Droit d'Auteur et les Droits Voisins dans la Société de l'Information*), written to implement the EU's 2001 copyright directive and the 1996 WIPO internet treaties, would have criminalized peer-to-peer file-sharing and downloading even for private use. In the face of unexpected parliamentary opposition (some of which reflected simple Gallic resistance to anything that might benefit American media corporations rather than a genuine regard for the public interest in copyright policy), the government offered rhetorical improvements, moderating its penalty proposals and paying at least lip service to the notion of "achieving a balance between internet downloaders and authors."¹⁸⁶ France's 2008 HADOPI law (*Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d'auteur sur Internet*), ratifying a private agreement reached in 2007 among internet providers and content companies, established an escalating range of penalties for file-sharing, culminating in accused downloaders' internet connections being cut off. A final tweak in 2009 incorporated judicial oversight into this process. At each step, advocates for more user-friendly legislation were ignored or defeated. Baldwin writes: "this cluster of laws (DADVSI, HADOPI, and the final 2009 law) reaffirmed traditional French views. Digital age or not, the author remained firmly in the saddle . . . The left's hopes for an audience-friendly approach with more open access and downloading at flat-rate fees went nowhere."¹⁸⁷ Later, after warning that the Google Books digitization project would marginalize French literature online by focusing on English-language works, the French government and publishing industry worked together to guarantee precisely this result by refusing to permit French works to be digitized.¹⁸⁸

¹⁸² *Id.* at 344.

¹⁸³ *Id.* at 344.

¹⁸⁴ *Id.* at 345-346.

¹⁸⁵ *Id.* at 346-348.

¹⁸⁶ BALDWIN, *supra* note 6, at 348.

¹⁸⁷ *Id.* at 357; *see generally id.* at 348-358. The French left, Baldwin notes, is itself divided; it has attempted, so far without success, "to reconcile the nation's traditional veneration of high culture with the need to pay attention also to the common people's cultural interests." *Id.* at 398. The same might well be said of the U.S. government, with the caveat that maximizing export revenues, not promoting high culture, seems to be the paramount objective of U.S. copyright policy.

¹⁸⁸ *Id.* at 359-65.

The digital era introduced new tensions into Continental copyright policy. On the one hand, advanced economies such as France and Germany resisted suggestions that technological advance required rethinking their settled commitments to strong authors' rights.¹⁸⁹ They saw the Internet as a particularly American invention crafted to serve the needs of English-speaking consumers.¹⁹⁰ On the other hand, the nations of Eastern Europe, only recently admitted to membership in the EU, shared little of their Western peers' reflexive anti-Americanism. They instead embraced the Internet's democratizing, enlightening potential with great enthusiasm. "In the former East slogans of free and universal access were proclaimed on blogs and chanted in the streets."¹⁹¹ Delegates from Eastern European nations led the attack on the proposed Anti-Counterfeiting Trade Agreement (ACTA), a treaty which would have "create[d] a new international regime for punishing counterfeiting and piracy."¹⁹² The EU Parliament rejected ACTA by a lopsided vote of 478-39 on July 4, 2012, following a long string of adverse recommendations by EU committees. Of the small number of Parliamentary delegates voting in favor of the treaty, fully half were French.¹⁹³

On the whole, however, Baldwin concludes that we now live in the era of "European hegemony" in copyright.¹⁹⁴ The conventional view, which sees copyright policy driven by the needs of American media interests, overlooks the fact that "[a]uthors' rights were but one policy where the Americans followed European examples."¹⁹⁵ Patent law, bankruptcy law, and even the law of capital punishment, all have come to bear identifiable European influences in the United States.¹⁹⁶ Copyright law in the United States has moved, in a strikingly brief period of time, first to internalize the principles of the Berne Union that the United States had long resisted, and then to insist that America's trading partners adopt even higher levels of protection. A delayed reaction is underway, however, driven in part by "many American liberals and intellectuals [who] regarded such author-centrism as an outmoded obeisance to elitism . . . out of sync with the digital age."¹⁹⁷ And in an intellectual reaction to Berne's insistence upon ever-stronger protections for copyright holders based upon the one-way logic of natural rights,

the traditional view of copyright as a limited monopoly that—while keeping authors happy—fundamentally serves the public interest has returned as an aspiration. Rejuvenated in the United States, where it never entirely died, it is now echoed among the pirate parties and youthful downloaders of Western Europe and the digitally

¹⁸⁹ *Id.* at 358.

¹⁹⁰ *Id.* at 360-62.

¹⁹¹ *Id.* at 358.

¹⁹² BALDWIN, *supra* note 6, at 358.

¹⁹³ *Id.* at 358.

¹⁹⁴ *Id.* at 378.

¹⁹⁵ *Id.* at 379.

¹⁹⁶ *Id.* at 379-80.

¹⁹⁷ *Id.* at 378.

aspirational citizens of the former East. The battle between author and audience continues.¹⁹⁸

III. THE EVOLUTION OF NORTH AMERICAN COPYRIGHT LAWS SINCE 1996

Blayne Haggart's *COPYRIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM* turns a skeptical eye toward the conventional belief that the United States has become the dominant player in international copyright law and that the United States' policy choices (and, therefore, the world's) are dictated in large measure by the wishes of American media companies. Refuting that view would be a challenging task indeed, for the United States has in fact acted repeatedly (and, in some instances, expressly) to advance the interests of domestic content producers as against the interests of both its foreign trading partners and, indeed, its own citizens. Ultimately, Haggart is compelled to settle for a narrower, but still provocative, thesis: that internal political and economic institutions and regional trade treaties may give smaller countries surprising resources to resist U.S. pressure for ever-stronger copyright rights. Foreign public and private actors may effectively sand the rough edges off United States demands and maintain a degree of autonomy in copyright policy despite America's undeniable political and economic might.

Haggart develops his theory by examining how the two WIPO Internet treaties of 1996 were negotiated, and then how the treaties came to be implemented in United States, Canadian, and Mexican law. The fact that Mexico has yet to enact legislation specifically implementing the anti-circumvention requirements and safe harbor provisions of the WIPO treaties poses less of a problem for Haggart's analysis than might first appear, for Mexico's inaction in the face of U.S. pressure itself illustrates Haggart's point about smaller nations maintaining their own policy autonomy.

In Haggart's view, the 1996 WIPO treaties make suitable subjects for analysis because they "set the terms of the global digital-copyright debate and established the actors—some veteran players, others newly minted, all with strongly held views about how copyright law should be reformed—who would drive copyright reform in the twenty-first century."¹⁹⁹ To these advantages might be added one other: the WIPO treaties represent the last serious attempt in international policymaking to accommodate the needs and interests of nations who do not see eye-to-eye on copyright issues. Since the WIPO treaties, the subsequent pattern—in evidence both with regard to the ACTA treaty in 2012, and the just-concluded TPP agreement—has been for negotiations to involve progressively smaller groups of like-minded nations who support strong copyright rights. That efforts to include a broader cross-section of the international community have largely stalled since the WIPO treaties has ongoing consequences, however, for 1996 was an eternity ago in Internet time. The digital copyright debate has, in many respects, moved on since WIPO, and the world the WIPO treaties anticipated has already changed in ways that international copyright agreements have yet to recognize.

¹⁹⁸ BALDWIN, *supra* note 6, at 382.

¹⁹⁹ HAGGART, *supra* note 1, at 5; *see also id.* at 18 (WIPO treaties supply "the normative baseline for states considering how to reform their copyright laws in the digital age.").

The choice of Canada, Mexico, and the United States as the subjects for Haggart's examination both strengthens and hinders the analysis. The advantage is that the nations of North America describe the copyright universe in microcosm: North America "includes the global copyright superpower, a small developed country, and a key developing country."²⁰⁰ Relatedly, the three nations straddle the conceptual divide between the "copyright" and "authors' rights" perspectives that was the subject of Baldwin's analysis: Canada has largely retained copyright's emphasis on the public interest from its Commonwealth heritage, while Mexican law continues to show the influence of the authors'-rights ideology that Spain historically shared with its Continental European neighbors.²⁰¹ The drawback is that it may be exceedingly difficult to generalize from the North American example to draw conclusions about other nations in light of the already tight economic integration between the United States, Canada, and Mexico under the North American Free Trade Agreement (NAFTA). That is to say, Haggart's thesis is that smaller countries may be able to resist demands for stronger copyright protection from the United States, but his illustrations of that point all involve countries over whom the United States has ceded some of its bargaining power as a result of NAFTA. Whether his conclusions may be extended to other nations less fortunately situated than Canada and Mexico remains unclear.²⁰²

Haggart agrees with Baldwin that technological change makes contemporary copyright debates look newer than they really are, while "below the flashy surface we see the same story that has played out in American copyright law since its inception."²⁰³ Nevertheless, technological advance has altered that story in at least one critical way by bringing ordinary members of the public into the debate (a development Haggart welcomes far less grudgingly than Baldwin). No longer a remote, dusty corner of the law of interest to only a handful of industry specialists, copyright has come to regulate a broad and still-growing swath of everyday human conduct due to the effects of digitization.²⁰⁴ The result, in Haggart's view, has been an increasing activation of copyright as a political (if still largely not a partisan) issue, a development which has occasionally caught unprepared policymakers off-guard—as Canada's government was when sudden public outrage swamped its first proposed WIPO bill in 2007, and as the United States Congress was when the

²⁰⁰ *Id.* at 9.

²⁰¹ *Id.* at 9-11. And the United States, of course, has occupied both ends of the spectrum at different times in its history.

²⁰² Haggart articulates somewhat inconsistent positions on this point. He first suggests that the tight economic linkages that both Canada and Mexico share with the United States might leave countries less tightly bound to the U.S. even greater freedom to choose the copyright policies that best suit their own interests. *Id.* at 11. Later, however, he recognizes that regional economic integration deprives the United States of a powerful tool—namely, improved access to American markets—to influence the copyright policies of its smaller trading partners, necessarily implying that U.S. influence may be greater in those nations where it can continue to offer valuable trade concessions in exchange for stronger IP protections. *Id.* at 245.

²⁰³ *Id.* at 100.

²⁰⁴ *See id.* at 65 ("what was originally a commercial law designed by lawyers for lawyers now directly affects individuals in ways that would have been inconceivable even twenty years ago because computers, which are now ubiquitous in society, work by making copies"); *id.* at 92 ("The technological empowerment of the individual represents a fundamental challenge to copyright.").

“internet blackout” of January 18, 2012 scuttled the draft SOPA and PIPA legislation.²⁰⁵

The first three chapters of COPYFIGHT provide an overview of Haggart’s methodology and conclusions. Haggart’s study of how the WIPO internet treaties were negotiated, and how they have come to be implemented (or not implemented) in the nations of North America, rests upon over fifty interviews with “experts, policymakers, and business and civil society representatives” in all three countries.²⁰⁶ Chapter 2 describes the “historical-institutionalist” framework of analysis—providing, for legal scholars, a welcome guide to how political scientists such as Haggart approach the study of legal change. Chapter 3 provides a thorough overview of copyright policy and recent history. The book then presents four distinct case studies of recent developments in copyright law, one dealing with how the WIPO internet treaties were negotiated (Chapter 4), then three studies of how those treaties have, or have not, been implemented in the domestic laws of the United States (Chapters 5-6), Canada (Chapter 7), and Mexico (Chapter 8).

Haggart’s historical-institutional analysis attempts to account in a rigorous way for “the changes over time in the relationship among the ideas underpinning IP, the actors involved in policymaking, and the institutions structuring their interactions.”²⁰⁷ “Institutions,” in this sense, are not just *organizations*; rather, “institutions” are enduring social constructs “created, sustained, and changed by purposeful actors” who differ in their resources, knowledge, and influence.²⁰⁸ Copyright itself is an institution. Importantly for Haggart’s analysis, institutions inevitably have distributive consequences; they “always favour some groups and policies over others.”²⁰⁹ Institutions affect, and are affected by, actors pursuing differing interests; but actors differ, depending on their resources and information, in their abilities to influence institutions. Institutions also have a sort of inertia that may make them resistant to change and cause them to persist even after the social conditions that brought them into being have dissipated.²¹⁰ Ideas can both support existing institutional structures or lead to institutional change. The institution of copyright rests upon particularly forceful ideas, yet is also vulnerable to forceful critique. In Haggart’s words:

Copyright . . . is anchored in core Enlightenment ideas of property and individuality: powerful ideas that are often deployed to defend copyright as a policy. However, the positive idea of ownership is in tension with the negative idea of copyright as “monopoly” . . . which can be used by those who do not benefit from copyright law to challenge it.²¹¹

Would-be countervailing ideas, in order to produce lasting institutional change, must be “credible (fitting the dominant paradigm), effective (insofar as it promises a

²⁰⁵ See HAGGART, *supra* note 1, at 3, 184-91, 251-55; see also *supra* note 9.

²⁰⁶ *Id.* at 30-31.

²⁰⁷ *Id.* at 33-34.

²⁰⁸ *Id.* at 35.

²⁰⁹ *Id.* at 35.

²¹⁰ *Id.* at 36-37.

²¹¹ HAGGART, *supra* note 1, at 38.

reasonable solution to a decision-making problem), and legitimate (resonate with public sentiment).²¹² The power of an existing institution to constrain competing ideas along these dimensions is referred to as “path dependence,” a concept Haggart finds “incredibly useful in explaining how and why policies like copyright have persisted, in some recognizable form, over several centuries.”²¹³ The mere fact of institutional persistence, however, may simply reflect the inertia of path dependence; it does not itself demonstrate the institution’s “social utility or effectiveness.”²¹⁴ Internal pressures within institutions and exogenous shocks from without may both create opportunities for change. “[T]he history of copyright law,” Haggart writes, “is often told in terms of exogenous shocks, specifically the ways that technological change creates new interests and changes the relative position of existing ones.”²¹⁵ One such exogenous shock occurred in the 1970s and 1980s, when copyright in the United States was purposely re-conceptualized as a mechanism for promoting the export of U.S. music and film, thereby regaining a measure of global economic influence even as American manufacturing industries declined. Haggart writes:

[T]he link between trade and IP was the result of lobbying in the 1970s and 1980s by US IP leaders, who argued that maximizing international IP protection would maintain US global economic dominance at a time when this hegemony was being threatened by the rising star of Japan, among others. There was nothing “natural” or inevitable about this linkage, but once made, it exerted, and continues to exert, a powerful hold on our conceptions of how to address copyright and IP issues.²¹⁶

Haggart then undertakes an examination of copyright as a tool of public policy, placing its distributional consequences front and center: copyright law is a part of “an ongoing battle among various business and social groups to expand copyright in some cases and in the service of some interests, and to restrict it in others.”²¹⁷ “All debates over copyright involve actors attempting to emphasize either the need for greater protection or the promotion of dissemination—the two fundamentally irreconcilable objectives of copyright law.”²¹⁸ Copyright law requires constant ideological justification precisely because its actual effect—“*constructing* a scarcity” in knowledge and information—seems detrimental on its face, especially when measured against Enlightenment values.²¹⁹ That is why compensating benefits are often asserted to explain why copyright’s costs are worth paying: copyright protection may limit our uses of creative works today, but in return we will receive more works tomorrow than without it. Yet, three centuries of experience with copyright law has failed to produce more than anecdotal support for this proposition; the most that can be said, in Haggart’s view, is that “copyright’s effects on the production and

²¹² *Id.* at 39 (internal quotations omitted).

²¹³ *Id.* at 39.

²¹⁴ *Id.* at 41.

²¹⁵ *Id.* at 44.

²¹⁶ *Id.* at 46.

²¹⁷ HAGGART, *supra* note 1, at 49.

²¹⁸ *Id.* at 51.

²¹⁹ *Id.* at 51 (internal quotations omitted; emphasis in original).

dissemination of creative works are, at best, indeterminate, dependent on the structure of the particular market in question.”²²⁰ That indeterminacy may have been tolerable for most of copyright's history, but has become less so in an era where “digital technologies challenge the necessity of the business models and justifications that have grown up around copyright.”²²¹

Haggart then surveys the primary players on the copyright stage, focusing first on the businesses that base their livelihoods from the buying and selling of copyrighted works (such as the music, film, software, and traditional publishing industries), their affiliated lobbying arms, and the government agencies that have historically responded to their perceived needs. On the whole, the so-called “content industries” business models are based not on the production of new expressive works, but on controlling and monetizing copies of works already in existence.²²² That orientation necessarily gives those industries a backwards-looking perspective; they are more likely to perceive their interests as threatened rather than advanced by technological change.²²³ And the present technological era may pose the biggest challenge yet, for “[d]igitization threatens traditional content industries’ scarcity-based business model to a much greater extent than previous technological advances.”²²⁴ The logic of the digital communications revolution undercuts the rationale for creating property rights in expressive works in the first place, for “since it now costs much less to create, reproduce, and distribute works, publishers should therefore need fewer, not more, property rights to protect their investment.”²²⁵

Such are the risks for publishers. What of creators themselves? Pre-internet content-industry business practices exploited creators for publishers’ benefit, but at least offered creators “certainty.” The digital era replaces that certainty with an opportunity, which many creators have successfully seized, to eliminate the middleman and communicate directly with fans. The WIPO treaties that are the focus of Haggart’s study, however, have relatively little to do with artistic creation as such; they involve issues that are typically of far greater concern to disseminators of copyrighted works.²²⁶

Although ordinary “citizens and consumers have historically been excluded from the formulation of copyright policy . . . the early 2000s witnessed a growing awareness within civil society of the importance of copyright policy.”²²⁷ Individuals now have a direct stake in copyright policy due to technological change, which has given ordinary citizens both the tools to create new works by remixing existing content and a global publishing platform. Haggart writes: “This is the revolutionary fact that lies at the heart of the content industries’ crisis . . . For the first time in

²²⁰ *Id.* at 53.

²²¹ *Id.* at 53.

²²² *Id.* at 59.

²²³ HAGGART, *supra* note 1, at 59 (discussing example of how composers and sheet-music publishers sought to leverage copyright to control duplication of player-piano rolls in early twentieth century).

²²⁴ *Id.* at 60.

²²⁵ *Id.* at 60 (internal quotations omitted).

²²⁶ *Id.* at 62-63.

²²⁷ *Id.* at 63-64.

history, publishers and distributors are facing competition from their *customers*.²²⁸ “This direct involvement of the public fundamentally changes the dynamics of copyright negotiations.” Obviously it is impossible for “millions of individuals” to participate individually in the process of setting rules that will directly govern their conduct.²²⁹ Accordingly, consumers’ interests have come to be represented—tolerably, if imperfectly—by proxy, through technology companies. The technology sector’s general interest lies in maximizing the interoperability or functionality of its products to make them appealing as many consumers as possible, avoiding copyright rules that would limit suppliers’ ability to meet consumer demand.²³⁰

National governments’ stake in copyright policy tends to be driven by the structure of their domestic copyright-sensitive industries and on whether the nation is an importer or exporter of intellectual property. Nations at different levels of development may have different preferences as to the value of protecting intellectual property. For countries that are net exporters of intellectual property goods, raising global levels of protection redound directly to the benefit of their balance of accounts. Conversely, for countries that import more intellectual property goods than they export, every increase in levels of protection leads directly to an outflow of national wealth to IP-producing nations.²³¹

The movement to internationalize copyright law, which was born with the Berne Convention in the 19th century and accelerated rapidly in the last few decades of the 20th, brings new institutions into the picture. Two international bodies—the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)—have vied for influence over global intellectual property standards.²³² WIPO, as a specialized agency of the United Nations, historically “promote[d] a particular view of knowledge and intellectual property rights” that was “centrally concerned with socialization.”²³³ In the 1980s and 1990s, dissatisfaction with WIPO’s broader social mandate led large copyright exporters, such as the United States and the European Union, to turn instead to the WTO, which was more focused on economic concerns. The developed nations’ “coordinated push” to raise global levels of intellectual property protection resulted in the 1994 WTO TRIPS Agreement, which now defines “the global ‘floor’ in intellectual property rights” to which all WTO member nations must adhere.²³⁴ The 1996 WIPO Internet treaties that are the focus of Haggart’s book represented an attempt by WIPO to reassert its own relevance in the wake of TRIPS.²³⁵

The United States’ push for stricter global copyright standards cannot, however, be explained solely as an attempt to maximize the nation’s global competitive advantage in world trade. This is so, Haggart explains, because higher levels of copyright protection disserve industries that collectively contribute more to the

²²⁸ *Id.* at 65. Haggart also blames the recording industry’s years-long litigation campaign against end-users of peer-to-peer file-sharing software for raising the public profile of copyright issues, not always to the recording industry’s benefit. *See id.*

²²⁹ HAGGART, *supra* note 1, at 66.

²³⁰ *Id.* at 67.

²³¹ *Id.* at 69-71.

²³² *Id.* at 72.

²³³ *Id.* at 74.

²³⁴ *Id.* at 74, 82-84.

²³⁵ HAGGART, *supra* note 1, at 74.

nation's economy than do the publishing and recorded entertainment industries. Thus, although United States content companies in the 1980s "successfully linked American concerns about the potential loss of American economic predominance to a push for stronger IP protection,"²³⁶ the legal structure that emerged from those efforts sacrifices newer, growing industries to serve older, shrinking ones. In Haggart's words:

Absent political lobbying—the crucial factor determining US government support for stronger copyright—the content industries' contribution to the US bottom line may not be enough to justify the one-sided pursuit of an agenda (stronger copyright) that disadvantages other American companies and interests—some of which, like Google, may have more upside potential than legacy media companies like Disney.²³⁷

Furthermore, the linking of U.S. demands for stronger intellectual property protections to the nation's perceived self-interest in global trade has led to an outsized role for the Office of the U.S. Trade Representative in global copyright policymaking.²³⁸

A. The White Paper and the WIPO Treaties

Haggart next describes how the United States government took a sharp turn towards a maximalist view of copyright in the 1990s—a turn that began among Executive Branch officials before becoming recognized in international treaties, and which finally became the basis for the controversial DMCA statute. It makes sense to begin the story with the United States' view, Haggart believes, because the U.S. influences outside actors in the copyright arena to a far greater degree than it is influenced by them.²³⁹ Yet, despite its undeniable economic and political clout, the United States found itself constrained in the setting of international copyright standards in the WIPO Internet treaties.²⁴⁰

One highly consequential feature of United States copyright policymaking, Haggart explains, has been the frequent, repeated use of negotiations among affected groups to set policy. Haggart describes copyright policymaking as "a pragmatists' game, involving trade-offs among various interest groups that have a seat at the table."²⁴¹ Congress has taken a comparatively limited role, generally contenting itself with validating and enacting language resulting from these inter-industry

²³⁶ *Id.* at 76.

²³⁷ *Id.* at 79.

²³⁸ *Id.* at 75-82.

²³⁹ *See id.* at 93 ("a country whose own policies are almost completely a function of domestic ideas, institutions, and interests, rather than of regional or international institutions").

²⁴⁰ *Id.* at 93 ("not all of WIPO's rules were conducive to US desires").

²⁴¹ HAGGART, *supra* note 1, at 99; *see also* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861 (1987) (describing how statutory language of the Copyright Act of 1976 "evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines").

negotiations.²⁴² This practice has shaped substantive copyright law in the United States (and, therefore, internationally) to a great degree. Haggart writes:

US copyright law reflects the interests and relative strength (economic and political) of those who have been invited to the table. Already established groups tend to have an advantage over upstarts, specific interests (i.e., industries) generally outclass the overall “public interest,” and every invited guest does better than the wallflowers.²⁴³

The industries whose interests were most directly in play at the time of the 1996 WIPO Internet treaties included the content-producing industries (music, film, publishing, software, and the like) that generally favored stronger protections; and the newer technology, Internet, and telecommunications industries, who generally favored freer dissemination of expressive works.²⁴⁴ The interests of the public were represented, if at all, only by proxy to the extent that the public happened to share some interests in common with industry groups promoting freer dissemination.²⁴⁵

The story of the WIPO Internet treaties begins in 1993 in the United States. In that year—just as Internet access was beginning to become widespread outside the circle of educational, military, and government agencies where it had already taken root—the Clinton Administration appointed a task force to study the new technology and make policy recommendations. The so-called Information Infrastructure Task Force’s Working Group on Intellectual Property, chaired by USPTO Commissioner Bruce Lehman, responded by issuing a report in 1995 that has become known simply as the “White Paper.” The White Paper offered “an overwhelming emphasis on protecting the rights of copyright owners and reflected a vision of creative ‘works’ as tradable products.”²⁴⁶ “Users’ rights were treated as residual.”²⁴⁷ The White Paper defined copies of works briefly present in volatile computer RAM memory as infringing and offered a series of copyright-maximalist policy recommendations, including a recommendation that online service providers should be required to police their users’ actions to avoid possible copyright infringement, and a recommendation for the creation of a new right for copyright owners against circumvention of technological measures deployed to protect their works.²⁴⁸

When the Clinton Administration proposed new legislation to implement the White Paper’s recommendations, however, Congress balked. The Task Force’s recommendations departed from the historic U.S. practice of negotiated copyright policymaking and provoked opposition from excluded industry groups (as well as from new public-interest organizations formed to resist the White Paper’s proposed encroachments on user freedoms).²⁴⁹

²⁴² HAGGART, *supra* note 1, at 99.

²⁴³ *Id.* at 100-01; *see also id.* at 103 (end-user interests “simply cannot compete with the content industries’ lobbying budgets”).

²⁴⁴ *Id.* at 102-07.

²⁴⁵ *Id.* at 106-07.

²⁴⁶ *Id.* at 111-12.

²⁴⁷ *Id.* at 112; *see also supra* notes 138-140 and accompanying text.

²⁴⁸ HAGGART, *supra* note 1, at 112; *see also supra* note 1 and accompanying text.

²⁴⁹ *Id.* at 112-13.

In response to the legislative stalemate, Commissioner Lehman and other Executive Branch officials sought to create further pressure to support the adoption of the White Paper's policy recommendations. The venue they selected was WIPO: backers of the White Paper's policy proposals would use the White Paper as the basis for a new international commitment on stronger digital copyright protection, then return to Congress with a new argument that enacting the White Paper's proposals had become an international obligation of the United States.²⁵⁰ They found in WIPO a generally receptive partner as the organization worked to reassert its own relevance following the landmark 1995 WTO TRIPS Agreement. And their efforts were, in large measure, successful: the two WIPO Internet treaties of 1996 both contained new provisions mandating legal rules against the circumvention of technological protection measures protecting copyrighted works.²⁵¹

Nevertheless, the WIPO process, and the treaties it produced, departed from the United States' preferences in multiple respects. Achieving agreement on the proposed treaty language required accommodating the interests of countries that did not share the United States' economic views or the Clinton Administration's philosophical embrace of copyright maximalism.²⁵² Resistance from other nations forced the U.S. to retreat from its original proposed anti-circumvention provision, which would have banned circumvention tools outright regardless of their effects on traditional copyright interests. Instead, the negotiators settled on more flexible language—such as requirements that nations provide “adequate legal protection and effective legal remedies”—that the treaties left undefined.²⁵³ The resulting language was sufficiently vague to invite ongoing debate over what the WIPO Internet treaties actually require.²⁵⁴

The United States also did not succeed before WIPO in establishing expansive new liability rules for Internet providers as the White Paper had recommended. The U.S. delegation was itself divided; American telecommunications interests strongly opposed the entertainment industries' push for expansive rules of secondary liability for technology providers whose users infringed copyright. As a result, the final treaties contained no provisions directly on point, with both the technology and media industries' concerns reflected in a pair of “agreed statements” accompanying the treaty text.²⁵⁵

Haggart finds in the final agreed language of the treaties evidence that WIPO “member states chose to defend the status quo, not to create a new regime,” and notes that the treaty language “seems to go out of its way to link any new provisions with existing treaty obligations.”²⁵⁶ Although it is true that the Clinton Administration ultimately could not persuade its negotiating partners to accept the

²⁵⁰ *Id.* at 113-14.

²⁵¹ *Id.* at 115-16, 127-28.

²⁵² *Id.* at 117-18.

²⁵³ *Id.* at 120.

²⁵⁴ HAGGART, *supra* note 1, at 120-21, 127-28. In Haggart's view, the negotiating history supports a minimalist understanding of nations' obligations to provide legal protections against the circumvention of technological measures, for language that would have clearly required stronger forms of legal protection was rejected in favor of the comparatively vague requirements quoted above. *Id.* at 121.

²⁵⁵ *Id.* at 122-24.

²⁵⁶ *Id.* at 125.

maximalist recommendations enunciated in the White Paper, Haggart's dismissive view appears to sell the WIPO treaties short; for it is clear in retrospect that the new treaties effectively ended the legislative resistance that had blocked implementation of the White Paper's recommendations the year before and led directly to the passage of the DMCA statute in the United States.

B. WIPO-Plus: The United States' Response

Haggart identifies three primary consequences for United States law due to the adoption of the WIPO treaties. First and most directly, as intended by the Administration, the treaties broke the back of legislative resistance to the adoption of strong rules prohibiting the circumvention of technological protection measures protecting copyrighted works. Indeed, although the Administration's demands (which continued to rest upon the 1994 White Paper) were moderated somewhat as the treaty-implementing legislation progressed through Congress, the final outcome was a set of statutory provisions that arguably went beyond what the treaties required ("WIPO-plus"), both as to the new anti-circumvention rules and in the creation of a notice-and-takedown system for online service providers. Second, Haggart finds that the compromises needed to secure the assent of its negotiating partners to the WIPO treaties soured the Executive Branch on WIPO as a forum for international intellectual property negotiations, leading the U.S. to again seek a friendlier venue for future talks (which it has done ever since by negotiating only bilaterally or among a comparatively limited and hand-picked group of like-minded trading partners). WIPO marked the end of the United States' effort—and perhaps, Haggart suggests, its ability—to gain support from nations whose interests in intellectual property policy diverge in any significant degree from the U.S.'s own. Finally, Haggart writes, the fact that the Clinton Administration abandoned any pretense of impartial service to the public interest, instead acting before both WIPO and Congress as a mouthpiece for the wishes of the content industries, led to copyright becoming, seemingly for the first time, a political issue of significant concern to the broader public. What had long been a comparatively technical field of interest only to a handful of legal specialists came, in a very short span of time, to be a controversial political issue, culminating in the public revolt against the then-pending SOPA and PIPA legislation in 2012.

With the new WIPO treaties in hand, the Clinton Administration returned to Congress to continue pushing for the stronger copyright protections it had demanded in the 1994 White Paper. The result, however, was a legislative compromise that reflected (even as the White Paper had defied) the historical use of inter-industry negotiations to set U.S. copyright policy.²⁵⁷ As with prior instances in which Congress had effectively permitted the representatives of affected industries to set policy, the result was "long, detailed, counterintuitive, kind to the status quo, . . . hostile to potential new competitors, [and] overwhelmingly likely to appropriate value for the benefit of major stakeholders at the expense of the public at large."²⁵⁸

²⁵⁷ See *supra* notes 241-243 and accompanying text.

²⁵⁸ HAGGART, *supra* note 1, at 132.

The compromise between competing industry groups that finally led to the enactment of the Digital Millennium Copyright Act of 1998 involved the technology and telecommunications industries on one side and the recorded entertainment and media industries on the other. Technology companies accepted new rules limiting circumvention technologies; in exchange, the content industries dropped their objections to the technology companies' efforts to obtain immunity from liability for infringements committed by users of their services. Haggart writes that "[t]he DMCA's passage reflected both the process's compromise/negotiation-based nature and that the process is weighted in favor of those actors with the greatest economic and political resources."²⁵⁹ Thus, the powerful content industries got "much of what they wanted" from the new statute, which drew directly from the Administration's 1994 White Paper in setting the language of the new anti-circumvention and anti-trafficking rules.²⁶⁰ Technology companies' concerns about secondary liability were partly satisfied by the addition of the statutory safe harbor provision insulating them against direct and contributory (but arguably not vicarious) liability arising from users' infringing acts.²⁶¹

Like Baldwin, however, Haggart articulates an understanding of the DMCA that subsequent events have at least partly contradicted. His assertion that DMCA critics' fears that the new statute would chill innovation and research have not come to pass because "the courts generally have interpreted the DMCA to require a 'nexus' between copyright infringement and circumvention"²⁶² will come as a surprise to informed readers.²⁶³ Haggart also uncritically quotes the assertion of a content-

²⁵⁹ *Id.* at 132.

²⁶⁰ *Id.* at 133. The fact that the DMCA drew from the provisions of the White Paper, not the less stringent language that the United States was compelled to accept in the WIPO treaties, underlies Haggart's characterization of the statute as going "far beyond what the treaties required." *Id.* at 24.

²⁶¹ *Id.* at 135 (notice-and-takedown system, now codified in 17 U.S.C. § 512(c), "satisfied both content owners and ISPs").

²⁶² *Id.* at 136.

²⁶³ *Cf.*, e.g., *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950-52 (9th Cir. 2010) (expressly rejecting argument that DMCA violation requires proof of a "nexus" with copyright infringement); *MGE UPS Sys., Inc. v. GE Consumer & Industrial, Inc.*, 622 F.3d 361 (5th Cir. 2010) (superseding panel's own prior opinion, 612 F.3d 760 (5th Cir. 2010), and deleting the prior opinion's reference to a copyright nexus requirement); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458-59 (2d Cir. 2001) (rejecting argument that statute would be unconstitutional if interpreted to forbid noninfringing fair uses); Pamela Samuelson, *DRM {and, or, vs.} the Law*, COMM. ACM, Apr. 2003, at 41, 43 (noting copyright holders' past attempts to suppress findings of academic researchers on strength of encryption technologies); Electronic Frontier Foundation, *Unintended Consequences: Sixteen Years under the DMCA* 3-12 (2014) <https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf> (recounting many similar incidents) [hereafter *Unintended Consequences*]. To be sure, interpreting the DMCA to require some connection with the rest of copyright law is by far the better reading, easily resolving thorny interpretive difficulties that arise from treating the DMCA's anti-circumvention and anti-trafficking rules as *sui generis*. See Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1, 28-32 (2008). The Federal Circuit and the Sixth Circuit have articulated interpretations of the DMCA that do require inquiry into whether a plaintiff's copyright interests have been violated, at least where the plaintiff's use of the DMCA seems to impair competition in the marketing and sale of durable goods. See *id.* 15-27. For better or worse (mostly worse), however, this understanding is not yet shared by the majority of the appeals courts that have considered the DMCA (including the

industry lawyer, whose clients naturally support a broad interpretation of the statute's liability rules and a narrow construction of its liability safe harbor provisions, that "there haven't been any catastrophes"—a contestable proposition.²⁶⁴ Regardless of whether U.S. law under the DMCA has become more moderate in recent years, however, Haggart is surely correct that such moderation has not yet come to characterize the nation's dealings with its trading partners: in its external relations, at least, the U.S. "continues to advocate a blanket prohibition on TPM circumvention mirroring the original Lehman white paper and draft Internet treaties."²⁶⁵

Reviewing the DMCA's overall effects, Haggart finds that the statute's "record is mixed."²⁶⁶ The DMCA utterly failed to solve the problem of widespread copyright infringement online that led to the statute's enactment, and Haggart is skeptical that the statute has in fact increased the amount of authorized content available online.²⁶⁷ Haggart also finds a subtler, potentially insidious long-term effect insofar as the DMCA legitimizes the viewpoint that only rights holders' interests, not users', matter in the setting of copyright policy. He writes:

The acceptance of the legal protection of TPMs and the legitimization of the position that copyright owners have the right to control access to the use of copyrighted works has potential to be an "evolutionary" change in copyright that moves it closer towards being exclusively a right that recognizes only the interests of copyright owners.²⁶⁸

Haggart finds a second consequence of the WIPO Internet treaties in how the WIPO experience altered the United States' government's subsequent negotiating strategy. Getting the WIPO treaties adopted required the United States to make concessions from the preferred policies it had enunciated in the White Paper.²⁶⁹ Just as the United States had previously changed the negotiating venue from WTO to WIPO, its search for a more favorable forum led the United States to begin a new round of negotiations in 2008, limited to a relatively small group of like-minded nations, towards the new so-called Anti-Counterfeiting Trade Agreement (ACTA). The ACTA treaty was "negotiated largely in secret," but the "content industries received privileged access to the negotiations, while telecoms were generally shut out."²⁷⁰ Yet

Second and Ninth Circuits, who exercise outsized influence in U.S. copyright law), and the contrary conclusion suggested by Haggart's book is in error.

²⁶⁴ HAGGART, *supra* note 1, at 136; *cf. Unintended Consequences*, *supra* note 263; Creative Commons Australia & Organization for Transformative Works, *Submission to the Australian Government's Online Copyright Infringement Discussion Paper 2-4* (2014), <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/OnlineCopyrightInfringement-CreativeCommonsAustraliaAndOrganizationForTransformativeWorks.doc> ("Data collected from the operation of Notice and Takedown procedures under the US DMCA shows it has been frequently used for the purposes of silencing critical speech or limiting competition.").

²⁶⁵ HAGGART, *supra* note 1, at 138.

²⁶⁶ *Id.* at 140.

²⁶⁷ *Id.* at 140.

²⁶⁸ *Id.* at 141; *see also id.* at 147 ("Given the enduring persistence of US copyright institutions, DMCA rules on TPMs (and ISP liability, for that matter) would be very hard to reverse.").

²⁶⁹ *See supra* notes 252-255 and accompanying text.

²⁷⁰ HAGGART, *supra* note 1, at 142, 141.

despite the government's attempt to silence competing viewpoints, Haggart finds, the outcome of the ACTA negotiations "was similar in many respects to that of the Internet treaties,"²⁷¹ for Europe, Japan, Mexico, and other participants refused to accept U.S. demands for still-stronger copyright rules along the lines that the White Paper had recommended, "prefer[ring] language closer to that of the Internet treaties."²⁷² Haggart attributes the results to the lack of sufficient economic diversity among the participants, for by liming the ACTA negotiations to a self-selected group of (mostly larger and more developed) like-minded nations, the U.S. ceded some of the bargaining power it ordinarily enjoys when smaller, less-developed countries are included. The lesson from ACTA, in Haggart's view, is that there are "real limits to the US ability to influence international copyright laws" where it "cannot credibly link IP reform to market access."²⁷³

A third consequence of the WIPO treaties was to increase the profile of copyright as a domestic and international political issue. The fact that the Clinton Administration's 1994 White Paper had been drafted without input from affected industry groups marked a departure from past practice in copyright policymaking, raising concerns that only deepened when the Administration continued to base its demands before WIPO and Congress on the White Paper's recommendations. The U.S. experience since WIPO, Haggart finds, marked the end of copyright as "a technical and largely apolitical issue," instead "suggest[ing] that the days of apolitical inter-industry bargaining to create copyright laws are numbered if not over."²⁷⁴ Yet, despite its rising profile, copyright had not yet emerged as an issue of significant concern to the broader public at the time of the WIPO treaties or the DMCA. Haggart notes that academic writers and public-interest advocates had begun to sound warning bells, but that copyright did not emerge as an issue of concern to a significant portion of the public until the widely covered *Napster* file-sharing litigation in 1999 and 2000—by which time the DMCA had already become law.²⁷⁵ It would take more than a decade before the content industries' constant push for ever-stronger protection (using the last high-water mark as their new minimum baseline) finally provoked a mass public backlash in the United States.²⁷⁶

C. WIPO-Plus-and-Minus: The Canadian Response

Canada's domestic institutional structure, Haggart writes, affects substantive copyright law in a way that has no parallel in the United States. In Canada, policy responsibility is divided between two government institutions with competing mandates: Industry Canada, whose authority over intellectual property law represents one component of a broader portfolio centered around the promotion of innovation and growth; and the Department of Canadian Heritage, which focuses on

²⁷¹ *Id.* at 142.

²⁷² *Id.* at 142.

²⁷³ *Id.* at 142.

²⁷⁴ *Id.* at 145.

²⁷⁵ *Id.* at 146; see also *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (upholding trial court's order requiring Napster service to shut down).

²⁷⁶ See *supra* note 9 (discussing 2012 internet blackout and the ensuing withdrawal of the then-pending SOPA and PIPA legislation).

the protection of artists and other creators and seeks generally to maximize their rights. Thus, Haggart writes, “[t]he departments’ opposing mandates institutionalize copyright’s user-creator, or protection-dissemination, dichotomy.”²⁷⁷ As a result, Canadian copyright policy often emerges from inter-agency jockeying, rather than from negotiation among industries with a vested stake in the outcome as in the United States.²⁷⁸ Where Industry Canada and Canadian Heritage disagree, conflicts between the agencies are resolved by the Prime Minister’s Office and Privy Council Office, which also provide policy direction to the agencies to act in certain ways and not in others.²⁷⁹ With competing government agencies representing divergent interests, it is little wonder that Canadian copyright law has long emphasized balancing the interests of creators and audiences.²⁸⁰ But Canadian rhetoric began to shift in the 1980s, when Conservative governments began to push for maximizing rights for creators of expressive works—a policy prescription that could only redound to Canada’s economic disadvantage as a net copyright importer.²⁸¹ Haggart finds evidence of clear rhetorical overreach by the Canadian government, whose statements supporting a maximalist, one-sided approach to copyright galvanized public opposition.²⁸²

Although Canadian industry groups influence the direction of Canadian copyright policy, the creative sector is a comparatively small part of the Canadian economy.²⁸³ A more significant influence on Canadian policy comes from the United States, which in recent years has used both diplomatic influence and the threat of trade sanctions to press for ever-stronger copyright laws in Canada.²⁸⁴ Although Haggart finds clear signs of attempts by Canadian governments to placate the United States in setting Canadian copyright rules, he also finds that Canada exercises substantial autonomy in copyright, because NAFTA sharply limits the United States’ ability to impose trade sanctions to coerce compliance.²⁸⁵ The example of Canada’s implementation of the WIPO Internet treaties shows both the reach and the limits of U.S. influence. Furthermore, the United States’ influence sometimes pushes Canadian law in contradictory directions—although U.S. pressure on Canada to strengthen its copyright regime has been constant, Canadian policymakers see the U.S. DMCA statute as a disastrous experiment and a cautionary example of what not to do.²⁸⁶

In contrast to the rapid progression in the United States from the White Paper (1994), to the WIPO Internet treaties (1996), and to the passage of the DMCA (1998), sixteen years elapsed before Canada finally enacted legislation to implement the WIPO treaties in 2012. Haggart charts the progress of four Canadian copyright bills that addressed the subjects of the WIPO treaties: bills C-60 (proposed in 2005), C-61 (2008), C-32 (2010), and the final bill C-11 (2012). Indeed, it took five years for

²⁷⁷ HAGGART, *supra* note 1, at 159.

²⁷⁸ *Id.* at 158.

²⁷⁹ *Id.* at 158.

²⁸⁰ *Id.* at 150-51.

²⁸¹ *Id.* at 153-54, 156; *see also supra* note 231 and accompanying text.

²⁸² *Id.* at 177-78.

²⁸³ HAGGART, *supra* note 1, at 151-52, 166-69.

²⁸⁴ *Id.* at 163-66.

²⁸⁵ *Id.* at 164-65; *see also supra* note 202 and accompanying text.

²⁸⁶ HAGGART, *supra* note 1, at 179.

Canada to even begin considering the WIPO treaties, with a series of papers issued by the Canadian government in 2001 inviting further debate and consultations over the issues raised by the treaties.²⁸⁷

The earliest Canadian bills diverged markedly from the DMCA both with respect to the circumvention of technological protection measures and as to immunity for online service providers. The Liberal government's bill C-60 would have barred TPM circumvention only where infringement resulted, thus legislating precisely the required "copyright nexus" that Haggart incorrectly identifies in the U.S. DMCA.²⁸⁸ The bill rejected the DMCA's "notice-and-takedown" system for online service provider liability in favor of a less burdensome "notice-and-notice" system, which required the service provider to inform its subscriber upon receipt of a notice alleging infringement by the subscriber but did not require the service provider to remove or disable access to the challenged content.²⁸⁹

The "notice-and-notice" system for online service provider liability survived intact in all subsequent Canadian copyright bills, finally becoming law with the passage of bill C-11 in 2012—a reflection, Haggart writes, both of Canadian independence from United States policy preferences and of the fact that the Canadian content industries and internet providers are both generally satisfied with the notice-and-notice regime.²⁹⁰ On the issue of circumventing technological protection measures, however, the next proposal—bill C-61 in 2008—veered sharply in the direction of maximalist protection. The bill was introduced by a new Conservative government that had been elected in 2006 partly upon a pledge to smooth diplomatic ties with the United States.²⁹¹ But the language of the government's proposed bill went even beyond the already stringent requirements of the U.S. DMCA, "making it a crime to break digital locks except under certain circumstances," with no periodic "safety valve" for user rights such as the DMCA provided with its triennial rulemaking procedure.²⁹² Haggart writes:

Bill C-61 proposed a significant reorientation of Canadian copyright law towards the US-desired position that the presence of digital locks should effectively trump user rights, adding a new layer to copyright that could potentially eliminate any user-owner balance in the law decided in favour of the owner.²⁹³

Unlike the U.S. DMCA, which effectively flew under the public's radar before being passed in 1998, Canadian citizens swiftly organized in opposition to bill C-61. Even before the bill's text was finalized, Industry Canada's call for a DMCA-style response to the WIPO treaties "ended up fomenting widespread public protests that panicked the government, confounded cabinet colleagues, and led to a 6-month delay in the bill's introduction."²⁹⁴ Opponents to the bill organized themselves on social media,

²⁸⁷ *Id.* at 172.

²⁸⁸ *Id.* at 178-79; *cf. supra* notes 262-264 and accompanying text.

²⁸⁹ HAGGART, *supra* note 1, at 178-79; *see also id.* at 23 (explaining the two systems).

²⁹⁰ *Id.* at 193.

²⁹¹ *Id.* at 181-82.

²⁹² *Id.* at 188.

²⁹³ *Id.* at 188.

²⁹⁴ *Id.* at 183.

including a highly popular “Fair Copyright for Canada” Facebook page created by University of Ottawa law professor Michael Geist.²⁹⁵ Citizens organized multiple meetings with government officials, including a large group who protested the draft bill at the Christmas Open House held by the Industry Canada minister in 2007.²⁹⁶ The public opposition seems clearly to have caught the Canadian government off guard, and bill C-61 was withdrawn in the face of an election call in the fall of 2008.²⁹⁷

The defeat of bill C-61, however, appeared to mark the apex of the Canadian government’s responsiveness to the interests of citizens who opposed the adoption of strong anti-circumvention rules modeled on the U.S. DMCA. Although the Government invited written comments and held several public round-table discussions on copyright in 2009, yielding public comments that “were overwhelmingly in favour of stronger user rights,” the resulting bills C-32 and C-11 duplicated bill C-61’s maximalist anti-circumvention provisions in all pertinent respects.²⁹⁸ The final bills included provisions expressly specifying new user rights; however, copyright holders who deployed technological measures to protect their works were not required to permit users to circumvent those measures to exercise these new rights, leaving them essentially meaningless in the digital arena.²⁹⁹ The lesson that Haggart draws from the Canadian government’s acceptance of “WIPO-plus” strictures on TPM circumvention is that “the ability of civil-society groups to influence the course of the debate was constrained by the institutional context within which Canadian copyright policy is made.”³⁰⁰ The public’s stated opposition to strong anti-circumvention rules was outweighed by the Prime Minister’s objective of satisfying the demands for strong protection measures from the U.S. government and U.S. content producers. In Canada, “[t]he priority accorded to TPMs over user rights, and of infringement over balance, suggests that while the Conservative government has learned the importance of paying lip service to user groups, the traditional protection-oriented copyright interests continue to hold sway.”³⁰¹ Nevertheless, the fact that Canada has retained its relatively relaxed notice-and-notice system despite U.S. demands for notice-and-takedown, and that NAFTA insulates Canada from U.S. trade pressure, suggests to Haggart that “Canada retains the ability to set its own copyright policy.”³⁰²

D. ¿Quién es WIPO?: The Mexican Response

Mexico, Haggart writes, is a country of two minds when it comes to protecting copyright. On the one hand, Mexico is a relatively poor country and, by some measures at least, a net importer of copyrighted works—both characteristics that

²⁹⁵ HAGGART, *supra* note 1, at 184.

²⁹⁶ *Id.* at 185-86.

²⁹⁷ *Id.* at 189.

²⁹⁸ *Id.* at 190.

²⁹⁹ *Id.* at 191 (“the presence of a digital lock on a work effectively overrides many of these new user rights”).

³⁰⁰ *Id.* at 192.

³⁰¹ HAGGART, *supra* note 1, at 194.

³⁰² *Id.* at 198.

ordinarily correlate with policy preferences for comparatively weak copyright rights. Yet, Mexico simultaneously sees itself as playing an outsized, highly influential cultural role on the world stage. Concerns for the protection of cultural heritage have long been reflected in Mexican law, which draws greatly from the authors'-rights perspective of Continental Europe, and are expressed in emphatic terms in the Mexican constitution. Thus, despite sharing economic characteristics with countries that favor relatively limited copyright rights, Mexico's history and experience has tended to place the country much more in the strong-copyright camp, with laws that (at least formally) rival or even exceed the level of copyright protection that prevails in the most developed, copyright-exporting nations. Mexico's poverty, in contrast, comes into play not at the level of policymaking, but at the level of enforcement; although Mexican copyright laws are among the world's strictest, infringement is punished relatively rarely.³⁰³

Mexico adopted copyright reform legislation in 1997 in order to implement its obligations under NAFTA, but the 1997 legislation did not address the requirements of the new WIPO treaties. Because Mexico's formal copyright rights were already very strong, they were little changed by the 1997 legislation. Mexico's 1997 law did extend copyright to new subject matter and also included new provisions addressing enforcement in order to satisfy U.S. demands. The revisions to Mexican copyright law made by the 1997 amendments, although substantial, appear to have caused little controversy.³⁰⁴

In general, the Mexican government shares with the U.S. government a strong predilection to favor the interests of content producers. In Mexico, the government's preferences rest upon a number of factors, including: a corporatist ideology that remains a powerful vestige of Mexico's many years under one-party rule; a historically compliant legislature that raised virtually no dissent when the nation adopted the world's longest copyright term (100 years following the death of the author) in 2003; the influence of content providers, including both foreign multinationals and domestic producers such as the powerful Televisa company; and executive agencies who see their own role as serving the needs of artists' collective societies—who, in turn, benefit directly from the increased licensing revenues that stronger and longer copyright protections necessarily bring.³⁰⁵ Given these many affinities between Mexican and American copyright policy interests, it is quite surprising that, nearly twenty years later, Mexico has yet to enact legislation specifically implementing the provisions of the WIPO Internet treaties. Haggart devotes chapter 8 of *COPYFIGHT* to investigating why the significant changes to both United States and Canadian law that resulted from the WIPO treaties as yet have no parallel in Mexico.

Under Mexican law, the WIPO Internet treaties are self-executing, and the government now considers both to be in force in the country. Yet, Mexican law clearly contains no provisions of direct relevance to some of the key subjects covered by the treaties. Nothing in the 1997 Mexican copyright statute addressed the question of online service provider liability for infringing acts of their users—an unsurprising omission, in view of Mexico's historically low internet penetration rates.

³⁰³ *Id.* at 202-09.

³⁰⁴ *Id.* at 210-11.

³⁰⁵ *Id.* at 212-20.

Nor did anything in the statute address the circumvention of technological protection measures for copyrighted works of any type other than computer software. These gaps in the Mexican statutory scheme do much, Haggart believes, to explain why a variety of parties both inside and outside the country have urged Mexico to adopt additional legislation to implement the provisions of the WIPO internet treaties.³⁰⁶

COPYFIGHT's search for an explanation why Mexico has yet to enact legislation implementing the WIPO Internet treaties ultimately comes up short—partly a reflection, surely, of the perennial difficulty of proving a negative. The factors Haggart points to as potentially salient generally tend to support COPYFIGHT's broader thesis about the potential for smaller state actors to resist what is frequently portrayed as the hegemonic dominance of the United States in global intellectual property law. They are less satisfactory, however, as explanations of why Mexico should be *more* resistant to U.S. pressure than was Canada, which adopted WIPO implementing legislation in 2012. As already noted, Mexican history and cultural self-image have tended to support very strong intellectual property rights—stronger even, in some instances, than those provided under United States law. Given these factors supporting expansion of copyright rights, Mexican reluctance to legislate in this area demands a stronger explanation than Haggart is able to offer.

Haggart identifies several factors that tend to offset calls for Mexico to strengthen its copyright laws. First, the Mexican technology sector remains underdeveloped relative to its American and Canadian counterparts—a comparatively small portion of the Mexican population has Internet access, and copyright holders' concerns consequently focus more on distributions of infringing content via physical media, a subject not addressed by the WIPO Internet treaties.³⁰⁷ Furthermore, concerns about low Internet penetration rates have influenced Mexican public policy, with government initiatives now aimed at boosting Internet access to spur economic growth. Therefore, proposals that risk making Internet access costlier or less widely available—as would result, for example, from any expansion of ISP secondary liability—might well draw opposition from other parts of the Mexican government.³⁰⁸ A hands-off regulatory approach would also be championed by Telmex, the massive telecommunications monopoly, and its politically well-connected chief, billionaire Carlos Slim.³⁰⁹ Finally, as with the Canadian example, Haggart finds, U.S. influence over Mexico is substantially limited by NAFTA.³¹⁰ Nevertheless, Haggart expects that the historical and contemporary forces for strengthening copyright will ultimately prevail, leading Mexico to adopt legislation implementing at least the anti-circumvention provisions of the WIPO internet treaties.³¹¹

In contrast to both Canada and the United States, Mexican civil-society groups and public interest advocates have been largely absent from the conversation thus

³⁰⁶ *Id.* at 225-26.

³⁰⁷ See HAGGART, *supra* note 1, at 228-29.

³⁰⁸ *Id.* at 216-17.

³⁰⁹ See *id.* at 222 (noting that Telmex controls over 95% of the Mexican ISP market); *id.* at 231-32.

³¹⁰ *Id.* at 227 (post-NAFTA, the United States can “influence (through training) and lobby, but not coerce”).

³¹¹ *Id.* at 229-30.

far.³¹² Recently, however, Mexico experienced its own public awakening to the effects of copyright on social welfare, much as the United States did following the *Napster* litigation and Canada did in response to Bill C-61.³¹³ In 2010, a very small cadre of Mexican civil-society advocates—numbering perhaps a dozen in total, but linked via social media to the broader international intellectual property activist community—formed a “Stop ACTA” group to oppose Mexico’s participation in the ongoing negotiations over the Anti-Counterfeiting Trade Agreement. The group skillfully rallied public opposition, triggering protests against the agreement and provoking the Mexican Senate to demand that the government provide more information about the ongoing (but highly secretive) negotiations. The Mexican government then added fuel to the burgeoning ACTA opposition by stonewalling the Senate’s request and then defying a Senate resolution calling for the suspension of negotiations. The Mexican Senate held public hearings at which witnesses attacked both the substance of the agreement and the secretive conditions in which it was being drafted. Amazingly, even in the face of growing public opposition, the Mexican government and the treaty’s content-industry proponents steadfastly refused to engage with the critics’ arguments.³¹⁴ Because the pro-ACTA forces had effectively ceded the field, Haggart writes, “[b]y the working group’s final hearings in July 2011, it was clear that the copyright establishment had lost both the public opinion and policy battles, gaining no allies in the Senate or in the wider society.”³¹⁵ The result was an unprecedented resolution by the Mexican Senate disapproving ACTA on both procedural and substantive grounds and calling on President Felipe Calderón not to sign the treaty.³¹⁶

Despite the Senate’s vote, however, the Mexican ambassador signed the ACTA treaty in 2012, and the treaty has generally been “firmly and consistently supported” by the executive branch of the Mexican government.³¹⁷ Haggart takes a glass-half-full perspective on the impact of the Mexican Senate’s anti-ACTA vote, noting that such a public uproar “would have been unimaginable only two years earlier” and arguing that “Mexican copyright policymaking has been thrown into turmoil by the involvement of the telecoms and the public, and by the rediscovery of a paradigm—development and dissemination—that challenges the dominant protection view of copyright.”³¹⁸ The fact that users and civil-society groups have begun to be heard in Mexican copyright debates, Haggart concludes, “bodes well for the chances for future copyright reforms.”³¹⁹

IV. ANALYSIS AND CONCLUSION

Both *THE COPYRIGHT WARS* and *COPYFIGHT* are richly rewarding works that are certain to influence future debates over copyright in valuable ways. Teachers of

³¹² *Id.* at 223-24.

³¹³ *See supra* notes 275-276, 294-297 and accompanying text.

³¹⁴ HAGGART, *supra* note 1, at 232-36.

³¹⁵ *Id.* at 236.

³¹⁶ *Id.* at 236-37.

³¹⁷ *Id.* at 238.

³¹⁸ *Id.* at 239.

³¹⁹ *Id.* at 241.

copyright law in the United States may find Baldwin's book to be a particularly valuable aid in understanding the very different philosophical premises that animate European authors'-rights laws, and the many colorful disputes recounted in *THE COPYRIGHT WARS* may greatly enliven class discussions of topics that some students find dull. And advocates seeking to realize meaningful policy change may find Haggart's clear-eyed accounting of the political forces in play highly useful in identifying where to focus reform efforts for the greatest likelihood of success.

Nevertheless, each book has certain shortcomings that informed readers also should take into consideration. What is particularly noteworthy is the degree to which each book occasionally reads as a critique of the other. Considering both works together will substantially aid readers looking for a balanced perspective on copyright in the digital arena. Identifying a few of the areas of possible improvement in each book should not, I hope, detract from the overall conclusion that both Baldwin's and Haggart's books are wonderful accomplishments that deserve to find the widest possible audience.

Baldwin's *THE COPYRIGHT WARS* is first and foremost a work of history. Its goals are descriptive rather than prescriptive, and it lacks the critical perspective of Haggart's work. Although Baldwin scrupulously strives for neutrality, accuracy, and evenhandedness, this chosen perspective occasionally leads *THE COPYRIGHT WARS* into descriptions of contemporary phenomena that omit crucial variables. A few examples should suffice to illuminate the point.

A. Copyright and Technological Advance

For a book that takes as its thesis the lingering effects of past debates on contemporary copyright discourse, Baldwin's description of the issues in play in the digital arena is selective and incomplete. Baldwin acknowledges, for example, the broad consensus among United States scholars that contemporary copyright law has grown far stronger and more restrictive than is necessary to serve the purposes of the law, and that copyright law may now actually be disserving the interests of the public who were its historical beneficiaries.³²⁰ But Baldwin appears not to grasp the origin of this scholarly consensus. In Baldwin's account, "digital anarchists" and "digital guerrillas" simply do not like paying for things, and the legal "salaried intelligentsia" who support them are biased against artists because academic authors need not struggle to make a living from their art.³²¹ But this misses an enormously important point that Haggart, in contrast, understands perfectly. The core of the argument against excessively strong copyright is not, as Baldwin suggests, that it raises the price of copyrighted goods, but rather that it impedes technological advance, slows economic growth, and disadvantages industries that may contribute far more to the economy than Hollywood does. Copyright benefits one set of industries at the expense not only of "digital anarchists" and the "salaried intelligentsia," but of other significant (and growing) industries—propping up past

³²⁰ BALDWIN, *supra* note 6, at 332 ("The consensus in America's law schools was that copyright had overreached to damage the public sphere.").

³²¹ *Id.* at 334, 375-77.

creators at the expense of future innovators. This aspect of the modern copyright critique is missing from *THE COPYRIGHT WARS*.³²²

Part of the problem lies in Baldwin's choice of a single analytical lens through which to view both past and present disputes. Baldwin describes copyright disputes as involving the distinct interests of three parties: authors, disseminators, and audiences.³²³ Where two of those parties combine against the third, the two usually win. This analytical construct proves potent in many instances; authors and the public combined to limit disseminators' rights in the 18th-century Battle of the Booksellers, and authors and disseminators have joined forces against the public in the post-Berne United States. Today's digital copyright debate, however, offers a less comfortable fit with Baldwin's chosen paradigm. The debate today includes "authors versus other authors" and "disseminators versus technology innovators"—dimensions of conflict that Baldwin's methodology is not designed to capture.

B. Copyright, Wages, and Business

Baldwin articulates an understanding of the relationship between technological change, legal change, creativity, and employment that is less sophisticated in some ways than Haggart's. In Baldwin's view, the digital era has made it too difficult for artists to make a good living in the ways to which they were accustomed in the past. He concludes from this that advocates of traditional copyright protections have a point, and that perhaps such protections should be strengthened in order to permit artists to continue to make a comfortable living from their works in the digital arena.³²⁴ Haggart, in contrast, applies the same skepticism to defenders of the status quo that Baldwin reserves for its critics. A comparison of the two perspectives reveals two distinct shortcomings in Baldwin's account.

First, Baldwin essentially ignores the positive effects of technological change on artists. Haggart seems to have little difficulty in locating artists who have taken advantage of the Internet to find an audience, to build name recognition, and even to sell their works; while Baldwin seems to despair even of making the effort.³²⁵ The authors for whom Baldwin expresses sympathy are those who would have created their works regardless of the existence of the Internet; the possibility that technological change itself permits forms of creativity to arise that could not have existed in the pre-digital era is barely mentioned.³²⁶ Haggart has less to say

³²² Cf. HAGGART, *supra* note 1, at 79.

³²³ BALDWIN, *supra* note 6, at 14, 389-92.

³²⁴ *Id.* at 376 ("Digitality has gutted the inherited business models and few new means to earn a living have emerged."); *see also id.* at 374-75 (arguing that historically stronger European copyright protections afforded more authors an opportunity to make a living from creative endeavor alone than their comparatively weak United States counterparts).

³²⁵ Compare BALDWIN, *supra* note 6, at 376-77 (pronouncing it unlikely that many creators can make a living from digital distribution of their works), with HAGGART, *supra* note 1, at 62 (recognizing that, although digitization has been "both blessing and curse" for authors, many creators have found it profitable to eliminate the middleman and communicate directly with fans online, and new organizations have emerged to advocate specifically on behalf of artists, rather than for the publishers who formerly presumed to speak for them).

³²⁶ Even Baldwin's nod towards the possible favorable impact of the Internet on creative endeavor is backwards-looking; he portrays the academic fondness for "mash-ups . . . and other

specifically about creativity as such, but in general seems much more sensitive to technology's role in creating new markets, not simply disrupting old ones.³²⁷ Perhaps the Internet changes *which* artists prosper, but the notion that it represents a net drag on creative endeavor seems difficult to credit.

Second, Baldwin's critique seems to privilege the interests of artists over those of other actors in the modern information economy. But technology is disrupting historical labor markets on a vast scale, not merely those involving the creation and distribution of expressive works. Workers in many industries, not just traditional intellectual property businesses, are facing an as-yet unsettled future in which technology increases the array of substitutes for traditional economic inputs and outputs of many kinds.³²⁸ Where technology is wrecking or marginalizing old markets (while simultaneously, to be sure, creating new ones) across a wide swath of human endeavor, Baldwin's support for creators' historical prerogatives can at times come across as special pleading on artists' behalf for an exemption from modernity itself.

C. Continuity and Change

Baldwin's thesis, developed and supported throughout *THE COPYRIGHT WARS*, is that past conflicts provide a template for current ones, and that even issues that seem uniquely of today's moment ultimately echo earlier chapters in copyright's lengthy history. Yet one key data point seemingly contradicting, or at least qualifying, this thesis passes virtually unrecognized. As Haggart's book astutely recognizes, the WIPO treaties and the United States' response marked a significant point of departure, not continuity, with past copyright practice. Baldwin identifies no

pastiches" as "a return to the participatory culture of the era when music was played and not just listened to." BALDWIN, *supra* note 6, at 327; *see generally id.* at 326-29. Yet it seems more accurate to say that the Internet also enables at least some forms of expression that would have been impossible in the pre-digital era, not mere rediscovery of past forms. *See, e.g.,* Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133 (2011); David E. Ashley, *The Public as Creator and Infringer: Copyright Law Applied to the Creators of User-Generated Video Content*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 563, 571-78 (2010) (collecting examples). For a concrete illustration, consider the works of the Israeli performer known as Kutiman, whose "ThruYou" series of online videos dissect and reassemble snippets (sometimes only a single note in length) of dozens of musical performances posted by both amateur and professional musicians from around the world. The result is something greater than the sum of its constituent parts: a song that none of the performers who appear in the video is actually playing and which exists only because of creative choices made during editing. *See, e.g.,* Kutiman, *Give It Up*, YOUTUBE, https://youtu.be/WoHxoz_0ykI (Sept. 12, 2014); WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 101-02 (2011) (citing further examples).

³²⁷ *See* HAGGART, *supra* note 1, at 59, 61-62, 65.

³²⁸ *See, e.g.,* Guia Marie Del Prado, *Lawyers are just as likely to lose their jobs to robots as truck drivers and factory workers*, TECH INSIDER, (Aug. 27, 2015), <http://www.techinsider.io/robots-may-make-legal-workers-obsolete-2015-8> [<http://perma.cc/SHP3-P4FA>]; Josefin Smeds, *Are Jobs Coming or Going in the Digital Age?*, SMARTER TOGETHER, (June 29, 2015), <http://smartertogether.telenorconnexion.com/2015/06/are-jobs-coming-or-going-in-the-digital-age/> [<http://perma.cc/4A88-7LRP>]; Cadie Thompson, *We've reached a tipping point where technology is now destroying more jobs than it creates, researcher warns*, BUS. INSIDER, (June 3, 2015), <http://www.businessinsider.com/technology-is-destroying-jobs-and-it-could-spur-a-global-crisis-2015-6> [<http://perma.cc/7C7A-D62Q>].

period in history (certainly not the eighteenth-century Battle of the Booksellers, Baldwin's often-invoked exemplar of a "copyright war") when authors successfully demanded the right to limit mere reading, not copying, of their works. Yet the DMCA, at least as construed by the Second and Ninth Circuits, appears to create a new right on copyright holders' part to regulate mere access to their works irrespective of whether infringement follows. Haggart fears, with some justification, that what began as an unprecedented expansion of copyright holders' power to control access to their works will become accepted as the new baseline for further expansions of rights holders' interests at the expense of the public. By portraying contemporary debates as mere reruns of those lost past, however, Baldwin misses this critical distinction.

D. History and Critical Distance

Finally, although Baldwin's historical perspective strives for neutrality and generally achieves it, readers looking for greater critical engagement with the ideas under discussion may come away disappointed. Taking pains to avoid being seen to favor one side over another may well increase *THE COPYRIGHT WARS*' credibility as an evenhanded accounting of the ebb and flow of copyright thinking over time, but it simultaneously permits some seemingly weak ideas to pass by unremarked upon.

The best example may be found in the book's treatment of the authors'-rights ideology, which *THE COPYRIGHT WARS* manages to describe without meaningfully grappling with issues that an informed reader will find immediately apparent. Consider the implications for democratic governance on copyright policy: in political systems resting upon the consent of the governed, citizens may justifiably decide to bear copyright's costs in the hope of securing its promised benefits. Yet from the authors'-rights perspective, at least as Baldwin summarizes it, it is apparently considered out of bounds even to ask what benefit citizens derive from copyright policy, for only authors' interests count in the calculus. Yet to exclude the interests of ordinary citizens from consideration in policymaking raises challenging questions about whether the authors'-rights philosophy is antidemocratic.³²⁹ To put it slightly differently: what do citizens receive in return for bearing the costs imposed by copyright's long-term exclusion of expressive works from the public domain? For nations that follow the copyright approach, the answer is simple: eventual free access to a greater corpus of expressive works than would otherwise exist. The fact that the authors'-rights approach appears to have no answer except to deny the validity of the question is hardly a point in its favor, but such critical analysis lies outside *THE COPYRIGHT WARS*' scope.

Similarly, the book's account of some very contentious issues occasionally seems credulously deferential toward assertions made by interested parties to deflect criticism. Baldwin's discussion of the DMCA may be summarized, with tolerable accuracy, as *although some people feared that the DMCA would curtail fair use, Congress said it was fixing the DMCA to make sure that would not happen, therefore*

³²⁹ Cf. BALDWIN, *supra* note 6, at 386-87 (noting that basic tenets of authors'-rights philosophy developed in Europe before democracy became widespread, but not addressing why those tenets were not widely challenged as Europe democratized).

*the DMCA does not curtail fair use.*³³⁰ Similarly, Baldwin's discussion of the implications of property theory for copyright simply states that policymakers have used property theory to justify both alienability and inalienability without grappling with the inconsistency between the two.³³¹ The list could go on. The possibility that policymakers don't always mean what they say, but sometimes deploy rhetoric opportunistically to give a veneer of justification where it may not be warranted, seems not to be recognized at any point in *THE COPYRIGHT WARS*; participants' rhetoric (even disingenuous rhetoric) is reported accurately, but seldom questioned.

The book's lack of critical perspective shows most strongly in the chapter on fascism, which surely does less than any other portion of *THE COPYRIGHT WARS* to advance Baldwin's thesis about the links between past and contemporary debates. The problem lies partly in a choice of emphasis, for the countries Baldwin selects as exemplars of the authors'-rights perspective—France and Germany—did very little with copyright law during the war years. The chapter's detailed recounting of competing unenacted German legislative proposals teaches very little of value to Baldwin's thesis. The problem is not simply that none of the empty statements made by Nazi officialdom to prop up a government of arbitrary terror constituted *law* under any reasonable understanding of that term, although that is part of it.³³² The broader difficulty is that unenacted legislation says virtually nothing about where the center of gravity actually lies at any given moment. For example, a few years ago Congress considered competing legislative proposals on the question whether federal agencies should make taxpayer-funded research publicly available online in open-access repositories—one bill would have required the practice, and the other would have outlawed it.³³³ Neither bill passed. What conclusions, if any, may future scholars draw about the 111th Congress's views on open access to federally funded research, except that the issue remained unsettled? To point to either proposal as a validation of future legislation would be granting undue weight to the still-inchoate musings of a handful of legislators. It seems comparably fruitless to seek value from the back-and-forth of unenacted Nazi copyright proposals, and the resultant gain in understanding is less than proportionate to the number of pages *THE COPYRIGHT WARS* devotes to the task.

Haggart's *COPYFIGHT* eschews Baldwin's historical perspective in favor of a close examination of developments occurring in the past two decades in three nations. The more limited scale proves both a help and a hindrance. On the one hand, Haggart more clearly grasps what is uniquely modern about the contemporary copyright debate; he demonstrates in clear terms that the issues in dispute post-WIPO era differ in fundamental respects from those that preceded it. The focus on the modern North American copyright debate, however, occasionally leads Haggart to overstate the implications of his thesis, despite *COPYFIGHT*'s generally cautious approach to drawing inferences from a small number of historical data points.

³³⁰ See generally *supra* notes 147-152 and accompanying text.

³³¹ See *supra* notes 39-41, 86-89, and accompanying text.

³³² See FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM* 440-51 (2d ed. 1944).

³³³ Compare H.R. 801, 111th Cong., 1st Sess. (2009), with S. 1373, 111th Cong., 1st Sess. (2009).

E. Short-Term Openness and Long-Term Constraint

At multiple junctures Haggart emphasizes that there is nothing inevitable about the inherited structures of North American copyright policy; that the laws we happen to have today simply represent choices made by past policymakers, not unalterable natural truths; and that nothing prevents future policymakers from reorienting copyright policy in a way more hospitable to technology providers' and consumers' interests. Baldwin's analysis, however, demonstrates that policymakers' past choices (and, necessarily, their future ones) are in fact bounded by both philosophical and practical constraints.

For example, writing of the United States' decision to leverage copyright as a new tool of international trade policy in the 1970s and 1980s, Haggart writes that "[t]here is nothing inherent in IP that requires it to be defined as a trade issue rather than, for example, a purely domestic regulatory policy."³³⁴ Given the Berne Convention and the very lengthy history of international negotiations over copyright recounted in Baldwin's work, however, a reader might very well conclude that it was entirely foreseeable, even inevitable, that copyright would come to be a contentious trade issue as global markets for the import and export of expressive works matured. Perhaps it was not inevitable that the United States would yoke copyright policy to the WTO trading system via the TRIPS Agreement, thereby enabling bigger countries to threaten smaller ones with trade sanctions if they did not bring their domestic copyright laws up to the standards favored by the large copyright-exporting nations; but Baldwin's historical account suggests a much deeper and firmer linkage between copyright and trade than Haggart imagines.

Baldwin's analysis also teaches much more than Haggart's about the value of having a fairly deep theory of *what copyright is for* in order guide policy in a way that makes sense. Without a robust set of foundational principles, copyright becomes a law that simply responds to whichever political winds happen to be blowing at a particular moment in time. The harms this has already caused to copyright policy are well understood; indeed, Haggart documents some of them himself. When the United States began to grow concerned about the ballooning trade deficit and declining manufacturing exports, copyright was reborn as a trade issue; more recently, during the economic recession that began in the last decade, policymakers began to speak glowingly of the effects of intellectual property law on labor and employment levels.³³⁵ The longer historical time horizon adopted in Baldwin's work provides a firmer basis for critiquing such short-term policy choices than does anything in COPYFIGHT.

F. Policy Autonomy and Trade

Haggart's thesis is that, to a broader extent than is commonly recognized, smaller nations are not simply "policy takers" compelled to serve the interests of

³³⁴ HAGGART, *supra* note 1, at 46.

³³⁵ See Tim Armstrong, *The Emerging "IP is All About Jobs" Meme*, INFO/LAW, (Aug. 8, 2011), <http://blogs.law.harvard.edu/infolaw/2011/08/08/the-emerging-ip-is-all-about-jobs-meme/> [<http://perma.cc/4R6T-QUXY>].

large copyright exporters such as the United States. One might quarrel with some of the evidence COPYFIGHT marshals in support of this conclusion, however. First, as Haggart recognizes, both of the smaller countries he has chosen to focus on—Canada and Mexico—are situated quite differently from other smaller countries insofar as the United States has already ceded a good deal of its influence under NAFTA. COPYFIGHT offers comparatively little evidence that the much larger group of countries who have not yet concluded a free-trade agreement with the United States may maintain similar autonomy. Second, the Canadian example provides fairly equivocal support to Haggart's independence thesis; the same events might as readily be explained as demonstrating U.S. influence rather than its opposite. A proposed bill that would have significantly departed from U.S. preferences was defeated in favor of a bill that, at least in its anti-circumvention provisions and despite public opposition, appeared tailored to meet U.S. demands.³³⁶ The process, perhaps, reflected Canadian autonomy, but it is not easy to say the same of the substance of the final Canadian law.

Indeed, and perhaps perversely, Haggart's analysis, if accurate, suggests an approach smaller countries may use to insulate themselves from U.S. pressure that is essentially the opposite of the one that civil-society groups (towards whom Haggart appears generally sympathetic) recommend. Perhaps the best strategy for U.S. trade partners is simply to accede to U.S. demands today in exchange for a free-trade agreement, forestalling the more extreme demands the U.S. is sure to make tomorrow. That would surely be a bizarre result from the perspective of maintaining copyright's historical center of gravity and would produce instead a strong lurch towards greater lockdown and control over works by rights holders; but it would, at least, strengthen the parallels between the Canadian and Mexican examples and the rest of the world and offer an avenue for preserving future policy autonomy. COPYFIGHT, for better or worse, takes no account of this unsettling but logical implication of its own argument.

G. The Direction of Future Debates

COPYFIGHT reckons, as it must, with the reality that attempts to reorient Canadian and Mexican copyright law in more pro-consumer directions post-WIPO have thus far yielded more rhetoric than action. The awakening of consumer awareness over the effects of stringent copyright regulation that Haggart documents, at different points, in the United States, Canada, and Mexico is surely beneficial. A skeptic may wonder, however, whether COPYFIGHT places undue emphasis on changing the tenor of discussion as opposed to actual substantive policy outcomes. Both the discussions of Canada's and Mexico's responses to WIPO appear to follow a similar pattern: the government proposed an anti-consumer law (or, in Mexico's case, a treaty), members of the public organized in opposition, and the result was that law passed anyway; but perhaps the next debate will occur on different terms. Changing the debate, however important, is not the same as changing the law. At some point, public agitation against legislative or executive overreach must achieve a tangible result in order to maintain credibility. It is speculative to think that the content-

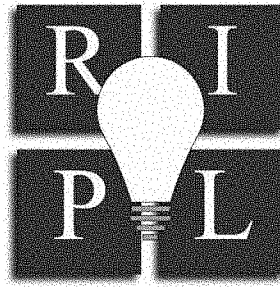
³³⁶ See *supra* notes 288-301 and accompanying text.

industry lobbyists who successfully overcame the objections of public-interest advocates to pass Canada's bill C-11 in 2012 will believe themselves more, rather than less, obliged to account for users' desires during the next battle when it comes.

The clearest example Haggart develops of users organizing to defeat maximalist copyright legislation is the uprising, culminating in the January 2012 "internet blackout," that led Congress to withdraw the SOPA and PIPA bills in the United States. As with the Canadian and Mexican examples, Haggart sees in the SOPA/PIPA protests the seeds of lasting policy change. But the "internet blackout" was self-evidently a tactic, not a strategy; it cannot be repeated *ad infinitum* in response to future ill-conceived legislative proposals without losing the qualities that made it effective. Change, in Haggart's historical-institutionalist framework, ultimately requires institutions, which can exercise sufficient pressure to defeat the policy inertia of path dependence. COPYFIGHT, however, devotes little effort to documenting how institutional actors are channeling the energies that succeeded in derailing SOPA and PIPA to ensure that they do not dissipate when the next round of maximalist legislative proposals arise. What new institutions arose from the 2012 "internet blackout"? The answer would appear to be critically relevant to sustaining COPYFIGHT's thesis that we have passed an inflection point in the extent of end-user influence over future copyright policy, but the book has little to say on the subject.

None of these critiques should detract from the fact that both THE COPYRIGHT WARS and COPYFIGHT are outstanding books that deserve and reward careful study. Both make significant contributions to the literature on copyright, and they are well-timed to influence the course of discussions as Congress begins debating major copyright revision for the first time in more than a generation. Heeding their many insights will do much to rationalize and improve copyright policy in this country and beyond.

THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THAT OLD FAMILIAR STING: TATTOOS, PUBLICITY, AND COPYRIGHT

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ABSTRACT

Tattoos have experienced a significant rise in popularity over the last several decades, and in particular an explosion in popularity in the 2000s and 2010s. Despite this rising popularity and acceptance, the actual mechanics of tattoo ownership and copyright remain very much an issue of first impression before the courts. A series of high-priced lawsuits involving famous athletes and celebrities have come close to the Supreme Court at times, but were ultimately settled before any precedent could be set. This article describes a history of tattoos and how they might be seen to fit in to existing copyright law, and then proposes a scheme by which tattoo copyrights would be bifurcated similar to architecture under the Architectural Works Copyright Protection Act.

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